Mexican Law Review

New Series
VOLUME III
Number 1
July - December 2010

UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES JURÍDICAS

Mexican Law Review

New Series

July-December 2010 Volume III, Number 1

Interior design and edition: Wendy Rocha
Cover elaboration: Arturo Flores

MEXICAN LAW REVIEW

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JUDGES AS INVITED ACTORS IN THE POLITICAL ARENA: THE CASES OF COSTA RICA AND GUATEMALA*

Elena MARTÍNEZ BARAHONA**

ABSTRACT. *The goal of this article is to broaden our knowledge of the high courts in Costa Rica and Guatemala by examining the degree to which these courts are used as "mechanisms of social accountability." For this purpose, this study assesses changes in the number of judicial claims filed by individuals or social groups before the high courts to control the legality of government actions or to protect their own rights. I analyze whether the emergence of this "judicialization by the people" is a consequence of changes in institutional settings and/or a growing distrust in politicians, scenarios that turn the high courts into viable forums for the achievement of political results.*

KEY WORDS: *High courts, supreme courts, judges, societal accountability, judicialization, Costa Rica, Guatemala.*

RESUMEN. *Este artículo pretende profundizar en el estudio de las cortes constitucionales en Costa Rica y Guatemala, examinando hasta qué punto son utilizadas como mecanismo de accountability social. Con ese propósito, este estudio evalúa si hay un aumento en el número de recursos interpuestos ante las cortes por los ciudadanos y grupos sociales para controlar la legalidad de las acciones gubernamentales o para proteger sus derechos. A través de este artículo se probará si la emergencia de esta "judicialización por los ciudadanos" es consecuencia tanto de cambios de las reglas institucionales como de la desconfianza hacia los políticos, circunstancias que convierten a dichas cortes en un foro adecuado para obtener resultados políticos.*

PALABRAS CLAVE: *Cortes supremas, cortes constitucionales, accountability social, judicialización, Costa Rica, Guatemala.*

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* I am indebted to Inés Amezaga for her excellent copy editing and her careful observations. I would also like to thank the anonymous referees of the *Mexican Law Review* for their extensive and insightful comments on an earlier draft of this article. This article is based on ELENA MARTÍNEZ BARAHONA, SEEKING THE POLITICAL ROLE OF THE THIRD GOVERNMENT BRANCH: A COMPARATIVE APPROACH TO HIGH COURTS IN CENTRAL AMERICA (Ph.D. dissertation, European University Institute, published in VDM Verlag Dr. Müller, 2009).

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I. INTRODUCTION

Analysts of the "Third Wave" of democratization have placed an extraordinary degree of confidence in judges as the guardians of democracy. Furthermore, the current crisis in the system of political representation has led to a reconsideration of the role of the courts, mainly high courts, in public life. On the one hand, this is due to popular discontent with the nature of representative democracy where electoral victory becomes the predominant concern of political actors and accountability is lacking. It is therefore not surprising that countervailing powers that operate under different premises are increasingly welcome. As Dworkin states, "people are attracted to the idea of one forum, at least, where argument matters".[1] On the other hand, the intervention of high courts can be considered an instrument to break political impasses. In this sense, "courts are not welcome intruders into the democratic process, but invited (and perhaps necessary) release valves for democratic impulses that cannot be addressed through the ordinary legislative route."[2]

This article contributes to this discussion by showing that judicial institutions in Central America are being used as mechanisms of "social account-

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[1] "Judges are supposed to do nothing that they cannot justify in principle, and to appeal only to principles that they thereby undertake to respect in other context as well. People yearning for reasoning rather than faith or compromise would naturally turn to the institution that, at least compared to others, processes the former ideal."

[2] Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (or, Why Be so Positive about Judicialization of Politics?)*, 65 LAW & CONTEMP. PROBS. 78 (2002).

ability."[3] It contributes to the literature which argues that judges have now emerged as active participants in the political process by offering new opportunities to citizens, social movements, interest groups and politicians. This may transform courts into the perfect channel to pursue political objectives. First of all, courts can be used by some groups to achieve political aims that they cannot accomplish through the normal political process. Secondly, the courts can be used as a mechanism that allows a large number of actors to exercise control through legal claims. As a result, this affects the role of judges in contemporary politics.

The goal of this article is to extend the existing research on high courts by examining the degree to which, in a given period, a high court is used as a "mechanism of social accountability." Following the work of Catalina Smulovitz and Enrique Peruzzotti, this is defined here as a non-electoral, yet vertical, mechanism that allows actors to exercise control by making legal claims through courts.[4] Thus, I will assess whether there is an increase in the number of judicial claims filed by individuals or social groups with high courts to control the legality of governmental actions or to protect their rights.[5]

Based on an adaptation of Smulovitz's theory, I argue that one of the sources of the judiciary's new role in politics is democratic institutions' failure to work efficiently. In fact, the weakness of the prevailing democratic structures has prompted the Courts to intervene in politics. This intervention is fostered precisely by individuals or groups that hope to find in the high courts solutions to problems that political institutions have not been able or willing to provide. The emergence of this "*judicialization by the people*"

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[3] Catalina Smulovitz & Enrique Peruzzotti, *Societal and Horizontal Controls. Two Cases about a Fruitful Relationship*, Paper presented at the CONFERENCE ON INSTITUTIONS, ACCOUNTABILITY AND DEMOCRATIC GOVERNANCE IN LATIN AMERICA (The Helen Kellogg Institute for International Studies, University of Notre Dame, 2000).

[4] Smulovitz & Peruzzotti, *supra* note 3, at 2. According to these authors, "social accountability" also involves participation in institutional arenas for monitoring and policy-making and the use of non-institutional tools (mainly encompassing social mobilizations and media reports).

[5] It is important to mention the difficulties with making cross-national comparisons of caseloads. As Tom Ginsburg points out, "institutional structure is not always commensurable, and small variations in the institutional configuration can produce large variations in such indicators as strike rates, filings, and other variables." TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES. CONSTITUTIONAL COURTS IN ASIAN CASES (Cambridge University Press, 2003). However, this does not mean that comparison is impossible. As the above-mentioned author and this study suggest, the trajectory of each High Court's caseload over time and the concepts of high-and-low-caseloads can be used to evaluate the performance of the high courts. As Tom Ginsburg states, "essentially, this strategy involves comparing each court with itself at different points in time and then comparing the overall pattern of development with that of other courts. This avoids problems of incommensurable institutional design faced by simply comparing caseloads" (*id.* at 251).

is mainly manifested in the growing distrust in politicians and the acceptance of the new judicial role by citizens and "interest groups."[6] Where the judiciary has *more* credibility than other government institutions, it is more likely that the media, political parties, interest groups, individuals and weak and marginalized groups will go to the courts to push a specific agenda. Following Neal Tate, this is due to the fact that if these groups view majoritarian institutions as immobilized, self-serving or even corrupt, it is hardly surprising that these groups will allocate policy-making duties to the judiciaries, who have good-standing reputations for their expertise and honesty, and at least as much legitimacy as that of the executive and legislative branches.[7] This tendency should only accelerate if there is a large and important number of "interest groups" using the courts as an additional means to influence policy. This can result in a shift in the balance of power away from the other branches of government toward the judiciary.

This article puts this argument to the test by analyzing the Costa Rican and Guatemalan high courts. The essay is divided into three sections. It begins with an overview of the literature to identify the main theories that explain the public recourse to high courts as a mechanism of "social accountability." Next, the article analyses the cases of Costa Rica and Guatemala. I first examine statistics concerning each country's high court caseload over time to depict the evolution in this public recourse. I then study the possible causal factors that explain this evolution, mainly focusing on the institutional changes that have facilitated legal mobilization, which partly depends on the threshold rules to access the courts.[8] I also analyze whether the erosion of citizens' perception of democratic institutions have an impact on the general expansion of judicial power and whether this legal mobilization from below is enough to guarantee greater judicial activism. This indi-

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[6] "Judicialization of politics" refers to the growing influence of the courts, in particular on matters that were once considered purely political. Vallinder first introduced this term in 1995 when he made reference to the growth of judicial intervention in politics. Stone Sweet also uses this term in reference to the general process by which legal discourse —norms of behavior and language— penetrates and absorbs political discourse. Alec Stone Sweet, *Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany*, 26 COMPARATIVE POLITICAL STUDIES 443-469 (1994). Other and wider definitions can be found in: Pilar Domingo, *Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America*, 11 DEMOCRATIZATION 104 (2004); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41-66 (2002) or Stella Righettini, *La politicizzazione di un potere neutrale. Magistratura e crisi italiana*, XXV RIVISTA ITALIANA DI SCIENZA POLÍTICA (1995), among others.

[7] Neal Tate, *Why the Expansion of Judicial Pow*er*?*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 31 (Neal Tate & Torbjörn Vallinder eds., New York University Press, 1995).

[8] The concept of a threshold rule is developed in Scheppele 1988 and describes the rules that courts use to govern access to legal remedies. Kim Lane Scheppele & Jack L. Walker, *The Litigation Strategies of Interest Groups*, *in* MOBILIZING INTEREST GROUPS IN AMERICA 181 (Jack L. Walker ed., The University of Michigan Press, 1991).

cator will be observed in the public perception of confidence in the high courts compared to confidence in representative institutions, and whether there is an increase in interest groups acting as a response to the immobility of democratic institutions. Finally, the conclusion discusses the implications of the empirical findings by analyzing the repercussions of judges' role in contemporary democracies.

The analysis uses data gathered by the Latin American Public Opinion Project (LAPOP) in 2004, 2006 and 2008 for the countries studied, together with the Latinobarómetro database.[9] These surveys contain questions measuring attitudes of confidence in democratic institutions. The study also uses interviews with Supreme Court justices and experts to obtain descriptive information that is difficult to extract from regular questionnaires.[10]

The Central American countries selected for this study share some historical similarities, as well as socio-economic challenges, but they vary considerably in terms of political development. While Costa Rica has long boasted a stable democratic tradition, Guatemala did not undergo a transition to democracy until the 1990s. This variation in political development allows for the examination of the increase in the use of judicial strategies in two distinct national settings. The available information allows for a comparison across and within countries at two different points in time: in Costa Rica before and after the 1989 judicial reform and in Guatemala before and after after the signing of the 1996 Peace Accords.

II. Expansion of the Use of Judicial Strategies

Scholars have increasingly departed from a traditional disregard for the influence of the judiciary in mainstream politics. Within a broader compar-

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9 *Latin American Public Opinion Project* (LAPOP) is a project funded by the United States Agency for International Development (USAID) and backed by the United Nations Development Programme (UNDP), the Inter-American Development Bank (IADB) and Vanderbilt University. For many years, it was housed at the University of Pittsburgh, but is now hosted by Vanderbilt University. This cross-national set of similar surveys measuring public opinion in Latin America is available at *www.la popsurveys.org*. As LAPOP has no data prior to 2004, I also use *Latinobarómetro*. *Latinobarómetro* is an annual public opinion survey carried out in 17 Latin American countries, most of which date back to 1995. The survey has the support of the Swedish International Development Agency (SIDA), the UNDP and the IADB. This survey applies identical questionnaires to representative samples. In the specific cases of Costa Rica and Guatemala, the samples represent 100% of the population. *Latinobarómetro* is available at: *www.latinobarometro.org*.

10 The in-depth interviews with key informants are part of my doctoral thesis: Elena Martínez Barahona, Seeking the Political Role of the Third Government Branch: A Comparative Approach to High Courts in Central America (European University Institute, published in VDM Verlag Dr. Müller, 2009).

ative context, high court activism is a reality along with the new position of these courts in political systems.[11] Thus, this phenomenon of the "judicialization of politics" has increasingly come to be recognized as a feature of political development.[12]

In general, this judicialization of politics indicates judges' greater involvement in law-making and social control. However, as the judicial system is fundamentally a *reactive* system in the sense that judges do not tend to act of their own accord, their "judicialization" is mainly initiated by the "victims" who approach the judges and bring their legal claims forward. In this sense, legal complaints are mechanisms used by citizens, NGOs or interest groups to turn mobilization into a potential law-enforcing activity, moving the Courts into a more prominent position as actors in the political arena.[13] While some of these groups concentrate on establishing contact with executive agencies, lobbying parliaments, unfolding media campaigns or even staging public protests in the streets, others prefer to pursue their goals through the judiciary as part of a strategy named "the rights revolution."[14] It is significant that the growth in the number of interest groups, NGOs or parallel "social watchdog" organizations, which initially emerged as a means of using the law as an instrument to hold public institutions accountable, has now extended this role to the advancement of rights protection. In this way, this network (also called "public interest law movement") has expanded the role of the courts in social and political affairs within the

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[11] In some Eastern European countries, politicians and legislators frequently resort to constitutional courts. Consequently, these courts supervise policy decisions made by parliament and the executive branch on an almost routine basis. Yoav Dotan & Menachem Hofnung, *Legal Defeats-Political Wins. Why Do Elected Representatives Go to Court?*, 38 COMPARATIVE POLITICAL STUDIES 78 (2005). In this sense, the constitutional courts of Hungary and Poland have been quite influential and the courts in Bulgaria, Slovakia, Slovenia, the Czech Republic, and the Baltic states (but with relative failure in Russia and complete failure of the high courts in Kazakhstan, Belarus, Albania, and Romania) have proven to have been relatively successful in the first few years. We can also find works on the growing judicial intervention of African constitutional courts —the cases of South Africa; Theunis Roux, *Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court*, *in* DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES (Siri Gloppen *et al*. eds., 2004) or Tanzania and Zambia; E. g., GINSBURG, *supra* note 5.

[12] Pilar Domingo, *Judicialization of Politics: The Changing Political and Social Role of the Judiciary in Mexico*, Paper presented at the CONFERENCE ON JUDICIALIZATION OF POLITICS (ILAS-University of London, 17-19, March, 2004).

[13] In this sense, we can cite the excellent work of Catalina Smulovitz on the Argentinean case: *Petitioning and Creating Rights. Judicialization in Argentina*, Paper presented at the CONFERENCE ON JUDICIALIZATION OF POLITICS IN LATIN AMERICA 3 (ILAS-London, 2004).

[14] CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (Chicago, University of Chicago Press, 1998).

system.[15] The most important channel of influence for interest groups attempting to bring litigation before the courts involves creating a public climate in which judges are forced to respond: "Powerful groups from all points along the ideological spectrum now consider a sympathetic judiciary essential to the development and achievement of important policy goals."[16]

Such legal strategies often aim at wider *political* and *social* goals. Thus, "social mechanisms" may also *trigger* the use of horizontal mechanisms as they involve increased cost to the reputations of public officials and the threat of their being taken to court. In the words of Smulovitz and Peruzzotti, "societal mechanisms can influence the performance of horizontal ones by adding relatively persistent and newly societal organized guardians to the guardians."[17]

Why are actors using the courts? Studies have shown that the specific outcomes of judicialization depend on the way laws and courts interact with social and political conditions such as the level of political competition, the social and organizational capacities of the actors or the decision structure of the judiciary.[18] As a result, even though the relevance of judicialization in the region cannot be disregarded, we are lacking assessments of its effects on public policy, requiring analysis of the specific social and institutional context in which laws and courts operate.

The relationship between interest groups and the judiciary is one of the most significant areas of concern in the literature on the judicial process.[19] As the number of publications on interest group litigation has grown, a number of diverse explanations have been developed to explain why some groups use the courts more than others.[20] There are two sets of significantly

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15 "If one considers the tremendous expansion of the 'class actions' and 'public interest litigation' in the United States, of '*actions collectives*' in France, of '*Verbandsklagen*' in Germany, and more generally, of the phenomenon now called 'diffused interest' litigation,' one will recognize that a profound metamorphosis has been taking place not only in the traditional concepts and structures of the judicial process, but also in the very role of the modern judge". MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 553 (Oxford University Press, 1989).

16 MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS 71 (W. W. Norton, 1994).

17 Smulovitz & Peruzzotti, *supra* note 3, at 4.

18 Catalina Smulovitz, *Public Policy by Other Means. Playing the Judicial Arena*, *in* COMPARATIVE PUBLIC POLICY IN LATIN AMERICA (Susan Franceschet & Jordi Diez eds., University of Toronto Press, forthcoming).

19 Herman Pritchett, *The Development of Judicial Research*, *in* FRONTIERS OF JUDICIAL RESEARCH 33 (Joel Grossman *et al.* eds., 1969).

20 In their study, Scheppele and Walker use different arguments to describe when groups are likely to use courts: *a)* when they are at a political disadvantage in the electoral process; *b)* when they can frame its interests in terms of rights; *c)* when they have large organizational resources and networks; and finally, interest groups' use of the courts may depend

powerful variables in an interest group's decision to use the courts. On one hand, a set of *threshold rules* governing when groups can make use of the courts. On the other hand, the structures and strategies of the organizations themselves. For instance, if there is a large and important number of "interest groups" or parallel "social watchdog" organizations using the courts a means of influencing policy, an increase in the political role of high courts is likely to occur since it encourages judicial intervention in politics. This article will only analyze the first variable, studying the changes in the institutional settings to access high courts in the countries in question. Together with this variable, the article examines confidence in courts compared to that in other democratic institutions.

III. Public Recourse to High Courts in Costa Rica: The Social Implications of Legal Reforms

"The Sala IV has been a revolution in this country."

Personal Interview with Deputy Federico Malavassi, San Jose, Costa Rica, September 1, 2005.

Until 1989, politicians and citizens turned to the Costa Rican Supreme Court only on rare occasions and as a last resort. When they decided to seek litigation, the Supreme Court adhered to a narrow concept of judicial review, which did not encourage future litigation. In the 51 years between 1938 (when the Court solidified its power to exercise judicial review) and 1989 (when the Constitutional Chamber of the Supreme Court was created), few cases of unconstitutionality were filed with the Supreme Court.[21] This minimal involvement of the court in Costa Rican political and social debates produced a high level of judicial immobility. However, this situation radically changed when the 1989 judicial reform created the *Sala IV* [the fourth chamber] as a new chamber with constitutional functions within the Supreme Court. Individuals and groups no longer had to depend on the legislative process or mobilize a large number of affected people in collective action suits for the pursuit of rights.

Consequently, citizens began to recognize this new legal opportunity and the number of cases brought to court increased exponentially (see Figure 1).[22]

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more on the requirements of litigation than on the groups' specific agenda (*supra* note 8, at 160).

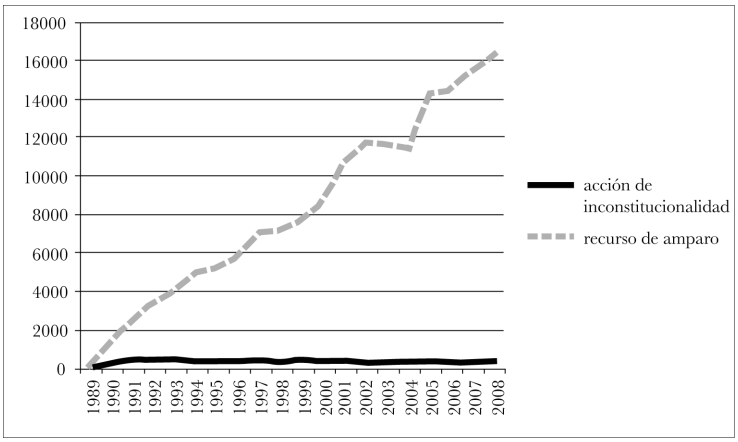
[21] Bruce M. Wilson & Juan Carlos Rodríguez Cordero, *Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics*, in Comparative Political Studies 245 (2006).

[22] In the 51 years before the creation of the constitutional branch of the Supreme Court,

In the first year after the reform, the total number of cases before the *Sala IV* increased by 529% (663% in *recursos de amparo*). Although the upsurge has been proportionally lower in recent years, it reached 17,966 cases in 2008, for a total caseload of over 195,517 (1989-2008).[23] The most important increase has been in *amparo* suits (*recursos de amparo)*, which in 2008 represented 90.9% of the total number of cases brought before the *Sala IV*.[24] Thus, we can observe a growth of the *Sala IV*'s role in politics as a mechanism of "social accountability," which reflects a change in the political calculations of both individuals and interest groups that approach this court instead of using the traditional political paths. As a direct consequence of the low cost of appealing to the *Sala IV,* coupled with confidence in courts, citizens began to make use of this new legal opportunity.

Legal strategy becomes an alternative to orthodox political participation.

FIGURE 1. EVOLUTION OF CONSTITUTIONAL LITIGATION RATES IN COSTA RICA (1989-2008)



only a total of 347 cases of unconstitutionality were filed with the Supreme Court while in the first two and a half years after the creation of the *Sala IV*, 756 cases were filed and 293 were resolved. JAIME MURILLO VIQUEZ, LA SALA CONSTITUCIONAL: UNA REVOLUCIÓN POLÍTICO-JURÍDICA EN COSTA RICA 73 (Guayacán, 1994).

[23] One of the most obvious problems is the long-term effectiveness of the Court given its continually escalating caseload. In principle, all cases are formally reviewed, but the Court is now using a panel to sift through cases and identify the most relevant ones. The cases are first reviewed by law clerks (*letrados*) who examine each case and decide on the case's appropriateness. However, this situation can lower the quality of the sentences and undermine the Court's credibility. *See* Roger Handberg *et al.*, *Comparing Activist National Courts: Hungary and Costa Rica*, Paper presented at the ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 9 (2001).

[24] *Amparo*, contained in Article 48 of the Constitution, guarantees everyone the right to appeal to the *Sala IV* against public or private actions involving a violation of the individual or social rights established in the Constitution (sections IV and V) and not already included in the *habeas corpus* provisions (the rights of personal integrity and freedom).

In the next section, I study the main factors that have aided in delegating power to Costa Rica's *Sala IV*: the change in institutional settings and the widespread public confidence in the judiciary compared to the rest of representative institutions.

1. *Legal Reforms*

The creation of the *Sala IV* in 1989 received widespread support in the legislature, as evidenced by the fact that the constitutional reform was approved in just three and a half months (with a margin of 43-6) when such amendments usually require several years before being passed.[25] This new chamber has the power to implement new directives and enforce existing ones more comprehensively because the *Sala IV* rules on all issues of constitutionality regardless of the actions taken by other branches of government, state-financed agencies or private individuals. The political actors, however, had underestimated this reform. Perhaps because national elites considered judges sufficiently constrained by a civil-law tradition, political actors were unaware of this new institution's real power and viewed it more along the line of symbolic politics rather than substantive in itself. This was, however, a mistaken assumption. In the words of Wilson and Handberg, "what disconcerted those plans was the fact that provisions of easy access to the Court (minimal procedural stops and no requirement for legal counsel) undermined the *status quo* orientation of the reformers."[26] The expansion in the use of judicial strategies in the first years after the creation of the *Sala IV* was made possible mainly by the reduction of the cost to access the court. Any citizen in the country (barring age restrictions) can present a claim directly to the *Sala IV,* which admits cases 24 hours a day, 365 days a year.[27] Claims can even be written in any language with no content restriction and lawyers are not required to submit an *amparo* appeal. These new rules have given interest groups and marginalized groups representation in the political arena, augmenting their political presence and share of power.[28]

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25 MURILLO VIQUEZ, *supra* note 22, at 40.

26 Bruce Wilson & Roger Handberg, *Opening Pandora's Box: The Unanticipated Political Consequences of Costa Rican Legal Reform*, Paper prepared for presentation at the MIDWEST POLITICAL SCIENCE ASSOCIATION 11 (Palmer House Hilton, Chicago, 1998).

27 For example, there is the case of a 10-year-old boy who filed a *recurso de amparo* concerning the tardiness of private school buses, arguing that this restricted his constitutional right to free education.

28 Since 1989, the *Sala IV* has ruled extensively and at times controversially on a broad range of issues including trade union matters, the rights of marginalized groups (gays or inmates, for example), environmental rights, taxes, etc., as well as on some cases with potentially important consequences for policy-making and economic decisions. For a full analysis, see MARTÍNEZ BARAHONA, *supra* note 10.

2. *Public Confidence in* Sala IV

The first factor that has aided in delegating power to the courts has been widespread public confidence in these courts compared to the rest of the representative institutions. As seen in Table 1, in the period of 1996-2001, the highest level of confidence Costa Rican citizens placed in institutions was held by the judiciary (44%). This high average has been sustained in the last two surveys (61% in 2004 and 53% in 2006), but increases when citizens express their confidence in the Supreme Court (62% in 2004 and 57% in 2006), rendering the judiciary as the institution with most credibility in the country.[29]

TABLE 1. CONFIDENCE IN COSTA RICAN DEMOCRATIC INSTITUTIONS

Institution	*Average Degree of Confidence 1996-2001 (%)*	*Degree of Confidence 2004*	*Degree of Confidence 2006*
National Government	33	58	53
Supreme Court	—	62	57
Judiciary	44	61	53
Congress	30	53	49

SOURCE: For 1996-2001: Latinobarómetro (average percentage over 1996-2001). Question: "Please, tell me how much confidence you have in each of the following groups, institutions or persons: a lot of, some, a little, or no confidence? (Here, the "a lot of" and "quite a lot of" confidence categories are combined). For 2004 and 2006 (media scale 1-100). The Americas Barometer by the Latin American Public Opinion Project (LAPOP), *www.Lapop Surveys.org*.

This confidence has also been reinforced by the role of interest groups in Costa Rican democracy, which has increased due to the low cost of legal strategy. The impact of the *Sala IV* in a country whose democracy has been called "the democracy of groups" in 1970s has been overwhelming.[30] The

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[29] While the percentage over the period of 1996-2001 uses the responses "a lot" and "quite" in the categories regarding confidence, the LAPOP data express grading on a scale of 1-100.

[30] The historical role of "interest groups" can be found in OSCAR ARIAS SÁNCHEZ, GRUPOS DE PRESIÓN EN COSTA RICA 76-78 (San José, 1971). Though their effectiveness has not been systematically studied, Wilson highlights how there is "evidence of cases where deputies have changed their policy positions in response to changes in public opinion or disruptive mass actions." BRUCE M. WILSON, COSTA RICA: POLITICS, ECONOMICS, AND DEMOCRACY 66 (Boulder, Lynne Rienner, 1998).

court has become a powerful instrument for interest groups that are now using the Court to challenge legislation they failed to change or deter during the policy-making process.[31] Furthermore, as explained above, significant changes in defining access and the expense to gain admittance into the Supreme Court have made petitioning the *Sala IV* a tempting option for politicians and citizens seeking national publicity.

Moreover, as the classic democratic institutions of participation such as referendums or plebiscites did not exist in Costa Rica,[32] constitutional justice has also served as a mechanism of citizen participation, opening an additional channel for controlling public institutions. According to *Sala IV* Judge Ana Virginia Calzada, the judiciary is still a politically "non-contaminated" institution and the *Sala IV* remains as the only institution which can solve problems of ungovernability fast.[33] As Professor Solís Fallas has stated:

> ...the country is in a situation of ungovernability in which the public institutions, as the Executive or Legislative Assembly, do not work. These institutions are not complying with the obligations and needs of the contemporary times. Thus, the citizens prefer to go to Sala IV because it provides solutions faster than the public institutions.[34]

As a result, the growth of the role of the *Sala IV* in politics as a mechanism of "social accountability" reflects a change in the political calculations of both individuals and interest groups that approach this court instead of using the traditional political paths. The efficiency of the Costa Rican Constitutional Chamber has inspired a new term, the *sala-cuartazo*, which refers to a threat of requesting an injunction. "*Te voy a poner un 'sala-cuartazo*'" ("to file a Sala IV-case") is now a common expression in a country where "everything is going to the *Sala IV*."

However, this "judicialization by the people" has also been reinforced by a change in the attitudes of *Sala IV* judges in terms of how they see themselves in the political system and the role they play in Costa Rican society. After the 1989 reform, *Sala IV* justices have been receptive to increased public expectations and this view has facilitated the court's more encompassing role in Costa Rican politics in the short term. As Judge Luis Pau-

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31 WILSON, *supra* note 30, at 66.

32 Only with the Law Number 8281 did the Assembly partially reform the Constitution to introduce the referendum (Article 102.9) on May 28, 2002. However, under pressure from the *Sala IV*, the Legislative Assembly is currently regulating the law of the referendum process.

33 Interview with Virginia Calzada, Magistrate, *Sala IV*, in San Jose, Costa Rica (Sept. 12, 2005). Translated from original Spanish by the author.

34 Interview with Solís Fallas, Law Professor, in San Jose, Costa Rica (Sept. 14, 2005). Translated from original Spanish by the author.

lino Mora points out: "...now judges have a political activity, not partisan but political. Although the majority of judges are embarrassed to accept it... we used to say that 'politicians have nothing to do with us'… but this is because we have no idea about what 'to be political' means."[35]

Sala IV magistrates also accept this new mandate and profit from the wider formal powers national elites have granted them. The *Sala IV* has invested in making people aware of their rights. As Handberg, Wilson *et al.* point out, "the *Sala IV* spent considerable funds educating individuals regarding their rights and actively encouraging and facilitating presenting their cases to the court."[36] The Court embarked on massive publicity campaigns explaining the contents of the Constitution and potential judicial remedies that citizens or anyone else in Costa Rica can take hold of to resolve those problems (one example is the many large posters explaining rights and remedies that were placed in several public buildings). Very soon, this court also proved that it was willing to protect the rights of all citizens, even in instances when it might embarrass the government. To give an example of this, the "Don Trino" case was symbolic.[37] Costa Ricans quickly recognized the *Sala IV* as an efficient and effective arbiter to solve their problems, which shows how far symbolism is often critical in establishing new political contexts for institutions: "The publicity was clearly disproportionate to the practical effect, but it accomplished the purpose of sending a message to the populace and other branches of the government that the Sala IV was in business."[38]

These findings confirm Smulovitz's theory arguing that judicialization is not only related to *ex ante* changes in legal culture, but rather to the combined effects of changes in opportunity structures for claim-making and the earlier emergence of a support structure for legal mobilization. In Costa Rica, a change within the judicial institution has triggered a change in the use of constitutional litigation, but the activist attitude in Constitutional Chamber magistrates has also influenced their assuming a more proactive role in politics. This is because Courts always operate "within the bound-

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35 Interview with Luis Paulino Mora, Magistrate, *Sala IV*, in San Jose, Costa Rica (Aug., 2003). Translated from original Spanish by the author.

36 Roger Handberg *et al.*, "Comparing Activist National Courts: Hungary and Costa Rica," Paper presented at the ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 8 (2001).

37 Symbolic for its publicity, the case of Trinidad Ortega Fuentes (commonly known as "Don Trino"), a snow cone (*copos)* vendor who had sold his wares at the street corner of the Legislative Assembly building for 25 years, successfully appealed to the *Sala* to defend his right to sell there despite the security measures implemented for the Summit of the Americas celebrated in San Jose (Resolution Nº 0075-89).

38 Handberg *et al.*, *supra* note 36, at 10.

aries of both the law and the social expectations."[39] All these factors explain the increase in public recourse of the Courts, rendering judges as "new politicians in robes."

IV. Public Recourse to the Courts in Guatemala: A Quest to Strengthen the High Courts

> "*This peace settlement, which brought an end to 36 years of armed conflict, aimed at laying the foundations for a democratic Rule of Law and transform an authoritarian, discriminatory and highly punitive legal tradition*."[40]

Guatemala is a good case study for testing the expansion of the use of judicial strategies because of the country's long history of injustice. Despite this, there has been a growth in the mechanism of social accountability. Less than ten years ago, human rights in Guatemala were systematically violated by the State.[41] The callous behavior of the judiciary in the defense of human rights during (and after) the military regime made Guatemala one of the more extreme cases of judicial inactivity in the Latin American region.[42] Guatemala currently has a constitutional government and democratically-elected presidents, yet one of the most formidable obstacles for the consolidation of democracy is the persistent absence of an effective rule of law. Therefore, strengthening the judiciary represents one of the most important struggles in contemporary Guatemala as it entails unavoidable complexities that include problems of racism and discrimination against the majority of the indigenous population, as well as the judiciary's failure to punish the perpetrators of human rights violations.

However, despite this scenario, the public recourse to high courts has increased in Guatemala after the Peace Accords were signed in 1996. Citizens have begun to see recourse to the courts as part of a general strategy of political action. Specifically, the number of petitions based on the constitu-

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39 *Id.*

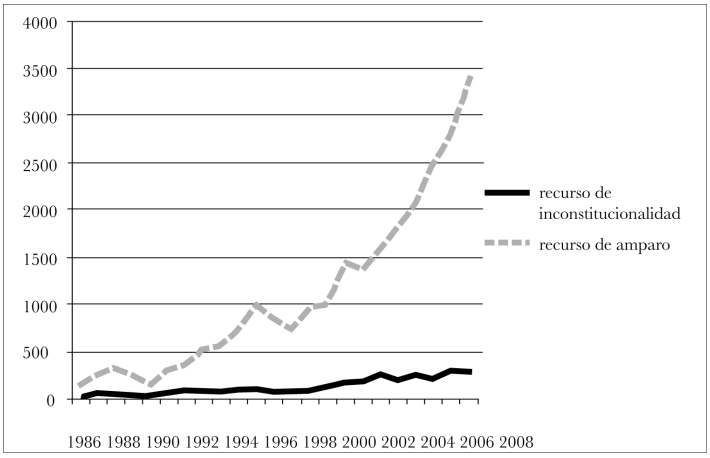
40 Rachel Sieder, *Renegotiating 'Law and Order': Judicial Reform and Citizens Responses in Post-War Guatemala*, *in* Democratization and the Judiciary: The Accountability Function of Courts in New Democracies 141 (Siri Gloppen *et al*. eds., 2004).

41 The almost forty years of this regime were characterized by political exclusion, repression and extreme state violence: "the human cost of this model were exceptionally high —over 150,000 people killed, over 50,000 disappeared, a million people displaced and scores of communities destroyed in the counter-insurgency offensive of the early 1980s." Rachel Sieder, Guatemala after the Peace Accords 245 (1998).

42 Kenneth Anderson, Maximizing Deniability: The Justice System and Human Rights in Guatemala 9-10 (International Human Rights Group, 1989).

tional right of the *amparo* suit has risen steadily since 1986, and is now approximately 74.8% of the Constitutional Court's workload (the figure for 2008, see Figure 2).[43] These data also show the growing trend in the number of cases filed before the Constitutional Court, even against high-level political members through the "*amparo uni-instancial o de única instancia*."[44] Much in the same way, there is also an increase in the number of times rulings of unconstitutionality have been served.[45]

FIGURE 2. EVOLUTION OF CONSTITUTIONAL LITIGATION IN GUATEMALA (1986-2008)



SOURCE: Statistical Section. Constitutional Court, Guatemala. Data provided by Julio César Cordón Aguilar.

As in the Costa Rican case, we can identify two key causal variables: a change in institutional settings on one hand, and the confidence towards the Supreme Court compared to the rest of democratic institutions on the other.

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43 Individuals are granted the right to file a "constitutional complaint" if they believe one of their fundamental rights has been violated. In the Guatemalan case, there is an extensive procedure to access the *recurso de amparo*, which can be exercised by anyone (*Ley de Amparo*, Article 8).

44 This particular *amparo* can only be filed against the president or vice-president of Guatemala, the Congress or the Supreme Court of Justice. It is not open to appeal and can only be filed before the Constitutional Court.

45 The "unconstitutionality action" can be reduced to a specific case (here, it may only be sought by the aggrieved) or against norms that seek an *erga omnes* and *ex nunc* effect (here, the plaintiff can only be the *Junta Directiva del Colegio de Abogados*, *Ministerio Público*, *procurador de Derechos Humanos*, or any person assisted by three lawyers and the *procurador General de la Nación)*.

1. *Judicial Reform after the Peace Accords*

Since the Peace Accords in Guatemala there has been a propensity to "judicialize" conflicts before the Constitutional Court.[46] More than a decade ago, Mather pointed out the importance of political factors, including "democratization," on the external environment of courts.[47] Although the impact of "democratization" is difficult to assess in politically unstable countries, it is possible to explore the judicial implications of the political moments that mark the formal transition to democracy.

The Guatemalan case involves analyzing whether there have been changes in constitutional litigation rates after the signing of Peace Accords in 1996. Figure 2 shows how the number of cases filed before the Constitutional Court has increased considerably since then. This result highlights how democratization has a significant positive correlation on constitutional litigation rates. Moreover, if the aim of the Peace Accords was to transform political life and change the actors and rules of the game of power, we should expect increased constitutional litigation because of the strategic use of courts as actors with new power in the political arena. Domestic prosecutions brought before the Guatemalan courts have also been enabled by the new Code of Criminal Procedure (*Código Procesal Penal* or CPP), which includes the provision for civic actors (relatives of victims and NGOs) to assume the role of co-plaintiff (*querellantes adhesivos*) in key human rights cases.[48] It is possible to find many examples: the representation of *Río Negro* massacre survivors by the Human Rights Action Center (*Centro de Acción Legal para los Derechos Humanos*, CALDH) or *Dos Erres* massacre survivors by the Relatives of the Detained-Disappeared organization (FAMDEGUA). These organizations have also had an important role in defending the independence of High Court judges.[49] In 2001, as a result of pressure from the *Movi-*

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[46] María Inés Bergoglio, *Argentina: The Effects of Democratic Institutionalization*, *in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION (Lawrence Friedman & Rogelio Pérez-Perdomo eds., Stanford University Press, 2003).

[47] Lynn Mather, *Dispute Processing and a Longitudinal Approach to Courts*, 24 LAW & SOC'Y REV. 357-371 (1990).

[48] Human rights organizations, such as the Mack Foundation (*Fundación Myrna Mack*, FMM), the Human Rights Legal Action Center (*Centro de Acción Legal para los Derechos Humanos*, CALDH), the Mutual Support Group (*Centro de Apoyo Mutuo*, GAM), the National Confederation of Widows (*Confederación Nacional de Viudas de Guatemala*, CONAVIGUA) and the Relatives of the Detained-Disappeared in Guatemala (*Familiares de los Detenidos-Desaparecidos de Guatemala*, FAMDEGUA) and elite civic groups like the Families and Friends against Delinquency and Kidnapping (*Familiares y Amigos contra la Delincuencia y el Secuestro*, FADS) and Distressed Mothers (*Madres Angustiadas*), have made technical alliances to lobby these issues (Sieder, *supra* note 40, at 158).

[49] As an example, in 1999 they convinced then UN Special Rapporteur Mr. Coomaraswamy to present a report on the Independence of Judges and Lawyers in the Country (1999/31).

miento Pro Justicia for the adoption of a transparent process, the Supreme Court (one of the appointed institutions) established a public selection process to elect Supreme Court magistrates.[50] Furthermore, there are organizations called *fiscalizadoras* [watchdog] —the Relatives of the Detained-Disappeared in Guatemala (*Familiares de los Detenidos-Desaparecidos de Guatemala*, FAMDEGUA); Families and Friends against Delinquency and Kidnapping (*Familiares y Amigos contra la Delincuencia y el Secuestro*, FADS); the Mutual Support Group (*Centro de Apoyo Mutuo*, GAM), among others, that have become pressure groups with strong opinions about the judicial process.[51]

In Guatemala, we should also mention the importance of the international factors driving judicialization. As Pásara has observed, the United Nations (UN) was the principal agent in drawing up detailed proposals for change in Guatemala.[52] In 1997, the UN set up the multi-sector Commission for the Strengthening of Justice, according to the terms of the September 1996 Agreement to augment judicial independence and reduce corruption, professionalize the judiciary, guarantee basic rights, increase access to justice and make it more multicultural. These recommendations were incorporated into the judiciary's five-year Plan for Democratization (*Plan de Modernización del Organismo Judicial*), approved in mid-1997 and supported, among others, by the World Bank.[53] The main advice was:

a) To ensure access to justice for Guatemala's largely indigenous population ("multiculturalizing" the justice system). However, rejecting the recognition of indigenous peoples' right to use customary law in the constitutional referendum of March 1999 meant that local community conflict resolution procedures are not recognized by courts.
b) To mandate that budget allocations to the justice sector between 1995 and 2000 double and that it massively extend its institutional coverage throughout the country.[54]

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[50] LUIS PÁSARA PAZ, ILUSIÓN Y CAMBIO EN GUATEMALA. EL PROCESO DE PAZ, SUS ACTORES, LOGROS Y LÍMITES 209 (2003). Some social organizations with objectives related to justice —such as *Madres Angustiadas*, *Fundación Myrna Mack* (FMM), *Familiares y Amigos contra la Delincuencia y el Secuestro*, *Movimiento Pro Justicia* and the *Instituto de Estudios Comparados de Ciencias Penales de Guatemala*— criticized the process of high courts appointments, and voiced their disapproval of the selection of some of the candidates.

[51] Yolanda Pérez, *Informe sobre la independencia judicial en Guatemala*, Paper presented at the CONFERENCIA INTERNACIONAL: PERSPECTIVA GLOBAL, REGIONAL Y NACIONAL 29-39 (Lima, Peru, November 2001).

[52] Pásara, *supra* note 50.

[53] For a deeper analysis, see Sieder, *supra* note 40, at 143.

[54] Between 1994 and 1999, the total number of judges and magistrates rose from 400 to 753 (Guatemala: Informe de Desarrollo Humano 2000 [Guatemala, PNUD, 2001]). Some 102 new courts were established after 1996, along with 35 positions for legal interpreters. Offices of justices of the peace (*juzgados de paz*), which covered only two thirds of the national territory at the end of the armed conflict, are now present in all 331 of Guate-

c) To reform the criminal procedures by introducing a framework for criminal justice based on a *garantista* model, to ensure due process and human rights guarantees for those detained.

These changes have implied an important overhaul of the legal culture: rather than simply a means to punish, it was hoped that the courts would come to be seen as means to secure accountability and restitution.

As seen in this section, since the 1996 Peace Accords, there has been an evident increase in the number of cases brought before the courts. The Peace Accords have tried to reinforce the judicial role by means of judicial reforms. Indeed, institutional weakness has also allowed civil organizations and NGOs to "use" the Court as a mechanism of "social accountability," turning these groups into a potent lobbying force in the courts.

2. *Regaining Confidence in the Judiciary*

Guatemala also illustrates, however, how the paradox of increasing judicial claims can and does coexist with low credibility towards the judiciary. This low credibility in the judicial system has deep historical roots in Guatemala due to its historical legacy in addition to politicians' ability to avoid accountability by securing favorable court rulings. While this negative perception is common towards all Guatemalan institutions during the transition period of the judicial institutions (1996-2001), the judiciary has maintained a higher level of confidence (27%) in comparison with other democratic institutions, such as Congress (24%). This situation has been confirmed in the most recent public opinion surveys (2004, 2006 and 2008): confidence towards the judiciary, the Supreme Court and the Constitutional Court is still higher than that towards Congress (see Table 2).

This slightly higher confidence towards the judiciary in relation to the other democratic institutions could help partially explain the increase in the number of cases brought before the high courts. However, we can find an additional answer, provided in the literature on legal mobilization that reinforces the idea of the high courts as a causal factor of the increase in litigation. This is because legal disputes can also be used to achieve symbolic legitimacy, institutional acknowledgement of the claims, and political and social leverage for the petitioners.[55] As Smulovitz points out, an increase in the rates of litigation can be a sign of a process of legal mobilization, rather

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mala's municipalities and each departmental capital now has specialized criminal, civil, family and labor courts.

55 Michael Mc Cann, *Legal Mobilization and Social Reform Movements: Notes on Theory and its Application*, *in* STUDIES IN LAW, POLITICS AND SOCIETY 11 (1991).

than an indication of the trust in the abilities of the judiciary to solve disputes.[56] This may well be the case of Guatemalan high courts.

TABLE 2. CONFIDENCE IN GUATEMALAN DEMOCRATIC INSTITUTIONS

Institution	*Average Degree of Confidence 1996-2001 (%)*	*Degree of Confidence 2004*	*Degree of Confidence 2006*	*Degree of Confidence 2008*
National Government	29	49,4	43,9	50,1
Supreme Court	—	43,9	45,4	42,8
Constitutional Court	—	46,5	43,4	41
Judiciary	27	44	46	44,9
Congress	24	38,3	40,6	40,2

SOURCE: For 1996-2001: Latinobarómetro (average percentage over 1996-2001). Question: "Please, tell me how much confidence you have in each of the following groups, institutions or persons: a lot of, some, a little, or no confidence? (Here the "a lot of" and "quite a lot of" confidence categories are combined). For 2004 and 2006 (media scale 1-100) The Americas Barometer by the Latin American Public Opinion Project (LAPOP), *www.Lapop Surveys.org*.

It can be expected, as Smulovitz says of the Argentinean case, that despite the negative perceptions of the performance of the judiciary, in Guatemala "the courts will remain a viable space for engaging in political competition and obtaining political attention."[57] This means that although the "transition to democracy is in itself an indicator of changes in legal culture"[58] and furthers the wider use of judicial strategies, social conditions and the way institutions have driven these changes will condition the significance of an effective judiciary.

In this sense, Guatemalan high courts are being legitimated through the activism of interest groups, NGOs or parallel "social watchdog' organizations"[59] (like the large civilian and humanitarian MINUGUA mis-

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56 Smulovitz, *supra* note 13, at 3.

57 Catalina Smulovitz, *The Discovery of Law: Political Consequences in the Argentine Case*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY 267 (Yves Dezalay & Bryant Garth eds., Michigan University Press, 2002).

58 Bergoglio, *supra* note 46, at 56.

59 These organizations are formed by institutionalizing certain denouncing movements so as to become more permanent organizations that oversee the behavior of certain public officials in specific policy arenas. The efforts of some of these organizations originally centered on claims of human rights violations. Recently, some new organizations have emerged

sion).[60] Thus, the increase in litigation rates is also the result of empowering these social groups as overseers of the government's implementation of the Peace Agreements. Therefore, interest groups have become an important "accusation apparatus" in a country where political institutions are fragile. As Ginsburg[61] states, "if the court is not seen as an effective forum for advancing political and legal claims, plaintiffs are not likely to bring actions to it."

Thus, findings suggest that Guatemalan public expectation of justice after the Peace Accords and the activism of interest groups have increased the rate of constitutional litigation despite the negative image of the high courts. This implies the re-activation of a judiciary that had in many ways ceased to function, as well as the challenge of changing traditional perception of a judicial system as passive, discriminatory and "ethnicized."

Taking into account the low confidence in representative institutions and the ill-functioning channels of participation, it could be expected that courts will continue to be a viable forum for obtaining political outcomes. Certainly, the constant increase in the caseload may indicate a shift in the country's legal culture.

Guatemala, however, confounds expectations about the effect of institutional strength and contradicts the expectation of an incipient development of a modern legal culture with the judiciary playing an important role in claims of rights violations. A more in-depth analysis reveals complex aspects that influence the effective role of judges as a mechanism of "social accountability."

There is enough evidence of the intimidation, constant harassment and threats against judges in Guatemala that directly undermines their independence.[62] Moreover, formalism in judicial performance (as a part of its

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and some of the older ones have expanded the scope of their activities to include additional concerns of public interest (Smulovitz & Peruzzotti, *supra* note 3, at 4).

60 From September 1994 to 2004, the UN General Assembly decided to establish a Human Rights Verification Mission in Guatemala acting on a recommendation by the Secretary-General that such a mission would contribute to putting a stop to a persisting pattern of human rights abuse. While retaining its acronym MINUGUA, this peacekeeping mission's name was changed to *United Nations Verification Mission in Guatemala* on April 1, 1997, to reflect the new mandate: to verify agreement on the definitive cease-fire between the Government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), signed at Oslo on December 4, 1996.

61 Ginsburg, *supra* note 5.

62 In 2001, the *Association of Judges* indicated that 40 percent of all justice operators had been threatened. That same year, a new office was set up as part of the Public Ministry to deal specifically with threats against justice sector workers (*Fiscalía de Amenazas*) and within two months of its creation, 55 cases had been reported to this office (data from *Fundación Myrna Mack*, 1999). This is largely due to the absence of civilian control over the military, which also determines the role of the high courts in Guatemala. For a more detailed discussion, see Martínez Barahona, *supra* note 10.

reactive and passive legal culture) conditions judges to provide an institutional voice for social groups which may otherwise have limited access to the political process, as happens with indigenous people:

> ...judges tend to focus on applying the law to the letter, rather than on creative interpretation of existing statutes and constitutional articles. In fact most judges and lawyers are unwilling to accept constitutional principles as law, arguing that implementing or secondary legislation is necessary in order to make them justiciable.[63]

For all these reasons and despite the attempts to reinforce the role of the high courts after the peace process, the pressure placed on judges, the impunity of high officials and a reactive role persist as problems that affect the political role and the performance of these judges as a democratic institution controller. In this sense, Guatemalan judges have become more relevant as a political actors, but not significantly more efficient. Judicial overview is being exercised more than before, but it seems to be more of a response to the increased number of claims coming before high courts, rather than an indicator of any sustained pattern of judicial activism as such.

V. Key Findings and Conclusions

As Alivizatos points out, high courts are often "cast as veto-players institutions designed to protect democracy from the excesses of executive power, majority tyranny, corruption, and a myriad of social and political ills."[64] Today, in new democracies around the world, some courts have exceeded expectations by being "surprisingly effective in policing the contours of the new regimes."[65] This "rejuvenation" of national courts experienced in many countries (often as a result of democratization) has also opened up a different type of opportunity structure, namely "legal opportunity."[66] This is because High Court decisions also provide a convenient outlet that enables citizens to bring issues which were previously ignored or neglected by the political system out into the open.

This article begins to address the fact that high courts today are not only political, but also more active in a country's social and political life.

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63 Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, Draft paper prepared for the workshop entitled Courts and the Marginalized: Comparative Experiences (Universidad Diego Portales, Santiago de Chile, 1-2 December, 2005).

64 Nicos Alivizatos, *Judges as Veto Players*, *in* Parliaments and Majority Rule in Western Europe (H. Doring ed., St. Martin's Press, 1995).

65 James L. Gibson & Gregory Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 Journal of Politics 2 (2003).

66 Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 Journal of European Public Policy 238-255 (2002).

Throughout the analysis of the evolution of caseload litigation in Costa Rica and Guatemala, this article has examined the factors that influence increased legal litigation. I have found strong evidence that institutional changes may result in the reinforcement of Courts as institutions that can serve as strategies for claiming rights. In Costa Rica, the growing frequency of the use of the Court to pursue rights has led to the creation of the *Sala IV,* a clear mechanism of "social accountability." In Guatemala, interest group activism illustrates a good example of the use of judges as an instrument of "social accountability."

