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Competition and regulatory policies interwined: Towards a comprehensive oversight of digital platforms

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Abstract: The digital economy provides a good dose of efficiency and it brings about more benefits than costs. However, nothing guarantees that there will be no further costs or that these benefits will remain over time. A competition deficit in any sector, even more so in the digital economy, requires strong public policy measures and the development of an ecosystem characterized by reasonable contestability. Negative externalities— including privacy issues, consumer rights and misuse of information, among others—should also be controlled through public action. This article first explains how these business models behave differently, as opposed to traditional industries, and considers recent developments in the European and American jurisdictions. It then identifies the challenges ahead and possible solutions from the perspective of both regulatory and competition policies, as complementary measures, while highlighting the balance that must prevail between embracing investments and innovation, and protecting the public interest.
Keywords: digital platforms; digital economy; competition; regulation; innovation.

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Resumen: La economía digital aporta una buena dosis de eficiencia y conlleva más convenientes que inconvenientes. Sin embargo, nada garantiza que no haya más inconvenientes en el futuro ni que estos beneficios se mantengan en el tiempo. Un déficit de competencia en cualquier sector, y más aún en la economía digital, requiere medidas enérgicas de política pública y el desarrollo de un ecosistema caracterizado por una contestabilidad razonable. Las externalidades negativas —incluidos los problemas de privacidad, los derechos de los consumidores y el uso indebido de la información, entre otros— también deben controlarse mediante la acción pública. Este artículo explica en primer lugar cómo estos modelos de negocio se comportan de forma diferente, a diferencia de las industrias tradicionales, y examina la evolución reciente en las jurisdicciones europea y estadounidense. A continuación, identifica los retos futuros y las posibles soluciones desde la perspectiva tanto de las políticas reguladoras como de las de competencia, como medidas complementarias, al tiempo que destaca el equilibrio que debe prevalecer entre acoger las inversiones y la innovación, y proteger el interés público.
Palabras clave: plataformas digitales; economía digital; competencia; regulación; innovación.

I. Introduction

Technology has transformed all kinds of interactions. In the economic sphere, it has multiplied commercial transactions and offers important benefits to both producers and consumers. Producers can expand their client base, diversify products and services, optimize productive processes, reduce costs, innovate, and differentiate themselves. On the other hand, consumers have access to a broader range of goods and services at better quality and price conditions, face lower transaction and search costs, have more information to take decisions and effective channels to settle disputes with providers.

In the social dimension, technology has a multifaceted role. It promotes interaction between peers as well as the expression of ideas; it also facilitates access to information and brings citizens closer to public life. At the political level, it has become a useful tool to accompany democratic processes and offers powerful accountability mechanisms that serve as a counterweight against public authorities.

However, this process does not come without risks. The characteristics surrounding some business models of the digital economy have given rise to players with dominant positions in activities that are becoming increasingly relevant. Evidence of this is the position held by the top five technology companies in the world: Google, Apple, Meta (Facebook), Amazon and Microsoft (hereinafter referred to as the "the Big Five"). Although these companies owe most of their

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success to sound investments, productive efforts, and constant innovation, they have also benefited from regulatory loopholes, as well as dynamics that lead to monopolization (tipping) and encourage anticompetitive practices that weaken competition on the merits.

The notion in competition policy that "size does not matter" and that rather the abuse of dominance is the problem, is not entirely true in the digital economy, since there are a number factors that do not apply in the same way in traditional markets, such as powerful network effects, organic growth at zero cost, massive data gathering and processing, the creation of ecosystems or clusters, platform envelopment strategies, and the constant acquisition of potential competitors or incipient innovations by incumbents.

This situation surpasses the capabilities of competition authorities and shows the systems shortcomings, including an inability to effectively combat abuses of dominance. It is also critical to limit the abnormal growth rate of the Big Five who monopolize activities, abuse their dominant position, block competitors and transfer costs to related markets.

On the other hand, there are also those who defend the role of big tech companies. For some scholars there is no evidence that the behavior of digital platforms—not even the much-criticized alleged self-preference tactics of Amazon or Google—are hurting consumers and hence consider there is no reason to deviate from current policies and practices.[2] Other voices point to unprecedented productivity growth, constant innovation and entry, characteristics that would not typically be present in markets with no competition; in any case, there is "a group of diversified digital companies, coexisting and competing vigorously in an oligopoly situation, with new firms entering from time to time".[3]

Hovenkamp contends that sustained competition is feasible in most of the business elements of digital platforms and advises against intrusive measures such as forced divestitures, breaking-up measures or generic regulation that limits supply, quality or innovation. Even so, he recognizes an underlying problem and proposes resorting to targeted measures such as restructuring decision-making processes within the firms or forcing interoperability or pooling in certain circumstances to increase network effects among all players and thus favor efficiency.[4]

It is fair to say that companies like the Big Five have gained market share due to their productive efforts, but also through practices that have helped them to maintain and increase their dominant positions. As in other industries, a serious deficit of competition invariably decreases consumer welfare. Certain digital

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[2] John M. Yun, *Does Antitrust Have a Digital Blind Spot?*, South Carolina Law Review, May 2020, at 305, https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=4361&context=sclr

[3] Nicolas Petit & David J. Teece, *Innovating Big Tech firms and competition policy: favoring dynamic over static competition*, 30 Industrial and Corporate Change, 1168-1169 (2021), https://academic.oup.com/icc/article/30/5/1168/6363708

[4] Hebert Hovenkamp, *Antitrust and Platform Monopoly*, 130 The Yale Law Journal 1952, 1955-2050 (2021), https://www.yalelawjournal.org/pdf/130.Hovenkamp_mawopj7e.pdf

business models entail risks that may increase costs on certain goods and services, as well as negative externalities that, if not controlled through public action, may erode the public interest.

II. The *tipping* phenomenon

In some traditional sectors there are usually economic conditions that favor market concentration, as it happens in television, telecommunications, financial services, transportation, oil, or food. These sectors have in common that entry costs are high, especially due to the infrastructure, technology and logistics required. Hence, the only way to produce efficiently and at low cost is by maintaining a large scale. Sometimes there are also economies of scope, where due to synergies and an efficient use of assets, it is cheaper to produce two or more services jointly rather than separately, which in turn influences the size of the company. That is why the existence of a certain degree of market concentration in some industries is understandable and even desirable.

In the digital platform world, we are dealing with infrastructures that allow interaction between different groups of users: for example, customers, buyers, or users of services, as well as advertisers, sellers, service providers and content creators. They are complex entities that are characterized by bringing together markets from several sides (mostly two) with interdependent demands, asymmetric price structures and strong network effects, both direct and indirect, so the more users the platform has the greater its value.

The literature has emphasized the presence of indirect network effects, that is, between different groups of users of the same platform.[5] Rochet and Tirole have focused on the fact that the platform sets prices in a non-neutral way (where the prices of each side matter for the total volume of transactions)[6]. On these platforms, the price charged to a user reflects both the cost and the externalities generated by their participation, in such a way that pricing strategies can consider categories of users as an input, given the value they create for another category.[7]

The network effects which are inherent to multi-sided platforms encourage a massive accumulation of users and large-scale growth, which is supported by additional factors such as:

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[5] Mark Armstrong, *Competition in two-sided markets*, Rand Journal of Economics, 2006, 669-691; Bernard Caillaud & Bruno Jullien, *Chicken and egg: competition among intermediation service providers*, Rand Journal of Economics, 2003, 309–328.

[6] Jean Charles Rochet & Jean Tirole, 2006. *Two-sided markets: where we stand*. Rand Journal of Economics, 2006, at 645.

[7] Bruno Jullien, *Competition in Multi-Sided Markets: Divide and Conquer*, American Economic Journal: Microeconomics, Nov, 2011, at 186, http://www.aeaweb.org/articles.php?doi=10.1257/mic.3.4.186

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I. *Organic growth capacity*. Unlike traditional sectors, technology allows platforms to rapidly increase their number of users at no cost.

II. *No distribution costs*. In the digital world, borders are blurred—no need to pay freight or face trade barriers—and economies of scale foster market concentration globally.

III. *Information*. Platforms can collect and process huge volumes of information, make use of intelligent algorithms and exploit personal data to offer more refined and personalized services, which reinforces business value, facilitates growth into adjacent activities and attracts more users. A market participant that has access to significant amounts of information strengthens its market position and decreases the ability of others to compete.

IV. *Consumer cognitive biases*. The platforms usually take advantage of the position—conscious or unconscious—and biases of the user, to induce their decisions so that they are more in line with the platform's commercial interests.

III. The risks

As a rule of thumb, the presence of monopolistic (or *quasi* monopolistic) practices in a market translates into higher prices, lower quality, reduced supply, and loss of innovation. The characteristics of digital markets encourage companies to compete "for the market" and not "in the market," leading to a "winner takes all" effect. Under these conditions, whoever comes first tends to monopolize, facing weak rivals and few prospects of future competition. As if that were not enough, it is common practice for dominant companies to buy startups at an early stage to prevent them from becoming competitors. As the Furman report points out, large incumbent firms in the digital market act in a way which, "at best, absorbs innovation to protect themselves from potential competition and, at worst, uses acquisitions to kill off or distort innovation, creating a 'kill-zone' around their positions".[8]

The Big Five operate as full digital ecosystems, with one or more main services where they hold a dominant position, but with a much wider and diversified offering. Among the various goods and services offered there is a strong interdependence, given their complementary use, productive synergies, vertical relationships or joint processing of information. This attracts users while it also generates incentives to carry out anti-competitive practices, such as bundling, "lock-in," predatory pricing or cross-subsidization. Platforms can also act as "gatekeepers" in some part of the value chain they control and simultaneously compete downstream with their own clients, giving way to practices such as refusal to deal, self-preference or discrimination.

[8] Report of the Digital Competition Expert Panel, *Unlocking digital competition*, March 2019, at 40, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

Although Google stands out for dominating the market of search engines, emails, and mobile operating systems (Android), it also offers multiple other tools for consumers. Apple is a leader in the production of mobile devices and hardware, but it also offers a wide variety of products and services to its users. Amazon started as an online bookstore in 1994 and now operates the most important digital marketplace in the world. Microsoft's software products are targeted to businesses and are designed to be used together. Meta generates most of its income through personalized ads on the world's most successful social networks (Facebook & Instagram), but it also operates the most popular app for instant messaging (WhatsApp).

The success of these companies is mostly a result of their innovation and investment efforts. However, they have also engaged in behavior that has allowed them to artificially consolidate their power and close opportunities for new entrepreneurs. The indictments against Microsoft filed by the US Department of Justice in 1998 were a prelude to a much more recent wave of concerns and issues.[9]

Digital platforms may for instance deploy behavioral tactics that could hardly be explained by efficiency reasons. Vertical foreclosure may take place when a dominant platform owns an input and denies access (or offers access in discriminatory terms) to a third party that competes in a related market. This may include practices such as refusal to deal, constructive refusal, denial or degradation of interoperability and excessive price of the input.[10] The incentives for abuse come into play when the gains from excluding a competitor are greater than the losses incurred from not granting access (such as loss of income).

Foreclosure through platform discrimination may also occur, mostly when consumers attach significant value to using a particular platform to access a secondary product, have incomplete information about the product in the secondary market and there are significant switching costs that leave consumers locked into a single platform. Such consumers are discouraged from attempting to access secondary products through a competing platform, due to the high cost of transitioning between platforms.[11]

In sum, abuse of an entrenched position may take the form of vertical or even horizontal foreclosure (such as tying or bundling), various forms of discrimination and contractual arrangements. In Europe and more recently in the United States, competition agencies have launched investigations and imposed sanctions for these and other reasons, involving Apple, Google, Amazon and

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[9] United States v. Microsoft Corp., 253 F.3d 34 (D.C., ca. 2001)

[10] Massimo Motta, *Self-preferencing and foreclosure in digital markets: theories of harm for abuse cases*, Barcelona School of Economics Working Papers, Dec. 2022, https://bse.eu/research/working-papers/self-preferencing-and-foreclosure-digital-markets-theories-harm-abuse-cases

[11] Erik Hovenkamp, *Platform Discrimination Against Rivals: An Economic Framework For Antitrust Enforcement*, University of Southern California Center of Law and Social Science Research Paper Series, January 2023, 23-5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4323207

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Meta.[12] In Latin America, there are currently open investigations regarding social networks (Chile and Argentina) and app stores (Chile and Mexico).[13] After reviewing high profile cases, some of which are commented below, Motta argues that broadly speaking they belong to well-known and established categories of theories of harm (mostly on vertical foreclosure), albeit adapted or modified to fit the specificities of the digital sector.

The risks associated with the Big Five depend on each business model. Facebook and Google offer "zero price" services and earn revenue through targeted digital advertising due to the information they collect from their users on their own platforms and even from external sources. Caffarra sustains that this has multiple implications, since it makes it very difficult for an entrant to invest, enter and compete, while the platforms have strong incentives to use, collect and exploit the maximum amount of information with low levels of protection and security. They can also prevent third-party businesses in the value chain from monetizing the information they generate and focus on adjacent activities that could evolve and put competitive pressure on the primary market (such as specialized search sites).[14] Google's founders themselves promoted the impartiality of their search engine on the basis that it would not be subject to the harmful influence of advertising.[15]

Caffarra concludes that businesses that earn income differently, be it by charging for their services, selling a complement, or obtaining a percentage of a transaction, have different incentives. This does not mean that platforms that do not monetize their users' information are free from risks. Apple's focal business has been the sale of devices, so it could be assumed that it has the incentive to offer through these devices the widest possible variety of services (and therefore not obstruct or hinder the use of applications developed by third parties), in such a way that it is more attractive to acquire them. However, to the extent that the income obtained from the sale of services through devices decreases the incentives could be reversed.

In 2008, when the App Store was launched, Steve Jobs himself claimed that Apple had no intention of earning revenue this way, an idea that was abandoned when the service matured and showed its high profitability. Apple and

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[12] Viktoria H.S.E. Robertson, *Antitrust Law and Digital Markets, A Guide to the European Competition Law Experience in the Digital Economy,* in The Routledge Handbook of Smart Technologies: An Economic and Social Perspective 432-456 (Heinz D. Kurtz et al. eds., 2022), https://ssrn.com/abstract=3631002

[13] Juan David Gutiérrez & Manuel Abarca, *Database of Latin American Antitrust Cases in Digital Markets, 2015-2022*, Nov. 3, https://www.researchgate.net/publication/369170142_Database_of_Latin_American_Antitrust_Cases_in_Digital_Markets_2015-2022

[14] Cristina Caffarra, *Follow the Money: Mapping Issues with Digital Platforms Into Actionable Theories of Harm*, Concurrences. Antitrust Publications and Events, (Oct 29, 2024) https://www.concurrences.com/en/bulletin/special-issues/platforms/follow-the-money-mapping-issues-with-digital-platforms-into-actionable-theories

[15] Alexander White, *Search Engines: Left Side Quality versus Right Side Profits,* International Journal of Industrial Organization, Apr. 22, 2013, at 690, DOI: 10.1016/j.ijindorg.2013.04.003

Google became critical distribution channels for multiple services through mobile apps, allowing them to charge substantial fees or commissions (reaching 30% of revenue for the first year and 15% in subsequent years). In a study, Padilla and Perkins show that when demand for electronic devices is healthy, foreclosure in the aftermarket is unlikely; in contrast, when the demand for devices faces saturation, such exclusion is more likely when a service offered by the manufacturer of the device is not too inferior to that offered by a third-party competitor. Under that model, they claim, consumer welfare would be increased if the device is prohibited from using its own applications that compete with third parties.[16]

IV. Practices under scrutiny

1. The battle between the European Commission and Google

In 2017 Google was fined by the European Commission with €2.4 billion for having abused its dominant position in general search services to favor its own comparison-shopping service (Google Search).[17] The authority found that Google Shopping was not subject to the normal results thrown by the algorithm, as the search engine systematically positioned Google's service prominently over rival options. The evidence showed that even the best-ranked price comparison sites–other than Google– appeared on average down to the fourth page of the results, which in practice meant that consumers would hardly see them.

Google alleged, among other issues, that the Bronner criteria (related to refusal to deal and essential inputs) was not satisfied and that the Commission was unfairly imposing on Google a duty to promote competition by giving its own competitors greater visibility in general search results pages. Additionally, they claimed that there was no precedent to characterize this conduct as an abuse of a dominant position, as new abuse categories had to be consistent with the legal framework and be known in advance.

In 2021, the General Court of the European Union dismissed most of the claims made by Google and upheld the legality of the fine, pointing out three

[16] Jorge Padilla & Joe Perkins et al., LXX *Self-Preferencing in Markets With Vertically Integrated Gatekeeper Platforms*, Journal of Industrial Economics 371, 371-372 (2022) (The economic significance of online marketplaces, such as Apple's App Store and Google Play, has increased over time. Apple's App Store and Google Play earned gross revenues of around €70 billion in 2019, of which almost €10 billion came from Europe. Access to consumers via such platforms has stimulated rapid innovation; over 2.5 million apps are available on Google Play, and more than 1.8 million on the App Store.)

[17] Google Search (Shopping), Case AT.39740, Antitrust Procedure, European Comission, June 27, 2017, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

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circumstances that weakened competition: (i) the importance of the traffic generated by Google's general search engine for comparison shopping services, (ii) the behavior of users, who typically focus on the results that appear at first; and (iii) the large proportion of traffic diverted in comparison shopping services and the fact that it could not be effectively replaced by other means.[18]

In 2018, the Commission imposed another sanction on Google, this time for €4.34 billion, for having implemented anti-competitive restrictions on Android device manufacturers and mobile network operators to strengthen its dominant position in general internet search.[19] In particular, Google: (i) required manufacturers to pre-install the Google Search app and browser app (Chrome) as a condition for licensing Google's popular app store (Play Store); (ii) paid manufacturers and mobile network operators large sums of money in exchange for the pre-installation of Google Search and (iii) prevented manufacturers who had pre-installed Google apps (including Google Search, Play Store and Chrome) from selling devices if they allowed alternative versions of Android.[20]

This conduct is particularly harmful considering that Google is dominant not only in search engines, but also in mobile operating systems, since most mobile smart devices in the world use Android, the original version of which was bought by Google itself in 2005. The other highly popular system, Apple's iOS, has less reach because it is used only by iPhone's vertically integrated model. This scheme benefits the so-called *status quo* bias as empirical evidence shows that users tend to stick with pre-installed apps. The practice reduced the incentives of manufacturers to invest in search and browser apps, which in turn eliminated the possibility of rivals to emerge and compete against Google.

The "third round" of sanctions came in 2019, when the Commission imposed a €1.49 billion fine against the same firm, for abusing its dominant position in the online search advertising intermediation market. Many content sites, such as news, blogs, travel, or entertainment sites, have their own online search function that generates profits on advertising. Through the "AdSense for Search" service, Google acts as an intermediary between advertisers and the owners of these websites. Starting in 2006, Google included exclusivity clauses in its services contracts to prohibit sites from placing their competitors' ads on their search results pages. Around three years later, Google began replacing its exclusivity clauses with "Premium Placement" clauses, whereby sites had to reserve the most profitable places in search results for Google's own ads. Other clauses required publishers to obtain Google's written approval before making

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[18] General Court of the European Union, Press Release No 197/21, (Nov 10, 2021) https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf

[19] Google Android, Case AT.40099, Antitrust Procedure, European Commission, July 18, 2018, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf

[20] European Commission Press Release, *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine,* (July 10, 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581

any adjustments to the way any rival ads were displayed.[21] All of this prevented Google's rivals from competing on digital advertising by preventing them from effectively placing ads on third-party pages.

The constant revision of Google's practices in recent years has not been limited to the European Commission's watchful eye. Recently, the Competition and Markets Authority (CMA) launched a new investigation into Google's advertising business over fears its practices may be unfairly freezing out competitors.[22]

2. The dual role platform: Amazon

When platforms offer a service as intermediaries, but are also competing downstream with their own clients, there is a risk that they could use some of the information they gather for the benefit of its own retail operations. Amazon falls into this scenario, since it operates a marketplace and, simultaneously, sells its own products through its platform. The main concern is that this agent could exploit information that is not otherwise available from other sources, such as the products searched by consumers ("consideration data") or their purchasing decisions, which could be used to match or improve offers and displace products offered by third parties, unduly benefiting from the efforts undertaken by third parties.

In 2019, the European Commission launched a formal investigation into Amazon's use of non-public data of its marketplace. In the corresponding Statement of Objection, the European Commission preliminary found that Amazon was dominant on the e-commerce French and German markets, the largest in the European Union. It also found that Amazon's reliance on the use of non-public business data for its own benefit regarding retail decisions–for example new products offered through Amazon Basics–distorted fair competition on its platform.[23]

This investigation highlights that Amazon has access to non-public business data of third-party sellers such as the number of ordered and shipped units of products, revenue, sales, performance, claims and activated guarantees. Thus, large quantities of data may be available to employees of Amazon's retail business and flow directly into its automated system, which could be used to modify Amazon's offers and strategic decisions to the detriment of independent mar-

[21] European Commission Press Release, *Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising,* (March 20, 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770

[22] Competition and Markets Authority, *Investigation into suspected anti-competitive conduct by Google in ad tech,* (Oct. 30, 2024 4:05 PM) https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-conduct-by-google-in-ad-tech

[23] European Commission Press Release, *Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime,* (Dec. 20, 2022) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7777

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ketplace sellers,[24] for example, by allowing Amazon to focus on the best-selling products by category and to adjust its offers accordingly.

Although Amazon does offer competitive prices and thus benefits consumers, a repeated and widespread practice of this sort could reduce innovation efforts and displace competitors, distorting the market in the medium term. Even though a retailer is free to choose the distribution channels that best suit its interests, it may not have a different choice given Amazon's dominance in e-commerce in multiple countries. Against these claims, it has been argued that self-preferencing would not generate any consumer harm and, moreover, it could increase price competition between sellers and private brands offered by the marketplace.[25]

It is important to note that every company has the right to make individual decisions based on what its competitors are doing, and even carry out "reverse engineering" strategies to introduce new products without violating industrial property rights. The problem is that Amazon could be unfairly avoiding commercial risks and capturing efforts undertaken by its competitors due to its unique dual role position.

Amazon should not have an incentive to engage in these self-preference practices as they would affect the neutrality and reputation of the marketplace, its core business. Prioritizing Amazon's role as a retailer at the cost of pushing or excluding sellers from the platform would not make much business sense. But its dominant position may give some space to do it if the benefit is greater than the cost; sometimes organizations just make bad decisions and in doing so break the law.

In parallel to the Statement of Objections issued on this investigation, in 2020 the European Commission opened a second investigation against Amazon to assess whether the criteria that Amazon sets to select the winner of the *Buy Box* and to enable sellers to offer products under its *Prime Programme*[26] lead to preferential treatment. In this investigation, the Commission preliminary concluded that Amazon abused its dominant position in the French, German and Spanish markets for the provision of online marketplace services to third-party sellers and determined that the criteria used by the company unduly favored

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[24] European Commission Press release, *Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices,* (Nov. 10, 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077

[25] *See* Javier Tapia & Manuel Abarca Meza, *Abusos de posición dominante en mercados digitales: ¿Nuevos trucos para un perro viejo?*, 126 Revista de Derecho Administrativo.

[26] Amazon's Buy Box prominently displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button (almost all Amazon purchases are made using this tool). Amazon's Prime Programme offers premium services to customers for a fee and allows independent sellers to sell to Prime customers under certain conditions. This is also crucial since Prime consumers spend much more than those who do not hold that category.

its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.[27]

In response, Amazon offered commitments, and in December 2022, the Commission made the amended version of the commitments legally binding under EU antitrust rules.[28] In general terms, Amazon committed: i) not to use non-public seller data by Amazon Retail, ii) to establish an unbiased selection of sellers for the selection of the Buy Box winner and display of two Buy Boxes, iii) to guarantee equal treatment of marketplace sellers and offers on Prime, as well as free choice of carriers and the improvement of the communication channel used between independent carriers and Amazon customers, among others.

3. Abusive Exploitation: Germany against Facebook

Facebook's business model has been a common topic of discussion, since it is a platform that charges a zero-price on one side (social media) and monetizes on the other side (digital ads). It is therefore misleading to consider this service as "free" since consumers are paying with their personal data. The dominant provider can then exploit consumers in an open or subtle way, extracting an excessive amount of information—which necessarily implies a loss of privacy—when the price should be negative, that is, the company should be paying the user because the value of its data outweighs the value of the service itself. Are consumers being overcharged by Facebook? What value do we give to our data?[29]

These strategies take advantage of a peculiar behavioral bias that has been referred to as the "privacy paradox", which consists in the fact that consumers tend to express great concern for their privacy but do not act accordingly, since they usually offer their personal data in exchange for little or even nothing.[30] Many consumers are unaware of the costs associated with the loss of privacy and the income that their information represents for companies.

In March 2016 the German Federal Cartel Office (*Bundeskartellamt*) announced that it was investigating Facebook for the alleged abuse of its dominant position in social networks. According to the *Bundeskartellamt* the company collected data from its users without their consent, using both its own platforms—such as Instagram and WhatsApp—and third-party platforms, in the latter case through social plugins ("like" or "share" buttons) that allow to fol-

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[27] European Commission Press Release, *Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime* (Dec. 20, 2022).

[28] *Idem.*

[29] A study shows that a good digital advertising strategy increases the "click" by up to 66.8%. *See* Omid Rafieian & Herma Yoganarasimhan, *Variety Effects in Mobile Advertising*, Computers & Security, Oct. 8, 2021, at 226.

[30] Nina Gerber *et al.*, *Explaining the privacy paradox: A systematic review of literature investigating privacy attitude and behavior*, Computers & Security, Aug. 2018, at 226, https://www.sciencedirect.com/science/article/pii/S0167404818303031

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low the activity of users. The competition authority established that Facebook's data policy which allowed them to collect user and device-related data from sources outside Facebook and to merge it with data collected from Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms.[31]

Facebook claimed that the data collected was necessary to provide a better service and part of its legitimate business model. The company argued that data aggregation from various sources was efficient to the extent that it improved the product itself, as well as the quality of the targeted advertising. Nevertheless, the company was found guilty in 2019 for abusing its dominant position by inappropriately collecting, using, and merging its users' data.[32]

The competition authority considered that the terms and conditions set by Facebook and the way in which it collected and used the data of its users violated the General Data Protection Regulation.[33] In the opinion of the *Bundeskartellamt*, the consent requested by Facebook was illegal and ineffective, since the benefits obtained by Facebook outweighed the interests and benefits of users. In other words, in the absence of alternatives, users had no choice but to give their consent that their data be collected from sources outside of Facebook-related activities.

Facebook appealed against this decision to the Düsseldorf Higher Regional Court (DHRC). The DHRC considered possible that at least part of the data collected could be based on a legitimate interest of Facebook. Shortly after, the German Federal Court of Justice overruled the DHRC's decision and rejected Facebook's request for suspension. On March 24, 2021, the DHRC decided to refer General Data Protection Regulation (GDPR) compliance questions to the European Court of Justice, which ruled that the *Bundeskartellamt* may take data protection rules into consideration when weighing interests in decisions under competition law.[34]

4. The New US Momentum

In December 2020, the Federal Trade Commission (FTC), together with prosecutors from 46 states, filed lawsuits against Facebook[35] for monopolizing so-

[31] Bundeskartellamt [BKartA.] [Federal Cartel Office], Feb. 15, 2019, Case Summary, (Ger) https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=

[32] [BKartA.] Feb. 15, 2019, Case Summary, (Ger)

[33] [BKartA] 6th Division, Feb. 6, 2019, Case B9-22716, Administrative Proceedings, (Ger) http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5

[34] [BKartA], Press Release, *CJEU decision in Facebook proceeding: Bundeskartellamt may take data protection rules into consideration* (June 3, 2023) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/04_07_2023_EuGH.html

[35] Complaint for Injunctive and other Equitable Relief at Federal Trade Comission v.

cial networks and preserving its position through a series of anticompetitive conducts, such as the acquisition of rivals Instagram in 2012 and WhatsApp in 2014. The lawsuit also describes the imposition of anticompetitive conditions on software developers. For example, Facebook ensured that the applications that interconnect with Facebook do not compete with the platform in any of its functions—such as messaging—and do not export data or promotions to social networks different than Facebook.[36] According to the lawsuit, these actions, individually and collectively, removed the ability and incentive of other apps to become competitive threats to Facebook.

On June 2021, the federal judge of the District of Columbia dismissed the lawsuit arguing that although the FTC had made out a plausible market definition for personal social network services, such authority failed to provide an estimated actual figure or range for Facebooks' market share at any point over the past ten years.[37] On January 2022, the judge admitted the FTC's amended complaint which detailed the claim that Facebook holds monopoly power in the market of personal social networking services.[38]

There is still a hard road ahead to prove FTC's allegations, especially considering US's prevailing judicial standards and the fact that Facebook's acquisitions of Instagram and WhatsApp were consummated more than a decade ago and were not investigated or otherwise objected at that time. And just recently, in April 2024, Meta filed a motion asking the court to award them summary judgment and dismiss the FTC's lawsuit, arguing that they face fierce competition from a range of platforms (such as TikTok, X and YouTube) and that the FTC had failed to prove its claims of alleged harm to competition and consumers.[39] In fact, they contend that the acquisition has provided benefits both for consumers and for the apps.

5. Department of Justice v. Google

In October 2020, the Department of Justice (DoJ) sued Google for unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through

FACEBOOK, INC., (D.D.C., Jan. 13, 2021) https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf

[36] These policies were eliminated in 2018 due to the public reaction from the publication of several documents that detailed the anticompetitive conduct of Facebook in detriment of app developers.

[37] Memorandum at Federal Trade Comission v. FACEBOOK, INC., (D.D.C., June 28, 2021) https://www.ftc.gov/system/files/documents/cases/073_2021.06.28_mtd_order_memo.pdf

[38] The Federal Trade Commission alleges that 70% of daily active use of social networking used Facebook since 2016.

[39] Memorandum at Federal Trade Commission v. Meta Platforms, (D.D.C., Apr. 5, 2024) https://storage.courtlistener.com/recap/gov.uscourts.dcd.224921/gov.uscourts.dcd.224921.324.1_2.pdf

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anticompetitive and exclusionary practices. The plaintiffs argued, among other claims, that Google licenses its apps and interfaces only if device manufacturers agree to bundle other apps and prevent their removal. These practices are also used to secure default status for its general search engine through the payment of a revenue share based on online queries; actually, Google has paid billions of dollars each year to device manufacturers, wireless carriers and browser developers.[40] The lawsuit has many similarities with the findings of the European Commission in the Google Android case.

The authority claims that these practices allow the monopolization of the activities in question, since Google represents 82% of computer search queries and 94% of queries on mobile devices in the United States.[41] Among other defenses, Google argued that consumer loyalty to its search engine is due to the quality of the results, that the agreements in question are no different from those used to distribute software, and that consumers can switch search engines on mobile devices at any time. Additionally, they stated that search engines are not their only competition, considering that they also compete with other sources of information.

In January 2023, the DOJ filed a second antitrust lawsuit against Google for monopolizing digital advertising technologies. The complaint alleges that Google has monopolized what is known as the "ad tech stack," the website publishers depend on to sell ads and that advertisers rely on to buy ads and reach potential customers.[42] Similar to the case filed against Facebook, the lawsuit alleges anticompetitive and exclusionary conducts in the form of neutralizing or eliminating ad tech competitors through acquisitions. The one thing that is crystal clear from these lawsuits is that the US authorities have no intention of backing down from the scrutiny that has been placed recently on these tech giants.

