Mexican Law Review

New Series
VOLUME II
Number 2
January - June 2010

UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES JURÍDICAS

Mexican Law Review

New Series

January-June 2010 Volume II, Number 2

Interior design and edition: Wendy Rocha
Cover: Arturo Flores

MEXICAN LAW REVIEW

New Series

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ARTICLES

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CONFRONTATION, COLLUSION AND TOLERANCE: THE RELATIONSHIP BETWEEN LAW ENFORCEMENT AND ORGANIZED CRIME IN TIJUANA

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ABSTRACT. *This paper offers an analytic narrative of relations between organized criminal groups and Tijuana's municipal police force. While civil society mobilization has made it progressively more difficult for elected and appointed officials to tolerate or collude with organized crime, civil society has few tools to hold the rest of the police bureaucracy accountable, particularly when compared with organized crime's ability to bribe, threaten, and overcome information asymmetries. As a result, interactions between organized crime and the police is a mix of confrontation, corruption, and tolerance. Recognizing the corruptive power of organized crime, this article asks if honest officials can alter the equation for rank and file officers. The paper explores advances in police remuneration, setbacks in selection criteria, the challenges to creating internal accountability mechanisms, and the difficulties in protecting officers.*

KEY WORDS: *Police reform, Tijuana, organized crime, corruption, civil society*.

RESUMEN. *Este artículo ofrece una narrativa analítica de las relaciones entre los grupos de crimen organizado y la policía municipal de Tijuana. A pesar de que las movilizaciones sociales han hecho más difícil que los gobernantes electos toleren o participen con el crimen organizado, la sociedad civil cuenta con pocas herramientas para supervisar a la burocracia policial, especialmente si se le compara con la capacidad del crimen organizado de sobornar, corromper y obtener información. En consecuencia, la relación entre la policía y el crimen*

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organizado se caracteriza por una mezcla de confrontación, corrupción y tolerancia. Asimismo, explora los avances en remuneración policial, los retrocesos en los procesos de selección, los retos para la creación de sistemas de rendición de cuentas, así como la dificultad de proteger a los oficiales.

PALABRAS CLAVE: *Reforma policial, Tijuana, crimen organizado, corrupción, sociedad civil.*

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I. INTRODUCTION

Violent crime and the presence of drug cartels have been recognized as problems in Mexican society for decades. However, since the beginning of the 21st century these issues have steadily reached the top of the national agenda. In the last decade, the uneasy truces and balance of power that had governed relations among the country's organized criminal groups fell apart entirely, provoking several costly conflicts that would spread nationwide. Organized crime related assassinations have adorned newspapers everyday as the number of killings rose to approximately 2,280 in 2007, over 5,200 in 2008 and 6,587 in 2009.[3] The violence has affected almost every part of the country, although it has been particularly brutal in the cities of Tijuana, Ciudad Juárez and Culiacán, traditional homes to Mexico's three

[3] Estimates based on calculations by the *Reforma* newspaper as presented by the Justice in Mexico Project (*www.justiceinmexico.org*). Different sources provide different estimates, with several placing the number of assassinations in Mexico much higher.

largest criminal organizations.[4] While most of the dead have been participants in organized crime, innocent civilians are often caught in the crossfire.[5] As the competition has increased and the rules of the drug trade have changed, criminal groups have begun to diversify into other activities to fund their operations, including theft, kidnapping, extortion and local drug sales.[6] As the ensuing violence has spread, citizens have increasingly demanded a solution from government authorities at municipal, state, and federal levels.[7]

Unfortunately, now that organized crime and public security have become top national priorities, Mexican society has found it lacks the police forces (and an effective criminal justice system) to effectively confront the problem. Daily newspaper reports illustrate how many police officers have not only turned a blind eye to organized crime but have also become active participants in criminal activities.[8] As the national death toll has risen, so has the number of police killed. Yáñez estimates that 831 police were killed in organized crime-related executions in 2007 and 2008.[9] While many died in the line of duty, it is believed that many more were killed because of their involvement with the cartels.

Presidents Vicente Fox Quesada (2000-2006) and Felipe Calderón Hinojosa (2006-2012) have been of the opinion that in the absence of a professional and honest police force at all three levels of government, they had to turn to the military to take on a leading role in Mexico's war on organized crime.[10] Both Fox and Calderón pledged to build the capacity of Mexican law enforcement and phase out the use of the military, but such efforts have been hindered by the pervasiveness of police corruption and drug cartel infiltration.

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4 The Arellano Félix organization is based in Tijuana, Baja California, the Juárez organization or Vicente Carrillo Fuentes organization is based in Ciudad Juárez, Chihuahua, and the Sinaloa organization is based in Culiacán, Sinaloa.

5 For example, in January 2010, organized criminal elements affiliated with the Juárez cartel killed 15 innocent people (mostly youths) at a party believing they were members of a rival gang. Because of the commonality of such "ajustes de cuenta," or reprisal killings, the Calderón administration made regretful statements under the assumption that the innocent youths had links to organized crime. See for example, *Desligan del narco a jóvenes masacrados*, EL UNIVERSAL, Feb. 4 (2010).

6 See for example, *El Kaibil exhibió al CAF y al gobierno*, 1824 ZETA (2009), on the use of kidnapping to make up for insufficient drug trafficking revenues.

7 See for an example Ken Ellingwood, *Mexico Massacre Response Fails to Convince*, L. A. TIMES, Feb. 4 (2010) on societal response and frustration with insecurity.

8 See for example, *Policías y mafiosos, los secuestradores*, 1817 ZETA (2009).

9 José Arturo Yáñez Romero, *Violence in Mexico: Organization and Expansion*, 84 VOICES OF MEXICO (2009).

10 For further discussion, see Marcos Pablo Moloeznik, *The Militarization of Public Safety and the Role of the Military in Mexico*, *in* POLICE AND PUBLIC SECURITY IN MEXICO (Robert Donnelly & David Shirk eds., University Readers, 2009).

Besides the military, the federal police have been the key players in the fight against organized crime as drug trafficking, participation in organized crime, money laundering and the use of weapons restricted to the military fall under federal jurisdiction.[11] Despite this, municipal police forces are important figures in the current situation. First, municipal police could play an important role in supporting federal authorities since they make up the largest part of the country's police (49%) and possess substantial local knowledge and intelligence.[12] Moreover, as organized criminal groups have diversified their activities, they have increasingly run afoul of state and municipal legislation. Second, and perhaps more importantly, municipal police officers have in many cases served as an obstacle to the Calderón administration's efforts and have even worked for criminal groups. Corrupt police officers working with organized crime regularly offer intelligence; provide security, weapons and uniforms; release criminals; and in some cases actively commit crimes.[13] The impunity for many organized crime leaders would simply not be possible without the support of local law enforcement.

Persistent police corruption in Mexico has produced a cynical attitude toward reform efforts, which is perhaps warranted after decades of unfulfilled promises. There is a generalized feeling that the police are a homogenous group that always has been and will be corrupt and corruptible. For example, a *New York Times* article offered, "[i]t has been said, not entirely in jest, that of every 10 police officers in Tijuana, 11 were on the cartel's payroll in the 1990s."[14] Even the accounts sympathetic to police officers argue that corruption is the inevitable product of low pay, large bribes and threats from organized crime.

This paper offers a case study of relationships between organized criminal groups and Tijuana's municipal police force, the Secretaría de Seguridad Pública Municipal, an agency of over 2,000 officers. The study uses data from interviews with police officers, police leaders and members of

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[11] Functionally, the police are divided into preventive and investigative departments. Preventive police departments operate at all three levels of government and are typically organized under the auspices of a department of public security. Their primary job is to patrol, maintain public order, and be the first to respond to crime. Investigative police are organized under the auspice of the Office of the Public Prosecutor at the state and federal level and are responsible for investigating crimes and carrying out arrest warrants. For more information, see Ernesto López Portillo Vargas, *The Police in Mexico: Political Functions and Needed Reforms*, *in* TRANSNATIONAL CRIME AND PUBLIC SECURITY: CHALLENGES TO MEXICO AND THE UNITED STATES (John Bailey & Jorge Chabat eds., 2002).

[12] For 2007 numbers of Mexican police, see Guillermo Zepeda Lecuona, *Mexican Police and the Criminal Justice System*, *in* POLICE AND PUBLIC SECURITY (Robert Donnelly & David Shirk eds., 2009).

[13] *Corrupción hasta el cuello*, 1867 ZETA (2010).

[14] Tim Weiner, *Mexico Holds 41, Including Tijuana Police Chief, in Crackdown*, N. Y. TIMES, April 12, 2002.

civil society conducted during July 2008 and August 2009, complemented by an exhaustive study of newspaper articles from Tijuana's *Frontera* and *Zeta* newspapers and the national *El Universal* and *Proceso.*

Without a doubt, Tijuana, Baja California, represents an extreme case, as the traditionally dominant Arellano Félix Organization (AFO) has demonstrated its willingness to use both bribes and bullets to ensure a compliant police force again and again.[15] As such, this paper offers a critical case study for understanding the challenges to altering the status quo of police corruption and organized crime infiltration. Furthermore, although it is an extreme case, it is not a unique one and lessons from Tijuana can serve other cities that struggle with powerful organized criminal groups.

This article is primarily descriptive, detailing the complex relationship between the police and organized crime. Such an analytical narrative is a necessary first step to build better theories in a constantly changing policy arena with limited information and data. The analysis argues that the equilibrium in organized crime-police relations has traditionally been one of collusive corruption. However, it is increasingly difficult to discuss organized crime-police relations without being aware of the diversity among criminal groups and within the police force. While not excluding these options, civil society mobilization has made it progressively more difficult for elected and appointed officials to tolerate or collude with organized crime. Nonetheless, civil society has few tools to hold the rest of the police institution accountable, particularly when compared with organized crime's ability to bribe, threaten and overcome information asymmetries. As a result, current interaction between organized crime and the police is a mix of confrontation, corruption and tolerance. Recognizing the increasing accountability of high level officials, this research asks if those same officials can alter the equation that their subordinates face. This article explores the progress made in police remuneration, setbacks in selection criteria, challenges in creating internal accountability mechanisms and difficulties in protecting officers. Noting some positive developments, the article concludes that only sustained efforts will allow Tijuana police leaders to change the logic of the "bullet or the bribe." The article also ends with a discussion of the generalizability of the Tijuana case and offers suggestions for further research.

II. Organized Crime, the Police and Democratic Accountability

Bailey and Taylor argue that organized crime has various strategic options in dealing with the state, including (1) evasion, (2) corruption and (3)

[15] Jesús Blancornelas, El Cártel: Los Arellano Félix: La mafia más poderosa en la historia de América Latina (Plaza & Janés, 2002).

confrontation.[16] According to them, evasion is the most desirable strategy for criminal groups since they can continue with their activities without the cost of bribing or the risk of conflict. However, as the authors point out, it is often impossible for criminal operations to go entirely undetected by law enforcement. As a result, bribery and corruption offer a means to ensure the continuity of their operations. Confrontation is of course always an option. However, it is perhaps the least desirable, as it endangers human, financial, and contraband resources. The state also has the option to (1) tolerate, (2) collude, or (3) confront organized crime. Bailey and Taylor argue that the interaction (or interplay) between these two sets of actors has traditionally found equilibrium at either evasion-tolerance or corruption-collusion. Recently, this equilibrium has been disrupted and even a casual review of the daily headlines in Mexico suggests a strategy of confrontation has been brought into play.[17]

As Bailey and Taylor point out, such a simplified model of interaction offers parsimony but can fail to capture the often complex relationship between the state and organized crime. A primary concern is the extent to which either the state or organized crime can be viewed as unitary actors. At the most basic level, a federal system divides the state into three levels of government and municipalities might have very different interests than those of the federal government. Allison's influential work clearly illustrates how different assumptions about the diverse interests within the state produce radically different explanations of state behavior.[18] Or as Bendor and Hammond argue, organizations can be assumed to operate (1) as a unitary actor, (2) as multiple actors with the same goals or (3) as multiple actors with conflicting goals.[19]

This insight applies to police departments as well. Police agencies are often portrayed as quasi-military organizations that function hierarchically, whereby orders are given by the chief and then trickle down through the chain of command to line-level officers. In news media accounts and popular discourse, the police are commonly presented as a whole and it is assumed that corruption runs from the top to the bottom of the organization. In contrast to this view, the police could also be seen as a complex bureaucracy comprising diverse interests and subject to principal-agent problems.

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[16] JOHN BAILEY & MATTHEW TAYLOR, EVADE, CORRUPT, OR CONFRONT? ORGANIZED CRIME AND THE STATE IN BRAZIL AND MEXICO (GIGA, 2009).

[17] The reason organized crime has abandoned its evasion strategy appears to have less to do with its relationship with the state than with its relationship with other criminal groups. Fighting between criminal groups for territorial control has been the driving force of the violence affecting Mexico.

[18] GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (Longman, 1971).

[19] Jonathan Bendor & Thomas Hammond, *Rethinking Allison's Models*, Vol. 86 (2) AMERICAN POLITICAL SCIENCE REVIEW 301-22 (1992).

A principal-agent approach maintains that an agent or subordinate is supposed to act in the interest and under the command of the principal, in this case the police leader. In practice, however, agents have their own interests that might deviate from that of the principal. More importantly, principals lack complete information about the actions of their subordinates, and agents can and often do exploit these information asymmetries to pursue interests contrary to the good of the organization or the public.[20] This principal-agent problem does not only exist between the police chief and his or her operational commanders, but down the entire hierarchy.

Assuming hierarchy and unitary command within organized crime is also problematic. Although some criminal organizations do follow a strict hierarchy consistent with the public's image of a mafia, research on organized crime has found a variety of organizational structures. A 2002 United Nations Office of Drugs and Crime (UNODC) report divided criminal structures into standard hierarchies, regional hierarchies, clustered hierarchies, core groups and criminal networks, this last category including largely independent criminals collaborating on specific short-term objectives.[21] To offer another example, Bailey and Taylor divide organized criminal networks into four categories based on the degree of hierarchical control and the short and long-term nature of their collaboration.[22]

There is a natural resistance against recognizing the diversity within the police and within organized crime. Both are organizations little understood by the public and even experts (justifiably given the lack of transparency in the police and the lack of reliable information about organized crime). Nonetheless, recognizing the diversity within the state, within any given police department and within organized crime organizations opens the door for not one type of interaction between the state and organized crime but numerous ones. As such, it is possible for a police chief to collude with one organized crime group and confront another, or to confront organized crime while some of his subordinates confront, others collude with, and even others tolerate criminal organizations.

A second concern with a simplified model of police-organized crime interactions is that of identifying the utility function of police officers since the interests of public officials depend on the extent to which they are accountable to citizens. For example, corruption is desirable for unaccountable officers, but the officials held accountable run the risk of punishment. Of course, holding officials accountable to citizens also faces principal-agent problems. In a democracy, the most celebrated tool of accountability is

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[20] ROBERT KLITGAARD, CONTROLLING CORRUPTION (Berkeley, University of California Press, 1988).

[21] UNODC-United Nations Office on Drugs and Crime, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries*, 2002, available at: *http://www.unodc.org/pdf/crime/publications/Pilot_survey.pdf*.

[22] Bailey & Taylor, *supra* note 16.

elections and the ability to "throw the rascals out." While elected leaders cannot run for reelection in Mexico, elections still offer citizens the option to reward or punish politicians in future races for higher offices. This tool is, however, undermined by limited and unreliable information on the behavior of elected officials and appointees. Corruption is by its very nature difficult to detect and accused officials are quick to portray themselves as victims of political attacks by their opponents.[23]

Accountability to citizens can also be short-circuited by interest groups.[24] James Q. Wilson has noted that it is far easier for a small group of individuals highly affected by public policy (in this case organized crime) to organize and influence the policy process, than a large group of less intensely affected individuals (*i.e.* the general public).[25] In fact, by paying bribe money to police and police leaders, organized crime becomes a second principal. Criminal organizations do not only offer police carrots, however; they also pose a credible threat of reprisals for acting against their interests. As repeated in hundreds of journalistic accounts and in academic writing, organized crime offers police a choice between "*plata o plomo*" ["a bullet or a bribe"]. To illustrate this, on the day of his appointment as Tijuana's chief of police and prior to his subsequent murder by organized crime in 2000, Alfredo de la Torre told a colleague, "First they send you a briefcase full of money. Then, if you reject it, they send you a briefcase with a gun."[26] It is unquestionable that the simple logic of "a bullet or a bribe" provides considerable explanatory power. However, it risks being overly deterministic and offers little guidance as to how to break the vicious cycle of corruption that grips Mexico's local police forces.

In response to the overdeterminism in corruption literature, in the 1980s and 1990s several authors began to explore policy initiatives to raise the costs and reduce the benefits of corruption.[27] Klitgaard, for example, offers a commonly followed framework for reducing corruption based on selecting qualified agents, creating carrots and sticks, gathering information and monitoring, restructuring the principal-agent relationship and changing attitudes about corruption. Figure 1 offers a simplified equation of the choices officers have ranging from confrontation with, corruption by and tolerance of organized crime. The result is the product of the benefit of corruption

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[23] For example, the head of the federal Secretaría de Seguridad Pública, Genaro García Luna, is both celebrated as Mexico's top cop and accused of colluding with the Sinaloa cartel. See for example, Anabel Hernández, *Intocable y solapado*, 1672 PROCESO (2008).

[24] J. LEIPER FREEMAN, THE POLITICAL PROCESS (Random House, 1965); George Stigler, *The Economic Theory of Regulation*, Vol. 2 BELL JOURNAL OF ECONOMICS 3-21 (1971).

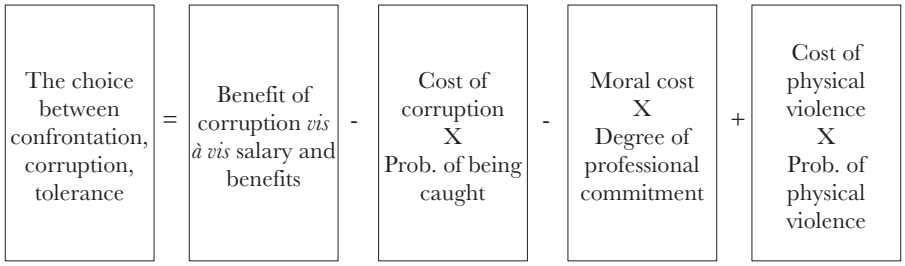
[25] JAMES Q. WILSON,THE POLITICS OF REGULATION (Basic Books, 1980).

[26] Molly Moore, *Mexicans Stunned by Killing of Police Chief; Attack in Tijuana Follows Tough Talk by President*, WASHINGTON POST, February 28, 2000.

[27] SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (Cambridge University Press, 1999); Klitgaard, *supra* note 20.

minus the cost of corruption, a figure that is affected by the probability of being caught. From this, the moral cost of corruption, a function of the degree of professional commitment in itself, is subtracted. To these two factors, we add the cost of retaliation from organized crime, which depends on the probability of organized crime's use of violence.

FIGURE 1. THE CORRUPTION EQUATION FOR POLICE



While the result of this equation has traditionally favored corruption and tolerance rather than confrontation, it offers clues towards potential policy solutions. The probability of corruption could be reduced by decreasing the relative value of the benefit (by increasing wages, improving benefits, and providing a pension), raising the probability of being caught, increasing a sense of professional commitment and protecting threatened police officers.

It is worth noting that while organized crime plagues governments the world over, there has been success in fighting organized crime, dismantling collusive ties with the state and reforming police departments in the United States, Sicily, Hong Kong and Colombia. In all these cases, citizen mobilization played an important role.[28] For example, despite the obvious power of the Sicilian mafia, Leoluca Orlando argues that it was cultural rejection and citizen mobilization against the mafia that (in conjunction with legal action) led to its dramatic decline in Palermo.[29] While not concerned with organized crime per se, Lawrence Sherman has illustrated the impact corruption scandals have had on mobilizing citizens and forcing change within U.S. policing.[30] More generally speaking, several scholars have noted that

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28 T. Wing Lo., *Pioneer of Moral Education: Independent Commission against Corruption*, Vol. 4 (2) TRENDS IN ORGANIZED CRIME 19-30 (1998); Richard LaMagna, *Changing a Culture of Corruption: How Hong Kong's Independent Commission against Corruption Succeeded in Furthering a Culture of Lawfulness*, Vol. 5 (1) TRENDS IN ORGANIZED CRIME 121-136 (1999); LEOLUCA ORLANDO, FIGHTING THE MAFIA AND RENEWING SICILIAN CULTURE (Encounter Books, 2001).

29 Leoluca Orlando, *supra* note 28.

30 LAWRENCE SHERMAN, SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION (University of California Press, 1978).

large scale mobilization can overcome entrenched interests and provoke rapid policy changes even in environments that favor continuity.[31] This suggests a role for citizens and civil society in a policy arena that has traditionally been considered the sole purview of well-armed and well-trained law enforcement officers.

This discussion has raised several questions that might shed light on understanding the current conflict raging in Mexico. First, are observers better served by viewing a police force or an organized criminal group as a unitary actor, as multiple actors with the same interests or as different actors with different interests? Second, to what degree are the police accountable to citizens and to what extent can citizens assert themselves as principals over their police agents? Third, is the logic of "a bullet or a bribe" deterministic or can reform efforts undermine this compelling formula?

III. The History of the Tijuana Experience: Collusive Corruption

As Bailey and Taylor posit, there did appear to be a corruption-collusion equilibrium governing Mexico generally, and Tijuana in particular, prior to the most recent escalation of violence.[32] In fact, for many, the central question was not whether there was cooperation between organized crime and government authorities, but which of these two groups could dominate the relationship.[33] In Baja California specifically, Luis Astorga uses health official's reports from the 1930s to document the direct involvement of Baja California's territorial governors in opium smuggling.[34] As late as the early 1980s, Blancornelas's writings suggest that the Baja California federal attorney (delegate of the Procuraduría General de la República), José Luis Larrazolo, was able to dictate the terms of the relationship with drug traffickers.[35] However, organized crime's position *vis-à-vis* state actors changed

31 Frank R. Baumgartner & Bryan D. Jones, *Agenda Dynamics and Policy Subsystems*, Vol. 53 (4) JOURNAL OF POLITICS 1044-1074 (1991); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (Harper Collins, 1995).

32 For more about collusive corruption in Tijuana, see Blancornelas, *supra* note 15. Regarding Mexico in general, *See* Stanley A. Pimentel, *The Nexus of Organized Crime and Politics in Mexico*, *in* ORGANIZED CRIME AND DEMOCRATIC GOVERNABILITY: MEXICO AND THE U.S. MEXICAN BORDERLANDS (John Bailey & Roy Godson eds., University of Pittsburgh Press, 2000); Luis Astorga, *Organized Crime and the Organization of Crime*, *in* ORGANIZED CRIME AND DEMOCRATIC GOVERNABILITY: MEXICO AND THE U.S. MEXICAN BORDERLANDS (John Bailey & Roy Godson eds., University of Pittsburgh Press, 2000).

33 For further discussion, *See* ORGANIZED CRIME AND DEMOCRATIC GOVERN- ABILITY: MEXICO AND THE U.S. MEXICAN BORDERLANDS (John Bailey & Roy Godson eds., University of Pittsburgh Press, 2000).

34 Astorga, *supra* note 32.

35 Blancornelas, *supra* note 15.

in the 1980s and 1990s. On the one hand, the monopoly power of state actors began to decline as Mexico transitioned to democracy and liberalized its economy. On the other hand, the power of organized crime grew as the Mexican cartels supplanted Colombian groups in transporting drugs into the United States.[36]

This change was visible in Baja California with the rise of the Arellano Félix cartel in the 1980s and 1990s. The Arellano Félix family maintained firm control of the Tijuana organization and successfully fended off attempts by the Sinaloa and Juárez cartels to enter the Tijuana market. Flush with profits, the AFO provided sizeable carrots to induce collusive corruption, which could be readily backed up by credible threats and violence. In his seminal study of the AFO, Blancornelas provides several narratives of how those who acted against the cartel met with reprisals.[37] Although dominance had shifted to organized crime, the image of two unitary actors (the AFO and law enforcement) engaged in collusive corruption appeared to effectively describe the situation in the 1990s.

Corruption would survive the 1990s and continue to thrive in the 2000s. In 2002, during the 2002-2004 municipal administration of Jesús González Reyes, federal authorities called many of Baja California's police leaders to the state police academy for what was being promoted as training and evaluation. Upon checking weapons at the entrance, federal authorities arrested over forty police officers and flew them to Mexico City.[38]

Rather than progress in the fight against corruption, cartel infiltration only seemed to increase under the 2005-2007 municipal administration of Jorge Hank Rhon. In early 2008, Calderón deployed 3,300 federal police and military personnel to Tijuana and took the extra step of confiscating the guns of all of Tijuana's officers, leaving the police force without weapons for nearly a month.[39] Although the official statistics do not bear out the assertion, popular perception holds that crime decreased during this time period.[40]

IV. Civil Society Mobilization and the Strategic Game for Police Leadership

The increase in criminality in the mid-2000s had the unanticipated effect of galvanizing popular opinion in Tijuana and mobilizing civil society. There

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36 Tony Payan, *The Drug War and the U.S.-Mexico Border: The State of Affairs*, Vol. 105 (4) SOUTH ATLANTIC QUARTERLY 864-880 (1996).

37 Blancornelas, *supra* note 15.

38 Weiner, *supra* note 14.

39 *Operación conjunta Tijuana: gráfico animado*, EL NORTE, February 2, 2007.

40 *Con las manos vacías*, 1714 ZETA (2007).

had always been a few groups and individuals active in condemning organized crime and police corruption. The first deserving mention is the weekly newspaper *Zeta* which, under the leadership of Jesús Blancornelas (until his death due to natural causes in 2006), consistently and unwaveringly published about police corruption and organized crime, much to the discomfort of some government officials who have labeled the publication as yellow journalism. *Zeta* remains one of a handful of newspapers in the country that is willing to conduct investigative journalism into organized crime-related issues. As a result of its activities, two of Blancornelas's associates were killed (in 1988 and 1994) and Blancornelas barely survived an assassination attempt in 1997, proving that it is also dangerous for civil society and the media to become too involved.

A second long term voice has been the Centro Binacional de Derechos Humanos [Binational Human Rights Center or CBDH], a Tijuana-based organization run by Víctor Clark. In 1992, the center published a report detailing a police side-business: selling police identification to criminals, as well as other acts of police corruption. Its activism also proved dangerous: two informants were killed, the group's offices were burglarized and copies of the report were stolen. Clark was provided with a body guard detail and later a sophisticated wiretap was found in the organization's phone.

Given the risks faced by *Zeta* and the CBDH, few individuals or organizations were willing to step forward.[41] However, by the mid-2000s the security situation had become intolerable. While organized crime-related assassinations had always occurred in Tijuana, in 2005 *Zeta* calculates that there were a shocking 352 in the city and 539 in the state. By 2008, this number would rise even further to 882 in Tijuana and 1,019 in the state.[42]

For various reasons, including increased competition, the rising costs of internal struggles and financial shortfalls, the AFO's cells also began to diversify their activities. Rather than just trafficking drugs, an activity that arguably had comparatively less impact on Tijuana society, AFO cells (and criminal groups operating under the protection of AFO cells) began engaging in kidnapping, extortion, bank and ATM robberies and local drug sales. The increase in violence and criminal activity had an unprecedented impact on Tijuana society. Examples abound: A civil society group called Aso-

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41 In addition, the country's one-party corporatist state had produced an anemic autonomous civil society, as evidenced by comparative studies. GUSTAVO VERDUZCO ET AL., MEXICO. IN GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE NONPROFIT SECTOR (L. M. Salamon *et al*. eds., Center for Civil Society Studies, 1999).

42 *Ejecuciones Baja California por año. Tijuana*, 1814 ZETA, 2009. It should be noted that *Reforma* newspaper reports much lower numbers of organized crime related killings. They estimate that there were 154 in 2007, 604 in 2008, and 320 in 2009. NUMBER OF DRUG KILLINGS IN MEXICO (Transborder Institute, 2010), available at: *http://www.sandiego.edu/peacestudies/tbi/projects/current_projects/mapping_project.php#narcoannual*.

ciación Esperanza contra las Desapariciones Forzadas y la Impunidad, A. C. (The Association for Hope Against Kidnappings and Impunity) reported in an interview that they had documented 134 kidnappings and disappearances in the first half of 2008.[43] Military personnel became increasingly visible as they established checkpoints throughout the city and surrounded public hospitals attending to wounded cartel members. A four-hour confrontation between authorities and an AFO cell took place outside a day care center and 450 children had to be evacuated in the midst of a shootout. An infant was killed by crossfire from a shootout between police and criminals. A family was accidentally killed by AFO hit men attempting to assassinate a police officer. Civil society's indignation at the growing violence in the mid to late 2000s forced it into action.

The earliest and most salient example was a fifteen-day March for the Victims of Insecurity held in 2006 in the most populous areas of Baja California. The march, an initiative of the Consejo Ciudadano de Seguridad Pública de Baja California [Baja California Public Security Citizen Council] under the leadership of Jesús Alberto Capella Ibarra, sought to draw attention to the crime-related problems the state was facing. The Council, created by law as a vehicle for formalized public participation in public security, does not have much power of oversight, but it does offers civic leaders regular access to public officials and has been an important tool for analyzing and making crime data public.

Many business leaders had traditionally felt that admitting the severity of the security problem would discourage business investment. However, as the situation worsened in the mid-2000s, the perception of insecurity could no longer be minimized and the business community overcame its ambivalence to play a more active role in recognizing and addressing the security concerns. For example, the Cámara de Comercio [Chamber of Commerce or CANACO] initiated a program called *Ponle dedo al ratero,* or "target the criminal". Through the program, CANACO works with the police to publish something akin to a most wanted list of thieves and rewards police involved in their apprehension.

No issue, however, has created more fear and mobilized more of Tijuana's civil society than that of kidnapping. Kidnapping victims taken for ransom have ranged from prominent business men to doctors to members of lower middle class families. Fernando Ocegueda Flores, the father of a kidnapping victim, is one of several citizens who has stepped into the spotlight, helped reinvigorate the above-mentioned Asociación Esperanza and later helped to found Associación Ciudadana contra la Impunidad [Citizen Association against Impunity]. These organizations successfully pushed Gov-

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[43] While the number above is taken from official statistics, official numbers are problematic since many kidnappings go unreported.

ernor José Guadalupe Osuna Millán to create a special prosecutor to investigate kidnappings.[44]

A group of doctors also emerged to lead public protest against insecurity. The Consejo Médico Ciudadano [Citizen's Medical Council] came into being after doctors became a target for kidnappings and telephone calls extorting money.[45] The group reported that by mid-2008, 22 doctors had been the target of kidnappings or extortion. The doctors were also concerned that they were being put at risk by treating and housing wounded criminals brought to public hospitals for treatment.[46] In response, the group held protests, hung banners and held work stoppages to pressure authorities for protection. They succeeded in extracting governmental promises for stepped up commitment, self-defense courses and the transfer of patients to a military hospital.

These groups and others (such as a public security coalition of 55 institutions called Alianza Civil) illustrate an increasing willingness on the part of civil society to demand an end to impunity and violence and to extract a response from elected and appointed officials. With available information, protests and voting power, citizens in Tijuana have the tools to pressure public officials and help hold them accountable, making tolerance of and collusion with organized crime less desirable.

While there is considerable pressure on elected and appointed officials, there are limits to the involvement of civil society. For example, it appears that there has been less activity in supervising and overseeing the police directly. Even the state Citizen Public Security Council, which meets regularly with police leaders, has felt that it has had to resort to demonstrations to be effective. Moreover, the once active municipal Citizen Public Security Committee, a municipal version of the state level council, is now defunct. So while public officials have reasons to respond to civil society protest, line-level officers are (ironically) more insulated from citizens. As such, while citizens have tools to hold city and police leaders accountable, they have few tools to do so with the rest of the force.

V. Inter-Cartel Conflict and the Strategic Game for Organized Crime

By the mid to late-2000s, the situation had also changed for organized crime. In February 2002, the cartel's main enforcer Ramón Arellano Félix was killed in a shootout in Mazatlán, Sinaloa. A month later, the group's

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44 Luis Pedro Arellano Sarmiento, *En defensa de los desaparecidos*, 1812 ZETA (2008).

45 *Exigen los médicos seguridad. Tijuana*, FRONTERA, May 2, 2008.

46 Daniel Salinas, *Piden atender en cuartel militar a los lesionados en balaceras*, FRONTERA, May 8, 2008.

leader Benjamín Arellano Félix was arrested. Following numerous additional detentions of mid and lower level cartel operatives, in August 2006, the new leader, Francisco Javier Arellano Félix was also arrested. Although the mantel of leadership formally passed to a nephew, Luis Fernando Sánchez Arellano, challenges began to surface from within the organization.

Traditionally, the Arellano Félix cartel has been made up of a number of cells loyal to the Arellano Félix family, but with a degree of operational independence, a structure labeled by the United Nations Office on Drugs and Crime as a clustered hierarchy.[47] With the decline of the Arellano Félix brothers, one of the cartel's cell leaders, Eduardo Teodoro García Simental challenged Sánchez Arellano's leadership, producing a major rupture in the organization. Concurrently, the Sinaloa cartel, which had always been the AFO's chief rival, sought to take advantage of the AFO's weakness and strengthen its presence in Baja California, cultivating ties to the García Simental camp.[48] Clearly, the conditions of the game had changed for the Arellano Félix family leadership, which had to fight off both an insurgency from within its ranks and the entrance of an outside cartel.

The internal division turned violent by the spring of 2008. In April of that year, a sustained shootout took place between the two rival groups, resulting in sixteen deaths and many more wounded. Following a lull in violence over the summer, the killings escalated dramatically in the fall. By the end of the 2008, *Zeta* estimates that there were 882 assassinations in Tijuana, up from 310 the year before.[49] After months of fighting, which left both camps drained of human and financial resources, in December 2008, it is believed that the two groups called a truce and agreed to respect each other's territory. Despite some signs of cooperation during early 2009, conflict continued between the two groups.

VI. Police-Organized Crime Relations in Tijuana in 2008-2009

Under increasing pressure from civil society, there is cautious optimism that the administration of Jorge Ramos (December 2007-November 2010) is more serious about tackling the problem of police corruption and developing a professional police department than previous administrations. Upon arrival in office, the Ramos administration responded to the crisis in the police force by going to two different extremes. For the post of Secre-

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47 UNODC, Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries (United Nations Office on Drugs and Crime, 2002).

48 Kriztian Camarena, *Opera 'El Chapo' en TJ*, Frontera, Nov. 13, 2008.

49 *Ejecuciones Baja California por año*, 1814 Zeta, Tijuana, 2009.

tary of Public Security he appointed Alberto Capella Ibarra, the abovementioned civil society activist. Capella Ibarra was so outspoken that upon his selection as secretary, gunmen shot at his house in an attempt to scare or assassinate the civic leader turned police chief. The attack failed when Capella used the automatic assault rifle left by his bodyguards to fend off the assailants, propelling the young lawyer to stardom status in the national media.

For the position of police director and operational commander, the administration appointed a lieutenant colonel from the military, Julián Leyzaola Pérez. The colonel sought to bring military-style discipline to the force and took an active role in day to day operations, participating in police operations and meeting daily with all district commanders. The two appointments were meant to reassure civil society.

In early January 2008, members of an AFO cell attempted to rob an armored car along one of Tijuana's main thoroughfares.[50] Under the direct leadership of Leyzaola, a police pursuit was initiated, the thoroughfare was shut down and the robbers were forced to flee without their cargo. The operation detailed in the following day's newspaper was surprising to members of Tijuana's society for two reasons. First, the municipal police had successfully prevented a major criminal act, and second, the director of the police had personally joined and then led the operation. The incident suggested that the new leadership would not select the traditional options of tolerance and collusion, but would instead confront organized crime.