My analysis also suggests that the increasing number of high courts decisions, which avoid the deficiencies of party politics in pluralistic democracies, also provides a convenient outlet that enables citizens to bring forth issues that were ignored or neglected by the political system. In this sense, the courts are a viable forum to obtain political outcomes. Within this context, I agree with Koopmans's argument that the failure of democratic processes to work efficiently has led to a growth in judicial interference.[67]

However, as shown throughout this analysis, the change in the institutional settings, public confidence in the judiciary or the role of interest groups, enhanced by the low cost to access the court, are still not enough to explain judges' increased activism in the political arena. It is also necessary for judges to be sensitive to social demands and willing to take potentially controversial decisions on political, social or economic issues. Judges have to assume public political stances and enter the political arena autonomously, directly and unconditionally to resolve on instances of political immobility or power stalemate. Without giving judges a proactive role, it is not possible for courts to emerge as active participants in the political process offering new opportunities to citizens, social movements, interest groups or politicians. This is one of the variables that needs to be explored further because, as Taylor and Kapizewsky point out, "for the most part, we know little about the backgrounds, ideologies, or preferences of the region's judges and justices, and have barely begun to explore the politicization of the region's judiciaries or the implications of that dynamic for those who populate Latin American courts."[68]

More empirical research is needed on the judicialization by the people. Variations in the use of the Courts as a mechanism of social accountability demand further details on the underlying mechanisms. Nevertheless, as the analysis of the Costa Rican and Guatemalan cases has shown, we are more confident to hypothesize that the failure of democratic institutions to work efficiently is one the main causes of the growth of judicial interference and the new role of judges in contemporary politics.

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67 THIJMEN KOOPMANS, COURTS AND POLITICAL INSTITUTIONS. A COMPARATIVE VIEW (Cambridge, Cambridge University Press, 2003).

68 Diana Kapiszewski & Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, *in* PERSPECTIVES ON POLITICS 765 (Cambridge University Press, 2008).

Recibido el 27 de enero de 2010 y aceptado
para su publicación el 6 de abril de 2010.

MLR Mexican Law Review
New Series
VOLUME III
Number 1

THE COUNTER-MAJORITARIAN DIFFICULTY: BICKEL AND THE MEXICAN CASE*

Mauro Arturo RIVERA LEÓN**

Quis custodiet custodes?

ABSTRACT. *In this article, I analyze the counter-majoritarian difficulty and examine how it manifests itself in the Mexican case. I first summarize the problem originally formulated in Alexander Bickel's work "The Least Dangerous Branch." I then present some of the main objections against judicial control that have found their way into the debate surrounding the counter-majoritarian difficulty and give an overview of the main defenses of judicial control over the constitutionality of laws. Subsequently, I argue that given the particular nature of Mexico's history and its constitutional court, the debate on the antidemocratic nature of these control mechanisms has been and will be less intense than the one surrounding the U.S. Supreme Court and judicial review. I also analyze the different types of counter-majoritarian decisions regarding constitutional control which have been made in Mexico.*

KEY WORDS: *Countermajoritarian difficulty, judicial review, Constitutional Tribunal, democracy.*

RESUMEN. *En este artículo se analiza el argumento "contramayoritario" y se examina su manifestación en el caso mexicano. Inicialmente se plantea la formulación original del programa realizada por Alexander Bickel en "The Least Dangerous Branch". Posteriormente se presentan algunas de las principales objeciones contra el judicial review, que encuentran su lugar en el debate del argumento contramayoritario; se analizan de forma somera las principales*

* I would like to give special thanks to Dr. Diego Valadés for his stimulating comments on the ideas discussed in this article and his helpful thoughts on American democracy. Also I would like to thank the anonymous reviewers of the MEXICAN LAW REVIEW. Finally, I am especially in debt with my father, Héctor Rivera: without his help this article would not have been possible.

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defensas del control jurisdiccional de constitucionalidad de las leyes. De forma subsecuente, se argumenta que dada la naturaleza particular de la historia de México y su tribunal constitucional, el debate del caso mexicano ha sido y será menos intenso que el de su contraparte en Estados Unidos en relación con el judicial review. Finalmente se analizan los diferentes tipos de decisiones contramayoritarias en relación con el control jurisdiccional realizado por el tribunal constitucional mexicano.

PALABRAS CLAVE: *Argumento contramayoritario, judicial review, Tribunal Constitucional, democracia.*

TABLE OF CONTENTS

I. IN LIMINE

This article discusses the counter-majoritarian difficulty and applies it to the Mexican case. I will argue that there is not a single legitimating cause, but rather a conjunction of reasons that legitimize the exercise of jurisdictional control of constitutionality. I try to demonstrate that this conclusion is valid as a general idea and as a concrete legitimating defense in the Mexican case. I will try to demonstrate that the Mexican case can be inserted in the counter-majoritarian discussion, but given the nature and particularities of the Mexican system the discussion has a different quantity and quality. I also argue that there are numerous cases in the Mexican system where judicial counter-majoritarian decisions prevail.

The article is structured in the following manner: In the present section (I), I present the historical background of the counter-majoritarian difficulty and some of the circumstances which increased its interest in U.S. democratic theory. In (II) I carry out a review of the counter-majoritarian discussion and the authors involved in it using as a departure point the analyses of Ferreres and Friedman. In (III) I study the Mexican case arguing that the differences in history and function of Mexico's constitutional tribunal have produced a divergence in the nature of the counter-majoritarian argumentation. I analyze differences in the Mexican context and different types of counter-majoritarian decisions in Mexican constitutional process. Finally some conclusions are provided in (IV).

Judicial control over constitutionality is widely accepted nowadays; but this was not always the case. In the history of the expansion of judicial control, two defining moments stand out. The first is the famous 1803 Marbury v. Madison decision in which the U.S. Supreme Court established judicial supremacy. The second appears in 1920 when the first Constitutional Court of Austria began operating using Kelsen's model. There are however very important differences between the Kelsenian model and the U.S. judicial review. One of the main differences is marked by the circumstances surrounding the appearance of judicial review. While Kelsen's court was a product of a carefully scrutinized academic discussion about safeguarding the constitution,[1] in the U.S. judicial review was a result of jurisprudence, constitutional doctrine and politics.

Thousands of pages have been devoted to explaining, studying, analyzing and debating Marbury v. Madison. In this paper, I will not repeat what others have already done in a meticulous manner.[2] I will however describe the most relevant facts of Marshall's decision to better understand the nature of the countermajoritarian difficulty.

Appointing John Marshall as Chief Justice of the United States Supreme Court was a clear measure outgoing President John Adams took in an effort to restrict and limit incoming President Thomas Jefferson's political powers on assuming office. While in power, the Federalist-controlled Congress passed the Judiciary Act of 1801 which, among other things, increased the number of circuit courts, reduced the number of Supreme Court judges and gave the president the authority to appoint justices of the peace and federal judges. However, given the number of vacant positions, Adams's government was not able to deliver all commissions in time and simply assumed that the new Secretary of State James Madison would see that the corresponding documents were delivered. One of the newly appointed justices of peace, William Marbury, a staunch supporter of Adams, had been appointed justice of the peace for the District of Columbia and did not receive his commission before Jefferson's inauguration. Legally maneuvering in an obvious attempt to counteract Adams's strategy, Jefferson's government refused to deliver the commissions under a Judiciary Act of his own (1802).

When Marbury judicially pursued what he considered his right, recently appointed Chief Justice —and still acting Secretary of State— Marshall

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[1] For an excellent study on this discussion, See LETIZIA GIANFORMAGGIO, ESTUDIOS SOBRE KELSEN (2002). For instance, in the first essay of the book, Gianformaggio provides excellent comments on the discussion between Kelsen and Schmitt.

[2] For a detailed analysis, see Margaret Kelly, *Marbury v. Madison: An Analysis*, 1 H.C.Q.R. 58 (2005) (explaining the impact of the decision); John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) that describe the importance of Marbury v. Madison as constitutional adjudication and the modern conceptualization of judicial review.

faced a terrible dilemma:[3] either he decided in favor of Madison and therefore have the Court yield to the politically dominant ideology or of Marbury with the knowledge that the Supreme Court's decision would hardly be enforceable and the court's role as the final arbiter of the law would be both jeopardized and severely questioned. The court declared Section 13 of the Judiciary Act of 1789 unconstitutional and ruled that the court did not have binding authority over writs of mandamus.[4] In John Marshall's concluding words, the institution of judicial review was born:

> So, if a law [*e.g.*, a statute or treaty] be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the Constitution, and the Constitution is *superior* to any ordinary act of the legislature, *the Constitution, and not such ordinary act, must govern the case* to which they both apply.[5]

Marshall's creation, or rather the court's *recognition* of judicial review, did not come easily. At first glance, Marshall's arguments seem logical. The Constitution is the basis of the U.S. legal system and therefore anything contradicting it should be treated as secondary. However, problems began to arise once the court used judicial review to invalidate federal legislation. How can a decision taken by a small group of justices prevail over the will of an entire country as expressed by their legitimate representatives?

The most elaborate version of the counter-majoritarian difficulty —the argument of the antidemocratic nature of judicial review— can be found in Alexander Bickel's classic book *The Least Dangerous Branch*. Bickel's argument sees judicial review as a counter-majoritarian force within the American system. In Bickel's opinion, Marshall tried to elude this difficulty by using the people and the nature of the Constitution as the grounds for the legitimacy of judicial review. Bickel's main point was that when the court exercised judicial review it was: "...[N]ot on behalf of the prevailing majority,

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[3] The problem was much more complex for Marshall since the commission Marbury was claiming had been signed by Marshall himself when acting as Adam's Secretary of State.

[4] Needless to say, Jefferson disagreed with the Court's decision. In his opinion, defending such a doctrine would be accepting the rule of judges over the Rule of Law. In our personal understanding, as a Democratic-Republican, Jefferson displayed much more faith in the people than his counterpart Adams. He believed a democracy could be improved by simply adding mechanisms of direct democracy. His disapproval of Marshall's decision was not due to a specific philosophical doctrine of constitutional adjudication, but rather was based on a different understanding of the meaning of the word *democracy*.

[5] *5 U.S.* (1 Cr.) at 177-178 (emphasis added).

but against it."[6] Alexander Bickel's argument accusing judicial review of being antidemocratic was the clearest case against it made in a long time.[7] By the time Bickel's book was published, the U.S. Supreme Court had produced a number of controversial decisions, enough to attract the attention of politicians, academics and members of the judiciary. Among these decisions were Marbury v. Madison,[8] Dred Scott v. Sandford,[9] the decisions invalidating New Deal legislation[10] (and Franklin D. Roosevelt's "court-packing plan"),[11] Brown v. Board of Education[12] and of course

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[6] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (2nd ed., 1986).

[7] Many arguments have been used to discredit judicial review, which by nature is greatly influenced by politics, and has been therefore subject to attacks from various political branches.

[8] 5 U.S. (1 Cranch) 137 (1803).

[9] 60 U.S. (19 How) 393(1856). This decision had serious political implications that ultimately contributed to the U.S. Civil War. It was severely criticized, especially in the North, and was based on countermajoritarian terms. The court's argument that people of African descent brought to the United States as slaves and their descendants were not protected by the U.S. Constitution and could never be U.S. citizens was an opinion held by a small portion of the population. The Court's decision presumably went against the majority. See for example, Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT. L. REV. 97 (2007), which basically argues the importance of Scott v. Sandford as one of the detonators of the Civil War; see also Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261 (2000). Finkelman (261) calls Scott v. Sandford "*the most politically divisive decision of the Supreme Court in our history*" and analyzes the implications of all the circumstances prior to the Civil War, as well as why this decision is often referred to in U.S. constitutional law.

[10] A detailed explanation of this topic would be so extensive that several volumes could be written on it. Franklin Delano Roosevelt, the 32nd president of the United States (1933-1945), tried to offset the Great Depression in the United States with a series of policies called "The New Deal." The Court systematically struck down all the New Deal programs, declaring them unconstitutional. This led to an open confrontation between Roosevelt and the Supreme Court, which ultimately resulted in various attempts to undermine the court's autonomy (mainly the unsuccessful Judiciary Reorganization Bill of 1937, often called the court-packing plan). In the end, the Court became much more accepting of Roosevelt's policies and gradually reversed its decisions. After serving four consecutive terms in office, the only president to ever do so, Roosevelt had appointed eight of the nine Supreme Court justices. During this period, the countermajoritarian argument was frequently used to question the court's conservative ideology, which was notoriously at variance with the prevailing politics of the time.

[11] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty Part Four: Law's Politics*, 148 U. PA. L. REV. 971. On pages 973-981, Friedman gives a detailed description from a historical perspective of the New Deal legislation, the court-packing plan and the problems between Roosevelt and the Supreme Court, as well as reasons why certain aspects of the court-packing plan failed.

[12] 347 U.S. 483 (1954). This and the Baker v. Carr decisions are considered two landmark cases of the Warren Court. For an in-depth study of Brown v. Board of Education,

Baker v. Carr.[13] The common denominator in all these cases was that the court made a controversial decision which affected the entire country, so much so that the opposing side could affirm that it represented the opinion of the majority; therefore the court supposedly was acting against the will of the majority. In some cases, the opposition made this claim without it being precisely true. For example, Brown v. Board of Education was a decision that was widely accepted and therefore not countermajoritarian despite the arguments against it (mainly from the Southern states). However, decisions like the systematic invalidation of the New Deal legislation brought a series of critiques of the lack of the Court's legitimacy to decide against a firm majority.

The peculiar nature of the critique of counter-majoritarianism must be kept in mind. Its main objection does not center on the fact that the court's decision overrides a majority that theoretically represents the will of the people. If that were the only objection, then other counter-majoritarian controls, such as the power of veto in most presidential and parliamentary systems would be severely questioned. In considering mechanisms of counter-majoritarian control,[14] the veto has not received even half of the attention given to judicial review.[15]

See Richard Delgado and Jean Stefancic, *The Racial Double Helix: Watson, Crick and Brown v. Board of Education*, 47 HOW. L. J. 476 (2004), in which the importance of Brown v. Board of Education is discussed and compared to the discovery of DNA (476).

13 369 U.S. 186 (1962). Interestingly enough, this case was decided the year Alexander Bickel's book was published.

14 A simple example would be that of an elected president with 35% of all the effective votes with the rest of the effective votes (65%) divided among the other parties. If 40% of all the ballots were invalidated due to absenteeism, the president would have less than 27% of all possible votes, and yet would be able to exercise the power of veto. The nature of the veto is unquestionably countermajoritarian. I am indebted to Dr. Diego Valadés for this idea. Dr. Valadés argues that given the fact that the veto and jurisdictional control of the constitutionality of laws share the same countermajoritarian characteristics, there is something that makes constitutional justice substantially different from the veto so as to attract much more attention.

15 The institution is quite interesting and many analogous conclusions may be drawn from a careful study of the structure of the veto as countermajoritarian. In a veto, the congress or parliament, the House of Representatives or the senate in most countries, have the ability to override a veto. For a careful study of the differences between presidentialism and parliamentarism (and the unique characteristics of the U.S. presidentialism system) regarding the topics discussed here, see Fred W. Riggs, *Presidentialism versus Parliamentarism: Implications for Representativeness and Legitimacy*, 18 INT'L. POL. SCI. REV. 254 (1997), especially (258) which discusses the specific case of U.S. presidentialism. On the nature of veto and congressional overrides in Latin America and the United States, see Manuel Alcántara Sáez & Francisco Sánchez López, *Veto, insistencia y control político en América Latina: una aproximación institucional*, 9 PERFILES LATINOAMERICANOS 153 (2001). The authors place special emphasis on congressional overrides and interesting conclusions can be drawn from the process of jurisdictional control and the complex power struggle that arises be-

Admittedly, certain court decisions that sometimes oppose a majority are not as questioned as others, and that is precisely one of the main features of the countermajoritarian argument. Following Friedman's analysis, countermajoritarian criticism of court decisions[16] tends to *emerge* when four factors converge: 1) the extent of the unpopularity of judicial decisions with a group that is large enough for the group to say it speaks for a majority; 2) the predominant public attitude toward democracy (favoring popular or direct democracy mechanisms); 3) the prevailing concept of the determinacy of judicial interpretation of the Constitution[17] and finally 4) whether these decisions are rendered during a period of judicial supremacy.[18] This fourth condition stands out in Friedman's work because it had been relatively ignored in previous works on the topic.

The main reason underlying the importance of judicial supremacy is that without it, countermajoritarian and controversial decisions can be simply ignored and defied; in the presence of such material power, interference from the will of the people cannot be disputed.[19] As will be discussed below, Mexico's deference to the countermajoritarian argument is largely based on the absence of this fourth factor.

In the following section, I will summarize the arguments that have been put forth against judicial review and analyze specific cases. The arguments presented by both sides and the possible objections to these arguments will be examined, even though I do not personally support the argument against judicial activism embodied in discussions of the counter-majoritarian difficulty. Nevertheless, I do think that the arguments are clear, important and not easily refuted.

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tween the legislative and judicial branches. Is it not a certain form of *override* (and an aggravated procedure) to reform the law or even the Constitution as to reverse a court's countermajoritarian decision?

16 I am convinced this doctrine applies to constitutional courts, and as well to any form of jurisdictional control over the constitutionality of laws.

17 I partially disagree with this. In my opinion, none of the preconditions for countermajoritarian criticism need an absolute concept of the determinacy of constitutional adjudication as a whole or an absolute theory of the constitutional precept of determinacy. It is sufficient for the group questioning the court's decision to have interpreted the constitutional article or doctrine in question and assume that it is widely accepted or shared by the community (academics, citizenry, judges), and for the corresponding interpretation presented in the controversial case to notoriously differ from the one previously shared without having to present a justified reason for said divergence (or claim that the divergence is a result of political considerations and therefore unjustified).

18 Barry Friedman, *The History of Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 342 (1998). Friedman's analysis clearly focuses on the emergence of countermajoritarian criticism and not the reasons why it is criticized.

19 *Id.* at 431-433. Friedman is one of the few authors who has studied the countermajoritarian difficulty in U.S. democracy.

II. The Counter-Majoritarian Difficulty and the Counter-Countermajoritarian Arguments

When compared to the numerous arguments defending judicial control of constitutionality, the number of arguments against judicial activism are much fewer. This is namely due to two reasons. First, there is increased acceptance of judicial review and judicial control as a standard and inherent feature of the constitutional state. This distinctiveness is reflected in the number of constitutional courts established after World War II. Second, the main discussion of the countermajoritarian difficulty is made under particular concepts of democracy while other arguments against judicial review are presented in terms that ignore the democratic factor and should therefore not be considered countermajoritarian.[20]

In an excellent, recently published work, Victor Ferreres studies the counter-majoritarian argument and the Spanish case. He detects the reasons why counter-majoritarian objections against constitutional justice may arise. His analysis is similar to Friedman's[21] (who studied the context in which criticism appeared, but not the reasons) and is based on three aspects: *a)* the lesser degree of democratic legitimacy of constitutional judges; *b)* the rigidity of the Constitution and the legislative branch's inability to act against a constitutional judge's decision (*e.g.* the lack of congressional overrides) and *c)* the different possibilities of constitutional interpretation.[22] These aspects will be analyzed to guide us through the labyrinth of the countermajoritarian difficulty.

Why do we place constitutional justice in the hands of judges who cannot be held accountable and who are not elected by popular vote? The response to this question is perhaps found in the qualities of judges that other officials do not have (an argument favored by Bickel). It can also be argued that as long as we agree on the need for judicial control, constitutional

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[20] For example, some arguments attack constitutional judges' legitimate powers for constitutional adjudication, taken from a restricted concept of the division of power or even criticizing not the powers or the legitimacy of constitutional judges, but the extent to which their powers can be exerted —without taking into consideration the undemocratic nature of judges' decisions. All these reasons may used against judicial review, but their nature is not countermajoritarian and should not be considered as such. Nowadays, for instance, I know of no author who has stated that judicial review or control should not be exercised because of its undemocratic character. (The only exception to my knowledge would be Robert Ivan Martin.) It is common, however, to try to determine the degree and nature of the type of control that may effectively be exercised by judicial review. The countermajoritarian argument is ultimately an obstacle, a nuisance deeply engrained in our modern democratic tradition.

[21] *See* Friedman, *supra* note 18.

[22] Víctor Ferreres Comella, Justicia constitucional y democracia 42-46 (1997).

judges seem to be the most reliable institution since other alternatives are not as dependable.[23]

It is important to bear in mind, however, that a judge may attain democratic legitimacy not only by being appointed democratically, but also by defending democracy. Ferreres's first condition considers both facets. The first is the level of legitimacy and undemocratic nature of constitutional judges and the second deals with the judicial branch's counterpart —the legislative branch. Ferreres states that judges have a lower degree of democratic legitimacy because they correctly presume that legislators are legitimated by a more democratic process than judges are (mainly in terms of accountability). But does a legislature truly represent the will of a nation? Or is its democratic legitimacy due to the process under which legislative power is attained and not because the exercise of its powers has been endowed with a democratic component? Many authors agree that the judiciary has been an institutional escape valve immersed in the crisis of political representation.[24] This quality may arise from the powers constitutional justice has to safeguard electoral procedures,[25] an important feature of constitutional democracy. However, it might just be that electoral processes are neither the ends nor the strict expressions of a democratic society or of democracy itself.[26] Many arguments have been put forward to counter this lack

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[23] Fernando Álvarez Álvarez, *Legitimidad democrática y control judicial de la constitucionalidad*, 17 DÍKAION 147, 157 (2003). Argues that since there is no acceptable alternative, constitutional judges are the appropriate institutional agents to exercise judicial control. The argument is common, but weak nonetheless. While other agents may not be the proper choices for constitutional control, it does not legitimize the power given to constitutional judges. The fact that other options are *worse* does not make it the *right* choice, neither does it remove the antidemocratic nature of constitutional judges. When Álvarez (158) states that "…there is no institutional alternative to the exercise of judicial control of constitutionality of laws," he might assume that theorists would stop insisting on the undemocratic nature of judges by realizing they are the best available choice. I myself do not think much of this objection, but I have not yet found a way to effectively counteract it. Perhaps the undemocratic nature of judges is a risk and a feature of constitutional justice that must simply be accepted.

[24] Roberto Bergalli, *Protagonismo judicial y representatividad política*, 15-16 DOXA 423, 442 (1994). Bergalli suggests that the democratic legitimacy of the judicial branch is not necessarily attained through procedural means, but because of its decision-making nature.

[25] *See id.* at 439. Bergalli's assumption in particular may be partly based on a careful reading of Ely's concept of a procedural Constitution.

[26] Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1920 (1991). Winters states that the countermajoritarian difficulty assumes that the electoral process in a democracy is definitive —and entirely representative— and that unelected judges are politically held unaccountable. Winter may simply be suggesting that neither of these premises are completely true and both are, at least, open to question. Winter's argument is quite interesting and well-grounded. Much can be said about the representative and definitive nature of democracy, as well as about the accountability of the unelected members of the judiciary branch.

of democratic legitimacy. When judicial control of constitutionality is exerted in political issues, political actors become more aware of the lack of democratic legitimacy. Only the transparency in the work of the court[27] and the judges' ability to defend their decisions stand in their favor. Much can also be said about the indirect, democratic way Supreme Court justices and constitutional judges in general are appointed. For example, in almost every country in Latin America, constitutional judges are appointed by joint decision between the executive and legislative branches.[28] This indirect democratic method of appointing[29] constitutional judges may help dissipate the criticism made about the antidemocratic nature of the judiciary.[30] The appointment process may help democratize the non-elected members of the judiciary itself, but the result largely depends on the political actors[31] and their political *attitudes*. Furthermore, it has been said that the relative undemocratic nature of the judiciary often makes it immune to political pressures and therefore, they sometimes tend to base their decisions more on principles and long-term considerations than elected officials do.[32] In Mexico, this argument is partially true. The judiciary has been known to be used by the government as a tool of control for the past 50 years. However,

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27 *See* Antonio La Pergola, *Funciones del Tribunal Constitucional en la democracia*, 5 EXTERNADO 3 (1991).

28 Base de Datos Políticos de las Américas (2008). Normas de la justicia. *Análisis comparativo de Constituciones de los regímenes presidenciales*, Georgetown University and Organization of American States, *available at http://pdba.georgetown.edu/Comp/Judicial/Constitucional/designacion.html*.

Interesting cases are for example Chile (where the Supreme Court participates in choosing its appointees); Ecuador (where considerations regarding gender parity and representation in the composition of the court is constitutionally mandatory) and Guatemala (where even the University of San Carlos participates in nominations, thus including the academic area).

29 "[I]t could be argued that, if constitutional judges are not directly elected by the citizen, they are at least appointed by a directly elected body, such as, for example, parliament itself." Mark van Hoecke, *Judicial Review and Deliberative Democracy: A Circular Model of Law Creation and Legitimation*, 14 RATIO JURIS 415, 416 (2001).

30 It is possible to contradict this assertion. When people vote, they are undoubtedly expressing their will. Their choices are clear. If a citizen chooses option "x," it can be said the voter wants option "x" to prevail and that option "x" is his will. However, when the president and the people's representatives vote, they do not directly represent the preferences of their constituents, but a combination of their constituents' preferences, their own political views, party interests and many other considerations that perhaps democratically and formally (but not materially) legitimate the appointees.

31 *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty Part Five*, 112 Y.L.J. 155, 258 (2002).

32 John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, Median Senator, and Countermajoritarian Difficulty*, 1 SUP. CT. L. REV. 257, 286 (2005). The authors explain the importance of immunity the non-elected members of the judiciary have, as opposed to that of elected officials.

in recent years, the judiciary has earned a reputation for impartiality. Nowadays, the federal judiciary is known for its efficiency and is considered much more trustworthy than state judiciaries. A great many trials end in an *amparo*, at which point the disputes go on to be resolved by a federal court and not a state court. By and large, the use of the *amparo* has federalized justice.

The last argument to be made against Ferreres's first objection can be found in Ely's *Democracy and Distrust*.[33] Fully aware of the undemocratic nature of judicial review, Ely proposes a democratic solution: judicial review should be focused on what Ely called "clearing the channels of political change,"[34] meaning that if it were to become a way of preserving American democracy, judicial review would be legitimate, to a certain extent.[35] In a democracy, judges should pay special attention to the mechanisms that express popular will[36] because "…unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and the denial of the vote seems the quintessential stoppage."[37] However, by stating what the *preeminent* function of judicial review should be, Ely infers that judicial review might also have another (secondary) function. The answer is simple: judicial review should not concern itself with the substantive content of laws as long as the laws do not violate the right to equal treatment within reasonable proportions so as not to result in any misrepresentation, which in Ely's opinion is at the core of the democratic process.[38]

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[33] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[34] *See id*. at 103-134; in particular 117.

[35] *See* LUIS ROBERTO BARROSO, EL NEOCONSTITUCIONALISMO Y LA CONSTITUCIONALIZACIÓN DEL DERECHO 61 (2008). Barroso states that legal interpretation seeks legitimacy to uphold the conditions needed to ensure a democratic state. However, he argues that it is the judge's duty to ensure 1) substantive values and 2) observance of the proper procedures of participation and deliberation. Ely would undoubtedly agree with the second condition, but only partially with the first.

[36] However, constitutional judges should not be overburdened with protecting democracy. Ely's theory apparently works well in the United States, but that does not necessarily mean it would work —or should work— in other countries. *See* DIETER NOHLEN, DERECHO Y POLÍTICA EN SU CONTEXTO 13-27 (2008). Nohlen (13) argues that the consolidation of democracy should not be the main goal of constitutional justice, especially in Latin American courts whose political position is not clearly established, because a very active role in the defense of democracy may simply endanger judicial supremacy or the judiciary as a whole.

[37] *See* Ely, *supra* note 33, at 117. Ely makes his point clear, *id.* at 117: Judicial review should focus on electoral cases and expressions of popular will, namely when voting or expression "(I) [A]re essential to the democratic process and (II) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo." Ely calls his theory a representation-reinforcing theory of judicial review, *id.* at 181.

[38] This is a powerful and yet problematic notion. *See* Ferreres, *supra* note 22, at 53-93. The author makes an in-depth analysis of Ely's work. Ferreres agrees with Ely's concept of

I believe the most important justification for assigning limited[39] democratic legitimacy to the non-elected members of the judiciary is contained in these lines. Other arguments concerning the lesser democratic legitimacy[40] of constitutional judges are not as well grounded.[41]

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procedure as a plausible theory of the role of the judiciary, but considers Ely's concept of defending minority rights under an equal protection clause problematic. Ferreres argues (and I agree) that Ely's description of a judge as an arbiter in the democratic procedure gives way when a judge is also ordered to protect minorities against discrimination (even though discrimination is reflected in the democratic process by the figure of underrepresentation) because "…If the judge also protects people's right to not be discriminated in the distribution of goods, is not the judge in charge of a task that goes beyond being a simple arbiter?" (58). If a judge declares a law unconstitutional because it is discriminatory and unequal, he must analyze not only the procedure under which the law was approved, but also the substance of the law.

39 One can easily recall certain issues that even majorities in a democracy should not have the power to decide. *See* Ernesto J. Vidal, *Justificación a la democracia y límites a la decisión por mayorías*, 1 DOXA 227 (1994).

40 Robert Dahl's *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker* is a classic work on this topic. Dahl's argument does not center on whether the court is democratic or not, nor does it examine the legitimacy of its interpretation. He simply (and brilliantly) states that when the court renders its decisions, they usually follow the line of the views held by the prevailing political party, and that the role of the court as a defender of minority rights is fundamentally non-existent. However and even accepting Dahl's point of view, the Court can still be *ideally* seen as a defender of the rights of minorities and every countermajoritarian decision —the exception in Dahl's terminology— that the court takes is still objectionable under these same terms. Although Dahl's study was written many years ago (1957), Dahl's analysis is both timeless and noteworthy. *See* Robert Dahl, *La toma de decisiones en una democracia: la Suprema Corte como creadora de políticas nacionales*, *in* TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA 141 (SCJN), translated from the original: Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For a more recent study on the same topic, See Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004).

41 *See* Juan Carlos Hitters, *Legitimación democrática del Poder Judicial y control de constitucionalidad*, 2 JUSTICIA 87, 421-427 (1987). In this essay, Hitters agrees with Cappelletti in that the judiciary has a certain degree of legitimacy because it is closer to the people since it solves their problems (which at least applies to the diffuse control of constitutionality or of non-elected members of the judiciary in general). However, I believe he is interpreting Cappelletti's thesis inaccurately. Hitters argues that "…the judiciary is closer to the people because it resolves the problems that the parties present to the courts every day." I assume this particular point of view was not entirely what Cappelletti meant. Even though it may be an effective argument for ordinary judges (and even then, the entire array of all possible problems and social situations is not presented before these courts), the argument becomes more ineffective the higher the judicial authority. This is largely based on systems with concentrated control over constitutional justice. In the case of Mexico, the argument simply does not apply. Is it possible to say that the limited number of *amparo* cases that come before the Mexican Supreme Court brings the court closer to the people and makes the court more knowledgeable of the reality and social problems than, say, representatives?

The second part of Ferreres's argument deals with the rigidity of the Constitution and the legislative branch's inability to oppose decisions made by the judiciary. Much has been said about this point, and the rigidity of the Constitution has clearly been one of the major concerns of academics of our times.[42]

Constitutional rigidity is an important factor in counter-majoritarian criticism because it is a major obstacle in overturning a judge's or a court's decision. We may safely say that this difficulty is the necessary result of the function of a Constitution. A Constitution *should* be rigid by nature.[43] A Constitution places organic rules and laws outside the realm of the political arena.[44] It is clear that one of the functions of a Constitution is to define limits.[45] Ferreres is right in arguing that the more flexible a Constitution, the less difficult it is to give a court or a constitutional court the final say in interpreting said Constitution.[46] A flexible Constitution provides an easy remedy against decisions of constitutional justice: simply reform the Constitution.

Constitutional rigidity and the consequential difficulty a legislature encounters in attempting to revert presumably counter-majoritarian decisions taken by constitutional judges or courts is quite common. Serious discussions have taken place in other countries besides the United States, such as Canada,[47]

What about activists, doctors or law school and sociology professors? I believe Cappelletti was referring to a deeper sense of democratic legitimacy. It is harder for minorities to be heard in the House of Representatives —especially if it is a small group of minorities— than to be heard in a judicial process. Minorities can defend their right to equal treatment and protection in a court of law more effectively than in the political arena of Congress.

42 Rigidity of the Constitution is the first of Guastini's conditions for the constitutionalization of law. *See* Riccardo Guastini, *La* "*constitucionalización*" *del ordenamiento jurídico*, *in* NEOCONSTITUCIONALISMO (Miguel Carbonell ed., 2003).

43 Other than the Constitution of the United Kingdom, what other countries with a constitutional law tradition have a flexible Constitution? While I do not wish to engage in the complex debate of the particular case of the United Kingdom, it is generally accepted that constitutional rigidity is a positive characteristic of a constitutional State.

44 *See* Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 20 (1999). Ides agrees with Chemerensky in that "…the Constitution purposely is a countermajoritarian document reflecting a distrust of government conducted entirely by majority rule…"

45 PETER HÄBERLE, EL ESTADO CONSTITUCIONAL 228 (2007).

46 Ferreres, *supra* note 22, at 44.

47 *See* ROBERT IVAN MARTIN, THE MOST DANGEROUS BRANCH: HOW THE SUPREME COURT OF CANADA HAS UNDERMINED OUR LAW AND OUR DEMOCRACY (2003). Martin describes the work of the Supreme Court of Canada as tearing apart the constitution. In his opinion, judges rule on cases according to their own values and not guided by reasoned understanding of the principles of law (*id.* at 38), and it is therefore completely undemocratic. He also criticizes the lack of legitimacy of Canadian representatives (*id.* at 41), "Whatever flaws may exist in Canada's system, none is so serious as to justify replacing it by a rule of judges." Martin declares (*id.* at 23): "I believe that a useful and

France,[48] New Zealand,[49] Germany, Italy and Austria.[50] Dahl's argument[51] seems to work well against constitutional rigidity since a court or constitutional court —particularly in the case of the United States— is not able to delay policy implementation —or majoritarian decisions— for too long when there is full majoritarian support (as in the case of the New Deal). A delay in implementing a certain policy may arouse serious discussion about the court's decision and the control might be accepted as a rational argument by the relevant political actors.

Ferreres's final concern is that of the interpretive controversy over the Constitution. The democratic value of the Constitution is one of the main topics in modern debate. A key argument against judicial control has been that when a Constitution is enforced, a document that has not been democratically approved —or is so old that it lacks democratic consent in modern times— is being put into effect and hence should not have the value modern constitutionalism attributes to a Constitution.[52] This may be true of new Constitutions which may have been imposed —to a certain extent— in an authoritarian way, but in democratic societies that have developed a coherent constitutional theory over the years, the objection becomes ambiguous. We may also say that the interpretation given by constitutional judges is justified because the Constitution itself is controversial. It is not clear

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practical means of protecting our constitutional democracy would be to abolish the Supreme Court."

48 France has a Constitutional Council that exercises *a priori* control of the constitutionality of laws and a rigorous abstract review. An interesting situation occurred in 1981 when the new socialist government was faced with a council dominated by the opposition, most of whom were politicians, bearing close resemblance to the state of affairs during U.S. president Jefferson's term in office. For a better description of the case of France and the consequences of judicial review in French legislative politics, see Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 251-254 (1995).

49 *See* K. J. Keith, *A Bill of Rights for New Zealand? Judicial Review versus Democracy*, 11 N.Z. L. REV. 307.

50 *See* Mauro Cappelletti, *El formidable problema del control judicial y la contribución del análisis comparado*, *in* OBRAS 256-280 (Fernando Serrano Migallón ed., 2007).

51 Dahl, *supra* note 40.

52 The idea of the undemocratic nature of the Constitution is not new. For a study on pre-conditions of constitutional power and democracy, See Mauro Arturo Rivera León, *Los presupuestos democráticos del Poder Constituyente*, 1 REVISTA JURÍDICA DEPARTAMENTO DE DERECHO 109 (2008). In this article, I deal with the undemocratic character of the Constitution. I state that flexible mechanisms for constitutional reform must be implemented to mitigate the response to the reformed constitution. These mechanisms must be inclusive enough so as to help legitimize the constitution. Perhaps the Constitution signed in Philadelphia was not entirely democratic (African Americans, women, Native Americans, etc., were excluded), but there is no reasonable doubt that the U.S. Constitution is anything but democratic.

when the original sense of a constitutional article should prevail and when a new interpretation should emerge to adapt the Constitution to present-day circumstances. That decision is neither easy nor mechanical or logical-deductive. Naturally, this kind of constitutional interpretation implies power.[53] However, the concept of a judge's ideal interpretation is no more the *bouche de la loi*. Again, the criticism is aimed at the *criteria* and not its *legitimacy*. In Mexico, the court's interpretation has become less formalistic in recent years and more according to the interpretation of modern constitutionalism.

These arguments both attack and defend constitutional justice. However, there are other ways of justifying the control exerted by unelected members of the judiciary, mainly that of human rights protection. While Dahl's theory states that the court is not a protector of minority rights, it has also been argued that even if a court or a constitutional court does not materially act as a defender of human rights, that does not mean that its jurisdictional control is not legitimate when that control is exercised effectively. In fact, even though Dahl's depiction of the U.S. Supreme Court's way of exercising judicial review is quite majoritarian and in line with the dominant political power, as opposed to Carlos Santiago Nino's[54] thesis, I believe that they are enough cases —even by taking into account only those decisions made in the United States before 1957— to consider judicial review potentially legitimate.

We must be aware that any argument used must be based on a specific concept of democracy. Ferreres was aware of this and therefore he also studied the type of constitutional democracy that should be embraced in the Constitution. The counter-majoritarian difficulty is an antidemocratic objection, but one that assumes a certain and particular concept of democracy which might not be the most accurate one if one wants a deliberative

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53 Roberto Gargarella, *La dificultad de defender el control judicial de las leyes*, 6 ISONOMÍA 59 (1997).

54 CARLOS SANTIAGO NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL 680 (1994). Nino states that the protection of rights in no way restricts majoritarian decisions. The Argentinean author says that "It is perfectly conceivable, even if it were objectionable for other reasons, to have a legal system which recognizes individual rights even if their protection were left to the will of majorities in the democratic process and there were no judicial review of their decisions". However, I think that by accepting this thesis, Nino also has to accept the possibility of conceiving a particular system that recognizes individual rights even if the protection of these rights is left to the will of a monarch, a priest, law professors and scholars or even (why not?) the Führer, without any judicial review of their decisions. Rights are stated in constitutional terms because most constitutions conceive them as game-preservers and therefore outside the political arena. Some rights are game-preservers and some rights act as prerequisites of the game. For a description of the rights inherent to democracy as game-preservers, see NORBERTO BOBBIO, EL FUTURO DE LA DEMOCRACIA 24-27 (2004).

and representative democracy. I am not saying that the counter-majoritarian difficulty fully implies a populist notion of democracy, but perhaps it does to a small extent. Democracy is much more than the way decisions are made; substantive content in democracy that along with the procedural methods of decision making is a fundamental part of the essence of the constitutional State.[55] It should come as no surprise that only a few authors use the validity of the counter-majoritarian argument to recommend the elimination of judicial control. Even the supporters of judicial review are concerned about the countermajoritarian difficulty because they believe it to be an important argument, but not a decisive one. Nowadays, criticism of judicial control is of *degree* but not of *substance*. As Ely said "…so the point isn't so much one of expertise as it is one of perspective."[56]

III. Some Considerations on Mexico and Bickel

After discussing the counter-majoritarian difficulty and its origins, and analyzing an activist and independent court's revolutionary decision in Marbury v. Madison that established judicial review and constitutional supremacy, we will now delve into Mexican history to discover reasons that have caused such a divergence in the contexts between the United States and Mexico. I will make certain considerations which I think have influenced the differences between the two countries in terms of the countermajoritarian difficulty. However, I will not analyze all of them because a detailed description of all the circumstances would be a book in itself.

The Mexican Constitution of 1917 incorporated an important number of articles found in the Constitution of the United States of America. (It is no secret that entire articles in the Mexican Constitution of 1917 are exact translations of articles contained in the U.S. Constitution).[57] The system chosen was modeled after U.S. federalism, and even the Mexican Supreme

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55 A similar idea has been expressed by Aharon Barak, a long time member of Israel's Supreme Court. Barak argues that if we conceive democracy as something other than majority decision-making, as in the case of protecting human rights —substantive democracy as opposed to formal or procedural democracy, judicial review is not antidemocratic. *See* Aharon Barak, Un juez reflexiona sobre su labor: el papel de un tribunal constitucional en una democracia 32 (2008).

56 Ely, *supra* note 33, at 102. This refers to the argument that a constitutional judge's expertise may fail because some legislators are lawyers, politicians, philosophers and good academics themselves. Therefore, the judicial branch cannot claim to be more capable than the legislative branch —although it is sometimes possible to agree that the judicial branch seems much more capable.

57 For a clear example, see Article 135 of the Mexican Constitution and Article VI of the U.S. Constitution. Both articles establish a supremacy clause. However, in the case of the United States, it was seen as textual support for the power of judicial review. In

Court —*Suprema Corte de Justicia de la Nación*— was named and structured under similar terms to that of its counterpart in the United States.

The amount of U.S. literature on the counter-majoritarian difficulty equals or exceeds the number of studies that have been produced in the rest of the world, even in countries with a relatively developed constitutional jurisdiction and complex constitutional courts. Why have U.S. scholars been so engrossed in this topic, and produced so much more literature about the counter-majoritarian difficulty while Mexican scholars have not?

A straightforward answer would be to look at Friedman's theory and analyze Mexico's judicial history using those criteria: 1) the extent to which judicial decisions are unpopular with a group of people that is large enough for the group to say it speaks for a majority; 2) the predominant public attitude toward democracy; 3) the prevailing concept of the determinacy of judicial interpretation of the Constitution, and finally 4) whether these decisions are rendered during a period of judicial supremacy.[58]

I believe Mexico's judicial history can be divided into two eras for the purpose of this analysis. The first era consists of the time before the Supreme Court was reformed to basically become a constitutional court. I think that we can safely say that there was a 10-year transition period that took place five years before and five years after said reform. The second era would then be after the 1994-1995 reform and the consequent change of the court structure, functions and composition. Those two eras —and perhaps the transition period as well— are essential for assessing the results of Mexican judicial control.

In the first era, judicial control in Mexico was non-existent. The use of the *amparo* worked well enough for defending citizens' liberties and guarantees, but only to a certain extent —as long as they did not go against the will of the prevailing power, but since *amparo* sentences had and have *inter partes* effects as opposed to *erga omnes* effects, its control was simply incidental and relative. In addition to this, the lack of a strong judicial branch explains why in the first era, Mexico did not have any serious discussion about the antidemocratic character of *amparo* sentences. Furthermore, the first era was overwhelmingly dominated by a single political party with a firm control of the presidency and an astonishing —perhaps illegal— absolute majority in congress. Therefore, it was extremely easy to impose judges for their ideological views or loyalty to the party. Moreover, it should be noted that although the Mexican Constitution is[59] and was —formally— rigid, it was

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Mexico's case, although it was the same article for the same purpose, it was not interpreted as such. This has made some Mexican theorists speculate on the limits of interpretation.

58 Friedman, *supra* note 18.

59 I think we can safely argue that the conditions that make a Constitution formally and materially rigid have only recently been fulfilled in Mexico due to increased pluralism

easy for the dominant party to amend it or reform it at leisure.[60] According to statistics from the Mexican Chamber of Deputies,[61] the Mexican Constitution has been reformed 187 times. Since various constitutional articles were modified or added in the same reform, Mexican academics agree that the number of reforms oscillate between 400 and 600. I believe that after this portrayal of the Mexican political environment in the first era, it is safe to assume that Friedman's first three conditions were not fulfilled and thus there was no countermajoritarian criticism whatsoever. As to the fourth condition, judicial supremacy was a complete myth in Mexico's first era of judicial control over the constitutionality of laws, and the judiciary would commonly capitulate to the executive branch of government.

Analyzing Friedman's prerequisites, it is possible to identify another important factor in the emergence of counter-majoritarian criticism toward a court's decision. Counter-majoritarian debates surface in societies that fulfill the pluralistic criteria in the composition of the executive and legislative branches. The pluralistic composition of the legislative and executive branches usually leads to a more representative and moderate composition of the judiciary. This condition can also be fulfilled by introducing inclusive mechanisms of high judicial official appointees who are more tolerant of opposing ideologies and thus more representative of the political environment.[62]

An even deeper distinction between Mexico and the United States may be drawn from the different natures of the types of control exerted by the two courts. The U.S. Supreme Court —as well as ordinary judges in the U.S. system— employ diffuse control mechanisms over constitutionality while in Mexico, the control is usually abstract and concentrated. Moreover and contrary to the situation in the United States, concentrated judicial control in Mexico is directly derived from the Mexican Constitution —Article 105 and its regulatory law— and not (as in the United States)

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in congress, the division of power and the lack of a congress majority. In the first era, however, the Constitution could have been formally rigid, but it was undoubtedly flexible.

60 The perfect example of this is the case of José López Portillo's nationalization of the banking sector. To avoid a surfeit of *amparo* trials that his decision would have undoubtedly unleashed if legislated as a statue or ordinary law, he —literally he and not the Congress— reformed the Constitution as to include bank nationalization in the Constitution. This measure was very resourceful because there is no *amparo* against a constitutional law. The continuous reforms made to the Mexican Constitution go directly against Ferreres's second circumstance for the emergence of countermajoritarian criticism. *See* Ferreres, *supra* note 22.

61 Available at *http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm*.

62 However, as argued here, the representation of the political environment and popular opinion should not be part of the criteria —or at least not the main factor taken into account— for designating the judicial officials that perform the ultimate judicial control over the constitutionality of laws.

from the jurisprudential interpretation of the Constitution by a court that can be described as forward-looking. Therefore, since constitutional justice is contemplated in the Mexican Constitution and was enhanced by means of a democratic procedure, we can say that an important counter-majoritarian argument is invalid in the case of Mexico. This argument may seem strong,[63] but in fact, it is not. In an analysis of the case of Spain, Ferreres made a distinction between the democratic structure of an institution and the democratic procedure by which the institution is created. In Ferreres's opinion, the Spanish constitutional court is democratic in the second sense, but not in the first.[64]

In the second era, a different court can be seen: a stronger and more independent court that has produced interesting decisions[65] and showed that it may be capable of optimal performance in our burgeoning democracy. Mexican academics will be looking at the court very closely and the results will be seen in due time. We have already stated that in the first era Mexican review of the constitutionality of laws was limited to *amparo* sentences and only in a narrow sense. The reforms to the *amparo* proposed by the judiciary and the academic sector include the suppression of the *amparo* under the terms of Articles 14 and 16 of the Constitution and the inclusion of the *erga omnes* effects on *amparo* sentences. Given the nature of Mexico's constitutionality control, it is quite possible that this reform will take place within the next ten years. If this reform were effectively implemented, Mexico will have another countermajoritarian control in its system.

However, two interesting instruments emerged regarding the 1994 constitutional reforms: "*acción de inconstitucionalidad*" [Action of Unconstitutionality] and "*controversia constitucional*" [Constitutional Controversy], both of which are regulated in the regulatory law of Article 105 of the Mexican Constitution.

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63 Barak also argues that the countermajoritarian difficulty is a problematic argument. One of the reasons is that constitutions in which judicial review is expressly stated should not leave any doubt as to the legitimacy of its control. *See* Barak, *supra* note 57. Perhaps Barak's analysis is restricted to democratically legitimate judicial review in a formal sense. Ferreres's analysis on the other hand, also deals with the inherent antidemocratic nature of the courts. *See infra* note 65.

64 Ferreres, *supra* note 22, at 47. The same can be argued in the Mexican case. Even assuming that the procedure by which the Mexican constitutional court was created was entirely democratic, it is still possible to draw attention to the undemocratic nature of the composition of the court, as well as its procedures, methodology, inner rules and decisions.

65 This is namely seen in a widely accepted decision, Action of Unconstitutionality 26/2006, in which the court declared the "Ley Federal de Telecomunicaciones" [Federal Telecommunications Law] and the "Ley Federal de Radio y Televisión" [Federal Radio and Television Law] partially unconstitutional. The decision was accurate and accepted almost unanimously by the academic sector and the general population. However, a complete evaluation of the court's second era and recent decisions is beyond the scope of this essay and perhaps will be the subject of future work.

A Constitutional Controversy is a trial that defends the federal system established in the Constitution, analyzing acts and general norms so as to determinate whether they pass constitutional muster. The plaintiff may be an entity, a power or a branch of the government whose constitutional powers are being violated by a general law or a concrete act;[66] the defendant is the entity, power or branch that enacted the general or concrete law whose constitutionality is being questioned. The Constitutional Controversy was already a preexisting constitutional trial in the Mexican Constitution but it lacked the regulations imposed by the 1994 reforms. Before 1994, 26 constitutional controversies had already been decided using the Federal Code of Procedure, the Organic Law of the Supreme Court and several other laws as supplementary norms of the non-regulated Constitutional Controversy procedure. If the plaintiff can prove the validity of his claim, the court orders the defendant to stop the act or, in certain conditions, the relevant law analyzed may cease to be valid with *erga omnes* effects. In a concrete challenge to a specific act, the court's resolution has *inter partes* effects. Article 21 of the regulatory statute establishes the terms in which the lawsuit is to be filed.[67] However, a distinction should be made of the types of countermajoritarian decisions that are made in a Constitutional Controversy. A procedural countermajoritarian decision takes place when the Court declares a specific act unconstitutional. When examining the acts, the Court does not supersede any legislative decision. Therefore, there are no grounds to argue that the decision invalidates a presumably majoritarian decision. Even in this case, it is dubious and should undergo a case-by-case review to determine whether a countermajoritarian decision has truly been made. A substantive countermajoritarian decision is made when the Court invalidates a law —a general norm. In this case, a Constitutional Controversy is similar to an Action of Unconstitutionality, differing namely in the motivation for invalidating the authoritative norm.[68]

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66 A Constitutional Controversy may well be initiated to solve a problem involving territorial state limits. However, this case is completely irrelevant to the countermajoritarian decisions that interest us here. It can be argued that when the court rules on a controversy on state limits, its decision does not go against a majority because it is a technical matter (the same argument is also ineffective when applied to laws).

67 This argument can also be employed to determine whether the terms set forth in the law can be countermajoritarian under certain conditions. If a constitutional controversy is not filed within the legal term: should an unconstitutional law —one that goes against the federal system— remain fixed because the time limit has expired? Does the passage of time validate the law?

68 Motive is clear in a Constitutional Controversy: the law in question violates the federal system and represents a violation of the powers granted by the Constitution. In an Action of Unconstitutionality, the law would be invalidated for opposing an article or principle in the Constitution due to its generality.

The Action of Unconstitutionality, on the other hand, is a procedure in which a general law is examined in terms of its compliance with the Constitution. This abstract examination does not require the law to have been actually applied. The plaintiff may be a fraction (33 percent) of the legislative branch that enacted the law in question (a state or federal Congress, the Mexico City Assembly, etc.), the political parties filing complaints against electoral laws, the Attorney General (in all cases) and the National Human Rights Commissions against laws that violate human rights. If the plaintiff proves his case and wins by 8 votes, the law is declared unconstitutional with *erga omnes* effects.

Of these procedures, the Action of Unconstitutionality is at the core of our constitutional control, but the Constitutional Controversy plays an important role in protecting the federal system and the powers of the government provided for in the Constitution. There is a countermajoritarian element in both procedures.