V. Digital mergers: efficient or risky?

The Big Five share a common feature: they have a voracious appetite to acquire any business that facilitates their growth, complements their ecosystem or strengthens their position. The Furman report states that, in the last decade, they made over 400 acquisitions globally.[43] In 2017 alone, they spent $31.6 billion to acquire start-ups. From 2001 to 2018, Google bought an average of one

[40] Complaint at U.S.A. and others v. GOOGLE LLC, (D.D.C. Oct. 10, 2020) https://www.justice.gov/opa/press-release/file/1328941/download

[41] Complaint at U.S.A. and others v. GOOGLE LLC, (D.D.C. Oct. 10, 2020) 31 https://www.justice.gov/opa/press-release/file/1328941/download

[42] U.S. Department Of Justice Press release, *Justice Department Sues Google for Monopolizing Digital Advertising*, Jan 24, 2023, https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies

[43] Report of the Digital Competition Expert Panel, *Unlocking digital competition*, March, 2019,

firm per month, so the success of these companies could hardly be explained without this non-organic growth strategy.[44] Although some of these transactions may have had the deliberate aim of killing innovation projects that could represent some kind of competition in the future, the reality is that most of these had the purpose of complementing goods or services already offered by the acquirer.[45]

The so-called killer acquisitions are more common in different markets, such as the pharmaceutical industry where incumbents have acquired new firms in order not to adopt the acquired product, but rather to stop their development.[46] Using a sample of 35,000 projects from more than 6,700 pharmaceutical companies over the past 25 years, Cunningham found evidence that there is a 36.6% probability that companies will fail to develop the acquired projects when they overlap with their own portfolio, and out of those projects, 6.4% would be killer acquisitions in the full sense. In the digital sector, what firms want instead is to incorporate an innovation or functionality into their ecosystem. Between 2008 and 2018, Amazon, Facebook, and Google concluded 299 operations, 60% of which were not horizontal but aimed to acquire young companies—no older than 4 years—that offered something else.[47]

Many of these acquisitions generate synergies and efficiencies as the buyer develops the acquired innovation, diversifies its portfolio, and offers better services to its users. Even the possibility of selling can stimulate entry and facilitate financing the project in the first instance. However, the acquisition affects the competitive environment when (i) the acquirer is a dominant platform and (ii) the acquired company had the resources and capabilities to grow on its own merits, scale up, diversify, or become a viable competitor. In this scenario, it is very likely that the acquisition is anticompetitive, since it would reinforce leadership, eliminate potential competition and provoke a loss of innovation.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[44] Marc Bourreau & Alexandre de Streel, *Big Tech Acquisitions, Competition & Innovation Effects and EU Merger Control*, (Centre on Regulation in Europe, 2020) https://cerre.eu/wp-content/uploads/2020/03/cerre_big_tech_acquisitions_merger_control_EU_2020.pdf

[45] For example, a study analyzes the characteristics of 300 acquisitions made by Amazon, Facebook and Google in the period from 2008 to 2018 and conclude that, in most cases, the products and services of the acquired companies were complementary to those of the acquirers. Elena Argentesi et al., *Merger Policy in Digital Markets: An Ex-Post Assessment*, Journal of Competition Law & Economics, Munich, Working Paper, No. 7985, 2019) https://www.econstor.eu/bitstream/10419/214987/1/cesifo1_wp7985.pdf

[46] Organisation for Economic Co-Operation and Development, *Start-ups, Killer Acquisitions and Merger Control*, (May 12, 2020) https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf

[47] Alessandro Massolo, *Mergers in Big Tech: An overview of EU and national case law*, Concurrences. Antitrust Publications and Events, (Oct 30, 2024, 06:28 PM) https://www.concurrences.com/en/bulletin/special-issues/mergers-in-big-tech/mergers-in-big-tech-an-overview-of-eu-and-national-case-law

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The concept of "reverse" killer acquisition can also take place. This occurs when the buyer stops innovating organically—having enormous capacities to do so—to instead buy something already developed by a third party: "the acquisition may effectively extinguish the standalone effort of the buyer to expand in a particular space because the target immediately provides it with those capabilities".[48]

Among the acquisitions that have been questioned are targets that may have evolved to become competitors of the acquirer (Facebook/Instagram), others that have given the acquirer a strong position in a related market (Google/DoubleClick[49]) or that have involved significant amounts of data which may have consolidated the position of the buyer in both their focal business and the acquired one (Google/YouTube, Google/Fitbit and Facebook/WhatsApp). In a recent paper, Padilla and Condorelli argue how a dominant firm in a *data-intensive* primary market may enter a *data-rich* secondary market in which it could set below-cost prices and acquire customers; this, in turn, would entrench its position in such a primary market, making entry therein less desirable for potential competitors.[50]

In the acquisition of Facebook/Instagram, there were clear signs that this innovative company had an exciting future. While Instagram was small in assets, sales, employees, and users, charged a subscription fee, and offered few features compared to what it is now, the $1 billion purchase price was a clear sign of the value Facebook placed on the business. When a company—incipient or less mature— represents a potential competitor, the price reflects not only the value of the acquired assets but also the loss of future income of the acquired company and the protection of the acquirer's leadership position.

According to the Lear report, the merger strengthened Facebook's position as an advertising platform in three ways: (i) it allowed more information to be used and combined for advertising purposes, (ii) it avoided the competitive pressure that Instagram might have exerted in the future, and (iii) it increased its user base.[51] This report criticizes that the authority paid too much attention to the specific functionalities offered by the apps of the merging parties, instead

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[48] Gregory Crawford et al., *How tech rolls: potential competition and reverse killer acquisitions*, (Oct. 30, 2024, 06:23 PM) https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions

[49] When Google acquired DubleClick, the transaction got cleared by both the FTC and the European Commission because both companies were not seen as direct competitors. The fact is that a dominant agent in digital advertising got valuable personal data to improve its search-advertising capabilities.

[50] Being a data-rich business one that enables the harvesting of information of extensive databases of user behavior, and a data-intensive business one that centers on the exploitation of data. *See* Jorge Padilla & Daniele Condorelli, *Data-driven Envelopment with Privacy-Policy Tying*, The Economic Journal, Oct. 11, 2023, at 515.

[51] Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets*, (May 9, 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf

of analyzing with a broader perspective how they could become competitors in the business of harvesting consumer attention and selling it to advertisers.

It is of course easier to criticize the Facebook/Instagram merger now that we see the huge success of Instagram, but still this merger involved a market leader who was taking over a platform that had a strong chance of becoming an important participant. A fundamental feature of digital platforms was overlooked, that is their inherent ability to diversify and evolve. Instagram was, like Facebook, a platform that allowed social interaction between peers, attractive to consumers and mature enough to start monetizing through advertising. Instagram did develop under the umbrella of Facebook, but the relevant question was whether this company could reasonably have grown on its own or even with a different buyer.

The acquisition of WhatsApp by Facebook also raised several issues.[52] At the time, the European Commission identified that, out of the services offered by Facebook, there was an overlap only in communication services, discarding effects on social networking services and digital advertising. Although the communication services of both companies offered the possibility of sending text, voice and content, the means used were different (WhatsApp via mobile app and, for Facebook Messenger, through the platform).

Hence, Facebook and WhatsApp were considered, if anything, "distant" competitors. Then the Commission did analyze the possibility that Facebook increased its power in social networks by introducing digital advertising in WhatsApp or using this service as a data source to feed Facebook services. But these risks were ruled out because the parties stated that it was not technically possible for WhatsApp and Facebook to interact between themselves, and that both systems would continue to function independently. A few years later, WhatsApp announced changes to its privacy policy, including the possibility of linking its users' telephone numbers with Facebook accounts. The Commission fined Facebook with €110 million for providing misleading information regarding the Whatsapp takeover,[53] although it assured that the original conclusion would not have been different.

It is striking to see that almost no transaction has been objected by authorities worldwide when digital mergers pose particular risks. This can be partly explained due to the notification thresholds that in many jurisdictions are based on the number of sales of the firms involved. Therefore, the acquisition of start-ups or incipient firms that do not generate much income could fall out of the radar, even if the amount of the operation is high. In response, the UK, Austrian and German competition agencies implemented changes to the cri-

[52] Facebook/WhatsApp, Case COMP/M.7217, Merger Procedure, European Commission, Oct. 3, 2014, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

[53] European Commission Press Release, *Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover,* (May 17, 2017) https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369

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teria under which a merger is to be reviewed. But this does not explain the full story, as there are a good number of mergers of digital businesses that were either reviewed and approved, without in-depth examination, or not questioned or investigated afterwards.

In any industry, whether traditional or digital, dominance is a concern, as it may disrupt supply or price conditions to the detriment of consumers or facilitate anti-competitive conducts, whether exploitative or exclusionary. Prior merger control seeks to prevent a transaction from creating an anticompetitive situation or structure that did not exist before. Further, there are special considerations regarding concentration of information, something which has been referred to as "data-opolies".[54]

On the other hand, it is likely that competition authorities have made some "type II" errors or false negatives, by authorizing concentrations which could reasonably have an anticompetitive impact of some sort. This is mainly due to three reasons:

a) Digital mergers do not normally involve a horizontal overlap, but the purchase of a differentiated product, so it can strengthen its ecosystem or expand into adjacent segments.
b) Digital markets are dynamic, and what appears to be a service at one point may evolve, add functionalities, and mutate into a different service later. Complements can become substitutes, and portfolio effects can evolve into horizontal overlaps.
c) Where there is an overlap between a strong acquirer and a small firm, a conclusion of potential loss of competition is difficult to reach as it must be based on robust analysis to avoid mere speculation.

Consequently, authorities must acknowledge that the digital economy sometimes requires a departure from traditional analysis. This does not necessarily mean altering the traditional objectives of protecting efficiency and consumer welfare, but rather using more appropriate analysis tools and reducing the strong risk aversion of generating false positives. In certain cases, the level of scrutiny could be raised and an anti-competitive result may be assumed *prima facie*, especially when the acquirer has a dominant position and the transaction raises barriers to entry through network effects or the accumulation of data, which makes it difficult for users to move —generating a lock-in effect— or it reduces the levels of competitive pressure in the present or near future.

For this strategy to be possible, procedural and substantive approaches would have to be explored. Many voices —including the Stigler and European Commission reports, as well as Motta and Peitz— propose reversing the burden of

[54] Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, Georgetown Law & Technology Review, 2018, at 275, https://georgetownlawtechreview.org/wp-content/uploads/2018/07/2.2-Stucke-pp-275-324.pdf

proof and presumptions, so that when a dominant digital platform acquires assets, it should be assumed that the operation is anti-competitive, unless the parties show evidence that it does not generate risks or that the efficiencies are strong enough. This proposal is not without problems since each jurisdiction would have to define how to administer these exceptions. Also, alleviating the burden of proof of competition agencies to show at least a *prima facie* theory of harm could clash with basic legal principles. Also, it could be difficult to prove a negative situation —that there are no risks— or even the positive in this case —the presence of efficiencies that are not well known yet—.[55]

A viable alternative is to change the type of analysis and lower the threshold that is typically used to object a merger. As Shapiro argues, competition policy must tolerate certain false positives to avoid false negatives and not allow transactions that eliminate competitors that could become competitors of incumbents.[56] This is consistent with the proposal of the Furman report, which suggests moving from a "balance of probabilities" test to a "balance of damages" test,[57] which would involve looking not only at the probability of harm, but also at the probable scale of that damage, in such a way that the intervention of the agency could take place if the scale of the damage is high, even though its probability of occurrence is low.

In this regard, Salop comments that rational decision-making under scenarios of imperfect information should give greater importance to costs rather than risks, as the courts and lawyers claim.[58] This approach is useful for acquisitions involving small or start-up firms where the probability of harm is much lower since it is difficult to establish or predict their future development and success.[59] It could be applied as a tool that strengthens merger analysis in a particularly risky situation, without making distinctions between sectors or companies, nor relieving the authority of its obligation to show a reasonable theory of harm. To mitigate information asymmetries that play in favor of involved parties, authorities should have sufficient power to require any relevant information regarding the transaction, including efficiencies.

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[55] Jay Ezrielev, *Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple*, North America Column. Competition Policy International, Nov, 2020, https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/North-America-Column-November-2020.pdf

[56] Report of the Digital Competition Expert Panel, *Unlocking digital competition*, 98, March, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

[57] Such an approach is also proposed in the Stigler report, and has received support from Crémer, Pecman *et al* (2020), and Motta & Peitz (2020) amongst others.

[58] Steven C. Salop, *An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards*, Georgetown Law Library, 2017, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3025&context=facpub

[59] Organisation for Economic Co-Operation and Development, *Start-ups, Killer Acquisitions and Merger Control – Background Note*, (May 12, 2020) https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf.

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Regarding the substantive analysis, flexibility is much needed. The standard should not only consider the typical concerns of a horizontal overlap —the creation of a dominant company or the empowerment of an already dominant company— a vertical implication —the denial or restriction of access to an essential input— or coordinated effects —where the new structure of the market would be more prone to collusion—. Greater attention should be given to a possible conglomerate effect that we rarely see materialize in traditional sectors, as the diversification and growth of digital ecosystems can bring together complementary or interconnected services that have or could have common users. Thus, the combination of products in related markets may give the merged entity the ability and incentive to leverage a strong position in some activity through foreclosure practices such as tying or bundling. This of course is particularly risky when one of the companies holds a dominant position, the product involved is relevant to consumers, and there are only a few or no alternatives available.

The rapid evolution of digital ecosystems also requires the injection of horizontal elements into the theories of harm. Aspects such as data accumulation and its use, growing network effects, mobility of users and the *modus operandi* of the ecosystem involved must be a priority in the analysis. The European Commission report suggests that the Commission must revisit substantive theories of harm under the "Significant Impact on Effective Competition Test" (SIEC test), especially for those cases in which there is a dominant platform or ecosystem which benefits from strong network effect and data access, both of which are significant barriers to entry.[60]

For which, the following questions should be answered: (i) does the acquirer benefit from barriers to entry linked to network effects or the use of data? (ii) is the target a potential or actual competitive constraint within the technological/users space or ecosystem? (iii) does removing this force increase power within this space through higher barriers to entry, and (iv) if so, is the merger justified by efficiencies?

With regard to the loss of potential competition analysis, although any conclusion in this regard must be based on facts and evidence, it is also not desirable for agencies to set a high threshold for themselves that prevents them from making reasonable predictions. As the Merger Assessment Guidelines of the Competition and Markets Authority (CMA) points out, "[s]ince merger assessments are prospective, an element of judgment is necessary in deciding whether any loss of competition is substantial rather than any exact quantitative measurement".

Unlike traditional analysis, which compares the situation before and after the transaction, in these cases one would have to ask whether the target, had it not

[60] Jacques Crémer et al., Competition Policy for the Digital Era (European Commission ed., 2019) https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en

been acquired, could have been developed by itself and become a source of significant competitive pressure. This would imply accepting that the counterfactual cannot be bulletproof, but the conclusion may be duly motivated based on the company's profile, service attributes, innovation capacity, growth prospects and viability, among other elements.

The possible loss of dynamic competition is highly relevant. Certain mergers can eliminate efforts such as the development of new products or the improvement of existing ones, introducing more efficient or disruptive business models, or sacrificing short-run margins in order to attract users to their platform and benefit from network efficiencies. In line with this discussion, in 2021 the Competition and Markets Authority ordered Meta to sell Giphy, the largest provider of animated figures on social networks. The Competition and Markets Authority found that the deal removed Giphy as a potential challenger in the UK display advertising market, preventing UK businesses from benefiting from innovation.[61] Especially considering its innovative service called "Paid Alignment",[62] which had already been offered in the US.

Another central concern was the increase of Meta's already significant market power by denying access or offering less favorable terms to rival social networks,[63] as there were practically no alternatives at the time of the acquisition; Giphy offered special features and functionalities that made it very attractive for social networks, including the quality of the content, the superiority of the search algorithm and its reach.[64]

In short, it is essential to consider price and non-price aspects, which can include the levels of quality and service, privacy conditions offered to the user and the way in which they can enjoy a platform without interference.

1. The Cornershop case (Mexico)

In Mexico, the Cornershop acquisition drew much attention since the Federal Competition Commission (*Comisión Federal de Competencia)* (COFECE) originally blocked Walmart´s attempt to acquire the platform in 2018 and then cleared Uber to do so a few months later. Cornershop was a digital platform for the purchase and delivery of products offered by supermarkets and other retail businesses. It allowed users to interact with a "shopper" in real time and view

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61 Competition and Markets Authority Press release, *CMA orders Meta to sell Giphy*, (Oct. 18, 2022) https://www.gov.uk/government/news/cma-orders-meta-to-sell-giphy

62 These services allowed businesses, such as Dunkin' Donuts and Pepsi, to promote their brands through visual images and GIFs.

63 For example, requiring TikTok, Twitter and Snapchat to provide more data from UK users to obtain access.

64 Competition and Markets Authority Summary of Remittal Final Report, *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc.*, (Oct. 18, 2022) https://assets.publishing.service.gov.uk/media/634e6ce58fa8f53465d13a35/Facebook_GIPHY_-_Remittal_Summary_.pdf

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the delivery route. It also offered its commercial users a service called "Cornershop Merchant Center," through which they had access to disaggregated information about the performance of their own stores, including the number of orders, tickets, sales by category, most popular products, shortages, and heat maps.

COFECE identified an existing vertical relationship between the parties to the transaction, as Walmart used Cornershop as a one of its distribution channels. It then detected a number of competitive risks, due to the fact that Walmart —as the would-be owner of Cornershop— could have access to strategic commercial information of its own competitors and deploy self-preferential tactics (for example, by displaying its own products in a more favorably way). The possible departure of commercial users from the platform (mainly competing supermarkets), most likely due to a loss of trust, would in any case imply the elimination of a distribution channel and fewer options for consumers. Due to these and other reasons the operation was objected.[65]

A few months later, a new proposal to acquire Cornershop came from Uber. Unlike the previous case, the acquirer did not have a commercial relationship with the target company since its core business was the provision of passenger transportation services and the delivery of prepared food through mobile applications. Even though there were no horizontal overlaps in the main services provided by the notifying parties,[66] nor vertical relationships, the operation warranted an in-depth analysis since it would combine two very popular digital platforms, although of very different size and scope. In the digital economy certain transactions must consider the possible loss of potential competition, the effect of data aggregation and the strengthening of ecosystems. COFECE's approach showed a flexible and practical manner to perform this analytical exercise.

Uber's objective was to expand its portfolio of services through its application, in order to allow its users to buy products from supermarkets and other businesses already integrated into Cornershop (complementing Uber Eats). The relevant questions were: would the integration of Cornershop into Uber´s ecosystem strengthen the latter's position in passenger transportation? Or, viewed the other way around, would the integration strengthen Cornershop's position in such a way that it could raise prices without competitive constraints? Could Uber's diversification generate anticompetitive conglomerate effects? The answers, to a large extent, relied on the nature of the client's portfolios and information on the companies involved, and the synergies that could be generated by their integration.

65 Interesting to note is that in Chile this same transaction was approved.

66 Although Uber and Cornershop commercialized similar products (for example, wines, pet products, and pharmaceuticals), those sales represented a marginal portion of each company's total sales.

These risks were ruled out mainly due to the following: (i) Cornershop faced significant competitive pressures not only from similar digital platforms, but also from the physical supermarkets and stores themselves, including their online sales, (ii) the groceries market is quite dynamic and contestable, with existing companies with brand recognition, technology and resources able to enter successfully, (iii) users do "multihoming" and are not tied to a single platform; (iv) from a demand perspective, the main services offered by Uber and Cornershop were not necessarily complementary, (v) likewise, the information provided by Uber users was not complementary to that provided by Cornershop's users; (vi) Cornershop's user base was very small compared to Uber's; (vii) bundling Uber Rides and Uber Eats with Cornershop under one membership could ultimately benefit users; (viii) after the transaction it could be expected that Cornershop (directly or through Uber Eats) would offer its services in new cities, as eventually did happen.

Finally, although there was evidence that Uber had plans and made certain efforts to participate in the delivery of groceries market, it was hard to confirm whether this would happen and when.

VI. Competition Policy and Regulation: Challenges Ahead

Some digital models pose significant challenges, not only because they tend to monopolize markets, but also because of their inherent dynamism and complexity, as well as the incentives that incumbents have to strengthen their position through artificial strategies or anti-competitive practices driven by technology. It is key to distinguish what falls within the scope of competition policy and what is a matter for regulatory intervention. The conditions of entry, the degree of contestability and competitive rivalry depend on multiple variables ranging from economic to institutional. Therefore, action on multiple fronts is required.

The digital environment needs regulation and public policy like any other activity that causes negative externalities, affects consumers, or generates social risks. Competition law is not supposed to set the rules of the game for specific industries, but rather to correct deviations that affect the efficient functioning of markets. Therefore, it is necessary to distinguish between strengthening competition systems and necessary regulatory approaches. Both could complement each other towards similar or complementary ends.

There is no need to redesign the fundamental principles and concepts of competition law. Most of the procedures and tools still have a solid ground and may work quite well even in the digital context. The system in most jurisdictions is flexible enough and apt to resort to different methodologies, analytical approaches and risk scenarios depending on the circumstances.

The consumer welfare standard normally requires determining an overprice created by anti-competitive practices, while in the digital economy it is common

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to observe "zero prices". Hence, different approaches are needed such as considering counterfactual "negative price" scenarios or analyzing variables other than price, e.g. quality, availability, variety, access or loss of innovation. In the digital economy, aspects such as displacement through the increase in switching costs, lock-in effects, misuse of information or the loss of potential competition become critical.

Another discussion has to do with market definition. In two-sided or multiple-sided markets, which is common to see in the digital economy, the question arises as to whether they should be defined jointly or separately. This only implies one more step in the analysis, not an obstacle. Thus it becomes necessary to analyze the dynamics of interdependence between each side, so they may belong to the same market when transactions occur between each other (a marketplace or transport services through mobile apps), or one side may be a market in and of itself when the network effects only operate within that group (as in social networks, where one component would be the user side and the other the advertiser side). Multi-sided markets are not exclusive to the digital world, as they have always existed to the extent that two categories of users with interdependent demands interact with each other; a shopping center attracts both tenants and buyers while a newspaper attracts both readers and advertisers.

This certainly comes with complexities. The definitions become more complex when the platform operates as an ecosystem or a conglomerate, with multiple functionalities and a great capacity for versatility and development. Likewise, the price of each side should not be analyzed independently since the increase in price of one side can derive from the increase in the cost or in services offered by the other side. The interdependence of demands could require more information and complex analytical methods or even measure values such as changes in quality.

On the other hand, market shares may or may not be indicative of dominance, depending on the duration of innovation cycles, entry conditions and the evolutionary nature of services that offer one thing one day and another the next. In this context, it is essential to consider the impact of data and the mobility of users. In the digital world it would make more sense to determine the relevant market through observed dominance and not the other way around. Basing dominance conclusions on a previous market definition under a rigid approach may distort the results, as it could ignore the competitive pressure that two seemingly different activities exert between each other. Unlike traditional sectors, competitive pressure in the digital world can come not only from the same products but also from differentiated versions. In addition, services are often offered in a complementary manner through dynamic and evolving ecosystems.

Finally, certain digital concentrations must be analyzed with a greater degree of scrutiny and the scale of the possible damage should be considered rather than the likelihood of it materializing, especially when a digital platform with market power acquires a service that has the possibility of becoming a competi-

tor, or when the merger raises the barriers to entry through network effects, restricts the mobility of users or triggers data accumulation.

Therefore, it is not necessary to modify the competition regime, but to make its application more flexible. There are of course concrete adjustments that would strengthen the system, for example modifying the thresholds or criteria to notify a merger, expanding the catalogue of anti-competitive practices, increasing fines or empowering competition authorities when it comes to their investigation tools and resources.

Regarding regulation, the outlook is different, as some digital giants have flourished in the absence of government controls. The public reaction has been notoriously slow. The phenomenon is new, and even to this day it is not clear how we should deal with the risks and challenges. There is also a natural tension between restrictions that may serve legitimate purposes but they could be counterproductive and lessen innovation and entrepreneurship.

In any case, social objectives related to privacy, security, and the flow of information in general must be protected. The same is true when minimum conditions of competition and rivalry are needed. At the same time, it is essential that regulation does not inhibit innovation efforts and investment, as this could bring greater costs than benefits. Unlike competition procedures, where it is valid to expect false positives, regulation is applicable across the board and its consequences have a great impact.

It is also preferable to only resort to measures such as structural remedies and divestments in exceptional situations, since the evidence indicates that this type of intrusive intervention is usually counterproductive and does not produce benefits for consumers.[67] This is so because they increase costs and reduce economies of scale and scope, while well-designed regulatory schemes could allow economic agents to be larger and reach more users.

In a structure with several participants of similar size, for example, it would be convenient for all of them to operate with a total user base instead of having each their own, or to contribute information to a common database that allows everyone to operate more efficiently with less risk, as it happens in the financial sector. The problem in the digital economy is not dissimilar to what has been seen in the telecommunications sector, where the largest operator has incentives to deny interconnection to its user base to block rivals.[68]

The regulatory measures that have the potential to address different challenges depending on the underlying problem and the type of business model include data portability, access to data that is in the hands of a dominant participant, pooling, interoperability, and marketplace regulation. After an intense

[67] Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, in David S. Evans, Microsoft, Antitrust and the New Economy: Selected Essays, (Kluwer Academic Publishers, 2d ed. 2002).

[68] As Eleanor Fox comments, Facebook favored interoperability until it became the dominant social network. See Scott Morton, F. M., Dinielli, D. C., *Roadmap for an Antitrust case Against Facebook*, June 2020, Stanford Journal of Law, Business & Finance.

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public debate, in March 2022 the European Parliament and the Council—representing the 27 member countries of the European Union—agreed on the new regulation named the Digital Markets Act (DMA).[69] The objective of the regulation is "complementary to, but different from that of protecting undistorted competition, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market".[70] In other words, it emphasizes that it is a regulation that seeks to influence *ex ante* the behavior of the regulated subjects, without having to investigate or determine the existence of an anti-competitive practice.

This is the first regulation specifically aimed at the large digital platforms that offer services to users and that are the gateway for commercial users. The DMA is only applicable to companies designated as "gatekeepers,"[71] which are those that play a particularly important role in the internal market because of their size and their position as gateways for business users to reach their customers.[72]

The DMA entered into force in November 2022; in September 2024 the European Commission designated for the first time six gatekeepers–Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft.[73] The DMA has been subject to debate, and it will take years for its usefulness to be seen, but it offers a good approximation of the way in which specific digital models could be regulated. In Latin America, although there have been important case law and current investigations, up to date, there are no specific regulations in force for competition in digital markets such as the ones enshrined in the European Union.[74]

VII. Conclusions

Certain digital platforms have created ecosystems of excessive dominance, reduced the options available to consumers, deployed aggressive practices that

[69] European Commission Press Release, *Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force,* (Oct. 31, 2022) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423

[70] Digital Markets Act [DMA], paragraph 11. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925

[71] [DMA] Article 3 (establishes the criteria that is reviewed in order to determine whether an undertaking shall be designated as a gatekeeper).

[72] European Commission, *Questions and answers: Digital Market ACT: Ensuring fair and open digital markets*, (July 7, 2023) https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2349

[73] European Commission, *Gatekeepers*, (Oct. 30, 2024, 5:01 PM) https://digital-markets-act.ec.europa.eu/gatekeepers_en

[74] However, for a discussion on how the DMA's experience could influence Latin American jurisdictions, *see* Alba Ribera Martínez, *La senda del efecto Bruselas en la "DMA" en Latinoamérica*, Latin American Law Review, Oct. 28, 2022, at 93, https://doi.org/10.29263/lar11.2023.05

reduce competition on merit and limited a healthy competitive rivalry, thus justifying public action on various fronts.

Regulation is pertinent when there is market failure or a legitimate public objective is pursued, which is visible in the digital environment regarding consumer rights and security, protection of personal data and contestability conditions. In economic activities with constant innovation, interventions must be rational, focused, proportional and should not limit legitimate business decisions, since there is a risk of reducing innovation and lessening social welfare.

Radical measures such as the structural separation of businesses or the divestment of assets, should be the exception, considering that their effects are not predictable. Instead, measures that encourage entry and create scale for smaller businesses should be preferred, such as interoperability, user mobility, multihoming, information portability and pooling, even taking some regulatory experiences from traditional sectors such as finance or telecommunications. Specific prohibitions or mandates, such as those contained in the DMA, can also come into play. Since the main digital platforms operate globally, some solutions will have to be transnational in nature, which complicates (but does not prevent) the adoption of solutions. Therefore, the reaction of the main jurisdictions and the work of international organizations are essential.

The competition system can continue to function around its fundamental premises, without losing sight of the fact that it was never designed or intended to formulate specific rules for industries. It has the ability to face the challenges posed by the digital economy, particularly to monitor and forcefully penalize abuses of dominance, as well as to prevent anti-competitive mergers.

But this implies strengthening the material and technical capabilities of the agencies, revisit analytical approaches, favor flexibility, reduce risk aversion and understand that digital platforms behave differently from traditional sectors. Furthermore, the consumer welfare standard must be viewed broadly, so that not only short-term effects on prices are considered, but also dynamic aspects such as the loss of innovation and the impact on privacy, user mobility and the characteristics of the use of the services involved.

There are multiple cases around the world, which have shed light on the type of anticompetitive behavior where it is worth paying more attention and devoting resources. The response to these challenges should not punish size or success. Above all, it is essential to maintain economic and institutional conditions that stimulate entrepreneurship and constant innovation, since historically this is what has eliminated dominances that were believed to be indestructible.

Creative destruction and legitimate state intervention should not be seen as mutually exclusive. The digital economy must involve complementary actions from different authorities, at least in a triple dimension: (i) an economic aim to "protect" the process of free competition and rivalry, mainly repressing behavioral deviations and preventing mergers that lessen competition; (ii) economic regulation that seeks minimum conditions of fairness and contestability, with *ex ante* interventions of a preventive nature; and (iii) social regulation that protects

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the privacy conditions and the basic interests of consumers, in an environment where personal information is increasingly valuable to companies. Digital markets are not especial and should be subject to justified controls as many others. It is the obligation of governments to achieve objectives based on public interest grounds without depriving society of the enormous benefits that innovation and technology have brought to society.

All this discussion should also remind us that technology will keep posing new public challenges and we cannot stay at a standstill. Artificial intelligence has made its way into people's life in manners nobody expected. AI tools are now capable of generating content, ideas and influencing human behavior. Disclosure requirements, pre-check systems and basic prohibitions must be put in place. Regulatory loopholes cannot prompt other digital models to flourish again in detriment of the public interest.

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Necropolitics and *crimmigration* in Baja California, México

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Abstract: This article aims to examine two interrelated concepts present in Baja California: necropolitics and crimmigration. The research employs a qualitative methodology, which, while not comprehensive, encompasses several case studies of violence perpetrated against migrants in Baja California from 2021 to 2024. The investigation is substantiated by evidence disseminated in reputable local media, in-

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cluding The San Diego Union-Tribune, Zeta, Proceso, and La Jornada. The question guiding the research is: is crimmigration encompassed within the framework of necropolitics, or are they two different phenomena? The results of the research show that although they are very similar phenomena, they in fact complement each other within necropower frameworks. Final considerations include the necessity for the state to develop an inclusion policy aimed at migrants; the establishment of new lines of quantitative research; and the comprehension of the political and legal organization of migrants in Baja California from a cultural and social perspective.
Keywords: migrants; crimmigration; necropower; Tijuana; Baja California.

Resumen: Este artículo pretende examinar dos conceptos interrelacionados presentes en Baja California: la necropolítica y la crimigración. La investigación emplea una metodología cualitativa, que, si bien no es exhaustiva, abarca varios estudios de caso de violencia perpetrada contra migrantes en Baja California de 2021 a 2024. La investigación se sustenta en pruebas difundidas en medios locales de renombre, como The San Diego Union-Tribune, Zeta, Proceso y La Jornada. La pregunta que guía la investigación es: ¿la crimigración puede ser entendida en el marco de la necropolítica, o son dos fenómenos diferentes? Los resultados de la investigación muestran que, aunque son fenómenos muy similares, en realidad se complementan en los marcos del necropoder. Las consideraciones finales incluyen la necesidad de que el Estado desarrolle una política de inclusión dirigida a los migrantes; el establecimiento de nuevas líneas de investigación cuantitativa; y la comprensión de la organización política y jurídica de los migrantes en Baja California desde una perspectiva cultural y social.
Palabras clave: migrantes; crimigración; necropoder; Tijuana; Baja California.

I. Introduction

Necropolitics cannot be understood without its counterpart, biopolitics.[4] Biopower, on the one hand, manages human life and, on the other, exercises sovereign power to destroy "sacrificial" bodies, which "do not deserve to live".[5] In both cases, the state legitimately holds the capacity, the technology, and the power devices to reset or reorder—as many times as necessary—, the status quo.[6] Necropolitics is, then, a state policy deployed —sometimes in an unveiled man-

[4] Michel Foucault, El Poder, una Bestia Magnífica. Sobre el Poder, la Prisión y la Vida (Siglo XXI Editores, 2012); Ariadna Estévez, *Biopolítica y necropolítica: ¿constitutivos u opuestos?*, *Spiral*, 25 (2018) https://www.espiral.cucsh.udg.mx/index.php/EEES/article/view/7017

[5] Giorgio Agamben, Homo Sacer. El Poder Soberano y la Nuda Vida (Pre-Textos, 2010).

[6] Ibidem.

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ner and, at other times, not so much, as happened during totalitarian regimes—to selectively designate "who can live and who must die".[7]

The epistemic principle associated with necropolitics pertains to the insidious mechanisms of control whereby sovereign power, through the enactment of a state of exception, exploits, neglects, criminalizes, and orchestrates the demise of populations deemed worthy of such treatment.[8] Nevertheless, the category remains incomplete, and as will be demonstrated below, experts have introduced new distinguishing characteristics that enhance the examination of necropolitics in Mexico and globally.