Had the story ended there, it might have been on balance a very positive outcome. Instead, however, messages were broadcast over the police radio threatening that anyone who participated in the operation would be killed. Only a few hours later, the commanders Leyzaola had ordered to close off the thoroughfare were assassinated. In addition, in attempting the carry out one of the killings, organized crime triggermen opened fire on the wrong house, killing a woman who lived there and wounding her husband and child. On realizing their error, the gunmen turned their weapons on the correct house, killing police commander Margarito Saldaña along with his wife and 12-year-old daughter.[51] The killing of an honest officer (as evidenced by Saldaña's humble home and limited financial resources) seemed to break with a history of targeting double-crossing police and sparing families.

This cycle of crime, police response and reprisal would repeat itself several times in the following months. Organized crime was used to impunity and had no intention of giving an inch, even for rather small offenses.

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[50] Fausto Ovalle, *Persiguen y matan policías a asaltante*, FRONTERA, Jan. 15, 2008.

[51] Daniel Salinas & Fausto Ovalle, *'Es la guerra': 6 muertos*, FRONTERA, Jan. 16, 2008; Myrna Sánchez, *Policías se sienten vulnerables*, FRONTERA, Jan. 16, 2008; Fausto Ovalle & Manuel Villegas, *Vive Tijuana una jornada sangrienta*, FRONTERA, Jan. 16, 2008.

When a twenty-year-old youth who claimed to have "connections" was detained in early April 2008 for driving a car without license plates, a municipal officer accompanied by another individual arrived at the district police station where the youth was being held and made threats in an attempt to obtain his release. To the commanding officer's credit, the two men were arrested and transported to the central police station. Minutes later, an armed group of about ten men open fire on the district station and three days later an armed group tried to assassinate the police commander at his home.[52]

History would repeat itself in March. Throughout early 2008, organized criminal cells were actually using tow-trucks to drag away ATM's. The act was brazen and symptomatic of the degree of impunity with which organized crime felt it could operate in Tijuana.[53] Believing they were responding to a grocery store robbery, an elite police unit arrived at 4:00 am to find a tow truck guarded by armed men pulling away an ATM. A firefight ensued and two of the criminals were detained and arrested despite threats that there would be retribution. The next day, the mid-level officer in charge of the operation was assassinated on his way home from work just outside the police station.[54] Of the four remaining officers that participated in the arrests, three resigned in fear and one was transferred to another area.

Nonetheless, throughout 2008 and 2009, Leyzaola continued to pursue a confrontation strategy, facilitated by improved cooperation between municipal, state, federal and military authorities. Unable to corrupt Leyzaola and unable to kill him,[55] the AFO opted for an intimidation strategy. Following a tactic that had proven successful in removing Ciudad Juárez's police chief in 2008, a somewhat united AFO threatened to randomly kill innocent police until Leyzaola resigned. Seven were killed in April 2009 in what were believed to be coordinated attacks between the Sánchez and García factions and another three officers were randomly shot in July.[56] Nonetheless, Leyzaola did not step down from his post.

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[52] Luis Gerardo Andrade, *Cumplen amenaza; balean comandancia*, FRONTERA, Jan. 1, 2008; *Mueren dos sicarios al atacar a jefe policiaco*, FRONTERA, April 13, 2008.

[53] By mid-March, the head of the Tijuana police acknowledged in an interview that there had been 14 ATM robberies in the first two and a half months of 2008. Fausto Ovalle & Luis G. Andrade, *Bandas 'secuestran' ahora a cajeros*, FRONTERA, March 19, 2008.

[54] Manuel Cordero, *Balean a policía y amenazan a otras*, LA VOZ DE LA FRONTERA, March 22, 2008.

[55] In November, 2009 military and police personnel uncovered and foiled a plan to assisinate Leyzaola. Organized crime elements had been tracking Leyzaola's movements and planned an attack on his vehicle dressed as military personnel and using high powered .50 caliber rifles. *Militares apócrifos: Iban por Leyzaola*, 1858 ZETA (2009).

[56] *CAF amenaza a Leyzaola*, 1831 ZETA, May 1-May 7, 2009; *Asesinos de policías siguen libres*, 1841 ZETA, July 10-16, 2009.

Ever since the 1997 arrest of the Mexico's then drug czar General Jesús Gutiérrez Rebollo for collaborating with the Juárez cartel while leading the fight against other criminal groups, even effective police leaders are still distrusted by the population. Although some members of civil society worry that Leyzaola has made a similar deal, most members of civil society feel that he is engaged in a genuine confrontation strategy. It was even reported that Leyzaola's corrupt assistant director told his criminal handlers that the chief would not pact with organized criminal groups and could not be corrupted.

Nonetheless, even as Leyzaola pursues a confrontation strategy, many of the men and women under his command continue to play by the old rules. Evidence of collusive corruption between the rank and file and organized crime continues to come to light. It is worth mentioning a few of the events of 2008.[57]

- General Sergio Aponte Polito took the unprecedented step in April 2008 of sending an extensive letter to the press detailing allegations of corruption against individual police officers and police leaders throughout the state.
- In June 2008, three police officers were detained along with 55 others in a police raid of what would become known as the "*narcobautizo*," a baptism for an AFO member's child.[58]
- In July 2008, Mexicali police detained a band of kidnappers, two of whom where Tijuana municipal police.[59]
- In November 2008, the federal attorney general's office announced the arrest of 19 municipal police. All 19 were commanding officers, including one of the force's assistant directors.
- In December 2008, an officer working for a kidnapping gang with ties to García Simentel used his authority to pull over a vehicle and abduct the driver.[60]

While there is evidence of collusion by the above-mentioned officers, a far more common strategy among line-level police officers is simply tolerance. As municipal police technically do not have jurisdiction over organized crime and drugs, it is easy for officers to justify turning a blind eye to

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57 Of course, evidence of corruption would continue to come to light in 2009. For example, in late 2009, authorities arrested corrupt former officer Gilberto Sánchez Guerrero working on behalf of cells affiliated with García Simental. His testimony led to the arrest of eight active duty officers. *Corrupción hasta el cuello*, 1867 ZETA (2010).

58 Luis Gerardo Andrade, *Pasó 'narcopolicía' test de confianza*, FRONTERA, June 24, 2008.

59 Yadira Murillo, *Suman 11 secuestradores detenidos; 2 son policías*, FRONTERA, July 17, 2008.

60 *Policías y mafiosos, los secuestradores*, 1817 ZETA, 2009.

organized criminal activity. Tolerance is in fact a far safer strategy then collusion. When the rift emerged in the AFO in 2008, corrupt officers found themselves on either side of that division and hence a legitimate target of the rival gang. In April 2008, a major shootout took place between two rival groups within the AFO. Sixteen people were killed in the incident including a municipal police officer.[61] The weekly newspaper *Zeta* alleged that ten other municipal police participated on both sides of the fighting.[62] It is believed that of the 30 municipal police killed in 2008, most were partisans in a war between the two factions.

A key to explaining the contradictory strategies of tolerance, collusion (with two different criminal factions) and confrontation is understanding the differences in the incentives faced by Leyzaola and those faced by his subordinates. As a political appointee, Leyzaola is more sensitive to civil society pressure. In fact, while Jesús Alberto Capella, the civil society advocate appointed police chief, was originally a popular choice, his lack of police experience quickly became a liability. After one year of poor results, he was pushed out and replaced by Leyzaola. Moreover, while the retired lieutenant colonel faces considerable risk by pursuing a confrontation strategy, he does have body guards and is able to live on the army base for added protection.

The incentives Leyzaola's subordinates have, however, are entirely different. They face only limited pressure from civil society because citizens have limited information, few tools to hold police accountable and even minimal personal interaction with officers. The one organization that might have such access, the Citizen Public Security Committee (a municipal version of the state council) was marginalized by the Ramos administration and is basically defunct. On the other hand, as the above assassinations indicate, police officers are very susceptible to the carrots and sticks provided by organized criminal operations.

In short, evidence remains of the choice between "a bullet and a bribe." In early 2009, two mid-level officers confessed to being paid between US$500 and $700 a month to facilitate criminal operations. They contended that they did not do it by choice but were told they would be killed if they did not cooperate.[63] In May 2009, another mid-level officer, Abel Santos Salazar, was killed on his way to work. Reports by *Zeta* suggest that he had been killed for refusing to work with organized crime.[64] It should be mentioned that police are not allowed to carry a weapon while off duty, making them particularly vulnerable.

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61 *Guerra de 'narcos' deja a 13 muertos*, FRONTERA, April 27, 2008.

62 *Balacera: la verdad oculta*, 1779 ZETA, 2008.

63 *Los acusan de repartir dinero del narco*, 1826 ZETA, 2009.

64 *Asesinados por no aceptar teléfono*, 1834 ZETA, 2009.

Organized crime has also been able to overcome information asymmetries. In theory, if a police operation is carried out by masked police officers, the criminals should not know exactly who carried out the operation and be unable to issue reprisals. However, as one interviewed officer explained, "the problem is the other police officers" who report back to the cartels.[65] Organized crime is also able to monitor and communicate with the police by listening to unsecured police radios. In all of the above-mentioned cases, organized criminal elements announced threats over police radio.

As such, tolerance or collusion continues to be a prevalent strategy for line-level officers even though the situation is different for police leadership. The question then remains: how can the equation be changed for subordinate members of the police bureaucracy? The following section explores efforts to create a more accountable police force in Tijuana.

VII. Challenges to Changing the Equation for Police Officers

Despite the demonstrated ability of AFO cells to use violence, police leaders do, nonetheless, have policy options at their disposal to alter other aspects of the tolerance-corruption-confrontation equation. Referring back to Figure 1, the outcome of the equation could be altered by (1) raising police salaries and benefits (to reduce the relative benefit of corruption), (2) increasing the probability of being caught colluding, (3) increasing the degree of professional commitment by means of improved selection criteria and better training and (4) reducing the probability of being targeted by organized crime by increasing information asymmetries and protecting officers.

In fact, some important advances have been made. During the three-year administration of Jorge Hank Rhon (2004-2007), the salaries of police were virtually doubled. A line level police officer went from earning around $800 USD per month to earning around $1,450 USD per month. While the cost of living is admittedly much higher in Tijuana than in other Mexican cities, Tijuana police currently make far more than any municipal police force anywhere in the country. While improving salaries is one of the central tenets of reform efforts, there is strong consensus that it is an insufficient mechanism.[66] If the probability of being caught for engaging in corruption and the sense of professional commitment remain low, then the product of the equation remains the same. Absent such complementary re-

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[65] Following the reprisals from the ATM robbery, some officers began to illegally use tape to cover over the patrol numbers and license plate numbers identifying their vehicles. Fausto Ovalle, *Tapan placas de patrullas los policías*, FRONTERA, March 27, 2008.

[66] Rose-Ackerman, *supra* note 27.

forms under Hank Rhon's administration, the salary increase did not have the intended impact.

Historically, the selection criteria to join the police have not been very restrictive in Tijuana. Interview respondents frequently made statements like, "In the old days, they would ask, 'Do you want to be a police officer?' 'Then come on in, we need police.' Or, 'You can't find work, join the police.'" While selection and training had improved in Baja California's police departments over the years, it suffered a major reversal in quality during the Hank Rhon administration. To better fight the city's crime problems, the administration dramatically enlarged the department from around 1,500 officers to almost 2,400 in just three years. During the expansion, selection and training filters were quickly overwhelmed by the need to put more police on the street. It is widely agreed that organized crime groups took advantage of the disorganization to place their own people within the institution. Without effective screening processes, the moral costs of corruption remain low and nonexistent for those who entered the force with the intention of engaging in criminal activity.

Truly altering the equation requires improving accountability mechanisms. However, such efforts have also suffered from implementation challenges. Over the years, several mechanisms have been developed to identify, investigate and sanction officers that violate the public trust. The primary institutionalized vehicle for doing so is known as the Sindicatura [statutory auditor], a branch of the municipal government that investigates allegations of abuses of authority by any municipal employee. Tijuana's statutory auditor has an institutional structure that is better than most. It is set apart from the police, which in theory should give it institutional autonomy. In addition, compliance with its decisions is obligatory and not mere recommendations for the police leadership (as they are in many other jurisdictions).

Nonetheless, the Sindicatura has not emerged as an effective tool for fighting corruption. While the agency had grown from just five investigators in the previous administration to twelve, the number is nonetheless insufficient for police a force with the historic challenges of Tijuana. Tijuana's statutory auditor only has .64 employees per 100 officers, a comparatively low percentage even in a country with weak accountability mechanisms on the whole (See Table 1.) Moreover, the agency primarily responds to formally filed citizen complaints. However, as there is often no "victim" in a corruption case in the way there is a victim when rights have been violated, there are relatively few reports of corruption.

TABLE 1. COMPARATIVE DATA ON POLICE ACCOUNTABILITY MECHANISMS

	Auspices	*No. of Employees*	*No. of Police*	*Employees per 100 Police*	*Citizen Participation*
Tijuana	City Govt.	15	2,360	0.64	No
Ahome (Los Mochis)	City Govt.	5	1,009	0.50	Yes
Chihuahua	Police & City Govt.	5	1,138	0.44	No
Cuernavaca	Police	10	882	1.13	Yes
Guadalajara	City Govt.	88	2,996	2.94	Yes
Mérida	Police	2	312	0.64	Yes
Mexico City	Police & City Govt.	303	35,860	0.84	No
Monterrey	Police	30	806	3.72	Yes
Puebla	Police	6	1,406	0.43	No
San Luis Potosí	Police	15	1,111	1.35	No
Torreón	Police	4	1,003	0.40	Yes
Zapopan	Police	19	1,669	1.14	No

SOURCE: Survey of police departments conducted by the author.

More fundamentally, there has not been sufficient political will to tackle corruption directly. Sindicatura officials responsible for investigating police misconduct interpret their mandate to exclude investigating collusive ties between the police and organized crime. They argue that they investigate "administrative violations," and since involvement in organized crime is a criminal offense, it is the providence of the state and federal ministerial police to investigate this type of felony. However, this argument does not actually square with the agency's legal mandate, which requires it to investigate and resolve a situation in which "...a member or element does not comply with or violates one of the requirements to remain in the police force..."[67] As involvement in criminal activity violates these requirements, such activities are clearly within the mandate of the agency. Of course, *de facto* removal of this responsibility is perhaps inevitable in Tijuana's dangerous cli-

67 Ayuntamiento de Tijuana, Reglamento de la Secretaría de Seguridad Pública, published in the *Periódico Oficial del Estado de Baja California* on April 9, 2003, Vol. CXI, No. 16.

mate. Taking on organized crime would require major restructuring of the agency to ensure it could carry out its mission and protect its investigators. Currently none of the twelve investigators are provided any additional security or carry a weapon. The agency's credibility was further damaged in late 2008 when investigators were accused of soliciting bribes from officers to influence the conclusions reached in their investigations.

Given the failure of municipalities like Tijuana's to clean up their departments, the federal government began to promote a nationwide vetting program referred to as *control de confianza* [trust control]. Through the Subsidio para la Seguridad Pública Municipal [Municipal Public Security Subsidy or SUBSEMUN] program, Tijuana received around US$8.2 million in 2008 ($104 million pesos) and a slightly smaller amount in 2009 and 2010.[68] In exchange, it had to meet a number of requirements, including submitting their officers to a vetting process run by the federal government.[69] Tijuana and other cities (150 in 2008 and 206 in 2009) sent their police to take tests in practical policing skills and knowledge, fill out asset declarations, enter personal information into a national database and submit to psychological, medical, and polygraph tests.[70] The use of the lie detector at the municipal level was a new step in Mexican policing, previously employed by only a very few agencies.[71]

The impact of the program is difficult to determine. The federal government released aggregated test results in late 2008 showing that 88.9% of the State of Baja California's tested officers were not fit for service (compared to 61.6% nationally).[72] The results both in Baja California and nationally were not encouraging. Rather than fire the vast majority of their officers, police leaders report that they view the test results as red flags that need further substantiation. The response has merits, but it only highlights the continued importance of a currently ineffective investigation agency.

Tijuana's police leadership has also tried to create its own internal mechanisms. In November 2008, the army temporarily replaced the police in the eastern half of the city, and 500 police were sent to the state police academy for vetting and further training. Since that time, over 60% of the department has been taken out of service for two-week periods for vetting and in-service training. In addition to strengthening professional commitment through training, police leaders claim that this process has helped them

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68 Myrna Sánchez, *Comprarán 2 mil radios y 55 patrullas*, FRONTERA, February 18, 2008.

69 SUBSEMUN: CONCEPTUALIZACIÓN Y MECÁNICA OPERATIVA DEL NUEVO MODELO POLICIAL (Secretaría de Seguridad Pública, 2008).

70 *Id.*

71 Interviews by the author.

72 Felipe Calderón Hinojosa, Respuestas a las preguntas formuladas en relación con el Segundo Informe de Gobierno, Presidencia de la República, Nov. 26, 2008. Available at: *http://www.senado.gob.mx/sgsp/gaceta/60/3/2008-11-27-1/assets/documentos/Respuestas_50preguntas.pdf*. Data not available for 2009.

identify corrupt officers. This program dovetails with a policy known as *recuperación de espacio* [territorial recovery]. The police leadership is proceeding through the city district by district, removing entire district personnel, replacing them with officers that have performed well in the courses and vetting process, and assigning retired military officers to lead them.

The most effective measures to clean the police force have been carried out by the federal attorney general's (PGR) organized crime unit (SIEDO) working in conjunction with the military. In November 2008, the PGR arrested 19 municipal officers based on intelligence believed to be provided by an arrested AFO member. In March 2009, SIEDO arraigned another 27 based on intelligence provided by a corrupt police officer turned informant. The detentions were well received, but the success was marred by allegations that arrested officers were tortured by their military captors.[73]

As a result of all of these processes, the Tijuana municipal government reported that it had purged 430 officers, or almost 18% of the force as of July 2009. The number is not entirely accurate, however. Many of them (205) are actually officers who voluntarily resigned. While some did so to avoid confirming links to organized crime, others did so out of fear or simply normal attrition. In addition, 105 are officers who are suspended and in the process of removal, but have not actually been removed. In fact, labor laws make it difficult for police leaders to fire police suspected of corruption without sufficient evidence, highlighting again the importance of an effective investigation agency.[74] Only 64 were actually fired and 20 of them were not fired by the police force until after they were arrested by federal authorities. The celebrated reduction in force has also been undermined by admissions that the city wanted to reduce the size of the department for financial reasons. There is in general a tendency to prematurely declare that the police force has been successfully purged.

While the federal government's arrests suggest that the equation might be changing, the weakness of the municipality's own oversight mechanisms allow for only very cautious optimism. It should also be mentioned that all the existing efforts are focused on identifying "rotten apples," without sufficient concern as to whether the barrel might be rotten as well. A more systematic and public effort to identify why police are being corrupted and subsequent preventive measures that incorporate civil society in meaningful oversight has been lacking.[75]

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[73] Luis Alonso Pérez, *Policías en el limbo*, 1838 ZETA (2009).

[74] For example, four removal proceedings before the city's statutory auditor had failed to remove Luis Hernández Jaime from the force until he was finally arrested for the assassination of fellow officers on behalf of García Simental's group. *Atrapan más policías*, 1814 ZETA (2009). Constitutional changes enacted in 2008 have granted the police greater flexibility, but the underlying inability to gather evidence that can hold up in court remains to be addressed (Interviews by author).

[75] For example, public investigation commissions like the famous Knapp Commission

Finally, the equation can be altered by providing greater protection for police officers to reduce the probability of being victims to attacks from organized crime. Using Municipal Public Security Subsidy money, the department has invested heavily in bullet proof vests and high powered assault rifles, which have been issued to most officers. During times of crisis, the police patrol in caravans of three. The department is also transitioning to a more secure radio network using Matra radios that randomize communication frequencies and encrypt sound to prevent organized crime from listening to police communications and making threats over the police radio.

Leyzaola contends that he has reiterated to his commanders that if they are approached by organized crime and offered the choice between "a bullet or a bribe" that he will act to protect them. In some cases, threatened officers have been temporarily relocated, although there is no formal program. A few officers have also been granted permits to carry a weapon; however, in general, police are not permitted (by federal law) to carry their weapons off duty. And while municipal, state, and federal authorities recently announced that investigating police assassinations would become a joint priority, most cases have gone uninvestigated.[76] In addition, the random killings of 10 police in April and July 2009 reveal their continued vulnerability.[77]

In summary, important efforts have been made to alter the equation of incentives given to officers. However, it is safe to conclude that they have fallen short. While salaries have been raised and efforts have been made to better protect police, accountability mechanisms have not been sufficiently effective, professionalism has been undermined by weak selection criteria, and the police are still vulnerable. Although the department does appear to be moving in the right direction, altering the equation will require sustained long-term reform efforts upheld by several consecutive administrations. Such a long-term approach would allow for gradual improvements in policy implementation and the elimination of loopholes that perpetuate police illegality. This is a tall order in Mexican policing, as elsewhere I have argued that the primary obstacle to successful professionalization has been precisely the lack of continuity in reform efforts across administrations.[78]

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in New York City [Knapp Commission], Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, KNAPP COMMISSION REPORT ON POLICE CORRUPTION (George Braziller, 1972) have not been established.

[76] In fact, most organized crime-related homicides are not investigated. Juan Veledíaz, *Homicidios violentos, los que nadie investiga*, EL UNIVERSAL, February 23, 2009.

Generally speaking, state authorities claim that the crimes are a federal responsibility and the federal authorities claim that they are a state responsibility, thus allowing both departments to avoid the dangerous task of investigating organized crime.

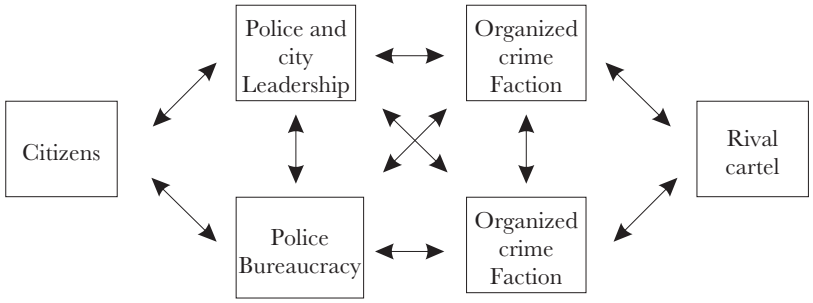
[77] *Asesinos de policías siguen libres*, 1841 ZETA (2009).

[78] Daniel M. Sabet, *Two Steps Forward: Lessons from Chihuahua*, *in* POLICE AND PUBLIC SECURITY (Robert A. Donnelly & David A. Shirk eds., University Readers, 2009).

VIII. Discussion

In the theory section of this paper three questions were raised. First, are observers better served by viewing a police force or organized criminal group as a unitary actor, as multiple actors with the same interests, or as different actors with different interests? Clearly divisions within the police and within organized crime are important in the Tijuana case. The police leadership has pursued a confrontation strategy, while some street-level police have colluded with one faction of the AFO and others have colluded with another faction, and perhaps the largest number has opted for a tolerance strategy. Rather than a simple two player game between the state and organized crime, Figure 2 presents a more complex game better reflective of the Tijuana case.

Figure 2. Citizen-Police-Organized Crime Interaction



Moving beyond the Tijuana case, while the assumption of a unitary actor might offer parsimonious explanatory power, it does not offer prescriptive power, as it shades over opportunities for change, ignoring honest police officers who could sustain reform and disregarding divisions within organized crime that could be exploited to gain a strategic advantage. Recognizing the diversity within organized crime also begs a question for future research: does a divided organized criminal landscape (as is increasingly the case throughout Mexico) discourage collusive corruption? Traditionally, it was in the interest of Tijuana police and police leadership to collude with the AFO because they received a bribe and avoided a bullet. However, in view of the competing groups, collusion with one group does not protect officers from another group, possibly making tolerance a safer strategy than collusion.

Second, the paper asked to what degree are the police accountable to citizens and to what extent can citizens assert themselves as "principals" over their police "agents?" While citizens have tools to pressure and help hold the mayor and police chief accountable, they lack the means to monitor

and hold individual officers accountable. This is not to suggest that police leadership will always act in the interest of citizens or to say that city and police leadership are not susceptible to the pressures and threats of organized crime. However, in comparison with line-level officers, citizens have far better tools to monitor and pressure police and city leaders. This finding can also be widely applied and begs the question can police institutions be made more accountable to citizens? Greater transparency, community policing and citizen oversight committees all offer avenues for civil society to counterbalance incentives for corruption. Unfortunately, the tendency in a deteriorating security situation is precisely the opposite: opacity over transparency and oversight and militarization over community-oriented policing.

Third, I asked if the logic of "a bullet or a bribe" deterministic, or can reform efforts undermine this compelling formula? While it does appear that the police chief has pursued a confrontation strategy and avoided both a bullet and a bribe, it has been harder for policy initiatives to change the logic of this equation for ranks further down the hierarchy. It is important to note that efforts have been made to improve police salaries, protect police and bring corrupt police to justice (primarily through federal investigations). Nonetheless, organized crime's willingness to resort to violence with impunity and the lack of effective accountability mechanisms at a local level, suggests that line-level officers will continue to prefer tolerance and collusive corruption to confrontation. This finding can also be generalized to other Mexican cities with a strong presence of organized crime. Regrettably, a review of the literature and my own research suggests that there are no recognized models of effective local accountability mechanisms in Mexico despite successful international models. Given the importance of such tools in altering the tolerance-corruption-conflict equation, greater research on the implementation challenges of accountability mechanisms is urgently needed.

Looking towards the future, different options are possible in Tijuana and in Mexico in general. If civil society pressure is maintained, organized crime remains fractured and police leadership is able to sustain reform efforts that raise salaries and benefits, develop effective accountability mechanisms, promote professionalism and protect officers, the municipal police will then be able to maintain a confrontational strategy. On the other hand, changes in leadership, the consolidation of organized criminal groups or a decline in civil society pressure might cause a return to collusive corruption equilibrium.[79]

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[79] In early 2010 as this article was to be published, Teodoro García Simental and his top two lieutenants were arrested by Mexican authorities. It is as of yet too early to tell if this will lead to a long term reduction in violence and the consolidation of Arellano Sánchez power in Tijuana or if other actors will emerge from within the García Simental operation and continue the conflict.

Recibido el 10 de septiembre de 2009 y aceptado para su publicación el 24 de septiembre de 2009.

Mexican Law Review
New Series
VOLUME II
Number 2

MAKING THE BEST OF IT: A CONCEPTUAL RECONSTRUCTION OF ABORTION JURISPRUDENCE IN THE UNITED STATES AND MEXICO

Luisa CONESA LABASTIDA*

ABSTRACT. *This article makes an effort to identify conceptual categories abstracted from the history of abortion case law in the United States, with the ultimate goal of building a conceptual constitutional framework that is more or less detached from the particularities of the legal system that created it. The result is then used to evaluate the unprecedented ruling by the Mexican Supreme Court in 2008 to decriminalize abortion. The study is divided into five sections. Section I asks why women should be allowed to have abortions. The answer to this question justifies the existence of the right to choose, which involves interests, rights, principles and values. Sections II and III consider how the State should regulate abortion procedures by presenting a detailed regulatory scheme born out of various concepts of United States jurisprudence. Section IV offers some general conclusions on American case law. Finally, Section V focuses on the decriminalization of abortion in the Mexico City Criminal Code. It offers an exercise in comparative law that gives a detailed account of the content of the newly reformed statute and its constitutional challenge in the Mexican Supreme Court, analyzing it through the newly constructed looking glass.*

KEY WORDS: *Abortion, jurisprudence, United States, Mexico, comparative law.*

RESUMEN. *Esta investigación está enfocada a la identificación de categorías conceptuales abstraídas de la jurisprudencia del tema de aborto en los Estados Unidos, con la meta de construir un esquema constitucional que pue-*

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da ser deslindado de las particularidades del sistema jurídico que le dio origen. El resultado de este proceso es utilizado como un parámetro de medición para estudiar la acción de inconstitucionalidad sobre la despenalización del aborto, emitida por la Suprema Corte de Justicia de la Nación en 2008 y que constituye la primera de su tipo. El estudio se divide en cinco secciones. La sección I se pregunta por qué se debe permitir la práctica del aborto. La respuesta justifica la existencia del derecho a elegir, involucrando intereses, derechos, principios y valores. Las secciones II y III consideran cómo el Estado debe regular el aborto, creando un detallado esquema a partir de las categorías que surgen de la jurisprudencia norteamericana. La sección IV ofrece algunas conclusiones generales sobre la experiencia constitucional en ese país. Finalmente, la sección V se enfoca en la despenalización del aborto en el Código Penal del Distrito Federal. Se construye a partir de un ejercicio sobre derecho comparado que brinda una descripción detallada del contenido de esta reforma y el proceso de su impugnación constitucional, concluyendo con un análisis de la sentencia emitida por la Corte mexicana a través del nuevo esquema construido.

PALABRAS CLAVE: *Aborto, jurisprudencia, Estados Unidos, México, derecho comparado*.

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I. Introduction

Regardless of one's perspective, discussing abortion is never easy. In a country like the United States that has recognized women's right to choose for over thirty years, the topic still raises many eyebrows. Women who have had an abortion seldom admit it and will most likely deny it. The issue is even used as a basis for moral accountability on political grounds.[1]

Society is harsh on abortion, judging women who have chosen —for whatever reason— that having a child is not the right decision for them at a certain moment in time. Even though in the United States the procedure is legal under an established framework, women are morally criminalized for exercising their constitutionally protected choices.

The pro-choice versus pro-life battle is not exclusive to social morality; battles are going strong in the legal arena as well. This ongoing fight has spanned over three decades in a clash that started with the Supreme Court's recognition that the constitutional right to privacy encompassed the choice for women to terminate a pregnancy in *Roe v. Wade*,[2] followed by a tug-of-war in Congress —fueled by a very active sector of conservative society— and the courts.

On one side, there are the conservative state legislatures —claiming their actions are in the name of "the People"— who exhaustively regulate abortion to an extent that often make procedures practically inaccessible. On the opposite side, there are the courts that —in the name of *stare decisis* via judicial review— must uphold the central tenet of *Roe* by reviewing legislation and ensuring that regulations do not nullify a constitutionally protected choice.[3]

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[1] Former vice-presidential candidate Sarah Palin politicized abortion on two fronts: the fact that she never considered the *possibility* —lest we forget, because she had the right of choice— of interrupting her pregnancy even though she knew her child would be born with Down's syndrome; on the other hand, by parading her pregnant teenage daughter as a model of how young girls should conduct their affairs. *See* "Sarah Palin on Abortion", available at: *http://www.ontheissues.org/2008/Sarah_Palin_Abortion.htm*.

[2] Roe v. Wade, 410 U.S. 113 (1973).

[3] This is a broad generalization, as conservatives can form part of legislatures while also taking on the role of judges who impose their own moral discourse in their rulings. One example is found in the words of Judge Easley: "ever since the abomination known as *Roe v. Wade,* became the law of the land, the morality of our great nation has slipped ever so downwards to the point that the decision to spare the life of an unborn child has become an arbitrary decision based on convenience." See *In The Matter of R.B., a Minor, By and Through Her Next Friend, V.D., v. State of Mississippi*, 790 So.2d 830,835 (Miss. 2001).

Because the advances of American abortion jurisprudence have provided a fertile ground for study over the past three decades, it is no wonder that so much literature has focused on analyzing it. Of the many interpretative possibilities, this article focuses on the difference between merely naming rights and implementing mechanisms that protect the exercise of these rights, adhering to the premise that "the point of constitutional adjudication is not merely to name rights but to secure them, and to do so in the interests of those whose rights they are."[4]

The focus is not on the institutional question of *who* should be securing rights, be it the legislature or judges —and therefore, leaving the countermajoritarian debate aside— but on the mechanisms themselves. In this case, the right for women to choose to terminate a pregnancy was *named* in *Roe* in 1973, but has been *secured* —or in some cases left unprotected— by the jurisprudence the American judiciary has produced in its study of the various forms of regulations presented by legislatures.

This article does not offer a detailed description of American abortion jurisprudence, but makes an effort to identify conceptual categories abstracted from case law. The search is guided by the following questions: What are the different interests held by women and State? What are the constitutional principles and values behind the right to choose? What possible tests should be used? Are there varying degrees of scrutiny? How much regulation is permitted without nullifying this right?

The ultimate goal is to build a conceptual constitutional framework that is more or less detached from the particularities of the legal system that created it. Ideally, such a structure could be adopted by other legal systems that have decided to decriminalize abortions and are looking for answers on how best to regulate the procedure, or even by those still struggling with the decriminalizing decision itself. The object of study is limited to giving the jurisprudential reasons that make the criminalization of abortion for women over eighteen unconstitutional. The issue of teenage abortion lies outside its scope.[5]

The article contains no hidden agenda; this work takes a liberal prochoice stand and focuses on identifying liberal concepts. It is not directed at providing a detailed account of *how the regulatory system is* but on interpreting

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[4] RONALD DWORKIN, LAW'S EMPIRE 390 (Harvard University Press, 1986).

[5] As an aside, it should be mentioned that the current rule in American jurisprudence is that parental consent can be given to girls under 18. In addition, if a state decides to require that a pregnant minor obtain one or both parent's consent to an abortion, it must also provide an alternative procedure whereby authorization for the abortion (which in most states takes the form of judicial bypass) can be obtained. See Bellotti v. Baird. 443 U.S. 622 (1979). Other relevant cases: Hodgson v. Minnesota. 497 U.S. 417 (1990); Cincinnati Women's Services Inc v. Taft D K, 468 F.3d 361 (2006); and In the Matter of Mary P., 444 NYS 2d 545, NY (1981).

it as *the best it can be*. Consequently, attention is centered on the good and not on the bad, on "making the best" of what is available.

The philosophical background of this article follows the constructive method of interpretation proposed by Ronald Dworkin, who argues that legal interpretation —much like artistic interpretation— is creative in nature, as opposed to conversational and scientific interpretations, which are descriptive. Creative interpretation is constructive: it is a matter of imposing a purpose on an object or practice in order to make it the best possible example of the form or genre to which it belongs. It does not follow that an interpreter can make a "practice" or work of art anything he may want it to be because the history or shape of a practice or object constrains its available interpretation. It is an issue of interaction between purpose and object. In short, it is about making the object or practice the best it can be.[6]

The study is divided into five sections. Section I asks why women should be allowed to have abortions. The answer to this question justifies the existence of the right to choose, which involves interests, rights, principles and values. Sections II and III consider how the State should regulate abortion procedures by presenting a detailed regulatory scheme born out of various concepts of United States jurisprudence. Section IV offers some general conclusions on American case law. Finally, Section V focuses on the decriminalization of abortion in the Mexico City Criminal Code. Here I offer an exercise in comparative law that gives a detailed account of the content of the newly reformed statute and its constitutional challenge in the Mexican Supreme Court, and then analyzes it through the newly constructed liberal looking glass.

II. What Are We Protecting?

The responsibility of a legislature is to regulate the exercise of constitutionally protected rights by creating a legal framework that will support the constitutional text and provide the conditions for individuals to access their privileges and comply with their obligations. When carrying out this responsibility, it must take into account two major points: harmonizing competing interests while protecting the values the Constitution recognizes as important.

