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ARTICLES

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BANKING REGULATION IN MEXICO: LESSONS FROM FINANCIAL CRISES*

Karen B. Sigmond**

Abstract. *This article first provides a survey of recent Mexican banking history. It then analyzes the causes that led to the peso crisis (1995) and the banking crisis that came after as well as the government response, the bank bailout, and the role of international financial organizations. Regulatory reforms of the Mexican financial system are also discussed. These provide the background for comparative analysis with the financial crisis (2007-2009) that initiated in the United States of America. Both crises are compared and contrasted, both in terms of the causes leading to them and the regulatory responses by the governments. Finally, by studying the similarities and differences, lessons are drawn from both cases.*

Key Words: *Banking regulation, Financial crisis, Bank bailouts, Mexican peso crisis, U.S. financial crisis.*

Resumen. *El presente artículo versa sobre la historia reciente del sistema bancario mexicano. Se analizan las causas que originaron la crisis del peso (1995) y la subsecuente crisis bancaria. También se analizan las medidas tomadas por el gobierno ante el fallo del sistema bancario, así como el papel desempeñado por las organizaciones financieras internacionales. Lo anterior sirve como telón de fondo para realizar un análisis comparado con la crisis financiera de los Estados Unidos (2007-2009). Ambos episodios son comparados en términos de las causas que los originaron, así como las medidas regulatorias impuestas por los respectivos gobiernos. Finalmente, del análisis del contraste entre las semejanzas y diferencias de ambos casos, se infieren recomendaciones generales para aplicar en casos similares.*

Palabras clave: *regulación financiera, crisis financiera, rescate bancario, crisis del peso mexicano, crisis financiera estadunidense.*

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I. Introduction

Over the last decade, the impact of globalization on financial markets, specifically banking, has led to an increased need to understand financial systems throughout the world. This article seeks to examine the Mexican financial system, and specifically the banking sector. It first addresses the recent evolution of banking history in Mexico, covering recent significant events. In doing so, it follows the changes in economic policy, particularly in trade and investment, to analyze the effects of a more liberalized market in the banking sector. The second part of this article examines the Mexican Peso Crisis, the bank bailout, and the effects these events have had on regulation. In the third section, the global financial crisis of 2007-2009 is studied and compared with the Mexican experience of 1995. Finally, past and recent experiences are used to draw lessons from the different responses to financial crises.

II. The Evolution of Mexican Banking

In Mexico, the development and regulation of the banking sector have had several phases.[1] The recent history of Mexican banking, which will be ad-

[1] For an in depth analysis of the different phases in the development of Mexican banks, *see* Karen B. Sigmond, Mexican Banking Laws, Evolution into NAFTA and the Global Economy, VDM Verlag (2008).

dressed for purposes of this paper, begins with the expropriation of the banks in 1982. Several decades of expansion in banking from the 1940s-1960s, during the "Mexican Economic Miracle," had led to robust growth in this sector.[2] The total assets of private institutions in the banking system "grew by 3,259 percent from 1940 to 1960, from 845.8 million pesos to 28, 412.9 million pesos."[3] However, the decade that followed brought inflation and a slowdown in the economy. Inflation went from 3.91% in 1970 to 24.79% in 1976.[4] Other factors such as government overspending, a series of devaluations, and capital flight began to complicate the economic outlook at the end of the 1970s. In banking, a series of mergers took place,[5] and despite the worsening economic conditions, "the profits of the four principal banks increased in pesos, more than 1156% from 1977 to 1982."[6] By 1982, the government was facing an economic crisis and someone had to be blamed. As capital flight increased, the government turned its attention to the banks. On September 1, 1982, 58 out of the 60 banks in Mexico were nationalized by the Mexican government.[7]

The José Lopez-Portillo (1976-1982) administration "nationalized its banking system to stem the flight of wealth from Mexico and to provide Mexicans with greater access to capital. President Lopez-Portillo contended that Mexico's economic crisis had been exacerbated by the greed of private banks and the lack of central control over the nation's banking system."[8] With this action, decades of banking development and expertise came to a screeching halt.