The purpose of this article is to reflect on two concepts that are not mutually exclusive, and are present in Baja California: necropolitics and crimmigration. We selected cases from various media sources, such as The San Diego Union-Tribune, Zeta, Proceso, and La Jornada, to illustrate how these categories materialized in reality. These cases focused on acts of violence against migrants in Tijuana between 2021 and 2024. The question guiding the research is: is crimmigration understood within the framework of necropolitics, or are they two different phenomena? The research's hypothesis is that, despite their similarities, they are two different phenomena that are explained within the context of necropower.

The article is divided into seven sections. After the introduction, the second section entitled "Tijuana, city of fury" describes the context of violence present in the border city, where the concepts of gore capitalism and juvenicide were developed. Subsequently, the third section entitled "Characterizing necropolitics and crimmigration" addresses the theoretical framework and the categories that integrate "necropolitics" as a working concept. The fourth section develops the research methodology. The fifth, "Migrant deaths in Baja California territory," problematizes the case studies. The sixth section delves into the extent to which necropolitics embraces crimmigration in Baja California, and, finally, the seventh section addresses the final considerations.

II. Tijuana, city of fury

Tijuana is located in northwestern Mexico. It is the most populated municipality in the state of Baja California,[9] and the border city with the highest number of daily crossings along the entire northern border of Mexico.[10] It is

[7] Achille Mbembe, Necropolítica (Melusina, 2006); Hannah Arendt, Los Orígenes del Totalitarismo (Taurus, 1998).

[8] Giorgio Agamben, Homo Sacer. El Poder Soberano y la Nuda Vida (Pre-Textos, 2010); Achille Mbembe, Sobre el Gobierno Privado Indirecto (Melusina, 2011).

[9] INEGI, *Información Baja California, territorio*, (2024), https://cuentame.inegi.org.mx/monografias/informacion/bc/territorio/div_municipal.aspx?tema=me&e=02

[10] Zulia Orozco, *"Autos chocolate" en la escena del crimen: El caso de Baja California (2010-2022)*, Revista Estudios Fronterizos (2024) https://doi.org/10.21670/ref.2415151

impossible to understand this border-industrial city without considering San Diego, a neighboring county in southern California (United States). In that sense, for some, the proximity and daily interconnectivity between Tijuana and San Diego form a "third country",[11] while for others, it is the "gateway to Latin America".[12]

Tijuana has consistently been the most affected city in Baja California due to fatal violence stemming from territorial conflicts among organized crime factions. The criminal organizations are well known: the self-called "Sinaloa Cartel", the "Tijuana Cartel", and the "Jalisco New Generation Cartel". They are all equally violent, dehumanized, and highly specialized within a transnational scope. Such criminal organizations traffic, among many others, illegal substances, firearms, and humans. Precisely in Tijuana, two concepts emerge that explain the cut across sociocultural and economic dynamics: juvenicide and gore capitalism. The first concept refers to the rampant murders of young men, whether it is by the state or organized crime, while the second one refers to the sadistic and bloody culture of torturously killing victims—while bragging about it—and endlessly reproducing the spiral of violence embedded in the depredation and extraction of human bodies.[13]

The state of Baja California registered 9,805 intentional homicide victims related to criminal disputes between January 2021 and August 2024, with 7,154 (72.96%) occurring in Tijuana.[14] During 2023, Tijuana's homicide rate was 106 victims per 100 thousand inhabitants; indeed, a very high number considering the worldwide average rate of 6 per 100 thousand residents.[15] Even though organized crime extends to the rest of the state of Baja California, Tijuana—the municipality—has been chronically affected by these violent actors. To be more specific, since the 1990s, when Mexico joined the globalization movement by signing an international commercial treaty and thus engaging in neoliberal policies.[16]

Migrants are one group among many that are impacted by crime. Some support for "coyotes", that is, smugglers that know crossing border routes into the United States, in exchange for the payment. "Coyotes" exploit their victims, taking advantage of their ignorance and high vulnerability to put their lives at risk, without accepting responsibility for their actions. Indeed, migrants make a

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[11] Michael Malone, El Tercer País: San Diego & Tijuana (Silicon Valley Press, 2020).

[12] Selene Rivera, *Cinco razones para visitar Tijuana: La entrada a Latinoamérica*, Los Angeles Times, (March 8, 2018), https://www.latimes.com/espanol/california/articulo/2018-03-08/hoyla-loc-5-razones-para-visitar-tijuana-la-entrada-a-latinoamerica-20180222

[13] For more information, see the work of José Manuel Valenzuela Arce & Sayak Valencia.

[14] Secretaría de Seguridad Ciudadana de Baja California, *Estadística estatal y municipal*, (2024), https://www.seguridadbc.gob.mx/contenidos/estadisticas2.php

[15] The World Bank Group's report on intentional homicides (per 100,000 people) for the year 2024 can be accessed at https://data.worldbank.org/indicator/VC.IHR.PSRC.P5

[16] Zulia Orozco, *Money laundering in Tijuana, Mexico (2000-2020)*, Revista de Direito da Cidade (2022) https://doi.org/10.12957/rdc.2022.64750

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blind deal without any legal commitments by the human traffickers. Even more importantly, some "coyotes" might be colluded with organized crime, incurring several felonies on both sides of the border since foreigners are reified as a lucrative profit-making commodity.[17]

INEGI reports no substantial records of foreign migrant fatalities on Mexican territory. The year with the fewest recorded deaths of this sector was 1993, totaling 66 fatalities. In 2021, the year with the highest incidence, there were 479 fatalities.[18] Regrettably, comprehensive information at the state or municipal levels is not available. Likewise, between 2021 and 2024, Tijuana recorded the disappearance of three migrants: one Venezuelan, one American, and the last of nationality unknown,[19] while Baja California registered a total of five migrant disappearances. In other words, Tijuana officially accounts for 60% of the state's migrant disappearances. However, as we will subsequently examine, there is a discrepancy between official data and local journal publications. Numerous migrants have died as a result of political and criminal violence in an environment of institutional neglect, with their deaths not even officially documented. This situation raises the question: should we view crimmigration within the context of necropolitics, or are they two distinct phenomena? Next, we develop the conceptual framework in relation to necropolitics and crimmigration.

III. Characterizing necropolitics and crimmigration

The epistemic principle underlying the concept of necropolitics centers on those perverse instruments of domination in which the sovereign power, by enacting the state of exception, abuses, disregards, criminalizes, and artfully murders the population it deems worthy of praise.[20] However, specialists worldwide have added new distinctive features to the category, strengthening the studies of necropolitics in Mexico and around the world. We will discuss the components of the two transversal categories: necropolitics and crimmigration.

1. Defining necropolitics

Necropolitics cannot be comprehended without its counterpart, biopolitics.[21] As discussed above, biopower is the ability to control human life while also ex-

[17] Manuel Hernández & Eduardo Torre, *Uso de coyotes en la migración mexicana a Estados Unidos: una mirada a las regiones de cruce, Revista Papeles de población* (2024) https://doi.org/10.22185/24487147.2023.118.30

[18] See INEGI, *Mortality. Homicide deaths,* (2024), https://www.inegi.org.mx/sistemas/olap/consulta/general_ver4/MDXQueryDatos.asp?#Regreso&c=

[19] Comisión Nacional de Búsqueda Estadística del RNPDNO por filtros, (2024), https://versionpublicarnpdno.segob.gob.mx/Dashboard/Sociodemografico

[20] Ibidem; Achille Mbembe, Sobre el Gobierno Privado Indirecto (Melusina, 2011).

[21] Ariadna Estévez, *Biopolítica y necropolítica: ¿constitutivos u opuestos?*, Spiral, 25 (2018) https://www.espiral.cucsh.udg.mx/index.php/EEES/article/view/7017

ercising sovereign power to eliminate "sacrificial" bodies that "do not deserve to live" either directly or indirectly.[22] In both scenarios, the state lawfully possesses the means, the technology, and the devices of power to reset or reorganize the social order as many times as required.[23] Governments employ necropolitics, sometimes overt and sometimes covert, as seen in totalitarian regimes, to selectively determine "who may live and who must perish".[24]

Universal history shows that, from the necropower[25] or necropolitical governmentalization of the state,[26] the sovereign power legitimizes the perverse devices of control and dominance, which sustains the deadly selection in its territory and even abroad. In fact, legal norms serve as a significant tool of power, enabling both covert and overt legal actions related to subjugation, dominance, segregation, exclusion, and extermination of the populace. According to Estévez:

> A particularity of necropower is that it creates and recreates the violence of neocolonial spatiality, drawing lines of social injustice marked by race, ethnicity, class, gender, age, and sexual orientation. The role of law in creating neocolonial spatiality is fundamental, as it not only legitimizes violence, but is the nomosphere that helps create its geographical, meaningful, and subjective contours [Author's translation].[27]

Afterwards, we read:

> Thus, the necropower of the empire legislates and interprets through the rule of law and policies that lead people into deadly scenarios, such as laws that facilitate individual and mass expulsions, border closures and militarization, child vulnerability due to family separation, exposure to disease and violence, ghettoization, and mass incarceration [Author's translation].[28]

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[22] Giorgio Agamben, Homo Sacer. El Poder Soberano y la Nuda Vida (Pre-Textos., 2010).

[23] Idem.

[24] Ibidem at p. 19

[25] "Necropower is the postcolonial interpretation of Michel Foucault's biopolitics, coined by the Cameroonian philosopher Achille Mbembe, and refers to the sovereign power to administer death. However, necropower also exists in the countries of the first world. (Ariadna Estévez, *El necropoder del imperio de la ley: la gestión de la muerte en el primer mundo norteamericano,* Acta Sociológica 88-89 (2022) https://revistas.unam.mx/index.php/ras/article/view/84866, 27 [Author's translation]).

[26] "A type of state that has merged with criminal organizations and uses devices and knowledge to administer death and the situations it generates: massive numbers of victims, suffering, management of corpses, and forced displacement. However, in times of neoliberal capitalism, necropower also belongs to the 'civilized' first world" (Idem [author's translation]).

[27] Ibidem, p. 40.

[28] Ibidem, p. 42.

Necropolitics, in an unveiled and/or open way, is governmentalized geographically through the legal norm. Because "danger is eliminated" through the application of law.[29] In other words, the law serves to instrumentalize inclusion or exclusion, whether it be for the sake of life or death. The enforcement of the legal norm can result in the legitimate criminalization and revictimization of youth, migrants, indigenous individuals, African Americans, Muslims, the homeless, those living in poverty, substance abusers, members of the LGBT+ community, and others.

It is a process of transgression in which the victim is symbolically immersed. The victim endures physical and psychological abuse, mistreatment, discrediting, humiliation, and segregation gradually but steadily until, eventually, the system reduces him or her to a mere statistic, indifferent to whether the body survives in precarious conditions or dies. Examples of the aforementioned include young people who are tortured, killed, and go missing without the authorities being able to locate the bodies; the homeless population who is not eligible for any social services; individuals who are in a dangerous state of abandonment as a result of drug abuse; or mothers who experience sexist violence on a regular basis and are on the verge of femicide.

Time is another important component in the necropolitical governmentalization of the state. Death arrives, but in a gradual, asphyxiating, and scorching way;[30] that is, it will include symbolic aspects that will slowly erode the ontological security of the victim, and later will include physical aspects that inevitably lead to death, through intentional homicide or suicide. Determining whether necropower targets men or women is challenging; however, experts have proposed two distinct yet non-exclusive categories: juvenicide and femicide.

For Valenzuela Arce (2019, 50), *juvinis sacer* cannot be understood without taking seriously into consideration the "unjust frameworks that define the conditions of life and death of young people, especially those in developing countries where 97% of these deaths occur". Poverty, marginality, the lack of real opportunities for young people to quickly insert themselves into the labor market, as well as the intermittent state of defenselessness or classist and racist criminalization, are just some of the obstacles that youth face as governmentalized power devices by necropower.[31]

> The concept of juvenicide was constructed linked to that of femicide, which identifies the sexual abuse and murder of women that became visible at the beginning of the 1990s in Ciudad Juárez. At first, these women

[29] Günter Jakobs & Manuel Cancio Meliá, Derecho Penal del Enemigo 55 (Civitas, 2003).

[30] Germán Muñoz, *Juvenicidio en Colombia: Crimen de Estado y Prácticas Socialmente Aceptables*, in Juvenicidio: Ayotzinapa y las Vidas Precarias en América Latina (José Manuel Valenzuela coord., Colef-Iteso-Ned Ediciones, 2015).

[31] José Manuel Valenzuela, Trazos de Sangre y Fuego. Bionecropolítica y Juvenicidio en América Latina (CALAS, 2019).

were called the "dead women" of Juárez, a descriptive, passive allusion without responsibility, that later became feminicide, a concept that made evident the homicidal act with its complicities, precariousness, and vulnerability of women and the impunity that protects the murderers [Author's translation].[32]

Subsequently, Valenzuela (2019, 62) observes:

> I began to use the concept of juvenicide in some interviews and then in the book *Sed de mal. Feminicidio, jóvenes y exclusión social*, published in 2012, where I highlighted that poverty undermines the definition of viable life projects in Mexican children and youth who live uncertain paths of risk. Along with femicide, juvenicide has increased, and there is an overflow of pictures, scenes, and scenarios of brutal death where young people are mostly affected by this violence [Author's translation].

Thus, another distinctive feature of necropolitics is the sexual division of violent death. For example, "juvenicides" examine young men's deaths from a non-legal standpoint. Meanwhile, "femicides" is both a theoretical category, and a statutory crime.[33] Indeed, from the Federal Criminal Code approach, "femicides" are constructed by observing the crime as an act of sexual exploitation, consummated in the context of an abuse of trust (e.g., kinship, work, affective relationship). In that sense, "femicides" are the deprivation of life for "gender reasons".[34]

Article 325 of the Federal Criminal Code (FCC) does not challenge the enduring discrediting of female victims by the patriarchal system. Neither does it address how the patriarchal system marginalized her, nor how her gender constrained her opportunities. Later, in the Ley General de Acceso de las Mujeres a una Vida Libre de Violencia, specifically in Chapter V, Article 21, the legal term recognized the victims' human rights violations in the context of abusive male exercise of power.[35] Though, as we shall see later, the difference between the two codes' definitions of the crime of femicide was recently closed in 2023.

In fact, in order for the FCC to label a crime as femicide, it must be demonstrated that the victim's freedom was unlawfully taken away for "gender-based motives." However, until 2023, it was unclear what exactly qualified as "gender

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[32] Ibidem, pp. 61-62.

[33] Cfr. Código Penal Federal [CPF]. Título decimonoveno, Capítulo V, Feminicidios, Art. 325 https://mexico.justia.com/federales/codigos/codigo-penal-federal/libro-segundo/titulo-decimonoveno/capitulo-v/

[34] Ibidem.

[35] Ley General de Acceso de las Mujeres a una Vida Libre de Violencia. Capítulo V. De la violencia feminicida y de la alerta de violencia de género contra las mujeres, Article 21, http://www.ordenjuridico.gob.mx/Documentos/Federal/html/wo17079.html

motives." That year, the Federal Criminal Code was reformed, delineating the criteria that constitute femicide:

> a) signs of sexual violence in the victim's body; b) pre- or post-deprivation of life injuries or mutilations; c) history of violence within the environment related to the victim; d) the perpetrator and the victim have been related by blood or affinity or have had a sentimental, affective, work, teaching or trust relationship or any de facto relationship between the parties; e) direct or indirect threats related to the criminal act, harassment or injury by the perpetrator against the victim; f) the victim has been held incommunicado prior to the deprivation of life; g) the victim's body is exposed, thrown, deposited or exhibited in a public place; h) the perpetrator forced the victim to perform any form of exploitation [Author's translation].[36]

It was only after the implementation of technical reforms that authorities acquired essential elements for prosecuting offenders, thereby concluding the victimization of women by recognizing both their symbolic and physical demise.[37] Are girls and women, in an overt manner, subjected to biopower globally? Yes, but in a different way, because violent death is divided sexually, and there is a cosmogony centered on sexed bodies.[38]

The victims' bodies manifest and inherently reveal the imprints of torture, suffering, and deprivation inflicted under abhorrent and severe circumstances by their oppressor: the sovereign authority. Arendt, Mbembe, and Agamben consistently illustrated the concentration and extermination camps of the Nazi regime in Auschwitz (Poland) as a manifestation of the grave repercussions that can arise from the state's legitimate governance of death. However, in parallel, the Union of Soviet Socialist Republics (USSR), which was part of the Allied bloc,[39] had forced labor concentration camps where millions of martyrs succumbed to terrible and virulent conditions.[40]

Experience indicates that necropower has vigorously exerted its governance both prior to and following Auschwitz. For instance, let us examine the brutal process through which the planet's "colonization" was executed and safeguarded for centuries. The populations of five continents—North America, South America, Asia, Africa, and Oceania—were threatened, violated, subjugated, exploited, and massacred by European monarchies, including Spain, Portugal,

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[36] Ibidem.

[37] Germán Muñoz, *Juvenicidio en Colombia: Crimen de Estado y Prácticas Socialmente Aceptables*, in Juvenicidio: Ayotzinapa y las Vidas Precarias en América Latina (José Manuel Valenzuela coord., Colef-Iteso-Ned Ediciones, 2015).

[38] Anne Fausto-Sterling, Cuerpos Sexuados. La Política de Género y la Construcción de la Sexualidad (Melusina, 2006).

[39] The Allies of World War II were France, Poland, the United Kingdom, the USSR, China, and the United States.

[40] Alexandr Solzhenitsyn, Archipiélago Gulag (Tusquets, 2015).

England, Italy, Belgium, Germany, France, Holland, Denmark, and Austria, under the pretext of "civilizing the savages."[41] The most effective instrument of terror, in terms of global impact and fatalities, was the Tribunal of the Holy Office of the Inquisition.[42]

The apartheid in South Africa (1948–1994) is another recent example. The local population was subjected to severe discrimination, discredit, humiliation, and violation, as well as segregation in ghettos.[43] The ultimate objective was not the extinction of the population; rather, it was the complete exploitation and depredation of nature and black bodies by European countries.[44] In a context of profound injustice, systemic violence, and intensified racism, akin to that experienced in Auschwitz, it would be naive to assume that the Western necro-empire would refrain from pursuing widespread extermination. The South African Truth and Reconciliation Commission recognized the persecution and murder of 21,000 victims, along with the physical and psychological harm inflicted on an additional 22,000 individuals.[45] Nonetheless, unofficial sources assert that the number of martyrs exceeds 130,000, significantly diverging from the official count.[46]

Keeping with the theme of the unique characteristics of necropolitics, another unique aspect is the cunning way in which the victim is cruelly disposed of. Mbembe (2011, p. 75) refers to the term "living dead"; that is, those people who do not finish dying while surviving in agony. For Mbembe, cruelty constitutes an element of the politics of death. The essence lies in the deliberate slowness and brutality with which necropower annihilates the victim. Thakur notes:

> Shklar understood summum malum (the 'greatest evil') as 'cruelty and the fear it inspires'. Although cruelty has been understood as a physical phenomenon because of the pain and suffering it caused, it also has immediate

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41 Eduardo Galeano, Las Venas Abiertas de América Latina (Siglo XXI, 1971); Bartolomé de las Casas, Brevísima Relación de la Destrucción de las Indias (Colección Er Textos Clásicos, 1991).

42 Salvador Carmona, et al., *Penal accountancy, and the Spanish Inquisition*, 2 Journal of Accounting and Public Policy 42, (2022) https://www.sciencedirect.com/science/article/abs/pii/S0278425422000941?via%3Dihub

43 Doris Lessing, Canta la hierba (Zeta Bolsillo, 2007).

44 Juliette Peires, *The Holocaust and apartheid: similarities and differences: a comparative study*, Master's thesis, (University of Cape Town, 2004) https://open.uct.ac.za/items/ad4610cd-66e1-4e12-9974-d208de2459d1

45 South African Press Association [SAPA]. *HRC Submits apartheid repression book to the Truth Body*, (May 27, 1997), https://www.justice.gov.za/trc/media/1997/9705/s970527b.htm; Basil Ugorji, From Cultural Justice to Inter-Ethnic Mediation. A Reflection on the Possibility of Ethno-Religious Meditation in Africa (Outskirts Press, 2012).

46 Augustine S. J. Park & Madalena Santos, *The counter-reparative impacts of South Africa's reparation gap: victims as reparation 'experts' and the role of victims' organization*, 4 Journal of Law and Society 49, (2022) https://onlinelibrary.wiley.com/doi/10.1111/jols.12400

> and long-term psychological consequences, as it inflicts fear, anxiety, and humiliation on the victims.[47]

It further reads:

> The normalization of cruelty and necropolitical conditions is the result of indifference to suffering, historical and systematic subjugation, inequality, and precarity. If individuals are unable to compete effectively, due to an inability to maximize their human capital, chronic illness, or an inability to assess risk, they must face the consequences. The inability to compete is the responsibility and fault of individuals, not the state or the particular political/economic/social system; therefore, individuals face the consequences, including slow death due to chronic illness, homelessness, physical and emotional stress, etc.[48]

In fact, the sovereign power's governmentalization of necropolitics has a significant negative impact on people's mental health as well as that of their close relatives.[49] Both overt and subtle acts of cruelty result in persistent physical and emotional abuse, as well as a complete apathy towards the pain and suffering of others amid significant human rights violations.[50] Thus, the rational instrumentalization of necropolitics demands that its operator annul any moral trait of justice and human warmth. Upon objectification, the victim transforms into an adversary and, consequently, a threat to society.[51] In this climate of vulnerability, cruelty is inherently internalized within the victims' bodies; nonetheless, psychological trauma disseminates and ensnares subsequent generations.[52] That is, the dire aftermath of necropower-marked on the human body and mind comprises generational consequences for the subjugated population.[53]

Extractivism is yet another fundamental feature of necropolitics. The savage subjugation and depredation of sexed bodies and nature in the Global South

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[47] Monika Thakur, *Cruelty, and violence in the Global South*, 2 Global Studios Quarterly 2, (2022) https://academic.oup.com/isagsq/article/2/2/ksac031/6613438

[48] Idem.

[49] Among others, the psychological affectations detected in the victims are anxiety, depression, post-traumatic stress disorder, somatization, and substance abuse (Jutta Lindert, et al., 2018).

[50] Monika Thakur, *Cruelty, and violence in the Global South*, 2 Global Studios Quarterly 2, (2022) https://academic.oup.com/isagsq/article/2/2/ksac031/6613438

[51] Hugo C. Moreno H., *Desciudadanización y estado de excepción*, 24 *Andamios* 11, (2014) https://www.redalyc.org/pdf/628/62832750007.pdf; Primo Levi, Si Esto es un Hombre (Austral, 2019).

[52] Jutta Lindert, et al., *Genocide and its Long-Term Mental Impact on Survivors – What We Know and What We Do Not Know*, in Multidisciplinary Perspectives on Genocide and Memory (Jutta. Lindert & Armen. Marsoobian eds., Springer, 2018).

[53] Dayra Rostam Ahmed, *From holocaust to Anfal: The impact of genocide and cross-generational trauma on the mental health of Kurds*, 3 International Journal of Social Psychiatry 70, (2023) https://journals.sagepub.com/doi/abs/10.1177/00207640231210107

is a constant from colonialism to neoliberalism. Although it may appear that necropolitics is a purely anthropocentric concept, it does, in fact, have a nature-agnostic component. There are two ways in which this occurs:

1) Nature as a space, territory, and setting where significant acts of violence transpire, and
2) Nature is characterized by dispossession, devastation, and environmental degradation due to human actions.

In the initial instance, these are natural environments that were obliterated and altered by human intervention to create concentration and extermination camps in Auschwitz; the concentration camps of forced labor— gulags; the ghettos founded in rural areas, near the sea or river, as is the case of Gaza (Palestine) and Khayelitsha (South Africa); as well as the concentration camps in the Amazon jungle (Brazil). Mbembe points out the following:

> Colonial occupation is also dictated by the specific nature of the terrain and its topographical variations (hilltops, valleys, mountains, and watercourses). Thus, hilly terrain offers strategic advantages that a valley does not have (usefulness to see better and to protect oneself, panoptic fortifications that allow one to look in multiple directions).[54]

The second point refers to the history of the colonization and neo-colonization of the world by Europeans.[55] The wealth and profits that emanated from the long-lived plundering and hyper-wild predation of mines, mountains, and valleys, in search of spices, gold, silver, tobacco, cocoa, and sugarcane, among others, were such that the kingdom of Spain emerged from misery, to position itself as an empire[56] and to impose, together with the Vatican, the Tribunal of the Holy Inquisition.[57] In this sense, plundering five continents underpins Western Europe's modern intellectual, cultural, urban, mercantile, and financial growth.

Subsequently, it is possible to summarize the attributes of necropolitics by noting that it includes the necro rule of law, the time and cruelty with which the body and mind of the individual are destroyed, the sexual division of violent death, juvenicides and femicides, the extractivism of nature and human bodies, and, most importantly, the artful death. In this context of heightened vulnerability, as previously noted, migrants are among the frequent victims of necropower. Consequently, we will now examine the concept of "crimmigration",

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54 Achille Mbembe, Necropolítica 48-49 (Melusina, 2006).

55 Eduardo Galeano, Las Venas Abiertas de América Latina (Siglo XXI, 1971).

56 Leslie Bethell, Historia de América Latina (Cambridge University Press, 2000).

57 Diana L. Ceballos, *Entre el Rey y el Papa. La Inquisición: trayectoria de una institución plurisecular*, 83 Análisis, (2013) https://revistas.usantotomas.edu.co/index.php/analisis/article/view/1049

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which elucidates the manifestations of sovereign power's violence towards individuals based on their migratory status.

2. Defining crimmigration

In the United States, according to Juliette Stumpf (2006, p. 369), "The 1980s saw the beginning of a dramatic increase in criminal consequences [due to] immigration law violations and deportations of even legal immigrants convicted of crimes". In other words, from that decade on, immigrant minorities established in U.S. territory began to be persecuted and harassed by the security and justice apparatus. Stumpf observes the beginning of the criminalization of migration, of arbitrary detentions and deportations, and of the creation, à la carte, of a new public enemy.

Indeed, the term "crimmigration," in addition to synthesizing criminal justice and migratory controls, should be added to anti-migrant policies. According to Moreno, "the criminalization of migration [allows] the law [to] leave migrants without political and human rights, turning them into enemies of the state and, therefore, trapped in a state of exception".[58] For instance, the coercive actions of the sovereign power against the migrant population include surveillance, harassment, arbitrary detention, separation of children and adolescents from their parents, encapsulation in cages, accelerated deportation, and even death under his tutelage.

As a result of pressure from the United States since 2018, Mexico has tightened its immigration policy in recent years. The general strategy of containment of flows along the routes transited by migrants has been called "the vertical border".[59] This has increased detentions and arrests in Mexico.[60] For instance, in 2023, Baja California received 77,137 deportees from the United States, with Tijuana accounting for 80% of these individuals.[61] Necropolitics and crimmigration are two concepts present in Baja California that are not mutually exclusive. The objective of this article is to examine their relationships. Therefore, the question guiding the research is: is crimmigration understood within the framework of necropolitics, or are they two different phenomena?

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[58] Hugo C. Moreno H., *Desciudadanización y estado de excepción*, 24 Andamios 11, (2014) https://www.redalyc.org/pdf/628/62832750007.pdf

[59] Luis E. Calva Sánchez & Verónica del Rocío Carrión, *Cambios en la migración a México en el contexto del endurecimiento de las prácticas migratorias en Estados Unidos*, 13 Frontera Norte 7, at 11 (2022) https://huellasdelamigracion.uaemex.mx/article/view/17344

[60] Reforma, *México récord de arrestos migrantes tras presión de EU*, (March 8, 2024), https://www.reforma.com/rompe-mexico-record-de-arrestos-migrantes-tras-presion-de-eu/ar2770228

[61] Alberto Elenes, *Estados Unidos registra récord de deportaciones desde 2013; más de 77 mil*, B.C., Uniradio, (February 2, 2024), https://www.uniradiobaja.com/reportajes-especiales/video-estados-unidos-registra-record-deportaciones-2013-mas-77-mil-bc-n729826.

IV. Methodology

The research uses a qualitative, exploratory methodology with a 2021-2024 timeframe. Its foundation is the search of official online, hemerographic, and bibliographic sources that concentrate on two subjects: crimmigration and necropolitics. The subjects of this study are migrants in Baja California (Mexico) who have been adversely impacted by state neglect in circumstances jeopardizing their physical safety, as well as by political violence manifest in instances of excessive force that may result in fatality. The recent militarization of security across all domains has endangered the lives of individuals in transit in Tijuana and throughout the country.

Mexico does not possess any legislation or public policy that is hostile to migrants, as doing so would be a clear violation of the Mexican Constitution. The Migration Law was reviewed, revealing no evidence of the criminalization of migrants, including Chapter III, articles 143 to 158. This research seeks to determine if crimmigration is encompassed by the concept of necropolitics or if it constitutes a distinct phenomenon. We hypothesize that, despite their similarities, they represent two distinct phenomena explicable within the framework of necropower.

We will delineate certain characteristics that we observe that may constitute the category of crimmigration, focusing on the case of Baja California. To achieve this objective, we will utilize news disseminated by reputable media outlets, both local and international, that specifically addresses the following issues: surveillance, harassment, arbitrary detention, the separation of children and adolescents from their parents, confinement in cages, expedited deportation, and even migrant fatalities under police jurisdiction. We included violent incidents associated with human traffickers and organized crime as well.

We primarily collected news from local sources in Tijuana, Mexico, and San Diego, United States, over the past four years, from 2021 to 2024. We consider these narratives to possess significant media influence owing to their connection with migrant fatalities, the portrayal of both direct and indirect migration, and the representation of a deteriorating situation in the region. Three examples were therefore sought, in which the victims were foreign and national migrants; offenders were i) law enforcement officials, ii) organized crime members, and iii) common criminals.

Finally, it is worth noting that this research is not exhaustive. It provides specific instances observed during the study period (2021-2024) of conditions that endanger the lives of migrants in Baja California, Mexico. Consequently, the research is not founded on case studies, but rather on the account of violent incidents that had a direct impact on the lives of migrants. That being said, we are curious to see how, as in the case of Tijuana, the dynamics of animosity towards the population of foreign migrants are positioned within a framework of ongoing criminal violence. The cases were organized in an Excel database in 2024.

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V. Migrant deaths in Baja California territory

Undocumented migration is a violent process, as it involves risks that jeopardize the physical and mental well-being of individuals in transit.[62] Some individuals, such as women, children, and unaccompanied adolescents, are more vulnerable than others.[63] Disputed areas are violent because of the rich profits from migration. Risks are always present at borders, but they are also becoming more prevalent in cities (both transit and arrival), on roads, in shelters, and anywhere else that officials or civilians are present to "manage" migrant bodies.[64] Between 2014 and 2021, there were 40,505 recorded migrant deaths and disappearances globally.[65] In sum, as long as policies criminalize the mobility of people, the number of lethal victims will continue to grow, as a result of the governmentalization of necropolitics by sovereign power.[66]

As mentioned above, migrants are particularly vulnerable to racist and violent attacks by the necropower, parallel to those of organized crime.[67] In this context, regardless of the natural environment (e.g., ocean, rainforest, arid region, or waterways), the likelihood of perishing in the pursuit of the "American dream" is considerable.[68] In 2022, according to the World Organization for Migration (IOM), more than 1,300 migrants died or disappeared in the Americas.[69] In the same year, the U.S. Border Patrol recorded the deaths of 855 migrants,[70] of which 307 occurred during the crossing of the dangerous deserts of Sonora and Chihuahua. The aforementioned number of victims ex-

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[62] María D. Paris, *Trayectos peligrosos: inseguridad y movilidad humana en México*, *90* Papeles de Población 22, (2016) https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-74252016000400145

[63] David Rocha & Marco T. Ocegueda, *Después de tantos años me deportaron. Proceso de identificación y deportación de mujeres inmigrantes no delincuentes*, 28 Revista Estudios Fronterizos 14, (2013) https://ref.uabc.mx/ojs/index.php/ref/article/view/57

[64] María D. Paris, *Trayectos peligrosos: inseguridad y movilidad humana en México*, 90 Papeles de Población 22, (2016) https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1405-74252016000400145

[65] Andrea García Borja, A., & Julia Black, *Medir las muertes y las desapariciones de migrantes*, 66 Revista Migración Forzada, 54 (2021) https://rua.ua.es/dspace/handle/10045/114378

[66] Andreas Feldmann & Jorge Durand, *Mortandad en la Frontera*, 10 Migración y Desarrollo (2008) https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-75992008000100002

[67] Laura Gómez-Mera, *A global protection gap: Migrant insecurity in Mexico*, 4 Latin American Policy 14, 1-27 (2023) https://onlinelibrary.wiley.com/doi/10.1111/lamp.12329

[68] Leanne Weber & Sharon Pickering, Globalization and Borders. Death at the Global Frontier (Palgrave Macmillan, 2011).