In this respect, constitutional judges have the correlative obligation of evaluating legislation and determining whether it does indeed protect values and harmonize interests or whether it disregards what the Constitution —either the text itself or as it is interpreted by the Supreme Court— deems valuable and favors certain interests to the detriment of others.

On the subject of abortion, courts must review regulations on the basis that the State and women have distinct and separate interests that will oc-

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6 *See in general* Dworkin, *supra* note 4.

casionally compete with each other. The result should accommodate these interests and when in conflict, the outcome should be balanced and not blatantly in favor of one or the other.

1. *Separate and Distinct Interests*

Any discussion on the topic of abortion must take into account the fact that there are separate and distinct interests involved. The claim that the only existing interest is the women's right to choose without mention of any countervailing or, counterbalancing concern is only half of the story. Vice versa, an incorrect bias is evidenced by affirming that the topic centers exclusively on State protection of prenatal life while disregarding a woman's right over her own body.

As expressed in *Roe*, the chief interests are that of a woman's to decide over her own body and that of the State to regulate pregnancy in terms of maternal health and the protection of potential human life:

> B. *The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus*. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. *As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly* (emphasis added).[7]

These separate interests also hold varying degrees of intensity regarding the stage of pregnancy. While initially separate and distinct, these interests will most likely become competing forces with the progression of the pregnancy. It is in this complex balancing act that judges must exercise special care:

> In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. *These in-*

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[7] Jane Roe *et al.* v. Henry Wade, 93 U.S. 705, 730 (1973).

> *terests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes* "*compelling*."
>
> *With respect to the State's important and legitimate interest in the health of the mother, the* "*compelling*" *point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health*. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.
>
> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.
>
> *With respect to the State's important and legitimate interest in potential life, the* "*compelling*" *point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications*. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother (emphasis added).[8]

The fact that the interests have varying degrees of intensity makes for varying degrees of scrutiny that will be developed further on. Suffice to say, while the "compelling" note used in *Roe* is relevant when evaluating competing interests, it should be made clear that the proposed model follows the possibility of regulation in the first trimester —before State interest becomes "compelling"— accepted in *Casey*, as part of the compromise between State and maternal concerns.

It should be noted that the fetus' interest in its potential life is absent at this initial point of the discussion. This is no mistake, but rather a proper conceptual delimitation. Further along, this study will show that acknowledging the fetus as having a distinct and separate interest from the mother from the moment of conception is unacceptable when the structure of the argument is based on autonomy. This component should be introduced hand-in-hand with the concept of viability instead.

Placing the emphasis on the separate interests of women and of the State advances the liberal argument as it leaves out questions like "When does

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[8] *Id.*

life begin?" and "Is the fetus a person?" outside its scope, similar to the position adopted in *Roe*:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[9]

This reasoning does not conclude that the fetus is completely irrelevant in the discussion, but that there is no legal fiction —arising from the Constitution itself— that gives it a distinct interest opposable to its mother's own life plan at least until the "point of viability" is reached.

2. *Constitutional Rights, Principles and Values*

The argument was first framed in the language of interests to contextualize the considerations judges must take into account when evaluating legislative actions, ensuring that every regulation bears in mind both sets of interests, brings them together and in the case of competing interests, that this be done fairly without favoring one to the detriment of the other. The next step is to ask what *right* is protected by declaring the criminalization of abortion unconstitutional, as well as what *principles and values* are derived from the Constitution and subsequently guide any interpretation.

The abortion decision —the right to choose— is not absolute unto itself, but rather a reflection, a consequence, of other constitutionally protected rights. Because its nature is not autonomous but an effect, a response must be given on those grounds.

A. *Autonomy and Bodily Integrity*

Combining the reasoning of both *Roe* and *Casey v. Planned Parenthood*, a more complete and comprehensive justification can be provided as to why abortion should not be criminalized. The Supreme Court's original argument in *Roe* centered on women's right to privacy —stemming from the 14th Amendment's concept of personal liberty— which is broad enough to encompass a woman's decision of whether or not to terminate her pregnancy.

While this response is convincing and privacy is an important right —fundamental even— within most legal systems, the proposed argument is that it is not the primary right that should be taken into account, but rather a secondary one. Under a liberal perspective, autonomy and bodily integ-

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[9] *Id.*

rity take center stage in decriminalizing abortion.[10] The emphasis shifts from the reasons of *Roe* to the arguments in *Casey*:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey v. Population Services International, 431 U.S. *Our cases recognize* "*the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child*." Eisenstadt v. Baird, supra, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944). *These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life*. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.
>
> Roe, however, may be seen not only as an exemplar of Griswold liberty *but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since Roe accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims* (emphasis added).[11]

In this text, stress is placed on the right to make intimate and personal life choices free from governmental interference. In the United States Constitution, these two principles —autonomy and bodily integrity— are inferred from the positivized right to personal liberty prescribed in the 14th Amendment. It is worth mentioning that these principles are completely autonomous in other modern legal systems, such as the German one.[12]

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[10] A basic definition of autonomy: the actual possibility for a person to choose his or her own individual "life plan."

[11] Planned Parenthood of Southeastern Pennsylvania *et al.* v. Robert P. Casey *et al.*, 505 U.S. 833, 851, 857 (1992).

[12] The first two articles of the German Constitution or Basic Law, prescribe:

"Article 1 [Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 2 [Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

Liberalism is the art of separation. The fundamental exercise of constitutional engineering based on this ideal is to separate with absolute clarity the space that belongs to the master of the house —the citizens— and the area restricted to his servants —government authority. In other words, the central focus of liberal constitutional construction is to place strong boundaries and build unmistakable limits between that which corresponds to citizens and the limited space confined to governmental action.

The liberal framework, built primarily from the concepts presented in *Casey*, rests precisely on the goal of separation, on placing a protective sphere around the core of an individual's personal choices. In the present case, this core is qualified by the State's interest in protecting prenatal life and maternal health, and should be regulated accordingly.

The concept of personal autonomy can be addressed from two different angles. From a descriptive point of view, its characteristics and requirements can be analyzed. Adopting a valorative perspective one focuses on the moral value of autonomy and the justification behind the right to personal autonomy:

> A. From a descriptive point of view autonomy can be defined as the capacity that people have to design their own life. This is the capacity to critically decide over which life plan to follow. This capacity requires having a mental ability to form complex intentions and plan their execution, the lack of coercion and manipulation, and the existence of an array of possibilities.
>
> …
>
> B. The valorative point of view regarding personal autonomy looks to the question of its value. It seems uncontested that autonomy as a capacity to guide our own life by critical reflection is something valuable per se. This intuition is heavily justified by the fact that the notion of autonomy is strongly tied to the notion of what it means to be a moral person, a responsible individual, an agent capable of giving him or herself an individual life plan […] [F]ollowing this line of thought it can be said that to be a moral person —an individual— it is required to guide our actions by the rules we set for ourselves. A difference between autonomous beings and those are not, resides on the fact that the first are responsible, that they are held accountable for their actions, while the second are not […] [B]eing autonomous is a necessary precondition for the rest of the values to really make sense […] [B]y accepting the value of autonomy one can derive a postulate of political philosophy, the principle of individual autonomy that holds that the free adoption of individual life plans is valuable and that the State must not interfere in this regard.[13]

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(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

13 Gabriel Bouzat, *El principio de la autonomía personal en la teoría constitucional*, 37 CUADERNOS Y DEBATES 86-88 (Centro de Estudios Constitucionales, 1992).

Autonomy is clearly a key concept in modern constitutionalism, especially in one that takes pride in its forward-thinking liberal nature. In the framework proposed in this work, the concept is understood both in descriptive terms and as a value that should serve as an interpretative canon in any modern legal system.

The reasons in *Casey* are fully compatible with this complex conception of autonomy and the significance of considering it valuable in a legal system. The Constitution protects women's right to make personal choices over their own bodies, and this is projected in positive terms in the right to privacy. Additionally, it can be said that autonomy is also valued in terms of the Constitution as a whole, as the document protects individuals and their personal choices —evidenced in the Supreme Court's Due Process Clause interpretations in *Griswold v. Connecticut* and *Lawrence v. Texas*, amongst others.

The primary rationale of my argument is not based on equal protection or gender rights. Although these are considerations that can certainly be introduced —as in the prohibition of spousal veto in *Casey*—, they are not the *sine qua non* conditions for a declaration of unconstitutionality concerning laws that prohibit abortions.

B. *Human Dignity*

Another concept that should be brought into play from reading *Casey* is the value of human dignity. Reva Siegel proposes an interesting dignity-based focus on Justice Kennedy's opinion that is a helpful addition to the desired liberal construction. Bringing dignity into the discussion is useful because in many legal systems it is a concept that is common language in both human rights and constitutional law. Siegel writes "dignity is a value to which opponents and proponents of abortion are committed, in politics and in law. It is a value that connects analysis of abortion regulation to other questions of constitutional law. It is a value that guides interpretations of other national constitution and of human rights."[14]

Since the proposed scheme places autonomy and bodily integrity at the heart of decriminalizing abortion, it takes into account dignity in its specific autonomous dimension, which resembles "Kantian autonomy —the right of individuals to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instrument of another's will."[15] Dignity will also come into play further on when developing an undue burden standard based on this value.[16]

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[14] Reva B. Siegel, *The Politics of Protection: A Movement History and Dignity Analysis of Abortion Restrictions Under Casey/Carhart*, 117 YALE L. J. 101 (2008).

[15] *Id.*

[16] As a matter of clarification: values belong in the axiological realm, as opposed to principles that work at a deontological level.

C. *The Right to Privacy*

Having established that the fundamental principles that allow women to have a qualified right to make the abortion decision are autonomy, bodily integrity and the value of dignity, I now reintroduce the original reasons in *Roe* in the form of the *right to privacy*. Within this framework, privacy is not the primary reason, but the result of other hierarchically superior principles and values. In other words, individuals have privacy because they have autonomy, bodily integrity and human dignity, not the other way around.

This is a distinction with a highly practical value. Autonomy is broader while privacy is narrower. Liberal legal philosophers believe autonomy is a true fundamental right, even more valuable than the right to life.[17] Even though the right to privacy holds a significant place in many legal systems, it is also true that it can be defeated against government interest in a wide array of instances, such as legal searches and seizures, wire tapping, and disclosure requirements, among others.

In *Roe*, the right to privacy argument used to recognize the right to choose is presented as follows:

> *This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy*.
>
> …
>
> On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. *The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute*. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in

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[17] Euthanasia is an example of balance between autonomy and life, in which the first rises above the second. We refer to cases in which a competent person makes an autonomous decision to end his or her own life. *See* in general Manuel Atienza, *Juridificar la bioética*, 8 ISONOMÍA (1998), available at: *www.cervantesvirtual.com/servlet/SirveObras/35706177436793617422202/isonomia08/isonomia08_05.pdf*.

> the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination); Buck v. Bell, 274 U.S. 200 (1927) (sterilization) (emphasis added).[18]

Using the same methodological approach as the one used in this work, the argument in *Roe* identifies the right to choose as a projection, a reflection, of the positive right to privacy. It is only natural that privacy would take on a central role in this decision, since nowhere in the American Constitution does it specifically mention anything regarding the "right to have an abortion" —better defined as the right to choose— and the right to privacy is sufficiently open-ended and flexible that a wide range of concepts can be incorporated into its meaning.

Summarizing these findings, the subject of abortion entails balancing separate and distinct interests held, on the one hand, by women making the abortion decision and, on the other hand, the government's concern in regulating it due to its interest in maternal health and protecting potential life. By combining the reasons found in both *Roe* and *Casey*, it is possible to build an acceptable liberal framework based primarily on the principles of autonomy, bodily integrity and the value of dignity, and to a lesser degree on the right to privacy.

III. Qualitatively Speaking, How Much Is Too Much?

1. *Outlining a Regulatory Scheme*

The right to make the abortion decision is not absolute. It is a *qualified* right, which means it can be regulated at varying intensities as the pregnancy progresses. In order to figure out, qualitatively speaking, how much regulation is too much regulation —which would result in nullifying the right—, this article proposes a combination of *Roe's* trimester framework and *Casey's* undue burden standard.

The overall idea is that there is an indirect relation between the health-related risks involved in the procedure and the degree of scrutiny: the safer the procedure, the stronger the scrutiny; the riskier the procedure, the weaker the scrutiny. This proportion is accurate to the point of "viability," when an abortion should only be permitted on rare and exceptional cases based on a threat to maternal life.

The argument is as follows:[19]

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[18] Roe, *supra* note 2, at 727.

[19] The argumentative framework used is based on the one developed by John Hart Ely when explaining *Roe* in John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973).

1) Based on the principles of autonomy, bodily integrity, the value of human dignity and the right to privacy, women have a qualified right to make the abortion decision. The State may regulate the exercise of such right on the basis of a distinct interest that will become compelling at some point of the pregnancy.
2) The State has two separate and legitimate interests: protecting maternal health and life, and protecting prenatal life. Neither can be counted as compelling throughout the entire pregnancy, as each evolves differently in terms of the unborn child.
3) The scrutiny applied by the Court will be measured as an indirect proportion between the health-related risks of the procedure and the undue burden scrutiny.
4) This rule is applied until the point of viability. After this moment, abortions should be extremely rare and exceptional, and the burden of proof should be shifted accordingly, as now the instances in which an abortion is permitted should be judged with strict scrutiny, only allowing the procedure when maternal life is seriously at stake.
5) Since the risks of performing the procedure are minimal during the first trimester of pregnancy, neither interest is sufficiently compelling to justify the State's interference with the decision that lies between a woman and her physician. This does not mean that procedure will be available on demand because the State can impose regulations to ensure the woman is a competent individual making a decision based on informed consent and that the procedure is carried out with the required medical care. Government regulation will be judged on the basis of an undue burden with the use of strict scrutiny.
6) As we move into the second trimester, the interest in protecting the fetus is still less compelling, but the procedures performed to interrupt the pregnancy grow riskier. At this point, the health-related risks of having an abortion begin to exceed those of childbirth. The government may impose regulations related to the preservation and protection of maternal health, judged on the basis of an undue burden test and utilizing intermediate scrutiny.
7) When the fetus becomes viable, the interest in protecting it becomes compelling. This leads to strict restriction of the instances in which an abortion is permitted, judged on the basis of strict scrutiny and only allowing the procedure when maternal life is seriously at stake. Viability also marks the introduction of the concept of the fetus' restricted autonomy, and thus a distinct interest in its own life that is now balanced against the mother's.

2. *Autonomy and Interest in Potential Life*

Introducing the fetus' interest in its own life and its restricted autonomy at the point of viability is consistent with the same principle of autonomy that protects the abortion decision in the first place. Before viability, the fetus is not considered an autonomous being, but completely dependent on the mother because it would not be able to survive outside the womb.

However, once viability is reached, even though the fetus has not *ipso iure* become an autonomous entity, it now has the actual possibility of becoming one as it has been detached from the womb.[20] Accordingly, its interests grow compelling and the State may not only prohibit abortions but is even obliged to do so, except in exceptional cases when it is absolutely necessary to protect maternal life.

The issue of fetal autonomy is incredibly complex. It would be impossible to apply the above concept of autonomy when it comes to a fetus. However, considerations on the special nature of this restricted concept have been made by legal philosopher Carlos Santiago Nino, who identifies the fetus as valuable because of its possibility of becoming an autonomous individual:

> …[e]ven though in reality autonomy has a minimum threshold that is satisfied with the capacity to make evaluations, trivial as they may be; it reaches its highest expression when the person is capable of evaluating a life plan and choose between diverse ideals of personal good. From the fact that the fetus or the embryo is not an autonomous entity it does not necessarily follow that it is not an individual and that, as such, does not have the incommensurable value that belongs to individuals. From the fetus' lack of autonomy, its individuality, just like that of a newborn child, can only stem from its identity with a future autonomous being.[21]

Having resolved the question of value, Nino then focuses on drawing a line at the moment the fetus develops a central nervous system, which corresponds with the principle of autonomy:

> However, even though this identity does not require autonomy, it demands, under the most plausible criteria, a continuity of mental processes with that which will become an autonomous entity. It is obvious that the fetus or the embryo during the first stages of gestation cannot have a psychological continuity with that which will become an autonomous entity, for the simple

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[20] In this scenario, the use of autonomy is very limited. After viability, the fetus can survive without being attached to the mother, even if it cannot make informed decisions or design its own life plan.

[21] Carlos Santiago Nino, *La autonomía constitucional*, 37 CUADERNOS Y DEBATES 45-46 (Centro de Estudios Constitucionales, 1992).

> reason that it does not have mental processes; and it does not have such processes also for the simple reason that it has not developed a neurological system, which according to our current scientific knowledge is necessary to develop a psyche. Accordingly, the fetus or the embryo cannot have value as an individual during the first stages of gestation in which it has not developed a central nervous system. Consequently, a Constitution that is committed to the value of personal autonomy must not necessarily protect the fetus or the embryo in the early stages of its development.[22]

The background Nino lays out advances the arguments proposed in this essay, regarding the fact that the fetus' interests in its potential life comes into play as distinct and opposable to its mother's in the later stages of pregnancy, and should not be introduced in the first and second trimester, as stated earlier.

3. "*Trimesters*" *and* "*Viability*"

These are not legal but medical concepts. A trimester refers to the three twelve-week periods in which a pregnancy is divided. Viability is a concept used to designate the moment in which a fetus could potentially survive outside the mother's womb, even if it means through artificial means. Unlike a trimester, the point of viability is not a static term, but a dynamic one that depends on technological breakthroughs.

In the proposed scheme, the specifications established by the Court in *Planned Parenthood of Central Missouri v. Danforth* should be considered:

> In Roe, we used the term "viable," properly we thought, to signify the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and presumably capable of "meaningful life outside the mother's womb," 410 U.S. at 160, 163. We noted that this point "is usually placed" at about seven months or 28 weeks, but may occur earlier. Id. at 160.
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> …
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> *In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician*. The definition of viability in § 2(2) merely reflects this fact. The appellees do not contend otherwise, for they insist [p. 65] that the determination of viability rests with the physician in the exercise of his professional judgment (emphasis added).[23]

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[22] *Id.* at 46.

[23] Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

Accordingly, the point of viability should not be codified by the legislature, but left open-ended to take available technologies into consideration and the particular situation of the woman, as evaluated by her physician. Currently, viability regulation varies from State to State from twenty to twenty-four weeks or in the third trimester.[24]

4. *Informed Consent, Paternalism and Perfectionism*

For a decision to be considered autonomous, it must be an informed conclusion voiced by a competent person. One cannot state that a drunken person "autonomously" chose to get behind the wheel and drive in a completely inebriated state, eventually ending up in a terrible accident. That affirmation would be incorrect because his judgment was impaired by the amount of alcohol in his body.

A similar consideration can be made when it comes to medical procedures, and particularly to abortion. The State cannot assume the person already knows all the benefits and consequences associated with a procedure. Accordingly, the State must prescribe that it is the duty of the physician performing the abortion to inform the patient and guarantee that the patient's decision is autonomous.

Informed consent should not be equated with unjustified paternalism, which is frowned upon in a liberal state. A justified form of paternalism in which government uses objective criteria to protect those considered incompetent is very much compatible with a modern democratic state.

Ernesto Garzón Valdés has differentiated two forms of paternalism by using arguments based on autonomy and giving objective criteria to identify when a person can legitimately be deemed incompetent.[25] These causes are:

1) Ignorance: understood as the lack of knowledge of the relevant elements of the situation one has to act upon. For example, a person may ignore the consequences of using a certain drug; therefore, the Food and Drug Administration is justified in forcing drug companies to include a detailed label explaining all possible effects —and side effects— of the medication. In the same way, the State must ensure the woman is informed of all the medical consequences of having an abortion.
2) Lack of willpower: these are the circumstances in which an individual's willpower is so affected or reduced that he cannot make an informed decision. This is the case of a person suffering from substance

[24] *See* The Guttmacher Institute (2008), *An Overview of State Abortion Laws*, available at: *http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf*.

[25] *See* Ernesto Garzón Valdés, *¿Es éticamente justificable el paternalismo jurídico?*, 5 DOXA 155 (1988).

abuse, whose decisions cannot be considered based on objective considerations. One example would be a heroin-addicted mother demanding an abortion.

3) Coercion: when the individual is acting under compulsion to behave in a certain way, the decision cannot be considered as having been taken by a competent person. A man acting under a death threat does not freely choose his actions just as a woman who is forced to have an abortion by her violent spouse is not a free-acting agent.
4) Incoherence: if a person accepts the importance of a value and yet refuses a mechanism that ensures its protection, the resulting decision cannot be judged as competent. This would be the example of an individual proclaiming the value of life above all else and then refusing to wear a seatbelt on a potentially dangerous amusement park ride, or a woman who goes to her doctor explaining that she wants an abortion because she wants the fetus to live.

Paternalism is generally unjustified when the person is competent and does not fall under any of the above-mentioned categories. If a woman who wants an abortion is informed and makes coherent arguments to justify her free and autonomous decision, the State has no role in stopping her. Because the State cannot make *a priori* assumptions that all the women who request abortions are competent, it must impose informed consent regulations aimed at fulfilling this requirement.

Once the autonomic importance of informed consent has been accepted, we must not forget that these regulations can cut both ways, as they are situated along a fine line between paternalism and perfectionism. As explained, paternalism refers to coercive State action aimed at protecting an individual from harming himself or creating an unsolicited benefit, and can be either justified or unjustified.

On the other hand, perfectionism is never justified in a liberal democratic State as it entails the government's assuming a certain model of virtue and consequently coercing its citizens into acting accordingly. Informed consent can be the perfect guise for a perfectionist legislature that believes abortion is immoral to impose its own value-judgments and place almost unbearable obstacles for women to gain access to this procedure.

A textbook example of the wrongful use of these types of regulations is South Dakota Title 34 that requires the doctor to "inform" the woman "that the abortion will terminate the life of a *whole, separate, unique, living human being*."[26] In *Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881 (D.S.D.

[26] This is not the only example of value judgments imposed by South Dakota legislation. In the South Dakota Women's Health and Human Life Protection Act —repealed in a November 2007 referendum— which was set to ban abortion in the State, it is possible to find such value filled statements as: "life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*, including the fact

2005), the District Court for the District of South Dakota granted a preliminary injunction preventing the 2005 version of South Dakota's statute regulating informed consent to abortion from becoming effective, based on its finding that Planned Parenthood had a fair chance of success on its claim that § 7(1)(b) violated physicians' 1st Amendment right to free speech and that the balance of harms favored Planned Parenthood.[27]

Because of the potential misuse of informed consent, it is necessary to develop a standard to judge regulations that could invalidate constitutional rights under a legal disguise. The New Jersey Supreme Court has developed reasonable jurisprudence that strikes down laws that only use informed consent as a vehicle for perfectionism:

> On the profound issue of when life begins, this Court cannot drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arrayed along a deep societal and philosophical divide. We are not unmindful of the raging debate that has roiled the nation and of the sincerely and passionately held beliefs by those on opposite sides of the debate. We are sympathetic to the deep pain plaintiff has suffered in the aftermath of the termination of her pregnancy. However, *the common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion only with material medical information, including gestational stage and medical risks involved in the procedure. Under that doctrine of informed consent, the knowledge that plaintiff sought from defendant cannot be compelled from a doctor who may have a different scientific, moral, or philosophical viewpoint on the issue of when life begins. Therefore, we do not find that the common law commands a physician to inform a pregnant patient that an embryo is an existing, living human being and that an abortion results in the killing of a family member* (emphasis added).[28]

In addition to this, there is the following ruling from the District Court of the District of Rhode Island:

> The next provision under "Required disclosures," § 23-4.7-2(2), provides that a woman seeking an abortion acknowledge that "the nature of an abortion has been fully explained, including the probable gestational age of the fetus at the time the abortion is to be performed." Regarding the first part of this provision, *requiring that the nature of an abortion be fully explained, I interpret this to require an explanation of the medical nature of an abortion. Consistent with the notion*

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that each human being is totally unique immediately at fertilization;" allegedly protecting "the mother's fundamental natural intrinsic right to a relationship with her child;" and defining the fetus as an "unborn human being, an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and childbirth."

27 The injunction was subsequently overturned on appeal by the Eighth Circuit Court of Appeals on the 27th of June 2008.

28 Acuna v. Turkish, 192 N.J. 399, (2007).

> *that the State may act in unintrusive ways to enhance the quality-medically speaking-of the decision-making process, this provision requires simply that a woman be informed that an abortion will terminate her pregnancy and that, once completed, the operation cannot be reversed*. Nothing on its face indicates that a physician must engage in a philosophical or moral discussion of abortion to satisfy this provision. In fact, physicians are not necessarily qualified to engage in such discussions and the State's interest in *assuring informed consent extends only far enough to include the medical aspects of a woman's decision*. Interpreted in this way, the provision requires nothing more than what was approved by the Supreme Court in Danforth: "we are content to accept, as the meaning (of informed consent), the giving of information to the patient as to just what would be done[…]" 428 U.S. at 67 n.8, 96 S. Ct. at 2840 n.8. Fundamental to a meaningful decision on whether to have an abortion is a precise understanding that it will terminate pregnancy, and that the operation is irreversible. *This kind of information serves to enhance the quality of the decision-making process and cannot be viewed as anything except a neutral, non-normative requirement that a woman know exactly what it is that she is requesting*. Thus, I find the requirement that women be informed of the "nature of an abortion" to be constitutional (emphasis added).[29]

The Rhode Island Court highlights the most important characteristic of informed consent: it is meant to *enhance* the quality of the decision-making process. Following the cases cited, informed consent should not be interpreted as a grab bag for legislature to introduce its own values, but rather as a very narrow term that only allows for material medical facts, informing the patient that an abortion ends the pregnancy, the gestational age, the fact that it is not a reversible procedure and the potential medical risks involved.

5. *Undue Burden*

Aside from requiring that women make the decision to terminate a pregnancy by fulfilling the requirements of informed consent, the State may also place another set of regulations if they are backed by the legitimate interest in protecting maternal health and potential life. These regulations are directly aimed at ensuring the quality of the procedure.

Much like informed consent, these types of regulations can also serve as a cover for a legislature to introduce its own moral agenda aimed at preventing women from gaining access to the procedure. Consequently, they will be judged by the undue burden standard. Modalities like a twenty-four hour waiting period, the "two-visit rule," and requiring a physician to perform the procedure are all examples of what the State is allowed to do when

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[29] Women's Medical Center Of Providence, Inc. v. Dennis J. Roberts II, et al., 530 F. Supp. 1136 U.S. Dist. (1982).

placing modalities on the right to choose. Below, we explore the concept of undue burden following the dignity-based reading proposed by Siegel and incorporating another set of categories, such as the gender paternalism argument.

It is important to clarify that while the system proposed in this article incorporates both the trimester rule and the undue burden standard, it partly aims at "making the best of it" and is directed at creating a stronger yet dignity-based test. These two concepts have not coexisted in American jurisprudence as the undue burden test was coined by the Court in *Casey* to take the place of the trimester standard. The ruling forgoes the design set forth in *Roe* that allowed for an unregulated first trimester and replaces it with one that will judge regulations based not on trimesters, but on the finding that these regulations impose an undue burden which "exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[30]

An undue burden is understood as the "substantial obstacle rule," better understood in the context of other considerations made in the opinion:

> The means chosen by the State to further the interest in potential life must be calculated to *inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends*.
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> …
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> Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. *Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose*. See infra, 505 U.S. at 899-900 (addressing Pennsylvania's parental consent requirement). [*878] Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. *Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden* (emphasis added).[31]

In Justice Kennedy's opinion, the cited considerations are central in the dignity-based argument interpreted by Siegel, whose reading rests on stressing the importance of these paragraphs to explain why the standard is based on dignity —both as autonomy and as equality. Siegel reaches the following conclusions:

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30 Casey, *supra* note 11, at 878.

31 *Id.* at 877-878.

> The joint opinion does not understand abortion regulation as a zero-sum game requiring choice between dignity as life and dignity as liberty and equality; instead, the undue burden framework requires government to vindicate multiple dimensions of human dignity, concurrently. *The joint opinion allows government to regulate abortion in ways that respect the dignity of life, so long as the regulation also respects the dignity of women as autonomous and equal.* Indeed, when the interest in potential life understood as an interest in expressing respect for life (rather than an interest in increasing population, understood as human capital, it makes little sense to vindicate this value by means that manipulate or instrumentalize women. Accordingly, the joint opinion adopts an undue burden framework that insists that regulation on behalf of potential life must assume a form that respects women's dignity as self-governing members of the polity.
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> […]
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> Even as the joint opinion dramatically expands government authority to regulate abortion expressively, *it prohibits regulation that restricts autonomy of the pregnant woman* or that instrumentalizes her life. The joint opinion recognizes government interest in expressing respect for human life as a reason to allow additional, incremental regulation of abortion: but it simultaneously affirms that constitutional protection of women's dignity limit the ways government can intervene in women's decision making. Even as *Casey* allows more restrictions on abortion, the undue burden framework reaffirms women's constitutional right to decide whether to carry a pregnancy to term. *Women's decisional autonomy is the core value the undue burden framework vindicates. Government may persuade women to carry a pregnancy to term, it may not manipulate, trick, or coerce her into continuing the pregnancy. The undue burden framework thus allows modes of vindicating the state's interest in potential life that create meaning, promote values, or communicate with a pregnant woman and her community—that may deter abortion, rather than prohibit it* (emphasis added).[32]

This dignity-based standard fits perfectly into the autonomy-centered system proposed in this article. Since women's autonomy is the main principle behind the right to choose over her body, the undue burden framework should be centered on treating women as equal autonomous beings.

The twenty-four hour waiting period vindicated in *Casey* is incorporated into the above dignity-based conception because it treats women as autonomous beings as opposed to taking an instrumentalist approach. "Under the undue burden framework, dignity-respecting regulation of women's decisions can neither manipulate nor coerce women: the intervention must leave women in substantial control of their decision, and free and unimpeded to act on it."[33]

In addition to the autonomy reading, Siegel utilizes a gender-based approach in which the "government cannot enforce customary or common

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[32] Siegel, *supra* note 14, at 44.

[33] *Id.* at 45.

law understanding of women's roles."[34] Take the example of the spousal notification requirement struck down in *Casey* because it established a third party veto —in the husband's hands— that placed the decision outside the sphere of the woman and her doctor —the only ones legitimized to make the choice. Instead of attaching an autonomous dimension to this decision, Siegel focuses on the implications of gender and equality:

> In striking down the spousal notice requirement, the Court vindicated dignity as liberty and equality, analyzing abortion regulation with attention to history and social meaning of the kind required to identify violations of equal respect. In applying undue burden analysis to the spousal notice requirement, the Court identifies the traditions of legal coercion that the Constitution renounces in protecting women's dignity as self-governing members of polity.[35]

Following this line of reasoning, a dignity-based undue burden standard proves to be useful not only in the realm of the autonomous, but can also be incorporated on the level of equality.

This framework acknowledges that another fundamental aspect of protecting any decision is that of protecting the path that leads to reaching its conclusions. A resolution is not autonomous and cannot be made by a competent person if it is based on untruthful or misguiding information. Writing about the possibility of striking mandatory ultrasound requirements as an undue burden, Carol Sanger notes:

> It is generally accepted that in a liberal democracy certain decisions about how a person organizes his or her life reside within the special competence and authority of the person making the decision. These decisions encompass a range of deeply personal, often self-defining preferences and commitments […] [S]ince 1973, a decision whether or not to abort has been a similar sort of protected decision, one characterized by the Supreme Court as involving nothing less than a choice about a woman's destiny. *But it is not the decision alone that is protected from state interference. It is also and importantly the deliberative path a person takes to reach the decision* […] [B]ut, if a choice is protected because of the profound significance it bears to the meaning of a person's life, *then the part of life devoted to the choosing —the thinking of it— has got to be protected as well. Adults may arrive at certain decision —including or not whether to have a child— having chosen and followed their own path to get there without intercession from one's offspring or from God or from legislatures doing God's work* (emphasis added).[36]

This is another aspect of the undue burden standard of which the Courts should be wary: not only scrutinizing the fact that a woman is allowed to

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[34] *Id.*

[35] *Id.*

[36] Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 387, 391 (2008).

make the choice, but constantly verifying that the act of decision-making is informed and coercion-free, thanks to the obligation placed upon her doctor to provide truthful and neutral information.

6. *Varying Scrutiny*

The operational part of the undue burden standard has been mostly developed under the "large fraction test" stated in *Casey*: "the Court inquires, based on expert testimony, empirical studies, and common sense, whether in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[37] Lower courts have also opted for judging abortion restrictions under the *United States v. Salerno* "under no circumstances" test, which requires the challenger making a facial claim to show that there is no set of circumstances under which the statute would be valid.[38]

While it is clear that the "large fraction" test is more benign than the "under no circumstances" one, I consider both options unsatisfactory and incompatible with an autonomy-based framework. When the issues at stake are constitutional principles, values, compelling interests and individual rights, courts should not discriminate on the basis of quantity. What would the Constitution say to a "small fraction" of women who were sufficiently deterred from getting an abortion by a determinate set of requirements? Would it answer that they, as individuals, are not significant enough?

Because of these reasons, the scheme I propose opts for the application of varying degrees of scrutiny in the form of strict and intermediate standards. This is not an unprecedented argument, as it was suggested back in *Roe,* but later abandoned in *Casey*. The combination of undue burden and varying degrees of scrutiny provides a more comprehensive test. Why is this important? Because in a liberal democracy, citizens should be wary of instances in which the government persuades them to abandon the exercise of their constitutional rights and protected choices.

Some might argue that the use of strict scrutiny automatically translates into equating the right to choose —which encompasses the abortion decision— to a fundamental right. While there might be some theoretical misgivings about taking this step, it is consistent with the labeling provided in *Roe.* To be clear, I do not advocate that the right to choose is a fundamental right unto itself, but rather that personal autonomy should be branded as fundamental, and the abortion choice is but one of its manifestations.

The varying degree framework would work as follows:

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[37] Casey, *supra* note 11, at 925.

[38] *See generally* United States v. Salerno, 481 U.S. 739 (1987).

a) During the first trimester of pregnancy, where the risks involved in the procedure are minimal, the Court should be especially careful in analyzing government regulations by using strict scrutiny. To pass the test, a compelling government purpose —the interests announced in *Roe*, as well as the need for the treatment, would have to be proved.
b) During the second trimester, as the risks are greater and government interests more compelling, the Court should relax its standard of review. An intermediate review in which the State must prove the existence of specific government objectives and the law must be substantially related to the achievement of those aims would be the desired standard in these circumstances.
c) Finally, third trimester abortions should be extremely rare and exceptional. Thus, the burden of proof shifts as now it is the instances in which an abortion is permitted that should be judged with strict scrutiny, only allowing the procedure when maternal life or health is seriously at stake.[39]

While it is evident that the use of varying degrees of scrutiny turns the framework into a more complex exercise than the "large fraction" or the "under no circumstances" test, this fact should not be viewed negatively. When applying a complex standard results in one that favors dignity and individual autonomy, the burden placed upon the courts is fully justified in a liberal democracy.

IV. The American Conclusion

This paper is an example of constructive interpretation of what is considered the most liberal and useful concepts of American abortion jurisprudence. The result is a workable framework that could be imported into countries that are struggling with the decriminalization of abortion or how best to regulate the procedure.

The scheme can be summed up as follows: both women and the State have separate and distinct interests related to interrupting a pregnancy, but women have a qualified right to choose that stems from the constitutional principles of autonomy, bodily integrity, the value of human dignity and the right to privacy.