A Constitutional Controversy is quite similar to an *amparo* but with the difference that in examining a general norm, the sentence will have *erga omnes* effect and thus exercise a countermajoritarian force in the system. In a Constitutional Controversy dealing with concrete acts, counter-majoritarism may be restricted to the interpretation of the constitutional articles in which the defendant's and plaintiff's arguments are based. However, that interpretation will only be valid for that specific case, rendering an acceptable yet limited countermajoritarian decision that does not technically reflect general will (an act of Congress), but only the alleged interpretation of that will. Decisions on a Constitutional Controversy dealing with a general norm are susceptible to the same objections as judicial review and Actions of Unconstitutionality. The difference between a Constitutional Controversy in a general norm case and an Action of Unconstitutionality is that in a Constitutional Controversy, the court explores whether the defendant had the constitutional authority and attributes to promulgate such a norm in the case at hand or whether the norm violates the federal provisions in the Mexican Constitution. In an Action of Unconstitutionality, the Court carries out an abstract review of the constitutionality of the law. Furthermore, the minimum number of votes needed to declare a general norm invalid in a Constitutional Controversy is 8. If there are fewer than 8 votes, the Controversy is dismissed and the law is upheld. This procedure grants four justices veto powers. Even if a majority of the justices vote in favor of the invalidation of the law (7-4), the law will continue to be upheld. This veto power and obvious countermajoritarian force within the Court's decision-making process may be due to: *a)* a legislator wanting to avoid serious countermajoritarian issues that would arise if a simple majority could invalidate a law[69] and *b)*

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[69] This argument presents strange characteristics. If the 8 justice's majority was due to this reason, it is paradoxical that to avoid a countermajoritarian issue the legislator has

what Ferreres defines as a "*presumption of constitutionality.*" Thus, the legislator would only want to invalidate a law when its unconstitutionality is patent and the voting minimum would be established for this effect.

Actions of Unconstitutionality have their own countermajoritarian nature, which is observed in the number of justices who must vote to declare a law unconstitutional. Just as the Constitutional Controversy dealing with general norms, Actions of Unconstitutionality require an eight-vote majority. However, countermajoritarism is even present in the authority needed to file an Action of Unconstitutionality. For example, only 33 percent of the legislative body that effectively promulgated the unconstitutional norm may demand its unconstitutionality (this only refers to a percentage because there are other actors with the authority to file this type of legal action). This means that a minority of the legislative body may ask another minority —the Court— to declare a law presumably passed by a legislative majority invalid. In this case, both the Court and the plaintiff wield authorized countermajority; a minority within the legislative body exerts countermajority by asking the Court to invalidate a law passed by a majority while the Court can exert either a majority —if it decides to uphold the law— or a countermajority —if it invalidates the law. Even if the law is upheld, the Court may do so by means of an internal countermajoritarian process using the veto power of four justices. Ironically, even a majoritarian decision made by the Court may be countermajoritarian.

The legitimacy of the Attorney General may be questioned as well. Directly under the President's command, the Attorney General has the power to file an Action of Unconstitutionality in every case and against all types of laws. As such, the Attorney General has the authority to petition the court for a countermajoritarian decision regarding all laws and cases established by the corresponding regulatory law. This circumstance presents several peculiarities: 1) the Attorney General is a countermajoritarian force within the system. He can initiate an Action of Unconstitutionality as the sole plaintiff while the legislative branch needs the support of 33 percent of the body; 2) the purpose of legitimizing the Attorney General and not the President may seem odd, but can be explained by the fact that it is customary for the Attorney General to follow a direct order given by the President.[70] Therefore, given the legitimacy described above, an Action of Unconstitutionality is in the hands of the Executive, and therefore a countermajoritarian tool; 3) political parties and human rights commissions have legiti-

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simply introduced a countermajoritarian mechanism. This voting may be seen as a countermajoritarian mechanism against countermajoritarian decisions.

[70] I know no of Action of Unconstitutionality filed by the Attorney General without having received permission, the order, a petition, counsel or advice from the chief executive. The presidential capacity of asking for the invalidation of the will of a majority is a common feature of the Action of Unconstitutionality.

mate claims to file action in electoral laws and norms that violate human rights, thus allowing non-governmental organisms (even though if they are constitutionally established) to initiate a process to reverse laws enacted by government organs based on presumably majoritarian views.

The Mexican Supreme Court is in essence a constitutional court and therefore it may be subject to the same criticism, but it is rarely criticized for countermajoritarian reasons. Friedman's analysis and Ferreres's conditions clearly apply to the Mexican case. Much more analysis is needed and the Court's role in Mexican democracy will provide the material required for an analysis of this kind.

IV. Ex mea sententia

The counter-majoritarian difficulty is perhaps the strongest argument that has been put forward against constitutional justice. It is no mystery why this particular issue has received so much attention and has created a great deal of controversy. I think the natural progression of the argument is to soften as well as criticize the *uncontrolled* and *unprincipled* exercise of judicial control of constitutionality. Moreover, the argument has evolved from being a substantive-based argument to a degree-based one. I have no definite answer to the question of what criteria should be followed by a constitutional tribunal when exerting constitutional justice or the extent to which constitutional interpretation should be taken. Those questions, which were once *secondary* to the counter-majoritarian difficulty, are the great questions of constitutional law of our time. I cannot answer them because I have yet to find a solution that is not highly debatable. Assuming an answer to that particular question would mean espousing a particular view of democracy, of philosophy, of politics and of law.

In Mexico, the counter-majoritarian debate has been almost nonexistent due to political conditions that have prevented Ferreres's conditions from fully developing. However, in this article I have shown that discussion on the countermajoritarian difficult will soon appear in Mexico given 1) the new political context and the alternation in power; 2) a stronger judiciary; 3) the development of an intrinsic system of constitutionality control that includes Constitutional Controversy and Actions of Unconstitutionality —and probably in the future *amparo* with *erga omnes* effects— and 4) the constitu- tionalization of the Mexican legal system.

After giving an overview of the main arguments for and against constitutional justice in Mexico and in general, I come to the conclusion that constitutional justice is legitimate. This is not due to a single reason in itself, but rather because of the unique, complex and necessary role it plays in Mexican society. It is legitimate because: *a)* it protects minority rights —or

should do so— by interpreting and applying the rules and rights the majority has willfully left out of the political debate by establishing these rights in the Constitution; *b)* it ensures procedural and substantive rights that conform to the essence of a democratic regime, and namely because *c)* constitutional justice contributes to the true meaning of the word *Constitution*.

Recibido el 28 de julio de 2009 y aceptado
para su publicación el 6 de noviembre de 2009.

Mexican Law Review
New Series
VOLUME III
Number 1

THE "ABILITY TO PAY" AS A FUNDAMENTAL RIGHT: RETHINKING THE FOUNDATIONS OF TAX LAW

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ABSTRACT. *This article starts by arguing that the ability to pay, as a tax law principle, has a meaning of its own, separate from political or economic considerations of vertical and horizontal tax equity. It then presents three different conceptual meanings of this principle. Each meaning has tremendous importance depending on context: whether it is in the law-making process, the administrative application of tax law, or the moment of judicial interpretation. The essay also summarizes the positions which are skeptical of treating the ability to pay principle as a fundamental right.*

KEY WORDS: *Tax equity, fundamental right, tax principle.*

RESUMEN. *El presente artículo comienza con los argumentos relativos a demostrar que el principio de capacidad económica tiene un significado propio, diverso a consideraciones políticas o económicas sobre equidad horizontal o vertical. Posteriormente se presentan tres acepciones de este principio. Cada acepción tiene gran importancia dependiendo del contexto: ya sea que estemos en el proceso de creación de normas, en la aplicación administrativa de las disposiciones fiscales, o en el momento de interpretación judicial. El ensayo también presenta las posiciones que resultan escépticas de la idea de que el principio de capacidad económica sea tratado como un derecho fundamental.*

PALABRAS CLAVE: *Equidad tributaria, derecho fundamental, principio tributario*.

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I. INTRODUCTION

The "ability to pay" principle is what we might call a "classic topic" in tax law. Discussions about the meaning of this principle have been constant since the ancient science of public finances to modern-day tax law. Far from ending this discussion, current economic and political circumstances have presented new challenges.

The idea of people contributing to government expenses according to their ability to pay has not always been inherent to the concept of taxation or tax fairness. Adam Smith started modern debate about tax fairness by

including "equity" as one of his main principles,[1] but what is "equity"? Musgrave demonstrated how the Smithian approach to equity moves in two directions: that taxes should correspond to the benefits while also reflecting the ability to pay.[2]

The first legal formulation of the ability to pay principle came with the Declaration of the Rights of Man approved by the National Assembly of France (August 26, 1789). Article 13 states that all citizens should contribute in proportion to their means.[3] But the most difficult task does not lie in declaring the principle, but in applying it.

In the first part of this article, I show the importance of separating the meaning of this principle from economic or philosophical considerations of horizontal and vertical tax equity. Such considerations are an obstacle to understanding or defining a clear meaning of the ability to pay principle as a legal principle. The second part of the article shows how this tax principle has three perfectly valid and applicable meanings nowadays. These meanings do not exclude each other, but reveal the importance of the principle at different moments of applying the law. Overall, this article highlights the importance of the ability to pay principle as a fundamental right.

II. Separating the Legal Meaning of the Ability to Pay Principle from Issues Related to Vertical and Horizontal Tax Equity

Traditional doctrine has wrongly seen the principle of "ability to pay" as "the only principle of tax fairness."[4] Tax fairness is an abstract ideal and requires adequate principles as well as specific conditions of application to be implemented in a certain society.[5] Some authors give the ability to pay

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[1] Adam Smith, *Sobre la naturaleza y causas de la riqueza de las naciones*, Vol. I Oikos-Tau 852 (1988).

[2] Richard Abel Musgrave, *Una breve historia de la doctrina fiscal*, 115 Hacienda Pública Española 299, 331 (1990).

[3] "Article 13. A common contribution is essential for the maintenance of the public force and for the cost of administration. This should be equitably distributed among all citizens, in proportion to their means."

[4] Carlos Palao Taboada, *Apogeo y crisis del principio de capacidad contributiva*, *in* 2 Estudios jurídicos en homenaje al profesor Federico de Castro 418 (Tecnos, 1976). General explanations about the ability to pay principle, among others, in José Manuel Gallego Peragón, Los principios materiales de justicia tributaria (Comares, 2003); Miguel Ángel Martínez Lago, *Una interpretación constitucional de la funcionalidad de la capacidad económica como principio informador del ordenamiento*, 55 Revista Española de Derecho Financiero (1987); Francesco Moschetti, El principio de capacidad contributiva (1980); Emilio Albi Ibáñez, *Clásicos del enfoque de la capacidad de pago*, 39 Hacienda Pública Española (1976).

[5] Lucien Mehl, Elementos de ciencia fiscal 316 (Bosch, 1964).

principle the function of "covering a lie"[6] that is hidden in other ideologies. Although the ability to pay principle cannot remain separate from ideologies, it should not be mistaken for them. To confuse the ability to pay principle with the current ideology poses the risk of denying its specific content.

We can divide the present debates about economic equity into vertical and horizontal dimensions. The first has to do with equity among the different economic levels of society; the second is about finding a fair distribution of public expenses among the different sources of wealth.

As to vertical equity, it is evident that when we refer to issues regarding distribution and redistribution of income, the conclusion reached will always depend on the concept of social justice in mind.[7] Should taxation be proportional for the rich and the poor? Should taxation be more than proportional (progressive) for the rich? Must taxation be less than proportional (regressive) for the rich? The answers to all these questions vary according to different ideologies.

a) *Strict equality or capitation.* Capitation is positioned in the sphere of strict equality.[8] In recent times (from 1988 to 1993), the United Kingdom introduced the *Poll Tax* that set aside the ability to pay principle to go back to the benefit principle.[9] This "new tax" was a *per capita* contribution that all citizens over the age of 18 had to pay.[10] The Thatcher administration[11] wanted to "correct" the disparities among "those who vote, those who pay and those who receive the local benefits."[12]

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6 Concept used by Alexander Rustow, quoted in FRITZ NEUMARK, PRINCIPIOS DE LA IMPOSICIÓN 24 (2nd ed., 1994).

7 Santiago Álvarez García & María Luisa Fernández de Soto Blas, *Principios de equidad y justicia distributiva en la imposición*, *in* LA ÉTICA EN EL DISEÑO Y LA APLICACIÓN DE LOS SISTEMAS TRIBUTARIOS 29 (Santiago Álvarez García & Pedro Manuel Herrera Molina coords., Instituto de Estudios Fiscales, 2004).

8 The same equity that, as Anatole France said, prohibits rich and poor from sleeping under the bridges. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread". ANATOLE FRANCE, THE RED LILY (1894), chapter 7.

9 It began with "...the existing local government finance system (making) it almost impossible for local electors to relate what they pay to the services provided." In Green Paper, Department of Environment, 1986, quoted in ARTHUR MIDWINTER & CLAIRE MONAGHAN, FROM RATES TO THE POLL TAX 64 (Edinburgh University Press, 1993).

10 *Id.*

11 Following Friedrich August von Hayek, as quoted by Fritz Neumark in FRITZ NEUMARK, PRINCIPIOS DE LA IMPOSICIÓN 138 (2nd ed., Instituto de Estudios Fiscales, 1994). *See also* Friedman and Niskanen in MILTON FRIEDMAN, CAPITALISMO Y LIBERTAD (RIALP, 1966).

12 The consequences for the Thatcher administration are well known. See more in: OLIVER MORRISEY ET AL., POLL TAX PARADOXES AND THE ANALYSIS OF TAX REFORM (University of Nottingham, 1990); TIMOTHY BESLEY ET AL., FISCAL ANARCHY IN THE

b) *Proportionality*. This is a fairness criterion that takes into account the fact that each person must pay an equal percentage according to his ability to pay. According to the supporters of this idea, equality is synonymous with proportionality.[13] This criterion also starts from the idea that a tax system should be neutral. In other words, different economic levels should remain in the same circumstances after taxation and taxes should not be used as a tool for "redistribution."[14]

c) *Progressivity.* According to defenders of progressive taxation, the ability to pay is a principle of tax fairness needed to achieve "redistribution."[15] Critics of this concept come mainly from the liberal school that considers progressivity a punishment to the competitive and a reward to the economically incapable.[16]

Several theories of "optimal taxation" combine the criteria of progressivity and proportionality.[17] Regardless of one's particular opinion on these issues, choosing from the above possibilities does not have a direct effect on the ability to pay principle.[18] Respect for the ability to pay does not depend on the fact that a certain State accepts either progressivity or proportionality,[19] or even a "flat tax."[20]

On the other hand, so-called horizontal equity seeks to find "generality" in taxation, not *stricto sensu* (for every single tax), but *lato sensu* (in the tax system as a whole). Therefore, it should not be confused with the ability to pay principle.[21] The principle of generality in taxation means the prohibition of any tax privilege.[22]

UK (Instituto de Estudios Fiscales, 1993); Stephen James Bailey, *The Poll Tax in Scotland: The First Year*, 16 LOCAL GOVERNMENT STUDIES 57-80 (1990).

13 HENRIK WILHEM KRUSE, DERECHO TRIBUTARIO. PARTE GENERAL 103 (Editorial de Derecho Financiero, 1978) (1973).

14 *See* Musgrave, *supra* note 2, at 32; *See also* Emilio Albi Ibáñez, *Clásicos del enfoque de la capacidad de pago*, 39 HACIENDA PÚBLICA ESPAÑOLA 170 (1976).

15 Neumark, *supra* note 6.

16 *Id.* at 138. For Milton Friedman, progressive taxes are against individuals. MILTON FRIEDMAN, CAPITALISMO Y LIBERTAD 221 (RIALP, 1966).

17 *See* John G. Head, *Tax Fairness Principles: A Conceptual, Historical and Practical Review*, 9 AUSTRALIAN TAX FORUM (1992).

18 *See* JACINTO FAYA VIESCA, FINANZAS PÚBLICAS 86 (Porrúa, 1998).

19 *See* the opinion of Klaus Tipke, quoted in Carlos Palao Taboada, *Nueva visita al principio de capacidad contributiva*, 124 REVISTA ESPAÑOLA DE DERECHO FINANCIERO 772 (2004); *See also* Reinhold Beiser, *Das Leistungsfähigkeitsprinzip – Irrweg oder Richtschnur?*, ÖStZ (Österreichische Steverzeitung), No. 16 (2000).

20 *See* Arie Rijkers, *Ability to Pay Principle and Privileges*, 5 STUW (2005).

21 *See* JOSÉ JUAN FERREIRO LAPATZA, CURSO DE DERECHO FINANCIERO 327 (16th ed., Marcial Pons, 1994).

22 "Pertenece a la esencia del impuesto el que su emisión se produzca según la regla general. En otro caso no sería más un impuesto, sino una extorsión." ["Part of the essence

The main questions that arise regarding horizontal fairness are: Does equal ability to pay among taxpayers mean an identical taxation? Or is it fair for two people with the same "wealth" to pay different amounts of taxes due to the origin of the resources (personal work, commercial activity, capital gains, etc.)? It is useless to defend the preeminence of a source of wealth: income, patrimony, consumption.[23] These three manifestations of ability to pay are (could or should be) considered in a tax system in order to achieve horizontal justice.

We need to maintain a healthy conceptual distance between the legal concept of the ability to pay principle and the aspects of horizontal and vertical equity. Those elements pursue an ideal state of equity while the ability to pay principle, as a legal instrument, only helps substantiate the principle of equality in tax law. The ability to pay principle is part of what is called "tax fairness," but it is not tax fairness in itself.

III. Three Contemporary Interpretations of the Ability to Pay Principle

Tax doctrine has developed several ideas on the meaning of the ability to pay principle.[24] Some scholars have even sustained the supposed *emptiness*[25]

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of tax is that its emission is produced according to the general rule. Otherwise, it is no more a tax, but extortion."] Kruse, *supra* note 13, at 103.

[23] *See* Vittorio Luigi Berliri, El impuesto justo 222 (Instituto de Estudios Fiscales, 1986).

[24] José Luis Pérez de Ayala, *Las cargas públicas: principios para su distribución*, 59 Hacienda Pública Española (1979) makes a classification that I synthesize as follows:

1) Positivists who deny any relevance of the principle as a criterion of equity, for whom there is no other source of justice than the law.

2) Those in search of ethical criteria and tax justice that are a cut above the law, but who do not see the ability to pay principle as a real solution.

a) Those who see a glimmer of the already defeated utilitarian philosophy in the ability to pay principle and, therefore, it should also be eliminated.

b) Those who see a guiding criterion or focus built inductively on this principle to resolve problems of tax equity.

3) Those who see this principle as an imprecise, undetermined concept and try to substitute it with more specific ideas.

4) Those who think that the ability to pay principle derives from the concept of justice that has prevailed in Europe.

5) Lastly, his personal idea of the ability to pay principle. For him, it is not an autonomous principle of tax justice, but a common or necessary ground upon which the principles of tax fairness, to use the correct term, stand: progressiveness, equality and non-confiscatoriness.

I do not adhere to any of these ideas and I think there are other ideas on this.

[25] See Wolfgang Gassner & Michael Lang, who conclude that this principle lacks importance from a tax law science point of view. Wolfgang Gassner & Michael Lang, *Das*

or "non-juridical"[26] nature of this concept. I do not share these ideas, nor do I agree with those that remove the ethical elements of this principle.[27] I believe the ability to pay principle has three perfectly valid meanings that do not necessarily exclude each other, but have to do with the specific way the principle is applied.[28]

1. *The Ability to Pay as a Premise, a Limit and a Parameter of Taxation*

The ability to pay principle is a precept that justifies and legitimates all taxes,[29] which is why I consider it a premise of taxation. The ability to pay principle also serves as a limit in the law-making process of any tax because legislators cannot ignore this principle by taxing acts or businesses without any economic content. Since all taxes must be based on a clear manifestation of wealth,[30] we can also say that this fact applies to the tax system as a

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Leistungsfähigkeitsprinzip in Einkommen- und Körperschaftssteuerrecht, 14 ÖJT Band III/1, Manzscher Verlag, 121 (2000), as well as sufficient grounds in certain States; *Die mangelnde Leistungsfähigkeit des Leistungsfähigkeitsprinzips*, ÖStZ (*Österreichischer Juristentag*), No. 22 (2000).

26 See Emilio Giardina & Antonio Berliri who thought this principle as "parajurídico" [parajudicial] quoted by Palao Taboada, *supra* note 4, at 383. Fernando Sainz de Bujanda argued against this idea: "La ciencia económica suministrará criterios aptos para gravar las rentas, atendiendo su origen o su altura, con arreglo, por ejemplo, a un criterio de igualdad; pero ese criterio, en sí mismo considerado, no es un criterio económico sino jurídico. Es el principio de justicia adoptado el que mueve los resortes técnicos del reparto." ["Economic science will supply criteria that are fitting for taxing income, considering its origin or its aggregate, adhering, for example, to a criterion of equality; but that criterion in itself is not an economic criterion, but a legal one. The principle of fairness adopted is the one that moves the technical strings of distribution."] FERNANDO SAINZ DE BUJANDA, HACIENDA Y DERECHO III 183 (1963).

27 This interpretation of the ability to pay principle implies making jokes, such as "a taxpayer has taxable capacity when he can sell his wife and his children as slaves to pay taxes." Barry Bracewell-Millnes, *Economic Taxable Capacity*, Vol. 29 No. 4 INTERTAX 114 (2001). Also: "Nothing of value —not life itself— could go on without taxation" or, even more radically "If it moves, tax it!" GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE (1992), quoted by Hans Gribnau, *General Introduction*, *in* THE PRINCIPLE OF EQUALITY IN EUROPEAN TAXATION 1 (Gerard T. K. Meussen ed., 1999).

28 With this explanation of the ability to pay principle as having "different meanings," I do not imply that the principle is vague or undetermined. On the contrary, I am well aware of its different scopes of application.

29 For Tulio Rosembuj, it is "the only precept..." TULIO ROSEMBUJ, ELEMENTOS DE DERECHO TRIBUTARIO 28 (PPU, 1988), and the "north star" of tax legislators. MATÍAS CORTÉS DOMÍNGUEZ, ORDENAMIENTO TRIBUTARIO ESPAÑOL 28 (Tecnos, 1968).

30 *See* José Luis Pérez de Ayala, *Las cargas públicas: principios para su distribución*, 59 HACIENDA PÚBLICA ESPAÑOLA 90 (1979); and Miguel Ángel Martínez Lago, *Una interpretación constitucional de la funcionalidad de la capacidad económica como principio informador del ordenamiento financiero*, 55 REVISTA ESPAÑOLA DE DERECHO FINANCIERO 396 (1987).

whole.[31] In other words, legislators must abstain from taxing acts that do not constitute a manifestation of wealth.[32] Even if those acts have economic content,[33] legislators must openly observe reality and become familiar with economic realities to determine whether the act to be taxed is a true indicator of the ability to pay.

Once legislators are certain that the act intended to be taxed is a clear manifestation of wealth, they must devise the taxes in such a way as to avoid the possibility of exceeding the tax threshold and adapt the taxes to each taxpayer's personal and professional circumstances.

2. *The Ability to Pay as an Interpretation Criterion in the Application of Taxes*

The legally defined indicator of the ability to pay is the compelling force behind the application of any tax.[34] This assertion brings us to a new aspect

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[31] FRANCESCO MOSCHETTI, EL PRINCIPIO DE CAPACIDAD CONTRIBUTIVA 395 (Instituto de Estudios Fiscales, 1980).

[32] *See* Álvaro Rodríguez Bereijo, *Los principios de la imposición en la jurisprudencia constitucional española,* 100 R.E.D.F. 613 (1998). *See also* CÉSAR ALBIÑANA GARCÍA-QUINTANA, DERECHO FINANCIERO Y TRIBUTARIO 315 (1979). The Spanish Constitutional Court decision can be interpreted along the same lines: "[C]apacidad económica a efectos de contribuir a los gastos públicos, tanto significa como la incorporación de una exigencia lógica que obliga a buscar riqueza allí donde la riqueza se encuentre" ([F]inancial capacity for the purpose of contributing to public spending is as important as developing a logical demand that requires searching for wealth there, where there is wealth).

[33] Gulliver's Travels comically shows several forms of taxation lacking of economic contents in a discussion among professors from the *Grand Academy of Lagado*: "I heard a very warm debate between two professors, about the most commodious and effectual ways and means of raising money, without grieving the subject. The first affirmed, 'the justest method would be, to lay a certain tax upon vices and folly; and the sum fixed upon every man to be rated, after the fairest manner, by a jury of his neighbours.' The second was of an opinion directly contrary; 'to tax those qualities of body and mind, for which men chiefly value themselves; the rate to be more or less, according to the degrees of excelling; the decision whereof should be left entirely to their own breast.' The highest tax was upon men who are the greatest favourites of the other sex, and the assessments, according to the number and nature of the favours they have received; for which, they are allowed to be their own vouchers. Wit, valour, and politeness, were likewise proposed to be largely taxed, and collected in the same manner, by every person's giving his own word for the quantum of what he possessed. But as to honour, justice, wisdom, and learning, they should not be taxed at all; because they are qualifications of so singular a kind, that no man will either allow them in his neighbour or value them in himself… The women were proposed to be taxed according to their beauty and skill in dressing, wherein they had the same privilege with the men, to be determined by their own judgment. But constancy, chastity, good sense, and good nature, were not rated, because they would not bear the charge of collecting." *See also* KLAUS TIPKE, MORAL TRIBUTARIA DEL ESTADO Y DE LOS CONTRIBUYENTES 24 (Pedro M. Herrera trans., 2002).

[34] TULIO ROSEMBUJ, DERECHO FISCAL INTERNACIONAL 22 (El Fisco, 2001).

of the ability to pay principle, which involves activities pertaining to tax administration and the administration of justice.

Part of the attributes and responsibilities of tax administration is interpreting legislation and classifying acts to determine what should be taxed. When interpreting the law, the tax administration must consider the ability to pay principle, and in doing so, assess whether the law abides by the principle. If this is not the case, the tax administration can and should correct legislative mistakes. However, in interpreting the law, the tax administration may not overstep its authority.

If we hold that the legislative branch must ensure that, among other things, the tax threshold is complied with, there is no need to release the tax administration from that obligation, especially when it prevents certain interpretations of the law from imposing confiscatory effects on taxpayers. Therefore, the tax administration can use the ability to pay principle as a means to evaluate the law.

3. *The Ability to Pay as a Fundamental Right of Citizens*

The ability to pay principle can also be seen as a fundamental right of citizens: the right to contribute according to one's means. Fundamental rights act as a way to reach substantial equality (an essential aspect of a fair tax system).[35] Underlying the obligation of contributing to public spending, there are unalienable rights: legality, generality, etc., as well as considerations on the ability to pay. I understand fundamental rights as ethical realities that need positive law to fulfill their purpose, or a legal reality that requires ethics of dignity, equality and freedom to be fully satisfied.[36]

Human rights scholars have not taken seriously the study of the fundamental right of contributing according to one's ability to pay.[37] It is easy to

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[35] Andrea Amatucci states that the first paragraph of Article 31 of the Spanish Constitution gives a modern and complete vision of the financial phenomenon within the scope of fundamental freedoms. Andrea Amatucci, *La intervención de la norma financiera en la economía: perfiles constitucionales*, *in* SEIS ESTUDIOS SOBRE DERECHO CONSTITUCIONAL E INTERNACIONAL TRIBUTARIO 23 (Editorial de Derecho Financiero, 1980).

[36] I follow an eclectic position that takes into consideration both ethical aspects (from natural law) and legal aspects (from positivism) that have a bearing on fundamental rights. *See*, *e.g.*, GREGORIO PECES-BARBA MARTÍNEZ ET AL., CURSO DE DERECHOS FUNDAMENTALES. TEORÍA GENERAL (Universidad Carlos III de Madrid-Boletín Oficial del Estado, 1999).

[37] *See Id*. Nonetheless, this author considers taxation according the ability to pay to derive from the principle of equality, *id.* at 286; *See generally* ANTONIO ENRIQUE PÉREZ LUÑO, LOS DERECHOS FUNDAMENTALES (Tecnos, 1984); DIEGO LÓPEZ GARRIDO, LIBERTADES ECONÓMICAS Y DERECHOS FUNDAMENTALES EN EL SISTEMA COMUNITARIO EUROPEO (Tecnos, 1986); PATRICK WACHSMANN, LE DROITS DE L'HOMME (Dalloz, 2002); REMEDIO SÁNCHEZ FERRIZ, ESTUDIO SOBRE LAS LIBERTADES (Tirant lo Blanch, 1989);

see that this right has all the elements of a "traditional" fundamental right: a legal framework, generalization and internationalization.[38] Any shortcomings found in these elements do not necessarily imply that the right does not exist.[39] The right to contribute according to one's ability to pay constitutes a real limit to public power.[40] It is important to note that this right is not "new," "exotic" or a fourth or fifth generation fundamental right, even if it has not historically been included in the "list" of fundamental rights.

IV. The Ability to Pay as a Fundamental Right

1. *The Legal Basis of the Right to Contribute According to One's Ability to Pay*

A. *Equality*

This right is primarily based on the general principle of equality. The right to equal application of the law translates into as the right to contribute according to one's ability to pay in tax law. Since the ability to pay is the measure of equality in tax law,[41] the right to contribute should therefore be based on that measure of equality. The ability to pay is undoubtedly a significant differentiating feature of taxation, and no argument can be put forward to claim that taxation based on the ability to pay contravenes formal equality.[42]

The equality principle is a good example of what have been called "historically open principles" that have been perfected at the same rate as societies have evolved.[43] Equality before the law is clearly not the same today as it was yesterday, nor as it will be tomorrow.[44]

Luis Prieto Sanchís, Estudio sobre derechos fundamentales (Debate, 1990); Luis López Guerra et al., Derecho constitucional (Tirant lo Blanch, 1992).

38 Rafael de Asís Roig, Las paradojas de los derechos fundamentales como límites al poder (Dikinson, 2000).

39 Regarding the international application of the ability to pay principle, *see* Hick Schamburg, *Steuerrechtliche Leistungsfähigkeit und europäische Grundfreiheiten im internationalen Steuerrecht*, StuW, No. 4 (2005) and Reinhold Beiser, *Das Leistungsfähigkeitsprinzip im Licht des Gemeinschaftsrechtes*, StuW, No. 4 (2005).

40 *See* Perfecto Yebra Martul-Ortega, El poder financiero 160 (EDERSA, 1977).

41 Pedro Manuel Herrera Molina, Capacidad económica y sistema fiscal 84 (Marcial Pons, 1998).

42 *See* Emilio Giardina, Le basi teoriche del principio della capacità contributiva (Giuffrè, 1961), Ignazio Manzoni, Il principio della capacità contributiva nell'ordinamento costituzionale (Giappichelli, 1965), *quoted by* José Manuel Gallego Peragón, Los principios materiales de justicia tributaria (Comares, 2003).

43 Francisco Laporta, *El principio de igualdad: introducción a su análisis*, 67 Sistema (1985).

44 An example of this situation is equality in political rights. In the 18th century, Kant

B. *Solidarity*

Solidarity is a relationship among people united toward a common goal.[45] Unlike other values, solidarity is indirectly based on rights, that is, it is achieved by means of obligations.[46] In terms of the right to contribute according to one's ability to pay, the obligation is clear.

Originally, proposing solidarity as the basis for the ability to pay principle was a way to justify progressive taxation. However, if solidarity is understood as people's responsibility to collaborate for the further development of legal entities, there is nothing that says it must necessarily be higher than a proportional rate for those with more resources.

As fundamental rights scholars have pointed out, the proper use of the value of "solidarity" leads to positive behaviors on behalf of public institutions in terms of removing obstacles against freedom and equality.[47]

C. *A Decent Standard of Living*

Another foundation for the right to contribute according the ability to pay is comprised of certain rights classified as "economic rights:" the right to own property, the right to work, and in general, the right to a decent standard of living.

While it is true that certain rights that form part of these grounds may not be completely regulated, it is also true that legislators cannot create a tax system that directly contradicts these principles or values. For example, one fundamental right is the right to health. Taxing expenses made to satisfy this basic need would go against the ability to pay principle. A person who spends money to restore his health does not show an ability to pay taxes and should therefore not be obligated to be taxed for those services.

2. *The Central Points of the Right to Contribute According to the Ability to Pay*

The central points of the right to contribute according to the ability to pay can be divided into three basic stages: determining the objective ability to pay (objective net principle), ascertaining the subjective ability to pay (subjective net principle), and establishing the intensity of taxation (prohibition of confiscatory taxes).[48]

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considered that the "equals" able to vote were only proprietors. IMMANUEL KANT, TEORÍA Y PRAXIS 34-35 (Tecnos, 1986).

45 *See* A. CORTINA, quoted in Peces-Barba Martínez *et al.*, *supra* note 36, at 277.

46 Peces-Barba Martínez et al., *supra* note 36, at 280.

47 *Id.* at 282.

48 Herrera Molina, *supra* note 41, at 116.

A. *Objective Ability to Pay*

Objective ability to pay means that taxation must be based on net and real gains.[49] Net yield is the total income minus the basic expenses needed to earn that income. Every activity requires a certain investment and expenses. These expenses do not show any ability to contribute to public expenditure, but only reflect the ability to generate income by operating a business or carrying out an activity.

The techniques each State uses to enforce this principle may vary. In terms of the quantitative aspect, the ability to pay requires taxing real gains and not only the expected or nominal assets.[50] At the same time, fictions of law[51] —which are very useful when it is impossible to know the real ability— should be established on practical criteria to avoid claims of wealth that are clearly not based on reality.

B. *Subjective Ability to Pay*

Subjective ability to pay comes into play only after the taxpayer's basic personal needs have been met. Abiding by a tax threshold involves two facets: the tax aspect and participation in public expenditure. A tax threshold in tax law refers to a set of measures set forth in the tax code that prevent taxing people in a way that would affect their having a decent standard of living. It would be incongruous for taxation not to respect citizens' minimum needs for survival, and for governments to attempt to compensate the lack through State aid. It also would be "illogical to demand a sacrifice for the sake of the common good when people do not have the minimum needed for their own survival."[52]

Subjective ability to pay tends to rank on par with the minimum subsistence level,[53] but it goes beyond that and extends to different elements that constitute a decent standard of living. A decent standard of living satisfies the most basic needs, but it also includes all those elements that allow a per-

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49 *Id*. at 118.

50 *Id.* at 117.

51 A classical work on this topic is JOSÉ LUIS PÉREZ DE AYALA, LAS FICCIONES EN EL DERECHO TRIBUTARIO (Editorial de Derecho Financiero, 1970). *See also* Victor Thuronyi, *Presumptive Taxation*, *in* TAX LAW DESIGN AND DRAFTING (Kluwer Law International, 2000).

52 Herrera Molina, *supra* note 41, at 121.

53 Some authors have seen the ability to pay principle as "susceptible of working" in "extremes." *See generally* María Pilar Alguacil Marí, *La capacidad económica como parámetro de enjuiciamiento*, Vol. XLIX, No. 253 REVISTA DE DERECHO FINANCIERO Y DE HACIENDA PÚBLICA 656 (1999).

son to fully develop himself and his potential, such as freedom, a decent place to live, a good environment, a decent job with wages that cover the taxpayer's typical needs and those of his dependents (food, dress, transportation, education, rent, culture, sports, entertainment, etc.).

This idea of a decent standard of living falls under the economic principle of "needs are unlimited and resources are scarce." But it is also true that resources vary at a certain time or place. Thus, some expenses might be considered a luxury in one place, but necessary in another.[54] Therefore, constant observation of the social reality is required.

We can conclude that expenses that originate from a compensatory situation and those that allow the taxpayer a decent standard of living should be set aside from tax payments. Some States have regulated "a tax threshold" as a guideline to follow this principle.[55] A State can adopt various types of measures and can even combine them. Here are some examples:[56]

1) Based on economic studies, an amount can be established for the concept of minimum personal or family subsistence.
2) The minimum subsistence can be the same as the official minimal wage or to the amount of State aid allocated to the needy.
3) Legislators can establish minimum and maximum limits on deducting certain expenses that are considered necessary, and even require certain conditions to ensure that said expenses are not superfluous.
4) Exceptions and reductions to the tax base can be established for basic items. Regardless of its name, its importance lies in examining which concepts are left out of taxable concepts for being considered necessary. As to indirect taxes, the ideal procedure would be to exempt certain goods or services that are considered necessary (allowing credit for the taxes paid).

Each type of tax requires an in-depth analysis on how to observe the minimum subsistence level and the most suitable way of reaching it. For example, exceptions are not the best way to acknowledge a minimum subsistence level in taxes like V.A.T.

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54 As Ángeles García Frías states, these terms have been used by German authorities. Ángeles García Frías, *Balance de la jurisprudencia del Tribunal Constitucional alemán sobre el impuesto sobre la renta*, 122 REVISTA ESPAÑOLA DE DERECHO FINANCIERO (2004).

55 See an in-depth analysis of the family and personal minimums in Javier Martín Fernández, *Regulación en España*, and Pedro Herrera Molina, *Derecho comparado: especial análisis del caso alemán*, quoted *in* EL MÍNIMO PERSONAL Y FAMILIAR EN EL IMPUESTO SOBRE LA RENTA DE LAS PERSONAS FÍSICAS (Pedro Herrera Molina ed., IEF-Marcial Pons, 2000).

56 Herrera Molina explains some techniques that can take the personal and family minimum into account with regard to income taxes. *Fundamento y configuración del mínimo personal y familiar*, in Herrera Molina, *supra* note 55, at 10.

C. *The Intensity of Taxation*

The last factor to be considered in the ability to pay principle is that the tax rate should not be confiscatory. The general principle of non-confiscation can refer to the entire tax system, including expenditures made by the public sector.[57] Public spending should be assigned to guaranteeing the basic needs of the poor and improving the living conditions and competitiveness of the rest of the population, but not for compensating any instability caused by the tax system itself.[58] A tax becomes confiscatory when it takes the resources the taxpayer needs to maintain his same level of productive economic capacity. A tax can also become confiscatory when it leads to situations in which the economic yield after taxes does not compensate the cost, the risk or the effort involved.[59]

The prohibition of confiscatory taxes clearly limits the progressive nature of a tax system, but this principle does not only affect progressive taxes. A tax system that seeks proportionality can also be confiscatory when legislators create a vast number of taxes and their total exceeds the amount taxpayers need to carry out their productive activities. Furthermore, a proportional tax by itself can be confiscatory when it completely inhibits certain activities or the production of certain goods.

There are five different circumstances in which confiscatory taxes might occur:

1) When the payment of a single tax in due time and form is excessive or steep;
2) When the payment of all the taxes in due time and form does not compensate the cost, the risk and the effort involved in the economic activity;[60]
3) When payment is not made in due time, there are two distinctions:

    a) If the non-compliance does not violate a law and it only violates an administrative procedure, taxes would be confiscatory if the total amount of interests, fines and other fees are ruinous;

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57 Scholars have stated that the principle of non-confiscatory taxation includes three elements: 1) observing the level of the minimum exempt, 2) fulfilling the principle of justice in expenditures and 3) limiting tax rates; *See* MARÍA DEL CARMEN BOLLO ARCENA, LA PROHIBICIÓN DE CONFISCATORIEDAD COMO LÍMITE CONSTITUCIONAL A LA TRIBUTACIÓN 174 (1989).

58 On the different concepts of the principle of non-confiscatory taxation, see FRANCISCO GARCÍA DORADO, PROHIBICIÓN CONSTITUCIONAL DE CONFISCATORIEDAD Y DEBER DE TRIBUTACIÓN 93 (Dikinson, 2002).

59 See the opinion of José Luis Pérez Ayala in Bollo Arcena, *supra* note 57, at 394.

60 See Herrera Molina, *supra* note 41, at 133.

b) If the non-compliance arises from breaking a law, the confiscatory effects might be justified since a considerable part of such a taxpayer's wealth was obtained by criminal means;

4) When inefficient tax administration allows high levels of tax evasion and only a few taxpayers (the honest ones or those who cannot avoid paying taxes) support the entire tax burden, and;
5) When inefficient public administration does not allow taxpayers partake in the benefits that legitimately correspond to them.[61]

The German Constitutional Court has stated that the right to own property and the ability to pay principle prevent the total tax burden from exceeding a limit of close to 50% of a taxpayer's income since property serves both public and private interests.[62] The Argentinean Court has also set a limit of 33% as the highest possible tax rate.[63] These limits, however, are quite arbitrary and oversimplify the connection between ability to pay and the right to own property. I think it is more important to ensure a coherent tax system than to establish limits in terms of percentages (a 60% tax might be fine if the population so desires and if government-provided services were good while a 20% tax might be excessive if the government were extremely inefficient).[64]

3. *A Critical Perspective on the Idea of the Ability to Pay Principle as a Fundamental Right*

Carlos Palao Taboada has presented several different ideas on the ability to pay principle, as well as his own, with remarkable clarity.[65] Although my idea of the ability to pay principle as a fundamental right might seem contrary to his, we hold several points in common.

We coincide in that the ability to pay principle influences tax fairness less than what many scholars have suggested. By itself, the principle does not aim at "ideal justice."[66] I also agree with his criticism of those who see this principle as the only criteria of tax fairness. The ability to pay principle alone is not enough to achieve tax justice.

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61 It seems as if the solution to this kind of problem is more political than it is legal.

62 BverfGE 93, 121, 138, cited by Herrera Molina, *supra* note 41, at 67.

63 Gustavo Naviera, *La prohibición de confiscatoriedad por la vía tributaria en el derecho judicial argentino*, IV DIRITTO E PRATICA TRIBUTARIA INTERNAZIONALE (2002).

64 I am not proposing any of these percentages, but I am simply showing how accurate taxation is related to the ideal of state that both citizens and governments want.

65 Carlos Palao Taboada, *Apogeo y crisis del principio de capacidad contributiva*, *in* ESTUDIOS JURÍDICOS EN HOMENAJE AL PROFESOR FEDERICO DE CASTRO, Vol. II (Tecnos, 1976). *See also* Palao Taboada, *supra* note 19.

66 Palao Taboada, *supra* note 65, at 418 and Palao Taboada, *supra* note 19, at 769.

Along this line, I have explained and demonstrated that the aspects related to horizontal and vertical equity (which pertain to politics or economic sciences) should not be mixed with the strictly legal content of the principle.[67] A logical formulation of the ability to pay principle at the core of the tax law might give a certain coherence to tax systems and even bring in ethical criteria in tax law that cannot logically be drawn from other tax principles.

Palao Taboada strongly criticizes the fact that what he calls "positive theories" always fail because it is impossible to formulate a principle like this in purely logical terms. Therefore, these theories usually include elements that are foreign to positive law and more related to the concept of arbitrariness.[68] I have taken care not to include elements that belong to non-legal areas in my proposal. For this reason, I have carefully demonstrated that the elements of the ability to pay principle have a logical basis that does not involve elements outside positive law.

Coming to know an individual's ability to pay taxes requires identifying genuine manifestations of the ability to pay. I am not straying from basic logic by omitting the part of the taxpayer's assets that guarantee his economic and personal growth. Nor do I include non-legal aspects in stating that the tax rates are applied without having ruinous effects. The three "sub-principles" of the ability to pay principle (objective ability to pay, subjective ability to pay and intensity of rates) do not defy basic logic by using a term that is initially abstract.

Finally, as Palao Taboada has said, the ability to pay principle has been used to justify diverse tax initiatives.[69] Nonetheless, the fact that the use of this principle has been "abused" (using it only as rhetorical justification) from time to time does not mean it should be paid no attention. Unfortunately, many important values of society (like democracy, social justice, freedom, etc.) are also used to justify illegitimate and illegal political projects (even wars), and that does not mean they should not be defended.

V. Conclusions

1) This article proposes a healthy conceptual distance between the ability to pay principle and the ideas of horizontal and vertical tax fairness as explained here. The ability to pay principle is part of what is called "tax fairness," but it is not tax fairness in itself.

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67 I think mixing general ideas of equity with a strictly legal concept of the ability to pay (or substantiation of the principle of equality) results in discussions such as the one Joachim Lang and Wolfgang Gassner had in JOACHIM LANG & WOLFGANG GASSNER, THE NOTION OF INCOME FROM CAPITAL (IBFD, 2005).

68 Palao Taboada, *supra* note 19, at 799.

69 *Id.* at 769.

2) The ability to pay principle has three perfectly valid meanings that do not exclude each other. They center on the specific moment of applying the principle: the ability to pay principle as a premise, a limit and a parameter of taxation; an interpretation criterion in the application of taxes; and as a fundamental right.
3) The legal basis of the right to contribute according to one's ability to pay is found in the principles of equality, solidarity and dignity of life in general. These last two also point toward the central elements of the principle. In tax law, the general principle of equality means contributing according to one's ability to pay, which is in turn a measure of equality.

The central points of the fundamental right to contribute according to one's ability to pay consist of three logical elements: determining the objective ability to pay (objective net principle), the subjective ability to pay (subjective net principle), and the intensity of taxation (prohibition of confiscatory taxes).

Recibido el 2 de abril de 2009 y aceptado
para su publicación el 6 de julio de 2009.

Mexican Law Review
New Series
VOLUME III
Number 1

THE AUTONOMY PRINCIPLE OF LETTERS OF CREDIT

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ABSTRACT. *This article explores the erosion that the autonomy principle has suffered in documentary credit transactions. When a seller and a buyer encounter too many hurdles to reach an understanding, the parties decide to ask banks to accept the liability and thus solve the difficulties. The appeal of letters of credit as instruments of payment in international transactions lies in substituting an often unreliable promise of payment from an unknown buyer with the very certain promise from one or more banks. The complexity of a letter of credit arises from the fact that it protects not only the issuing bank and the applicant under a doctrine of strict compliance, but also the beneficiary under the autonomy principle. Through a discussion of recent cases where courts have argued in favour of overcoming the autonomy principle, this article suggests that fraud is not the only exception to this principle of the letter of credit, rather there are other exceptions that could question its autonomy. This article argues that if courts around the world keep interfering with letters of credit turning them into ancillary obligations, soon beneficiaries will be forced to accept exclusively letters of credit issued or confirmed by banks within those jurisdictions whose courts are prone to respect the autonomy of an independent undertaking.*

KEY WORDS: *Letter of credit, autonomy, exception, fraud, injunction.*

RESUMEN. *Cuando un vendedor y un comprador encuentran demasiados obstáculos para cerrar una negociación, dichas partes deciden solicitar la ayuda de instituciones bancarias que asuman los riesgos de la transacción, y así sobrepasar dicho problema. Lo atractivo de las cartas de crédito como instrumentos de pago en transacciones internacionales recae en sustituir la frecuente poco fiable promesa de pago de un comprador desconocido por la certera promesa de pago de un banco o grupo de bancos. La complejidad de una carta de*

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crédito surge del hecho de que no sólo protege al banco emisor y al ordenante bajo la doctrina de cumplimiento estricto, sino también al beneficiario conforme al principio de autonomía. Al hacer un breve señalamiento de los casos más recientes donde los tribunales han pronunciado otros posibles escenarios donde el principio de autonomía de la carta de crédito podría ser superado, este artículo sugiere que el fraude no es la única excepción al principio de autonomía de la carta de crédito, sino que existen otras excepciones que pueden poner en peligro su autonomía. Este artículo argumenta que si los tribunales alrededor del mundo siguen interfiriendo con las cartas de crédito, volviéndolas obligaciones subordinadas, los beneficiarios estarán obligados a únicamente aceptar cartas de crédito emitidas o confirmadas por bancos en aquellas jurisdicciones donde sus tribunales sí respeten la autonomía de obligaciones independientes.

PALABRAS CLAVE: *Cartas de crédito, autonomía, excepción, fraude, medida cautelar.*

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I. INTRODUCTION

This article explores the erosion the autonomy principle has suffered in documentary credit transactions. The first part explains the cornerstone role independent undertakings play in documentary credit transactions, including Letters of Credit (L/Cs), performance bonds and standby credits.[1]

[1] The law governing L/Cs has come a long way and is quite uniform around the world. Tremendous effort has been made by the International Chamber of Commerce ("ICC") with regard to documentary credits, establishing the Uniform Customs and Practice for Documentary Credits ("*UCP*"). As of July 1, 2007, the 6th revision of the UCP (the "*UCP600*"), the most revised version in the history of UCP, has been in effect. Robert Par-

Subsequently, this article focuses on the autonomy principle of L/Cs, as well as their payment, commercial and financing functions. The third and core part of this article discusses the most common exceptions to the autonomy principle as argued by courts and statutes, including fraud, nullity, illegality, attachment of proceeds, unconscionability, avoidance of the underlying contract and freezing orders by underwriting authorities. This section will also comment on British, U.S., Canadian, South African and Singaporean case law, as well as outline the challenges these courts have faced to maintain the role of L/Cs as a method of payment untouched by protecting beneficiaries under the autonomy principle, while calming the pleas of banks, buyers and governments under strict compliance doctrine,[2] public policies, statutes, public interest and third party rights. Finally, some comments will be presented in the conclusion.

Sellers want to minimize the risk of delivering goods and not being paid while buyers do not want to pay unless they are certain of receiving the goods they are buying.[3] The possibility of either party's defaulting on the business transaction, the physical distance between parties,[4] the different

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son, *UCP 600 - A New Lease of Life for Documentary Credits? Part 1*, FINANCE AND CREDIT LAW, 2007, 1, 6; Robert P. Imbriani, *The Holy Grail in Negotiating Terms in International Payment*, BUSINESS INTELLIGENCE AT WORK, 2007, 7, 1, 13. The purpose of the UCP600 is to reflect the customs traders apply when dealing with L/C transactions. For the UCP600 to apply, reference must be made in the L/C. In this respect, in its verdict of 16 November 16, 1978, the Commercial Court of Brussels ruled that the UCP600 applies to the legal relationship between parties that use the L/C device as form of payment in normal business activities, unless otherwise specified. Accordingly, the French Supreme Court ("*Cour de Cassation*") concluded that the UCP600 has the same effect as the French Civil Code. Moreover, in 1976, the Commercial Court of Paris reversed the assertion that the UCP600 was only a recommendation. Conversely, in the United Kingdom and in the United States, the UCP600 has no legal binding effect although its provisions are incorporated into almost every L/C by express provision, thus having the effect of contractual terms. In *Attock Cement Co. Ltd. v. Romanian Bank for Foreign Trade* [1989] 1 Lloyd's Rep. 572, Staughton L. J. explains the above by stating that unless otherwise agreed by the parties, the UCP restates the common law applicable to all letters of credit and performance bonds. Michael J. Smith, *Transmitting the Benefit of a Letter of Credit*, JOURNAL OF BUSINESS LAW 449 (1991). Dorothea W. Regal, *Letter of Credit Litigation*, INTERNATIONAL COMMERCIAL LITIGATION 52 (1996-1997), Likewise, U.S. Article 5 of the Uniform Commercial Code ("UCC") embraces the developments achieved in the UCP. Charl F. Hugo, *Documentary Credits: The Basis of the Bank's Obligation*, 117 SOUTH AFRICAN LAW JOURNAL 241 (2000).

[2] Yeliz Demir-Araz, *International Trade, Maritime Fraud and Documentary Credits*, 8 (4) INTERNATIONAL TRADE LAW & REGULATION 128 (2002).

