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IS MEXICO READY FOR A JURY TRIAL?: COMPARATIVE ANALYSIS OF LAY JUSTICE SYSTEMS IN MEXICO, THE UNITED STATES, JAPAN, NEW ZEALAND, SOUTH KOREA, AND IRELAND*

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ABSTRACT. *This article examines the possible re-establishment of the jury system in Mexico and explores its broader application in criminal trials. Viable options might include: the use of a "verdict questionnaire" in the form of a list of propositions answered by the jury; vigorous strategies to ensure the security and safety of judges and jurors from defendants involved in drug cartels; introduction of lay participation at a state level; and implementation of a mixed tribunal that allows joint deliberations by professional and lay judges, in addition to all-citizen juries.*

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KEY WORDS: *Jury, lay participation in law, judicial reforms, mixed tribunals, direct democracy*.

RESUMEN. *Este artículo examina el posible reestablecimiento de los juicios or jurado en México, y explora su aplicación en juicios penales. Opciones viables podrían incluir: el uso de un verdict questionnaire en la modalidad de crear una lista de ideas respondidas por el jurado; estrategias para asegurar la seguridad de jueces y jurados en casos de narcotráfico; y la implementación de tribunales mixtos que permitan deliberaciones conjuntas de jueces profesionales, y ciudadanos así como jurados completamente ciudadanos*.

PALABRAS CLAVE: *Jurado, participación ciudadana, reforma judicial, tribunales mixtos, democracia directa*.

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I. Introduction

This article examines the possible re-establishment of the jury system in Mexico and explores its broader application in criminal trials. Despite a long history of jury trials, the practical use of the oral and adversarial jury trial has virtually disappeared in Mexico. While the Mexican Constitution has a provision for a jury trial on press-related cases (Article 20, Section A (6)),[1] nearly all criminal cases are today adjudicated by judges, not juries.

Recent federal bills in Mexico attempted to transform the criminal justice process and introduce a jury trial in criminal cases.[2] In 2001, president Vicente Fox proposed a bill which would reform the Code of Criminal Procedures by implementing jury trials in criminal cases.[3] While this initiative was not passed, the judicial reform passed in 2008 did introduce oral trials, the presumption of innocence, and the adversarial criminal process in Mexico.

A cross-national empirical analysis of views, attitudes, and sentiments on lay participation in court matters shows that, compared with citizens in other nations, Mexicans are more willing to participate in jury trials and express greater confidence in, and respect for, people's abilities to make fair and just decisions. The great majority of Mexican respondents also support the broader application of lay participation in the administration of justice.

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[1] "In all cases, crimes committed by means of the press against the public order, or the foreign or domestic security of the nation, [shall] be judged by a jury." The English translation of the Mexican Constitution is available at *http://historicaltextarchive. com/sections.php?op=viewarticle&artid=93* (last visited: March 1, 2009).

[2] "Iniciativa de Decreto por el que se Expide el Código Federal de Procedimientos Penales," submitted to the Senate of the Republic by then President Vicente Fox Quesada in March 29 (2004) (hereinafter Iniciativa 2004). For more detailed information on this initiative, see Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. L. 715, 785 (2004). See also *Iniciativa de Reforma al Código de Procedimientos Penales y a la Ley Orgánica del Poder Judicial de la Federación*, Gaceta Parlamentaria, November 22, 2001 (hereinafter Iniciativa).

[3] See *Id.*

In the actual implementation of popular legal participation, however, new procedural mechanisms must be carefully evaluated due to persistent corruption in Mexico's police system and other public institutions. Viable options for the possible establishment of the lay justice system in Mexico might include: the use of a "verdict questionnaire" in the form of a list of propositions answered by the jury; vigorous strategies to ensure the security and safety of judges and jurors from defendants involved in drug cartels; introduction of lay participation at the state level; and implementation of a mixed tribunal that allows joint deliberations by professional and lay judges, in addition to all-citizen juries. Given the strong public support for a citizen-in legal system, we believe that it is imperative to open the national debate on the introduction of the lay justice system in Mexico which has failed to receive the attention it deserves. The future transformation of Mexico's justice system, therefore, could allow Mexican citizens to directly participate in criminal trials and to make the criminal process even more open and transparent.

The Evolution of Lay Participation Debates in Mexico

On March 6, 2008, Mexico's Senate gave final approval to an historic overhaul of its judicial system by introducing oral trials and an adversarial process, similar to the procedure used in U.S. courts.[4] The judicial reform also established a new legal standard, by which criminal defendants in court will now be presumed innocent until proven guilty. This historic judicial overhaul, however, stopped short of introducing a jury trial in Mexico.

The switch from an *en camera,* closed, inquisitorial process to an open, oral, and more transparent trial promises to represent a paradigmatic shift in Mexican jurisprudence. Today, judges deliberate in private and base their decisions exclusively on written affidavits prepared by prosecutors and police investigators. Now, not only do lawyers and judges have to become accustomed to making oral statements in public, but also, for the first time, the media and public will have a full view of the evidence. Prominent Mexican legal scholar, Dr. Raúl Carrancá y Rivas, who strongly opposes the introduction of a jury trial in Mexico, recently argued that the introduction of oral arguments and the open presentation of evidence is equivalent to the introduction of a jury trial, and that "this is what I consider risky and critical, since we are not prepared in Mexico to have the jury or trial by jury."[5]

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[4] James C. McKinley, *Mexico's congress passes overhaul of justice laws*, NY TIMES, March 7, 2008, available at: *http://www.nytimes.com/2008/03/07/world/americas/07mexico.html?_r=2&oref=slogin*.

[5] Raúl Carrancá y Rivas, *Conferencia: Algunos aspectos de la iniciativa que en materia penal envía el Presidente de la República al H. Congreso de la Unión*, Senado de la República, August

The purpose of this paper, then, is to examine the possible re-establishment of the jury system in Mexico. Reform is definitely possible. By modeling after a citizen jury system currently adopted in more than 60 countries around the world,[6] the future transformation of Mexico's legal system and criminal procedures may open a path to allow Mexican citizens to directly participate in criminal trials and make criminal justice procedures ever more transparent and resistant to political manipulation and corruption.[7]

This article is structured as follows. Part II of this article examines the historical and political importance of the institution of lay participation in the judicial system. This section also examines why many countries around the world are currently embracing the introduction of the lay justice system in democratizing their own jurisprudence and legal apparatus. Part III then examines Mexico's historical experience with the introduction of lay participation in law.

Part IV examines opinions, attitudes, and perceptions about the lay justice system in six different nations: (1) Mexico, (2) Ireland, (3) Japan, (4) South Korea, (5) New Zealand, and (6) the United States. Cross-national data were obtained from a select group of college students and researchers, *i.e.*, the possible future intelligentsia in those respective countries. They have responded to a set of questions about the lay judge system; its social and political significance; their willingness to serve; confidence in jurors' abilities to make fair and just decisions; jurors' moral and ethical responsibilities; the fear of retaliatory violence from defendants and their families; views on confessionary documents; attitudes on the jury's diversity based on race, ethnicity, and gender; and perceptions of trial fairness and verdict legitimacy.

Part V examines the possible re-introduction of the jury system in Mexico and explores its potential socio-political impact on Mexico's criminal justice system. Part VI offers conclusions about the possible significance of lay participation in the administration of justice in Mexico.

II. The Socio-Political Significance of Lay Participation in Law

The historic and political foundation for lay participation in criminal jury trials is that it offers an important check on judicial and political power exercised exclusively by the government. The jury's role as a popular body for oversight of government becomes especially important when individual

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24, 2004, available at *http://www.derecho.unam.mx/papime/TemasSelectosdeDerechoPenalVol.III/tema12-5.htm*.

6 Neil Vidmar, World Jury Systems (Oxford University Press, 2000).

7 See *Id.*

citizens or groups have been accused of committing serious crimes against their own government.

After the terrorist attacks of 9/11 and the passage of the 2001 Patriot Act in the United States and similar anti-terrorism measures imposed in other nations in the world, serious terrorism charges have been brought against their citizens, political dissidents, and civic activists. In Australia, for instance, after the passage of the Anti-Terrorism Act in 2002, two separate juries examined charges of terrorism. In Australia's first-ever terrorism trial in 2005, the all-citizen jury acquitted Zeky Mallah, 21-year-old supermarket worker, of terrorist charges of preparing to storm government offices and shoot officers in a supposed suicide mission.[8] In the second highly controversial trial, in which the government's only evidence was the defendant's confession extracted at a Pakistani military prison, the jury found Joseph Thomas guilty of charges for intentionally receiving funds from al-Qaeda. However, soon after the verdict, the appeal's court reversed all of his convictions because it determined his coerced confession at a foreign prison to be inadmissible.[9]

In Russia, where anti-Islamic political fever runs high, many citizens have also been accused of terrorist acts against the government and their cases adjudicated by all-citizen juries. After the passage of the anti-terrorism act in 2004, following the Beslan school attack in which more than 330 child hostages died, the all-citizen jury acquitted three suspected terrorists of the charges of a gas pipeline explosion in the Republic of Tatarstan in September 2005.[10] Two of the defendants, who were among seven Russians released from the Guantanamo Bay prison in 2004, claimed that they were tortured while transferred to and detained in Russia. They criticized the government of false charges of extremism without any substantial evidence.[11] Another all-citizen jury acquitted four men of terrorist charges for the murder of the minister for national policy, in which the evidence used to implicate the defendants consisted solely of confessions extracted under torture.[12] In other high profile "terrorism" cases, such as the 2001 bombing of an Astrakhan city market and a December 2004 attack on the headquarters of the anti-drug enforcement agency in Kabardino-Balkaria, all-citizen juries also acquitted all defendants of terrorist charges.[13]

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8 R v. Mallah [2005] NSWSC 317 (2005).

9 Australia's first terrorism conviction quashed, Reuters, August 18, 2006, available at: *http://www.redorbit.com/news/international/621900/australias_first_terrorism_conviction_quashed/index.html*.

10 Peter Finn, *Russian homeland no haven for ex-detainees, activists say*, WASHINGTON POST, September 3, 2006, at A14.

11 *Id*.

12 Nabi Abdullaev, *A jury is a better bet than a judge*, MOSCOW TIMES, June 1, 2006.

13 Otto Luchterhandt, *Russia Adopts New Counter-Terrorism Law*, RUSSIAN ANALYTICAL

In New Zealand, after the passage of the Suppression of Terrorism Act in 2002, the government also brought terrorism charges against their own citizens. In one of the most celebrated trials in 2006, an all-citizen jury acquitted freelance journalist and political activist Timothy Selwyn of seditious conspiracy. The government evidence included a political pamphlet, in which the defendant called for "like minded New Zealanders to [commit] their own acts of civil disobedience [against governmental oppression]."[14] The jurors did not accept the governmental arguments and returned a verdict of not-guilty.[15]

In the United States, all-citizen juries have also tried suspected terrorists. In December 2005, a Florida jury acquitted former University of South Florida Professor Sami Al-Arian of providing political and economic support to terrorists and being part of a conspiracy to commit murder abroad, money laundering, and obstruction of justice.[16] In this highly celebrated trial, the government produced over 100 witnesses and 400 transcripts of phone conversations obtained through 10 years of investigation. In the post-verdict interviews, one juror expressed that "there was absolutely no evidence of any wrongdoing on the part of Al-Arian."[17] Similar views were also expressed by the defense counsel who concluded that the prosecution's case was so weak that there was no need to call defense evidence in the trial.[18] In February 2007, a grocer and a university professor were also acquitted by a Chicago jury of a terrorist conspiracy to finance the Palestinian political organization of Hamas.[19] In October 2007, another jury acquitted five defendants of nearly 200 combined terrorist charges in Dallas, Texas.[20] Five defendants were former officials of an Islamic charity and philan-

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DIGEST 2006, available at: *http://www.res.ethz.ch/analysis/rad/documents/Russian_Analytical_Digest_2_2006.pdf*.

[14] John Braddock, *An attack on democratic rights: New Zealand man jailed for sedition*, WORLD SOCIALIST WEB SITE (2006). *http://www.wsws.org/articles/2006/jul2006/sedi-j2 5.shtml*.

[15] *Id.* The jury, however, found Selwyn guilty of publishing a statement with seditious intent.

[16] Alexander Abboud, *Group accused of aiding terrorists acquitted in U.S. court* (2005). *http://www.america.gov/st/washfile-english/2005/December/20051207144424maduobbA0.1730463.html*.

[17] Joe Kay, *Palestinian activist Sami Al-Arian acquitted on charges in Florida*, WORLD SOCIALIST WEB SITE (2005), available at *http://www.wsws.org/articles/2005/dec2005/aria-d08.shtml*.

[18] Neil Vidmar, *Trial by jury involving persons accused of terrorism,* DUKE LAW SCHOOL WORKING PAPER SERIES (2006), 20. The jury, however, could not reach consensus on other lesser charges.

[19] Andrew Stern, *U.S. jury acquits two men of Hamas conspiracy*, REUTERS ALERTNET (2007). *http://www.alertnet.org/thenews/newsdesk/N01356156.htm*.

[20] Jason Trahan & Michael Grabell, *Judge declares mistrial in Holy Land Foundation Case*, DALLAS MORNING NEWS, Oct. 22, 2007.

thropic organization that provided financial assistance to the poor in occupied Palestinian territories.[21]

What lessons can we draw from these cases? Trial by jury provides citizens with the important legal shield from governmental oppression and unreasonable prosecution. Trial by jury reveals its catalytic power —promoting the importance of lay participation in the community and strengthening the perception of trial fairness and verdict legitimacy. It is thus no surprise that many nations in South and Central America have also adopted contemporary versions of representative all-citizen juries. Mexico's attempt to reinstate the system of all-citizen juries and introduce a more transparent and adversarial criminal procedural system also may help improve the perception of the overall proficiency of the administration of justice and increase the level of confidence that Mexican citizens have in their own legal system. The increased confidence in the judicial system in Mexico is critically important in the eyes of international communities because its weak judicial organization has been subject to significant criticisms of corruption in the past. Mexico, for instance, ranks 72 out of 180 countries in Transparency International's Corruption Perceptions Index for 2008.[22]

III. Jury Trials in Mexico: Historical Background

Research indicates that Mexico extensively used jury trials between 1856 and 1929.[23] Historical records show that, prior to 1856, juries were also used in various provinces and small towns and cities. Mexican juries have played an important political role in the criminal justice system and deliberated on many prominent criminal cases, including the trial of José de León Toral, who murdered then President-Elect Álvaro Obregón, as well as the trial of Maria Teresa de Landa, the 1928 Miss Mexico, who allegedly killed her husband.[24] However, after the end of the Mexican Revolu-

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[21] Greg Krikorian, *Mistrial in Holy Land terrorism financing case*, L.A. Times, Oct. 23, 2007, available at: *http://www.latimes.com/news/local/la-na-holyland23oct23,0,1540715.story?coll=la-home-center*. In the second jury trial, however, the Holy Land Foundation and five of its former organizers were found guilty of 108 separate charges. See Jason Trahan & Tanya Eiserer, *Holy Land Foundation defendants guilty on all counts*, Dallas Morning News, Nov. 25, 2008, available at: *http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/112508dnmetholylandverdicts.1e5022504.html*.

[22] Johann Graf Lambsdorff and Mathias Nell, *Corruption: Where we stand and where to go*, available at: *http://www.icgg.org/corruption.cpi_2008.html* (last visited: January 12, 2010).

[23] Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. L. 715, 785 (2004).

[24] Robert Buffington & Pablo Piccato, True Stories of Crime in Modern Mexico (University of New Mexico Press, 2009).

tion and the creation of the National Revolutionary Party (PRI or *Partido Revolucionario Institucional*) in 1929, jury trials began to gradually disappear. Today jury trials are rarely used in Mexico, and judges are currently empowered to determine legal outcomes of nearly all criminal cases.

1. *Jury Trials in 19th-Century Mexico*

Article 185 of the Constitution of 1824 first authorized the use of a jury trial in Mexico. The jury was responsible for determining whether or not there was a legal foundation for the accusation and was given the task of evaluating or assessing the nature of crimes or disputes. The jurors were named by the corresponding city council.

The case of the state of Querétaro, México, provides an excellent example of popular participation in both civil and criminal cases. Ministers and prosecutors of the Supreme Tribunal of Justice established the jury in Querétaro, Mexico.[25] The jury generally consisted of twelve citizens chosen at random by the city parliament. Early records of Querétaro show that, on March 4, 1826, the city parliament first created a list of potential candidates to be summoned for jury duties. To be qualified to be a jury member, potential candidates had to be at least thirty-five years old and not be members of the clergy or their employees.[26] Thus the city parliament created an initial list of jury candidates in 1827 and did so again in 1829. The list of candidates was prepared periodically so that a new group of eligible residents could serve on jury trials. The record also shows that jury trials in Querétaro were mostly used in criminal cases involving theft and robbery.[27]

The following example of a criminal case illustrates how a jury trial was held in a rural municipality in 19th-century Mexico. In Querétaro, on July 4, 1862, two men, José Perea and Francisco Salina, were charged with the crime of stealing cattle. A group of local residents was then summoned to decide this matter, and a judicial panel of nine male citizens was chosen at random from the list.[28] Once their names were identified and they were summoned, they were legally required to show up the following day for the trial. If they failed to respond to jury summonses, the record shows that they would be punished and fined for their failure to appear in court.[29]

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[25] JUAN RICARDO JIMÉNEZ GÓMEZ, EL SISTEMA JUDICIAL EN QUERÉTARO 1531-1872, 298 (1999).

[26] *Id.* at 473.

[27] *Id.* at 415.

[28] See *Id.* The names of jury members were: Licenciado Rodríguez Altamirano, Vicente Ruiz, Vicente Leyva, Florencio Ramírez, Antonio Rodríguez, Dolores Trejo, Atilano Maldonado, José Reyes, and Zacarías Zúñiga.

[29] *Id.* at 473.

Justice often did not prevail, however. Average citizens were not familiar with legal principles of criminal proceedings. Jury verdicts were often appealed and reversed by higher courts, as the appeals court often ruled that jurors in Querétaro failed to understand legal principles and thus made inaccurate decisions.[30] Mexican historian Juan Ricardo Jiménez Gómez, who investigated legal records of Querétaro, has stated that it was extremely difficult to find detailed records about jury members or the procedural content of trials held in Querétaro. He suggests that it was because the jury system in Querétaro probably never "prospered" or gained wider public acceptance.[31] Nevertheless, he also indicates that people actively participated in jury trials and made decisions based on their conception of justice and moral principles.[32]

Federal judge and legal scholar Manuel González Oropeza argues that one of the most controversial amendments to the Mexican Constitution has been the right to a jury trial.[33] The Mexican Constitution originally provided that each state be responsible for including a provision for individual rights in their respective jurisdictions. According to González Oropeza, José María Luis Mora, an attorney in the state of Texcoco, was a strong advocate for the institution of juries and wrote powerful essays in defense of jury trials in Mexico. He also helped draft jury rules that were later approved under Article 209 of the Mexican Constitution, which stated, "No tribunal of the state can pronounce a sentence in criminal matters for severe crimes without a grand jury and without certification of a petit jury to determine the motivation of the accusation."[34] The Spanish Constitution of Cádiz of 1812 has also influenced jury trials in Mexico, especially in crimes involving press offenses.[35]

José María Luis Mora believed that legal knowledge was an unnecessary component of people's ability to serve as jurors. Nevertheless, Mora was

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30 *Id*. at 415.

31 *Id.* at 298.

32 *Id.* There is another reason for juries' social insignificance in 19th-century Mexico. In the 1830s and 1840s, Mexico was torn between the rights of the Church to hold land, control the peasantry and dictate local affairs; the oligarchy owning the old silver mines, landed property employing *encomienda* labor to grow cotton, and weaving factories; and the military under Santa Ana who became President in 1833, undermining liberal reforms made by previous generations of urban middle-class leaders. The Church eventually won the battle; anticlerical decrees were largely repealed; and the *hacendados* themselves had the option to pay tithes or not to the Church. In this battle, the power oligarchy, the Church, and the militarized state wanted no citizen juries.

33 Manuel González Oropeza, *El Juicio por Jurado en las Constituciones de México*, 2 CUESTIONES CONSTITUCIONALES 73-86 (January-June 2000).

34 *Id.*

35 This Constitution of Cádiz was adopted by independent Spaniards in Spain while in refuge and served as a model for liberal constitutions of Mediterranean nations such as Italy and Latin American countries, including Mexico.

not successful in moving his jury project forward. When the Congressional hearing was convened in 1856, Ignacio L. Vallarta, a strong opponent of the use of juries, insisted that the jury should be left for other nations that are more cultured and civically mature. On November 27, 1856, the Mexican Congress finally voted against the implementation of jury trials, with 42 to 40 votes.[36]

On June 15, 1868, President Benito Juárez, who became the first Mexican leader in 1858 without a military background, brought back the jury in criminal matters for the federal district court. As a Zapoteco Indian, Juárez also became the first indigenous national to serve as President of Mexico after he previously served as the leader of the reform movement that led to the Constitution of 1857.[37] The jury was then guaranteed by a sequence of legal enactments: the CPP (Código Procesal Penal, hereinafter CPP) of 1880, the Law on Criminal Juries in 1891, the CPP (in 1894, the Law on Judicial Organization in the Federal District and Territories in 1903, and the Organic Laws of the Ordinary Court in 1919 and 1928.[38] However, on October 4, 1929, the Code of Organization, Jurisdiction, and Procedure in Criminal Matters for the District and Federal Territories finally abolished the requirement for the popular jury in judgment of general criminal cases.[39]

The jury for press-related crimes was first introduced in Mexico by the Spanish regulation on October 22, 1820. The regulatory code was then ratified by the provincial government by the Rules for the Freedom of the Press on December 13, 1821.[40]

The jury for press-related crimes was later regulated by: the Law of 1828, the Regulation of the Freedom of the Press of 1846, the Decree of 1861, and the Law of Freedom of Press of 1868.[41] The popular jury for official crimes was also introduced in 1917, as well as the Laws of Responsibilities of 1939 and 1979, respectively. In the 1982 reform, however, the intervention of the popular jury in the judgment of these types of crimes was suppressed.[42] Today, Mexico only authorizes a jury at the federal level to intervene in criminal proceedings for press-related crimes against the public order or for internal or external security of the nation (Article 20, Section A (6) of the Constitution).[43]

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36 *Id.*

37 ULICK RALPH BURKE, A LIFE OF BENITO JUAREZ: CONSTITUTIONAL PRESIDENT OF MEXICO (Bibliolife, 2009).

38 Iniciativa *supra* note 2.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 The Constitution, *supra* note 1. For detailed discussions of the Constitution, the federal judiciary and related discussions on the issues of human rights and constitutional laws,

2. *Jury Trials in the Federal District*

According to prominent jury historian Elisa Speckman Guerra, jury trials in Mexico went through several significant transformations around the turn of the 20th century. In the Federal District between 1869 and 1880, for example, the jury was given the responsibility to act as judges of fact, determine guilt or innocence, describe the nature of the crime, and resolve the presence of aggravating or extenuating circumstances.[44] The jury's verdict was determined by a majority vote, which was irrevocable; and the method of jury selection was managed by the city council, which compiled a list of approximately 600 names of qualified males selected at random from local communities. To serve as a juror, an individual had to be a native-born Mexican citizen, at least 25 years of age, and know how to read and write. In the early years, the jury typically consisted of eleven well-educated males.[45]

Interestingly, prior to 1869, foreigners were allowed to serve as jurors for press-related offenses, as there were not enough Mexican born citizens who could satisfy all the qualifications for jury duty. The strict jury qualification eliminated the vast majority of jurors in the Federal District. As a result, due to the significant shortage of qualified Mexican citizens for jury service, foreign jurors constituted five to seven percent of the popular jury.[46] Nevertheless, foreigners were excluded from jury selection for common criminal offenses throughout most of the jury's existence between 1869 and 1929. The jury law for common criminal offenses also excluded convicted felons for crimes against the common order, "deceiving tricksters," the blind, and anyone who was a government employee or had an occupation that prevented him from having the liberty of time-off without affecting his pay or income necessary for subsistence.

Between 1880 and 1903, the potential jury list expanded to include 800 individuals; and in 1891, the governor of the Federal District, not the city council, was given the responsibility of creating the jury candidate list. In this period, the verdict had to be determined by eight or more votes to be-

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please see HÉCTOR FIX-ZAMUDIO, ESTUDIO DE LA DEFENSA DE LA CONSTITUCIÓN EN EL ORDENAMIENTO MEXICANO (Porrúa-UNAM, 2005).

44 Elisa Speckman Guerra, *Los jueces, el honor y la muerte: un análisis de la justicia (Ciudad de México, 1871-1931)*, 55 HISTORIA MEXICANA, 1411-1466 (2006); Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidencialismo*, 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 411 (2006) (discussing more recent fundamental changes and important legal reforms during the past decade related to Mexico's constitutionalism); JOEL CARRANCO ZÚÑIGA, EL JUICIO DE AMPARO EN MATERIA ADMINISTRATIVA (Porrúa, 2008).

45 Personal interview with Elisa Speckman Guerra (Mar. 18, 2009) (interview tapes on file with the authors).

46 *Id.*

come irrevocable. However, in 1891, the size of the jury shrunk from eleven to nine and made it increasingly difficult for the jury to render an irrevocable verdict. This period also witnessed the imposition of an income requirement on potential jury candidates who had to earn a daily income of at least one peso. This economic requirement made the city government fearful that it might fail to gather enough people, so the government decided to allow public employees and foreigners with at least five years of residency to participate in jury trials. In 1891, the income requirement was raised to one hundred pesos per month and the age requirement was lowered to 21 and three years of residency for foreigners. The age and residency requirement were lowered once more out of fear that the new economic restriction would eliminate many potential candidates for jury trials.[47]

From 1907 to 1919, the economic requirement was eliminated and foreigners were excluded from future jury participation. In 1907, the jury was called to serve only in cases in which the penalty of the crime exceeded six years. By 1919, the city council once again took charge of creating a candidate list. However, the jury was no longer allowed to describe the nature of the crime or determine any aggravating or extenuating circumstances in criminal cases. Between 1922 and 1929, the government also added an educational requirement and juror candidates had to have an education above elementary school.

Over time, many other changes to the jury function emerged in the Federal District. From 1869 to 1907, for instance, the jury adjudicated in criminal cases, in which the potential sentence might exceed two-and-half years of incarceration. Between 1907 and 1919, the jury presided over criminal cases with potential penalties exceeding six and half years of incarceration; between 1919 and 1922, the jury decided on cases exceeding two years of incarceration; and between 1922 and 1929, the jury presided over criminal cases with five years of incarceration.[48] Criminal cases available for jury adjudication also changed over time. For example, in 1903, juries were no longer allowed to adjudicate a criminal case that involved a breach of trust, fraud, embezzlement, extortion, or bigamy, and in 1928, adultery was added to the list of prohibitions.[49]

Despite the long history of jury trials prior to the end of the Mexican Revolution in 1929, the practical use of the popular jury in an open and adversarial court has all but disappeared today.[50] Yet, the 2008 judicial re-

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47 *Id.*

48 Elisa Speckman Guerra, *El jurado popular para delitos comunes: leyes, ideas y prácticas (Distrito Federal, 1869-1929)*, *in* HISTORIA DE LA JUSTICIA EN MÉXICO (SIGLOS XIX Y XX) (Salvador Cárdenas ed., Suprema Corte de Justicia de la Nación, 2005).

49 *Id.*

50 Dave Stoddard, "Why don't we just improve the economy of Mexico," available at: *http://www.newswithviews.com/Stoddard/david1.htm* (last visited: September 23, 2009) (He stated that "[T]here are no jury trials in Mexico.").

form laid an important foundation for the possible establishment of the popular jury system by implementing the use of oral arguments in proceedings, an adversarial system, the presumed innocence of an accused until proven guilty, and the placing of the "burden of proof" on prosecutors.

Several states have already proposed and introduced oral and more transparent criminal proceedings. In 2004, the State of Nuevo León introduced the oral adversarial criminal procedure in non-serious culpable felonies. In February 2005, in its first oral trial in the city of Montemorelos, 19 witnesses testified publicly and documentary evidence was also filed within a period of five hours, showing great judicial speed and efficiency.[51] The government of Nuevo León also won approval of an "access to information" law that allowed public access to governmental records not only in the executive branch, but also in legislative and judicial branches.[52]

The states of Zacatecas and Chihuahua similarly have introduced their own reform initiatives to introduce open and transparent criminal procedures.[53] Chihuahua courts also introduced plea bargains, mediation, suspended sentences, probation, and other legal tools in an attempt to more effectively process their criminal cases.[54] These legal changes have had a dramatic effect on the efficiency of criminal cases. Of 1,112 cases filed in the City of Chihuahua in 2008, only eight went all the way to an oral trial, and in Ciudad Juárez, six of 1,253 criminal cases were tried in an open and adversarial court.[55]

On May 16, 2006, an international forum on the relevance and feasibility of establishing Mexico's popular jury was held at the Siqueiros Polyforum in Mexico City.[56] Many scholars and citizens of diverse countries shared experiences on the challenges and potentialities of the restoration of Mexico's jury system and held debates on how to improve the system of justice.[57] The international discussion on the re-establishment of the jury sys-

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[51] See "Reforming the Justice System and Enhancing Competitiveness", José Natividad González Parás, Governor of Nuevo León, *http://www.wilsoncenter.org/index.cfm?topic_id=5949&categoryid=357C322F-65BF-E7DC-48004415419DCE89&fuseaction=topics.events_item_topics&event_id=117611*. See also Basham Ringe and Correa S. C., *First Oral Trial*, available at: *http://www.hg.org/articles/article_989.html*.

[52] *Id*. The article also states that the Federal Attorney General's Office objected to aspects of the "access to information" law and it is currently under review by the Supreme Court.

[53] James Cooper, *Slow road to legal reforms in Mexico*, SAN DIEGO UNION-TRIBUNE, Nov. 26, 2006, available at: *http://www.signonsandiego.com/uniontrib/20061127/news_mz1e27cooper.html*.

[54] Ken Ellingwood, *In a Mexico State, Openness is the New Order in the Courts*, L.A. TIMES, Feb. 6, 2009.

[55] *Id.*

[56] Guillermo Zepeda, *Los juicios orales en México*, EL ECONOMISTA, May 16, 2006.

[57] *Id*.

tem in Mexico was extremely timely and symbolic, especially given the fact that many Central and South American nations have already introduced and democratized their criminal justice systems, including Nicaragua, Guyana, Belize, Panama, Brazil, Venezuela, Bolivia, and many Caribbean countries, including British Virgin Islands, Montserrat, Tortola, Anguilla, Antigua, Barbuda, St. Lucia, St. Vincent, the Grenadines and Grenada, Turks and Caicos Islands, Jamaica, Trinidad, and Puerto Rico.[58]

3. *The System of Lay Participation in Law in the United States, Japan, Korea, Ireland, and New Zealand*

This section briefly examines the lay judge system of five nations of which citizens were asked to respond to a set of questions on the popular jury, and opinions are empirically analyzed. Those countries include: (1) the United States, (2) Ireland, (3) New Zealand, (4) Japan, and (5) South Korea. The United States, Ireland, New Zealand, and South Korea have adopted an all-citizen jury system, in which people are selected at random from local communities to make decisions in criminal trials.

The tradition of a jury trial in Ireland, the United States, and New Zealand came from Britain through their colonial history which has been rooted in part in Roman law.[59] Britain transplanted both grand and petit criminal juries and civil jury trials to their colonies. In recent years, however, the civil jury trial has all vanished in many of the former British colonies. At home, Great Britain has also abolished a tort-related, civil jury trial. The U.S. and New Zealand, however, still retain general civil jury trials, as does Hong Kong, another former British colony in East Asia.

Japan once held criminal jury trials from 1928 to 1943. However, the jury system was suspended by the Japanese military government in 1943, because only men thirty-years-old and over with property were allowed to serve, and no eligible jurors either survived or could afford to serve at the end of the war.[60] Nevertheless, in May 2004, nearly six decades after the end of WWII, the Japanese Diet passed the Lay Assessor Act and set up two different civic participatory panels for criminal trials.

The fundamental difference between the lay assessor (or mixed tribunal) and the all-citizen jury systems is that, while the latter panel exclusively con-

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58 Vidmar, *supra* note 6, at 437-444; Stephen Thaman, *Latin America's First Modern System of Lay Participation*, FESTSCHRIFT FUR STEFAN TRECHSEL ZUM 65. GEBUTSTAG 765-79 (Andreas Donatsch et al. ed. 2002).

59 Vidmar, *supra* note 6.

60 Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INTERNATIONAL LAW JOURNAL 315 (2007).

sists of local residents chosen at random from a nearby community, the former is composed of a judicial panel of both professional and lay judges. In other words, the mixed tribunal system may be seen as a judicial compromise between all-citizen jury and professional bench trial systems, thereby requiring a joint collaboration of professional trial judges and a select group of local residents acting as assistant adjudicators. Lay judges are either politically chosen from local communities or summoned from registered rolls prepared by local governments.

In Germany, prominent political party members in local communities first create a list of lay judges twice the size of what is actually needed.[61] After the initial list is prepared, it is further reviewed by a special board of political members who then determine the final official list.[62] German lay judges are then required to serve for a term of four years. [63] In Japan, the local government prepares a list of lay judges from registered rolls, and candidates are chosen randomly from the list. Once chosen, they are required to serve only for the duration of a single trial.[64]

For Japan's mixed tribunal system, a panel of both three professional and six lay judges is asked to make decisions in both the conviction and penalty phases of a contested criminal case, whereas a panel of one professional and three lay judges is asked to make a decision in the penalty phase of an uncontested case where the facts and issues identified by pre-trial procedures are undisputed.[65]

In 2007, the South Korean Parliament approved a judicial reform measure and set up the all-citizen jury system in criminal cases. While the decisions are not binding, judges use the jury verdict as an important guidance for determining final trial outcomes.[66] South Korea's legal transformation has been quite remarkable because, unlike Japan, South Korea never had a

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[61] For Germany's lay assessor selection, see Walter Perron, *Lay Participation in Germany*, 71 INTERNATIONAL REVIEW OF PENAL LAW, 181 (1999); Nancy Travis Wolfe, *Lay Judges in German Criminal Courts: The Modification of an Institution*, 138 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, 495-515 (1994); C.C. SCHWEITZER ET AL., POLITICS AND GOVERNMENT IN GERMANY, 1944-1994: BASIC DOCUMENTS (Oxford University Press, 1995). Other nations with lay assessor systems or mixed tribunals include France, Italy, Portugal, Sweden, and Norway in Europe, China in East Asia, Nicaragua and Venezuela in the Americas, and South Africa in Africa.

[62] *Id.* The board consists of one professional judge, one administrative officer, and ten confidants who were then designated by the public administration in each community.

[63] Schweizer et al., *supra* note 61, at 279. After the four year period, the lay assessors can be re-elected a second term.

[64] Perron, *supra* note 61.

[65] Saiban-in no sanka suru keiji saiban ni kansuru horitsu, Law No. 63/2004 (hereinafter the Lay Assessor Act). See Kent Anderson & Emma Saint, *Japan's Quasi-Jury: Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J., 233, 233-283 (2004).

[66] Jon Herskovitz, *South Korea to Try Jury System for First Time*, REUTERS, May 3 2007.

history of jury trials. The introduction of the popular jury also had an impact on another branch of the South Korean government. In 2005, the Ministry of Defense announced that it would adopt a jury system in which officers, noncommissioned officers, and rank-and-file soldiers could participate as jurors in an effort to increase public trust in military tribunals.[67]

Prior to the introduction of lay participation, South Korea also revised its election law in 2005 and granted the right to vote in local elections to permanent foreign residents living there for three years or more, including ethnic Japanese, Chinese, Americans, Latinos, including Mexicans, and other minority groups.[68] The 2005 law also lowered the voting age from 20 to 19, thereby expanding the voting population.[69] The first election under the new law took place on May 31, 2006.[70] Changes in the electoral system and the expanded political franchise are seen as another sign of South Korea's movement towards the development of a fairer and more balanced democracy in East Asia.

In all of these nations, jurors are selected at random from local electoral rolls. There is no specific requirement as to gender, race, ethnicity, education, or economic background to be eligible to serve. Thus, in theory, every citizen in these nations is treated equally and considered as an able, trusted element of society, capable of making fair and just decisions in criminal trials, thereby contributing to the judicial governance of the society in which he/she lives. Whether or not Mexico will be ready to follow in the footsteps of these countries is the question examined in the following section.

IV. Methodology

This section examines the views, attitudes, and opinions of college students and university researchers, i.e., the possible future intelligentsia of six nations, who one day may be expected to lead their respective countries into the 21st century. Between 2005 and 2008, two thousand respondents from ten private, state, and/or national colleges and universities in six different nations were contacted and asked to provide their views and opinions on the popular jury. Both closed-ended and open-ended questions were used in the opinion surveys. The six nations examined include the following: (1) Mexico, (2) Japan, (3) the United States, (4) Ireland, (5) South Korea, and (6) New Zealand.

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67 Joo Sang-min, *Military Seeks to Revise Martial Laws*, KOREA HERALD, Jul. 20, 2005. In 2012, the South Korean jury system will be reviewed and permanently implemented with or without major changes.

68 *See* Cho Chung-un, *Elections Expand Voting Rights for Foreigners, Younger Citizens*, KOREA HERALD, May 25, 2006.

69 *Id.*

70 *Id.*

1. *Survey Questions*

More than 70 questions were asked of our respondents. The questionnaire was translated into the following four languages to maximize the response rate from college students and researchers: (1) Hangul for Korean respondents; (2) Spanish for Mexican students; (3) Japanese for respondents in Japan; and (4) English for the United States, Ireland, and New Zealand respondents.

The questions were classified into the following eleven categories: (1) confidence in jurors' abilities; (2) willingness for legal participation; (3) perceived obstacles to jury service; (4) moral/ethical responsibilities; (5) confidence in the jury system; (6) procedural suggestions for jury trials; (7) fear of serving as jurors; (8) jury's oversight function of the government; (9) confession and believability; (10) race, gender, diversity, and jury representation; and (11) fairness of court and the criminal process.

Respondents were asked to rate their agreement on a five-point Likert scale: (1) strongly agree, (2) somewhat agree, (3) uncertain/neutral, (4) somewhat disagree, and (5) strongly disagree. We also asked for narrative responses about their views and opinions on lay participation, including any suggestions to improve the system of popular legal participation in their country. A select group of respondents was also contacted in a person-to-person and/or telephone interview. Finally, their responses were transcribed, translated into English, and qualitatively analyzed.

2. *Samples*

A. *Mexico*

In December 2008, a group of students at Instituto Tecnológico Superior de la Región de los Llanos in the State of Durango was asked to respond to a jury survey questionnaire.[71] Mexican students who responded to the survey questionnaire were enrolled in the following two seminar courses: (1) ethics and administration and (2) the development of human potential. A total of 278 students filled out survey questionnaires. In March 2009, a group of law students at the National Autonomous University of Mexico (Universidad Nacional Autónoma de México (UNAM)) was also asked to respond to the same questionnaires (n=34).[72]

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[71] The institute offers the BS in computer science, and other degrees in industrial engineering, food engineering, and mechanical engineering. See *http://www.itsrll.edu.mx* (last visited: September 23, 2009).

[72] 7 of these UNAM students filled out the questionnaire earlier, December 2008.

B. *Japan*

Between October and December 2005, undergraduate students at three private universities in a Tokyo metropolitan area filled out the same jury questionnaire in Japanese (n=607). Those universities included: (1) International Christian University (ICU), (2) Senshu University, and (3) Toyo University. The survey questionnaire was distributed to undergraduate students enrolled in lower division sociology and psychology courses during the time of survey.

C. *New Zealand*

In July 2008, the jury questionnaire was distributed to both undergraduate and graduate students at the University of Otago in Dunedin, New Zealand.[73] The university has been the South Island's largest employer and demonstrated New Zealand's highest research excellence, only second to the University of Auckland.[74] A total of 90 students responded to the jury survey questionnaire.

D. *Ireland*

In October 2006, the jury questionnaire was distributed to undergraduate and graduate students at the National University of Ireland, Galway. The university is one of the oldest educational institutions in Ireland. The university first opened for teaching in 1849, and currently it has approximately 15,000 students. [75] A total of 114 students responded to the jury survey questionnaire.[76]

E. *South Korea*

In April 2008, a group of undergraduate students at Chungbuk National University in the City of Cheongju was asked to participate in the survey. A group of students enrolled in an introductory psychology course provided their responses in Hangul. A total of 186 students responded to the jury survey questionnaire.

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[73] For university information, please see *http://www.otago.ac.nz* (last visited: March 1, 2009). Ms. Madeline Munro assisted the 2008 jury survey in New Zealand.

[74] *Id*. See also *http://www.otago.ac.nz/research* (last visited: March 1, 2009).

[75] For university information, please see *http://en.wikipedia.org/wiki/National_University_of_Ireland,_Galway* (last visited: March 1, 2009).

[76] The survey was assisted by Paul Gavin, a former undergraduate student at the National University of Ireland, Galway. At the time of survey, he was enrolled at Kings College London, studying Criminology and Criminal Justice for his Master's degree.

F. *The United States*

In the fall quarter of 2005 and the winter quarter of 2006, a group of undergraduate students at two University of California campuses in Santa Cruz and Davis participated in the opinion survey. A total of 623 students in undergraduate sociology and psychology courses provided their responses in the survey questionnaire.

3. *Findings*

Table 1 shows the results of the cross-national analysis, indicating differences and similarities of the views on lay participation among the respondents of six nations. The first set of questions examined the respondents' confidence in jurors' overall abilities. One significant way in which Mexico stood out was the response to the questions on jurors' abilities to reach a fair, just, and equitable decision, as well as their capacity to separate facts and evidence from prejudicial publicity.

The overwhelming majority of Mexican respondents felt confident that they could make fair and just decisions as jurors (75.9%) and that they are more likely to base their decisions solely on facts and evidence presented in court (72.8%). The latter figure shows the highest confidence level among six nation respondents (see [1] "Confidence in Jurors' Abilities" in Table 1). The majority of Mexican respondents also agreed that it is not difficult for ordinary people to determine a verdict (*i.e.*, guilty/not-guilty) (only 46.6% of them felt that it is "extremely" difficult). The majority of Mexican respondents also did not agree that jurors are incapable of separating actual evidence from media coverage and prejudicial information in highly publicized criminal cases (48.1%). On the other hand, the majority of respondents in the other five nations felt that jurors would be unable to escape from prejudicial information on criminal cases. Those results show that Mexican respondents tend to hold greater faith and respect for the popular jury and people's abilities to engage in deliberation and determine a fair and equitable verdict based on factual evidence and information.

Mexico's high confidence in lay participation starkly contrasts to the confidence expressed by Japanese respondents, in which only 27% felt confident in making a fair and just decision. While Japan's lay justice system began in May 2009, many scholars and citizens have already expressed their concerns about the low confidence among jury candidates and the overall quality of the deliberation and trial outcomes in Japan. Despite the fact that Mexicans today do not have the opportunity to participate in jury trials in general criminal cases, empirical results suggest that Mexicans are more willing to accept the jury system as an important form of adjudication and they certainly expressed their willingness to participate in the trial process.

TABLE 1. CROSS-NATIONAL ANALYSIS OF PERCEPTIONS AND OPINIONS ON LAY PARTICIPATION IN LAW*

Attitudinal Questions	*Ireland*	*Japan*	*Korea*	*Mexico*	*New Zealand*	*United States*
(1) Confidence in Jurors' Abilities						
I am confident that, if I became a juror, I could make a fair and just judgment	86.0 (93.6)	27.3 (35.2)	66.7 (64.4)	75.9 (72.9)	70.0 (72.9)	77.1 (79.0)
It is extremely difficult for ordinary people to determine the verdict (*i.e.*, guilty/not-guilty)	51.8 (55.3)	55.9 (53.4)	70.5 (66.7)	46.6 (45.9)	48.9 (54.0)	36.5 (38.3)
In high profile cases, jurors are incapable of separating actual evidence from media coverage	63.1 (59.6)	80.9 (77.1)	66.7 (72.2)	48.1 (49.4)	68.9 (72.9)	53.5 (57.7)
It is difficult for ordinary citizens to determine an appropriate penalty in a criminal trial	78.1 (83.0)	41.1 (40.3)	87.1 (83.1)	53.0 (53.4)	82.2 (83.7)	62.2 (65.7)
A jury has a potential risk of acquitting the guilty and convicting the innocent	79.0 (72.3)	79.9 (77.3)	84.4 (80.0)	74.3 (72.3)	85.6 (86.4)	82.4 (84.8)
Jurors are most likely to make decisions based solely on facts and evidence	64.9 (68.1)	70.8 (60.0)	49.5 (47.7)	72.8 (73.6)	55.6 (43.2)	44.8 (37.3)
(2) Willingness for Legal Participation						
I am willing to serve as a juror	88.5 (91.3)	40.3 (44.6)	81.7 (75.5)	70.4 (69.8)	73.0 (64.8)	67.9 (67.6)
I feel it is my duty to serve as a juror when needed	85.1 (76.6)	74.3 (72.4)	71.4 (62.2)	71.9 (69.8)	73.3 (75.7)	64.0 (58.1)
(3) Perceived Obstacles to Jury Service						
If I could pick the date of jury service 6 months in advance, I could easily serve	74.5 (76.6)	69.8 (72.3)	61.8 (55.5)	56.5 (57.2)	67.8 (67.5)	64.6 (64.8)
My employer would not be resentful of my jury duty	53.6 (50.0)	27.4 (29.6)	43.8 (42.2)	39.4 (40.5)	51.1 (63.9)	41.1 (39.6)
The importance of jury duty is widely advocated in my community	29.8 (34.0)	7.8 (11.4)	34.4 (37.8)	49.9 (54.7)	26.7 (27)	26.2 (31.3)

TABLE 1. CROSS-NATIONAL ANALYSIS OF PERCEPTIONS AND OPINIONS ON LAY PARTICIPATION IN LAW* (continued...)

Attitudinal Questions	*Ireland*	*Japan*	*Korea*	*Mexico*	*New Zealand*	*United States*
(4) Moral/Ethical Responsibilities						
I would feel overwhelmed if I had to make a judgment on the defendant and his/her charges	47.3 (40.4)	73.2 (61.5)	69.9 (68.9)	43.9 (41.8)	61.1 (59.4)	55.3 (43.8)
It would be very difficult for me to never discuss my jury experience	67.9 (71.8)	70.9 (66.5)	73.5 (76.6)	47.4 (51.6)	68.5 (72.9)	66.6 (67.1)
(5) Confidence in the Jury System						
If I became a defendant in a criminal case, I would prefer a jury trial to a judge trial	73.7 (72.3)	32.3 (30.4)	51.6 (52.2)	62.2 (65.0)	60.0 (56.7)	61.2 (68.0)
A jury's decision reflects the community's values and judgments	73.6 (70.2)	81.0 (76.9)	78.0 (75.6)	64.9 (67.3)	72.2 (73.0)	53.9 (51.9)
A jury trial is not the best way to determine a trial outcome	29.0 (25.5)	43.0 (41.9)	59.2 (55.5)	39.0 (40.4)	35.5 (35.1)	26.9 (28.6)
I support other countries introducing the jury system like ours	82.5 (87.2)	44.3 (47.8)	65.1 (62.2)	54.7 (53.8)	67.7 (70.2)	65.3 (64.6)
(6) Procedural Suggestions for Jury Trials						
In discussing a verdict, jurors should utilize the judge to clarify questions/concerns	93.0 (95.7)	86.8 (84.6)	79.0 (82.2)	75.4 (73.4)	91.1 (94.6)	83.4 (81.9)
Recording (transcribing or videotaping) is important in all trial proceedings	92.1 (93.6)	80.5 (79.4)	97.8 (98.9)	86.2 (84.9)	92.2 (94.6)	85.0 (88.1)
Citizens should be encouraged to serve on a civil jury (*i.e.*, medical malpractice, drug poisoning, or negligence cases)	64.0 (63.8)	52.5 (52.3)	77.3 (77.8)	68.2 (66.7)	62.9 (50.0)	68.2 (67.2)
The more diverse the jury's racial and gender background, the fairer the trial	65.8 (63.8)	86.2 (82.4)	77.4 (74.4)	73.4 (68.7)	71.1 (67.5)	76.0 (70.5)

TABLE 1. CROSS-NATIONAL ANALYSIS OF PERCEPTIONS AND OPINIONS ON LAY PARTICIPATION IN LAW* (continued...)

Attitudinal Questions	*Ireland*	*Japan*	*Korea*	*Mexico*	*New Zealand*	*United States*
(7) Fear of Serving as Jurors						
In a trial where many gang supporters may appear, I believe I could make a fair judgment as a juror	57.5 (59.6)	21.3 (24.4)	39.8 (40.0)	60.7 (60.1)	46.6 (54.0)	54.1 (57.0)
If I became a juror, I would be concerned about potential retaliation from the defendant	56.1 (57.4)	64.2 (62.8)	80.6 (77.8)	63.6 (67.3)	60.7 (51.3)	42.7 (41.6)
(8) Oversight Function of the Government						
Ordinary people's presence in a jury serves to prevent future crimes in the community	31.6 (32.0)	44.9 (47.8)	52.8 (48.9)	55.5 (59.1)	32.3 (32.4)	32.7 (34.9)
Ordinary people in a jury can prevent possible overzealous prosecutions or judges' unfair decisions	61.0 (57.4)	74.0 (69.9)	81.7 (76.7)	67.4 (66.5)	65.2 (62.2)	66.0 (72.2)
(9) Confession and Believability						
Some defendants plead innocent, even if they already confessed. In such a case, I am curious to know how the confession was made	91.3 (93.6)	91.3 (91.1)	93.0 (90.0)	83.6 (81.8)	85.6 (83.8)	89.2 (87.0)
For the above case, I believe that the defendant was forced to confess	34.2 (38.3)	16.9 (18.4)	61.3 (60.0)	53.7 (50.9)	36.6 (37.8)	41.1 (41.8)
(10) Race, Gender, Diversity, and Democracy						
It is important to create programs to increase the number of female and minority lawyers	73.7 (59.6)	19.5 (29.8)	83.3 (78.7)	63.8 (58.5)	62.2 (48.6)	79.9 (66.9)
Every taxpayer including permanent residents (non-citizens) should be allowed to serve on juries	70.2 (74.4)	69.1 (64.6)	59.3 (57.3)	57.1 (54.8)	60.9 (52.8)	68.1 (64.9)

TABLE 1. CROSS-NATIONAL ANALYSIS OF PERCEPTIONS AND OPINIONS ON LAY PARTICIPATION IN LAW* (continued...)

Attitudinal Questions	*Ireland*	*Japan*	*Korea*	*Mexico*	*New Zealand*	*United States*
In criminal court, non-English speakers are more likely to be treated worse than English speakers	47.4 (48.9)	54.2 (51.8)	67.8 (63.2)	43.4 (45.9)	44.5 (48.6)	71.1 (73.2)
An increase of lawyers will generally lead to a lower quality of legal services	21.1 (25.5)	57.0 (55.5)	22.5 (26.7)	37.3 (43.4)	27.8 (32.4)	19.1 (23.4)
If a wife kills her partner who physically abused her, wives should be included in the jury	57.9 (48.9)	58.5 (46.1)	54.3 (54.5)	43.6 (40.2)	57.3 (54)	63.8 (60)
(11) Fairness of Court & Criminal Process In the court process, all people are treated with respect and dignity	36.8 (42.5)	22.0 (25.0)	35.5 (38.9)	29.7 (33.8)	55.6 (54.0)	27.2 (35.0)
I believe that my country's judges are generally less biased than judges in other countries	14.1 (19.5)	13.7 (18.1)	8.6 (13.3)	16.7 (20.8)	34.5 (32.4)	15.0 (13.4)
Fair procedures are generally used to make the final judgment on a case	67.6 (59.6)	42.6 (45.2)	55.9 (60.0)	43.4 (46.8)	66.7 (70.3)	47.8 (51.6)
Courts are generally sensitive about the concerns of average citizens	55.3 (63.8)	20.2 (21.0)	30.9 (32.1)	25.3 (25.8)	55.5 (56.7)	35.9 (39.2)

NOTE: The analysis relied on the use of a 5 point Likert scale: (1) strongly agree, (2) somewhat agree, (3) unsure/uncertain, (4) somewhat disagree, and (5) strongly disagree.

* The first figure in the box shows an overall percentage of respondents (*i.e.*, both male and female students) who either strongly or somewhat agreed with the statement. The second figure in parenthesis shows a percentage of male respondents who either strongly or somewhat agreed with the statement.

The great majority of Mexican respondents also indicated their willingness to serve on juries both voluntarily (70.4%) and even as required by law (71.9%). When they were asked whether or not the importance of jury duty and popular participation was espoused in their communities, almost half of Mexican students responded affirmatively (49.9%). The response is nearly 20% higher than Korea, which is the second at 34.4%. All the rest of countries were below 30%. Nearly 60% of Mexican students also indicated that if they could pick the date of jury service six months in advance, they could easily serve as jurors (56.5%).

A. *Fear of Serving as Jurors and Credibility of Confession*

Another set of questions was asked about a potential fear of serving as jurors. The great majority of Mexican students indicated that in a trial where many gang supporters could appear, they believed they could make a fair judgment as jurors (60.7%). The response was the highest among the six nations. Japanese respondents had the lowest confidence, where only one in five expressed confidence in making a fair decision in a gang-related trial (21.3%).

With respect to socio-political ramifications of the popular jury, the majority of Mexican respondents felt that ordinary people's presence in a jury could serve to prevent future crimes in their local communities (55.5%). The response was the highest among six nations. The great majority of Mexican respondents also felt that the popular jury could prevent possible overzealous prosecution or judges' unfair decisions (67.4%). Those results suggest that lay participation in Mexico will play an important watchdog function in local communities, as well as in the courtroom.

The next set of questions was asked about the views on the credibility of confessionary documents and their ability to stand as evidence in court. The overwhelming majority of Mexican respondents felt that they needed to understand how confessions were being extracted, especially in criminal trials in which defendants later contested the content of such confessionary documents (83.6%). Over half of Mexican respondents also felt that defendants must have been coerced to make confessions in such situations (53.7%). South Korea is the only nation that showed a higher response than Mexico (61.3%). This is perhaps because until recently, South Korea was run by a powerful, dictatorial government that used the military and the courts to control political opposition. The Korean government and its military agencies (including the Korean Central Intelligence Agency or KCIA), for instance, long relied on the illegal confinement and torture of many political dissenters and civic activists to extract coerced and falsified confessions to ensure their convictions.[77]

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[77] *See* generally CHALMERS JOHNSON, NEMESIS (Henry Holt and Company, 2008).

With respect to the fairness of the court and criminal process, the overwhelming majority of the respondents indicated that the judges in their respective nations are generally more biased than judges in other nations, and that the courts have not been sensitive about the concerns of average citizens. Similarly, the majority of Mexican respondents felt that the final judgment of criminal cases in Mexico did not follow fair and equitable criminal procedures.

B. *People's Confidence in the Government and Criminal Justice Managers*

Table 2 shows people's confidence in the central government, the administration of justice, prosecutors, the police, jurors, and the media. Mexican respondents' confidence in the police was the lowest among the six nation respondents (15.9%), a large percentage below any figures of other countries. Not only did it show the lowest confidence among six countries by a large margin, but it also had the lowest confidence in the prosecutors (27.5%). South Korea is next by a significant margin (42.2%).

Confidence in the court also failed to reach a majority in Mexico (45.2%). Mexico is the only nation where respondents' confidence in prosecutors, the police, and the court failed to reach the majority. With respect to the confidence in defense attorneys, slightly more than half of Mexican respondents have shown confidence in them (57.8%). The majority of Mexican respondents also showed confidence in juries (52.0%). Japan showed the lowest level of confidence in juries (44.4%), followed by South Korea (45.9%).