The State may impose regulations on the procedure, but it cannot prohibit abortion until the point of "viability," at which point it should be an exceptional procedure only permitted when maternal life or health is gravely at stake. Before the point of viability, the State may impose informed consent

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[39] An argument could also be made here for third semester abortions in the case of serious birth defects that would prevent the child from ever having an autonomous life.

requirements and other regulations aimed at protecting maternal health and its interest in potential life, which will be judged under the undue burden standard with varying scrutiny in an indirect proportion to the pregnancy's progression: the safer the procedure, the stronger the scrutiny; the riskier the procedure, the weaker the scrutiny.

The proposed conceptual framework is born solely out of American jurisprudence analyzed through a liberal looking glass. The construction is not rigid but flexible, which means that adjustments can be made to address particular concerns and it would still remain functional.

Is this the only way? Is this the best way? Not necessarily. Others might argue that the varying degrees of scrutiny are unnecessary or that the trimester framework should be eliminated. There are many different interpretations and they are all acceptable as long as compelling arguments are given to justify their conclusions. But the main idea behind this review is to make a solid case for a liberal interpretation of abortion jurisprudence.

V. The Mexican Experience

April 26, 2007 marks a historical event in Mexican legislative history. It is the date the amendments to the Mexico City Penal Code and the Health Law were officially promulgated, legalizing abortion for the first time ever in Mexican history.[40] These reforms were the culmination of a process that took many years in the making, representing the struggles between local and federal governments, feminist groups, right- and left-wing activists and the prominent involvement of the ever-present Catholic Church.

Even though Mexico is a secular State and thus there is no official religion, the reality is that the predominance of Catholicism is an enduring legacy from the 1521 Spanish *Conquista.* A 2005 document on religious diversity released by the *Instituto Nacional de Estadística y Geografía* (INEGI, the federal organ in charge of national surveys and census) showed that in 2000 there were 84.4 million people over 5 years of age, of which 96.6% admitted to having religious beliefs. Overall, 88 out of every 100 people responded as being Catholics, 8 said they had a different religion and only 4 said they did not profess any religion.[41]

Under such circumstances, the obvious question is raised: How was decriminalizing abortion in Mexico possible? The answer comes within the composition of the *Asamblea Legislativa del Distrito Federal* [Mexico City Legislature] where there is a supermajority of the left-wing party, *Partido de la*

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[40] Gaceta Oficial del Distrito Federal, No. 70, April 27, 2007.

[41] *See* Instituto Nacional de Estadística y Geografía, *La diversidad religiosa en México,* 2005, available at: *http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/integracion/sociodemografico/religion/Div_rel.pdf*.

Revolución Democrática (PRD) [Party of the Democratic Revolution]. This distribution in the legislature is the key that allowed the reforms to pass in the midst of heated debate with the vocal opposition of the conservative *Partido Acción Nacional* (PAN) [National Action Party].

In the end, the final vote was taken on April 23rd, with an outcome of 43 votes in favor, 17 against and 1 abstention. The winning coalition was made up of the leftist PRD, the centrist *Partido Revolucionario Institucional* (PRI) [Institutional Revolutionary Party] and the swing vote *Partido Nueva Alianza* (PANAL) [New Alliance Party], while opposed were the right wing parties PAN and *Partido Verde Ecologista* (PVEM) [Green Ecologist Party].

As was expected, voices were immediately raised both for and against the reform. Legal action was taken soon after and two lawsuits challenging constitutionality (*acciones de inconstitucionalidad)* were presented before the *Suprema Corte de Justicia de la Nación* (SCJN) [Mexican Supreme Court] by the *Procurador General de la República* [Federal Attorney General] and the *Presidente de la Comisión Nacional de los Derechos Humanos* [Federal Ombudsman of the National Human Rights Commission] on May 24th and 25th, respectively.[42]

In an unprecedented decision, the Court allowed public hearings to take place, giving anyone with an opinion about decriminalizing abortion the opportunity to be heard. From April 11th to June 27th, 2008, a total of 6 hearings were held before the justices. A wide variety of actors presented their arguments to the Court: from the Attorney General and the *Ombudsman* to representatives from every political party and both Chambers of Congress, non-governmental organizations, prominent lawyers, academics, physicians and regular citizens acting on a personal capacity. By the last hearing, a total of 80 people had spoken before the Court.[43]

Having concluded these hearings, on August 15th Justice Salvador Aguirre Anguiano presented his fellow justices with a first draft of the ruling to be discussed over the days to come. In a truly noteworthy effort towards transparency, this document was made available to the public on a website created for this purpose.

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[42] It is important to note that the Mexican Judiciary was completely restructured in 1994 by means of a constitutional amendment, which effectively transformed the Supreme Court into a Constitutional Court with abstract review, concrete review and individual complaints (known as *acción de inconstitucionalidad*, *controversia constitucional*, and *amparo*, respectively) under its jurisdiction. An *acción de inconstitucionalidad* is a constitutional proceeding regulated by Article 105, Section II of the Mexican Constitution which allows for the minority of the Federal or local chambers within each Congressional Chamber —a minimum of 33%—, the Attorney General, the *Ombudsman* and political parties —only in electoral law matters— to question the constitutionality of a statute within 30 days of its publication before the Mexican Supreme Court. For the ruling to result in the annulment of the statute and a binding precedent (*jurisprudencia*), a total of 8 votes out of the 11 Justices sitting *en banc* is required.

[43] Press release on the subject available at: *http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AlDiaConLaCorte/2008/Junio/30jun284.pdf*.

The first document drafted by Justice Aguirre Anguiano proposed striking down the amendments because they violated the right to life that was implicit in the Mexican Constitution. According to the proposal, allowing abortion in the first 12 weeks of gestation resulted in a failure to protect a life that the Constitution safeguarded unconditionally from conception to birth.

After days of public deliberation —from August 25th to the 28th, 2008— in more than 17 hours of heated debate —available to the general public on the Court's Transparency TV Channel, a Judiciary version of C-Span— the eleven justices reached a decision, with a majority of 8 voting for the constitutionality of the statutes. The new ruling that validated the reforms was written by Justice José Ramón Cossío, and was made public in mid-February of the following year.[44]

1. Acción de inconstitucionalidad *146/2007 and 147/2007: An Example of Legislative Deference*

In a completely different scenario from that of the American experience, Mexican justices were not faced with one citizen challenging a statute that criminalized the abortion procedure, but rather a democratic majority that chose to decriminalize abortion in the first 12 weeks of gestation. Articles 144, 145, 146 and 147 of the Mexico City Criminal Code were reformed as follows:

> Chapter V
> Abortion
> Article 144. Abortion is the interruption of pregnancy after the 12th week of gestation.
> For purposes of this Statute, pregnancy is the part of the human reproductive process that starts with the implantation of the embryo in the endometrium.
> Article 145. A woman who voluntarily practices her own abortion or consents to another person performing it after the 12th week of gestation shall be punished by imprisonment for no less than three months but no more than six months or community service no less than 100 days but no more than 300 days. In this case, the crime shall only be punished when completed.
> A penalty of one to three years of prison shall be imposed on the person that performs an abortion, even with a woman's consent. Whoever performs the abortion, be it with or without the pregnant woman's consent,

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[44] For more on the subject, *see* Francisca Pou, *El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal*, ANUARIO DE DERECHOS HUMANOS (Universidad de Chile, 2009), available at: *http://www.anuariocdh.uchile.cl/anuario05/6_Perspectivas_regionales/PerspectivasRegionales_FranciscaPou.pdf*.

> will be punished by imprisonment for no less than one year but no more than three years.
>
> Article 146. Compelled abortion is the interruption of the pregnancy, at any moment, without the pregnant woman's consent.
>
> For the purpose of this article, a penalty of five to eight years in prison shall be imposed on the person that forces a woman to abort by any means without her consent. If physical violence or intimidation were to be proved, the penalty imposed will be from eight to ten years in prison. For the purpose of this article, whoever forces a woman to abort by any means without her consent shall be punished by imprisonment for no less than five years but no more than eight years. In this case, when the person uses physical or moral violence as a force, he or she shall be punished by imprisonment for no less than eight years but no more than 10 years.
>
> Article 147. When the compelled abortion is procured by a practicing medical doctor, midwife or nurse, in addition to the penalties prescribed in this Chapter, their practicing license shall be suspended for a period of time equal to that spent in prison.

Interpreting the cited articles one can differentiate three different categories:

a) The voluntary interruption of pregnancy within the first 12 weeks of gestation, which is not punishable by law.
b) The unjustified interruption of pregnancy after the 12th week of gestation, identified as abortion punishable by law for both the woman and the doctor who performs the abortion.
c) The forced interruption of the pregnancy at any moment, classified as compelled abortion, punishable by law for anyone who performs the abortion.

In addition to reforming the Criminal Code, the legislature also amended the Mexico City Health Law to guarantee that women would have access to the procedure, free of charge, in public hospitals. As a result, Article 16 Bis 6 prescribes that Mexico City public health institutions must provide women with quality procedures free of charge, as well as give timely and truthful information about other available options and possible side effects. The abortion must be performed within 5 days of the formal request presented, which must be honored even if the woman has another type of private or public insurance. In addition, Article 16 Bis 8 establishes the public health policy to be followed by local hospitals, which includes implementing a policy of education, reproductive choice and prevention of unwanted pregnancies (by distributing free contraception), as well as psychological counseling after the procedure has been performed.

There were two main issues presented to the Court in the unconstitutionality lawsuits: *a)* Did the Mexico City legislature have the power to leg-

islate in health policy or is this the dominion of federal law under Articles 73, paragraph XVI, and 133 of the Constitution? And *b)* should the protection of life be qualified or does the Constitution warrant the uncompromised protection of life?

2. *Federal or State Powers?*

The plaintiffs argued that the definitions of concepts such as embryo, pregnancy, gestation, and issues related to family planning and health policy in general were under the jurisdiction of the federal health authority reserved for the federal powers exercised by *Congreso de la Unión* [Congress of the Union].[45] On the subject, the Court held that Article 4 of the Constitution and the statutes contained in the General Health Law (*Ley General de Salud*) establish a National Health System that coordinates both Federal and state authorities, and that the matter of women and their pregnancies is left to the jurisdiction of state law.

Regarding the definition of pregnancy in the General Health Law, the ruling states that the law itself does not define the concept. Although there is a definition in health regulations (*Reglamento de la Ley General de Salud en Materia de Investigación para la Salud* [General Health Law Regulations for Matters of Health Research]), it only applies to the Federal Public Administration and not to state or municipal law.

In view of these reasons, the Court concluded that the local legislature acted within its autonomous powers —especially safeguarded in terms of criminal law— when it defined pregnancy for the purposes of its Criminal Code, and thus there was no invasion of powers.

3. *Does the Constitution Warrant a Right to Life?*

At the first level of analysis, the Court specified that just because life is a prerequisite for the exercise of all the other rights, it does not mean that it is placed in a higher position than the rest. In fact, it clearly stated that no constitutional right is absolute or ranked higher than another, and when in conflict they should be balanced against each other. The ruling went on to analyze the constitutional text and reaches a clear conclusion: the Mexican Constitution does not recognize a right to life in any of its articles. This does not mean that life is not protected, but that the right to life is not —as is often argued— expressly warranted in the Constitution or superior to the rest.

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[45] Similar to the American Congress, composed by the joint Senate and the House of Representatives, both enact federal laws.

The Court then studies international law and jurisprudence —ranked below the Constitution but higher than federal and state law in the Mexican legal system— and states that due to international obligations life should be protected under the following circumstances:

- The right to life should be warranted by national legislation, stating a minimum standard for its protection which should be progressively expanded;
- There is no international convention to which Mexico is a party that warrants an absolute right to life or establishes when life begins;
- In compliance with international law, Mexico has obligations with respect to the arbitrary deprivation of life and the execution of the death penalty; and
- Mexico is not internationally constrained to protect life from the moment of conception, or at any specific point.

In other words, the Court states that there is no right to life in itself, only rights that reflect a State's obligation to promote and protect life —such as the right to healthcare granted in Article 4. Using this as a starting point, the decision goes on to declare that criminal law should not be viewed as punishing acts that are *mala in se* but rather *mala prohibita*; thus, the criminalization of a certain conduct depends on the social circumstances of the time and not on a particular notion of natural rights that are above positive law.

The Court then comes to a fundamental point in which it differentiates the case presented to them from the decisions adopted by the American Supreme Court in *Roe v. Wade*,[46] the Colombian Constitutional Court, the Canadian Supreme Court and the Spanish Constitutional Tribunal. These courts were faced with criminal sanctions that penalized abortion, while the Mexican ruling analyzes the decision of a democratically elected legislature to decriminalize the procedure.

The question is then, the ruling states, not of whether the criminalization of an action should be prohibited in constitutional terms but whether a legislature should be forced to criminalize certain behaviors. While the Constitution forces the legislature to criminalize some behaviors in so many words —citing the examples of Articles 16, 19 and 20 all those pertaining to violations of criminal procedure—, it reads no such mandate when it comes to the interruption of pregnancy, and cites a wide variety of examples of offenses that have been decriminalized over the years by a democratically elected legislature. Such an action is evidently permitted in constitutional terms as long as there is no express mandate to criminalize.

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[46] Roe, *supra* note 2.

Through this standpoint of legislative deference, the ruling then cites the reasons that motivated the local legislature to make its decision: public health concerns related to ending back alley abortions; equal rights among women, especially concerning those living in poverty and without access to private doctors who would perform the procedure safely, as opposed to well-to-do women who have their private doctors perform the procedure at a minimum risk; freedom of reproductive choice; the importance of the 12-week barrier in guaranteeing that the procedure is done while still safe, and the fact that the embryo has not yet developed sentience or consciousness, which it considers suitable in constitutional terms.

Following the *ultima ratio* criminal law principle, the Court states that criminal sanctions should only be used as a last resort to ensure the protection of constitutionally recognized values because government intrusion should be kept to a minimum in a modern democratic state. Accordingly, if the legislature decided that criminalizing abortion no longer fit into the social reality because far from preventing women from undergoing the procedure, it forced them to seek abortions under unsafe circumstances —that present both a public health issue and a disregard for women's rights— the Court should not force the legislature into criminalizing abortion.

Having solved the main issue at hand —that the local legislature did not have an obligation to criminalize abortion and the balancing criterion used to decriminalize it corresponded with constitutional standards— the ruling then turns to more specific questions regarding the equal protection clause in Article 1: abortions solicited by underage girls and criminal law principles.

Regarding the first issue, the plaintiffs had argued that the legislation discriminated against men as it denied them of their right to procreate because they had no veto power over women's choice to have an abortion. The Court rejected the claim, explaining that due to the nature of pregnancy, the burden on men and women's life plan is completely asymmetric. Women bear much heavier consequences, not only physically but also legally since the legal system does not provide full certainty that the father will be economically responsible for the child. Thus, the ruling concludes that the legislature based its decision to let women have the last word on objective reasons, thereby respecting equal protection standards.

Regarding underage abortions, the decision rules out the argument that the legislature should have been forced to establish a special procedure for women under the age of 18, stating that there is no compelling reason to broaden informed consent requirements due to legal age. The Court concludes by reaffirming the fact that criminal law intrusion should be kept to a minimum and that if the legislature decided to decriminalize certain behaviors, the Court should be extremely wary of striking down a law that would result in more State interference against the will of the democratic

power. The final part of the Court's decision is focused on criminal law principles, affirming that the type of criminal offense is clearly defined and provides full legal security, and that there is a relationship of proportionality between the actions punished and their legal consequences.

4. *Preliminary Conclusions with Regard to the Mexican Case*

Having analyzed the Mexican abortion ruling, it is quite evident that comparing the Mexican case to thirty years of American experience is like comparing apples and oranges. This is mainly due to the fact that American courts have been faced with legislative prohibitions while the Mexican Supreme Court had to rule on a legislative permission, which called for a completely different approach that the Court fully understood and acted accordingly.

One can still find common ground between them such as women's rights over their own bodies, even though there is a shift of focus between the right to privacy (the United States) and an autonomous life plan (Mexico); the 12-week framework which was imported from American jurisprudence; informed consent requirements, and so forth.

The Mexican framework is notably more rigid, poses no exceptions to the 12-week period and is far less complex, but this is only natural seeing as it embodies a legislature's first attempt at providing a regulatory scheme for decriminalizing abortion. Another notable difference is the treatment given to underage abortions. While the Mexican Court stated special requirements need not be placed upon minors, its American counterpart decided in *Planned Parenthood of Missouri v. Danforth* that while States may not impose a blanket parental veto for minors, a judicial bypass —where the minor needs to prove to a judge that she is either mature enough to make the decision or, if she is not, it would be in her best interest to have the abortion— does comply with constitutional standards.[47]

Just as the 30-year abortion debate in the United States is still going strong, Mexico has only just begun a process that will surely take years to perfect. The next hurdle is a new *acción de inconstitucionalidad* in which the local Baja California Constitution was amended to force its legislature to criminalize abortion that has already been presented before the Supreme Court.[48] Without legislative deference used as a baseline, it is safe to predict that the Mexican Court will most likely look to comparative jurisprudence to start building a more complex structure, much like the one the United States has developed over the past decades.

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47 Parenthood, *supra* note 23.

48 *Acción de inconstitucionalidad* 11/2009 assigned to Justice Franco.

5. *Epilogue*

As expected, the Baja California Constitutional reform was only the beginning. What has followed since is a tidal wave of amendments in state constitutions. Conservative legislatures have since banned abortions in their highest-ranking norms by stating that human life begins at the very moment of conception. This has been the case for fifteen out of the thirty-one states.[49]

But local constitutions are just a part of the story.[50] Besides the Baja California *acción de inconstitucionalidad*, there is another one presented by the San Luis Potosí legislature;[51]a *controversia constitucional* filed by the Municipality of Uriangato in the state of Guanajuato challenging the local antiabortion law;[52] and last but not least, a whopping 400 plus *amparos* questioning the administrative standards regulation (NOM) that forces private hospitals to perform abortions free of charge when the pregnancy is the result of a rape.[53]

These cases give the Court an opportunity to expand its constitutional doctrine not only on the topic of abortion itself, but also on a number of relevant issues such as the right of privacy, autonomy and federalism, to mention a few. It should be added that at the end of 2009 two justices (Mariano Azuela Güitrón and Genaro Góngora Pimentel) left the seats they held in the Court —for the last fifteen plus years—, which could shift the balance on the abortion issue. As more and more politically complicated questions are brought before the Court, all eyes will be on the eleven justices in the upcoming years, scrutinizing the way they interpret modern-day problems through the eyes of a Constitution that —admittedly, amended an estimate of five hundred times— will be celebrating its 100th anniversary in 2017.

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49 Thirty two if Mexico City, technically not a state, but a federal district, is counted. The state constitutions that have been amended to protect life from the moment of conception are those of Baja California, Colima, Jalisco, Sonora, Puebla, Morelos, Campeche, Querétaro, Quintana Roo, Durango, Nayarit, Guanajuato, San Luis Potosí, Yucatán and Oaxaca.

50 For an account of the wide variety of cases presented before the Court, news coverage is available at: *http://www.alterinfos.org/spip.php?article3848*.

51 *Acción de inconstitucionalidad* 62/2009 assigned to Justice Franco.

52 In this most peculiar of cases, the *controversia constitucional* 26/2009 assigned to Justice Góngora Pimentel, a municipal government challenges the state anti-abortion law. For news coverage, see: *http://www.jornada.unam.mx/2009/07/09/index.php?section=estados&article=035n3est*.

53 Normas Oficiales Mexicanas [Official Mexican Standards] are general administrative regulations that can regulate a number of issues. News coverage of these *amparos*, currently pending resolutions in the district courts, available at: *http://www.aciprensa.com/noticia.php?n=25857*.

Recibido el 17 de junio de 2009 y aceptado
para su publicación el 17 de septiembre de 2009.

Mexican Law Review
New Series
VOLUME II
Number 2

RACING TO THE TOP?: ACQUISITIONS AS A VEHICLE FOR IMPROVED ENVIRONMENTAL PERFORMANCE IN MEXICO

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ABSTRACT. *This article presents evidence which suggests that a "race to the top" is happening, as opposed to a "race to the bottom" with regard to environmental protection in the globalized world. The article analyses how environmental compliance influences mergers and acquisitions in Mexico. It presents new data on environmental compliance in relation to foreign investment in Mexico and asks whether the nationality of businesses affects the level of compliance. The evidence found suggests that as a consequence of the North American Free Trade Agreement, environmental legislation and compliance has improved. In addition, the evaluation of the level of soil contamination has proven to be an important factor in the acquisition of Mexican companies or subsidiaries of companies settled in Mexico.*

KEY WORDS: *Race to the top, race to the bottom, pollution haven, globalization, environment, NAFTA.*

RESUMEN. *Este artículo presenta evidencia que sugiere que una "carrera hacia la cima" está sucediendo, al contrario de una "carrera hacia el fondo", en materia ambiental. La autora obtuvo datos de abogados que se dedican a derecho ambiental y fusiones y adquisiciones sobre la forma en que las fusiones y adquisiciones funcionan en México en la práctica y cómo influye esto en el cumplimiento de la legislación ambiental. El presente artículo contiene información nueva sobre el cumplimiento de las obligaciones ambientales en relación con la inversión extranjera y si la nacionalidad influye en reverdecer los negocios. La evidencia presentada sugiere que como consecuencia del Tratado de Libre Comercio, la legislación ambiental y el cumplimiento de ésta ha mejorado. Adicionalmente, la evaluación del nivel de contaminación de suelos ha probado ser un factor importante en la adquisición de compañías mexicanas o subsidiarias establecidas en México.*

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PALABRAS CLAVE: *Paraíso ambiental, cumplimiento ambiental, globalización, ambiente, TLC.*

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I. INTRODUCTION

Globalization is said by some to give rise to a "race to the top" where cross-border acquisitions play an important part.[1] Others categorically dispute this perspective.[2] Mexico has opened its economy and it is important to know whether in addition to promoting economic growth this also has had a positive influence on environmental performance This article uses new survey evidence to analyze the effects of cross-border acquisitions on environmental compliance in Mexico. The data demonstrates that there is a clear tendency towards a "race to the top".

The phenomenon under study is acquisitions taking place in Mexico. Only companies incorporated in Mexico (hereinafter referred to as the *Ac-*

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[1] David Vogel, *Trading up and Governing Across: Transnational Governance and Environmental Protection*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY 556-571 (1997).

[2] Herman Daly, *The Perils of Free Trade*, 269 SCIENTIFIC AMERICAN 24 (1993).

quired) which are being or have been acquired by companies directly or indirectly controlled by foreigners (hereinafter known as the *Acquirer*) were part of the study. The results suggest that Acquiring companies are interested in knowing the environmental conditions of the *Acquired*. In some cases the *Acquired* is registered in an Environmental Management Program with the purpose of bringing it to full compliance with environmental laws, although the evidence for this last proposition was not strong.

Surprisingly, Mexico is particularly concerned with one specific environmental obligation: soil contamination. The prohibition on transferring contaminated sites, as well as the obligation to clean-up contaminated facilities prior to closing them down, has gotten the attention of merger and acquisition ("*M&A*") lawyers. According to the results obtained from my questionnaire, this topic alone has proven to be strong enough to cancel multi-million dollar acquisitions.

This article will try to answer the following questions:

1. Whether *Acquirers* are interested in acquiring companies whose environmental compliance record is high or whether this is irrelevant;
2. What are the reasons *Acquirers* want to find out the *Acquired* companies' level of compliance with environmental laws; and
3. Whether *Acquired* companies comply with local environmental standards or foreign standards.

The structure of this paper is as follows: Section II contains a discussion of the "race to the top" and the "race to the bottom" hypotheses and argues in favor of the former. It also analyzes Mexico's position with respect to foreign direct investment over the years and the issue on whether joining the North American Free Trade Agreement (*NAFTA*) has showed positive influence on Mexican environmental legislation and institutions. Finally, the design of the Environmental Audit Program will be studied in terms of its achievements with environmental compliance. Section III provides information on the methodology used in the preparation of this paper. The fourth section presents the results obtained from surveys completed by lawyers working for top Mexican law firms who specialize in mergers & acquisitions, environmental law or both specialties. This provides the basis for assessing whether cross-border acquisitions bring a "race to the top" with respect to compliance with environmental laws.

II. Globalization as Detonator for Either a "Race to the Top" or a "Race to the Bottom"

The "race to the top" and "race to the bottom" theses arose from the competitive advantage theory, which is the basis for free trade. According

to this theory each country would manufacture only the products in which it had a competitive advantage. As a consequence, each country would be more efficient in the use of its resources. Some authors criticized this much-debated idea.[3] An example of competitive advantage is discussed in Abel and Phillips,[4] who describe one competitive advantage that appeared in Mexico after the execution of *NAFTA*. The stonewash industry was originally set up in El Paso, Texas, but was relocated to Mexico, which offered lower wages than the United States and has a strategic geographical location. This was determinant when choosing between Asia and Mexico, as transportation costs were lower.

Daly[5] supports the argument that globalization would result in weaker environmental standards or lax enforcement thereof, that is, a "race to the bottom." The other position, the "race to the top,"[6] argues that free trade would have the opposite result. This paper argues that since the negotiation of *NAFTA*, Mexico has pursued a "race to the top" both in environmental legislation and compliance. To support the argument, the results section provides evidence obtained from experienced lawyers specializing in cross-border acquisitions.

Another debate is related to the power foreign companies could hold in a country and whether allowing foreign direct investment (*FDI*) would be beneficial. Mexico is one of the countries that chose to open its economy and allow *FDI* with certain limitations, such as the provision of electricity, as a public service, which is restricted to Mexico's federal government.[7] The reasons behind the decision to open up to *FDI* will be explored, and the article will also analyze whether Mexico should aim to attract more *FDI* in the future in view of possible favorable outcomes in environmental compliance, as well as on the grounds of economic growth.

1. *The "Race to the Bottom"*

The "race to the bottom" thesis is based on the assumption that, in a free trade scenario, a country's decision to enact more stringent environmental

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3 *See generally* Daly, *supra* note *2*.

4 Andrea Abel & Travis Phillips, *The Relocation of El Paso's Stonewashing Industry and its Implications for Trade and the Environment in Commission for Environmental Cooperation of North America*, *in* THE ENVIRONMENTAL EFFECTS OF FREE TRADE, PAPERS PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT 263-291 (2002).

5 Daly, *supra* note 2.

6 Vogel, *supra* note 1; Sebastian Princen, *Trading up in the Transatlantic Relationship*, 24 JOURNAL OF PUBLIC POLICY 127-144 (2004).

7 Cámara de Diputados del Honorable Congreso de la Unión [Congressional Chamber of Deputies], Constitución Política de los Estados Unidos Mexicanos [Political Constitution of the United Mexican States], available at: *www.cddhcu.gob.mx*, February 22, 2010.

legislation would increase the cost of industry compliance. Under this assumption, companies' options for establishing industrial facilities would be based on countries with the least stringent environmental laws and standards, and thus the lowest costs in environmental compliance. Along the same line, countries would compete to attract foreign investment by lowering their environmental standards and/or the enforcement of instruments of compliance, thus creating "pollution havens."[8]

The "pollution haven" theory has been difficult to prove in practice because it involves lowering environmental requirements and exporting pollution to a specific country. Exporting pollution has been analyzed by several authors. For instance, Mark T. Heil and Thomas M. Selden[9] find that when income increased in developed countries, the amount of carbon emissions decreased as it increased in developing countries. Matthew Cole and Eric Neumayer[10] analyze the percentage of consumption of imports from developing countries and found that there was an increase in pollution-intensive imports from developing countries. Vivek Suri and Duane Chapman[11] study the rate of consumption of products manufactured domestically compared to those produced by a foreign country and imported. The results show that domestic production is replaced by exports. Although these studies provide evidence on the export of manufacturing activities from developed countries to developing ones, there is no evidence of "pollution havens."

Vogel[12] disagrees with the "race to the bottom" thesis and adds that when companies choose where to set up an industrial facility, the choice is based more on labor regulations as opposed to environmental regulations. Kumar[13] found that one of the characteristics that will drive general *FDI* away from a country is cheap labor. The reason for this is because investors need qualified workers for certain types of industries, as opposed to un-educated cheap labor. However, cheap labor may attract more investment from companies with the purpose of exporting the goods produced, Mexico's competitive advantage under the *NAFTA*.[14]

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[8] Princen, *supra* note 6.

[9] Mark T. Heil & Thomas Selden, *International Trade Intensity and Carbon Emissions: A Cross Country Econometric Analysis*, 10 JOURNAL OF ENVIRONMENT AND DEVELOPMENT 35-49.

[10] Matthew Cole & Eric Neumayer, *Environmental Policy and the Environmental Kuznets Curve: Can Developing Countries Escape the Detrimental Consequences of Economic Growth?*, *in* HANDBOOK OF GLOBAL ENVIRONMENTAL ECONOMICS 298-318 (Peter Dauvergne ed., Wiley-Blackwell, 2005).

[11] Vivek Suri & Duane Chapman, *Economic Growth, Trade and Energy: Implications for the Environmental Kuznets Curve*, 25 ECOLOGICAL ECONOMICS 195-208 (1998).

[12] David Vogel, *Environmental Regulation and Economic Integration*, Vol. 3 No. 2 JOURNAL OF INTERNATIONAL ECONOMIC LAW 265-279 (2000).

[13] KUMAR NAJES, GLOBALIZATION AND THE QUALITY OF FOREIGN DIRECT INVESTMENT (Oxford University Press, 2002).

[14] Supporting Vogel's assumption, my own evidence shows that cheaper labor in for-

When *NAFTA* was being negotiated, there was fear that relocation to Mexico would become a method of escaping compliance with the U.S. and/or Canadian environmental standards, thus turning it into a "pollution haven."[15] The evidence, however, is that both Mexican environmental legislation and compliance have improved since *NAFTA*'s passage.[16] In terms of free trade and *NAFTA*, Schatan[17] concluded that Mexico has shifted towards the export and manufacture of technological products, as opposed to primary goods and that since 1994, it has not turned to more polluting sectors. Thus, it has not become a "pollution haven."

In fact, there is at least one example of Canada as a "pollution haven," in terms of its environmental protection standards on transboundary movement of hazardous waste. Jacott *et al.*[18] study data on transboundary movements of hazardous waste between Canada, the United States and Mexico and found that after *NAFTA*, there was an increase of U.S. hazardous waste exports to Canada for its disposal, accompanied by weaker environmental protection standards. Unlike Canada, Mexico decided to ban the import of hazardous waste, and its environmental performance has been improving continuously.

2. *The "Race to the Top"*

According to Vogel and Johnson,[19] the "race to the top" theory has reflected the current outcomes of globalization and free trade, disqualifying

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eign countries is a more frequent cause of relocation of industrial facilities to Mexico than the difference in environmental requirements. Labor is clearly an important factor investors take into consideration when selecting where to set up an industrial facility. However, there is a difference in the type of *FDIs* attracted by cheap labor. Although the type of *FDI* that a country attracts and its possible spillovers are interesting, it is not part of this research.

15 Bryan Husted & Jeanne M. Logsdon, *The Impact of NAFTA on Mexico's Environmental Policy*, 28 GROWTH AND CHANGE 24-48 (1997).

16 P. S. Wisner & M. J. Epstein, *"Push" and "pull" impacts of NAFTA on Environmental Responsiveness and Performance in Mexican Industry*, *in* PAPER PRESENTED AT THE THIRD NORTH AMERICAN SYMPOSIUM ON ASSESSING THE ENVIRONMENTAL EFFECTS OF TRADE (2005).

17 Claudia Schatan, *Mexico's Manufacturing Exports and the Environment under NAFTA*, *in* PAPERS PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT, TORONTO, CANADA, 335-354 (2000).

18 Marisa Jacott, *The Generation and Management of Hazardous Wastes and Transboundary Hazardous Waste Shipments between Mexico, Canada and the United States, 1990-2000*, *in* THE ENVIRONMENTAL EFFECTS OF FREE TRADE. PAPERS PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT 161-212 (2002).

19 Vogel, *supra* note 6; Pierre Marc, *The Environmental Effects of Free Trade*, *in* PAPERS

the "race to the bottom" thesis. This line of thought suggests that interdependency brings higher environmental standards and more resources invested in environmental protection. Using the "tuna dolphin" case, Vogel[20] shows how more stringent U.S. environmental protection requirements raised the tuna production standards in Costa Rica, France, Mexico, Spain and Venezuela by way of the Panama Declaration.

This case is an example of the "California effect."[21] Although principally used for production standards, the "California effect" takes place when one party has stricter environmental standards than its commercial activity partners. Following these standards becomes a requirement of continued commercial activity between the parties. Hence, the commercial partners in the less regulated country adopt the more stringent environmental standards of the more regulated one.

Other examples of the "California effect" include: (i) Europe's eco-labeling based on life-cycle assessment which has made Brazil re-think the way its leather goods are produced, which in turn has influenced Argentina and Uruguay, Brazil's trading partners; and (ii) the European Union's warning to Canada about the possibility of its exclusion from European Union markets if baby seals continued to be slaughtered.[22]

The "California effect" has yet to be a proven rule. Although there are examples of successful "contagion" of higher environmental standards between trading partners, there are also cases in which environmental standards have not been raised. In the "beef and hormone" case, the European Union imposed higher standards on meat imports, but the United States and Canada have not attempted to meet them.[23] Although this is an exception to the "California effect" theory, it does not by itself support the "race to the bottom" thesis. As we will see below, the best example to illustrate a "race to the top" in Mexico is the negotiation and enactment of the *NAFTA* between Canada, the United States and Mexico.

Apart from the "California effect," the other possible effect which has been discussed in the literature is the concept of "regulatory chill."[24] A "regulatory chill" would occur if Mexico decided not to enact stricter environmental laws out of fear that investors would leave the country or choose to invest elsewhere. Guerrero *et al.*[25] suggest one potential case in which

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PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT (2002).

[20] Vogel, *supra* note 12.

[21] Vogel, *supra* note 1.

[22] *Id.*

[23] Princen, *supra* note 6.

[24] Jennifer Clapp, *What the Pollution Haven Debate Overlooks*, 2 GLOBAL ENVIRONMENTAL POLITICS 11-19 (MIT, 2002).

[25] María Teresa Guerrero, *The Forestry Industry in the State of Chihuahua: Economic, Ecological and Social Impacts Post-NAFTA*, *in* THE ENVIRONMENTAL EFFECTS OF FREE TRADE.

"regulatory chill" could occur in Mexico, namely in the forestry industry. As a result of *NAFTA*, import tariffs for wood were reduced from 15% to 0%. Although the forestry industry in Chihuahua alleged they could still remain competitive, the authors believed that the forestry industry would strongly oppose an increase in environmental quality standards, giving birth to a "regulatory chill."

3. *Foreign Direct Investment*

Mexico did not open its markets until the 1980s. It was not until the negotiation of *NAFTA* and its execution that Mexico's environmental legislation and institutions were formally and materially created and began to evolve. Just as *NAFTA* helped Mexico build more stringent environmental policies, cross-border acquisitions have also contributed to higher compliance levels with Mexican legislation.

In the 1950s, 1960s and 1970s, Mexico lived through a phase of "national import substitution." This economic model promoted Mexico's national industries providing tax benefits and easy loans to private industries. During the "national import substitution" phase, Mexico opposed free trade as "…numerous writers from developing countries worried that the market power of multinational firms would lead to these firms dominating their economies, such that prosperity, if it came, would be clouded by foreign control over these economies. This led, in many countries, to the adoption of policies to regulate or even, for some sectors at least, to ban foreign direct investment."[26] This was the case of Mexico, which for obvious reasons was particularly worried about its northern neighbor.