[3] INDIRA CARR, INTERNATIONAL TRADE LAW (3rd ed., 2005).

[4] Generally, letters of credit (L/Cs) as a device for payment are not commonly used for domestic transactions because of the high cost, the lengthy processing time and the relative security a seller usually finds within a domestic legal framework. Stephen J. Leacock, *Fraud in the International Transaction: Enjoining Payments of Letters of Credit in International Transactions*, 17 VAND. J. TRANSNATL. L. 898 (1984). See also *Hamzeh Malas v. British Imex Indus-*

time zones and currencies, the need for additional intermediaries,[5] the nature of multi-jurisdictional transactions[6] and the fact that the parties do not usually know each other are reasons that explain the dominant role letters of credit ("L/Cs") play in the international trade law of our time.[7]

Generally speaking, an L/C is a written instrument[8] used when a person (the applicant) has a payment obligation towards another (the beneficiary) under a given transaction (usually the sale of goods).[9] The former asks a banking institution (the issuing bank) to assume primary[10] and absolute[11] liability by promising to pay the beneficiary under terms and conditions previously negotiated between the applicant and the beneficiary. Usually, these terms and conditions require that the beneficiary comply with specific provisions regarding the documents to be presented to the issuing bank.[12] Another common procedure may include the participation of a fourth party, a bank from the same country as the beneficiary[13] that may act as a "correspondent bank" of the issuing bank to advise the beneficiary on the terms of credit, or as a "confirming bank" that acquires the same liability towards the beneficiary as the issuing bank.[14] This confirming credit allows the beneficiary to deal with a local bank and avoid a certain degree of political risk that may prevent him from receiving payment.[15]

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tries Ltd. [1958] 2 Q.B. 127 cited by Razeen Sappideen, *International Commercial Letters of Credit: Balancing the Rights of Buyers and Sellers in Insolvency*, J. BUS. L. 146 (2006, MAR).

5 Rhys Bollen, *An Overview of the Operation of International Payment Systems with Special Reference to Australian Practice: Part 1*, 22 (7) JOURNAL OF INTERNATIONAL BANKING LAW AND REGULATION 381 (2007).

6 *Id.* at 379.

7 Paolo S. Grassi, *Letter of Credit Transactions: The Banks' Position in Determining Documentary Compliance. A Comparative Evaluation under U.S., Swiss and German Law*, 7 (81) PACE INTERNATIONAL LAW REVIEW 122 (2006).

8 Jacqueline D. Lipton, *Documentary Credit Law and Practice in the Global Information Age*, 22 FORDHAM INTERNATIONAL LAW JOURNAL 1998-1999 (1989).

9 Maurice Megrah, *Risks Aspects of the Irrevocable Letter of Credit*, 24 ARIZ. L. REV. 260 (1982).

10 Roy Goode, *Surety and On-Demand Performance Bonds*, J. BUS. L. 88 (1988).

11 Anthony Walker, *American Accord – Third Party Fraud and Letters of Credit*, 1 INTERNATIONAL FINANCIAL LAW REVIEW 5 (1982).

12 David Richard Taggart, *Letters of Credit: Current Usages and Theories*, 39 LA. L. REV. 602 (1978-1979).

13 JACK RAYMOND ET AL., DOCUMENTARY CREDITS: THE LAW AND PRACTICE OF DOCUMENTARY CREDITS INCLUDING STANDBY CREDITS AND DEMAND GUARANTEES (3rd ed., Butterworths, 2001).

14 Lijuan Zhou, *Legal Position between Advising Bank and Confirming Bank: Contrast and Comparison*, 17 (7) JOURNAL OF INTERNATIONAL BANKING LAW 226 (2002); Alphonse M. Squillante, *Letters of Credit: A Discourse, Part IV*, 85 COMMERCIAL LAW JOURNAL 51 (1980).

15 Gerard McCormack *et al.*, *Subrogation and Bankers' Autonomous Undertakings*, 116 LAW QUARTERLY REVIEW 141 (2000).

When a seller and a buyer encounter too many hurdles to reach an understanding, the parties usually ask banks to assume the liability.[16] The appeal of L/Cs as instruments of payment in international transactions lies in substituting an often unreliable promise of payment from an unknown buyer with the very certain promise from one or more banks.[17]

L/Cs entail a unilateral payment undertaking of "considerable complexity"[18] of a documentary nature that protects not only the issuing bank and the applicant under a doctrine of strict compliance,[19] but also the beneficiary under the autonomy principle. Basically, autonomy is the key principle governing L/Cs in that the issuing bank takes on the liability of the beneficiary without involving itself in the underlying transaction that brought about the need for the credit or any dispute thereunder.[20] The issuing bank is obligated to pay the beneficiary regardless of any valid defenses its customer may have against its liability to pay under the original contract, and is bound to pay the full amount of the credit even though the customer may have valid counterclaims or rights of compensation towards the beneficiary in the underlying contract.[21] These specific claims should be sought separately.[22] This means that the beneficiary need not evince his due performance in the underlying contract to be paid, but only produce the right documentation.[23]

II. The Independent Obligation of the Letters of Credit

As mechanisms for financing trade,[24] L/Cs have been used since the time of the Phoenicians, Babylonians, Assyrians and Greeks.[25] These in-

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16 Jean Pierre Mattout, *Letters of Indemnity in Shipping Transactions: Legal Aspects*, 6 JOURNAL OF INTERNATIONAL BANKING LAW 322 (1991).

17 Alan Davidson, *Commercial Laws in Conflict – An Application of the Autonomy Principle in Letters of Credit*, 6 INT'L TRADE & BUS. L. ANN. 65 (2001).

18 Gerard McCormack *et al*., *Assignment of Documentary Credits*, 16 JOURNAL OF INTERNATIONAL BANKING LAW 138 (2001).

19 Steven C. Rattner, *Letters of Credit: A Return to the Historical Documentary Compliance Standard*, 46 U. PITT. L. REV. 481 (1984-1985).

20 E. Peter Ellinger, *The Autonomy of Letters of Credit after the American Accord*, 11, 2 AUSTRALIAN BUSINESS LAW REVIEW 118 (1983).

21 Gerard McCormack *et al*., *supra* note 15, at 142.

22 Dora S. S. Neo, *A Nullity Exception in Letters of Credit Transactions?*, SINGAPORE JOURNAL OF LEGAL STUDIES 49 (2004).

23 Ross P. Buckley *et al*., *Development of the Fraud Rule*, 23 U. PA. J. INT'L ECON. L. 698 (2002).

24 The present form of the L/C has only existed about 100 years. *See* in general Charles B. Harris II, *Commercial Letters of Credit: Development and Expanded Use in Modern Commercial Transactions*, 4 CUMB. SAMFORD LAW REVIEW 134 (1973-1974), cited in David J. Kalson, *The International Monetary Fund Agreement and Letters of Credit: A Balancing of Purposes*, 44 U. PITT. L. REV. 1061 (1982-1983).

25 Richard A. Wiley, *How to Use Letters of Credit in Financing Sales of Goods*, 20 THE

struments were created by merchants as a way to help their own credit.[26] The term L/C comes from the French word *accreditif* ("the power of doing something"), which in turn derives from the Latin word *accreditivus* ("trust").[27] Stemming from the bill of exchange, the L/C was a useful device for travelers who did not want to carry hard cash on their journeys and would instead give this money in trust to their bankers in exchange for a "letter of credit," which could later be cashed at another bank at their destinations. Lord Denning has compared it to the bill of exchange because both share the same principle: autonomy.[28]

The L/C is a "complex of contractual obligations."[29] The basic structure of an L/C provides for 3 different independent commitments;[30] (1) a contract between the beneficiary and the applicant (the "*underlying transaction*"), (2) a contract between the applicant and the issuing bank for opening a credit for an amount to be reimbursed by the applicant (the "*application*"),[31] and (3) the issuing bank's undertaking towards the beneficiary that will honor the L/C if requirements are complied with.[32]

Academics argue that the difficulty of understanding L/Cs lies in the relationship between an L/C operation and the underlying contract.[33] This is indeed more intricate than appears at face value. On the one hand, there is the argument that opening an L/C cannot be construed as the execution of the buyer's obligation of the underlying contract. But on the other, if the L/C is not opened in favor of the seller, the buyer would be breaching the underlying contract by putting the seller in the position of having to look for other ways to enforce the contract, given that the applicant's liability towards the beneficiary is central, but its action is suspended during the time

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BUSINESS LAWYER 495 (1964-1965), cited in Stephen P. McLaughlin, *Letters of Credit: Exploring the Boundaries of Injunctions against Honour*, 4 FORDHAM INTERNATIONAL LAW JOURNAL 161, 170 (1980-1981).

26 Norman I. Miller, *Problems and Patterns of the Letter of Credit*. 1959 U. III. L. F. 162 (1959).

27 Robert Bulger, *Letters of Credit: A Question of Honor*, 16 N.Y.U. J. INTL L. & POL. 799 (1983-1984). *See also* Charles B. Harris II, *supra* note 24, at 157.

28 Clive M. Schmitthoff, *The Transferable Credit*, JOURNAL OF BUSINESS LAW 51 (1988).

29 Serguei A. Koudriachov, *The Application of the Letter of Credit Form of Payment in International Business Transactions*, 10 INTERNATIONAL TRADE LAW JOURNAL 41 (2001).

30 Herman N. Finkelstein, *Performance of Conditions under a Letter of Credit*, COLUM. L. REV. 747 (1925).

31 Professor McCormack argues that with documentary credit, the issuer usually takes security directly in the underlying transaction, through a pledge of the goods or documents representing the goods. Gerard McCormack *et al.*, *supra* note 15, at 45.

32 Robert D. Aicher, *Credit Enhancements: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 THE BUSINESS LAWYER 933 (2004). *See also* Alphonse M. Squillante, *Letters of Credit: A Discourse, Part III*, 84 COMMERCIAL LAW JOURNAL 471 (1979).

33 Serguei A. Koudriachov, *supra* note 29, at 48.

the issuing bank is bound to pay under the L/C.[34] This explains why practitioners believe L/Cs try to compensate for the buyer's weaker position in the underlying transaction.[35]

The above supports the argument that even when the autonomy principle aims at isolating the payment undertaking by making it independent[36] of the underlying transaction, this transaction inevitably plays a significant role in determining the equities competing[37] within the L/C and in deciding the battle between the seller's certainty of payment against his factual right to be paid. Therefore, it is not possible to conceive the underlying transaction as separated from the L/C commitment. Basically, if there were no underlying transaction, there would be no L/C in the first place.[38] Empirical studies have proved that a lack of concern about the underlying transaction has brought about false calls, abuse and fraud.[39] Still, British courts have traditionally been very reluctant to instruct banks from honoring undertakings under L/Cs.[40]

Along this line, a recent study[41] says that in certain civil law countries,[42] and mostly in Latin American countries, jurisprudence does not consider the underlying transaction completely isolated from documentary commitment. In these countries, jurists have found difficulties in understanding the concept of the autonomy of independent undertakings because the principle of "cause" is deeply rooted in civil law tradition. Schwank[43] argues that

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34 Markus Heidinger, *Bank Guarantees, Letters of Credit and Similar Instruments under Austrian Law*, 12 (11) JOURNAL OF INTERNATIONAL BANKING LAW 452 (1997).

35 Ronald J. Mann, *The Role of Letters of Credit in Payment Transactions*, 98.8 MICH. L. REV. (2000).

36 Generally, U.S. academics and courts refer to the autonomy principle as "independency principle." *See generally*, Edward L. Symons, *Letters of Credit: Fraud, Good Faith and the Basis for Injunctive Relief*, 54 TULANE LAW REVIEW 357 (1979-1980); Michael Stern, *The Independence Rule in Standby Letters of Credit*, 52 U. CHI. L. REV. 236 (1985); Timothy J. Henderson, *The Independence Principle, The Presentment Warranty and the Status of the Texas Letter of Credit*, 22 TEX. TECH L. REV. 830 (1991).

37 Laura K. Austin, *Letters of Credit: Gold Bullion?*, 45 LA. L. REV. 930 (1984-1985).

38 Alphonse M. Squillante, *Letters of Credit: A Discourse, Part II*, 84 COMMERCIAL LAW JOURNAL 430 (1979).

39 Henry Stewart, *It is Insufficient to Rely on Documents*, 5.3 JOURNAL OF MONEY LAUNDERING CONTROL 225 (2002).

40 Antony Pugh-Thomas, *Letters of Credit - Injunctions - The Purist and the Pragmatist: Can a Buyer Bypass the Guarantor and Stop the Seller from Demanding Payment from the Guarantor*, 11 JOURNAL OF INTERNATIONAL BANKING LAW 211 (1996).

41 Friedrich Schwank, *New Trends in International Bank Guarantees*, 6 INTERNATIONAL BANKING LAW 37 (1987).

42 Belgian law acknowledges the abstraction between the underlying transaction and the documentary undertaking. *See generally* Philippe De Smedt, *First Demand Guarantees in Belgian Law*, 2 INTERNATIONAL FINANCIAL LAW REVIEW 20 (1983).

43 *Id.* at 38.

this principle is similar to the "consideration" concept in British law. However, in my opinion, this concept is not completely accurate since the concept of "cause" in civil law jurisdictions is sometimes not taken into account in the transaction. Moreover, the term "cause" is often used as an exception to the autonomy principle of documentary obligations, thus allowing the parties to benefit from it if included in the instrument.

In the words of Ackner in *Esal (Commodities) Limited v. Oriental Credit Limited*,[44] the nature of independent obligations relies on the issuer not concerned in "the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not." The whole idea behind independent law obligations is to have a certain guarantee that the bank's undertaking will not be affected by any abnormality regarding its underlying obligation and that the seller should not be conditioned to obtain payment solely by suing the buyer.[45] Therefore, generally speaking, courts are prevented from granting injunctions to order payment under a L/C.[46] However, it seems reasonable to uphold an unjust payment when there is evidence that the beneficiary is not entitled to receiving it. Nonetheless, academics[47] argue that making the issuer's performance subject to the underlying transaction will make L/Cs lose their commercial usefulness, making it better for merchants and courts striving for equity to seek three-party transactions like guarantees to assure the primary obligor in an underlying transaction.

III. Autonomy

An L/C is a "one-way abstract transaction, in which the emitting bank cannot reject the execution of its obligation by referring to the non-execution of obligations by other parties to the transaction."[48] The issuer's independent commitment is a *sui generis*[49] primary obligation and the "cornerstone of the commercial vitality" of this instrument of payment.[50] Understood as a merchant practice by British courts, a third beneficiary party theory device by

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44 2 Lloyd's Rep. 546, at 245 [1985] .

45 Henry Stewart, *supra* note 39, at 225.

46 John F. Dolan, *Tethering the Fraud Inquiry in Letter of Credit Law*, 21 BANKING AND FINANCE LAW REVIEW 480 (2006).

47 Peter A. Alces, *An Essay in Independence, Interdependence and the Surety Principle*, 3 UNIVERSITY OF ILLINOIS LAW REVIEW 449 (2003).

48 Serguei A. Koudriachov, *supra* note 29, at 47.

49 Leacock argued that its binding nature is derived from statute even though it lacks consideration. Stephen J. Leacock, *supra* note 4, at 886.

50 See *Ward Petroleum Corp. v. FIDC*, 903 F.2d 1297, 1299 (10th Cir. 1990), cited by Robert D. Aicher, *supra* note 32, at 898.

civil law academics, or an offer made by the issuer to the beneficiary, the certainty of payment provided by an L/C makes it traders' favorite payment device[51] since the underlying transaction is usually not entered *inter praesentes*,[52] thus binding the beneficiary to claim payment in a foreign jurisdiction.[53]

The autonomy of L/Cs and other financial devices is reflected in several judicial decisions[54] and upheld by the most important domestic and international legal frameworks.[55] This paper has identified three major functions of the principle of autonomy, which has been described as the "engine room behind of the letter of credit."[56] First, it has a payment function which consists of delimiting the risks[57] in the underlying transaction by allocating each party's liabilities,[58] so that the seller is paid and the issuer is either reimbursed or given recourse against the applicant regardless of any

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51 Jonathan D. Their, *Letters of Credit: A Solution to the Problem of Documentary Compliance*, 50 FORDHAM L. REV. 848 (1981-1982).

52 Nicholas L. Deak, *Letters of Credit (Documentary Credits)*, 2 N.Y.J. INTERNATIONAL & COMPARATIVE LAW 239 (1980-1981).

53 According to its content, traders have created different kinds of L/Cs which are generally used pursuant to the form of payment intended by the seller and the buyer, either by presenting documents and installments, accepting bills of exchange issued by the issuing bank or accepting bills of exchange by negotiation. U.S.-British cases prefer the inclusion of the acceptance of bills of exchange in L/Cs while European cases usually tend to favor the presentation of documents practice. *See generally* Meir Yafrich, *Third Party's Attachment on Letter of Credit Proceeds*, JOURNAL OF BUSINESS LAW 158 (2001).

54 In 1941, the New York Supreme Court in *Sztejn v. J Henry Schroder Banking Corp*, 31 NYS 2, 631 at 633-34 [hereinafter *Sztejn*] set forth the independency of an L/C in its underlying transaction. Almost 50 years later, a dictum by Lord Diplock in the well-known British case of *United City Merchants (Investments) Ltd. and Another v. Royal Bank of Canada and Others* ("*United City Merchants*") 1 A.C. 168 (1983), *The American Accord* asserted that notwithstanding whether the issuing bank has knowledge of a breach in an underlying transaction, if the documents appear to be correct, the issuer is bound to pay the credit. In Canada, the Supreme Court in *Angelica-Whitewear Ltd. v. Bank of Nova Scotia* ("*Angelica-Whitewear*") 36 D.L.R. (4th) 161, EYB 1987-67726, 1987 CarswellQue 24, 1987 CarswellQue 91, S.C.J. No. 5, 73 N.R. 158.6Q.A.C. 1.36B.L.R. 140, [1987] I S.C.R.59 (S.C.C.) stressed that the independence from the transaction is what gives L/Cs their advantage. Cited in Case Comment, *Phillips v. Standard Bank of South Africa Ltd. (Unreported - South Africa)*, 4 INTERNATIONAL BANKING LAW (1986).

55 Articles 3 and 4 of UCP 600; Article 2 (b) of Uniform Rules for Demand Guarantees; Articles 2 and 3 of UNCITRAL Convention on Independent Guarantees and Stand-By Letters of Credit; and Sections 5-109 (1)(a), 5-114 (1) and 5 5-103(d) & cmt of UCC.

56 Jonathan Arkins, *Snow White v. Frost White: The New Cold War in Banking Law*, 15 JOURNAL OF INTERNATIONAL BANKING LAW 31 (2000).

57 Lisa G. Weiberg, *Letter of Credit Litigation – Bank Liability for Punitive Damages*, 54 FORDHAM L. REV. 923 (1985-1986).

58 Gerard McCormack *et al.*, *supra* note 15, at 45.

dispute between the parties.[59] None of the banks participating in the L/C transaction are bound to act on the strength of the underlying transaction, not even if the L/C contains a direct reference to such a transaction.[60] Likewise, no set-off[61] or counterclaim is allowed.[62] The parties to an L/C can only counterclaim the party towards whom they are liable.[63] Under this principle, an applicant cannot sue the issuer on the strength of its dealings with the issues or with the beneficiary, citing the undertaking of the L/C.[64] Similarly, the undertaking of the issuer of the L/C does not concern nor binds the advising bank towards the beneficiary of this transaction in any way.

However, the autonomy principle of the L/C does not absolve the issuer of any liability triggered from its inexperience and resulting in failing its payment under the L/C towards the beneficiary.[65] Ward explains that the severance of the different undertakings that conforms the L/C device simply aims at avoiding any obstruction to issuing bank's payment obligation under the L/C, which means that the applicant still holds an action towards the issuing bank for any possible breach in the application contract.[66]

Secondly, Professor McCormarck explains its commercial function[67] in conjunction with the strict compliance doctrine as limiting the issuer's exposure by giving it the ministerial function of document checking[68] and fund transferring[69] so as to eliminate any doubt as to whether it is bound to pay or not,[70] as well as to ensure that the issuer will be reimbursed by the applicant,[71] solely based on the documents.[72] Illustrating the above, the British

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59 Ross P. Buckley *et al.*, *supra* note 23 at 656.

60 Serguei A. Koudriachov, *supra* note 29, at 47.

61 It is worth mentioning that a limitation to the autonomy principle was put in *Hong Kong & Shanghai Banking Corp. v. Kloeckner & Co. Ltd.* 2QB514 (1989) whereby it was held that the rights of set-off on an issuer against the beneficiary under a L/C are not affected by the autonomy principle, cited by Howard Bennett, *The Formal Validity of Demands under Performance Bond*, 6 JOURNAL OF INTERNATIONAL BANKING LAW 207-211 (1991).

62 Clive M. Schmitthoff, *supra* note 28, at 51.

63 Razeen Sappideen, *supra* note 4, at 146.

64 Serguei A. Koudriachov, *supra* note 29, at 48.

65 Alan Ward, *The Liability of Banks in Documentary Credit Transactions under English Law*, 13 JOURNAL OF INTERNATIONAL BANKING LAW 389 (1998).

66 *Id.*

67 *American Bell Int'l, Inc. v. Islamic Republic of Iran*, 474 F. Supp. 420, 426 (1979) cited by Peter A. Alces, *supra* note 47, at 550.

68 Christopher Hare, *Not so Black and White: The Limits of the Autonomy Principle*, 63 THE CAMBRIDGE LAW JOURNAL 288 (2004).

69 Gerard McCormack *et al.*, *supra* note 15, at 41.

70 Christopher Hare, *supra* note 68, at 289.

71 Serguei A. Koudriachov, *supra* note 29.

72 Lord Diplock in *The American Accord*, note 79, cited in Yeliz Demir-Araz, *supra* note 2, at 129.

case of *Gian Singh & Co. Ltd. v. Banque de l'Indochine*,[73] demonstrates that the autonomy principle binds an issuer to pay to the beneficiary even when the documents provided for under the terms of an L/C are forged. Likewise, the Australian decision on *Pacific Composites Pty Ltd. & Anor v. Transpac Container System Ltd. & Ors*[74] ruled that even when the documents required under an L/C are incorrect, the issuer is bound to pay. Moreover, *IE Contractors Limited v. Lloyds Bank Plc*[75] stated that the payment of independent obligations like L/Cs is subject to the condition of the proper presentation of documents and is not concerned at all with whether the facts represented in these documents are true or actually happened.

Finally, its financing function consists of protecting the parties (other than the issuing bank) to an L/C from any interference from being reimbursed by the issuer after paying the beneficiary[76] while also supporting sellers to leverage other transactions on the strength of the credit opened in their favor under the L/C.

IV. Exceptions

Assurance of payment plays a quintessential role when the seller asks the buyer to open an L/C, but does the seller have an absolute right to payment?[77] Donaldson remarked that thrombosis would occur were courts to disturb the mercantile practice of treating the rights under an L/C as being equivalent to cash in hand.[78] When courts are asked to award injunctions to enjoin payment under an L/C, a public interest test is carried out to decide whether the injunction would, on the one hand, prevent an innocent party from fraud or unconscionability, declaring a nullity[79] or an illegal transaction, or enforcing an act of state, or, on the other hand, if the injunction would strengthen the autonomy of the issuer's undertaking under the letter of credit.[80]

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73 2 All E.R. 754 (1974), cited by Jonathan Arkins, *supra* note 56, at 32.

74 Unreported decision of Tamberlin J., Federal Court of Australia, NSW District Registry in Admiralty, May 11, 1998, NG377 of 1996, cited in *Id.*

75 2 Lloyd's Rep. 496, Staughton L.J., 499 (1990).

76 Meir Yafrich, *supra* note 53, at 159; Robert S. Rendell, *Fraud and Injunctive Relief*, 56 Brooklyn Law Review 113 (1990-1991).

77 Ronald J. Mann, *supra* note 35, at 29.

78 *See Intraco Limited v. Notis Shipping Corp*, *The Bhoja Trader* ("*The Bhoja Trader*") 2 Lloyd's Rep. 256, 250 (1981).

79 Generally, nullity as exception is accepted in civil law jurisdictions. *See* Alberto Giampieri *et al.*, *Enforceability of International Documentary Letters of Credits: The Italian Perspective*, 27 The International Lawyer 1025 (1993).

80 *See Intraco Limited v. Notis Shipping Corp*, *supra* note 78.

In practice, it is often said[81] that issuers tell their beneficiaries the issuing bank will pay the credit unless an injunction is presented.[82] An injunction is used to block the execution of an L/C by preventing the beneficiary from claiming payment, the issuer from paying out the credit or, in some cases, both of these actions.[83]

As opposed to several studies[84] that recognize fraud as the only exception to the autonomy principle, this paper presents outline cases in which courts have asserted other possible scenarios where the autonomy principle is superseded. For instance, according to the rulings on *Rafsanjan Pistachio Producers Co-operative v. Bank Leumi (U.K.) Plc*[85] and *KBC Bank v. Industrial Steels (UK) Ltd.*,[86] fraudulent misrepresentation by the beneficiary on opening the credit is also a possible scenario for awarding an injunction to prevent the beneficiary from claiming payment.

Likewise, pursuant to Canadian case law,[87] the parties are allowed to contract out of the principle of autonomy by expressly stipulating in the terms of the credit that the issuer's undertaking will be conditioned to proof of the applicant's liability, thus having to inquire into the underlying transaction. Moreover, a recent study[88] suggests that the compliance test set forth in the UCP[89] indirectly boycotts the principle of autonomy as it centers on the fact that the seller can always present a claim through the underlying transaction. This is understood since the document requirements for the credit have been reduced to a point that the seller can easily produce these documents by relying heavily on the provisions in the original contract.

Professor McCormack[90] also points out that in some jurisdictions, the autonomy principle cannot prevent issuing banks' common practice of choos-

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81 Reade H. Ryan Jr., *Who should be Immune to the Fraud in the Transaction Defense in a Letter of Credit Transaction?*, 56 BROOK. L. REV. 128 (1990-1991).

82 Since injunctions are equitable remedies, they have been always subject to limitations by courts. *See* generally Francis Bacon, *Developments in the Law: INJUNCTIONS*, 78 HARV. L. REV. 995 (1964-1965).

83 Renee Martin-Nagle, *Injunctions of Letters of Credit: Judicial Insurance Against Fraud*, 3 JOURNAL OF LAW AND COMMERCE 305 (1983).

84 *See*, *e.g.*, Glower W. Jones, *Letters of Credit in The United States Construction Industry*, INTERNATIONAL BUSINESS LAWYER 16 (1986).

85 1 Lloyd's Rep. 513 (1992), cited by E. Peter Ellinger, *New Cases on Documentary Credits*, JAN JOURNAL OF BUSINESS LAW 33 (1994).

86 Commercial Court, 27 Nov. 2000, cited in Case Comment, *Deceit and Letters of Credit*, 23 THE BUYER (2001) 7.

87 *Fuji Bank Canada v. 1440 Ste Catherine Street Developments Inc* 1997 CarswellOnt 1579, 6.

88 Jonathan Arkins, *supra* note 56, at 31.

89 *Id.*, articles 13.a and 37.c of UCP 600.

90 Gerard McCormack *et al.*, *supra* note 15.

ing whether or not to fulfill their payment obligations under an L/C based on the chance of entering into litigation with the beneficiary. This proved so in *Dairy Queen, Inc. v. Bank of Wadley*,[91] in which the issuer's defense against payment was on the grounds that the L/C had exceeded its lending limit.

1. *Fraud*

When traders are asked to identify an exception to the autonomy principle,[92] the most common response is imprecision. However, when it comes to fraud, defining parameters are very different from jurisdiction to jurisdiction,[93] even though the disparities are sometimes explained as being necessary.[94] Professor Goode[95] argues that fraud should be understood as a false statement knowingly and intentionally included in a document to be used against the deceived party. A breach of warranty would not suffice to prove fraud, but only the unscrupulous intention to deceive.[96]

Is it an option to decide whether an issuer should pay out or not under an L/C? It is generally assumed that issuers have the right to decide whether to refuse payment on grounds of fraud. Generally speaking, the autonomy principle allows banks to pay out the credit, acting in good faith,[97] in the face of documents that appear *prima facie* to comply with the terms prescribed in the credit.[98] Strict compliance doctrine obligates banks

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91 407 F. Supp. 1270 (M.D. Ala. 1976), cited in G. Hamp Uzelle III, *Letters of Credi*t, 10 THE MARITIME LAWYER 52 (1985).

92 John F. Dolan, *supra* note 46, at 491.

93 As an example of exceptions to the autonomy principle, according to the 1981 ruling of the *Cour de Cassation*, in the case of indisputable fraud by the beneficiary, the buyer can address the courts to seize the L/C account to prevent the beneficiary from receiving payment. In South Africa, the position is akin to that of France, whereby falsification of the documents required under the L/C clearly interdicts payment under the transaction. Anglo-American cases share the same limitations. However, the practice of applying this exception has been developed more in these countries. For example, while Britain has developed common criteria for applying the fraud exception, the U.S. law has a specific law to use when ruling on the position of issuing banks facing these types of practices. Gavalda Stufle, BANKING LAW (1989), cited by Serguei A. Koudriachov, *supra* note 29.

94 John F. Dolan, *supra* note 46, at 250.

95 Roy Goode, *supra* note 10, at 991. Davidson points out that the common law fraud in statements comes from *Derry v. Peek* 14 App Cas 337, 374 (1889). Alan Davidson, *supra* note 17, at 66.

96 *See* Case Comment, *supra* note 86.

97 Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 539 (2005).

98 Dora S. S. Neo, *supra* note 22, at 51; Alphonse M. Squillante, *Letters of Credit: A Discourse, Part V*, 85 COMMERCIAL LAW JOURNAL 91 (1980).

to pay in the face of documents that strictly comply with the credit terms,[99] without any reference to facts not contained therein[100] or any examination of the factual background of the documents.[101] Nonetheless, case law has also proved that (1) where the issuer is aware of the fraud, in either the underlying transaction or the tender of the documents,[102] the issuing bank is not only entitled to refuse payment towards the beneficiary, but also has a limited duty to refuse this payment,[103] as seen in *Signal Capital Corp. v. First National Bank of Gatlinburg*[104] and *Ross Bicycles, Inc. v. Citibank*[105] (it can be argued, however, that the issuer may also have a limited duty to investigate)[106] and (2) the applicant has a right to apply for an injunction to prevent payment if fraud on the beneficiary's behalf can be proven.[107]

Well established in the United States in cases like *Sztejn*[108] and referred to in Britain in the *Edward Owen* case,[109] the fraud exception is an example of applying the principle *ex turpi causa non oritur action*.[110] Case law has evinced that the standards for applying fraud as exception dramatically lack uniformity, even between common law jurisdictions.

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99 *See generally Corporacion de Mercadeo Agricola v. Mellon Bank Int'l* 608 F. 2d 43, 47 (2nd Cir. 1979), cited by Gerald T. McLaughlin, *Letters of Credit: Basic Principles and Current Controversies*, 17 AUSTRALIAN BUSINESS LAW REVIEW 307 (1989).

100 J. P. Geraghty, *Many a Slip... Acceptance by a Bank of Documents under an International Documentary Credit*, 11 SOUTH AFRICAN MERCANTILE LAW JOURNAL 331 (1999).

101 Roy Goode, *Reflection on Letters of Credit – I*, J. BUS. L. 291 (1980).

102 This is the position of Canadian case law in *Angelica-Whitewear*, see *supra* note 54.

103 *See generally Sztejn*. *Id*.

104 No. 89-5760 (6th Cir. Apr. 24, 1990) (unpublished; text in WESTLAW), cited in Albert J. Givray, *Letters of Credit*, 44 BUS. LAW. 1567 (1988-1989).

105 555 N.Y.S.2d 740-741 (N.Y. App. Div. 1990).

106 *See*, *e.g.*, *Sztejn*, *supra* note 54 and *Royal Bank of Canada v. Darlington* (unreported), [1995] O.J. No.15, 1995 Carswell, Ont 2661 at [196] (Ont. Gen. Div).

107 See, among others, *Stztejn supra* note 54; *Discount Records Ltd. v. Barclays Bank Ltd.*, 1 Lloyd's Rep. 166 (1975). Recently, Rix J. in *Czarnikow-Rionda Sugar Trading Inc v. Standard Bank London Ltd. supra* note 112; *Banco Santander S.A. v. Banque Paribas*, 1 All E.R. 776 (2000), cited by Paterson, S. *et al.*, *Fraud and Documentary Credits*, 16 JOURNAL OF INTERNATIONAL BANKING LAW 38 (2001). *Hamzeh Malas and Sons v. British Imex Industries Ltd.*, *supra* note 4; *R D Harbottle (Mercantile) Ltd. v. Barclays Bank International Ltd.* 1978 QB 159 (CA); *Edward Owen v. Barclays Bank*, *supra* note 79; *Bolivinter Oil S.A. v. Chase Manhattan Bank*, 1 Lloyd's Rep. 251 (1984) and *United Trading Corporation S.A. and Murray Clayton Ltd. v. Allied Arab Bank Ltd.*, 2 Lloyd's Rep. 554 (1985), cited by Antony Pugh-Thomas, *supra* note 40, at 212.

108 *See Sztejn*, *supra* note 54.

109 *Id*.

110 "Fraud unravels all", cited by Case Comment, *Documentary Credit – Derogation of the Principle of Autonomy on the basis that the Terms of draw-down have not been met*, 5.10 FINANCE & CREDIT LAW 4 (2003).

For instance, academics argue that in Britain, fraud is almost a theoretical concept since courts are quite reluctant[111] to grant injunctions.[112] Although British case law's position regarding fraud is based on *Sztejn*,[113] its conception is almost unattainable[114] unless the beneficiary has expressly confessed to committing the deceit; otherwise, the applicant would be required to (1) establish a cause of action and provide clear and obvious evidence of the fraud[115] to the issuer;[116] (2) prove that the beneficiary is accountable for the wrongdoing; (3) have the balance of convenience on the applicant's side;[117] (4) prove issuer's knowledge of the situation at the time of tendering the documents; and[118] (5) demonstrate that the injunction is the appropriate remedy.[119]

By way of contrast, other common law jurisdictions have treated this exception slightly different and less stringently.[120] U.S. courts have adopted flexible standards in the design of the fraud exception.[121] Even when fraud is suspected,[122] these courts do not hesitate in granting temporary injunc-

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111 Yeliz Demir-Araz, *supra* note 2, at 133.

112 *Id.*

113 *See Sztejn*, *supra* note 54.

114 *See* generally *Power Curber International Ltd. v. National Bank of Kuwait S.A.K.*, 2 Lloyd's Rep. 394 (1981), cited by F. R. Malan, *Letters of Credit and Attachment Ad Fundandam Jurisdictionem*, JOURNAL OF SOUTH AFRICAN LAW 151 (1994).

115 *The Society of Lloyd's v. Canadian Imperial Bank of Commerce* 1 A.C. 168 (1983); QB 208 (1982); 1 Lloyd's Rep. 267 (1979) and 2 Lloyd's Rep. 498 (1979), cited by Yeliz Demir-Araz, *supra* note 2, at 133.

116 *United Commercial Bank v. Hanuman Synthetics Ltd.,* 61 Company Cases 245 (1987), Brown L.J. in Edward Owen, *supra* note 55, cited in Shri N. K. Randeria, *Letter of Credit - Documents Drawn Thereunder Accepted - Discrepancies Pointed Out Later on of Trivial Nature*, 5 INTERNATIONAL BANKING LAW 150 (1987); *See also* Roy Goode, *supra* note 10, at 992.

117 This determines whether the balance of convenience is just and equitable for a court to grant the injunction. *See generally American Cynamid Co. v. Ethicon Ltd.* 1975 AC 396 *cited by* Alexander Loke, Case Comments, *Injunctions and Performance Bonds – A return to English Orthodoxy*, SINGAPORE JOURNAL OF LEGAL STUDIES 693 (1995). *See also Czarnikow-Rion- da Sugar Trading Inc. v. Standered Chartered Bank London Ltd.*, 1 All E.R. 890 (1990), *cited in* Simon Pullen, *Recent Developments in Letters of Credit*, 4(1) FINANCE & CREDIT LAW 2 (2001).

118 Sir John Donaldson MR in *Bolivinter Oil S.A. v. Chase Manhattan Bank supra* note 107, cited by Jason Chuah, *Briefing*, 4.1 FINANCE & CREDIT LAW 85 (2002).

119 Howard Bennett, *supra* note 61, at 210.

120 John F. Dolan, *supra* note 46, at 260.

121 *United Bank Limited v. Cambridge Sporting Goods Corp* 41 N.Y.2d. 254, 392, N.Y.S.2d 265, 360 N.E.2d 943 (1976).

122 During the Iranian revolution, U.S. contractors speculated that their Iranian guarantors might make fraudulent calls on the credits. Therefore, the contractors asked the U.S. courts for injunctions against potential fraud. These applications were dismissed in cases like *American Bell Int'l v. Islamic Republic of Iran*, *supra* note 67 and *Pan American Airways Inc. v. Bank Melli Iran* 484111 S.D. N.Y. (1979) looking up at *Nadler and Mei Loong Corp. of China, Ltd.* 177 Misc. 263, 30 N.Y.S.2d 323 (1941) in which it was ruled that unless the de-

tions to prevent payment and then later give time for the buyer to establish his allegation.[123] The distinction between a breach of warranty and fraud in U.S. case law has been described in *Sztejn*[124] and in *United Bank Ltd. v. Cambridge Sporting Goods Corp.*,[125] which ruled that a bank could only be issued an injunction for not paying an L/C when fraud is evident,[126] and the bank had been informed of this before the documents had been presented. However, a dissenting position was set forth in *Dynamics Corp. of America v. Citizens and Southern National Bank*[127] in which an equitable broad definition of fraud was given and the injunction was granted even when fraud had not been clearly established, since the beneficiary was not guilty of the fraud. This concept has moved academics to argue[128] that in the United States, courts often grant preliminary injunctions without concern to the beneficiary, being often that this party would only learn of the proceedings on receiving the issuer's letter stating that the credit will not be honored. It seems that U.S. courts are more prone to grant temporary restraining orders if the circumstances[129] encompass the suspicion of fraud,[130] unlike British courts whose standards for granting injunctions are stricter.[131] Another contrast is that unlike British case law, U.S. statutes[132] and case law, such as *Shaffer v.*

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mands of the beneficiaries are proven to be fraudulent, payment would not be enjoined. Cited by F. Friedrich Schwank, *Documentary Letters of Credit – Recent Cases*, 1 INTERNATIONAL FINANCIAL LAW REVIEW 9 (1982).

123 Yeliz Demir-Araz, *supra* note 2.

124 *See Sztejn*, *supra* note 54. Later, the UCC attempted to codify this by applying the concept of "material" fraud to L/Cs. S.5-109 states that an issuer must refuse payment when fraud is found in the documents and was committed by the beneficiary.

125 See *United Bank*, *supra* note 121.

126 In *Sztejn*, *supra* note 54, an injunction was awarded on the grounds of not being goods at all rather than just damaged goods as in *Maurice O'Meara*, 39 A.L.R. 747 (1925), cited by Norman I. Miller, *supra* note 26, at 192.

127 356 F. Supp. 991, 995 (1973).

128 Dorothea W. Regal, *supra* note 1, at 52.

129 *See* Friedrich Schwank, *supra* note 41.

130 *See generally* the decisions in *Walton Insurance Co. v. Chase Manhattan Bank*, WL 1211555 (S.D. N.Y.) (1990); *Phillip Brothers, Inc. v. Oil Country Specialists, Ltd.* 787 S.W.2d. 38, 10 U.C.C. Rep. Serv. 2d. 943 (1990) (rehearing decision on 1-17-90 withdrawing decision of 6-7-89, 9 U.C.C. Rep. Serv. 2d 201 (Tex. 1989); *Ground Air Transfer, Inc. v. Westated Airlines, Inc.* 899 F2d 1269, 11 U.C.C. Rep. Serv. 2d. 177 (1st Cir. 1990); *O'Neil v. Poitras*, 551 N.Y.S.2d 92, 93 (N.Y. App. Div. 1990); *Lamar Builders, Inc. v. Guardian Sav. V. Loan Ass'n*, 789, S.W.2d 373, 374-75 (Tex. Ct. App. 1990); *Unifirst Fed. Sav. Bank. v. American Ins. Co.*, 905 F.2d 208, 211, 11 U.C.C. Rep. Serv. 2d. 926, 929-30 (8th Cir. 1990); *Ross Bicycles, Inc. v. Citibank,* 555 N.Y.S.2d 740-741 (N.Y. App. Div. 1990).

131 *United Trading Corporation S.A. v. Allied Arab Bank*, cited by Antony Pugh-Thomas, *supra* note 40.

132 UCC SS. 5-109. UCC Article 5 applies to fraud in the documents and fraud in the transaction, but limits this exception to cases of serious beneficiary misconduct. It also provides protection for third parties that have taken the beneficiary's documents in good faith

Brooklyn Park Garden Apartments[133] and *NMC Enterprises Inc v. Columbia Broadcasting Systems*[134] have set forth the incorporation of the underlying transaction in tethering the fraud inquiry by not restricting it to the documents.[135]

Canadian courts had recognized the fraud exception primarily by relying on the cases of *Sztejn*[136] and *Edward Owen*,[137] thus requiring an established case of fraud[138] and the issuer's actual knowledge of this. However, in later cases, such as *CDN Research & Development Ltd. v. Bank of Nova Scotia*;[139] *Rosen v. Pullen*;[140] *Henderson v. Canadian Imperial Bank of Commerce*,[141] and the leading case in Canada *Angelica-Whitewear*,[142] Canadian courts have been more inclined to accept only a *prima facie*[143] argument. In contrast with Britain and the United States, Canadian courts might issue injunctions in cases in which fraud is carried out in either the transaction[144] or issuing the documents.[145] Similarly, the position of South African courts of underpin-

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without being privy to fraud. Moreover, in order to grant injunctive relief, the applicant is required not to have good chances at a hearing of the merits and a security deposit must be posted to protect the beneficiary from potential loss by virtue of the injunctive relief. In the United States, the UCP is applicable to all documentary credits unless expressed otherwise. Article 5 contemplates the broader scope of the UCP and provides that where UCP is adopted but conflicts with Article 5, except when distinction is forbidden, UCP provisions are permissible modifications. Dong-heon Chae, *Letters of Credit and the Uniform Customs and Practices for Documentary Credits: The Negotiating Bank and the Fraud Rule in Korea, Supreme Court Case 96 DA 43713*, 12 FLA. J. INTNL F. 50 (1998); Mark A. Wayne, *The Uniform Customs and Practice as a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation*, 7.1 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 160 (1989-1990); Note: Letters of Credit: Injunction as a Remedy for Fraud in U.C.C. Section 5-114, 63 MINNESOTA LAW REVIEW 501 (1978-1979).

133 250 NW 2d 172 (SC Minn) (1977).

134 14 UCC Rep Serv 1427 (SC NY) (1974).

135 *Intraworld Industries Inc v. Girard Trust Bank* 336 A 2d 316 (1975). Dissenting criteria was put forth in *Shaffer v. Brooklyn Park Garden Apartments* Minn. *supra* note 196 cited in Case Comment, *Recent Minnesota Cases. Commercial Law – Injunctive Relief for the Letter-Of- Credit Customer*, 4 WILLIAM MITCHEL LAW REVIEW 450 (1978).

136 See *Sztejn*, *supra* note 54.

137 *Id*.

138 Alan Davidson, *Fraud; the Prime Exception to the Autonomy Principle in Letters of Credit*, 8 (23) INTERNATIONAL TRADE & BUSINESS LAW ANNUAL (2003).

139 *Id.* 18 CPC 62 (1980).

140 (1981) 126 DLR (3d) 62.

141 (1982) 40 BCLR (SC).

142 See *Angelica Whitewear*, *supra* note 54.

143 *See supra* note 54, cited in Daniel Zacks, *United City Merchants: The Canadian Viewpoint*, (1) INTERNATIONAL BANKING LAW 7 (1987).

144 *Angelica-Whitewear*, *supra* note 54.

145 *Intraworld Industries Inc. v. Girard Trust Bank*, *supra* note 198, cited by Jimmy L. Jr.

ning the autonomy of the L/C in cases of fraud is akin to that of U.S. courts as proved in *Phillips & another v. Standard Bank in South Africa & others*.[146]

Finally, in other jurisdictions, the drafters of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit[147] did remarkable work in providing that courts may issue a provisional order preventing the beneficiary from receiving payment or freezing the proceeds thereof in cases in which fraud is suspected on strong evidence.[148] The Convention cogently avoids any definition of fraud to avoid falling in the court practice of giving the issuer the right to withhold payment. In contrast, UCP600 does not even mention the word fraud and the International Standard Banking Practice solely mentions that using a defense of fraud is available pursuant to domestic law. Academics argue that this lack of regulation in such international instruments is by no means a mistake, but a possible solution in tethering the fraud exception.[149]

2. *Avoidance of the Underlying Contract*

A careful examination of the extent to which the underlying transaction should be disregarded was outlined in *Potton Homes Ltd. v. Coleman Contractors (Overseas) Ltd*.[150] Although this case deals with performance bonds, a parallel between these documentary obligations and L/Cs can be drawn. In this case, Eveleigh argued that were the underlying contract to be avoided or the consideration to fail thereunder, the beneficiary should be enjoined from claiming payment. In this context, Arora[151] comments that allowing this exception would destroy the commercial utility of the documentary obligation by consigning the performance of this device to the lawfulness of the underlying contract.

Verner, *Fraud in the Transaction: Intraworld comes of Age in Itek*, 14 MEMPHIS STATE UNIVERSITY LAW REVIEW 164 (1983-1984).

146 1985 SA 301 cited in A. J. Kerr, *The Autonomy Principle in Documentary Letters of Credit Transactions: The First South African Decision*, 102 SOUTH AFRICAN LAW JOURNAL 381 (1985).

147 The UN Convention on Independent Guarantees and Standby Letters of Credit was adopted by the General Assembly of the United Nations on December 11, 1995, entering into force on January 1, 2000, after it was ratified by a 5th State. *See generally* Flip De Ly, *The UN Convention on Independent Guarantees and Standby Letters of Credit*, 33 THE INTERNATIONAL LAWYER 833 (1999).

148 Article 20.1.

149 Jean Stoufflet, *Fraud in Documentary Credit, Letter of Credit and Demand Guaranty*, 26 DICKINSON LAW REVIEW 26 (2001-2002).

150 See *supra* note 54, cited by Howard Bennet, *supra* note 61, at 580.

151 *Id*.

3. *Attachment in Letters of Credit Proceeds*

Academics have also referred to the applicant's insolvency[152] as an exception of the autonomy of L/Cs based on the argument that a receiver may attempt to enjoin L/C payment when holding a security interest in the applicant's assets. *Baja Boats Inc v. Northern Life Insurance Co.*[153] and *Martin v. Westfall Township*[154] are cases in which authorities have held that any payment by the applicant can be taken back as a preference under a preference period. Along this line of thought, it has been argued that *In re Twist Cap, Inc*.[155] may represent the first chance a court had to ban payment under an L/C on the strength of a bankruptcy proceeding. However, later decisions in *In re Page*;[156] *In re M.J. Sales & Distributing Co., Inc.*;[157] and *In re Price Choper Supermarkets, Inc.*;[158] have held the that payment under an L/C is an independent transaction and cannot be refunded since the issuer is paying from its own funds and not from the debtor's. Moreover, in *Agemene Bank Nederland, N.V. v. Soysen Tarin Urunleri Dis Ticaret Ve Sanayi A.S.*,[159] a case involving a negotiation credit and its assignment, it was held that a creditor who purports to attach its debtor's payment rights under an L/C may never see a clear opportunity to do so. In such case, the Southern District of New York awarded payment to the negotiating bank and dismissed the attachment application. Givray[160] explains this window of opportunity hypothetically by stating that if an application of attachment: (1) comes before the beneficiary has complied with the L/C requirements, it would be dismissed since the issuer's liability towards the beneficiary has yet to exist; (2) if it comes after the discharge of the issuer's obligation, this application would again fail because there is nothing to bind the issuer with the beneficiary, (3) if it comes after the acceptance of a draft drawn on the issuer, the application would be dismissed pursuant to statute law,[161] and finally (4) if it comes after a negotiation, it would be also dismissed since the credit proceeds no longer belong to the beneficiary. Examples of this last hypothesis

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152 Alan Davidson, *supra* note 138, at 34.

153 *Id.* 203 BR 71 (1996).

154 *Id.* 197 BR 31 (1996).

155 I. Bankr. 284 (Bankr. D. Fla. 1979), cited by James A. Rodenberg, *Letters of Credit in Bankruptcy: Can the Independence Doctrine Survive Preference Attacks?*, 96 (4) COMMERCIAL LAW JOURNAL 96 (1991); Stanley F. Farrar, *Letters of Credit*, 38 THE BUSINESS LAWYER 1171 (1982-1983).

156 18 Bankr. 713 (D.D.C. 1982).

157 25 Bankr. 608 (S.D. N.Y. 1982).

158 40 Bankr. 816 (Bankr. S.D. Ca. 1984).

159 748 F. Supp. 177, 13 U.C.C. Rep. Serv. 2d 834 (S.D. N.Y. 1990), cited by Albert J. Givray, *supra* note 104, at 1613.

160 *Id.*

161 *Id.* at 1615, U.C.C. Article 5 section 4-303.1.

can be found in *Diakan Love, S.A. v. Al Haddad Bros.*[162] and *Supreme Merchandise Co. v. Chemical Bank*.[163]

Similarly, the possibility of preventing payment to the beneficiary under an L/C by seizing a beneficiary's claim against the issuing bank was argued in a South African case decided by the full bench of the Witwatersrand Local Division.[164] In this case, the principle of autonomy was exalted to the point of concluding that when a buyer agrees to open a credit in favor of his seller through an L/C, he is unconditionally giving up any right (*a*) he might later be entitled to or (*b*) to obstruct the beneficiary's rights to be paid in any way.[165] The argument presented by the applicant of this attachment and based on a similar decision[166] was that the autonomy principle was not undermined because such an attachment would not prevent payment, but would only lead to the payment being made to the deputy sheriff who would receive it on behalf of the real beneficiary for security reasons.[167] In the final judgment, Streicher rejected this last argument, explaining that even if the deputy sheriff receives the money on behalf of the beneficiary, the beneficiary would not receive anything until a court has decided on the allegations. *The Bhoja Trader*[168] case would not apply since in this specific case, the beneficiary did receive payment but was enjoined from taking it out of that jurisdiction.

Similarly, a recent case in Israel proposes the position of trying to keep the L/C device intact as a form of payment to the extent of preventing any interference from a third party even if this party is a creditor of the beneficiary.[169] In this case, the Supreme Court of Israel ruled that a prejudgement attachment[170] on the proceeds of an L/C would be not allowed because it would definitely impair the documentary credit system. This decision was upheld to maintain the high value placed on the principle of autonomy of L/Cs as payment devices. This particular case involved the Israeli importer Niko, Ltd., who, on facing a breach of contract by his manufacturer Shan Dong,

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162 584 F. Supp 782 (1984), cited by Gerald T. McLaughlin, *supra* note 99, at 303.