The 2008 judicial reform in Mexico guaranteed the legal representation of criminal defendants by public defenders when defendants failed to appoint their own attorneys. Public defenders can play an important role in the administration of justice in Mexico because confidence in both defense attorneys and the jury is much higher than confidence in the police, prosecutors, or the court. It is also important to note that confidence in the jury in Mexico is relatively lower than in the United States, New Zealand, or Ireland, the nations that have had a long history of common law tradition. In those nations, the use of jury trials has also been considered as an integral part of the criminal justice system. Nevertheless, among countries with a long history of civil law tradition and an inquisitorial and non-adversarial criminal justice system, such as in Japan and South Korea, Mexico showed the highest level of confidence in jurors.

TABLE 2. CROSS-NATIONAL ANALYSIS OF PEOPLE'S CONFIDENCE IN THE GOVERNMENT AND LEGAL INSTITUTIONS*

Attitudinal Questions	*Ireland*	*Japan*	*Korea*	*Mexico*	*New Zealand*	*United States*
National (Federal) Government	66.7 (2.31)	57.1 (2.52)	29.8 (2.90)	42.7 (2.84)	85.0 (2.04)	38.7 (2.76)
Defense Attorneys	89.7 (2.02)	82.9 (2.03)	42.8 (2.71)	57.8 (2.60)	79.0 (2.09)	68.2 (2.35)
Police	53.1 (2.53)	60.7 (2.45)	31.8 (2.87)	15.9 (3.46)	77.9 (1.93)	54.4 (2.52)
The Court (Judges)	88.2 (1.93)	87.3 (1.97)	55.4 (2.50)	45.2 (2.92)	87.8 (1.72)	68.4 (2.31)
Prosecution	86.8 (2.02)	78.9 (2.16)	42.2 (2.65)	27.5 (3.26)	82.0 (2.00)	63.3 (2.36)
Jurors	75.9 (2.16)	44.4 (2.69)	45.9 (2.66)	52.0 (2.85)	63.3 (2.37)	65.1 (2.35)
Television/ Radio	46.2 (2.58)	48.3 (2.64)	22.6 (3.06)	45.4 (2.77)	41.9 (2.69)	23.0 (3.03)
Newspapers	53.3 (2.47)	75.8 (2.16)	32.6 (2.87)	52.0 (2.57)	52.3 (2.54)	54.6 (2.52)
Internet News	28.7 (3.01)	n/a	20.7 (3.19)	n/a	40.0 (2.81)	48.4 (2.62)

NOTE: People's confidence is measured by using the following 4 point rating scale: (1) very confident, (2) some confidence, (3) little confidence, and (4) no confidence.

* Figures show percentages of respondents who were very confident or somewhat confident in respective institutions. Figures in parentheses show the mean of 4 point rating scales.

V. DISCUSSION: MEXICO AS THE LEADER OF DEMOCRACY IN NORTH AMERICA

Research shows that Mexico once had a long tradition of social and political efforts to advance the democratic ideals of equality and direct citizen participation in politics and law. Indeed, Mexico has been one of the most important political leaders of democracy in North America for the last two centuries.

The U.S. media proudly boasts that in 2009, newly-elected Barack Obama has become the first African President to lead the nation in the Western hemisphere.[78] But this assertion is patently false. Nearly two hundred years ago, Mexico became the first nation in North America to choose an African

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[78] Via Democracy Now, *Pan-African Scholar Ali Mazrui on the Election of Barack Obama as the First Black President in the Western World,* INDYBAY (2009), *http://www.indybay.org/newsitems/2009/02/16/18571196.php* (last visited March 15, 2009).

as President, Vicente Guerrero Saldaña, who lived during a crucial period of Mexican history and became the second President of Mexico on April 1, 1829. He was born in 1783 as a son of former African slaves in the town of Tixtla near Acapulco, became one of the main rebel leaders of the Mexican Revolution, and fought against Spain in the Mexican War of Independence.[79] He was an ardent defender of Indian rights and a harsh opponent of social and economic inequities.[80] While his tenure was cut short by political unrest and his untimely death in 1831, his accomplishment and historical legacy will never be forgotten. President Guerrero Saldaña signed a decree on September 15, 1829 that abolished the system of slavery in Mexico and emancipated all slaves.[81] He also helped write Mexico's first Constitution and took various steps to educate and elevate its poor and people of color. The Mexican state of Guerrero was also named in his honor.[82]

The jury was also a very important political institution for Mexicans in the American Southwest, when the U.S. government claimed its jurisdiction following the Mexican-American War. Mexican juries in the newly "occupied territory" served as a powerful check on the potentially prejudicial attitudes and behavior of European-American prosecutors and judges.

In 1846, the United States declared war against Mexico and occupied Mexico's northern territories, now called the American Southwest. From 1850, New Mexico then became a federal territory and continued its colonial status until 1912 when New Mexico became the 47th state. In Territorial New Mexico, Mexican women were not allowed to serve as jurors. However, Mexican women were permitted to testify as witnesses in court. Legal historian Laura Gomez stated that "Mexican women... testified quite regularly as general witnesses for either the prosecution or defense and in either grand jury proceedings or trials."[83]

Despite the fact that blacks and other racial and ethnic minorities were prohibited from testifying against whites in criminal trials in other parts of the United States,[84] Mexican men and women in New Mexico routinely testified against European-American defendants.[85] In the politically "colonized" Southwest, Mexicans exerted significant political and judicial power over the territorial American government through their active participation

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79 STACY LEE, MEXICO AND THE UNITED STATES 384 (Marshall Cavendish, 2002).

80 *See* generally THEODORE G. VINCENT, THE LEGACY OF VICENTE GUERRERO: MEXICO'S FIRST BLACK INDIAN PRESIDENT (University Press of Florida, 2001).

81 EUGENE C. BAKER, MEXICO & TEXAS, 1821-1835, 77-79 (Russell & Russell, 1965).

82 *Id.*

83 Laura E. Gomez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 35 LAW & SOC'Y REV. 1129, 1172 (2000).

84 For a detailed history of the relationship between race and the jury in the United States, *see* generally, HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (SUNY Press, 2003).

85 Gomez, *supra* note 83.

in criminal proceedings. Historical records show that they dominated more than 80% of both grand and petit trial juries.[86] Since the majority of residents in the Southwest were Mexicans, the centrality of the Spanish language in trial proceedings also created a strong sense of ownership of both legal and cultural space among Mexicans. Predominantly Mexican juries then functioned as significant oversight of white judges and other law enforcement officials.[87]

In the legal environment where judges, prosecutors, and law enforcement officials were almost exclusively selected from European-American communities, Mexican juries served as a powerful check on the potentially prejudicial attitudes and discriminatory behavior of white prosecutors and judges. Mexicans in New Mexico successfully resisted the European-American legal control and political domination through the high degree of participation in the popular jury.

In fact, such an important political power of the popular jury is observed in many countries around the world. As stated earlier, many countries have recently adopted the lay justice system and democratized their own jurisprudence and legal system. Those nations include Japan, South Korea, China, and Taiwan[88] in East Asia; Venezuela,[89] Bolivia, and Argentina in South America; Uzbekistan, Kajikistan, Latvia, and other former Soviet republics in Central Asia; and Spain in Western Europe. In Thailand, with no history of jury trials prior to the September 2006 coup, the Thai government also considered and debated the possible introduction of popular participation in their legal system.[90]

In 1993, Russia also successfully reinstated jury trials after a break of more than seven decades. Recent Russian studies show that the acquittal rate by the all-citizen jury is much higher (18%) than by professional judges (3.6%).[91] The 2006 Russian national survey also indicated that 44% of citizens would encourage friends and relatives to opt for a jury trial in criminal cases, including the allegation of terrorism.[92] The higher acquittal rate of Russian juries is partly due to the fact that the bulk of evidence against defendants in Russia has mainly consisted of their confessions extracted under

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86 *Id.*

87 *Id.*

88 The Taiwanese government has been debating the possible introduction of the Japanese-style mixed court system.

89 On November 12, 2001, the Venezuelan legislature stopped the creation of a jury court. However, the mixed court system is still operating in Venezuela.

90 Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40 CORNELL INTERNATIONAL LAW JOURNAL 455-476 (2007).

91 Alexei Trochev, *Fabricated Evidence and Fair Jury Trials*, RUSSIA ANALYTICAL DIGEST, 7 (2006).

92 Peter Finn, *Russia Homeland No Haven for Ex-Detainees, Activists Say*, WASHINGTON POST, Sept. 3, 2006, at A14.

lengthy detention and torture, and the jury has expressed their skepticism about the credibility of evidence. The verdicts of all-citizen juries in Russia thus demonstrate the application of higher evidentiary standards in evaluating the legal validity and reliability of confessionary documents.[93] On December 17, 2008, however, Russia's Parliament approved a bill to abolish the use of all-citizen jury trials to adjudicate criminal cases involving terrorist acts, treason, espionage, coup attempts, and other serious offenses against the government.[94] Now the Russian judge has the exclusive jurisdiction over terrorism cases.

The current wave of judicial reforms in the world is similar to the kind of political and judicial changes in the 19th century, triggered by the 1789 French Revolution and political unrest in Europe —which in turn strengthened the petit trial jury in England. Trial by jury also became an integral part of the emerging judicial system of the American society and of other nations on the European Continent.[95] France, for example, introduced trial by jury in 1789 and it became an important political tool in the hands of the insurgent bourgeoisie against the absolute French monarchy. Germany introduced trial by jury in 1848, Russia in 1864, Spain in 1872, Italy by the end of the 19th century, as was done in almost all other European nations.[96]

The recent institution and re-introduction of trial by jury in many countries around the world follows comparable dramatic shifts in the balance of political power and order —exemplified by the collapse of the Soviet Union in 1991. Since then, the United States has emerged as the lone global power and has begun to exert its military muscle and greater political influence in the world. After the attacks of 9/11, the United States assumed world leadership against terrorism and began to engage in legally questionable intelligence operations and activities, including warrantless surveillance, extra-ordinary rendition of prisoners of war, lengthy detention of suspects in secret prisons, and torture of alleged terrorists, including foreign nationals.[97]

As other foreign governments began to follow America's footsteps in the prosecution of suspected terrorists, trial by jury has become an important

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93 *Id.*

94 Nick Holdsworth, *Russia Scraps Right to Jury Trial*, TELEGRAPH, Dec. 12, 2008, available at: *http://www.telegraph.co.uk/news/worldnews/europe/russia/3725300/Russia-scraps-right-to-jury-trial.html*. The law gave three judges, not the jury, the power to exercise the right to rule on terrorism cases.

95 Stephen Thaman, *Japan's new system of mixed courts: Some suggestions regarding their future form and procedure*, SAINT LOUIS-WARSAW TRANSATLANTIC LAW JOURNAL, 89-90 (2001-2002).

96 *Id.*

97 AMY GOODMAN & DAVID GOODMAN, STATIC: GOVERNMENT LIARS, MEDIA CHEERLEADERS, AND THE PEOPLE WHO FIGHT BACK (Hyperion, 2006).

liberal cause as a way to defend against the government's abuse of power and authority. Through jury trials, citizens in these nations have begun to arm themselves with the force to resist political oppression from their own government. Political institutions of third world nations and developed countries in Asia have become increasingly vulnerable to the material force and military influence of the United States and developed nations in Europe.

1. *Is Mexico Ready for a Jury Trial?*

As academic researchers and consultants, we believe that Mexico is ready to set up the jury system and promote active citizen participation in making judgments in criminal cases. Lay participation in Mexico will also lead to civic oversight of activities of the Mexican government, including the judiciary.

The Mexican judiciary is already structured to be constitutionally independent and judges are appointed for life (unless dismissed for cause). However, serious allegations have recently been raised that judges are often partial to the government's executive branch or business elites; and low pay and high caseloads are said to contribute to the susceptibility to corruption in the judicial system. As a recent example of such judicial corruption, in 1993, the Mexican government issued an arrest warrant against a former Supreme Court Justice (Suprema Corte de Justicia de la Nación (SCJN)) for the obstruction of justice and bribery, and three federal judges were later dismissed for obstructing justice.[98] In this bribery case, the SCJN Minister fled Mexico in 1988 after being charged with accepting a half million-dollar bribe to pressure a lower court magistrate to release an affluent Mexico City businessman who was convicted of raping and murdering a child.[99]

The perception of judicial corruption is widespread in Mexico, as the United Nations Special Rapporteur recently reported: "50%-70% of the federal judiciary is corrupt."[100] One scholar also has argued that low judicial salaries feed even greater corruption because such salaries "left the best-trained and most capable young law graduates inclined to pursue careers in private practice... [A]n average of 83.15% of Mexico's federal judges and magistrates graduate from what are generally considered to be inferior quality law programs."[101]

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98 "1993 Human right report: Mexico," available at: *http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_ara/Mexico.html* (last visited: March 16, 2007).

99 Sallie Hughes, *Law and Disorder*, MEXICAN BUSINESS JOURNAL, April (1995), at 8.

100 U.N. ESCOR, 58th Sess., Provisional Agenda Item 11(d), at 25, U.N. Doc. E/CN. 4/2002/72/Add.1 (2002) ("UNSR"), at 18.

101 Kossick, *supra* note 23, at 742.

One significant concern about the introduction of jury trials in Mexico involves the socio-legal impact of unsubstantiated votes rendered by the jury. American jurors, for example, are not required to provide the rationale or logical reasoning for the deliberative content of the final vote. The declaration of the final verdict in the form of either "guilty" or "not guilty" represents a sufficient deliberative condition in the United States. In the case of Mexico, however, votes which are unsubstantiated or "unreasoned" may be seen to increase or even promote the notion of arbitrariness and corruption. Given the widespread corruption in the judiciary, unsubstantiated verdicts may even make it difficult for defendants to challenge the rulings because litigants or courts would not have any legal basis to make an appeal.

Unlike their counterparts in North America, thus, the Mexican jury system should consider the possible implementation of the deliberative process adopted in Spain and Russia, where all-citizen juries are instructed to respond to a pre-arranged question list for the deliberation of their final verdict. For instance, the Spanish jury is required to fill out a verdict questionnaire in the form of a list of propositions that are restricted to facts presented by various parties and only related to basic elements of crimes charged.[102] Russia's verdict questionnaire similarly requires the posing of three inquiries: (1) whether the body of crime (*corpus delicti*) has been proven; (2) whether the defendant as perpetrator of the crime has been proven; and (3) whether the defendant is guilty of having committed the crime.[103]

The Mexican jury system may also consider another important safeguard to eliminate jury arbitrariness in the eyes of the public and legal experts. Active participation by crime victims and their families in the trial process should be considered to make the jury trial and verdict transparent and even more responsive to public sentiments. In the United States, the related parties, including victims, are not allowed to make an opening statement in the jury trial. In Spain's jury trial, however, victims and related parties are allowed to make an opening statement, including their pleadings, the facts that they believe will be proven, and likely verdicts or sentences that they believe will be appropriate and just.[104] They can also propose the hearing of new evidence.[105]

In Mexico, victims' active participation in the trial process and the use of verdict questionnaires in the form of a list of questions to be answered by the jury could increase the legitimacy of the jury trial and make the trial proceeding even more open and transparent in the eyes of the public. They

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[102] Stephen Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW AND CONTEMPORARY PROBLEMS, 233 (1999).

[103] *Id.*

[104] *Id.*

[105] *Id.*

also provide both professional judges and the public the opportunity to examine the jurors' reasoned judgment and possibly challenge it if deemed necessary.

2. *Protecting Jurors and Judges*

In the case of Mexico, many residents and legal practitioners have been intimidated by drug trafficking cartels because of deep collusions between influential members of the government and the drug traffickers. In April 2007, due to the extensive police corruption and their alleged ties to drug cartels, over 100 state police officers in the northern state of Nuevo León were suspended.[106] In June 2007, due to corruption concerns, President Felipe Calderón also dismissed 284 federal police commanders, including federal commanders from all 31 states and the federal district.[107] In August 2009, a Mexican judge also decided to bring to trial eighteen municipal police chiefs and officers for their presumed links to the brutal enforcement arm of the Gulf drug cartel.[108] They were arrested for their alleged links to the murders of a police coordinator and a civilian.[109] Given the extensive collusion between police and drug cartels, prosecutors and law enforcement agencies are faced with enormous difficulties in effectively securing the privacy and safety of judges and related parties in drug-related trials.

In the United States, in order to protect jurors from a threat of possible retaliation by defendants and/or their families in high profile cases, the identity of jurors has been routinely hidden from the public in order to preserve the democratic quality of jury trials. For example, after the 1995 bombing of the federal building in Oklahoma City, which resulted in the deaths of 168 people, jury selection in the trial of Timothy McVeigh began with the screening of jury candidates who were completely hidden from the press. No cameras were even allowed in court. Presiding Judge Richard Matsch determined that the case be tried by an anonymous jury and sealed all records that otherwise could reveal the identity of local residents summoned for jury selection.[110] As a result, jurors' identities were only known to the court and to the related parties in the case.

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106 *Mexico: Congress Summons Defense Minister*, LATIN AMERICAN WEEKLY REPORT, April 19, 2007.

107 *Mexico Shakes Up Federal Police*, EFE NEWS SERVICE, Jun. 25; Sam Enriquez, *Mexico Purges Federal Police Chiefs*, FINANCIAL TIMES, Jun. 26, 2007.

108 *18 Mexican Police Put on Trial for Drug Trafficking Links*, LATIN AMERICAN TRIBUNE, Sept. 1 2009, available at: *http://laht.com/article.asp?ArticleId=342597&CategoryId=14091*.

109 *Id.*

110 Jane Kirtley, *Hiding the Identity of Potential Jurors*, AMERICAN JOURNALISM REVIEW (1997), available at: *http://www.ajr.org/article.asp?id=1778*.

American judges are also not immune to violence due to their rulings and opinions. The 2005 murder of U.S. District Court Judge Joan Lefkow's husband and mother rekindled an ongoing debate on how to secure the privacy and safety of American judges. Judge Lefkow presided over the enforcement of a high profile trademark infringement case against an organization run by white supremacist leader Matthew F. Hale. He later made a death threat and solicited Lefkow's murder after she ruled against him in a civil case.[111]

Despite Hale's death threat against her, it was later revealed that her family members were killed by another litigant whose medical malpractice suit has been dismissed by Judge Lefkow.[112] Meanwhile, she was closely guarded by a detail from the U.S. Marshals Service. In recent years, the number of threats made to the judiciary has increased exponentially. In 2008, 1,278 threats were made against judges, and the number of threats was estimated to exceed 1,500 in 2009.[113]

In Mexico, a similar security service may be necessary to provide competent protection to jurors and judges. Improved security measures such as home protection security systems, coordinated intelligence among security agencies, and threat analysis could be introduced in Mexico in order to protect the democratic quality of the jury trial. The identity of jurors also needs to remain closely guarded during the jury selection process. Like the Timothy McVeigh trial, high profile defendants in Mexico can be tried by an anonymous jury, where the identity of individual jurors is kept secret from the public.

Once those mechanisms and precautionary measures are installed, the all-citizen jury can also serve as a political force and significant oversight of police, prosecutors, and other governmental officials. The potential ramification of the all-citizen jury in Mexico thus would be similar to the political influence exerted by Mexican jury trials in the American Southwest in the late 19th century, in which Mexican residents who dominated the composition of both grand and petit juries exerted significant political power over the territorial U.S. government and public officials through their active participation in the criminal process.

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111 Michael Higgins, *Internet Leaves an Open Window on Lives of Judges*, DAILY PRESS, Mar. 3, 2005, available at: *http://www.dailypress.com/news/national/chi-0503030272mar03,0,2954630.story*.

112 Associated Press, *Judge Lefkow discusses tragedy, security*, CHICAGO BREAKINGNEWS CENTER, Aug. 1, 2001, available at: *http://www.chicagobreakingnews.com/2009/08/judge-lefkow-discusses-tragedy-security.html*. He left a note confessing to the crime and both DNA evidence and spent shells confirmed that he was the killer.

113 Terry Frieden, *Marshals Honor Lefkow as Threats against Federal Judges Climb*, CNN, Mar. 24, 2009, available at: *http://www.cnn.com/2009/CRIME/03/24/judges.marshals/index.html*.

3. *Introduction of Jury Trials at the State Level*

Any significant social and political changes rarely begin at a national level. Politically testy, yet innovative and transformative changes usually occur at a smaller territorial level.

In other countries, the major political reforms such as an introduction of a jury trial or major welfare initiatives including a universal healthcare program typically traces its transformative origin at sub-national levels. For example, in Canada, the so called "single payer" or universal healthcare system was first introduced in the Province of Saskatchewan in 1962.[114] This health care reform then guaranteed the hospital care for all provincial residents. The rest of the country soon followed province-by-province, as the new system gained support from the general public. The federal government then passed the medical legislation in 1966, enacted it in 1968, and then all provinces in Canada introduced the universal health care system by the end of 1971.

Russians also witnessed similar transformative changes in its judicial reform. After the collapse of the Soviet Union in 1991, the jury system was reintroduced as a pilot project in nine regions of the Russian Federation in 1993. Russia is comprised of a total of eighty-three federal subjects or regions, and each subject possesses equal federal rights and political representation. Soon after the pilot project's introduction, the rest of Russia then followed republic-by-republic, and by 2004, trial by jury became available for criminal defendants in all regions, except Chechnya. In 2006, the introduction of jury trials in Chechnya was finally approved by Russian lawmakers and the first jury trial is set to begin in Chechnya in 2010.[115]

In Córdoba, Argentina, a mixed tribunal, not an all-citizen jury, was first established in criminal cases in 1987.[116] As stated earlier, the criminal justice system in nearly all of Central and South American nations began with the inquisitorial, non-adversarial criminal process due to the civil law tradition of the Spanish Empire during their colonial periods. Thus, similar to Mexico's historical experience with jury trials, the first introduction of jury trials in Argentina was also found in the Constitution, when drafts were first proposed in 1813, as well as in the Constitutions of 1819 and 1826.[117] Trial by jury was also a constitutional right guaranteed by the Constitution of

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114 MICHAEL RACHLIS, PRESCRIPTION FOR EXCELLENCE: HOW INNOVATION IS SAVING CANADA'S HEALTH CARE SYSTEM (Harper Collins, 2004).

115 *Introduction of Jury Trials in Chechnya Delayed*, RADIO FREE EUROPE RADIO LIBERTY (2006), *http://www.rferl.org/content/article/1073304.html*.

116 Constitución de la Provincia de Córdoba, §3, Ch.1, Art. 162.

117 RICARDO CAVALLERO & EDMUNDO HENDLER, JUSTICIA Y PARTICIPACIÓN - EL JUICIO POR JURADO EN MATERIA PENAL (Ed. Universidad, 1988).

1853.[118] Ironically, however, the jury trial has never been established by the legislative body in Argentina.[119] Córdoba is one of twenty-three provinces of Argentina and became the first to introduce the lay justice system in the country. The 1991 Code of Criminal Procedure then specified that a mixed judicial panel be composed of three professional judges and two lay citizens, called "*escabinos*" to adjudicate serious criminal cases, but only on request by the defendant, the public prosecutor, or the victim.[120]

While the national debate on the possible introduction of all-citizen juries continues in Argentina, other provinces and municipal governments have been already engaged in examining the future introduction of the lay judge system. In 1991, a trial judge in the city of Buenos Aires granted a defendant's motion requesting trial by jury, annulled the criminal proceeding, and urged Congress to enact legislation implementing the constitutionally-guaranteed jury trial.[121] Another national debate was begun by a social movement whose leader has submitted a petition that included demands for trial by jury.[122] The people's movement is considered essential in continuing the national debate on judicial reforms at the national level.

In Mexico, recent judicial reforms at both national and state levels have created the sufficient and necessary legal conditions for the possible reintroduction of the jury system. Similarly, more modern criminal procedures have already been adopted in a number of individual states in Mexico and some of them may even consider the introduction of the popular legal system such as mixed tribunals and/or all-citizen jury trials. As the Mexican student survey indicates, the younger generation is more inclined to accept

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118 Edmundo Hendler, "Implementing Jury Trials in Argentina: Is it possible?" Paper presented at the annual meeting of the Law & Society in Denver, Co (2009) (the manuscript on file with the first author).

119 Edmundo Hendler, *The Inquisitor: Latin America's Criminal Procedure Revolution: Lay Participation in Argentina: Old History, Recent Experience*, 15 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS 1 (2008).

120 María Inés Bergoglio, "Jury and Judge Decisions: The Severity of Punishments in Cordoba Mixed Tribunals," presented at the 2009 Law & Society Meeting in Denver (2009) (the manuscript on file with the first author).

121 Proceso Penal, 44.542 CN Crim. y Correc., Sala I, 148 E.D. 589 (1991) (discussing the implementation of the penal process in Argentina).

122 The social movement was led by Juan Carlos Blumberg whose son was murdered by his kidnappers. In April 2004 in Buenos Aires, he and over 150,000 people assembled and marched to the Congressional building to submit a petition that contained a demand for harsher punishment for criminals. On April 22, he also submitted a list of other demands to the Department of Justice, which included an introduction of trial by jury. In many other cities and towns in Argentina, similar demands were submitted by movement supporters. For a more detailed discussion of this social movement in Argentina, see Juan Pegoraro, *Resonancias y silencios sobre la inseguridad*, 4 REVISTA ARGUMENTOS (2004), available at: *http://argumentos.fsoc.uba.ar/n04/articulos4.htm*.

the lay justice system which offers a promising alternative to a traditional bench trial system.

Like Argentina, Venezuela went through a similar transformative period and ultimately adopted two distinct forms of popular legal participation in recent years. The jury system was constitutionally guaranteed in Venezuela, and the right to trial by jury was included in the Constitutions of 1811, 1819, 1821, 1830, and 1858, but the enactment of the jury system has never occurred.[123] Like Mexico, the legal system became so ineffective in the administration of justice that prominent South American lawyer Raúl Eugenio Zaffaroni once claimed that the situation "downgrades the country's judicial branch to the status of a mere accessory of the executive branch represented by the police."[124] Another report by the World Bank in early 1990s similarly found the judicial system of Venezuela to be in a state of "absolute crisis" at the hands of "politicization and bureaucratic incompetence."[125] Another claim has been made by the United Nations, indicating that the Venezuelan judiciary was one of the least "credible" in the world.[126] Venezuelan people also shared similar views, in which a 1995 national survey concluded that 78% of respondents believed that the Supreme Court was "inefficient and untrustworthy."[127]

While recent judicial reforms in other nations of Central and South America are by no means identical, they primarily consist of the same shift from a closed and inquisitorial to an accusatorial, oral, and more transparent criminal procedure. In Venezuela, such a transition came with the publication of the Código Orgánico Procesal Penal in 1998 (hereinafter COPP).[128] With help from the German Adenauer Fund, the Max-Planck-Institute for Foreign and International Criminal Law and progressive North American jurists, the old criminal code was replaced with a system of contemporary legal processes more comparable to the systems of developed democracies.[129] No longer was a single judge responsible for the oversight of the police's investigative gathering of evidence, approving of encroachments of constitutional rights, setting the case for trial, and serving as presiding judge at the trial.[130] Although a two party adversarial system —that of the accuser and

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123 Thaman, *supra* note 58, at 766.

124 "Code of Criminal Procedure," Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition, ORGANIZATION OF AMERICAN STATES (2007), available at *http://www.oas.org/juridico/MLA/en/ven/en_ven-int-des-codepenal.html*.

125 JULIA BUXTON, THE FAILURE OF POLITICAL REFORM IN VENEZUELA 32 (Ashgate Publishing, 2001).

126 *Id.*

127 *Id.*

128 Thaman, *supra* note 58, at 767.

129 *Id.*

130 *Id.*

the accused— was present in previous procedural codes, the actual impartiality of the judge as a third party was effectively ensured in the new adversarial system.

On July 1, 1999, the Venezuelan government enacted the COPP, finally replacing the old inquisitorial system with an adversarial procedure. The system also allowed the establishment of both mixed tribunal and all-citizen jury systems.[131] Venezuelan legislator Luis Enrique Oberto originally proposed the judicial reform in 1995 that established three types of trial courts dependent upon the severity of crimes:[132] (1) a single judge trial with crimes punishable by up to four years of incarceration, (2) mixed tribunals with crimes punishable from four to sixteen years of imprisonment, and (3) a jury trial for crimes punishable by more than sixteen years of imprisonment.[133] The mixed tribunal court is composed of one professional judge and two lay assessors, while a jury panel consists of nine residents selected from voter registrations.[134]

Despite widespread corruption in police and public officials, Venezuela was able to successfully introduce two distinct forms of lay participatory systems. The dramatic shift in its criminal procedure in Venezuela can offer an important lesson for Mexico because of similar historical backgrounds in their legal tradition, social and political evolution, and persistent problems of political and judicial corruption. Like Mexico, Venezuela had jury trials and oral procedures until the beginning of the 20th century.[135] However, the authoritarian regime of General Juan Vicente Gómez later unified the legal procedure and suppressed jury trials.[136] When Hugo Chávez became President in January 1999, he immediately called the Constituent Assembly and created a new Constitution that recognized many of the principles of new criminal procedures, including the adoption of mixed tribunals and all-citizen juries. While an amendment of November 14, 2001 (Act No. 5558) suppressed the nine-member jury, the mixed tribunal continues to remain a viable form of lay participation in Venezuela and there has been an increase in the citizens' awareness and commitment to the process of popular decision-making.[137]

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131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 Organization of American States, Code of Criminal Procedure, available at: *http://oas.org/JURIDICO/mla/en/ven*.

136 Rogelio Pérez Perdomo, *La justicia penal en Venezuela al final del Periodo Colonial: el caso de Gual y Espara*, 6 ANALES DE LA UNIVERSIDAD METROPOLITANA 175, 180-196 (2006), at 175, 180-96.

137 Pablo Han et al., *La participación ciudadana en la justicia penal venezolana*, REVISTA CENIPEC 254-255 (2006), available at *http://www.saber.ula.ve/revistacenipec*.

4. *Strict Eligibility Standards*

Lastly, we wish to make critical comments on the jury eligibility standards in Mexico. The 2004 federal bill attempted to re-introduce the popular jury in criminal trials in Mexico. The proposal also suggested a strict standard for jury eligibilities, in which people with legal knowledge would be given an exclusive right to participate in criminal jury trials.[138] Specifically, this proposal requires that jury candidates consist of law graduates who are then nominated by municipal presidents before the Federal Judicial Council.[139]

Mexico's initiative to restrict the jury opportunity to those with privileged educational backgrounds is neither new nor is it an anomaly in other nations. In 2004, for instance, the Chinese government promulgated the law to set a strict eligibility standard for the lay assessor system.[140] Article 4 of the 2004 Chinese Lay Assessor Act indicated that assessors must have college diplomas or a higher educational status.[141] According to the report of the National Population and Family Planning Commission of China in 2005, only 5.4% of the total population had a college education.[142] If Article 4 were to be strictly enforced, 94.6% of the total population would be ineligible to serve as lay assessors.

Such a representative disparity is in direct conflict with the spirit of Subsection 2 of Article 33 of the Chinese Constitution, which states, "all citizens of the People's Republic of China are equal before the law." Article 34 of the Constitution also provides that "all citizens of the People's Republic of China who have reached the age of 18 have the right to vote and to stand

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138 Iniciativa, *supra* note 2.

139 The jury candidacy to only individuals with legal education, however, creates another problem in terms of how much broader education they have received in their preparation to become a lawyer. See Héctor Fix-Fierro, *The Role of Lawyers in the Mexican Justice System, in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 251-272 (Wayne A. Cornelius & David A. Shirk eds., University of Notre Dame Press, 2007) (discussing that Mexican lawyers need not obtain a graduate degree in order to practice law and that there is significant lack of oversight of students with legal knowledge).

140 Hiroshi Fukurai & Zhuoyu Wang, *Civic Participatory Systems in Law in Japan and China*, a paper presented in a session, IRC East Asian Legal Professionalism: Judiciary in Transition, at the Law and Society Association Meeting in Berlin, Germany, in July 28 (2007).

141 The translation of the act was the "Decision on the Perfection of People's Assessors Institution of the Standing Committee of the People's Congress" (*Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Wanshan Renmin Peishenyuan Zhidu De Jueding*). Hereinafter it is referred as the "Chinese Lay Assessor Act." The act was designed to correct shortcomings of the lay assessor system that has long been criticized for the lack of institutional support, insufficient funding, the infrequent use of lay assessors, and people's resistance to participate.

142 *Id.*

for election, regardless of ethnic status, race, gender, occupation, family background, religion, education, property status, or length of residence, except persons deprived of political right according to law."[143] In an egalitarian sense, "standing for election" herein should include all the rights of being elected to participate in the administration of national affairs, including the right to serve as assessors. The new provision thus creates a skewed representation of lay assessors, thereby possibly violating the essential democratic rights of citizens in China.

In Venezuela, the requirement for both lay assessors and jurors is much broader than that of the Chinese system. The candidate must be citizens of Venezuela, more specifically, residents of the jurisdiction where the trial is to be held; at least 25 years of age —those 70 years of age or older may exonerate themselves if they so choose; without a criminal record; possession of sound body and mind; and with "average, diversified" education.[144] Individuals affiliated with law enforcement, the military, legal professions, and politicians are prohibited from serving.[145]

In the United States, despite the fact that there is no educational requirement for jury duty, the jury tends to be dominated with people with higher education. For example, past research has shown that jury candidates with less education are less likely to respond to jury summonses.[146] Even when they may appear at a courthouse, many are likely to request to be released from jury service due to economic hardship and personal excuses, resulting in their significant underrepresentation on final juries.[147] To ensure equitable jury representation from socially and economically disenfranchised segments of population, jury reform has been a contested political issue in the United States, where racial and ethnic minorities such as African Americans and Hispanics have been systematically excluded from jury service.[148] The U.S. Supreme Court has recognized minority populations to form special and distinct groups that need judicial protection against discrimination in jury selection.[149] Since the large proportion of criminal defendants come from the same racial or ethnic background, active participation of their peers in the popular jury is likely to place greater pressures on the government to behave properly and equitably in the prosecution of criminal defendants with minority backgrounds. In trials "monitored" by minority jurors, credibility of evidence and strength of testimony —as well as race-

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143 *Id.*

144 Thaman, *supra* note 58, at 768.

145 *Id.*

146 *See* generally HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (Plenum Press, 1993).

147 *Id.*

148 *Id.*

149 *Id.*

neutral investigative preparation and trial presentation of such evidence—have become critical concerns of both police and prosecutors.[150] For in the minds of minority jurors, these matters may raise reasonable doubt that the accused may not be guilty.

VI. Conclusions

This paper has examined the question of whether or not Mexico is ready to re-establish the jury system. We have attempted to examine whether or not the system of popular civic participation might be effective in democratizing the criminal process and building broader public confidence in the system of justice in Mexico. While the 2001 federal proposal to re-introduce the popular jury in judging general criminal cases failed, the 2008 judicial reform introduced the legal principles of oral arguments during trials, the presumption of innocence, and the adversarial criminal process in Mexico. The switch from a closed, inquisitorial process to an open, oral, and more transparent trial represented a paradigmatic shift in the Mexican legal system. Today judges execute their deliberations in private and base their decisions exclusively on written affidavits prepared by prosecutors and police investigators. Now, not only do lawyers and judges have to become accustomed to making oral statements in public, but also for the first time, the media and public will have a full view of the evidence.

A cross-national empirical analysis of views, attitudes, and sentiments regarding lay participation reveals that, compared with citizens in other nations, Mexican respondents are more willing to participate in jury trials and express greater confidence in and respect for jurors' abilities to make a fair and just decision. The great majority of Mexicans have also supported the broader application of lay participation in the administration of justice. Given such strong support for a popular jury, both federal and state governments might advantageously explore the potential establishment of the jury system in Mexico.

In the case of Mexico, several new features of lay participation should be considered. The use of a "verdict questionnaire" in the form of a list of propositions answered by the jury, various strategies to ensure the security and safety of professional and lay judges, possible introduction of lay participation at a state level, and implementation of a mixed tribunal that allows joint deliberations by professional and lay judges would provide important options for the possible establishment of the lay justice system in Mexico. We also believe that it is imperative to open national debate on the introduction of the lay justice system which has failed to receive the national attention it deserves. By modeling it after a popular jury system currently

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150 Fukurai & Krooth, *supra* note 84, x.

adopted in more than 60 countries around the world,[151] the future transformation of Mexico's classic jury system and criminal procedure will allow Mexican citizens to directly participate in criminal trials, make the criminal justice proceeding evermore open and transparent, and help build a strong democratic foundation for the creation of civil society in Mexico.

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151 Vidmar, *supra* note 6.

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MEXICAN LAW IN CALIFORNIA AND TEXAS COURTS AND THE (LACK OF) APPLICATION OF FOREIGN LAW IN MEXICAN COURTS

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ABSTRACT. *This article discusses two areas of Mexican law seldom addressed by either American or Mexican scholars, namely: first, court decisions rendered by U.S. courts based on Mexican law; and, second, the application of foreign law (including U.S. law) by Mexican courts. Since the entering into force of NAFTA on January 1, 1994, Mexican law has been slowly but steadily making its presence felt in the decisions of U.S. courts. Evidently, this incipient phenomenon is found only in a selected number of States, notably Texas, California, Illinois, Florida, New Mexico and Arizona, where a large concentration of Mexican-Americans and Mexicans are found. Regarding the second area, notwithstanding that Article 14 of Mexico's Federal Civil Code (as amended in 1988) recognized the application of foreign law in that country (including U.S. law), Mexican courts have somewhat disregarded the tenor of said Article. There is not sufficient data to explain this result.*

KEY WORDS: *Mexican law, foreign law, Mexican courts, cases*.

RESUMEN. *Este artículo discute dos áreas del derecho de México que son poco tratadas tanto por estudiosos de México como de Estados Unidos, a saber: primera, las decisiones de tribunales de Estados Unidos que se rinden*

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con base en el derecho de México; y, segunda, la aplicación del derecho extranjero (incluido el de Estados Unidos) por tribunales mexicanos. Desde la entrada en vigor del TLCAN en enero de 1994, el derecho de México ha hecho sentir su presencia de manera gradual aunque segura en las decisiones rendidas por los tribunales de Estados Unidos. Evidentemente, este fenómeno se da en un número selecto de Estados, en especial en Texas, California, Illinois, Florida, Nuevo México y Arizona, donde hay importantes grupos demográficos de mexicanos-americanos y de mexicanos. Por lo que se refiere a la segunda área, no obstante que el artículo 14 del Código Civil Federal (por enmienda de 1988) reconoció la aplicación del derecho extranjero (incluyendo el de Estados Unidos) en ese país, los tribunales mexicanos en cierto modo han desatendido el tenor de dicho artículo. No se cuenta con datos suficientes que expliquen este resultado.

PALABRAS CLAVE: *Derecho mexicano, derecho extranjero, tribunales mexicanos, casos.*

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I. Introduction

It is only logical to expect that, in principle, American courts should impart justice to American citizens by applying American law. This is the fundamental reason the judicial power of the United States, and that of the 52 states, was established pursuant to the U.S. Constitution.[1] However, since the early days of the country, American courts also have been empowered by U.S. law at the state and federal levels to decide cases based on foreign law.[2] Moreover, legal scholars have recently suggested that around the time of the founding of the United States, the Supreme Court used international law to inform some of its constitutional interpretations, possibly because the distinction between domestic law and international law "was much less crisp at the time Bentham was writing than it was in the middle of the twentieth century."[3]

A recent article asserts that the Supreme Court and federal and state courts throughout the country "have been using *foreign* and international law in their decisions since the eighteenth century."[4] Most of these decisions citing or invoking foreign and international law have been used, in some way, "to interpret constitutional provisions that facially have no international implications." Whereas many of the early decisions using international law referred to the laws of war,[5] state court decisions have relied on foreign law (and international opinions) for a comparative law perspective.[6]

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[1] U.S. Const. art. III § I.

[2] The use of the term "foreign law" applies to the law which is in force in a foreign country such as Mexico, Canada, France, Japan, etc. Therefore, this term does not include international law or the law of nations (modern *Ius Gentium*).

[3] *See*, for example, Jeremy Waldron, *Modern Law and the Modern Ius Gentium* (Comment), 119 Harv. L. Rev. 129, 135 (2005); David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. of Empirical Legal Studies 297-331 (July 2006); and Vicki Jackson, *Yes, Please, I'd Love to Talk with You*, Legal Aff. 44 (Aug. 2004).

[4] Mark Wendell DeLaquil, *Foreign Law and Opinions in State Courts*, 69 Alb. L. Rev. 697 (2005-2006).

[5] *Griswold v. Waddington*, 16 Johns. 438 (N.Y. 1819). For a discussion on this matter, *see* Steven G. Calabresi an Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision,* 47 Wm. & Mary L. Rev. 743 (2005).

[6] *See*, for example, David S. Clark, *The Use of Comparative Law by American Courts (I)*, 42

Justice Sandra Day O'Connor, in her acceptance speech when she was presented with the "World Justice Award" in 2003, alluded to the inescapable importance that *foreign law* exercises upon American courts when she said:

> American courts need to pay more attention to international legal decisions to help create a more favorable impression abroad... The impressions we create in this world are important. Although it is true that the U.S. judicial system generally gives a favorable impression worldwide, *when it comes to the impression created by the treatment of foreign and international law by a United States court, the jury is still out*.[7]

In the past, the application of foreign law in the United States was generally represented by the domestic laws of Canada and Western European countries (in particular Great Britain, Germany, Switzerland, France, Italy and Spain), as reflected in the decisions by New York City courts.[8] More recently, under the influence of the phenomenon of "globalization,"[9] an increasing number of Free Trade Agreements (including NAFTA), as well as the considerable flow of immigrants, business transactions and U.S. investment abroad, the domestic law of Mexico and other Latin American countries is beginning to gradually make its entrance into American courts.

The emerging presence of Mexican law is of particular importance given its proximity.[10] The present article includes a survey of cases in California and Texas that were resolved based on Mexican law between 2000 and 2007. Unfortunately, the results were disappointing since a total of only nine cases were found (two in California, two in Texas and five in other states).[11] Nevertheless, there is clearly an important increase in interest in Mexican law throughout the U.S. scholarly and judicial community and most likely the number of cases will multiply in the years to come. It is therefore very important to take stock of the present situation.

Viewed from the perspective of Mexico, under Mexican law each of Mexico's individual states (32 if the Federal District is included) handle and

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AM. J. COMP. L. SUPP. 23 (1994), and Alain A. Levasseur & Madeline Herbert, *The Use of Comparative Law by Courts II*, 42 AM. J. COMP. L. SUPP. 41 (1994).

7 O'Connor, *U.S. Must Rely on Foreign Law*, WORLDNETDAILY, Oct. 23, 2003.

8 Zaring, *supra* note 3 at 299.

9 *See* Sandra Day O'Connor, *International Law, Globalization and U.S. Law*, Address at the dedication of the Eric E. Hotung International Law Building, Georgetown University Law Center (October 27, 2004).

10 Jorge A. Vargas, *The Emerging Presence of Mexican Law in California Courts*, 7 SAN DIEGO INT'L L.J., 215 (2005-2006); Carlos Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUS. J. INT'L L., 119 (2003-2004); Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV., 225 (2003).

11 The list of cases is found in Section B. of this article, *see infra* notes 41 and 42.

resolve U.S. requests to recognize and enforce a U.S. judgment in Mexico according to the provisions of the Code of Civil Procedure (*Código de Procedimientos Civiles*) of the state in question. Each of these codes includes a section devoted specifically to this subject, usually under the title of "*Cartas rogatorias*." In most cases, the applicable provisions of each local code follow the language of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*)[12] which has inspired most of the provisions on this matter in state codes dating back to 1988.

In Mexico, questions pertaining to "*Cartas Rogatorias*" and the recognition and enforcement of foreign judgments were the consequence of a major substantive overhaul of the Mexican legal system which took place in 1988. Until then, there was a lack of the proper codified legal bases for handling these questions due to the extreme policy of "Absolute Territorialism," introduced in the 1928 Mexico City Civil Codes that entered into force in 1932.[13] The drastic change of 1988 was soon emulated in some of the codes at the state level throughout Mexico by reproducing the same amendments with minor variations.[14]

Unlike the United States, Mexico does not adhere to the *stare decisis* principle.[15] In other words, court judgments in Mexico are decided and based on applicable statutes, codes, and regulations (including international treaties and conventions to which Mexico is a party) and not on precedent.[16] It

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[12] The 1988 amendments to this Federal Code are now included in its Book Four: *International Procedural Cooperation*, composed of Articles 543-577. For an analysis of these Articles, *see* Jorge A. Vargas, *Conflict of Laws in Mexico as governed by the Rules of the Federal Code of Civil Procedure*, *in* MEXICAN LAW FOR THE AMERICAN LAWYER (Jorge A. Vargas ed., Carolina Academic Press, 2009).

[13] *See* Jorge A. Vargas, *Conflict of Laws, §22.4 Background and Purpose of the 1988 Amendments*, *in* MEXICAN LAW A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS, Vol. 1, Chapter 22, 247-252 (West Group, 1998) (*hereinafter* MEXICAN LAW TREATISE).

[14] At that time (1988), the Civil Code for the Federal District served a double function: as a Mexico City Code for local matters and as a Federal Civil Code for federal matters throughout the Republic of Mexico. Since 2000, there have been two codes: one for the Federal District and the Federal Civil Code (both based on the original 1932 version). From a substantive viewpoint, both codes share identical language although their functions are different. For a discussion on how the original 1932 Civil Code for the Federal District was divided into the current two codes, *see* J.A. Vargas, *The Federal Civil Code of Mexico,* 2005 INTER-AM. L. REV. 229 (Winter/Spring 2005).

[15] *See* J.A. Vargas, *Contrasting Legal Differences between Mexico and the United States*, *in* MEXICAN LAW TREATISE, *supra* note 12, Chapter 1, §1.11 at 6-9.

[16] The only exceptions to this rule are the so-called *Jurisprudencias* [court precedents] which are those federal judicial resolutions rendered by Mexico's Supreme Court and Circuit Collegiate Courts pursuant to Articles 192 and 193 of the *Amparo* Act (*Ley de Amparo*) that are legally binding to all lower courts. *See* José María Serna de la Garza, *The Concept of Jurisprudencia in Mexican Law*, Vol. I, No. 2, MEXICAN L. REV., 131 (2009).

should be clarified, however, that the "Jurisprudencias" [court precedents] rendered by Mexico's Supreme Court and by the Federal Circuit Courts are legally binding and must be complied with by all lower courts in that country. The basic difference between the U.S. legal system (as a part of the common law tradition) is that in the United States all judicial cases must be decided based on applicable precedents in accordance with the *stare decisis* principle. This principle predicates that "when the court has laid down a principle of law as applicable to a certain state of facts, *it will adhere to that principle*, and apply it to all future cases, where facts are substantially the same, regardless of whether the parties and property are the same."[17] In contrast, in Mexico there are only a very few number of precedents, *i.e.*, only those ruled the same way in five consecutive cases by Mexico's Supreme Court or its Federal Circuit courts. In other words, the difference is not only numerical but also qualitative.

In recent years other countries belonging to the civil legal tradition, such as Germany, Austria, France and Spain, have adhered to the practice of recognizing that under certain special circumstances, judicial precedents become legally binding to lower courts.[18] Continuity and predictability of the law are important attributes, long recognized by the countries belonging to the *common law* tradition. As a result, in Mexico the judicial resolutions rendered by state courts —including final judgments by first instance courts (*Juzgados de Primera Instancia*) and those of appellate courts (usually resolved by the *Tribunal Superior de Justicia*) within same state— are *not* published and, consequently, not made available to the general public. The reason for this is simple: since judicial precedents in Mexico have no legally binding effect, and court judgments are strictly based on the language of the law as it is written in codes, statutes and regulations, and in the text of international treaties and conventions when approved by Mexico's Senate and promulgated by the Executive, there is no apparent need for publishing any judicial precedents (except for *Jurisprudencias*).

This Mexican state level judicial practice of not publishing judicial judgments has created serious problems for gathering and collecting statistical data and information from judicial sources. These have to be supplemented through personal interviews with judges, legal practitioners and academics. Unquestionably, the results of this survey constitute the most valuable, unprecedented and original empirical legal contribution of the joint transborder project on *International Civil Litigation between the United States and Mexico*.[19]

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17 BLACK'S LAW DICTIONARY 1261 (9th edition, 2004).

18 M.A. GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 132-149, 276 (3rd ed. 2009).

19 All the data resulting from interviews and questionnaires with Mexican judges, court secretaries and Mexican legal practitioners from the six Mexican States bordering the United States (*i.e.*, Baja California, Sonora, Chihuahua, Coahuila, Nuevo León y Tamaulipas) on international judicial cooperation and conflict of laws between both countries

II. Mexican Law in California, Texas and Other Courts

1. *Mexican Law in the United States*

Mexican law is turning into a nascent field of law in the United States, particularly in California and Texas, but also in other states such as Arizona, New Mexico, Florida, Illinois, Washington, New York, and Washington, D.C. The fundamental reasons for the growth of Mexican law can be summed up in three words: *a)* geography; *b)* people; and *c)* wealth.

A. *Geography*

For Mexico, its geographical proximity to the United States is, no doubt, its most precious strategic asset. The old adage attributed to Porfirio Díaz, dictator of Mexico at the beginning of the 20th century, "Oh, poor Mexico! So close to the United States and so far away from God!" has now lost its original meaning. When this adage was formulated (prior to 1910 when Díaz was forced to leave Mexico to be exiled in France), the image of the United States as an enemy was still fresh in many Mexicans' memories: a country that militarily defeated Mexico in the 1846-1848 war, forcing Mexico to "cede" almost half of its territory to the United States, as established in the language of Article V of the Treaty of Guadalupe Hidalgo of 1848.

In contrast, today (161 years after the signing of that Treaty), the volume of Mexican exports to the United States amounts to about $216 billion per year.[20] Furthermore, since the end of World War II, the United States has been Mexico's largest foreign investor.[21] The largest companies in the United States, such as Coca Cola, Pepsi Cola, Lucent Technologies, Ford Motor Company, Chrysler, IBM, Hewlett-Packard, and WalMart, among others, operate in Mexico providing millions of jobs to Mexicans.[22] Every

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were gathered by Prof. Jorge Alberto Silva, Facultad de Derecho, Universidad de Ciudad Juárez, Chih.

[20] Official Trade and Industry Information available at: *http://ita.doc.gov/td/industry/otea/OTII/OTII-index.html* (last visited October 1, 2009). According to the Secretariat of Economy (Secretaría de Economía) the value of exports from Mexico to the United States in 2008 was $234.557 billion. *See*: *http://www.economia-snci.gob.mx/sphp_pages/estadisticas/cuad_resumen/expmx_e.htm* (last visited: October 1, 2009).

[21] U.S. Department of State available at: *http://www.state.gov/r/pa/ei/bgn/35749.htm* (last visited: October 1, 2009).

[22] According to "*Expansion*" magazine, in 2008 Wal-Mart provided 157,432 employments and Coca Cola provided 58,126. *See*: *http://www.cnnexpansion.com/las-500-de-expansion/2009/06/25/las-500-en-resumen*. For a complete list of the largest employment providers in Mexico visit *http://www.cnnexpansion.com/XPA5002009/?uid=9* (last visited: October 1, 2009).

year, close to 20 million Americans visit Mexico as tourists and the U.S. Department of Commerce reported that in 2002 Mexico had a trade surplus with the United States totaling some $35 billion dollars.[23] In sum, to a large extent, all of these major benefits for Mexico, its economy and its people, may be attributed to Mexico's geographical contiguity to the United States. This geographical proximity is perceived today not as a curse, but a clear advantage.

The 1,952 mile-long border that runs between the two countries —formed by natural and artificial segments— does not divide the two nations. Rather, they unite a major global power with a developing democracy rich in history, culture and natural resources.

B. *People*

Mexican people are Mexico's best resource, and the United States receives thousands of them every day. Whereas the U.S. population is growing older every day, with increasing numbers of people who are no longer able to work and drain considerable resources in terms of social security payments, medical treatment and rehabilitation,[24] the Mexican population is young, healthy and physically apt to work and contribute to the economy. Consider, for example, that over the last five years, the remittances of Mexican nationals who work in the United States totaled over $20 billion dollars, representing the third source of revenue for Mexico after oil and trade.[25] With nearly 107 million people, Mexico continues to strengthen its position as a mid-size power in Latin America and the Caribbean.[26] In 2006, the U.S. Census Bureau reported that the Hispanic population had become the largest ethnic minority in the United States.[27] About 67% of

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[23] *See*: *http://www.unameseca.com/ejercicios/Negocios/Otono_2003/Superavit.pdf* (last visited: October 1, 2009).

[24] U.S. Census Bureau, Age Data of the United States, *http://www.census.gov/population/www/socdemo/age/agebyage.html* (last visited October 1, 2009).

[25] Federal Reserve Bank of Dallas, *http://www.dallasfed.org/research/swe/2007/swe0704b.cfm* (last visited: October 1, 2009). *See* related articles from Mexican sources: *http://www.elsiglodetorreon.com.mx/noticia/20999.superavit-comercial-historico-para-mexico.html*; *http://www.banxico.org.mx/documents/%7BB7CBCFAF-AB7D-BE65-F78F-6827D524C418%7D.pdf* (last visited: October 1, 2009).

[26] The estimated population of Mexico as of mid-2008 is 106,682,500 people. *See*: *http://www.inegi.gob.mx/est/contenidos/espanol/proyectos/integracion/inegi324.asp?s=est&c=11722#tres.*

[27] In 2002, there were 37.4 million "Latinos" in the non-institutional civilian population of the United States, representing 13.3% of the total. Among the Hispanic population, two-thirds (66.9%) were of Mexican origin, followed by Central and South American (14.3%), Puerto Rican (8.6%), Cuban (3.7%), and the remaining 6.5% from other Hispanic origins. The regional distribution of the Hispanic population ranged from 44.2% in the western part of the United States to 7.7% in the Midwest. "Latinos" of Mexican origin

this group is made up of Mexicans and Mexican-Americans, a large number of which live in California.[28]

From the perspective of U.S. travel and emigration to Mexico, nearly 20 million American tourists visit Mexico every year.[29] About 350,000 Americans live on a permanent or semi-permanent basis in Mexico,[30] including some 25,000 who consider Baja California to be their "home."

The constant flow of people between both countries allows them to engage in a variety of activities: business and trade, tourism and excursions, shopping, movie- and theater-going, and school enrollments. Over the last two decades, bi-national marriages between American and Mexican people have become increasingly common, as well as adoptions and divorces, with the resulting exponential growth —of course— of international civil litigation between both countries.[31]

C. *Wealth*

Speaking in terms of wealth, Mexico is the United States' second most important trading partner (after Canada), having displaced recently Japan. To give an idea of the volume of wealth that moves across both countries, the United States sells more goods and services to Mexico than it does to Germany, the United Kingdom, Italy and France combined, or to the People's Republic of China, Singapore and Hong Kong combined, or to the rest of Latin America.[32] Some readers may be surprised to know that California exports more to Mexico than it does to Japan.[33] Furthermore, as a result of NAFTA, the volume of exports from Texas to Mexico between

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are more likely to live in the West (54%) and the South (34.3%), particularly in metropolitan areas. *See* Roberto R. Ramírez and G. Patricia de la Cruz, U.S. DEPT. OF COMM., BUREAU OF THE CENSUS. THE HISPANIC POPULATION OF THE UNITED STATES: MARCH 2002 (June 2003), available at: *http://www.census.gov/prod/2003pubs/p20-545.pdf*.

28 *Id.*

29 *See* Jorge.A. Vargas, *Rights and Obligations of Americans in Mexico under Immigration Law and Other Areas of Mexican Law*, *in* MEXICAN LAW FOR THE AMERICAN LAWYER 451-492 (Jorge A. Vargas ed., Carolina Academic Press, 2009).