To fund the activities that would promote Mexican industry, loans were obtained from foreign countries. This economic system worked for some time, but in the 1970s and 1980s Mexico became increasingly indebted, which led to a severe economic crisis. However, during the José López Portillo administration (1977-1982), sources of petroleum were found in Mexico. Confident of having oil as a source of income, Mexico continued with high spending rates and increasing debts. This had tragic consequences and eventually led Mexico to reconsider opening its economy to international markets after 1982.[27] The Mexican economy shifted towards greater inte-

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PAPERS PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT 29-77 (2002).

[26] Edward Graham, *Introduction: Foreign Direct Investment in Developing Countries – Where Do We Now Stand?*, *in* MULTINATIONALS AND FOREIGN INVESTMENT IN ECONOMIC DEVELOPMENT 9 (Edward M. Graham ed., Palgrave Macmillan, 2005).

[27] RONIE GARCIA-JOHNSON, EXPORTING ENVIRONMENTALISM. U.S. MULTINATIONAL CHEMICAL CORPORATIONS IN BRAZIL AND MEXICO (MIT, 2000).

gration with the international economy: Mexico joined the General Agreement on Trade and Tariffs in 1986 and the *NAFTA* in 1992[28] (which entered into force in 1994).

Every rule has its exception, and while Mexican legislation today allows foreign investment, it also contains exceptions. The Foreign Investment Law[29] restricts the following activities that only the State can control: petroleum, basic chemistry, the generation, conduction, transformation, distribution and supply of electricity as part of the power public utility service,[30] nuclear energy generation; radioactive minerals; telegraphs, radiotelegraphs and mail; the issuance of Mexican notes and coins; and the control, supervision and inspection of ports, airports and heliports. Only Mexican companies or individuals are allowed to operate: land passenger transportation, tourism and freight (excluding courier services), gasoline commercialization and distribution of liquefied gas, credit unions, development bank institutions and certain professions.

4. *The North American Free Trade Agreement as a Means for the Development of Mexico's National Environmental Regulation*

Environmentalism in Mexico grew in the 1990s.[31] During the *NAFTA* negotiation years, the number of air emission permits requested increased dramatically. Before 1992, only 50 air emission permits had been granted. Between 1992 and 1994, the number grew to 22,021. Today, there have been 35,500 air emission permits given.[32] The Secretariat of the Environment and Natural Resources (*SEMARNAT*) explains this increase in the number of permits as the result of the establishment of the Federal Prosecutor for the Protection of the Environment (*PROFEPA*) in 1992, and the commencement of their inspection program. *PROFEPA* was created on account of pressure to raise Mexico's environmental legislation and standards

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[28] Juan Pablo Zorrilla Salgado, *La historia económica de México (Un resumen bajo la óptica sobre riesgo)* [Mexico's Economic History (A Summary under a Risk Perspective)], May 2004, available at: *http://www.gestiopolis.com/canales2/economia/histomex.htm*; Dale Colyer, *Foreign Direct Investment in the Primary Sector of Mexico*, *in* FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 223-237 (H. S. Kehal ed., 2004).

[29] Cámara de Diputados del Honorable Congreso de la Unión, *Ley de Inversión Extranjera* [Law on Foreign Investment], Mexico City, February 22, 2010. Available at: *www.cddhcu.gob.mx*, February 22, 2010.

[30] Dirección General de Compilación y Consulta del Orden Jurídico Nacional, Ley del Servicio Público de Energía Eléctrica [Electric Power Public Utility Law], Mexico City, February 22, 2010. Available at: *www.ordenjuridico.gob.mx*, February 22, 2010.

[31] Susmita Dasgupta, *What Improves Environmental Compliance? Evidence from Mexican Industry*, 39 JOURNAL OF ENVIRONMENTAL ECONOMICS AND MANAGEMENT 39-66 (2000).

[32] JOSÉ LUIS LUEGE TAMARGO ET AL., LA GESTIÓN AMBIENTAL EN MÉXICO 372 (2006).

pertaining to *NAFTA.*[33] After *PROFEPA* began inspections, companies began to work on their environmental obligations, obtaining the proper documentation for their operations.[34]

Husted and Logsdon[35] study whether *NAFTA* negotiations were an example of a "race to the top," and if so, whether that trend would be maintained in the long run or if Mexico would be "stuck in the mud." After a thorough analysis of Mexican environmental legislation and regulatory enforcement, they concluded that Mexico had in fact raised its environmental standards as of the 1990s, and had spent increasing amounts of money on regulatory enforcement.

Wisner and Epstein[36] also analyze whether *NAFTA* brought higher environmental standards to Mexico and increased levels of compliance. Their findings are that both Mexican environmental legislation and environmental performance have been strengthened. The most important finding is that the most relevant driving force for compliance is not the regulation itself, but market forces. Fredriksson and Millimet[37] study whether U.S. states bordering Mexico and Canada changed their environmental standards, knowing that some facilities could leave the United States and establish themselves in Canada or Mexico. They found that environmental quality in the United States did not lower as a consequence of the *NAFTA*, and thus concluded that a "race to the bottom" did not take place.

Mexico's first environmental law was enacted in 1971, however, "…for the major part of the 1970s, the Underministry of Environmental Improvement (SMA) did not enforce Mexican policy. While some facilities were temporarily closed, and minor fines imposed in Mexico City, regulation was not enforced."[38] The Secretariat of the Environment, Natural Resources and Fisheries was created in 1994, and changed its name to the Secretariat of Environment and Natural Resources (*SEMARNAT*) in 2000. *PROFEPA* was created in 1992, and is responsible for inspection and evaluation of compliance with environmental legislation. The creation of both authorities coincides with Mexico's entering *NAFTA*.

Mexico uses two instruments to verify or guarantee compliance with environmental legislation: environmental audits and environmental inspections. Environmental audits are voluntary and preventive while inspection

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33 Wisner & Epstein, *supra* note 16.

34 Luege Tamargo, *supra* note 32

35 Husted & Logsdon, *supra* note 15.

36 Wisner & Epstein, *supra* note 16.

37 G. Fredriksson & Daniel Millimet, *Is there a Race to the Bottom in Environmental Policies? The Effects of NAFTA in Commission for Environmental Cooperation of North America*, *in* THE ENVIRONMENTAL EFFECTS OF FREE TRADE. PAPERS PRESENTED AT THE NORTH AMERICAN SYMPOSIUM ON ASSESSING THE LINKAGES BETWEEN TRADE AND ENVIRONMENT 241-261 (2002).

38 Garcia-Johnson, *supra* note 27, at 117.

visits are obligatory and corrective. Both instruments are responsibility of *PROFEPA*. Although positive outcomes were found in terms of developing environmental legislation in Mexico in the 1990s by Husted and Logsdon,[39] they also found that there was only a limited capacity to inspect companies' compliance with environmental laws.

This situation prevails today. The strategy does not center on visiting a larger number of industries, but on visiting the most contaminating industries and devoting more time to each.[40] At the time, there was probably small capacity to keep up with inspections of every establishment in Mexico. While that still applies today, Mexico is now shifting from a command-and-control environmental policy system to a voluntary one. The environmental audit program thus plays a very relevant role. Dasgupta *et al.*[41] assure that although monitoring and enforcement of environmental legislation is poor in Mexico, there are still high levels of compliance. This fact shows that firms have reasons to comply besides the possible direct legal outcomes (economic fines, closure of facilities, etc.).

A previous analysis was undertaken by Dasgupta *et al.*[42] regarding compliance with environmental legislation in Mexico and what triggers it. They found that publicly-traded companies have higher compliance levels than other companies, and firms with ISO-14001 certification were more compliant than non-certified companies. As Dasgupta *et al.*[43] assert, "A number of studies in North America, Latin America, and Asia have shown that bad environmental performance lowers the market valuation of firms and reduces banks' willingness to extend credit…"

Garcia-Johnson[44] studies the export of environmentalism to Mexico from the United States, focusing on chemical industries. Interviews were carried out with officers working for both the chemical industry and Mexico's environmental authorities. She concludes that environmentalism was imported to Mexico with the help of "Responsible Care," an environmental management program for the chemical industry. Free trade plays an important part, given that chemical companies in Mexico adopted it to facilitate trade with foreign countries.

5. *Environmental Audit Program*

A successful environmental policy system consists not only of reliable environmental legislation, but also of the right enforcement mechanisms. Mex-

39 Husted & Logsdon, *supra* note 15.

40 Luege Tamargo, *supra* note 32.

41 Dasgupta, *supra* note 31.

42 *Id.*

43 *Id.*

44 Garcia-Johnson, *supra* note 27.

ico's Environmental Audit is an instrument for sustainable development that was created in 1988 as a voluntary compliance mechanism. This instrument aims at attracting companies that wish to be in full compliance with Mexican environmental legislation, and also want to comply with foreign and international applicable laws. After a company goes through the process, it is granted a "Clean Industry Award" which certifies that the entity is in full compliance with Mexican environmental legislation and that it will be for the following two years. The certificate may be renewed, provided that the entity demonstrates that its activities are in full compliance with all the environmental laws.[45]

This is one of the most important instruments in Mexican environmental policy as it is now shifting from an adversarial system based on command-and-control rules to a cooperative one based on voluntary compliance.[46] After a thorough analysis, Mexico discovered that as efforts and resources increased in terms of inspection visits performed by *PROFEPA*, environmental outcomes were decreasing. Surprisingly, there was also an increase in companies registering in *PROFEPA*'s environmental audit program. According to Luege Tamargo *et al*.[47] (former Special Attorney General for Environmental Protection, former Minister of the Environment and Natural Resources and currently head of the National Water Commission), it seems that the reputation gained by a company for voluntarily obtaining a certificate is one of the most important reasons for firms to join the program.[48]

Weiß[49] finds that the external reasons for a firm to join an environmental management program were: (i) competitive behavior, (ii) government requirements, (iii) environmental interest groups, and (iv) the firm's stakeholders. According to *SEMARNAT*, "exporting companies, companies that provide goods to the Mexican government, the ones that have a large amount of capital, the ones that belong to the construction, electricity, water, gas, manufacture, mining and other services are more prone to join the program."[50] A thorough review of the incentives of the manufacturing in-

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45 Dirección General de Compilación y Consulta del Orden Jurídico Nacional, (1) *Ley General del Equilibrio Ecológico y la Protección al Ambiente* [General Law of Ecological Balance and Environmental Protection]. Available at: *http://www.ordenjuridico.gob.mx/Federal/Combo/L-158.pdf*, February 23, 2010; and Dirección General de Compilación y Consulta del Orden Jurídico Nacional, (2) *Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Auditoría Ambiental* [Regulations for the General Law of Ecological Balance and on Environmental Audits]. Available at: *http://www.ordenjuridico.gob.mx/Documentos/Federal/wo44397.doc*, February 23, 2010.

46 Luege Tamargo, *supra* note 32.

47 *Id.*

48 *Id.*

49 P. Weiß et al., Environmental Management Systems and Certification (2006).

50 Luege Tamargo, *supra* note 32, at 397.

dustry for joining the program was not included in the study, but the results give some guidance as to the reasons companies might consider joining the program.

According to Husted and Logsdon,[51] the Mexican environmental audit became an important instrument to correct environmental problems. They list two incentives to register in the program: (a) no fines can be imposed under the program; and (b) industrial plants cannot be closed while the Clean Industry Award is valid. It is possible that these incentives were granted by *PROFEPA* on a case-by-case basis since the General Law on Ecological Balance and Environmental Protection (*GLEBP*),[52] the Regulations for the *GLEBP* on Environmental Audits[53] and the format of the contract to be entered into by the audited company and *PROFEPA*[54] do not specify any incentives given to those who join the program related to fines or closures. Aside from the fact that the audited company can use the Clean Industry Certificate logo, there would seem to be a lack of incentives to join.

SEMARNAT considers the strategy and the achievements to date successful. So far, 4,757 facilities form part of the program; only 1,934 of them obtained the Clean Industry Certificate.[55] Recently, *PROFEPA* launched an upgrade of the program, called the "Award of Excellence." Although this proceeding is free of charge, the only incentives provided by *SEMARNAT* are allowing the relevant company to use the Excellence logo, and being recognized as a leader in environmental protection. In order to receive the award, a company must: (i) hold a valid Clean Industry Award, (ii) have an on-going environmental management program, (iii) not be the subject of any administrative proceedings, and (iv) not have any continuing environmental claims against it. Only 16 companies were granted this award in the year 2005. Although efforts are being made to get more companies to join the program, they have proven unsuccessful.[56]

When compared to other environmental management systems or certificates, the Clean Industry Award certificate holds certain prestige. It requires compliance with the environmental legislation in force at the moment of the audit, as well as compliance with applicable foreign laws (in specific cases

51 Husted & Logsdon, *supra* note 15.

52 Secretaría de Medio Ambiente y Recursos Naturales (1), *supra* note 45.

53 Secretaría de Medio Ambiente y Recursos Naturales (2), *supra* note 45.

54 The format of the agreement to be entered into by the audited company and PROFEPA is publicly available at: *http://www.profepa.gob.mx/NR/rdonlyres/CA24B72A-164E-4284-AEBA-B04EE01EB1CE/4732/ConvenioAA1.pdf*, February 22, 2010.

55 Luege Tamargo, *supra* note 32.

56 Procuraduría Federal de Protección al Ambiente, *Boletín de prensa. Recibirán 16 empresas el reconocimiento de excelencia ambiental 2005: PROFEPA* [Press Release. 16 Companies to Receive the 2005 Environmental Excellent Award] available at: *http://www.profepa.gob.mx/PROFEPA/ComunicacionSocial/BoletinesdeMedios/CP-160-06.htm*.

where legislation is not available in Mexico, such as in soil contamination standards or when foreign laws are more stringent than local legislation), similar to the European Eco-Management and Audit Scheme (*EMAS*).[57] It could not be compared to the content of ISO-14001, which provides a choice of laws with which the facility can comply,[58] and there is no involvement with the authorities.[59] The Clean Industry Award involves the expert opinion of an environmental consultant whose capability has been certified by an independent organization (the Mexican Entity of Certification). The certificate may be renewed, provided that the firm is still in compliance, the status of which is confirmed by an independent environmental consultant. This is an opportunity to update any new environmental obligations that may have been incorporated into the relevant legislation and changes in the production process or new activities undertaken. In support of this fact, Watzold *et al.*[60] argue that companies which are part of an environmental management system are more up-to-date with environmental legislation.

On the other hand, there is a problem related to administrative fragmentation. *PROFEPA* is the entity responsible for carrying out Environmental Audits and issuing Clean Industry Award certificates. Legally speaking, however, it has no authority to perform an audit related to matters of either water extraction or waste water discharges (unless water was polluted as a result) or fisheries (unless as a result of such action environmental damages were caused), which are under the jurisdiction of the National Water Commission and the Ministry of Agriculture, Cattling, Rural Development, Fisheries and Food, respectively. In the opinion of the author, this diminishes the instrument's reliability. There is also the issue of the scope of the certificate, as the Clean Industry Award only certifies compliance with federal laws, leaving out state and municipal ones (for example, the handling of urban solid wastes and waste water discharges into municipal infrastructure are under municipal jurisdiction; and environmental impact and risky activities could be under state jurisdiction depending on the activity). Therefore, it certifies compliance with environmental administrative laws and standards and leaves out environmental taxes. As is the case with an ISO-14001, having the Clean Industry Award does not guarantee any improvements in environmental performance. It does at least, however, show that registered firms are motivated to comply, organized and informed.[61] It is recognized locally, as opposed to ISO-14001, which is recognized worldwide.[62]

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57 Franz Watzold, *EMAS and Regulatory Relief in Europe: Lessons from National Experience*, 11 EUROPEAN ENVIRONMENT 37-48 (2008).

58 P. Weiß *et al.*, *supra* note 49.

59 Watzold, *supra* note 57.

60 *Id.*

61 Dasgupta, *supra* note 31; P. Weiß *et al.*, *supra* note 49.

62 Watzold, *supra* note 57.

The Clean Industry Award has proven to be a useful tool with the potential to achieve positive environmental performance. It meets Mexico's requirements because it is a strategy that is less costly than inspection visits. However, the incentives to get facilities and/or companies to register have been insufficient so far and thus *PROFEPA* should focus on improving them if it wishes to focus environmental compliance through this instrument.

III. METHODOLOGY

A survey was designed and conducted by the author of this paper, using the "Tailored Design Method" created by Don Dillman[63] for web-based surveys. It was carried out via SurveyMonkey, a web-based survey tool. According to the literature,[64] more honest responses are obtained in written questionnaires as opposed to interviews, given that they are self-administered. To avoid bias on this basis, respondents were assured that their responses and identities would be kept confidential.

The cluster sampling method and stratified random sample were used.[65] The names of the top ten law firms were found[66] and the population was selected from these firms. The relevant subgroups were (a) Mergers & Acquisitions; (b) Environmental Law; or (c) Both.

Cross-border acquisitions[67] generally take place within a short period of time, require a large team of multidisciplinary lawyers to perform a legal

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63 DON A. DILLMAN, MAIL AND INTERNET SURVEYS: THE TAILORED DESIGN METHOD (Wiley, 2002).

64 John C. Whitehead, *A Practitioner's Primer on the Contingent Valuation Method*, *in* HANDBOOK OF CONTINGENT VALUATION 66-91 (Anna Alberini & James R. Kahn eds., 2000).

65 BRETT MARTIN DAVIES, DOING A SUCCESSFUL RESEARCH PROJECT: USING QUALITATIVE OR QUANTITATIVE METHODS (McMillan, 2007).

66 Although the Mexican Bar for lawyers exists, it does not have the function of certifying the quality of lawyers, as is the case with Bar Associations in the United States. A complete list of lawyers and their specializations is thus not publicly available from it or from any other institution. To overcome this obstacle, the author of this paper consulted LatinLawyer, a magazine which, among other things, researches and ranks the quality of legal services provided to foreign clients by firms located in Latin America. It also provides the names and specializations of thousands of Mexican lawyers. The top ten Mexican law firms were picked from LatinLawyer's 9th edition of the "250 Most Authoritative Latin America Leading Business Law Firms." A law firm specializing in environmental law, which was amongst the top fifteen law firms, was also included in the law firms surveyed. Six of the ten law firms were also listed as the top ten law firms in Mexico by Martindale.com, one of the most recognized web-based lawyer location and ranking tools.

67 This paper deals principally with the issue of acquisitions. Mergers are the act of combining two companies to create a larger company. Acquisitions, on the other hand, happen when a company decides to buy either shares or assets of another company, and thereby takes control of them. The surveys completed by lawyers made reference only to

audit and find any non-compliance, and are carried out in English because the *Acquirer* is a foreign company. Prior to the design of the survey, lawyers that had been previously selected with the desired specializations were contacted randomly via phone to find out how acquisitions usually worked.

Law firms are often contacted by either a foreign law firm or a foreign company wishing to acquire a Mexican company. In most cases, the Mexican law firm will assist in acquisition transactions and will not follow up on the *Acquired* company, unless an issue arises. This is the reason why most of the questions are related to information provided during the acquisition and not information that would have emerged at a later date.

Using Martindale's Internet Lawyer Locator, a search was conducted to find each of the lawyers working for the above firms that specialized in Mergers & Acquisitions, Environmental Law or Both. Although the Web page contained current information for most of the possible recipients, some information was unfortunately out of date. In the search for updated information, each law firm's website was checked against the lists. However, there is still the possibility that personnel who were recently hired and/or who had recently left the law firms were not contacted.[68]

The request for completion of the survey was sent individually, via e-mail, to 165 lawyers. Of those 165 lawyers: (i) 77% specialized in Mergers & Acquisitions; (ii) 18% specialized in Environmental Law; and (iii) 3% specialized in Both. The numbers reflect the number of people working at each of the specialties in the top ten law firms. The questionnaire was completed by 49 lawyers (29% of responses)[69] of which: (i) 65% specialized in *M&A*; (ii) 28%, in Environmental Law; and (iii) 6%, in *Both*. The questionnaire contained mainly closed, but also some open-ended, questions, and asked for detailed information about each lawyer's experiences with: (a) the type of industries that receive foreign direct investment; (b) the most common way of acquiring a company established in Mexico (either by means of acquiring assets or shares); (c) whether transactions were cancelled due to environmental or labor issues; (d) to what extent environmental certifications play an important role in cross-border acquisitions; (e) if environmentalism has a

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"acquisitions." It is possible that if they had been asked about mergers as well, the responses would have been similar to those obtained for this paper.

68 The contact details for each lawyer were obtained from each law firm's webpage. One of the eleven law firms to be surveyed did not have their personnel's contact details publicly available. Although personnel at the law firm were contacted via telephone and e-mail for the purpose of obtaining the relevant contact details, they were not provided and therefore that law firm was not surveyed.

69 Although a request to complete the survey was sent individually to each lawyer, in two cases, the relevant law firms completed only one survey on behalf of the law firm. The action taken was an obstacle to obtain a higher number of responses; however in both cases, it was an experienced partner who answered the questionnaire; therefore valuable information was provided.

nationality; (f) whether a foreign legal framework is used by foreign companies to bring the *Acquired* company to full environmental compliance, and (g) why foreign companies find out the environmental performance of the company to be *Acquired*.

IV. Results and Discussion

There are significant differences between responses given by environmental lawyers and *M&A* lawyers. In most cases, environmental lawyers are only involved in acquisitions where the company has industrial facilities capable of polluting (air, water, hazardous waste, etc.). *M&A* lawyers are always involved regardless of the type of company. The responses given by each lawyer enhances the outcome of the research given that they show how they think and what their experience is with respect to certain topics. Most of the discrepancies have an explanation, which is always based on a legal requirement applied to real-life cases.

1. *Support for Vogel's Environment vs. Labor Competition*

The questionnaire included a question designed to explore Vogel's hypothesis that wages were more important than environmental requirements when investing in another country. Lawyers were asked whether they had experienced any closures of industrial facilities during the past year in which the owner had the intention of setting it up elsewhere (in a foreign country). Only 16% responded they had. When computed separately based on the area of legal specialty, there is only a 10% difference in the responses; hence trends do not substantially differ between the respondents.

Of those reported closures, the results suggest that only 2% of the cases were related to environmental requirements being too strict in Mexico compared to other countries, while 14% were due to lower wages in foreign countries. In terms of environmental-related closures, when computed separately, results show that 50% of the environmental lawyers have experienced it and only 18% of *M&A* lawyers have done so. Lawyers with specialties in *Both* reflect the overall trend (30%).

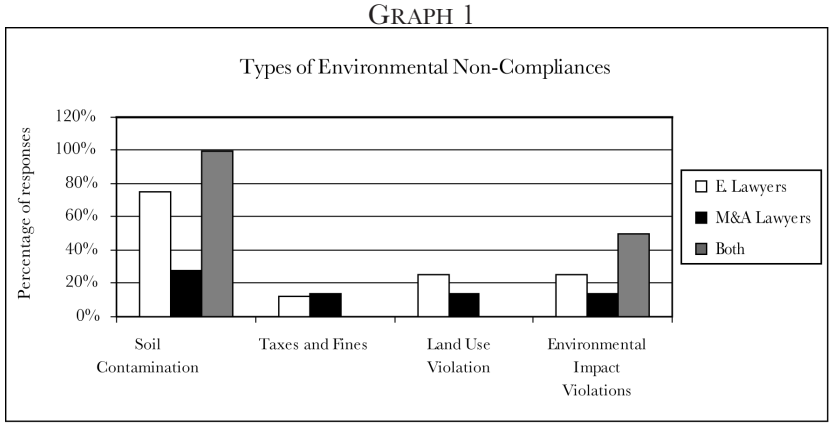
As to closing down an industrial facility to set it up elsewhere due to lower wages, when computed separately none of the environmental lawyers had come across this situation while 15% of the *M&A* lawyers had. In conclusion, Vogel's hypothesis is supported by the overall results. We should not forget that "*maquiladoras* are designed to be able to relocate geographically according to different comparative advantages offered by different coun-

tries, regions."[70] We observe a much stronger relationship for the hypothesis that where an industrial facility is closed down to be set up in other country, it is because of lower wages rather than lower environmental requirements.

2. *Deal-Breakers: Environmental vs. Labor*

When asked whether the lawyers had any experiences with an acquisition that was cancelled due to environmental non-compliance, only 30% responded they had. When asked for the reason(s) the acquisition was rescinded, 73% answered that it was for reasons of soil contamination. When computed separately, 75% of environmental lawyers made reference to soil contamination while only 28% of the *M&A* lawyers responded the same. With respect to the lawyers with both specialties, 100% responded that it was related to soil contamination. Graph 1, below, contains the environmental non-compliances that gave rise to the suspension of an acquisition, which include: (i) land use violation; (ii) environmental impact violation; (iii) taxes and fines; and (iv) soil contamination.

GRAPH 1



Soil contamination has the strongest potential impact when acquisitions are undertaken. In the event that a contaminated site was transferred during an acquisition, not only would authorization need to be obtained from *SEMARNAT* and/or *PROFEPA*, but the *Acquirer* would also become responsible for its clean-up (unless an agreement was reached for the previous

70 Claudia Schata & Liliana Castilleja, *The Maquiladora Electronics Industry on Mexico's Northern Border and the Environment*, *in* THIRD NORTH AMERICAN SYMPOSIUM ON ASSESSING THE ENVIRONMENTAL EFFECTS OF TRADE: INVESTMENT, GROWTH AND THE ENVIRONMENT, Montreal, 30 November and 1 December, 2005, slide 10. Available at: *http://www.cec.org/symposium/documents.cfm?varlan=espanol*, July 10, 2009.

owner to arrange clean-up). Fines[71] for soil contamination may range from approximately US$90 dollars to US$225,000 dollars.[72] It is difficult to estimate the cost of the remediation of a site with contaminated soil given that it varies depending on: (a) the amount of contaminated soil and (b) type of contaminants. In *PROFEPA*'s experience, approximate costs incurred by the authority in the remediation of 15 contaminated sites ranged from US$2,148 to US$21'485,000.[73] The price paid for cleaning up contaminated soil is always significantly higher than a fine. This explains why such a high percentage of transactions are cancelled due to soil contamination. Cross-border acquisitions can therefore be expected to play an important role in the nature and extent of contaminated site clean-up over the next several years, hence increasing environmental compliance levels.

Results show that environmental non-compliance is a more frequent deal-breaker than labor issues. Again, soil contamination plays an important role. As mentioned above, in addition to soil contamination remediation's being expensive, it is time-consuming and a potential future liability. Relevant standards for clean-up exist for some heavy metals, hydrocarbons and polychlorinated biphenyls. However, Mexico is in the process of developing all of the standards needed and thus buying a potentially-contaminated site raises concerns about future liabilities which might arise as the law on contaminated lands continues to develop.

Mexico has had contaminated sites since the colonial era as a result of mining activities. Recently, the number of contaminated sites has increased due to petroleum and industrial activities. No actions had been taken on this issue until six years ago when the General Law on the Prevention of Integral Management of Waste (*LGPGIR*) was published, and subsequently enacted in January 2004.[74] After the *LGPGIR* was published, sites with soils contaminated with hazardous waste could only be transferred if authorization was given by *SEMARNAT*. Owners and/or possessors of contaminated sites would be jointly responsible for the site clean-up. According to *SEMARNAT*'s web site, since the *LGPGIR* was enacted, and until today, only 12 applications were filed with *SEMARNAT* to obtain an authorization to transfer a site whose soil is contaminated. In contrast, there were 118 applications for the approval of the proposals to remediate contaminated soil. We may conclude that parties who own a contaminated site clean it up instead of transferring such site as an environmental liability.

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71 Cámara de Diputados del Honorable Congreso de la Unión, *Ley General del Equilibrio Ecológico y la Protección al Ambiente*, Mexico City, 2007. Available at: *www.cddhcu.gob.mx*, February 22, 2010.

72 The exchange rate used is the one published in *Diario Oficial de la Federación* on February 23, 2010.

73 The exchange rate used is the one published in *Diario Oficial de la Federación* on February 23, 2010.

74 Luege Tamargo, *supra* note 32.

Evidence supporting the argument that fines create an incentive for compliance if set high enough[75] was obtained from the questionnaire. *PROFEPA* may impose fines for environmental non-compliance ranging from US$90 dollars to US$225,000 dollars.[76] The National Water Commission may impose fines related to water non-compliances ranging from US$4,500 dollars to US$90,000 dollars.[77] According to *PROFEPA*'s annual report, 5,325 administrative proceedings were undertaken during 2006. The total amount of fines imposed in those proceedings was 112 million pesos (approximately US$8'750,000 dollars). When divided, it shows that each administrative proceeding imposed a fine of approximately US$1,643 dollars. Cross-border acquisitions are never below several millions of dollars, making fines irrelevant to the transaction. These issues are often dealt with by reducing the price paid for the *Acquired* company.

3. *Environmental Management Systems: Who Joins the Club?*

It has already been suggested in this paper that Mexico has not become a "pollution haven." It has also been argued that Mexico is shifting from a command-and-control system towards a voluntary and cooperative one. Following this line of thought, lawyers were asked whether acquiring companies had the intention of registering the *Acquired* company in one of the programs designed to improve their environmental compliance and management (only applicable to the cases in which the *Acquired* was not certified or in the process of obtaining certification). In the majority of the cases (55%), the acquiring company did not involve the *Acquired* in an environmental management program. In some cases (35%), the *Acquired* company was already registered in one of these programs and the acquiring company was certified or in the process of obtaining certification in 46% of the cases. When computed separately, both results are exactly the same for environmental lawyers and *M&A* lawyers (57% and 35%, respectively).

The results show that the most popular program chosen by the acquiring companies is the Clean Industry Award run by *PROFEPA*. Although most of the evidence would point to a positive effect of cross-border acquisitions in an increase in the number of companies registered in the Environmental Audit program, the evidence is not conclusive. There is only a small contribution from cross-border acquisitions to the development of Mexico's voluntary compliance strategy and *PROFEPA* needs to work harder to offer in-

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75 Dasgupta, *supra* note 31.

76 The exchange rate used is the one published in *Diario Oficial de la Federación* on February 23, 2010.

77 The exchange rate used is the one published in *Diario Oficial de la Federación* on February 23, 2010.

centives to companies that join the program and obtain the Clean Industry Award.

The evidence presented here is not able to address the reasons the acquiring companies chose one environmental management program over another. However, it is clear that the acquiring companies wish to know the *Acquired* company's compliance status and bring it to full compliance with the applicable Mexican environmental legislation, which is clearly the purpose of the Environmental Audit Program.

4. *Green Nationality*

In general, when we make reference to green nationalities we mostly think of either Germans or Swedes. Due to the controversial position of the United States towards the Kyoto agreement, it has not achieved a reputation for its clean ideology. Also controversial is the U.S. performance as both a part of and a defendant of the World Trade Organization on environmental matters.

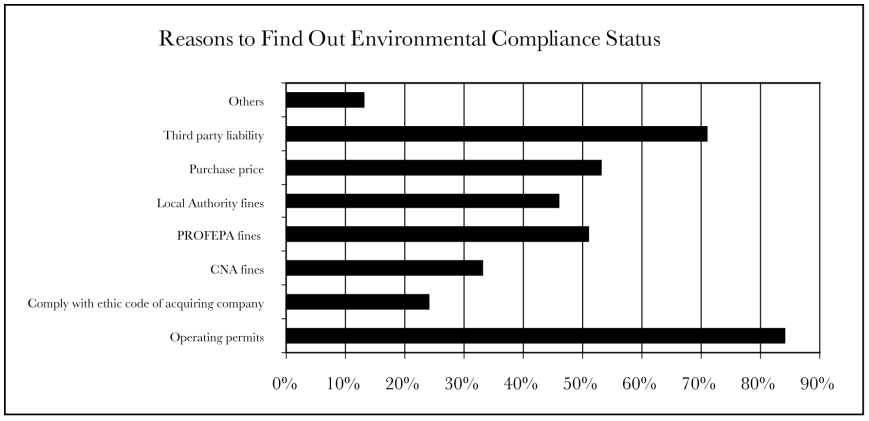
Mexico's Federal Secretariat of Economy provides a list of the nations that invest most money in Mexico. This is based upon the data collected by Mexico's Federal Foreign Investment Registry. According to this document, the nations with the most investment in Mexico are: the United States, Spain, Germany, Canada, Holland, Korea, France, Japan, Italy, United Kingdom, Panama, Belgium, Colombia, Brazil, Switzerland, Cayman Islands, Barbados, Virgin Islands, Argentina, Uruguay, Sweden and China. Based on this information, lawyers were asked which nationality in their experience was more interested in learning about environmental compliance of the company to be *Acquired*. The results show that 95% of the respondents answer the United States. The complete results are contained in Table 3 below. Only those countries ranking above 0% are included in the list.

TABLE 1. GREEN NATIONALITIES

Country	*Percentage*	*Country*	*Percentage*
United States	95%	Brazil	4%
Germany	31%	Sweden	4%
Canada	21%	Belgium	2%
United Kingdom	21%	Holland	2%
Japan	11%	Switzerland	2%
Spain	9%	China	2%
France	7%	Others	2%

Following up on this topic, the reasons an acquiring company would be interested in finding out the *Acquired* company's compliance status with environmental laws are shown in Graph 2:

GRAPH 2. REASONS TO FIND OUT ENVIRONMENTAL COMPLIANCE STATUS



The effect of fines imposed by *PROFEPA*, the National Water Commission or local authorities on the acquisition of a company is positive, as expected, but not particularly strong. Having the relevant permits for operating the facility as soon as the acquisition takes place, third party liability and the purchase price remain the three most important reasons an acquiring company wants to find out the *Acquired* company's environmental compliance status. Again, these reasons are directed at the possible costs to be incurred by the *Acquirer* if everything is not in good conditions, all of which are substantially higher than any of the fines that could be imposed.

5. *Following National or Foreign Environmental Laws*?

The only legal framework applicable to a company established in Mexico is Mexico's federal, state and municipal environmental legislation. However, in practice, multinationals sometimes follow the laws of their home country. Mexico accepts compliance with foreign environmental laws, as long as they are stricter than Mexican standards. This is only applicable to cases in which legislation is not readily available.

An example of this is the standards for soil contamination. Mexico has enacted the following Mexican Official Standards for soil contamination: (a) NOM-138-SEMARNAT/SS-2003, which sets forth maximum permitted limits for hydrocarbons in soils and specifications for its characteriza-

tion and remediation, and (b) NOM-147-SEMARNAT/SSA1-2004, which sets forth criteria for determining remediation, concentrations for soil contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium and vanadium. In addition, the Mexican Official Standard for polychlorinated biphenyls contains limits for such material in soil. These standards are only some of the parameters which should be published for soil contamination concentrations (*i.e.*, there are no parameters for fertilizers in soil). Therefore, to date, Mexico has not enacted the complete framework that would allow a party to define its site as a contaminated one. To comply with the law (*LGPGIR*) already in force, *PROFEPA* and *SEMARNAT* encouraged the use of either: (a) unpublished criteria developed by a group of experts in the *PROFEPA*; or (b) the U.S. Environmental Protection Agency's Region IX Soil Contamination Standards.[78]

Survey results show that in 91% of the cases, companies are brought to comply with Mexican environmental legislation. Only in 8% of the cases do companies choose to comply with foreign laws. We did not find any evidence of instances in which companies did not comply with either national or foreign environmental legislation.

V. Conclusions

According to the literature, Mexico's performance in environmental matters has advanced since entering *NAFTA*.[79] Generally speaking, Mexico has witnessed improvements in its environmental legislation as globalization progresses. This article contributes to the debate on the consequences of economic globalization by creating data on cross-border acquisitions and its effects on compliance levels with environmental laws in Mexico which were not previously available. Our results suggest that foreign Acquiring companies are interested in finding out the level of environmental compliance of *Acquired* companies. Below are the conclusions gathered from the findings of the paper.