[69] Aristegui Noticias, *1338 muertes de migrantes al cruzar por América en 2022*, (February 24, 2023), https://aristeguinoticias.com/2402/mexico/1338-muertes-de-migrantes-al-cruzar-por-america-en-2022/

[70] Joebeth Terriquez, *Muertes de migrantes en el mar alertan a la frontera norte de México*, San Diego Union-Tribune, (Nov. 14, 2022), https://www.sandiegouniontribune.com/en-espanol/noticias/bc/articulo/2022-11-14/muertes-de-migrantes-en-el-mar-alertan-a-la-frontera-norte-de-mexico

ceeds the fatalities of migrants who perished while attempting to traverse the vast Sahara Desert, where 212 individuals died in the same year.[71] Moreover, experience shows that migrant victims of crime in Mexico are becoming more frequent. For instance, reports of 841 cases in 2021 increased by 35 percent to 1,136 cases the following year.[72]

Although the environmental threat diminishes in the city, the "urban jungle" remains a hazardous environment for migrants due to various atmospheres of criminalization that render them susceptible. The threat comes directly or unveiled from the sovereign power and its perverse power devices. The authority may choose to intervene or refrain from intervening in the protection of vulnerable groups against organized crime that exploits migrants.[73]

Necropolitics entails the exertion of authority over mortality and the characterization of life as the application and demonstration of power.[74] Political power is the capacity to influence others through dissuasive, coercive, or overtly violent means. Sovereign authority employs legitimate power to shape political discourse, encompassing the subjects addressed, the manner of discussion, and the stakeholders involved.

The sovereign power marginalizes migrants in matters of public interest when their rights are neither acknowledged nor regarded as socially relevant issues. Indeed, regardless of the quantity of laws or speeches advocating for migrants within social, academic, and governmental spheres, issues pertinent to migrants remain marginalized, excluded from political discourse, and, consequently, from governmental agendas, thereby rendering them overlooked. In the context of necropower, migrants and their rights frequently remain unacknowledged.

In the case of Mexico, no formal campaign against unauthorized migration has been announced. The Migration Law (LM for its Spanish acronym) and the Law on Refugees and Complementary Protection (LRPC for its Spanish acronym),[75] provide legal protection to migrants in their passage through Mexico. Nevertheless, despite these laws, members of various security forces still carry out violent crimes against migrants.[76] While traversing Mexico, migrants

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[71] EFE, *Datos migrantes muertos 2022*, (September 12, 2023), https://efe.com/mundo/2023-09-12/datos-migrantes-muertos-2022/

[72] Gobierno de México, *Delitos perpetrados en contra de personas migrantes irregulares en México. Serie histórica 2016-2022*, Politic migratory, (2023), http://www.politicamigratoria.gob.mx/es/PoliticaMigratoria/Cuadros_Delitos?Anual=2022&Secc=2.

[73] Andreas Feldmann & Jorge Durand, *Mortandad en la Frontera*, 10 Migración y Desarrollo (2008) https://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-75992008000100002

[74] Achille Mbembe, Necropolítica 20 (Melusina, 2006).

[75] Cámara de Diputados. Ley sobre Refugiados, Protección Complementaria y Asilo Político. Diario Oficial de la Federación (2011), https://www.gob.mx/cms/uploads/attachment/file/211049/08_Ley_sobre_Refugiados__Protecci_n_Complementaria_y_Asilo_Pol_tico.pdf

[76] Carla Angulo-Pasel, *The Politics of temporary protection schemes: The role of Mexico's TVRH in re-*

may face violence.[77] The number of migrant deaths in Mexican territory is regrettably increasing; in 2021, for instance, police in Tamaulipas burned 17 migrants.[78] Mexico apprehended a total of 307,569 migrants in 2021, and during the same year, 130,863 individuals sought refugee status.[79]

Two categories—a) unveiled crimmigration and b) direct crimmigration—are suggested in Figure 1. The term "direct crimmigration" refers to the state or government directly intervening in the lives of migrants, with the sovereign power deciding "who should die." Veiled crimmigration, on the other hand, occurs when the authorities fail to respond to circumstances that place migrants in a state of extreme insecurity and vulnerability, such as organized crime, unsafe spaces, and negligence. This failure to act effectively determines "who can die."

Figure 1. Typology of crimmigration

Direct Crimmigration	Veiled Crimmigration
Order, execute	Abandonment, neglect, failure to do
"Who must die"	"Who can die"

Source: own elaboration

In relation to the proposed typology, it is crucial to recognize that Tijuana and Mexicali, the two largest cities in Baja California, are locations where migrants transit, wait, or arrive. This is partially due to the Mexican government's failure to, among other things, regularize their stay and protect their integrity, which poses a threat of violence. Violence against individuals in mobility situations is supported by numerous incidents. The three primary sources of overt and explicit crimmigration violence are illustrated in Figure 2 below: i) the state and its military and police forces; ii) organized crime; and iii) social delinquency. Before analyzing the presence or absence of each trigger, the following are a number of real situations.

producing precarity among central American migrants, Journal of Politics in Latin America, July 2021, at 1-19 https://journals.sagepub.com/doi/10.1177/1866802X211027886

77 René Leyva-Flores, et al., *Migrants in transit through Mexico to the US: Experiences with violence and related factors, 2009-2015*, 8 *PLoS ONE* 14, 2 (2019).

78 BBC, *Declaran culpables a 11 policías de "fusilar y carbonizar" a 17 migrantes en el norte de México,* (September 15, 2023), https://www.bbc.com/mundo/articles/c0j3y858527o.

79 Human Rights Watch, *Mexico: Asylum seekers face abuse at southern border*, (June 6, 2022), https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border

Figure 2. Violent incidents against migrants in Baja California

Date	Source	Event	Place	Aggressors	Victims	Cause
03/06/21	Tele Mundo San Diego	Death by clandestine sea crossing	Coasts B.C.	Traffickers	5 Dead migrants	Crossing the sea
14/11/22	The San Diego Union-Tribune	Two migrants drowned at sea	Coasts B.C	Traffickers	2 Dead Migrants	Crossing the sea
29/09/23	Infobae	Migrants shot in Tecate	Tecate B.C.	Unknown	14 Migrants shot	Crossing through the mountainous area
29/09/23	CNN México	Murder of migrants	Tecate, B.C.	Traffickers	2 Migrants killed	Crossing through the mountainous area
14/06/22	Proceso	Death of Haitian migrant	Tijuana B.C.	Unknown	1 Migrant killed (three more in 2020)	Violence in Tijuana
17/02/23	The San Diego Union-Tribune	Migrants stoned to death	Tijuana B.C.	Traffickers	2 Dead Migrants	Crossing through a poorly guarded area
07/04/23	La Jornada	Migrant killed in Tijuana	Tijuana B.C.	Unknown	1 Migrant killed	Migrants circulating in a popular neighborhood
10/04/23	ZETA	Cartels smuggle migrants	Tijuana B.C.	Traffickers	Migrants	Human trafficking
20/09/23	Punto Norte	Smugglers shoot migrants	Tijuana B.C.	Traffickers	2 Migrants	Crossing through the mountainous area
17/10/23	Punto Norte	Harassment of migrants in Tijuana shelter	Tijuana B.C.	National Guard and INM	Migrants	Harassment by report
02/11/23	The San Diego Union-Tribune	Wall causes migrant deaths	Tijuana B.C.	Various	Migrants	Wall causes deaths
02/02/24	Punto Norte	National Guard kills migrants in Tijuana	Tijuana B.C.	National Guard	Migrants	The National Guard attacked them for trying to cross.

Source: Own elaboration with journalistic sources.

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As a result, organized and social crime are positioned in the veiled crimmigration simply because they lack the right to use force given that they are not political actors. Nonetheless, this does not imply the absence of specific groups that harass, condemn, and criminalize migrants, perceiving them as public enemies due to their mobility, precariousness, and/or vulnerability. In the case of sovereign power and its respective perverse devices of power, it is located in direct crimmigration.

Direct criminalization occurs when migrant individuals are subjected to harassment, threats, and even murder—through the sanctioned application of force—within a context of vulnerability exacerbated by targeted xenophobia. It is indirect crimmigration when, deliberately, the government ignores, discredits, and neglects migrants (whatever their age and gender), even when confronted with imminently threatening situations in the face of criminal groups.

As illustrated in Figure 2, human traffickers and organized crime have been the primary perpetrators of lethal violence against migrant bodies in recent years. Profiting on necessity, human traffickers drive them along impassable roads, even by sea, where some have drowned.[80] Also, they extort them to pay significant amounts during their journey.[81] Undoubtedly, crime exploits the absence of authority to target the physical integrity of migrants, as they regard them as "sacrificial bodies." [82]

Another source of violence against migrants is social delinquency. Non-organized criminals, who operate under the guise of impunity and are supported by corruption, weigh the costs and benefits of preying on vulnerable migrants. The Migrant Defenders' Organizations Documentation Network (REDODEM) independently recorded over 25,000 acts of aggression or potential crimes and violations of migrants' rights in Mexico.[83] Although classified as the "unknown" in Figure 2, newspaper articles suggest the potential involvement of ordinary criminals.

Finally, Figure 2 shows how the police and military contribute to acts of violence against migrants. This is the result of their mistreatment, extortion, coercion, and, in some cases, murder. In addition, their absence makes it easier for criminals to prey on migrants. Indeed, those who are supposed to protect order and social peace, can also be involved in acts of lethality, as evidenced by a newspaper report on the murder of migrants by the National Guard in Tijuana (Figure 2).

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[80] Laura Gómez-Mera, *A global protection gap: Migrant insecurity in Mexico*, 4 Latin American Policy 14, 1-27 (2023) https://onlinelibrary.wiley.com/doi/10.1111/lamp.12329

[81] René Leyva-Flores, et al., *Migrants in transit through Mexico to the US: Experiences with violence and related factors, 2009-2015*, 8 *PLoS ONE* 14, 17 (2019) https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0220775

[82] Achille Mbembe, Necropolítica (Melusina, 2006).

[83] Armando Correa, et al., Cohesión Social. Hacia una Política de Integración de Personas en Situación de Movilidad en México 36 (CIDE, 2020).

According to Figure 2, the state can engage in unveiled crimmigration within the framework of necropower. Despite the perception of Baja California as a migrant-friendly state, the reality reveals the absence of an inclusive policy that includes and respects migrants.[84] This situation places migrants at a juncture, compelling them to choose between remaining or departing, as they are vulnerable to both overt and covert forms of crimmigration.

VI. To what extent does necropolitics encompass crimmigration in Baja California?

The circumstances of oppression, neglect, abandonment, and lethality affecting the migrant population are inherently intricate. Nevertheless, in the context of necropolitical governmentalization, revealed and orchestrated by the state, crimmigration asserts its influence and is bolstered by the aegis of necropower. As previously stated, necropolitics includes the following factors: artful death, juvenicide, femicide, sexual division of violent death, extractivism, time, and cruelty in the destruction of human bodies and minds. Conversely, crimmigration represents the amalgamation of anti-migrant policies and adversarial criminal law, positioning the migrant population as the focal point of public discourse regarding local issues that authorities have failed to address effectively. Likewise, experience demonstrates that there is a cultural component to crimmigration that permeates the phenomenon by means of stigmatization, persecution, and the (re)production of fear among the migrant community.

Leyva-Flores (2019) explores the violence suffered by migrants in transit through Mexico, the types of violence they suffer, and who are the victims. For instance, psychological violence occurs when men and women experience great levels of intimidation and humiliation, respectively. This phenomenon occurs not only from the three sources of violence listed above but also from common people, who may constitute a fourth source of violence. This illustrates how crimmigration is not limited to criminals and institutions (e.g., legal and political dimension). Reguillo (2021), Valenzuela (2019), Valencia (2012), and Estévez (2022) all claim that Baja California and other parts of Mexico's northern border are necro-territories (e.g., cultural, economic, social dimension). Stated differently, the region has experienced the aforementioned traits, along with others, for many years (e.g., all dimensions). However, the phenomenon of crimmigration has evolved in recent years, and now has specific characteristics, such as being unveiled, direct, or indirect.

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[84] César A. Rojas, *Los miles de migrantes en Tijuana están cercados y en la incertidumbre*, France 24, (November 27, 2018), https://www.france24.com/es/20181127-migrantes-tijuana-detenidos-asilo-eeuu; Juan Antonio Del Monte, *Vidas rompibles en el vórtice de precarización: políticas de expulsión, procesos de exclusión y vida callejera en la ciudad fronteriza de Tijuana, México*, 2 Norteamérica 16, (2021) https://www.revistanorteamerica.unam.mx/index.php/nam/article/view/433

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The migration challenge confronting the three tiers of government, especially in Tijuana, is exceptional. In contrast to other Mexican cities, the migratory influx that this city is attempting to regulate shows no signs of abating. To quantify the magnitude of the challenge: Baja California was officially founded in 1952, nearly a century ago. In 2024, Tijuana became the most populous municipality in the country, with nearly 2 million residents, despite consistently having the highest rate of intentional homicides among Mexican cities since 2000.[85]

In recent years, the United States has applied considerable pressure on Mexico to temporarily accept Central American refugees and immigrants from the United States as a safe third country. The coercion of the American necro-empire towards Mexico was so severe that it literally constrained and compromised the signing of the treaty with the United States and Canada (T-MEC), with Mexico agreeing to commit as a safe third country.[86] The failure to sign the treaty would have had catastrophic consequences for Mexico's economic structure, likely resulting in a schism in economic and international cooperation with the United States, with potentially more severe repercussions. Therefore, as anticipated, the northern neighbor's astute conditions were accepted.

In this context, the authorities at the three levels of government in Mexico were effectively constrained by the demands of refugees and migrants on one side, and the resident's seeking resolution of issues purportedly caused by the presence of migrants on the other. The United States' influence, within the framework of necropower, materializes crimmigration, increasingly evident from a national security and international cooperation approach.[87] The objective of this research, as stated in the introduction, is to contemplate and reflect on two concepts that we have observed to be present in a covert and candid manner: necropolitics and crimmigration in Baja California. While they have been observed in both democratic and authoritarian regimes, they clearly thrive in despot territories.[88]

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[85] Gerardo Hernández & Zulia Orozco, *Armas de fuego sin frontera. El caso de Baja California, México (2013-2020)*, Revista Estudios Fronterizos 22, (2021) https://ref.uabc.mx/ojs/index.php/ref/article/view/991; Zulia Orozco, Criminalidad y Doble Nacionalidad. Algunas Claves para Repensar la Seguridad Transfronteriza en la Región Calibaja, in La Transterritorialidad Nacional en México: Una Visión Multidisciplinaria (Roxana Rosas & Nuria González coords., Serie Opiniones Técnicas sobre temas de relevancia, No 61. UNAM, 2023).

[86] BBC, *Qué es "un tercer país seguro" y por qué Trump quiere que el gobierno de AMLO acepte que México se convierta en uno,* (June 6, 2019), https://www.bbc.com/mundo/noticias-america-latina-48536239

[87] Hugo C. Moreno H., *Desciudadanización y estado de excepción*, 24 *Andamios* 11, (2014) https://www.redalyc.org/pdf/628/62832750007.pdf; Ariadna Estévez, *El necropoder del imperio de la ley: la gestión de la muerte en el primer mundo norteamericano*, Acta Sociológica 88-89 (2022) https://revistas.unam.mx/index.php/ras/article/view/84866

[88] Hannah Arendt, Los Orígenes del Totalitarismo (Taurus, 1998); Achille Mbembe, Necropolítica (Melusina, 2006); Giorgio Agamben, Homo Sacer. El Poder Soberano y la Nuda Vida (Pre-Textos, 2010).

Irrespective of the dire circumstances evident at Mexico's northern border, it is evident that the United States bears responsibility for the prevailing conditions in its southern neighbor. The U.S. has an arsenal of perverse devices of domination deployed towards the Global South, such as, for example, the firearms strengthened by organized crime along Latin America;[89] its enemy criminal law that massively deports migrant minorities since the 1980s;[90] the opening and closing of visa programs (e.g., Temporary Protection Status) focused on vulnerable populations, which, when they decide to migrate in spontaneous caravans, destabilize the region;[91] not to mention the border wall that is the landmark for distancing, immobility, agglomeration, exclusion and, of course, artful death.

To address the research question, direct or concealed crimmigration overlaps and takes place in necropolitical environments where violent death is sexually divided, the body is extracted, time moves slowly, and the brutality with which bodies are abused reaches deep into the being. Although there is structural violence throughout the "urban jungle," there is a particular focus on migrants that is evident in murders, disappearances, and the forgetting of the disappeared by the legal system. Under the umbrella of necropower, there are, in fact, two separate phenomena that interact. The distinction lies in the population that is being targeted for abandonment and violence.

So, what distinguishes crimmigration from necropolitics as distinct phenomena? Are they not both speeches that incite animosity? Do they not slowly murder while dehumanizing and objectifying the person? Indeed, the contexts for both situations are highly analogous. Possibly the most distinctive aspect is that necropolitics can be transformed into a government regime that the state apparatus operates from (e.g. Germany). On the other hand, crimmigration is a multidimension criminalization based on cultural, legal, and/or policy-based persecution and harassment of migrants, due to their mobility background (e.g. the United States). It is essential to recognize that crimmigration, whether explicit or implicit, intersects with the domain of necropolitics, which originates from necropower.

VII. Conclusions

In conclusion, the authors wish to highlight four points regarding the research topic. The first is that while all borders are special in symbolic and cultural terms, Tijuana is a particularly special border. To give a relevant example, the

89 Gerardo Hernández & Zulia Orozco, *Armas de fuego sin frontera. El caso de Baja California, México (2013-2020)*, Revista Estudios Fronterizos 22, (2021) https://ref.uabc.mx/ojs/index.php/ref/article/view/991

90 Juliet Stumpf, *The crimmigration crisis: Immigrants, crime, and sovereign power*, 2 American University Law Review 56, (2006) https://digitalcommons.wcl.american.edu/aulr/vol56/iss2/3/

91 *Idem*.

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Tijuana (Mexico)-San Diego (United States) micro-region cannot be understood without Los Angeles. There exists a dynamic and enduring interaction among the three metropolitan areas, evident in the exchange of individuals, commodities, and services, encompassing both legal and illicit transactions. Over 22 million residents inhabit the transboundary micro-region, highlighting the complexity of the interaction. In this way, it is impossible to comprehend the context that exists in Baja California, and in particular in the city of Tijuana, without taking into account the complex role that California, and especially the southern California counties, play in the state.

The second point that we wish to emphasize is that both categories are relatively recent and are currently under development in various regions of the planet. This is, regrettably, a contribution to the international discourse, presented from a local viewpoint, originating from Mexico's northern border, akin to the efforts of other intellectuals from this region associated with El Colegio de la Frontera Norte and the Universidad Autónoma de Baja California. We acknowledge that, alongside the epistemic formulation of these decolonial categories, there is a lack of contemplation from other perspectives that would enhance the international paradigm. For instance, this involves the development of advanced databases, as well as statistical and cartographic analyses, to illustrate the manifestation of crimmigration, necropolitics, and necropower. There are undoubtedly many analytical and creative dimensions from which to approach the study of these extremely complex phenomena.

The third point in the concluding remarks is that there is no straightforward solution to the phenomenon. The dimensions at play encompass political, legal, cultural, economic, and social aspects. This indicates that, even in democratic regimes, there is persecution and criminalization of migrants, as well as persecution of young people for racial profiling or against women because of their gender. One of the paradigms that society could adopt for guiding our actions is that of peacebuilding and social pacification. The path is complex, particularly with the United States—a nation that manufactures firearms—as a neighbor; however, it is evident that neither regulations nor policies have adequately mitigated organized crime and social violence. In any case, academia and civil society can intensify their efforts to increase awareness among authorities and decision-makers.

The final and fourth point to be covered in this discussion is potential research directions in these two areas of study. We believe that certain areas requiring a better approach include the examination of the state's failure to formulate policies for the targeted inclusion of migrant groups, with the concept of the melting pot in mind. Likewise, it would be intriguing to understand how migrants politically and legally organize themselves in Baja California. For instance, it should be determined whether there are migrant clubs that can serve as locations for socialization, counseling, support, and interaction to assist individuals in managing their circumstances in the country. Lastly, an additional

line of analysis may be associated with the cultural factor that enables the occurrence of both crimmigration and necropolitical regimes.

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Individual versus collective freedom: antinomies and tensions

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Abstract: This article sets out to analyze the right to freedom as a human right, with the purpose of contrasting two of its aspects: the right to freedom as an individual right v. the right to freedom as a collective right, so as to reach a conclusion on the antinomies and collisions between these aspects. In this sense, the epistemic origin of the supremacy of collective rights over individual rights, as well as the potential risk to individual freedoms when indiscriminate privilege is given to collective rights, is questioned and discussed. To solve this dichotomy we propose, on the basis of Law, the use of the Weight Formula, which is a tool that makes use of the Law of Balancing applied in legal reasoning when there are antinomies and collisions between two or more human rights.
Keywords: individual freedom; collective freedom; human rights; legal antinomies; legal reasoning.

Resumen: El presente artículo analiza el derecho a libertad como derecho humano con la intención de confrontar dos de sus vertientes: la libertad como derecho individual frente a la libertad como derecho colectivo, para arribar a reflexiones sobre las antinomias y tensiones entre sí. En este sentido, se cuestiona y debate el origen epistémico de la primacía de los derechos de la colectividad sobre los derechos de corte individual y el riesgo que puede representar para las libertades individuales sí

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los derechos colectivos son privilegiados de forma indiscriminada. Para resolver esta dicotomía proponemos desde el derecho el uso de la denominada fórmula del peso, una herramienta que hace uso de la teoría de la ponderación desde la argumentación jurídica aplicada en el caso de colisiones o antinomias entre dos o más derechos humanos.
Palabras clave: libertad individual; libertad colectiva; derechos humanos; antinomias jurídicas; argumentación jurídica.

I. Preliminary ideas

This research aims to address the right to freedom as a human right with the purpose of contrasting two of its aspects, that is, the right to freedom as an individual right versus the right to freedom as a collective right to reach a conclusion on the antinomies and tensions between both of them. We focus on what we call "the fallacy of the supremacy of collective rights over individual rights" and our objective is to produce legal solutions that allow us to empower the right to individual freedom as the foundation of a democratic, equal, and plural society. To support the above, we will use the so-called Weight Formula, a tool based on the Balancing Law applied in legal reasoning when there is a collision or antinomy between two or more human rights.

II. Human right to freedom and its different aspects

Freedom throughout history has been a difficult word to define. From disciplines such as Philosophy, there has been a wide debate about its meaning. To define the concept of freedom, we will refer to two fundamental philosophical theories: utilitarianism and existentialism. On the one hand, we have the utilitarianism developed by John Stuart Mill, who established the concept of freedom from a social and civil perspective, leaving aside what he called "free will". Stuart Mill argues that individual choices, and not just collective ones, are of public importance, and that any action, whether individual or collective, that may have a negative impact on society transgresses the freedom of the individual and of the collectivity.[2] This, if applied strictly, is a dangerous theory and even a doctrine used in tyrannies.

[2] *See* Miguel Angel, Morales Sandoval, *¿Qué es la libertad? Hechos y Derechos*, Revista de la Facultad de Derecho, 2020.

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On the other hand, Jean-Paul Sartre stated, from the perspective of existentialism, that:

> Freedom is conceived in an absolutely unconditional way, although it remains within the limits of what exists in fact and is devoid of need in the world. However, since this facticity is indeterminate, because freedom is built from the choice to do or not to do of the being, it is also the reason why one is responsible for the world and for oneself concerning one's way of being.[3]

Existentialism also presents certain difficulties such as that of establishing that freedom can only be of an individualistic nature. We need to briefly review these philosophical theories in order to reflect on the concept of freedom as a starting point, as this article sets out to offer a legal contribution, based on human rights and legal reasoning. Therefore, we must begin by analyzing the concept of human rights, because from the perspective of the legal sciences freedom is a right of such nature.

Throughout history, different terms have been coined to address the matter of what we call today "human rights". At the beginning of the modern age, we find denominations such as natural rights; in France, "fundamental rights" was a common term after the French Revolution and, towards the end of the eighteenth century, "public freedoms" was another; during the nineteenth-century, in Germany the term "subjective public rights" was frequent and in more recent times we identify other denominations such as "moral rights". All the terms above are related to the matter of human rights.[4]

Leah Levin argues that:

> Human rights are inalienable and inherent moral rights that, by the mere fact of being a human being, all humans possess. These rights are articulated and formulated in what we now call human rights and have been embodied in legal rights established in accordance with the law-making procedures of each society in the national and international scope.[5]

In this sense, we can understand freedom as *a human right that has a multidimensional and complex nature*. In the first place, freedom, in a broad sense, according to Cecilia Medina:

> Is related to the possibility of self-determination, that is, the possibility to conduct oneself in life as one sees fit as long as one's actions do not affect the rights of third parties. Freedom, understood in this way, is in the foundation of human rights and it works, within the inventory of rights, as a special protection to certain aspects of

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[3] *Id.*

[4] *See* Juan Antonio Cruz Parcero, el lenguaje de los derechos. Ensayo para una teoría estructural de los derechos 21-70 (Trotta, 2007).

[5] Leah Levin, Human rights: Questions and Answers 14 (UNESCO, 1998).

> freedom such as, for example, the right to peacefully associate, the right to assembly, and the right to free speech.[6]

Furthermore, international legal documents that originated in this continent, such as the American Declaration of the Rights and Duties of Man, have recognized freedom since 1948 as a fundamental aspect for the life of a human being with a minimum framework of rights. This Declaration sets forth in Article I: "Every human being has the right to life, freedom and the security of their own person". This same instrument provides in Article XXV:

> No person may be deprived of their freedom except in the cases and in accordance with the procedures established by pre-existing law. No person may be deprived of their freedom for nonfulfillment of obligations of a purely civil nature. Every individual who has been deprived of their freedom has the right to have the legality of their detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. They also have the right to humane treatment during the time they are in custody.[7]

Additionally, the American Convention on Human Rights recognizes the right to individual freedom as follows:

> 1. Every person has the right to personal freedom and security. 2. No one shall be deprived of their physical freedom except for the reasons and under the conditions established beforehand by the constitution of the State Party or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment.[8]

On the other hand, Mexico in its Federal Constitution recognizes the human right to freedom from different perspectives, mainly in sections 1, 5, 6, 8, 9, 11, 14, and 24.[9] The forementioned sections are some of the most relevant regarding freedom: the abolition of slavery, the right to engage in work and to pursue

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[6] Cecilia Medina Quiroga, La Convención Americana: Teoría y Jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial 212-213 (Centro de Derechos Humanos Facultad de Derecho de la Universidad de Chile, 2005).

[7] *American Declaration of the Rights and Duties of Man*, Adopted at the Ninth International Conference of American States, Bogotá, Colombia, (OAS, 1948) https://www.oas.org/es/cidh/mandato/basicos/declaracion.asp

[8] *American Convention on Human Rights*, Adopted at San José, Costa Rica, by the Organization of American States, November 22, (OAS, 1969. Effective date: July 18, 1978. The Mexican Senate passed it on December 18, 1980. Mexico adhered to it on March 24, 1981. It was published in the Federal Official Gazette (DOF by its acronym in Spanish) on May 7, 1981. Treaties entered by Mexico means any "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." *See article 2, section A, of the Vienna Convention on the Law of Treaties from 1969.*

[9] *See* Mexico's Federal Constitution.

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an occupation, the right to free speech, the right to associate and assembly, the right to petition, the right to freedom of movement, and the right to religion.

It should be noted that while some of these freedom typologies are of an individual nature, others are of a collective one. For example, the right to freedom of speech has, *a priori*, an individual nature, while the right to associate and assembly, due to its nature, has an implicit collective nature. In this sense, in the case of the right to freedom of speech, one of the medullary aspects for individual freedom, the Inter-American Court of Human Rights has emphasized that

> Special attention must be given to the principles of a "democratic society". The right to freedom of speech constitutes one of the essential foundations of a democratic society. It is an important condition for its progress and for the development of the individuals. The right to freedom of speech is valid not only for the information or ideas that are favorably received or considered inoffensive or irrelevant, but also for those ideas that collide, disturb, or offend the State or any sector of the population. Such are the demands of pluralism, tolerance, and open-mindedness, all crucial elements for the existence of a "democratic society". This means that any formality, condition, limitation, or punishment imposed regarding this matter shall be proportioned for the legitimate end that is being pursued.[10]

For a democratic and plural society to exist, it is necessary that the right to freedom of speech is protected by the legal systems and that any person can exercise said right without the opposition of the State.

III. Problems with human rights: the case of right to freedom

We will analyze, according to Norberto Bobbio, what problems hinder the respect for and observance of human rights. Here lies the importance of the present investigation, as this analysis will allow us to understand the complexity of freedom as a dichotomous human right. Freedom, on the one hand, has an individual nature and, on the other hand, a collective one. In this sense, Bobbio points out that human rights have four issues from their very origin, namely:[11]

1) The term "human rights" is "obscure" (in other words, a tautology).
2) Human rights are a variable and historically relative category.
3) They are heterogenous and divergent.
4) They may be "antinomies" under certain contexts.

[10] *Case of the Last Temptation of Christ (Olmedo Bustos et al.) v. Chile*, C Series, no. 73, 68-69 (Inter-American Court of Human Rights, Judgement of February 5, 2001).

[11] *See* Norberto Bobbio, Sobre el fundamento de los derechos del hombre, in El tiempo de los derechos 55 and ss (Sistema, 1991).

The first problematic aspect points out that the term human rights is *obscure* and inaccurate, and, as a result, it impedes us from establishing an absolute foundation for this kind of rights. "This problem gives place to a discourse in which logical fallacies are present both in theory and practice. That is to say that it pulls away from the scientific classification criteria deriving from logical empiricism". In other words, a foundation built upon inaccurate and obscure terms as well as tautologies can hardly serve as a "foundation" for human rights in less more practical scopes.[12] A tautology, in simple terms, refers to a redundant concept. In the case of the term "human rights," the definition is the same as the term itself (faculties that correspond to an individual for their human nature). This, as we can see, does not add information, and simply repeats the information that had already been provided.

In second place, the issue regarding *the relativity of human rights as a historical concept* is related to the relativity of the values that are part of the ethical content of rights. For this reason, the history of mankind and the changes in religious, ethic, and political views must be taken into consideration. The evolution of the human being is characterized by the development of several ways of thinking, which is reflected in the historical development of human rights.[13] The right to freedom of thought and religion has a plurality of moral conceptions that are the reason for its existence. To put it another way, if there was an absolute foundation for religious and moral matters, it would not have been necessary to establish the freedom of thought and religion because all human beings would have to believe and think in the same way.[14]

In third place, *the heterogeneity and divergence*[15] argued by Bobbio implies that human rights are different to each other, because they arose from and are applied to diverse needs. This means that, to mention one case relevant to our analysis, the reasons that served to establish the right to freedom of religion are different from those that allowed the origin of other rights such as the right to education. Therefore, it is not possible to speak of an absolute foundation for human rights and, as a result, a foundation for each right must be established.[16]

Finally, the fourth problematic aspect of human rights and, in our view, the most important for the purpose of this article, is the one concerning the *antinomic nature* of human rights. These "antinomies" are present, specifically, between individual and collective rights, i.e., between those rights that consist in free-

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[12] Miguel Román Diaz, Los Derechos Humanos en el Pensamiento de Norberto Bobbio, Doctoral diss., 238 (Universidad Carlos III de Madrid, 2015) https://www.corteidh.or.cr/tablas/r38076.pdf

[13] *See* Norberto Bobbio, Sobre el fundamento de los derechos del hombre, in El tiempo de los derechos, 55 and ss (Sistema, 1991).

[14] *Id.*

[15] *See* Norberto Bobbio, Ciencia del derecho y análisis del lenguaje, in Contribución a la teoría del Derecho 181 (Debate, 1991).

[16] Diaz, *supra* note 12.

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doms and those that consist in powers.[17] In this sense, we find limits imposed by the State that under no circumstance must transgress the human dignity[18] of the individuals. The case of the limitation imposed on the right to freedom of movement during the COVID-19 pandemic is a case point. During this time, the State, for public health reasons, imposed limitations over the rights to individual freedoms like the aforementioned.

Nonetheless, citizens shall pay close attention when the State imposes limitations over certain rights and freedoms, because "despite the fact that human rights can operate as an emancipatory tool in a given historic moment (like the American civil rights movement), they can also become a regulatory discourse, i.e., a tool to hinder or co-opt more radical and political demands, or simply become the emptiest of the empty promises."[19] This is to say that human rights may be utilized as mere political discourses to manipulate, hinder or limit freedoms in an arbitrary way and, as result, they do not serve the purposes for which they were conceived.