30 According to INEGI (*Instituto Nacional de Estadística, Geografia e Informática* or National Institute of Statistics, Geography and Information) out of 492,617 foreigners living in Mexico today, 69.7 percent (or 343,391) are Americans. Taken from *Los Extranjeros en México* [Foreigners in Mexico], INEGI (2005), available at: *http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/estudios/sociodemografico/ext_en_mex/extraen_mex.pdf*.

31 Thirty cases between 1995-2002 compared with 45 between 2003 and present, as seen in MEXICAN LEGAL DICTIONARY AND DESK REFERENCE (West/Thomson, 2009 ed.).

32 U.S. Department of State, available at *http://www.state.gov/r/pa/ei/bgn/35749.htm* (last visited: October 1, 2009).

33 Trade Statistics - California Chamber of Commerce, available at: *http://www.calchamber.com/International/Trade/Pages/TradeStatistics.aspx* (last visited: October 1, 2009).

1997 and 2000 was equal to $48 billion dollars or 46% percent of the total amount of Texas exports.[34]

These impressive figures become meaningful when placed within the context of American investment in Mexico. Since the end of World War II, the United States has been an important foreign investor in Mexico, with investments totaling $85 billion dollars, which represents 70% of Mexico's total direct foreign investment (DFI).[35] Other investors include the U.K. (6%), Germany (4%), France, Spain and Switzerland combined (3.5%), and the Netherlands and Japan combined (2%).[36]

After the People's Republic of China, Mexico today is one of the top destinations of DFI on a global scale.[37] Before NAFTA, U.S.-Mexico trade amounted to $86 billion dollars annually.[38] Today, this trade exceeds $225 billions dollars every year.[39] In 2002, the U.S. Department of Commerce reported that Mexico had a $35 billion dollars surplus over the United States.[40]

2. *Summary of Cases Involving Mexican Law in California, Texas and Other States*

California Cases

1) *Coufal Abogados v AT&T, Inc.*
223 F.3d 932 (9th Cir. 2000)
Tort Law/Contract Law/Rendering of Professional Services

Plaintiff, Coufal, sued the defendant, AT&T, based on the tort of interference with a contract. Under Mexican law, contract interference does not constitute illicit behavior allowing for recovery of damages. The defendant had hired Coufal to represent a claim the defendant had in Jalisco, Mexico. The contract entered into by Coufal and AT&T allowed Coufal to retain a

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34 *See http://texaspolitics.laits.utexas.edu/9_3_3.html* (last visited: October 7, 2009).

35 *See http://www.economia.gob.mx/pics/pages/1175_base/JunW09.pdf* (last visited: October 1, 2009).

36 *See* supra note 32.

37 *See http://www.promexico.gob.mx/wb/Promexico/razones_para_invertir_en_mexico* (last visited: October 1, 2009).

38 Pre-NAFTA Trade: a. The NAFTA Preference and U.S.-Mexico Trade, Figure 2 b. Laurie-Ann Agama, Christine A. McDaniel, October 2002 c. Office of Economics Working Paper, U.S. International Trade Commission.

39 Post NAFTA Trade: About $216 billion b. Official Trade and Industry Information, *http://ita.doc.gov/td/industry/otea/OTII/OTII-index.html* (last visited: October 1, 2009).

40 *See http://usasearch.gov/search?affiliate=commerce.gov&v%3Aproject=firstgov&query=mexican+surplus+2002* (last visited: October 1, 2009).

portion of the collections from the arbitration claim in Jalisco. AT&T eventually removed Coufal as their lead counsel due to a perceived conflict of interests. Eventually, AT&T decided that collecting the arbitration award would hinder their ability to do business in Mexico and dropped the collection efforts. The trial court granted summary judgment in favor of AT&T holding that the law of Jalisco, Mexico, would apply to this case. Jalisco does not recognize the tort of contract interference and illicit behavior has a statute of limitations of two years, which had already run out. The Circuit Court applied the California test for choice of law questions, which is a governmental interest analysis. The analysis led the court to hold that Mexican law was correctly applied since Mexico has the greatest interest in seeing its laws upheld. The court said: "The parties agree that the laws of New York and Mexico differ. Specifically, New York recognizes a claim for tortious interference, *whereas Mexico does not*" (*Coufal* case, page 936).

2) *Laparade v. Ivanova*
387 F.3d 1099 (2004)
Intellectual Property Law/Copyright

Plaintiff, Laparade, sued defendant, Ivanova, alleging copyright infringement involving thirty-four Spanish language films. Defendant argued that the plaintiff could not hold a copyright under Mexican law. In order to rule on the issue, the Ninth Circuit Court referred to a Fifth Circuit case, *Alameda Films SA de CV v. Authors Rights Restoration Corp.*, 331 F. 3d 472. The court simply stated that it agreed with the reasoning in the *Alameda* case (see below).

Texas Cases

3) *Southwest Livestock v. Ramon*
169 F.3d 317 (5th Cir. 1999)
Contract Law

Plaintiff, Southwest, sued defendant, Ramon, for damages based on a debt that Southwest defaulted on. The trial court granted summary judgment in favor of Southwest. Southwest had entered into a loan arrangement with Ramon, a Mexican citizen, in which Southwest borrowed money and signed a new promissory note every month while paying interest on the previous month's note. Southwest defaulted on the loan and Ramon received a judgment in Mexico to collect the debt. After the action was taken in Mexico, but before the judgment was rendered, Southwest sued in Texas federal court to recover based on the fact that the interest rate was too high and against Texas usury laws and, therefore, was contrary to public policy. The

Circuit Court used the Texas Recognition Act to determine whether the court was required to recognize the judgment from Mexico, which would bar the current litigation if upheld. In Texas, there are ten specific grounds for non-recognition, none of which Southwest was able to prove. The court reversed the summary judgment, stating that Southwest failed to prove that the judgment should not be recognized. The court further determined that under the language of the Recognition Act the judgment was not contrary to public policy and therefore the collection of the debt did not violate public policy.

4) *Alameda Films S A de C V v. Authors Rights Restoration Corp.*
331 F.3d 472 (5th Cir 2003)
Intellectual Property Law/Copyright Law

Plaintiff, Alameda, sued defendant, Authors Rights, claiming copyright infringement. At the trial level, a jury ruled in favor of the plaintiff. The defendant appealed alleging that a production company is not considered "an author" under Mexican law and cannot hold a copyright. The issue arises out of the Uruguay Round Agreement Act ("URAA"), which changed the way copyrights are given for foreign work. This Act requires that the law of the country where the work was produced determine the copyright. The films at issue were created in Mexico and under said Act Mexican law would be the applicable law. The court cites the Collaboration Doctrine of the Mexican Civil Code to explain that corporations can hold copyrights. The court also received Amicus briefs from the Mexican Government further stating that in Mexico companies can hold permits. This was based upon Art. 59 (1963) of the Ley Federal de Derecho de Autor [Federal Copyright Act], which states that legal entities can hold copyrights. The court held that Alameda did have the rights to the films and the trial court was correct in its findings.

Cases from Other States

5) *Spinozzi v. ITT Sheraton Corp.*
174 F.3d 842 (5th Cir. 1999)
Tort Law

Plaintiffs, Dr. Spinozzi and Linda, were residents of Illinois who vacationed in Acapulco. While on vacation, the plaintiffs' hotel had a power outage that lasted into the night. While waiting for the outage to end, Dr. Spinozzi walked past the planters and gate guarding a maintenance pit and fell into the pit. This accident led to the court action. The trial court granted summary judgment for Sheraton because under Mexican law any con-

tributory negligence constitutes a total bar on tort claims. It is from this judgment that the Spinozzis appealed. The Circuit Court decided to use the *Restatement (Second) of Conflict of Laws*, which deals with the proper choice of law when there is a conflict of laws. An important factor is the place where the tort occurred. The appellant tried to argue that contributory negligence is repugnant to the public policy of Illinois and should not be applied to this case. The court determined that Illinois still uses a form of contributory negligence to bar some tort claims and the policy would not be against the public policy of Illinois. The Circuit court affirmed the decision of summary judgment for Sheraton. The Circuit did not cite any Mexican codes or cases because the concepts of contributory negligence are the same in Mexico and the United States.

6) *Silverman v. Rosewood Hotels*
2004 US Dist Lexis 16110, 2004 WL 1823634 (New York 2004)
Tort Law

The plaintiff, Silverman, a resident of New York, was vacationing in Cabo San Lucas, Mexico, at the defendant's hotel. Silverman suffered an injury when a sauna jet burned her ankle requiring surgery upon her return to the U.S. The defendant asked the court to grant partial summary judgment in order to ban the collection of moral damages. The court had to decide which law to apply. Concerning tort law, New York utilizes an interest analysis to determine which jurisdiction should have its laws applied. The location of the tort serves as the tiebreaker when the interests of the parties are both compelling. The court determined that Mexico had the greatest interest in seeing its law applied because of the nature of regulating employees, managers and guests within its territory. The court used Article 1821 of the Civil Code of Baja California Sur, Mexico, to help decide whether the injuries received by the plaintiff ascended to the level of moral damages under said Civil Code. The court granted the defendant's motion for partial summary judgment as to the application of Mexican law and denied the motion as to a determination of the extent of the guest's recovery.

7) *March v. Levine*
136 F.Supp.2d 831 (Tennessee 2000)
Family Law/ Custody Rights/ Child Abduction

Petitioner, March, sought the return of his two children to Mexico who were in the custody of their grandparents, the Levines. The Levines brought the children out of Mexico pursuant to a visitation order issued by a court in Illinois but failed to return them to Mexico as they were required to do at the end of the visitation period. March brought the action under the In-

ternational Child Abduction Remedies Act (ICRARA), which was designed to implement The Hague Convention on the Civil Aspects of International Child Abduction ("Convention"). The Convention states that the removal of a child from one country to another is wrong when the parent can show that it breaches their right to custody under the laws where the child habitually resides. The court determined that the children were habitual residents of Jalisco, Mexico, because they had lived there over a year and attended school there as well. The court next determined that March had the rights of custody over the children at the time of their removal from Mexico. The court cites Articles 412 and 418 of the Civil Code for the Federal District of Mexico City to show how custody rights are determined in Mexico. The court held that March was exercising his right of custody over the children based upon the law of Jalisco, Mexico, and ordered the return of his children to him.

8) *Whallon v. Lynn*
230 F.3d 450 (1st Cir 2000)
Family Law/Custody Rights/ Child Abduction

Whallon petitioned the district court in Massachusetts for the return of his daughter under The Hague Convention on the Civil Aspects of International Child Abductions ("Convention"). The district court granted the petition in Whallon's favor and from that decision came the appeal. Whallon and Lynn lived together in Cabo San Lucas, Baja California Sur, Mexico, but were never formally married. Under the Convention, the court must determine whether the petitioning parent has the right of custody over the child in the jurisdiction where the child habitually resides. The parties agreed to the fact that Baja California Sur is the place of habitual residence and thus the law of that state would apply to the case. The court cited Article 474 of the Civil Code of Baja California Sur to determine the custody rights over the children and which parent exercises those rights. Article 478 of the Civil Code of Baja California Sur explicitly states that both parents exercise the parental authority. The court held that Whallon was exercising his parental authority and thus his custody rights as they were determined under the Civil Code of Baja California Sur, Mexico, where the child was a habitual resident.

9) *Curley v. AMR Corp.*
153 F.3d 5 (2nd NY 1998)
Tort Law

Plaintiff, Curley, sued the defendant, AMR Corporation, under various tort actions in order to recover from an incident that occurred on AMR's airline in Mexico. The trial court granted summary judgment in favor of

AMR, basing their decision on New York law. Curley appealed the decision to the Circuit Court. The Circuit Court did an interest analysis to see if the district court applied the correct law in order to reach their decision. The court determined that Mexican law was the correct law to apply to the case, citing Article 1910 of the Mexican Federal Civil Code, which prescribes economic indemnification for the victim of a tort. The court also included in its analysis a reference to Article 308 of Mexico's General Communications Act to support the idea that what happens in Mexican airspace is considered to have happened on Mexican soil. The court held that the summary judgment was correctly granted, but that the law that should have been applied was Mexican law and not New York state law. The court reasoned that Mexico had the greatest interest in seeing its laws applied since the claim originated from actions that took place in Mexican airspace and, as a consequence, on Mexican soil.

3. *Discussion of Cases*

In the listed tort law cases, we can see that the application of Mexican law to a given case is not difficult for an American judge when this application can be done simply and without complications.[41] For example, in the Spinozzi case, the Circuit Court had no problem in applying what probably constitute the two most fundamental and well-recognized Mexican tort law principles: that the law of the place where the act occurred governs the case (*Lex loci delicti*) and that contributory negligence constitutes a total bar to any recovery.

The Civil Code of the State of Guerrero (where Acapulco is located), as well as the Civil Codes of the other "federal entities" that compose the Republic of Mexico (*i.e.,* total of 31 States and one Federal District), virtually reproduce the language of Mexico's Federal Civil Code which today reads: "*Article 1910*. Whoever, by acting illicitly, or against good customs, causes damage to another shall be obligated to compensate him/her, *unless he/she can prove that the damage was caused as a result of fault or inexcusable negligence of the victim*."[42]

Based on the "Principle of Limited Territorialism," each Civil Code in Mexico mandates that "the laws of the State shall apply to all inhabitants of the State of [Guerrero, or any other State], with no distinction as to persons and regardless of sex or nationality, whether domiciled in the State or tran-

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41 For a detailed review of this subject, *See* Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L. JOURNAL 475 (Spring 2007).

42 Taken from JORGE A. VARGAS, MEXICAN CIVIL CODE ANNOTATED BILINGUAL EDITION 653 (Thomson/West, 2009 ed.).

sient."[43] Therefore, when a tortious act takes place in, say, Guerrero, the law of the State of Guerrero shall govern that act. It should be noted that the Civil Code of that state regulates the commission of tortious acts, known in Guerrero (and in Mexico at large) as "Extra-contractual liability" for acts arising out of illicit civil acts.[44]

The second fundamental tort-law principle under Mexican law, also established throughout Mexico, prescribes that contributory negligence constitutes a total bar to any recovery. In this regard, the Civil Code of the State of Guerrero reads: "*Article 1735*. Any person's act, whether committed through deception or fault, that causes damage to another, shall obligate its author to repair the damage and to indemnify the losses, *unless it is proven that the damage was caused as a consequence of the inexcusable fault of the victim*."[45]

In other words, once the American court has already determined that the case is to be governed by Mexican law, after having denied the motion for *Forum Non Conveniens,* the application of the Civil Code provisions of the Mexican State in question may be smooth and incontrovertible.

However, it may not be so simple for an American judge to determine, for example, whether a "tortious interference with a contract" should be judged by Mexican law. In principle, this cause of action may be considered a true legal construct of U.S. law. This type of case is expected to generate serious arguments and counter-arguments between the litigants, especially if the economic stakes of the case are high.

Although under Mexican law there is no explicit cause of action for tortious interference with a contract (with that specific name), there may be —at the discretion of the American court— certain acts significantly valid to persuade the court that, under Mexican law, said acts are similar or equivalent to the U.S. cause of action. This possibility may be realistic considering, first, that the law is always dynamic and fluid and second, American law has exercised a profound influence on Mexican law in contractual relations, business, commerce, tax, intellectual property, etc.

Sometimes, the determination of an American court regarding a specific legal question or issue under Mexican law may simply require the consultation of the pertinent Mexican code or statute. Since Mexico —unlike the United States— is a country under the Romano-Germanic tradition that

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43 The corresponding Article in the Civil Code of the State of Guerrero is Article 1: "The provisions of this Code shall apply, in the State of Guerrero, to situations and civil relations of ordinary law not subject to federal laws, and shall supplement, when appropriate, the other laws of the State, except for any provision to the contrary" (translation by author).

44 Extra-contractual liability is governed by Article 1735, *et seq*., of the Civil Code of the State of Guerrero. Evidently, this Article was highly influenced by Article 1910 of the Federal Civil Code (Código Civil Federal).

45 *Id*. Article 1735 (translation by author).

does not adhere to the *stare decisis* principle, the explicit language of the law as reflected in its statutes, codes and regulations (including international treaties and conventions to which Mexico is a party), is of the utmost importance to Mexican judges in rendering their resolutions and judgments. Rather than giving their judicial reflection to precedents,[46] Mexican judges give their careful and full attention to the letter of the law since they have been trained to be "appliers of the law," rather than "interpreters," and never "creators of the law."[47]

This strategy may apply, for example, when an American court has to determine whether, under Mexican law, a Mexican company (known in Mexico as a "legal person") can be the legal holder of a copyright. Basically, to resolve this question, it would suffice for the judge to ascertain whether Mexico's Federal Copyright Act (*Ley Federal del Derecho de Autor*, which regulates copyright issues) expressly authorizes Mexican legal entities to hold a given copyright.

This federal statute protects the rights of authors, artists, interpreters, etc., regarding their literary or artistic works in all their manifestations, including films, videotapes, interpretations, performances, editions, etc., and including their intellectual property rights.[48] This Act prescribes that the author "may authorize others (whether individuals or companies) for its exploitation, in any form, within the limits established by said Act without detriment to the author's moral rights referred to in Article 21 of said Act."[49] In addition, the statute provides that "The holder of patrimonial rights may freely, pursuant to what is established by the latter Act, transfer his/her patrimonial rights or grant licenses for its exclusive or non-exclusive use."[50] Finally, under this Act, "the producer of an audiovisual work (including films) is the individual or company [literally: "persona fisica o moral"] who has the initiative, coordination and responsibility for the realization of the work, or that sponsors such work."[51] Once the determination has incontrovertibly been made that in Mexico a company may be the legal holder of a copyright license pursuant to that country's Copyright Act, the case is resolved.

In general, Mexican law finds its way to U.S. courts via (i) American judges taking judicial notice; and (ii) through the legal opinion or declaration of an expert witness. Occasionally, the U.S. court may be assisted by a "Master to the Court," or by a detailed enunciation of the applicable Mexican law to the case at bar through a detailed legal report either prepared by

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46 Vargas, *supra* note 15.

47 Vargas, *supra* note 15, at 34, 1-35.

48 Article 1, Federal Copyright Act, published in the *Diario Oficial* [Federal Official Gazette] of December 24, 1996 (as amended on July 23, 2003).

49 Article 24, Federal Copyright Act.

50 *Id.*, Article 30.

51 *Id.*, Article 98.

a Mexican legal specialist or by a member of Mexico's Foreign Service, delivered to the American judge through consular or diplomatic channels.

The limited amount of cases we have been able to find of the full application of Mexican law in U.S. courts limits the reach of the analysis in this section. However, a few general observations may be tentatively advanced:

A. The search of cases decided by American courts both in California and Texas (as well as in many other states) produced more than one hundred cases in each state. However, over 90% of these cases consisted of discussions relative to a *Forum non conveniens* motion and not to the application of Mexican law;
B. Once the American court decided that the case was to be governed by Mexican law, judges made a genuine effort to apply what they considered to be the valid and accurate Mexican law governing the case, principally relying on (a) Mexican law expert witnesses' affadavits or depositions or (b) on the skill of their judicial clerks to find, assimilate and apply the needed Mexican law to the case at bar;
C. Like Mexican judges, American judges are allowed to apply foreign law (*i.e.,* Mexican law) to a portion of the case, and American law to the other portion(s) of the case;
D. The limited data did not provide any cases in which the American judge produced a "legal hybrid" formed by a combination of Mexican law and American law (what may be described as a "Calimex" or "Texican" resolution);
E. No evidence was found that the decisions were influenced by parochial "ethnocentric" preferences on the part of the American judges to favor American plaintiffs.
F. Trans-border judicial relations or personal contacts between American judges and Mexican judges, and the possibility of learning about the other country's legal system can be greatly enhanced through:

    (a) a "Practical Handbook on Mexican law for U.S. Judges" (and a similar handbook for Mexican judges on U.S. law);[52]
    (b) the publication of an "Annual Compendium on U.S. Cases involving Mexican Law;"
    (c) special courses on practical legal issues between the United States and Mexico;
    (d) regular annual meetings (or legal conferences) between U.S. judges and Mexican judges;
    (e) periodic legal lectures of U.S. judges to Mexican judges and Mexican law schools (and similar lectures of Mexican judges in the United States); and

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[52] *See* Jorge A. Vargas, *The Emerging Presence of Mexican Law in California Courts*, 7 SAN DIEGO INT'L L. JOURNAL 215-221 (Fall 2005).

(f) the annual publication in English of Mexican judicial decisions and other Mexican legal materials of interest to U.S. judges.

III. Application of Foreign Law by Mexican Courts

1. *Absence of Foreign Law Prior to 1988*

In theory, the application of foreign law by Mexican courts is a rather recent development, formally introduced in 1988 by way of a series of legal reforms at the initiative of Miguel de la Madrid, then President of Mexico. These amendments took place thanks to the efforts made by the Mexican Academy of Private International Law (*Academia Mexicana de Derecho Internacional Privado*) through its participation in the Advisory Commission on Private International Law of the Secretariat of Foreign Affairs (*Secretaría de Relaciones Exteriores* or SRE).[53] However, despite these legislative amendments, the application of foreign law in Mexico today is still something to be desired.

It should be made clear that the major objective of the 1988 amendments —as asserted by Fernando Vázquez Pando—[54] was simply to incorporate into Mexico's domestic legislation the basic rules and principles already contained in a number of Inter-American Conventions on private international law to which Mexico had already become a party prior to 1988.

The amendments the Executive proposed to Congress resulted in the modernization of the language in four particularly relevant areas, namely:

1) Application and proof of foreign law;
2) Letters rogatory "*Cartas Rogatorias*";
3) International judicial cooperation on gathering evidence; and,
4) Enforcement of foreign judgments and arbitral awards.

The Mexican codes amended in 1988 were: *a)* the Civil Code for the Federal District, applicable to the entire Republic on federal matters;[55] *b)* the Code of Civil Procedure for the Federal District;[56] *c)* the Federal Code of Civil Procedure;[57] and *d)* the Code of Commerce.[58]

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53 Vargas, *supra* note 13, Vol. 2 at 241-273.

54 Fernando Vázquez Pando, Nuevo Derecho Internacional Privado 45 (Themis, 1990).

55 Decree published in the *Diario Oficial* of January 7, 1988.

56 *Id.*

57 *Id.*

58 Decree published in the *Diario Oficial* of January 4, 1989.

The Notion of Absolute Territorialism

Prior to 1988, none of these codes were legally equipped with the language or the sufficient provisions to overcome the traditional isolationist attitude that had prevailed in Mexico until then —known as the Doctrine of Absolute Territorialism— adopted in 1932, when the Civil Code for the Federal District entered into force.[59] The original notion of "Absolute Territorialism" (which was attenuated as a result of the 1988 amendments) was included in Article 12 of the respective Civil Code of 1928 which read: "*Article 12*. Mexican laws, including those relative to the status and capacity of persons, shall apply to all the inhabitants of the Republic, whether national or foreigners, domiciled therein or transient."[60]

Since its inception, this provision posed two serious problems: first, it elevated civil matters to a federal level which until then had been traditionally governed by state legislation; and second, it applied Mexican law to foreigners on matters of the civil status and legal capacity of individuals. Therefore, it adopted an absolute or extreme position with respect to the applicability of Mexican law. From 1932 to 1988, strong adherence to this "Absolute Territorialism" led Mexican courts to resolve cases based solely on Mexican law. The judicial philosophy shared by judges and magistrates in Mexico during those five decades was to maximize the importance of Mexican law and virtually disregard foreign law, including the law of the United States.

Historically, during those years the diplomatic relations between Mexico and the United States were not very cordial or even amicable.[61] Mexico was undergoing a period of drastic political changes somewhat connected to the violent and national revolutionary movement of 1910. In addition, the nationalization and expropriation of the foreign oil companies —including U.S. companies— by the administration of President Lázaro Cárdenas in 1938, resulted in a political distancing between the two countries. Accordingly, in those years the application of American law by Mexican courts was clearly out of the question.

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59 Although this Code was published in the *Diario Oficial* of March 26, 1928, it entered into force on October 1, 1932, by Presidential decree published in the *Diario Oficial* of September 1, 1932. For additional information about this code, *see* Jorge A. Vargas, *The Federal Civil Code of Mexico*, 36 INTER-AMER. L. REV. (Winter/Spring 2005) at 229-247. Since May 29, 2000, Mexico has a Federal Civil Code that regulates federal matters throughout the Mexican Republic, and a Civil Code for the Federal District that governs civil matters at the local level (*i.e.*, in Mexico City).

60 Vázquez Pando, *supra* note 54, at 22.

61 LUIS G. ZORRILLA, HISTORIA DE LAS RELACIONES ENTRE MÉXICO Y LOS ESTADOS UNIDOS DE AMÉRICA, 1800-1958, 467-482 (Porrúa, 1977).

As a result of the 1988 amendments, the "absolutist" language of Article 12 was somewhat attenuated. Today, Article 12 of the Federal Civil Code reads:

> *Article 12*. Mexican laws apply to all persons within the Republic, as well as to acts and events which take place within its territory or under its jurisdiction, including those persons who submit themselves thereto, *unless the law provides for the application of foreign law, or is otherwise prescribed by treaties or conventions to which Mexico is a signatory party*.[62]

In principle, Mexican law applies within the boundaries of the Republic of Mexico, including legal acts and events. However, this prescription recognizes that under certain circumstances, "the law" may provide for the application of foreign law[63] or the application of foreign law is mandated by those international treaties and conventions to which Mexico is a party. In Mexico, this new approach is known as the notion of "Limited Territoriality."

2. *The "Opening" of Mexico to Private International Law Conventions*

During the first three decades that followed Mexico's adoption of its "Absolute Territorialism" in 1932, there was no perceivable dissent or critique by academics or by judges and legal practitioners. It seems that during those years Mexico had become shrouded in an "isolationist cocoon." In other words, the attention of the country regarding judicial and legal matters was only centered on domestic matters, in clear disregard of the important developments that were taking place at that time at the regional and international levels in the area of private international law.

However, this ethnocentric attitude was slowly but effectively changed by the ideas and the work of a distinguished group of academics and legal practitioners who were members of the Mexican Academy of Private International Law (*Academia Mexicana de Derecho Internacional Privado*), among them José Luis Siqueiros, Leonel Pereznieto Castro, Fernando Vázquez Pando, Laura Trigueros and Ricardo Abarca Landero.[64]

Interested in putting Mexico up to date with the progressive developments and codification of conflict of laws matters (*i.e.,* opening the country to the latest legal trends formulated by the international legal community),

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62 VARGAS, *supra* note 42, at 5.

63 VÍCTOR CARLOS GARCÍA MORENO, DERECHO CONFLICTUAL 25 (UNAM, México, 1991).

64 Vázquez Pando, *supra* note 54, at 17. *See* also LEONEL PEREZNIETO CASTRO, DERECHO INTERNACIONAL PRIVADO 84-187 (Harla, México, 1995).

members of the Academy approached the Secretariat of Foreign Affairs (SRE) in 1985 with the proposal of forming an Advisory Commission to SRE on Private International Commercial Law.[65] The proposal was accepted and this led to a complete change of policy in this important legal area. Later that same year, members of the Academy prepared a number of legislative bills to add the necessary language to Mexican codes —taken or adapted from selected international conventions to which Mexico was already a party—[66] to modernize Mexican law in the major substantive areas where there were conflicts between laws.

Mexican academics specializing in conflict of laws questions —including Vázquez Pando,[67] García Moreno,[68] and Pereznieto Castro—[69] are of the opinion that Mexico's becoming a party to numerous international conventions on conflicts of laws, especially at the Latin American regional level, was the most decisive factor in accomplishing the updating and modernization of the Mexican codes in the area of private international law, including the application of foreign law by Mexican courts.

By the time the Mexican Executive Branch sent the legislative bills to Congress in 1988 to add provisions to the four major codes that regulate matters pertaining to private international law (*i.e.,* conflict of laws), Mexico had become a party to a total of thirty-three international conventions.[70] Pursuant to Mexico's Political Constitution of 1917, "all the treaties in accordance with the Constitution, made or which shall be made by the President of the Republic, with the approval of the Senate, shall be the Supreme

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65 Vázquez Pando, *supra* note 54, at 17-18.

66 By December of 1985, Mexico was a party to these six conventions: 1) Inter-American Convention on Letters Rogatory (*D.O.* of April 25, 1978); 2) Inter-American Convention on Conflict of Laws regarding Bills of Exchange, Promissory Notes and Invoices (*D.O.* of April 25, 1978); 3) Inter-American Convention on Conflict of Laws regarding Commercial Companies (*D.O.* of May 8, 1979; 4) Additional Protocol to the Inter-American Convention on Letters Rogatory (*D.O.* of April 28, 1983); 5) Inter-American Convention on Proof of Information regarding Foreign Law (*D.O.* of April 29, 1983); and 6) Inter-American Convention on General Rules of Private International Law (*D.O.* of May 8, 1984; Erratum: *D.O.* of October 8, 1984). List taken from Vargas, *supra* note 14, Vol. 2 at 247-248.

67 Vázquez Pando pointed out that the incorporation of the private international law principles found in the international conventions into Mexican law was a formal obligation for Mexico as a party to said conventions, *See supra* note 55, Chapter 4 at 46. At that time, Mexico had become a party to 33 of this kind of conventions. The complete list appears at *Id.* 30-32 and 36-37.

68 García Moreno, *supra* note 63, at 20-24.

69 *See* Pereznieto Castro, *supra* note 64 at 183-187.

70 At the recommendation of the Advisory Commission to SRE, in 1987 and 1988, Mexico became a party to eleven additional conventions on powers of attorney, domicile of physical persons, personality and capacity of legal entities, extraterritorial effects of foreign judgments and arbitral awards, adoption of minors, reception of evidence abroad, international sales, etc. For the complete list, *see* Vargas, *supra* note 13 at 247-248.

Law of the entire Union."[71] As a result of this constitutional text, the language of all the international conventions "approved" by the Senate became fully incorporated into Mexican law, legally binding on Mexico as a party to those international instruments.[72] Accordingly, all Mexican courts must abide by the provisions in these international conventions giving them priority over federal statutes and local laws.

A. *When is Foreign Law to be Applied in Mexico?*

The new language of Article 12 of the Federal Civil Code, as amended in 1988, introduced a new and limited territorialism. Under this novel approach, Mexico now allows the application of foreign law as an exception to the fundamental principle that Mexican law applies within the Republic of Mexico. Accordingly, foreign law applies in these two cases:

A. When Mexican law explicitly prescribes the application of foreign law; and
B. When pertinent treaties and international conventions to which Mexico is a party clearly provide for the application of foreign law.

Specialists in this legal field characterized this innovation as cautious since it did not abandon Mexico's traditional territorialism. In general, the change has been perceived as necessary and positive.[73]

Vázquez Pando, in commenting on a proposal prepared by the Federal Chamber of Deputies (*Cámara de Diputados*) on the application of foreign law in that country in 1979, suggested that "if foreign law is to be applied, it has to be done in conformity with the provisions of Mexico's Civil Code, taking into consideration sources, methods of interpretation, court precedents, etc., as these elements are considered to form part of the applicable foreign law."[74] In other words, he advocated a true and comprehensive application of foreign law by Mexican judges rather than the mere mechanical process

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[71] Article 133. Evidently, this Article was inspired by Article VI, Section II of the Constitution of the United States.

[72] It may be of interest to point out that from a hierarchical viewpoint, unlike the United States, when approved by the Senate in conformance with Article 133 of Mexico's Political Constitution, international treaties and conventions in Mexico are only inferior to the Constitution but superior to federal statutes and local laws by decision of the Plenary of the Supreme Court of the Nation. This decision reads: "*The Supreme Court of Justice considers that international treaties are placed on a second tier below the Fundamental Law and above the federal and local law*." P. LXXVII/99, *Amparo en revisión* 1475/98. SEMANARIO JUDICIAL DE LA FEDERACIÓN (*Federal Judicial Weekly*), Ninth epoch, Vol. X, November 1999 (*emphasis added*).

[73] Vázquez Pando, *supra* note 54 at 54.

[74] *Id.* at 54-55.

of simply citing the foreign law provision considered to govern the case devoid of any historical background, sources, interpretation, precedents, opinions, etc.

B. *Rules Governing the Application of Foreign Law in Mexico*

Article 14 of the Federal Civil Code enunciates the "rules" to be observed in the application of foreign law. The first paragraph reads:

> I. *It shall be applied in a manner that the corresponding foreign judge would apply it, for which the local judge shall take legal notice of all necessary information regarding the text, applicability, meaning and scope of the foreign law.*[75]

This paragraph simplifies the language of Article 2 of the Inter-American Convention on General Rules of Private International Law,[76] adhered to by Mexico in 1984. Although it is believed that this language closely follows the most advanced opinions on the matter, Miguel Acosta Romero,[77] a leading commentator of the Civil Code, questions the possibility of whether a Mexican judge may be able to truly comply with this prescription. Acosta Romero raises a pragmatic question: How viable is it for a Mexican judge to apply foreign law if he or she is not fluent in the foreign language of the law or has never studied the legal system of that country?

Scholars in Mexico have pointed out that, given the language of this new Article 14 (1) of the Federal Civil Code, it is unnecessary in that country to prove the existence of foreign law, meaning that the interested party does not have to provide evidence that the foreign law exists in its country. It simply suffices for the interested party to invoke the application of foreign law, and the judge would have to comply with this request.[78]

Pereznieto Castro indicates that a Mexican judge must apply foreign law *motu proprio (ex officio)* "whether through the parties or using the means he or she considers the most convenient for that purpose (consulting an expert witness, through the Secretariat of Foreign Affairs) whether in relation with the language of foreign law to prove that it is in force and, especially, its legal meaning and scope."[79] Pereznieto Castro concludes that by means of

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75 Translation by author

76 Signed at Montevideo, Uruguay, on May 8, 1979.

77 MIGUEL ACOSTA ROMERO, CÓDIGO CIVIL PARA EL DISTRITO FEDERAL. COMENTARIOS, LEGISLACIÓN, DOCTRINA Y JURISPRUDENCIA 27-29, Vol. I (Porrúa, México, 1998) (At that time, the language of the Federal Civil Code and that of the Civil Code for the Federal District were identical).

78 Vázquez Pando, *supra* note 54 at 88-90.

79 *Id.*

this provision of the Federal Civil Code "the most complete assimilation of foreign law to Mexican law is established and it gives ample possibilities of interpretation to the judge."[80]

The new text of the Civil Code was inspired by the language of Article 86-Bis of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*) which reads:

> *Article 86-Bis*. The [Mexican] court shall apply foreign law in a manner that the foreign judge would apply it.
>
> To gain more information on the text, the temporal validity of the law (*vigencia*), meaning and scope of foreign law, the court may use the official reports on this matter, which may be requested from the Mexican Foreign Service, as well as order and admit the evidentiary proceedings (*diligencias probatorias*) that may be deemed necessary or offered by the parties.[81]

Although Mexican judges are legally empowered to apply foreign law in Mexican proceedings, and no formal or informal survey has been conducted since 1988 to determine the number of substantive cases that have been resolved on the basis of foreign law, empirical data suggests that the number of these cases is close to zero. In an informal and preliminary survey conducted with judges and court secretaries in the six Mexican states bordering the United States (in addition to Mexico City), no cases of any Mexican court resolving a given case based on American law or any other foreign law were reported.[82]

In the United States, when the application of foreign law is requested by a defendant, that request may be challenged by filing a *forum non conveniens* motion. Mexico lacks this type of motion and preliminary proceedings. However, a procedural challenge may take place attacking the substantive application of foreign law based on these considerations, as formulated in the Federal Civil Code:

a) When fundamental principles of Mexican law are evaded; and,
b) When the provisions of foreign law, or the result of its application, is contrary to Mexico's public order (*orden público*)[83] (Such is the case in the United States).

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80 Pereznieto Castro, *supra* note 65 at 194.

81 Article 86-Bis, Federal Code of Civil Procedure taken from AGENDA DE AMPARO 2008, ISEF, México (2008) at 16 (Translation by author).

82 Prof. Jorge A. Silva, from the University of Ciudad Juárez, Chih., School of Law, distributed a questionnaire and interviewed judges, court secretaries and legal practitioners in civil court of the six Mexican states bordering the United States. *See supra* note 20.

83 Article 15, Federal Civil Code.

In addition, said applicability may be contested through the *Amparo* lawsuit,[84] when one of the parties to the controversy is of the opinion that the application of foreign law may have been done in violation of his or her constitutional rights (known in Mexico as *garantías individuales*).

Whether in Mexico, the United States or elsewhere, the application of foreign law warrants a certain degree of concern in a judge's mind. Clearly, applying foreign law places the judge in an exceptional situation. The judge's role has always been that of applying domestic law and for that task he or she has been trained. Judicial experience has provided the judge with a certain degree of experience in the study, interpretation, research, analysis and application of the law. However, applying foreign law may have little or nothing to do with the techniques and methods required for applying the law of the land.

Based on the above considerations, it may not be surprising to learn that there is some degree of reluctance, hesitation, and maybe even doubt, when a judge anywhere in the world needs to resolve a case based on foreign law. Indeed, this may be an unprecedented and alien experience. This kind of idea is present not only among judges in Mexico but also those in the United States, and elsewhere in the world. No one knows to what degree, if any, this inherent reluctance in applying foreign law is responsible for the relatively low number of cases decided based on foreign law by any judge in a domestic arena.

> *II. Foreign substantive law shall be applied except when, by reason of the special circumstances of the case, the conflict of laws rules of said foreign law must be taken into account, as an exception, thus requiring the application of Mexican substantive law or that of a foreign state.*[85]

This provision establishes, according to Pereznieto Castro, two clear rules: first, Mexican judges are legislatively mandated to apply substantive foreign law, without taking into account the conflict of law rules of said foreign law, always doing their best to avoid *renvoi* when possible; and, second, only when there are "special circumstances of the case," do Mexican judges have the powers of discretion to apply the rules of conflict of laws predicated by foreign law limited to two situations: (i) when the rules of said for-

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84 Amparo is a federal lawsuit filed by any Mexican individual or foreign when a constitutional right (also known in Mexico as "Garantias individuales" (or *Individual guarantees*) is considered to have been breached by a Mexican authority. The "Amparo" lawsuit is based on Articles 103 and 107 of Mexico's Political Constitution of 1917 and both its substance and procedure are governed by the Federal "Amparo" Act (*Ley de Amparo*). For additional information, *see* Jorge A. Vargas, *Introduction to Mexico's Legal System*, MEXICAN LAW FOR THE AMERICAN LAWYER 40-42 (CAP, 2009).

85 Article 14, Para. II, Federal Civil Code (*hereinafter* FCC).

eign law remit to Mexican law, and (ii) when said remission (*renvoi*) is made to the law of a third state, which substantially limits the applicability of the foreign law of another state.[86]

Most scholars agree that the objective of the Mexican Congress was to elude the use of *renvoi,* given the doubts and controversy associated with this concept. The solution given by the Federal Civil Code is to reach a compromise. In principle, the message to the Mexican judge is: "Do your best not to use the notion of *renvoi.* However, if you have to, do it only in exceptional cases when the specific circumstances of the case justify it."[87] Other scholars, among them Dr. Carlos Arellano García, have characterized this position as "moderate."[88]

However, Arellano García and Alberto G. Arce have been critical about the use of *renvoi* under Mexican law. The first author goes to the extreme of characterizing the allusion to *renvoi* in Article 14, paragraph II, of the Federal Civil Code, as amended in 1988, as incorrect. In general terms, Dr. Arellano García alleges that paragraph II would be perfect "if it had only limited itself to establishing that 'when the conflictual norm remits to foreign law the foreign legal norm of a material character (*Norma jurídica extranjera de carácter material*) would be applied in an obligatory manner.'"[89]

The rationale that accompanied the 1988 amendment is silent on this matter and does not provide any guidance to determine what those rules are.[90]

In closing this section, it may be said that it has always been somewhat of a challenge for judges to have to apply foreign law to a given case. At least from a U.S. perspective, American judges do their best to apply Mexican law when they do so as a Mexican judge would: objectively, impartially and in perfect symmetry with the letter and the spirit of the Mexican legislature.

However, on very rare occasions, American judges may believe that they are applying Mexican law, but the tenor of the judicial resolution may appear to be more of a hybrid, resembling Mexican law with U.S. law components. This could lead a Texas judge to strongly rely on the opinion of a Mexican law expert to advise him in drafting the respective judicial resolution in order not to produce a "Texican" resolution.

The Third Federal Collegiate Court on Civil Matters of the First Circuit declared in 2001 that it corresponds to the parties to prove the relevance of the application of foreign law. The relevant part of this judicial resolution reads:

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86 Pereznieto Castro, *supra* note 64 at 194.

87 Vázquez Pando, *supra* note 54 at 57-58.

88 *Id.* at 58.

89 CARLOS ARELLANO GARCÍA, DERECHO INTERNACIONAL PRIVADO 874 (Porrúa, México, 1999).

90 *Id.* at 874-875.

> *Foreign law. Its proof at the trial corresponds to the Parties, and to the Mexican court, the power to verify its language, temporal application, meaning and scope, giving special attention to the international conventions to which Mexico has become a party.*
>
> ...[I]t corresponds to the parties to provide the judge with evidence of the foreign law invoked, as well as the elements from which its language, temporal application, meaning and scope [may be determined], granting powers to the court to utilize, when necessary, the official reports prepared by Mexican Foreign Service officials or the conventions to which Mexico has become a party to accurately ascertain the required information and data, in order to give legal accuracy to the [court's] determinations.
>
> The [Mexican] legislature has incorporated general rules of an international nature into the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*) to form a part of the Mexican legal system, pursuant to Article 133 of the Federal Constitution, in order to facilitate the application of foreign law in this country, by considering the provisions in said code insufficient to adequately regulate issues regarding private international law. This allows [this court] to conclude that to obtain the exact solution to these issues, and in particular to prove foreign law, special attention is to be given to the international conventions that Mexico has already signed, since these [conventions] form a part of the national law.[91]
>
> *III. The application of foreign law shall not be prevented because of the non-existence of institutions or essential procedures under Mexican law similar to the applicable foreign institution, if there are analogous institutions or procedures available.*[92]

In principle, scholars are of the opinion that this paragraph tries to avoid the situation in which a judge may dismiss a case based on the fact that the Mexican domestic law does not have a similar institution equivalent or identical to that of a given foreign legal institution. In this regard, a Mexican judge keeps in mind the mandates of the Federal Civil Code that prescribes: "Silence, obscurity or insufficiency of the law shall not deter judges or courts from resolving any controversy that comes before them,"[93] and that: "Civil juridical controversies shall be decided in strict adherence to the letter of the law or its judicial interpretation. *In the absence of law, controversies shall be decided in accordance with the general principles of the law*."[94]

This provision assumes a certain degree of legal erudition and judicial experience on the part of Mexican judges that is sometimes difficult to find,

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91 Direct *Amparo* 10623/2001. Juan Cortina del Valle. October 18, 2001. Unanimous decision. *Instance:* Tribunales Colegiados de Circuito [Collegiate Circuit Courts]. *Source:* SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [Weekly Federal Court Report], Ninth Epoch, Vol. XV, March 2002, p. 1326. *Tesis Aislada.*

92 Article 14, paragraph III, FCC.

93 Article 21, Federal Civil Code.

94 Articles 18 and 19, FCC (*Emphasis added*).

especially when certain empirical factors suggest that Mexican judges' application of foreign law seems to be virtually absent today. This question may be further complicated by the fact that the study of foreign law or, more directly, U.S. law in the academic curriculum of Mexican law schools is lacking. Moreover, unlike the United States, the institution of "judicial clerks" does not exist in Mexico. In the United States, judicial clerks are selected among the brightest and most capable law students or graduates to assist judges in doing research on specific legal issues, drafting legal memoranda on legal topics, searching for precedents, writing drafts of judgments, etc., including doing research to provide the judge with objective and current legal information about a specific area of foreign law that may or may not be applied by the judge.

Introducing in Mexico the institution of "judicial clerks" as it operates in the United States (and in other countries) may be a valuable aid that would eventually assist Mexican judges, *inter alia,* in obtaining the appropriate legal information on foreign legal rules or institutions, including those of the United States, that may be required by a judge when resolving a given case. On the American side, for example, these kinds of cases usually require the U.S. judge to make determinations as to whether, for instance, a Mexican "concubine" may be legally equivalent to a "common law spouse" under U.S. state law;[95] or what the legal effects attributed under Mexican law to a religious marriage conducted by a priest, a pastor or a religious minister in a remote village where there is no Civil Registry are, for example. Other examples may include issues such as whether the Mexican civil concept of "moral damages"[96] is legally akin to equitable damages or exemplary damages; or whether there is a legal institution in Mexican civil law similar or equivalent to the U.S. cause of action of "tortious interference to a contract."[97]

The language of paragraph III of Article 14 of the Federal Civil Code was taken, *mutatis mutandis,* from Article 3 of the Inter-American Convention on the General Rules of Private International Law,[98] which reads: "*Ar-*

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95 *See* Jorge A. Vargas, *Concubines under Mexican Law: With a Comparative Overview of Canada, France, Germany, England, and Spain*, XII SOUTHWESTERN J. OF LAW & TRADE IN THE AMERICAS 45 (2005).

96 *See* also Vargas, *Moral Damages under the Civil Law of Mexico. Are These Damages Equivalent to U.S. Punitive Damages?*, 35 INTER-AMER. L. REV. 183 (Spring 2004).

97 In the *Coufal* case (*see* section II, 2 in this article *supra*), the U.S. Court determined that "Mexico does not recognize... a claim for tortious interference with a contract."

98 Mexico is a party to the Inter-American Convention on General Rules of Private International Law, signed on May 8, 1979; approved by the Mexican Senate on January 13, 1983; and promulgated in the Federal Official Gazette of October 10, 1984. Other parties to this Convention include: Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru, Uruguay and Venezuela. Information taken from L. PEREZNIETO CASTRO & J.A. SILVA, DERECHO INTERNACIONAL PRIVADO. PARTE ESPECIAL 490-491 (Oxford, 2000).

ticle 3. Whenever the law of a State Party has institutions or procedures essential for their proper application that are not provided for in the law of another State Party, this State Party may refuse to apply such a law if it does not have like institutions or procedures".

It is unquestionable that judges from both the United States and Mexico would benefit greatly if they could attend bi-national annual meetings to exchange information about their respective legal systems in areas of their judicial interest. A prospective format could call for the conference to be held on one side of the border one year and on the other side the following year. Topics of discussion could include questions relating to "letters rogatory" and the enforcement of judgments, as well as the application of foreign law, and other matters, under the umbrella of U.S.-Mexico bi-national judicial cooperation.

> *IV. Prior, preliminary or incidental questions that may arise in connection with the principal questions shall not necessarily be resolved in accordance with the applicable law to the latter*.[99]

In this regard, the Federal Civil Code adheres to the "principle of independence of both questions" which predicates that "previous, preliminary or incidental questions" are recognized as legally different from the "principal issues" in a given case. Therefore, the law governing these principal issues may not necessarily apply to previous or incidental matters. However, the judges in question are under the obligation to provide valid legal reasons supporting their decisions; otherwise, the affected party is likely to allege that his or her constitutional rights may have been violated by the judge's decision via the use of "*Amparo*" proceedings.

With respect to this kind of cases, or situations, the Inter-American Convention on the General Rules of Private International Law states: "*Article 8*. Previous, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue."[100]

This would be the case, for example, for a Colombian judge who applied Mexican law to resolve an interestate succession (*principal issue*) of a person of Colombian descent *(de cujus)* who died in Mexico, but whose assets were located in Colombia. A problem arises when the legitimacy of the adoption of one of the heirs is challenged (*preliminary issue*). Regarding said adoption, is the Colombian judge to apply Mexican law (including its rules of conflicts) or, based on the legal differences between both issues, is the Colombian judge to apply the law that controls adoption?[101]

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99 Article 14, paragraph IV, Federal Civil Code.

100 Article 8, Inter-American Convention, *supra* note 98.

101 This example is provided by Pereznieto Castro, *supra* note 64 at 195.

Another example is when a judge in Mexico City (*i.e.,* Federal District) confronts a lawsuit for breach of contract executed in El Salvador and containing a *Choice of law* clause designating Salvadoran law to govern the contract (*principal issue*). However, one of the parties domiciled in Costa Rica does not have the legal capacity to execute that contract (*preliminary issue*). Therefore, the Mexico City judge may apply Salvadoran law, designated by the parties as the governing law for the contract, including the issue of capacity of the contracting parties; or apply the law of Costa Rica as a personal right based on the parties' residence, to resolve the capacity issue. In either case, the judge is to resolve the principal issue by applying Salvadoran law because it was expressly chosen by the parties to govern the contract, and then it will resolve the capacity issue based on Costa Rican law.[102]

> *V. When different aspects of the same legal relationship are governed by different laws, they shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case.*[103]

This paragraph is almost a *verbatim* copy of Article 9 of the Inter-American Convention on General Rules. Vázquez Pando has said that this provision constituted "the principal novelty of the 1988 reform."[104] Two principles are embedded in this text: first, that different aspects in a legal relationship may be governed by different laws (*decoupage*); and, second, the adherence to a policy that discards the application of mechanical criteria and adopts a position that brings the notion of equity to resolve the central elements of a case.[105]

Pereznieto Castro recognizes the value of this equitable solution, although he bases his opinion on the ideas advanced by the classical French specialist on *Droit International Privé,* Henri Batiffol.[106] Pereznieto Castro illustrates the case with the following example: an 18-year old individual signs a promissory note in Panama, where the legal capacity for contracting these commercial obligations is a minimum age of 21. The note indicates that it should be paid in Guatemala, where the age for such a transaction is 18. Since the person who signed the promissory note (*obligado o girador*) owns real estate in Mexico, the holder of the title files a lawsuit in Mexico. The Mexican judge would be faced with this situation: the law of the place of emission which invalidates the note, and the law of the place of payment

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102 *Id.* at 195-196.

103 Article 14, paragraph V, Federal Civil Code.

104 Vázquez Pando, *supra* note 54 at 60.

105 *Id.*

106 Pereznieto Castro, *supra* note 64 at 196.

under which the credit instrument is valid. Clearly, it is a relationship governed by different laws, and the judge aims "to attain the purposes pursued by each of such laws." Accordingly, the judge shall apply the law of Guatemala, validating the title, and shall take jurisdiction over the lawsuit to attach the assets of the person in Mexico.[107]

3. *Exceptions to the Application of Foreign Law in Mexico*

The Federal Civil Code mandates that foreign law "shall not be applied" in these two situations: *a)* When foreign law is used to evade the application of fundamental principles of Mexican law; or, *b)* When the substance of foreign law, or its application, runs contrary to "the principles or fundamental institutions of Mexico's public order."

A. *When Fundamental Principles of Mexican Law are Evaded*

This exception refers to the old and well-known notion of *fraud au loi* (*fraude a la ley*), dating back to the time of Justinian, as explained by Paulus and Ulpian, when they declared that: "Acting against the law is doing what the law forbids; fraud of the law is when someone, respecting the language of the law, eludes its meaning;" and "When someone does something that the law did not want to be done but did not prohibit it," respectively.[108] The Spanish jurist Adolfo Miaja de la Muela defines fraud of the law "as the commission of one or several licit acts in order to reach an anti-legal outcome. It constitutes a means to breach imperative laws."[109]

From the viewpoint of private international law, fraud of the law is characterized as "a remedy that impedes the application of a foreign legal norm, to which the interested parties have subjected themselves voluntarily, because it is more convenient to their interests, thus deceptively evading the imperative nature of the domestic legal norm."[110] From this perspective, fraud of the law is composed of the following elements:

a) A rule of conflict of laws that recognizes the valid application of the material foreign legal norm;
b) The placement of the individual case in a substantially close relationship with the foreign legal norm;

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107 *Id.*

108 Cited in the entry "Fraude a la Ley," NUEVO DICCIONARIO JURÍDICO MEXICANO (*New Mexican Legal Dictionary*), Vol. 2, 1736 (Porrúa/UNAM, México, 2000).

109 *Id.*

110 *Id.*

c) The advantages or benefits that the application of the foreign legal norm provides to the interested parties;
d) The less advantageous or less beneficial aspects of the domestic material legal norm from the viewpoint of the other involved parties in the controversy;
e) The intentional evasion of the domestic material legal norm that originally was to be applied to the individual case in question, prior to the occurrence of element b), *supra*;
f) The presence of deception, lack of sincerity, or anomaly on behalf of the parties involved; and
g) The evasion of the imperative nature of the national legal norm which is not applied given the change introduced in the individual case by the parties.[111]

Article 6 of a "Conflict of Laws Draft" formulated by Carlos Arellano García and José Luis Siqueiros added: "It shall correspond to the authority or judge of the receiving State of the foreign juridical norm (*norma jurídica extranjera*) to determine the scope and modalities of this exception."[112] Article 7 of the same draft proscribed the application of foreign law, "when it has deceptively evaded the law of the receiving States, it shall be left to the discretion of the competent authorities of this State to determine the fraudulent intention of the interested parties."[113]

B. *When Contrary to Mexico's Public Order*

Fraud of the law should not be confused with the other "public order" exception even though both lead to the end result of the non-application of the valid foreign law norm. The non-application of foreign law as a result of a *fraud of the law* is the direct consequence of a deceitful act on the part of one of the interested parties. This action clearly intends to evade the application of the foreign norm. In contrast, in a *public order* exception, the non-applicability of foreign law is the result of the fact that said foreign law runs contrary to public order. Since the foreign law norm offends or breaches the public order it is not applied.[114]

In a draft of this provision, formulated by Carlos Arellano García and José Luis Siqueiros, these specialists not only referred to "foreign law," but also expanded this notion by including "judicial judgments, arbitral awards,

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111 *Id.*

112 Article 7, Arellano-Siqueiros Draft on "Conflict of Laws," reproduced in Vázquez Pando, *supra* note 54 at 61.

113 *Id.*

114 NUEVO DICCIONARIO, *supra* note 108 at 1737.

legal acts and declarations from abroad to be applied in Mexico in accordance with the international or domestic rules of conflict of laws, shall cease to have legal effect (*dejarán de tener eficacia*) when they run contrary to the public order of the receiving country."[115] The draft produced by Dr. Perez-nieto Castro in 1977 on this same issue, states that: "Foreign law may not be applied in Mexico when it is manifestly incompatible to the public order as understood by the international law and custom. No one may benefit in Mexico out of a legal situation created by virtue of the application of foreign law committed in fraud of Mexican law."[116]

Both of the exceptions in Mexican Law are in close symmetry with Articles five and six of the Inter-American Convention on General Rules of Private International Law:

> *Article 5*. The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (public order).
>
> *Article 6*. The law of a State Party [to this convention] shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded. The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties.[117]

Mexico's Concept of Public Order

Today, there is no legal norm —whether statute or code— which provides a legal definition of "public order" (*orden público*) as part of Mexican law. However, the Federal Civil Code mandates: "*Article 8*. Any act that runs contrary to the tenor of prohibitive or public order laws (*Leyes prohibitivas o de interés público*) shall be null and void, unless otherwise provided by law."[118]

Public order may have different legal meanings. Generally speaking, "public order" refers to the existence of peaceful coexistence among members of a given community, generally identified with public peace in a community.[119]

From a legal perspective, *public order* is defined as the body of legal institutions that identify the law governing the community, when this law is

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115 Article 6, Arellano-Siqueiros Draft on "Conflict of Laws," *supra* note 112.

116 The Pereznieto Castro draft is also reproduced by Vázquez Pando, *supra* note 54 at 62.

117 *See* Inter-American Convention on General Rules of Private International Law, *supra* note 98.