1) Given the results obtained from green nationality, Mexico should not only promote foreign direct investment, but also encourage it from the United States, Germany, United Kingdom and Canada, which have shown an interest in environmental compliance. Moreover, if any more activities are open to foreign investment (such as energy), the green nationality factor should be taken into consideration when revising companies interested in investing in Mexico.

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78 This information was obtained via e-mail from the Soil Contamination Offices of *PROFEPA* and *SEMARNAT* on August 17, 2007.

79 Husted & Logsdon, *supra* note 15; Wisner & Epstein, *supra* note 16.

2) Mexico should increase the amount imposed for economic fines for environmental or water violations in order to increase compliance levels. As discussed in this paper, the amounts that can be legally imposed, as well as the amounts actually imposed in cases to date, are irrelevant when compared to the purchase prices paid in cross-border acquisitions. The responses of lawyers interviewed for this paper have suggested that soil contamination has been an obstacle in acquiring a Mexican company. This was explained by the fact that site clean-up is both expensive and time consuming. This tends to support, although in a different setting, the theory that if fines are set high enough, they will encourage compliance instead of making non-compliance part of a company's budget.
3) *PROFEPA* should increase incentives for companies in order to achieve higher compliance levels with environmental legislation via voluntary compliance. This strategy fits Mexico's profile given that voluntary programs are less resource-intensive for environmental authorities, which is the case of Mexico's budget for environmental matters. Today, being part of the program provides the incentive of being able to use the Clean Industry logo and the possible promise of not closing its facilities or being fined while part of the program.
4) Regulatory chill and soil contamination: evidence from the surveys suggests that the link between soil contamination and its relevance in cross-border acquisitions has strengthened environmental compliance. The results also show that it is possible to create environmental legislation that establishes higher environmental liabilities, which can result in increased costs. These violations have been dealt with by either reducing the purchase price of a transaction, agreeing on the clean-up of the contaminated site before the acquisition takes place, or cancelling the transaction.
5) We found little statistical evidence of companies in Mexico being shut down for the purpose of setting them up in a foreign country with either lower wages or less stringent environmental standards. We find stronger evidence for the lower wages hypothesis as opposed to the less stringent environmental requirements.

Recibido el 2 de mayo de 2009 y aceptado
para su publicación el 19 de junio de 2009.

Mexican Law Review
New Series
VOLUME II
Number 2

GLOBAL WAR: THE CONCEPT OF MODERN WAR UNDER ATTACK

Anderson V. TEIXEIRA*

ABSTRACT. *This article analyzes how the concept of modern war has been changed in its basic elements by the effects of globalization at the beginning of this century. The article takes a critical-analytical approach which seeks to structure the theoretical arguments from an historical perspective beginning with the transition from religious war to modern war. After examining how war became a globalized event at the beginning of the 21st century, the article proposes that one way to overcome —or attenuate the main effects of— the present reality presented by global war in the context of international relations would be to adopt a juridical globalism articulated into regionally based Nation-State communities.*

KEY WORDS: *Philosophy of law, international relations, war.*

RESUMEN. *El presente artículo analiza cómo el concepto moderno de guerra ha ido cambiando en sus elementos básicos desde principios de este siglo, debido a los efectos de la globalización. El artículo parte de un enfoque crítico y analítico que busca estructurar los argumentos teóricos desde una perspectiva histórica, comenzando con la transición de la guerra religiosa a la guerra en su concepto moderno. Después de examinar cómo la guerra se convierte en un fenómeno globalizado a principios del siglo XXI, el artículo sostiene que una forma de superar —o atenuar— los efectos de la guerra global en el contexto mundial imperante sería mediante la adopción de un ordenamiento jurídico global a partir de la articulación de comunidades regionales de Estados.*

PALABRAS CLAVE: *Filosofía del derecho, relaciones internacionales, guerra.*

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I. INTRODUCTION

In addition to increasing contact between the cultures and peoples of the world, deepening the relationship between national and international markets, and changing traditional political concepts of the Modern State, globalization has also produced profound changes in military theory and practice. The traditional concept of modern war completely changed its character during the 20th century as the level of dissemination of weapons of war, both among countries (horizontal spread) or within countries to paramilitary groups (vertical spread) has increased at frantic speed. The illegal weapons market, which a few decades ago was not a significant problem for the international community, is now so professionalized that the use of weapons exclusive to the world's greatest armies is now available for anyone interested and able to pay. For these reasons, and especially due to the consolidation of the notion of global war in the international lexicon, it is important to present some considerations about what appears to be another consequence of the globalization processes.

This article begins with a brief reconstruction of the concept of modern war, going back to the medieval ideas of *bellum justum* and *jus ad bellum* to the formation of international law also concerned with *jus in bello*. The article then analyzes the transformations produced both by the end of the Cold War and the expansion of globalization, in the 20th century, to the basic elements of modern war. In the final part of this article, I propose establishing a juridical globalism articulated in Nation-States communities, in order to handle the new nature of war in the contemporary era. The proposed structure is generally similar to the European Union's structure, but my perspective has a distinct philosophical and normative grounding.

II. The Construction of the Concept of Modern War

Concomitantly with the consolidation of the Modern State, and maybe as a consequence, we can find an essential modification in the historical development of the concept of modern war: the transition from religious war to modern war. Until the Peace of Westphalia in 1648, that ended the Thirty Years' War, religious influence on the causes of war prevailed in deciding whether to go to war or not. In this sense, the Crusades became famous: a modality of war whose main cause was not a political issue, but simply the consolidation of the *auctoritas spiritualis* of the *Respublica Christiana* over its territories and over every single "infidel" —a term which simply ignored the possibility of any religion other than Catholicism. The Pope held the *potestas spiritualis* that was to be imposed on any people who did not recognize his legitimacy. The *Respublica Christiana* considered itself to be the holder of a cognitive-spatial integrality capable of bringing together the mundane and the transcendental, so that any insurrections inside its territories were not to be considered wars, but rather as insurrections led by infidels, instead of by the enemy.[1]

With the beginning of the Thirty Years' War, a conflict with a religious background was initiated between the Hapsburg Emperor of the Holy Roman Germanic Empire, who was a Catholic, and the commercial city-States in northern Germany, whose religious influence was Lutheran and Calvinist. Only after the development of an almost pandemic war in Europe, with Scandinavian countries like Sweden and Denmark joining in the conflict, and the economic, political and military destruction of all countries involved, was it possible to settle a final agreement to the effect that, from then on, religious freedom would be considered each State's own right and a consequence of its sovereignty. Hence, wars among countries and civil wars for religious reasons lost their political legitimacy and, consequently, ceased in Europe. Carl Schmitt considered the laicization of the concept of war as overcoming the confessional despotism, which during the religious wars of the 16th and 17th centuries provided reasons for the worst forms of cruelty, as well as for the degeneration of war into civil war.[2]

However, the most concrete outcome of the Peace of Westphalia was, in fact, the secularization of public power because real "peace" had not been truly constructed through the development of communitarian rules capable of bringing closer the countries that had been in conflict until then, and generating an environment that favored the rise of a lasting peace.[3] Conse-

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[1] Carl Schmitt, Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum (Duncker&Humblot, 1974).

[2] *Id.* at 164.

[3] Antonio Cassese, International Law 21 (Oxford University Press, 2001).

quently, the consolidation of a normative international system was very slow and occurred through agreements and bilateral or multilateral treaties. What happened in 1648 was an armistice, *i.e.*, the parties stopped fighting because there were no more reasons that justified the cost and destruction produced by war. Peace was effective with respect to the Hapsburg hegemony, for it had lost its power against Lutheran kingdoms and city-States, but this did not mean the immediate rise of an international community.[4]

1. *From* Bellum Justum *to* Jus Ad Bellum

The concept of modern war later developed from a lay perspective, but did not completely abandon the doctrine of *bellum justum*,[5] which was used to determine that war was forbidden and a State could only start a war if it had a just cause for that —although the concepts of "just cause" were subjective and an occasional unjust war could be ended with recourse to another war. From a formal standpoint, a just war was conditioned by the Church's authority, whereas from the material aspect it was a conduct *ex justa causa* that aimed at the external affirmation of some juridical claims characteristic of the internal juridical system, but without taking into consideration whether the war was one of aggression or of defense.[6] Basically, the doctrine of just war, instead of permitting the one who was right in the conflict to win, was simply useful to declare whoever won, the rightful winner.[7]

With the loss of power suffered by the Catholic Church in relation to the State and with the transformation of the power of *potestas spiritualis* into *potestas indiretas*,[8] the causes of war were no longer legitimated by that *potestas spiritualis* and started to focus on more "objective" criteria. The rationale that a State uses to legitimate its desire to start a war against another is the moment when the concept of modern war, as we understand it, can actually be visualized. Like the Europeans, who from the 15th century to the 18th century sought in "reason" the element that could distinguish them

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4 KALEVI J. HOLSTI, PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL ORDER 1648-1989 40 (Cambridge University Press, 1998).

5 The expression *bellum justum* has its origin in Ancient Roman Law, and Cicero already used the term when referring to the lawful war destined to submit all those peoples that were against the political and juridical order —the Roman one. See LUIGI LORETO, IL BELLUM JUSTUM E I SUOI EQUIVOCI 17 (Jovene Editore, 2001); and PAUL GILBERT, NEW TERROR, NEW WARS 16 (Georgetown University Press, 2003).

6 Schmitt, *supra* note 1, at 133.

7 NORBERTO BOBBIO, IL PROBLEMA DELLA GUERRA E LE VIE DELLA PACE 59 (Il Mulino, 1997).

8 The expression *potestas indiretas* is here used in the sense that its owner, *i.e.*, the Catholic Church, has no relation of legitimacy with the State.

from the American savages, reason will be one of the main references to define when a war is just and when it is not.[9]

As war began to be known as retribution/reaction, its modern version brought with it the doctrines of *jus ad bellum* and of *jus in bello.* When a State's sovereignty had been violated, the possibility of a State reacting by starting a war against the offender was given the name of *jus ad bellum.* Instead of defending a strong conception of justice, as in the doctrine of *bellum justum*, in this case it is enough that the State's territorial sovereignty be violated to allow it to argue *jus ad bellum* against the offender. In addition to this possibility of going to war for defensive reasons, *jus ad bellum* also included the possibility of going to war as punishment of the offending State and as a way of winning back territories that had been "illegally" lost to another State. But in the 19th century, with the consolidation of the *jus publicum Europaeum*, the possibility also arose for any Sovereign-State member of this international system to argue their *jus ad bellum* as a cause to formally intervene in deliberations and diplomatic negotiations regarding any war taking place on European soil or involving any State on this continent.[10]

2. *International Law and* jus in bello

It could be said that *jus in bello* was an attempt of the *jus publicum Europaeum* in the 19th century to formalize war by means of procedures and minimal codes of conduct that should be adopted by the States involved in a war, making the notion of *bellum justum* lose its previous meaning.[11] According to Zolo, war began to be ritualized by a series of diplomatic procedures, such as the declaration of war and the settlement of peace.[12] War, which until then had been an instrument of external politics, began to be treated as an act with legal repercussions and capable of generating criminal responsibility for political leaders.[13]

Bobbio has characterized the preponderantly formal sense of *jus in bello* from a Jusnaturalist perspective. From this point of view, *jus in bello* did not regulate the cause of war but regulated its conduct, regardless of the cause. Regarding the cause of war, the States has no legal limits (in positive law)

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9 "Rationality was a way of looking at the world in which the meaning of an act derived entirely from its utility. Within the framework of practical rationality all means of procuring desired ends are viewed as 'techniques' or 'strategies' rather than as systems of values adhered to on the basis of ethical standards." CHRISTOPHER COKER, THE FUTURE OF WAR 26 (Blackwell Publishing, 2004).

10 Schmitt, *supra* note 1, at 236.

11 Bobbio, *supra* note 7, at 168.

12 DANILO ZOLO, GLOBALIZZAZIONE. UNA MAPPA DEI PROBLEMI 119 (Laterza, 2004).

13 Holsti, *supra* note 4, at 228.

but only moral limits (based on natural law); regarding the conduct of war, it also has legal limits which are established by a law enforced within the international community of which it is a member, and that it has itself contributed to produce.[14]

20th century wars overthrew many theoretical and legal constructions that up to that time had supported the conception of modern war. The nuclear attacks on Hiroshima and Nagasaki in 1945 represented the end of any possibility of maintaining a minimum standard of ethics in war, respect for civilians (who are often the victims of their own regimes), respect for *jus in bello* and even respect for the concept of war itself.

An inherent characteristic of war is the conflict, the battle, which Hobbes has defined as the "*act of fighting*."[15] It must be noted, however, that a nuclear war does not represent conflict, battle or act of fighting. If a nuclear war occurs between two or more States that are all nuclear powers, there would not be a conflict for the purpose of one side vanquishing the other; the conflict would boil down to a few brief decisions concerning attacks whose ultimate end would probably be reciprocal extermination.

After the possibility of a nuclear war arose, the primary responsibility for maintaining international peace and security was assigned to a single body, the United Nations Security Council. The fear of a nuclear conflict led the international community to accept the decisions of this body as binding, since even *jus ad bellum* as retaliation became conditioned by a manifestation of the Security Council, a body which —according to the Charter of the United Nations— is the rightful protector of *international peace and security*. Thus, the military interventions conducted by the UN against countries at war marked the beginning of the fall of modern war. Rendering the conflict and the parties involved impersonal *stricto sensu*, transferring the generic interest in the conclusion of the crisis and in re-establishing peace, is a mode of military intervention that had made all wars subject to international community interests. This shift marks the beginning of global war.

III. The Effects of the End of the Cold War on the Basic Elements of Modern War

One of the immediate consequences produced by the end of the Cold War in the political-international scene was the transformation of the winning world power (USA) into the world's only superpower, giving it the possibility to expand its dominion to all corners of the world. The end of

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14 Bobbio, *supra* note 7, at 64.

15 "For Warre, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of Time, is to be considered in the nature of Warre; as it is in the nature of Weather." Tomas Hobbes, Leviathan 185-186 (Penguin Classics, 1985) (1651).

the USA/USSR political bipolarization produced and even precipitated overstated conclusions like that of Francis Fukuyama, who has called this process the "end of History"[16] —*i.e.*, the ultimate triumph of liberal democracy over all systems and ideologies that have ever competed with it.

Once the communist axiology —incompatible with the development of almost all globalization processes— lost its supreme political reference, the USSR, the idea of the "*global village*"[17] began to be considered possible. The end of the USSR also seemed to be the great solution to the problems of the U.S. government in the international arena, especially since the Cold War was already part of the past and no country was able to compete with the political, economic and military power of the United States. But with the end of the 20th century and the beginning of the 21st, the massive power of the United States in world politics and the economy, the overwhelming dissemination of its culture to the four corners of the world and, above all, the unquestioned leading role played by the United States in the United Nations have concentrated all attention on this country. The paramilitary groups —usually Islamic fundamentalists—[18] that had also fought against the USSR and its allies now have only a single target to hit: USA.

Originally, the Islamic fundamentalist groups did not support or appeal to terrorist attack tactics; they were an organization of an exclusively religious nature that proclaimed respect for the Koran. The "Muslim Brotherhood," founded in Egypt in 1928, was one of the first groups that linked the rise of Islamic fundamentalism with terrorist activities.[19] On one hand, the Brotherhood offered armed resistance to the British colonizer, but, on the other, the group developed literacy and medical support programs for the poorest populations of Egypt. The fundamentalists would reconstruct their national identity based on the Islamic religion, as opposed to the political and cultural values of the colonizer.

However, the Brotherhood suffered persecution by the kings of Egypt who were subject to the British Crown. Even after the Egyptian Republic

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16 See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

17 See MARSHALL MCLUHAN, UNDERSTANDING MEDIA (1964). We can also see JAMES JOYCE, FINNEGANS WAKE (1939), and PERCY WYNDHAM LEWIS, AMERICA AND COSMIC MAN (1949), as references to the origins of the expression "global village."

18 Some of the most important fundamentalist groups are: Abu Nidal's Organization (Palestine and Lebanon), Armed Islamic Group (Algeria), Hamas (acting in the Palestinian territories occupied by Israel), Hezbollah (Lebanon), Al-Jihad (Egypt), Palestinian Islamic Jihad (in the Palestinian territories occupied by Israel), Front for the Liberation of Palestine (in the Palestinian territories occupied by Israel), Al Qaeda (originated in Afghanistan, but today acting around the world). Even though these groups have been created as a reaction against regional and specifics problems, the uprising's last fundament is always against values and principles that characterize the United States.

19 See WALTER LAQUEUR, NO END TO WAR: TERRORISM IN THE TWENTY-FIRST CENTURY 31 (Continuum Publishing, 2003).

was established in 1953 by nationalist leader Gamal 'Abd al Nasser, the group continued to be oppressed and remained illegal. Nasser was a leader with ideas clearly influenced by the West, making him incompatible with the religious world-view of Islamic fundamentalists and generating the political context for ideological radicalization and terrorism.[20] In 1981, the Muslim Brotherhood launched its biggest attack, killing the Egyptian president Anwar al-Sadat as retaliation for the agreement that Sadat had signed with the United States, becoming the first Islamic country to recognize Israel as an independent State.

Terrorism has become the main form of public expression for many Islamic fundamentalist groups after the slow process of exclusion from international political debate perpetrated by the ruling Western powers. There were some episodes, like the U.S. support to Iraq in the war against Iran in the 1970s, and the international community's indifference to Soviet oppression of Islamic countries, especially Afghanistan, that were decisive in producing a profound ideologically-based division of the globe into zones of Judeo-Christian influence and Islamic influence. Thus, the September 11 attacks were one of the points of maximum exclusion and reciprocal rejection of the two traditions.

However, after these attacks, the international community began to deal with an agent that had until then been unknown in the military field: paramilitary groups with no territorial bases, whose attacks could be adapted to the needs and possibilities of the group. The effects of the offensives in Afghanistan and Iraq in 2003 proved that the U.S. government and its allies were trying to fight on the terms of modern war against an enemy and on a battlefield that did not fit that standard of war.

Some factors, like the difficulty of defining all the agents involved in a conflict and the international community's strong presence in trying to establish legal and moral standards of conduct in the sense of avoiding war, have transformed war into a globalized reality and an event with complications never before seen in history.

IV. Understanding Global War and its Ontological Foundations in Globalization Processes

The expression *global war on terrorism (GWOT)*, created by the U.S. government immediately after the September 11 attacks, summarizes the moment when the traditional concept of war lost its ground in the notion of Nation-State and became essentially a global phenomenon. In the present

[20] For a concept of terrorism, we indicate Noam Chomsky, who uses the term "terrorism" to refer to "the threat or use of violence to intimidate or coerce (generally to political ends)." Almanac of Modern Terrorism 264 (Jay M. Shafritz ed., Facts on File, 1991).

context, the definition of one side in the conflict —the United States and its allies— does not necessarily correspond to the definition of who the enemy is, because the enemy's increasing fragmentation into non-State cells does not allow us to understand war in the same sense in which it had been understood until now.

The first consequence of this conceptual change was the attempt to maintain the traditional notion of modern war —where Nation-States are the main or only agents actively capable of interacting in the conflict— through the wars initiated by the United States against Afghanistan (2001) and Iraq (2003). Arguing that both countries were involved in the September 11 attacks, the United States and its allies started a war along the same lines as modern war. Nevertheless, it took a few years for it to become clear that none of those countries has any causal relation —demonstrable in the logical-rational field— with the attacks of September 11.

Following the war in Iraq and the political and economic domination by the U.S. government in that country, a process of "fragmentation" of the comprehension of the United States' enemy began. The consolidation of the paramilitary group model adopted by Al Qaeda at end of the 20th century represented a political-military alternative for the radical Islamic groups ready to face the West and its conquering fury. The great problem in defining the territorial base according to the member's nationality and financial origins transforms those groups into *transnational companies* of terrorism, especially in view of the ease of moving from one country to another and the logistical structure to conduct attacks (small or large) in many different places. The nature of these groups is transnational and because of the use of high technology —produced by the West— and late generation weaponry combined with a permanent online worldwide financial system, the basic conditions are created for a group to do without a country as a territorial reference. Therefore, the reaction to the enemy cannot be like it was in the times when war was only among Nation-States.

Among all the elements of globalization, global war seems to be the one that has most quickly changed the world's politics. Throughout history, war was consolidated as an instrument to seek and carry out political objectives. Clausewitz used to define war as *nothing but a duel on an extensive scale*[21] which has as its final purpose *to compel our opponent to fulfill our will.*[22] But when war became a globalized event, many of these political objectives —as well as the objectives of the State or the non-State agent— were still being argued only through the use of typical expedients of modern war. Consequently, a global war is in truth a "world civil war"[23] unable to distinguish between internal/external, public/private, State/non-State and military/civil because all notions of frontier or boundaries have already vanished.

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21 CARL VON CLAUSEWITZ, ON WAR 118-119 (Penguin, 1968) (1832).

22 *Id.* at 119.

23 CARLO GALLI, GUERRA GLOBALE 68 (Laterza, 2002).

It is not really possible to talk about a Third World War. Firstly, this is because the conflict is not constant, determined in time —*i.e.*, with a clear beginning— and does not have defined States and purposes; and secondly, for the reason that the characteristics of global war seem to be closer to the Hobbesian *state of nations* (a real state of nature between nations) than the patterns of a classical 20th century World War. A degree of inconsistency in this process lies in the fact that the state of nature is a pre-State —as well as a pre-society— moment that is freely flourishing just at a time of great and increasing scientific and technological developments in the history of mankind and of a unique cognitive approach between peoples and cultures that had been separated by distance until now.

It is as if postmodern international politics were in a development process inversely proportional to that followed by the rest of mankind. Another degree of inconsistency of this new conception of war originates in the complete absence of *logos* (communication) among the agents in conflict.[24] Even though globalization has been characterized by the dissemination of information and all the new possibilities of intercultural contact (which necessarily means a communicational approach), there is no space for communication between agents that are theologically separated in the universe of global war. One of the presupposed parameters for any communicational process is the possibility to also question the maxims (the first principles) of the discourse. Notwithstanding universalizing in an absolute sense, the main maxims that represent answers to metaphysical questions —which range from anthropological to political issues— makes the religious orientation of the agents involved in the conflict an insurmountable obstacle to embark on any serious dialogue.

One of the most elementary concepts in war is the idea of "enemy," the person who materializes and personalizes that against which we are fighting. We can define our true aims in the conflict in detail through the dialectical relation of thesis against antithesis established with the enemy. Schmitt used to say that the enemy is not anything that must be annihilated for any reason or due to a supposedly natural undervaluing; the enemy is at the same level that I am, which also answers the question "why should I fight him?": to find my measure, to find my limits.[25]

However, the reality of global war has removed all possibilities for the parties to the conflict to distinguish between friends and enemies, for there is no declaration of war[26] by a given agent against another given agent. The

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[24] *Id.* at 28.

[25] CARL SCHMITT, THEORIE DES PARTISANEN (Duncker & Humblot, 1963); the Italian translation comes from TEORIA DEL PARTIGIANO 119 (Adelphi, 2005).

[26] The declaration of the U.S. government, made soon after the September 11 attacks, saying that it was the beginning of a "global war on terrorism," seems insufficient to characterize the moment at which we started to change from modern war to global war. This

volatile nature of globalization causes the enemy to be volatile too, allowing interactions with the conflict to occur only according to their will. Within the context of global war, it makes the precise definition of "me" and "the others" absolutely irrelevant, just like the distinction between "friend" and "enemy." As a result, we are allowed to recognize only the existence of a subjective line that separates two great zones of ideological-cultural influence —clearly oriented by the Judeo-Christian values that clash with the axioms of Islam— as a point that can define who is involved in the conflict if even only circumstantially.

This difficulty in defining who the enemy is also generates a condition of absolute unreliability in the populations of the countries directly or indirectly involved in the conflict, as seen, for example, in wars in the Balkans, Afghanistan and Iraq. As a consequence of this difficulty —or impossibility— to characterize "civilian," "military" and "terrorist" groups, we are compelled to conclude that a similar situation occurred in 16th century Europe concerning maritime wars:[27] the definition of enemy was being all and any agent that acts, supports, collaborates or negotiates with a State or enemy group. In our already consolidated global society, with no boundaries and having global war as a permanent phenomenon, the argument "collaboration with terrorism" has been used more and more by the main world powers, especially by the United States and the United Kingdom, to detain and investigate any citizen, including those from their own country, without formal charges and without establishing limits to the detention. Instead of new horizons, we see global man reviving the same fears the vast blue sea produced in 16th century man.

The "absolute enemy," who according to Schmitt,[28] was to be avoided due to the impossibility of seeking peace, is not immersed in the conceptual abstraction responsible for defining the parts that compose the two zones of religious influence that are at the root of global war. So, the same subtlety that defines the "enemy" will be the parameter to define "me," giving an individual of global society —and consequently of global war— an empty existence in which he seeks something capable of clearing his doubts and ending his anguish.

Zolo presented a comprehensive interpretation of "global war" by dividing the term into conceptual subcategories as a way to analyze it from different epistemological perspectives without losing the dynamics that characterize the whole. We can summarize his proposal in four specific aspects.[29]

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is a process composed of several factors that go beyond that declaration made by the U.S. government in 2001.

27 CARL SCHMITT, LAND UND MEER (1981). The Italian reference comes from: TERRA E MARE 72 (Giuffè,1986).

28 *Id.* at 131.

29 Zolo, *supra* note 12, at 121-30.

The first is geopolitical. While ancient and modern wars have agents clearly involved in the conflict and defined moments in time, in global war the agents, duration and territorial venue are unknown. Both the declaration of war and the declaration of peace have been forgotten in this global context.[30]

The second aspect is the systemic nature of global war. Considering that international order is conceived as an anarchical[31] and decentralized system in which the most powerful figure is the leader, in a systemic interpretation the role occupied by the United States as "sheriff" of the world would necessarily exist, even in case of its replacement by another country. The criteria for determining hierarchy are merely based on power.

The third aspect is normative. The ineffectiveness of international law and international institutions in dealing with the post-September 11 situation confirms that international norms cannot compete with the political, economic and military power of the great powers. Ignoring human rights concerns, *jus ad bellum* and *jus in bello,* the U.S. government and its allies have resorted to methods that are no less cruel than those adopted by terrorist groups.

The fourth and last aspect is ideological. The ambitions of the great power in charge go beyond cultural, economic, political or military fields because the Manichaeism of the U.S. government brings the world back four hundred years and revives an argument similar to the one presented by the *Respublica Christiana* in defending its *auctoritas spiritualis* throughout the world. The "Axis of Evil" proves that the world today is once again divided into the faithful and the infidels.

Thus, by going beyond the political scope, global war is a conflict based on an incompatibility of basic concepts, such as human being, life, death, God and world, that are separating and entrenching the divides between Jews, Catholics and Muslims. More than the position of leadership is currently at stake: the very cultural identity of peoples is being threatened.

As a way of protecting the conquests of the West —or should we say, its impositions?— in the international community, the "humanitarian wars" that are supposed to defend human rights can be seen as something peculiar to global war. After the military interventions in Iraq in 1990 and in Yugoslavia in 1997, the occurrence of violations like apartheid, torture, genocide, inhuman or degrading treatment of ethnical minorities by a State was affirmed as a cause for the armed defense of international humanitarian law.[32] The paradox is that the solution found to solve a situation of internal crisis in a State that violates human rights requires military interven-

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30 Schmitt, *supra* note 1, at 335.

31 For the concept of "anarchy" in international relations, see HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (Macmillan, 1977).

32 DANILO ZOLO, CHI DICE L'UMANITÀ 23 (Einaudi, 2000).

tion, which is nothing short of "humanitarian war" and carries the same risks and uncertainties of any other war. In short, it is protecting from one evil by appealing to another evil.[33]

Besides all of the uncertainties about the practical results that those wars could present, there is a problem of an exclusively juridical nature. According to a cogent principle of international law expressed in many international documents and in the United Nations Charter in particular,[34] only self-defense could justify military action against another country, and any other military act, like these "humanitarian wars," would be illegal from an international law perspective because there are peaceful measures foreseen by the international order for conflict resolution. Moreover, the power to decide on the legitimacy of the use of armed force is an exclusive prerogative of the UN Security Council[35] —a body that only approved the first war against Iraq in 1990 and did not authorize the actions in the Balkans and the second Iraq invasion.

In discussing the Yugoslav invasion by NATO, Ferrajoli points out some inconsistencies of this kind of war: NATO's "humanitarian" war, beyond being a violation of international law and constitutional law, was in fact carried out with actions and procedures —for example, guaranteeing immunity to those who launched bombs and missiles at the cost of deadly errors called "side effects"— that have clearly violated the principles of the so-called "humanitarian law of war", pertaining to the historical tradition of international law. NATO's air attacks have provoked unintentional, but surely not unforeseeable effects: thousands of casualties of civilians, whose only guilt was to have failed to rid themselves of a despotic, criminal regime.[36]

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33 It is yet too soon to see how Barack Obama's administration will work with the legacy of his predecessor in terms of international politics. However, the commitment to international law and the pursuit of peace by diplomacy, as he stated in his acceptance speech for the Nobel Prize and in many other situations, would be effective measures to reduce instability in the international order, but certainly not enough to change the entire context of global war.

34 Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

35 Article 24: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

36 Luigi Ferrajoli, *Guerra 'etica' e diritto*, 7 RAGION PRATICA 119 (1999).

Ferrajoli defends the idea that rationality strictly limits an act by its ultimate aims. He discusses the proper rationality of humanitarian wars, since this act, besides the huge costs and great suffering produced, is not simply inept but completely contrary to the noble purposes of States, and therefore it is an unreasonable, irresponsible act.[37]

For the purposes of this article, we will avoid dealing with these issues concerning human rights. For now, it is important to conclude that humanitarian wars provide empirical proof that there are no solid international institutions on the international scene. The decision of which conflicts are of greater interest for military intervention and which are not as important is left to the free will of the great powers. The autonomy of decision attributed to the great powers, especially to the United States, as to where and who to invade, and which international "rules" to respect, exposes the fragility of a system, namely, a lack of political integration, normative effectivity and, above all, an institutional structure capable of giving dynamism to the dialectical relation between Nation-States and the international community.

V. Overcoming Global War

A systemic interpretation, like the one proposed by Zolo that argues that a leading figure in world politics necessarily exists, can surely be defended today as the concept of global war is being consolidated. However, this leadership does not seem to be essential to maintaining this new concept of war because associating that figure with the United States is only a circumstantial effect: either the United States could be replaced by another country able to play the role of "sheriff" of the world or there could be a new world division between two or more countries with similar political-military conditions. It is our understanding that the main fact which should call our attention is the ethnic-cultural separation process being generated by globalization between cultures and peoples that are theologically oriented by religions that do not recognize the existence of the others, such as Judaism, Catholicism and Islam. This separation process is to a great extent responsible for nourishing hostility within the international political system.

From a formal perspective, globalization has produced a cognitive approach among cultures and peoples never seen before in the history of mankind. But from a material perspective, it has had the opposite effect: it has created an environment of unavoidable approximation among peoples and has consequently started a permanent ideological conflict among cultures that until that time had simply tolerated each other. Other than that, there is the fact that economic globalization has increased social inequalities between the rich and the poor because, even though the Gross National

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[37] *Id.* at 120.

Product of the world has increased over the last two decades, a marked economic growth is seen in the countries that have historically concentrated capital and technology when compared with those that concentrate poverty, economic instability and social exclusion.[38]

Global war is one of the results of a slow impersonalization process of the weakest and the maximization of the main features of the strongest, once a direct fight would certainly be unequal. This tends to cause the weaker party to seek all the tactics and means that can help it face —or at least damage— the stronger party. If this tendency continues, the concept of global war will be consecrated as the standard conflict pattern in the global society of the 21st century because the concentrations of power and poverty are growing.

In this environment of conflict, actual "zones of cultural exclusion" have emerged. Behind fallacious speeches defending multiculturalism and the good relationship between peoples there is an axiological thinking aimed at the recognition and affirmation of its own principles and values, even if it is necessary to exclude and deny the other, the different one, for this purpose.

The problem seems to be more comprehensive than a "clash of civilizations."[39] In Huntington's interpretation, States still play a central role in the fault lines of wars[40] and consequently the fight for territory and material goods is still among the main reasons to start a war.[41] I do not agree with this analysis because it does not give due attention to the fact that States, borders and peoples are no longer guided by the Schmittian land-reference. Today we are talking about "zones of cultural exclusion" without focusing on the territorial aspect since the volatility of human relations in the global area has allowed conflicts within its own borders that have originated from the presence of —and unavoidable contact with— different patterns of axiological structures unable to recognize any other pattern as legitimate. Furthermore, there is also the fact that the USA is not a universal civilization, as Huntington argues, but a specific culture that cannot expect the whole world to model itself after it.[42]

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38 See HUMAN DEVELOPMENT REPORT 2007-8.

39 See SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER (Simon & Schuster Paperbacks, 2003).

40 "Fault line conflicts are communal conflicts between states or groups from different civilizations. Fault line wars are conflicts that have become violent. Such wars may occur between states, between nongovernmental groups, and between states and non-governmental groups." *See id.* at 252.

41 "The fault line conflicts sometimes are struggles for control over people. More frequently the issue is control of territory. The goal of at least one of the participants is to conquer territory and free it of other people by expelling them, killing them, or doing both, that is, by 'ethnic cleaning'." *See id.*

42 See PAUL HIRST, WAR AND POWER IN THE 21ST CENTURY. THE STATE, MILITARY CONFLICT AND THE INTERNATIONAL SYSTEM 100 (Polity Press, 2001).

Instead of trying to universalize a single culture and giving it the label "cosmopolitism" or another word with the same meaning —as if this could solve all problems in international society, the greatest challenge the phenomenon of global war presents to States and the international community is to find proper ways of establishing political structures which could reduce the distances between individuals and the international order, transforming this system into a field based on something more solid than the contingent will of the leaders of the great powers. Considering the interpretation presented here, a proposal for juridical globalism articulated into Nation-State communities is viable to overcome —or reduce the effects of— the context of global war.

The successive failures in the implementation of universalist models of legal regulation in international politics, like those adopted by the League of Nations and in forming the United Nations, have an essential *aporia*: the impossibility to universalize the particular, *i.e.*, to prescribe an epistemological understanding of a specific and proper cultural tradition to the entire circumstances of mankind. Even though the debate around this topic presents provocative and difficult problems, we cannot develop further questions here due to space considerations.[43]

What appears undeniable is that international relations in the last few centuries have been divided by two opposed paradigms: the Kantian (based on the universalism of human nature and the idea of a universal peace that needs to be sought together by the whole international community) and the Grotian (based on the principle of self-determination of peoples, the balance of powers and viewing the international community as essentially anarchical). It is widely known that, especially in the UN Charter,[44] the 20th century has consecrated the Kantian ideal as the one to guide international relations.

Despite the Kant *vs*. Grotius debate, it seems possible to find a model that is not necessarily universalist or purely anarchical. Likewise, Kant has deduced the universal from the human nature and Grotius, the anarchical from the nature of the State. We would like to think of the international community as based on notions of ethnicity (in *lato sensu*), historical tradition and culture.

A peculiar condition of human beings is the task of dividing, distinguishing, separating and classifying everything that is brought to their notice, and the same process occurs with cultures.[45] It is the notion of distinction

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[43] For further developments, *see* ANDERSON TEXEIRA, TEORIA PLURIVERSALISTA DEL DIRITTO INTERNAZIONALE (Aracne Editrice, 2010).