Furthermore, as we will analyze with more deeply in the section regarding antinomies between rights, a specific set of human rights under a certain context may collide. In the case of the COVID-19 pandemic (where a valid and legitimate limitation was imposed over the right to freedom of movement due to the health emergency with the purpose of maintaining the public order), the right to freedom of movement of an individual is an antinomy of the right to public health and to the right to collectivity.

IV. Perspectives on and distinctions between the right to individual and collective freedom

As already discussed, freedom is a two-sided right, i.e., it has both an individual and a collective nature. To further explain this two-sided nature and to understand the collisions that may arise in practice and reality from the exercise of an individual right and a collective one, we will start with the basics. That is, we will give a general overview of both types of rights to find the differences between them.[20]

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[17] Eusebio Fernández, El problema del fundamento de los derechos humanos, in Teoría de la Justicia y Derechos Humanos 82 (1987, Debate).

[18] Human dignity is the conceptual framework that connects the morality of equal respect for any individual with Positive Law and a democratic law-making procedure which results in a public order founded in human rights. See Jürgen Habermas, *The concept of human dignity and the realistic utopia of human rights*, 4 Metaphilosophy 41, 464-480 (2010).

[19] *See* Wendy Brown, Lo que se pierden con los derechos, in La crítica de los derechos 83 (Siglo del Hombre Editores, 2003).

[20] C. Rosario Batista, Derechos humanos individuales y colectivos, ¿Individuales o Colectivos? Propuestas para la nueva Constitución desde diferentes miradas *passim* (Inter-American Court of Human Rights, 2011).

> Human rights are the result of a liberal vision in which the person, as an individual, prevails as the subject of law. The recognition and evolution of human rights within the international scope has been undoubtedly important since the adoption of the Universal Declaration of Human Rights from 1948, as well as the adoption of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights from 1966. They have contributed to "humanize" the exercise of power by establishing limits and constitutional rights common to all the States that allow to protect the freedom and dignity of the individuals.[21]

Despite the existence of these international instruments, it is common to observe violations of rights, such as the right to freedom and dignity in contemporary societies because of authoritarian governments and States. Regarding individual rights, they are fragile in comparison with the state machinery, because they arise from an unequal position of power or from a disadvantageous situation with the state authorities. For example, the right to petition involves an asymmetrical relationship between the petitioner and the government.

> Furthermore, a considerable difference regarding the exercise of collective rights is that when we refer to the rights of a given group as collective rights, we are talking about rights inherent to a given group of people that have a common interest or characteristic that distinguishes them from others. Age is a case point as it allows recognition of different rights for children, adolescents, young adults, or elderly people. There are also different population sectors that enable the recognition of special rights, such is the case of disabled people and immigrants.[22]

We can also find collective rights with a broader scope. Such is the case of the human right to a healthy environment which is a right of the collectivity.

Concerning *freedom as an individual right*, it is crucial to point out that individual freedom is what makes us full and fulfilled human beings. Without individual freedom, individuals would fade out in the collectivity together with their demands, wishes, and identities. We believe that to be free in a social environment, there is no need to sacrifice our dreams to conform to the wishes of the majority or to protect their wellbeing, because the majority is not always right or acting in accordance with law. It is not fair to claim, *prima facie*, that collectivity deserves the best right.

In this sense, Justice Ketanji Brown Jackson (the first Black woman to serve in the U.S. Supreme Court) argued that "constitutions must be color-blind, despite the human reality not being color blind."[23] This statement implies *a priori* that there is equality before the law when rights are seen through those color-blind

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[21] *Id.*

[22] *Id.*

[23] *See* Bernd Debusmann Jr., *La decisión de la Corte Suprema de EE. UU. que elimina la 'discriminación positiva' por raza en las admisiones universitarias*, BBC News, June 29, 2023 https://www.bbc.com/mundo/articles/c84wnlw77nko.amp

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glasses. While in theory Law is general, abstract and has a design that serves for a common recipient, i.e., the *collectivity* (conceived as an homogeneous, unique and indivisible structure), in practice, the reality is that *the human being is heterogeneous and diverse and, as a result, rights cannot be applied in the same way all the time and this fact is what produces the challenge we have been discussing in this article.*

Even if the constitutional colorblindness provides an absolute solution for this discussion (individual rights v. collective rights), the reality is that arguing that collective rights must be given priority over individual rights constitutes a fallacy. The essence of the problem lies in the belief that collectivity has priority over the individual in any circumstance and context. This, being categorical, is inaccurate and fallacious as will be shown in the following section.

V. The right to collective freedom: Recurring fallacies concerning its supremacy

The interest and wellbeing of the majority is deemed, by antonomasia, to be superior to the freedom or interests of the individual. The constitutional colorblindness gives an advantage to the rights of the collectivity over the rights of the individual. But this advantage is not always fair. In this sense, figures such as public safety, national security, public order, and others, have been adopted by the governments to impose limitations over individual freedom. Such figures are interpreted as dogmas or undeniable mandates *prima facie,* which infer the supremacy of the collectivity over the individuality. Nonetheless, if we acknowledge that such figures belong to a mandatory category under any circumstance, variable or hypothesis, we are prone to embrace a fallacy from the perspective of logic and even more from the perspective of deontic logic or *ought-to-be* logic.

A fallacy is a failure in the structure of reasoning. They are commonly unintentional but result in knowledge that is false and misleading.[24] We are of the opinion that the idea arguing that "the collectivity must be given priority over the individuality when it comes to rights under any circumstance" is a fallacy, because if we acknowledged this idea we would give rise to an absolute, authoritarian, and dangerous context for the exercise of individual rights such as the right to freedom of speech and thought.

If we analyze the perspectives on freedom from the Middle Ages, we will realize that the individual element was sacrificed for the sake of the collective ideal of society as well as for the absolute submission to monarchic power. Nowadays, society aims to encourage diversity and tolerance by means of an equal environment that transforms freedom in a real "public good". That is, a right that makes accessible and exercisable for the individuals the possibility to govern within a new model of political organization ruled by the empire of Law.

[24] *See* J. E. Broyles, *The Fallacies of Composition and Division,* 2 Philosophy and Rhetoric 8, 108-113 (1975).

"A society in which any individual has the possibility to govern the affairs of the republic and an equal right to choose."[25]

This means that, if we acknowledge that collectivity must be given priority over individuality under any circumstance in any social environment, we are bringing back a concept of freedom that is highly restrictive and potentially harmful, especially if it is used as a political and governmental discourse to impose arbitrary limitations over the rights of the individuals. It may be misleading and, as a result, can give rise to decision-making practices within the spheres of political power that restrict individual freedoms and rights on the grounds of democracy to protect the wellbeing of the majority, but that rather constitute an actual limitation over the legitimate exercise of the individual freedom.

VI. What to Do When Two Human Rights Collide? A Brief Approach to Antinomies in Law

As we have argued, there are instances in which human rights can be antinomies. In this section we will analyze antinomies with more depth. "A legal system[26] presents an antinomy when a given case may have two diverse and opposite solutions on the grounds of existing norms within that system."[27] Guastini, a renowned constitutionalist author, has argued that an antinomy is present if the following criteria is met:[28]

a. When a given behavior is qualified, in a deontic manner, in two incompatible ways in two different norms within a legal system.

b. When two incompatible legal effects are triggered for a certain situation based on two pre-existing norms within that system.

In the case of human rights, particularly in the case of individual freedom v. collective freedom, this problem arises. For this reason, we must refrain from establishing absolute solutions (for in most cases said solutions put collective freedom before individual freedom vanishing the identity of the individual in the face of society's demands).

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[25] *See* Víctor Alarcón Olguín, *Libertad y Democracia*, Cuadernos de Divulgación de la Cultura Democrática 18, 55 (2000) https://portalanterior.ine.mx/documentos/DECEYEC/libertad_y_democracia.htm#relacion

[26] Legal system means "the articulated and coherent assembly of institutions, methods, procedures, and legal rules that constitute the Positive Law of a given time and place. Any free and sovereign State has its own legal system". *See* José Humberto Zárate, et al., Sistemas Jurídicos Contemporáneos, as cited by Nuria González Martín, *Nociones Introductorias y Familia Jurídica Romano Germánica*, in Sistemas Jurídicos Contemporáneos 1 (Mc Graw Hill México, 1997) http://historico.juridicas.unam.mx/publica/librev/rev/jurid/cont/30/cnt/cnt27.pdf

[27] Ricardo Guastini, Estudios sobre la Interpretación Jurídica 71 (Marina Gascón & Miguel Carbonell trans., Porrúa-Universidad Nacional Autónoma de México, 2014).

[28] *Id.*

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VII. Emerging answers on the basis of legal reasoning to solve antinomies concerning the human right to freedom

1. The balancing law and the weight formula as a possible solution

A. Note regarding the research's methodology

In this article, we will use the "illustrative case study" method. This type of case study is used to "[...]evidence a characteristic that we are interested in studying and that is present in other instances."[29] In this case, we are looking for clarifying the nature of the collisions between the individual freedom right versus the collective freedom right. Furthermore, due to the nature of this type of case study, it will be easier to "come up with a theory or a set of propositions regarding the functioning of a phenomenon."[30] In other words, research limited to an "illustrative case" allows us to contrast the theoretical proposals with reality.

In this sense, our main purpose is to provide a potential solution. For this reason, we named this section "Illustrative case", as it is precisely an example of a potential answer within the wide and diverse range of possible solutions.

B. The balancing law

In this article, we suggest a scientific answer using the legal *Balancing Law* and the application of the *Weight Formula*.[31] When we aim to solve a conflict on the grounds of Law there are, in general, two basic operations:

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[29] *See* Xavier Coller, *Estudio de casos,* 30 Cuadernos metodológicos, 31 (2000).

[30] Ibid.

[31] We will not go in-depth about the viability and objectivity of the *Weight Formula* as a reasoning tool within the Balancing Law´s theoretical framework. In other words, we will not reflect on the challenges and problems that may arise from applying the *Weight Formula* in general or specific cases. Therefore, we acknowledge that the Balancing Law´s is a radically subjective operation. It has been questioned because of the use of intuitive theories which may jeopardize the objectivity of a result. To understand more about this theoretical discussion and others, *see*: Frederick Schauer, Playing by the Rules (Oxford University Press, 1991) and M. Cristina Redondo, *Reglas «genuinas» y positivismo jurídico*, in Analisi e Diritto 243-276 (Paolo Comanducci & Riccardo Guastini eds., Ricerche di giurisprudenza analitica, 1998). Jonathan Dancy, Moral Reasons 60 (Blackwell, 1993). Bernard Schlink, La ponderación en el derecho. Evolución de una teoría, aspectos críticos y ámbitos de aplicación en el derecho alemán 75-110 (Universidad Externado de Colombia, 2014).

As we stated before, we aim to provide a potential solution to the tensions arising from the right to individual versus the right to collective freedom. Hence, the following section is called "Illustrative case", as it is a case that evidences a potential solution within the diverse and wide range of solutions that may exist. In other words, this illustrative case is not special *per se*, but it is a case that allows us to clarify in reality what has been theorized. To understand more about the methodology for case study selection and case studies, *See* Xavier Coller, *Estudio de casos*, 30 Cuadernos metodológicos, 31 (2000).

> *Subsumption* and *balancing*. While subsumption has been researched to a considerable degree, where balancing is concerned there are still several questions to answer. There are three basic problems with balancing: its structure, its rationality, and its legitimacy. There is a close link between these problems. The legitimacy of balancing in Law depends on its rationality. The more rational the ponderation, the more legitimate is its practice in Law.[32]

Subsumption consists in the application of a norm to a fact. For example, when a person decides to get a divorce, the law will find for that specific situation (i.e., children, property or other elements that arouse during the civil marriage) a legal solution. On the other hand, *balancing or making an operation of balancing* in Law entails understanding that Law provides more than one coherent answer because in most cases there are two human rights that cannot be applied at the same time involved. In this sense, we can find a basic logic rule, "*reality just is, A is A, and it cannot be not A*. If we apply this rule to geometric shapes, a square is a square and it cannot be a triangle, not at the same time."[33]

Human rights can be antinomies and the way to solve their contradictions or collisions is not expressly provided by Law as in the case of a civil divorce, where subsumption is used. Regarding individual freedom v. collective freedom, we have the following example: in Spain during the nineties, several young men decided to refuse the nation's call to join the military because it was against their freedom of thought, of conscience, of religious beliefs and individual moral values.[34] In this example,[35] we stand before a collision between two human rights: on the one hand, *the right to freedom of thought and the right to religion of an individual*, and, on the other hand, *the right to public order and the right to collective legal safety provided to the State by an active military*.

To solve this collision between human rights (the individual freedom to religious beliefs v. the State's faculty to call upon their citizens to enlist in the military in order to guarantee the public order and collective safety), one relevant option created in legal sciences that may provide an efficient answer is the so-called Law of Balancing and the Weight Formula proposed by Robert Alexy.[36]

Robert Alexy defines this law of competing human rights or principles as follows: "The conditions under which one principle or right takes precedence over another constitute the operative facts of a rule giving legal effect to the

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[32] *See* Manuel Atienza, Las razones del Derecho (Teorías de la Argumentación Jurídica), *passim*, (Universidad Nacional Autónoma de México, 2005).

[33] *Id.*

[34] *See* César Díaz, *De objetor a desertor*, El País, (November 2, 1985), https://elpais.com/diario/1987/11/03/espana/562892406_850215.html?event_log=oklogin.

[35] The methodology of the illustrative case study is used to select theoretically decisive cases in a general or specific research context. *See* Xavier Coller, *Estudio de casos*, 30 Cuadernos metodológicos, 31 (2000).

[36] Robert Alexy, Teoría de los derechos fundamentales 31-62 (Carlos Bernal Pulido trans., Centro de Estudios Políticos y Constitucionales 2d ed. 2008).

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principle deemed prior."[37] On the basis of this law, we can deduce that, as there are no absolute precedence relations between the rights of a legal system, no principle or right is prior, superior or hierarchically stronger (in its origin) to another, unless there are conditional precedence relations that precisely arise from that specific case. Now, we can have a better understanding of what it means to decide a case by balancing: "to decide a case by balancing consists in deciding by means of a rule that is based on the principles that play in the opposite direction."[38]

Regarding the Balancing Law, *per se*, Alexy argues that

> Between the proportionality principle and the fundamental structure of the principles there is an intimate connection and a correlation. Hence, as human rights are optimization commands within the field of factual and legal possibilities, it follows logically from it that the sub-principles of appropriateness, of necessity, and of proportionality in a narrow sense are deducible from the operation of balancing in a strict sense.[39]

The theoretical proposal from the author establishes that the balancing of rights can be broken down into three stages: "in first place, determining the degree of non-satisfaction of one principle; in second place, establishing the importance of satisfying the competing principle, and, in third place, justifying the priority or optimization of one principle over the other.[40] According to the above, human rights, unlike other types of legal norms, are more flexible as they are considered principles, and, as a result, we will have one definite answer when we face a specific case. In the following section we will analyze a case as a way of illustration.

C. "Illustrative case" on the priority of individual freedom over collective freedom

We cited above the case of the Spanish young men that opposed the mandatory enlistment in the military of their country. They put their right to freedom of thought, conscience, and religion over the right to public order and collective safety. In this case, the right of the individuals who did not wish to enlist in the military to freedom of thought for moral, ideological or religious beliefs is what we call an affected right, because they were forced by the State to enlist in the military as those who dropped out of the military were sanctioned with imprisonment (situation that occurred up until the nineties).[41]

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[37] Robert Alexy, Teoría de la argumentación jurídica 75 (Centro de Estudios Constitucionales, 1997).

[38] *Id.*, 100.

[39] *Id.*

[40] *Id.*

[41] *See* Miguel González, *25 de los 92 presos militares en 1990 eran desertores*, El País, (January 30) 1991), https://elpais.com/diario/1991/01/31/espana/665276402_850215.html.

The right to freedom of thought, conscience and religion is recognized by the Universal Declaration of Human rights in article 18 which provides: *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change their religion or belief, and freedom, either alone or in community with others and in public or private, to manifest their religion or belief in teaching, practice, worship and observance.*

Additionally, the International Covenant on Civil and Political Rights in article 18.3 sets forth, about the limits of this individual freedom, that: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by Law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". In this sense, we can identify two competing human rights or rights that are antinomies concerning freedom. On the one hand, we have the right to freedom of thought of each young man to not enlist in the military as it goes against their morals, principles, ideology or religion; on the other hand, we have the right of collectivity to safety, public order and protection provided by the military. In other words, in this illustrative case individual freedom is face to face with collective freedom in the following way:

COMPETING RIGHTS:
P1: The right to freedom of thought of everyone to not comply with the mandatory enlistment in the military.
V.
P2: The right of collectivity to safety, public order and protection provided by the military.
P1: *Principle or right potentially affected.*
P2: *Principle or right that aims to justify its protection and enforcement.*

By using the Balancing Law and by analyzing both rights in accordance with the Weight Formula, it is possible to justify the non-satisfaction of the second right (P2: The right of collectivity to safety, public order and protection provided by the military) so as to guarantee the right to freedom of thought, conscience, and religious beliefs of each individual that deems enlisting in the military as incompatible with their conscience, morals, and ideology.

WEIGHT FORMULA:

$$W = \frac{I.W.R}{I.W.R} =$$

$$W = \frac{4.4.1}{4.2.^{(1/2)}} = \frac{16}{4} = 4$$

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Alexy points out that in the Weight Formula, by making multiplications and divisions, three degrees of non-satisfaction may be obtained for each right: light, medium, and severe which are quantified in 1, 2, and 4; in the case of the last element to be determined by the Weight Formula the result may be 1, ½, and ¼. The result of the formula will determine which right or principle must prevail. He further explains that in instances where the result of the formula is greater than 1, the P1 (Principle or right 1) takes precedence over P2 (Principle or right 2). In the case of our example, the result we obtained is 4 (four) which means that *the right to freedom of thought of everyone to not comply with the mandatory enlistment in the military* takes precedence over *the right of collectivity to safety, public order and protection provided by the military*.[42]

The greater good in this case consists in protecting individual freedom over collective freedom for every time such a fundamental freedom as the freedom of thought, to make decisions and to believe in what one wishes is suppressed. If an essential foundation of a society that is truly free is lost, as a result, the society, as a collectivity, would inevitably be subjected to and affected by the violation of this individual right.

The core idea of the formula, according to the author, is that the competing rights in balancing are commands to be optimized in accordance with the factual reality. In our example, *the right of collectivity to safety, public order and protection provided by the military* is the command that must be optimized and made more flexible to fulfill the individual right which is fundamental and cannot be infringed regardless of the conditions, emergencies, or imminent need of a military of a country.

The respect for the individual freedoms is what makes a society a democratic and authentically free entity capable of guaranteeing the enjoyment of human rights. To conceive a "democratic society without a minimum frame of freedoms that work as a foundation triggers the blurring, to a great extent, of any defense of the civilization and the modernity, for freedom and democracy are a reference point for any individual and society in the constitution and expression of their most elementary actions."[43]

In this sense:

> Freedom must be exercised with the purpose of fully developing all human capacities and any attempt to manipulate its purpose results in its refusal. However, in different instances, it has been concluded that the oppression of freedom under a

[42] The *Weight Formula* is used at present time within the jurisdictional field; it is used in constitutional courts across different countries in the world to solve problems regarding Human Rights that are antinomies. In the case of Mexico, the Electoral Tribunal of the Judicial Branch of the Federation has used the *Weight Formula* in cases where political individual human rights and collective rights are concerned.

[43] *See* Víctor Alarcón Olguín, *Libertad y Democracia*, Cuadernos de Divulgación de la Cultura Democrática 18. https://portalanterior.ine.mx/documentos/DECEYEC/libertad_y_democracia.htm#relacion Alarcón Olguín, *supra* note 25.

> generalizing idea of democracy (as it has occurred with communism and fascism) results in the annulment not only of the first but also of the second. [44]

Although it is true, the Weight Formula cannot give us a generic answer. In this example we are interested in reflecting on the importance of individual rights. Freedom gives the power of raising one's voice without fear, fully exercising our human rights. Undoubtedly, individual freedom is a fundamental right to build a democratic and inclusive society which also implies reflecting on the legal mechanisms (like the Balancing Law) that allow to efficiently give priority to individual rights in collective rights contexts.

Finally, regarding the illustrative case referred, we must understand individual freedom as an articulating principle of contemporary democracies.[45] If this principle is violated, the essence of a free and autonomous society is broken. A society must be capable of protecting its individuals while building a heterogeneous and diverse collectivity that respects differences (a collectivity that seeks the common good while respecting the freedom and personal fulfillment of the individual). This is the great challenge of applying the human right to freedom in the social reality.

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[44] *Id.*

[45] *See* Robert A. Dahl, On Democracy, *passim* (Yale University Press, 2008).

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The *amparo directo* in the 21st century. From subjective to objective means of constitutional control

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Abstract: This article examines the evolution of the *Amparo Directo* (AD) in Mexico during the 21st century (2001-2023). I hold that AD has faced not just one, but two problems in recent years: the *classic problem*, which refers to its widespread use as a means of control of legality and the *contemporary problem*, which refers to the shortcomings of the Collegiate Courts' objective role in terms of control of constitutionality and the production of binding precedents. My argument is developed at two levels: a) I analyze the institutional design through an analysis of the constitutional reform process, and b) I explore the performance of federal Collegiate Courts through a study of their work in line with their power to solve cases and establish judicial interpretive criteria.
Keywords: collegiate courts; judicial reform; amparo directo; judicial behavior.

Resumen: Este artículo observa el desarrollo del juicio de Amparo Directo [AD] en México durante el siglo XXI (2001-2023). Sostengo que el AD enfrenta actualmente no solo uno sino dos problemas. El *problema clásico*, que se refiere a su uso generalizado como medio de control de la legalidad y el problema contemporáneo, que se refiere al déficit en los medios de control de la constitucionalidad en su dimensión objetiva por parte de los Tribunales Colegiados (producción de precedentes vinculantes). Para ello, la metodología aborda dos niveles: a) el diseño institucional a través del análisis del proceso de reforma constitucional, y; b) la actuación de los Tribunales Colegiados federales, a través del estudio del trabajo realizado en la materia, de acuerdo con sus

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atribuciones para resolver casos y fijar criterios.
Palabras clave: amparo directo; tribunales colegiados de circuito; reforma judicial; comportamiento judicial.

Summary: I. *Introduction*. II. *Institutional design*. III. *Empirical analysis of the classic problem*. IV. *Empirical analysis of the contemporary problem*. V. *Conclusions*. VI. *References*.

I. Introduction

What are the contemporary uses of the *Amparo Directo* [AD] in Mexico? The objective of this article is to answer this question, bearing in mind the constitutional reforms of 1999, 2011 and 2021. People often comment on the problems with AD in Mexico, although it is likely that no other procedural figure in the Mexican judicial system has generated as much interest as this one. Over the last one hundred and fifty years, it has attracted the attention of renown Mexican legal scholars, who have generated authoritative analyses of the topic.[2]

Among the different processes included under the concept of *amparo*,[3] AD is the one that raises the most controversy and polarizes opinions in the legal sphere (judges, lawyers, and academics). Although it was originally meant to serve as an exceptional and extraordinary means of constitutional control of final judgments issued by the *Suprema Corte de Justicia de la Nación* (hereinafter *Supreme Court*), its main function has become a means to control legality in the Mexican judicial system, in a similar way to wheich cassation appeals operate in other jurisdictions around the world. To date, the *Tribunales Colegiados de Circuito* (hereinafter *Collegiate Courts*) decide around 180,000 ADs each year, deciding in favor of the claimant in about one third of them and hereby granting them federal protection. The Supreme Court, in turn, hears dozens of AD cases and passes judgment on hundreds of ADs "under review" [ADRs] every year.

For some authors, AD exists to guarantee effective judicial protection anywhere within the Mexican judicial system, which is commonly perceived as inefficient, partial, and corrupt.[4] For others, AD is an institution that does not allow local courts to grow to their full capacity as it leaves it to the Collegiate Courts the possibility to review the legality of any final decision issued by any

[2] Emilio Rabasa, "El artículo 14. Estudio constitucional", *El Progreso latino* (1906); Héctor Fix-Zamudio, Estudio de la defensa de la Constitución en el ordenamiento mexicano (Porrúa, 2d ed. 2011); José Barragán, Proceso de discusión de la Ley de Amparo de 1869 (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1987); Julio Bustillos, El amparo directo en México. Evolución y realidad actual (Porrúa, 2008); Manuel González-Oropeza, Constitución y derechos humanos. Orígenes del control jurisdiccional (Porrúa, 2009); Arturo Zaldivar, Hacia una nueva ley de amparo (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2002).

[3] [Arts. 103 & 107, *Constitución Política de los Estados Unidos Mexicanos*].

[4] Héctor Fix-Fierro *et al.*, Encuesta Nacional de Justicia (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2015).

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jurisdictional authority, causing work overloads, as well as an excessive concentration of human and material resources in the federal judiciary.[5] Some also claim that AD promotes an elitist justice that is "neither prompt nor expeditious" and difficult to access for the majority of the population.[6]

Research done between 2001 and 2023 has brought this discussion into the 21st century, especially noting the changes and resistance arising from the constitutional reform processes of 1999,[7] 2011[8] and 2021.[9] Likewise, the behavior of the Collegiate Courts has been analyzed from the perspectives of court rulings and the creation of binding precedents during those years. I argue that AD currently faces two different problems. On the one hand, the "classic problem" refers to its widespread overuse as a means of control of legality with severe negative consequences on judicial federalism. On the other hand, the "contemporary problem" refers to the shortcomings of the Collegiate Courts' objective role in terms of control of constitutionality andthe production of binding precedents.

This research examines how AD has developed in Mexico during the 21st century (2001-2023), taking the classic problem and the contemporary problem as its main variables. To do so, the behavior of the Mexican federal judiciary towards AD is examined on two levels: a) institutional design by analyzing the constitutional reform process, and b) Collegiate Court performance by studying the AD-related work these courts carry out, based on their powers to solve cases and establish criteria.

This double dimension —normative and performative— is necessary so as not to address the problem solely from a legalistic perspective. Studying regulatory change and performance is a classic strategy used by institutionalist studies to break away from research that only observes norms, as well as from those that observe reality without any normative references.[10] In this research, both the normative and empirical aspects are rigorously dealt with.

The time and place of the study are well defined. The location is limited to where the federal judiciary has jurisdiction while the time period covers the 21st century, specifically regarding what happened between 2001 and 2023 as recorded in the annual reports presented by the President of the Supreme Court,

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[5] José Barragán, Proceso de discusión de la Ley de Amparo de 1869 (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1987).

[6] Alberto Abad Suárez-Ávila, *El juicio de amparo y la reforma al sistema de justicia en México* (1987-2018), 43 Cuestiones Constitucionales, 433-461 (2020).

[7] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], June 11th, 1999 (Mex.).

[8] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], June 10th, 2011 (Mex.).

[9] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], March 11th, 2021 (Mex.).

[10] Howard Gillman & Cornell W. Clayton, The Supreme Court in American Politics: New Institutionalist Interpretations (Kansas University Press, 1999).

who is also the president of *Consejo de la Judicatura Federal.* This period is sometimes extended a few years earlier to include the reforms of 1987[11] and 1994.[12] In the analysis of Collegiate Court performance regarding ADs, three different periods of interpretation are contained in the *Semanario Judicial de la Federación*, the main source of data for this article: the last years of the *Novena Época* (2001-2011) that began in 1995; the entirety of the *Décima Época* (2011-2021) and the first three years of the *Undécima Época* (2021-2023).

With regard to normative analysis, the main hypothesis is that legislative powers have disregarded the need to advocate for a change in the *status quo*; that is, none of the reforms presented in the period have been aimed at modifying or specifically limiting the extensive use of AD as a means of legality control. Despite this, a sub-hypothesis enhances the above, suggesting that the constitutional changes in the ordinary procedural justice system, mainly in the accusatory and oral aspects of criminal proceedings, as well as the inclusion of *ex officio* constitutionality/conventionality control, have modified the institutional design of AD from the outside.

The main hypothesis of the performance analysis is that the judicial branch of the 21st century has continued to address the classic problem in the same way it has since 1951: by creating as many Collegiate Courts as needed to attend to the demand generated by AD. This hypothesis is complemented by another sub-hypothesis claiming that the changes in the procedural systems of ordinary justice indirectly define a more extensive or more restricted use of AD.

There are also hypotheses on the contemporary problem of using AD as a means of objective constitutionality control. At the level of institutional design, one hypothesis is that the judicial reform processes of the early 21st century sought to strengthen the role of the Supreme Court as a constitutional court that exercises objective constitutionality control through its highly qualified and discretionary powers, as well as through an integrated case law system, that includes the Collegiate Courts.

With regard to judicial performance, I hold that despite a structural design that creates incentives for the Supreme Court and Collegiate Courts to assume objective control of constitutionality, they have difficulties in doing so because they continue the historical trajectories of formal and informal institutions (institutional rigor and path dependence) that draw them towards subjective constitutional control. Among these trends, we find an attitude of restricting active interpretation, as well as the rules for establishing binding precedents through consistent and consecutive Collegiate Court rulings. Moreover, the traditional ways lawyers file for ADs prevent an extended use of objective control of constitutionality.

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[11] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], August 10th, 1987 (Mex.).

[12] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], December 31, 1994 (Mex.).

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II. Institutional design

At the birth of Mexico as an independent nation, both American constitutionalism and modern developments in the civil law tradition bore a strong influence on its constitutional design. The figure of the Mexican *amparo* emerges in the *Acta de Reformas* of 1847 as a symbiosis of both traditions. From North American constitutionalism, we take the idea that the courts are the highest guarantors protecting the rights of people as established in the Constitution. From the Roman-canonical tradition, we take the idea that the true interpreter of the Constitution is the will of the people represented by its political powers; hence the judicial scope must be checked. The intersection between both traditions gave way to a one-of-a-kind legal figure: the Mexican *amparo*, which was created to protect the plaintiff's human rights (or 'individual guarantees' as they were known at the time). Granted by the federal judiciary, it limited effects to a specific range of protection with *inter-partes* effects, without impinging on the powers of the legislature.[13]

The *Acta de Reformas* of 1847 was specific on the issue of preventing broad control of legislative and administrative work from being carried out through an *amparo*, and so restricted its protection to each specific case. In this sense, the *amparo* was limited and its effects do not extend to the entire legal system. At the same time, care is taken to avoid any general declaration of unconstitutionality of a given legal provision. The *amparo* was originally restricted to protecting a plaintiff's individual rights against violations that might come from a public entity. In this context, protection is centered on the plaintiff. It emerged as a type of subjective control to protect the person who files an *amparo* against legislatures and administrations that have violated the person's rights.[14]

The drafting of the *Constitution of 1857*, where the scope of the *amparo* was expanded to protect against any authority and not just legislative and administrative ones, sparked a lively discussion on the origin of the *amparo* against judicial activity. The main issues debated were whether judges can violate individual guarantees and whether the *amparo* is the appropriate means of defense in such cases. This is no trifling matter since jurisdictional control of constitutionality is built on the assumption of the reliability of judges as rational beings trained to defend the constitution and legal order. Meanwhile, legislators and judges themselves tend to be reluctant to extend the influence of the *amparo* to include the judicial sphere, unless the conditions of the system itself and relevant litigation make it impossible to refuse.[15]

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[13] Oscar Cruz-Barney, *Introducción histórica. Artículo 103*, in Derechos del Pueblo Mexicano; México a través de sus Constituciones (Suprema Corte de Justicia de la Nación & Porrúa, Vol. X Exégesis de los artículos 96° al 115°) (2016).

[14] Julio Bustillos, El amparo directo en México, Evolución y realidad actual (Porrúa, 2008).

[15] Manuel González-Oropeza, Constitución y derechos humanos. Orígenes del control jurisdiccional (Porrúa, 2009).

Throughout its history of being used as a procedural tool, the *amparo* shows two fundamental characteristics: its flexibility to adapt to conditions of litigation in the Mexican justice system and its use as a remedy for failings in the judicial system. Eventually, the *amparo* was implemented as a means of protection against human rights violations in ordinary justice. In due course, it even came to absorb the figure of cassation, thus becoming a critical instrument for controlling the legality of judicial activity in the country.[16]

The adaptability of the *amparo* as a tool for litigation set forth in the *Constitution of 1917* allows it not only to be taken up by the reform power, but to evolve into what is now known as *Amparo Directo [AD]* with procedural rules of its own. Prior to that, protection against final resolutions was processed just like any other violation: first bringing the case before a District Judge and then filing an appeal before the Supreme Court. The Constitution of 1917 and the implementing legislation of 1919 state that judicial protection can be processed in one of two ways: any violation committed in the ruling or during the process that has an impact on the final decision is addressed by filing an AD before the Supreme Court, while any other type of procedural violation is pursued according to the generic *amparo* procedure. AD as a procedural instrument for final judgments with rules of its own appears in the Constitution of 1917.