163 70 N.Y.2d 344, 514 N.E.2d 1358, 520 N.Y.S.2d 734 (1987).

164 222G to 223 of the report of the judgment of the full bench in *Sapan Trading (Pty) Ltd., Re* 1995 (1) S.A. 218 (W), cited by A. Nico Oelofse, *South Africa: Trade Finance – Letters of Credit,* 10 (6) JOURNAL OF INTERNATIONAL BANKING LAW 130 (1995).

165 *Id*.

166 *The Bhoja Trader*, *supra* note 78.

167 This point is also argued by Gerald T. McLaughlin, *supra* note 99, at 308.

168 *The Bhoja Trader*, *supra* note 78.

169 *NikoBadim Ltd. v. The Israel Discount Bank*, 54 PD 773 (2000), cited by Meir Yafrich, *supra* note 53.

170 A prejudgment attachment has a similar nature to that of an interlocutory relief. Yafrich compares this "pre-judgment relief" with the Mareva injunction, explaining that this relief aims at seizing the defendant's assets to aid the plaintiff in collecting his debt from the defendant after the case has been ruled in favor of the plaintiff, *id.* at 159.

tried to attach the proceeds to which the latter was entitled under an L/C issued by the Israel Discount Bank. This credit was separate and unrelated to the underlying transaction between Niko Ltd. and Shan Dong. The court's argument was that the principle of autonomy not only should be invoked *inter partes*, but should also be effective against third parties. The court's rationale for ruling that proceeds under an L/C are not attachable by neither the applicant for the credit nor any third party creditor was basically to enshrine the principle of autonomy as the quintessential element of L/Cs and to follow an *obiter dictum* ruled by a New York district court in *Diakan Love SA v. Al-Haddad Bros. Enterprises*.[171]

The civil law perspective was shown in *Societé Bisch v. Societé Facon Deutschland*,[172] in which the *Cour de Cassation* dismissed an attachment arguing that this remedy is not available to the applicant. Supporting this position while not exactly dealing with the same circumstances, U.S. cases like *East Girard Savings Associations v. Citizens National Banks*[173] and *Temtex Products, Inc. v. Capital Bank & Trust Co.*[174] have concluded that the autonomy principle prevents the issuer from considering the beneficiary's "ledger" and that an L/C is independent of any right of set-off that might be available under contract law between the issuer and the beneficiary. Regardless the above criteria, other academics have recently suggested that even amendments in *quasi rem* law that limit the attachment of the proceeds, the autonomy principle should not be extended to endanger the rights of creditors that are not party to the L/C device. Cases like *Chase Manhattan Bank, N.A. v. Banque des Antilles Francaises*[175] and *China Nat'l National Technical Import-Export Corp. v. Industrial Resources Corp*[176] judged that if this attachment rule applies to payment obligations in general, those rules should apply to L/Cs as well.

4. *Nullity*

Left open[177] by the House of Lords in *United City Merchants*[178] and indirectly considered in *The American Accord* by Lord Diplock, the nullity excep-

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171 *Id.* 584 F. Supp 782 (1984).

172 *Id.* at 309, Cass. Civ. Com. No. 86-16.737 (1986). *Id.* at 309.

173 *Id.* 593 F.2d 598 (1979).

174 *Id.* 623 F. Supp 816 (1985), *aff'd*, 788 F.2d 1563 (1986).

175 *Id.* Cass. Civ. Com, No. 81-11.971 (1983) reported in John H. Riggs, *Recent Developments in France in Documentary Credits and Bank Guarantees*, 14 LETTER OF CREDIT SEMINAR, London (1987).

176 Hu Gao Jing Shang Zi No. 30 in Shanghai Municipal High People's Court, Oct. 11, 1988. *Id.*

177 Dora S. S. Neo, *supra* note 22, at 70.

178 *See generally* Charl F. Hugo, *Documentary Credits: Apparently Conforming Documents Equals Conforming Documents! The Bizarre Heritage of United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, 13 SOUTH AFRICAN MERCANTILE LAW JOURNAL 595 (2001).

tion to the autonomy of the L/C is recently at the core of discussion in the United Kingdom and Singapore.[179] Basically, the nullity exception aims at embracing cases in which the beneficiary is not guilty of fraud, but the documents are null[180] because they have been forged by a third party or have been executed without authorization.[181]

In the ruling on the *Montrod Ltd. v. Grundkotter Fleischvertriebs GmbH & Standard Chartered Bank*[182] (*"Montrod"*) case, the "nullity exception" has no place in British law.[183] In this case, the applicant filed for an injunctive relief, which would enjoin other parties to be paid under the credit. The applicant's argument was based on the grounds that one of the documents required under the L/C was executed by a party who had been misled by the beneficiary. The Court of Appeals held that there was no right to affirm that since one of the documents was allegedly a nullity, all the liabilities of the parties to the L/C were therefore null and void. Moreover, this erroneously executed document was not essential, but merely accidental to the credit because it only referred to the quality of the goods.[184] It also held that a nullity exception would not be beneficial to the certainty of L/Cs, would put the issuer in a predicament as to whether to look beyond the documents to explore facts —a task for which it certainly lacks the skills to do, and would undermine the rights of good faith beneficiaries.[185]

In contrast, Hooley[186] argued that the *Montrod* decision might encourage the circulation of forged documents in international trade. Likewise, he asserted that the purpose of L/Cs is to pay against documents of value, and since a null document is worth only the paper it is written on, a paying bank might be risking its right to being reimbursed. Within this context, in *Beam Technology (Mfg.) Pte. Ltd. v. Standard Chartered Bank*[187] a Singaporean court held that nullity is an exception to the autonomy principle and that neither the *United City Merchants*[188] nor the *Montrod* cases can be considered precedents. In this particular case, one of the documents to be tendered under the credit was considered a nullity since the party in charge of its execu-

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179 *Id.* Lord Diplock recognized that nullity would result if the documents tendered to the issuer lacked legal value.

180 Dora S. S. Neo, *supra* note 22, at 71.

181 Richard Hooley, *Fraud and Letters of Credit: Is there a Nullity Exception*?, 61 CAMBRIDGE L. J. 279 (2002).

182 [2001] December 20th, *cited by* Jason Chuah, *supra* note 118, at 86.

183 *Id.* H.H.J. Raymond Jack Q.C. in *Montrod*.

184 Dora S. S. Neo, *supra* note 22, at 71.

185 Mark Williams, *Documentary Credits and Fraud: English and Chinese Law Compared*, JOURNAL OF BUSINESS LAW 155 (2004).

186 Richard Hooley, *supra* note 181.

187 1 S.L.R. 597 (2003), *cited by* Dora S. S. Neo, *supra* note 22, at 73.

188 *See supra* note 54. Michael Furmston, *An Introduction to Bankers' Commercial Credits*, 2 INTERNATIONAL COMPANY AND COMMERCIAL LAW REVIEW 93 (1991).

tion did not exist. The main difference between this case and the *Montrod* case was that the null document in question was in fact material to the credit. In view of this decision and pursuant to Singaporean case law, a bank that is privy to the nullity of the document and even then goes on to pay the credit would definitely not be reimbursed. Therefore, a bank privy to the nullity is neither entitled (against the applicant) nor bound (against the beneficiary) to pay the credit.[189]

5. *Unconscionable Conduct*

"Freedom of contract cannot be absolute."[190] While common law courts were occupied dealing with equity, the civil law legislators were the first to consider some contracts as going against the "public good" or "conscionable."[191] Unconscionable conduct has made courts void contracts that are oppressive or go against public policy, lack a meaningful choice,[192] involve fraud, include excessively high prices, are linked to a sales program or use fine print.[193]

A recent case in Australia has made academics debate whether a statutory unconscionability can undermine the autonomy principle of the L/C. Based on the decision of the Australian case of *Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd.*,[194] Davidson[195] argues that the 1974 Australian Trade Practices Act has often been cited as an incursion in the autonomy principle by providing against unconscionability. In this case, *Olex Focas Pty. Ltd.* agreed to provide an L/C to *Skodaexport Co. Ltd.* to secure the former's obligations of mobilization advances/securement advances contained in a construction contract. A dispute over delayed work arose and *Skodaexport* threatened *Olex Focas* with calling in the L/C unless its claim for the work done under the contract was lowered. The court decided that *Skodaexport* was abusing its position and its behavior was "unreasonable" and "against conscious," in terms of the 1974 Trade Practices Act (Cth) (s 51AA), for demanding more

189 Dora S. S. Neo, *supra* note 22, at 71.

190 Alphonse M. Squillante, *Unconscionability: French, German, Anglo-American Application*, 34 ALBANY LAW REVIEW 301 (1969-1970).

191 *Id.*

192 *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445, 449 (1965), cited by Clinton A. Stuntebeck, *The Doctrine of Unconscionability*, 19 MAINE LAW REVIEW 84 (1967).

193 *Morehead v. New York ex. rel.*, Tipaldo, 298 U.S. 587 (1936); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S. 391 (Civ. Ct. of City of New York, New York County) (1967); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (D.C. Nassau County N.Y.) (1966), cited by Alphonse M. Squillante, *supra* note 255, at 73.

194 3 VR 380-404 (1998), cited by Alan Davidson, *supra* note 138.

195 *Id.*

money than was reasonably needed to protect itself. Therefore, the court awarded the corresponding injunction.[196]

The distinction between fraud and unconscionability was put forward in the Singaporean case of *Dauphin Offshore Engineering & Trading Pte. Ltd. v. The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan*.[197] Following various supporting cases,[198] it was ruled that unconscionability is a separate grounds for denying payment under an L/C. The court's argument was that unlike fraud, unconscionable conduct involves unfairness.[199] Nonetheless, a later case[200] set the extent to which this exception can be used, asserting that calling in the entire amount of the credit may be uncalled for since only the exceeding amount is found to be unconscionable.

6. *Illegal Underlying Transaction*

It is trite law that the autonomy principle should not enable the parties to circumvent statutes or contravene public policy.[201] Following a decision in *Old Colony Trust Co. v. Lawyers Titles' & Trust Co.*[202] it has been said[203] that Aston made the first reference to illegality as an exception to the autonomy of the L/C in *Pillans v. Van Mierop*.[204] The certainties of commercial law should not outrank public policy[205] and it is in the interest of society to prevent illegal conduct.[206] Infringing lending limits on credits,[207] violating ex-

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196 Jeffrey J. Browne, *The Fraud Exception to Standby Letters of Credit in Australia: Does it Embrace Statutory Unconscionability?*, 11 BOND LAW REVIEW (1999).

197 1 SLR 657 (2000), cited by Poh Chuh Chai, *Banking Law*, 26 SAL ANNUAL REVIEW (2000).

198 *See generally Raymond Construction Pte. Ltd. v. Low Yang Tong & Anor* (Suit 1715/1995, unreported judgment dated 11.7.1996); *Min Thai Holdings v. Sunlabel*, 2 SLR 368 (1999); *Sin Kian Contractor Pte. Ltd. v. Lian Kok Hong*, 3 SLR 732 (1999); and *GHL Pte. Ltd. v. Unitrack Building Construction Pte. Ltd. & Anor*, 4 SLR 604 (1999), cited *in* Adrian S. P. Wong, *Restraining a Call on a Performance Bond: Should "Fraud or Unconscionability" be the New Orthodoxy?*, 12 SINGAPORE ACADEMY OF LAW JOURNAL 153 (2000).

199 *Id.* Lai Kew Chai J. in *Raymond Construction Pte. Ltd. v. Low Yang Tong & Anor*.

200 *Id. Eltraco International Pte. Ltd. v. CGH Development Pte. Ltd.* [2004] 4 SLR 290.

201 Gordon B. Graham *et al*., *Standby Credits in Canada*, 9 CANADA BUSINESS LAW JOURNAL 198 (1984).

202 See *supra* note 150, cited by Renee Martin-Nagle, *supra* note 83, at 324.

203 Alan Davidson, *supra* note 138, at 32.

204 *Id*.

205 Colman J. in *Balfour Beatty Civil Engineering Ltd. v. Technical & General Guarantee Company Ltd.*, 68 CON LR 180 (2000).

206 Gerald T. McLaughlin, *supra* note 99, at 310.

207 *Id. International Dairy Queen Inc. v. Bank of Wadley*, 407 F. Supp. 1270 (M.D. Ala) (1976). Dissenting the latter, see in general *City Nat'l Bank v. First National Bank & Trust Co.* and *First Am. Nat'l Bank v. Alcorn, Inc.*, 361 So. 2d 481 (1978).

change control laws[208] or disobeying government bans on payments to certain persons are common illegalities.[209] However, when the illegality in the transaction is solely trivial, the autonomy principle should not be superseded on the grounds of public policy.

In Mahonia Ltd. v. J. P. Morgan Chase Bank,[210] the court held that when an underlying transaction is illegal, the L/C resulting from this transaction would also be affected by any illegality. In this case, British courts refused to enforce the L/C supporting an alleged misdemeanor committed by the beneficiary, who was trying to obtain a loan of US$350 million by using the L/C in disguise without accounting for this debt in its books, thus violating the U.S. securities law. The reasons given were that since the L/C was part of the structure of the misdemeanor, the L/C is deemed to have an illegal purpose.

Likewise, in *Chuidian v. Phillipine Nat'l Bank*,[211] illegality and other reasons were argued as excuses for dishonoring an L/C. After the collapse of Philippine government in 1990, the Manila office of the Philippine National Bank refused to honor an L/C to be made available at the bank's branch in the United States on the strength of the government's ban order by applying principles of illegality, international comity and act of State. The L/C was securing a loan, the proceeds of which the applicant had invested in prohibited foreign securities. After the diversion was disclosed, the L/C was frozen by the new Philippine government. The California Central District Court concluded that the determination of illegality of the L/C depended on the jurisdiction under which the L/C was to be performed and since all the arrangements had taken place in the Philippines, dishonoring the commitment was allowed.

Another form of illegality that may imperil the autonomy principle is a preferential transfer in breach of a bankruptcy statute. Broadly speaking, the trustee or receiver in charge of the debtor's pool of assets can avoid the transfer of the debtor's assets within a certain period before the debtor enters into an insolvency procedure. This issue was the heart of the litigation in *In re Air Conditioning of Stuart, Inc.*[212] and later in *In re Compton Corp.*[213] In these cases, the applicant opened an L/C by giving security to the issuer

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208 Agasha Mugasha, *Enjoining The Beneficiary's Claim on a Letter of Credit or Bank Guarantee*, 5 JOURNAL OF BUSINESS LAW (2004).

209 McLaughlin argues that during Iranian crisis, President Carter ordered that all payments under L/Cs to Iranian beneficiaries should be made on blocked accounts. Gerald T. McLaughlin, *supra* note 99, at 310.

210 [2003] Commercial Court, cited by Jason Chuah, *Documentary Credits and Illegality in the Underlying Transactions*, 6 JOURNAL OF INTERNATIONAL MARITIME LAW 9 (2003).

211 734 F. Supp. 415 9 (1990), cited by Julia Anderson Reinhart, *Reallocating Letter of Credit Risks: Chuidian v. Philippine National Bank*, 18 N.C.J. INTERNATIONAL LAW & COMMERCIAL REGULATION 725 (1992-1993).

212 72 Bankr. 657 (1987), *aff'd in part and rev'd in part,* 845 F.2d 293 (1988).

213 831 F.2d 586 (1987), *reg'h granted*, 835 F.2d 584 (988).

and then later was subject to an involuntary bankruptcy proceeding. In these cases, the court decided to allow the issuer to pay the L/C and keep the collateral and allow the receiver to recover the amount of the credit from the beneficiary so that neither the autonomy principle nor the bankruptcy policy would be impaired.[214]

7. *The Mareva Injunction*

A general principle of law states that no debtor's assets can be foreclosed before delivering judgment.[215] Named after the *Mareva Compania Naviera v. International Bulk Carriers Ltd.* case,[216] the Mareva order is nothing more than an injunction that can be granted pre- or post-judgment[217] to freeze the defendant's assets until a final ruling has been made.[218] Courts have identified two basic requirements for awarding this relief: namely, an arguable or at least a *prima facie* case[219] and clear evidence of an eminent attempt on the debtor's behalf to dispose of the assets.[220] Not having assets within the jurisdiction of the awarding court is not an impediment for granting these orders since Canadian and British courts have asserted that courts can freeze the defendant's assets even if the assets are found outside their jurisdiction.[221]

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[214] *Id.* This was also allowed in connection with Section 550 (a)(1) of the U.S. Bankruptcy Code pursuant to which a receiver is allowed to recapture "the value" of the property transferred in detriment of the debtor's assets.

[215] A. Nico Oelofse, *supra* note 164, at 130.

[216] 2 Lloyd's Report 509 (1975). It originated in *Nipon Yusen Kaisha v. Karageorgis*, 1 W.L.R. 1093 (1975).

[217] Simon Vaughan, *Moments to Savor in the Development of the Mareva*, 7 INTERNATIONAL BANKING LAW 101 (1988).

[218] The origin of the order was equity. However, the 1981 Supreme Court Act encoded it in statutory form and was renamed as a freezing order even though British and U.S. courts still refer to it as a Mareva injunction. Jeffrey L. Wilson, *Three if by Equity: Mareva Orders and the New British Invasion*, 19 SAINT JOHN'S JOURNAL OF LEGAL COMMENTARY 673 (2004-2005).

[219] A standard developed by Lord Denning in *Rasu Maritima S.A. v. Perusahaan Pertambangen* (1978) QB 644, cited by Simon Vaughan, *supra* note 217, at 102.

[220] Michael Brandon, *Recent Developments in International Law Affecting International Transactions*, 15 INTERNATIONAL LAWYER (ABA) 630 (1981).

[221] See generally *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1988), 1998 CarswellBC 2725, [1988] B.C.J. No. 2887, 168 D.L.R. (4th) 309, 15 B.C.A.C. 262, 189 W.A.C. 262, 59, B.C.L.R. (3d) 196, [1999] 7 W.W.R. 289 (B.C.C.A.) at para. 23 [*Silver Standard*]; *Mooney v. Orr* (1994), 1994 CarswellBC 488, 98 B.C.L.R. (2d) 318, [1995] 1 W.W.R. 517, 33, C.P.C. (3d) 13 (B.C. S.C.[In Chambers]) additional reasons at (1994); *Hamza v. Hamza* 1997 Carswell Alta 723, [1997] A.J. No. 836, 29 R.F.L. (4th) 460, [1997] 9 W.W.R. 592, cited by David A. Crerar, *Mareva Freezing Orders and Non-Party Financial Institutions: A Practical Guide*, 21.2 BANKING AND FINANCE LAW REVIEW 173 (2006). However,

A Mareva injunction was first granted for a documentary obligation in the *Bhoja Trader* case.[222] In this case, Staughton lifted a previously granted injunction and replaced it with a freezing order that banned the defendants from disposing their assets and any other monies payable under the bond within the jurisdiction.[223] When this case reached the Court of Appeals, the injunction was dismissed to underpin the autonomy of the bond, which was to be paid in Greece. However, the arguments in this case urged the courts to consider the application of a Mareva injunction in *Z Ltd. v. A-Z and AA-LL*,[224] *Potton Homes Ltd. v. Coleman Contractors Ltd.*,[225] and *United Trading Corporation S.A. v. Allied Arab Bank Ltd*.,[226] though an injunction was not granted in their final resolution, or if it was, it was dismissed in the end. The precedent set by these rulings has led academics to assert that, although the nature of an injunction is based on court discretion,[227] there is no apparent reason why courts should refuse a Mareva injunction when it comes to documentary obligations provided that the jurisdictional requirements set forth in *Siskina (Cargo Owners) v. Distos Compania Naviera S.A.*,[228] and the guidelines put forward by the courts in *Third Chandris Shipping Corporation v. Unimarine S.A.*,[229] and *Z Ltd. v. A-Z and AA-LL*, are met. Therefore, the

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in *Ashtiani v. Kashi*, 3 WLR 647 (1986), Lord Justice Dillon argued that pre-judgment injunctions should be limited to assets within the jurisdiction since (*a*) it could very well be oppressive to the defendant for all his assets to be frozen regardless of their location as a result of an order of the British court; (*b*) a Mareva injunction over foreign assets would be difficult for British courts to police; (*c*) pre-judgment Mareva injunctions would involve an invasion of the absolute right to privacy; and (*d*) the object of the Mareva is not to give the plaintiff security for the amount of his claim, cited by Simon Vaughan, *supra* note 217, at 102.

222 See Albert J. Givray, *supra* note 104.

223 Peter S. O'Driscoll, *Performance Bonds, Banker's Guarantees and the Mareva Injunction*, 7 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 398 (1985-1986).

224 *Id.* 1 Q.B. 558 (1982).

225 28 B.L.R. 19 (1984), cited by Howard Bennett, *Performance Bonds and the Principle of Autonomy*, JOURNAL OF BUSINESS LAW (1994).

226 2 Lloyd's Rep. 554 (1985), cited by Antony Pugh-Thomas, *supra* note 40.

227 Wilna Faul *et al.*, *The Mareva Injunction*, 2 SOUTH AFRICAN MERCANTILE LAW JOURNAL 305 (1990).

228 (1979) A.C. 210, in which the House of Lords ruled that for an applicant to succeed in obtaining a Mareva Injunction he may prove a pre-existing cause of action under English law different and separated from the action seeking the Mareva injunction. Cited by Peter S. O' Driscoll, *supra* note 223.

229 *Id.* at 395. I Q.B. 645 (1979). Such case described the guidelines that a plaintiff must follow in applying for a Mareva Injunction, namely, (1) give knowledge to the court of all material information related thereto; (2) provide the court with details about the claim specifically grounds, amount of the issue and points made by the defendant; (3) reasons implying that the defendant owns assets within the jurisdiction; (4) provide with reasons for believing that the defendant may dispose of his assets prior to receive a final judgment;

Mareva injunction can be used independently of any action directed at preventing the issuer from paying the credit as long as the requirements for this an injunction are met. Professor Goode argues that this injunction does not harm the autonomy principle because it only has a bearing on the proceeds of the credit that have been drawn down.[230]

V. Final Comments

When a seller agrees to open an L/C, he assumes that the last step he would have to take to obtain his money would be tendering the documents to the issuer.[231] Reality is much different. Being the favorite payment device for merchants does not make it perfect.[232] Every rule has it exception and the autonomy principle of the L/C is not exempt from this.[233] This paper has provided a brief outline of the major exceptions courts in major common law jurisdictions usually take into account when granting injunctions to prevent payment of an L/C. Broadly speaking, courts all over the world seem to only issue injunctions when the case is as serious as to "make it obviously pointless and unjust to permit the beneficiary to obtain the money."[234]

On the one hand, there are the position of *Sztejn*[235] and UCC that go beyond ensuring payment of an L/C and, on the other, we have British case law, which is so strict about exceptions (specifically fraud) that it has reached the point of not allocating the risks of the transaction among the parties, but solely allocating them on the applicant. All in all, the UCP[236] seems to have a more successful approach in regulating L/C transactions. Traders have not challenged its application since it establishes the required framework for enforceability, is sensitive to bankers' and businesses' needs, and complements international business practices.[237] Davidson argues that the UCP and the International Standard Banking Practice have intention-

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and (5) take liability to cover any damages resulting from the discharge of the relief or the lack of grounds for awarding the injunction.

230 *See generally* Roy Goode, *Reflection on Letters of Credit – II*, Journal of Business Law 378 (1980).

231 E. Peter Ellinger, *Tender of Fraudulent Documents*, 7 Malaya Law Review 27 (1965).

232 Yeliz Demir-Araz, *supra* note 2, at 134.

233 Charles Chatterjee *et al.*, *The Principle of Autonomy of Letters of Credit is Sacrosanct in Nature*, 5.1 Journal of International Banking Regulation 72 (2003).

234 See Official Comment to UCC 5-109 and *Ground Air Transfer v. Westate's Airlines*, 899 F 2d 1269 at 1272-1273 (1st Cir.) (1990), *cited by* Agasha Mugasha, *supra* note 208, at 535.

235 See *Sztejn*, *supra* note 54.

236 UCP 600, *supra* note 1.

237 Jose MA. Emmanuel A. Caral, *Lessons From ICANN: Is Self-Regulation of the Internet Fundamentally Flawed?*, 12 International Journal of Law and IT 4 (2004).

ally left the matter of fraud to the courts. "Jurisdiction and fraud are two matters which the UCP cannot deal with."[238]

The fraud exception has given courts a very difficult time. Nullity seems to have become the new fraud. It has been argued recently[239] that the fraud exception should disappear since the concept was misunderstood from the beginning. This argument relies on the fact that fraud has never been separate grounds for denying payment. Since fraud invariably involves documents, an inconformity with the credit often ensues, causing the issuer to deny payment in the first place under the strict compliance doctrine. Other academics argue that the fraud rule should be based on the premise of total failure of consideration.[240] If this argument is correct, it would be very difficult to distinguish the line between the fraud exception and a breach of the underlying contract. Another viewpoint argues that, in recent years, the fraud exception has been fashioned in such a way as to not erode the autonomy principle.[241] This paper suggests that the recent propositions are based on the wrong assumption that fraud came after the letter of credit as method of payment. Therefore, these efforts are unlikely to be completely successful. Fraud is a practice that began long before the letter of credit device was created. Moreover, there are other exceptions that could endanger the autonomy of the letter of credit. These exceptions are neither new nor have surfaced recently. The question is why they seem to pervade the letter of credit device. The answer is logical. The letter of credit device is flawed from its outset and like every tool or piece of machinery, maintenance and modernization is required; otherwise it will continue to be worn down until it is completely useless.

Academics argue that courts are rapidly developing exceptions to the L/C. The concern is that if this continues, the commercial function of the L/C as certain and prompt payment device[242] would no longer apply. This argument has led academics to contend that unless the courts are given guidance as to tethering the exceptions, the L/C as a payment device is doomed to disappear.[243] This conclusion would also coincide with the overarching

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238 Declaration of Dan Taylor, Vice President of the ICC Banking Commission, at the 2000 Annual Survey of Letter of Credits Law and Practice, New York, 9 March 2000, cited by Alan Davidson, *supra* note 138, at 33.

239 Andrew Borrowdale, *The Autonomy Rule and Fraud Exception in Documentary Credits*, 99 THE SOUTH AFRICAN LAW JOURNAL 139 (1982).

240 Menachem Mautner, *Letter-Of-Credit Fraud: Total Failure of Consideration, Substantial Performance and the Negotiable Instrument Analogy*, 18 LAW AND POLICY IN INTERNATIONAL BUSINESS 611 (1986).

241 Alan Davidson, *supra* note 138.

242 Richard F. Dole Jr., *Warranties by Beneficiaries of Letters of Credit under Revised Article 5 the UCC: The Truth and Nothing but the Truth*, 39 HOUSTON LAW REVIEW 375 (2002-2003).

243 Nadeem Faruqi, *Letters of Credit: Doubts as to their Continued Usefulness*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 327 (1986-1987).

fact that an allegation of an exception generally delays the payment of a credit and carrying out an investigation on every credit would increase costs and place burdens on the issuers that they are not prepared to bear.[244]

Against the academics are the practitioners who contend that even when the documents imply a default in the underlying contract, buyers almost always waive the discrepancies and permit full payment to the beneficiaries of the L/C.[245] This line of reasoning would render the certainty of payment of an L/C a complete fallacy since empiric studies have proven the seller's right to be paid at all times at the buyer's discretion in waiving the discrepancies in the documents submitted by the seller.[246] Within this context, another optimistic viewpoint is that there are not many cases in which courts have awarded injunctions because the courts are not eager to interfere with the banks' business, making almost every exception practically useless. This position holds that even when a bank knows a payment demand is fraudulent, it would be obligated to pay the credit on the lack of evidence to support the issuer's wrongdoing. Banks seem to be prepared to pay beneficiaries that are able to produce documents that appear to conform to the credit[247] because they apparently have no other option. If issuers refuse to pay and the courts dismiss the argued exception, the courts would be liable towards the beneficiary for breach of contract. On the other hand, if the bank pays the credit, thus underpinning the independence principle, and the courts later determine that there was evidence of an exception, then the issuer may face liability towards the applicant. In this case, the credit would probably not be reimbursed and, were illegality present, liability may be claimed for criminal conduct.[248] Similarly, practitioners argue that the disputes arising from L/Cs are very sporadic since the good faith and reliability of the parties play a distinctive role.[249] The reality is that if the courts continue to interfere with credits, turning them into ancillary obligations, beneficiaries will be bound to look for other solutions, such as requiring only L/Cs issued or confirmed by banks within jurisdictions whose courts tend to respect the autonomy of an independent undertaking.[250]

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244 Stephen J. Leacock, *supra* note 4, at 912.

245 Ronald J. Mann, *supra* note 35.

246 *Id*.

247 Jason Chuah, *supra* note 210.

248 Gerald T. McLaughlin, *supra* note 99, at 310.

249 Stuart Cotton, *LOCs: Not Foolproof but Still Safe*, 88 BEST'S REVIEW 57 (1987).

250 John F. Dolan, *supra* note 46, at 270.

Recibido el 10 de septiembre de 2009 y aceptado
para su publicación el 26 de noviembre de 2009.

NOTES

Mexican Law Review
New Series
Volume III
Number 1

THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE DEATH PENALTY*

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ABSTRACT. *This essay examines the jurisprudence of the Inter-American Court of Human Rights with regard to the death penalty: advisory opinions, final judgments and provisional measures. The general tendency of the jurisprudence is abolitionist, since it stresses the strict limits for the imposition of the death penalty and moves toward the final elimination of this punishment. In its decisions on the matter, the Court has examined the issue of the mandatory death penalty, which is still stipulated in some States when "the most serious crimes" are involved. The Court has reviewed national criminal justice systems and established clear limits for laws concerning crimes and penalties. Similarly, the Court has examined the guarantees of an accused person who faces trial, particularly when the possibility of imposing the death penalty exists. The essay also highlights other issues of the highest importance regarding the punitive role of the State and the means of defense of the accused.*

KEY WORDS: *Death penalty, abolitionism, respect for life, procedural guarantees, Inter-American Court of Human Rights.*

RESUMEN. *En este ensayo se examina la jurisprudencia de la Corte Interamericana de Derechos Humanos a propósito de la pena capital, que consta en resoluciones de diversa naturaleza: opiniones consultivas, sentencias y medidas provisionales. El signo general de la jurisprudencia es abolicionista, en cuanto acentúa los límites estrictos para la imposición de la pena de muerte y avanza hacia la supresión final de esta sanción. En sus decisiones sobre esta materia, la Corte ha examinado el concepto de pena de muerte obligatoria*

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* The present essay is a translated and edited version of the paper originally presented to the "International Seminar on the Abolition of Capital Punishment". Center for Political and Constitutional Studies-Institute of European and International Penal Law, Madrid, December 9-10, 2009. An initial approach to this topic, five years ago, appears in my article *infra* note 64.

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(mandatory death penalty) que todavía disponen algunos Estados cuando se trata de los "más graves delitos". El tribunal ha debido revisar el sistema penal nacional y fijar los límites a los que debe sujetarse la legislación sobre delitos y penas. Asimismo, la Corte ha examinado las garantías del inculpado sujeto a un proceso penal, particularmente acentuadas cuando existe la posibilidad de imponer la pena de muerte. En el artículo figuran otras cuestiones de primer orden a propósito de la actuación punitiva del Estado y de los medios de defensa del inculpado.

PALABRAS CLAVE: *Pena de muerte, abolicionismo, respeto a la vida, garantías procesales, Corte Interamericana de Derechos Humanos.*

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I. THE ISSUE OF DEATH IN THE AMERICAS

The Inter-American Court of Human Rights was established thirty years ago when the American Convention on Human Rights took effect, determining the legal basis for its creation and defining its sphere of competence.

It represents an important stage in the American process —constantly changing and always at risk— of developing a homegrown system for the protection of human rights. The seminal idea emerged in 1945 under the auspices of the Inter-American Conference on Problems of War and Peace held at an emblematic location for our continent: Chapultepec Castle, at the heart —in more ways than one— of Mexico.

The "American journey" toward recognition and the effective exercise of human rights has been long and turbulent and will continue to be so in the years to come. It represents a strong reaction to a deep-rooted authoritarian tradition: predating the presence of Europeans, active through conquest and colonization, assiduous in the 19th and 20th centuries and persistent in the 21st. Its motives have been varied; its manifestations, numerous. Activists in favor of human dignity have included defenders of indigenous peoples, true insurgents, liberal democrats who brought Western political decisions to the American legal system, social movements at the dawn of the 20th century, and militants in the 21st century.

Within this context that frames its historical and contemporary circumstances, the Inter-American jurisdiction on human rights has struggled against death inflicted by agents of the incumbent powers or their emissaries. The reality of inferred death, whether formal or informal, is never far off, although it appears —if we are optimistic— to be in decline. On the one hand, there are extrajudicial executions: fugitive law, summary execution, extrajudicial execution, massacres;[1] on the other, capital punishment: punitive death. All of them are manifestations of the "violent efficiency of the penal system," to quote Raúl Zaffaroni.[2] In the Americas —and especially south of the Rio Grande, which is much more than a political border, it covers increasingly limited geography; however, it persists despite good intentions and abolitionist provisions.

When we speak of the Western Hemisphere within the context of the Inter-American system, we commonly refer to various regions. To the north

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[1] The *Historical Clarification Commission Report on Guatemala*, which analyzes the most violent phase of the country's historical conflict (1978-1983), refers to 626 massacres. IAHR Court, *Masacre Plan de Sánchez*, ruling of April 29, 2004. Several cases brought before the Inter-American Court have been identified with reference to this form of collective or mass execution (which has also appeared in other lawsuits identified differently). Thus: *Masacre Plan de Sánchez v. Guatemala* (2004), *Mapiripan Massacre v. Colombia* (2005), *Pueblo Bello Massacre v. Colombia* (2006), *Ituango Massacres v. Colombia* (2006), and *Rochela Massacre v. Colombia* (2007) all the cases mentioned in this article are available in English and Spanish at the website of the Court *http://www.corteidh.or.cr/casos.cfm*.

In terms of the elimination of members of indigenous communities, as a category in the set of violations against these groups, cf. the observations in my concurring opinion for the ruling of the Inter- American Court in *Yatama v. Nicaragua* of June 23, 2005.

[2] RAÚL ZAFFARONI, MUERTES ANUNCIADAS 11-13 (Temis-Instituto Interamericano de Derechos Humanos, 1993).

—mainly the United States (which did not sign the American Convention on Human Rights)— the debate centers on abolitionism and retentionism. To the south (which includes Mexico), abolitionist laws prevail. In the Caribbean, contradictory currents persist; however, we are seeing a tendency toward an abolitionist stance. The Inter-American Court and the Inter-American Commission on Human Rights —an important cog in the system— operate under these circumstances.

I shall now briefly discuss the most relevant and recurrent issues in the abolitionist project —evident in the norms and the decisions resulting from them— in the Inter-American *corpus juris*, pointing in the only logical direction.

II. The Regulatory Framework of the Abolitionist Project: The Convention and the Protocol

I shall not elaborate on the intentions expressed in the texts leading to the Universal Declaration of Human Rights of 1948 and the Inter-American Convention on Human Rights of 1969. These documents and their effects on the *corpus juris* highlight the defense of human life and shun, reduce or proscribe the death penalty, accordingly. Here, events have followed the same path as elsewhere —whether globally or in Europe: death does not die swiftly, with a single blow; it needs to be hounded and it has been necessary to confine it with perseverance.

It would be advisable to refer to the preparatory work of the Pact of San Jose to weigh the tendencies at play and the solutions adopted. These were —as it is often the case— commitment formulas in hope of better times, which are invariably slow in coming. At the 1969 San Jose Conference, there was an abolitionist conviction, the predominance of which could not be established in the pact itself despite being a strong majority view among the participating nations. Fourteen of the nineteen States attending the conference left explicit evidence of holding this conviction, as well as a follow-up plan to formalize it in a binding text.

Argentina, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela defined their common position: "reflecting the broad majority sentiment expressed in the course of the debates on prohibition of the death penalty, in accordance with the purest humanistic traditions of our peoples, we solemnly state our unwavering aspiration to see the application of the death penalty eradicated forthwith in the Americas and our unyielding intention to make every effort possible to see that, in the short term, an additional Protocol to the American Convention on Human Rights —Pact of San Jose— may be signed that enshrines the definitive abolition of the death

penalty and returns America to a position of leadership in the defense of the fundamental rights of man."[3] The "firm ethos" —also present in some individual affirmations— was reflected in the Report of the Rapporteur of Commission I.[4]

The term was not that short, nor would the concurrence of the States be unanimous once the Protocol was open for signing. This took place on June 8, 1990, in a process similar to that of the European Convention and the United Nations International Covenant on Civil and Political Rights, to which the respective abolitionist protocols were added: Protocol 6 of 1983 and Protocol 13 of 2002 to the former, and the second elective Protocol of 1989, to the latter.

The Protocol was based on a series of precepts illustrated in its whereas clauses: the right to the respect for life, the aforementioned abolitionist ethos, the obvious connection between that respect and this ethos, the irreparable condition of the death penalty and the need for "an international accord that represents a progressive development of the American Convention" in the field.

However, the Protocol's plausible intention has proven insufficient to gather all the ratifications and overcome reservations. To date, only eleven countries have ratified it,[5] compared to 24 parties to the American Convention —an unsatisfactory number if we consider there are 35 members in the Organization of American States— and the 32 signatories of the Belém do Pará Convention on the Prevention, Punishment and Eradication of Violence against Women.

How are we to interpret the fact that this Protocol is the instrument with the least coverage of all those that make up the inter-American *corpus juris* on human rights? Are they keeping an ace up their sleeves? Does this caution —for the lack of a better word— coincide with the regularly made suggestions to reinstate capital punishment in countries that have suppressed it, even though it could not be re-established without violating higher-ranking national decisions and external commitments?

On the other hand, as with other instruments, the suppression of capital punishment is not absolute: so-called extremely serious military offenses committed during wartime are left pending. The State that ratifies or adheres to the Protocol may make reservations for these possibilities, as has

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[3] Conferencia Especializada sobre Derechos Humanos [Inter-American Specialized Conference on Human Rights], San Jose, Costa Rica (Nov. 7-22, 1969), *Actas y Documentos*, OEA/Ser. K/XVI/1.2, Washington, D.C., 1973, at 467 [*Proceedings and Documents* OAS/Ser. K/XVI/1.2, Washington, D.C., 1973, at 389].

[4] *Id.*

[5] As of November 27, 2009, the corresponding instrument of ratification had been deposited by: Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

occurred in some cases.[6] Total, unconditional abolition of the death penalty, along the lines of Protocol 13 of the European Convention of 2002, is still a thing of the future.

III. Inter-American Jurisprudence

The above-mentioned aim of reducing the death penalty is enhanced by the judicial interpretation rooted both explicitly and consistently in the principle *pro homine* or *pro persona*, which extends the coverage for protecting individual rights and liberties and has been invoked again in the Inter-American Court's most recent ruling on the death penalty, handed down in *DaCosta Cadogan v. Barbados* on September 24, 2009.[7]

This abolitionist inclination is spurred on by the necessary re-reading of Convention texts with the idea —upheld by the European Court based on Amnesty International's assertion in *Soering v. The United Kingdom*— that a treaty is "a living instrument which… must be interpreted in the light of present-day conditions."[8] This shows how the Court's authority to interpret international law works, as the Court itself has ruled in its *Advisory Opinion OC-20/09* of September 29, 2009 —although on a different issue than the one addressed here. This opinion excludes —and alters a criterion that had remained unchanged for a quarter of a century— *ad-hoc* judges and national judges of the respondent State from participating in proceedings arising from complaints or accusations instituted by private citizens.

The jurisprudential actions of the Inter-American Court support this abolitionist approach in an important —and influential— series of advisory opinions, rulings and provisional measures. From among the different channels and to different extremes (in addition, obviously, to the numerous pronouncements relating to the killing of persons: extrajudicial execution), the jurisprudence that applies to my chosen topic is abundant and diverse.

The backbone of the jurisprudence explicitly associated with substantive or procedural issues relating to the death penalty under Inter-American jurisdiction is contained in: *a)* two advisory opinions: *OC-3/83*, *Restrictions to the Death Penalty* of September 8, 1983, and *OC-16/99*, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process* of October 1, 1999; *b)* several rulings on actions against States in the region: mainly those referring to the cases of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* of June 21, 2002;[9] *Raxcacó Reyes v. Guatemala* of Septem-

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[6] Thus, Brazil and Chile have expressed reservations to leave open the possibility of applying the death penalty in wartime for extremely serious crimes of a military nature.

[7] *DaCosta Cadogan v. Barbados*, para. 49 (Sept. 24, 2009).

[8] *Soering v. The United Kingdom, Judgment (Merits and Just Satisfaction)*, para. 102 (Apr. 23, 1989).

[9] Originally, there were three different cases: *Hilaire, Constantine et al.*, and *Benjamin et*

ber 15, 2005; *Fermín Ramírez v. Guatemala* of June 20, 2007; *Boyce et al. v. Barbados* of November 20, 2007; and *DaCosta Cadogan v. Barbados* of September 24, 2009. To these, we can add: *c)* provisional measures aimed at ensuring procedural propriety and protecting the rights of persons facing sentencing or execution: the rulings in *James et al. (Trinidad and Tobago)* of May 27, 1998; *Boyce and Joseph* (Barbados) of June 14, 2005; and *Fermín Ramírez* (Guatemala) of March 12, 2005.

Together, this series of decisions defines the criteria the Inter-American jurisdiction has upheld over slightly more than a quarter of a century within the context of the defense of human rights. It is a core issue as expressed by Antonio Beristain in his study on capital punishment within the context of criminal law: it influences all other issues in the system; it is the rotten apple that spoils the barrel.[10]

In this regard, it is fitting to mention a far-reaching proposal put forward by the Inter-American Commission on Human Rights —making use of its inherent powers as an organ of the OAS and the American Convention— that seeks to obtain certain Court rulings on the issue. I specifically refer to the April 20, 2004 request for an advisory opinion on "*Legislative rulings or other measures denying an appeal or other effective remedy to challenge the death penalty*."[11]

In this request, the Commission asked that the Court "more accurately define how the American Convention on Human Rights and the corresponding principles and jurisprudence of the Inter-American Human Rights System impose requirements or restrictions on legislative actions by the States, in particular with regard to the death penalty."[12]

The request referred to measures adopted in Barbados, Belize and Jamaica, and pointed out that "various Caribbean Community member States have considered, and in one case promulgated, constitutional amendments designed to counteract jurisprudence on human rights of local justice systems and the Inter-American Commission and Court in relation to the application of the death penalty."[13] To support the use of the Court's advisory function in the matter, it stated that "the majority of OAS member States that maintain the death penalty have not ratified the American Convention, and therefore are subject to the requirements of the American Declaration."[14]

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al., merged by a ruling of November 30, 2001, and resolved in a single judgment of June 21, 2002.

[10] Antonio Beristain, *Pro y contra la pena de muerte en la política criminal contemporánea*, *in* CUESTIONES PENALES Y CRIMINOLÓGICAS 579 (Reus, 1979).

[11] Opinión consultiva de la Comisión Interamericana de Derechos Humanos (Apr. 20, 2004), *available at http://www.corteidh.or.cr/docs/opiniones/soli_comi_20_04_04.doc.*

[12] *Id.* para. 3.

[13] *Id.* para. 19.

[14] *Id.* para. 15.

The Court did not see fit to respond to the questions raised in the Commission's request by means of an advisory opinion. Instead, it stated its position in a resolution issued on June 24, 2005, observing that the Court "on several occasions… has handed down rulings in relation to the imposition of the death penalty and its execution, both in contentious cases and provisional measures, and in advisory opinions."[15] The Court went on to list the above-mentioned rulings.

The Court added that "In such jurisprudence the Court has referred to issues related to the object of the request for an advisory opinion, which clearly present the court's position on the questions raised by the Commission."[16] In the form of a "complete and concise reply," it then stated that its decisions regarding all the topics mentioned in the Commission's request, and in its conclusions it underscored that "it follows that the answers to the questions raised by the Commission can be extracted from a comprehensive analysis and interpretation of the Court's *corpus* of jurisprudence."[17]

Finally, in view of the relevance of its decisions (referring in turn to the binding nature of the pronouncements of the interpreter of the Convention, a very important issue that will not be discussed here), the Court said that this interpretation and the Court's application of Convention norms "should also constitute a guide for the actions of other States that are not parties in the case or the measures."[18] The petition for criteria regarding certain death penalty issues was not ignored: the Court expressly reiterated its jurisprudence.

IV. The Respect for Life

The American Convention or Pact of San Jose devotes Article 4 to the proclamation of life and the limitation of punitive death. The former is comprised within a single, emphatic paragraph; the limitation extends along several paths and takes up five more or less detailed paragraphs.

The general proclamation set forth in Article 4, which the Inter-American Court has named the "substantive principle,"[19] proclaims that "every person has the right to have his life respected." It then adds a fluctuating formula, which reflects the intense debate over the interruption of a pregnancy: "This right shall be protected by law and, in general, from the moment of conception," and concludes with an affirmation that is constantly

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15 Resolución de la Corte Interamericana de Derechos Humanos (Jan. 24, 2005), *available at http://wwwcorteidh.or.cr/docs/opiniones/res_cor_24_06_05.doc*.

16 *Id.* para. 7.

17 *Id.*

18 *Id*. para. 13.

19 *Advisory Opinion OC-3/83. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, para. 53 (Sept. 8, 1983) [hereinafter *Advisory Opinion OC-3/83*].

referred to in judicial Inter-American system rulings: "No one shall be arbitrarily deprived of his life," a provision that the Court refers to as the "procedural principle."[20] What follows is, as I have remarked, a series of clauses on limitation or resistance, and even —fortunately— the prohibition of the death penalty.

For several years now, our jurisprudence has placed greater emphasis on one aspect of the protection of life that requires that particular mention. It has done so on the basis of a far-reaching ruling —Case of the "Street Children" (*Villagrán-Morales et al.) v. Guatemala* of November 19, 1999— which underscores the positive side of the right to life and the corresponding duties of the State: not only abstentions, but also measures that favor quality of life, personal development, the choice of one's own destiny.

In this paradigmatic judgment, the Inter-American Court stated:

> In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not to be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur.[21]

V. Legality and Arbitrariness

Under the American Convention, the death penalty is conditioned, as it often is, by the principle of legality. It must be provided for by law. Article 4 states this provision emphatically in the section on *lex praevia*, a manifestation of the principle of legality. However, it is necessary to measure the true reach of the legal reserve. On this point, conventional norms concur —Article 30— which authorize the restriction or deprivation of rights —and among them the deprivation of the most valued: life itself— and the broadly tutelary concept contributed by the Inter-American Court in *Advisory Opinion OC-6/86* of May 9, 1986, on *The Word "Laws" in Article 30 of the American Convention on Human Rights*.

When jurisprudence defines the meaning of the term "laws," there is a twofold demand that legitimates a law under the coverage of the Pact of San Jose: on the one hand, it must be formal; on the other, material or substantive.[22] The American Convention contains no specific premises that

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[20] *Id.*

[21] *The "Street Children" (Villagrán Morales et al.)*, para. 144 (Nov. 19, 1999).

[22] This Advisory Opinion affirms that "laws" are "normative acts directed towards the general welfare, passed by a democratically elected legislature and promulgated by the Executive Branch," para. 35.

eliminate the infringement of Article 4, like those of Article 2.2 of the European Convention.

The application of the death penalty should also respond to another condition: that it not be arbitrary. The first paragraph of Article 4 of the Convention repudiates arbitrariness, which is also rejected in the detention regime under Article 7.3. The norm on rejection appears in the International Covenant on Civil and Political Rights (Article 6.1), and appears again in the African Charter (Article 4). The Inter-American Court has explored and unraveled the concept of arbitrariness —so deeply rooted in authoritarianism— in ways that allow it to evade numerous unacceptable hypotheses through broad *pro persona* interpretations, which invoke reasonableness, measure, necessity and proportionality.[23]

At this stage, the assessment of the court comes into play, weighing circumstance and experience based on those criteria, and not on legality alone. This in turn leads to the constant erosion of the right to apply or impose punitive death, despite express authorization by law, as the Court has maintained in the relevant judgments —accompanied by a broad explanatory vote— on cases in Trinidad and Tobago, which I will discuss below, and which opened an important chapter in the manifestations of the Inter-American justice system on the matter.

VI. Restrictions and Prohibitions

We now turn to the regime of restrictions and prohibitions defined in five paragraphs of Article 4 of the American Convention. The Inter-American Court has examined this point and the path shown by these restrictions and prohibitions when its consequences are set forth in general premises and specific cases. The Court stresses that this precept reveals "a clear tendency to limit the scope of this (death) penalty both as far as its imposition and its application are concerned." Thus, the Convention —and the Court that interprets and applies it— "adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance."[24]

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[23] The Court has associated arbitrariness (with reference to detention) with "methods... incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality." *Gangaram Panday*, para. 47 (Jan. 21, 1994). For deprivation of liberty not to be arbitrary, its ends must be compatible with the Convention, and it must represent an appropriate means of achieving those ends, necessary and proportional. *Contra Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, para. 93 (Nov. 21, 2007) and *Yvon Neptune v. Haiti*, para. 98 (May 6, 2008).

[24] *Advisory Opinion OC-3/83*, *supra* note 19, par. 52, 57.

This tendency extends itself in four directions: *a)* commination, in other words statutory prevision (reduction) of the death penalty for certain offenses; *b)* imposition, which is judicial disposition of the death penalty at the end of a process that culminates in separate criminal rulings; *c)* execution of the penalty; and *d)* interpretation, which represents a perspective from which to examine and assess the other three dimensions.

When the Inter-American Court refers to this subject —in *Advisory Opinion OC-3/83* on *Restrictions of the Death Penalty*, as well as in various judgments, it finds three types of limitations that apply to countries that have not ruled on the abolition of the death penalty.[25] First, the imposition or application of the death penalty is subject to comply with procedural requirements that must be strictly observed and reviewed. Second, its sphere of application should be reduced to only the most serious common crimes that are not related to political offenses. Finally, certain considerations involving the offender that may exclude the imposition or application of the death penalty must be considered.

This list of contentions does not cover —or does not clearly address— a pair of forthright prohibitions that shed light on the future. In effect, Article 4, paragraph 2, states that "[t]he application of [the death penalty] shall not be extended to crimes to which it does not presently apply;" and paragraph 3 anticipates the step that would be taken, with greater emphasis, by the additional Protocol on the subject, stipulating that "[t]he death penalty shall not be reestablished in States that have abolished it."