118 Vargas, *supra* note 42 at 3.

119 NUEVO DICCIONARIO, *supra* note 108 at 2701.

formed by principles, rules and institutions that cannot be altered by either the will of individuals (*i.e.,* the autonomy of the will of the parties) or the application of foreign law. It should be noted that these principles, rules and institutions are not only formed by legislative enactments, since public order also consists of traditions, customs and judicial practices, including those pertaining to the legal and judicial professions.[120]

In civil law matters, public order is defined as a mechanism through which the State (whether the legislature or the judiciary) impedes certain acts of individuals that may affect the fundamental interests of the community. It acts as a limit or boundary to any activity that takes place within the legal realm. It corresponds to the institutions that apply the law to define which acts affect the public interest. Sometimes, specific legislative enactments explicitly declare those activities that affect the public order. It may also correspond to the tribunals to make a determination as to which acts or activities run contrary to public interest.[121]

Regarding public order as a legal concept, the Fourth Federal Collegiate Court on Administrative Matters rendered the following opinion in August 2005:

> PUBLIC ORDER. IT IS A VAGUE LEGAL CONCEPT THAT IS UPDATED EVERY TIME IT IS APPLIED TO A SPECIFIC CASE, TAKING INTO CONSIDERATION THE MINIMAL RULES OF SOCIAL COEXISTENCE. Public order does not constitute a notion that may be defined on the basis of a formal declaration contained in a given law. To the contrary, a constant criterion of the Supreme Court of Justice of the Nation has been to assert that it corresponds to the judge to determine its presence in each individual case. Accordingly, this legal concept may only be delineated by the circumstances of form (*modo*), time and place prevailing at the moment of making the determination. In any event, the judge must take into account the essential conditions for the harmonious development of the community; that is to say, the nominal rules of social coexistence, in the intelligence that the decision to be rendered in a specific case cannot rest on mere subjective appreciations but on objective elements that are translated into the fundamental concerns of the society, always striving not to obstruct the legitimate rights (*eficacia*) of a third party.[122]

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120 *Id.*

121 *Id.* at 2702-2703.

122 *Cuarto Tribunal Colegiado en Materia Administrativa [Fourth Collegiate Court for Administrative Matters]*. Direct *Amparo* 312/2004. Alberto Salmerón Pineda. 12 January 2005. Unanimity of votes and Direct *Amparo* 453/2004. Hospital Ángeles del Pedregal, S.A. de C.V. 23 February 2005. Unanimity of votes. *Instance:* Tribunales Colegiados de Circuito [Circuit Collegiate Courts]. *Source:* Semanario Judicial de la Federación [*Weekly Federal Court Report*] and its Gazette, Ninth Epoch. Volume XXII, August 2005, p. 1956. *Tesis Aislada [isolated thesis]*.

4. *Choice of Applicable Law*

Article 15 of the Federal Civil Code establishes five rules that govern the choice of law in Mexico. These rules are:

> *I. Situations and determinations validly emanating from any entity of the Republic, or in a foreign country, in accordance with its laws, shall be recognized as valid.*[123]

Inspired by the Constitution of the United States,[124] Mexico's Political Constitution prescribes:

> *Article 121.* Full faith and credit shall be given in each state of the Federation to the public acts, records, and judicial proceedings of every other state. The Congress of the Union, by general laws, shall prescribe the manner of proving such acts, records, and proceedings, and their effect, by subjecting them to the following principles:
>
> I. The laws of a state shall have effect only within its own territory and are consequently not binding outside that state;
>
> II. Real and personal property shall be subject to the laws of the place where they are located;
>
> III. Judgments pronounced by the courts of one state regarding property rights or real estate located in another state, shall only have executory effect in the latter when its own laws so provide;
>
> Judgments regarding personal rights shall be executed in another state only when the convicted defendant (*condenado*) has expressly, or by reason of place of residence, deferred to the court that pronounced the judgment, and provided that he/she has been personally summoned (*citada personalmente*) to appear at a judicial hearing;
>
> IV. Acts regarding the civil status of individuals done in conformance with the laws of a given state shall have validity in the others; and
>
> V. Professional degrees (*títulos profesionales*) issued by the authorities of one state, in conformance with its laws, shall be respected in other states.[125]

This article has drawn virtually no attention or commentaries from constitutional and conflict of law experts in Mexico, despite the legal importance of its language. The article focuses on the express mandate of the

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123 Vargas, *supra* note 42 at 5.

124 *See* U.S. CONST. Article IV § 2, which reads: 'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

125 The original language of Article 121 of the Political Constitution of Mexico was taken from AGENDA DE AMPARO (ISEF, México, 2008) at 89.

Constitution directed at each of Mexico's political entities (31 states and one Federal District, that administratively functions as a state), to give full faith and credit to the public acts, records and judicial proceedings of the other states. As pointed out by leading constitutional law expert Felipe Tena Ramírez, whereas this obligation does not exist between countries, unless based on pertinent bilateral agreements or international treaties or conventions, the federal entities in Mexico have this obligation directly imposed upon them by the Federal Constitution of 1917.[126]

Laura Trigueros has emphatically pointed out the powerful influence the U.S. Constitution exercises regarding paragraph I of this article. She has also been critical of the fact that this paragraph has been incorrectly translated into Spanish from the original English version.[127] In the Mexican translation, the English expression "public acts," which refers to formal legislative enactments passed by Congress, has been incorrectly translated as "*actos públicos*," which means "public acts" in the sense of actions on the part of a public authority like when the police close a street. This paragraph also reiterates Mexico's concept of "limited territorialism," as formulated in Article 12 of the Federal Civil Code.[128]

On the subject of the valid application of foreign law in Mexico, the Third Federal Collegiate Court on Civil Matters of the First Circuit rendered the following opinion in 2000:

> FOREIGN LAW. VALID APPLICATION IN THE MEXICAN TERRITORY. When a legal act executed abroad produces effects in national territory, the validity of said act is to be previously ascertained as a prerequisite to determine the applicability of the legislation or place of its implementation and, if this is the case, which law is to define the validity of said act..... To resolve an individual case, the state court taking cognizance of the controversy that may result in the application of foreign substantive law (*derecho sustantivo extranjero*) must adapt its actions to the law of the land. In other words, on procedural matters, as a general rule, the court cannot be obligated to apply a procedural rule that has not been formulated by its own legislative branch, including that which has been prescribed by international treaties as part of its domestic law, when these have been incorporated into the positive law system, provided no one challenges their having entered into force or their inapplicability has been decided by a *res judicata* decision.
>
> The court should consider the substantive aspects of international law norms which have been incorporated into its domestic legal system and the specific rules for resolving a given case. What is the applicable norm governing the legal act in a given controversy? It cannot be generally and fully decided that the foreign substantive law cannot be applied by the Mexican

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126 *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Vol. IV, 304 (Porrúa/UNAM, México, 2003).

127 *Id.* at 308.

128 *See* Article 12, Federal Civil Code.

> court since there are federal norms, such as Articles 14 and 133 of the Political Constitution and Articles 12 and 13 of the Federal Civil Code, that establish specific rules that should be followed to resolve a controversy of this nature duly grounded in law and fact (*para resolver en forma fundada y motivada*). In this case, the Mexican court is to resolve the controversy presented to it in the manner a foreign court would.[129]

> *II. The status and legal capacity of individuals* (personas fisicas) *shall be governed by the laws of their place of residence.*[130]

Accordingly, an individual's civil status, *i.e.,* birth, marriage, divorce, or their legal capacity, *i.e.,* legal capacity to execute or to enter into certain acts, incapacities, etc., are governed by the law of said individual's place of residence.[131] For example, if an individual's address is in La Jolla, California, U.S.A., and is planning to execute a testament with a Notary Public in Mexico City, the Notary has to confirm that, under California law, the individual in question is legally capable of formulating and executing said testament.

> *III. The creation, term and termination of real property, as well as leasing agreements and temporary rental contracts of real or personal property, shall be governed by the laws of the place where they are situated, regardless of the foreign nationality of their holders or owners.*[132]

This paragraph simply reiterates the ancient Roman law principle of *Lex rei sitae (i.e., the law of the place where the thing is located),* applicable to both real and personal property. Evidently, this paragraph is in complete symmetry with Article 121, paragraph II, of the Political Constitution of Mexico.[133]

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129 Direct *Amparo* 10523/2000. Victor Vasarherely, alias Vasarely, now his heirs (*herederos*) André and Jean Pierre. 12 June 2001. Unanimous decision. *Instance:* Tribunales Colegiados de Circuito [*Collegiate Circuit Courts*]. *Source:* Semanario Judicial de la Federación [*Weekly Federal Court Report*] and its Gazette, Ninth Epoch. Volume XIV, September 2001, p. 1311. *Tesis Aislada* [isolated ruling].

130 Article 13(II), Federal Civil Code (2009 Ed.) at 5.

131 In Mexico there are different kinds of "addresses," such as an individual's place of residence, legal domicile, etc. Article 29 of the Federal Civil Code defines an individual's place of residence as "the place where the person habitually resides; if none, then where the person has his or her principal place of business; if none, then where the person actually resides and, if none, then where the person is located." An individual's legal domicile (Article 30, FCC) is "where the law determines the person's place of residence to be for the exercise of his or her rights and where the person must comply with his or her obligations, even if in fact not physically present." Legal entities (Article 33) "are domiciled at the place where their administrative offices are located."

132 Article 13 (III), Federal Civil Code (2009 Ed.) at 5.

133 *See supra* note 125 and the accompanying text.

> *IV. The formalities required of legal acts shall be determined by the laws of the place where they are executed. In the event such acts produce effects within the Federal District, or in the Republic regarding federal matters, they may follow the formalities prescribed in this Code.*[134]

Recognized Roman law principles assert that the form of legal acts is to be governed by the law of the place where they are executed (*Locus regit actum*). When the act produces an effect in, say, Mexico City (*i.e.,* Federal District), such act should conform to the law of Mexico City (*i.e.,* Civil Code for the Federal District).

> *V. Except as provided in the preceding paragraphs, the legal effects of acts and contracts shall be governed by the laws of the place of their performance, unless the parties have validly designated the applicability of a different law.*[135]

This final paragraph of Article 15 of the Federal Civil Code begins by reiterating the fundamental principle that the effects of acts and contracts shall be governed by the laws of the place of their performance, subject to the *lex loci executionis* principle, applicable to both formalities and legal substance. Alternatively, this same paragraph recognizes that the principle of the autonomy of the parties should prevail when said parties "have validly designated the applicability of a different law." This would be the case when a given contract, for example, was executed by the parties in the city of Monterrey, Nuevo León, Mexico, but the contract included a choice of law clause validly stating that the contract should be governed by the laws of Mexico City, *i.e.*, pursuant to the Civil Code for the Federal District.

The use of the adverb "validly," found in the language in paragraph V leaves the determination as to whether the choice of law clause is legally sound and valid in accordance with the law where the contract was executed to the judge's discretion.Consider the example of a Mexican national selling an American citizen a piece of ocean-front real estate on fee for the construction of a private villa. Article 27, paragraph I, of Mexico's Constitution imposes an outright prohibition on foreigners to acquire direct ownership of a piece of real estate located in the so-called "restricted zone," which comprises a strip of 100 kilometers along Mexico's borders and 50 km. along its coastlines. Such a purchase-sale contract would run contrary to Mexico's public order as established by its Federal Constitution and, as such, would be null and void.[136]

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134 *Id.*

135 Article 13 (V), Federal Civil Code (2009 Ed.) at 5.

136 *See* Jorge A. Vargas, *Acquisition of Real Estate in Mexico by U.S. Citizens and American Companies*, *in* MEXICAN LAW FOR THE AMERICAN LAWYER 155-187 (Carolina Academic Press, 2009).

Therefore, the judge has to ascertain whether the selection of a different law goes against Mexico's public order, or whether the chosen law was made use of only to thwart the application of Mexican law. In this regard, it may be pertinent to recall that the Inter-American Convention on the Law Applicable to International Contracts,[137] to which Mexico is a party since May 1998, prescribes: "The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be explicit or, in the event that there is no explicit agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole."[138] It adds that: "If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties."[139]

IV. Recent Court Decisions in Mexico

Recently, Mexico's Circuit Collegiate Courts have rendered a couple of important rulings (*Tesis aisladas*) regarding foreign law in Mexico. These brief resolutions have established the following:

1. In 2001, the Third Collegiate Court of the First Circuit on Civil Matters prescribed that in order to prove the existence of foreign law in Mexico due consideration is to be given to the pertinent provisions of an international treaty or convention to which Mexico is a party, such as the Inter-American Convention on Proof of and Information on Foreign Law (published in the Federal Official Gazette on April 29, 1983). Articles 1 and 3 of this convention establish that the proper proof and information should consist of: a) certified copies of legal texts of the applicable foreign domestic legislation together with an indication of their validity, or judicial precedents (if any); b) Expert testimony rendered by experts on the matters; and c) official reports of the State of destination on the text, validity, meaning and scope.[140]

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137 This convention was signed by Mexico in Mexico City on November 27, 1995, and adopted in the same place on March 17, 1994, during the Inter-American Specialized Conference on Private International Law (CIDIP V). The Instrument of Ratification was signed on August 20, 1996 and deposited with the Secretary General of the Organization of American States (OAS). The publication decree was published in the *Diario Oficial* [Federal Official Gazette] on May 25, 1998.

138 Article 7, paragraph I, Inter-American Convention on International Contracts. The final paragraph of Article 7 reads: "Selection of a certain forum by the parties does not necessarily entail selection of the applicable law."

139 *Id.*, Article 9.

140 Direct *Amparo* 10623/2001. Juan Cortina del Valle. 18 October 2001. Unanimous

2. In 2001, the Third Collegiate Court of the First Circuit on Civil Matters dictated a resolution sentencing that in regard to Article 14, paragraph I, of the Federal Civil Code and Article 86 Bis of the Federal Code of Civil Procedure, it corresponds to the parties to provide the Mexican judge with the foreign law that has been invoked, along with the necessary elements of the text, validity, legal meaning and scope of said law. The parties in question should also authorize the judge to request, if deemed necessary, official reports produced by the Mexican Foreign Service or international conventions to which Mexico is a party to verify the accuracy of this information for the purpose of giving legal certainty to its determinations. The court reiterated the importance that should be given to those international conventions to which Mexico is a party in cases involving the proof of foreign law.[141]

V. Conclusions

The number of cases that require some kind of judicial trans-border cooperation between the United States and Mexico today remains relatively small. Since the enactment of the Civil Code for the Federal District of 1928 (local and federal at that time), Mexico has strongly embraced a legal concept of "absolute territorialism." This notion maximized the importance of Mexican law *vis-à-vis* foreign law, especially with that of the United States. As a consequence of this extreme domestic policy, foreign law became virtually banned from Mexican courts. Fueled by the intense wave of nationalistic sentiments that engulfed the country during the expropriation of the oil industry by President Lázaro Cárdenas in 1938, Mexico encapsulated itself in an "isolationist cocoon." This was a sterile policy that hindered any contact with foreign law but, more importantly, deprived Mexico from participating in and assimilating the progressive developments in important areas in private international law that flourished in Latin America in the 1970s and 1980s. Fortunately, the enactment of the 1988 amendments by President Miguel de la Madrid put an end to this ethnocentric policy.

The 1988 amendments on conflict of laws and enforcement of judgments were expressly targeted to amend the most important codes in Mexico: those in force in Mexico City at a local level, such as the (i) Civil Code for the Federal District and (ii) the Code of Civil Procedure for the Federal District; as well as the (iii) Federal Civil Code, (iv) the Federal Code of Civil Procedure and (v) the Federal Code of Commerce.

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decision. Semanario Judicial de la Federación (SJF) [Federal Weekly Court Report], Ninth Epoch, Volume XV, April 2002, p. 1248.

141 *Id.*, SJF, Ninth Epoch, Volume XV, March 2002, p. 1326.

It is well known that since the enactment of the very first codes at the end of the 19th century (all of which were published in Mexico City), each of those five codes was formulated by a group composed of eminent Mexican jurists in Mexico City. Highly influenced by similar codes in Spain and France (as well as those of other countries), the substance and format of these Mexican codes have exercised the most profound and permanent influence in the formulation of similar codes at state level since the time of their publication in the *Diario Oficial de la Federación* [Federal Official Gazette] in Mexico City. In other words, those five codes have served in the past —and continue to serve in the present— as the "legal models" that each and every state in the Republic of Mexico strives to emulate.

The area of private international law is a case in point. The 1988 amendments to the Federal Civil Code regarding the application of foreign law and the questions pertaining to *Cartas Rogatorias*, *exequatur, homologación* and the enforcement of judgments in the Federal Code of Civil Procedure, for example, are four perfect examples. The language of the federal codes and those of the Federal District has been followed so closely by the state legislatures that, with minor exceptions, the provisions of all of the states' codes are but a copy of the federal codes and of the local codes for the Federal District.

In general, Mexico has utilized as "legal models" the principles and rules formulated by the various Inter-American Conventions on a number of areas of private international law to which Mexico is a party. The influence of these "legal models" is evident in the language of the Federal Civil Code and, especially, in the new relatively "Book four" of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*), relative to "International Procedural Cooperation" (*Cooperación Procesal Internacional*), Articles 543-577, added in January of 1988.

It should be noted, however, that leading Mexican jurists and private international law experts actively participated in formulating and drafting the language of many of these Inter-American Conventions, dating back to the 2nd Specialized Inter-American Conference on Private International Law (Montevideo, CIDIP-II,1979 and subsequent conferences). Furthermore, Mexican experts who were members of the Mexican Academy of Private International Law at the time, became directly involved in the formulation and revision of the draft provisions of the 1988 amendments (Advisory Commission to SRE and then to the Interior Ministry).[142]

In closing, special reference should be made to the work of the current Mexican Academy of Private International and Comparative Law (Ame-

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[142] For a detailed description of the work of these jurists and specialists, and the articulate and dynamic work of the Mexican Academy of Private International Law, *see* Vázquez Pando, *supra* 54 at 7-32; Pereznieto Castro, *supra* note 64 at 213-214; and García Moreno, *supra* note 65 at 18-32.

dip).[143] Composed of law professors and legal practitioners interested in this field of the law, the Academy organizes congresses and seminars on current legal areas of interest to Mexico, and posts the most recent papers submitted to these academic events on its website. Jointly with the Legal Research Institute (*Instituto de Investigaciones Jurídicas, UNAM*), the Academy is a leader in the advancement of private international law in Mexico.

Despite the fact that the international border between the United States and Mexico is one of the longest and oldest in the world (1,952 miles in length, and dating back to 1848, and slightly modified in 1853), empirical legal research projects between these two countries is virtually non-existent. Sociologically, the "border" between these countries is frequently characterized as a fascinating laboratory that fuels the conduct of numerous research projects addressing issues such as legal and undocumented immigration, bi-national and bilingual education, trans-border pollution problems, increasing flows of trade and investment, *maquiladoras,* technology transfer, tourism, acquisition of real estate on both sides of the border, demographic acculturation, as well as other aspects that include national security and terrorism, human trafficking, local and trans-border kidnappings, drug smuggling, and organized crime activities, to mention only the most salient areas.

However, empirical projects of a legal or judicial nature are sorely lacking between Mexico and the United States. As of today, the results of possible research projects addressing, for example, the differences and similarities in legal education in the United States and Mexico; the number and type of lawsuits filed by Mexican nationals in American courts; the number of Mexican inmates in American prisons, or the number of Americans in Mexican prisons; the adoption of Mexican children by American citizens; the number of cases in the United States and Mexico involving the application of The Hague Convention for the Protection of Abducted Children, etc., are projects waiting to be undertaken by scholars and academics, legal practitioners and government officials.

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143 Academia Mexicana de Derecho Internacional Privado y Comparado, A. C. (Amedip) at: *www.amedip.com*.

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THE NOTION OF "PRINCIPLE" IN LEGAL REASONING AS UNDERSTOOD IN MEXICAN LAW

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ABSTRACT. *The use of the term "principle" is common to law, but it has a wide variety of different meanings. Contemporary legal theory has added some new ones which should help improve the application of justice, particularly when they are accompanied by an appropriate theory for the interpretation of rules. This article revisits the term "principle" and analyzes the distinction between principles and rules in order to evaluate the different ways in which Mexican Courts apply principles. "Balancing" and "subsumption" are compared as methods when there are conflicts between norms.*

KEY WORDS: *principles, norm conflicts, legal justification, constitutional control.*

RESUMEN. *El término principio, de uso común en el derecho, tiene varios significados. La teoría del derecho contemporánea ha agregado otros, que junto a una específica teoría de la aplicación de las normas, deben contribuir a mejorar el sistema de impartición de justicia. Se analizan el término principio, asi como la distinción entre reglas y principios para evaluar la forma en que son aplicados por los tribunales mexicanos. Los métodos de ponderación y subsunción son comparados a la luz de los con- flictos entre normas.*

PALABRAS CLAVE: *principios, conflictos de normas, justificación legal, control de constitucionalidad.*

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I. Introduction

Over the past 20 years the notion of "principle" as distinguished from "rule" has provoked a great deal of discussion with regard to its meaning, scope, application and advantages. The impact of this discussion has moved beyond academia into the practical realm. One of its most attractive characteristics is that this distinction has offered an alternative to "subsumption," the traditional form of applying norms usually considered a "logical" method, to open the possibility of taking a more explicitly justified decision based on "weighing" and "balancing."[1] Nevertheless, there are still many unresolved questions with regard to the distinction between principles and rules.

I will argue that logical syllogism is a required part of the decision to individuate a norm regardless of the kind of conflict between norm sentences, whether referring to rules or principles. I will take this idea further to analyze: 1. the ambiguity of the term "principle" in law, 2. the theory of principles, 3. conflicts between norms: subsumption *vs.* balancing, 4. how courts make legal decisions, 5. the use of the term "principle" in some specific decisions taken by Mexican courts.

Although legal adjudication implies a variety of procedures, I shall only describe the judicial process in general terms and concentrate on the logical aspects of the resolution of normative conflicts. Even if a legal decision cannot be deemed as having a logical nature, logic plays an important role in legal decision-making processes, and not only in relation to subsumption. For implications of the theory of principles, it is important to distinguish the different possible kinds of conflicts between norm sentences, because the solution to the problem depends on how the norms collide.

The process of justification is a reconstruction of legal reasoning. Legal certainty is best served if the arguments of a legal decision are made public. The "legal syllogism" is the traditional form in which a legal decision is presented and the logical appearance of its structure is very persuasive. The

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[1] Subsumption is the procedure used to compare the hypothesis of the norm sentence with the proven facts in a given case in order to determine the applicability of the norm. *See* Karl Engisch, Introducción al pensamiento jurídico 69-70 (E. Garzón Valdés trans., Ediciones Guadarrama, 1967). For Kelsen, subsumption is simply an act of norm creation, so that the facts are subsumed in a general norm and the legal consequences are produced. *See* Hans Kelsen, Die Idee des Naturrechtes 261 (Die Wiener Rechtstheoretische Schule, 1968).

question is whether formally speaking the solution to a collision of principles is substantially different from the solution of a conflict of rules. Especially because the legal effects of the application of a legal sentence follow from a weighing procedure, it is also presented in the form of a legal syllogism as if obtained by subsumption. The main difference resides in the fact that balancing norms has to be justified by explaining the reasons behind the decision taken to do so, which are not expressed in the internal justification.

The main purpose of this paper is not only to point out that there are different ways in which norms collide, but also to evaluate the possibilities of making a decision by using logic, since the object and process of argumentation varies depending whether it concerns rules or principles.

II. The Ambiguity of the Term "Principle" in Law

The term "principle" is not really new to law, although perhaps not as old as the concept of "rule."[2] Nevertheless, the history of law has shown that the use of principles was common practice in Roman law. Many of these are still applied all over the world. In some legal systems, the word "principle" will appear quite often. But usually, no formal definition is given since the purpose of law is not to describe, but to prescribe some kind of act or action.[3] Identifying principles is therefore no easy task.

According to the use of the term we can separate its different meanings into four groups: 1. when it refers to some value, 2. when used as synonym of "legal principle" and refers to a legal institution, 3. as a general principle of law, and 4. as the complementary category of rules as differentiated by the theory of principles.

In the first sense, which is the most general, its meaning refers to the ethical dimension, so that understanding a certain principle, like justice, equity or proportionality, for example, is an issue related to the dimension of goodness. However, one should not confuse these principles with the values that sustain a legal system, since the latter have a social origin in either a social or political discourse, and may therefore have a different scope.

The main difference between values and principles in law resides respectively in their teleological and directive functions. They are similar in so far as both are formulated as general clauses. Nevertheless values resemble criteria while principles resemble a norm. Principles prescribe a *Sollen*, some-

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[2] The doctrine uses the term "principle" in different ways, *See* Aulis Aarnio, *Taking Rules Seriously*, 42 ARSP 183-185 (1990).

[3] Even so-called "definitions" are prescriptions of meaning for the application of legal sentences in order to produce certain legal consequences. "Definitions" in law do not explain but determine the scope of a concept.

thing that *ought to be*. According to Dworkin,[4] principles establish rights, their binding nature is a requirement of justice and equity, and so, they reflect the moral dimension of law. In this sense, he appears to assimilate principles to values.

Values have a guiding function towards an end and are used in the interpretation and application of other norms. As part of the decision-making process, they might be considered reasons for action, for both individuals and authorities. In that sense, they seem like generic directive clauses, but in law they operate as meta-norms in relation to principles.

Values and norms constitute different categories. Considering a semantic definition of norm,[5] one could agree with Sieckmann that norms are the meanings of a legal sentence and are characterized by a deontic modality, while values may be described as criteria for evaluating the good. Values represent the part of a sentence that limits the evaluation and the way it corresponds to its content.[6]

The meaning of the term "principle" used in the concept "legal principle" is completely different since legal principles have a specific function in law. They are formulated to express the regulation of a given legal institution formed by a variable number of legal sentences, like "due process," "Rule of Law" or "presumption of innocence." They are exclusively applied in a legal context and have no axiological value.

"General principles of law" on the other hand constitute a type of sentences that become part of a legal system through the practice of written law. Yet this cannot be called a simple and uniform category, as Bobbio pointed out.[7] While seldom given as rules that are to be obeyed by those who apply norms, these principles are used and quoted by judges in their decisions. Most of them originate in Roman law and are even formulated in Latin. They are mainly guidelines for conflict resolution and integration in case of a gap or absence in the law. Some examples are "*nullum crimen sine lege*," "*testis unus testis nullius*," "no one can benefit from one's own tort," "first in time first in right," etc.

A general principle of law can be understood as a summary of a set of relevant legal sentences and are usually inferred from written law by doc-

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[4] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22, 90 (Harvard University Press, 1978).

[5] *See* J. R. Sieckmann, *Semantischer Normbegriff und Normbegründung*, 80 ARSP 228 (1994). The terminology used by Sieckmann coincides with that of C. and O. WEINBERGER SEMANTIK UND HERMENEUTIK, 20, 108 (Munich, 1997), as well as with the one used in ALEXY, THEORIE DER GRUNDRECHTE 42 (Suhrkamp, Frankfurt a. M., 1994).

[6] *Zum Verhältnis von Werten und Normen*, *in* PERSPEKTIVEN DER ANALYTISCHEN PHILOSOPHIE, 743, 744, 749 (Meggle, Nida-Rümelin eds., 2000).

[7] *See* generally Norberto Bobbio, *Principi generali del diritto*, NOVISSIMO DIGESTO ITALIANO XIII (Turin, UTET, 1966).

trine and judges. For Aarnio[8] these principles originate in positive law and even if they are created by legislators, they are part of the legal tradition that passes from one generation to the next by means of their decisions and argumentation.

Due to their uncertain origin, general principles of law are often characterized as summarized legal sentences, as abbreviated formulae or even as short descriptions of written rules depending on their process of elaboration. They are inferred from the legal system in force and constitute legally valid rules even if they are not expressly formulated. As norms, they operate like rules (*s.s*), which means that they are applied in an "all or nothing" way as Dworkin describes it,[9] and their function is secondary, integrative and corrective of legal norms. This kind of principles may be applied to the same set of sentences, *e.g.* to ensure consistency in the set regarding a certain issue at the heart of the principle. They can also be used to identify conflicts between the realm at which that set of legal sentences is aimed and other realms or aims, whose set of relevant legal sentences may also be summarized as different principles.

It is in this way that Zagrebelsky[10] understands the term "principle" when he holds that science cannot provide an articulation of principles because of their plurality and the absence of formal hierarchy among them. For him, principles are not structured according to any kind of "hierarchy of values." Therefore, he suggests that they be prudently "balanced." He argues that the only rule that could be accepted is the optimization of all principles, but considers reaching this goal a more material and practical issue. It should be noticed though, that in this case Zagrebelsky does not use this term in the sense of the theory of principles as Alexy does.

In the last sense of the term, principles are understood as "norms."[11] This conception has been introduced to establish a distinction between norms that are applied strictly and those whose application can be interpreted in different degrees within the framework of legality. This special form of operation of principles is nevertheless only noticeable when applied, and especially in case of a conflict. These norms are the meaning of legal sentences structured in the classical form, though they might be given an abbreviated formulation or be identified as rights or principles (such as the right to life or freedom of expression).

It is in this sense that norms interpreted as principles allow an evaluation of their possible application as given by legislators or more restrictively with-

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8 AULIS AARNIO, LO RACIONAL COMO RAZONABLE 131 (Centro de Estudios Constitucionales, Madrid, 1991).

9 Dworkin, *supra* note 4, at 22.

10 GUSTAVO ZAGREBELSKY, EL DERECHO DÚCTIL. LEY, DERECHOS, JUSTICIA 125 (Trotta, Madrid, 1997).

11 As Dworkin and Alexy do.

out affecting their validity. That is why doctrine has insisted on optimizing their content in the case of a conflict, so as to warrant their application in the fullest possible way. Weighing and balancing as methods for applying norms must reconcile the principles in conflict in the best possible way, even optimally, avoiding any harm or loss.

Even if traditional legal positivism does not consider any conceptual distinction between "rule" and "principle" as Zagrebelsky[12] states, conflicts between different types of norms are possible.

III. The Theory of Principles

An important part of contemporary legal theory focuses on the reconstruction of the process of justifying legal decisions. In recent years, experts have argued that legal reasoning does not have a single structure. The reason for this resides in the fact that the reasoning procedure varies depending on the type of conflict between the norms. An important change has derived from the typology of norms that distinguishes rules from principles.

Legal decisions have traditionally been presented in the form of "legal syllogisms." The theory of legal argumentation suggests that the application of principles differs from that of rules in that they are not "subsumed" but "weighed." The question is whether subsumption and weighing constitute different forms of reasoning or only of reconstructing a legal decision. Do judges actually reflect the intellectual process carried out in a resolution that includes principles? Is "weighing" independent from the standard or classical form of application associated to propositional or formal logic? This seems a valid question especially since legal decisions are finally presented in the form of a legal syllogism.

The answer to these questions presupposes an explanation of the difference between rules and principles. From a linguistic perspective, one could say that norms are the meaning of normative sentences. These sentences must be reformulated into their ideal structure and interpreted to determine the normative status of the regulated conduct (that is the "deontic character" as in Aarnio).[13]

The ideal or logical structure of a legal sentence consists of a hypothesis (the condition), a normative link (usually the verb "to be" that is deontically translated as a duty or permission) and a sanction (understood as legal consequence, that is, rights or duties). A legal sentence has a conditional form, and as Kelsen stated, produces a necessary imputation of the legal consequences on the subject that materializes the hypothesis as regulated.[14] This

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12 Zagrebelsky, *supra* note 10 at 117.

13 George Henrik von Wright, Norma y Acción 87 (Tecnos, Madrid, 1979).

14 The principle of imputation, as Kelsen called it, explains the functional connection

is the structure of a sentence that, according to its rule of recognition, belongs to a legal system. Law provides for the legal character of the sentence. It is not a consequence of regulated content, but a quality that depends on their function as sentences sanctioned by the competent authority.

If we agree that all sentences issued by legislators have legal meaning and may produce an effect on the legal status of an act or action, then the unity of the legal system allows for their reconstruction as norms (*s.s.*). One could reconsider Kelsen's theory on the non-independent norm[15] and on those grounds establish a relationship between the sentences that form a complete normative sentence in the ideal form.[16]

Many authors believe that due to their formulation and function, legal sentences may contain two different kinds of norms: rules and principles. Rules are applied in terms of "all or nothing." On the other hand, principles, they say, have to be "weighed." But what does weighing really mean?

Contemporary legal theory has distinguished the basic components of the legal system: the norm, in rules and principles. Following Dworkin and Alexy, this distinction leads to two forms of application: subsumption and weighing. However, rules and principles have the same nature. They are legal norms sanctioned by legal authorities. The difference cannot be perceived in the formal or logical structure of the legal sentence, and does not take into account the generality of their formulation. It is only possible to distinguish a rule from a principle in the case of conflict, which provides for a different way of justifying the application.

One of the difficulties in explaining this method resides in the actual possibility of distinguishing a rule from a principle. In my opinion, this is not possible *a priori*, but only when a conflict of norms arises, especially because legal sentences are hypothetically formulated and expressed in a common and often technical language. A norm, understood as the meaning of a legal sentence, can be inferred as a rule or a principle depending on its content. Regretfully there is no concept of principles that enables their immediate identification by simply reading a legal sentence. And though they constitute a distinct logical category of norms, they are still general and abstract, just like rules. The difference is only perceived by the authority or interpreter of the legal sentence in terms of its application to a particular case and could hence be discretional. Second order rules may come in handy to

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between the condition and the sanction brought about by a legal norm, HANS KELSEN, GENERAL THEORY OF NORMS 24-25 (Michael Hartney trans., Clarendon Press, 1991).

15 HANS KELSEN, LA TEORÍA PURA DEL DERECHO 52 (2nd ed., 1981); HANS KELSEN, TEORÍA GENERAL DEL DERECHO Y DEL ESTADO (Eduardo García Máynez trans., UNAM, 1988).

16 According to this thesis, norms that do not provide for a coercible sanction are connected to others that do, due to the unity of the legal system. HANS KELSEN, REINE RECHTSLEHRE, 52-55 (2nd ed. 1960), and Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 87 (1941-1942).

determine the nature of the norm, yet its interpretation as a rule or a principle still has to be justified.

Dworkin proposes a model of principles according to which a legal system is integrated not only by rules, but essentially by principles. He considers that law contains other elements but he does not define principles. For him, all principles are "legal principles," but he also alludes to their moral dimension.[17] So, their origin or the kind of principles judges may legitimately use is not clear. For Dworkin, rules are applied in an all-or-nothing fashion. If the norm is valid, legal consequences follow when the hypothesis is fulfilled. Even when applicable, principles do not determine the case; they give reasons in favor of one or another decision. Principles have a dimension of weight, which become evident in case of a collision. The weight is assigned by the competent authority solving the case.

The distinction Dworkin proposed and Alexy further developed is the nucleus of the so-called "theory of principles." Principles are *prima facie* applicable. This means they are to be applied only if no other principle can be applied. For Alexy, central to the distinction between rules and principles is the fact that principles are norms that order something be done to the highest possible measure within legal and factual possibilities. Hence he defines principles as rules for optimization.[18] A collision of principles is solved by establishing what ought to be done in a definite way, but it could be expressed as a collision of values, to thus refer to what is better in a definitive way.[19]

Balancing constitutes a form of reasoning that justifies a different application of a legal sentence. The interpretation of a norm as a principle requires the comparison of the norms in conflict and must be sustained by arguments. Weighing arguments is central to this procedure. It is the arguments that are balanced to defend the weight of a certain norm in a case of conflict. Transforming the norm into a principle allows the application of two norms in conflict without questioning their validity. As a process it requires a certain method for weighing norms, that is, to explain the relevance attributed to each one of them. By balancing normative sentences, the weight settles on the arguments that establish the preference of a principle.

According to Alexy, fundamental norms are principles, that is, norms that have to be optimized. He goes on to point out that interferences with constitutional rights are admissible if they are justified,[20] which is only pos-

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[17] Dworkin, *supra* note 4, at 20, 90, and RONALD DWORKIN, LAW'S EMPIRE 225 (Fontana Press 1986).

[18] Alexy, *supra* note 5, at 75, 76.

[19] Alexy, *Sistema jurídico, principios y razón práctica*, 5 DOXA 139, 145 (1988).

[20] Judges often use the terms "principle" and "value" synonymously when referring for example to fundamental freedoms specified in a Constitution. This practice has contributed to the confusion of the different character and function of principles in law.

sible if said interferences are proportional. For him "proportionality judgments, however, presuppose balancing."[21] Balancing has a similar structure to subsumption though it is not a logical one. Alexy has proposed a triadic model of a "weight formula"[22] to maintain that this procedure links judgments on degrees of interference, the importance of abstract weight and degrees of reliability.

The notion of principle is the starting point for a type of argumentation that provides an exceptional solution to a conflict. It preserves the validity of the norms while establishing a differentiated degree of relevance for their fulfillment in the case at hand. If priority is granted to a principle, it then operates as a rule regarding an individual normative claim.

IV. Conflicts Between Norms

Legal norms are issued to direct human behavior in society. It is therefore important for their content to be clear. However, legal sentences may be vague, obscure or ambiguous. These problems, in addition to the superabundance of norms, produce uncertainty. Norms in conflict fail to fulfill their object: they cannot direct conduct. Some application problems originate in these defects or in the lack of precision of particular normative sentences. Sometimes they can be solved by interpretation, but genuine norm conflicts cannot be solved by mere interpretation. But understanding the nature of a norm conflict and the process of solving it can help overcome a problem.

The possibility of a norm conflict cannot be denied even if such a situation is not considered ideal in a coherent legal system. For Von Wright a "*contradiction between prescriptions can be said to reflect an inconsistency (irrationality) in the will of a norm-authority,*"[23] but that does not necessarily mean that a normative system is inconsistent in itself or that legislators deliberately issue contradictory norms. As von Wright argues, the coexistence of contradictory commands might not be a logical contradiction; but in any case it can be called a "conflict."

Conflicts have been usually identified as a problem of application or fulfillment of the norm, and even in the execution of the legal consequences.[24]

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[21] Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, Vol. 16 No. 4 Ratio Juris 433, 436, (2003).

[22] For him, this formula is a scheme that works according to arithmetic rules: numbers help in the interpretation. Balancing represents a graduating scheme of legal reasoning, *id,* at 448.

[23] George Henrik von Wright, Norm and Action a Logical Enquiry 145, 151 (Routledge and Kegan Paul 1963) (1951).

[24] As Stanley Paulson correctly mentions it in *Zum Problem der Normkonflikte*, there are as

On a higher level however, it is more a matter of the actual validity and belonging of the norm to the legal system. Regarding the structure of legal sentences, the conflict can occur in terms of different elements of the norm, that is, in the hypothesis (its content or its character[25]) or in the legal consequence. Incompatibility between any of those elements makes it impossible to apply both norms at the same time, because they oppose each other. They are either contrary or contradictory, which is why it is logically impossible to satisfy both.[26]

A normative conflict implies the incompatibility of two or more *prima facie* valid norms that are to be applied under the same circumstances. They can either not be satisfied simultaneously or they produce contradictory legal consequences. The incompatibility of the norms can be of a normative or a logical nature, but it does not need to be the kind of a logical contradiction. To be conceived as a normative conflict, it is only necessary for the norms to prescribe something that cannot be legally or logically satisfied at the same time without some undesired or inconvenient consequence.

As a result many different types of normative conflicts can materialize in a legal system. Since the conflict-solving process begins by determining its existence and type, the first step is to analyze the legal sentences in order to identify the norms and determine whether there is in fact some kind of incompatibility between them. A semantic definition of norm is best suited for this purpose. The legal sentence is hence understood as the linguistic expression of a norm. Norms are the meaning of normative sentences.[27] Generally speaking, there are different kinds of conflicts between norms. When the distinction resides in the type of norms to be applied in a certain case, then we can speak of conflicts between norms and collisions of principles.

The interpretation of the norms requires that the legal sentence be reconstructed and reformulated to the ideal form, "If A then B." This is done from the syntactical perspective, that is, independent of any kind of interpretation. The object is simply to put the pieces together in such a way that, the "new sentence," allows the norm to be identified. Once this condition has been fulfilled, other problems will have to be overcome such as vagueness, ambiguity and obscurity of the concepts and the sentence they belong to.

Making a legal decision implies a far more complicated process than appears at first glance since it may imply many different forms of analysis and

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many conceptions of the nature of normative conflicts as authors have written about it, ARSP, Bd. LXVI/4, p. 487.

25 The term "content" refers to the regulated behavior and "character" to the deontic modality that qualifies it, for this classification, *see* von Wright, *supra* note 13, at 87 ff.

26 For von Wright "*A norm directing a person to undertake both a certain act and its complement is directively unreasonable if it prescribes what is logically unreasonable, and its fulfillment is therefore logically impossible*," *supra* note 23, at 174.

27 In *Norm and Action,* von Wright distinguishes between "norm" and "norm formulation," *id.* at 95.

of course a certain methodology. Logic —not only formal logic, but also deontic logic— plays an important role at different moments in this process and serves different purposes. Taking into account that there is more than one kind of logic related to this process, the analysis at this point can be separated into two moments: first, that of referring to the "external justification" to ascertain the function and limits of logic at this stage of the process given that the correction of the premises has to be verified in this part of the justification; and then, to that of the "internal justification," which will be analyzed to evaluate the logical character of the subsumption and the so-called legal syllogism.

There are many kinds of legal decisions, but all of them have something in common: there is a normative problem that must be solved by the competent authority. It can deal with the vagueness of a concept, the meaning of a normative sentence, a gap in the legal system, a contradiction between norms or the validity of a norm. But they can all be reduced to one single problem: deciding which legal sentence to apply and how.

As for what the role of logic in the solution of normative conflicts entails, von Wright[28] states that logic cannot help us solve a conflict, but can provide certain principles or normative rules, certain "meta-norms" that indicate how it can be done. In the first stage of solving a normative conflict, logic can be a useful instrument to identify the problem and the kind of normative conflict.

For Ota Weinberger, logic can only determine the existence of a normative contradiction, but cannot eliminate it.[29] In the case of a conflict between the deontic character of two norms, deontic logic is necessary to determine the conflict. Thomas Cornides[30] is of the same opinion. He sustains that logic can only confirm the contradiction, but not solve it. Logic might therefore be considered as a limited, but useful tool to solve normative conflicts.

Finally, we could say that a solution of a normative conflict cannot be reached by logical means, but by legal ones. The rules of logic do not apply to the solution of normative conflicts; guidelines must be found in the law. That is why García Máynez[31] believed that establishing the applicable norm is not a matter of logic, but has to be regulated by positive law, to thus determine the criteria for resolving conflicts. The solution of a legal problem follows more from the subsumption of the case in the applicable norm than from a logical inference.

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[28] Georg Henrik von Wright, *Sein und Sollen*, *in* NORMEN, WERTE UND HANDLUNGEN, 73 (1994).

[29] OTA WEINBERGER, RECHTSLOGIK 254 (Duncker und Humblot 1989) (1982).

[30] Thomas Cornides, *Ordinale Deontik,* 25 FORSCHUNGEN AUS STAAT UND RECHT 5 (Vienna, New York, 1974).

[31] Eduardo García Máynez, *Some Considerations on the Problem of Antinomies in Law*, Vol. 49 No. 1 ARSP 9 (1963).

V. Legal Justification

According to Alexy,[32] the object of legal discourse is the justification of legal decisions that constitute a special case of normative sentences. To demonstrate the complexity of the process, it has been divided in two parts: the "internal justification," which shows how the decision follows "logically" from the premises adduced as basis, and the "external justification," in which the adequacy of the premises is verified.

The interpretation and argumentation of the norms and facts related to a certain case must be stated in the external justification. At this stage of the reasoning, many decisions are taken about the meaning of the norms and the legal consequences they might produce, the way in which they have to be applied and the considerations regarding the particular case and the related facts that indicate the reasons that will uphold the final decision.

The process of justification will be explained using as an example the solution of a normative conflict, distinguishing between the external and the internal justification. A normative conflict is usually related to the circumstances of a certain case. Sometimes they are not even evident and have to be identified through interpretation of scholars or the judges competent to control the norms of a legal system.

Aarnio[33] argues that the conflicts between norms constitute a logical inconvenience of the system because two norms that establish different legal consequences to the same hypothesis can produce contradictory normative sentences. For him, conflicts are possible as a matter of fact. The problem of which of the norms and under what circumstances they should be obeyed must be solved, because both cannot be applied at the same time. Therefore, in his opinion one of them has to "recede, at least partially." Nevertheless, he does not explain the meaning of his assertion —he could be thinking of the temporary suspension of the application of the norm, or that the norms can be applied to different degrees, as with Alexy in the case of conflicts between principles. Regrettably, Aarnio does not delve into this problem even when he considers it relevant.

In the case of a normative conflict, the challenge resides in deciding on the application of the norms. Internal justification only determines that a certain norm must be applied to a case and therefore has immediate effects on a specific person's rights or duties. External justification studies the incompatibility of the norms that cannot be applied at the same time and the choice of the norm to be taken as the normative premise for internal justification.

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[32] Robert Alexy, Teoría de la argumentación jurídica 36 (Centro de Estudios Constitucionales, Madrid, 1989).

[33] Aarnio *supra* note 8, at 160.

The argumentative process actually begins with the external justification. The first premise states that two norms are applicable to the case; the second one indicates that they are incompatible; and the third that incompatible norms cannot be applied at the same time. The following premises are the sentences that consolidate the argumentation of the existence of a conflict and the reasons why one norm should be preferred over the other. In the case of a collision of principles, weighing is done at this stage of the argumentation to decide on the need to apply one or both of the conflicting norms and to what degree. Propositional logic may be useful to verify the correctness of the arguments, but that does not necessarily mean that external justification has a logical structure or produces a deductive inference. In the case of a collision of principles,[34] the weighing would be done at this stage of the argumentation to reach the conclusion of the need to apply one or both of the conflicting norms to a certain degree.

The incompatibility of the norms must be proven in the external justification. After having tested their actual applicability and their normative validity, the argumentation of the reasons to preserve one or the other must convince the audience that there are sufficient grounds to eliminate one or even both norms because they infringe higher normative rules, principles or values. The conclusion is the elimination —or better said, the decision not to apply— at least one of the norms. In the event that both norms are considered non-applicable, the judge can fill the gap created if it falls within his competence. If not, the legislative power will have to issue a new norm.

Once the legal sentences have been reformulated, the norms identified and their meanings established, the incompatibility of the norms can be analyzed. In the first stage of solving a norm conflict, logic can be a useful instrument to establish the relationship between norms and thus identify the problem and kind of conflict. When a conflict can be identified in the deontic character of the norms, analysis will have to be carried out by means of deontic logic. However, if there is in fact incompatibility, it cannot be solved by logical, but only by normative means.

Other instruments such as normative criteria, interpretation and argumentation, as well as considering the operating rules of a normative system, are also needed in order to complete the process of justification. It is always important to take into account the operating rules of the normative system. Thus, the definition and operation of the legal system and its basis are also relevant to discovering the problem and finding a solution.

For Aarnio,[35] the structure of the internal justification differs not only from that of the classical syllogisms, yet it is also more complex since it is composed of premises, rules of inference and the values needed for the in-

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34 Here I follow Alexy's conceptualization in ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES 81 (Centro de Estudios Constitucionales, Madrid, 1989).

35 Aarnio, *supra* note 8, at 166.

terpretation. For him, the difficulty in interpreting does not reside in whether the conclusion follows logically, but in selecting the premises and determining its content, in choosing the appropriate rules of inference or basic values. That is why he believes the real problem of the legal discourse centers on the external justification.

As Aarnio clearly points out, external justification in not syllogistic; it is more a matter of convincing the addressee of the interpretation, the syllogisms supporting the interpretation or the argumentation guided by criteria of rationality or interpretation standards. In the end, the objective of external justification is to prove that the chosen normative premise is the right one for the case, which implies that the decision is lawful and thereby obligatory. In the case of normative conflicts, the applicability of one of the conflicting norms, as well as the acceptance of the judge's decision of the definitive validity of the norm must be assured.

Internal justification has the appearance of a syllogism. Its first premise consists of the norm chosen to be applied, which is therefore called "normative premise." The second premise summarizes the legally proven or admitted facts to be subsumed in the hypothesis of the norm. The third and last premise, usually the "conclusion," expresses the decision regarding the legal consequences after applying the norm.

Despite its logical characteristics, the so-called "legal syllogism" does not produce a deductive inference nor does it in fact represent a logical process (*s.s.*). The conclusion derived from a normative premise and the facts compared to it in the subsumption is that the norm is applicable to the case. The formal structure of subsumption is usually presented as a deductive scheme. It represents a way of formalizing an apparently deductive structure by means of formal logic. The actual individuation of the norm is the result of a different type of reasoning.

The justification process in the resolution of a normative conflict needs to distinguish between conflicts in a specific case (concrete) and those produced by issuing a norm (abstract).[36] The possibility of a concrete conflict cannot be denied, and I believe that its process of justification is also clearer than that of an abstract conflict. A concrete conflict usually depends on circumstances regarding the application of the norms. The existence of abstract conflicts is harder to accept, because they are not evident and they need to be identified by interpretation of either by scholars or those with

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[36] Most contemporary legal systems regulate at least some form of control of constitutionality. Constitutional legal theory speaks of two main forms of control: the concrete or actual case related system, and the abstract or potential conflict system. In Mexican law, the *Amparo* is an example of the concrete form of control of constitutionality; the procedures regulated in article 105 of the Mexican Constitution are, on the contrary, abstract forms of control since the existence of a directly affected person or interest is not necessary. In these cases, abstract control protects the legal system from invalid norms that may produce some conflict.

the power to control the legality of norms, as commonly found in cases of unconstitutionality.

In the case of either a concrete or an abstract normative conflict, the question lies in deciding the application of the norm. In a concrete conflict, internal justification aims at individuating the norm so as to apply it to the case at hand. In an abstract conflict, only the validity of one or both norms can be determined. The outcome of the resolution of the conflict may be a modification of the legal system, but it has no direct effect on any person's legal status. Of course, the consequence of the determination of the invalidity of a norm is that it can no longer be legally applied. Legal effects depend on the stipulations in the legal system and can include the possibility of a legal nullity declared retroactive.

External justification in both cases is similar since incompatible norms should not be applied and one of them must be chosen as normative premise for the internal justification. In extreme cases, both conflicting norms can be found non-applicable or invalid. With such a decision, the judge could produce a gap in the legal order. In these situations, it is advisable that the legal system provide for a way to remedy the problem, so that the judge can give a legal solution. The difference between both forms of control resides in the legal consequences of the decision since they depend on the powers attributed to the judge, more than on the procedure of justification. In the concrete case, the decision regarding the non-applicability or the declaration of invalidity of the norm considered inappropriate for the case ends with the individuation of another norm. Abstract cases usually function as methods of control over the coherence of the legal system and the normativity of its legal sentences. Therefore, the decision could even be the declaration of the nullity of the norm.

Abstract judicial review requires that external justification deal with the fact that two norms pertaining to a same legal system are incompatible with each other with demonstrating their incompatibility. The relevance of this form of control resides in that it serves to avoid future conflicts. Judges can therefore determine the definitive elimination of a norm from the legal order. It operates as a mechanism of control of the norm-issuing power. Incompatibility produces a problem of application of norms and therefore in the coherence and efficacy of the legal system.

Internal justification in an abstract conflict starts with the norm (or general principle) that establishes that two conflicting norms cannot be simultaneously applied. The second premise is related to the actual applicability of a norm saying that it is either not valid or that it cannot be applied. The conclusion is that one of the norms (or even both) is declared either invalid or null.

One could therefore conclude that the main difference is that in the concrete case, the object of the decision is the application of the norm, whereas

in the abstract conflict it is related to its validity -which also determines its future application. Legal validity of a norm is presupposed in order to accept that there is a normative conflict. Even if the validity of a norm could be revoked in certain cases of concrete conflicts, discussion dos not center on the issue of validity, but on the application of a norm. Principles need not be nullified nor declared invalid, because each conflicting norm persists since the judge finds some kind of balance. Arguments sustain the relevance of one or another principle to determine their precedence of application to the case.

VI. Principles as Understood by Mexican Courts

Law should be conceived as a dynamic legal system in order to give an adequate and comprehensive answer to the problem of norm conflicts. This model implies that its elements (legal norms) are interrelated because the legal system forms a unity, and are organized according to certain criteria that determine their relationship.

The Constitution is the norm at the basis of a legal system. As a dynamic norm that itself operates as a system, it allows its systematic interpretation, a method that produces modifications in norms and in the institutions it regulates as a result of the process known in the constitutional legal science as "mutation."[37] As the Supreme Norm of a legal system, it determines (to some degree) not only the relationships between the norms of the system, but also their meaning because of its nature as a frame of reference for the interpreter. A legal system created in conformity with the Constitution's stipulations operates as a whole; its completeness, coherence, consistency and independence[38] make it applicable.

Interpreting the legal system according to the principle of non-contradiction helps prevent situations that seem to produce contradictions between constitutional norms. The principle of coherence enables the meaning of an institution to change from its original sense to make it compatible with other institutions. Assuming the rationality of the constituent assembly, there cannot be any redundant norms in the Constitution because each norm has a meaning of its own, hence affirming each one's independence. Finally, the Constitution as the Supreme Norm of the legal order is complete. Therefore, constitutional gaps are not possible. Human conduct is either regulated or not, and both situations are lawful. The completeness of the Con-

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[37] Konrad Hesse, Escritos de derecho constitucional 25 (Centro de Estudios Constitucionales, Madrid, 1983).

[38] *See* Carla Huerta, *Constitución, Reforma y Ruptura*, *in* Transiciones y diseños institucionales (González & López eds., UNAM, 1998).

stitution is a necessary supposition for its application and interpretation. The completeness of the system is, on the contrary, a rational ideal.

The Constitution establishes the processes for creating norms, which are directly linked to the system of constitutional control. The possibility of judicial control of constitutionality is at the core of constitutional efficiency since it reinforces the mandatory character of the Constitution. The judicial system guarantees the applicability of norms. Part of its function is to solve conflicts between norms by giving coherent and independent solutions. Ever since the Constitution began being considered a legal norm instead of a political document,[39] judicial review became a fundamental axis in the structure of the Supreme Norm.[40] In this way, balance between fundamental rights and the separation of powers can be attained.

Mexican law follows the Roman legal tradition and many general principles of law are part of it, as can be expected. As in other legal systems, the term "principle" appears often in legislation and in court decisions. Judges often appeal to principles to solve a case, but they either refer to principles established by the law as obligatory for its interpretation or to general principles of law. In the first case, this kind of principles are considered as "undetermined," and are defined by the organs with the legal power to delimit them. Examples of such legal indeterminate legal concepts in Mexican law are "general interest," "public security," "transparency," etc.

Courts often resort to principles to use their discretional powers and adapt a decision to values such as equality, justice or fairness. Methods of interpretation and argumentation are not fully developed by law; this task has been undertaken by doctrine. Positive law regulates the general methods allowed by simply mentioning them. For example, Article 14 of the Mexican Constitution states that in criminal law, no argument by analogy or *mayoría de razón*[41] is permitted. In any other matter, the application of general principles of law can fill the gaps in the law.

In Mexico, resolutions based on principles normally do not refer to norms that are optimized through a balancing procedure as proposed in Alexy's theory of principles. Nevertheless, a recent decision has started to make changes in this area by explaining the "balancing" process, focusing on the need to solve contradictions between norms following the criteria of "the interest of society, its values and the consequences of a decision" in envi-

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[39] One could say that the decision on *Marbury v. Madison* is the turning point in this matter.

[40] On the internal structure of the Constitution, *see* Huerta, *Constitución y diseño institucional*, *in* TEORÍA DEL DERECHO. CUESTIONES RELEVANTES 58-61 (UNAM, México, 2009).

[41] With this concept the Mexican Constitution refers to an extensive argumentative method know as *a fortiori* in both its forms, *a majori ad minus* and *a minori ad majus*, which allows the interpreter to add something to a norm or create a new one.

ronmental law. However, it does not indicate the difference between rules and principles.[42] It does not indicate though the difference between rules and principles or the meaning of the term "principle." There is another key court decision that technically reproduces Alexy's theory, and so shows its actual influence on Mexican judges.[43] This decision presents certain flaws since it confuses a norm conflict with a meta-conflict between interests.