The main problem since its adoption is that AD has been excessively used as a means of legality control. While it was originally designed for constitutionality control, is it right for federal courts to use it for mere legality control? Mexican scholars agree that using it for the latter is inacceptable and have shown that this has generated significant distortion in the justice system, which has led to serious consequences for the development and autonomy of local courts.[17]

Although the line between the concepts of constitutionality and legality is blurred, in general terms we can find at least three criteria to draw a line between these concepts: a) the type of constitutional provision invoked: legality control reviews rulings in light of the right to due process as recognized in Articles 14 and 16 of the Constitution, while constitutionality control is employed for direct violations of the Constitution, b) the validity parameter used to review the ruling itself: if the parameter corresponds to a secondary law, it falls under legality, but if it directly corresponds to the Constitution, it is control of constitutionality, and; c) the type of violation in question: if it is a violation of procedural formalities or due to the inaccurate application of the law, it is legality control, but if it is a violation of other types of rights, it is about constitutionality, regardless of the source.[18]

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[16] Héctor Fix-Zamudio, *Presente y futuro de la casación civil a través del juicio de amparo mexicano, in* Memoria de El Colegio Nacional (El Colegio Nacional, 1979).

[17] Julio Bustillos, El amparo directo en México, Evolución y realidad actual (Porrúa, 2008).

[18] Roberto Niembro-Ortega, *El interés excepcional en materia constitucional o de derechos humanos para la procedencia del recurso de revisión en el amparo directo*, 1 Boletín Jurídico Práctico 107-130 (2023).

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In the civil law tradition, violations to the principle of due process are usually solved through an appeal to the same court where the case is processed. The Mexican system attempted to implement a justice system model with cassation proceedings in the late 19th century. However, the flexibility of using the *amparo* trial for broader protection led to its replacement. This consolidation of the *amparo* trial has caused problems on at least two levels: its interference with the principle of judicial federalism and the excessive workload in the Federal Judiciary. To a greater or lesser degree, these problems have affected the concept of AD since the late 19th century and been the greatest encumbrance for constitutional reform in the 20th century.

The problem AD poses to judicial federalism is seen as an infiltration of federal judicial powers into local courts. In the *Constitution of 1824*, concurrent jurisdiction was believed to address problems of justice based on each one's own sphere. Every level of government was independent of the other as the Constitution of 1824 established that any matter that began at the local level would end at that same level. After the centralist period, the *Acta de Reformas of 1847* and the *Constitution of 1857* touched once more upon the principle of concurrent jurisdiction, which would again be upheld in the *Constitution of 1917*. Meanwhile, the protection known as *amparo* would correspond to an extraordinary constitutional jurisdiction. Any participation in addressing problems arising from ordinary jurisdiction, regardless of it being federal or local, would be limited to human rights violations specified in the Constitution.

Federal judicial jurisdiction through the *amparo* should not be the norm, but rather an exception to the constitutional jurisdiction in place to guarantee the protection of human rights. The problem of intruding federal powers arises when this extraordinary instrument provides regular protection of legality, moving away from its original intention of being used as an exceptional constitutional control and becomes a means of ordinary legality control. The moment in which it moves into the sphere of the ordinary local jurisdiction is not when it serves as an extraordinary protector of constitutionality, with all the power to do so according to the constitution, but in its role as a regular protector of the legality.

In this sense, the federal judiciary is believed to insert itself into local jurisdiction, replacing it to control legality. The consequences it has on the justice system are very harmful, condemning local judicial powers to eternal adolescence by which they cannot rectify their own problems of legality, and much less establish their own theories and interpretations. The most harmful outcome of this situation is that the judicial powers have not reached their maturity as a third power in the states.

From another perspective, the cassation protection model through AD has overwhelmed the federal judiciary workload, thus limiting its work in controlling constitutionality. The job of controlling the legality of all the trials in the country has resulted in an overload of federal cases that has only been partially resolved over the years. The constitutional reforms to the federal judiciary in

1951,[19] 1967[20] and 1979[21] were aimed at mitigating the effects of this jurisdiction through the creation of the first Collegiate Courts in 1951 to assist the Supreme Court in its labors, and later to establish a regime of concurrent powers shared between the Supreme Court and the Collegiate Courts as set in the reforms of 1967 and 1979.

The surplus of cassation cases has an extremely harmful side effect on the work of federal courts: it distances itself from constitutionality control, which should be its priority. The AD backlog has limited the Federal Judiciary's institutional possibilities to assume constitutionality control. In 1951, a trend began to leave constitutional control under the exclusive jurisdiction of the Supreme Court by creating an AD review recourse [ADR], which would consolidate itself in 1987 when the Supreme Court withdrew from the original AD jurisdiction, retaining only its power to choose to take on cases of "attraction".[22]

In this situation, constitutional control was gradually concentrated in the Supreme Court while legality control was housed with Collegiate Courts. This division ended up distancing Collegiate Courts from constitutional control and, for a significant period, it actually meant separating AD as a means of protecting constitutionality. Since 1987, the guiding rationale of the constitutional reform has been to build a Supreme Court with the traits of a Constitutional Court that is consistent with the democratization and modernization processes of globalized societies in the late 20th century. The biggest problem for the Supreme Court today is not the saturation of issues regarding legality, which was dealt with in the past century by creating infrastructure in the form of Collegiate Courts, but the lack of consistent work in the control of constitutionality, mainly in terms of objectiveness.

In contemporary theory, constitutionality control is two-fold: it can be subjective or objective. Subjective constitutional control refers to deciding on constitutional issues on a case-by-case basis and primarily seeks the protection of the parties. Objective constitutional control has a more ambitious purpose since it goes beyond specific cases and aims to correct systematic violations in the legal system. For many reasons ranging from judicial backwardness to political context and legal culture in the country, the Supreme Court has fundamentally fulfilled the legality aspects of its work through AD over other jurisdictions. Despite having the authority to control constitutionality since its foundation, its internal dynamics have favored legality over constitutional issues. By the end of the 20th century, the reform process sought to address this issue by strengthen-

[19] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], February 19, 1951 (Mex.).

[20] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], October 25, 1967 (Mex.).

[21] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], August 7, 1979 (Mex.).

[22] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, Diario Oficial de la Federación [D.O.], August 10, 1987 (Mex.).

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ing the role of the Supreme Court as a constitutional court, but not without errors in its design that would negatively affect the protection system.

Delegating the load of AD protection to the Collegiate Courts was done through an unfortunate formula that assigned matters of legality to the Collegiate Courts while reserving constitutionality issues for the Supreme Court, granting it the authority to take on cases of "interest and significance" in the 1987 reform, as well as the above-mentioned ADR. Those drafting the reform considered that concentrating constitutional issues in the hands of the Supreme Court of Justice was the most appropriate formula to strengthen its role as a Constitutional Court, moving away from a semi-concentrated model to a concentrated model of human rights protection. Between 1951 and 1999, ADR followed a model of subjective constitutionality control by setting the requirement of having a constitutional issue in order for it to proceed.

Not only Mexican federal courts, but also courts around the world that use *amparo*, have generally tended to give greater weight to the objective function over the subjective one, which in turn, rests more strongly on ordinary jurisdiction. Thus, in Spain for example, a 2007 reform established a new criterion of admissibility for *amparo* proceedings so that the Spanish Constitutional Court could only center on dealing with cases of "transcendental interest".[23] In Germany, strict requirements were also established to make the *amparo* a truly exceptional form of constitutional control that brought it closer to the "objective" than the "subjective" function.[24]

In Mexico, the Supreme Court was given tools for objective constitutionality control with the "power of attraction" granted in 1987, and the criterion of origin of "importance and significance" as part of ADR, which was added in 1999. The SCJN tools gained through AD were limited by case law by reiteration, which requires that the Supreme Court uphold the same interpretation of a decision for five consecutive times without any ruling to the contrary. This rule hampered the possibility of agile and efficient use of interpretive tasks. In fact, the Supreme Court struggled to build up its objective constitutional control role. Given the absence of subjective constitutional control, rather than carrying out objective constitutional control, the Supreme Court used its position at the zenith of the Mexican legal system to carry out a limited "selective" control, underusing its "power of attraction" and modifying the essence of the recourse of review to ruling on cases pertaining to important actors over criteria of interest and significance.

It was not until the constitutional reform of 2011 that the Mexican justice system rectified this situation, granting all courts in the country the power to exercise subjective constitutional control to protect human rights. The absence of such protection at a judicial level before then undoubtedly contributed to

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[23] Pablo Pérez Tremps, El recurso de amparo (Tirant Lo Blanch, 2d ed. 2015).

[24] Gertrude Lübbe-Wolff, ¿Cómo funciona el Tribunal Constitucional Federal? (Palestra Editores, 2019).

deepening the human rights crisis the country has faced in recent decades. 1987 to 2011 was a critical period in human rights protection at both objective and subjective levels due to deficiencies in institutional design.

For many authors, the *amparo* reform was one of the great topics missing of the constitutional reform processes between 1987 and 2011.[25] Despite expectations for a substantial modification after a powerful call for a new *Amparo Act* by Genaro Góngora Pimentel in 1999[26] and the 2006 *Consulta Nacional* organized by the Supreme Court, the reform process did not move in that direction.[27] Legislators failed to promote significant changes in matters of protection, thus contributing to the human rights crisis that is still experienced today.

The long-awaited constitutional reform to the *amparo* did not take place until 2011, along with a reform regarding human rights. Some of the most important changes to AD were the introduction of new limits on the expiration of a term for criminal proceedings of up to eight years after the final decision. Adhesive litigation was created to prevent different trials from adhering to the same resolution by simply adding the alleged violations of the parties in the original trial to the final decision.[28] Despite the reform being well-received, it is practically an agreement among its drafters that although the reform has brought significant benefits to indirect *amparo* trials, it did not represent an important change to the AD process.[29] The most anticipated changes, such as the limit on the criteria of origin or the creation of a local means of cassation, did not materialize.

Despite this, it is only partially true that judicial reform has had little impact on AD in the 21st century. Although procedural changes were limited, AD significantly transformed the justice system stemming not only from changes in its own institutions, but also through the reforms of other procedural means in the ordinary justice system for human rights protection. In another article with an in-depth analysis of the AD reform in the broader process of judicial reform, I argue that:

> It is true that the *amparo* trial reform of 2011 came at least ten years too late after its bases had been well founded in academic and comparative discussion. That period was enough to make AD lose its dominant role in the institutional design of the justice system. This reform did not have the ex-

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[25] Ana Laura Magaloni, & Arturo Zaldívar, *El ciudadano olvidado*, 28 Nexos XXVIII, 342 (2006).

[26] Arturo Zaldivar, Hacia una nueva ley de amparo (Universidad Nacional Autónoma de México, 2002).

[27] Jose A. Caballero-Juarez et al, Libro Blanco de la reforma judicial en México (Suprema Corte de Justicia de la Nación, 2006).

[28] Eduardo Ferrer Mac-Gregor, & Ruben Sánchez-Gil, El nuevo juicio de amparo. Guía de la reforma constitucional y la nueva Ley de Amparo (Porrúa, 9d ed. 2016).

[29] Francisca Pou-Giménez, *El nuevo amparo mexicano y la protección de los derechos: ¿ni tan nuevo ni tan protector?*, Anuario de Derechos Humanos, 10 (2014).

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> pected importance for a long time. For example, the human rights reform adopted a few days later shook up the Mexican justice system with greater force. The most important reform that the *amparo* underwent is seen in the changes made to the Mexican justice system, rather than to the modification of its institutional design. The appropriate way to view judicial protection today is as a procedure whose main function is to organize the assorted procedural options available in the justice system from its special place as a means of formal constitutionality control. [30]

AD in the 21st century has undergone an important transformation in its function in the justice system, mainly due to the changes made to the justice system itself through ordinary procedural means. The intense process of judicial reform that the country has experienced in recent years has modified the way justice is understood in Mexico and, consequently, the importance of the AD. Without a far-reaching AD reform, changes in the justice system simply show variations in the historical use of this means of control.

Recent judicial reform in Mexico can be divided into two stages: the first one or the *reform to the justice system´s upper echelons*, which spanned from 1987 to 2000, was oriented at building up the institutional autonomy of the Judiciary to contribute to the country's democratic transition, as well as to provide a means of resolving conflicts for relevant political actors. The second stage, or the *reform to ordinary justice*, went from 2000 to 2018 and focused on providing procedural instruments for ordinary justice.

Among the most notable modifications in the first stage was to strengthen the role of the Supreme Court as a Constitutional Court as mentioned above, as well as to transform its structure, and its way of working. Of utmost relevance was the creation of the *Consejo de la Judicatura*, the establishment of a civil service career within the judiciary or "*Carrera judicial*" and the creation of the Electoral Tribunal or "*Tribunal Electoral*". The reform of Constitutional Article 105 stands out as it gave the Court the power to issue declarations of unconstitutionality through *acción de inconstitucionalidad* as a new means of constitutionality control and expanded active legitimation for municipalities in cases of constitutional controversies (Fix-Fierro, 2020: 233-316).

The second stage of the judicial reform, which I call a *reform to ordinary justice*, adds different constitutional amendments that contributed to modifying the scope of AD. Among the most important are the criminal procedure reform and alternative dispute resolution of 2008; the human rights reform of 2011; and the labor reform derived from *Diálogos de la Justicia Cotidiana* process in 2017.[31] It is important to include other legal reforms that did not reach a

[30] Alberto Abad Suarez A., *El amparo judicial y la reforma al sistema de justicia en México*, 43 Cuest. Const., jul./dic. (2020).

[31] Javier Martin Reyes, Reforma En Materia De Justicia Cotidiana (Fondo de Cultura Económica, 2018).

constitutional level but have also transformed the justice system, such as the reform regarding oral trails for trade issues, which started in 2011.

One of the most illustrative examples is found in the change to an oral accusatory criminal procedure system implemented between 2008 and 2016. Among other aspects, the figure of *juez de control* was introduced as the real judge of due process control in charge of guaranteeing the rights of the parties during the investigation and intermediate stages. The *juez de control* allows Collegiate Courts to declare that previous stages in AD have been exhausted. The *juez de control* has the advantage of being able to monitor due process immediately and in person much more efficiently than the Collegiate Court. Other aspects such as strengthening the figure of the public defender is also important to controlling the legality of the processes.

But perhaps the reform with the greatest impact on the role of AD in the justice system is found in the inclusion of *ex officio* diffuse conventionality control, the newest form of constitutionality control recognized by the Mexican system, which grants this power to all judges in the country. Before 2011, under the concentrated control model of *amparo* only the federal judiciary could perform constitutionality control, and in the most restrictive interpretations only the Supreme Court could do so. Since the constitutional reform of June 10, 2011, it is the obligation of all the country's authorities, notably judges, to carry out diffuse *ex officio* constitutionality control. The greatest advantage this innovation offers is to settle constitutional conflicts at the earliest possible procedural moment without the need of an *ad hoc* procedure.

In 2021, a new cycle of reforms emerged to once again review judicial structures in a way that has not been seen since the 1990s. The epistemology behind the process has yet to be studied, but its driving force has been the fight against corruption and nepotism and in favor of gender equality and the promotion of human rights.[32] This reform has focused on creating a new role for the *constitutional judge*, by including the auxiliary positions (clerks and officials) in the civil service and establishing a Federal Judiciary Education School (*Escuela Federal de Formación Judicial)* at a constitutional level. The reform also modifies the rules for creating judicial precedents on two levels. On the one hand, it establishes *Plenos Regionales* to replace the *Plenos de Circuito* of the 2011 reform while on the other hand establishes the new rules of case law by precedent in the Supreme Court.

The significance of the reform regarding case law based on precedents is enormous since the change grants the Supreme Court an institutional context of much greater operability to address constitutionality control in its objective dimension. Throughout history, the greatest operational limit was the rule of reiteration to develop its case law. The need for five consecutive cases ruled in

[32] Jose A. Caballero-Juárez, La reforma judicial de 2021. ¿Hacia dónde va la justicia? (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2021).

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the same direction with none against impeded the development of useful case law, preventing it from providing the justice system with relevant criteria.[33]

The new precedent model also allows the Supreme Court greater flexibility in selecting the cases to be handled. For a long time, it was a contradiction that attention in AD and ADR was limited to issues of "interest and significance," but the interpretation of these matters still depended on the reiteration of five consecutive rulings. This of course diminished the strength of the objective dimension of its control. Many relevant criteria remained at the level of isolated opinions because the rule of case law by reiteration forced the Supreme Court to "fish" for cases in Collegiates Courts or to wait for sufficient ADR to make the criterion mandatory.

With the new precedent model, the criterion of reiteration is no longer needed to establish mandatory precedents since a single decision is sufficient to generate a precedent. In addition to the change in the formal rule, precedents substantially modify the way case law is carried out. The need for formality of the precedent is maintained without the complete ruling being considered a precedent. ADR adds the prohibition of admitting any appeal against the order dismissing the review. This reform was important because since 2011 it has significantly increased the number of ADR filed before the Supreme Court, as well as the number of appeals its rejection causes, taking time and relevant resources away from the Supreme Court.

III. Empirical Analysis of the Classic Problem

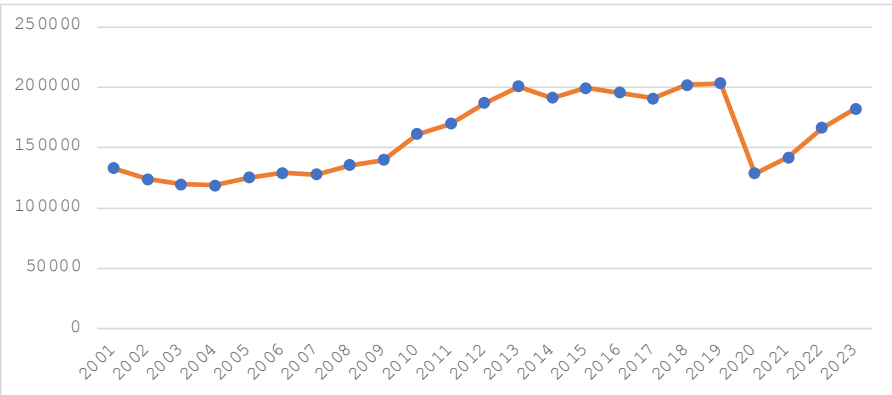
This section addresses the subjective control carried out by the Collegiate Courts through AD from 2001 to 2023. I do not differentiate between control of constitutionality, conventionality or legality because this would imply carrying out a qualitative analysis of the cases which would go beyond the scope of this article. Despite this, we can conclude that the vast majority of AD refer to issues of mere legality, based on interviews carried out with federal judges. We will focus on the trends of permanence-change in the federal judiciary regarding AD resolutions. The database has been built from the annual reports presented by the corresponding Supreme Court presidents of the timeframe in question.

Figure 1 tracks the number of AD cases the Collegiate Courts dealt with between 2001 and 2023. A steady trend can be seen between 2001 (132,923) and 2007 (127,922) in the number of completed cases, which then increases rapidly between 2008 (135,565) and 2013 (200,998). By 2013, there is already a difference of 51% up from 2001. From 2013, when the new *Amparo Act* came into

[33] Michelle Negrete-Cárdenas, El precedente judicial en la jurisprudencia de la Suprema Corte de Justicia de la Nación. Un estudio crítico con motivo de la reforma judicial 2021(Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2022).

force, to 2019 (203,307), the number of cases stabilized at around 200,000 per year. In 2020 (128,880) there was a significant drop due to the COVID-19 pandemic, with a reduction of 36.64% compared to the previous year. An upward trend begins again in 2021 (141,937), which by 2023 (182,596) has not returned to pre-pandemic levels.

Figure 1.
AD cases resolved annually by Collegiate Circuit Courts (2001-2003)



Source: Created by the author based on the annual reports issued by the Presidency of *Consejo de la Judicatura Federal* 2001-2023.

The numbers show that the age-old problem of judicial backlog is starting to be dealt with. The burden of AD (182,596 cases in 2023) has been managed by an extensive network of Collegiate Courts throughout the country (258 Collegiate Courts at the end of 2023). In 2001, there were 154 Collegiate Courts, but by 2022, this number reached its peak with 253 Collegiate Courts and 19 Auxiliary Courts. In 2023, there are 258 active Collegiate Courts and no Auxiliary Courts. Between 2001 and 2023, 104 new Collegiate Courts were created, which represents a growth of 67.5%. These numbers confirm the tendency of setting up new Collegiate Courts to meet the demand for AD cases in the country, as early as 1951 and this has intensified since 1987.

Research has found data regarding the behavior of the completed cases of AD and its relationship with the creation of new Collegiate Courts. By 2013, the number of AD had stopped growing. In fact, in 2020 with the measures adopted by the federal judiciary during the COVID-19 pandemic, the number of cases dropped significantly (36.64%) compared to the previous year. Although cases have increased between 2021 and 2023, they have not reached pre-pandemic case levels.

The *Consejo de la Judicatura* continues to create Collegiate Courts. It is true that AD is not their only workload, as they also attend very similar numbers of *amparo en revisión*. However, it is still striking how federal jurisdictional bodies

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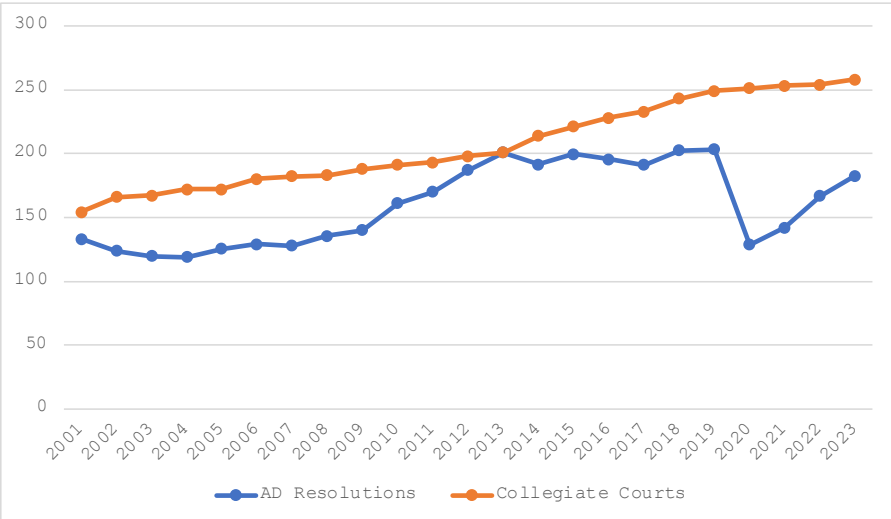
continue to grow. A clear explanation of this would require further research, but it might be a response to dynamics of internal expansion rather than a need for greater jurisdictional coverage.

Figure 2.
Number of AD per year (x 1000) vs. Number of active Collegiate Courts (2001-2023)



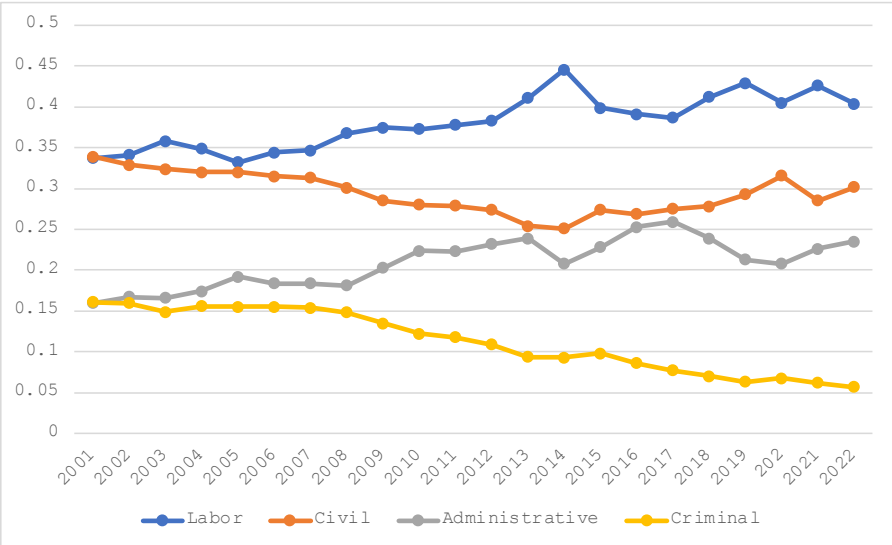
Source: Created by the author based on the annual reports issued by the Presidency of *Consejo de la Judicatura Federal* 2001-2023.

The fact that the number of AD resolved has not grown since 2013 is one of the main findings. Fix-Fierro (2020) theorized possible solutions for the "impossible task" AD posed. In his opinion, the most viable options were to maintain the status quo, limit the origin of judicial protection, improve the efficiency and quality of ordinary courts, create supreme courts or local courts of cassation, improve legal training and practice or radically change the judicial organization model.[34]

Figure 3 shows data on the resolution of AD from the Collegiate Courts by subject-matter, distributed according to the classification used by the judiciary: civil, criminal, labor and administrative matters. Distribution by subject and differentiating different types of conflicts makes it possible to see what is happening in the Mexican judiciary with greater clarity. The behavior of each of the areas was distinctive, a closer examination of this aspect is central to better understand the use of AD in Federal Courts.

[34] Héctor Fix-Fierro, El poder del Poder Judicial y la modernización jurídica en el México contemporáneo (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 2020).

Figure 3.
Percentage of AD cases by subject-matter resolved by Collegiate Courts (TCC) per year (2001-2023)



Source: Created by the author based on the annual reports issued by the Presidency of *Consejo de la Judicatura Federal* 2001-2023.

It is evident how workloads have changed in recent years. There has been significantly more cases related to labor matters, which represented 33.47% of Collegiate Courts cases in 2001 and peaked at 44.68% in 2014. By 2022, it represented 42.62% of the total AD workload. In 2023, labor-related cases represented 41.97% of the entire workload. The main reason for such high numbers in labor matters is because prior to the 2017 constitutional reform, attention to labor issues in the country was dealt with outside of the formal judicial system through conciliation or arbitration at federal and local boards. The possibility of a judicial appeal was not contemplated at a first instance within this old paradigm, which is why AD was used as a second instance reviewing recourse. Although the new professionalized labor judicial system has fully entered into force since 2022, there are many processes still conducted under the rules of the previous system, so it is not yet possible to see the effect it may have on reducing the number of AD trials.

Civil matters represented between 27% and 32% of the cases. Between 2005 and 2014, it decreased from 32.0% to 25.10%, but started increasing again in 2014 to reach 31.68% in 2020. It currently stands at 30.2% in 2023. The main reason for explaining this trend in civil matters is the reform in oral trials for commercial matters in 2011, through which an administrative appeal against this type of procedure was eliminated. This meant that AD serves as a second

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instance since there is no resource to exhaust before this one. Immediate attention should be given to this procedural remedy in order to stop the increase in cases that may appear in coming years, similar to the trend seen in labor matters.

Administrative matters have had a more erratic behavior, with a slightly upward trend. The lowest year was 2008 at 18.12%, while the highest was 2017 with 25.98%, but it currently stands at 23.51%. In the realm of administrative matters, it is difficult to elucidate what is happening. According to María Amparo Hernández-Chong, recent behavior in AD for administrative matters is due to a gradual shift between indirect *amparos* and AD motivated by the sophistication and specialization in contemporary public administration.[35]

The opposite is observed in criminal matters, which showed a steady and significant decrease in cases, going from 15.60% in 2001 to 5.75% in 2023. The decrease began in 2008, with the enactment of the constitutional reform in criminal procedure, and accelerates again in 2016, the year of complete entry into force of the accusatory oral criminal system in the country at both local and federal levels.

The data shown confirms one of the hypotheses. The strongest reason explaining the lower numbers of AD trials comes from a substantial improvement in the accusatory oral criminal process. While cases in all subject matters increased in the period in question, only those for criminal matters decreased considerably. Studying why this happened is key to understanding what to do to considerably reduce the number of AD cases in other fields.

The process to reform the justice system not only in terms of AD, but also with respect to means of protection in ordinary processes in the country, has given way to a decrease in the number of matters that end up in AD. In the case of criminal matters, the eight-year limit for filing AD as established by the 2011 constitutional reform may have been important, but the changes in accusatory oral criminal processes that include various safeguards on the legality and limits on the review of actions and closure of stages, as well as the extensive use of alternative dispute resolution mechanisms and alternative solutions, have been vital.

The incorporation of a *juez de control* in the ordinary process has been of great importance. Having a judge with the power to immediately protect due process rights greatly helps relieve the federal justice system from dealing with issues by a judge present during the different stages of the adversarial process. The participation of the public defender has also been an indispensable element in a new model of control of legality in the criminal process (Fix-Fierro & Suarez-Avila, 2016).

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35 María Amparo Hernández Chong, *Enroque: la gradual inversión entre el amparo indirecto y el directo en materia administrativa y como la inversión reconfiguró el amparo judicial*, in El amparo directo en México. Origen, evolución y desafíos (Instituto de Estudios Constitucionales del Estado de Querétaro, México) (2021).

The fact that many cases are closed through an abbreviated procedure has kept collegiate courts from having to review formalities in many cases. As to other procedures like conditional suspension, plea bargaining has also been established to limit AD cases, as has the precedent established by the SCJN regarding closing stages prior to the oral trial. The decrease in the number of criminal cases filed before Collegiate Courts is the most relevant finding of the analysis. In 2001, criminal protection represented 16.01% of all AD cases; by 2023 it stood at only 5.75% of the total. This fall could be motivated by the successful implementation of the accusatory oral criminal procedural system. This data should be carefully quantified in upcoming years since it may lead to finding a solution to the classic problem of AD, insofar as a successful procedural reform can reduce the number of AD cases brought before Collegiate Courts annually. This would coincide with the hypothesis upheld in this article that the changes in the judicial reform process, not only in matters of protection but especially in the incorporation of ordinary means of protection of legality in criminal matters, would result in reducing the need to resort to AD proceedings.

To date, it is not clear that diffuse *ex-officio* constitutionality control has had a direct impact on reducing AD cases in Mexico. Although the constitutional reform enabling it is more than ten years old, its effects have yet to make themselves known. It is necessary to look further into the relationship between both forms of constitutional control to know the real impact that diffuse control might have, beyond the high expectations its adoption in 2011 may have generated at the time.

IV. Empirical Analysis of the Contemporary Problem

One of the main goals of my research is to analyze not only what has happened with the classical problem, i.e., the broad control of legality that federal courts exercise in ordinary jurisdiction, but also to address the contemporary problem. I have alluded to this problem as the need for federal courts to carry out an objective control of constitutionality and legality by issuing jurisprudential criteria. In other words, I refer to the need for control carried out by Collegiate Courts not only for a specific case, but to establish interpretative theories to solve problems in the ordinary justice system.

Traditionally, little attention has been paid to the role of the Collegiate Courts in the objective dimension because the Supreme Court has been overplayed as the entity that issues precedents in its role as a constitutional court. Despite this, since 1967 the Mexican case law system has established that Collegiate Courts can participate in establishing binding precedents (Saavedra, 2019). With the 2011 reform, the importance of Collegiate Courts in constitutional interpretation has intensified. By enabling all the judges and courts in the country to review constitutionality through *ex officio* diffuse control, the work

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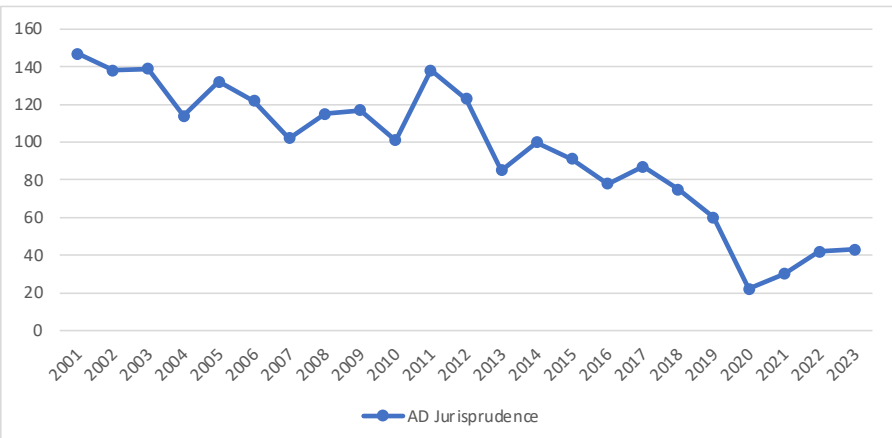
of Collegiate Courts in the constitutional system should move towards a more objective control of constitutionality, focused on establishing more precedents.