This last norm is not merely a limitation, but a categorical exclusion. According to Professor Schabas and based on sound legal grounds, the Pact of San Jose "was in reality an abolitionist treaty, at least for those States that had already abolished the death penalty, because it provided that capital punishment may not be reinstated once it has disappeared from a State's statute books."[26]

The prohibition of the death penalty, which reflects a widespread rejection in a large part of the Americas, could constitute regional *jus cogens*, as Schabas suggests.[27] This is further compounded by the consequences of *de facto* abolition, a point raised in the rulings in *Soering v. United Kingdom* and *Öcalan v. Turkey*, handed down by the European Court of Human Rights.[28]

Even so, the temptation to broaden death penalty statutes has persisted. The Inter-American Court has had to resist it and has done so in performing advisory functions and in exercise of its contentious jurisdiction. In *Advisory Opinion OC-3/83, Restrictions on the Death Penalty* —one of the oldest pro-

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25 *Id.* para. 55.

26 WILLIAM SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 367 (3rd ed., Cambridge University Press, 2004).

27 *Id.* at 376.

28 *Soering v. The United Kingdom*, par. 102-103. *See also*, Schabas, *supra* note 26, at 260-261.

nouncements made and proof of the Court's historical concern for these issues— the Court defined a stance that should be noted within this context.

In analyzing the above-cited conventional paragraphs, the Inter-American Court maintained that

> ...it is no longer a question of imposing strict conditions on the exceptional application or execution of the death penalty, but rather of establishing a cut off as far as the penalty is concerned and doing so by means of a progressive and irreversible process applicable to countries which have not decided to abolish the death penalty altogether as well as to those countries which have done so.
>
> Although in the one case the Convention does not abolish the death penalty, it does forbid extending its application and imposition to crimes for which it did not previously apply. In this manner any expansion of the list of offenses subject to the death penalty has been prevented.
>
> In the second case, the reestablishment of the death penalty for any type of offense whatsoever is absolutely prohibited, with the result that a decision by a State Party to the Convention to abolish the death penalty, whenever made, becomes, *ipso jure*, a final and irrevocable decision.[29]

Attempts to bring back the death penalty have reached some internal penal laws, spurred on by conditions of insecurity and criminality, which breed profound social unease. This then starts to permeate the legislative agenda, with calls for greater penal rigor and reduced guarantees, as occurred with the Guatemalan penal code reform which, through Legislative Decree 81/96, extended the application of the death penalty to include not only kidnapping and murder of a person —already capital offenses— but kidnapping by itself —which was not. The *nomen juris* of the crime was not changed; what changed was its contents.

The Inter-American Court ruled against this reinstatement of the death penalty. In its ruling on *Raxcacó Reyes v. Guatemala*, the Court stated:

> …although the *nomen juris* of kidnapping or abduction remains unaltered from the time Guatemala ratified the Convention, the factual assumptions contained in the corresponding crime categories changed substantially, to the extent that it made it possible to apply the death penalty for actions that were not punishable by this sanction previously. If a different interpretation is accepted, this would allow a crime to be substituted or altered with the inclusion of new factual assumptions, despite the express prohibition to extend the death penalty contained in Article 4.2 of the Convention.[30]

One heading under the substantive limitations concerns political crimes and related common crimes. The admission of this regime has not been

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29 Para. 56.

30 *Raxcacó Reyes v. Guatemala*, para. 66 (Sept. 15, 2005).

unanimous or peaceable. Some countries have expressed reservations or interpretative declarations: Barbados, on the exclusion of treason if treason is considered a political crime; Guatemala, on related common crimes, although its reservation was withdrawn in 1986; and Dominica, also for this same type of crimes. It is also significant that the issue of political crimes has not been raised before the Court.

VII. The "Most Serious" Crimes and the "Mandatory" Death Penalty

Another heading under the substantive limitations, which holds some points in common with the International Covenant on Civil and Political Rights (Article 6.2) and the United Nations Safeguards (paragraph 1), restricts the death penalty to the "most serious" crimes. This has led the Court to produce copious jurisprudence and inspired reflections on the exercise of State powers of classifying and penalizing offenses in general and in a way that is compatible with Inter-American human rights law. Judicial opinions, which flow from pondering the issue of the death penalty, go further still, to touch upon the meaning and operation of the penal system.

The Inter-American Court had to define the scope of the expression "most serious crimes" grounded on its findings in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, which contain some of the Court's core decisions on the issue of capital punishment, as well as on the penal system itself.

Both the conventional notion of "most serious crimes" and the Inter-American Court's jurisprudential interpretation have a notoriously restrictive nature and entail a specific application of the political-criminal idea of minimal penal law, which was not invoked under that name in the preliminary work for the Convention. This involves the rational and moderate use of the punitive instrument, only in response to the most serious injuries to the most valued assets, with the penalties deemed strictly necessary, an idea with a strong Beccarian component.[31] In its *Advisory Opinion OC-3/83*, the Court affirmed that the fact that the death penalty is limited to the most serious crimes "indicates that it was designed to be applied in truly exceptional circumstances only."

Distinctions are drawn not only between extremely serious and less severe crimes, but also between serious and "most serious crimes," which are "those that affect most severely the most important individual and social

[31] As the celebrated last paragraph of Beccaria's peerless work clearly states: "That a punishment may not be an act of violence, of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws." Beccaria, De los delitos y de las penas 323 (preface by Sergio García Ramírez, Juan Antonio de las Casas trans., Fondo de Cultura Económica, 2006).

rights, and therefore merit the most vigorous censure and the most severe punishment," as the Court stated in its ruling on *Raxcacó Reyes.*[32] Needless to say, invoking these concepts in no way means that the Court favors capital punishment for the most serious crimes; it only affirms that their singular seriousness can warrant the most severe consequences provided for by the State's criminal code, in which capital punishment ought never to figure: the limit is set below such a sanction.

The point arose with regard to a well-known and highly disturbing issue: the so-called mandatory death penalty, as provided for in the laws of Trinidad and Tobago in the *Offences against the Person Act* of 1925.[33] Under this concept, it suffices to prove the existence of willful homicide for the capital punishment to be found pertinent, or worse still, inexorable. Put differently —as stated in the ruling in *DaCosta Cadogan v. Barbados*— "statutory and common law defenses and exceptions for defendants in death penalty cases are relevant only for the determination of the guilt [*rectius*, responsibility] or innocence of the accused, not for the determination of the appropriate punishment."[34]

The Trinidadian State itself had started to reform this statute before the Inter-American Court resolved on this first lawsuit. The same occurred with other reforms to the Caribbean penal system, among them those introduced by Jamaica in the Act to amend the Offences against the Person Act of 1992, which differentiates capital murder (punishable by death) from non-capital murder (punishable by life imprisonment).[35]

The Court's decision reiterated the need to address the various statutory categories under willful homicide that reflect the varying degree of seriousness of crimes and explain the varying severity of applicable penalties.[36] I analyze this point in my explanation of my vote on the judgments of Trinidad and Tobago.[37] With this, the Inter-American Court clearly established a rigorous impediment not only to the death penalty, but also to the characterizing authority of the State, as it has done on other occasions and for different reasons.

The excess of the legislating State was described by the Court as arbitrariness, which conflicts with Article 4.1 of the Convention[38] and implies a violation of the general obligation provided in the Convention to adopt measures

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32 *Raxcacó*, para. 70, which follows the orientation of *Advisory Opinion OC-3/83*, para. 54.

33 Section 4 of this ordinance, of April 3, 1925, cit. in *Hilaire, Constantine and Benjamin et al.*, para. 103.

34 *DaCosta Cadogan v. Barbados*, para. 55.

35 Section 2.

36 *Hilaire, Constantine and Benjamin et al.*, para. 102.

37 SERGIO GARCÍA RAMÍREZ, TEMAS DE LA JURISPRUDENCIA INTERAMERICANA SOBRE DERECHOS HUMANOS. VOTOS PARTICULARES 110 (ITESO-Universidad Iberoamericana, Puebla-Universidad Iberoamericana, 2006).

38 *Hilaire, Constantine and Benjamin et al.*, para. 108-109 and resolution.

to adjust the national order to the international order, as part of the commitment assumed by the State itself. In this context, the issue of laws violating the Convention, which is challengeable in the Inter-American order, was reexamined. This occurs when the law can be applied immediately, even though no specific act of application has yet been confirmed.

This was the Court's understanding, as expressed in *Advisory Opinion OC-14/94* of December 9, 1994, on *International Responsibility for Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*. When dealing with provisions of immediate application, it is not necessary for the transcendent law to be applied for a violation to be denounced and for the obligation to rectify the situation to exist; the mere enactment of the law in question violates, *per se*, the obligation assumed by the State.[39]

It is worth noting that the Human Rights Commission has also understood —in Communiqué 806/1998 of October 18, 2000, in reference to *Eversley Thompson (Saint Vincent and the Grenadines)*— that the mandatory death penalty is incompatible with the right to life established in Article 6.1 of the International Covenant.

The Inter-American Court could explicitly go to other extremes on this issue, elaborating on cases on the applicability of capital punishment within the term permitted by Article 4, which would require a more detailed examination of the regime of restrictions and limitations on human rights and a review of the principles the Court itself has invoked in other precedents, like suitability, proportionality and necessity. The Human Rights Commission has held that "crimes that do not involve loss of human life cannot be punished with the death penalty."

Another problem posed by the indiscriminate application of the death penalty in cases of intentional homicide derives from the irrelevance of forms of participation in the crime, which often influence the assessment of the penalty. For this purpose, the difference between material responsibility —true responsibility— and complicity is well known. However, the *Offences against the Person Act* of Barbados maintains that whomsoever "assists (or) advises" "another person to commit homicide" can be charged and condemned as "primary perpetrator", and consequently subject to capital punishment.[40]

VIII. Collision between Constitution and Law

The reflections expressed on this delicate issue, which also originated from the jurisdiction of other bodies, such as the United Nations Commis-

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[39] *Advisory Opinion OC-14/94*, para. 93. *But see* the judgment reached by the Court in *Hilaire, Constantine and Benjamin et al.*, para. 116-118 and resolutions 2 and 8.

[40] *Boyce et al. v. Barbados*, Series C, No. 169 (Nov. 20, 2007), *available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_169_ing.doc*.

sion on Human Rights —regarding Barbados, among other countries— and the Judicial Committee of the Privy Council, opened the door to further questions. Above all, we can observe that the criminal statutes challenged in *Hilaire, Constantine and Benjamin* were inconsistent with constitutional norms on human rights.

These norms, however, added to the inconsistency through what we might call an "ultra-active validity clause," which shielded an unconstitutional law from being challenged and used the protection it afforded to permit the continuation of the mandatory death penalty.[41] Initially, the Privy Council overruled the continuation of previous norms and interpreted the constitutional provisions so as to exclude the mandatory death penalty, but that criterion changed later.

The Inter-American Court sharply questioned the continuance of statutes favoring death in defiance of constitutional provisions that favor life. This time, the Court questioned this issue in the Trinidadian cases in 2002 and reiterated its position in 2009 with the ruling on *DaCosta Cadogan*, which drew the court's attention to the conflict between section 2 of the Offences Against the Person Act and section 26 of the Constitution of Barbados.

At the pertinent procedural juncture, to withstand this onslaught and others like it, Trinidad and Tobago invoked a limitation of enormous latitude established when it recognized the jurisdiction of the international Court, which could be exercised —according to the State— "only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that any ruling of the court does not infringe, create or abolish any existing rights or duties of any private citizen."[42]

The Court rejected this broad limitation, which contravenes the object and the purpose of the American Convention and subordinates supranational jurisdiction to national appraisals and authorizations. For the Inter-American Court,

> …[i]t would be meaningless to suppose that a State which had freely decided to accept the compulsory jurisdiction of the Court had decided at the same time to restrict the exercise of its functions as foreseen in the Convention. On the contrary, the mere acceptance by the State leads to the over-

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[41] Article 26 of the Barbadian Constitution, which contains the "exclusion clause," prevents a review of the constitutionality of norms promulgated before the entry into effect of the Constitution, on November 30, 1966. Such is the case of Article 2 of the Offences against the Person Act of 1868. *Cf. Boyce et al. v. Barbados*, para. 71, *passim* (Nov. 20, 2007).

[42] *Basic Documents Pertaining to Human Rights in the Inter-American System*, Secretariat of the Inter-American Court of Human Rights, San Jose, Costa Rica, at 72 (updated to May 2008).

> whelming presumption that the State will subject itself to the compulsory jurisdiction of the Court.[43]

In this finding, the Inter-American Court also reiterated an extensive position contained in *Advisory Opinion OC-2/82*, concerning *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights,* which clearly explains the singular nature of human rights treaties and the consequences these treaties entail. They are not traditional conventions that establish rights and obligations between States, but are much broader in scope: they recognize individual rights, and should be construed and applied accordingly.[44]

In summary, the regional court left the criterion it had upheld unaltered: the inherently arbitrary *mandatory death penalty* is unacceptable even if it is in a law conflicting with the State's Constitution itself. As is known, Trinidad and Tobago denounced the Convention. Such a denunciation has occurred only once in the history of the Inter-American System. In this case, it was motivated by reasons related to the death penalty: in the conflict between abolitionism and retentionism, although there are specific arguments surrounding the dispute. Despite its being an isolated denunciation, it constitutes a significant event in the historical process leading to the abolition of capital punishment.

The issue, which appeared to be jurisprudentially settled by the rulings on Trinidad and Tobago, has recently resurfaced —first in *Boyce et al. v. Barbados*[45] and again in *DaCosta Cadogan v. Barbados*.

The Court's position has been unwavering, of course. It is noteworthy —as well as encouraging— that in response to the *Boyce* ruling the State announced its decision to reform its national criminal code in the terms requested by the Inter-American Court. Resistance was starting to subside. The change had not yet occurred when *DaCosta Cadogan* came before the Court, but in the course of the proceedings, the State reiterated its intention of repealing the mandatory death penalty.[46] However slowly, resistance has been gradually abating.

In my view, the applicability of capital punishment for the most serious crimes could and should have an impact on the functions of the legislature and the judiciary. In my personal vote attached to the Court's ruling in

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43 *Hilaire*, preliminary objections, judgment of September 1, 2001, par. 90. The Court issued similar findings in the judgments on preliminary objections of the same date in *Benjamin et al.*, *Constantine et al.*, par. 81.

44 *Advisory Opinion OC-2/82*, para. 27 (Sept. 24, 1982).

45 *Boyce et al. v. Barbados*, para. 47 *passim* (Nov. 20, 2007). The State found that the fact that the death penalty was established by law rescinded the burden of arbitrariness. Needless to say, the Court rejected this argument. Cf. *Boyce et al. v. Barbados,* para. 56.

46 *DaCosta Cadogan v. Barbados*, para. 74.

Cadogan, I stated that "the requirement contained in Article 4 extends both to the typification/classification of the conduct and selection of the punishment and to judicial individualization for purposes of a conviction. This duality has not always been highlighted."[47]

IX. A Related Issue: Dangerousness and the Death Penalty

In death penalty case hearings, the Inter-American Court has had the opportunity to examine other crucial matters and redefine the boundaries of punitive power. Such was the case in *Fermín Ramírez v. Guatemala*, in which the Criminal Code established the possibility of imposing the death penalty on a defendant charged with murder if "a greater dangerousness of the agent is revealed."[48] The challenge to the death penalty added another issue to the debate: is it admissible to take into account dangerousness when deciding on the punishment? Does a law that does so conflict with the provisions of Inter-American Law?

The Court restored the criminal law of act or event, considered the material implications of the principle of legality in the normative structure of a democratic society, and rejected —not only for cases related to the death penalty— the invocation of dangerousness as relevant to the characterization of an offense and the corresponding punishability. The ruling declared this "is not compatible with the freedom from ex post facto law and, therefore, contrary to the Convention."[49] This criterion, and others of the same nature, updates the meaning of Article 9, which is no longer circumscribed to the prior existence of penal statutes and the precise description they contain.

X. Maximum Procedural Exigency

I shall now discuss conventional exigencies apropos of the proceedings that culminate in the imposition of the death penalty. Many cases brought before the Inter-American Court include points of due process, violated by national authorities. This issue —which has also received considerable attention in the European jurisdiction— usually arises under several headings, both in doctrine and legislation, as well as in jurisprudence. It is the primary subject of Article 8 of the American Convention, under the epi-

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47 My vote appears after the Court's judgment, on the Court's website available at *http://www.corte idh.or.cr/docs/casos/votos/vsc_garcia_204_esp.doc*.

48 *Fermín Ramírez v. Guatemala*, para. 92.

49 *Id.* para. 96.

graph "Judicial Guarantees/Civil and Political Rights." The Court has taken the concept of due process as an expression of the broadest defense.

The procedural issue appears prominently in Articles 8 and 25, the latter relating to the judicial protection of fundamental rights. It also appears in other statutes, for different reasons: Articles 5, on integrity; 7, on liberty; 28, on the validity of judicial guarantees in a state of emergency, and —of course— 4, in relation to the death penalty.

In this regard, it is worth emphasizing both general procedural norms, and statutes that strengthen procedural rigor in capital cases. This latter issue is addressed by both the United Nations Safeguards —an appeal by the Inter-American Court to establish the context, the standard and the scope of procedural guarantees—[50] and certain extreme positions examined by Inter-American and universal jurisprudence. I refer specifically to presumptions linked to consular protection.

The issue of the strict procedural constraints on the death penalty has been considered from two mutually complementary perspectives: *a)* under the comprehensive regime of procedural guarantees, in its two normative extremes: judicial guarantees (ACHR, Article 8) and judicial protection (urgent and expeditious) of fundamental rights (ACHR, Article 25), which includes the intangibility of *habeas corpus* and special injunctions in case of states of emergency; and *b)* under the specific regime covered by Article 4.2, also considering procedural references, similarly specific, set forth in paragraph 6 of the same Article 4.

Advisory Opinion OC-16/99 referred to the generic regime in these terms: "given the exceptionally grave and irreparable nature of the [death] penalty… If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty… protects is at stake: human life."[51] Failure to observe these requirements violates due process and results in the arbitrary taking of life. In other words, as stated in the Court's ruling in *Fermín Ramírez v. Guatemala*, "respect to the set of guarantees that inform of the due process and provide the limits to the regulation of the state's criminal power in a democratic society is especially impassable and rigorous when dealing with the imposition of the death penalty."[52]

Advisory Opinion OC-3/83 referred to the specific regime: "the fact that these guarantees are envisaged in addition to those stipulated in Articles 8 and 9 clearly indicates that the Convention sought to define narrowly the conditions under which the application of the death penalty would not vio-

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[50] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Resolution 1984/50 of the Economic and Social Council of the United Nations.

[51] *Advisory Opinion OC-16/99*, para. 135.

[52] *Fermín Ramírez v. Guatemala*, para. 78.

late the Convention in those countries that had not abolished it."[53] To inform its position on this point, the Court has demanded in its recent ruling in *DaCosta Cadogan*[54] —and I myself have done so in my explanation of vote— observance of the standard that the 1984 Safeguards require to guarantee due process in trials in which the death penalty is a possibility.

What should the judge's position be on this issue, considering the clearly reductionist, protectionist orientation established by the substantive and procedural death penalty system? Equally a guarantor of human rights, vigilant —and responsible, with other issues in the process— of the regularity of prosecution, it must concur in the exigency and thoroughness that govern the issue. In my view —and also, with some limitations, in the view of the Inter-American Court, this can nuance the position and actions of the courts, derived from an accusatory regime conceived in its strictest terms.

The problem arose in the Court's deliberations on *DaCosta.* The application of the law, from the perspective of the defense, could prevent the defendant from being found eligible for the death penalty. There was a possibility —granting the arguments of the defense— that certain personal circumstances (use of intoxicants, drug use) might qualify the defendant for a statutory exclusion from capital punishment, but not necessarily from all punishment. This would be relevant not only for purposes of the hearing, but for the statutory framework of the proceedings, *ab initio*. However, the full burden of proof was placed on the defense, with no judicial initiative to assist it.

The Court acknowledged the existence of an omission on behalf of the State in the case in reference. It warned that "the [State's] failure to guarantee these rights in a death penalty case could undoubtedly result in a grave and irreversible miscarriage of justice;" in this area it is "requires that the right to life be interpreted and applied in such a manner that its safeguards become practical and effective (*effet utile*)."[55] In the explanation of my vote, I went further still: "the [national criminal] tribunal's first concern in a case such as the one brought before the Court should be the precise verification that the conditions on which the trial was based were fulfilled."[56]

I do not share the idea that "according to the strict rules of the accusatory criminal procedural system, the judge should abstain from assuming probative initiatives," limiting itself to "[waiting] for the other parties to request [them]."[57] We should recall that it was not a matter of proving the defendant's guilt or innocence, but the presence —or absence— of the stat-

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53 *Advisory Opinion OC-3/83*, para. 53.

54 Para. 85.

55 Para. 84, 85.

56 *Explanation of vote*, para. 15.

57 *Id*. para. 18.

utory conditions for prosecution that would necessarily end, in case of conviction, in the imposition of capital punishment.

XI. Foreign Detainees and Consular Assistance

Continuing our discussion of procedural issues, *Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, cited above, has particular relevance for the subject under consideration. In this opinion, the Court was able to state and argue its opinion centering on the right that Article 36 of the Vienna Convention on Consular Relations grants to foreign detainees. While the convention is not a human rights treaty, the Inter-American Court held that this convention defines an individual right in the framework of the due process of law,[58] regardless of which it also establishes a specific legal relationship —with rights and obligations— between the detainee's State of origin and the State conducting the criminal proceedings.

The cases of interest often involve subjects who belong to highly vulnerable groups, who need special attention from the standpoint of access to justice. Their vulnerability is twofold: on the one hand, they are foreign citizens; on the other, they are detainees and criminal defendants. (However, this presumption could equally apply, with a guaranteeist leaning, to defendants facing administrative proceedings which will often culminate in the application of measures that severely affect their human rights of liberty, movement, residence).[59]

Mexico requested that the Court issue the opinion that concerns me here, associating its petition with the cases in which capital punishment can be imposed —or is effectively imposed— without advising the foreign detainee of his right to receive consular assistance. Evidently, the petition could have covered a broader scope: any type of punishment, not only death. It may have been limited to capital cases in view of its supreme importance and because of the relevance of placing emphasis where it needed to be, in light of practical considerations. For that reason *OC-16/99* —which the European Court cites in its ruling in *Öcalan v. Turkey* and was invoked by some participants in *LaGrand* and *Avena* before the International Court of Justice— is pertinent to our discussion of Inter-American jurisprudence on the death penalty.

The Mexican petition referred to both the interpretation of the Vienna Convention and the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man and the Interna-

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58 *Advisory Opinion OC-16/99*, para. 87.

59 My explanation of vote concurring with *Advisory Opinion OC-16/99*, in García Ramírez, *supra* note 37, at 12.

tional Covenant on Civil and Political Rights. The American Convention was passed over. Although the petition referred not to an interstate contentious issue but to an enquiry on the interpretation of international instruments, it is important to note that the United States of America is a signatory to the OAS Charter, the Vienna Convention and the International Covenant, of which the petitioner requested an interpretation, but not the Pact of San Jose, for which it did not.

The Inter-American Court established its competence to examine the aforementioned instruments and recognized the detainee's right —faced with the resulting obligation of the State that detained him— to be informed of the possibility of receiving consular assistance: Article 36 "*concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law".[60] By adopting this interpretation, the Court shifted the borders of due process in favor of the individual, as they have been shifted at a national level whenever a defendant is guaranteed the timely exercise of legal defense by having received warnings on the right not to incriminate oneself, to remain silent, to know the reason for his detention, to legal counsel, etc.

Referring to Article 14 of the International Covenant, which establishes the right to due process, the Court stated that it "is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added."[61] In the concurring explanation of my vote, I examined this expansive nature —never static or exhausted— of the due process of law. The interest behind this issue, which intensely reflects the principle *pro persona*, the implications of which are heightened, often appears in Inter-American Court jurisprudence.

Also, the Court determined that such notification should be given before the defendant makes his first statement to the authority and ruled that failure to observe the obligation of informing the detainee of this constitutes a violation of due process, similar in entity, opportunity and consequences to the failure to inform defendants of other means of defense. On the issue of opportunity —a particularly relevant point from the standpoint of the defense, access to justice and protection for the defendant's rights, the Court adopted the most protective interpretation of the words "without delay," which Article 36.1 uses in the context of other expressions that refer to maximum promptitude and haste: "without unnecessary tardiness," "without delay." If one seeks to guarantee effective defense —and that is, in effect, the aim, the idea the Inter-American Court adopted regarding the opportunity of notification takes on its full meaning.[62]

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60 *Cf. Advisory Opinion OC-16/99*, Resolution 2, ¶¶ 68 *passim*, 107 *passim*.

61 *Id.* par. 117.

62 *Id.* Resolution 3 and para. 99.

The Inter-American Court considered that such inobservance implies an essential violation that tarnishes the process as a whole and diminishes the effectiveness of the sentence.[63] It established, then, the general criterion that would later be upheld by the rulings of the International Court of Justice in LaGrand, of Germany v. United States, and Avena, of Mexico v. United States.[64]

It remains for the future —which should not be too distant— to explore the expansion of protective information provided to foreign detainees, to embrace cases in which they are not at risk of suffering the death penalty, and also to cases in which they are not detainees *per se*, but are in the midst of an advanced criminal process that entails a serious risk that warrants opportune acts of defense.

Such extended protection could be supported by the motives that have led the Court to set references on the exercise of certain rights prior to the decision to prosecute or detention. This guaranteeist expansion has emerged, and will probably be developed further with the passing of time, especially in the areas of notification of charges, the right to defense, *dies a quo* for a reasonable term (understanding *dies* as the act that marks the beginning of the term taken into consideration for the purposes of serving justice and protecting human rights).

XII. Specific Procedural Guarantees: Impugnation, Substitution, Rectification

The American Convention, among other instruments, contains a specific and additional definition of the due process of law, which elevates some guarantees for reasons regarding the impugnation of death sentences or measures seeking the extinction of punitive authority or criminal benevolence. Such is the case of Article 4, paragraph 6, of the Convention, which refers to three acts that can lead to the lifting of a death sentence: amnesty, pardon and commutation, all of which must be accessible to the sentenced person.

It is understood that these concepts are to be interpreted with reference to the current use of the respective terms, which also encompass institutions with the same nature and the same effects even though they might be presented under different names in local laws. In short, what matters is to bring all available means of excluding capital punishment or preventing its execution within reach of the defendant.

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63 *Id*. Resolution 7 and para. 133 *passim*.

64 *See* my comment on this point in Sergio García Ramírez, *La pena de muerte en la Convención Americana sobre Derechos Humanos y en la jurisprudencia de la Corte Interamericana*, *in* 114 Boletín Mexicano de Derecho Comparado 1083 (2005).

This obviously supposes that there is legal provision for these precepts; that some organ of public power has the authority to exercise amnesty, pardon or commutation; that there is a proceeding —observing the rules of due process of law— that leads to the relevant review and decision; and that the proper resources are within reach of the condemned.

The acts to which I refer should be effective for the petitioner or the beneficiary, in the sense that they can be granted in all cases, without prejudicial obstacles that deny the petitioner the benefit the Convention provides. Total obstruction of such access for the lack of a public organ empowered to rule on petitions for reprieve is inadmissible. This issue emerged in the cases of *Fermín Ramírez* and *Raxcacó Reyes*, both in relation to Guatemalan law: Decree 32/2000 suppressed the recognized authority of an organ of the State to deliberate and rule on such matters.[65] This in turn led to condemnation for negligence of Article 4.6 of the Convention, in relation to Article 2, which obliges [States] to adopt measures conducive to respect and protection of the rights invoked in Article 1.1.

The remedy should be processed "through impartial and appropriate procedures,"[66] in accordance with Article 4.6 of the Convention along with relevant provisions on the guarantees of due process established in Article 8. In other words, as the Court stated in its ruling in *Hilaire, Constantine and Benjamin*, "it is not enough merely to be able to submit a petition; rather, the petition must be treated in accordance with procedural standards that make this right effective."[67] In other words, there will be true access to justice, that replaces the death penalty if the rules of due process are scrupulously observed; there will be no unyielding, previously established, impediments resulting from the severity of the crime or the conditions of the offender —under the catchwords of guilt or "dangerousness," for example— that obstruct granting the benefits mentioned outright in the Convention.

The Court elaborated,

> Article 4(6) of the [American] Convention, when read together with Articles 8 and 1(1), places the State under the obligation to guarantee that an offender sentenced to death may effectively exercise this right. Accordingly, the State has a duty to implement a fair and transparent procedure by which an offender sentenced to death may make use of all favorable evidence deemed relevant to the granting of mercy.[68]

It is important to mention that, in the view of the Inter-American Court, acts of grace are not the ideal means of remedying arbitrariness in the application of the death penalty, although they may obviously be performed

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65 *Fermín Ramírez vs. Guatemala*, para. 107.

66 *Id.* para. 54, 29 and 105.

67 *Id.* para. 186.

68 *Id.* para. 188.

to prevent its execution. In these cases, rectification should be placed in the hands of a jurisdictional organ by means of a process of the same nature.

At first —as seen in *Boyce et al. v. Barbados*, the Inter-American Court accepted rectification through political and administrative channels, although the same ruling affirmed that:

> ...a distinction must also be made between the right under Article 4(6) of the Convention of every convicted person to "apply for amnesty, pardon, or commutation of sentence," and the right recognized in Article 4(2) to have a "competent court" determine whether the death penalty is the appropriate sentence in each case, in accordance with domestic law and the American Convention.[69]

Jurisprudence has progressed through *DaCosta Cadogan*, also of Barbados. Given that the remedy for injustice in jurisdictional venue is an act of justice, providing it is for a judicial organ; "sentencing is a judicial function;" "…the judicial branch may not be stripped away of its responsibility to impose the appropriate sentence for a particular crime."[70]

XIII. Subjects Excluded from Capital Punishment

I have mentioned that there are restrictions on the death penalty —or rather proscriptions— related to certain categories of subjects: those excluded from capital punishment. They are mentioned in Article 4.5, with different expressions that could leave room for doubt. Capital punishment shall not be "imposed" on persons under 18 or over 70 years of age "at the time the crime is committed," a reference that has a different impact when applied to crimes that are committed instantly and when referring to ongoing or continued crimes. Furthermore, it is shall not be "applied" (sentenced? executed?) to pregnant women.

In my understanding, neither of the two presumptions refers merely to the inexecution of the penalty —which would constitute deferral in the case of a pregnant woman, but of exclusion from being condemned to death. I acknowledge that this conclusion is debatable, but it concurs with the rule *pro persona*: when faced with the choice of one of two possible interpretations of the words, I opt for the one that offers the greatest protection for the individual.

XIV. Precautionary or Provisional Measures

The Court's precautionary function implies a third sphere of competence for this Court, in which issues related to the death penalty have also

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69 *Boyce et al. vs. Barbados*, para. 60.

70 *Id.* para. 56.

been raised. It happened initially in the deliberations relating to *James, Briggs, Noel, García and Bethel* (Trinidad and Tobago), in which the court was charged with attempting to halt the execution of convicts until the Inter-American Commission could rule on the regularity of the proceedings that had led to their death sentences.[71]

Here, the Court was not questioning the death penalty *per se*: the point challenged involved the due process of law. In its 1998 ruling, the Court ordered that the execution be stayed while the case was pending before the Commission: "…should the State execute the alleged victims, it would create an irremediable situation incompatible with the object and purpose of the Convention, would amount to a disavowal of the authority of the Commission, and would adversely affect the very essence of the Inter-American system."[72] Clearly, it would be impossible to achieve the *restitutio in integrum* so often proclaimed in the debate on reparations.

The Inter-American Court understood that its provisional measures were binding for the State: they do not exhort; they order. Thus, the Court stressed that "the execution of Joel Ramiah by Trinidad and Tobago constitutes arbitrary deprivation of the right to life," a situation which "is aggravated because the victim was protected by Provisional Measures ordered by this Tribunal, which expressly indicated that his execution should be stayed pending the resolution of the case by the Inter-American Human Rights system."[73]

This issue of great importance appeared in *LaGrand*, before the International Court of Justice, which also confirmed the binding force of the measures. On the date these opinions were issued, March 3, 1999, Walter LaGrand was executed. In due course, the Court of The Hague would maintain that such measures did not constitute a "mere exhortation," but "created a legal obligation for the United States,"[74] an interpretation that was reiterated in *Avena*.

XV. Execution of the Penalty

Execution of the imposed or imposable penalty —understood as through a regular process— suggests other important questions. One of them concerns the method of execution. The Court has not ruled on this point. If the Court finds that the imposition of this penalty contravened the regime of

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71 The first ruling on provisional measures in this case, which would be followed by others also examined by the Court, was issued on May 22, 1998. On the succession of cases and rulings in 1998 and 1999, *cf. Hilaire, Constantine and Benjamin et al.*, para. 26 *passim*.

72 *James et al., Ruling on provisional measures requested by the Inter-American Commission on Human Rights in relation to the Republic of Trinidad and Tobago* (Aug. 29, 1998), Whereas Clause 9.

73 *Hilaire, Constantine and Benjamin et al.*, ¶¶ 198, 200, and Resolution 7.

74 *LaGrand case (Germany v. United States of America)*, para. 110, (March 31, 2004).

the Convention, there would be no point in examining execution procedures. In *Boyce,* the Court ruled that it "does not find it necessary to address whether the particular method of execution by hanging would also be in violation of the American Convention" (in addition to the violation implicit in the mandatory death penalty).[75]

However, this issue may be examined in light of Article 5.2 of the Pact of San Jose, which prohibits —with a *jus cogens* proscription as ruled by the Inter-American Court— submission to torture or cruel, inhumane and degrading treatment. The Court's findings in this regard, when examining corporal punishments —flogging executed in an especially cruel, humiliating or intimidating manner— are developed in *Caesar v. Trinidad and Tobago*.[76] The considerations relating to execution of the penalty of flogging could be transposed, *mutatis mutandis*, to methods of execution of the death penalty.

The issue of execution —in particular its more or less relative degree of imminence— also leads us to examine the phenomenon of the wait in the so-called "tunnel or canal of death," which can be very prolonged, anxiety-ridden, and harmful to human dignity. In *Soering*, the European Court referred to this point,[77] which has also drawn attention from the Inter-American Court in *Hilaire, Constantine and Benjamin*: "…compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment."[78]

Finally, humanitarian considerations have led this Court to exclude execution of the death penalty in cases in which it might prove applicable. I refer to the case in which a person is condemned to death irregularly. The Inter-American Court has ruled that in the new sentence —if there are grounds to issue another one— the death penalty is to be replaced by another sanction. Such was the Court's finding, on the basis of equality, in *Hilaire, Constantine and Benjamin.*[79]

XVI. Suspension of Guarantees

On reviewing the substantive, procedural and executive information contained in the American Convention and examined by the jurisprudence of the International Court, it is important to mention an obstacle of a general scope, both for this subject and others beyond the bounds of this arti-

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75 *Boyce v. Barbados*, para. 85.

76 *Caesar v. Trinidad and Tobago*, para. 88 (March 11, 2005).

77 *Soering v. United Kingdom*.

78 *Hilaire, Constantine and Benjamin et al.*, para. 169.

79 Para. 215 and Resolution 11.

cle: the rights established in Article 4 of the American Convention, which include all those relating to capital punishment, are not subject to the suspension authorized in extreme cases by Article 27.1 of the Pact of San Jose. The exclusion of the hard core of rights —as it has been called— appears in Article 28.2.

This exception in favor of life covers both the substantive, procedural and executive rights established in Article 4 and their broad jurisdictional safeguards, specifically the judicial guarantees required for their protection. Consequently, it is similarly impossible to suspend *habeas corpus* and special injunctions (*amparo*) —or other judicial recourses or remedies that may exist in the national order— in cases of the suspension of State obligations aimed at responding to exceptional circumstances of danger or emergencies.

Inter-American jurisprudence has affirmed this position in two advisory opinions from the 1980s: *OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights).* Advisory Opinion OC-8/87 of January 30, 1987. Series A N. 8.,[80] and *OC-9/87, Judicial Guarantees in States of Emergency*, of October 6, 1987.[81] Needless to say, under the terms of Articles 1.1 and 2 of that instrument, the signatories of the American Convention need to adopt measures to adapt their national statutes to the standards of the Pact of San Jose in this area —with the exception of opportunely formulated admissible reservations, as always. This is particularly important if we consider that the suspension affects the protection of the Inter-American *corpus juris*.

It is worth noting that this obligation has not resulted in regulatory reforms —which would be constitutional— in all cases, with the risk posed by discrepancies between national constitutional provisions and international human rights law statutes, especially if that difference —the source of dilemmas that put the rule of democracy and human rights at risk, whether in specific or relatively isolated cases— leaves the right to protection of life against the historical onslaught of capital punishment undefended.

XVII. The "Federal Clause"

Neither the Convention nor its interpreter, the Inter-American Court, have overlooked the problem that arises from the federal organization of the State obliged to respect and guarantee certain rights. Under the epigraph "Federal Clause," Article 28.2 of the Pact of San Jose establishes:

> With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall

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80 *Advisory Opinion OC-8/87*, para. 42.

81 *Advisory Opinion OC-9/87*, Resolutions 1 and 2, ¶¶ 25, 38-40.

> immediately take suitable measures in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

This specifies an obligation for federal States, which stresses the general duties attributed to all States.

The central government —that is, the federation that put its name to the international agreement on behalf of the State as a whole— must "immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units [which have jurisdiction in federated regions or states] may adopt appropriate provisions for the fulfillment of this Convention." There is, then, a kind of "reinforced obligation" derived from the general obligation to take measures to ensure respect and protection for human rights, and the particular obligation resulting from the federal clause.

The Court, in turn, has been emphatic on this point, to which it has referred on several occasions: international precepts on human rights must be respected by the States regardless of their unitary or federal structure.[82] In its 1998 ruling in *Garrido and Baigorria v. Argentina*, the Court affirmed: "a State cannot plead its federal structure to avoid complying with an international obligation."[83]

It is fitting to stress the fact that the State must "immediately" adopt the measures in question as ordered in Article 28.2, and we need not be reminded that it is not possible to hide behind obstacles of national law —the existence of which is recognized in the international convention— since these obstacles can and must be overcome or else breach an international commitment. The emphasis on this issue is pertinent in view of the vast importance it has clearly had in international death penalty litigation, as seen, without having to look much further, in the cases *LaGrand* and *Avena* as resolved by the International Court of Justice.

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[82] *Advisory Opinion OC-16/99*, Resolution 8 and para. 138 *passim*.

[83] *Garrido and Baigorria v. Argentina. Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment of August 27, 1998, para. 46.

Recibido el 19 de marzo de 2010 y aceptado para su publicación el 21 de abril de 2010.

Mexican Law Review
New Series
Volume III
Number 1

ENVIRONMENTAL LAW IN MEXICO: A NEW PARADIGM

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ABSTRACT. *This article proposes a new paradigm for the design and effective implementation of environmental law in Mexico. After briefly reviewing the current status of environmental law, as well as the academic boundaries, the article puts forward a new three-sided paradigm. First, rights and collective actions must be recognized constitutionally as fundamental principles that truly validate a far-reaching legitimacy that transcends personal interests and thus validates collective access to legal environmental protection. Second, a legal procedural framework —procedural network— must be outlined to enforce any related legal action. Third, a series of correlative public policies is needed to promote effective administrative collaboration and to allocate financial resources. The balanced co-existence of the three sides of our paradigm is the key for the successful implementation of an effective environmental law in Mexico and presents a public challenge within the Mexican arena of our times.*

KEY WORDS: *Environment, public policy, human rights, procedural network.*

RESUMEN. *El presente artículo plantea un nuevo paradigma sobre la concepción y efectiva aplicación de la ley ambiental en México. Después de revisar brevemente la situación actual de la ley ambiental, así como de las fronteras académicas, el artículo plantea un nuevo modelo de paradigma tipo triangular, con tres aristas. En primer lugar, se requiere el reconocimiento constitucional de los derechos y acciones colectivas de naturaleza difusa. Ello como principio fundamental que permita una amplia legitimidad —más allá del interés individual— para acceder a la defensa del medio ambiente. En segundo lugar, se debe estructurar un marco legal procedimental —una red procesal— que permita en la práctica jurídica accionar diversas vías. En tercer lugar, es necesaria una serie de políticas públicas correlativas que faciliten la colaboración administrativa institucional y la transferencia de recursos finan-*

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cieros. La existencia y armonización de las tres aristas del paradigma son elementos indispensables para la exitosa implementación de la ley ambiental y, consecuentemente, constituyen un reto contemporáneo en el caso mexicano.

PALABRAS CLAVE: *Medio ambiente, políticas públicas, derechos humanos, red procesal.*

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I. INTRODUCTION

Environmental problems are a growing global concern. Issues such as the destruction of the ozone layer, global warming and pollution know no geographical boundaries. That is why having a broad international perspective on this issue becomes so important when trying to assess the current status of this problem in different parts of the world. It is of critical importance to know how each country locally deals with its own environmental concerns in its own constitutional and regulatory mechanisms, as well as the public policies observed in each country. Furthermore, awareness on the matter will enable us to share insights and make proposals on the subject, thus enhancing the unification of international policy criteria, and in this way, empower sustainable national and local actions. Think globally, act locally.

This article discusses the inadequacy of Mexican judicial mechanisms for the protection of collective environmental rights in the country. Furthermore, it goes on to point out —from a public policy perspective— how it is necessary not only to acknowledge the problem, but more importantly, to develop adequate solutions within the constitutional and legal arena for the most pressing problems, in addition to creating policy enforcement mechanisms and establishing an official public policy.

Successful enforcement of environmental laws has been one of the biggest challenges for governments everywhere. In Mexico, it has been no different, especially at the beginning of the 21st century. Even though Mexico's environmental law-making and the enforcement of these laws have shown some improvement in recent years, the Mexican legal framework is still inefficient in successfully dealing with the drawbacks of pressing environmental problems along with their collective and dispersed implications.

This article offers a multidimensional approach to effectively protect collective environmental interests and rights. We can begin by saying that environmental jurisdiction requires pre-established, constitutionally based guarantees. It is also important to consider the unification of secondary and autonomous regulations and administrative mechanisms, as well as the public policies that can guarantee the successful implementation of the law.

To achieve this, we propose a new paradigm for the effective protection of the environment, based on recognizing three phases. First, it is necessary to have all the society's values and principles established in the Constitution as individual guarantees. Second, procedural mechanisms (rules that allow the practical application of legal processes) are needed. In Mexico specifically, it is extremely important to address the subject of standing —an obstacle that still exists for obtaining access to courts— and the legal defense of collective interests. Third, effective administrative actions or public policies are required. Once these phases have been completed, the law on fundamental rights can be managed successfully and can help prevent and repair environmental damage.

If a fundamental right, like the right to a healthy environment, has not fulfilled the three phases listed above, it becomes an obsolete right because there are no appropriate mechanisms to make it effective. Therefore, protecting the individuals and communities of this and future generations cannot be done.

In sum, this article uses this three-fold model to explore the main challenges to achieving effective environmental legislation in Mexico, the first step for the successful collective protection of such a fundamental right.

II. The Current Situation of Environmental Law in Mexico

Legislating environmental problems in Mexico has taken place rather gradually and quite recently. The first law on environmental issues, "Federal Law to Prevent and Control Pollution," dates back to 1971. Unfortunately, this law did not address environmental problems in depth, but rather focused on the effects of pollution on people's health. Basically, it was concerned with public health and not with environmental protection.

Subsequent steps towards attaining environmental rights in Mexico have mainly resulted from the international treaties the country has signed. Two

examples are the 1972 Stockholm Conference on Human Environment and the Kyoto Protocol.

It was not until 1988 that the General Law on Ecological Equilibrium and Protection of the Environment passed. This law aimed at protecting the environment and Mexico's natural resources. It is considered the core of environmental legislation in Mexico and was largely amended in 1996. To better understand recent environmental legislation in Mexico, we can mention the Wildlife Law, which was passed in July 2000. There is also a federal law for handling and preventing waste, which was published in the Federal Official Gazette in October 2003. The General Law for Sustainable Forest Development was passed in February 2003; the Biosecurity Law for Genetically Modified Organisms dates back to 2005, and the General Law for Sustainable Fishing and Aquaculture was made in July 2007.

In addition to these laws, environmental legislation is currently in the process of being created because in Mexico, once a law has been officially voted on and passed by the legislative branch, it must undergo a pre-enforcement process, which requires not only legal structure, but also administrative actions and budgets.

In Mexico, the lack of an effective environmental public policy that unifies both legal and administrative aspects is apparent. What Mexico has to date is an incomplete, segmented legislation aimed at protecting the environment, but lacking efficiency. Collective rights are not yet recognized at a constitutional level. Secondary legal mechanisms, such as civil and administrative procedures, as well as amendments to the criminal code and the *amparo* trial, have proved inefficient.

Because of this, the legal aspect of environmental protection in Mexico has been precariously enforced in practice. Some of these factors can be attributed to how difficult or literally impossible it is to obtain access to the courts to advocate collective rights, and the poorly trained administrative staff in government ministries that cannot effectively enforce all the legal powers that have been vested on them. Another factor is the lack of sufficient funds earmarked for implementing environmental legislation and public policies.

Therefore, in response to the current situation, this article proposes an updated concept of an effective environmental policy for Mexico. It is paramount to ensure it is complied with so as not to violate collective rights. Its main objective is to attain better and tangible results in abiding by the law and in preserving and protecting Mexico's natural resources.

III. Academic Literature in Mexico

The development of environmental law in Mexico is a relatively new concern. In a little more than two decades, the issue has changed profoundly

and evolved not only in terms of the legal framework, but also in academic studies.[1] This field is still in the process of exploration and expansion. In order to establish a theoretical framework on environmental law, some of the most important studies should be mentioned. While this is not intended as a thorough review, it comments on some of the most relevant studies to get a perspective of the academic literature.

Raul Brañes was a pioneer in the study of environmental law. Since his first book in 1987, he has updated his work to include all the changes that have gradually and progressively have taken place in Mexican law. The work of Brañes[2] provides an overview of environmental law in Mexico, both in law and in its administrative structure. In his efficacy and efficiency analysis, he identifies the need to include the fundamental right to a decent environment at a constitutional level,[3] but he does not identify collective actions as aspects that should also be incorporated. Nevertheless, the contribution of Brañes and other colleagues is an important foundation upon which theoretical and pragmatic proposals like this model can be built.

Raquel Gutiérrez's work has also contributed to place environmental law in Mexico as an important issue, not only as an academic study, but also as a new branch of law that should be addressed by legislators and politicians. In her study, Gutiérrez[4] describes and interprets the existing law, raising the importance of natural resources and environmental problems. She depicts the responsibilities various public offices have in environmental matters, as well as some institutions and environmental policy processes. She then reviews the various systems that have had some bearing on environmental protection and describes the procedures that existed at that time to conclude her study by examining environmental crimes. Without a doubt, this is a rich text that attempts to cover an entire perspective didactically.

Carla Aceves[5] also contributed with a study of the main topics of environmental law in a masterpiece that is now used as a textbook for the subject. She focuses on the legal framework of the time and describes the institutions and procedures related to the environment, among other issues.

Antonio Azuela's view[6] from an unconventional perspective presents ideas and observations on the inadequacies of the right itself and raises the

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1 This was largely the result of peer pressure and Mexico's international commitments.

2 RAÚL BRAÑES, MANUAL DE DERECHO AMBIENTAL MEXICANO (Fondo de Cultura Económica, 2000).

3 Probably due in part to his influence, a Constitutional reform was added to the Article 4 on June 28, 1999.

4 RAQUEL GUTIÉRREZ NÁJERA, INTRODUCCIÓN AL ESTUDIO DE DERECHO AMBIENTAL (Porrúa, 2001).

5 CARLA ACEVES ÁVILA, BASES FUNDAMENTALES DE DERECHO AMBIENTAL MEXICANO (Porrúa, 2003).

6 ANTONIO AZUELA, VISIONARIOS Y PRAGMÁTICOS. UNA APROXIMACIÓN SOCIOLÓGICA AL DERECHO AMBIENTAL (UNAM, 2006).

need for appropriate political and cultural contexts for the law to have compliance, efficacy and success. Azuela identifies social participation as a necessary part in social change.[7] He rightly points out that environmental law in itself is not enough to solve environmental problems. Thus, his approach goes beyond the strictly legal sphere to delve into the social sphere, opening up the possibility of thinking about multidisciplinary perspectives that offer a holistic approach to environmental law.

Emilio Rabasa[8] provides a collection of articles by well-known academics that explore environmental law from a constitutional perspective and contribute to understanding the genesis of environmental law in the Constitution. These articles explore the international perspective and even address issues of particular importance in the Mexican legal order. However, these studies do not embark on the legal perspective of collective rights to create a connection between constitutional principles, legal framework and public policies or administrative decisions.

Ricardo Luis Lorenzetti[9] offers a very current view of the nature of environmental law. He clearly identifies the structural constraints of Roman-Germanic law to better understand and address the new environmental paradigm of collective interest and its implications. His vision of environmental paradigm identifies: 1) collective well-being in the social sphere, 2) responsibilities, limitations and fundamental rights, 3) the concept of the environment, and 4) the causal system. This point of view is interesting, but its impact is unfortunately diluted in the generality and the broad scope of the subject. The author himself acknowledges that due to this it is not possible to construct a theory and therefore the approach simply identifies a set of principles and values. Based on Argentina's experience, his position has some nuances worth considering. Even when it makes valuable and critical contributions that consider specific points, Lorenzetti's paradigm does not attempt to ground the issues or place them in the context of Mexico.

It should be noted that neither Brañes,[10] Gutiérrez,[11] Aceves,[12] Azuela[13] or Rabasa[14] address or discuss environmental law as a collective right of a diffuse nature nor do they raise the need for its constitutional anchorage.

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7 He states that "…legal statements are processed socially, and therefore modified, both in their origin and their reception. Above all, their appropriation by individuals and their use in specific situations are mediated by the positions and the provisions of these individuals...". Azuela, *supra* note 6, at 15.

8 LA CONSTITUCIÓN Y EL MEDIO AMBIENTE (Emilio O. Rabasa coord., UNAM-IIJ, 2007).

9 RICARDO LUIS LORENZETTI, TEORÍA DEL DERECHO AMBIENTAL (Porrúa, 2008).

10 Brañes, *supra* note 2.

11 Gutiérrez, *supra* note 4.

12 Aceves, *supra* note 5.

13 Azuela, *supra* note 6.

14 Rabasa, *supra* note 8.

Thus, the discussion provided by the present text is an approach that emerges from the fundamental importance of shaping a legal framework that effectively protects the environmental rights we all have. I am convinced that we must start from the protection of environmental collective rights at a constitutional level to then develop a consistent procedural network that must be accompanied by sound public policies.

The constraints found over the years in the administrative, civil, criminal and *amparo* trials have highlighted the need for a much broader vision, and even for legal and procedural reengineering of environmental rights to ensure their effective protection. This article offers an updated view that emerges from the perspective of environmental law as a collective and diffuse right with all its implications. It also proposes a model that is possible now that the Mexican Congress has approved a Constitutional amendment to Article 17 that recognizes collective actions.[15]

I believe that the multidisciplinary approach —even though it is essential to the spectrum of public policies— has not been clearly identified by the main authors of environmental law in Mexico; such an approach can greatly contribute to the study of environmental law in Mexico, from a legal and public policy perspective.