A famous decision regarding the military officer's right to not be discriminated against for being HIV positive[44] appeals to different methods of interpretation, such as systematic, teleological and by "principles" to uncover the values that may fill the gap in the system to solve the case. It is not entirely clear what the court understands here by "principle" or "value," nevertheless one could say that the term "principle" is not used in the sense of the theory of principles, but refers to the special nature of fundamental rights.

Mexican judges apply general principles of law and legal principles that help them fill gaps, solve conflicts or better justify a decision. Nevertheless, their interpretation has not been able to innovate the legal system by resort-

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42 Multas por violación a las normas en materia de equilibrio ecológico y protección al ambiente. Como su imposición no tiene la finalidad de salvaguardar el derecho fundamental previsto en el artículo 4º de la Constitución Federal, resulta inaplicable la ponderación de principios constitucionales cuando aquellas se controviertan." [Fines for Infringing Norms of Ecological Balance and Environmental Protection. As the purpose of imposing a fine is not that of safeguarding the fundamental right set forth in Article 4 of the Federal Constitution, weighing constitutional principles does not proceed when there are contradictions among them.] Registry No. 169263, Ninth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette, XXVIII, July 2008, p. 1749, Thesis: I. 7º.A.579 A, Isolated Thesis, Law: Administrative.

43 "Suspensión en el Amparo. Conforme a la teoría de la ponderación de principios, debe negarse contra los requerimientos de información y documentación formulados por la Comisión Federal de Competencia en el procedimiento de investigación de prácticas monopólicas, pues el interés de la sociedad prevalece y es preferente al derecho de la quejosa a la confidencialidad de sus datos." [Suspension in *Amparo*. According to the theory of weighing of principles, it should be denied against the requirements of information and documentation stipulated by the Federal Antitrust Commission in procedures investigating monopolistic practices since public interest prevails and is preferred to the claimant's right to information confidentiality.] Registry No. 171901, Ninth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette, XXVI, July 2007, p. 2717, Thesis: I. 4º.A.582 A, Isolated Thesis, Law: Administrative.

44 "Militares. Para resolver sobre su retiro del activo por detección del VIH, debe estarse a la interpretación sistemática, causal-teleológica y por principios de los dispositivos constitucionales que protegen el derecho a la salud, a la permanencia en el empleo y a la no discriminación". [Military Personnel. To decide on one's discharge from active duty for having tested HIV positive, an interpretation that is systematic, causal-teleological and based on principles of the constitutional provisions that protect the right to health, the right to work and the right to not be discriminated against.] Registry No. 180322, Ninth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette, XX, October 2004, p. 2363, Thesis: I. 4º.A.438 A, Isolated Thesis, Law: Administrative.

ing to principles, as the Federal Constitutional Court in Germany has, whose decisions have even provided the legal system with new fundamental rights.[45] Judges in Mexico have still a very traditional positivistic perspective and remain therefore bound to written norms.

In their decisions, Mexican judges have often evaluated the meaning of the term "principle," its scope and form of application. It has generally been done regarding the concept of "general principles of law," establishing that principles are part of positive law, considered as evident "legal truths," organized by legal science to help judges in their decisions. They have a secondary function; that they are only to be applied in case of a gap in the system. It has also been held, however, that they may be invoked to decide cases that have not been regulated or where the law is deficient, that is, when a case "cannot be solved by the law." They seem to be considered as a "general formulation of values" and have an interpretative function.[46]

Regarding the ambiguity of the term "principle," we could mention a recent amendment to Article 20 of the Mexican Constitution that provides the "principles" for oral criminal procedures, as well its "general principles." The use of one of these principles will require the need to balance arguments with regard to the requirement that evidence must be evaluated in a "free and logical manner." It also establishes that a judge may only convict a defendant if he is "convinced" that he is guilty.[47] Legislators used the term "principle" in different senses in this amendment, leaving the interpretation of its meaning and function to the judge. It will nevertheless be necessary to teach judges to balance, especially because the term "proportionality" as regards argumentation and a way of applying norms as in the theory of principles has a very different meaning from that in Article 31 of the Mexican Constitution that refers to tax law.[48] Article 20 has to be fur-

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45 One example is the fundamental right of "self-determination of personal information" derived from the right to free development of personality and the principle of dignity, *Volkszählung* (*See* Resolutions of the German Federal Constitutional Court, BVerGE, 65, 1).

46 As has been so stated in many decisions, especially during the so called "*Quinta época*" that followed the Mexican Revolution, since the meaning of Article 14 had to be delimitated. *See* also, "Acuerdos dictados por los jueces de amparo. Pueden fundarse en los principios generales del derecho a falta de precepto legal aplicable." [Court Rulings Pronounced by *Amparo* Judges. Rulings can be grounded in the general principles of law in the absence of an applicable legal precept.] Registry: 221278, Eighth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette XV, March 2002, p. 1428, Thesis: I.4º.A.340 A, Isolated Thesis, Law Administrative.

47 Published in the *Diario Oficial de la Federación* [Federal Official Journal] on June 18th, 2008.

48 This has been clearly mentioned in, for example: "Principio de proporcionalidad y proporcionalidad tributaria. Sus diferencias." [Principle of Proportionality and Tax Proportionality. The Differences.] Registry: 168824, Ninth Epoch, Collegiate Circuit Courts,

ther developed by law, but in the meantime, it will have to be applied directly based on the supposition that every reform made to the Constitution aims at strengthening personal liberty and guaranteeing the exercise of fundamental rights.

Weekly Federal Court Report and its Gazette XXVIII, September 2008, p. 1392, Thesis: I.4º.C.26 K, Isolated Thesis, Law: Common.

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CHINA AND ITS DEVELOPMENT MODEL: A BROAD OUTLINE FROM A MEXICAN PERSPECTIVE

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ABSTRACT. *China's economic success from 1978 to 2008 is truly surprising, for example the growth rate of its GDP (an average of 10% a year for thirty years, third place in the world in 2008, 14 times its GDP from 1978 to 2007). However, we could also add that China's economic history is very far from being over, and in the future it will continue surprising us with its innovations, which it will have to keep in mind if it wants to have a close idea of the most successful development strategy of recent decades.*

KEY WORDS: *China, Development Model, Deng Xiaoping.*

RESUMEN. *El éxito económico de China de 1978 a 2008, es verdaderamente sorprendente; como el crecimiento porcentual de su PIB (10% anual promedio durante treinta años; tercer lugar mundial en 2008; de 1978 a 2007 incrementó su PIB 14 veces). Sin embargo, también podríamos agregar que la historia económica de China está muy lejos de estar concluida, y en el futuro nos seguirá sorprendiendo con sus cambios, los cuales habrá que tener muy presentes, si se quiere tener una idea cercana con la mejor estrategia de desarrollo de las últimas décadas.*

PALABRAS CLAVE: *China, Modelo, Desarrollo, Deng Xiaoping.*

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I. Introduction

> The reform in China is a great experiment that is not found in books.
>
> Deng Xiaoping (1985)

Despite its success and widespread diffusion of its results, China's economic reform from 1978 onward is still a topic that is difficult for the Western world to interpret. From its inception, the creator of the model, Deng Xiaoping, warned that reforming modern China was a "great experiment" based on a broad outline and subject to trial and error. While Deng pointed this out in 1985, a trusting, overestimating Western world has not yet completely understood this unilateral declaration from the main author of Chinese success. From the beginning, it told the world that a new China was embarking on the adventure of traveling through unknown paths towards development despite the economic failure of its previous experience (the Maoist Period 1949-1976) and the urgent need to feed around 900 million people (1978), of which nearly thirty million had died of starvation just eighteen years before.

In the Western world, however, different development theories continue to compete between the prevalence of politics over economics and/or vice versa. In a never-ending search for predominance, analysis is frequently complicated, more than clarified, by forgetting that a healthy relationship between politics and economics is inherent to successful economic development. There have been many disputes within economic development theories regarding the different visions that have tried to be imposed throughout the 20th century in search of sustained development. This has occurred in spite of the fact that, as Douglass North points out, "…the similarity in the performance of the economies and the persistence of disparate economies

throughout time has not been satisfactorily explained by the development economists, despite immense efforts carried out for 63 years. The simple fact is that the theory used is not up to the task."[1]

Despite the various formal economic development theories that have appeared since 1943 (Paul Rosenstein-Rodán), the new political group that began to re-think China's growth did not directly incorporate contemporary theories (Clark, Nurkse, Lewis, Rostov, etc.) when instrumenting their initial changes. China was well aware of its enormous economic limitations at the time: limited resources, overpopulation, widespread poverty, a lack of savings, an economy in arrears, ineffectual industry, a lack of infrastructure, limited external trade, an abundant but unqualified workforce, a lack of modern technology and a political crisis, among others. Its failure to fully adopt an earlier model (the Soviet model) led it to believe that reductionism was not the best way to attain successful development. As Oded Shenkar points out:

> The first 27 years (1949-1976) of the communist phase will continue being cause for debate; although little by little the apologists from the period of Mao Zedong are decreasing. However, regarding the economy and politics, there are no absolutes, and although the general results from the period are negative and at times were chaotic, such as the famine that presented itself in the middle of the period, it can be said that within it some lessons were generated for the Chinese model that were greatly useful in its new boom, from 1978 onward. The first theory among them that can be highlighted is the one that detaches from the Great Leap Forward and the Cultural Revolution, which consisted of pointing out the fact that the forcing the ideology of the economy produces catastrophic results, that concrete results for development must be oriented toward this theory. At the very time that it was impossible to continue with the Russian model of investing and creating infrastructure in the whole territory in such a big country with so few resources, the advisable thing to do was to focus the effort on the areas with the greatest potential, in order to later disseminate the results, an experience that has been one of the most important points of the new development model, and finally, that the viability of the political project necessarily requires economic success.[2]

Thus, talking about China's new development model is not an easy task. Its political environment from preceding years was imbued with intense nationalist sentiment. Its idiosyncrasy and its multi-layered past intertwine and confuse observers with their various settings. Its political-economic platform derives from a centralized model and it has recently implemented a market economy. In view of their different natures, all these aspects continue to dis-

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[1] JUAN GONZÁLEZ GARCÍA, PERFILES RECIENTES DEL DESARROLLO ECONÓMICO DE CHINA 17 (Universidad de Colima-UAM México, 2006).

[2] ODED SHENKAR, THE CHINESE CENTURY 34 (Wharton School Publishing, 2005).

tort the opinion of a Western world accustomed to dichotomous economic models (Communism-Capitalism) and that as early as 1989 thought could be synthesized into a single model after the fall of the former Soviet Union. In an attempt to analyze certain qualities of the current Chinese development model, it is useful to follow Deng Xiaoping's advice and heed his warning: starting from the premise that it is a "great experiment" that has not been deciphered in important economic treaties. It is an experiment thought out and executed by a group of engineers and it must be seen as something outside familiar paradigms within the framework of the new global order.

The three sections of this paper are as follows: II. Economic Development as a State Priority; III. The Law as Leverage for Development and IV. Evaluation and Conclusion, in order to outline the new development model of the People's Republic of China.

II. Economic Development as a State Priority

> Development by any means, without altering social stability.
>
> DENG Xiaoping

In the political crisis of the late seventies, China's immediate challenge was to grow at any cost to meet the urgent demands of its people. The previous economic model had already failed and outside China, future growth wavered between the "success" of developed Western economies and an early prospect of globalization that was starting to outline a new order for international development. Thus, the starting point for the first reforms was clearly the need to implement an outward-oriented political-economic system. Deng used all the State's power to design a new development model that centered on increased foreign trade. For this purpose, pertinent parts of Taiwan's economic model were analyzed. It was noted that between 1960 and 1965 its GDP had grown an average of 9.5% while China was unable to go beyond 4.7%. Between 1965 and 1972, when the Chinese GDP rose only 1%, Taiwan's grew at a rate of 10.1%. Consequently, the Taiwanese example[3] served as a starting point for the economic plan that Deng called "the four modernizations" to attain "economic development by any means."[4] Various trade missions were sent to northern Mexico at

[3] In addition to looking at Taiwan, Deng studied the experiments carried out in Sichuan, his native province, which succeeded in multiplying agricultural production by 79% between 1976 and 1979.

[4] The new regime's objective was to attain China's economic development by means of modernization in four areas: agriculture, industry, national defense, and science and

that time to see the assembly plant model first-hand. These visits also played an important part in devising the new Chinese model.

1. *A Broad Outline of Deng Xiaoping's Economic Theories behind the Chinese Development Model*

In the early stages of reform, Deng Xiaoping would say,

> Once we are certain that something has to be done, we should dare to experiment, to break out, and to mark new paths with it. This is the important lesson that we should learn from Shenzhen. If we do not have a pioneering spirit, if we are afraid to take risks, if we do not have energy and direction, we cannot break out and mark a new path, a good path, or do something new… No one can be 100% sure from the beginning that what he is doing is right. I have never been so sure. Every year, the leaders should review what they have done, continue with the measures that have proven adequate, act immediately to change those that have proven wrong, and face up to new problems as soon as they are identified.[5]

Deng's own life (1904-1997) falls within one of the most chaotic eras of Chinese history. He lived through the end of the Empire (1912), as well as through various revolutionary movements (1912-1949) and the Japanese invasion (1931-1945). During the Maoist Period (1949-1976), he met with different movements, like the Cultural Revolution (CR, 1966-1976), which made him the target of strong political attacks from the more conservative groups.

After the triumph of the Revolution and confronted with different social challenges, Deng's discourse was marked by starting from the current situation in order to find new that would take China out of poverty, a course which clashed against the central power's triumphalist and dogmatic discourse. In 1957, he pointed out that "Seeing everything through rose-colored glasses and too simplistically is manifest in our propaganda, idealizing the current situation of our country as if there were no longer any difficulties and we only need to enjoy the amenities." He added, "[o]ur main task from now on is building, which will be somewhat more difficult, or at least not easier, than the Revolution…"[6] In the face of the challenges of his time he spoke of "learning, of course, from all the advanced experiences of the world, learning how much they have advanced in different parts of the world, including the United States." Although in the fifties, he naturally put

technology. Under the leadership of Deng Xiaoping, greater emphasis was placed on them to position China at the forefront of all world nations. JOHN KING FAIRBANK, CHINA: UNA NUEVA HISTORIA 486 (Andrés Bello, 1996).

5 DENG XIAOPING, SELECTED WORKS, Vol. III, 361 (1994).

6 DENG XIAOPING, SELECTED WORKS, Vol. I, 295 (1994).

the Soviet Union in first place. He likewise recognized that "[i]n China, many national capitalists opened their paths in the midst of arduous struggles, and they know more than we do about business management." This opinion, which grew out of building up a new framework for growth, led to his having multiple enemies and posed serious threats to him during President Mao's orthodox and distinctive "school of thought" for using his discourse and work in the Party to incite the country to follow the capitalist path.[7]

In spite of the opposition, he rose to power upon Mao's death. Deng then had the opportunity to put his ideas into practice, which basically stemmed from bringing together three factors: development, structural reforms and political stability. As to this, he pointed out, "[t]he solution to all of China's problems depends on economic development," because "[d]evelopment is the absolute foundation and in order to achieve it, it is necessary to insist again and again on the reforms that make it possible." In 1985, he added, "[a]ll our reforms are aligned with a single objective, which is to remove the obstacles that limit or inhibit the development of productive forces, which, in turn, should be directed toward creating a technological basis for development." Deng's theory always regarded the link between reform and development as something perfectible with time and subject to trial and error; the reform to be applied should aim for the best possible development. Reforms are like permanent public policies that correct everything that does not contribute to development. However, he always maintained that these two premises would not be possible without the stability in the country brought about through social and political balance among its participants. On this topic, Deng Xiaoping declared, "If there is no stability, brought on by political disparities, it will be impossible for us to move toward social construction."[8]

This simple reform-development-stability trilogy forms the theoretical basis of Deng's development model. Its main challenge was to achieve a balance of the concepts in time, so that their combined effect would translate into benefits and improvements for the different social classes. Regarding this, Deng explained, "[t]he basic expression of the superiority of our socialist system is found in the possibility that the productive forces of our society can grow rapidly, at rates never before seen in the old China, and gradually give us the satisfaction of the cultural and material improvement that our people need."[9]

While various reforms for economic and commercial growth were being built around this development strategy, the long-term vision of the project

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[7] DENG LONG, DENG XIAOPING AND THE CULTURAL REVOLUTION 35 (Foreign Languages Press, Beijing, 2002).

[8] WANG MENGKUI, CHINA'S ECONOMIC TRANSFORMATION OVER 20 YEARS 32-38 (Foreign Languages Press, Beijing, 2003).

[9] *Id.*

emerged: the knowledge of knowing what is desired and what is possible, and the certainty of knowing in which direction to go. In 1978, Deng Xiaoping said, "[t]he essence of the reforms is to build the foundations for sustained development for the next decade and the first fifty years of the next century." He devised a strategy with a view towards the future that he called "the three steps." "In this century, we will take two steps, which represent the solution to the problems of an adequate supply of food and clothing for our people. In the next century, we will spend another 30 or 50 years to achieve the goal of another step, which is to reach the level moderately developed countries of the world have."[10]

Deng was a visionary with a great capacity not only to adapt to the new political period his country was entering after living practically walled in, but also to understand the great global transformation the world was experiencing in the late 1970s and to lead China to take advantage of this situation. In 1987, he said "[c]urrently, there are two models of productive development. Insofar as each one of them serves our purposes, we will make use of it. If socialism is useful to us, the measures will be socialist; if capitalism is useful to us, the measures will be capitalist." In an unusual approach, he pragmatically pointed out,

> [t]here are no fundamental contradictions between socialism and the market economy… The experience that we have gained throughout recent years has demonstrated to us that we could not develop productive forces in a rigid economic structure. It is for this reason that we have been implementing some useful capitalist measures. It is clear now that the correct approach for opening oneself to the world is combining a planned economy with a market economy, to which structural reforms are implemented.[11]

This combination of concepts gave way to what we now know as "market socialism."

"Surely the affirmation that the market economy only exists in capitalist society, that there is only a capitalist market economy, is incorrect. Why can't socialism practice the market economy?"[12] This stance defined and revolutionized the paradigm of his central planning model and the theory of the capitalist model was met in the same way. After all was said and done, what stood out was the pragmatic and utilitarian intention of transforming economic models from ends to means. It did not matter whether the cat was black or white, Deng said paraphrasing an old Chinese proverb, what mattered was that it caught mice. He added, "[t]here is no fundamental contradiction between socialism and a market economy, 'both are means.'" Even today, both (capitalist and socialist) theories continue to seek

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[10] *Id.*

[11] *Id.* at 40.

[12] DENG XIAOPING, SELECTED WORKS, Vol. II, 266 (2nd ed. 1995).

answers that clearly explain this new model, which has validated itself through the success of its results.

On the topic of structural reforms, Deng indicated in the eighties that "[w]ithout development, reforms don't mean anything." To that, he added, "[t]o reform was to remove the production relationships and the superstructures that weren't driving the development of productive forces."[13] Reform-development, development-reform, this new learning curve drew from successful experiences in the world, a learning process that compared the challenge to crossing an unknown river leading to development that would benefit the people. Therefore, "one should proceed with caution, feeling the stones." To do this, every reform and every development had to comply with three objectives (the three "favorables") to be considered viable and thus be approved. The criterion focused on *a)* whether it promotes the growth of productive forces, *b)* whether it increased the strength of the Socialist State, and *c)* whether it raised people's living standards. A clear understanding of a globalization in its initial stages more than a quarter of a century ago and the implementation of a winning strategy to participate in it contrasts with the lack of direction a number of economies present today.

2. *A General Outline of the Economic Model*

The combination of public policies the new Chinese model adopted, regardless of their origin, has led to a pragmatism that breaks with traditional methods of analysis and enhances China's economic results. After the fall of the Berlin Wall, the West consolidated its idea of a victorious free market model that was positioned well above the central planning strategy implemented by the former Soviet Union, which had clearly demonstrated its incompetence when compared to its Western counterparts. In the face of failure, both China (1978) and the former Soviet Union (1989) opened their borders and emerged into the world. The most foreseeable conclusion was that they had to put the neo-liberal model into practice and wait their turn in a pre-determined economic order. With the difference of only a decade, Russia followed a shock therapy strategy using the IMF model and established an open privatization plan (*laissez faire*) that was abruptly carried out under the 500-Day Program. It resulted in the massive closing of businesses and the loss of an important number of strategic State assets. This model instigated the full opening of its market and the free exchange of its currency, which brought about enormous debt and a financial crisis that entailed the loss of 4.2 times its gross national product (GNP) between 1992 and 1996. This strategy also led to a drop in income for 60% of the population while levels of extreme poverty rose to 40%. Moreover, only 10% of the

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[13] Mengkui, *supra* note 8, at 38.

population had access to higher levels of wealth and the development of Russian economy was thrown back twenty years.[14] In contrast, the gradual progression, selective openness and comprehensive strategy the Chinese State implemented in its economic development model produced completely different results.

One aspect stands out from among the different paths of learning gathered from the new Chinese development model: its caution in not impetuously giving over to the offer of free market models, as Russia and most Latin American countries have done. In addition to "feeling the stones of the new river," there is the wisdom of putting national interest and reality ahead of the different strategies being implemented without deterring them from inventing new, unproven formulas in the midst of a new free market dogmatism that worshipped the invisible hand of development. Some authors point out that, "[i]t is precisely the success of the Asian nations that allows current free market theorists, especially civil servants in the World Bank and the International Monetary Fund, to highlight the goodness of the free market, and, given its importance in the adjustment and stabilization programs, brings about the resurgence of the neoclassic paradigm."[15] As far as China is concerned, this idea is not wedded to a socialist market model that benefits from all kinds of strategies, regardless of their origin. The only requirement is that they contribute to its development.

At the 15th Congress of the Chinese Communist Party (CCP), China defined its model as follows:

> [t]o build a socialist economy with Chinese characteristics means developing the market economy under conditions of socialism and constantly emancipating and developing productive forces. We should maintain and improve distribution models based on the dominant work, allowing certain people and certain areas to be prosperous in the beginning so that they can later help others and thus achieve prosperity step by step.[16]

The new Chinese model is defined, first of all, by its awareness of historic change: that of facing a decision that if it succeeds, it would require its people's effort for around 100 years. It was also conceived as a gradual transition from an illiterate rural country to an industrialized one with high levels in science, technology, education and culture. It would merge its economic future with the favorable aspects of a market economy. It was seen as a historical period in which the free market would not affect its strong socialist system upon which they would build a socialist regime with Chinese characteristics, a socialist economic system and a socialist democratic politi-

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[14] *Id.* at 19.

[15] JUAN GONZÁLEZ GARCÍA, PERFILES RECIENTES DEL DESARROLLO ECONÓMICO DE CHINA 29 (2006).

[16] Mengkui, *supra* note 8, at 23.

cal system. This last point is the most difficult for Western observers to understand since they forget that throughout the different stages of China's economic development, the State has never stopped taking direct responsibility for the different policies made and this is seen at every step of its burgeoning private sector's contact with Western economy. China never accepted the simplistic concept of the "invisible hand of the market," but has opposed the "visible hand of the State" since its opening. This reflects its commitment and direct responsibility over the success of its sectors, businesses and businesspeople, and is one of the distinctive fundamental elements of the Chinese model.

3. *Instrumenting a Selective Opening Policy*

> Development requires getting rid of all the notions that hinder it; changing all the practices and regulations that prevent it, and liberating itself from economic burdens.
>
> JIANG Zemin

The biggest challenge in 1978 was development by any means and at any cost. The direct struggle among internal forces over the opening and the corresponding adjustments were not yet settled and the open door policy had to be handled progressively. Above all, as Deng Xiaoping used to say, it was still necessary to decide on which front the fight would take place against the "flies" entering the open windows of the foreign market, without losing sight of the fact that the name of the game was development, development and more development. China bore in mind the teachings of Sun Tzu to face this challenge: an army that wants to fight a battle throughout an entire territory is doomed to failure; it cannot be strong in everything. Therefore, they launched a policy for each geographic region (Pacific, Central and Western) and decided to allocate greater emphasis and resources to the first region due to its attributes with respect to the Western market. The strategy also enlarged its focus and defined the priority sectors that would receive State support. Thus, the Chinese again adopted the words of Sun Tzu in that, "[t]he place of battle must not be made known to the enemy. If it is not known, then the enemy must prepare to defend many places. If he prepares to defend many places, then the forces will be few in number."[17] In an initial attempt to give a hierarchical structure to the sectors, Deng started from a broad idea called the "Four Modernizations," which included: liberalizing agriculture, attracting foreign investment, implementing an aggressive export policy and creating special zones. Subsequently, in

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17 SUN TZU, EL ARTE DE LA GUERRA 52 (Mercado, 1999).

1981, priority sectors were established under the National Program of Science and Technology: agriculture, energy, new materials, computer science, space technology, genetic engineering, physical engineering and laser technology.

This focus on developing fields of priority economic action is very different from Latin America's strategy in general, and the Mexican one in particular. These countries opened their economies and trade in all aspects of their economic chains, losing strength and the concentration of resources in the process. When deciding the battles to be fought, competitive advantage can be gained by concentrating financial, material and human resources in the fields of development selected as the frontrunners of the global competition, keeping in mind that opening all sectors in haste weakens public and private lines of support and disperses State resources and attention. One example of this is the Chinese automotive industry. Designated a priority sector, this industry drew on the State's strengths (subsidies, research, development, education, raw materials, costs, etc.) to become a winning sector, taking it from 200 thousand units in 1995 to over 5 million in 2004 and nearly 10 million by 2010 (CSM WorldWide). This growth logically led to increased vehicle sales (sales increased 75% from 2002 to 2003) and greater growth in its supply chains (in recent years, the demand for steel has grown an average of 20% a year). This policy of preferences has also led to an industrial integration of 70% in the automotive sector; that is, only 30% of foreign supplies is required to produce vehicles. This level of integration is higher in other sectors, such as the electronics, textile and shoe industries, which have gone from 90% to 100%.

By establishing development as the State's comprehensive policy, geographic areas as the wise choice for managing its opening and globalization, and a hierarchical structure of sectors as clear objectives for national growth, Chinese development has gained strategic advantage.

4. *The Creation of Special Economic Zones*

> The birth of Special Economic Areas (SEAs) is the most important event within the opening policy and China's reform and the most evident sign of its change toward the outside world. Through the last shining fifteen years, an enormous amount of information derived from the SEAs, which have been considered a miracle by their great number of observers, has been accumulated.
>
> CHI Fulin

In the late seventies, the Chinese model created different kinds of territories or privileged economic areas to concentrate public support in strategic

points of its territory while providing them with a differential competitive value that could be identified by foreign investment without being tainted by the huge social, economic and productive inequality in the rest of the country. Therefore, it launched a regional development policy that established Special Economic Zones (SEZs) with the highest concentrations of foreign investment. SEZs included: Economic and Technological Development Zones (ETDZ), Free Trade Zones (FTZ), High-Tech Industry Development Zones, Border Economic Cooperation Zones and Export Processing Zones (EPZ). These international competition zones-regions continue to grant all kinds of facilities and support for the entry and exit of products, especially for technology-oriented ones.

From 1978 to 1985, the first five SEZs were set up in the provinces of Guangdong (Shenzhen, Zhuhai, and Shantou), Fujian (Xiamen), and Hainan. By offering a wide range of public stimuli, new undertakings were encouraged in these areas. An extensive promotional campaign targeting foreign entrepreneurs was carried out so they could form joint ventures with Chinese businesses. In this same period, another six Priority Investment Areas were opened and Economic and Technological Development Zones were established in fourteen cities on the eastern coast. With this policy of focusing and concentrating resources, three "Development Triangles" were instituted to accelerate economic growth in the Pearl River Delta. In the 7th Five-Year Plan (1985-1990), the decision was made to enlarge the SEZs and the ETDZs in the coastal region. The 8th Five-Year Plan (1990-1995), devised the modernization of the famous Pudong (Shanghai) District, which received SEZ treatment, boosting its development with the creation of 15 duty-free areas, 54 Economic and Technological Development Zones, and 53 High and New Technology Industry Development Zones. The support policy for capitals and provinces in the interior was expanded at this time to implement a strategy to gradually incorporate the central area into the thriving development of the Pacific coast, which would continue to remain under the special support public policy. Most notably, this special support policy to attract foreign capital was expanded to include the area of the three gorges (Chengdu and Chongqing). Given the success of this strategy, the 10th Five-Year Plan determined the opening of the central and eastern zones (Tibet, Hubei and Mongolia) to FDI. Fishing villages on the east coast and marginalized agricultural towns in the central part of the country have been transformed into global production and technological research cities, in ten to twenty years.

This policy of focusing resources and forming value chains, along with segmenting geographic areas, defining priority sectors and creating special economic areas, has yielded a high level of competitiveness from Chinese producers, who have easily surpassed those from other countries. This concentration of strategic assets can be clearly appreciated in cities like Shang Yang and Nanchong which manufacture around 8 billion pairs of socks a

year; Xiamen, 225 million pairs of jeans; and Suzhou, 300 million of ties. On the other hand, businesses like Hon Hai Precision Industry Co., the main contract exporting company of electronic appliances in the world, are true manufacturing units with nearly 500,000 employees.

The idea of a countrywide boom in such a large territory with an overwhelming marginal population would have led to the failure of any development plan opted for "all together, at the same time" growth. Criticism of the Chinese model's privileging certain areas at the expense of others overlook this. This development model, which begun on the East Coast for its geographic location and facilities for exporting, has extended over time to the central and western areas. In view of its success, migration from rural areas to urban areas has become a permanent labor phenomenon with the more than 300 million jobs the model had created by 2006. For Deng Xiaoping, economic advancement would be progressive and the wealth and development in the Eastern-Pacific area would spill over to the central and western areas, representing one of today's greatest challenges to China's political-economic stability. To guarantee the institutionalization of this policy, the "Law on the Promotion of Development in the Western Area" was passed for the 11th Five-Year Plan of the National People's Congress. These 50- and 100-year regional government investment strategies have already started by prioritizing 50% of the industrial value of state-owned businesses in 2002 (20% more than in the Eastern Zone), and 53% of their fixed-asset investment for that same year (14% more than in the East). A specialized financial policy for the area (banking, loans, development funds, etc.) has been added, as well as more aggressive social policies.[18]

With China's entry into the World Trade Organization (WTO) in 2001, preferential treatment to the different kinds of strategic zones has been losing the impact given to the first SEZs. Even then, China continues granting SEZs preferential treatment in its public policy, especially seen in the different facilities given to central and western provinces. In an atmosphere of free competition, these facilities rival in their offering of qualified personnel, technical innovation, and a business environment, among others.

On the other hand, international pressure and the institutional commitments signed in this century have made China's latitude with SEZs more difficult. However, China will clearly not stop using this strategy although with some adjustments along the way. As Jiang Zemin pointed out, "SEZs should be developed during the entire course of the construction of modern socialism,"[19] that is, for at least 100 years. Chi Fulin, one of the main economists and ideologists behind the Chinese model, has also stated that the experience gained from SEZs will be of great help and exemplary impor-

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18 CHI FULIN, THE THRESHOLD 178 (Foreign Languages Press, Beijing, 2006).

19 GAO SHANGYUAN & CHI FULIN, NEW PROGRESS IN CHINA'S SPECIAL ECONOMIC ZONES 9, 41 (Foreign Languages Press, Beijing, 1997).

tance in future reforms to the model, which are quickly turning toward a market economy. However, he adds, it will be necessary and even obligatory for the SEZ economic policy to continue as intact as possible.[20] The dynamic changes in the Chinese economy unravel within this frame of reference: compliance with international commitments (WTO) and internal advancement toward Rule of Law on one hand, and the challenge of upholding an economic model that has maintained and privileged direct State participation in different economic stages and processes for 30 years on the other. This has given it an edge over competition from other countries, such as those in Latin America that began their extreme withdrawal from State models in 1980. In this State-market challenge, despite China's important legal advancement in economic development, direct State participation in economic processes does not entirely disappear. On the contrary, it continues to steer the model toward the center and west of the country by sustaining SEZs and special policies that motivate and support sustainability in the eastern area and new development in the center and west. Company classifications ("encouraged," "restricted" and "to be eliminated") are still in effect to determine the financial and tax support that allow them to develop and compete internationally. The State continues to hold direct shareholdings in "strategic industrial" sectors (military industry, power generation, petroleum, telecommunications, etc.) and in so-called "basic industry" areas (machinery, automotive, technology, etc.). It also has reduced and slowly "corporatized" their participation in state-owned enterprises (SOEs), or maintained certain prices under State control (approximately 4%), or continued to keep the price of utilities (water, electricity, gas, etc.) below normal to support local or strategic businesses. Furthermore, it has sustained tax rates and development policies for companies in certain geographic regions or sectors that are still considered of national importance, such as those in research and development.[21] These are only some examples of a China that advances in compliance with its international relations and another China that continues to privilege growth strategies that give added value to economic development, though not entirely in line with global business regulations.

One of the main virtues of the Chinese model is that it changes at all times. Its flexibility and ability to adapt to new challenges place it at the forefront of the world economic scene. The 1980 Chinese model, weighed down with cheap manufacturing, is very different from the model of the 1990s with its intense electronics and technology exports. The 21st century model already shows a very solid outline, both in the strength of its exports and in the emergence of an internal market that did not exist in 1980.

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[20] CHI FULIN, PRESSING TASKS OF CHINA'S ECONOMIC TRANSITION 261 (Foreign Languages Press, Beijing, 1996).

[21] United States International Trade Commission: China Description of Selected Government Practices and Policies Affecting Decision-Making in the Economy, 2007.

Priorities have also undergone changes. The model has now shifted its strategy toward the center and west of the country, combining new and old formulas aimed at giving China more stable and homogenous growth. Both the new Corporate Income Tax Law (2008) and the Contract Labor Law (2008) have further strengthened workers' regulations. Both regulations form part of an economic development reorientation strategy, since the eastern area has started to reach the same levels of tax and work environments as the Western market. By discontinuing some of the attractive tax and labor benefits from the eastern area, companies and investments are encouraged to move to the central and western areas of the country, which are awaiting to take part in China's economic success. This is a significant change since, for example, nearly 80% of the manufacturing companies located in the Pearl River Delta are based on a low-cost business model. With these measures, companies will either survive with low profits, shut down or move to more advantageous areas with cheap labor, as they did 30 years ago in the same Delta region. As to this, the vice-president of the Taiwan Business Association in Dongguan pointed out, "[n]o one wants to leave, but we are forced to move due to the vertiginous growth of costs."[22] In spreading out businesses as a result of the adjustments made to the model's inherent strategy (along with a devaluating exchange rate, international pressure from the WTO and the very success of Chinese trade), the Federation of Hong Kong Industries, one of the main participants in the area, estimates that 37% of its 80,000 companies have planned to move some or part of their operations outside the Delta. The Asian Footwear Association says that about 50% of its manufacturing centers will move to interior provinces while 25% have chosen another Asian country and the remaining 25% will wait and see. Authorities anticipate that technology manufacturing plants in the eastern area will prompt the sustainability of cleaner and more advanced industries in the fields of technology or research and development. Bearing in mind the experience and success attained in the Pacific, they expect to reproduce the 1980 and 1990 models in the central and western parts of the country with provisions for investments and more relaxed regulations.

Given its enormous success in China, this policy of preferential customs duties, meticulously applied in the 20th century and selectively applied in the 21st century, has brought about changes in global public tax policies and has even put pressure on tax application strategies in some European countries, which in recent years have seen the advantage of lowering income tax rates to maintain a level of competitiveness to in turn attract international capital. For example, in May 2004, France and Germany decided to reduce their corporate taxes to stimulate employment. In Mexico, global

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[22] Interchina Insight, *¿Dónde estará el próximo Dongguan?* 3, March 2008, available at: *www.interchinaconsulting.com*.

competition has compelled it to implement an income tax reduction policy, which went from 35% in 2000 to 28% in 2008. However, both in Europe and in Mexico, the measures applied correspond to a general economic inertia that makes no distinction between sectors, products or regions, as the Chinese model does. In consequence, the effectiveness of the measure decreases its application levels, its focus and its precision.

Since 2001, China has suffered international pressure to stop applying this kind of special support, commonly known as "tax dumping." Although China passed a new Corporate Income Tax Law in 2008 that already considers to progressively homologate company rates by 25%, this same law still includes a series of special discounts, such as 20% of applicable tax for small businesses with low profits, 15% for high-tech businesses, tax exemption for environmental protection businesses and "lower duties in general," which is completely discretional for venture capital businesses in State-motivated investments. Businesses with agricultural projects or in the central and western areas will continue to receive preferential customs duties for both income tax and sales tax, which may be fully extended in these cases (17%) (Annual sales tax evasion in China is estimated at 45% of the total collectible amount).[23]

The current strategy of raising China's Foreign Direct Investment (FDI) is not the same as the one instrumented in the two previous decades. The National Commission for Development and Reform and the 11th Five-Year Plan 2006-2010 have pointed out that the priorities have changed from quantity to quality, giving precedence to high technology, research and development and high added-value sectors, which are advised not to resort to intellectual property rights arguments to frustrate China's pursuit of innovation; that is, that they be willing to share technology. Services within strategic and national security sectors have been opened up to FDI, closely watching the impact wholly foreign-owned enterprises (WFOE) might have on China's economic security and particularly on its industry.[24]

Investments in China's central, western and northeastern regions are encouraged and an expected 80% of the new FDI is destined to these areas. Foreign investments with low technological content, high natural resource consumption or highly contaminating activities are prohibited.[25] In summary, China has gone from giving many facilities in the 1980s and 1990s in the early days of FDI in China (1978, scant FDI records) to a selection program that limits or prohibits unwanted investment and is moving toward a new elitist FDI centered on technological value and the region where it will be used. Despite these limitations, the amounts obtained have not decreased

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23 United States International Trade Commission *supra* note 21, at 67-69.

24 Interchina Insight, *La actitud china hacia la inversión extranjera está cambiando*, November 2006, available at: *www.interchinaconsulting.com*.

25 *Id.*

with 75 billion dollars recorded for 2007 (World Bank). The recent legal changes in the eastern area, along with new FDI criteria for entry into China, come together in a clear strategic line, demonstrating that after 30 years the "Deng" model with Chinese characteristics is still applied.

5. *Long-Term Vision*

China already knows what it wants for the year 2020 and has a plan to achieve it. According to its Economic Development Plan for 2020, its goals are to quadruple its GDP, grow at an annual rate of 7% and reach a GDP per capita of US$4,000 to US$5,000 for roughly 1.5 billion people. It foresees 50% of its exports being made up of high tech goods. Finally, it contemplates implementing an internationalization program to position 50 transnational companies, 500 medium-sized companies and 5,000 SMEs in the world market by the year 2015. In 1953, China began its long-term programs with its 1st Five-Year Plan, drawn up under the guidance of the then Soviet Union and privileging heavy industry and the agricultural sector. To date, China has continued to plan ahead, as evidenced by its 11th Five-Year Program (2006-2010), which stresses the importance and responsibility of civil servants. This program will be evaluated not only on the country's success in economic growth, but also on the progress made in social development, education, environmental protection and job creation. This general and systematic policy of working towards long term goals is enhanced by special plans for specific topics, such as technology, income distribution, poverty reduction, etc., based on the State's development strategy. China has reached the point of planning 50 or 100 years into the future, as in the case of development in the western area.[26]

The use of time and space is an intrinsic part of Asian culture in general, and to China in particular. Incorporating these variants into the development model and its business strategy has given China a competitive advantage over most developing economies. Most Latin American countries —Mexico included— do not have an economic objective for 2020, just as they lack clear strategies or specific plans to achieve it. There is still a notable absence of planning that lays down a public and private policy derived from each country's strengths and aptitudes that could be successful within the framework of global competition. The only discernible route taken into consideration is generally found in the commitments established at the Millennium Summit for 2015. During this summit, goals to reach for certain rates of human development and social improvement were set. To date, China is the only country that has attained them. In Mexico, however, the

[26] ARTURO OROPEZA GARCÍA, CHINA ENTRE EL RETO Y LA OPORTUNIDAD 290 (IIJ-UNAM, 2006).

political power struggle (executive vs. legislative) along with short-term outdated government criteria have brought development expectations to an immediacy that is not compatible with a policy for a project that evolves, like that needed in the technology sector, for example. China already knows which technological products it will incorporate next into its export platform, just as it has already defined what will be produced in given regions or areas of the country and when it should be achieved. Comprehensive long-term vision is a lesson that could be of great use in Latin American public policy.

6. *State-Owned Enterprises*

In 1980, state-owned enterprises (SOEs) made up approximately 99% of China's productive sector, a logical result of a central government. Under its various connotations, this sector had lessened its participation in enterprises to 8% by 2007. Given that it provided 18 million jobs in 2006 its strategic importance in the industrial sector is far from diminishing.[27] This important diminution of State ownership, especially in the last two decades, was the result of adopting the new economic model, which coincided with the arrival of foreign capital that gradually replaced state-owned companies. At the same time, the State privatized its public companies locally, mostly from 1990 to 2000, by offering executives and workers from medium and small enterprises the facility to acquire these companies.

The strategy the Chinese State implemented has followed a gradualist policy since its inception. Hence, it has privileged privatization, activities that produce increased exports or yield an apprenticeship in technology or some other area that gives added value over non-strategic sectors. Within this process, the State always assumed the role of referee for the different interests involved and balanced out privatization, foreign investment, strategic sectors and the strength of the development model. In contrast, there was no gradualism in Latin America and Mexico. On the contrary, most Latin American countries established a competition to see who could liquidate their public assets first. The different results of the two strategies are obvious. China emerges as a modern State with considerable economic power and large public enterprises, in addition to a private sector that has been converted into the basic force behind exports, technological change and the implementation of best management practices. In other words, by privatizing and opening up to trade, China consolidated a growth strategy that has positioned it today as one of the most successful countries, setting the pace and new paradigms for the entire world.

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27 CHINA STATISTICAL YEAR BOOK 520 (2007).

Latin America in general displays weak states in terms of its industrial chain, having lost important public assets whose proceeds were used for dead-end developmentalism or an increase in current spending. Between 1990 and 2000, most Latin American countries handled their privatization processes anarchically, without any strategic orientation that would allow them to select the goods to be privatized beforehand based on a long-term development plan that would strengthen their economic model. Although there are a few exceptions like the oil and electric industry in Mexico, the sale of public assets, which included industrial, banking, services, or electric industry companies, transpired under a formula of international demand and not a systematic offer from the State (a process that was not exempt from acts of corruption). Unlike China, State privatization in Latin America did not promote the political or economic growth of the participants. On the contrary, because of its deficient implementation, Latin American nations are now less able to fulfill the task of promoting economic growth, social development and the preservation of public order.

Privatizing millions of enterprises or going from a central planning economy to a mixed market economy has not been easy for China. The State has confronted many problems and contraditions during the process of implementing "Market Socialism" without any historical reference at all. Which enterprises are non-strategic? How can national interest be safeguarded? How are the resulting monopolies to be administrated? How can corruption be prevented? How can a SOE legally be on the same level as a private enterprise? How can local SOEs be transformed without resistance from the provinces?

Today, the process is far along, but it is a long way off from the finish line. To begin with, a countless number of company categories still exist in China. However, according to Ministry of Industry and Commerce statistics, in 2006, there were already close to 5 million private enterprises in the various categories employing 52 million people, which represents 57% of the companies in the country. Despite the importance of privatizing, the Chinese strategy clearly indicates that progress made in the market economy or in the privatization of its assets is secondary to national economic interest. For example, the 2007 assessment report on the reforms carried out by China indicates that, "…experience has shown that in the context of economic globalization, a passive resistance to foreign investments turns out to be counter-productive…" adding that, "in the current situation, the excessive relaxation as far as an irrational placement of the State's assets in the productive sectors should be halted,"[28] to such a degree that, even with privatization, State-owned enterprises continue to have very strong participation in strategic sectors, such as gas and oil, where the State controls al-

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[28] 2007 EVALUATION REPORT ON CHINA'S REFORM 83 (Chi Fulin ed., Foreign Languages Press, Beijing, 2007).

most 100% of the area, 100% of the basic telecommunications services, 55% of electric energy generation, 82% of civil aviation, 89% of water, 50% of automotive production, 60% of the steel industry, 70% of the hydroelectric industry, etc. At the same time, SOEs have increased productivity over time, quickly adapting to more intense free market competition, drastically increasing its annual profits from 1.46 trillion Yuan in 1998, to 19.50 trillion Yuan in 2006.[29]

7. *Industrial Policy*

> The strategy of low prices on finished industrial products within the Chinese domestic market inevitably has been spread to the international market. This can provoke phenomena associated with the current industrialization stage in China, such as anti-dumping lawsuits, a large-scale trade surplus, reevaluation pressures for the RMB (Ren Min Bi, currency of the People's Republic of China), as well as a hollowing out of the industry in some developed countries and neighboring countries as a result of the industrial transference. Fundamentally, these phenomena turn out to be imbalances in the economic trade relations, caused by the irrationality of the world economic order. They are also manifestations of the competitiveness of the Chinese finished industrial products, which have been moderated by the market competition between the 'good and the cheap.'[30]

In 1978, internal credit in China's State banking sector represented 51% of the GDP. In 1985, it rose to 67%; in 1990, to 87%; and to more than 100% in 2000. Although the significant increase in these flows put an end to most of the corruption that had arisen from granting loans arbitrarily and fraudulently, its main aim was to transform an obese, inefficient industrial sector. The goal was fully reached when its participation in the economy rose from 40% to 50% over a period of twenty years. However, what was more important was the financial facilitation of the cost of its learning period, and later that of its industrial reconversion period and the development of a modern, efficient platform of goods and capital that today sustains the priority sectors. Such is the case of the automotive sector, in which 50% of the machines and numerical control instruments used in these factories are already produced by Chinese companies. In addition to preferential, there was also a tariff subsidy and duty-free benefit strategy that opened up machinery and capital goods imports exempt from any payment whatsoever to cover part of the learning stage. To date, the machinery for high technology sectors or priority sectors are still exempt from import tariffs or

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[29] Jin Bei & Li Gang, *Chinese Industrial Enterprises*, *in* CHINA ECONOMIST 55 (2008).

[30] JIN BEI, THE INDUSTRIAL COMPETITIVENESS OF CHINESE INDUSTRY 32 (Foreign Languages Press, Beijing, 2007).

restraints. Moreover, strategic industrial lines were backed by monopoly policies in the internal market and access to international financial markets were established. SOEs were given priority treatment in the metallurgic, transportation equipment and chemical industry sectors, as was foreign investment in textile and manufacturing, electronics and telecommunications exports with the opening of the market.

When one speaks of the "world factory," one thinks of the 30 or 50 cents on the dollar per hour paid to the Chinese workforce. Although this cost is a strength (both for China and all developing economies), a comprehensive public strategy that transforms a weak manufacturing position into an internationally competitive productive activity is required to make it possible for this workforce to give added value. This change can be clearly seen in the composition of the Chinese industrial sector, in which manufacturing-assembly lines went from representing 90% of it in 1978 to 70% in 2002, despite a significant increase in the industrial sector's GDP for the same period. Just as in-bond assembly and the agricultural sector lived through the Asian development boom, the trade surplus generated by mature 100% Chinese manufacturing branches, such as the textile and clothing, toy, sports, footwear and furniture industries currently provides for the new technological sectors that have yet to generate surplus balances, such as electronic, medical-surgical, electrical material and photographic equipment sectors, etc., or lack supplies like fuels, minerals or steel.[31]

Industrial policies in China and Latin America (including Mexico) have followed different patterns. With mercantilist pragmatism, the Chinese model first focused on opening by exporting manufactured goods made by its ample workforce and then went on to flexible specialization with strong state investment. This led to setting up labor intensive industries such as textiles, clothing and electronics, and later moving on to heavy industries (steel, petrochemistry, vehicles, aeronautics) and now to high technology. This process was accompanied by a strong boost to infrastructure for development and important resources in innovation and technological development with high rates of internal savings and investment. This model followed a gradual and progressive path that made it possible for them to learn from their own experiences.

The Latin American industrial model, however, came about with an almost complete trade opening without possessing the experience to administrate it properly, and with an extreme lack of State involvement. This left the national production chain at the mercy of free market forces. Jin Bei points out that "[t]he most powerful driver of the market economy is competition, which generates efficiency, promotes growth, and creates well-being." However, he adds,

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[31] Oropeza, *supra* note 26, at 308.

> [t]his market mechanism does not intrinsically have the ability to reach balance, security, and automatic innovation, and it is not in itself a mechanism that distributes the fruits of industrialization to all its participants. On the contrary, the competition of an imperfect market will always generate great disparities, even chaos, crisis, and polarization, creating an undesirable situation that is contrary to the accepted human values and that goes against long-term national interest and its basic values…

Which is why, "[i]n summary, the industrial development strategy of a country will always be based on rational and national factors that include factors such as nationalism, ethics, and many other cultural values."[32] National interest is precisely what some Latin American countries have lost on their way to the free market. It is also marks the big difference with the Chinese model, which is based on the basic principle of regarding national interest as a priority. Therefore, China has always been on the side of its companies and industrial projects in both its internal market where it has successfully increased the production of products selected every five years and in its external market where its participation in world exports was only 0.8%, in 1980 but reached 5.3% by 2001 to be surpassed in 2007 with 6%.

INDUSTRIAL GROWTH (1978-2006)

Industrial Product	*1978 Production*	*2006 Production*	*Industrial Product*	*1978 Production*	*2006 Production*
Automobiles	0	3.8 million	Chemical Fibers	280 thousand tons.	20.7 million tons.
Washers	0.04	35.6 million	Beer	400 thousand liters	35 million liters
Refrigerators	2.8	35.3 million	Water Energy (100 million KHW)	4.4 million	43.5 million
Air Conditioners	0.02	68.4 million	Paper	4.3 million tons.	68.6 million tons.
Cellular Phones	0.0	480 million	Sulfuric Acid	6.6 million tons.	50.3 million tons.
Micro computers	0.0	933 million	Chemical Fertilizers	8.6 million tons.	53.4 million tons.
Clothing	1.1	5.9 million	Ethylene	380 thousand tons.	9.4 million tons.

[32] JIN BEI, THE INDUSTRIAL COMPETITIVENESS OF CHINESE INDUSTRY 155 (Foreign Languages Press, Beijing, 2007).

INDUSTRIAL GROWTH (1978-2006)
(continuation...)

Industrial Product	*1978 Production*	*2006 Production*	*Industrial Product*	*1978 Production*	*2006 Production*
Color TV	0.38	83 million	Cement	65.2 million tons.	1236.7 million tons.
Tractors	110 thousand units	190 thousand units	Crude Iron	31.7 million tons.	419.1 million tons.
Motor Vehicles	140 thousand units	7.2 million	Pig Iron	34.7 million tons.	412.4 million tons.

SOURCE: CHINA STATISTICS YEARBOOK 2007.

In the last 30 years, China has never stopped its industrial process nor has it allowed it to eliminate its weak and inefficient industry of 1978 in the interests of a "free market." On the contrary, by using the free market, it has established continuous improvement and strengthened the greater part of its manufacturing sector. As Meza Lora points out,

> [t]he convergence of the market and the State in the industrial sector in China is an expression of an unquestionable fact: recognition that the rules of the game should be governed by the market and the necessary State intervention given the weakness of this Institution. A socialist market economy with Chinese characteristics does not assume the antagonism between the State and the market. On the contrary, it understands that the market and the State can play a complementary role in industrial coordination activities. If the market is deficient in solving coordination problems, an explicit industrial policy is justified as a coordination mechanism *ex ante* that does not come from the market.[33]

Within this general framework of joint State-market work, the following actions that the Chinese government has implemented in its industrial policy stand out:

- Direct investment in infrastructure projects; financial and budgetary assistance in projects from regions lagging behind.
- Administrative intervention from the central authority in its enterprises to conclude and establish joint ventures, mergers, etc.

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[33] JOSÉ SALVADOR MEZA LORA, EL ROL DE LAS INSTITUCIONES CON LAS GRANDES TRANSFORMACIONES DEL SECTOR INDUSTRIAL EN CHINA DURANTE LA REFORMA ECONÓMICA 285 (Porrúa, 2006).

- Price control over basic supplies (for example, energy and water supply).
- Direct and long-term financing for key companies; preferential capital allocation to companies by way of the capital market, especially for new companies or those seeking to increase their technological development.
- Tariffs and duty-free measures, import quotas, licenses and local restraints on imports.
- The prohibition for foreign companies to distribute products not produced in China or for controlling their own distribution networks.
- Low interest rates in State banks and selective loans to different industries.
- Tax incentives to companies oriented toward industry.
- Reduced tax rates for high-tech companies in the field of industrial technological development.
- Zero taxes for companies of "urgent need for the State" (fixed capital investments for agriculture, water conservation, transportation, postal service, telecommunications, certain medical projects and machinery and electronics, etc.).
- State enactment of a Direct Foreign Investment Guide that specifies the projects that are encouraged, allowed, restricted and prohibited, etc.[34]

8. *Research and Development as Part of State Policy*

With a research and development budget of more than 60 billion dollars for 2006 and a staff of 3.2 million people (2 million of which are scientists or engineers), China is growing in this sector (Jian Bei, 2007). Since the 1st Five-Year Plan (1953), technological development had been included, but its market focus was not emphasized until the 6th Five-Year Plan (1979), in which interest was unmistakably centered on technological growth by means of research and development. In the late 1970s, a planning system for science and technology activities was drawn up and technological innovations were implemented in public enterprises to increase productivity while federal research centers were established in different parts of the country. With the 7th Five-Year Plan, a policy to reform the research and development centers (RDC) was adopted, focusing on responding to market requirements and not adhering to obsolete or bureaucratic outlines. At the same time, manufacturing enterprise and RDC mergers intensified to achieve improvements in technology or in-line production. By adding business incubator programs to this cluster, it has been possible to improve productivity based on new technological developments. Furthermore, it has sup-

[34] *Id.* at 229.

ported the creation of new technology enterprises (NTEs), as well as patents in science and technology.

During the 1990s, covered by the 8th and 9th Five-Year Plans, RDC operations were reviewed again for ways of improving performance. To better compete and better motivate research personnel, the possibility of registering science and technology patents was instituted so the centers could financially benefit from the commercial rights to these patents, which would be bought by the market. One notable aspect of the Chinese government's efforts in this field is that its strategy was not handled as an independent public activity, but directly aligned with the market, education, special areas and strategic sectors, in addition to the other policies aimed at development and public spending to obtain seeking maximum productivity. In the 10th Five-Year Plan (2000-2005), new technologies and so-called third generation products were given a boost by making research and development one of the most important issues in plan. This field was deemed so important that the outline was reproduced in the 11th Program (2006-2010) and the 2020 Development Plan. In the year 2000, the research and development budget was significantly increased to 1% of the GDP —about 100% the previous amount— over a 10-year period (World Bank). This percentage currently exceeds 1.4% of the GDP.[35]

There are approximately 700 federal and provincial institutions that comply with the requirements to be considered as RDC. In most cases, a RDC consists of state-of-the-art installations with the best quality equipment in the world that offers all kinds of services to public and mixed companies. One example of technological development with comprehensive management is Zhangjiang Hi-tech Park in the Shanghai area. This park has a surface area of 25 km^2 and houses around 50 RDCs that serve both the public and mixed companies. These parks operate under a cluster-type head office through which the entire technological development value chain interacts: RDCs, companies, educational centers and incubation programs from new production projects. Around 3,168 companies coexist with the 50 centers, as well as countless specialized educational centers that provide the experts needed for development (to date, this cluster is working on approximately 400 research projects). This productive research and development park in Shanghai has attracted investments of approximately ten billion dollars to date, 70% of which corresponds to foreign investment (Beijing Investment, 2005). This model of "intelligence" centers has also registered approximately 3,000 patents.