The next administration, Miguel de la Madrid (1982-1988), "faced the sobering prospect of inheriting the leadership of a country beset with economic problems so serious that they threatened to disrupt social order."[9] "As early as his second day in office, he sent a bill to the Congress to open a new 'economic chapter' in the constitution […] But, only three months after the expropriation of private banks, this measure was seen as one following the

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[2] *See* Leopoldo Solís, Evolución financiera de México (Mexican Financial Evolution) 43 (1967).

[3] Sigmond, *supra* note 1, at 39.

[4] Instituto Nacional de Estadística, Geografía e Informática (INEGI, National Institute for Statistics, Geography and Informatics), http://www.inegi.gob.mx/inegi/ (last visited May 10, 2010).

[5] From 1975 to 1982, the number of banks dropped from 139 to 60. *See* Sigmond, *supra* note 1, at 43.

[6] Carlos M. Nalda, *Nafta, Foreign Investment, and the Mexican Banking System*, 26 Geo. Wash. J. Intl'l., L & Econ. 379, 385 (1992).

[7] Decreto que Establece la Nacionalización de la Banca Privada (Nationalization Decree), *Diario Oficial de la Federación* [D.O.], Sept. 1, 1982 (Mex.).

[8] Nalda, *supra* note 6, at 386.

[9] Michael C. Meyer & William L. Sherman, The Course of Mexican History, 684 (Oxford University Press, 1995).

same 'state-centered economic path.'"[10] In regards to the nationalization of the banks, his hands were tied because of political reasons. The PRI had approved this action and a quick reversal of the decree would have had high political costs.[11] Thus, the necessary constitutional reforms and legal reforms were moved forward for a nationalized banking system. Articles 25 through 28 of the Constitution of the Mexican Republic were amended to make banking and credit services an activity reserved exclusively to the State. Laws were passed to implement the decree. Austerity measures were implemented, and banks were merged.[12] And, towards the second half of this administration, trade and investment regulation shifted from a protectionist, closed economy towards an outward looking economy with Mexico's participation in the multilateral negotiations and its admission into the General Agreement on Tariffs and Trade (GATT).[13] This set the stage for the next administration and a major shift for the banking sector.

The Carlos Salinas de Gortari administration (1988-94) completely shifted economic and trade policy in Mexico. The liberalization movement was put on fast track. Despite Salinas' later arguments,[14] many of the policy recommendations, known as the *Washington Consensus*, were implemented in Mexico during this period.[15] Thus, with Mexico in GATT, Salinas looked to the possibility of a free trade agreement with its northern neighbors. During the negotiations of the North American Free Trade Agreement (NAFTA),[16] many state-owned companies were put on sale, including the banks.[17] However, Mexico was aware that it had to protect the recently privatized banking sec-

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[10] Francisco Valdés Ugalde, *The Changing Relationship between the State and the Economy in Mexico*, in Changing Structure of Mexico, Political, Social, and Economic Perspectives 58 (Laura Randal, ed., Armonk: M. E., Sharpe, 1996).

[11] *See* Carlos Elizondo Mayer-Serra, *La expropriación bancaria veinte años después*, *in* Cuando el Estado se hizo banquero. Consecuencias de la nacionalización bancaria en México, 133 (Gustavo A. del Ángel et al. coords., Fondo de Cultura Económica, 2005).

[12] *See* Sigmond, *supra* note 1, at 55.

[13] *See* Charles T. DuMars, *Liberalization of Foreign Investment Policies in Mexico: Legal Changes Encouraging New Direct Foreign Investment*, 21 N.M.L. Rev. 251, 255 (1990-1991).