IV. The Model

We have developed a triangular model that allows us to more easily understand the complex network of legislative procedures required to successfully implement environmental law in Mexico.

It is not enough to formally create a law, even at a constitutional level, and assume it will be effective. Implementing a law is neither simple nor casual. Constitutional principles require that certain processes be followed and an administrative framework, as well as public policies are established for their execution, observance and effectiveness to be set in place. Only then can it be successfully enforced.

In reality, this assertion takes us away from the strict surroundings of the law and places us within the territory of public policies. Along that line, Aguilar[16] states: "Public matters mean that meta-individual issues, but not

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15 This decree inserts a new third paragraph to Article 17 of the Constitution of the United Mexican States and was published in the *Gaceta Parlamentaria*, Chamber of Deputies No. 2976-IV (March 25, 2010). It states: "The laws shall regulate those actions and procedures for adequate protection of collective rights and interests, as well as measures that allow individuals their organization for itself defends." This addition is a significant advance. However, a hard work must be done to establish the secondary legal framework.

16 Luis F. Aguilar Villanueva, El estudio de las políticas públicas 29 (Miguel Ángel Porrúa, 1992).

the disappearance of individuals in a collective entelechy of some kind, such as a nation, society, class or mass…"[17] In this sense, it could be argued that any governmental issue is public, but public issues can go beyond government walls. Therefore, a public policy is a government decision that also includes public opinion and the participation of the citizens themselves.

A public policy can be expressed in a variety of ways. As Aguilar states,[18]

> A policy can be a regulation here, the distribution of different types of resources (incentives or subsidies, in cash or in kind, present or future, free or conditioned) there, the intervention that takes the form of direct redistribution over there and leaving citizens to themselves beyond that. Precisely due to their public nature, analyzing and designing public policies open up a wide range of action plans shared by the government and society.

It is important to note that the contemporary literature is not precise in indicating the characteristics of the type of policy, that is, the ways in which a policy is or could be made public. Moreover, some scholars speak of administrative decisions, plans or programs while others hold that a statute or law is the main element of a policy.[19]

Within this great range of possibilities, we should take into account the fact that a law seems to be the most durable mechanism. As I have written elsewhere,[20]

> Political decisions change over time influenced by political actors and in countries such as Mexico certainly according to the perception of different political administrations. The political bargaining could be expressed in a variety of ways. Nevertheless, it seems that some governments prefer to create laws in order to increase the possibility of the policy enduring over time. The statute or law is then the most formal legal instrument for shaping and channeling the political decision. Among the different types of policy, the law has the most formal construction. Consequently, the law acts as the primary instrument used by contemporary governments to influence social behavior.[21]

When we think of a State policy, we see it as a general policy that contains different courses of action on public policies, which can cover the three events stated above: a constitutional base, a procedural network (a regulatory legal framework) and administrative actions or related public policies.

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17 *Id.* Author's translation.

18 *Id.* at 32.

19 *See* Benjamín Revuelta Vaquero, *The Process of Rule Implementation in Mexico: Presidentialism and the Rural Sector in the 1980's*, VDM (USA-UK, Verlag Dr. Müller Aktiengesellschaft & Co. KG).

20 *Id*. at 33.

21 This is because congressional approval of a law gives it more permanence.

To give an example of this perspective, in the early 1990s, the executive branch conceived a new macro policy that would open up and increase the productivity of Mexico's rural sector to modernize Mexico and open it up to global economy. This idea was consistent with the North American Free Trade Agreement (NAFTA) negotiations with the United States and Canada, which would be signed a couple of years later.[22] The political elite saw the amendment of Article 27 of the Mexican Constitution, which involved modifying the "*ejido-system*," then considered one of the taboos of Mexico's social system, as the first step. The Constitutional reform was approved in December 1991, and was published in the Federal Official Gazette on January 28, 1992. As a part of this policy, a new procedural network was issued, centering on the new Agrarian Law (published on February 26, 1992), as well as the subsequent approval of other laws, such as the National Water and Forest Law. The macro policy for the rural sector also included a series of administrative decisions linked to public policies that would reinforce the constitutional reform and make it effective. These decisions included establishing Agrarian Courts and the Commission for Regularizing Land Ownership (CORETT), as well as re-designing the National Trustee Fund for the Support of the "*Ejido System*" (FIFONAFE), among other measures.

Regardless of the success or failure of this policy, this example shows that a macro policy —or a major policy as referred to here— not only requires amendments to the constitution, but also secondary regulation or a procedural network to implement these principles. Moreover, new administrative institutions need to be set up and decisions must be taken regarding established structures, plans, programs, actions and the public policies needed to enforce the main principles. The proper operation of these instruments will largely depend on the effectiveness of the constitutional principle and the success of public policies.

This initial idea allows us to build a triangular model for effective environmental policies. At first glance, it comes across like a simple plan; however, it entails a series of multiple interconnected relationships and involves citizen participation, which in itself is very complex. Just within the government, extensive participation between the executive, legislative and judicial branches can be seen. And the involvement of federal, state and city or municipal jurisdictions is also important, but complicated none the less.

V. The Paradigm

To elaborate on this model, we will describe each of these perspectives in further detail. We will begin by defending the incorporation of collective

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[22] The North American Free Trade Agreement was signed on December 17, 1992, and entered into effect on January 1, 1994.

environmental rights on a constitutional level. Then, we will suggest the re-engineering or creation of a new procedural network. Finally, we will comment on related public policies, including mechanisms for repairing existing damage.

1. *Collective Constitutional Rights*

The subject of the environment and the repercussions of the damage it has suffered not only takes into account collective rights, but also acknowledges these rights in basic legislation. This is a fundamental starting point for a legal system that emanated from the Roman-Germanic tradition of private law.[23]

The right to a decent environment for all citizens of a society has recently been established in the Mexican Constitution.[24] The fourth paragraph of Article 4 of the Constitution states that "Every person has the right to a decent environment for his or her development and well-being."[25] Nevertheless, it should be noted that neither this specific article nor any other emphasizes or even considers the existence of collective rights with a diffuse nature as a main principle to establish that the environment belongs to everybody, and therefore, anyone can demand environmental protection or defend its interests and rights. An adequate constitutional protection is, in consequence, a pending matter in the Mexican legal system.

Collective rights are widely acknowledged in different Latin American legislations.[26] Despite their differences, they follow the same line established

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[23] "For centuries, private law has been the only Law in Continental Europe (and in systems that follow this tradition). Only in the sphere of private law could institutionalized or State recognized jurisdictions fulfill their duty and give an impartial solution to disputes. If one party of the dispute was the Administration, the entire system would be corrupt, in theory and in practice; in theory, because the public interest and personal interests were in different scenarios and cannot be measured in the same way; and in practice, because it becomes a serious problem to give an impartial and independent resolution in a litigation in which the State and an individual are confronting each other.

...In every country in the Roman-Germanic family, public law has only achieved a certain level of development and perfection much lower than that of private law. This has caught neither jurists nor public opinion by surprise. On the contrary, they are quite content with what has been achieved and do not believe much more can be done without risking the relative good order that reigns over society." RENÉ DAVID, LOS GRANDES SISTEMAS JURÍDICOS CONTEMPORÁNEOS, DERECHO COMPARADO 62-64 (Aguilar, 1968; author's translation).

[24] As of June 28, 1999.

[25] Author's translation.

[26] Among them, we can cite the cases of Brazil, Colombia, Uruguay, Chile, Venezuela and Costa Rica.

in the Brazilian Code of the Consumer's Defense Bill, which classifies rights as collective rights, diffuse rights and homogeneous, individual rights.[27]

After analyzing this bill, we hold that environmental rights are *collective rights of a diffuse nature* because indivisible and trans-individual rights belong to a group of people, that are not easily identifiable, with no prior legal ties (outside of sharing citizenship or neighborhood) and that can identify themselves with a specific event (and in some cases even this is not possible).[28]

We do not only refer to collective rights since that implies that members of a group are joined by a previous legal relationship. This condition would make them a legal entity, which is not the case.

Nor can we speak of homogeneous individual rights since this is a procedural figure that allows a set of unitary actions to be included in a single collective action. This is not fitting because in considering cases of environmental damage, only privileged citizens can afford to legally defend their case. The vast majority of marginalized or low-income citizens could certainly not do so. So, the question is: what happens to the rights of all the people who have been left out, and those who cannot pay for their defense in a court of law?[29]

By using the term "*collective rights of a diffuse nature*," we want to stress that interests and rights belong to people from all levels of society, that is, not only people from the community, town, state, region or country, but to everyone on the planet. Moreover, we must accept that environmental rights belong not only to present generations, but also to futures ones.[30]

Some Mexican authors[31] believe it is not necessary to discuss diffuse interests regarding natural resources in Mexican law, arguing that the consti-

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[27] *See, e.g.*, ANTONIO GIDI, LAS ACCIONES COLECTIVAS Y LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES EN BRASIL. UN MODELO PARA PAÍSES DE DERECHO CIVIL (UNAM, 2004) and JOSÉ OVALLE FAVELA, LAS ACCIONES PARA LA TUTELA DE LOS INTERESES COLECTIVOS Y DE GRUPO (UNAM, 2004).

[28] We do not say they interact with each other because they often do not interact directly because they do not even get to meet each other.

[29] Luis Paulo Da Silva (*in* LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES HOMOGENEOUS. HACIA UN CÓDIGO MODELO PARA IBEROAMÉRICA [Antonio Gidi & Eduardo Ferrer coords., Porrúa, 2nd ed., 2004]) mentions that these rights are individual and divisible but that they can assume, in certain circumstances, collective nature only in the way they are safeguarded.

[30] Therefore, we do not accept Kazuo Watanabe's criticism stating that in practice, interests or diffuse rights and collective ones are fragmented, related to just one section of society, like the citizens of a town or a state, because this statement goes against its indivisible nature. LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES HOMOGENEOUS. HACIA UN CÓDIGO MODELO PARA IBEROAMÉRICA (Antonio Gidi & Eduardo Ferrer coords., Porrúa, 2nd ed., 2004).

[31] Among them, see María del Carmen Carmona Lara, International Conference on Environmental Law, Puerto Vallarta, Jalisco, Mexico, October 2008.

tutional Article 27 outlines national assets' ownership. Therefore, its defense corresponds to the nation at all times. The article states: "Ownership of the lands and waters within the boundaries of national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property." It even highlights that

> The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible to appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth, as well as safeguarding its conservation, sustaining the country's development and improvement in the standards of living in rural and urban areas.[32]

According to these authors, most judges have not given the proper interpretation of this article when referring to national assets, their ownership and safekeeping, and do not usually take into consideration that they form part of the nation's assets.

Two alternatives emerge from this discussion. The first one centers on the need to break through the courts' interpretation of this concept to fortify the criteria and the thesis presented above. This would make it possible to solve collective conflicts on a social basis. The second possibility is to continue with legislative reform that clarifies the interpretation of what the environment is and its components according to its collective nature. This explicit reference would allow the effective enforcement of such a law.

Because of the complexity of the first alternative and the time required to implement it, the second alternative becomes more attractive. In this sense, we agree with all the authors, professors, environmental activists and judges who believe in the importance of defining and establishing collective rights based primarily on the constitution, like our new model has established.[33] This would allow the subsequent creation of a complete procedural network, which would detail its exercise, defense and broad regulation, and include an adequate means for repairing environmental damage. It is paramount to establish actions, institutions and procedures that are compatible with the collective spirit and its related public policies.

Having said that, it should be mentioned that a bill was introduced in the Senate in February 2008. This proposal aims at modifying Article 17 of the Constitution by adding a fifth paragraph which would state: "The law shall regulate those actions and procedures for the protection of collec-

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[32] Author's translation.

[33] Understood as collective diffuse rights, collective in strict sense of the word and the individual as having collective incidence.

tive rights and interests, in the same way it regulates mechanisms that grant individuals the right to request legal defense."[34]

From the experience of Colombia and other Latin American countries, we can say that this constitutional reform would allow legislators from federal and state jurisdictions to implement the procedural and operational networks through easy, flexible and simple procedures that would in turn effectively protect collective rights and interests, not only for environmental issues, but also for those in need of this kind of regulation.[35]

This proposal requires further analysis to determine its viability.[36] In any case, we strongly see the need to gradually incorporate the principle of protection of collective rights in the constitution as the first step toward achieving its effectiveness.

2. *The Procedural Network*

Once the constitutional foundations have been laid, it is necessary to create secondary regulations, like a procedural network, to promote the mechanisms or procedures that will establish the legal basis, which will in turn make collective rights functional. The second part of our model deals with this issue.

Various speeches, seminars and academic studies have pointed at the insufficiency of procedural instruments to effectively protect environmental rights. Existing mechanisms, such as popular denouncement in an administrative field, civil trial and protection, reforms to the criminal code, or the so-called *amparo* trial, have apparently not been enough to effectively protect environmental interests and collective rights.[37] In view of this, scholars, ecologists and even judges call for new legislative answers and alternatives.

Many good ideas and proposals have been put forth at different academic meetings and forums, many of which have unfortunately been left aside as isolated suggestions. Even then, some ecologists, scholars, experts and judges

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[34] Author's translation. The bill —presented by Senator Jesús Murillo Karam— gathers the opinions and proposals of a group of scholars, judges and non governmental organizations discussed in a forum held in 2007, available at *http://www.senado.gob.mx/gace.php?sesion=2008/02/07/1&documento=21*.

[35] The reform touches upon the environment, ecological equilibrium, development, use of public spaces, use and protection of public property, access to public services, rights of consumers, moral values in the administration and in general all collective rights stated in laws and international treaties.

[36] Without a doubt, this is necessary, but at this time it is beyond the scope of this article.

[37] Obtaining an updated vision was the result of holding several forums arranged by Judges Rubén Minutti Zanatta and Neofito López Ramos, like Professor Rafael Coello Zetina's at the 1st Encounter of Environmental Jurisdiction/Law in Puerto Vallarta in October 2008.

have shared the common goal of reaching a consensus on some of those proposals. Nevertheless, the importance of the issue and its urgency demand a greater effort to create a better and more complete initiative.

By the last quarter of 2009, we can see two main groups of proposals: those that defend the need to re-engineer procedural instruments, and those that advocate the need to create a completely new system of environmental laws. It seems that both sets of proposals can and should be compatible. Re-engineering the existing procedural instruments could lead us to the creation of a new legal framework that would allow adequate, agile and effective access to environmental protection. On the other hand, those who defend the idea of environmental jurisdiction have presented a proposal for establishing an environmental court, which also seems to be a very good idea. However, it must be studied further to justify and identify the alternatives that may be found in existing procedural structures to address some of the main issues. Therefore, a specific environmental procedure enhances the idea of re-engineering the process so that both proposals are compatible.

An analysis of environmental procedural networks inevitably brings up the discussion on the standing to enforce collective rights precisely because of their complexity.

On this issue, Gidi[38] says that courts should abandon the orthodox and individual principles of the civil process since a process like this involves personal interests. Who then has collective standing? To answer this question, we can consider the experiences of other countries when designing the best mechanisms for Mexico. It has been said that Mexico has fallen behind in the regulation and legislation of collective rights. This is an undeniable truth, but it also has some advantages if seen from a comparative perspective.

According to Brazilian legislation, bodies with the proper standing can initiate collective lawsuits that represent the interests of a certain group. The Office of the Public Prosecutor, the Federal Republic of Brazil, states, city councils and municipalities, governmental organizations and private associations are some of the accepted bodies. However, standing is restricted to individual citizens, even when the concern is collective.

There are several proposals for determining who can file a lawsuit to defend collective rights, ranging from the standing of any member of an affected group and the standing of associations or private groups, according to the Brazilian Law (the legitimacy and recognition of government bodies named above). Each of these solutions has its strengths and weaknesses.

For instance, in the case of determining the standing of representing public bodies, there is a risk of being partial or manipulated by politics. The issue of standing can be turned into a monopoly or tyranny if there are no additional control mechanisms. On the other hand, if standing is granted to

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38 Gidi, *supra* note 27.

any member of the community, some checks and balances must be implemented to avoid political misuse, such as harming other individuals or governments. Even when standing is granted to private associations, they must present a series of proposals to be properly represented.[39] On this issue, Gidi states that according to Brazilian legislation, associations "are considered the natural representatives of group rights, not because these rights are expressed in their bylaws, but because of the responsibility that exists between the trans-individual nature of the law required in the court and the need for a trans-individual representative."[40] Nevertheless, he also admits that there is a hidden element to this rule because "not all associations represent social interests. Second, the legal requirements to establish an association are minimal… Third, the law does not require that the association receive prior authorization from a general assembly of its members to promote a collective lawsuit."[41]

Moreover, environmental affairs hardly ever involve all the people affected. By definition, any association —or group of associations— will always be partial. In addition to this shortcoming, we should also consider how the use of certain procedural instruments can obstruct lawsuits filed by future claimants. These are key issues that should be reviewed from different points of view to find the best alternatives for Mexico.

Gidi-Ferrer discuss three theories. The first is defended by Barbosa Moreira, who states that the legal guardianship of individual rights must be completely separate from the authorization expressed in procedural law. Thus, he agrees with "extraordinary standing" from what is established by law. The second theory is held by Kazuo Watanabe and is based on the flexible Brazilian law: *an ordinary standing from the bodies created in society for the purpose of protecting supra-individual rights.*[42] A third theory is endorsed by Nelson Nery Jr., who states the need for *autonomous standing to drive the process.* In the concept of "autonomous standing," procedural standing must be set apart from the main body of the given law. On this issue, Gidi, quoting Rodolfo de Camargo Mancuso, says "the criteria the law uses to grant standing to file collective lawsuits is not based on the ownership of the material law invoked, but on the possibility the collective author has to become the indicated person to become the spokesperson of the community's interests."[43]

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[39] *Id*. Gidi states that associations must have a well defined action program. This means that association must be essentially related to the topics established in its statutes. For example, an environmental association only should have the standing to file collective lawsuits on environmental issues. This could be a check, but further analysis of this is needed.

[40] *Id.* at 82. (Author's translation.)

[41] *Id.* Author's translation.

[42] Gidi, *supra* note 27, at 111. (Author's translation.)

[43] *Id.* at 112. (Author's translation.)

This last topic has been the object of constant analysis because with environmental issues —as with collective diffuse goods, public goods and social values— it is practically impossible to find out who has legitimacy to file a collective lawsuit to promote acts that could implement the removal of material rights.

Even though the mechanisms for the protection of collective rights still do not exist in Mexico, the Supreme Court has issued some statements on the subject, like the thesis that states: AN INDIRECT *AMPARO* IS OF AN INADMISSIBLE NATURE WHEN THE LACK OF IT IS ADDUCED AS A RESULT OF A POPULAR COMPLAINT AS SET FORTH IN THE GENERAL ENVIRONMENTAL PROTECTION LAW (IN APPPLICATION OF JURISPRUDENCE P./J. 4/2001 OF THE SUPREME COURT OF JUSTICE OF THE NATION).[44] This opinion clearly states that the remedy of an indirect *amparo* does not proceed when there is a claim regarding the lack of plaintiff's standing since the procedure of popular complaint possesses all the characteristics of a real collective lawsuit. Therefore, the identity of the person promoting the lawsuit is irrelevant.

This criterion is a good starting point for the effective protection of collective rights of a diffuse nature in the procedural network, which needs to be developed and elaborated on. By now, the convenience of analyzing standing within the scope of the issue of repairing damage should be discussed so as not to overlook the fact that adequate appropriation rules for repairing environmental damage could limit excessive and improper uses of standing.

3. *Related Public Policies*

The third element of our model is related to public policies. These are the decisions, actions, plans, programs or administrative structures that should accompany the secondary regulations, as well as the procedural instruments to guarantee successful policy implementation. It is a fact that many initiatives come to a halt precisely due to the lack of effective administrative framework needed to enforce the legislation.

The universe of the relevant public policies on environmental issues is immense and would take up several books and manuals. Since a review of the possibilities falls outside the scope of this article, we will only mention a few cases and list some general ideas that help understand the importance related public policies have in the model.

The first case deals with the powers of a city government. These powers are set forth in Article 115 of the Mexican Constitution. Among the changes

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[44] It should be noted that the opinion is under registration number 170469, dated January 2008, which shows that this important topic has recently been discussed in the Mexican Supreme Court.

implemented in March 2000, the Congress gave more authority to city councils in two areas: water and waste disposal. Section III, part a), not only includes the responsibility of "potable water and the sewer system" as it did before, but in the latest version it now says "potable water, sewer systems, wastewater treatment and disposal." And, in part c), the term "cleaning" was added to read "the cleaning, collection, transfer, treatment and final disposal of waste."[45]

Perhaps legislators thought city councils would become stronger if given more legal power in these two areas, but it seems they did not consider the implications these actions would have. Legislators did not set a general policy for funding or a way to direct resources to back city council resolutions. Water treatment is extremely expensive and in most cases city councils lack the economic resources to pay for it. Therefore, only some city councils —those in larger cities and with trained personal to carry out such projects— are able to treat their wastewater. Most of the smaller cities in Mexico find it practically impossible to run these programs. The national water agency, CONAGUA, has enforced some operational norms, but they have not been successful because most of the burden has been placed on the poorest city councils. As a result, instead of promoting a supportive policy, CONAGUA has levied millions of pesos in tax obligations on city councils for not having implemented water treatment projects, which is absurd in my opinion.

Almost the same thing happens with waste handling and disposal. The financial support needed to carry out these actions is scarce, and for small city councils, it is almost impossible to address this problem. Thus, more and more garbage and solid waste end up in streets and in open spaces.

Facing the lack of support in public policies for both issues, the constitutional reform, which originally aimed at strengthening city councils, has not been very successful. What is worse, if a constitutional reform that allowed citizens to demand that city councils enforce the legal provisions for environmental protection were passed today, thousands of city councils all over the country would probably be under legal threat without the possibility of solving the problem because they lack the financial resources.[46] This example clearly shows how the good intentions behind the law cannot possibly materialize without having adequate public policies in place.

The second example deals with repairing environmental damage. People now realize that repairing environmental damage encompasses a series of complex underlying issues, not only because of the difficulty of quantifying and repairing the existing damage, but also because the damage is irreparable in some cases.

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45 Author's translation.

46 In this scenario, more than 2,000 municipalities all over Mexico would face conditions of severe poverty.

García[47] stated that environmental damage is autonomous and not the same as personal damage. Therefore, it is necessary to differentiate between acts that cause damage to the environment and those that cause damage to individuals. Repairing the existing environmental damage would benefit the entire society while repairing the damage done to individuals could be taken care of by compensating the affected citizens.

This comment makes it possible to identify the two-fold nature of repairing environmental damage: for the good of a group and for the good of individuals. To better understand this, imagine that a person is flushing waste from his paint manufacturing factory into a river. This directly affects the eight people who harvest vegetables and irrigate their farms with water from this particular river. These individuals (and possibly others who can be clearly identified) need to be in conditions to demand redress for the damage done directly to their farms. But if we consider that this waste also affects the flora and fauna in and around the river, as well as the surrounding area –and possibly for several years, this clearly shows that the action is causing collective damage that must also be repaired. Thus, the same act can have a two-fold effect.

In the case of remediation, Article 203 of the Mexican Law on Ecological Equilibrium and Protection of the Environment states: "Without prejudice to the criminal or administrative sanctions that may apply, whosoever contaminates or harms the environment or affects natural resources or the biodiversity shall be held responsible and shall be compelled to repair the damage caused according to that set forth in the corresponding civil law."[48] Mexican environmental legislation leaves the responsibility of regulating the environment in the hands of civil legislation as if it only were a matter between individuals and ignoring the collective nature of the environment. On this, González Márquez[49] says: "From the point of view of damage repair, the legal systems of many countries have ended up with civil, legal and administrative laws, but there are only a few countries that have specific provisions regarding assuming responsibility and repairing environmental damage."[50]

The collective dimension of the environment requires that remediation be directed at leaving things as they were before, and if this were not possible, then a fine would be imposed to compensate for the damage caused. In other words, action must be taken to benefit the environment, or resources will be appropriated or divided among the affected individuals.[51]

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47 Tania García López, *El principio de la reparación del daño ambiental en el derecho internacional público. Una aproximación a su recepción por parte del derecho mexicano*, *in* VII ANUARIO MEXICANO DE DERECHO INTERNACIONAL 482-512 (2007).

48 Author's translation.

49 García, *supra* note 47, at 503.

50 Author's translation.

51 The indirect implications can also be very serious. It would be unfair to appropriate

Nevertheless, in studying remediation mechanisms, we find these measures useless because there are no agile procedures or ways to quantify how much needs to be repaired. Specialists in the field are very few and their services are very expensive. Moreover, technical environmental remediation studies have not been promoted in Mexican universities.

In this sense, implementing an effective remediation procedure for environmental damage falls under the scope of public policies. But the issue does not end here. In determining the amount of damage to be repaired, another problem emerges: the destination of the collected fines. Article 175-Bis of the General Law on Ecological Equilibrium and Protection of the Environment and Article 130 from the General Wildlife Law establish a fund for programs, projects and activities linked to the conservation of the species, as well as for inspection and scrutiny of the regulations in place. However, this fund has not gone beyond being a good intention stranded in the network of legal instruments since Mexico lacks the administrative procedures that would allow the fund to be used accordingly. Unfortunately, the economic resources collected from fines go to current government expenditure, and are not channeled to repairing environmental damage. What is even more distressing is that the budget for environmental issues has not shown any significant growth in recent years.

This reality is forcing us to come up with an effective, redesigned system of bureaucratic framework to ensure that fines are effectively channeled to a fund for environmental actions. Even then, further analysis shows the benefits of creating a local fund in each state. This proposal is backed by the argument that state funds would be more effective if they are used to repair the environmental damage in the same place the damage was produced. Likewise, it can be argued that citizen participation and the opinion of universities over the destination of the funds should be encouraged to guarantee transparency and increase the success rate.[52] All these arguments also fall under the sphere of public policies.

These two examples are the foundations that unify policies so the model can work. People's participation in environmental issues seems to be an essential factor in the successful implementation of the law. Many public policies and actions could be designed with the active participation of the citizenry. Some policies would aim at creating environmental awareness among all levels of society; others would increase the quality of government perfor-

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or divide the redress of damages only among the individuals who went to court because it would be unfair to those who did not get the chance to go to trial. These people are generally the poor and the marginalized who do not have the resources to take part in these lawsuits. And then there are those who also suffer from the effects of environmental damage, as well as future generations.

[52] Serious and positive social participation systems, like the Environmental State Council in Michoacán, are good examples of the positive effects of having resources channeled for environmental remediation.

mance in environmental issues; and others would help in the complex work of estimating environmental damage and the mechanisms for repairing said damage in a practical, fast and effective way; some policies would introduce compensatory systems; others would instrument environmental services as preventive measures; others would strive to attain institutional collaboration, and so on. Numerous policies are needed to supplement the constitutional principles and the procedural network for them to be effective.

VI. Conclusions

This article has discussed the insufficiency and inefficacy of the Mexican legal system for the protection of collective environmental rights. It has also emphasized Mexico's need to follow international parameters to implement and strengthen its vision within the guidelines of this new model so that collective environmental rights can be protected effectively. Accomplishing this would be the starting point to pave the way for implementing public actions and policies that would ensure the proper protection and preservation of Mexico's natural resources.

A multidimensional focus that goes beyond a legal standpoint would allow us to have a broader and more in-depth view of what environmental protection is and what needs to be done to ensure public awareness. An effective model for environmental policies can become a useful tool to better understand the need of combining the different efforts, not only from the government or from a legal perspective, but also through administrative actions that involve open public participation. This is, precisely, the principle of public politics.

Environmental law in Mexico —conceived as a part of a larger policy— must be redesigned according to the elements of the model presented here, that is, fundamental principles at the constitutional level, a procedural network and a series of related public policies to respond to the wide range of environmental needs. Understanding this complex idea goes beyond any single effort made by legislators, ministers or judges, and implies the need to understand, produce and build collective collaboration systems in which the general population and universities have much to contribute. A great task to be carried out in the years to come.

Recibido el 19 de junio de 2009 y aceptado
para su publicación el 5 de marzo de 2010.

COMMENT

Mexican Law Review
New Series
Volume III
Number 1

AN OVERVIEW OF THE RULES GOVERNING THE PERFORMANCE OF PUBLIC MIDDLE SCHOOL TEACHERS IN MEXICO CITY*

Jorge Luis SILVA MÉNDEZ**

ABSTRACT. *Rules governing the performance of public middle school teachers in Mexico City are contained in a myriad of regulations, a fact which leads to certain difficulties in understanding them. This article analyzes them based on a detailed review of the relevant laws and interviews with the public officers who enforce these provisions. Teacher performance rules are divided into three groups depending on the type of activity regulated: performance in the classroom, discipline, and attendance/punctuality. The comment also provides a brief explanation of the remedies for sanctions imposed on teachers by the educational authorities, and explains the nature of the termination lawsuit before the Federal Court of Conciliation and Arbitration.*

KEY WORDS: *Middle school, Mexico City, teacher performance, termination, rules.*

RESUMEN. *Las reglas que regulan las funciones de los docentes que laboran en secundarias públicas en México se encuentran en diversas disposiciones, lo que hace complicado entenderlas. Con base en una revisión detallada de las leyes relevantes, así como de acuerdo con diversas entrevistas realizadas con funcionarios encargados de aplicar tales leyes, el presente artículo analiza dichas reglas, las cuales se dividen en los siguientes tres grupos, dependiendo del tipo de actividad regulada: desempeño en el salón de clase, disciplina, y asistencia/puntualidad. Asimismo, brinda una breve explicación sobre las acciones legales que pueden interponerse en contra de las sanciones aplicadas a los docentes, y explica el juicio de cese ante el Tribunal Federal de Conciliación y Arbitraje.*

PALABRAS CLAVE: *Secundarias, Distrito Federal, desempeño docente, cese, leyes.*

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* This essay is based on chapters II and III of my doctoral dissertation entitled *How Do Principals Deal with Underperforming Teachers? A Study of How Principals from Middle Schools in Mexico City Manage Underperforming Teachers*, submitted to the Stanford Law School for the completion of the Doctor of Science of Law (J.S.D.) Program.

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I. INTRODUCTION

Middle school teachers in Mexico work under a special —and difficult to understand— labor law regime. Not only are the corresponding provisions spread throughout different federal statutes and administrative regulations,[1] but some of their aspects do not appear to make sense as they were published at very different times (the first in 1946 and the most recent in 2008). Furthermore, the procedures for implementing the rules (especially disciplinary measures) are obscure and give no explanation as to who is responsible for enforcing them.

From a legal point of view, there are two main factors that can explain the complexity of the labor regime of public middle school teachers in Mexico City. First of all, Mexico City is the only jurisdiction that has not been decentralized. Therefore, the Federal Ministry of Education (SEP) is directly responsible for providing public education services in this district.[2] Second, although public middle school teachers in Mexico City are legally considered federal employees, details regarding their working conditions are actually contained in several regulations, many of which are administrative regulations issued by the SEP or dependent agencies. Due to these factors, understanding the legal framework that regulates the performance of teaching staff is complicated. The goal of this essay is to clarify this legal framework by presenting it in a way that is useful and easy for educational officers and researchers to understand.

This note focuses on studying the rules governing the performance of general middle school teachers in Mexico City. "Basic education" comprises three levels: preschool, elementary and middle school education.[3] There are four types of public middle schools: general middle schools, tech-

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[1] Although there is a state statute containing some provisions regarding the working conditions of public school teachers in Mexico City, these provisions do not appear to actually be taken into consideration or implemented by the corresponding educational authorities. Due to this, these provisions are excluded from the analysis presented in this essay. See *Ley de Educación del Distrito Federal* [L.E.D.F.] [General Education Act], *Gaceta Oficial del Distrito Federal*, 8 de junio de 2000 (Mex.).

[2] *See Ley General de Educación* [L.G.E.] [General Education Act], provisional section number 4, *Diario Oficial de la Federación* [D.O.] 13 de julio de 1993 (Mex.) [*hereinafter L.G.E.*].

[3] Section 37 of the L.G.E.

nical middle schools, middle schools for workers and distance education middle schools (*telesecundarias*). When the term *middle school(s)* is used during this manuscript, I am referring to *general middle school(s)*. Regardless of the type, middle school covers three years of education. On completing elementary school, students can be admitted to a general middle school if they are between 11 and 15 years of age. In the school year 2006-2007, and according to the *Administración Federal de Servicios Educativos en el Distrito Federal* (AFSEDF) [Federal Administration for Educational Services in Mexico City], general middle schools comprised the largest number of students in Mexico City, as well as the largest number of teachers: 262,527 students and 13,937 teachers.[4]

For the purpose of analyzing teacher performance rules, I divide them into three categories: classroom performance, teacher discipline and finally, attendance and punctuality. Using these conceptual subcategories will make it much easier to understand the legal framework and order the relevant provisions.

Besides reviewing the relevant legal provisions, this note is also based on interviews with the following educational authorities: four Mexico City middle school superintendants[5], two judges from the *Tribunal Federal de Conciliación y Arbitraje* (TFCA) [Federal Tribunal of Conciliation and Arbitration], lawyers working at the Dirección General de Asuntos Jurídicos (DGAJ) [General Office of Legal Affairs], as well as union representatives and private lawyers who represent teachers in termination cases. Most of these interviews were carried out between July and December 2008. All of these individuals participated voluntarily and were ensured of confidentiality. A database with information on the lawsuits presented before two TFCA courts between 1997 and 2008 has also been used as source material.

This note has two substantive sections: Section II describes the institutional framework of middle schools in Mexico City and Section III explains teacher performance rules. The conclusions (IV) are presented at the end.

II. The Organization of Middle Schools in Mexico City

1. *The Federal Administration for Education Services in the Mexico City District, the Sector Coordinating Office for Middle School Education, the Superintendants and School Districts*

The *Administración Federal de Servicios Educativos en el Distrito Federal* (AFSEDF) [Federal Administration for Education Services in Mexico City] is a

[4] AFSEDF, Prontuario Estadístico. Inicio de Cursos 2006-2007, 109 (2006).

[5] I use the term "superintendant" to refer to the "*director operativo*", who is the officer that heads the operative directorate. For a detailed explanation of the superintendant's role, see section II.2.

semi-independent ("*organismo descentralizado*") administrative agency governed by the SEP. The AFSEDF's main goal is to provide "basic" educational services in Mexico City.[6] Two AFSEDF branches manage educational services: the *Dirección General de Orientación y Servicios Educativos* (DGOSE) [General Office for Supervision and Educational Services] and the Dirección General de Servicios Educativos Iztapalapa (DGSEI) [General Office of Educational Services for Iztapalapa]. The DGOSE manages the basic educational services for all of Mexico City's boroughs, except that of Iztapalapa, where it is overseen by the DGSEI.

The DGOSE is divided into several branches. The office in charge of middle school operations is the *Coordinación Sectorial de Educación Secundaria* (CSES) [Sector Coordinating Office for Middle School Education], which is made up of seven Operative Directorates (OD), each headed by a superintendent.[7] In general, ODs perform several tasks related to the operation of middle schools in their corresponding territorial jurisdictions (*i.e.* Mexico City boroughs). The DGSEI consists of four regional units, each of which performs the same tasks as an OD. Every OD has a Legal Assistance Office (LSO) to assist principals on legal matters related to running the school, including legal counsel in underperformance cases. Every middle school in Mexico City belongs to a school district based on its location. Every school district is headed by a supervisor.[8]

2. *The Internal Organization of Middle Schools*

The internal middle school organization is mainly regulated by the Organization Manual for General Middle Schools and *Telesecundarias* in Mexico City[9] and the General Provisions and Guidelines for the Organization of the Operation of Basic, Initial, Special and Adult Education Services in Mexico City.[10] Based on these provisions, the organization of middle schools in Mexico City is shown in Figure 1.

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6 The AFSEDF structure is provided in the AFSEDF, *Manual General de Organización de la Administración Federal de Servicios Educativos del Distrito Federal* [M.G.O.A.F.] [General Federal Administration of Education Services in Mexico City Organization Manual], *Diario Oficial de la Federación* [D.O.], 23 de agosto de 2005 (Mex.) [*hereinafter M.G.O.*].

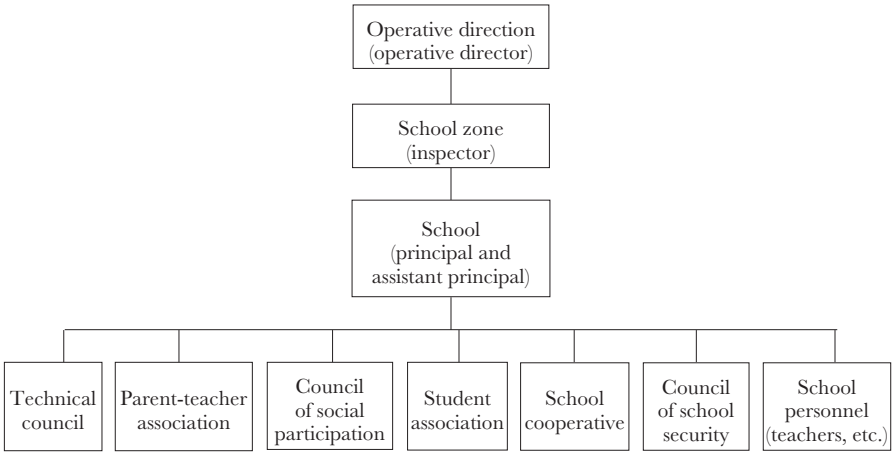
7 *See supra* note 5.

8 I use the term supervisor as a mere convenience to refer to the *inspector*. For a detailed explanation of the supervisor's role, see section II.2.

9 *Manual de Organización de la Escuela de Educación Secundaria y Telesecundaria en el Distrito Federal* [M.O.E.E.S.T.D.F.] [Manual for the Organization of the General Middle Schools and Telesecundarias in Mexico City] SEP, 2000 [*hereinafter M.O.*].

10 *Disposiciones y lineamientos generales para la organización y funcionamiento de los servicios de educación básica, inicial, especial y para adultos en el Distrito Federal, 2008-2009* [2008-2009 General Provisions and Guidelines for the Organization of the Operation of Basic, Initial, Special and Adult Education Services in Mexico City], AFSEDF, 2008 [*hereinafter L.G.*].

FIGURE 1. THE ORGANIZATION OF GENERAL MIDDLE SCHOOLS IN MEXICO CITY



The highest authority, the superintendant, is responsible for running the middle schools located in his/her territorial jurisdiction. The supervisor is the next in the chain of command, followed by the principal and the assistant principal. Other school organizations play an important part in running the school, especially the Technical Council (TC), the Parent Association (PA) and the Social Participation Council (CSP). These bodies are governed by the M.O. and the L.G. The TC is a collegial body formed by teachers, the assistant principal and the principal to advise the principal on certain issues, particularly those concerning underperforming teachers or undisciplined students. The PA is composed of parents who work with school personnel in performing school activities. The CSP, which comprises parents, teachers, union representatives, alumni and the principal, is responsible for carrying out activities that promote better school-community relations.

3. *The General Office of Legal Affairs of the Ministry of Education*

Two DGAJ directorates, the *Dirección de Calificación de Actas* (DCA) [Department of Evaluation of Administrative Hearings Records] and the *Dirección de Procesos Legales* (DPL) [Department of Labor Processes], play an important role in the termination lawsuits. When the act committed by the teacher can lead to a termination lawsuit, the principal can initiate the termination process by holding an administrative hearing at the school. A record of these proceedings is then filed with the DCA to be reviewed and to determine whether a termination lawsuit should be initiated against the

teacher. If the DCA decides against a lawsuit, the DCA issues a written opinion justifying its decision and submits the case to the DPL. The DPL has the authority to impose disciplinary measures against the teacher depending on the circumstances[11] Disciplinary measures can be any of the following: a written reprimand, a censure, a "negative disciplinary score,"[12] a salary discount, unpaid suspension or an order for the teacher's permanent removal from the school.[13] The DGAJ is not part of the AFSEDF, but reports directly to the SEP.

4. *The SEP Comptroller's Office*

As federal civil servants, general middle school teachers are subject to the rules contained in the Federal Act of the Administrative Responsibilities of Civil Servants (L.F.R.A.S.P.).[14] The SEP Comptroller's Office is responsible for enforcing these provisions, especially the obligations stated in Section 8 of the L.F.R.A.S.P.[15]

5. *The National Teachers Union*

The *Sindicato Nacional de los Trabajadores de la Educación (SNTE)* [National Teachers Union] is one of the most powerful organizations in Mexico.[16] The *Estatutos del Sindicato Nacional de Trabajadores de la Educación (ESNTE)* [National Teachers Union Bylaws], issued by the SNTE in 2004, governs SNTE operations. Section 11 of the ESNTE states that all those involved in education services in Mexico are SNTE members, regardless of the their position or status (whether a current employee, a retiree or a pensioner).

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11 Section 82 of the *Reglamento de las Condiciones Generales de Trabajo del Personal de la Secretaría de Educación Pública* [General Conditions for the Ministry of Education Personnel], D.O., 29 de enero de 1946 [*hereinafter R.C.G.T.*].

12 As it is explained below, a teacher receives a "Negative disciplinary score" when he/she breaks disciplinary rules. This is not necessarily related to her/his pedagogical performance as a teacher.

13 These measures are established in Section 71 and 55 of the R.C.G.T.

14 *Ley Federal de Responsabilidades Administrativas de los Servidores Públicos* [Federal Act of the Administrative Responsibilities of Civil Servants], D.O., 21 de agosto de 2006 [*hereinafter L.F.R.A.S.P.*].

15 The AFSEDF also has an Office of the Comptroller, the functions of which are established in the M.G.O. From a purely legal perspective, the OIC and the AFSEDF Comptroller's Office have similar responsibilities. In practice and according to the superintendants, the OIC seems to have taken on a more active role in enforcing L.F.R.A.S.P. regulations.

16 For a more detailed description of the SNTE's importance in the Mexican political arena, *See*: RICARDO RAPHAEL, LOS SOCIOS DE ELBA ESTHER (2007).

According to Section 14 of the ESNTE, members are obligated to support the SNTE by paying a membership fee of 1% of their monthly salary. This money is managed by the SNTE National Executive Council under the guidelines set forth in Sections 18, 22 and 24 of the ESNTE.

According to Section 29 of the ESNTE, all teachers assigned to a designated school form a work center and have the right to elect their union representatives every three years. Section 40 of the ESNTE states that a teacher must have been a SNTE member for at least one year before becoming an elected union representative. Section 42 stipulates that union representatives cannot be reelected for consecutive terms. Sector union representatives can also defend teachers in labor matters, but the two most important union positions are that of secretary general and secretary of labor affairs, as they assist teachers in labor conflicts, usually by interceding on their behalf.

Today, the SNTE is divided into 59 sections, which include all teachers nationwide. Sections 35, 36 and 37 of the ESNTE regulate union sector organization. In Mexico City, there are four sectors: 9, 10, 11 and 43. General middle school teachers are members of Section 10. Union representatives working at sections are named sector union representatives. Unlike school union representatives, sector union representatives only have to perform SNTE-related tasks and do not have any teaching duties. Any sector union representative has the power to assist teachers facing labor issues.

III. Rules Governing Teacher Performance in General Middle Schools in Mexico City

The most important set of provisions governing general middle school teacher performance is the *Reglamento de Condiciones Generales de Trabajo para el Personal de la Secretaría de Educación Pública (R.C.G.T.)* [General Conditions for Ministry of Education Personnel], enacted in January 1946. Other relevant regulations are the M.O., the Ministry of Education Agreement Number 98[17] and the L.G.

The R.C.G.T. states the rights and obligations of the personnel working for the SEP, as well as the sanctions for those who do not comply with these rules. According to Section 87 of the L.F.T.S.E.,[18] the R.C.G.T. should be modified by an agreement between the SNTE and the SEP every three

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[17] *Acuerdo secretarial número 98, que establece la organización y funcionamiento de las escuelas de educación secundaria* [Ministry of Education Agreement Number 98, which establishes the rules governing the organization and operation of general middle schools], D.O., 7 de diciembre de 1982 [*hereinafter Agreement 98*].

[18] *Ley Federal de los Trabajadores al Servicio del Estado* [Federal State Workers Act], D.O., 28 de diciembre de 1963 [*hereinafter L.F.T.S.E.*].

years; however, the R.C.G.T. has not undergone any changes since its creation in 1946. In 2000, the SEP issued the M.O. that describes the functions of the collegial bodies in middle schools, such as the TC and the PA. The M.O. also details the functions of the school personnel, such as supervisors, teaching supervisors, principals, assistant principals and teachers. To a certain extent, Agreement 98 and the M.O. cover the same issues, and in some cases, the provisions contained in both are either exactly the same or quite similar. The L.G., which contains the rules governing teachers' work and general middle school operations, is published by the AFSEDF every school year.

1. *Different Types of Appointments and Promotion Mechanisms*

A. *Types of Teacher Appointments*

The type of appointment for middle school teachers is important because it determines whether the teacher has access to the promotion system or to the teacher incentive program known as *Carrera Magisterial* (CM). According to Section 9.1 of the *Manual para la Administración de Recursos Humanos de la Secretaría de Educación Pública* (M.N.A.R.H.) [Ministry of Education's Human Resources Administration Manual], an appointment consists of assigning a position to an individual working for the SEP by issuing a document called an appointment certification, formalizing the labor relationship between the teacher and the SEP. Section 3.9 of the M.N.A.R.H. describes the different types of appointments a SEP worker can hold as summarized in the following table.

TABLE 1. APPOINTMENTS FOR TEACHERS WORKING IN GENERAL MIDDLE SCHOOLS

Type of appointment	*Appointment Level*	*Definition of the appointment*	*Legal provision*
Permanent	Initial, Level 09	Granted to an individual to fill a newly created position or a vacant definitive (Level 10) position.	Section 16 and 17 of the R.C.G.T.
Temporary	Interim, Level 20	Granted to an individual to temporarily fill a definitive (Level 10) position for a period no longer of 6 months.	Section 63 of the L.F.T.S.E and sections 17 and 18 of the R.C.G.T.
Permanent	Provisional with formal occupant, Level 95	Granted to an individual to temporarily fill a definitive (Level 10) position held by another teacher for more than 6 months.	Section 64 of the L.F.T.S.E, and sections 20 and 23 of the R.C.G.T.

TABLE 1. (continued...)

Type of appointment	*Appointment Level*	*Definition of the appointment*	*Legal provision*
Permanent	Provisional without formal occupant, Level 95	Granted to an individual to temporarily fill a definitive (Level 10) position that is not held by another teacher for more than 6 months.	Section 64 of the L.F.T.S.E, and sections 20 and 23 of the R.C.G.T.
Temporary	Provisional, Level 97 (renewal of the appointment is required)	Granted to renew the term of a previous temporary appointment (either Level 20 or 97).	No legal provision.
Permanent	Tenure, Level 10	Granted to an individual after 6 months of filling an initial position (Level 09).	Section 6 of the L.F.T.S.E and section 19 of the R.C. G.T.

While there are temporary and permanent appointments, for the purposes of this article I will refer to teachers with temporary appointments as temporary teachers, and to teachers with permanent appointments as tenured or permanent teachers. There are two main differences between these two categories. First of all, a temporary teacher must have the principal renew her/his appointment after a certain period of time. Hence, the principal has the choice not to renew it if she/he is not satisfied with the teacher's performance. In contrast, a tenured teacher can only be fired by means of a complex termination process that starts with an administrative hearing and ends with the TFCA's decision to terminate the teacher. The second difference is that a temporary teacher does not have access to the promotion system or the CM. Thus, a temporary teacher has a limited number of ways to improve her/his working conditions and salary.

B. *The Promotion System*

The SEP promotion system is governed by the Ministry of Education Personnel Promotion System Regulations,[19] Section 1 of the R.E.T.S.E.P. establishes the SEP's authority to grant its teachers promotions. Section 10 of the R.E.T.S.E.P. states that only teachers with a Level 10 appointment are eligible to be included in the promotion system, thus excluding teachers with any other type of appointment. The CNME is the agency in charge of the promotion system. Once a teacher submits her/his application to participate in the promotion system, the principal fills out an Annual Evaluation Report (AER) for the teacher at the end of each school year. The AER

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[19] *Reglamento de Escalafón de los Trabajadores al Servicio de la Secretaría de Educación Pública* [R.E.T.S.E.P.] [Ministry of Education Personnel Promotion System Regulations] Comisión Nacional Mixta de Escalafón, 1974 [*hereinafter R.E.T.S.E.P.*].

evaluates three aspects of each teacher's performance during a school year. The first factor is the teacher's ability, which is in turn divided into three parts: the teacher's initiative in her/his job (75 points); the teacher's willingness to do her/his duties (125 points), and finally, the teacher's efficiency (280 points). The second factor is teacher discipline (120 points), and finally, punctuality (120 points). Thus, the highest score a teacher can obtain on her/his AER is 720 points. A poor AER score only affects Level 10 teachers since they are the only ones who can participate in the promotion system.

For it to be legally valid, the AER must be signed by the principal, the school union representative and the academic supervisor. When a principal does not assign 720 AER points to a teacher, the principal must present evidence explaining the poor score. If no evidence is provided, the school union representative or teaching supervisor can refuse to sign the AER until the score is amended or the principal provides the corresponding evidence.

C. *Carrera Magisterial*

The CM is a promotion system in which individual teachers participate voluntarily to receive additional compensation if they meet the requirements. The rules governing the CM are the *Lineamientos de Carrera Magisterial* (L.C.M.), [Carrera Magisterial Guidelines], issued by the National SEP-SNTE Commission on March 6, 1998.

Only permanent teachers can be included in the CM. Section 4 of the L.C.M. states that the CM is divided into five economic compensation levels: A, B, C, D and E (with A as the lowest level). Each level represents a significant improvement in teacher salary and can be accumulated. For example, a middle school teacher with a 25-hour appointment receives 9 hours compensation at level A, 8.5 hours at level B, 8 hours at level C, 7 hours at level D, and another 7 hours at level E. Therefore, a level E teacher is paid an additional 64.5 hours for 25 hours of work.

Every year, the official CM promotions announcement is issued. Teachers who want to be admitted into the first level or promoted to the next level submit their applications for review. After being promoted to a particular level (including level A), she/he remains at that level for a given number of years, depending on whether the teacher works in a rural, urban or low-development area. The years of permanency for teachers in urban and rural areas are: 3 years in level A, 3 years in level B, 4 years in level C and 4 years in level D. Teachers working in low-development areas stay at each level for a period of 2 years.

Section 6 of the L.C.M. governs the CM evaluation process. Once a teacher submits her/his application, these criteria are used to determine whether the teacher is admitted into the CM (*i.e.* level A) or promoted to

the next level. A teacher can obtain a maximum score of 100 points, assigned as follows: 10 points for tenure, 15 points for the teacher's academic achievement, 28 points for professional preparation, 17 points for teacher training, 10 points for professional performance and 20 points for student achievement. Points for tenure are proportional to the number of years a teacher has worked in the SEP. Points for academic achievement depend on the teacher's highest level of education: 9 points for a bachelor's degree or a teacher's degree from a teachers' college, 12 points for a master's degree and 15 points for a doctorate. Points for professional preparation are given based on a SEP-administered exam and reviewed by the National SEP-SNTE Commission. The exam focuses on evaluating the academic content and abilities teachers need to perform their job. By taking the courses offered by local education authorities, teachers can be awarded teacher training points and student achievement points are obtained from students' scores on an exam administered on the dates stipulated by the National SEP-SNTE Commission.