The 2011 reform modified the national case law production system distributing it between Collegiate Courts —*Plenos Regionales* (then *Plenos de Circuito*)— and the Supreme Court. The 2021 reform reiterated the importance of the evolution of Collegiate Court case law in institutional design by creating *Plenos de Circuito* to organize the precedents produced in the Federal Judiciary. Data show that despite expectations that the new institutional design for the Collegiate Courts would intensify their control of objective constitutionality, not only did they not increase the issuance of precedents in the period studied, but they even dropped to levels much lower than any forecasted.

The first indicator is the issuance of court opinions. According to Article 224 of the *Amparo Act*, Collegiate Courts can establish case law by reiteration "when they unanimously support the same criterion in five consecutive resolutions without any to the contrary. Matters of fact or law that are not necessary to justify the decision shall not be binding." Article 217 of the *Amparo Act* states that "Case law established by collegiate circuit courts is mandatory for all the jurisdictional authorities of the Federation and the states of its circuit, with the exception of the Supreme Court of Justice of the Nation, the regional plenary court and collegiate circuit courts."

Figure 4 charts the court opinions issued by all the Collegiate Courts from 2001-2023 that originate either totally or partially in AD rulings. The general downward trend has some spikes with greater activity.

Figure 4.
Total Number of Case Law Opinions Issued by Collegiate Courts by Year (2001-2023)

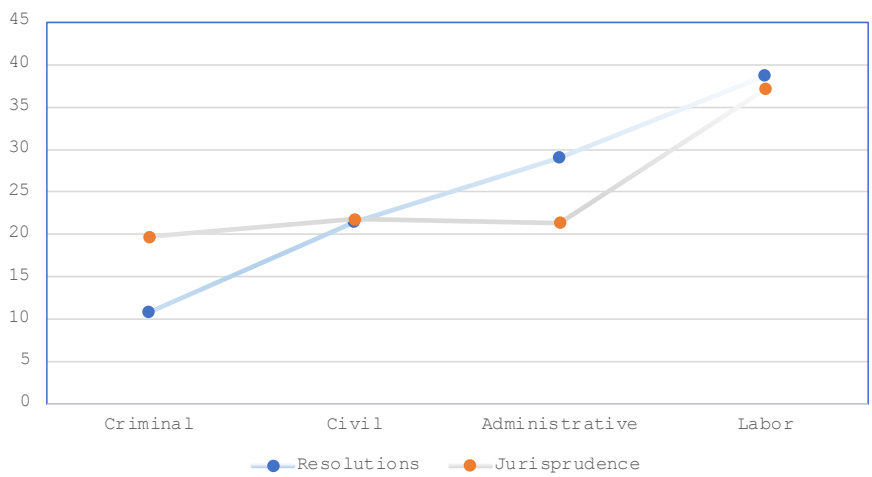


Source: Created by the author based on the annual reports issued by the Presidency of *Consejo de la Judicatura Federal* 2001-2023.

Dividing the number of AD resolutions by the number of case law opinions issued by Collegiate Courts gives us more information. In 2001, one court opinion was issued for every 1,149 AD resolved. In 2011, that number increased, requiring 1,232 AD to issue one court opinion. A decade later the number had practically tripled and by 2023, 3,379 AD were needed. In total, labor matters led to the highest number of precedents issued (547), followed by civil (321), administrative (314) and criminal (290) matters. The classification of the *Semanario Judicial* website also includes "*common matter*" (200) which generally refers to procedural issues. This ordering coincides with matters representing the greatest number of cases for the Federal Judicial Branch, although not in the same proportion.

In Figure 5, two lines are shown. The blue line corresponds to the percentage of resolutions, while the gray line corresponds to the precedents issued, by subject in both cases. A balanced proportion between both lines would show a steady balance while the difference between one indicator and the other shows the different productivity levels between them. A greater burden towards resolutions represents a greater emphasis on subjective control. A greater concentration on court opinions indicates a greater tendency towards objective control.

Figure 5.
Difference Between AD Resolutions Percentage vs. Percentage of Court Opinions Issued in the Period by Subject.



Source: Created by the author based on the annual reports issued by the Presidency of *Consejo de la Judicatura Federal* 2001-2023.

Precedents for criminal cases were issued at a higher percentage than those for everyday cases (a difference of +9.92%). The same happened in civil cases, although the difference was almost imperceptible (+0.36%). In the other two subject matters, the percentage was the opposite, favoring subjective control

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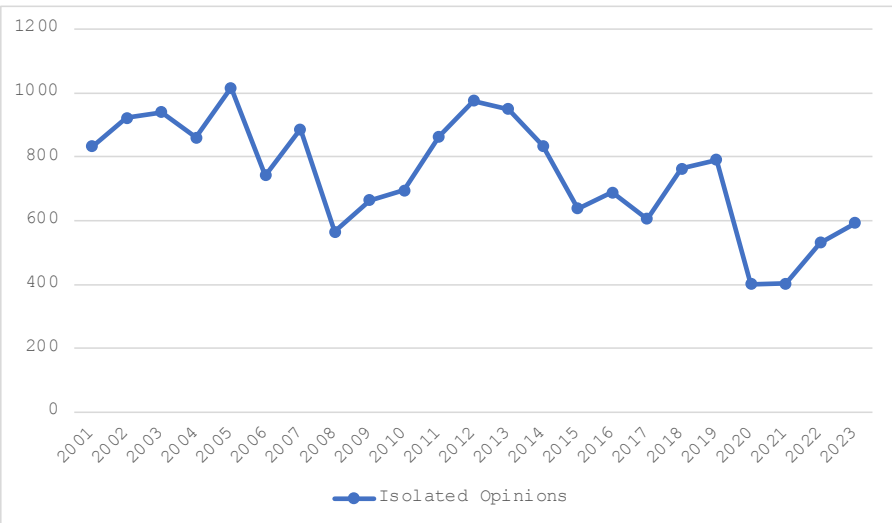
over case law. Administrative matters show the greatest difference (-7.71%) in favor of subjective control while labor issues also lean slightly towards a higher percentage than caselaw (-1.56%).

With regard to objective control carried out by Collegiate Courts, the second variable to analyze is the *tesis aisladas* [isolated opinions] in the period in question (2001-2023). Because collegiate courts can produce case law through the rule of reiteration, the first step is to issue an isolated opinion on a criterion considered important in a specific case. Between 2001 and 2023, Collegiate Court actions in this regard was erratic, going up and down. Between 2011 and 2014, there is a period of high productivity after the 2011 constitutional reform. The most notable thing is a downward trend that starts in 2015 and intensifies in 2020, the year of the COVID-19 pandemic, and then shows a slight recovery. The range of the 800 isolated opinions is an approximate average of the period under study.

Figure 6.
Collegiate Court Isolated Opinions Issued by Subject per Year (2001-2023)

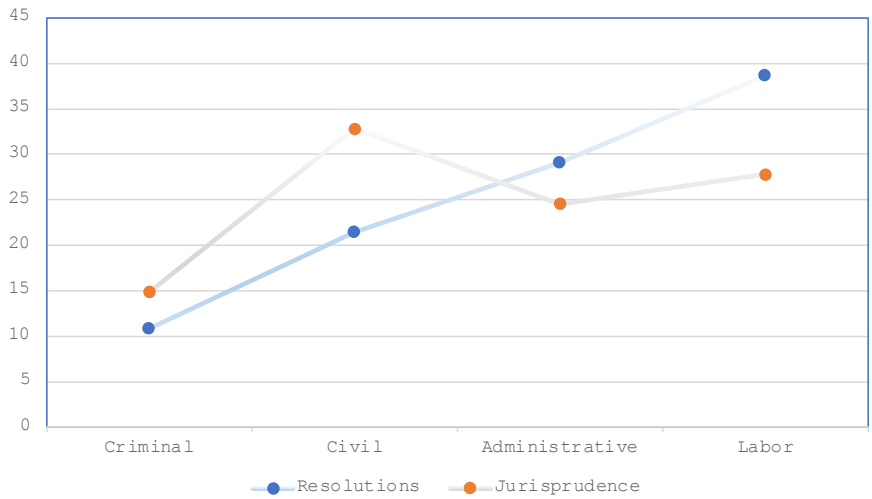


Source: Created by the author based on the annual reports issued by the Presidency of *Consejo de la Judicatura Federal* 2001-2023.

Between 2001 and 2005, more than 800 court opinions were issued each year, reaching a maximum in 2005 (with 1016). In 2006, it fell below the line for the first time (741), recovering in 2007 (886) while 2008 (565), 2009 (664) and 2010 (694) mark a period of lower activity. Then, between 2011 and 2014, each year indicates a higher number of cases than the established range, with two years 2012 (975) and 2013 (949) coming close to a thousand. After 2015, the number of cases no longer reaches 800, remaining within 600 and 700 cas-

es between 2015 (638) and 2019 (791). As of 2020 (401), the year of the pandemic, to 2023 (592), the number does not reach 600.

In Figure 8, the graph shows a difference in criminal matters in favor of objective control of 4.08. Civil matters, however, show the greatest difference in favor of objective control with 11.36%. In the other direction, administrative (-4.5%) and labor matters (-10.94%) show a reduction.



Source: Created by the author based on the annual reports issued by the Presidency of the *Consejo de la Judicatura Federal* 2001-2023.

This indicator shows that high numbers of AD resolutions have no direct impact on issuing precedents. In other words, there is no direct relationship between a broad exercise of subjective control and that of objective control, so they should be considered different activities. This separation is important for judicial policymakers since it makes evident the need for them to be established by their own means.

V. Conclusions

There are several findings that should be highlighted from the behavior observed in AD rulings by Collegiate Courts between 2001 and 2023. Since 2013, the number of cases that reach Collegiate Courts has not increased. The historical trend of a growing number of cases resolved year after year has been kept in check over the last ten years, a situation that is explained by two factors. The first is that AD on criminal matters show a sustained decrease in the number resolved year by year, a tendency attributed to the successful implementation of the accusatory oral procedural system in the country between 2008 and 2016. More research is needed to understand the specifics of how this has occurred.

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The second factor influencing the lower numbers of AD resolved as of 2020 was the COVID-19 pandemic and the changes it generated in accessibility to justice as federal Courts were closed from March 18 to July 31, 2020, with a staggered return to activities. AD temporarily migrated to an online trial service model, which has been implemented progressively. The number of resolved matters has gradually increased between 2021 and 2023 without returning to post-pandemic numbers yet.

Even though the adoption of diffuse constitutionality control through regulatory design in 2011 caused high expectations for lesser use of AD, no statistics were found indicating that it had a significant impact. Although more research is necessary, it can be concluded that the introduction of specific means of constitutionality and conventionality control in the ordinary process, like the *juez de control*, has led to a decrease in the number of AD cases in criminal matters.

The number of Collegiate Courts in this period has increased to meet the demand for AD cases, with close to 200,000 cases per year between 2013 and 2019. One hundred new courts were created in this period, increasing from 154 Collegiate Courts in 2001 to 254 today. The creation of new Collegiate Courts has slowed down in recent years, but there is no clear policy from the central administration regarding the future creation of such entities.

Regarding the use of AD by Collegiate Courts for objective control, the number of binding precedents and *tesis aisladas* [isolated opinions] is low and declining. Criminal matters present the best performance with the greatest number of court opinions with the lowest number of cases. Various hypotheses have been put forward to explain this behavior. In an interview, a federal judge noted that numbers are low because the amount of interpretable material is running out as new laws and procedural reforms are being analyzed. This is difficult to believe given the intensity of the judicial reform processes during the years in question. In my opinion, this behavior is better explained by theories of institutional rigidity.

Within the federal judiciary, there is a deferential attitude towards the Supreme Court as the one in charge of constitutional interpretation, which means that there are no incentives for Collegiate Courts to intensify their work in objective control. There was a great deal of insistence that the Supreme Court become an authentic constitutional court with the 1987 and 1994 reforms. Despite the fact that the Collegiate Courts are considered an important part of building case law in the institutional design, traditional practices in the institution have not allowed it to do this work. The strict mandatory nature of binding precedents issued by the Supreme Court has not allowed Collegiate Courts greater freedom to explore issuing their own criteria.

This study of classic and contemporary problems shows us that discussions on AD in the justice system are more relevant than ever. Although many years have passed since its creation, the challenges it faces today are just as or more complex to protect constitutionality in Mexico. AD must above all be a means of protection that corrects the flaws of a judicial system and the lack of protec-

tion of the human rights of Mexicans in general. The main question is whether it should be done extensively by ruling on tens of thousands of cases per year or if it can be done more strategically by issuing precedents. Of course, the second option is better and has the potential for greater sustainability for the justice system.

To this day, Collegiate Courts should continue to uphold the validity of this way of compensating for flaws in the justice system. But beyond that, they should promote the growth of further means of legal and constitutional protection in a way that is accessible and effective for the population in general in ordinary jurisdiction, by means of strict constitutionality control at the objective level.

Until this happens, Collegiate Courts will continue to shoulder a considerable burden of tens of thousands of AD cases. A radical reform should not be considered until ordinary jurisdiction is substantively improved. Eliminating AD without the support of ordinary jurisdiction with the means to ensure subjective constitutionality and legality would pose an enormous risk. But neither should we question the advances that ordinary jurisdiction has secured in exercising its own control in criminal matters, for example, and fall into the temptation of replacing it with AD again. Collegiate Courts must preserve the prestige that properly functioning ordinary jurisdictions have earned. Finally, *Consejo de la Judicatura* must review its policy on creating new tribunals and even begin to plan the closure of several of them to meet a more limited demand in certain cases, while remaining more ambitious in its interpretive depth.

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Voting power in subregional multilateral development banks in Latin America and the Caribbean-The case of the CAF

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Abstract: Multilateral development banks (MDBs) are international institutions that provide financial assistance for the development of their member states. Decision-making of MDBs is undertaken by the representatives of shareholders by voting. This article uses the absolute Banzhaf power index to measure the voting power of the shareholders of subregional MDBs, which have a voting system with a layered structure of different stock classifications. Differences in the voting power of shareholders holding different classifications of stocks are analyzed. The article also aims to explore the influence of the special voting system in the protection of the voting power in developing countries in the subregional MDBs of Latin America and the Caribbean. This protection benefits the democracy and independence of countries in the region.
Keywords: MDBs; MDBs´ voting systems; decision-making power; democratic principles; Latin American development.

Resumen: Los bancos multilaterales de desarrollo (MDB, por sus siglas en inglés) son instituciones internacionales que ofrecen asistencia financiera para el desarrollo de los Estados miembros. La toma de decisiones de estos es llevada a cabo por los representantes de los accionistas por medio de la votación. Este artículo utiliza el Índice de Poder Banzhaf para medir el poder de voto de los accionistas de los MDB regionales que cuentan con un sistema de votación estructurado en capas de diferentes clasificaciones de acciones, y analiza las diferencias en el poder de voto de los diferentes accionistas. También explora la influencia que el sistema de votación de

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estos bancos tiene en la protección del poder de voto de los países latinoamericanos. Dicha protección es beneficiosa para la democracia y la independencia de los países de la región.
Palabras clave: BMD; sistema de votación en los BMD; poder de decisión; principios democráticos; desarrollo latinoamericano.

I. Introduction

A multilateral development bank (MDB) is a type of international financial institution that encourages development in poor nations. MDB loans to fund projects related to infrastructure, energy, education, environmental sustainability, and other areas that often have little or no interest for traditional banks. The governance mechanism and the decision-making mechanism of MDBs, which could affect the projects undertaken in low-income countries and regions, are influenced by the voting power of bank members. The distribution of the voting rights of member states is relevant to the shares of member countries and presents various scenarios in different kinds of MDBs. Among them, some MDBs in Latin America, such as the Development Bank of Latin America (CAF) and the Central American Bank for Economic Integration (CEBEI), adopt a shareholding structure that is similar to a dual-class equity structure, dividing their capital into different classes and subscribing to different entities, which have different voting rights in the affairs of the banks. Some of the MDBs in Latin America adopt this special equity structure, which is different from that of other global or regional MDBs.

This article aims to analyze the distribution of decision-making power of Latin American MDBs based on their member states´ voting rights, as well as its democratization. It addresses the equity structure and voting rights regulations of various MDBs, and then calculates and compares the power index of this system regarding the voting power of the member states in subregional MDBs based on probability theory.

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II. Definition of multilateral development banks (MDBs)

Multilateral development banks (MDBs) are international institutions chartered by two or more countries, including regional developing countries and donor countries, to provide financial assistance in the form of loans and grants to developing countries for economic and social development.[2] The status of MDBs in international society is unique. MDBs have a dual nature: one is the international financial system, and the other is the international development system. They have their own specific mandate, which is different from that of commercial banks; that is, they can fund complex and important projects in developing countries, including large infrastructure projects and social projects, in which commercial banks may hesitate to invest.[3]

1. Institutional structure of MDBs

The basic structure of MDBs is based on the design of the Bretton Woods institutions, which include three tiers: first, board of governors; second, board of directors; and third, senior management. Formally, shareholders have representatives on the board of governors, and all powers of the MDBs are allocated to those representatives. The board of governors oversees the a MDB and takes responsibility for the admission and suspension of member countries, changes in capital, agreements for cooperation with other international organizations, supervision of the board of directors, appropriation of strategies, distribution of profits, etc. The responsibility of the board of directors is to supervise and guide management. It approves loans, investments and the borrowing of fund. It handles other matters related to the enforcement of decisions by the board of governance. The management and the staff take charge of daily operations.

III. Subregional MDBs in Latin America—A financial institution for development and a tool for the integration of Latin America

Latin America and the Caribbean developed a network of subregional MDBs in the 1960s. This includes the Central American Bank for Economic Integration (CEBEI), referred to as Banco Centroamericano de Integración Económica (BCIE), and the Development Bank of Latin America, formerly referred to as the Corporación Andina de Fomento (CAF). These MDBs were built with the purpose of facilitating financial integration and cooperation in their respective subregions. They adopted the same organizational dynamics as global

[2] Rebecca M. Nelson et al., Multilateral Development Banks and International Finance 2 (Leah M. Groffe ed., 2010).

[3] José Antonio Ocampo et al., Regional Financial Cooperation 68 (José Antonio Ocampo ed., 2006).

and regional MDBs and are made up mostly by borrower member states and a small number of donor states.

The CAF and CEBEI are subregional MDBs constituted by developing countries in Latin America and the Caribbean, and they fill the gaps in international financial institutions in the region.

IV. Comparison of decision-making mechanisms for different classifications of MDBs

MDBs are generally classified into global, regional and subregional according to their scope and ambition. Global MDBs lend to countries in several continents and include the World Bank (WB) and the International Bank for Reconstruction and Development (IBRD), among others. Regional MDBs lend to just one continent, for example: the Asian Infrastructure Investment Bank (AIIB) focuses on the infrastructure of Asia, and the Inter-American Development Bank (IADB) is a partnership between the United States and 19 Latin American and Caribbean countries.

Subregional MDBs focus on a specific region that is smaller than a continent; for example, the Development Bank of Latin America (CAF) is composed of 20 countries in Latin America and the Caribbean, as well as Spain, Portugal, and 13 Latin American private banks, focusing on Latin America and the Caribbean.

V. Examples of the voting systems of different MDBs

1. The global MDB: The World Bank (WB)

The World Bank is a global MDB composed of 189 member countries. These countries are represented by the board of governance, the ultimate policy maker of the World Bank. The World Bank provides low-interest loans, zero- to low-interest credits, and grants to developing countries to promote development in various sectors.[4]

The International Bank for Reconstruction and Development (IBRD), the International Development Agency (IDA), and the International Finance Corporation (IFC) are the arms of the World Bank that provide loans. In these institutions, the voting power of each member is determined by the combination of basic votes and share votes. The basic votes of each member are the number of votes that results from the equal distribution among all members, provided that there are no fractional basic votes. The share votes of each member are

[4] The World Bank, *Global Gender Gap Persists,* (Feb.17, 2024), https://www.worldbank.org/en/home.

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the number of votes that result from the allocation of one vote for each share of stock held.

2. A regional MDB: The Asian Infrastructure Investment Bank (AIIB)

The Asian Infrastructure Investment Bank (AIIB) is an MDB focused on developing Asia but with members from all over the world, which invests in infrastructure and other productive sectors with the aim to foster sustainable economic development, create wealth and improve infrastructure connectivity. The share structure of the AIIB is a combination of basic votes, share votes and founding member votes. The basic votes of each member are equally distributed among all the members, with twelve percent of the aggregate sum of the basic votes. The share votes are equal to the members' shares of the capital stock of the bank, and for each founding member, the AIIB allocates six hundred founding member votes.[5] According to the Articles of Agreement of the AIIB, the decision-making institution is the board of governors. Each member appoints one governor and one alternate governor. The governor votes as the representative of the member state, and the alternate governor votes only in the absence of the governor.[6]

Some critical affairs in the AIIB are decided by a special majority vote that requires an affirmative vote of a majority of the total number of governors, representing no less than the majority of the total voting power of the members. Other times a super majority vote requiring an affirmative vote of two-thirds of the total number of governors is needed, representing no less than three-fourths of the total voting power of the members. Except for these situations, general affairs are decided by a majority of the votes cast.[7]

3. A regional MDB in Latin America and the Caribbean: The Inter-American Development Bank (IADB)

The Inter-American Development Bank (IADB) is the regional MDB of Latin America. According to the establishing agreement of the IADB, votes are constituted by basic votes and votes connected to shares. The quorum for decisions on regular affairs requires two-thirds of the total votes, and some special decisions require three-fourths of the total votes. However, whether the increased authorized capital will have voting rights is determined by the board of governance. The proportion of votes held by the member countries is regulated by

[5] Asian Infrastructure Investment Bank, Asian Infrastructure Investment Bank Articles of Agreement, art. 28, Dec. 25 (Asian Infrastructure Investment Bank, A.I.I.B) (2015).

[6] *Id.* art. 22.

[7] Sagasti & Prada, *supra* note 2.

the Establishing Agreement of the IADB and should not be reduced.[8] The total proportion of votes held by the USA and Canada is 34.5%, and as PangXun and HeYikun mentioned, the high proportion of votes makes it easier for these developed countries to form a winning coalition and then obtain leadership in the IADB, while other member countries are less likely to resist the leadership of the USA because of their inferiority in votes.[9]

4. Regional and subregional MDBs with special capital structure in Latin America: The Development Bank of Latin America (CAF) and the Central American Bank for Economic Integration (CEBEI)

The CAF and CEBEI have a special weighted voting system based on their own structure of shares; that is, there are multiple types of shares. The shares of these MDBs are usually divided into different classes corresponding to different kinds of subscription entities, and each entity has its own weight in voting power.

The voting system of the CAF is a typical example. According to its Constitutive Agreement, the capital of the CAF is distributed in three series: Series "A", Series "B" and Series "C". Series "A" is for subscription by the government of each member country or by public, semipublic or private institutions, as the former may designate. Series "B" is for subscription by governments or public, semipublic or private entities of member countries. Series "C" is for subscription by legal entities or natural persons from outside the member countries.[10] Series "B" and Series "C" have the same nominal values of US $5000.[11] Although every share of these three Series represents one vote, the CAF implements the decision-making mechanism of weighted voting rights in the form of a double majority. For example, according to Article 17 of the establishing agreement, decisions at regular shareholders meetings shall be adopted by a majority representing at least 60% of Series "A" shares, plus half plus one of the other shares represented at the meeting.[12] As another example, in the CEBEI, the stocks are divided into Series "A" for founding members and Series "B" for nonfounding members. However, the purpose of classification is to control the fixed shares of shareholders and protect the voting power of the founding members. In CEBEI, all kinds of stocks have the same weight of one vote, while the holders of Series "A", which are founding member countries,

[8] Inter-American Development Bank, Agreement Establishing: Inter-American Development Bank, art.8, sec.4, (Inter-American Development Bank, I.D.B) (1987).

[9] Xun Pang & Yikun He, *Power versus Institution: How does the United States Manipulate and Control Multiple Development Bank?* 9 World Economics & Politics, 4, 20-21 (2015).

[10] Corporación Andina de Fomento, CAF Establishing Agreement, art. 5 (Corporación Andina de Fomento, C.A.F.) (2015).

[11] *Id.*

[12] *Supra* note 10, art. 17.

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shall always have a percentage equivalent to 51% of the increase. The shareholders of Series "B" are non-founding regional countries and non-regional countries. Series "C" is an addition of shareholders of "A" and "B", to align the equity of value of the shares with their nominal value. On the other hand, the maximum shares of Series "B" that non-founding members and cooperating parties outside the member states can hold should be decided by the board of governance.[13]

In the process of the election of the board of directors, different kinds of shareholders have different weights of power. In the CAF, every shareholder of Series "A" shall appoint one director and the respective alternate. Each of the member states that holds stock of Series "B" shall appoint one director and the respective alternate, and the private banking and private financial entities can elect one director. However, the shareholders of Series "C" can elect only two directors and their alternates. In the CEBEI, five directors and their alternates are elected by the founding members, and no fewer than four directors and their alternates are elected by the nonfounding members and cooperation outside the member states.

VI. Differences in the voting systems of MDBs

In traditional global and regional MDBs, developed countries have more decision-making power, and the developing countries that are influenced by the policies and decisions of MDBs have less negotiation and decision-making power. The MDBs built later, especially the regional MDBs formed by developing countries, concentrate on the protection of the decision-making power of developing countries.

The voting system of subregional MDBs in developing regions, such as Latin America, has a unique power structure to protect the voting power of founding members. The model of MDBs in Latin America, such as the CAF, is very unique in comparison to that of other MDBs. This kind of voting system involves setting different kinds of shares representing different votes. The shares of stock of the MDBs are divided into different classes, one class of shares with superior voting rights and a second class of shares with inferior voting rights. This voting mechanism is divided into different criteria, and for each criterion, the percentage of votes is different. Making the decision requires the result of voting to satisfy different criteria simultaneously, and the shares of founding members represent a greater proportion of the decision-making process and the election process. For example, the CAF does not apply a simple majority,

[13] Banco Centroamericano de Integración Económica, Banco Centroamericano de Integración Económica Convenio Constitutivo, art. 4 Feb. 5, 2021 (Banco Centroamericano de Integración Económica, B.C.I.E, AG-6 2010).

and a larger percentage of the votes of Series "A" is required in the decision-making process.

VII. The principle of democracy and the fragility of democracy in subregional MDBs

One of the principles of democracy is that one of the all-affected-interests. This principle states that all those affected by a policy decision should be given opportunities to participate in decision-making.[14] The decisions of subregional MDBs, especially decisions concerning the float of funds and programs for development, influence the interests of countries inside the region directly and indirectly. Thus, the reasonable and balanced distribution of voting power among these countries is significant to the democracy of subregional MDBs.

However, the gap in the degree of development in different countries affects the investment and shares of countries and could influence the distribution of negotiation and decision-making power. One of the influences is from the donor countries outside the region of the MDBs. The donor countries (non-borrowing members) primarily benefit from investment in MDBs at the political level. According to the neo-Gramscian perspective, the formal participation of donor countries may be weighted in favor of the dominant powers or the voting power of shareholders, which could help donor countries promote their economic and political hegemony.[15] In this process, MDBs serve as a tool to promote the interest and influence of donor countries in the area by propagating "appropriate" socioeconomic policies and requiring borrowers to comply with standards and practices on a wide range of issues, which violates the original function of MDBs as international financial institutions and development organizations.[16] For example, the European Bank for Reconstruction and Development (EBRD), the regional MDB in Europe, provides resources and funds under the conditions of reform and the principle of democracy, and if the borrower states are not in conformity with democratic principles or are retracting on reforms, the funding of the EBRD may be curtailed or cut.

In this scenario, the EBRD plays an ideological role through conditional funding.[17] The role of MDBs as tools for promoting political influence brings about the problem of hegemony. In addition to promoting ideology, developed donor countries can affect the borrower countries of MDBs in international affairs. Guo Yifan reported that the congruity between countries in Latin

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[14] Kim Angell & Robert Huseby, *The All Affected Principle, and the Weighting of Votes,* 19 Politics Philosophy & Economics, 366, 368 (2020).

[15] Robert W. Cox, *Gramsci, Hegemony and International Relations: An Essay in Method,*12 Cambridge Studies in International Relations, 162, 172 (1983).

[16] Ihsan U. Delikanli et al., Multilateral Development Banks: Governance and Finance 22 (Palgrave Macmillan ed., 2018).

[17] S*upra* note 13, at 17.

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America and the USA in the United Nations General Assembly is positively correlated with the total amount of stocks in MDBs.[18]

The other influence is from the countries that are in the dominant economic position in the region. The economic level varies among the developing countries within a region. In regional and subregional MDBs, countries with higher economic levels potentially could hold more shares than other countries. The projects and policies of MDBs concern the public interest of borrower countries, especially underdeveloped countries, which need more international economic aid. The countries at a lower level of development are influenced by MDBs, so it is important for these countries to maintain their voice in the process of decision-making to appropriately meet their development demand. Maintaining democracy in the decision-making process for developing countries is a significant problem for MDBs.

VIII. The mathematical explanation of voting power—The absolute Banzhaf Index

One of the power indices is the absolute Banzhaf index. It was first proposed by John Banzhaf in 1965. The theory of John Banzhaf is that in weighted voting games, the voting power is not necessarily proportional to the number of votes the voter can cast but rather to the effectiveness of the voter in a coalition. When the votes of a voter have a decisive effect in a coalition constituted by voters, the sum of the votes cannot meet the quota of the voting game.[19] For example, in a simple voting game with a quota of 6, voters A, B, C and D can cast 4, 3, 2, and 1 votes, respectively. In this game, the number of combinations is =16, and in these combinations, AB, AC, ABC, ABD, ACD, and BCD are total swing combinations, that is, combinations that cannot reach the quota without swing voters (the underlined items are swing voters). Thus, the absolute Banzhaf index divides power as follows: A = 5/12, B = 3/12, C = 3/12, and D = 1/12.[20] This simple example shows that the absolute Banzhaf index of the voters is the proportion of the number of times that the voters become the swing voters in the winning coalitions to the number of times all voters become swing voters.

[18] Yifan Guo, *Influence of Donor Interests on Infrastructure Investments by Multilateral Development Banks in Latin America,* 3 Comparative Economic & Social Systems, 183, 191-192 (2023).

[19] John Banzhaf, *Weighted Voting does not Work: Mathematical Analysis,* 19 Rutgers Law Review, *Nov. 25, 1965, at 317.*

[20] Philip D. Straffin, Game Theory and Strategy 185-187 (The Mathematical Association of America ed., 1993).

IX. The Voting Power of the Shareholders in Subregional MDBs in Latin America Under a Special Voting System—Taking the CAF as an Example

Rebecca Ray and Rohini Kamal calculate the voting power of different classifications of shareholders taking the shareholders of Series "A", Series "B" and Series "C" as a whole to calculate the voting power of each classification. To explore the voting power of regional and nonregional countries, this article calculates the Banzhaf index of every shareholder of the CAF in a complex layered voting system.[21]It uses the enumeration method to calculate the number of all the swing winning coalitions and the number of all the situations in which the voters can be swing voters.

Taking the adoption of the decisions at regular shareholder meetings as an example, in the voting system of the CAF, the criteria for passing a decision are 60% of the votes of Series "A" and half plus one votes of Series "B" or Series "C". According to these conditions, there are three classifications of winning coalitions containing swing voters from all the members: the first classification is the combination of 60% of the votes from the shareholders of Series "A", half plus one votes of the shareholders of Series "B" and any number of votes of the shareholders of Series "C". The second classification is the combination of more than 60% of the votes of the shareholders of Series "A", half plus one votes from shareholders of Series "B" and any number of votes from the shareholders of Series "C". The third classification is the combination of at least 60% of the votes of the shareholders of Series "A", at most half of the votes of the shareholders of Series "B" and half plus one votes of the shareholders of Series "C".

Because all the member states that hold Series "A" stocks are also shareholders of Series "B" stocks, and in Series "B", only commercial banks do not have Series "A" stock, this article assumes that the voters of Serie "A" are set like this: A= $\{a_1, a_2, a_3 ...\}$ (n≥0 and a_n round to integer)

Series "B" is set B= $\{b_1, b_2, b_3...\}$ (n≥0 and n round to integer). The quota of Series "A" is q, and the number of the least winning b_{n+1} voters in the coalition is w (n*q+1>w≥n*q, w round to integer).