The work China does in research and development is a central part of a strategic policy that sees development based on market reality as its main objective. However, in innovating itself, China is very much aware that its greatest strength —and its greatest weakness— is its enormous supply of

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[35] Oropeza, *supra* note 26, at 310-311.

work. Thus, while competitiveness and innovation has improved in certain high-tech sectors, its challenge is still that of maintaining large factories with an intense workforce in other areas of manufactured goods (heavy industry, for example, employs almost 80 million people) with reasonable technological improvements in terms of efficiency. China cannot afford the luxury of generalizing the use of robotics, for instance, because it would cause social imbalance in its workforce. Despite this, growth in research and development is a priority for the Chinese model. Since 1985, it has registered 14,000 patents, a number that was surpassed in 2003 with 300,000 registrations, placing it in third place worldwide after Japan and Germany. From 1995 to 2003, it has sustained an average annual growth in the high-tech industry of approximately 20%, which represents 18% of the national industry (Jin Bei, 2007).

III. The Law as Leverage for Development

Although the history of China is one of the oldest in the world (approximately 5,000 years old), it should be pointed out that in legal matters, the Asian country finds itself in the process of establishing Rule of Law, after going through a difficult and abrupt transformation of its feudal legal system that has taken 170 years. Therefore, one of the new facets of the Chinese phenomenon —and one of the least known in the world and especially in Latin America and Mexico— is that of understanding its current legal system.

Latin America already trades more than 100 billion dollars with China (2007), more than 30% of which corresponds to Mexico. However, in either case, there is not even a minimal amount of legal bibliography today that can legally lead and guide the exponential growth of the political-trade relationship with our new Asian partner, or that responds to questions on the history or precedents of the Chinese legal order. Even then, law in China is as old as its history, which, due to its volume, is difficult to summarize.

1. *Brief Overview of the Legal Order in Chinese History*

The exact dates and origins of Chinese culture varies, but some authors (Cornejo, 2007) place the emergence of their writing in the Shang period, between 1751 and 1122 B.C. However, most researchers agree that in 221 B.C., the first unified State in the history of China is established under the command of Quin Shi Huang Di, the first emperor of the Quin Dynasty.[36]

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[36] Arturo Oropeza García, China-Latinoamérica: una visión sobre el nuevo papel de China en la región 13 (IIJ-UNAM, 2008).

As to the historical background of its legal system, some authors (Xin Chunying, Li Lin, etc.) speak of its birth during the Xia Dynasty (21st century B.C.) and of later growth of written law between 770 and 221 B.C. Unlike other legal systems of the time, Chinese law was characterized from the start by having a secular influence because it was directly related to the power of the ruling governors more than with divine figures and it was understood that law was "[t]he rules of the natural order of things." The origins of Chinese law were also linked to the philosophical schools of thought of the time, such as Confucianism (551-479 B.C.). The three cardinal rules of this philosophy, which strongly influenced Chinese law —and to a certain extent, continue to influence social order in China— are: *a)* harmony between the subject and the monarch, *b)* harmony of the father over his son and *c)* harmony of the husband over his wife. For them to be carried out properly, these tenets were to be based on five basic virtues: kindness, rectitude, decorum, wisdom and sincerity. These principles would become the basis for the legal system of China's feudal society.[37]

"Let the ruler rule as he should and the minister be a minister as he should. Let the father act as a father should and the son act as a son should" is the Confucian premise of a social order that should start from the responsibility of its members and from a pre-established order that assigned each person his place and obligations. Breaching this order would lead to a disastrous loss of his face and self-esteem for which one remedy was suicide.[38] This philosophical line tended to keep the *status quo* by means of the proper or virtuous behavior of the different participants or social status that made up the Chinese feudal organization.

The concept of law in China was different from the Western one. Its perception of obligations and rights was not derived from a "Superior Law," but from the natural order of things; from a "harmonious society" that was ruled by the emperor's or the ruler's "wisdom." Hence, the first legal regulations were based on a social "should be" backed by a generalized concept of "decorum." These principles emerged from philosophers like Confucius and Lao Tze whose rules served to legislate a common code of conduct in which legal provisions were an expression of this natural order.

Given the ruler's hegemony, the most visible legal expression was that which corresponded to punitive law, which regulated and punished any breach in the established order, in addition to any resulting social disgrace. Just as corporal punishments were doled out, so were exile and death. Torture, in this scenario, was expected and accepted. Enforcing the law was entirely in the hands of the monarch, as was mediation since the legal profes-

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[37] XIN CHUNYING, CHINESE LEGAL SYSTEM & CURRENT LEGAL REFORM 311 (Beijing: KAS-Occasional Papers, 1999).

[38] JOHN KING FAIRBANK, CHINA: UNA NUEVA HISTORIA 78 (Andrés Bello, 1992).

sion did not exist in China. As to the codification of this legal standard, Fairbank points out, "[b]y pre-modern standards, Chinese legal codes were monuments of their kind. The great Tang code of the 8th century and its successors in the Song, Yuan, Ming, and Qing periods, still invite analysis. Early European observers were well impressed with Chinese justice."[39]

This general outlook of imperial law, or feudal law, remained practically unchanged until mid-19th century when China's direct contact with certain Western powers forced it to revise and begin some transformations in certain areas. China was once the greatest civilization in the world. Even from the 10th to the 15th century, Europe could not be put on the same level as the Chinese Empire in terms of agricultural productivity, industrial ability, commercial complexity, urban wealth or standard of living (not to mention bureaucratic sophistication or cultural achievements).

For over 1,000 years, its economy was the largest in the world, representing 30% global participation. However, from the 16th century on, and compared to other legal systems, Chinese law was characterized by not having a modern legal system in tune with the development of the economies and democracies of the time, which were beginning to display solid legal evolution.[40] In contrast, from the 17th century onward, China entered a stage known as the Late Empire (1600-1911), which accelerated in the 18th and 19th centuries.

The various internal rebellions that took place in China in the 18th and 19th centuries, directly incited the transformation of the established order, which despite its different stages and challenges, had been able to preserve its main characteristics for around two millennia. Because of these rebellions and foreign invasions that clearly revealed the weakness of an empire in decline and its inability to control its territory, a change in the legal framework also occurs, prompted by the presence of new participants in China's public life. For example, the period between 1842 and 1943 has been called "[t]he century of treaties" (Great Britain in 1842, the United States and France in 1844, Russia in 1858, etc.). During this period, the maritime powers of the time obligated China to recognize certain rights within the economic and commercial order that overturned the established legal order and the Empire's central concept: that of exercising power and full sovereignty within its walls. Under hegemonic pressure and with the signing of these treaties, China first had to accept the equal standing of other countries (Great Britain, France), which was a severe blow to the Emperor's principle of superiority over other governors and thwarted his right to demand tribute and obedience. China also had to recognize the jurisdiction of other countries within its territory, which had to include the "[m]ost

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39 *Id.* at 225.

40 Chunying, *supra* note 37, at 314.

favored nation" clause and free trade for these powers within Chinese borders.[41]

The meeting of a declining empire with maritime powers in full expansion provoked the forced opening of the Chinese Empire. This in turn gave rise to the transformation of its established political, economic and social order, as well as its legal order. This first discussion on legal order in China was mainly focused on drafting a Constitution as the starting point for a new legal system, which for the first time would include: a division of power system, an open (oral) justice mechanism, new regulations on foreign trade and the separation of civil and criminal law, among others. However, the interests of the time were such that in the first attempt (1898), Dowager Empress Tza-hsi opposed, incarcerated and sentenced six of the reformers to death. In the second attempt (1905), a bomb exploded on the train taking a group of experts chosen to study constitutional projects in other countries (Germany, Japan, etc.).[42]

Qing Dynasty rule came to an end in 1912, thereby concluding a lengthy and historic stage for the Chinese Empire. At times, it had tried to open up to the possibility of a new constitutional system, to remain in power and reduce pressure from foreign powers. After more than two millennia of maintaining an established order by and large (aside from the challenges from the Mongol conquest of 1279 and other foreign interferences), the constitutional reform project was not without its challenges. On the one hand, the group of new legal order sympathizers wanted their prerogatives to be recognized within a Rule of Law framework, which would also give the country a modern platform from which it could achieve financial success, as in the case of Japan (Meiji Dynasty). On the other hand, conservatives stated that the Chinese people had not asked for a Constitution; it was not a part of their culture and they were not ready to abide by it. Thus, it could give way to uprisings if not implemented properly. Amid these struggles, the interim of the Nanjing Chinese Republic government brought the prior feudal system to an end in January 1912. In March 1912, the temporary leadership of the new Republic of China adopted a political Constitution for the first time. Although temporary in nature (1912-1914), it proposed a division of powers system, sovereignty of the power of the people and an initial list of citizen's rights. It spoke of a temporary presidency, a Supreme Court of Justice and another set of powers, setting a precedent and becoming a milestone in the country's legal context.[43] The first year of leadership under Yuan Shi Kai (1914), ushered in a Chinese legal system defined by a revolutionary vortex that did not stabilize until 1949 with the victory of the Chinese Communist Party.

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41 Fairbank, *supra* note 38, at 245-248.

42 Chunying, *supra* note 37, at 315-317.

43 *Id.* at 323.

2. *Chinese Law 1949-1978*

After a long period of political change that stalled the nation's financial progress, China set out on the road to reconstruction, moving from an imperial model, which was feudal in nature, to a communist government, which was totalitarian in nature.[44] In the imperial model, the ruler and a social order based on philosophic principles usually regulated the judicial relationship between the Emperor and his subjects. Due to this preconceived order, the vertical balance of its social ties gave direction and meaning to the relationships of rights and obligations. Therefore, the transition from a ruler's vertical order to that of the Party did not represent a fundamental change in China's legal system.

China's legal system after the CCP's victory in 1949 can be analyzed from various angles: political, financial, or strictly legal, among others. As with all cultural output, law in China has a good amount of all three elements, which have asymmetrically come together over the last seventy years.

From a political point of view, China's legal system can be divided into two distinct periods. The first spans from the Mao Zedong era (1949 to 1976) and the second goes from 1978, the year opening and political reform began under Deng Xiaoping, to the present day. During the first period, the new legal system repeated the post-imperial transition phase's practice of abolishing all forms of legal legacy.[45] All kinds of legal provisions that might have been created by the opposing Kuomindang (KMT) faction were repealed to give way to a new legal system guided by the aims and objectives of a Communist and totalitarian State which, based on its own idiosyncrasy, did not require a horizontal system to regulate relationships other than those between the State and proletariat. Guiguo Wang points out that during this period, and especially during the Cultural Revolution (1966 to 1976), law was not deemed a necessary instrument and had no significant relevance within China's new social order.[46]

Regarding this time period, Li Lin points out,

> [t]he establishment of the People's Republic of China in 1949 gave birth to a new era in China's legal makeup. The time period from 1949 to mid-1950 was the initial stage, during which China enacted the National Committee of the Chinese People's Political Consultative Conference, as well as other laws and decrees that played an important role in the consolidation of the new State, establishing the new social order and a revival of the national economy. The Constitution of the People's Republic of China, adopted at

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44 ARTURO OROPEZA GARCÍA, CHINA ENTRE EL RETO Y LA OPORTUNIDAD 19 (IIJ-UNAM, 2006).

45 Chunying, *supra* note 37, at 327.

46 Guiguo Wang, *Evolution of the Chinese Legal System in the Globalized World*, *in* DERECHO COMPARADO ASIA-MÉXICO 98 (José María Serna de la Garza ed., IIJ-UNAM, 2007).

> the first session of the National People's Congress, and other related laws, defined China's political and economic system, as well as the rights and freedoms of citizens. They imposed the standardization of organizational structures, the functions and powers of the State's governing body; and established the basic principles for the Chinese legal system, which provided the preliminary foundations for the Chinese legal structure. However, after the mid-fifties, and especially during the 10 years of the Cultural Revolution (1966-1976), the Chinese legal system was severely destroyed.[47]

Though marked by scant legal production (marriage laws and agricultural reform in 1950), this important political stage was noted for adopting the first formal, permanent constitution in China's history in 1954. Clearly done under Soviet influence, this established the basis for a State property system and centralized management, which guided the legal system of the Maoist era by means of administrative provisions. Within this timeframe, a second Constitution was enacted in 1975.

During the almost thirty years of Maoist rule and throughout the various stages of the Great Leap Forward (GLF) or the Cultural Revolution (CR), China was unable to consolidate a political model that would contribute to the social and financial advancement of its inhabitants. Its various development strategies never attained results that would at least satisfy the basic needs of food and clothing for an average 700 million people at that time. This situation led to the solidification of the political and legal model, which awarded greater power to the State and its vertical decisions, to the detriment of the progress made towards establishing a law aimed at regulating the State or its relationship with its people. In choosing a political and economic model closed to the outside world, norms that were compatible with external participants were not an integral part of the agenda of the nation that withdrew from the then General Agreement on Tariffs and Trade (GATT) immediately after the victory of the 1949 Revolution. Nor did it resume its institutional project for opening up to the outside world until October 25, 1971, when China was once again admitted into the United Nations (UN) after having been expelled in the early 1950s.

3. *Chinese Law 1978-2008*

Unlike the first stage, the second political period led by Deng Xiaoping is characterized by its economic and political openness toward the Western world, heralding a new era in China's relationship with the world and in consequence, the construction of a new legal system. This period was born

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[47] Li Lin, *Historia del derecho chino y su sistema jurídico contemporáneo, in* MÉXICO-CHINA. CULTURAS Y SISTEMAS JURÍDICOS COMPARADOS (Arturo Oropeza García ed., IIJ-UNAM, 2008).

of the political decision to open China up to the world. During this time, legal matters can be summarized into the enactment of two Constitutions, four constitutional reforms, 229 general laws, 600 administrative regulations, 7,000 local regulations, and more than 600 autonomous regulations. This body of law spans over three decades and is greater than what China had produced in 5,000 years of history. This period is also noted for organizing its political stability, financial project and legal system around the centralized and prioritized objective of development. With this in mind, legal production in China over those thirty years was mainly aimed at channeling the economic opening of the State and reinforcing the agreements made with the outside world.

In 1978, China was practically bankrupt, with close to 70% of its population living in extreme poverty and with signs of recent famine that had caused millions of deaths. Since looking to the recent past would not clarify the situation, hunger and poverty were reasons enough to look outside China for new answers that would provide the necessary economic development for a nation of close to 700 million poor people. With this in mind, the 1978 Constitution came into being amid much political debate between the new reformers and the still very strong conservatives. This Constitution provided the background for the first economic changes in the nation, as set forth in Article 11, which highlights the importance of economic development.

The 1978 Constitution had the merit of ratifying the principles of the Chinese Revolution and sent a reassuring message to a country alert to future changes. However, a new Political Constitution was enacted on December 4, 1982. In contrast to the 1978 Constitution, the one from 1982 significantly changed the direction of the Chinese model. However, the legal and economic change that most stands out in this statute and outlines the opening of the new Chinese Development Model is found in Article 18, which states:

> Article 18. The People's Republic of China permits foreign enterprises and other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China...

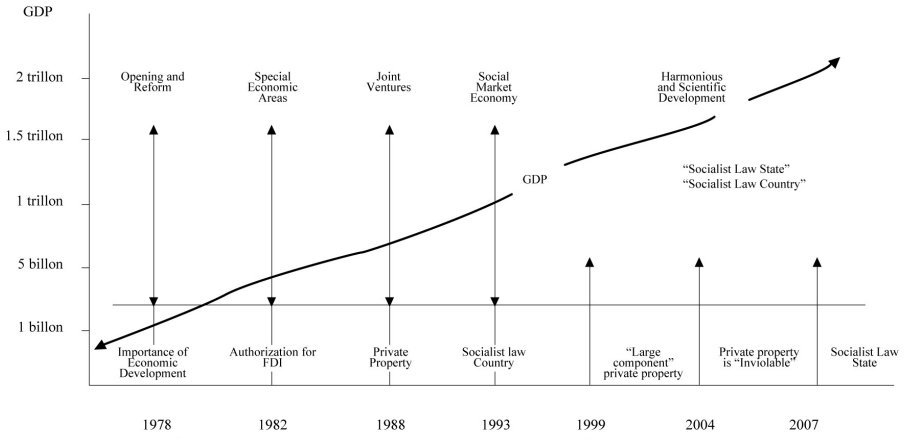
For the first time in its history, Article 11, as amended in 1988 recognizes the existence of a private sector of the economy, a significant step toward a new "market socialism."

> Article 11 (4th Par.). The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy

and exercises guidance, supervision and control over the private sector of the economy.

The Constitutions of 1982 and its amendment in 1988 represent a genuine watershed in China's economic, political, social and legal life. They also began to reflect the initial layout of a new project that continues developing to this day. Deng Xiaoping had already anticipated the construction of an economic model with "Chinese characteristics" that would include a free market since 1979. It was established in the 11th Central Committee of the Communist Party of China in December 1978, which initiated the project for reforms and China's opening. The first proposal for the creation of special economic zones was made in 1980 and was designed for them to incorporate foreign direct investment; hence, the important constitutional reforms of 1982. Following up on this, the concept of market price was introduced in 1981 and by 1984 economic reform began to spread throughout the country. That same year, the 12th Central Committee of the Communist Party of China issued the "Decision Concerning Reform of the Economic Structure" to facilitate the application of the law and the new development of the socialist economy.

The year 1992 holds special significance for the dynamics of the legal changes defined by the vision and advancement of the economic project since it represents the first amalgamation of political opening-up and economic reform. This was reflected in the 14th CCP National Congress, which officially declared a "Socialist Market Economy" a priority and consequently, the importance of constructing a legal system for this model.



SOURCE: The Author.

Four years after the events in Tiananmen Square and fifteen years after its opening-up, the second amendment of March 1993 marked the end of the transition period from the centralized planning system of 1949 to the

new socialist market model. Thus, this amendment was a political message to the nation by reaffirming China's new path, as well as one to the rest of the world by legally making public measures that would convey certainty and reliability to foreign investors official. Nevertheless, Article 7, according to the second amendment, reiterates the State's role as the leading force for the growth of State economy and defines its development strategy by pointing out that "[t]he State has put into practice a socialist market economy" (Article 15). The 1999 amendment further reiterates the constitutional message of 1993 and part of the new China's progress toward the "Rule of Law." Therefore, Article 5 institutionalizes the Rule of Law as a commitment, and as a result, the need to build a socialist rule of law while respecting foreign relations and private property, already described as a "great component" of the country's economy. Within this context of economic determinism in the new legal order, the 2004 amendment reached a stage of marked prosperity and the undeniable economic success of its development model. Therefore, changes were focused more on social and political issues than on economic ones. Notable economic milestones include defining its citizens' private property as "inviolable" and the prevision of "non-public economies" (Article 11), clear signs of the consolidation of private property in China.

Over the last thirty years, China has developed its own legal production with Chinese characteristics, centered on lending assistance for national development without being dependent on foreign pressures or interests. A Chinese-Foreign Equity Joint Venture Law was passed in 1979 and the Foreign Capital Enterprises Law was published in 1986. The first Corporate Law in China for the Regulation of New Foreign Companies was enacted after the second constitutional amendment in 1993, although the Private Sector Corporate Law did not appear until the year 2000.

Another clear example of modulating the legislative speed to the economic priorities of the development model has been China's trade and labor legislation. In terms of trade legislation, although China embarked on an ambitious export project that took its international trade ranking from the 27th place in 1978 to third in 2004 (China Today), it legislated its first international commerce law three years after its entrance into the WTO. As to labor, China regulated a far-reaching tolerance policy toward new foreign capital companies in the 1980s, but it was not until 1995 that it passed its first labor law. While this law does summarize some workers' rights, it is still a body of laws of a discretional nature that favors employers. With the successful economic development of the Pacific region, a new labor law went into effect in 2008. In addition to granting workers more effective rights, it paved the way for a massive transfer from work centers to less developed areas in the country, as stipulated in the dialectic vision of the development model. In view of all this, it can be said that to date, new legal production in China has always been done in direct correlation with its economic

model, complementing it as a tool that encourages growth without hindering it.

China's legal model was practically non-existent in 1949. Since then, it has gone far in establishing its own provisions. As Huang Lie points out, "China entered a new era after the foundation of the People's Republic of China, but the construction of the legal system went on a very tortous path. The disaster of the cultural revolution completely destroyed its legal institutions." Huang goes on to stress that

> [f]or a long time, some of China's leaders and cadres have placed their hope of durable peace and prosperity of the nation upon a few good leaders, and have failed to understand that the law and its institutions are the crux of the matter. This has been a major obstacle to the development of democracy and the legal system in China. Furthermore, the existence of power operating above the law is another indication that China's legal system is far from perfect. The law is sometimes displaced by power; the leaders' words sometimes substitute the law in the management of governmental affairs. When we promote rule of law and oppose rule of man, we are trying to confront these problems directly.[48]

Consequently, China cannot now speak of finished judicial systematics, nor can it be described as a socialist legal system. China's new legal system, which is currently under construction, finds itself between a totalitarian-style political system and an economic model deeply rooted in the free market system. Therefore, the current legal panorama has the appearance of a hybrid setup with "Chinese characteristics," and only time will tell how it will decipher the various lines of its development with greater clarity. In spite of this, throughout this lengthy period of guiding and backing its economic priorities while preserving the Party's central omnipresent power, China has had to include legal influences from both socialist and Common Law traditions, as well as from Civil Law, in its juridical model, due to its need to have dealings with the Western world:

> [After the reforms], Chinese laws underwent tremendous changes. The main trend has been to massively absorb foreign legislation, including legislative intent, legal concepts, and legal values. Obviously, these laws bore the influence of the common law system, possibly as a result of the large influx of Chinese scholars into countries and regions like the United States, Canada, Australia and Hong Kong. This does not mean, however, that China abandoned its own legal tradition entirely, as Chinese law has frequently studied and copied laws from the continental or civil law countries or regions, including Taiwan. This dual approach is illustrated by the enactment of the Company Law in 1993, the Securities Law in the end of 1998, and the Con-

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48 Huang Lie, *Rule of Law in China: Ideal and Reality*, *in* CONSTITUTIONALISM AND CHINA, 175, 177 (Li Buyun ed., Law Press, Beijing, 2006).

> tract Law in March 1999. For instance, most of the terms of Company law bear resemblances to those of the common law countries and regions like the United States and Hong Kong. However, arrangements for supervisors and supervisory boards were drawn from civil law countries like Germany. The Securities Law was directly influenced by the Hong Kong Securities Law, with the addition of measures to fix the latter's loopholes and areas of ineffectiveness that had been revealed by the Asian financial crisis.[49]

In accordance with its financial, social and political transformation process, China's new legal system has also experienced the vicissitudes of its environment, from purging influences to defining its own legal nature. For its 2010 project, it should also complete its constitutional base and regulatory laws while mitigating secondary regulations in order to advance toward a logical, coherent systematization of the various disciplines and branches of law that are currently still grouped together, oftentimes ambiguously.

The current Chinese global body of law stems from the Constitution of December 4, 1982, and its four amendments or reforms, through which the political and economic development of the new Chinese model is carried out.[50] Most current legal production has been generated from this constitutional foundation, with a few exceptions, such as the Penal Code and the Chinese-Foreign Equity Joint Ventures Law that date from 1979. It covers seven disciplines: Administrative Law with 79 laws; Economic Law, with 54 laws; Regulatory Constitutional Laws, 38; Civil and Trade Regulations, 32 laws; Social Law, 17 laws; Procedural Law, 7 laws; and Criminal Law, 1 law. This same constitutional body of laws is divided into three levels or jurisdictions with a total of 229 National Laws, Administrative Regulations, which are placed second, and Local Regulations that deal with the particular sphere of each province. China is made up of 56 ethnic groups and 5 autonomous regions, and thus a fourth level of regulations appears for the particular regulations of these districts. According to Wang Zhenmin, the development of the rule of law in China since 1978 can be divided into three stages: the first acknowledged the importance of what "ruling the country by law" would entail and culminated with the promulgation of the 1982 Constitution; the second, which lasted from 1982 to 1991, saw the further development of "legal construction"; the third began when Deng Xiaoping remarked that the objective of China's economic reforms was to develop a socialist market economy.[51] However, it should be noted that from a Western point of view, the Rule of Law in China is still something that needs to be perfected. Furthermore, legal production has been marked by a change

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[49] Wang, *supra* note 46, at 102.

[50] Constitution of the People's Republic of China 3 (Foreign Languages Press, Beijing, 2004).

[51] Wang Zhenmin, *The Developing Rule of Law in China*, Vol. 4, No. 4 HARV. ASIA QTLY. (Autumn 2000).

of direction at various stages of the development model. In the 1980s, for example, it encouraged widespread legal production in matters of foreign investment. However, with increased capital gains in the 1990s, tax regulations and an important part of the corporate regime emerge. The section on International Trade Law is found after 2001 as a result of China's admission into the WTO. Similarly, Social Law is one of the more recent legal branches in China, where its 17 laws, specifically human rights, appear after 2001.

IV. Evaluation and Conclusion

China's economic success from 1978 to 2008 is truly surprising. Little by little, the growth rate of its GDP and its foreign trade (third place in the world in imports and exports in 2008), increased international reserves (1.8 trillion dollars in 2008) and the decline of extreme poverty[52] (a U.N. report points out that 80% of the world poverty reduction statistics from 1978 to date corresponds to China), correspond to the implementation of a model that has been continuously built since Mao Zedong's death by a new group of statesmen headed by Deng Xiaoping up to Hu Jintao.

Of course, this does not mean that Chinese development has been a smooth process without problems. To the contrary, from the moment of its start-up to our days, one distinguishing feature has been the profound hardships that have enveloped it, such as generalized poverty, the demands of an enormous population and a minimal GDP per capita (2,500 dollars a year in 2007), etc., which have always played against its stability and good results. On the economic terrain, the strategic decisions taken have not al-

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[52] The results obtained by China in this segment are truly surprising. The drop in extreme poverty from 67% to 17% in a quarter of a century has caused general astonishment from global economic participants.

In 1978, China had an extreme poverty index of 67% or 630 million people. In 2004, this problem had been reverted to 17%, that is to say, 210 million people. This has been the result of the success achieved in implementing and sustaining economic growth from 1978 to date, which has originated the creation of nearly 300 million jobs that have incorporated urban and rural populations into the economic activity. The reduction of poverty has also derived from the good results from the application of public policies, such as the strategy and implementation of the National Poverty Reduction Program (1994) and the 2001-2010 Program for the Reduction of Rural Poverty, in addition to other development policies, such as the emigration method, by means of which people from the poorest areas of the country (remote mountainous regions, deserts, high regions, the plateaus of the southwest and areas inhabited by national minorities) are urged to move to places with more infrastructure and support for their social and economic development, thus pulverizing poverty and multiplying the social investment results. This shows us a China with a successful economic policy that is combined with a healthy social development strategy (Oropeza, *supra* note 27, 2006).

ways been successful either. For instance, during the 6th Five-Year Plan, the 14 coastal Economical and Technological Development Zone units that were set up were later reduced to four, in view of management failings. The problem of corruption could also be addressed since it has often held the model in check and has been a major challenge for the Chinese economy. However, in hindsight, the main criticisms made to the model today lie in its differing results and the high concentration of wealth it has generated among the different social layers and the different geographic areas.

2005 (Yuan)				
	Eastern Area	*Central Area*	*Western Area*	*Northeastern Area*
Rural Income per capita	4720	2956	2378	3378
Urban Income per capita	13374	8808	8783	8729
In relation to national income per capita (100%)	127%	83%	83%	83%

SOURCE: CHINA STATISTICAL YEARBOOK 2007.

The gap between rich and poor, in the different areas, has significantly risen. To illustrate, in health services, the percentage between the wealthiest and poorest families, instead of decreasing, has increased over the last ten years (1996-2005), going from a difference of 2.74 to 6.34 times. The difference in income levels among urban groups between 2000 and 2005 has increased from 3.61 to 5.7 times as much between the lowest and highest income brackets, with Shanghai, Tianjin and Jiangsu as the cities that have benefitted the most and Tibet, Yunnan and Guizhou as the most marginalized. In the country, this gap in income has expanded from 6.4 times to 7.2 times as great (China Statistical Yearbook, 2007). Regarding education, culture and entertainment, the breach has also widened in the same period, going from 3.84 to 8 times. All these differences are what today cast doubt on the nature of the success obtained, the increased social instability of a people that 20 years ago was still getting used to a certain degree of economic equality (though it was presented as generalized poverty), and not knowing the meaning of a middle class. For a large number of Chinese people, economic success still seems distant. Their uneasiness grows when they directly or indirectly notice the vast difference between cities like Zhejiang, Shanghai and Beijing that receive 27,703 Yuan, 22,808 Yuan and 22,417 Yuan, respectively, as annual income per capita; and Guizhou, Gansu and

Xinjiang that only receive 5,052 Yuan, 9,586 Yuan, 9,689 Yuan, respectively (China Statistical Yearbook 2007). In summary, economic success has not been uniform and disparities give rise to social uneasiness when in 2005 only 174 million people had senior citizens' insurance, 137 million had medical assistance insurance, 106 million had unemployment insurance, 83 million had accident and job insurance and 53 million had maternity insurance.[53]

However, the current challenges for the Chinese development model are not only centered on social issues; they are also seen in diverse subjects, such as ecology and economy, where there is a broad range of new challenges to be met. On the subject of the environment, authors like Pang Zhonying speak of China's enormous "ecological debt" caused by certain facets of its economic success. Despite its great surface area (9.5 million km^2), China is below average in natural resources essential for development. For example, it has only 0.094 hectares of arable land per capita, which places it 40% below the global average; 2.25 cubic meters of fresh water per capita, 30% below the global average. This situation repeats itself in forests, mineral resources and oil with 20%, 60% and 11% below the world average per capita.[54] At the same time, its accelerated economic growth has led it to consume 48%, 40%, 32% and 25% of the world's cement, crude carbon, steel and aluminum oxide production, which has in turn generated disparity in both supply-demand and pollution. According to statistics, the main polluting emissions from China have already surpassed the environment's capacity for self-purification. Of its seven river systems, more than half are severely contaminated (the Huang He, Huaihe and Liaohe Rivers are at 60% of the international level of environmental emergency, and the Haihe River is at 90%). Acid rain affects a third of the country's surface. Around 360 million hectares have water losses and soil erosion (38% of the country's land surface area), a figure that increases by 15 thousand km^2 every year, and desertification already covers nearly 20% of the national territory. The problem of environmental deterioration in China clearly represents a great challenge for its development and an annual cost of up to 8% of its GDP.[55]

Other topics could be added to the above, such as corruption, banking debt, problems of annual employment creation, etc. However in the economic terrain, the most important challenge of China's development model is that of developing new structural lines that will determine its fate it in the coming years.

Beyond the deficits presented by China's current economy, its success in matters of economic development is of such magnitude that it has come to

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53 DESARROLLO DE CHINA DENTRO DE LA GLOBALIZACIÓN 59 (Lenguas Extranjeras ed., Beijing, 2007).

54 *Id.* at 62.

55 *Id.* at 68.

represent one the most important economic achievements of humanity. However, after 30 years, China paradoxically returns to the starting point, from which it will have to validate its development model again and decide on the best lines of growth. This time, it will not only have to provide sustainability to what has been achieved, but will also have to allow for better wealth distribution to two-thirds of a population that has not benefited in the same proportion from the "Chinese Miracle." China will have to decide what its future will be, just as it did three decades ago, at a time when the only similarity it holds with 1978 is permanent change.

The debate has already begun in China, and different groups intend to impose their own version of the next development plan, just like 30 years ago. The common root in their arguments is that what has been done is not enough and that today's reality demands greater and different results. It is not enough to grow at an average of 10% annually; now more social and human growth are necessary. Nor is it enough to produce more goods if doing so puts its own national sustainability at risk. Likewise, the best practices for controlling inflation, which since 1996 has been in the region of 9% a year, are under discussion along with the new monetary phenomena of excessive liquidity and speculative capital. There is also talk of reviewing their export model in depth to incorporate and expand primary and tertiary sectors, as well as its internal model. Aligning and fine-tuning a vertical line of control also needs to be discussed since up to now it has constantly clashed with a horizontal market dynamic while local governments have yet to fully define their roles. In many cases, this continues to distort and break with the general strategy. Other issues under deliberation include modifying the role of State monopolies, special economic zones, and enterprises with State participation. These and other important issues are more present today than ever. They have been included in China's agenda, in forums like the 2003 "Third Great Debate on the Reform," and of course, in the 11th Five-Year Plan that, according to Chi Fulin, marks "[a] new historical beginning in the Development and Reform of China." There are various documents and general opinions among those that will have to decide whether a Socialist Market Model really exists, and if so, what its development strategy will be in the coming years. In the same way, the question arises as to whether the moment has arrived —once China's economy has been strengthened and under strong international pressure— to move toward greater degrees of free market or if, as some opinions maintain, it is time to recapture part of the socialist economy.

Regardless, after 30 years of success, we must point out that under its current strategy, China has presented the world with a new alternative that has demonstrated its viability by sustainably reducing the massive poverty indexes that had characterized it since the beginning of the 20th century. It has shown that economic underdevelopment is a problem that affected countries can successfully solve and that the way to solve it has much to do

with the institutional framework that accompanies the model, as well as the economic strategy each country chooses.

At a time in which growth has become every nation's challenge, the new Chinese model is an alternative for handling efficient public policies. It is true that the strategy's initial launching platform, that is, planning and political centralization in daily coexistence with free market capitalist policies, is a combination that few countries could imitate. But here, where many of the benchmark analyses of the Chinese model end, is precisely where the differential engineering that has made it a winner in globalization begins. For that reason, the learning opportunity for the developing economies should not be limited by the comparison of different political realities. In the first place, the political part would arbitrarily represent barely half of the model and without analyzing the rest of its public strategy for a free market global outline. Secondly, by disregarding the comparison and the lessons learned from the Chinese model because of its Communist foundation (and even, various authors have implied that its success is precisely due to that political component in its model) would be to tacitly or expressly recognize the superiority of this outline over an entire bibliography that has always privileged the superiority of the Western democratic model, especially from 1989 onward.

The political basis of each model clearly bears a different nature, but in the last example and within this same theoretical framework, the political component, more than being an impediment to analyze the Chinese model's economic measures, would give Western outlines competitive advantage. One should start from this same advantage to compare the free market strategies China has implemented and which since the beginning of the 21st century have tended to align themselves with WTO regulations. The results of the Chinese experience have shown to developing economies, especially Latin American economies and the Mexican economy in particular, that sustained growth is possible and that to a great extent it starts with each nation's good decisions, efforts and individual talents. Moreover, the main obstacles are found in each country's inability to attain political stability and find the development strategy best suited for it. Sustained growth of 10% for more than three decades is a great motivation for the different Latin American economies that have not been able to grow more than an average of 2% over the same period, within an asymmetrical framework and suffering from a lack of direction and the continuous appearance of crises that have limited their development in different ways. It is also a reflection on the real possibilities a country has at hand to face globalization and achieve sufficient and sustained growth without having to surpass all the obstacles globalization presents. These are indispensable requirements for nations that aspire to obtain the per capita level of income of intermediate countries. Of course, the networks and advantages with which the developed countries operate should not be looked down upon.

Finally, as the Tofflers correctly point out, "China now makes up part of all of us."[56] However, we could also add that China's economic history is far from over. In the future, it will continue to surprise us both with its changes and with its innovations, which must be kept in mind if we want to have a definite idea and an advantageous relationship with the best development strategy of the last decades.[57]

On the other hand, the newness of Chinese law and especially the circumstance of its having to sanction legal criteria for a variety of economic and political systems, along with a culture that has privileged customs and values above written law for more than 5,000 years, define a reality of advances and setbacks not unknown to Chinese experts. In that regard, Li Lin states that legal construction in China continues to pose various problems and the progress of democracy and the Rule of Law continue to lag far behind its economic development.[58] For example, although its Penal Code is the oldest in its modern era (1979), new economic crimes are on the increase, such as those regarding copyright infringement, intellectual property infringement, etc., some of them with increments of 29% a year. This challenges not only the purging, but also the updating of the entire system. As to labor, the new 2008 laws face increasingly greater disputes regarding worker-employer relationships, as seen in the 75,000 claims made in 2007 involving 142,000 workers. Overall, it can be said that notwithstanding its achieved advancement, China's legal system is still under construction. The arduous task of perfecting its constitutive norms and political order while closing legal gaps in its various disciplines lies ahead. By the same token, the systematization of the various legal bodies need to be carried out coherently and according to its inherent nature, improving on its contradictions and obsolescence, and eradicating its discretional nature, for the purpose of favoring a more objective and efficient application of the law.

To this, Professor Li Lin concludes the following: "We cannot await the changes passively as we face the challenge of improving the legal system; however, we must also be careful not to move forward in an impertinent manner." As to these changes, he adds, "[w]e should keep our minds clear."

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[56] ALVIN and HEIDI TOFFLER, LA REVOLUCIÓN DE LA RIQUEZA 449 (Debate, Mexico, 2006).

[57] JOHN HOFFMAN & MICHAEL EURIGHT, CHINA INTO THE FUTURE 21 (Wiley, 2008).

[58] Lin, *supra* note 47, at 18.

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NOTES

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CONSTITUTIONAL JUSTICE IN IBERO-AMERICA: SOCIAL INFLUENCE AND HUMAN RIGHTS*

José Ramón COSSÍO DÍAZ**

ABSTRACT. *This note offers a general overview of the state of constitutional justice in Ibero-America. In particular, it explores the influence the decisions of constitutional courts have on society and the development of international jurisprudence on human rights from a Latin American perspective.*

KEY WORDS: *Constitutional courts, Ibero-America, society, human rights.*

RESUMEN. *Este ensayo ofrece un panorama general sobre el es- tado de la justicia constitucional en Iberoamérica. Específicamente, explora la influencia que las decisiones de los tribunales constitucionales tienen en la sociedad, así como el desarrollo de la jurisprudencia internacional con respecto a los derechos humanos desde una perspectiva latinoamericana.*

PALABRAS CLAVE: *tribunales constitucionales, Iberoamérica, sociedad, derechos humanos.*

* This text was presented on behalf of the Constitutional Courts of Ibero-American countries at the Worldwide Conference on Constitutional Justice held in Cape City, South Africa, on January 22-24, 2009. It was discussed and enriched by all participants of the region, as well as those of Angola, Equatorial Guinea, Guinea-Bissau, Mozambique and Sao Tomé and Principe. The representative of the Moroccan Constitutional Court participated as an observer. I would also like to thank Alfonso Oñate Laborde, Francisca Pou Giménez, Gabino González Santos, David García Sarubbi and Karlos Castilla Juárez for their comments on and support with this article.

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I. INTRODUCTION

Constitutional justice is the result of three great political-legal syntheses: the democratic state, the liberal state and the social state. The democratic state has transformed the criteria that regulate access to power and legitimate governments while defining citizens' status. It has given new foundations to the relationship between society and those who govern in its name. The liberal state has in turn introduced an important distinction between public power and society, thereby providing the possibility of creating a space for individuals that is shielded from certain kinds of state action. The recognition of fundamental rights for the protection of personal freedom emerges from that act, which can also be said of the modern understanding of the division of powers and the principle of legality. Lastly, under the formula of a social state, a set of guarantees was introduced in order to bestow a basic amount of material benefits to the least fortunate. The rationale behind the constitutionalization of social rights was an institutional effort to guarantee a set of minimum entitlements to broader sectors of the population.

An understanding of this general constitutional structure, however, is simply a first step, since very serious problems immediately arise. The complexity arises out of the need to figure out how the components of these three elements (with their different origins and purposes) can be synchronized at a time of growing political pluralism.

The social and democratic states of law are broad structures whose full effectiveness requires solutions at more concrete levels. Where could the construction of these solutions start? In my view, constitutional courts must follow basic principles of constitutional democracy while also taking into due account the constraints posed by their singular and particular historical and political realities. It should be recalled, for instance, that in Latin America the introduction of the model of constitutional justice has been particularly challenging due to the need to adapt the region's consolidated historical reality to the new structure. In contrast, in Europe constitutional courts emerged as a result of a general re-founding process after the Second World War. As a result, their consolidation ran parallel to the consolidation of a new common political reality.

In consideration of this, the Ibero-American Conference of Constitutional Justice[1] —which gathers constitutional courts and chambers in Spanish- and Portuguese-speaking countries— has from time to time held meetings in which constitutional judges can share experiences and jurisdictional efforts by exchanging ideas, striving at all times to reaffirm the basic principles and values of the Rule of Law, the correct institutional functioning of the branches of government and a more effective guarantee of individual rights and freedoms.

In order to form a database of cases and experiences in Ibero-America that will be analyzed at various roundtables during this conference, the issues to be addressed have been grouped in two sections: "The Influence of Constitutional Justice on Society" and "The Development of Global Jurisprudence on Human Rights." It is also important to always keep in mind the difference between the domestic and the international aspects of our analysis. The domestic approach covers cases that were resolved nationally, while the international contains a reference to the arguments and criteria contained in the opinions of international bodies engaged in the protection of human rights.

II. The Influence of Constitutional Justice on Society

Strict constitutional jurisdiction has been defined as a privileged conflict-solving tool, as well as the forum in which the most profound political issues that cause social groups to confront one another in contemporary democracies are ultimately debated. It is little wonder, then, that exploring its influence on society constitutes an extraordinarily interesting topic.

I propose three main questions to guide the exploration of this topic:

1. We must first explore the collective perception of several aspects: the existence and magnitude of the social impact of constitutional justice; the existence and magnitude of the social reaction (in the mass media, politics and civil society) it causes, as well as the role of constitutional justice in the social fabric.
2. We must then explore how that perception leads to the instrumentation of internal elements in the system oriented at channeling this social impact, namely: the manner in which constitutional courts take into account the consequences of their resolutions upon pronouncing them; the way in which they might modify their decisions in the face of possible harm they may cause, and the obstacles courts may face in this regard.

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[1] *See http://www.cijc.org.*

3. And lastly, we should consider the ways in which these realities are translated into concrete constitutional options, verifying in particular whether social and economic rights enjoy constitutional status and whether they are backed by some form of judicial supervision.

1. As far as the first question is concerned —the collective perception of the social impact of constitutional justice and reactions to it— constitutional justice in Ibero-America is centrally perceived as a necessary influence in consolidating institutional life in the countries of the region. It is true, as will be seen in the following section, that some of its constitutional courts have developed human rights jurisprudence that is very rich in content. But the fundamental source of their social impact must be associated, I believe, with the maintenance and preservation of the normal functioning of democratic and republican institutions. In other words, constitutional courts are perceived more as guarantors of correct institutional interaction and the division of powers than as champions of individual rights against eventual abuses by law-making bodies.

Many constitutional courts have received recognition for their achievements in this regard. In Chile, for example, the Court is associated to the transition process that took place from 1985 to 1987;[2] in Venezuela, the importance of court resolutions confirming the autonomy and independence of the judicial branch *vis-à-vis* other branches is widely acknowledged; in Guatemala, as well, we find paradigmatic cases such as the one in which the Court had to declare the unconstitutionality of the dissolution of the Court attempted by the President, as well as the unconstitutionality of the concentration of legislative powers in the hands of the President, a decision that was not challenged by the army and ended up preserving the basic structure of the constitutional state;[3] in Brazil, the Court has declared highly sensitive pieces of legislation concerning the federal allocation of powers unconstitutional, decisions that have not gone without tensions and opposition from political parties.[4] We can also mention many cases in Mexico where the Supreme Court has re-shaped or re-invigorated the workings of the federal system, and also reinstated the conditions under which it safeguards the division between the three branches of government.[5]

Society's reaction to constitutional justice runs along the same lines. Latin American societies bring social conflicts to constitutional courts for the basic purpose of keeping public authority within constitutional parameters. For example, in Panama[6] and Argentina[7] we find high-profile resolu-

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2 *See*: *http://www.tribunalconstitucional.cl*.

3 *See*: *http://www.cc.gob.gt*.

4 *See*: *http://www.stf.jus.br/portal/principal*.

5 *See*: *http://www.scjn.gob.mx/Paginas/PaginaPrincipal2008.aspx*.

6 *See*: *http://www.organojudicial.gob.pa*.

7 *See*: *http://www.csjn.gov.ar*.

tions that have declared the unconstitutionality of amnesty laws issued to unjustifiably establish immunity for certain groups. Freedom of speech cases must also be mentioned in this regard. The courts' function to guarantee this right central for the preservation and development of incipient processes of democratization has been remarkable in countries such as Colombia,[8] Uruguay[9] and Chile.[10]

With regard to the social reaction to what constitutional courts do, I would underline two points: the influence of the mass media on the still embryonic social debate on constitutional court decisions; and the need to find more specialized forums and means to allow for proper debate within civil society. An innovative strategy, for instance, has been developed in Mexico where a limited access public television channel has been launched for the principal purpose of disseminating judicial activity. In Brazil as well, the Court has produced a significant number of programs and transmissions on legal matters. On the other hand, we can still observe a degree of political hostility toward the expansion of constitutional jurisdiction into spaces that were previously the exclusive preserve of politics —something that has not developed, however, into generalized and systematic action that jeopardizes the ordinary progress of the courts' work.

2. Has this social response and interaction had an impact on the system of constitutional adjudication? In my view, the answer is yes: it has become inherent to the functioning of constitutional justice. The role of constitutional courts as true "social architects" is discussed in many Ibero-American countries and courts take into account this kind of social impact when deciding their cases, and even when technically designing the way to issue their decisions. In Colombia,[11] Costa Rica,[12] Portugal[13] and Spain,[14] for instance, there is a growing body of case-law dealing with the characteristics of opinions in terms of their various spheres of application, *erga omnes* opinions as the ones that receive greatest attention in this regard. However, the best example of this phenomenon is the proliferation of "interpretative" opinions, a technique explored and used by constitutional courts to avoid pronouncements of unconstitutionality.

This development demonstrates that it is quite common for courts to self-consciously perceive their role as social architects and their corresponding concern as that of conciliating practical results with constitutional content while managing the institutional impact of their decisions. It is frequent

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8 *See*: *http://www.corteconstitucional.gov.co*.

9 *See*: *http://www.poderjudicial.gub.uy*.

10 *See*: *http://www.tribunalconstitucional.cl*.

11 *See: http://www.corteconstitucional.gov.co*.

12 *See: http://www.poder-judicial.go.cr*.

13 *See*: *http://www.tribunalconstitucional.pt*.

14 *See*: *http://www.tribunalconstitucional.es*.

to find some contrast and differences between cases in which a general statute has been challenged and those dealing simply with particular acts of authority. Courts assess the eventual impact of there decisions very differently when they touch upon the powers of the other branches of government. Equally interesting in this regard is the way courts engage in the analysis of legislative omissions, particularly when social rights are concerned. In many of these cases, courts enjoy considerable leeway in shaping normative hypotheses and solutions that will win the day —at least temporarily. This is, something that is met with suspicion by political branches ready to read these decisions as an encroachment on their powers.

In most cases, the pressure society has directly exerted on constitutional courts is inspired by a recognition of the historic singularities of the region and its pluralism. This is clearly observed in constitutional decisions dealing with indigenous communities in countries such as Bolivia, Chile and Mexico. The conciliation of the special demands of these communities has often taken place at a jurisdictional level in processes that have channeled the demands of broad social movements into the basic institutional network of the constitutional state.

3. Lastly, with regard to the issue of the way in which this social interaction has had a specific impact on "constitutional content," we need to refer to the way Ibero-American constitutional courts have fulfilled their task of overseeing constitutionalized economic and social rights. This has allowed them to play a direct role in the design and attainment of social goals in their countries. A particularly important reference must be made to the doctrine of "progressiveness" that many courts have adopted when facing cases that have forced them to speak about the scope of these constitutional entitlements. With few exceptions, social rights have not been acknowledged in the region as a binding force equal to that enjoyed by traditional civil liberties.

III. The Development of Global Jurisprudence on Human Rights

With regard to the second topic, constitutional justice in Ibero-America is undoubtedly pushing forward the development of global jurisprudence on human rights. As is almost unanimously acknowledged, the extent of overlapping in the interpretation and definition of the scope of fundamental rights among Ibero-American courts is rapidly increasing.

One of the elements that favors this process of increasing commonality is no doubt the extent to which international law is incorporated into opinions. This is so even though Ibero-American courts do not uniformly invoke international or regional human rights instruments. Among other rea-

sons, this is due to the fact that their binding quality according to domestic constitutional rules greatly varies and not all courts have developed a general interpretative theory that defines the specific role of these legal sources. However, it is clear that the constitutional courts of the region constantly and increasingly use and apply international human rights arguments, as a recourse to expressing provisions in their constitutions or to legally or jurisprudentially create the notion of a unified "block of constitutionality."

There is no uniformity among Ibero-American courts as to the form in which reference to decisions of international human rights bodies should be made. Nevertheless, there is clearly more uniformity in the way courts cite international opinions dealing with specific fundamental rights than in the way they directly apply and interpret international treaties. Nevertheless, disparity still exists between courts that constantly and consistently cite international jurisprudence and those that only do so only on an exceptional basis. There is also a more basic disparity in the ways they undertake the operation of spelling out the meaning and the purposes of international pieces of legislation. In some cases, courts apply themselves to the task of expounding and re-recreating the meaning of those texts while in others, they systematically defer to what has been said in opinions issued by international courts (for instance, the Inter-American Court of Human Rights,[15] the European Court of Human Rights[16]).

A few relevant examples of the use of international jurisprudence include: a decision on sex change in which the Supreme Court of Justice of Uruguay cited international case-law from both the Inter-American Court of Human Rights and the European Court of Human Rights; freedom of speech and due process cases, as well as in those dealing with vulnerable groups, decided by the courts of Guatemala and Colombia where they made ample reference to the decisions made by international bodies, though clearly giving priority to Inter-American Court jurisprudence. In Mexican cases dealing with the interaction between the right to health and the right to earn a living through medical practice, we have also cited the views of international courts, the United Nations Committee of Human Rights and its Committee on Economic, Social and Cultural Rights.

Because of the various ways in which supreme and constitutional courts introduce international law into national systems, it is difficult to speak of the existence of something like a "global or regional human rights jurisprudence rooted in international instruments." However, some Latin-American countries accord direct authority to the opinions of the Inter-American Court of Human Rights, regardless of the fact that, strictly speaking, they are legally binding only for states who are parties to the litigation and not

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15 *See*: *http://www.corteidh.or.cr*.

16 *See*: *http://www.echr.coe.int*.

all states in the region. This, in turn, poses new challenges: in the *Almonacid Arellano versus Chile* case, the Inter-American Court of Human Rights invited states to exert "conventionality control" through their judicial bodies, by contrasting their national law with the Inter-American convention. The possibility of recognizing the existence of more than one authorized interpreter of regional human rights treaties opens up completely new ways of building up protection for fundamental rights in the region.

In any case, the jurisprudence of international bodies is not the only possible source for creating global jurisdiction on human rights. The case-law of foreign tribunals can also play a role. Within the traditional legal culture in the region, this kind of evolution does not come as natural. But the fact is that, in most countries, one notices an ever-increasing willingness to engage, either explicitly or implicitly, in a dialogue with foreign courts. For example, the Constitutional Court of Guatemala[17] recently has made reference to what had been established by the Supreme Court of Argentina, the Colombian Constitutional Court, the Constitutional Court of Bolivia and the Spanish Constitutional Court in a high-profile case dealing with freedom of conscience. In the recent abortion debate in the Mexican court, repeated references were made to the constitutional court decisions of Germany, Colombia, Argentina, Spain, Canada and the United States[18] for similar cases. In many others, however, courts tend to refer to their equivalents in other countries implicitly. While there are no formal quotes, echoes and traces of what has been discussed elsewhere can be detected.

The extent of the references and the depth of comparative research it rests upon is still largely variable from case to case, but one can clearly observe a "jurisprudential dialogue" that is at present more fluid among supreme or constitutional courts than among national and international courts.

The development of global jurisdiction on human rights necessarily implies the need to create open "jurisprudential dialogue" along these two lines. And it is not only national tribunals that must examine what international bodies and foreign courts have said more carefully. International bodies must also keep a close and careful eye on what each country does when interpreting basic laws and international treaties. As stressed above and according to legal provisions in each country, the dialogue proceeds sometimes explicitly, sometimes implicitly. Regardless, it is necessary to take steps that would make this conversation more open.

We are inevitably involved in the process of constructing global jurisdiction on human rights on a highly de-centralized institutional platform, and not only for the overall purpose of finding common technical tools, but also and mainly for the purpose of building a common foundation of constitu-

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17 *See*: *http://www.cc.gob.gt*.

18 *See*: *http://www.supremecourtus.gov*.

tional values. The challenges are considerable, but the first steps have already been taken. We are on the road to building, perhaps not a uniform jurisprudence, but certainly an unquestionably global jurisprudence through which those of us who have the responsibility of speaking in the name of constitutional justice must find ways to assure better and greater protection of human rights, and more extensive institutionalization of peaceful social interaction.

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MEXICO'S 2007 ELECTION REFORMS: A COMPARATIVE VIEW

Heather K. GERKEN*

ABSTRACT. *This note explores Mexico's 2007 election reforms from a comparative perspective and offers a few cautionary notes on the long-term consequences of Mexico's constitutional choices. It also offers a brief analysis of the electoral system of the USA and the situation which arose in the 2000 Bush vs. Gore election.*

KEY WORDS: *Democracy, constitutional reform, elections, campaign financing.*

RESUMEN. *Este ensayo presenta un análisis desde una perspectiva comparada de la reforma electoral mexicana de 2007 y ofrece algunas advertencias con respecto a las consecuencias a largo plazo de las decisiones constitucionales que ha tomado México. También estudia el sistema electoral de los Estados Unidos de América y la elección de 2000 entre George W. Bush y Al Gore.*

PALABRAS CLAVE: *Democracia, reformas constitucionales, elecciones, financiamiento de campañas políticas.*

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* J. Skelly Wright Professor of Law, Yale Law School. This note is a lightly footnoted version of the remarks I delivered at the conference, *Mexico's New Democratic State: Political, Legal & Institutional Challenges*, organized by the Institute for Legal Research of the National Autonomous University of Mexico and Columbia University on February 19-20, 2009 in New York City. Thanks to Chris LeConey and Sophia Brill for excellent research assistance.

I. Introduction

It is hard not to be impressed with Mexico's election reforms during the last two decades. For a scholar who studies the United States, a mature democracy that is often run badly, it is refreshing to see a relatively young democracy run so well. It is also heartening that an "electoral meltdown"[1] can result in serious reform and grassroots engagement. The fiasco that confronted the United States in 2000 prompted Congress to pass the toothless Help America Vote Act, which addressed only the symptoms of the Florida debacle, not its root causes. The 2006 crisis in Mexico, in sharp contrast, resulted in serious and systemic reform. In the United States, election reform is almost entirely an elite enterprise, with little by way of grassroots involvement. In Mexico, election reform is a source of genuine participatory engagement. The failure to pass serious election reform in Mexico after 2006 would have raised serious questions about the legitimacy of the State. The failure to pass serious election reform in the United States after 2000 barely raised an eyebrow.

Because the differences between the two countries are so pronounced, it would be a mistake to insist that lessons learned from the United States necessarily apply to Mexico. For that reason, in this note I will simply draw upon the U.S. experience to raise several questions about the new reforms in Mexico, leaving the answers to those more intimately involved in Mexican politics.

II. Campaign Finance Reform, Ossification and Lock-up

The 2007 reforms made significant changes to Mexico's campaign finance system. The new rules prevent individuals and third parties from purchas-

[1] Richard L. Hasen, *Beyond the Margin of Litigation: Reforming Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937 (2005). For an analysis of the Mexican 2006 elections *see* John M. Ackerman, *The 2006 Elections: Democratization and Social Protest*, *in* Mexico's Democratic Challenges (Andrew Selee & Jacqueline Peschard eds., Stanford University Press-Woodrow Wilson International Center for Scholars, 2010).

ing television and radio ads for the purpose of influencing an election, placing restrictions on the content of political speech, and sharply reducing the amount of money available for campaigning. This trio of reforms brings to mind the two main challenges faced by election reformers in the United States: ossification and lock-up.