[44] One of the UN's goals seems to be clearly inspired by Kant's ideas of *Zum ewigen Frieden*: "to unite our strength to maintain international peace and security."

[45] "Culture is the activity of making distinctions: of classifying, segregating, drawing boundaries —and so dividing people into categories internally united by similarity and externally separated by difference; and of differentiating the ranges of conduct assigned to

and separation that allow cultures to remain alive because if it were not for the categorizations and classifications that every culture creates in relation to itself and the rest of the world, it would be impossible for a person part of any culture to distinguish between which alternative to choose when action needs to be taken, which values to choose and, finally, choosing between right and wrong, good and evil. The absence of differentiations results in the inexistence of deontological distinctions between what is "right" and what is "wrong." Cultures must be responsible for persisting with differentiations since it is within them that moral concepts are created. However, it is impossible for global society to delegate this prerogative because it must remain indifferent to good and evil, like the medieval God that Bauman refers to,[46] unless it prevent the cultural interactivity within it and, at last, lose its originality and capacity to represent idiosyncrasies.

In virtue of this "classificatory nature" of human beings and cultures, we consider it necessary to look at the ethnic-cultural origins of peoples as the fundamentals of legitimacy of international communities, which should be, in a first instance, regional communities. We are not talking about an absolute rule, but a referential term that transcends the circumstantial interests and wills of States and is able to generate a rapprochement among nations that already are, by origin and historical formation, naturally close. Undoubtedly, according to these criteria, the globe could be divided into a dozen regional communities with ethnic-cultural bonds that approximate them in centuries or even millennia of common history.

The term "juridical globalism" is used here because the juridical instance over these regional communities would be that of supranational law, but in a "minimum international law" version.[47] Instead of universalizing rights and values that do not have any significance for peoples that do not acknowledge these values as real values or attribute any importance to these rights (as occurs today with a large series of specific "human rights" that do not mean anything for many peoples in the East), the supranational instance would receive only the product of what has already been approved inside the regional communities. The proper solution of international conflicts becomes more legitimate if started by a third country (or group of countries) which the parties involved recognized as a peer and not a complete stranger.

I use the expression juridical globalism to go beyond the almost exclusively political character of international relations: there is a need for internal institutionalization of the judicial instances proposed here, or otherwise

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the humans allocated to different categories." ZIGMUNT BAUMAN, THE INDIVIDUALIZED SOCIETY 32 (Polity Press, 2001).

46 See ZIGMUNT BAUMAN, MISSING COMMUNITY (Polity Press, 2001).

47 For an initial reference, we refer to DANILO ZOLO, I SIGNORI DELLA PACE (Carocci, 1998), especially its "Conclusione."

maintain the spurious model of *ad hoc* tribunals presented since the Nuremberg trials as the standard jurisdiction in international law. The internal institutionalization of the international tribunals proposed here would permit a citizen of a Nation-State to appeal to his/her regional community tribunal the moment there is a serious violation of his/her fundamental rights by his own country, attested by the Constitutional Court sentence that confirms the violation or proclaims a decision not followed by the government or by the agent responsible for the violation. In this model, the regional community's sentence would automatically generate internal effects and would try to achieve the efficacy that was not attained by the decision of the Constitutional Court. However, in case of continued violation of that citizen's fundamental rights by the regional community tribunal, or in case of inefficacy, it would also be possible to appeal, as a last resort, to the supranational tribunal, to exhaust the last jurisdictional possibility of bringing justice to that citizen. It seems obvious that the division of subject areas of these two new, hierarchically-disposed jurisdictional instances authorities would need to be restricted; otherwise there would be a complete distortion of the State's internal sovereignty and the creation of an excessively slow judicial system to meet the needs of common citizens.

VI. Conclusions

In this article, I have offered a brief proposal on how to reinterpret the concept of modern war from the perspective of globalization, especially in the sense of how an empirical concept like global war is changing the basic structures of the concept of modern war. More than a way, as Clausewitz would say, to compel our opponent to fulfill our will, global war is undergoing a process of consolidation in the international scene as the usual way of developing international politics. Like other conceptions of war that were created —and overcome— one by one, we can now see global war replace the modern concept of war.

In order to present a contribution to the solution of problems inherent to global war, we have introduced a few guidelines for a viable model of juridical globalism articulated into communities of Nation-States. Our intention is to propose something far from idealism or utopias, but grounded on realities that are historically consolidated and take into account the ethnic-cultural basis of peoples, transforming the philosophy of international law into an activity capable of transcending the contingent and unstable nature of international relations into a more solid, continuous and effective system that can inspire more certainty regarding international law in the citizens of our *global village.*

Recibido el 23 de mayo de 2009 y aceptado
para su publicación el 25 de junio de 2009.

NOTES

Mexican Law Review
New Series
VOLUME II
Number 2

THE LEGAL CONSTRUCTION OF RACIAL DISCRIMINATION IN MEXICO: CELEBRATING 200 YEARS OF INDEPENDENCE?

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ABSTRACT. *In this note, I examine the legal construction of racial discrimination in Mexico, the approaches to legal theory which help us understand it, and the role of the UN Committee on the Elimination of Racial Discrimination. Until the end of the 20th century, the situation in Mexico was characterized by a denial or a trivialization of racial discrimination in legal institutions and society. In recent years, the Mexican government has taken actions to deconstruct the principles upon which racial discrimination was legally based. The case of Mexico directly assists in understanding post colonial racial discrimination in Latin America.*

KEY WORDS: *Racial discrimination, United Nations, Mexican government, legal principles.*

RESUMEN. *El presente ensayo examina el marco legal de la discriminación en México; también aborda las teorías jurídicas necesarias para su entendimiento, así como el papel de la ONU y su Comité para la Eliminación de la Discriminación Racial. Hasta finales del siglo XX la situación en México se caracterizaba por la negación o la trivialización de la discriminación, tanto por las instituciones como por la sociedad. Más recientemente, el gobierno de México ha implementado acciones para eliminar el marco legal que sustentaba la discriminación. El caso de México nos ayuda a entender mejor el legado del racismo pos-colonial en América Latina.*

PALABRAS CLAVE: *Discriminación racial, ONU, gobierno de México, marco legal.*

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I. INTRODUCTION

In 1994, the representative of Mexico to the UN Committee on the Elimination of Racial Discrimination [hereinafter the Committee] declared that "the phenomenon of racial discrimination did not exist in Mexico".[1] The representative of Mexico argued that although the most vulnerable groups in Mexican society, such as women, the disabled, migrant workers and indigenous people, did suffer some forms of discrimination, this was caused by socio-economic factors, and that these factors had nothing to do with racism or racial discrimination.[2] He also stated that the reasons which had led members of indigenous communities to rebel in southern Mexico in 1994[3] stemmed from economic and social marginalization, and that the Zapatista National Liberation Army (EZLN)[4] itself had not reported any problems of racial discrimination within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination.[5]

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[1] Report of the Committee on the Elimination of Racial Discrimination, General Assembly Official Records, Fiftieth Session Supplement No. 18 (A/50/18), paragraph 354.

[2] General Assembly Official, *Report of the Committee on the Elimination of Racial Discrimination*, Fiftieth Session Supplement No. 18 (A/50/18), paragraph 354.

[3] The indigenous inhabitants of Chiapas broke into the national and international scene on January 2, 1994, just one day after the North American Free Trade Agreement with the United States and Canada became operational. Later, they declared it was their way to say "We are still here in the middle of globalization."

[4] The Ejército Zapatista de Liberación Nacional (EZLN) is an armed revolutionary group based in Chiapas, one of the poorest states of Mexico. The EZLN claims to represent the rights of the indigenous population, but also sees itself and is seen as part of a wider anti-capitalist movement.

[5] The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification by the United Nations General Assembly in its Resolution 2106 A (XX) of 21 December 1965. It was signed in New York, United States of America, on March 7, 1966. In accordance with its Article 19, the Convention entered into force on January 4, 1969. Mexico signed the Convention on November 1, 1966, and ratified it on February 20, 1975. On January 17, 2002, the decree

In its analysis of the Report on Mexico, the Committee expressed its difference of opinion with the Mexican government. "The discriminatory nature of policies or practices that perpetuated the marginalization and impoverishment of certain ethnic groups of Mexico was indeed a form of racial discrimination within the meaning of the Convention."[6] The Committee pointed out that the kind of discrimination suffered by many indigenous people in Mexico did in fact fall within the scope of Articles 2 and 5 of the Convention.[7]

Ten years after these statements, the Mexican government acknowledged that racism and racial discrimination existed at all levels of Mexican society, and reported a series of legal reforms and actions undertaken to make a neutral assessment of the situation of racial discrimination in Mexico.[8] Since then, important means have been implemented to eliminate the various forms of racial discrimination and to promote the integration of the many Mexican ethnical groups into a multicultural society.

In this essay, I examine the legal construction of racial discrimination in Mexico. The case of Mexico illustrates the initial "official" denial or negation of the phenomena of racial discrimination and late "official" awareness of the problem. The Mexican government's recent awareness has been, to a certain extent, the result of its active participation in the Reports requested and considered by the Committee.[9]

This case is of particular interest for two main reasons. First, the situation in Mexico can be of great assistance in understanding racial discrimination in post-colonial Latin America. Second, there is an historical need to establish where Mexico finds itself in terms of legal racial discrimination after 200 years of its independence from Spain.

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approving Mexico's declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination established pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination was published in the *Diario Oficial de la Federación* [Federal Official Gazette]. On March 15, 2002, Mexico made a declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination, in accordance with Article 14 of the Convention, to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation of any of the rights set forth in the Convention.

6 General Assembly Official, *Report of the Committee on the Elimination of Racial Discrimination*, Fiftieth Session Supplement No. 18 (A/50/18), paragraph 358.

7 See Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

8 See below Section IV: New Awareness and Actions.

9 In accordance with Article 9 of the Convention, State parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention, every two years and whenever the Committee so requests.

II. The History of the Legal Construction of Racial Discrimination in Mexico

Race is a social construct produced by the dominant group in society and its power to define.[10] The concept of race, as understood by European Renaissance science and philosophy, was associated with the belief in white supremacy. By the 17th century, scholars had divided all the peoples of the known-world into four or five classifications.[11] This categorization of different races can be understood as a construct that in itself ordered reality. The massive exploitation of the recently discovered lands and the enslavement of its inhabitants were justified by what at that time was regarded as Europe's economic necessities.

In practice, living in racial categories, or castes, as was the case in Latin America, took a diversity of forms. It included the conceptual violence of regarding certain groups as inferior, which in turn resulted in physical violence. Today, many of these practices would be considered ethnic cleansing and genocide. It also legitimated a racist worldview through legislation and other types of "legal" and "religious" acknowledgement. The subjugation of the native peoples of the New World was legally sanctioned by "laws" of "discovery," "conquest" and "*terra nullius*" which made up the "doctrines of dispossession."[12]

Doctrines of oppression disrupted indigenous people's way of life and their relationship with the land. In the 15th century, two papal bulls set the stage for European domination of the Americas.[13] The first one, *Romanus Pontifex*, issued by Pope Nicholas V to King Alfonso V of Portugal in 1452, declared war against all non-Christians throughout the world, and specifically sanctioned and promoted the conquest, colonization and exploitation of non-Christian nations and their territories. The second one, *Inter Caetera*, issued by Pope Alexander VI in 1493 to the King and Queen of Spain after Christopher Columbus's voyage to the island he called Hispaniola, officially established Christian dominion over the New World. It called for the subjugation of the native inhabitants and their territories, and divided all newly discovered or yet-to-be discovered lands in two - giving Spain rights of conquest and dominion over one side of the globe and Portugal over the other.[14]

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10 *See* Ronald Takaki, A Different Mirror: A History of Multicultural America (Little Brown & Company, 1993).

11 Margaret Davies, Asking the Law Question: The Dissolution of Legal Theory 62 (London, Law Book Co., 2nd ed., 2002).

12 *Id.* at 265.

13 Colonialism Past and Present: Reading and Writing about Colonial Latin America Today (Álvaro Félix Bolaños & Gustavo Verdesio eds., University of New York Press, 2002).

14 Antonio Rumeu de Armas, El Tratado de Tordesillas 87 (Mapfre, 1992).

These "doctrines of discovery" provided the basis for both the "law of nations" and subsequent international law during Colonialism. They allowed Christian nations to claim "unoccupied lands" (*terra nullius*) or lands belonging to "heathens" or "pagans."[15] These concepts later gave rise to the situation of many native peoples in Latin America during the "Colonia Española." The colonialist regimes were therefore based on the presumption that race determines characteristics such as intelligence, work ethics and moral fiber. The idea of race was used by the Vatican, Spaniards and Portuguese as a way of rationalizing murderous violence and legally systematizing the domination of the colonies in the New World.

The Mexican War of Independence started because of *criollo*[16] resentment, which had greatly weakened relations between New Spain and Spain, its mother country, in the early 19th century. Two main factors contributed to this situation. The first was economic: the *criollos* in charge of the administration felt harassed by the Crown's tax impositions on commerce in the colonies. The second factor in spurring the independence movement was ideological: the influence of the European Enlightenment.[17] After reading the works of the Enlightenment writers, many *criollos* in the New World began to question the benefits and reasons for their colonial relationship with Spain.

The Enlightenment was a broad movement in the Western world which featured a new concept of humanism, the idea of secularism and liberalism, among other views.[18] This school of thought also defended the reinvention of democracy. Enlightenment in sciences included a rational philosophy and a worldview that would influence many intellectuals in the Spanish colonies. Following this movement, on September 16, 1810, Miguel Hidalgo, a priest who had become familiar with the ideas of the Enlightenment, began an insurrection in hopes of freeing Mexico from Spanish colonial government.

But as a school of thought, the Enlightenment was built upon solid European cultural bases. Its European origin promoted itself as universal, although Enlightenment values were particularly intolerant of pluralism.[19] Every legal institution created under this doctrine was based on a "so-called" universal truth. This resulted in a rejection of all other different realities. The first legal constitution of the independent Mexico was shaped by this principle. Mexico's first Constitution, which was called "The Feelings of the Nation" [or "*Sentimientos de la Nación*"], was enacted in 1813.[20] This Consti-

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15 Davies, *supra* note 11, at 265.

16 *Criollos* were people born in Mexico but directly descended from Spaniards.

17 JAY KINSBRUNER, INDEPENDENCE IN SPANISH AMERICA: CIVIL WARS, REVOLUTIONS, AND UNDERDEVELOPMENT 143 (University of New Mexico Press, 2000).

18 Davies, *supra* note 11, at 261.

19 *Id.* at 261.

20 Los Sentimientos de la Nación, available at: *http://usuarios.lycos.es/Aime/senacion.html*.

tution showed for example its loyalty to the Roman Catholic religion declaring it the only religion "without tolerance for any other."

This document contained the central characteristic of the prevailing "liberal ideology" among the revolutionary bourgeois classes that guided the fight for national independence.[21] Improvements in social justice and the abolition of slavery were welcome developments for the creation of a free and independent nation. However, the new laws were incapable of assimilating the multicultural origins of Mexican society. From their birth, Mexican legal institutions were based on a doctrine that was largely intolerant of pluralism. Modern thought in 1810 was based on the Enlightenment idea of a single rational "Truth." This legal perception was particularly unsuccessful in recognizing the existence of the ethnic differences among Mexicans. While its drafters based the document on a Western theory of law, they failed to consider non-Western concepts of law. The Western concept of law admits only one law.[22]

From the Mexican Independence to the last decade of the 20th century, a systematic and institutional form of racial dominance existed in Mexico. It was systematic because the concept of race was embedded in the worldview of Mexican society.[23] During the "Porfiriato" (the period of dictatorship from 1880-1910 under Porfirio Díaz), the racial social structure inherited from colonization was left untouched and Mexican government pledged to overcome its problems by "whitening" itself.[24] It was institutionalized because this systematic racism molded the legal system and shaped the institutions governing society. During that time, the policy was formally "race neutral" and prohibited individual racial discrimination, although it simultaneously was based on a certain model for people and a model of law that reflected the values of white Mexicans.

The policy promoted "color-blindness," that is, it advised all citizens, regardless of race or cultural origin, to ignore external appearances and think of each person as essentially human. As a consequence, the basic rights of indigenous communities in Mexico, including the ancestral right to land and to cultural identity, the use of language, education and administration of justice, were systematically violated in the name of "color-blindness" for almost two centuries. At the same time, racism and discrimination entrenched in society made indigenous people more vulnerable to human rights violations.

The error of this "color-blind" equality is obvious. In its insistence that people are essentially the same, it does not give sufficient recognition to the

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[21] JAIME RODRÍGUEZ, THE INDEPENDENCE OF MEXICO AND THE CREATION OF THE NEW NATION 90 (Los Angeles: UCLA Latin American Studies, 1989).

[22] Davies, *supra* note 11, at 268.

[23] *Id.* at 269.

[24] Rodríguez, *supra* note 21, at 97.

actual differences that exist. The aberration of seeing all people as ideally equal masks the fact that people are not equal in their material conditions. It was not until 1992 that Mexico legally recognized itself as a multi-ethnic and multicultural nation.[25] Until then, the indigenous populations had been regarded, at best, as peoples to be civilized and to be culturally assimilated.

III. Traces of Racism in Mexican Society

The original *criollo* structure still holds a hegemonic position in Mexico. It is true that Mexican racism has never been expressly written in the law as it was, for example, in the U.S. South. It is also true that racial mixing, or *mestizaje*, has occurred on a far greater scale in Mexico than in the United States. However, Mexican racism can be more pervasive today than in its northern counterpart. Mexico has lived in a "white fantasy" for many years. Racial domination exists in the relationships of power embedded in Mexico's language and cultural symbolism. For many years, it was enough to turn on any Mexican television program or examine the advertisements in any magazine to find the ingrained racism of its society. One would hardly know one was in Mexico. Almost all the people in the advertisements were white, of pure European extraction. Only occasionally did one encounter a *mestizo*. Still today, one may never see on television a *Tzeltal* or *Tarahumara* or *Purépecha* or *Yaqui* or any of the living indigenous inhabitants.

These facts illustrate that a certain colonialist mentality in the Mexican society still exists in many communities. The elite in power, the white, can only see a single form of truth.[26] In Mexico today, many symbols of its colonizing power are everywhere. The colonial world of Mexico was a world of "statues" that are kept alive in the modern racism of its society.[27] In the Colony, there was a "statue" of the general who succeeded in the conquest and a "statue" of the official who administrated the land.[28] Even when co-

[25] See below Section IV: Awareness and Actions towards a Change of Policy.

[26] Davies, *supra* note 11, at 271.

[27] Through the process of conquest and colonization, new actors emerged in the history of Spain; the conquest of Mexico was regarded as a triumph of the Spanish monarchy over a pagan civilization, hence, the winners, *e.g.* Charles V (King of Spain), Hernan Cortés (the Conqueror of Tenochtitlan), etc., were often regarded as heroes whose heroic acts were remembered through multiple forms of monuments. Such monuments embraced the ideology that led to the conquest of the defeated Aztecs, and that was preserved in the political and social relations between the Spanish descendants and the native Americans of Mexico.

[28] See for example the funeral statues of Spanish army or government members who served the Spanish crown in New Spain during the colonial period. Many of these statues were located within churches and were built thanks to these persons' financial support. These statues reflected the submission to the values of the unique Catholic God who made the military and religious colonization possible, see Manuel Toussaint, *La escultura funeraria*

lonialism ends in legal terms, the social effects of colonialism are enduring for both the colonized and the colonizers.[29] In modern Mexico, these traces take the form of names of streets, cities, buildings, universities, and so on.

Socially speaking, Mexico lives in a stage of post-colonialism after two centuries of its independence from Spain. Because independence or decolonization did not result in a return to a pre-Colonial state, the prefix "post-" does not mean after Colonialism, but rather denotes the continuation of colonialism in a different form.[30] Colonial thought remains in the consciousness of the formerly colonized Mexicans and their colonizers, as well as in the institutions imposed during the process of colonization. For instance, the issue of skin color in Mexican society is very intriguing. In Mexico, even in indigenous families, the member with the lightest skin will be called "*güero*" (blond or fair). Light-colored eyes are highly prized. In Mexican families, this emphasis on lighter skin remains. Racism enters every *criollo* and *mestizo* family, defining the value and the place of the children according to their coloring. The darkest one may become the outsider, while the fair-skinned one holds an esteemed place in the family.

This issue is a reminder of the Mexican colonial system of "*castas*" [castes]. The system identified dozens of racial stratas, with white on top and black at the bottom, with every conceivable combination categorized in between. It is well-documented that when registering their children at the church, which required registering race as well (*i.e.*, *criollo*, *zambo*, *indio*, etc.), mothers would try to elevate the status of her child by registering "up" if the child were light-skinned.[31] The issue of skin color represents the effects of colonialism which have become an inextricable part of Mexican culture and of its legal, educational and political institutions. The power of whiteness is evident in the everyday symbolism of Mexico's language, religious beliefs, literature and representations.[32]

The colonial regime produced the "hybrid" identity of modern Mexico. Hybrid identities are not single or stable, but rather fluctuating, caught between the opposing forces of the colonizing and colonized cultures.[33] This hybridity is not only the fate of the colonized Mexican, but also of the colonizers, who recognized themselves as Mexicans but at the same time defined themselves as different from "the other" Mexicans, leaving a trace of the denied "other" in their own identity. This peculiar identity can be seen in

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en la Nueva España, Vol. III No. 11, ANALES DEL INSTITUTO DE INVESTIGACIONES ESTÉTICAS 41-58 (UNAM, 1944); Eugenio Noriega Robles, *La estatua orante de don Manuel González de León en la Iglesia parroquial de Huichapan, Hgo.*, Vol. IX No. 35, ANALES DEL INSTITUTO DE INVESTIGACIONES ESTÉTICAS 33-35 (UNAM, 1966).

29 *Id.* at 271.

30 *Id.* at 280.

31 Bolaños & Verdesio, *supra* note 13, at 80.

32 Davies, *supra* note 11, at 280.

33 *Id.* at 280.

different manifestations of Mexican culture. For instance, the ideology of the Revolution of 1910 glorified the country's Aztec heritage. Statues and schoolbooks commemorate Cuauhtémoc's (the last Aztec emperor) heroic effort to defend himself against the Spanish conquerors. The Museum of Anthropology has been turned into a showcase of national pride. From the Aztec Stadium, the Aztec Television station to the Aztec soccer team, Aztec has become a synonym of Mexican.[34] Yet for all the glorification of long-dead Aztecs, none of that veneration extends to their living descendants, or to any other native Mexican.

In a nation devoted to celebrating its indigenous heritage, the terrible irony is that Indians are despised. "Don't behave like an Indian," is commonly heard among people. Indians are despised for their physical appearance, their poverty and their language.[35] Oddly, these expressions are also used by non-white persons. This is because oppressed people often experience a double consciousness —they simultaneously imitate their colonizers and identify with their own cultural setting or racial group.[36] Thus, for example, as one begins to recognize that the Indian is a symbol of imperfection, one catches oneself hating the Indian. But then one realizes that he is an Indian himself.

Recognition and explosion of this hybridity can lead to subversion: the creation and celebration of new identities and new ways of being, which are resolutely anti-essentialist and cross-natural.[37] Octavio Paz, Mexican Nobel Prize winner and devoted scholar of Mexican identity, had already noted this phenomenon. In his *The Labyrinth of Solitude*, he uses the metaphor of adolescence to explain Mexicans' persistent need to reinvent their culture to pass it on to their progeny.[38] His work is a discourse on Mexico's quest for identity that gives us an unparalleled look at the country hidden behind the masks.

In Mexico, colonialism, cultural imperialism and globalization have resulted in the global hegemony of white liberal values. These values are taken for granted, regarded as normal rather than providing only one alternative from among several. This is not to suggest that there is nothing positive about liberal values. However, the persisting problem is that liberalism is often regarded as the only perspective. After 500 years of the colonization of the Americas, and 200 years of independence in Mexico, the descen-

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[34] ROGELIO DÍAZ-GUERRERO, PSYCHOLOGY OF THE MEXICAN: CULTURE AND PERSONALITY 544 (University of Texas Press, 1975).

[35] See First National Survey on Discrimination: Survey Results by Category "Indigenous Peoples", available at: *http://www.conapred.org.mx/bibliotecav/biblioteca_arturo.php?var=biblioc89.html*.

[36] Davies, *supra* note 11, at 280.

[37] *Id*.

[38] OCTAVIO PAZ, THE LABYRINTH OF SOLITUDE: LIFE AND THOUGHT IN MEXICO 43 (Lane, 1967).

dants of the Mesoamerican indigenous people are still among the most marginalized and poorest communities, discriminated against and often exposed to serious abuses of their fundamental rights.[39]

IV. New Awareness and Actions

In 1992, the Mexican government recognized that it was a mistake to strive to build a homogeneous country at any cost and to deny the deep-seated roots of the Mexican nation. To that effect, Article 4 of the Constitution was amended to eradicate all discriminatory practices, particularly in the fields of access to natural resources, administration of justice, the administrative organization of communities and education.

That year, Mexico officially recognized the multicultural nature of the State and guaranteed indigenous rights in its Constitution. However, the theory still contrasted with the reality faced by the vast majority of indigenous people who were often treated as second-class citizens. As a result, the UN Committee on the Elimination of Racial Discrimination offered some recommendations that would later be implemented by the Mexican government. The Committee observed that without statutes and concrete policy measures to implement Article 4, the constitutional reform would have little practical effect since the oppression of the indigenous communities was due less to the absence of legal rules than to the fact that economic interest groups and local politicians pursued with impunity their abusive practices to the detriment of indigenous groups.[40]

Twelve years later, in 2004, the Mexican government submitted a new document with four Reports covering the previous decade.[41] In these Reports, the Mexican government announced the new legal reforms and actions that proved to be effective in assessing racial discrimination in Mexico, but that were still not enough for the total integration of the many Mexican ethnic groups of the recently recognized multicultural society.

First, the Mexican government responded to the Committee's concern about having accurate information about discriminated communities since discrimination can take the form of omission or minimizing information on the groups subjected to discrimination on grounds of race or ethnicity. As mentioned before, the need for accurate information lies in the fact that

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39 See First National Survey on Discrimination: Survey Results by Category "Indigenous Peoples", available at: *http://www.conapred.org.mx/bibliotecav/biblioteca_arturo.php?var=biblioc89.html*.

40 General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, Fiftieth Session Supplement No. 18 (A/50/18), paragraph 359.

41 CERD/C/473/Add.1, of May 19, 2005, Reports Submitted by States Parties under Article 9 of the Convention, Fifteenth periodic reports of States parties due in 2004 Addendum, Mexico, December 20, 2004.

stigmatized minorities often internalize their rejection by society to such an extent that they deny their ethnicity, nationality or membership in a sector rejected by the majority population.[42]

In order to deal with this issue, a congressional committee produced the first systematic study on discriminatory and social exclusion practices in Mexico.[43] In addition, the National Commission for the Development of Indigenous Peoples applied a new methodology in the Indigenous People Census, which improved its reliability. In the past, the basic criterion for determining the number of people belonging to a given indigenous group was language. There were as many indigenous people as there were registered speakers of indigenous languages, plus their children under 5 years of age. This approach excluded indigenous people who, through loss of their indigenous language —but not of other objective and subjective characteristics— had ceased to appear in the census counts. This methodology was replaced by a formula in which linguistic (objective) data was combined with a social (subjective) variable.[44]

In August 2001, a series of constitutional reforms conferring constitutional status to the prohibition of discrimination were enacted, establishing measures to combat discrimination against indigenous peoples. Specifically, a new Article 2 was added to the Constitution. Its wording goes considerably further than the text of former Article 4, paragraph 1, of the Constitution. The new Article 2 sets forth a clear definition of indigenous peoples and communities and recognizes them as an integral part of Mexico's ethnic composition.[45] This amendment was based on the conviction that indigenous peoples should be able to exercise, under equal conditions, all the rights exercised by other Mexican nationals. The Mexican state thereby accepted the fact that non-discrimination involves recognizing that safeguards protecting all Mexicans should be applied with due consideration, respect and regard for cultural differences.

In the second part of Article 2, the Constitution provides for a range of public policies and programmatic measures aimed at "promoting equal opportunities for indigenous people and eliminating all forms of discrimination" and seeks to ensure that the Federation, states and municipalities are endowed with institutions capable of extending and ensuring the applicability of all these rights to members of indigenous groups.[46] Accordingly, the legislative branch assumed the obligation of revising all domestic legislation

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42 See above Section III: Traces of Racism in Mexican Society.

43 *See* LA DISCRIMINACIÓN EN MÉXICO: POR UNA NUEVA CULTURA DE LA IGUALDAD (Gilberto Rincón Gallardo ed., 2001).

44 CERD/C/473/Add.1, of May 19, 2005, paragraphs 95-100.

45 See Political Constitution of the United Mexican States, Article 2, as amended by Decree published in the *Diario Oficial* [Federal Official Gazette] on August 14, 2001.

46 Political Constitution of the United Mexican States, Article 2, as amended by Decree published in the *Diario Oficial* [Federal Official Gazette] on August 14, 2001.

to identify norms that ran contrary to the provision prohibiting discrimination and bring them in line with the new general principle of equality. The weak point of these reforms is that individual states have the discretionary power to draft state laws in which the scope of the new constitutional provisions can be limited. This represents one of the main challenges facing the National Council for the Prevention of Discrimination, as it has to coordinate the drafting local laws to fight discrimination with state legislatures.

Article 2 also states that members of indigenous groups should participate in the design and functioning of these institutions. Article 2, section VII, recognizes and guarantees the right of indigenous peoples and communities to self-determination and, consequently, gives them the autonomy to elect representatives to town councils in municipalities with indigenous populations.[47] On this issue, the Committee regretted that the right of the indigenous peoples to elect their political representatives was limited to the municipal level, and recommended that it should guarantee the right of indigenous peoples to participate in government and in the management of public affairs at every level.[48]

The Mexican Government partially implemented this recommendation. The General Council of the Federal Electoral Institute approved the redistribution of electoral districts for the 2006 and 2009 elections on February 11, 2004. This "redistricting" was established on the basis that of the 300 uninominal districts, 28 have an indigenous population of 40% or more.[49] It sought to have 28 indigenous persons elected to the Deputies Chamber, giving effect to the constitutional mandate that requires taking the location of indigenous peoples into account in the territorial demarcation of uninominal districts "to promote their political participation."

This "redistricting" has been criticized on three grounds. First, the proposal and the "redistricting" was mainly undertaken by political parties (in which the representation of indigenous peoples is almost non-existent) and without consulting any of the indigenous peoples of Mexico —in violation of the constitutional rule.[50] Second, in "redistricting," the Federal Electoral Institute took into account the towns and municipalities with a majority indigenous population, in addition to geographical continuity, communications and public services. The use of these criteria determined the creation of 28 new districts, but it also meant that 53% of the national indigenous

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[47] Political Constitution of the United Mexican States, Article 2, as amended by Decree published in the *Diario Oficial* [Federal Official Gazette] on August 14, 2001.

[48] CERD/C/MEX/CO/15, 4 April 2006, Committee on the Elimination of Racial Discrimination Sixty-eighth session, February 20-March 10, 2006, paragraph 14.

[49] Agreement CG104/2004 IFE General Council on July 15, 2004, published in the *Diario Oficial* [Federal Official Gazette] on August 17, 2004.

[50] See Jorge Alberto González Galván, *La redistritación electoral y la participación política de los pueblos indígenas en México. Balance y perspectivas (2006-2009)*, 121 BOLETÍN MEXICANO DE DERECHO COMPARADO 176 (2008).

population was not taken into account in this reform because almost half of the indigenous people live dispersed in poorly communicated areas and do not have electricity and water.[51] Third, from the list of candidates enrolled for the 2006 deputy elections in the new 28 uninominal indigenous districts, only 2 percent were indigenous people. As to the elected deputies, only 7 out of 28 were indigenous people, 19 were not and two did not know their ethnic origin.[52]

Besides these constitutional reforms, other statutes improved and updated Mexican legislation against discrimination, particularly discrimination on grounds of racial or ethnic origin. The Federal Act to Prevent and Eliminate Discrimination was published in the *Diario Oficial* [Federal Official Gazette] on June 11, 2003.[53] Its purpose is to prevent and eliminate all forms of discrimination against any person, in accordance with Article 1, paragraph 1, of the Mexican Constitution, and to promote equal opportunities and equal treatment.[54]

This Act also contains a special section on indigenous peoples and establishes the National Council for the Prevention of Discrimination to conduct and coordinate anti-discrimination policies in Mexico.[55] Since 2004, the Council has been empowered by federal mandate to handle proceedings involving complaints of acts against discrimination.[56]

On May 19, 2003, an Act was promulgated to establish the National Commission for the Development of Indigenous Peoples,[57] aimed at implementing a cross-cutting policy to promote indigenous development, and providing a solid institutional framework for the elimination of discriminatory practices against indigenous peoples on the grounds of race or ethnicity.[58] According to the First National Survey on Discrimination, indigenous peoples who claim to be victims of discrimination tend to be more vulnerable in the area of access to, and the administration of, justice.[59] As a re-

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[51] *Id.* at 176.

[52] *Id.* at 200.

[53] For a review document on the Federal Act to Prevent and Eliminate Discrimination *See* Miguel Carbonell, *Consideraciones sobre la Ley Federal para Prevenir y Eliminar la Discriminación*, *in* DERECHO A LA NO DISCRIMINACIÓN 205-209 (Carlos de la Torre Martínez ed., UNAM, 2006).

[54] See Article 1 of Federal Act to Prevent and Eliminate Discrimination.

[55] See Article 17 the Federal Act to Prevent and Eliminate Discrimination and the National Council to Prevent Discrimination website at *www.conapred.org.mx/english*.

[56] See Article 43 the Federal Act to Prevent and Eliminate Discrimination.

[57] Published in the *Diario Oficial* [Federal Official Gazette] on May 21, 2003.

[58] See Article 2 of the Law of the National Commission for the Development of Indigenous Peoples published in the *Diario Oficial* [Federal Official Gazette]on May 21, 2003.

[59] See Survey Results by Category, "Indigenous Peoples", Survey question: "¿Cuáles son los derechos más importantes que se deben respetar de los indígenas?" at *http://www.conapred.org.mx/index.php*.

sponse to this problem, in 2002, several articles in the Federal Code of Civil Procedure and the Federal Code of Criminal Procedure were amended.[60] Furthermore, on March 13, 2003, the *Diario Oficial* published a decree promulgating the General Act on the Linguistic Rights of Indigenous Peoples.

Following these amendments, courts are now required to take into account indigenous traditions and customs and to respect self-identification of indigenous people involved in trials or proceedings. The first good signs have already appeared. In 2006, for the first time in history, a suit for *amparo*[61] was admitted in an indigenous language.[62]

Regrettably, and despite the legal recognition of indigenous traditions and customs, the non-recognition of "indigenous tribunals"[63] persists in a number of states. Courts continue to impose sentences disproportionate to the alleged offenses, as in the case of environmental offenses or those against public health.[64]

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[60] See CERD/C/473/Add.1, of May 19, 2005, paragraphs 95-100 and paragraphs 136-137.

[61] An *amparo* is a very powerful provision unique to Mexican law that is an order for constitutional protection against acts by authorities. There is no adequate translation for this term into English. An *amparo* provides for a constitutional review by a Federal Court at any stage of a case, including investigation.

[62] *Amparo* Trial commented in Jorge Alberto González Galván, *El primer juicio de amparo en lengua indígena: los idiomas del derecho en el México pluricultural del siglo XXI*, *in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO, Vol. XII, Chapter XLIV (Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea eds., IIJ-UNAM, 2009).