The coalition of Series "C" is the set $\{c_1, c_2, c_3...c_m\}$, and the number of voters in the coalitions is k(k≥0).

$$\sum_{k=1}^{n} b \qquad \sum_{k=1}^{w} b$$

Supposing the subset of B, B_W= $\{b_1, b_2, b_3...b_W\}$, if > *50%, the subset B_W can meet the criterion, and each voter can be a swing voter. Then, B_W $\sum\binom{k}{m} C_m^k$ matches all the voting coalitions of Series "C", including 0 votes. According to the combination formula, the number of coalitions of all the shareholders of Series "C" is $=2^m$.

[21] Rebecca Ray & Rohini Kama, *Can South–South Cooperation Compete? The Development Bank of Latin America and the Islamic Development Bank*, 50 Development & Change, 191, 197-200 (2019).

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Suppose that the number of subsets B_W is W and that the number of swing voters in the first classification is S_1 =W* 2^m*w.

For the second classification, suppose that for the subset of B, $B_s = \{b_1, b_2, b_3...b_s\}$, (w<s≤n+1, s round to integer); if > $\Sigma_{k=1}^{s} b$ $\Sigma_{k-1}^{n} b$ *50% and $\Sigma_{k=1}^{s} b$ b - b ≤ $\Sigma_{k-1}^{n} b$ *50%, the element b concerns the swing voters. Suppose that b is sv_b.

For the third classification, in the subset $C_j = \{c_1, c_2, c_3...c_j\}$(0<j≤m, j round to integer), the voters of C could swing the voting result $\Sigma_{k=1}^{j} c > \Sigma_{k=1}^{n} c * 50\%$ if, $\Sigma_{k=1}^{j} c - c \leq \Sigma_{k=1}^{n} c * 50\%$ and $\Sigma_{k=1}^{w} b$ $\Sigma_{k-1}^{n} b \leq$ *50%. Suppose the number of c $\Sigma_{k=1}^{j} c - c \leq \Sigma_{k=1}^{n} c * 50\%$ that satisfies the condition is sv_c . Additionally, when the number $\Sigma_{k=1}^{s} b$ $\Sigma_{k=1}^{n} b$ of voters surpasses the quota, if ≤ *50%, the decision will be adopted. The number of $\Sigma_{k=1}^{w} b$ $\Sigma_{k=1}^{n} b$ subsets C_n^w B_W that meet the condition of ≤ *50% is -W. Suppose the number of subsets B_S is S, the number of voters of C that could swing the voting result is J, and the number of swing voters in the second classification is $S_2 = \mathcal{J} * (C_n^w - W + S)$.

Therefore, the number of all swing voters is $S_1 + S_2 = W * 2^m * w + \mathcal{J} * (- C_n^w W + S) = W * 2^m * w + \mathcal{J} * [n!w!(n-w)!-W+S]$. Suppose that the number of members that could swing the result of the voting coalitions is v, and the absolute Banzhaf index of the shareholders of Series "B" is $\beta = S_2) = sv_b/[W * 2^m * w + J * (C_n^w - W + S)$ sv_b /(S_1 + /The absolute Banzhaf index of the shareholders of Series "C" is β = sv_c/(S_1+S_2)=sv_c/{W* 2^m *w+J* [n!w! (n-w)!-W+S]}.

Taking the situation of the subscribed capital of the CAF in 2021 as an example, the capital distribution of countries is shown in Table 1.

Table 1. Shares of countries in 2021[22]

Countries	Series "A"	Series "B"	Series "C"
Bolivia	1	62360	
Colombia	1	199613	
Ecuador	1	65115	
Peru	1	211432	
Venezuela	1	93021	
Brazil	1	94284	
Panama	1	37793	
Uruguay	1	39026	
Argentina	1	119079	
Paraguay	1	37313	

[22] Table 1 is made by the author. The data was taken from annual report of the CAF for the years 2021 and 2022.

Trinidad and Tobago	1	28037	
Barbados			3522
Chile			5541
Costa Rica			11038
Dominican Republic			10556
Jamaica			182
Mexico			15367
Portugal			1920
Spain			51939
Sum of Shares		984570	100065
Quota of Regular Meeting	7	492285	50032.5

According to this figure, to reach the criterion of at least 60% of votes for Series "A", the number of voters should be more than 11*60%=6.6; thus, w=7. Therefore, the number of coalitions that meet this criterion should be $C_{11}^{7}\left(\frac{7}{11}\right)$ =11!7! *(11-7)!=330.

The number of winning coalitions of Series "B" is 298,[23] and the number of failed coalitions of Series "B" is 330-298=32.

In coalitions of voters in Series "C", when the sum of votes of the coalition has reached half plus one votes of the shareholders of Series "C", the voters of Series "C" can only affect the result when the voters of Series "A" reach the criterion of 60% and the coalitions of Series "B" fail simultaneously; this situation belongs to the second classification of the winning coalition. When the sum of all shares of stock in these winning coalitions minus the shares of stock in one country is equal to or less than half of all shares of stock of Series "C", then this country is the swing voter, and this coalition is the swing coalition. In this example, the number of swing voters is 127, so the number of swing voters belonging to the second classification is 127*(330-298+38)=4064.

The calculation of the sum of the swing voters is shown in Table 2:

[23] In this article, the author uses the Python computer program to calculate the winning coalitions, and designed a command composed of *for loop* and conditional *if* statements to iterate all the combinations and judge whether the sum of the shares in the combination has reached the quota.

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Table 2. Example of The Calculation of The Swing Voters[24]

Swing type	Swing ways	Swing votes of Series "A" & Series "B"	Swing votes of Series "C"
A: 60% votes B: Half plus one votes C: Any votes	$298 \times 2^8 = 76288$	$298 \times \times 7 = 534016$	
A: More than 60% of votes B: Half plus one votes C: Any votes	$360 \times 2^8 = 92160$	$747 \times = 191232$	
A: At least 60% of votes B: Less than half plus one votes C: Half plus one votes	$127 \times (330 - 298 + 38) = 8890$		$127 \times (330 - 298 + 38) = 8890$
Sum of swing voters			734138

This article used the Python program and the command made by the author to analyze the specific voting structure of CAF to calculate the number of swing voters. It will take the capital and the distribution of the voting power of the voters in 2021 as an example to explain how the computer program calculates the number of winning coalitions and swing coalitions.

In the first classification, the decision-making process needs 70% of votes in Series "A", which means in 2021, the value of q is 7. The computer program the quota in Series "B" and Series "C", which should reach half plus one according to the rule. The program uses the *for loop* statement and the conditional statement *if* to calculate the value of W, the number of the coalition of 60% of Series "A" and half plus one votes of Series "B". In this classification, when the program randomly takes the 7 countries holding the shares of Series "A" and "B", and calculates their total votes, when the number of total votes reaches the quota, the boolean of the conditional statement will be "true", then the program will calculate and output the number of the "true" coalitions.

In the second classification, the number of coalitions which will fail to pass the decision without the swing voters is sv_b also calculated by the *for loop* and *if* statements in the similar code. After calculating the total coalitions in different classifications and the number of winning coalitions and swing coalitions, the power index can be calculated mathematically. The absolute Banzhaf index (β) of all shareholders of 2021 is shown in Table 3.

[24] Table 2 is made by the author. This table is an example to show the calculation process of power index.

Table 3. Absolute Banzhaf Index (β) of All Shareholders of 2021[25]

2021	60%	> 60%	The number of swing voters	Absolute Banzhaf index
Series "A" & Series "B"				
Argentina	188	81	68864	0.093802528
Bolivia	186	44	58880	0.080202905
Brazil	188	65	64768	0.088223195
Colombia	209	176	98560	0.134252688
Ecuador	186	44	58880	0.080202905
Panama	183	22	52480	0.071485198
Paraguay	183	22	52480	0.071485198
Uruguay	183	22	52480	0.071485198
Peru	191	191	97792	0.133206563
Trinidad	183	0	46848	0.063813615
Venezuela	188	65	64768	0.088223195
Series "C"				
Barbados	0	0	0	0
Chile	0	0	0	0
Costa Rica	0	0	0	0
Dominican Republic	0	0	0	0
Jamaica	0	0	0	0
Mexico	0	0	0	0
Portugal	0	0	0	0
Spain	127	7	8890	0.01210944

Using this method, the absolute Banzhaf index of shareholders from 2001 to 2021 was calculated and is shown in Table 4.

[25] Table 3 was made by the author.

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Table 4. Banzhaf index of CAF from 2001 to 2021[26]

Country	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Argentina	0	0	0.004164739	0.004408658	0.006172462	0.009599511	0.010285679	0.018254648	0.017258232	0.02189405
Bolivia	0.060769109	0.0625	0.059231837	0.062700915	0.062580211	0.062610822	0.06250763	0.062622309	0.062557273	0.076929681
Brazil	0.014717519	0.02734375	0.027070801	0.012246273	0.017417344	0.017242434	0.016634111	0.012322652	0.014005132	0.076929681
Colombia	0.131666403	0.270833333	0.256671294	0.271703967	0.271180916	0.271313564	0.270866398	0.27136334	0.271081516	0.197819181
Ecuador	0	0.0625	0.059231837	0.062700915	0.062580211	0.062610822	0.06250763	0.062622309	0.062557273	0.076929681
Panama	0.000474759	0.00390625	0.006709857	0.002939105	0.003116788	0.002384592	0.001922842	0.00272138	0.003940375	0.076929681
Paraguay	0.000474759	0.00390625	0.006478482	0.00269418	0.002750107	0.001956588	0.001617629	0	0.001557823	0
Peru	0.212691882	0.270833333	0.256671294	0.271703967	0.271180916	0.271313564	0.270866398	0.27136334	0.271081516	0.197819181
Trinidad and Tobago	0.000474759	0	0.000462749	0.000489851	0.000305567	0.000122287	0.000152607	0.0000917319	0.000213819	0
Uruguay	0	0	0.002776492	0.002081866	0.003483469	0.003852033	0.003570993	0.004433708	0.00644511	0.076929681
Venezuela	0.212691882	0.208333333	0.256671294	0.271703967	0.271180916	0.271313564	0.270866398	0.27136334	0.271081516	0.197819181
Commercial Bank	0	0	0	0	0	0	0	0	0	0
Barbados	0	0	0	0	0	0	0	0	0	0
Chile	0.000474759	0	0.001619621	0.000734776	0.000672248	0.000428004	0.004608717	0.003332926	0.002657462	0
Costa Rica	0	0.00390625	0.009949098	0.005755748	0.005072419	0.003729746	0.002716396	0.001742906	0.001557823	0
Dominican Republic	0	0	0	0	0	0.001834301	0.002655353	0.002660225	0.002779644	0
Jamaica	0.000474759		0.000462749	0.000122463	0.000305567	0.000122287	0.0000917319	0.001100783	0.0000305455	0
Mexico	0.000474759	0.00390625	0.019666821	0.008939779	0.008128094	0.005502904	0.00375412	0.00272138	0.002229825	0
Portugal	0	0	0	0	0	0	0	0	0	0
Spain	0	0	0.032161037	0.019104185	0.013872762	0.014062978	0.014375534	0.011283023	0.008949844	0

[26] Table 4 is made by the author. The data is from annual reports of the CAF from 2020 to 2021, and calculated through Python program made by author.

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Country	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Argentina	0.087550884	0.087322074	0.09005713	0.097029394	0.099282982	0.094283544	0.097770964	0.099516602	0.100178465	0.100124542	0.094423237
Bolivia	0.07295907	0.070801682	0.073246466	0.073507116	0.07358621	0.072365229	0.073328223	0.074724747	0.076607061	0.078254335	0.080733623
Brazil	0.087550884	0.087322074	0.087655607	0.091148824	0.092274771	0.094283544	0.09358078	0.091834619	0.089086039	0.089872882	0.088806985
Colombia	0.162941922	0.155763699	0.157299787	0.151130631	0.162040483	0.12768288	0.125007161	0.127101906	0.127562889	0.12917091	0.135141064
Ecuador	0.07295907	0.070801682	0.073246466	0.073507116	0.07358621	0.072365229	0.073677405	0.074724747	0.076607061	0.081329832	0.080733623
Panama	0.062015209	0.057821373	0.060038087	0.058217636	0.060737824	0.066102854	0.068439675	0.06913785	0.069327657	0.071078173	0.071958229
Paraguay	0.143486171	0.048381149	0.050431993	0.058217636	0.060737824	0.066102854	0.068439675	0.068439488	0.069327657	0.070394729	0.071958229
Peru	0.066879147	0.160483811	0.164504357	0.157011201	0.153012595	0.133597346	0.133387529	0.130593717	0.128949442	0.130537798	0.071958229
Trinidad and Tobago	0	0.003908843	0.001491571	0.002159272	0.002155846	0.066102854	0.065297037	0.06564604	0.065861274	0.069711285	0.134088017
Uruguay	0.062015209	0.062541485	0.064841134	0.067626547	0.065409964	0.067494493	0.069487221	0.069836212	0.070020934	0.071761617	0.064235883
Venezuela	0.162941922	0.155763699	0.157299787	0.152306745	0.153012595	0.130814068	0.124308797	0.121165828	0.119590209	0.100807986	0.088806985
Commercial Bank	0	0	0	0	0	0.00034791	0	0.000349181	0.000346638	0.000683444	0
Barbados	0	0	0	0	0.000513297	0	0	0	0	0	0
Chile	0	0.003908843	0.001491571	0.001295563	0.00153989	0	0	0	0	0	0
Costa Rica	0	0	0.00049719	0.000431854	0.000513297	0	0	0	0	0	0
Dominican Republic	0	0.003908843	0.001491571	0.002159272	0.001745209	0	0	0	0	0	0
Jamaica	0	0	0	0	0.000102659	0	0	0	0	0	0
Mexico	0.018700512	0.003908843	0.001491571	0.002159272	0.002155846	0	0	0	0	0	0
Portugal	0	0	0.00049719	0.000431854	0.000307978	0	0	0	0	0	0
Spain	0	0.0273619	0.014418522	0.011660066	0.010984549	0.008457197	0.007275535	0.006929062	0.006534673	0.006272467	0.005572375

As shown in Chart 1, the indices of Peru, Venezuela and Colombia increased to more than 25% until 2009, and then decreased from 2010 to 2021. Bolivia, Ecuador, Brazil, Uruguay, Trinidad and Tobago, and Argentina show an upward trend. The index of Paraguay first increased abruptly and then decreased in the same way, after which it gradually increased from 2012 to 2021. Jamaica, Costa Rica, Mexico, Spain and Portugal remain at a stable low level of less than 5%. Fluctuation of the index usually occurred in 2011 and 2012.

Chart 1. Banzhaf Index of CAF from 2001 to 2021
(Regular Shareholders' Meetings)[27]

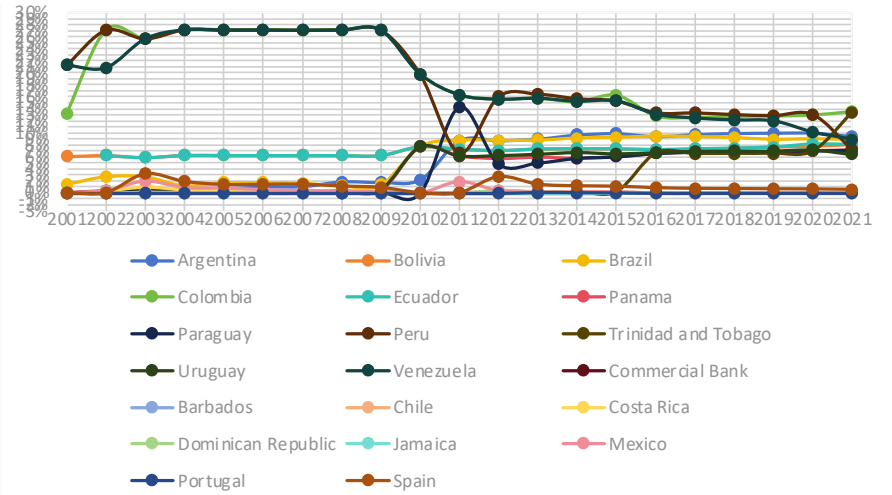


Chart 2 shows the absolute Banzhaf index of special shareholders´ meetings, in which decision adoption requires 80% of Series "A" votes and half plus one of Series "B" or "C" votes. In this chart, none of the shareholders of Series "C" have any voting power. The absolute Banzhaf index of shareholders shows a decreasing trend. The absolute Banzhaf index of Ecuador and Venezuela decreased in 2009, in which Uruguay held Series "A" and Series "B" stock; then, the absolute Banzhaf index of members declined when the countries holding stock of Series "A" and Series "B" increased. In 2021, the voting power of member states holding Series "A" and "B" was not obviously different.

[27] Chart 1 is made by the author. The result of power index is from Table 1.

Chart 2. Banzhaf Index of CAF from 2001 to 2021
(Special Shareholders' Meeting)[28]

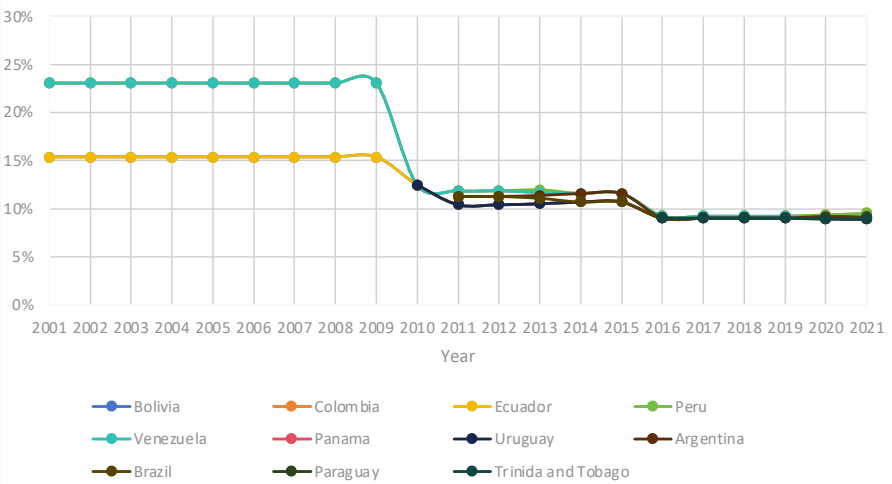
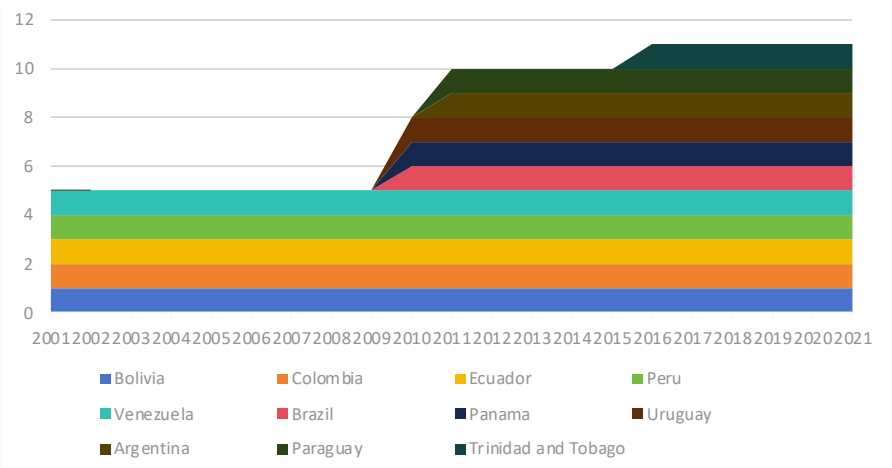


Chart 3 shows the trend of the number of shareholders of Series "A" stocks. According to Chart 3, from 2001 to 2009, the shareholders of Series "A" stocks were Bolivia, Colombia, Ecuador, Peru and Venezuela. From 2010 to 2015, Argentina, Brazil, Panama, Paraguay, and Uruguay held Series "A" stocks, and after 2016, Trinidad and Tobago joined the group of shareholders of Series "A".

Chart 3. Shareholders of Stock Series A[29]



[28] Chart 2 is made by the author. The power index is calculated by the author using the data of shares from annual reports of the CAF from 2020 to 2021.

[29] Chart 3 is made by the author. The data is from the CAF annual reports from 2001 to 2021.

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Although nearly all the member states have increased their shares of stock, the trends in the voting power of different members are mixed. As the number of shareholders of Series "A" increased, the voting power of the member states that initially held Series "A" stocks declined when the new countries joined the group, while the voting power of new members that gained Series "A" stocks increased when they first obtained them, to then decrease when more member states obtained Series "A" stocks in the series.

X. The protection of the democratic principle in subregional MDBs in Latin America-Comparison between IDB and CAF

Rebecca Ray and Rohini Kamal mentioned that in practice, the arrangement of the CAF voting system gives nearly equal decision-making power to Series A shareholders, regardless of their widely varying levels of Series B stock, and gives almost no power to Series "C" shareholders.[30] An economic gap exists not only between developed donor countries and developing member countries but also between developing countries at higher or lower levels of development in the region. To analyze whether the distribution of the voting power of subregional MDBs in Latin America can protect the democracy and equality of the MDBs, the influence of both nonregional developed countries and regional countries with dominant economic status needs to be explored.

Latin America and the Caribbean form the region with the largest external debt relative to GDP, and many countries in the region are affected by MDB programs and funds.[31] The regional and subregional MDBs in Latin America and the Caribbean are important supplements to the large MDBs in providing floating capital to the countries in this region, so the democratic governance of these banks, especially the all-affected-interest principle is a very important guarantee for the countries in this region.

In Latin America, the level of economic development varies among countries, and the structural gaps in poverty, inequality and productivity widened after the COVID-19 pandemic. Brazil, one of the BRICS countries, is an important emerging economy in the world. Additionally, Brazil, Mexico and Argentina are members of the G20. According to H. Wurf, the G20 has played an important role in promoting and directing investments focused on infrastructure in terms of quality and quantity.[32] Generally, the member states of the G20 have strong voting power in all MDBs, and while few G20 countries are members of the regional and subregional MDBs, they still have greater power

[30] Ray & Kama, *supra* note 20.

[31] ECLAC, *The Recovery Paradox in Latin America and the Caribbean Growth Amid Persisting Structural Problems: Inequality, Poverty and Low Investment and Productivity*, (Feb.17, 2024) https://repositorio.cepal.org/server/api/core/bitstreams/fe4f8baa-26bb-416f-9adb-dbb1d4e00d67/content.

[32] Wurf H., *Promoting Infrastructure Investment: The G20 and the Multilateral Development Banks*, 12 International Organisations Research Journal, 230, 235-236 (2017).

at the country level.[33] Although the economic development level of countries has no absolute connection to the shares they hold, countries with a higher level of economic development potentially invest more capital and obtain more shares. In contrast to these countries, some member countries in Central and South America have a lower level of economic development, and others, such as Venezuela, even face sanctions and a weak economic situation. The less-developed countries need more assistance from subregional MDBs and are more easily affected by MDB policies and programs, but their voting power may be undermined by the countries that have the ability to hold more shares, which violates the all-affected-interest principle and is not in conformity with the democratic spirit.

The statistics of the voting power index in the CAF indicate that the democratic principle is protected under the voting system of subregional MDBs in Latin America and the Caribbean, such as the CAF and CEBEI. That is, the negotiation and voting power of developing countries within the specific region is protected, and a balance of voting power is reached because the shareholder countries have different economic levels. This voting system limits the influence of donor countries and commercial banks by allowing them to maintain less voting power in the hierarchy of shares. The shareholders of Series "C" in the CAF and the shareholders of Series "B" in the CEBEI have less voting power as a result of the design of the voting system. In contrast, the shareholders of Series "A", including some less-developed countries, have stronger voting power relative to the capital they invest. This distribution of voting power protects the voting power of borrower countries. As the subregional MDBs are composed of developing countries, this kind of complex voting system protects the democracy of the core members made up of shareholders of Series "A"[34] and shields democracy in the MDBs from the control of donor countries.

Additionally, the unique voting system of subregional MDBs, such as the CAF, can maintain a balance between G20 countries and other developing countries in Latin America. Since an economic gap exists between G20 countries and other countries, one concern about democracy in the MDBs is that developing countries with worse economic situations are less likely to gain enough influence and negotiation power.[35] However, as Chart 4 shows, under the voting system of the CAF, developed countries outside Latin America and the Caribbean and the G20 countries in Latin America do not have decisive superiority in terms of voting power compared with other countries in Latin America and the Caribbean, which have much lower GDPs. Moreover, because the voting power is diluted by the newly entered shareholders of Series "A", the gap in voting power tends to shrink.

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33 S*upra* note 13, at 99.

34 Ray & Kama, *supra* note 20.

35 Nelson et al., *supra* note 1 at 20.

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This is because the power structure of the CAF is not similar to that of IADB, as shareholders who have more shares do not have a large advantage in forming winning coalitions required by regulations.[36] The voting power tends to be distributed increasingly equally among the core member states, and the voting system balances the voting power between G20 countries and other countries in Latin America, which reflects the all-affected-interest principle. Thus, the hierarchy of the shares and unique voting system in the subregional MDBs in Latin America, which protects the voting power of developing countries with lower GDPs, is significant for protecting the interests of these countries and maintaining the principle of democracy.

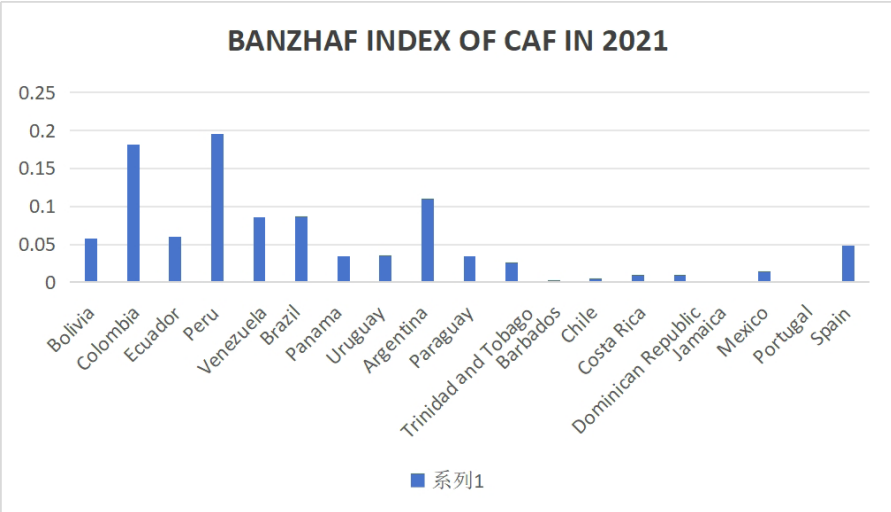
XI. Another example- The Inter American Development Bank (IDB)

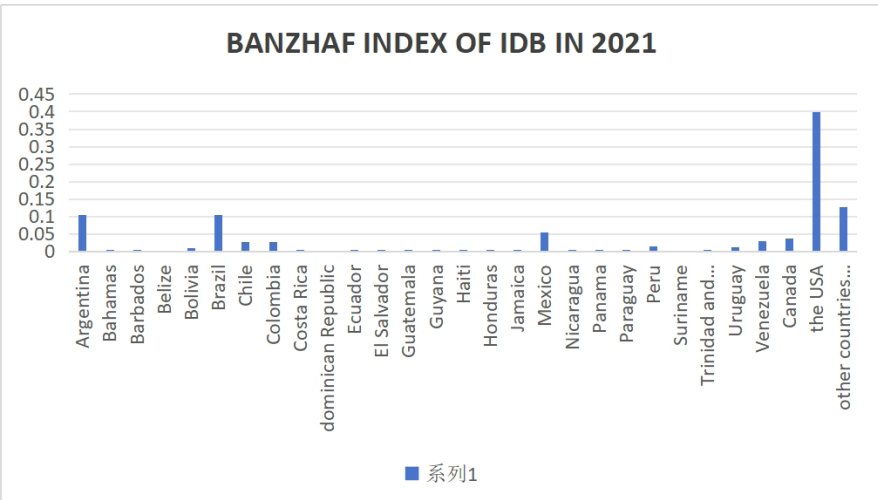
The IDB and the CAF are the two biggest MDBs in Latin America. IDB is the main source of financing of infrastructure in Latin America, and has 26 borrowing member states. Most of the loans has been provided to the borrowing member states. For example, in 2023, the sovereign guaranteed projects focused on countries like Argentina, Brazil, etc. The structure of voting power in IDB is to grant every votes equal weight of power, while the USA and Canada hold fixed share which accounts 34.5% of total votes. So the power index of member states could be calculated in the traditional way, that is, count the proportion of the swing voters in all winning coalitions.

This article use the calculator of power index provided by Generating Functions Program ipgenf (https://homepages.warwick.ac.uk/~ecaae/ipgenf.html). Because the shares of capital stock of IDB has been stable from 2001 to 2021 in the gross[37], this article will only calculate the Banzhaf Index of countries in IDB in 2021.

[36] For example, in 2021, Peru held most of the shares of Series "B", and the shareholding ratio of Peru is 21.47%, and the power index of Peru is 7.20%, while in IADB, the largest shareholder hold the votes in the percentage of 34.5% that is fixed by the establishing agreement. Additionally, the Establishing Agreement of the CAF did not maintain the number of shares in a standard.

[37] According to the annual report of IDB in 1999, the share of stock of total regional developing members was 50.057%, the USA was 30.031%, and Canada was 4.004%. In 2023, the share of stock of total regional developing members was 50.015%, the USA was 30.006%, and Canada was 4.001%.





Variance is the measure of the variability. The larger the value of variance is, the higher the degree of dispersion of data is. The power index in CAF is 0.003294222, while the variance of the power index in IDB is 0.006040731, which means the gap of the power index of IDB is larger than in CAF, and the degree of equality of IDB is lower than CAF. From the chart, it can be seen that the voting power of the USA is larger than that of other countries, which means it has a larger influence on the decision-making progress of IDB.

From the annual report from CAF and IDB, it could be known that the focus of both MDBs is different, which will have different influences on member countries. For example, in the annual report of IDB, the cross-cutting issues that IDB has positively acted on by approving operations are climate change and environmental sustainability, gender and diversity; institutional capacity,

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and the rule of law. IDB has invested $500 million in the sovereign guaranteed projects of the program to strengthen equality and equity policies for women and diverse populations in Colombia, which accounts for a much larger proportion of the investment to programs like Energy Efficiency ($34.5 million) or the Bogotá Subway Line ($50 million). In CAF, the significance of Bogotá Subway Line and the Gender, Inclusion, and Diversity Sector Program is relatively equal ($250 million and $255 million). This difference presents a different perspective of the program.

Another example is Ecuador. The loans from IDB concentrated on the energy transition ($500 million) and programs in water and sanitation ($125 million). They also support the innovation ecosystem and the reduction of the digital divide in education. In the energy sector, CAF concentrated on expanding the network of electricity distribution for aquaculture, and in the education sector, on infrastructure, connectivity, high school reforms and professionalization of teachers; also, it invested $125 million totally in water and sanity program.

Divergence exists between CAF and IDB in the prospect of development and the decision of the investment programs in Latin America. The different decisions derive from the different decision-making systems. In IDB, the voting power rests with the USA and Canada. Thus the decisions of IDB is affected by the attitude of these two advantaged voters, which does not conform with the all -affected-interest principle, and may cause the risk that the decision is inappropriate to the demand of Latin America.

XII. Conclusion

The subregional MDBs in Latin America distribute voting power in a unique way. The shares are divided into different classifications, and stocks are assigned different weights through the regulation of the voting process. This article uses the absolute Banzhaf index to measure the voting power of the members states, and compares the voting power of countries investing in the CAF. Through the calculation and comparison of the absolute Banzhaf index of different countries investing capital in the CAF, this article shows that the original founding member states and some states in Latin America are granted shares of Series "A" and have more voting power, while the donor countries outside the core member countries are granted the shares of Series "C" and have much less voting power.

According to this voting system, developed countries outside the member states have less control of the MDB and are less likely to influence the less-developed countries in Latin America through financial investment. Additionally, the distribution of voting power among shareholders of Series "A" is relatively equal, and in comparison with less-developed countries, the larger economies in Latin America and the Caribbean have no absolute superiority. The gap in

voting power shrank as countries joined the group of Series "A " shareholders. The low-income countries of Latin America, which have less influence and less negotiation power in international society, can maintain their voting power in these subregional MDBs and are more likely to benefit from decisions made by member states that are appropriate for the developing member states, especially countries with lower levels of development.

This voting power structure is adapted to the economic situation of Latin America and the Caribbean and supplements the funding gap for less-developed countries, allowing them to obtain more decision-making power. In other MDBs investing countries in Latin America without this kind of system such as IDB, the decision-making power rest in developed countries which have divergent prospect in the development of Latin America. This may cause the risk of mismatch of loans. Thus, a voting system such as the one the CAF has, helps developing countries in Latin America and the Caribbean to maintain independence from the developed donor countries. The voting power of countries with different levels of development within the region remains relatively equal, which benefits the democratic principle of the subregional MDBs.

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