1. *Two Challenges for Election Reformers*

One perennial problem reformers have encountered in improving U.S. elections is ossification. Law is typically the means used to freeze reforms in place. Its virtue is also its weakness in this regard, as law is often ill-suited for adapting to a changing regulatory environment. Once rules are in place, a set of interests develops around them. As constituencies become invested in the *status quo*, these rules become quite resistant to change. You can see the dilemma for reformers. They want to secure hard-won gains, but the means by which they do so may ultimately prevent regulation from keeping pace with change.

This problem is especially salient for election reformers. For politics to function, it is essential that the rules of the game be fixed in advance. Otherwise, politicians will devote their energies to gaming the system rather than competing on substance. Indeed, because the ruling party will always be tempted to alter the rules of the political game, reform commitments will be perceived as credible only if they are firmly entrenched in the legal system. The problem is that politics, with its fractious energy and entrepreneurial participants, can change quite rapidly, leaving existing regulatory structures behind. Rick Pildes, for instance, has argued that when election law is used to address ethnic discrimination, the need to create "credible institutional commitments" to the minority group can "make it difficult for these institutions… to be adapted down the road as ethnic identifications change."[2] He points to the Voting Rights Act in the United States as an example, arguing that the vision of racial empowerment originally embedded in the Act eventually became outdated and was in need of adjustment.[3]

The second problem for election reformers may be peculiar to elections: avoiding lock-up.[4] Lock-up occurs when insiders use electoral rules to lock-up the political system. Lock-up can take many forms: the ruling party can lock out its rival, major parties can lock out minor ones, elites can lock out the people. Examples of lock-up abound in the United States. Parties in

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[2] Richard H. Pildes, *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, *in* CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION 173, 185 (Sujit Choudhry ed., Oxford University Press, 2008).

[3] *Id.* at 195-97.

[4] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lock-ups of the Democratic Process*, 50 STAN. L. REV. 643 (1983).

control of the redistricting process use that power to help their own members and hurt their rivals. Campaign finance reform is often thought to be a tool for entrenching the power of incumbents.

Here again, the dilemma for reformers is clear. In order to get change passed, reformers must find a way to appeal to those in power. But when politicians regulate themselves, the temptation for self-dealing is intense. Reform is often hijacked for partisan ends. Indeed, even genuine good governance reforms can further entrench existing institutions and power structures.

2. *Campaign Finance Reform*

The question is whether the problems that plague reformers in the United States —ossification and lock-up— might prove equally troublesome to reformers in Mexico. There are grounds for sounding a few cautionary notes about the reforms Mexico has chosen. In raising these issues, I do not mean to question the importance of the reform nor the good faith of the people who passed it. I simply want to flag some of the potential risks associated with each change.

A. *Channeling electioneering through the parties*

One of the most interesting features of Mexico's recent reforms is its decision to prohibit individuals and third parties from buying radio or television advertising time with the intention of influencing an election.[5] Given the importance of these media for political campaigns, this rule effectively channels most electioneering —at least the most effective sort— through the political parties.

It is not hard to imagine the attractions of such a proposal. As the U.S. experience with 527 organizations has shown, there are genuine costs associated with pushing electioneering outside of the parties' domain. You might think that parties are more likely to electioneer responsibly, or at least that one can hold them responsible for what they do. You might think that it is easier to trace the effects of money on politics if heavily regulated institutions like parties are the main conduits of political advertising. You might think that it is important for parties and candidates to have some control over the messages broadcast on their behalf.

There are, however, potential costs associated with this choice. To begin, there is a potential risk of ossification. Funneling advertising through

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[5] Senate preamble and full text of the 2007 Electoral Reform, Chamber of Senators, Mexican Congress. *See* "Legal Documents" in this issue of the MEXICAN LAW REVIEW, Vol. II, No. 1.

the parties gives the party leadership leverage over outsiders, dissenters and minorities. Imagine that you wanted to challenge your party's platform on a highly contested issue. The party leadership will presumably have little interest in getting your message out, and the new rule prevents you from deploying the most natural strategy for countering the party's stance. It is not hard to imagine that such a rule might reinforce the dominance of the major parties, shielding them from outside influence or grass roots pressures. After all, the new rule seems to reduce both voice and exit options for party outsiders.[6] It cuts off an exit option, preventing would-be dissenters from going outside of the party structure to get their message to the electorate. Concomitantly, would-be dissenters might also find themselves with less voice inside the party, precisely because they no longer have a credible threat of exit.

Some might well welcome efforts to prevent would-be dissenters from going outside of the party structure to pursue their goals. Many think that it is useful for political fights to be resolved within the major parties.[7] The concern, though, is that a rule might contribute to the ossification of the party structure, protecting it from outside influence and making it more resistant to challenge. Whether ossification occurs, of course, will depend not just on this rule, but also on its interaction with the other features of Mexico's party system.

The lock-up problem may also lurk beneath the surface of this rule. There are many perfectly sensible reasons to channel electioneering through the parties, all consistent with a good-faith view about reform. But one might have a nagging worry that the one thing on which the leadership of all the parties can agree is that they should be the sole conduits for the most important forms of electioneering. Sensible reform strategies can and do coincide with the self-interest of incumbents, of course, but one should nonetheless be aware of the potential problem of self-interest at stake in these reforms.

B. *Restrictions on the content of political appeals*

Mexico has also decided to prohibit political parties from denigrating institutions and parties and from slandering individuals.[8] This restriction on the content of political speech would seem intriguing to at least some U.S.

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[6] *See* generally ALBERT O. HIRSCHMAN, EXIT VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (Harvard University Press, 1970).

[7] Nate Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 NYU L. REV. 750 (2001); Bruce Cain & Nate Persily, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000).

[8] Ackerman, *supra* note 1.

campaign finance advocates. Many bemoan the quality of political discourse in the United States, arguing that it is filled with invective and fails to promote a deliberative ideal.

As a scholar of the U.S. Constitution, it is hard to resist the impulse to focus entirely on the First Amendment implications of such a reform. Much of the First Amendment is built around the assumption that the government should play little or no role in regulating the content of political speech. Because the constitutional regimes of the two countries are so different, however, it seems more productive to focus on the institutional problems this rule might create, and here again ossification and lock-up come to the fore.

To begin, one might worry that this reform risks stultifying politics. It might seem perverse to worry about tamping down on the rough-and-tumble elements of political debate and eliminating the admittedly disgusting personal attacks that sully so many races. But it is a perfectly sensible concern if you believe that what energizes the electorate is the odd fusion of high and low politics that we often see during election season. The drama of the race focuses people's attention on the issues, and candidates provide human stand-ins for abstract policy proposals. In the words of one commentator:

> Popular politics has always been like a waterfall, graspable only in motion, always in descent, and yet never quite falling. Politics is not simply a matter of issues — at least not as we generally understand the term today. In a democratic society, politics is not just a means to governance but a form of public spectacle and drama. It is filled with rooting for your side; the joys of partisanship; the camaraderie of shared beliefs; the reveling in political talk; the pleasure of invective… There is no such thing as an engaged politics that does not to some degree derive its vitality from antagonism.[9]

Consider, for instance, the stark divide between electioneering and governing in the United States. A candidate might electrify voters and still find it hard to keep them engaged when he turns to the workaday project of governing. Note, for instance, how hard it has been to convert Obama for America into an equally muscular Organizing for America. Without the drama of the campaign and the excitement generated by personal rivalries, voters tend to fall away. They stop participating. They sometimes even stop paying attention.

If you think politics is what happens when policy gets personal, then you might worry about the effects of a prohibition like Mexico's. Heated electioneering may be both a symptom and source of vibrant participatory activity, and efforts to tamp down on those outbursts may dilute political en-

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[9] Josh M. Marshall, *Tough Chat*, *in* THE AMERICAN PROSPECT Sept-Oct. 1998, at 15.

ergy. I am thus quite sympathetic to Professor Ackerman's claim that the *uncivil* elements of 2006 were signs of vibrant, grassroots organizing that can be very good for the system in the long run.[10] The worry about efforts like Mexico's is that that civilizing politics may deaden it.

Finally, even setting aside the worry about ossification, one might be concerned that the prohibition on political invective fits a bit too easily with the interests of incumbent politicians. After all, it is not hard to imagine that most political name-calling is directed at those in power by those outside of it, if only because challengers need these types of dramatic appeals to get political traction. Justice Scalia made precisely this argument about Congress's decision to restrict the ability of corporations and political parties to fund issue ads. By preventing these institutions from "fund[ing] 'issue ads' that incumbents find so offensive," he insisted, the legislation would "mute criticism of [congressional] records and facilitate reelection."[11]

C. *Reducing funds available for campaigning*

One might have a similar set of worries about Mexico's decision to cap the amount of money political parties can raise from private sources while reducing the public funds available for campaigning.[12] Campaign finance advocates in the United States inevitably want to pull money out of politics. Indeed, they often argue that taking money away from politicians will drive them toward volunteers and the grassroots rather than the wealthy and the airwaves.

Even setting aside the regulatory challenges involved in reducing money's influence on politics,[13] the question is whether it's the right strategy for the long haul. The Obama campaign has posed a challenge to reformers in the United States, suggesting that the relationship between money and participation is more complicated than reformers typically suggest. While it clearly does not take $745 million to run a campaign, Obama was able to energize and organize so many people precisely because of the money he raised. Running a vibrant grassroots campaign turns out to be expensive. Moreover, the Obama campaign suggested that money was not just a means to encourage participation; it was a *form* of participation. Small donors to the Obama campaign became more and more invested in the candidate and gradually began to take part in other activities, like getting out the vote.

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10 Ackerman, *supra* note 1.

11 *McConnell v. FEC*, 540 U.S. 93, 248, 262 (2003) (Scalia, J., dissenting).

12 Ackerman, *supra* note 1.

13 Pamela S. Karlan & Samuel Issacharoff, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

The question for Mexican reformers is this: how much money is needed to run a vibrant political campaign? It makes perfect sense to deny politicians a political feast. But one must also be sure to avoid political famine, starving campaigns of the resources they need to energize the electorate.[14]

This worry leads, in turn, to the lock-up question. There is a lively debate in the United States as to whether spending limits make it harder for challengers to take down political incumbents.[15] The concern is that the only way to overcome the power of incumbency is a well-funded campaign. Here again, one might have a lingering worry that political incumbents can always agree upon campaign finance rules that make life more difficult for their challengers.

III. The IFE as Über-Regulator

Mexico's effort to extend the regulatory authority of the Federal Electoral Institute (IFE) to campaign finance offers a quite different set of regulatory puzzles. Here again, the U.S. reform perspective suggests several questions about the long-term implications of this strategy.

The IFE represents a markedly different approach to election administration than we see in the United States, and most of those differences strongly favor Mexico's approach. The IFE represents a central regulatory authority shielded from politics. In the United States, elections are highly decentralized and often run by partisans. Most academics and reformers strongly favor an approach like Mexico's. There are many advantages to scale in the elections context, and centralization ensures at least rough uniformity in the way elections are run. And precious few defend the U.S. practice of allowing partisans to run elections. We generally do not allow people to referee the game they are playing, and with good reason. It creates too many opportunities for partisan mischief.

It is thus easy to see the reasons for granting IFE additional regulatory authority. It has a relatively good track record in handling even heated political controversies. Moreover, it should be easier to build on IFE's success rather than try to create a robust campaign finance regulator from scratch.

While the IFE reforms have much to recommend them, the U.S. experience suggests at least two kinds of risks that IFE may face in the future, both

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[14] With apologies to Justice Souter, who used this phrase to far greater effect in *Johnson v. DeGrandy*, 512 U.S. 997 (1992).

[15] For analysis along these lines, including surveys of the social science literature, *see* Michael S. Kang, *To Here from Theory in Election Law*, 87 Tex. L. Rev. 787, 802-05 (2009); Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. Pa. L. Rev. 31 (2004); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 130-53 (2004).

associated with centralization. The first is the risk of regulatory capture. Capture is always a risk with any agency, but as the IFE's influence grows, so do the incentives for influencing it. One of the few benefits associated with the high level of decentralization in the United States is that the benefits associated with regulatory capture are smaller and thus less likely to be worth the effort. As IFE takes on more regulatory power, reformers and policymakers will need to be even more attentive to maintaining IFE's status as a neutral arbiter of Mexico's elections.

Second, and relatedly, as the IFE's portfolio expands, it may well face more significant challenges to its legitimacy. Challenges to the legitimacy of the decisionmaker in an elections controversy are exceedingly familiar in the United States. When an election fiasco occurs in the United States, even purportedly neutral arbiters are quickly accused of having partisan biases. Judges, for instances, are constantly described as Democrats or Republicans by party elites and the media. Even the Supreme Court, a revered institution in the United States, was tarred with accusations of partisanship when it intervened in the 2000 presidential election.

What may have shielded the IFE thus far from many (but not all) such accusations is that it has dealt only with the nuts-and-bolts issues of election administration. While decisions on basic details inevitably have political consequences, the decisions themselves are generally not politically loaded. As IFE is drawn into issues that are more contestable, however, there is a risk that political elites will have not just more reasons to challenge its judgments, but more tools for doing so. Judgments on how to administer an election tend to be fairly technocratic, reasonably objective, and often dull. It is hard to get voters riled up over them. Judgments on the content of political ads, in sharp contrast, are likely to involve more subjective judgment calls on issues about which everyday citizens will have an opinion. That means that a party or candidate unhappy with an IFE ruling will find it reasonably easy to challenge that judgment publicly and, in doing so, raise questions about IFE's legitimacy.

In sum, IFE's expanded portfolio poses several risks for the institution. The more heavily involved it is in political regulation, the more incentives political elites will have to try to influence it… and attack it. As IFE's portfolio expands beyond arcane election administration issues to controversies that might excite political debate, it will be more vulnerable to those attacks. Neither of these reasons, standing alone, is a reason not to grant IFE additional authority, but they do provide a cautionary note about efforts to expand IFE's authority.

IV. Conclusion

Mexico has much to celebrate in the progress it has made in running its elections. This note simply introduces a few, cautionary notes on the long-

term consequences of Mexico's choices, all drawn from the U.S. experience with election reform. Because the United States and Mexico possess markedly different democratic systems, it would be foolish to suggest that the U.S. experience necessarily translates directly into sound advice for Mexican reformers. The point of this essay is simply to raise a set of questions that Mexican reformers and policymakers may wish to consider as the country continues to refine and develop its regulatory approach.

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LEGAL DOCUMENTS

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SENATE PREAMBLE AND FULL TEXT OF THE 2007 ELECTORAL REFORM

CHAMBER OF SENATORS, MEXICAN CONGRESS*

Chamber of Senators

Proposal of the Joint Committee of Constitutional Issues; of Governance; Radio, Television and Cinematography; and of Legislative Studies that contains the draft decree of reforms to the Political Constitution of the United Mexican States concerning Electoral Reform

Approved with 110 votes in favor and 11 against

Remitted to the Chamber of Deputies

Parliamentary Gazette: September 12, 2007

Discussion and Voting: September 12, 2007

Honorable Assembly,

A Draft Decree bill undersigned by legislators from various parliamentary groups, members of the 60th Legislature of the Federal Congress, and presented to the Permanent Committee of the Federal Congress by Senator Manlio Fabio Beltrones Rivera was remitted to the Joint Committee of Constitutional Issues; Governance; Radio, Television and Cinematography; and Legislative Studies of the Chamber of Senators.

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* Translated by Carmen Valderrama. Reviewed by Carla I. Espinoza.

Editor's Note: The text below is a translation of the entire preamble and text of the Constitutional reform bill passed by a multi-partisan two-thirds majority of the Chamber of Senators on September 12, 2007. The reform was then quickly passed by the Chamber of Deputies and by a majority of the state legislatures and was published in the *Diario Oficial de la Federación* (Federal Oficial Register) on Novermber 13th, 2007. For a discussion of the importance of this reform see: Heather K. Gerken, *Mexico's 2007 Election Reforms: A Comparative View*, Vol. II, No. 1 MEXICAN LAW REVIEW 163 (2009) and JOHN M. ACKERMAN, NUEVOS ESCENARIOS DEL DERECHO ELECTORAL (IIJ-UNAM, 2009).

The petitioner's proposal is to amend "Articles 41 and 99 in their entirety; amend the first paragraph of Article 85; the first paragraph of Article 108; Section IV of Article 116; First Chapter Section V, Clause f of Article 122; insert three paragraphs to Article 134, and partially repeal the third paragraph of Article 97 of the Political Constitution of the United Mexican States."

On September 5, 2007, having gathered at the seat of the Senate of the Republic and verified the existence of a legal quorum, the abovementioned members of the Joint Committee proceeded with the presentation of the Draft Decree bill presented on August 31, 2007, by Senator Manlio Fabio Beltrones Rivera in his own name and on behalf of senators and deputies from the PAN, PRD, PRI and PT parliamentary groups undersigning it. This Draft serves as the basis for the analysis and discussion to be carried out by the Joint Committee, who unanimously voted to declare themselves in permanent session.

On September 10, 2007, at 7:00 p.m., the Joint Committee held a second work meeting within the framework of the permanent session declared on September 5th, to examine a second version of the Draft Decree, along with a document explaining the changes included by the Working Group formed of members of the Joint Committee. Deputies, members of the Chamber of Deputies Committees of Constitutional Issues and of Governance, attended the meeting for information purposes.

After an extensive exchange of opinions and the presentation of various proposals, the president of the Joint Committee stated that the committees would continue in plenary session until completing its task.

On September 11, 2007, at 12:00 p.m., the Joint Committee resumed the permanent session in order to examine the final Proposal for the Draft Decree concerning the Bill, object of their work.

Members of the National Chamber of the Radio and Television Industry (CIRT) and communications experts attended this work session and exchanged opinions. At the end of these contributions, a recess was called to resume work at 8:30 p.m. with the members of the examining committees.

Having established the above and under Articles 85, 86, 94 and 103 of the Organic Law of the General Congress of the United Mexican States and Articles 56, 60, 87 and 88 of the Internal Regulations governing Congress itself, the Joint Committee of Constitutional Issues; Governance; Radio, Television and Cinematography; and Legislative Studies issue this Proposal with Draft Decree along the following:

LEGISLATIVE HISTORY

As indicated by the petitioners, the Bill under review "is the first substantial result of the Law for State Reform, enacted on April 13th of this year."

The Joint Committee regards as extremely important the agreement that the political parties and parliamentary groups represented in the Federal Congress's Executive Committee for Negotiation and Building Agreements have reached since it aims at promoting an electoral reform that responds to the problems, deficiencies and voids the Mexican electoral system suffers from, as well as consolidating the significant progress brought about by the reforms effected in this matter between 1977 and 2005.

For this purpose, the Joint Committee has adopted the following considerations, stated in the Bill under review:

> "The proposals for electoral reform that we now submit for the consideration of the majority required to pass a constitutional reform are based on the positive experiences we have had over these three decades in terms of its strong points, as well as its now apparent deficiencies.
>
> It does not propose to start anew, but to consolidate what in hindsight has shown democratic effectiveness and good results. We want to remedy that which did not function and, above all, continue to build solutions that broaden the way to democracy.
>
> The electoral reform we are setting in motion is the next step of the long journey toward a common objective: a more democratic and less unfair Mexico."

We also agree with the guiding objectives that the drafters of the bill have explicitly identified:

> "The first objective is to significantly lower election campaign expenditures, which is intended to be accomplished by reducing the public funding allotted for this purpose by seventy percent for the midterm elections in which only the Chamber of Deputies is renewed, and fifty percent for the elections in which the Executive Power and the two Chambers of the Federal Congress is renewed.
>
> A new way to calculate annual public funding for the political parties' ordinary activities will make it possible to stop it from growing, as it has so far due to the increased number of national political parties. The proposed method would grant clarity and transparency to the implicated cost the party system, a fundamental part of a democratic system, for society.
>
> To state it clearly and simply: with the new method of calculating proposed in this Bill, the public funding for national political parties estimated per citizen would be 35 pesos and 40 cents a year.
>
> Furthermore, much lower limits than those now in force are purported for the private funding political parties can obtain. If ap-

proved, it would reflect a reduction of more than 85 percent of the total amount each party may annually receive under this concept.

The Bill goes on to address an aspect that concerns society and all political parties: the risk that by means of money, illegal or illegitimate interests may come to influence the life of parties and in the course of election campaigns.

Along with reduced campaign financing and to address society's justified demand, the Bill aims to stipulate that the current duration of the presidential campaign be shortened by almost half, going from 186 days to 90 days. This maximum term is also stipulated for senator and deputy campaigns taking place the same year. For intermediate elections, when only the Chamber of Deputies is renewed, campaigns shall only have a duration of 45 days.

In terms of access to communications means, the Bill lays the bases for the majority required to pass a constitutional reform, in full use of its Sovereignty, to make a suitable decision.

A second objective is to strengthen the attributes and power of federal electoral authorities in order to overcome the limitations they have faced in performing their duties. Thus, the Federal Electoral Institute would see its capacity strengthened as arbitrator during elections. Meanwhile, the Bill proposes to perfect the power of the Federal Electoral Tribunal in deciding the non-application of electoral laws that go against the Federal Constitution, coinciding with its attributes of Constitutional Court, which the Constitution itself reserves for the Federal Supreme Court of Justice.

Strengthening the independence of the Federal Electoral Institute, as well as the structure of the Federal Electoral Tribunal, is the main and central purpose of this Bill.

To this end, we intend to implement a proposal, which for many years has merited consensus, but that various circumstances have made it impossible to settle: the gradual renewal of electoral councilors and electoral magistrates. Combining renewal and experience has given positive results in other public collegiate bodies, so we are sure it will give equally positive results in the two pillar institutions of our electoral system.

Also bearing significant weight is the third objective pursued in the proposed constitutional reforms: to prevent actors not involved in the electoral process from influencing electoral campaigns and their results through communications media, as well as to raise the regulations to which governmental propaganda of any kind is subject to the rank of constitutional law during both election campaigns and non-election periods.

We who undersign this Bill have committed ourselves to devise and implement a new model of communication between society and

parties that addresses both aspects of the problem: private law on one side, and public interest on the other. In Mexico, it is urgent to bring the relationship between politics and the media into line under a new course of action. To attain this goal, public authorities must, at every level, always adhere to impartial conduct regarding electoral competition.

The individual rights acknowledged and consecrated in our Constitution are for the people, and not for the authorities. These principles cannot be invoked as a justification or defense for their acts. Freedom of expression is an individual right before the State; government authorities are not protected by the Constitution. The Constitution protects people, citizens, from any occasional misuse of government authority.

Therefore, we propose that laws preventing the use of government authority in favor or against any political party or candidate for an elective office, as well as the use of this same power to advance personal ambitions of a political nature, be incorporated into the text of our Constitution."

CONSIDERATIONS

The Joint Committee shares the idea and intent of giving way to a "third generation of electoral reforms." Between 1977 and 1986, the Mexican electoral system underwent the first generation of reforms, which was fundamentally meant to bring new vitality or political expression into legal life and the electoral competition, thus extending opportunities for national representation in the Chamber of Deputies in the Federal Congress, as well as in state congresses and in city councils.

From 1989 to 1996, a second generation of reforms profoundly transformed the institutions that make up the Mexican electoral system. In 1990, the Federal Electoral Institute (IFE) and the Federal Electoral Tribunal (TEPJF) were established within the framework of comprehensively renovated legislation. In 1994, new reforms gave way to citizen control over the IFE's General Counsel and a wide-ranging set of laws and procedures were implemented to ensure legality throughout the entire electoral process.

In 1996, the latest comprehensive reform was made to the electoral system. It centered on granting the IFE independence and creating the Federal Electoral Tribunal, a specialized body and the highest jurisdictional authority in the matter, endowed with full powers and whose decisions are final and incontrovertible.

Although the last comprehensive reform to the electoral system was carried out in 1996, the Federal Congress has passed other modifications to the law over the following years, notably those which established the rules

to promote gender equality in elective office candidatures and regulated the right to vote for Mexican citizens residing abroad in 2005 and was implemented for the first time in the past presidential election.

As pointed out in the statement of legislative intent of the Bill under scrutiny:

> "The third generation of electoral reforms should respond to the two great problems now facing Mexican democracy: money and the use and misuse of the communications media.
>
> To face these challenges, it is necessary to strengthen electoral institutions, an aim that begins by setting in motion everything within reach of the Federal Congress to regain the trust of the majority of citizens."

Having established the Joint Committee's concurrence with the grounds, purposes and objectives of the Bill, we shall proceed to indicate the reasoning behind specific proposals in order to establish its admissibility.

Analysis of Specific Proposals Included in the Bill and Resolutions of the Joint Reviewing Committee

Although the petitioners establish the amendment reform of Articles 41 and 99, as well as Section IV of Article 116, in the proposed Sole Article of the Draft Decree, implying that these are fully reformed articles, the Joint Committee is aware that it is in fact a proposal of reforms and amendments to the text currently in force.

We interpret the petitioners' reasoning more as a means to provide the reviewers with the full meaning of their proposal to amend Article 41 of the Constitution, than it being a completely different text from the one currently in force.

To provide equal access to all legislators, the Joint Committee has decided to preserve the format of the draft originally proposed in the Bill, transcribing both the texts that are not part of the reform and those under deliberation. These texts deal with Articles 41 and 99, as well as Section IV of Article 116, all of which are from the Political Constitution of the United Mexican States.

In the following section, the substance and the grounds of each specific proposal shall be analyzed to thus be able to carry out a comprehensive assessment of the congruency of the article's text in its entirety and in the harmonious correlation it must maintain with the other articles proposed for amendment.

FIRST

Article 41

In the first paragraph of section I of Article 41, the Bill proposes giving constitutional grounds to the official registry of political parties, for which it offers the following text:

> "I. Political parties are public interest actors. The law shall determine the rules and requirements for the official registry of political parties and the specific ways they can become involved in the electoral process. National political parties shall have the right to participate in state and municipal elections."

This reform is deemed admissible since the text currently in effect does not make any reference to the requirements to be met by organizations aspiring to and requesting official registry as a national political party. These requirements are set forth in the corresponding legislation, but require precise constitutional grounds.

The second paragraph of section I of the Bill proposes the following changes:

> "The purpose of political parties is to promote participation of the people in democratic life, contribute to the integration of national representation and, as citizen organizations, be the sole means of making it possible to gain access to this by exercising government functions,** according to the programs, principles and ideas they propose and by means of universal, free, secret and direct suffrage. Only citizens may form political parties and freely and individually affiliate themselves to political parties. Therefore, it is prohibited for union organizations or organizations with a corporate purpose other than that of founding parties or any kind of corporate affiliation to intervene."

The proposed amendment aims, on one hand, to solve a dilemma to which an appropriate solution has yet to be found. We refer to political parties' right to name candidates to elective offices, as recognized by Article 175 of the corresponding legislation as an exclusive right, notwithstanding the electoral reforms that have taken place in some states that allow, under

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** Editor's Note: This explicit prohibition of the possibility of independent candidates was eliminated on the Senate floor during discussion and did not find its way into the final reform bill. All other aspects of the present bill passed without modification.

its jurisdiction, the registry of so-called "independent candidates," that is, the participation of citizens not affiliated to a political party in elections as candidates to public elective offices.

The Supreme Court of Justice of the Nation had ruled that the provisions approved by local legislatures (the Yucatan case) in terms of the above are grounded in the systematic and functional interpretation of constitutional principles and laws on electoral matters. They have also alluded to the various international treaties Mexico has ratified on issues of human and political rights, defending citizens' right to being elected without having fulfilled the requirement of being postulated by a political party.

Establishing a general solution for this issue, one that is valid for every moment, place, and circumstance has proven itself impossible. International cases and comparative law shows that each country has solved this issue in accordance with the particularities of its political culture, its history of elections and its party system.

In Mexico since the late 1940s, the electoral system has been patently oriented toward promoting the rise, development and consolidation of a party system, as the basis of electoral competition. The reforms that took place between 1977 and 1996 were oriented along the same line and gradually defined a system of rights and obligations for political parties, which our Constitution defines as "Public Interest Actors." Establishing the right of each citizen who so decides to register and participate as a candidate for an elective office in the Constitution, even when satisfying legal requirements, would go against the path Mexico has followed successfully.

Moreover, it is evident that the so-called "independent candidacies," if adopted as a way of exercising the right to be elected to office, would openly contradict the legal framework that outlines the course of elections and campaigns, notwithstanding the guiding principles of the entire system. To recall, the Constitution establishes, for example, the obligation that the public funding political parties receive must exceed resources from private sources. A citizen who by himself, without the support of a political party, participates in an electoral competition should have the right to receive public funding; otherwise, the funds he used for his campaign would have to come from private sources, which would violate the constitutional law.

We can cite other contradictory effects in the complex system of regulation and control as established in the Constitution and expounded in the law as regards political parties' revenue and expenditures. The application of the law would be practically impossible since people are dealt with as individuals.

Therefore, the Joint Committee expresses its conformity with the implications of the proposals made by the legislators undersigning the Bill, but believes that the way it is expressed is not accurate since the purpose stipulated in the Constitution currently in effect for political parties has a different aim from that proposed in the Bill under review. This decision is con-

gruent with the objective of bringing about the undivided consolidation of the party system as one of the fundamental components of our democracy and the electoral system.

The other proposed amendment to the second paragraph of section I of the article in question is deemed necessary and justified in light of the negative experiences that have occurred in recent years. If our Constitution already establishes the binding effect that citizens' affiliation to political parties is to be done freely and individually, it is unacceptable for union organizations of any kind, or organizations not involved in the party system, to intervene, almost openly, in the creation of new parties and their official registry processes. Therefore, the Joint Committee believes that the proposal in the Bill should be approved. As a result, this paragraph would read as follows:

> "The purpose of political parties is to promote participation of the people in democratic life, contribute to the integration of national representation and, as citizen organizations, make it possible to gain access to this by exercising government function, according to the programs, principles, and ideas they propose and by means of universal, free, secret, and direct suffrage. Only citizens may form political parties and freely and individually affiliate themselves to political parties. Therefore, it is prohibited for union organizations or organizations with a corporate purpose other than that of founding parties and any kind of corporate affiliation to intervene. Political parties have the exclusive right to request the registry of candidates for elective offices."***

The insertion of a third paragraph to section I of Article 41 to limit the intervention of electoral authorities in the internal life of political parties to what is provided for in the Constitution and in the law should be approved in view of the general purpose behind the amendment so as to consolidate a political party system that has a defined legal framework.

Thus, the Bill proposes the following text:

> "Electoral authorities may only intervene in political parties' internal issues under the terms stipulated in the Constitution and the law."

The Joint Committee moves for its approval because the extreme *judicialization* of political parties' internal issues is a negative phenomenon for Mexican democracy. There are many causes of this phenomenon, but perhaps the most important is the federal jurisdictional authority's continued

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*** *See supra* note **.

practice of interpreting constitutional and legal laws on matters of parties' internal lives. This situation has resulted in the wrongful practice of substituting the law dictated by the Legislative Branch with decrees issued by the chambers of the Federal Electoral Tribunal that have given rise to complex and vast jurisprudence on this matter, which in turn feeds the *judicialization* of politics to further extremes. This was neither the intent nor the spirit of the 1996 electoral reform that instated the Electoral Tribunal and defined it faculties and powers.

The proposal in question shall bring about the amendment of the corresponding legislation for the purpose of perfecting political parties' obligation to have, within their own laws and common practices, internal bodies for efficient and opportune protection of its members' rights, without any delays or subterfuge that would render ineffective the exercise of its militants' rights.

As to political party financing, the *Bill* under review contains proposals that aim at addressing one of the most critical aspects of the electoral system as a whole.

It should be noted that the 1996 constitutional amendment on electoral matters established the bases, still in effect, to determine three types of public funding, the criteria for its distribution and other rules in which the law elaborates on matters of campaign expenditure, oversight, and scrutiny of the national political parties.

In its rules for calculating the amount of resources to be distributed, the public funding system still uses the so-called "minimum campaign cost" as a baseline, which the IFE General Council must establish each year. The text currently in force stipulates that in order to calculate the total amount to be distributed among the political parties "the number of senators and deputies to be elected, the number of political parties represented in the Chambers of the Federal Congress and the length of the electoral campaigns" should also be taken into account. The law elaborates on these factors in a complex set of regulations, which is very difficult for citizens to understand.

The IFE's experience since the enactment of the 1996 reform has been that after the first and only study carried out to the establish the "minimum cost of a campaign for deputy," the General Council has continued with the practice of updating this cost each year based on the consumer price index prepared by the Bank of Mexico. While it is true is that the law lacks objective criteria to determine the so-called "campaign cost," it should be noted that there is tremendous difficulty involved in establishing objective criteria that can be applied as a rule in view of the diverse demographic and territorial factors, as well as those concerning the availability of communications infrastructure and urban facilities seen in the universe of the 300 districts that the national territory has been divided into for electoral purposes.

To this, we must add the effect of the increase in the number of parties represented in either Chamber of the Federal Congress, which was unforeseen in the 1996 amendment. Since for purposes of calculation this number is multiplied by the base, it has an expansive effect on the amount of ordinary funding and, hence, in that of campaign financing. It should be noted that the total amount for this concept grew by more than 25 percent in 2007, in comparison to 2006. This is largely explained by the fact that two new political parties ratified their official registry and are represented in the Federal Congress, making the multiplier go from six to eight.

In view of this, the Joint Committee deems it convenient to modify the way to calculate ordinary public funding allotted to national political parties as outlined in the proposal since it adopts an easily-applied rule that consists of only two factors: a percentage of the daily minimum wage in the Mexico City stipulated in the Constitution, and the number of citizens registered in the voters registry. The result of this mathematical operation is multiplied by the second factor. The result is the total amount to be distributed among political parties under the concept of public funding for their ordinary activities.

With this new method of calculation, which has been adopted by more than twenty states and is commonly used in other nations, the following benefits would be obtained:

First, it would prevent any increment in the amount to be distributed that results from an increase in the number of political parties, as has happened over time. Any increase in this amount would be directly related any increase in the minimum wage and with any growth in the number of citizens registered in the voter registry, which, due to the changes in our country's demographic pyramid, should be much lower than that observed over the last two decades. It is even foreseen that in the short term, the number of registered citizens should begin to stabilize or even fall.

A second benefit of this new method of calculation is that it will convey to society transparency and clarity in terms of the cost of the party system, as the Bill under consideration fittingly points out:

> "The proposed method would grant clarity and transparency to the implicated cost the party system, a fundamental part of a democratic system, for society."
>
> "To state it clearly and simply: with the new method of calculating proposed in this Bill, the public funding for national political parties estimated per citizen would be 35 pesos and 40 cents a year."

Having established the above, the Joint Committee has, however, come to the decision to bring about even further savings than those proposed in the Bill under review, in terms of funding for campaign expenditure, which will be analyzed below. Therefore, the committee has decided that the per-

centage of the daily minimum wage in effect in Mexico City shall be used as the base for the annual calculation of ordinary public funding and stand at sixty-five percent, five percent less than that proposed in the Bill. Just this reduction would save the public treasury more than 200 million pesos once the amendment enters in effect.

The Bill also proposes a change in the current distribution criteria, making it completely proportional to the votes each party obtains in the preceding deputy elections. The current law in effect proposed to be amended was established in 1996 as affirmative action to bring about the advancement of the then-emerging parties. It aimed at creating conditions of competition that, in the beginning, were not conditioned by election results, the product of a system marked by deep-rooted inequality in terms of access to public funding and the communications means.

The measure adopted in 1996 has given results that have been positive in general terms. Today, we have a system of eight national political parties, whose official registries were endorsed by the electorate in 2006.

We, who are members of the Joint Committee, shall assume the responsibility of and understand the justified concern that five of the eight national political parties have expressed regarding the possible negative effects of the implementation of distribution criteria strictly proportional to the number of votes might have on their possibilities to compete, and even more so when the rule of forming part of the Chambers of the Federal Congress is not one of absolute proportionality, but is mixed with a dominant majority.

Therefore, the Joint Committee proposed to the Senate *en banc* that the method to distribute annual ordinary public funding to which political parties have a right, remain under its current terms. As a result, the paragraph in question would remain as follows:

> "a) Public funding to sustain political parties' permanent ordinary activities shall be determined each year by multiplying the total number of citizens registered in the voters registry by sixty-five percent of the daily minimum wage for Mexico City. Thirty percent of the amount resulting from the above calculation shall be distributed equally among the political parties and the remaining seventy percent, according to the percentage of votes obtained in the immediately preceding deputy elections."

The Bill under review proposes a change of enormous weight: a substantial cut in public funding allotted to political parties' electoral campaigns. Today, this funding is established as an identical amount allotted to each party in an election year under the concept of ordinary financing, without any distinction whatsoever between years in which the Federal Executive Branch and the two Chambers of Federal Congress are renewed, and in which only the chamber of Deputies is renewed.

We propose that in general election years, that is, when the Federal Executive and the two Chambers of the Federal Legislative Branch are renewed, public campaign funding should be equal to fifty percent of the amount each party receives under the concept of ordinary funding, half of what is currently in effect. In midterm election years, with the renewal of only the Chamber of Deputies, there will be a seventy percent reduction. In other words, in midterm elections, the treasury would give parties only thirty percent of the amount received for ordinary funding to be used for electoral campaigns.

This reform responds to society's justified demand to lower campaign expenditures and the prevent squandering and misuse of funds so offensive to society.

Hence, paragraph b) of section II of Article 41 would read as follows:

> "b) Public funding for activities aimed at obtaining votes during a year in which the President of the Republic, senators and federal deputies are elected shall equal fifty percent of the public funding that corresponds to each political party for ordinary activities that same year. When only federal deputies are to be elected, the amount shall be equal to thirty percent of said funding for ordinary activities."

As to paragraph c) of section II, the Joint Committee move that the proposal in the Bill be approved with one modification. The reason for this is that the law currently in effect has brought about undesired effects in parties' access to the funds the IFE assigns them and thus comply with the rights of parties. There are no objective criteria to determine the total amount that should be assigned to parties, nor does it indicate the method of distribution among them. The absence of this in the law has brought about a certain degree of discretional judgment in determining amounts to be distributed and a sense of uncertainty among parties, since the party that spends it at an earlier date has a better possibility of obtaining more resources, to the detriment of the others.

For this reason, the Joint Committee move that the proposal contained in the Bill be approved. However, we believe it judicious to strengthen the amount of funds destined for performing specific activities already established in the Constitution, and adopt the rule of thirty percent for all parties and seventy-five percent proportional to the votes obtained by each party, in keeping with the abovementioned criteria for the distribution of ordinary public funding. As a result, paragraph c) of section II of the article in question would be drafted as follows:

> "c) Public funding for specific activities associated with education, training and socio-economic and political research, as well as for publishing activities, shall be equivalent to three percent of the total

> amount of the annual public funding that corresponds to ordinary activities. Thirty percent of the total amount resulting from the above calculation shall be distributed equally among political parties while the remaining seventy percent shall be distributed to parties based on the percentage of votes obtained in the immediate preceding deputy elections."

The Bill under review also proposes the amendment of the last paragraph of section II and the insertion of a second paragraph *in fine* to the text currently in effect.

In terms of the first proposal, the provisions already established in the text currently in effect shall remain intact while the proposed insertions aim mainly at conferring constitutional grounds for the law to regulate not only political party spending for electoral campaigns, but also those for their primary elections to select their candidates.

The proposal is deemed admissible because internal candidate selection procedures, one of which is in the form of primary elections, are part of a permanent reality in the Mexican electoral system and must be regulated by law. Moreover, court precedent states that these procedures and primary elections are part of the electoral process governed by the Constitution.

As to the second addition proposed in the new draft, it should be noted that it aims at setting a maximum amount of contributions from party supporters, that is, political parties' private funding, equivalent to ten percent of the maximum amount of expenses set in the immediately preceding presidential election. With this, the amount each party can receive under this concept would lower significantly. To date, under the rules established by law, this amount comes to almost 270 million pesos a year per each party. Changing the calculation base would lower this amount to some 65 million pesos, if the cap on presidential campaign expenses remained at 2006 levels. However, it is apparent that the Federal Congress needs to lower the criteria in the corresponding legislation so the IFE's General Council may set the amount in order for it to coincide with the substantial reduction proposed in this Proposal for public funding for election campaigns. Thus, it is estimated that the maximum amount of private funding each party may receive a year will not exceed 40 million pesos, a decrease of approximately 85 percent in comparison to the current amounts.

Meanwhile, regarding the proposal to insert a paragraph *in fine* to section II, it should be noted that some time ago, specialists and parties proposed codifying the destination of the assets and resources of parties that lose their official registry due to any of the presumptions stipulated in the law. The assertion arose from the openly unscrupulous behavior of one political organization upon losing its official party registry. This organization refused to fulfill its obligation of rendering accounts and its leaders apparently dis-

posed of the assets and the remainder of the revenue from public funding they had been receiving for more than four years.

The Bill proposes, and the Joint Committee concurs, establishing constitutional grounds that will make the liquidation of assets and liabilities mandatory, as well as the return of the remaining assets and resources of political parties that lose their official registry to the treasury, based on the presumptions and rules to be established in the law.

Therefore, the approved text for the above paragraphs in this section, would read as follows:

> "The law shall establish the limit of the disbursements for political parties' primary election and election campaigns. The law itself shall establish the maximum amount of contributions parties may receive from their supporters. The annual total amount of these contributions per party may not exceed ten percent of the maximum amount of expenses established for the preceding presidential campaign. Likewise, the law shall classify control and oversight procedures on the origin and use of all the resources in their possession, and shall apply the sanctions deemed necessary for non-compliance with these provisions.
>
> Likewise, the law shall establish the procedure to liquidate the assets and liabilities of parties that lose their registry and the premises under which their assets and balances shall be transferred to the State."

The Bill under review proposes inserting a new section III to Article 41 of the Constitution to establish the rights of political parties to use radio and television be regulated in the corresponding legislation.

Therefore, the Joint Committee outlines the following considerations:

First of all, we believe it necessary to give solid constitutional grounds to the amendments introduced in the law on this critical issue. Therefore, the decision has been made to articulate these grounds in the new section III of Article 41 of the Federal Constitution.

Second, the four Reviewing Committees, at the session ordered by the Managing Committee of the Permanent Committee of the Federal Congress, go on to discuss the motives that jointly led them to propose to the Federal Congress, and through Congress to the majority required to pass a constitutional reform, a new model of communication between political parties and society, under the following considerations:

1. For several years societies and nations worldwide have been immersed in the revolution brought about by scientific and technological developments that have made instant communication possible through ra-

dio, television and new cybernetic means, among which the Internet stands as a change of historic proportions;

2. Societies and nations in the 21st century have been placed within the globalization process by means of information flows, which have irreversibly crossed over national borders. This new reality, which we are just beginning to know, opens up unprecedented challenges for the preservation of democracy and the sovereignty of each Nation. It is no exaggeration to say that the political-constitutional systems that each State has established for itself, in exercising its right to self-determination, are now experiencing great challenges within the framework of International Law;
3. For at least the past fifteen years, democratic nations have shown the tendency to move political races and election campaigns out of their historically established places —first, public squares, then printed media— towards electronic means of social communication, principally radio and television;
4. This new reality, marked by the growing social influence of radio and television, have created effects that go against democracy by consciously or unconsciously leading to the acceptance of patterns of political and electoral propaganda that imitate or replicate those used in the market to place or promote merchandise and services to those who aim at consumer acceptance;
5. In view of these trends seen worldwide, politics and electoral competition are exposed not only to models of propaganda that are foreign to it, but also to the risk of falling under the influence of radio station and television channel owners or concessionaires, or of other groups with the sufficient economic leverage to reflect their influence in communications media. Such a situation would give way to an extralegal economic power that goes against democratic constitutional order;
6. In Mexico, with the 1996 electoral reform, the conditions of electoral competition underwent a radical change toward equality and transparency. The instrument to bring about this change was the new model of public funding for parties and their campaigns. The root of this change is found in the constitutional provision that establishes the mandatory prevalence of public funding over private;
7. However, since 1997, a growing tendency for political parties to earmark increasingly larger proportions of the funds received from the State to purchase air time on radio and television has been observed. This situation reached extreme proportions in the 2006 elections since, according to IFE data, parties on average allotted more than 60 percent of their campaign spending budget to purchasing air time on television and radio, in that order of importance;
8. In addition to concentrating expenditures in radio and television, there is a worrying fact consistent with the proliferation of negative

messages excessively spread in these communications media, however harmful to society and to the democratic system. Despite the fact that legal provisions establish political parties' obligation to use half their allotted time on television and radio to make their electoral platforms known, this law has become a dead document from the moment parties opted to purchase and broadcast spots (20 seconds) in which their message takes on the traits of commercial advertising or aims at attacking other candidates or parties;

9. This situation has become increasingly exacerbated in state campaigns for governor and in municipalities with larger populations and socio-economic importance, as in the case of the Mexico City;
10. Society clamors for this; it is a democratic obligation and in the best interest of all political forces committed to advancing democracy and strengthening electoral institutions to put a complete stop to the negative trends seen in using television and radio for political-electoral purposes during campaign periods as well as in non-campaign periods.

In summary, the legislators who form part of the Joint Committee are convinced that the time has come to make way for a new model of social communication between parties and society, with different bases, different aims and in such a way that neither the money nor power held by the communications media is erected as determining factors in election campaigns and their results or in the political life of the nation.

This is society's clamor; this is the Federal Congress's response, which we hope will be fully shared by state legislatures, an integral part of the majorities required to amend the Political Constitution of the United Mexican States.

The bases for the new model of social communication proposed for incorporation into Article 41 of the Constitution are:

I. Political parties shall be strictly prohibited from acquiring air time, in any form, on radio and television;
II. Political parties' permanent access to radio and television shall take place exclusively during the amount of time allotted to the State on these means, according to this Constitution and the law. This time shall be consigned to the Federal Electoral Institute as the sole authority for these purposes;
III. The specific allocation of radio and television air time shall be made by the Federal Electoral Institute, for its own purposes and to effect the exercise of the rights that this Constitution and the law grants to political parties;
IV. The constitutional right that, for purposes of a new model of social communication between society and political parties, the State must allocate the amount of time allotted on radio and television for the objectives stipulated in the new section III of Article 41 of

the Constitution during both federal and state election processes, as well as in Mexico City. This changes the use of the air time the State already has at its disposal and does not impose fees or taxes in addition to those already in place, by the concessionaires of these communications media;

V. Along with the decision adopted regarding the criteria for distributing funding for ordinary and specific activities, it is directed that parties' allotted time on radio and television during primary elections and electoral campaigns shall be distributed the same way, that is, thirty percent equally and seventy percent in proportion to the votes obtained;

VI. The laws that apply to the use of radio and television by state electoral authorities and political parties during local electoral campaigns are established in section III, sub-section B, stipulating that during periods of local elections that coincide with federal elections, the allotted time for to the first shall be included in the total time established in section III, sub-section A;

VII. New criteria for national political party access to radio and television outside periods of primary elections and electoral campaigns are established, following the method of equal distribution established since the 1978 electoral reform;

VIII. Political parties' obligation to abstain from using denigrating expressions against institutions and parties or slander against people in its political propaganda is raised to constitutional level. Likewise, compulsory suspension of all government propaganda during electoral campaigns until the end of the election day is also established, specifying the only admissible exceptions;

IX. The prohibition of third parties from buying or broadcasting messages on radio and television with the intention of influencing voters' preferences or benefiting or harming any party or candidate to elective offices is elevated to constitutional level. An express provision to hinder broadcasting on national territory of this type of messages when undertaken abroad is also established;

X. To give the Federal Electoral Institute the power needed in the exercise of its new attributes, the law must establish the sanctions applicable to those who breach the new constitutional and legal provisions, thus empowering the IFE to order, in extreme cases, the immediate suspension of radio and television transmissions that violate the law in these cases and in compliance with the procedures stipulated in the law itself.

This is the most in-depth and most transcendental reform in the matter of political parties' use of radio and television that has ever been carried out in Mexico.

Along with the new rules in matters of party funding, regulating primary elections, the duration of campaigns and the laws to ensure no interference from third parties and the impartiality of civil servants, the constitutional laws on matters of political parties' use of radio and television constitute the basis to bring about an in-depth democratic transformation of our Electoral System and give rise to a new, stronger, more independent Federal Electoral Institute, which will be better able to fully exercise its powers and attributes than those it already had and that will be granted with this reform.

The Joint Committee moves to approve the proposal in the Bill for a new section IV of Article 41 of the Constitution to be established, stipulating that the law should specify the periods of time for primaries for candidates to elective offices, as well as the rules that apply to primary elections and electoral campaigns. Likewise, it is deemed necessary that the Constitution stipulate the length of the new periods of time for electoral campaigns. Election years in which the Federal Executive Branch and the two Chambers of Federal Congress are renewed shall comprise a period of ninety days for all campaigns, while for the case of midterm elections, campaigns for federal deputies, the Bill proposes that they have a length of forty-five days. Related to the above, it is proposed that it be stipulated that primary elections may not exceed more than two-thirds of the time established for constitutional campaigns. The law shall establish the sanctions to be applied to whoever violates these provisions.

The Joint Committee has decided to insert an amendment to the proposal of the Bill with the intention that campaigns for federal deputies in midterm election years have a length of sixty days, in view of the diversity that exists among the 300 federal electoral districts.

Therefore, the new approved section IV of Article 41 of the Constitution shall read as follows:

> "IV. The law shall establish the periods of time to carry out party proceedings for selecting and postulating candidates to elective offices, as well as the rules for primary elections and electoral campaigns.
>
> The length of campaigns for presidential, senate and federal deputy elections shall be ninety days. In years with only federal deputy elections, campaigns shall last sixty days. In no case shall primary elections exceed two-thirds of the period of time stipulated for electoral campaigns.
>
> Any violation of these provisions by parties or any individual or corporation shall be punishable by law."

The current section IV would become V, with the laws that give origin to the existence of the Federal Electoral Institute, its organic structure and matters pertaining to the structure and functioning of the body of higher

authority and the relationships between it and executive and technical bodies remaining intact with the following changes:

The Bill proposes that the figure of an Internal Comptrollership with technical and administrative independence to oversee and supervise the IFE's revenue and expenditures be established in the Constitution, as well as a procedure for appointing the head of this internal body, that can hold all the civil servants in the Institute responsible, including electoral councilors and the President of the General Council.

The Committees are well aware of the legitimate concern this proposal has awakened in certain circles of specialized opinion, as well as among legislators from various parties, in the sense of ensuring care that the IFE's independence not be infringed upon or undermined by the existence of a body of internal control whose head is appointed by the Chamber of Deputies with the vote of two-thirds majority of the members present. Likewise, concern has been expressed regarding the proposal of granting this internal body the power to sanction even electoral councilors and the President-Councilor of the General Council.

The Joint Committee has carefully analyzed the various advantages and implications of the proposal contained in the Bill and reached the conclusion that it is in accordance with the independence and the guiding principles the Constitution establishes for the Federal Electoral Institute and its eminent responsibility.

The independence our Constitution grants to the public entities indicated in the Constitution itself has well-defined aims for each. The common objective is that of preventing any government authority from interfering, obstructing or influencing the decisions that independent entities may adopt in the exercise of their powers.

However, independence is not self-sufficiency. Independent institutions are governed by the general framework of obligations and responsibilities established by the Mexican Constitution and legal order. It is advisable therefore to elaborate on the rules and regulations that permit the effective and opportune rendering of accounts by those institutions of the Mexican State that, we insist, are independent and not self-sufficient.

It is evident that the head of an internal control body should not be designated by those to be subjected to the oversight established by law. It would be a situation of being both judge and jury, producing harmful effects like those already seen in a not too distant case within the Federal Electoral Institute itself.

Nor is it recommendable for the Secretary of State, who within the scope of the Executive Branch has been assigned powers in matters of internal control of the centralized and semi-private public administration, to interfere with the powers of an independent body like the IFE. The Judicial Branch can likewise be an example of possible intervention in these matters, which are foreign to its nature.

The only course lies in turning to the popular sovereignty found in the Federal Congress to address the dilemma that arises in establishing a body for internal control at the core of constitutionally independent institutions. In particular, the Joint Committee believes it to be entirely congruent that being the Chamber of Deputies the depository of the sole power to choose electoral councilors and the President-Councilor of the IFE General Council, it be this same Chamber of Federal Congress that chooses the head of the Internal Comptrollership for this same Institution, endowing it with the constitutional grounds that allow it to exercise its heightened responsibilities with complete professionalism and adhering to law.

However, the Joint Committee believes that in order to safeguard the impartiality and professionalism that the head of the IFE's Internal Comptrollership must observe in the fulfillment of his duties, the candidates nominated to this office should hail from prestigious public universities as stipulated by law. The law should also establish the requirements the elected official should fulfill and the corresponding procedure.

Therefore, we move that the following proposals regarding the creation of the IFE's General Comptrollership by Constitutional law be included in the Bill under review, recalling that the current section IV would become section V:

> "V. …
>
> The executive and technical bodies shall have at their disposal the qualified personnel needed to render professional electoral services. *A Comptrollership General, with technical and administrative independence shall be responsible for overseeing all the Institute's revenues and expenditures*. The provisions of the electoral law and of the Statute, based on what the General Council approves, shall govern the work relationship with the public servants of the public body. The oversight bodies of the electoral registry shall be made up in its majority by representatives of the national political parties. Polling station boards shall be made up of citizens."
>
> …
>
> The head of the Institute's General Comptrollership shall be appointed by the Chamber of Deputies with a two-thirds majority vote of the members present and nominated by public institutions of higher education, under the form and terms determined by law. The term of office shall be six years and with the possibility of only one reelection. The head shall be administratively part of the Office of the President of the General Council and shall maintain the necessary technical coordination with the scrutinizing body of the Federation.

The Joint Committee concurs with the proposal posed by the drafters of the Bill under review to establish the staggered renewal of electoral council-

ors of the General Council, as well as of the magistrates of the Federal Electoral Tribunal.

We subscribe to the declarations in the statement of legislative intent for the bill under review, in the sense of implementing "a proposal, which for many years has merited consensus, but that various circumstances have made it impossible to settle: the gradual renewal of electoral councilors and electoral magistrates. Combining renewal and experience has given positive results in other public collegiate bodies, so we are sure it will give equally positive results in the two pillar institutions of our electoral system."

To make the staggered renewal possible, coinciding with the frequency of federal elections, we concur with the proposal of increasing the term of office for electoral councilors of the IFE's General Council by two years, leaving it to the corresponding legislation to regulate the exact transition period for this purpose. It is expected that the same criteria shall be adopted for electoral magistrates of the Chambers of the TEPJF.

To complement the new method of renovating electoral councilors and the President-Councilor of the IFE General Council, we accept the proposal of contemplating the possibility of mandatory elections due to a definitive absence of any of these public servants. In this case, whosoever fills the vacancy shall do so for the remainder of the term that was not discharged by the absentee. Likewise, the proposal of expressly establishing the principle of non re-election for those who have held these positions shall be included.

As to the President-Councilor of the Federal Institute's General Council, the Joint Committee has decided to approve the proposal presented by the Working Group responsible for drafting the Draft Decree to differentiate the term of office from the one granted to electoral councilors, setting it at six years and establishing that these public servants only have the possibility of being re-elected once. This proposal coincides with the staggered renewal being decided upon for electoral councilors, so that, like the staggered renewal of these councilors, it would be possible to renew the President-Councilor, or increase his term in this high position to six years more than the original appointment, should the Chamber of Deputies so deem it.

The Joint Committee has gathered and evaluated the proposals that have come from the people and their organizations aimed at opening a widespread process of an open consultation procedure to present nominees for electoral councilors and President-Councilor of the IFE General Council. Therefore, it has been decided to not only consider these proposals in a favorable light, but also give it the constitutional grounds to make this mandatory.

Finally, in terms of this issue, we believe it pertinent to suppress the figure of deputy electoral councilors, as well as to derogate the extraordinary powers granted to the Permanent Committee of the Federal Congress to

carry out councilor and President-Councilor elections, if deemed necessary because the Chamber of Deputies is in recess.

It is clear that deputies or senators can be summoned and can attend extraordinary sessions at short notice. Therefore, the provisions being discussed are unnecessary and their repeal is legally warranted.