The mechanism used to evaluate the Professional Performance Factor (PPF) deserves separate mention due to the principal's role in determining the points assigned to the teacher. The Evaluation Body (EB), a group consisting of the TC, the school union representative and the principal, is responsible for observing certain aspects of teacher performance to assess the PPF. Because the principal is the president of the EB, she/he holds the most influence in determining the points assigned to the teacher.

2. *Teacher Performance in the Classroom: Rules and Sanctions*

A. *Rules*

The rules governing teacher performance in the classroom are contained in the Agreement 98, the M.O. and the L.G. The obligations set forth in these regulations are often repeated, sometimes even verbatim. Teachers' responsibilities can be divided into five categories: lesson planning, teaching, student evaluation, participation in school academic activities, and performance in certain tasks assigned to them by the principal. The following paragraphs explain these responsibilities in further detail:

1) *Lesson planning*. The M.O. states that teachers should draw up an Annual Work Plan (AWP) and a Didactical Sequence (DS).[20] The AWP consists of the course content to be taught during the school year. The

[20] The AWP not only contains the topics that will be covered during the school year, but also the techniques that will be used to teach them. The DS is similar to a lesson plan for every one of the classes.

DS lists the material to be covered in each class, as well as activities and homework. Both the AWP and the DS must be submitted to the principal for review within the first months of the school year. According to Section 83 of the L.G., the teacher must give students a test in the first days of the school year to measure their level of prior knowledge on the subject.

2) *Teaching*. First, the teacher must follow a methodology that promotes student participation in the learning process and use teaching materials based on current Study Plans and Programs (SPP).[21] Both the methodology and teaching materials should be included in the DS.[22] According to Section 24 of the L.G., teachers can request teaching materials that have been previously approved by the parents and the principal. Under no circumstances may the students be asked for expensive or hard-to-get teaching materials Third, the teacher is required to tailor classroom activities to students' skills, interests and needs.[23] Fourth, the teacher should assign homework that corresponds to class content.[24]
3) *Student evaluation*. In this category, the teacher's primary obligation is to evaluate what the students have learned by following the rules provided in the Ministry of Education Agreement Number 200 (Agreement 200).[25] Further obligations include the teacher's obligation to prepare the instruments needed for student evaluation by giving ordinary exams every two months and extraordinary exams for students who did not obtain passing grades during the school year.[26] Set forth in Section 82 of the L.G. the teacher's next obligation to take PPS recommendations for student evaluation into consideration. This provision also states that the teacher must tell the parents or guardians the aspects to be covered in the exams at the beginning of the school year.[27] Section 85 of the L.G. states that the teacher is required to hold at least five parent-teacher meetings every school year to inform parents or guardians of the test results.[28] The teacher's third obligation to keep student evaluation and attendance records up-to-date and

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21 This responsibility is also mentioned by Section 23 (IV) of Agreement 98.

22 This is also stated in Section 23 (II) of Agreement 98.

23 This obligation is also stated in Section 23 (V) of Agreement 98.

24 *See also* Section 23 (VII) of Agreement 98.

25 *Acuerdo secretarial número 200, que establece las normas de evaluación del aprendizaje en educación primaria, secundaria y normal* [Ministry of Education Agreement Number 200, which establishes the rules for evaluating students in elementary and middle schools and teachers colleges], D.O., 19 de septiembre de 1994 [hereinafter *Agreement 200*].

26 *See also* Section 23 (V) of Agreement 98 and Section 81 of the L.G.

27 The M.O.and Section 23 (X) of Agreement 98 state that the teacher has the obligation to promote parent participation in students' education.

28 This responsibility is also found in Section 89 of the L.G.

that these records can be consulted by the principal or the assistant principal at any time.[29]

4) *Participation in school activities*. Section 14 (VII) of Agreement 98 states that the teacher must participate in the meetings organized by the principal or assistant principal during working hours. The M.O. also lists attendance to TC meetings as a teacher obligation.[30] Section 88 of the L.G. mentions the teacher's obligation of participating in the meetings held after every evaluation period (*i.e.* bimonthly) to analyze student scores and attendance records.
5) *Participation in school commissions*. According to Section 14 (VIII) and 23 (XVII) of Agreement 98, as well as the M.O., the teacher must participate in the school's education-related commissions. In practice, the principal assigns these commissions at the beginning of the school year based on the amount of work each commission requires.
6) *Prohibitions*. Other provisions forbid teachers from giving private lessons regardless of whether or not they charge students for these services.[31] According to Section 14 (XIII) of Agreement 98 and Section 29 of the L.G., teachers can only request materials or money (*i.e.* money for photocopying exams) from students when the parents and the principal have previously approved these items.

The following table summarizes rules regulating teacher performance in the classroom.

TABLE 2. RULES REGULATING TEACHER PERFORMANCE IN THE CLASSROOM

Type of duty	*Description of the duty according to the law*	*Legal provision*
Lesson planning	The teacher must design a plan of the material to be covered in each class through the AWP and the DS. These lesson plans are submitted to the principal at the beginning of the school year.	M.O. and Section 23 (I) of Agreement 98.
Lesson planning	The teacher must evaluate the students at the beginning of the school year to measure their knowledge.	Section 83 of the L.G.
Teaching	The teacher must follow the proper methodological approach when teaching the students.	M.O. and Section 23 (III) of Agreement 98.
Teaching	The teacher can only use teaching materials specified in the PPS. The parents and the principal must approve these materials beforehand.	M.O., Section 23 (IV) of Agreement 98 and Section 24 of the L.G.

[29] The same obligation is contained in Section 74 of the L.G. and Section 23 (XI) of Agreement 98.

[30] *See also* Section 23 (XVI) of Agreement 98.

[31] The M.O., Section 23 (IX) of Agreement 98 and Section 17 of the L.G.

TABLE 2. (continued...)

Type of duty	*Description of the duty according to the law*	*Legal provision*
Teaching	The teacher must adapt teaching activities to the students' circumstances, as well as the guidelines provided in the current PPS.	M.O. and Section 23 (V) of Agreement 98.
Teaching	The teacher must assign the students homework that related to the content taught.	M.O. and Section 23 (VII) of Agreement 98.
Evaluation	The teacher must evaluate students' learning process following the provisions contained in Agreement 200.	M.O., Section 23 (VI) of Agreement 98 and Sections 81 and 84 of the L.G.
Evaluation	The teacher must conduct periodical evaluation meetings with parents. In these meetings, the teacher must inform the parents of students' test results and explain the evaluation criteria.	M.O., Section 23 (X) of Agreement 98 and Sections 82 and 85 of the L.G.
Evaluation	The teacher must keep updated student evaluation and attendance records. These records can be consulted by the principal at any time. The teacher is obligated to grade homework and exams in a timely manner, and record the grades in an evaluation report.	M.O., Section 23 (XI) of Agreement 98 and Section 74 of the L.G.
Participation in school activities	The teacher must participate in all the school activities held at the school.	M.O., Sections 23 (XVI) and 14 (VII) of Agreement 98, and Sections 87 and 88 of the L.G.
Performance in school commissions	The teacher must participate in the school commissions assigned to him by the principal.	M.O., and Sections 14 (VIII) and 23 (XVII) of Agreement 98.

B. *Sanctions*

Several formal measures can be imposed on underperforming teachers, such as a poor AER score, a poor PPF score, non-renewal of an appointment (only when the teacher holds a temporary appointment), a censure or an underperformance note.

A teacher failing to perform her/his duties can receive a poor AER score, particularly in the skills section. A poor AER score only affects permanent teachers with a Level 10 appointment since they are the only ones who are part of the promotion system. A poor PPF score is another way of sanctioning underperforming teachers since it affects their general CM evaluation score.

The non-renewal of an appointment only applies to teachers with temporary appointments, which usually are made for a period of 6 months and are only renewed with the approval of the principal, the supervisor and the superintendant. The principal must back her/his motion for non-renewal by presenting evidence that the teacher is not fulfilling his/her duties. Proof is usually in the form of the school log with the supervisor's comments or

complaints filed by parents or students. When a principal does not renew an appointment, the supervisor and the superintendant need to verify the evidence. If the supervisor or the superintendant does not think the principal presented sufficient evidence, either official can request that the principal reconsider her/his decision or even renew the teacher's appointment. Union representatives (both at school and section levels) often invest considerable effort in trying to persuade the supervisor and the superintendant of the inadequacy of the evidence presented by the principal.

Section 25 (V) states that SEP teachers must "perform their duties with the required intensity and quality," but the concept of "required intensity and quality" is not defined.[32] Because there is no legal standard by which to measure teacher performance in the classroom, supervising officials do not have clear criterion for evaluating teacher performance, further complicating the use of the disciplinary measures provided in the law, such as a censure or a negative disciplinary score.[33] Likewise, TFCA judges do not have a clear rule to ground their decisions on teacher underperformance. This might be one of the reasons why the judges interviewed said they have not seen a termination lawsuit presented solely on the grounds of underperformance in the classroom.

The following table summarizes the measures that can be taken in cases of underperformance in the classroom.

TABLE 3. FORMAL MEASURES THAT CAN BE IMPLEMENTED IN CASES INVOLVING TEACHER UNDERPERFORMANCE IN THE CLASSROOM

Formal measure	*Consequences of the formal measure imposed*	*Teachers that can be affected by the measure*	*Legal provision*
Poor CEA score	This affects the teacher's opportunity of being promoted.	Only teachers holding appointments code 10.	R.E.T.S.E.P.
Poor PPF score	This affects the teacher's opportunity of being promoted in the CM program.	Only teachers holding appointments code 10 or code 95-without-holder.	LCM.
Non-renewal of an appointment	The teacher's appointment is not renewed.	Only teachers holding appointments code 20 or 97.	No legal provision.
Censure or negative disciplinary score	The document is placed in the teacher's personnel file as evidence of her/his underperformance in the classroom.	All teachers regardless the appointment code.	Sections 25 (V), 71, 73 and 77 of the R.C.G.T.

[32] Section 44 (I) of the L.F.T.S.E. contains the same principle.

[33] These sanctions are stated in Sections 71 and 77 of the R.C.G.T.

3. *Teacher Discipline: Rules and Sanctions*

A. *Rules*

Sections 25 and 26 of the R.C.G.T., as well as Section 46 (V) of the L.F.T.S.E. regulate teacher discipline. Sections 25 and 26 of the R.C.G.T. stipulate the obligations and prohibitions for SEP workers, including teachers, while Section 46 (V) of the L.F.T.S.E. outlines the grounds for terminating a civil servant for good cause.

Subsection VI of Section 25 of the R.C.G.T. notes teachers' obligation to obey the orders and instructions given by the school authorities (*i.e.* principal and assistant principal) for job-related matters. Subsection VII states that teachers must behave with discretion when doing their jobs. Subsection VIII refers to teachers' duty to treat the public courteously. According to Subsection IX, teachers must behave respectably in their public lives and their actions must not damage their reputations.[34] Subsection X indicates that teachers must not censure government actions or promote civil disobedience of any kind. Pursuant to Subsection XVI, teachers must inform the authorities of any irregularity observed in the educational services provided at the school.

Section 26 of the R.C.G.T. states the prohibitions for the teachers. In particular, Subsection II establishes that teachers cannot give any documents, data or information on school-related matters to any agency or individual without the corresponding authorization.[35]

Section 46 (V) of the L.F.T.S.E. lists the possible reasons for teacher termination: *(i)* when the teacher engages in acts of dishonesty, violence or disruptiveness against educational authorities, colleagues or any of their relatives at any time, whether during working hours or not; *(ii)* when the teacher intentionally destroys buildings, equipment or any other item used to do her/his job; *(iii)* when the teacher behaves immorally during working hours; *(iv)* when the teacher reveals secret or confidential job-related information; *(v)* when the teacher compromises the safety of the office or of her/his co-workers through imprudent, careless or negligent behavior;[36] *(vi)* when the teacher constantly and for no apparent reason disobeys orders from the educational authorities; *(vii)* when the teacher habitually attends work under the influence of alcohol or drugs; *(viii)* when there is strong evidence supporting teacher non-compliance with the general working condi-

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[34] Section 44 (II) of the L.F.T.S.E. states that teachers must behave respectably when working.

[35] A similar prohibition is referred to in Section 44 (IV) of the L.F.T.S.E.

[36] *See* also Section 44 (V) of the L.F.T.S.E.

tions provided in Sections 25 and 26 of the R.C.G.T., and *(ix)* if the teacher is sentenced to prison.[37]

B. *Sanctions*

The sanctions that can be imposed on a teacher who violates the rules contained in Sections 25 and 26 of the R.C.G.T. are listed in Section 71 as: an oral warning, written reprimand, written censure, underperformance note,[38] unpaid suspension and termination. This section gives a detailed description of two of these sanctions: the written censure and the underperformance note.

According to Section 77 of the R.C.G.T., a teacher receives a written censure when she/he disobeys the orders given by the educational authorities,[39] does not behave respectably on the job,[40] and violates any of the prohibitions stated in Section 26 of the R.C.G.T. According to the M.O. and Section 72 of the R.C.G.T., the principal has the authority to give a censure directly to the teacher in question. A copy of the censure is placed in the teacher's personnel file and another copy is submitted to the CNME, which is in charge of the promotion system. The text of the censure must elaborate on the circumstances (manner, time and place) under which the event occurred and must also express the legal principle the teacher has violated. The principal must deliver the censure to the teacher in the presence of two witnesses. The sanctioned teacher must sign and date all the copies of the censure in the presence of the principal. If the teacher refuses to sign, the principal reads the document to the teacher and, before the witnesses, certifies that the teacher refused to receive the sanction. When this occurs, the principal writes the date the delivery of the censure was attempted and the principal and witnesses sign all the copies of this document.

According to Section 73 of the R.C.G.T., an underperformance note due to misconduct is issued to teachers with three censures on their record. Once the principal sees that a teacher has received three censures, the principal requests that the superintendant give the teacher an underperformance note.[41] The principal must attach copies of the documents supporting the request, (*i.e.* a copy of each censure issued to the teacher). The superintendant evaluates the principal's request, and if adequately sup-

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37 When it is possible to appeal a court sentence, the teacher can only be temporary suspended from the job. *See* Section 45 (II) of the L.F.T.S.E.

38 The term in Spanish is *nota mala*.

39 *See* Section 25 (VI) of the R.C.G.T.

40 *See* Section 25 (IX) of the R.C.G.T.

41 *See* Section 74 of the R.C.G.T.

ported, the superintendant gives an underperformance note, which is then delivered to the teacher via the school principal. The superintendant must place a copy of the underperformance note in the teacher's personnel file,[42] and deliver a copy to the CNME.

Section 77 of the R.C.G.T. grants the principal discretional power to sanction teachers, with either a censure or an underperformance note if a teacher violates the codes set forth in Section 25 subsections of the R.C.G.T.[43] The DGAJ is also authorized to issue censures and underperformance notes for teacher misconduct. When the DCA decides not to present the record of a particular administrative hearing before the TFCA, the DCA submits the case documents to the DPL, which can then impose the corresponding sanction that may consist of a censure or a negative disciplinary score.

C. *The Administrative Hearing in Cases of Misconduct*

An administrative hearing can be held when a teacher violates the rules set forth in Section 46 of the L.F.T.S.E. In practice, principals facing these cases do not implement the administrative hearings immediately, but first inform the superintendant of the teacher's misconduct by filing a document known as a statement of facts. This document attests to the occurrence of one or several events at the school that directly involve the material, human or financial resources under the principal's control. The statement of facts must be written immediately after the principal receives knowledge of the event.

Once the principal has submitted the statement of facts to the superintendant, the officer issues a written response to the principal recommending the measures to be implemented. In addition to a censure or an underperformance note, another possible measure is an administrative hearing. When the superintendant recommends that the principal hold an administrative hearing, she/he also asks the principal to go to the LSO for legal advice as to how this proceeding should be carried out. The legal assistance provided by the LSO often consists of reviewing the template to be used at the hearing, as well as providing specific recommendations regarding witness participation. Since a principal does not have the school funds to pay for legal services, a principal who decides to hire private lawyers must pay them out of her/his own pocket.

Once the superintendant has recommended an administrative hearing, the principal must start the hearing proceedings as soon as possible. It is

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42 *See* Section 75 of the R.C.G.T.

43 *See* subsections V, VII, VIII, X and XVI of Section 25 of the R.C.G.T. These subsections have been presented above.

important to note that the statute of limitations for dismissal actions is four months from the date of the act of misconduct.[44] The procedure for an administrative hearing, the first step in the termination process, is found in the *Lineamientos que Regulan la Instrumentación de Actas Administrativas a Trabajadores de Base* (L.R.I.A.A.) [Guidelines for Implementing Administrative Hearings of Tenured Employees], issued by the AFSEDF in 2008. First, the principal must notify the teacher and her/his union representative[45] at least 24 hours before[46] the administrative hearing. Notification must be in writing and include the exact time, date and location of the hearing, which must take place at the school where the teacher works and during the teacher's work schedule. Only under exceptional circumstances can it take place elsewhere. The notification must specify the reasons for the administrative hearing and be signed by the principal. When delivering the notifications, the principal must request written acknowledgement of receipt from the teacher and the union representative.[47] All these steps are critical to the legal procedure for an administrative hearing. An error in drafting or delivering the notifications can render the entire procedure invalid, thus making it impossible to terminate the teacher.

The school principal chairs the administrative hearing.[48] If the principal is the party affected by the teacher's behavior (*i.e.* disobedience or aggression against the principal), the assistant principal or the supervisor performs the principal's role at the hearing. The principal is limited to allocating a speaking order for those taking part in the procedure and issuing a statement explaining the teacher's alleged behavior. The principal cannot speak with eyewitnesses or any other participant at the hearing; if the principal does, the DCA can rule the record of the administrative hearing invalid. At all times during the hearing, the principal is assisted by a secretary who records the entire procedure. The main purpose of an administrative hearing is to create an evidentiary record. It should be noted that the procedure for an administrative hearing does not consider the participation of an administrative law judge, an independent fact-finder or any other authority.

The principal begins the hearing by stating the time and place of the hearing as stated in the notification given to the teacher and the union representative. The personal information of the hearing participants (the teacher, the union representative and witnesses) is then recorded. The prin-

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44 The statute of limitation is specified in Section 113 (II) (C) of the L.F.T.S.E.

45 This person can be the school union representative or the sector union representative.

46 This provision is stipulated in Section 747 *Ley Federal del Trabajo* [L.F.T.] [Federal Labor Law], D.O., 1 de abril de 1970 [*hereinafter L.F.T.*].

47 According to Section 784 of the L.F.T.

48 In exceptional cases in which the school does not have a principal, the assistant principal is responsible for conducting the administrative hearing.

cipal goes on to make a statement regarding the acts that were allegedly committed by the teacher. According to DCA lawyers, eyewitnesses are not required to be present when the principal issues this statement. The principal is not obligated to refer to the legal provision violated by the teacher's behavior, and is in fact recommended not to do so.[49] The principal then assigns a speaking order for the eyewitnesses to give testimony. Each of the acts allegedly committed by the teacher must be backed by two or three eyewitnesses. It is possible to present only one eyewitness at an administrative hearing when, depending on the circumstances of the case, only one eyewitness knows of the event.[50] In general, eyewitnesses must mention the circumstances of the reported acts, such as time and place, in their testimonies.

When the eyewitnesses have finished giving testimony, the principal states the details of the teacher's appointment (level, school and shift assigned) and gives the teacher the opportunity to speak. After the teacher's statement, the principal assigns the speaking order for the teacher's witnesses, who are chosen by either the teacher or the union representative to testify in favor of the teacher. There is no limit on the number of witnesses the teacher or her/his union representative can present at an administrative hearing. After the participation of these witnesses, the principal gives the union representative the opportunity to speak and then closes the hearing.

Before the participants sign the record of the proceedings, the principal usually allows them to review their statements to ensure the record accurately reflects their oral participation. If the participants agree with the text contained in the record, the administrative hearing record is printed and signed by the participants and each page is stamped with the official school seal. One copy of the signed record is submitted to the DCA, another copy is sent to the CSES, a third copy is for the school principal, and a fourth copy is given to the teacher. The principal must attach any relevant documents that support the allegations of the teacher's misconduct to the administrative hearing record.

Although the principal is responsible for completing all the above-mentioned steps, the principal does not file the documents with the DCA and the CSES, but to the OD. After a brief review of the record, the LSO submits the record to the DCA and the CSES. The LSO focuses on confirming that the administrative hearing record fulfills certain basic legal requirements, for example, that the notifications were given to the teacher and the union representative. If the administrative hearing record does not comply with a legal requirement, but the error can be corrected without affecting the validity of the entire procedure, the superintendant returns the record

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[49] If the principal makes reference to the wrong legal provision, the DCA can declare the administrative hearing invalid.

[50] *See* Sections 813 (I) and 820 of the L.F.T.

to the principal for correction. If the legal deficiency constitutes a fatal error, for example, if the principal forgot to notify the teacher of the time and place where the administrative hearing would be held (regardless of the fact that the hearing was actually conducted and the teacher attended the procedure), the entire procedure becomes invalid. If the LSO rules that the administrative hearing record is invalid, another administrative hearing cannot be conducted again.

TABLE 4. STEPS FOR IMPLEMENTING AN ADMINISTRATIVE HEARING IN CASES INVOLVING UNDERPERFORMANCE THROUGH MISCONDUCT

Step	*Description*
Statement of facts	The statement of facts is a written document that describes the behavior allegedly committed by the teacher. The statement of facts is submitted to the superintendant.
Recommendation of the superintendant	After evaluating the statement of facts, the superintendant can recommend that the principal hold an administrative hearing.
Legal advice from the LSO	When the superintendant recommends an administrative hearing, she/he also asks the principal to attend a session with LSO lawyers to receive legal advice on how the hearing should be conducted.
Delivery of the notifications	The principal must deliver written notifications informing the teacher and her/his union representative of the date, time and place where the administrative hearing will be conducted at least 24 hours in advance.
Administrative hearing at the school	The principal chairs the administrative hearing. At the hearing, the principal assigns speaking order and makes a statement explaining the behavior allegedly committed by the teacher.
Additional evidence	The principal must attach to the hearing record any relevant evidence that might be useful to prove the behavior supposedly committed by the teacher.
Submission of the record of the administrative hearing	The principal files the hearing record, as well as any other relevant documents, with the superintendant.
LSO review of the record	The superintendant verifies that the administrative hearing record complies with the basic legal requirements. If the superintendant finds a mistake, she/he returns the record to the principal for correction.
Submission of the record to DCA	Once the superintendant has reviewed that the hearing record fulfils the minimum legal requirements, the record is submitted to the DCA and the CSES. The DCA determines whether the case is to be taken before the TFCA or is submitted to the DPL for further analysis.

According to the superintendants and DCA lawyers, principals take care to avoid certain common errors when conducting administrative hearings. First, the principal is recommended to warn eyewitness of the criminal responsibility that they could face if they give false testimony at the administrative hearing, which according to Section 247 of the Mexico City Criminal Code, is punishable by two years of prison. Second, the principal should contact the eyewitnesses days before the hearing to advise them how to give their statements; in particular, the principal should tell them that it is key to mention the circumstances (manner, time and place) of the events. If the testimonies given by eyewitnesses do not elaborate on these aspects, the testimonies might be useless due to their vagueness. Third, it is very hard to prove the teacher's behavior based on the testimony of a single eyewitness, for example, the offended party. If this situation arises, the principal should try to include other pieces of evidence in the administrative hearing record, such as expert witness testimony or public documents that effectively prove the behavior allegedly committed by the teacher. Fourth, the DCA and the TFCA consider hearsay testimonies invalid evidence. Therefore, only eyewitnesses should be chosen to participate in the administrative hearing. Fifth, the testimonies given by all the eyewitnesses must be consistent, that is, the testimonies must not contradict each other or refer to a completely different set of facts. If the testimonies are not consistent, the DCA will not take the administrative hearing record to the TFCA. Finally, the eyewitnesses cannot receive any assistance when issuing their testimonies from the principal or any other person. If the teacher or the union representative states on the record that the eyewitnesses were assisted in any way, the DCA will not take the hearing record to the TFCA.

To conclude this section, I present the following table, which summarizes the legal provisions that regulate teacher discipline, as well as the measures that can be imposed on teachers who break these rules.

TABLE 5. LEGAL PROVISIONS REGULATING TEACHERS' DISCIPLINE, AND MEASURES THAT CAN BE IMPLEMENTED IN CASES INVOLVING UNDERPERFORMANCE THROUGH MISCONDUCT

Description of the legal provision	*Legal provision*	*Formal measure that should be implemented by the principal*	*Legal provision*
The teacher must obey the orders given by educational authorities	Section 25 (VI) of the R.C.G.T.	Oral or written reprimand	Sections 78 and 71 (I) of the R.C.G.T.
The teacher must avoid continuous disobedience of the orders given by the educational authorities.	Section 46 (V) (G) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Sections 46bis and 82 of the L.F.T.S.E.

TABLE 5. (continued...)

Description of the legal provision	*Legal provision*	*Formal measure that should be implemented by the principal*	*Legal provision*
The teacher must behave with discretion when doing her/his job.	Section 25 (VII) of the R.C.G.T.	Censure or negative disciplinary score	Sections 77, 71 (I) and 71 (II) of the R.C.G.T.
The teacher must not display any immoral behavior on the job.	Section 45 (V) (D) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Sections 46bis and 82 of the L.F.T.S.E.
The teacher must treat the public with courtesy and diligence.	Section 25 (VIII) of the R.C.G.T.	Censure or negative disciplinary score	Sections 77, 71 (I) and 71 (II) of the R.C.G.T.
The teacher must display appropriate behavior in her/his public life, and avoid conduct that affects her/his reputation.	Section 25 (IX) of the RGCT and section 44 (II) of the L.F.T.S.E.	Oral or written reprimand	Section 78 and 71 (I) of the R.C.G.T.
The teacher must not attend work under the influence of alcohol or drugs.	Section 46 (V) (H) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Section 46bis and 82 of the L.F.T.S.E.
The teacher must not censure government actions or promote civil disobedience against educational authorities.	Section 25 (X) of the R.C.G.T.	Censure or negative disciplinary score	Sections 77, 71 (I) and 71 (II) of the R.C.G.T.
The teacher must inform the educational authorities of any irregularity observed in the services provided by the school.	Section 25 (XVI) of the R.C.G.T.	Censure or negative disciplinary score	Sections 77, 71 (I) and 71 (II) of the R.C.G.T.
Unless duly authorized, the teacher cannot provide any individual or entity information about documents, data or other job-related matters.	Section 26 (II) of the R.C.G.T. and section 44 (IV) of the L.F.T.S.E.	Oral or written reprimand	Section 78 and 71 (I) of the R.C.G.T.
The teacher cannot reveal any secret or confidential job-related information.	Section 46 (V) (E) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Section 46bis and 82 of the L.F.T.S.E.
The teacher must refrain from acting dishonestly or violently against the principal or her/his colleagues.	Section 46 (V) (A) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Section 46bis and 82 of the L.F.T.S.E.
The teacher must refrain from intentionally destroying buildings, equipment or any job-related material.	Section 46 (V) (C) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Section 46bis and 82 of the L.F.T.S.E.
The teacher must refrain from performing any negligent or careless action that compromises the safety of the school or co-workers.	Sections 46 (V) (F) and 44 (V) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Section 46bis and 82 of the L.F.T.S.E.
The teacher is sentenced to prison.	Sections 46 (V) (J) and 44 (V) of the L.F.T.S.E.	Administrative hearing to start the dismissal process	Section 46bis and 82 of the L.F.T.S.E.

D. *Temporary and Permanent Removal as Measures Implemented in Cases Involving Underperformance through Misconduct*

The TFCA is one of the bodies authorized to temporarily remove a tenured teacher from a school. For this, three requirements must be met: the teacher's behavior must violate Section 46 (V) of the L.F.T.S.E., the principal must have conducted the appropriate administrative hearing, and the DCA must have filed a record of the administrative hearing with the TFCA. If the TFCA grants the order, the teacher is transferred to a different school until the TFCA issues its final decision on the case.

A teacher can also be permanently removed from a school for misconduct by superintendants or the DPL. Based on Section 110 of the L.G., a superintendant can issue an order for a teacher's permanent removal from a school only because of necessities of the service. "Necessities of the service" means any aspect that may interfere with properly providing educational services at a school, for instance, a teacher who has had significant conflicts with several of her/his colleagues or a teacher whose behavior poses a threat to students' well-being. The superintendants interviewed say that orders for permanent removal are exceptional, and these orders are issued only when the principal has exhausted all the measures (formal and informal) at hand to solve the disciplinary issue, or when the teacher has committed an act of severe misconduct that requires her/his immediate transfer. An order for permanent removal can also be issued by the DPL in cases in which the DCA has elected not to take the case before the TFCA.

4. *Teacher Attendance and Punctuality: Rules and Sanctions*

A. *Rules*

Section 44 (VI) of the L.F.T.S.E. states that it is the teacher's obligation to attend work punctually.[51] Section 25 (II) of the R.C.G.T. says that the teacher must comply with the rules to verify the punctuality of school personnel. In particular, Section 117 of the L.G. indicates that to verify punctuality every member of the school personnel must clock in and clock out on a time card. Middle schools regularly use a time clock to record this information.

B. *Sanctions*

Section 116 of the L.G. indicates that tardiness is penalized under Section 80 of the R.C.G.T., which states that the following sanctions can be

[51] Section 14 (III) of the Agreement 98 also states that school personnel must be on time when performing their jobs and that they must not abandon their duties related at any time during their working hours.

imposed on the teacher: written reprimand, salary discount, unpaid suspension, underperformance note and termination.

The *Criterios para la Operación del Sistema de Administración de Recursos Humanos en la Secretaría de Educación Pública* [Ministry of Education Criteria for Personnel Administration System Operation], issued by the SEP in 2005, defines an unjustified absence as a teacher who does not present himself at work and does not have the necessary authorization to do so (*i.e.* a leave of absence). The rules determining the sanctions for tardiness and unjustified absences are: if the teacher is between ten and twenty minutes late on two occasions, the teacher receives a negative disciplinary score; if the teacher is between twenty and thirty minutes late, the teacher receives an underperformance note; if the teacher is more than thirty minutes late, the teacher is not allowed to clock in, which is considered an unjustified absence and is accompanied by a corresponding salary discount. A teacher who accumulates five underperformance notes due to tardiness is penalized with one day of unpaid suspension. If a teacher accumulates seven days of unpaid suspension due to tardiness in the course of a year, the SEP has the right to request the teacher's termination.

If a teacher accumulates several unjustified absences, the following rules apply: for two absences, the teacher receives a written reprimand and a salary discount of two days of work; for three absences, the teacher is sanctioned with one day of unpaid suspension and a salary discount of three days of work; for four absences, the teacher receives the corresponding salary discount of four days of work plus two days of unpaid suspension.

Section 80 (H) of the R.C.G.T. establishes that the sanctions that can be imposed on a teacher when she/he incurs non-continuous absences during a certain period of time are: for up to four absences within a period of two months, the teacher is sanctioned with a written reprimand and a salary discount of four work days; for up to six absences within a period of two months, the teacher receives three days of unpaid suspension and a salary discount of six days of work, and from 13 to 18 absences within a period of six months, the teacher is penalized with the corresponding salary discount for the number of absences, plus seven days of unpaid suspension.

Besides these measures, Section 46 (I) of the L.F.T.S.E. states that a teacher can be terminated for job abandonment. Section 60 of the R.C.G.T. defines job abandonment as when a teacher is absent for three consecutive days. Judicial interpretation provide that job abandonment requires that the teacher not attend work for unjustified reasons for four consecutive days.[52] Such interpretation contradict Section 60 of the R.C.G.T., which states that the teacher only has to be absent for three consecutive

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[52] SUPREMA CORTE DE JUSTICIA DE LA NACIÓN [S.C.J.N] [Supreme Court], APPENDIX OF 1995 OF THE JURISPRUDENCE BULLETIN OF THE FEDERATION AND ITS GAZETTE (Title V, part on the Supreme Court of the United States of Mexico, Thesis 559) at 368.

days to initiate an administrative hearing for job abandonment. To avoid any contradiction between Section 60 of the R.C.G.T. and judicial interpretations, superintendants recommend that principals conduct an administrative hearing for job abandonment after 30 minutes of the fifth day of unjustified absence.

The following table summarizes all the sanctions listed above.

TABLE 6. LEGAL PROVISIONS REGULATING PUNCTUALITY AND ATTENDANCE, AND FORMAL MEASURES USED IN CASES INVOLVING UNDERPERFORMANCE FOR LACK OF PUNCTUALITY OR UNJUSTIFIED ABSENCES

Description of the Behavior	*Formal Measure*	*Legal Provision*
Arriving between ten and twenty minutes late on two occasions	Negative disciplinary score	Section 80 (A) of the R.C.G.T.
Arriving between twenty and thirty minutes late	Negative disciplinary score	Section 80 (B) of the R.C.G.T.
Arriving more than thirty minutes after starting time	One day of unpaid suspension	Section 80 (C) of the R.C.G.T.
The accumulation of five negative disciplinary scores due to tardiness	One day of unpaid suspension	Section 80 (D) of the R.C.G.T.
The accumulation of seven unpaid suspensions due to tardiness in a period of one year	The SEP can request termination	Section 80 (E) of the R.C.G.T., Section 23.9 of the C.O.S.A.R.H. and Section 46 (V) (I) of the L.F.T.S.E.
Two consecutive unjustified absences	Two days of salary discount and a written reprimand	Section 80 (G) of the R.C.G.T.
Three consecutive unjustified absences	Three days of salary discount and one day of unpaid suspension	Section 80 (G) of the R.C.G.T.
Four consecutive unjustified absences	Four days salary discount and two days unpaid suspension	Section 80 (G) of the R.C.G.T., Section 23.6 of the C.O.S.A.R.H. and Section 46 (V) (B) of the L.F.T.S.E.
Five or more consecutive unjustified absences. In this case, it is considered job abandonment.	The SEP can request termination.	Section 60 of the R.C.G.T., Section 46 (I) of the L.F.T.S.E and jurisprudence criteria
Four non-consecutive unjustified absences in two months	Four days of salary discount and a written reprimand	Section 80 (H) of the R.C.G.T.
Six non-consecutive unjustified absences in two months	Six days of salary discount and three days unpaid suspension	Section 80 (H) of the R.C.G.T.
Between 13 and 18 non-consecutive unjustified absences in six months	The corresponding salary discount plus seven days unpaid suspension	Section 80 (H) of the R.C.G.T.

The procedure to implement the various sanctions is regulated by Section 80 of the R.C.G.T. When delivering a written reprimand to the

teacher, the principal must include a copy of the time card with the late marks or absence, a copy of the teacher's official schedule, and a copy of the absence report previously submitted to the OD. The written reprimand must be delivered to the teacher in the presence of two witnesses assigned by the principal and signed by the teacher. The principal must then file one copy of the written reprimand with the CSES Office of Personnel Administration (SAP), another with the CNME, and place another copy in the teacher's personnel file at the school.

The procedures for authorizing underperformance notes, unpaid suspensions and salary discounts are conducted by the OD. The processes for issuing an underperformance note and for imposing unpaid suspensions are very similar. First, the school principal writes the superintendant a petition requesting her/him to authorize an underperformance note or an unpaid suspension. The principal must include copies of the time card, the teacher's official schedule and the absence report in the petition. The superintendant then decides whether to authorize the sanction. If the superintendant authorizes the sanction, she/he issues a document certifying the poor performance note or unpaid suspension. The text of the document explains the behavior that resulted in the sanction, as well as the legal rule broken by misconduct. While in case of an underperformance note, the document is directly delivered to the teacher; the document pertaining to unpaid suspension is delivered to the principal, and the teacher only receives a copy. In both cases, the superintendant files a copy of the document certifying the sanction with the SAP and the CNME.

It is also the OD's responsibility to conduct the procedure for salary discounts. The OD must request a report of the teacher's absences and tardiness from the principal twice a month. In the report, the principal must attach the time cards proving the teacher's absence or tardiness. The OD must review the principal's report to verify that the documents supporting the absences or late tardiness are actually correct. If there are mistakes in the documents, the OD returns the report to the principal so that the error(s) may be corrected. Once the OD has verified that the report is correct, she/he then enters the attendance information into the SAP database so the SAP can deduct the corresponding discount from the teacher's next paycheck. Although the whole process might seem slightly cumbersome, if the principal submits the report to the OD on time, the salary discount is deducted the same month of the absence or tardiness.

The authorities issuing a written reprimand, an underperformance note or an unpaid suspension must always explain the reasons for the sanction and state the legal provision that authorizes them to apply the sanction. If the document certifying the sanction delivered to the teacher does not meet these legal requirements, the teacher can appeal the validity of the sanction on the grounds of due process violations. In practice, such appeals are very rare.

Finally, there is another mechanism to sanction teachers who are tardy or absent without a valid justification: non-renewal of the appointment. As noted before, the non-renewal is only applicable to temporary teachers. The principal must support her/his decision of non-renewal with any available evidence proving the teacher's misconduct. The most common evidence principals present in these cases are the teacher's time cards showing late marks or absences. The superintendant must ensure that the principal adequately justifies the teacher's non-renewal. If there is insufficient evidence for a non-renewal decision, the superintendant can request that the principal reconsider her/his decision or even order the principal to renew the teacher's appointment.

C. *The Administrative Hearing for Job Abandonment*

In cases of unjustified absences, a principal can hold an administrative hearing for job abandonment. As explained above, this occurs when the teacher is absent from the job for at least five consecutive days without legal justification. In contrast to the administrative hearings for misconduct, when a principal conducts an administrative hearing as described below, she/he does not need to submit a statement of facts to the superintendant.

In fact, jurisprudence criteria hold that an administrative hearing for job abandonment does not need to comply with the legal requirements established in Section 46 (b) of the L.S.F.T.S.E.[53] Therefore, the principal is not obligated to notify the teacher or her/his union representative of the hearing. In any case, the principal must be careful to substantiate that the administrative hearing record includes all the information and documents that prove job abandonment. The administrative hearing for job abandonment must be conducted at the school where the teacher works and during her/his working hours. At the hearing, the principal states that the teacher has been absent for at least five consecutive days without a valid excuse and then assigns a speaking order for the eyewitnesses, who certify that the teacher has been absent from her/his job for a number of days, and they know of no legally valid reason that justifies the teacher's absence. The principal also has to make a statement affirming that, to the best of her/his knowledge, she/he does not know of any legal reason that might justify the teacher's absences. Finally, the principal closes the hearing. The principal must present all the relevant documents that prove the teacher's unjustified absences, especially the time cards. After being signed by the participants, the hearing record is then sent to the OD.

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[53] SUPREMA CORTE DE JUSTICIA DE LA NACIÓN [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tesis P.LV/2005, título XXIII.

In an administrative hearing for job abandonment, the OD also submits the record to the DCA and the CSES after the LSO has checked that the hearing record complies with the basic legal requirements. In its review, the LSO focuses on verifying that the teacher has not requested any leave of absence that might justify her/his absences, and that the teacher has signed the time cards (otherwise the time cards would be legally invalid).[54]

5. *The Teacher as a Federal Civil Servant: Rules and Sanctions*

A. *Rules*

Teachers working for the AFSEDF are federal civil servants. As such, middle school teachers are subject to the L.F.R.A.S.P. Section 8 of the L.F.R.A.S.P. describes the obligations of federal civil servants. Relevant obligations listed include: performing duties adequately and treating the public respectfully (Subsection VI), as well as avoiding any acts of nepotism or corruption when performing the job (Subsections XII and XIII).

B. *Sanctions*

When any of the provisions contained in the L.F.R.A.S.P. is violated, in particular, those included in Section 8, the SEP Comptrollers' Office has the authority to impose one of the following administrative sanctions on the teacher: a public or private reprimand, unpaid suspension for a period ranging from three days to one year, termination or a fine.

Section 8 states that the sanction imposed on the teacher largely depends on the damage the teacher's behavior has caused and on whether the teacher obtained any significant economic benefit in breaking the law. Since the teacher's job does not involve handling valuable assets, it is likely that a teacher's violation is punished, at most, by unpaid suspension for a period no longer than one year.[55] The sanctions imposed by the SEP Comptrollers' Office can be challenged under the rules set forth in Section 25 of the L.F.R.A.S.P.

6. Remedies for Sanctions imposed on Teachers by Educational Authorities

Section 83 of the R.C.G.T. states that a teacher can request a motion for reconsideration when she/he is sanctioned with a written reprimand, a cen-

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[54] *See* section 20 of the L.R.I.A.A.

[55] According to Section 14 of the L.F.R.A.S.P.

sure, an underperformance note, an unpaid suspension or a salary discount. To present a motion for reconsideration, the teacher must submit a written petition to the officer who issued the sanction within 10 days of being notified of the sanction. The officer who decides on the motion for reconsideration is the person who issued the sanction. If the motion for reconsideration is denied, the teacher has the right to appeal to the TFCA. According to the interviews with superintendants, teachers rarely request a motion for reconsideration when they receive a sanction.

A motion of reconsideration does not apply to administrative hearings or hearing records. A motion for reconsideration involves an official's evaluation of the legal validity of the sanction. An administrative hearing is not a sanction, but an evidence-gathering procedure that will eventually support the allegations regarding the teacher's behavior. The TFCA is responsible for deciding whether the teacher should be sanctioned, taking into consideration the elements provided in the record of the administrative hearing. Since the TFCA, and not the educational authorities, is the only authority vested with the power to rule on the validity of any aspect of an administrative hearing, a motion of reconsideration against any issue related to an administrative hearing (including its record) is not applicable.

Nor does a motion of reconsideration apply to sanctions imposed by the DPL. As explained above, in cases in which the DCA decides not to take the case before the TFCA, the DCA submits the case file to the DPL. According to Section 82 of the R.C.G.T., the DPL has the authority to impose a sanction on the teacher. When this occurs, the teacher can request that the TFCA review the legal validity of the sanction issued by the DPL. The statute of limitation depends on the type of measure imposed: one year when the sanction is a censure or a negative disciplinary score,[56] and four months when the sanction is an unpaid suspension.[57] According to Section 129 of the L.F.T.S.E., to request the review of the sanction, the teacher needs to submit a written petition to the TFCA. The teacher must attach any relevant evidence that might be considered by the TFCA when issuing its final decision. In these lawsuits, the teacher has the right to be represented by a private attorney or a public defender.[58]

7. *Termination Lawsuits before the Federal Tribunal of Conciliation and Arbitration*

The TFCA is responsible for deciding termination lawsuits involving the SEP[59] and is comprised of four courts. Each of these courts is formed of

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56 *See* Section 112 of the L.F.T.S.E.

57 *See* Section 113 (II) (A) of the L.F.T.S.E.

58 *See* Sections 122, 134 and 135 of the L.F.T.S.E.

59 *See* Section 24 (I) of the L.F.T.S.E.

three judges: one appointed by the federal government, another by the Federation of State Employee Unions, and one jointly appointed by the two above-mentioned judges and who acts as the president of the court. Presidents of the courts are appointed for a six-year term while judges appointed by the federal government and by unions can be removed at any time by the entities that appointed them.

Section 127 (b) of the L.F.T.S.E. regulates the litigation procedure for lawsuits in which public agencies request the termination of an employee. This procedure has three basic stages: the agency's presentation of the termination petition, the teacher's or her/his lawyer's response to the petition, and a hearing where all the relevant evidence is presented. The agency begins the process by submitting a written petition, which includes the administrative hearing record and any other supporting evidence, requesting the teacher's termination to the TFCA. On receiving this document, the TFCA has three days to deliver a copy of the petition to the teacher. The teacher then has nine days to submit a written response to the agency's petition. This response must mention any evidence that might bear any weight in the TFCA's decision. Finally, the TFCA summons the parties to a hearing, giving the parties the opportunity to present their evidence, cross-examine witnesses and present a closing statement (either orally or in writing). The TFCA issues its final decision five days later.

The following table summarizes the information of all the disputes resolved by two of the TFCA courts from 1979 to 2007. This table only depicts the information of disputes with the SEP acting as either a defendant or a plaintiff. Note that the number of lawsuits where the SEP requests the termination of its employees only represents 8.23% of the total.

TABLE 7. LAWSUITS INVOLVING THE SEP* FROM 1979 TO 2007 (ONLY TFCA COURTS 1 AND 2)**

Type of Lawsuit	*# Lawsuits*	*% Lawsuits*
Termination cases (SEP is the plaintiff)	257	8.23%
Other lawsuits	2867	91.77%
Total	3124	100.00%

* Note that all SEP workers, and not only teachers, are included.

** SOURCE: Statistics Department, TFCA.

The next table provides information on the lawsuits in which the SEP requests the termination of its employees. This graph points out interesting facts: in most cases (63% of the total), the SEP does not obtain TFCA authorization to terminate the worker. It should also be noted that the average length of these cases is 3.43 years.

TABLE 8. LAWSUITS WHERE THE SEP* REQUESTED EMPLOYEE TERMINATION FROM 1979 TO 2007 (ONLY TFCA COURTS 1 AND 2)**

Decision	*# Lawsuits*	*% Lawsuits*	*Average Length of the lawsuit in years*
The Court authorized termination	94	37%	3.32
The Court did not authorize termination	163	63%	3.54
Total	257	100.00%	

* Note that all SEP workers, and not only teachers, are included.

** SOURCE: Statistics Department, TFCA.

It is interesting to explore lawyers' and judges' views on the SEP's losing record in these cases. Lawyers working at the DGAJ concur with judges in that the lack of due ratification of eyewitness testimony before the TFCA is the main cause of this. As a DGAJ lawyer writes: "It is often difficult to locate the eyewitness or persuade him to attend a hearing to ratify testimony that was rendered years ago." Another problem that arises from the delay is the fact that eyewitnesses cannot remember the exact facts mentioned in their original testimonies, which results in omissions or contradictions when restating their testimonies before the TFCA. Of course, the likelihood of eyewitnesses making errors when giving their statements again increases due to the presence of a lawyer who represents the teacher. As one defendant's lawyer said: "many eyewitnesses do not remember the exact details of the events, and therefore, it is easy for us to lead them to contradict themselves."

Another factor explaining the SEP's losing record is the lack of economic resources to hire more lawyers to handle termination lawsuits.[60] Since lawyers have an enormous workload, they cannot properly handle their lawsuits. In addition to this, lawyers currently working at the DGAJ have little financial incentive to do their jobs well with an average salary of $6,000 pesos a month. Moreover, most of these lawyers are hired on a temporary basis, which means they can be fired at any time without receiving any compensation. Given the unattractive working conditions, most DGAJ litigating lawyers are young people just out of law school and who see their work at the DGAJ as an opportunity to practice bureaucratic law for a couple of years before getting a better job.[61]

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60 This paragraph is based on two interviews conducted with Mr. Luis Vega Garcia, who headed the DGAJ for several years. These interviews were conducted on July 24, 2008, and on August 18, 2008.

61 The author presented a questionnaire on working conditions at the DGAJ to seven lawyers working at this office.

IV. Conclusions

1) Middle school teachers in Mexico City are subject to a special labor regime, which is complex and difficult to understand. Rules regulating teacher performance are spread throughout several federal statutes, administrative regulations and even jurisprudence criteria. These rules are sometimes redundant, an in several cases, obscure without the explanation as to who is responsible for enforcing them.
2) Although the rules that regulate teacher performance are the same regardless the type of appointment, working conditions can significantly vary depending on the teacher's appointment. On one hand, a permanent teacher has the right to participate in the promotion mechanisms, such as CM and the promotion system regulated by the R.E.T.S.E.P., provided by law, and she/he can only be terminated by means of a complex termination procedure that starts with the administrative hearing and ends with the TFCA's ruling. On the other hand, a temporary teacher cannot participate in the promotion mechanisms, and moreover, the principal has the discretionary authority to opt for her/his non-renewal, a relatively simple administrative procedure, if she/he is not satisfied with any aspect of the teacher's performance.
3) For a better understanding of the legal framework, teacher performance can be divided into three main categories: classroom performance, disciplinary performance, and attendance/punctuality.
4) A duty-based approach is used in the law to regulate teacher performance in the classroom.[62] This approach is focused on presenting a list of desirable attributes the teacher must to comply with to properly perform her/his job. These attributes refer to the teacher's obligation to plan lessons, teach, evaluate the students and participate in school activities. The problem with this approach is that the law does not provide with a clear legal standard to determine whether the teacher is performing her/his duties adequately. Although the law establishes that the teacher has to "perform [his] duties with the required intensity and quality," there is no regulation or jurisprudence that define the terms *intensity* and *quality*.
5) In practice, it is quite difficult to terminate a permanent teacher on the sole grounds of underperformance in the classroom. This type of termination does not occur mainly due to the lack of a legal standard for evaluating teacher performance. Temporary teachers with poor performance in the classroom can simply be expelled from the school by non-renewing their appointments.

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[62] Michael Scriven, *Duty-Based Teacher Evaluation*, Vol. 1 No. 4 Journal of Personnel Evaluation in Education 319-334 (1998).

6) The rules governing teacher disciplinary performance consist of a list of behaviors that the teacher must avoid. If the teacher incurs in any of these behaviors, the educational authorities have the right to impose a sanction on the teacher, including an administrative hearing for misconduct, the first step of the termination process. Although most of the administrative procedures for sanctions for misconduct are not quite complex, it is not the same for administrative hearings for misconduct, which is one of the most complicated administrative procedures regulated by the law. In practice, principals tend to make mistakes in performing this procedure.
7) The rules governing attendance and punctuality are clearly set forth in the law, as well as the sanctions to punish their violation. Due the nature of these behaviors and the evidence provided (generally time cards), the procedures to implement sanctions in these cases are easier compared to the other situations of underperformance.
8) According to the tables presented in section III.7, the SEP loses most of the cases in which it requests employee termination. The main reasons for this situation seem to be the lengthiness of the termination proceedings before the TFCA, particularly the hearing in which eyewitnesses have to corroborate their statements; and the lack of sufficient manpower to handle these cases properly.
9) Although this work focuses on presenting the rules that govern the performance of general middle school teachers in Mexico City, most of the provisions analyzed, except those included in the L.G. and the M.O., also apply to the teachers working at basic-level public education institutions.

Recibido el 29 de julio de 2009 y aceptado
para su publicación el 7 de octubre de 2009.

Mexican Law Review, nueva serie, vol. III, núm. 1, editada por el Instituto de Investigaciones Jurídicas de la UNAM, se terminó de imprimir el 28 de septiembre de 2010 en Cromocolor, S. A. de C. V., Miravalle 703, colonia Portales, Benito Juárez, 03570 México, D. F. Se utilizó tipo *Baskerville* en 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*).