[63] The expression "indigenous tribunals" should be understood as the civil or criminal state court proceedings in which the judge acknowledges the applicability of indigenous traditions and customs to a specific case, based on the participation of subjectively defined indigenous parties in proceedings. See the Supreme Court decision on the subjective definition of indigenous person under the Article 2, A, VIII of the Constitution.

See Supreme Court, Novena Época, Primera Sala, *Semanario Judicial de la Federación y su Gaceta XXX*, December 2009, p. 293, Thesis 1a. CCVIII/2009.

[64] For example, in a recent case (*amparo directo en revisión* 1624/2008) a person was arrested having illegal possession of turtle eggs. He alleged that in the indigenous community to which he belonged, eating turtle eggs has been a custom and tradition during many years, and asked to be judged having due consideration of the indigenous usages and traditions of his community. A state court denied the rights granted by article 2, A, II of the Constitution based on the fact that the accused spoke Spanish besides his indigenous language. In overturning that state court's decision, the Supreme Court established that the mere fact that indigenous persons speak Spanish or any other language does not deprive them from being considered as indigenous people. Instead, the self-recognition as indigenous may be a more relevant factor in determining the applicability indigenous traditions and customs.

See Supreme Court, Novena Época, Primera Sala, *Semanario Judicial de la Federación y su Gaceta XXX*, December 2009, p. 293, Thesis 1a. CCVIII/2009.

V. Conclusion

In recent years, Mexico has taken important and decisive steps to overcome its former negation of the existence of racism and to eliminate discrimination. Mexico now acknowledges that racism, racial discrimination, xenophobia and related intolerance exist at all levels of Mexican society.[65] Visible, but still insufficient, efforts of the Mexican government have sought to create an appropriate legal framework and competent bodies to prevent and punish the acts of discrimination that persist in Mexico.

In its Final Consideration of the Reports submitted by Mexico, the UN Committee has welcomed the adoption of the constitutional amendments and the enactment of the acts on the prevention of and protection against racial discrimination.[66] Nevertheless, the Committee has also identified areas in which racial discrimination still occurs and where combat against it needs to be reinforced. For example, the Committee is still concerned about the racial discrimination that exists against indigenous peoples in the media, including the projection of stereotyped and demeaning representations of indigenous peoples. On this issue, the Committee has recommended taking appropriate steps to fight racial prejudice that leads to racial discrimination in the media, whether public or private, by adopting a code of media/journalism ethics in this field.[67]

Although the Mexican government has taken important measures to legally deconstruct principles upon which racial discrimination was based, there is still much to do in the area of educating society and government agents in order to put the new principles of equality before the law and non-discrimination into practice.

Social education is very important since racism is also a problem of individual ignorance or prejudice that leads to social damage for specific racial groups.[68] Racial attitudes are hindering Mexico from making the necessary progress away from racism. These attitudes generate unequal dualities, making it nearly impossible to create a truly national project. Racism creates internal insecurity, as the denial of basic human rights, intolerance and discrimination often lead to confrontation among social groups that endangers democracy, peace and the economic and social security of the whole community.[69] In all, the racism present in Mexico is dividing and weakening the country.

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65 CERD/C/473/Add.1, of May 19, 2005, paragraph 215.

66 See CERD/C/MEX/CO/15, April 4, 2006, Committee on the Elimination of Racial Discrimination Sixty-eighth Session, February 20-March 10, 2006, paragraphs 3-10.

67 *Id.* paragraph 18.

68 Robert Miles, Racism 65 (2nd ed., 2003).

69 See UN High Commissioner for Human Rights, Commission on Human Rights resolution 2003/41, "The incompatibility between democracy and racism", *58th meeting*, *23*

It is not possible to ensure equal and impartial treatment before the law for all people until society understands that Mexican indigenous peoples have a different perception of law and life, and that the racism of an "only white" law or way of life perpetuates the economic, social and political marginalization of indigenous peoples. The question Davies poses on this issue illustrates the problem of white perception. "Equality may be good for one under this law, but what if another does not accept this law? 'Others' law is not equal to mine because it is not recognized as law, so how can equality be achieved?"[70]

April 2003 [Adopted without a vote. See chap. XI. - E/CN.4/2003/L.11/Add.4]: (3) Reaffirms that racism, racial discrimination, xenophobia and related intolerance condoned by governmental policies violate human rights and may endanger friendly relations among peoples, cooperation among nations, international peace and security and the harmony of persons living side by side within one and the same State.

70 Davies, *supra* note 11, at 287.

Recibido el 12 de noviembre de 2009 y aceptado para su publicación el 20 de noviembre de 2009.

Mexican Law Review
New Series
VOLUME II
Number 2

THE *ROTTERDAM RULES*: BETWEEN HOPE AND DISAPPOINTMENT

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ABSTRACT. *In September 2009, the UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea —known as the Rotterdam Rules— was opened for signature. When it formally enters into force, the United Nations Commission on International Trade Law (UNCITRAL) will have a single, uniform text which governs all international sea cargo transport as well as multimodal transport contracts that include a sea leg. The present study analyses the challenges and problems which might arise in the application of the Rotterdam Rules, especially with regard to carrier liability*.

KEY WORDS: *Maritime transport law, Rotterdam Rules, liability systems*.

RESUMEN. *En septiembre de 2009 se abrió a la firma la Convención de Naciones Unidas sobre el Contrato de Transporte Internacional de Mercancías Total o Parcialmente Marítimo, bajo el nombre de Reglas de Rotterdam. Con su entrada en vigor se pretende contar con un texto único y uniforme. En el presente artículo se reflexiona sobre algunos problemas que las Reglas de Rotterdam pueden presentar, especialmente en el tema de la responsabilidad*.

PALABRAS CLAVE: *Transporte marítimo internacional, Reglas de Rotterdam, sistemas de responsabilidad*.

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I. Introduction

After more than ten years of intense work on the issue, the UN Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea —the so-called Rotterdam Rules— was adopted on December 11, 2008, at the sixty-third session of the General Assembly by resolution A/RES/63/122. In accordance with its Article 88 (1), the Convention was opened for signature by all States at Rotterdam, The Netherlands, on September 23, 2009, and thereafter at the UN Headquarters in New York.[1] Shipping thus seems to have a new uniform text and expectations have been high, but many voices have predicted its failure even before its opening for signature. There is no shortage of reasons for either viewpoint. On one hand, there is a conviction that adopting uniform standards for the modernization and harmonization of rules applicable to international carriage of goods that include a sea leg will promote legal certainty, improve the predictability and efficiency of international commercial transport operations and reduce legal barriers to international trade between all States. On the other hand, there is a fear that the slow progress towards increased limitations on the carrier's liability might lead to a fiasco similar to that of the Hamburg Rules. Implementing a new regime that has no real chance of contributing to uniformity will most probably generate even more confusion in international commerce, especially in the scope of liability as will be seen later in this note.

II. Background

Before the Rotterdam Rules, maritime transport was regulated by several, co-existing legal texts that gave way to a situation some authors have

[1] Actual status of Convention as of October 26th, 2009 was 21 signatories: Armenia (Sept. 29, 2009), Cameroon (Sept. 29, 2009), Congo (Sept. 23, 2009), Denmark (Sept. 23, 2009), France (Sept. 23, 2009), Gabon (Sept. 23, 2009), Ghana (Sept. 23, 2009), Greece (Sept. 23, 2009), Guinea (Sept. 23, 2009), Madagascar (Sept. 25, 2009), Mali (Oct. 26, 2009), Netherlands (Sept. 23, 2009), Niger (Oct. 22, 2009), Nigeria (Sept. 23, 2009), Norway (Sept. 23, 2009), Poland (Sept. 23, 2009), Senegal (Sept. 23, 2009), Spain (Sept. 23, 2009), Switzerland (Sept. 23, 2009), Togo (Sept. 23, 2009), and the United States of America (Sept. 23, 2009). According to *Article 94. Entry into force:* "1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession."

described as a legal Tower of Babel.[2] To understand this assertion, it should be borne in mind that the first important legal manifestation on this matter were the so-called Hague Rules, put into force by the 1924 Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading. While the scope of application of the Hague Rules is vast due to their ratification by a large number of states, the text in force in the different signatory states is not necessarily the same. The reason for this is the fact that, despite their initial widespread acceptance, they would soon be modified by two protocols: firstly, by the Visby Rules on February 23, 1968, and, secondly, the Protocol of December 21, 1979. These protocols were opened to signature not only by the parties who had ratified the Brussels Convention, but also by other states in order to achieve a wider acceptance of the text. The signature and ratification of these protocols would produce the ac- cession to the Rules as a whole. As a consequence, there are states in which the Hague Rules are in force in their original version, while others apply the so-called Hague-Visby Rules (those that have ratified the Protocol of 1968) and yet others, like Spain, use the Hague-Visby Rules as amended by the 1979 Protocol.

In addition to the versions of the Hague Rules, we can find the 1978 UN Convention on the Carriage of Goods by Sea, commonly known as the Hamburg Rules. Although participation of UNCITRAL[3] has guaranteed success in other areas where high degrees of uniformity have been reached through the promotion of the UN, its intervention in the field of maritime transport was not as positive. The underlying idea of this initiative was that of replacing the Hague-Visby Rules so that the ratification of these new rules would be subject to a former denunciation of the Brussels Convention and the subsequent Protocols. The content of the *Hamburg Rules* was considered adequate[4] since it envisaged a fair distribution of risks between the contracting parties —at least when compared to the *Hague Rules* that awarded the carrier a privileged position. However, this fair distribution of risks has led to the fact that the Hamburg Rules, despite their technical superiority, have been ratified by only a small number of States that have little importance in international shipping. Although the Hamburg Rules finally entered into force in 1992, as of today —almost twenty years later— only 34 states have ratified the Rules (one third of which are landlocked countries),[5] and neither the big trading powers nor the countries with the

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[2] *See* CLIVE M. SCHMITTHOFF, EXPORT TRADE. THE LAW AND PRACTICE OF INTERNATIONAL TRADE (1990).

[3] United Nations Commision on International Trade Law (UNCITRAL).

[4] It is considered adequate mainly for UNCITRAL and the Commission members who drew up the text.

[5] The current status of ratifications of the Hamburg Rules can be found at the following address: *http://www.uncitral.org/uncitral/es/uncitral_texts/transport_goods/Hamburg_status.html*.

largest commercial fleets seem to be interested in joining the instrument. Created to establish uniform rules on international shipping of goods, the Hamburg Rules have thus contributed to expanding the legal Tower of Babel.[6]

Only four years after the entry into force of the Hamburg Rules, UNCITRAL recognized that the intended international uniformity had not been achieved and that certain fundamental problems had yet to be solved. At its twenty-ninth session, in 1996,[7] the Commission was informed that existing national laws and international conventions had left significant gaps regarding issues like the functioning of bills of lading and sea waybills, the relation of those transport documents to the rights and obligations of both the seller and the buyer of the goods and to the legal position of the entities that financed a party to the contract of carriage.[8] Some States had provisions on

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[6] The precepts contained in the Hamburg Rules have received a positive evaluation. In general on the contents of the Hamburg Rules, among others, see José Antonio Gómez Segade, *El transporte marítimo de mercaderías: de las Reglas de la Haya a las Reglas de Hamburgo*, 156 RDM 229-230 (1980); WILLIAM ERNEST ASTLE, THE HAMBURG RULES (1981); Rafael Matilla Alegre, *Reglas de Hamburgo: principios fundamentales*, LXXXII RGLJ 458 (1981); FERNANDO SÁNCHEZ CALERO, LAS REGLAS DE HAMBURGO SOBRE EL CONTRATO DE TRANSPORTE MARÍTIMO DE MERCANCÍAS. UNA VALORACIÓN CRÍTICA (1981); FERNANDO SÁNCHEZ CALERO, EL CONTRATO DE TRANSPORTE MARÍTIMO DE MERCANCÍAS. REGLAS DE LA HAYA-VISBY 57-60 (2000); José María Alcántara, *Las Reglas de Hamburgo ante su inminente entrada en vigor. Una valoración actualizada*, 91 DN 398-411 (1990); JOSÉ MARÍA RUIZ SOROA ET AL., MANUAL DEL TRANSPORTE MARÍTIMO 368-371 (2nd ed., 1997); Rafael Illescas Ortiz, *Las Reglas de Hamburgo (Convenio de las Naciones Unidas sobre el Transporte Marítimo de Mercancías, 1978)*, *in* DERECHO UNIFORME DEL TRANSPORTE INTERNACIONAL 67-77 (Agustín Madrid Parra ed., 1998). States that hold important merchant fleets cling to the Hague-Visby Rules, thus contributing to increasing the lack of uniformity as regards the international regulation of maritime transport of goods (in this sense, Juana Pulgar Ezquerra, *Especialidades del transporte de mercancías en contenedores*, 247 RDM 37-73 (2003), who, among others, points to the privileged carrier liability system under the Hague-Visby Rules as one of the main obstacles when establishing a uniform regulation).

[7] *Official Records of the General Assembly*, *Fifty-first Session, Supplement No. 17* (A/51/17).

[8] In particular, debates about whether to undertake the development of a new maritime convention and its scope of application took place during the UNCITRAL's 29th to 35th session periods. Initially, the proposal raised some misgivings, in the fear that a new international convention on maritime transport of goods would become a third tool in contention (see the UNCITRAL report on the work of its 29th session period, Official Records of the General Assembly, Fifty-first Session, Supplement No. 17, A/51/17, at 210 to 214). These misgivings were assuaged by the fact that certain aspects of maritime transport of goods are not covered by the Hague or the Hamburg Rules. It was argued that the new instrument could center on the regulation of these issues, without having to face the controversial issue of carriers' liability (*id.* at 214). UNCITRAL's response consisted in instructing the Secretariat to coordinate the work of gathering information, ideas and opinions regarding the practical problems and possible solutions from all interested organizations (*id.*, pr. 215), among which the WCC played an active role from the start. Following its 29th Session in 1996, UNCITRAL requested that the CMI (as well as other organiza-

those issues, but the fact that these provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and created the need for uniform provisions addressing issues regarding the use of new technologies.

Faced with these facts, the project to develop a new instrument was launched in 1996, based on a draft convention worked out by the *Comité Maritime International* (CMI). The plan was to incorporate new topics related to technical and commercial developments rather than adapting the existing Hague-Visby or Hamburg Rules. During its 34th session in 2001, the Commission established the Working Group III (Transport Law) for the task of preparing, in close collaboration with other international organizations, a new legislative instrument on certain issues regarding the international carriage of goods, such as the scope of application of the new instrument, the period of the carrier's liability, the carrier's obligations, the carrier's liability, the shipper's obligations and transport documents. The Working Group began its deliberations on a draft instrument on the carriage of goods [wholly or partly by sea] during its 9th session in 2002. After years of difficult negotiations, the final version of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was approved on July 3, 2008, at the 41st session.

III. Types of Conventional Liability Systems

There is no international convention for the carriage of goods in general. Each mode of transport has one or several international conventions that specifically regulate the provision of international transport by sea, rail, road or air. The degree of heterogeneity depends on the liability regime (in a broad sense) the carrier is subject to.

In this scenario, the international regulation of maritime transport stands out because different regimes are in force simultaneously. Compared with other modes of transport, the sea carrier's liability is less severe especially in terms of the basis of liability, the catalogue of exoneration clauses or the

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tions) gather information about current practices and laws in the area of international carriage of goods by sea, to establish the need for uniform rules in the areas in which no such rules existed. The UNCITRAL noted that "existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bill of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of goods, and to the legal position of the entities that provided financing to a party to the contract of carriage." See more in *http://comitemaritime.org/draft/travaux.html*.

monetary limits on compensation for loss, damage or delay in delivery of the goods.

One of the core issues to be considered in any attempt to produce a new text that aims at regulating international multimodal transport is that of determining the system of liability to be adopted. The main existing models are:[9]

1) "Uniform" Liability System: The multimodal transport operator is subject to a single liability format, regardless of the leg in which the event that gives rise to liability has occurred. Irrespective of where the damage, loss or delay may have originated, the carrier is held responsible under the same regime.[10]
2) "Network" Liability System: This system is based on the idea that the shipper should be considered as having concluded several "unimodal" contracts of carriage with each of the carriers that actually perform the transport operations. Thus, the liability of the multimodal transport operator is governed by the rules applicable to the transport leg in which the event that gives rise to liability has taken place. Obviously, a uniform system needs to be applied in cases in which locating the damage is impossible. In practice, implementing a network regime entails the nonexistence of a uniform liability system, resulting in a very high degree of legal uncertainty regarding these issues.[11]
3) "Modified" Liability System: Neither the "Uniform" nor the "Network" liability systems can be found in their purest form. It has become common to choose intermediate solutions like the modified liability system, according to which there is no block reference for unimodal conventions, but certain precepts are applied (usually those referring

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9 In this sense see Aníbal Sánchez Andrés, *El transporte combinado de mercancías*, RDM 82 (1975); CARLOS GÓRRIZ LÓPEZ, LA RESPONSABILIDAD EN EL CONTRATO DE TRANSPORTE DE MERCANCÍAS (CARRETERA, FERROCARRIL, MARÍTIMO, AÉREO Y MULTIMODAL) 606 (2001); Carlos Górriz López, *El contrato de transporte multimodal de mercancías*, *in* EL CONTRATO DE TRANSPORTE 377 (José Luis Concepción Rodríguez ed., Consejo General del Poder Judicial, 2003); Francisco Carlos López Rueda, *La consecución de un régimen uniforme para el transporte multimodal internacional: problemas y soluciones*, *in* ACTAS DEL I CONGRESO INTERNACIONAL DEL TRANSPORTE: LOS RETOS DEL TRANSPORTE EN EL SIGLO XXI 759 (Fernando Martínez Sanz ed., 2005); Aliki Kiantou-Pampouki, *The Liability of Multimodal Transport Operator*, *in* MULTIMODAL TRANSPORT 28 (Emile Bruylant, 2000).

10 Although this model seems to be the most coherent system, it has not met with success since it has not been adopted by any international organization or in any standard document.

11 The network liability system has not been very well received by the carriers as it is primarily defended by traders because of the possibility of deriving greater benefits from "unimodal" liability systems. See KIANTOU-PAMPOUKI, *supra* note 9, at 29.

to the basis of the carrier's liability and its limitations). The UNCTAD/ICC rules reflect a modified network system.[12]

IV. The Rotterdam Rules

While not every door-to-door operation requires the development of a uniform text to regulate legal issues related to multimodal transport, whenever a future convention is expected to apply to any international carriage that includes a sea leg, multimodality is an issue to be taken into account. The typical problems associated therefore need to be solved: which liability regime will be applied since the transport operation will be carried out with recourse to different transport modes that are, in principle, subject to different legal regulations. The original plan of the UNCITRAL Working Group III on Transport Law was to produce a new agreement capable of putting an end to the disparity and lack of harmony that characterized the legal environment of international carriage of goods by sea.[13] However, if the challenge were that of modernizing existing legal regulations, the new text should, rather than coordinate the peculiarities of maritime transport with regulations for the different modes involved, try to soften these very partic-

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[12] In order to fill gaps existing in the various standard contract terms applying in this field, the UNCTAD/ICC rules (1992) were promulgated. These rules follow the liability system of the Haya-Visby Rules as amended in 1979, and apply as such when a multimodal contract involves carriage of the goods by sea or inland waterway. When that contract does not have a sea leg but a road leg in addition to another mode of carriage, the rules of the CMR (Convention on the Contract for the International Carriage of the Goods by Road (1956), as atended by the Geneva Protocol in 1978) apply. This approach is internationally known as a *modified system*. However, the modified system does not solve all conflicting interests and the network system seems to still be attractive in the shipping industry, David Glass (2006). "Meddling in the multimodal muddle? - a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]." Lloyds Maritime and Commercial Law Quarterly (2006) 307-334.

[13] See Resolution 63/122, adopted by the General Assembly: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The text affirms that: "*The General Assembly* […] *Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade […] *Concerned* that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices […] *Convinced* that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States […] 2º. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution."

ular features by taking advantage of the opportunity to regulate door-to-door operations. It has been said[14] that the new text was to be an authentic maritime —and not merely multimodal— convention that, when delimiting its scope of application, should emphasize the importance of the sea leg throughout the entire transport operation. Thus, operations carried out with recourse to other modes of transport would be governed entirely by the new convention. The main issue is that the converging interests in maritime transport are more difficult to reconcile with those of any other non-maritime operator. By creating a single document for all transport operations involved, the aim is to award homogeneous protection to the owner of the goods during the whole operation, without excessively increasing rigidness in terms of the sea carrier's liability to prevent the risk of repeating the experience of the Hamburg Rules.

1. *Reasons for change*

Most of today's global trade operations are carried out according to the Hague-Visby Rules, but these rules are only a part of the law in force. Well over a quarter of the trade operations are still subject to the older Hague Rules and over thirty countries[15] have ratified the Hamburg Rules. To further complicate matters, not all countries adhere to only one of these three regimes.[16] Each of the elements that makes up this irregular patchwork is part of the "existing law" and should be taken into account in an in-depth comparative study. Certain aspects of the Convention will give way to more significant changes in some countries than in others. To a great extent, the Convention is mainly based on the Hague-Visby and Hamburg Rules, incorporating significant elements from both sets of rules. From a global point of view, changes to the existing law proposed by the Convention are not earth shattering: they are deliberately evolutionary, not revolutionary.

The focus has generally centered on updating and modernizing the existing legal regimes that govern the carriage of goods, filling some of the gaps that have been identified in practice over the years and harmonizing the

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[14] Nieves López Santana, *El papel de los auxiliares del porteador en las operaciones de transporte marítimo de mercancías concertadas de puerta a puerta y su tratamiento en el proyecto de Convenio sobre el Transporte de Mercancías Total o Parcialmente por Mar*, *in* ASPECTOS JURÍDICOS Y ECONÓMICOS DEL TRANSPORTE 1601-1632 (Fernando Martínez *et al.* eds., Universidad Jaume I, 2007).

[15] All be it, these countries represent a small sector of world trade.

[16] China —one of the world's largest trading nations— has a national maritime code that incorporates elements of both the Hague-Visby and the Hamburg Rules (along with domestic elements that are unique to Chinese law). Even the Nordic countries, which have long been major partners in the international effort to achieve uniformity in this field, have incorporated significant elements of the Hamburg Rules into their domestic versions of the Hague-Visby Rules.

law in force when possible. Several proposals for dealing with more important aspects (or those in which harmonization would have been difficult) were discarded in order to allow the Working Group to complete the project and address the core issues.[17]

Updating and modernizing is particularly necessary when a set of rules drafted over 80 years ago still regulates an industry that has drastically changed over that period. The Visby Amendments are over 40 years old and only made a few changes to the original Hague Rules. Even the Hamburg Rules are over 30 years old. The draftsmen of the early 1920s could not anticipate the container revolution, and not even the authors of the Visby and Hamburg Rules anticipated the impact the container revolution would eventually have on modern commercial practices —including the incredible growth of multimodal shipments, the increasing prominence of transport intermediaries and the potential for new technologies (such as electronic commerce).

Even if the existing law adequately addressed the requirements of modern industry, different regimes address those requirements in different ways, thus creating a need for greater harmonization. The benefits of international uniformity in this field are well-known and widely accepted, but some of the world's largest trading nations have nevertheless permitted their laws to diverge from international norms. The Rotterdam Rules offer the world community an opportunity to reclaim the uniformity it enjoyed immediately before the Second World War.

Perhaps the most visible of these changes has been the elimination of the severely criticized "nautical fault" exception,[18] but even this high-profile decision does not pose a "change to the existing law" for those countries that have adopted the Hamburg Rules. However, a number of other provisions in the Convention, some of which are critical, will also change the law to make it better suited to meet the needs of the industry as it enters the 21st century.

2. *Content of change*

Perhaps the most significant innovation of the Convention is its applicability to door-to-door operations. The Hague and Hague-Visby Rules apply only on a tackle-to-tackle basis,[19] while the Hamburg Rules extend cov-

[17] For instance, originally, see Doc. A/CN.9/WG.III/WP.21 (2002), Chapter 9 was dedicated to Freight however, in A/CN.9/WG.III/WP.56 (2005), the "Freight" chapter is eliminated.

[18] Article 4(2) (a) of the *Hague* and *Hague-Visby Rules* excuses the carrier from liability for any "[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

[19] "Tackle to tackle" referred to a period commencing when the tackle was hooked on to cargo for loading until the time the tackle was unhooked for delivery.

erage slightly, based on port-to-port criteria. Such limited coverage may have made sense in the days when each segment of a journey was generally governed by its own contract of carriage.[20]

In today's world, however, when contracts of carriage are typically carried out on a door-to-door basis, it makes much more sense for the governing law to follow the commercial practice. Thus, the Convention makes the carrier responsible for the entire contractual period of carriage. This fundamental change in the law was initially controversial, but it has been the only way to accomplish the most basic goals of a uniform international legal regime in this field: to obtain certainty, predictability and uniformity, a single legal regime must govern the entire performance of the contract. In today's practice, parties often agree to extend the maritime regime inland, but such a contractual extension only takes place with the force of a contract. The Convention will put into action a uniform legal regime with the force of law.

However, it is important to understand that the Convention is not a full multimodal instrument. To be applied, there must not only be a sea leg, but it must be an international one. The Convention can thus best be characterized as a "maritime plus."[21]

The Convention also recognizes that in some parts of the world (particularly in Europe), there are regional conventions that govern inland transport. As the countries involved tend to champion the preservation of these regional regimes, the Convention adopts a limited network principle so that the extent of the contracting carrier's liability for inland damage (when it can be localized) will be governed by the regional convention that would apply if a separate contract had been made for the inland leg. Although this approach undermines international uniformity and predictability, the Working Group concluded that it constituted a practical necessity.

As a general rule, the Hague and Hague-Visby Rules apply to outbound shipments *from* a contracting State. In contrast, the Hamburg Rules apply to both inbound and outbound shipments to or from a contracting State. The Convention follows the Hamburg Rules, thus changing the existing laws in many countries.

Another important reform is the Convention's revised treatment of the parties' freedom of contract.[22] Although this change has also been among the more controversial ones, it is still *evolutionary* rather than *revolutionary*.

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[20] *See* Section III of this paper.

[21] When the bill of lading involves different modes of transport, one of which being maritime transport, all parts of the contract shall be subject to the Rotterdam Rules, including its liability regime, even if the damage has occurred in the non-maritime leg. This is why we call this a "maritime plus" regime.

[22] According to Michael F. Sturley, "The UNCITRAL Carriage of Goods Convention: Changes to Existing Law" in *UNCITRAL Draft Convention on Contracts for the Int. Carriage of Goods Wholly or Partly by Sea*, 54-263 CMI YEARBOOK 2007-2008.

The Hague, Hague-Visby, and Hamburg Rules already permit freedom of contract between the immediate parties to a transaction in certain situations (particularly for contracts of carriage under charterparties). The Rotterdam Rules extend this freedom of contract to volume contracts,[23] but achieves greater uniformity by bringing these contracts under the new regime, at least on a default basis. In other words, shipments under volume contracts will be subject to the Convention unless the parties take the affirmative step of explicitly contracting not to apply the Convention. Under existing law, shipments under charterparties are routinely subject to the Hague or Hague-Visby Rules, but only because the parties take the affirmative step of contracting the rules into coverage.

Other developments of the rules are the chapters on jurisdiction and arbitration. These chapters are based directly on the corresponding chapters of the Hamburg Rules, and provide some additional protection for carriers (particularly in the context of volume contracts). As a result, these chapters will include some changes to existing law even in countries that have adopted the Hamburg Rules. The Hague and Hague-Visby Rules do not address jurisdiction or arbitration at all. Therefore, the existing law in most countries must be found in domestic legislation or national jurisprudence. As some members of Working Group III felt strongly about the need to address jurisdiction and arbitration while other members felt strongly about preserving inconsistent domestic law, these subjects were among the most controversial ones during the negotiations.[24]

The model seeks to provide the claimant with similar protection to that given in Article 22 of the Hamburg Rules.[25] Thus, any arbitration clause in

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[23] *Article 1.2* defines "Volume contract" as "a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."

[24] Matters were further complicated by the need to involve the European Commission, which has the exclusive powers to negotiate this issue for European Union member countries. In the end, it was possible to reach a compromise by making the jurisdiction and arbitration chapters optional. A nation may ratify the Convention without accepting these two chapters, which will bind only those countries that explicitly declare their intention to be bound by them.

[25] *Article 22. Arbitration.* 1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising there under shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

a transport document drawn up unilaterally by the carrier does not become an exemption clause in its favor.

Recourse to ordinary arbitration courts shall be open under the conditions laid down in Article 68.[26] There is, however, a problem because —according to Definition 29 of Article 1—[27] the competent court must be situated in a Contracting State. Therefore, any one of the four options the claimant can choose from must be situated in a Contracting State. Thus, the court that declares the arrest of a vessel only has jurisdiction over the substance of the matter if it is situated in a Contracting State of the Convention. It would have been desirable to establish that all the rules in the Convention regarding the choice of court were to be understood as exclusive jurisdiction, without admitting any doubt created by contractors.[28]

What are the limits of liability? The answer to this question is critical, and for many countries that protect users' interests it is the principal factor taken into account when deciding whether or not to adopt the Convention. All transport conventions contain limitations of the compensation to be paid by the carrier. The Hague Rules established the limitation at 100 pounds sterling, gold value, per package or unit. In the 1968 Visby Protocol, limits were set at 10,000 Poincaré gold francs per package or unit, or

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(*a*) a place in a State within whose territory is situated: (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or (ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or (iii) the port of loading or the port of discharge; or

(*b*) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

[26] *Article 68. Actions against the maritime performing party*: The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

(*a*) The domicile of the maritime performing party; or

(*b*) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

[27] *Article 1.29*: "Domicile" means (*a*) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (*b*) the habitual residence of a natural person.

[28] This is the same opinion found in José María Alcántara, *La Convención de Naciones Unidas sobre Transporte de Mercancías Total o Parcialmente por Mar: un instrumento neocon sobre responsabilidad del porteador*, *in* XIII CONGRESO DE DERECHO MARÍTIMO, INSTITUTO IBEROAMERICANO DE DERECHO MARÍTIMO (November 10-12, 2008).

30 gold francs per kilogram of goods lost or damaged, whichever is higher. With the introduction of SDR[29] in the 1979 Protocol, the Visby limits were fixed at 666.67 SDR per package or 2 SDR per kg. Meanwhile, the Hamburg Rules raised the limits to 835 SDR per package or 2.5 SDR per kg, whichever is higher. Finally, the 1980 Multimodal Convention[30] —which has yet to enter into force— raised the limits to 920 SDR per package or 2.75 per kg. In its Article 59,[31] the Rotterdam Rules adopt higher limits than those provided for in the Hamburg Rules, that is, 875 SDR per package or unit or 3 SDR per kg, whichever is higher. As in the case of other conventions, when the shipper has made a declaration of value in the transport document (B/L *ad valorem*), compensation will be paid up to this amount.

Notwithstanding the above, it should be noted that, according to Article 80,[32] special rules for "volume contracts" can be agreed upon by the con-

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[29] *Article 59*. 3. The unit of account referred to in this article is the Special Drawing Right (SDR) as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgment or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

Currently, 1 SDR is equivalent to 1.12 EUR (February 2010) or 1.53 USD (February 2010).

[30] United Nations Convention on International Multimodal Transport of Goods, established in Geneva on May 24, 1980.

[31] *Article 59. Limits of liability*. 1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

[32] *Article 80. Special rules for volume contracts*. 1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

tracting parties without being subject to the rules of the Convention. Thus, the parties are able to fix lower limits for this specific type of traffic than those established by the Convention.

V. Conclusions

This convention is the result of extensive and, at times, difficult international negotiations. Seeking consensus inevitably leads to compromises and a delicate balance between different viewpoints, legal traditions and interest groups. The compromises reached at international conferences often produce texts with a certain degree of ambiguity or deliberate silence, something outsiders often fail to notice.[33] The Rotterdam Rules are no exception

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(*a*) The volume contract contains a prominent statement that it derogates from this Convention;

(*b*) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(*c*) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(*d*) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (*a*) and (*b*), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(*a*) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(*b*) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

[33] Roy Goode, *Reflections on the Harmonization of Commercial Law*, 1 UNIFORM L. REV. 54, 73 (1991) (stating that "those who pick to pieces the open texture or verbal infelicities of an international convention rarely pause to consider how, when legislation prepared in a single legal system is generally so verbose, obscure and generally badly drafted, one can reasonably expect more of the product of many hands drawn from widely differing legal systems with different cultures, legal structures, and methods of legal reasoning and decision making, entailing maximum flexibility, co-operation and compromise").

to this general rule. International conventions also reflect the time at which they were negotiated.

Today's world is very different from the world at the time the Hague Rules and even the Hamburg Rules were negotiated.[34] The complexity of the Convention, one of the most common complaints made by innocent readers, is partly due to the efforts to solve every possible issue as explicitly as possible. It would be unfair to criticize the complexity of the text, because it comes from the complexity of the issues themselves, rather than from poor drafting. Given the value of a comprehensive regime for international carriage, we believe[35] that this is the price we have to pay.

Besides the issues mentioned above (in particular, the increase of the limits of liability and a modifiable decrease in volume contracts), one of the most remarkable innovations brought about by the Rotterdam Rules is the extension of the claim period to two years. Moreover, the Convention seems to have returned to the first quarter of the twentieth century, in terms of liability of the carrier and burden of proof (not to mention the shipper's obligation to claim). Taking into account the mentioned innovations, modernity and technical developments in the field of electronic recording, the new instrument can, in my opinion, be classified as neoconservative, a style certainly prevalent among big shipping companies, major terminal operators, exporters and large multinational trading companies.

All in all, the future of the Convention remains unclear, but if it is finally ratified by a sufficient number of countries and attains an acceptance similar to that of the Hague-Visby Rules, it should definitely produce the desired international uniformity, regardless of the critical observations offered here. It is difficult to predict whether this Convention will become the dominant international liability regime for maritime carriage.[36] However, provided that the United States, China, and a few other important trading nations ratify the Convention in a few years time, it is likely to become a huge success; if not, it will end up in the UN cemetery for dead conventions.[37]

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[34] Ownership of the international merchant fleet has changed dramatically in the few last decades. Although many European countries still maintain their position as maritime powers, ten of the world's twenty largest containership operators come from countries in the Far East.

[35] See also Fujita Tomotaka, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications*, 44 TEXAS INTERNATIONAL LAW JOURNAL 349-373 (2009).

[36] Although the Convention has been signed by 21 States (see *supra* 1), it cannot yet be assured that the *Rotterdam Rules* will eventually replace the existing texts. This is because, although it has been signed by 21 States, including the U.S., the *Rotterdam Rules* have not been *ratified* by any State. Article 94 of the Convention states: "1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of *ratification, acceptance, approval or accession*."

[37] Johan Schelin, *The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De- Harmonization?*, 44 TEXAS INTERNATIONAL LAW JOURNAL 327 (2009).

Recibido el 28 de septiembre de 2009 y aceptado para su publicación el 3 de noviembre de 2009.

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Mexican Law Review, nueva serie, vol. II, núm. 2, editada por el Instituto de Investigaciones Jurídicas de la UNAM, se terminó de imprimir el 20 de mayo de 2010 en Cromocolor, S. A. de C. V., Miravalle 703, colonia Portales, Benito Juárez, 03570 México, D. F. Se utilizó tipo *Baskerville* de 9, 10 y 11 puntos. En su edición se empleó papel cultural 57 x 87 de 35 kilos para los interiores y cartulina para los forros. Consta de 1,000 ejemplares (impresión *offset*).