As a result, it is proposed that the corresponding part of the section being discussed read as follows:

> "The President-Councilor shall remain in his position for six years and may be re-elected only once. The electoral councilors shall remain in their positions for nine years. Their renewal shall be staggered and they may not be re-elected. Depending on the case, the one or the others shall be successively chosen by a two-thirds majority vote of the members of the Chamber of Deputies present, based on nominations made by parliamentary groups after holding a far-reaching open consultation procedure. In the event of the definite absence of the President-Councilor or of any of the electoral councilors, a replacement shall be chosen to conclude the remainder of the term. The law shall establish the corresponding rules and procedures."

Along with the abovementioned amendment, modifications in style and congruency of the other paragraphs mentioning electoral councilors and the President/Councilor are recommended.

In the seventh paragraph of the section in question, the Bill proposes that the Comptroller General be included among the IFE officials compelled to fulfill the requirements stipulated by law for their appointment. Likewise, it specifies that electoral councilors, the President-Councilor and the executive secretary may not, for a period of two years after the date of their stepping down from office, hold a position of government authority in the elections of which they have participated. As to the appointment of the executive secretary, it is only proposed that it stipulate that the power of the General Council shall be exercised through the vote of whosoever has this right in said body.

As to the new constitutional law that would enable IFE officials stipulated in this law to hold positions of government authority in whose election they have participated, for a period of two years as of their stepping down from their positions in the IFE, it should be noted that this law already exists in the Federal Law of Administrative Responsibilities of Public Servants. However, this law proscribes this restriction for the lapse of only one year after leaving their positions.

In view of recent experiences and the nature of the law, the proposals are accepted by the Joint Committee and, therefore, the reformed text would read as follows:

> "The law shall establish the requirements the President-Councilor of the General Council, electoral councilors, the Comptroller General and the Executive Secretary of the Federal Electoral Institute must meet for their appointment. Those who have acted as President-Councilor, electoral councilors, and Executive Secretary may not hold, for two years after the date of their retirement, positions of government authority in the elections of which they have participated."
>
> "The Executive Secretary shall be appointed by the vote of two-thirds of the General Council from the nominees proposed by its President."

Likewise, the Bill under review proposes that the creation of a technical body to oversee national political parties' finances, its legal nature and the method of appointing the head of this agency be established in paragraphs 10th and 11th of the new section V of Article 41. It also establishes that in order to be able to fulfill its objectives, it shall not be limited by privileged bank, trust, and tax information, since it is also the compulsory medium for its state counterparts to overcome the restriction imposed by this same legal standard.

These proposals are significant because they make it possible to take another step toward the professionalization and impartiality in the work of oversight that, in terms of national political parties, the Constitution gave to the IFE General Council in 1996. This has caused unnecessary distortions in dealings between these civil servants and political party representatives in the Council itself, as well as the now competent councilors' failure to exercise this power.

In favor of the powers conferred to the Institute in this matter and for the technical and legal security of the national political parties subject to oversight and surveillance, the technical body the Bill under review proposes should be created. As a result, the constitutional law would read as follows:

> "The oversight of national political parties' finances shall be under the responsibility of a technical body of the General Council of the Federal Electoral Institute, endowed with administrative independence, whose head shall be appointed by the two-thirds vote of the Council from the nominees proposed by the President-Councilor. The law shall expound the integration and functioning of this body, as well as the procedures for the General Council to apply sanctions. In the fulfillment of its functions, the technical body shall not be limited by privileged bank, trust, or tax information.
>
> The technical body shall be the channel through which the competent authorities in matters of party oversight within the limits of

> federal entities can overcome the limitation referred to in the previous paragraph."

The Bill proposes that the IFE be endowed with a new and important attribute: that of organizing, upon reaching agreement with the competent authorities, local election processes within state limits, thus addressing a proposal from various political parties and numerous civil organizations, as well as specialists in electoral matters.

The solution devised by the drafters of the Bill under review is acceptable since it allows internal sovereignty granted by the Constitution to the states that form part of the Federation, which is initially expressed in its ability to organize and carry out elections for public offices within their territory and to form city councils, to be harmoniously coupled with the possibility of benefitting from the material and human resources the IFE has at its disposal throughout the national territory. This new constitutional provision shall make it possible to assist in lowering costs and raising efficiency and reliability in local elections in the short and mid-term, while fully respecting the internal sovereignty of the federal states.

Therefore, we move that the draft proposed in the Bill be approved so it establishes that:

> "The Federal Electoral Institute shall assume, by means of mutual agreement with the competent authorities from the federal states who so request, the organization of local elections, under the terms provided for in the applicable legislation."

The Joint Committee moves that the proposed reform be approved in order to remove the mention of national political groups from the ninth paragraph of section V of the text currently in force so that the law may regulate their rights and obligations. This is in view of the specific nature and purposes of these groups.

Finally, as to the makeup of Article 41 of the Constitution, it only remains to state that, with the effects of the amendment, the section currently identified by Roman numeral IV is now identified as number "VI," without any other change.

SECOND

Article 85

The Bill under review proposes an insertion to Article 85 of the Constitution so it specifies one of the presumptions that, if the case arose, would lead to the need for the Federal Congress to appoint an interim President. This presumption is in the event that the Upper Chamber of the TEPJF de-

clares the annulment of a presidential election, in which case the election would not have been declared *valid*. The Joint Committee believes it pertinent to insert, and likewise specify, that in dealing with three regulated presumptions in the first phrase in the article, it is convenient to substitute "and" for "or," to clearly differentiate the third, which refers to the case in which the Upper Chamber of the TEPJF declares the presidential election null and void. Thus, the first paragraph of Article 85 of the Constitution would read as follows:

> "Article 85. If at the commencement of a constitutional term the President-elect does not present himself, or if the elections have not been held *or* not declared *valid* on December 1st, the president whose term has ended shall nevertheless cease to function, and the executive power shall be entrusted to an individual whom the Federal Congress shall designate as interim President, or if the Congress is not in session, to an individual whom the Permanent Committee appoints as Provisional President, proceeding in accordance with that set forth in the preceding article."

THIRD

Article 97

In the above electoral reforms, the convenience of derogating the power granted to the Supreme Court of Justice to conduct investigations regarding possible violations of the public vote as established in the third paragraph of Article 97 of the Constitution has been analyzed and discussed. The paragraph in question establishes the following:

> "The Supreme Court of Justice is enabled to conduct the investigation of an act or acts that constitute the violation of the public vote, but only in the cases that in its judgment place doubt upon the legality of the entire election process for one of the Powers of the Union. The results of the investigation shall be brought to the attention of the competent bodies in a timely manner."

There is general agreement about the inapplicability of the power mentioned in the preceding paragraph, which since the 1996 reform enters into contradiction with the powers that the Constitution itself confers to the TEPJF. Since Electoral Tribunal rulings are final and irrefutable, the question is how and to what effect could the Supreme Court of Justice, the highest authority in the Federal Judicial Branch, conduct an investigation on possible violations of the public vote, which would have also affected the le-

gality of the entire election process for one of the Powers of the Union. If this presumption ever occurred, it is clear that the Upper Chamber of the TEPJF would have to fully exercise its powers and declare the process in question null and void.

Therefore, and taking into account that the Supreme Court of Justice itself has clearly expressed its agreement with those who propose the repeal of this paragraph, the Joint Committee moves to accept the proposal contained in the Bill under review and, in consequence, propose the repeal of the third paragraph of Article 97 of the Constitution.

FOURTH

Article 99

As in the case of Article 41, the Joint Committee first defines that the Bill under review affirms that it proposes the complete amendment of this article, when in reality it discusses amendments and insertions to several of the already existing paragraphs. Having made this clarification, we proceed to analyze each concrete proposal.

In the second paragraph of the article in question, the Bill proposes an in-depth proviso to establish that both the Upper Chamber of the TEPJF and regional chambers shall operate on a permanent basis. To date, it is not so due to a provision established in the corresponding legislation that stipulates that regional chambers are only to work during periods of federal elections.

In view of the workloads the Upper Chamber deal with each year, it is not deemed proper for regional chambers to be kept in recess outside the period of federal elections, and even less so when the electoral magistrates that form part of these chambers are guaranteed the right to continue to receive a salary as stipulated by law. The law should establish the distribution of powers between the Upper Chamber and regional chambers, within the framework of that which is provided for in the Federal Constitution.

Therefore, the Joint Committee approves the amendment proposed in the following terms:

> "For the exercise of its functions, the Tribunal shall function with an Upper Chamber and regional chambers *on a permanent basis*. Its resolution sessions shall be public, under the terms determined by law. It shall have the necessary legal and administrative personnel for its proper functioning."

The Bill proposes the insertion of a new paragraph after the current section II of the fourth paragraph of Article 99, sections that from I to IX de-

fine the powers of the Electoral Tribunal. Specifically, the proposed text would establish the following:

> "*The Upper and regional chambers of the Tribunal shall only declare an election null and void for causes that are expressly established in the laws*."

After a long exchange of opinions and discussions, the Joint Committee members responsible for the proposal have come to hold the conviction that the above transcribed text should be approved since it addresses a concern regarding the interpretive limits that should or should not be established in the Constitution itself for all jurisdictional authorities. We agree with the need for the TEPJF to ground its rulings in cases of nullity to the causes that are expressly stipulated in the law without establishing different causes through jurisprudence while not contravening the high purpose and broad powers the Constitution grants the TEPJF. In due course, the law will need to be amended to fill the void now present regarding the causes for annulling a presidential election, as well as specify other causes for annulling senator and federal deputy elections.

In the third paragraph of section II, a change consisting of relocating the phrase "*if it be the case*" is proposed. The proposal is admissible since it allows for a better understanding of the acts regulated in this paragraph, leaving it as follows:

"The Upper Chamber shall issue the final results of the election for President of the United Mexican States, once it has resolved any challenges regarding the election that have been brought to its attention. It shall proceed to formulate, if it be the case, the declaration of validity of the election and that of the President-Elect regarding the candidate who obtained the highest number of votes."

In section V of Article 99, the Bill under review proposes an insertion to its final part with the aim of establishing the legal obligation for citizens who believe their political rights have been affected by the party to which they are affiliated, after having exhausted the party instances of conflict resolution before appearing before the Electoral Tribunal. The proposal coincides with the general sense that motivated the petitioners, and which is shared by the Joint Committee, to strengthen political parties' internal life by preventing the continuous and undue judicialization of their primary elections. As citizen organizations, political parties must establish clear rules and internal agencies with simple and expedite procedures to settle the controversies that may arise between its supporters and their administrative bodies. Once these internal instances of conflict resolution have been exhausted, there is the recourse guaranteed by the Constitution and by law to appearing before the TEPJF.

As a result, the abovementioned section V would read as follows:

> "Challenges of acts and resolutions that violate the political-electoral rights of citizens to vote, be voted for, and freely and peacefully affiliate themselves to take part in the political affairs of the country, under the terms this Constitution and laws specify. For citizens to be able to have recourse to the jurisdiction of the Tribunal for violations of their rights by the political party to which the individual is affiliated, the individual must have previously exhausted the instances of conflict resolution provided for in its internal rules. The law shall establish the applicable regulations and terms;"

The amendment the Bill proposes for section VIII of Article 99 coincides with the extended powers of the administrative electoral authority established by the reform to Article 41 of this Draft Decree. The proposal is accepted since by establishing the IFE's authority to sanction individuals or corporations for violations to constitutional and legislative rules that frame electoral processes, these same individuals must be ensured of the possibility of appearing before the specialized jurisdictional authorities in these matters, electoral, for the protection of their rights. Therefore, the section in question would be as follows:

> "*VIII*. The determination and imposition of sanctions *by the Federal Electoral Institute to parties or political associations or individuals or corporations, whether national or foreign, that violate the provisions of this Constitution and the law; and*"

The Bill proposes the insertion of two paragraphs to Article 99, for the purpose of enhancing the powers of the TEPJF and settling a contradiction that arose in 2002. The paragraph proposed to be inserted immediately after section IX of the current text aims at granting the TEPJF the constitutional grounds to make use of any means of pressure it may require, in accordance with what the law stipulates, for the purpose of enforcing their sentences.

> "*The Electoral Tribunal chambers shall make use of any means of pressure needed to expeditiously enforce its sentences and rulings, within the terms established by law*."

If approved, the second paragraph proposed to be inserted would settle a contradiction that has arisen between the Upper Chamber and the Supreme Court of Justice of the Nation regarding the Upper Chamber's authority to rule on the non-application of electoral laws that go against the Federal Constitution. On resolving on the contradictory rulings, the SCJN holds that this faculty pertains to it, as a Constitutional Court deciding on the constitutionality or unconstitutionality of laws. In general, the Court's de-

cision is irrefutable within the framework of the authority and distribu- tion of power that the Constitution stipulates for the Federal Judicial Branch.

However, it is evident that since 1996, the majority required to pass a constitutional reform decided to grant the Upper Chamber the power to decide on the constitutionality of electoral laws, as confirmed in the reading of paragraph of Article 99 currently in force that states:

> "When an Electoral Tribunal Chamber sustains an opinion on the unconstitutionality of an act or resolution or on the interpretation of a precept of this Constitution and this opinion is contradictory to one sustained by the Chambers or the whole of the Supreme Court of Justice, any of the Ministers, Chambers or parties may bring the contradiction to the attention to the Supreme Court of the Nation en banc so it may decide which opinion should prevail. The resolutions that are issued in this case shall not affect affairs already decided."

The debate does not center on the previous existence or non-existence of the TEPJF's authority to decide on the non-application of electoral laws that go against the Constitution, but on the concordance of two constitutional laws and the effects of the resolutions issued by TEPJF Chambers on these matters.

The Joint Committee believes that the solution proposed in the Bill under review is apt since it establishes the limits of TEPJF resolutions and leaves ample space for the SCJN to exercise its functions as Constitutional Court.

As a result, and to better illustrate the proposed modification, the two paragraphs in question are transcribed below. The first is to be inserted and the second shall remain without any changes:

> "*Notwithstanding what is provided for in Article 105 of this Constitution, the chambers of the Electoral Tribunal may decide upon the non-application of laws on electoral matters that go against this Constitution. The decisions issued in the exercise of this power shall be limited to the specific case seen in the court proceeding. In these cases, the Upper Chamber shall notify the Supreme Court of Justice of the Nation.*"
>
> "When an Electoral Tribunal Chamber sustains an opinion on the unconstitutionality of an act or resolution or on the interpretation of a precept of this Constitution and this opinion is contradictory to one sustained by the Chambers or the whole of the Supreme Court of Justice, any of the Ministers, Chambers or parties may bring the contradiction to the attention to the Supreme Court of the Nation en banc so it may decide which opinion should prevail. The resolutions that are issued in this case shall not affect affairs already decided."

Since the Joint Committee has accepted the proposal of an amendment for regional chambers to operate on a permanent basis, the proposal to establish the Upper Chamber's authority to undertake court proceedings that appear in regional chambers in the text of Article 99, incorporating the precise and exact regulations for this power, in order to avoid contradictions or conflicts between regional chambers and the Upper Chamber.

> "*The Upper Chamber may, ex officio, undertake the trials that appear in regional chambers at the request of some or any of these chambers. The law shall specify the regulations and procedures for the exercise of this power*."

As to the configuration of TEPJF chambers and of the electoral magistrates that form them, the Bill under review proposes three important measures, with which the Joint Committee concurs:

The first is the establishment of the staggered renewal of the electoral magistrates, along with the proposal already stated in this Draft Decree for electoral councilors of the IFE General Council. Based on the arguments above, this proposal is approved.

The second measure pertains to making compatible the terms in office of the members of the bodies of highest authority from both institutions, foundations of the Mexican electoral system. The term in office for electoral magistrates in both the Upper Chamber as in regional chambers is proposed to be nine years, which, it should be noted, shall facilitate their staggered renewal based on the frequency of federal elections. It is approved; and

The third measure establishes that in the case of a definitive vacancy in any of the TEPJF chambers, the new magistrate shall only conclude the term for which the absentee was elected. It is also passed.

As result, the paragraphs in questions would be as follows:

> "The Electoral Magistrates that form the Upper Chamber must fulfill the requirements established by law, which may not be less than those required to be a Minister of the Federal Supreme Court of Justice and shall have a non-extendible term of office of *nine years*. Resignations, absences and licenses of Upper Chamber Electoral Magistrates shall be processed, covered and granted by this Chamber, as corresponds under the terms of Article 98 of this Constitution.
>
> "The Electoral Magistrates that form the regional chambers must fulfill the requirements established by law, which may not be less than those required to be a Magistrate of the Collegiate Circuit Court. Their term in office shall be *nine years* and non-extendible, unless they are promoted to higher positions.
>
> *In the event of a definitive vacancy, a new Magistrate shall be appointed for the remaining period of the original appointment*."

FIFTH

Article 108

The text currently in effect of the first paragraph of Article 108 of the Constitution sets the bases for Federal Electoral Institute officials and employees to be responsible and be subject to sanctions determined by law to this effect. However, it does not expressly consider the existence of other independent bodies that should be included under the same law. Thus and in agreement with the constitutional amendment —Article 41— on the administrative responsibilities to which electoral councilors, the President-Councilor and other IFE public servants are subject to, Article 108 of the Constitution should be amended as the Bill under review proposes, to extend the last part of the established law.

Considering that at the public ordinary session held on December 19, 2006, at the Senate of the Republic, the Minutes of the Draft Decree in which the first paragraph of Article 108 of the Political Constitution of the United Mexican States was approved for amendment and was returned with modifications to its co-legislative body for constitutional effects. To this regards it must be noted that these minutes display the same aim as that presented in the above Bill. Therefore, the Joint Committee has decided to incorporate the same text proposed in the abovementioned minutes in this proposal and in the corresponding Draft Decree. As a result, the first paragraph of said article would be the following:

> "For the purposes of stating the responsibilities alluded to in this Title, representatives of public election, members of the Federal Judicial Branch and the Judicial Branch of the Mexico City, officials and employees and, in general, any person who performs a job, position or committee of any kind *in the Federal Congress, the Legislative Assembly of Mexico City or* the Federal or Mexico City Public Administration, as well as civil servants *of the bodies to which this Constitution grants independence* and who shall be held responsible for any acts or omissions in which they occur in the performance of the respective duties shall be regarded as public servants."

SIXTH

Article 116

In Article 116, section IV, amendments and insertions are proposed to several of its clauses so that the reforms to Articles 41and 99 analyzed above concur with state constitutions and electoral laws. The object is very precise: to maintain a basic uniformity in the applicable legal standards in

the Mexican electoral system, considered as a congruent set of rules in their scopes of application and validity.

The Joint Committee is of the same opinion regarding this purpose and therefore moves to approve the amendments to the clauses listed below, so that each may read as indicated:

In clause b) of section IV of Article 116 of the Constitution the guiding principles to be followed by the electoral authority are grammatically restructured.

> "*b)* In the exercise of electoral functions, responsibility of electoral authorities, the guiding principles are *certainty, impartiality, independence, legality, and objectivity*;"

A new clause d) regarding the powers that Article 41, as amended, grants the IFE to come to an agreement with the local competent authorities to take charge of the organization and carry out state or municipal elections shall be inserted.

> *"d) Competent electoral authorities of an administrative nature may come to an arrangement with the Federal Electoral Institute so the latter may take charge of organizing local elections;"*

Two new clauses, e) and f), regarding that which is set forth in Article 41 about creating political parties, procedures for their establishment and registry and their right to register candidates to offices of public election are inserted. Likewise, the general limits on the intervention of local electoral authorities in the internal life of political parties are also established.

> *"e) Political parties are only founded by citizens without the involvement of union organizations or organizations with a different social object and without having any corporate affiliation whatsoever. Likewise, with the exception of that set forth in Article 2, Section A, subsections III and VII of this Constitution, their exclusive right to request the registry of candidates to offices of public election is acknowledged;*
>
> *"f) Electoral authorities may only intervene in internal affairs of parties under the conditions expressly set forth;"*

Two clauses of Article 116 are amended to become g) and h) respectively. These define ordinary and campaign public funding, as well as the liquidation process of parties that lose their registry. Likewise, the grounds for setting limits to disbursements to parties for primary elections and private funding are established and may not exceed an amount equivalent to ten percent of the amount set for the campaign for governor per year and

per party. The grounds for enforcing the corresponding sanctions are established.

> "*g) Political parties* receive equal amounts of public funding for *their permanent ordinary activities and those leading towards obtaining votes during election processes. The procedure for liquidating the parties that lose their registry and the destination of their assets and residual amounts are also established*;
>
> "*h)* The criteria for *establishing the limits on the disbursements of political parties during their primary elections and* election campaigns are set, as are the maximum amounts for the contributions from their followers, *the total sum of which shall not exceed ten percent of the limit on campaign spending determined for the election of Governor*; procedures for the control and oversight of the origin and use of all the resources political parties have are determined *and sanctions are established* for non-compliance with the provisions set forth for these matters;"

The proposals for the amendment of the clauses that are now clauses i) and j) in section IV of Article 116 of the Constitution, refer to the right of parties to have access to radio and television in local election processes, as well as the obligation for the corresponding state constitutions and electoral laws to establish the laws applicable to local primary elections and campaigns, as well as sanctions for those who violate these laws. Furthermore, the maximum period of time for campaigns for elections for governor, which shall be 90 days, and for local and municipal deputies, which shall be 60 days when only campaigns to these effects are carried out, is established.

> *"i) Political parties have access to radio and television, in accordance with the laws established in section III, sub-section B of Article 41 of this Constitution;*
>
> *j) The rules for political parties' primary elections and election campaigns, as well as the sanctions for whoever violates them are established. In every case, the period of time for campaigns shall not exceed ninety days for election for Governor, or sixty days when only local deputies or city councils are elected. Primary elections may not be longer than two-thirds of the respective election campaigns;"*

Clause k), which specifies the non-limitations of the oversight bodies of political parties in terms of privileged bank, trust, and tax information, is inserted so as to correspond with that proposed in Article 41 of the Constitution. To this effect, oversight bodies at state level may overcome this limitation by turning to the competent federal body for this matter.

> *"k) The mandatory bases for the coordination between the Federal Electoral Institute and the local electoral authorities in matters of political party finance over-*

sight, are instituted under the terms established in section V of Article 41 of this Constitution;"

The content is altered so that of clause l) be amended and clause m) be inserted to establish the bases for the possible recount of votes, whether total or partial, at jurisdictional and administrative levels. The obligation of establishing the causes for nullifying the election for governor, local deputies, and city councils in local Constitutions and electoral laws is set.

l) A system of means of challenges is established so that all electoral acts and resolutions are consistently subject to the principle of legality. *Likewise, that it establishes the premises and rules to carry out total or partial recounts of votes at administrative and jurisdictional levels;*

m) The causes for declaring elections for Governor, local deputies and city councils null and void are set, as well as the terms convenient for filing any challenges, taking into account the principle of finality of the stages of election processes; and"

Having established the above regarding Article 116, it is necessary to underline an agreement reached in the core of the Joint Committee. It is well-known that the calendar of state elections is one of the problems to be solved in the national election system. Although thirteen states and Mexico City have made their local election day coincide with the election day established for federal elections —the first Sunday of July— and Michoacán holds its local elections the week immediately after, the election calendar in the rest of the states poses a real problem in terms of the various dates for their respective election days.

On one hand, there is the situation that practically every year, including federal election years, more than half the states stipulate the dates for beginning and ending their respective electoral processes in their state Constitutions or laws, a fact that can only be explained by inaction in the past. In the two years of every period of three years in which there are no federal elections, the calendar of local elections is characterized by dispersed periods of times and dates.

This produces negative effects not only on the citizens in most states who must go to local elections on different days, and even on different dates within the same state and the same year; it is also a factor that raises the cost of elections nationwide and that is a permanent burden on states' public finances, as well as on national political parties.

One of the significant advances of the electoral reform being discussed is the new power granted to the IFE to organize and carry out local elections, on reaching an agreement with state or Mexico City electoral authorities, but that intention will find the dispersion that still prevails in the election calendar of yet more than half the states an obstacle.

Finally, another significant negative effect of this dispersion should be noted: that of subjecting national political parties to endless pressure in election competition, challenging or denying them the time to perform other political or public opinion activities, negotiations, and building agreements, which would be of significant value in consolidating the role of parties as citizens organizations, as well as legitimate expressions directly linked to its parliamentary groups in the Federal Congress.

Therefore, the Joint Committee has once more taken up the proposal from various parties and specialists in electoral matters and decided to incorporate the proposal of amending Clause a), section IV of Article 116 into its Draft Decree to establish that local state elections that are held in years in which federal elections are not, the constitution and electoral laws of the respective states should set the first Sunday of July of the corresponding year as the election day.

To address the situation of states with election days that coincide with that of federal elections, as is also the case of Mexico City, the text of cited clause a) establishes the corresponding prevision, which shall also apply to states that hold their local elections the same year as the federal ones, so they may continue with a different date for their respective election days from that established for federal elections.

In a Transitory Article, the Draft Decree establishes the period of time for state legislatures to make the corresponding modifications to their respective constitutions and electoral laws, which should be completed within a period of six years.

This way, the election calendar shall cease to be a source of problems to society, citizens, constituents, political parties, and the three branches of government. It is a measure that should benefit all.

As a result, clause a) of Section IV of Article 116 would read as follows:

> "a) The elections for governors, members of local legislatures and members of city councils are held by means of universal, free, secret, and direct suffrage. The election day shall be the first Sunday of July of the corresponding year. States with election days during a federal election year that do not coincide with the date for federal elections shall not be subject to this last provision;"

SEVENTH

Article 122

An indispensible adjustment is proposed for Clause f) of Section V of Article 122 so that what is set forth in Section IV of Article 116 regarding the federal states henceforth applies to local elections in Mexico City. Since it is

a modification strictly referred to in two articles of the Constitution, the Joint Committee confines itself to approve it.

However, analysis and debate resulted in a proposal to continue with the equating the Mexico City electoral system with that of other states. Therefore, we specifically propose to remove the last phrase of the clause in question, which to the letter states:

> "Only political parties with national registry may participate in these elections,"

This provision currently in effect assumes an exception to citizens' right to assemble and form local political parties in the Mexico City. This may have been justified in earlier periods when direct rule of Mexico City was entrusted to an administrative department part of the centralized Federal Public Administration Office and the President had the constitutional power to directly appoint or remove the head of the Department of the Federal District (Mexico City).

However, in view of the in-depth and positive transformation that the system of government of Mexico City has undergone for over more than two decades, the restriction imposed in the phrase in question has lost relevance and there is no reason whatsoever to preserve it.

Therefore, the Joint Committee moves to approve the joint proposal presented by PAN, PRD and PRI legislators to proceed with its repeal, and thus establish the grounds for the Federal Congress to stipulate the requirements, procedures and periods of time for the creation and registry of local political parties, in the Federal District Government Act.

> "*f)* Issue the provisions that *guarantee free and genuine elections* in Mexico City *through universal, free, secret and direct suffrage*; subject to the bases established in the Government Act, which shall *comply with* the principles *and rules* established in clauses *b) through n)* of Section IV of Article 116 of this Constitution. *Therefore, the references made in clauses j) and m) regarding the Governor, local deputies, and city councils shall be interpreted as meaning the Head of Government, Legislative Assembly deputies and Heads of Boroughs, respectively*;"

EIGHTH

Article 134

In the Bill under review, the insertion of three paragraphs is proposed to Article 134 of the Constitution for the purpose of establishing new and stricter previsions so that civil servants from all ranks of government conduct themselves with absolute impartiality in the administration and use of

the public resources under their responsibility. Furthermore, it is ordered that governmental propaganda of any kind and origin must be institutional, without promoting the personal image of civil servants.

Concurring with the aims of the Bill under review, the Joint Committee deems it necessary to make the proposed drafts clear in order to avoid confusion in their interpretation and regulation in the corresponding legislation.

Therefore, the paragraphs to be inserted in the abovementioned article would read as follows:

> "Civil servants of the Federation, states, and municipalities, as well as from Mexico City and its boroughs, have the obligation of using the public resources under their responsibility with impartiality at all times, without influencing fair competition between political parties.
>
> "The propaganda in any form of social communication that the government authorities, independent bodies, agencies, and public administration bodies and any other body from the three branches of government disseminate must be of an institutional nature and for information, educational or socially-oriented purposes. In no case shall this propaganda include names, images, voices or symbols that imply personalized endorsement of any civil servant. News and information that have not been paid for shall not be considered propaganda.
>
> "The laws, in their respective areas of application, guarantee strict compliance with that set forth in the two preceding paragraphs, including the system of sanctions deemed necessary."

Finally, in terms of the changes approved by the Joint Committee regarding the content of the bill under review, it the Working Group's proposal to insert a first paragraph to Article 6 of the Constitution has been approved for the purpose of filling a void that has survived in our legal order to our days. We refer to the right of reply that every person must have with regard to social communications means. The only law in which this right is found embodied, the Law of the Press, precedes the 1917 Constitution of Querétaro and its irrelevance has been apparent for decades. By including the right of reply in the Constitution, the Federal Congress shall be able to comprehensively update the legal framework that protects the right to information, as intended by the majority required to pass a constitutional reform with the amendment of Article 6 itself in the recently enacted reform.

In its transitory system, the Draft Decree establishes the bases for the staggered renewal of electoral councilors to the IFE General Council, making it possible to meet the two objectives of the reform: renovation and experience in the configuration of the body of highest authority in electoral

administration. Meanwhile, the rules for the staggered renewal of Electoral Magistrates are submitted to the corresponding law.

In light of what has been stated and proven, the Joint Committee of Constitutional Issues, Governance; Radio and Television and Legislative Studies, hereby submit for consideration to the Chamber of Senators of the Federal Congress *en banc* the following:

Draft Decree

SOLE.- The first paragraph of Article 6 is amended; Articles 41 and 99 are amended and supplemented; the first paragraph of Article 85 is amended; the first paragraph of Article 108 is amended; Section IV of Article 116 is amended and supplemented; Clause f), Section V of the First Chapter of Article 122 is amended; three paragraphs are inserted at the end of Article 134; and the third paragraph of Article 97 is repealed, all of which are in the Political Constitution of the United Mexican States, to read as follows:

Article 6. The expression of ideas shall not be the object of any judicial or administrative inquiry, except in the case in which it attacks moral order, the rights of a third party, incites a criminal offense or disturbs the public order. The right of reply will be exercised in the terms determined by law. The right to information shall be guaranteed by the State.

…

Article 41. The people exercise their sovereignty through the Powers of the Union in the cases of the competency of these, and by those of the States in matters concerning their internal affairs, under the terms established by this Federal Constitution and those of the States, which in no case may contravene the stipulations of the Federal Pact.

The renewal of the Legislative and Executive powers shall take place by means of free, authentic, and periodic elections, conforming to the following bases:

I. Political parties are public interest actors. The law shall determine the rules and requirements for the official registry of political parties and the specific ways they can become involved in the electoral process. National political parties shall have the right to participate in state and municipal elections, as well as for the Federal District.

The purpose of political parties is to promote participation of the people in democratic life, contribute to the integration of national representation and, as citizen organizations, make it possible to gain access to this by exercising government function, according to the programs, principles and ideas they propose and by means of universal, free, secret and direct suffrage. Only citizens may form political parties and freely and individually affiliate themselves to political parties. Therefore, it is prohibited for union organizations or organizations with a corporate purpose other than that of found-

ing parties and any kind of corporate affiliation to intervene. Political parties have the exclusive right to request the registry of candidates for elective offices.****

Electoral authorities may only intervene in political parties' internal issues under the terms stipulated in the Constitution and the law.

II. The law shall guarantee that national political parties shall equally have the elements to conduct all their activities and shall specify the rules to which political party financing shall be subject, guaranteeing that public resources prevail over those of private origin.

Public financing for political parties that maintain their registry after each election shall consist of remittances destined to sustain their permanent ordinary activities, and those aimed at obtaining votes during elections. It shall be granted as follows, and according to law:

a) Public funding to sustain political parties' permanent ordinary activities shall be determined each year by multiplying the total number of citizens registered in the voters registry by sixty-five percent of the daily minimum wage for Mexico City. Thirty percent of the amount resulting from the above calculation shall be distributed equally among the political parties and the remaining seventy percent, according to the percentage of votes obtained in the immediately preceding deputy elections.
b) Public funding for activities aimed at obtaining votes during a year in which the President of the Republic, senators and federal deputies are elected shall equal fifty percent of the public funding that corresponds to each political party for ordinary activities that same year. When only federal deputies are to be elected, the amount shall be equal to thirty percent of said funding for ordinary activities.
c) Public funding for specific activities associated with education, training, and socio-economic and political research, as well as for publishing activities, shall be equivalent to three percent of the total amount of the annual public funding that corresponds to ordinary activities. Thirty percent of the total amount resulting from the above calculation shall be distributed equally among political parties while the remaining seventy percent shall be distributed to parties based on the percentage of votes obtained in the immediate preceding deputy elections.

The law shall establish the limit of the disbursements for political parties' primary election and election campaigns. The law itself shall establish the

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**** Editor's Note: This explicit prohibition of the possibility of independent candidates was eliminated on the Senate floor during discussion and did not find its way into the final reform bill. All other aspects of the present bill passed without modification.

maximum amount of contributions parties may receive from their supporters. The annual total amount of these contributions per party may not exceed ten percent of the maximum amount of expenses established for the preceding presidential campaign. Likewise, the law shall classify control and oversight procedures on the origin and use of all the resources in their possession, and shall apply the sanctions deemed necessary for non compliance with these provisions.

Likewise, the law shall establish the procedure to liquidate the assets and liabilities of parties that lose their registry and the premises under which their assets and balances shall be transferred to the State.

III. National political parties shall have the right to permanent use of social communications means.

Subsection A. The Federal Electoral Institute shall be the sole authority for administrating the amount of time allotted to the State on radio and television for its own purposes and in exercise of the right of national political parties, in accordance with the following and that which is stipulated by law:

a. As of the beginning of primary elections to the day of elections, the Federal Electoral Institute shall have at its disposal forty-eight minutes a day, which shall be distributed in two or even three minutes per hour of broadcasting time on each radio station and television channel in the schedule referred to in clause d) of this Subsection;
b. During their primary elections, political parties shall have at their disposal a total of one minute per hour of broadcasting time on each radio station and television channel. The remaining time shall be used in accordance with that which is stipulated by law;
c. During election campaigns at least eighty-five percent of the total time available referred to in clause a) of this Subsection must be allotted to cover the rights of political parties;
d. The broadcast times on each radio station and television channel shall be distributed within the programming schedule between six a.m. and midnight;
e. The amount of time established as a right of political parties shall be distributed based on the following: thirty percent equally and the remaining seventy percent based on the results of the immediately preceding federal deputy elections;
f. Any national political party without representation in the Federal Congress shall only be assigned the amount of time on radio and television that corresponds to the equal percentage established in the preceding clause; and
g. Notwithstanding that which is set forth in Subsections A and B of this Chapter and outside periods of primary elections and electoral campaigns, the Federal Electoral Institute shall be allotted up to twelve

percent of the total amount of time on radio and television allotted to the State, by law and under any form. Of the total amount allotted to it, the Institute shall distribute fifty percent equally to the national political parties. The remaining amount of time shall be used for purposes of its own or of other electoral authorities, both federal and state. Each national political party shall use the time allotted to it under this concept for a monthly five-minute program and the remainder for twenty-second messages. In any case, the broadcasts referred to in this clause shall be made during the schedule determined by the Institute according to that which is stipulated in clause d) of this Subsection.

At no moment may political parties contract or acquire, on its own or through third parties, air time under any form on radio and television.

No other person, whether public or private, on his own behalf or through a third party, may buy propaganda on the radio or television with the intention of influencing citizens' electoral preferences, nor for or against political parties or candidates to elective offices. The broadcast of messages of this type undertaken abroad is prohibited.

The provisions contained in the two preceding paragraphs must be fulfilled within state territories and in the Federal District, in accordance with the corresponding legislation.

Subsection B. For election purposes in the states of the Federation, the Federal Electoral Institute shall administrate the amount of time allotted to the State on radio and television with coverage in the state in question, in accordance with the following and that which is stipulated by law:

a. In the case of local elections with election days that coincide with that of the federal election, the allotted time in each state of the Federation shall be included within the total amount of time available according to clauses a), b) and c) of Subsection A in this Chapter;
b. For other elections, the allotment shall be made according to law and the criteria in this Chapter of the Constitution; and
c. For the distribution of the allotted time among political parties, including those with local registry, shall be carried out in accordance with the criteria stipulated in Subsection A of this Chapter and that which is determined in the corresponding legislation.

When in the Federal Electoral Institute's opinion, the total amount of time on radio and television referred to in this Subsection and the preceding one is insufficient for purposes of its own or of other electoral authorities, it shall take the relevant action to cover the want of time, in accordance with the powers granted to it by law.

Subsection C. In the political or electoral propaganda published, parties must abstain from using denigrating expressions against institutions and parties, or slander individuals.

During the period that covers federal and local election campaigns and until the end of their respective election days, all dissemination of government propaganda from both federal and local authorities, as well as municipalities and bodies from the Federal District government, its boroughs and any other public body via means of social communication must be suspended. The only exceptions to the above shall be information campaigns on behalf of electoral authorities, those concerning educational and healthcare services, or those deemed necessary for civil protection in the event of an emergency.

Subsection D. Any violation to that which is provided for in this Chapter shall be punishable by the Federal Electoral Institute through expeditious procedures that may include the order of immediate cessation of radio and television broadcasts, of concessionaires and licensees, if found guilty of violating the law.

IV. The law shall establish the periods of time to carry out party proceedings for selecting and postulating candidates to elective offices, as well as the rules for primary elections and electoral campaigns.

The length of campaigns for presidential, senate and federal deputy elections shall be ninety days. In years with only federal deputy elections, campaigns shall last sixty days. In no case shall primary elections exceed two-thirds of the period of time stipulated for electoral campaigns.

Any violation of these provisions by parties or any individual or corporation shall be punishable by law.

V. The organization of federal elections is a State function that is carried out by an independent public body called the Federal Electoral Institute, endowed with legal identity and its own budget. It shall be formed with the participation of the Legislative Power, national political parties, and citizens under the terms stipulated by law. In the exercise of this State function, certainty, legality, independence, impartiality, and objectivity shall be its guiding principles.

The Federal Electoral Institute shall be the authority in these matters, independent in its decisions and functioning, and professional in the discharge of its duties. It will have a structure with administrative, executive, technical, and oversight bodies. The General Council shall be its body of higher authority, and shall be made up of a President-councilor and eight electoral councilors. With a voice, but without a vote, it shall include councilors from the Legislative Branch, political party representatives, and an Executive Secretary. The law shall determine the rules of its organization and the functions of its bodies, as well as the chain of command among them. The executive and technical bodies shall have at their disposal the qualified personnel needed to render professional electoral services. A

Comptroller General, with technical and administrative independence shall be responsible for overseeing all the Institute's revenues and expenditures. The provisions of the electoral law and of the Statute, based on what the General Council approves, shall govern the work relationship with the public servants of the public body. The oversight bodies of the electoral registry shall be made up in its majority by representatives of the national political parties. Polling station boards shall be made up of citizens.

The President-Councilor shall remain in his position for six years and may be re-elected only once. The electoral councilors shall remain in their positions for nine years. Their renewal shall be staggered and they may not be re-elected. Depending on the case, the one or the others shall be successively chosen by a two-thirds majority vote of the members of the Chamber of Deputies present, based on nominations made by parliamentary groups after holding a far-reaching open consultation procedure. In the event of the definite absence of the President-Councilor or of any of the electoral councilors, a replacement shall be chosen to conclude the remainder of the term. The law shall establish the corresponding rules and procedures.

The President-Councilor and electoral councilors may not have any other source of employment, position or commission, with the exception of those performed in representing the General Council and those carried out at educational, scientific, cultural, research, or non-profit associations, for which they shall not be reimbursed. The pay received shall be equal to that stipulated for ministers of the Supreme Court of Justice of the Nation.

The head of the Institute's General Comptrollership shall be appointed by the Chamber of Deputies with a two-thirds majority vote of the members present and nominated by public institutions of higher education, under the form and terms determined by law. The term of office shall be six years and with the possibility of only one reelection. The head shall be administratively part of the Office of the President of the General Council and shall maintain the necessary technical coordination with the scrutinizing body of the Federation.

The Executive Secretary shall be appointed by the vote of two-thirds of the General Council from the nominees proposed by its President.

The law shall establish the requirements the President-Councilor of the General Council, electoral councilors, the Comptroller General, and the Executive Secretary of the Federal Electoral Institute must meet for their appointment. Those who have acted as President-Councilor, electoral councilors, and Executive Secretary may not hold, for two years after the date of their retirement, positions of government authority in the elections of which they have participated.

The councilors from the Legislative Branch shall be proposed by parliamentary groups with party affiliation in one or both of the Chambers. There shall be only one councilor for each parliamentary group regardless of its recognition in both Chambers of the Congress of the Union.

The Federal Electoral Institute shall be completely and directly responsible for, in addition to that stipulated by law, activities concerning civic training and education, electoral boundaries, the rights and prerogatives of interest groups and political parties, the voter registry and lists, printing of electoral material, preparing for the election day, tallying votes under the terms specified by law, the statement of validity and granting certification at deputy and senator elections, tallying votes from the presidential election of the United Mexican States at each uninominal electoral district, as well as regulating of poll observation and surveys or opinion polls for electoral purposes. The sessions of all the collegiate administrative bodies shall be public, under the terms specified by law.

The oversight of national political parties' finances shall be under the responsibility of a technical body of the General Council of the Federal Electoral Institute, endowed with administrative independence, whose head shall be appointed by the two-thirds vote of the Council from the nominees proposed by the President-Councilor. The law shall expound the integration and functioning of this body, as well as the procedures for the General Council to apply sanctions. In the fulfillment of its functions, the technical body shall not be limited by privileged bank, trust or tax information.

The technical body shall be the channel through which the competent authorities in matters of party oversight within the limits of federal entities can overcome the limitation referred to in the previous paragraph.

The Federal Electoral Institute shall assume, by means of mutual agreement with the competent authorities from the federal states who so request, the organization of local elections, under the terms provided for in the applicable legislation.

VI. In order to guarantee the principles of constitutionality and legality of electoral acts and rulings, a means system of challenge shall be established, under the terms stipulated in this Constitution and by law. This system shall give finality to the different stages of electoral processes, and guarantee the protection of the citizens' political rights to vote, be voted for and of assembly, under the terms of Article 99 of this Constitution.

In electoral matters, the filing of means of challenges whether constitutional or legal, shall not have a suppressive effect on the challenged ruling or act.

Article 85. If at the commencement of a constitutional term the President-elect does not present himself, or if the elections have not been held or not declared valid on December 1st, the president whose term has ended shall nevertheless cease to function, and the executive power shall be entrusted to an individual whom the Federal Congress shall designate as interim President, or if the Congress is not in session, to an individual whom the Permanent Committee appoints as Provisional Resident, proceeding in accordance with that set forth in the preceding article.

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Article 97. …
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Article 99. The Electoral Tribunal shall be, with the exception of that set forth in Section II of Article 105 of this Constitution, the highest jurisdictional authority in electoral matters, and a specialized body of the Judicial Branch of the Federation.

For the exercise of its functions, the Tribunal shall function with an Upper Chamber and regional chambers on a permanent basis. Its resolution sessions shall be public, under the terms determined by law. It shall have the necessary legal and administrative personnel for its proper functioning.

The Upper Chamber shall be formed of seven Electoral Magistrates. The President of the Tribunal shall be selected by the Upper Chamber, from its members, and shall serve in this position for a period of four years.

The Electoral Tribunal shall be responsible for ruling definitively and indisputably under the terms established in this Constitution and according to that which is stipulated by law, on:

I. Challenges in the federal elections of deputies and senators;

II. Challenges presented regarding the election of the President of the United Mexican States, which shall only be resolved by the Upper Chamber.

The Upper and regional chambers of the Tribunal shall only declare an election null and void for causes that are expressly established in the laws.

The Upper Chamber shall issue the final results of the election for President of the United Mexican States, once it has resolved any challenges regarding the election that have been brought to its attention. It shall proceed to formulate, if it be the case, the declaration of validity of the election and that of the President-Elect regarding the candidate who obtained the highest number of votes.

III. Challenges of acts and federal electoral authority resolutions, other than those in the two preceding sections, which violate constitutional or legal laws;

IV. Challenges of definite acts or staunch and definitive rulings by the competent authorities of the states of the Federation, to organize and certify the elections or rule on the controversies that arise during the elections, which may be determining factors in the fulfillment of the electoral process, or the final result of the elections. This course of action shall only proceed when the remedy sought is materially and legally possible within the time

frame of the elections, and is feasible before the constitutional or legal date set for the inauguration of the bodies or the swearing in of the officials elected to them.

V. Challenges of acts and resolutions that violate the political-electoral rights of citizens to vote, be voted for, and freely and peacefully affiliate themselves to take part in the political affairs of the country, under the terms this Constitution and laws specify. For citizens to be able to have recourse to the jurisdiction of the Tribunal for violations of their rights by the political party to which the individual is affiliated, the individual must have previously exhausted the instances of conflict resolution provided for in its internal rules. The law shall establish the applicable regulations and terms;

VI. Labor conflicts or differences between the Tribunal and its employees;

VII. Labor conflicts between the Federal Electoral Institute and its employees;

VIII. The determination and imposition of sanctions by the Federal Electoral Institute to parties or political associations or individuals or corporations, whether national or foreign, that violate the provisions of this Constitution and the law; and

IX. Other stipulated by law.

The Electoral Tribunal chambers shall make use of any means of pressure needed to expeditiously enforce its sentences and rulings, within the terms established by law.

Notwithstanding what is provided for in Article 105 of this Constitution, the chambers of the Electoral Tribunal may decide upon the non-application of laws on electoral matters that go against this Constitution. The decisions issued in the exercise of this power shall be limited to the specific case seen in the court proceeding. In these cases, the Upper Chamber shall notify the Supreme Court of Justice of the Nation.

When an Electoral Tribunal Chamber sustains an opinion on the unconstitutionality of an act or resolution or on the interpretation of a precept of this Constitution and this opinion is contradictory to one sustained by the Chambers or the whole of the Supreme Court of Justice, any of the Ministers, Chambers or parties may bring the contradiction to the attention to the Supreme Court of the Nation *en banc* so it may decide which opinion should prevail. The resolutions that are issued in this case shall not affect affairs already decided.

The organization of the Tribunal, the powers of the chambers, the procedures for resolving affairs under its jurisdiction, as well as the mechanisms to set the criteria of jurisprudence deemed mandatory in electoral matters, shall be determined in this Constitution and in the laws.

The Upper Chamber may, *ex officio*, undertake the trials that appear in regional chambers at the request of some or any of these chambers. The law shall specify the regulations and procedures for the exercise of this power.

The administration, oversight, and control of the Electoral Tribunal, under the terms stipulated by law, shall be carried out by a Committee from the Council of the Judiciary Branch of the Federation, which shall consist of the president of the Electoral Tribunal, who shall preside over it, an Electoral Magistrate from the Upper Chamber appointed from among its members, and three members of the Council of the Judiciary Branch of the Federation. The Tribunal shall submit its budget to the president of the Supreme Court of Justice of the Nation for its inclusion in the proposed Budget of the Judicial Branch of the Federation. Likewise, the Tribunal shall issue its internal regulations and general resolutions on its proper functioning.

The Electoral Magistrates who form the Upper and regional chambers shall be selected by the vote of a two-thirds majority of the members present of the Chamber of Senators, from the nominees proposed by the Supreme Court of Justice of the Nation. The election of those forming part of these chambers shall be staggered, according to the rules and procedures stipulated by law.

The Electoral Magistrates that form the Upper Chamber must fulfill the requirements established by law, which may not be less than those required to be a Minister of the Federal Supreme Court of Justice and shall have a non-extendible term of office of nine years. Resignations, absences and licenses of Upper Chamber Electoral Magistrates shall be processed, covered and granted by this Chamber, as corresponds under the terms of Article 98 of this Constitution.

The Electoral Magistrates that form the regional chambers must fulfill the requirements established by law, which may not be less than those required to be a Magistrate of the Collegiate Circuit Court. Their term in office shall be nine years and non-extendible, unless they are promoted to higher positions.

In the event of a definitive vacancy, a new Magistrate shall be appointed for the remaining period of the original appointment.

The personnel of the Tribunal shall govern its work relationships according to the provisions that apply to the Federal Judicial Branch and the specific rules and exceptions stipulated by law.

Article 108. For the purposes of stating the responsibilities alluded to in this Title, representatives of public election, members of the Federal Judicial Branch and the Judicial Branch of the Mexico City, officials and employees and, in general, any person who performs a job, position or committee of any kind in the Federal Congress, the Legislative Assembly of Mexico City or the Federal or Mexico City Public Administration, as well as civil servants of the bodies to which this Constitution grants independence and who shall be held responsible for any acts or omissions in which they occur in the performance of the respective duties shall be regarded as public servants.

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Article 116. …

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I to III. …

IV. State Constitutions and laws on electoral matters shall guarantee that:

a) The elections for governors, members of local legislatures and members of city councils are held by means of universal, free, secret and direct suffrage. The election day shall be the first Sunday of July of the corresponding year. States with election days during a federal election year that do not coincide with the date for federal elections shall not be subject to this last provision;
b) In the exercise of electoral functions, responsibility of electoral authorities, the guiding principles are certainty, impartiality, independence, legality and objectivity;
c) The authorities responsible for organizing elections, and with the judicial functions to resolve controversies in electoral matters, shall enjoy independence in their functioning and independence in their decisions;
d) Competent electoral authorities of an administrative nature may come to an arrangement with the Federal Electoral Institute so the latter may take charge of organizing local elections;
e) Political parties are only founded by citizens without the involvement of union organizations or organizations with a different social object and without having any corporate affiliation whatsoever. Likewise, with the exception of that set forth in Article 2, Section A, subsections III and VII of this Constitution, their exclusive right to request the registry of candidates to offices of public election is acknowledged;
f) Electoral authorities may only intervene in internal affairs of parties under the conditions expressly set forth;
g) Political parties receive equal amounts of public funding for their permanent ordinary activities and those leading towards obtaining votes during election processes. The procedure for liquidating the parties that lose their registry and the destination of their assets and residual amounts are also established;
h) The criteria for establishing the limits on the disbursements of political parties during their primary elections and election campaigns are set, as are the maximum amounts for the contributions from their followers, the total sum of which shall not exceed ten percent of the limit on campaign spending determined for the election of Governor; procedures for the control and oversight of the origin and use of all the resources political parties have are determined and sanctions are es-

tablished for non-compliance with the provisions set forth for these matters;

i) Political parties have access to radio and television, in accordance with the laws established in section III, sub-section B of Article 41 of this Constitution;

j) The rules for political parties' primary elections and election campaigns, as well as the sanctions for whoever violates them are established. In every case, the period of time for campaigns shall not exceed ninety days for election for Governor, or sixty days when only local deputies or city councils are elected. Primary elections may not be longer than two-thirds of the respective election campaigns;

k) The mandatory bases for the coordination between the Federal Electoral Institute and the local electoral authorities in matters of political party finance oversight are instituted under the terms established in section V of Article 41 of this Constitution;

l) A system of means of challenges is established so that all electoral acts and resolutions are consistently subject to the principle of legality. Likewise, that it establishes the premises and rules to carry out total or partial recounts of votes at administrative and jurisdictional levels;

m) The causes for declaring elections for Governor, local deputies and city councils null and void are set, as well as the terms convenient for filing any challenges, taking into account the principle of finality of the stages of election processes; and

n) Crimes shall be typified and omissions shall be determined, in electoral matters, as well as the sanctions that are to be imposed for these.

V. to VII. …

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Article 122. …

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A …

B. …

C. …

FIRST…

I. to IV. …

V. Under the provisions of the Government Act, the Legislative Assembly shall have the following powers:

a) to e) …

f) Issue the provisions that guarantee free and genuine elections in Mexico City through universal, free, secret and direct suffrage; subject to the bases established in the Government Act, which shall comply with the prin-

ciples and rules established in clauses b) through n) of Section IV of Article 116 of this Constitution. Therefore, the references made in clauses j) and m) regarding the Governor, local deputies and city councils shall be interpreted as meaning the Head of Government, Legislative Assembly deputies and Heads of Boroughs, respectively;

g) to o) …

SECOND TO FIFTH…

D to H …

Article 134. …

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Civil servants of the Federation, states and municipalities, as well as from Mexico City and its boroughs, have the obligation of using the public resources under their responsibility with impartiality at all times, without influencing fair competition between political parties.

The propaganda in any form of social communication that the government authorities, independent bodies, agencies and public administration bodies and any other body from the three branches of government disseminate must be of an institutional nature and for information, educational or socially-oriented purposes. In no case shall this propaganda include names, images, voices or symbols that imply personalized endorsement of any civil servant. News and information that have not been paid for shall not be considered propaganda.

The laws, in their respective areas of application, guarantee strict compliance with that set forth in the two preceding paragraphs, including the system of sanctions deemed necessary.

TRANSITORY ARTICLES

Article First. This Decree shall enter into force the day after its publication in the Federal Official Gazette.

Article Second. Only for this occasion, the Federal Electoral Institute shall establish, the upper limit of presidential campaign expenses in 2008, based on the legal grounds issued, for the sole purpose of determining the total amount of private funding that each party can receive a year.

Article Third. The Federal Congress must make the corresponding modifications in federal laws within a maximum period of thirty calendar days as of the entry into force of this Decree.

Article Fourth. For the purposes of that which has been established in the third paragraph of section V of Article 41 of this Constitution, within a

period no longer than 30 calendar days as of the entry into force of this Decree, the Chamber of Deputies shall proceed to form the General Council of the Federal Electoral Institute according to the following bases:

a. A new President-Councilor, whose term in office shall end on October 30, 2013, shall be elected. If the case arises, the person nominated may be re-elected only once under the provisions established in the abovementioned third paragraph of Article 41 of this Constitution;
b. Two new electoral councilors, whose terms in office shall end on October 30, 2016;
c. From among the eight electoral councilors in office at the entry into force of this Decree, three shall be selected to end their term in office on August 15, 2008 and three shall remain in their positions until October 30, 2010;
d. By August 15, 2008, at the latest, three new electoral councilors, whose term in office shall end on October 30, 2013, shall be elected.

The electoral councilors and the President-Councilor of the General Council of the Federal Electoral Institute in office at the entry into force of this Decree shall remain in their positions until the Chamber of Deputies fulfills that which is set forth in this Article. The appointment of deputy electoral councilors of the General Council of the Federal Electoral Institute established in the Decree published in the Federal Official Gazette on October 31, 2003 no longer applies.

Article Fifth. For the purpose of staggered renewal of Electoral Magistrates of the Upper Chamber and regional chambers of the Federal Electoral Tribunal referred to in Article 99 of this Constitution, it shall adhere to that which is established in the Organic Law of the Federal Judicial Branch.

Article Sixth. State legislatures and the Legislative Assembly of the Federal District must make the corresponding modifications in their legislation according that which has been set forth in this Decree within a year, at the latest, as of the entry into force of this Decree. If the case arises, that which is provided for in Article 105, Section II, fourth paragraph of the Political Constitution of the United Mexican States shall be observed.

The states that upon the entry into force of this Decree have begun electoral processes or are about to begin them, shall carry out their elections according to that which is stipulated in their constitutional and legal provisions in force. However, once the electoral process has ended, they must make the modifications referred to in the preceding paragraph within the same period of time, as of the day after the completion of their respective electoral process.

Seventh Article. Any provisions that contradict this Decree are hereby repealed.

Main Session Room of the Chamber of Senators of the Federal Congress of the United Mexican States on the eleventh day of the month of September in the year two thousand seven.

COMMITTEE OF CONSTITUTIONAL ISSUES
COMMITTEE OF GOVERNANCE
COMMITTEE OF RADIO, TELEVISION AND CINEMATOGRAPHY
COMMITTEE OF LEGISLATIVE STUDIES

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