[14] *See* Carlos Salinas de Gortari, La "década perdida" 1995-2006. Neoliberalismo y populismo en México (Debolsillo, 2010).

[15] John Williamson, *What Washington Means by Policy Reforms*, in Latin American Adjustment. How Much Has Happened? (John Williamson ed., Peterson Institute for International Economics, 2010), *available at http://www.iie.com/publications/papers/paper.cfm?ResearchID=486* (last visited Feb. 11, 2011). In this document, Williamson summarizes the 10 topics that "Washington" considered important, including: fiscal deficits (discipline); public expenditure priorities; tax reform; interest rates; exchange rate, trade policy; foreign direct investment; privatization; deregulation; and property rights. In response to the debt crisis of the 1980s, many Latin American countries, including Mexico, implemented reforms urged upon them by Washington in these key areas.

[16] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M 289.

[17] *See* Lynn V. Foster, A Brief History of Mexico (Book, 1997) (The biggest sales were the

tor. Consequently, Chapter 14 of NAFTA[18] and the Foreign Investment Law (FIL) of 1993[19] were restrictive of foreign investment in this sector. Nonetheless, Mexico sent clear signals to the international community that it was open for business and for investment. All indications pointed to an open economy that had gone beyond protectionism, to a market economy where the government's intervention would be reduced. Economic indicators looked promising and expectations were high. NAFTA was to be implemented on January 1, 1994, and assured a positive outlook for Mexico. Few expected what followed.

III. The Mexican Peso Crisis and Bank Bailout (1994-1995)

The Peso Crisis and bank bailout that followed had many contributing factors to consider. This part will highlight some important elements of both. It will also survey the rescue package that resulted from this situation and the conditions placed by international loans that played a key role to establish a more regulated banking system. The adjustments made then could have, in large part, contributed to a stronger banking system better able to handle future shocks.

1. *The Peso Crisis*

The Peso Crisis must be studied from different perspectives. First, Mexico had initiated a series of economic reforms that placed it on the trade liberalization path since the late 1980s. The negotiation of a major trade agreement with the United States and Canada indicated that Mexico was ready to open up its markets. Negotiations proceeded for two years with improving economic data in Mexico being published.[20] Ultimately, NAFTA was signed on December 17, 1992. "The government had to find new ways to entice the capital inflows required for economic recovery and sustained growth."[21]

To demonstrate the success in attracting capital one can observe investor trends based on investor confidence. "Between 1983 and 1989, Mexico expe-

banks and the only telephone company (Telmex). Approximately 400 state-owned companies were put on sale).

[18] According to NAFTA, the aggregate capital limit for commercial banks owned by foreign investors started at 8% in 1994 and the limit was to increase to 15% in 1999. *See* Section B of the Party's Schedule to Annex VII. *See also* discussion of restrictions in Sigmond, *supra* note 1, at 83.

[19] *Ley de Inversión Extranjera* [L.I.E.], [Foreign Investment Law], Diario Oficial de la Federación [D.O.], Dic. 27, 1993 (Mex.). To be discussed below.

[20] Sigmond, *supra* note 1, at 62 (inflation rate went from 110.6 percent in 1983 to 7.5 percent in 1994); *id.* at 80-1 (foreign investment grew and the exchange rate was under control).

[21] Nora Lustig, Mexico, The Remaking of an Economy 134 (The Brookings Institution, 1998).

rienced net capital outflows of $15 billion, reflecting the impact of the 1982 Debt Crisis, but this reversed to net inflows of $102 billion between 1990 and 1994, signaling the perceived effectiveness of its domestic and international actions."[22] Apparently, Mexico was on the right track and it became one of the leading places to invest. "In 1993, Mexico received $31 billion of capital inflows —accounting for 20 percent of net capital flows to all LDCs [least developed countries]."[23] Investment flows speedily directed themselves into Mexico, but, other factors quickly changed that direction.

The other factors were not necessarily economic. Social and political factors quickly impacted the economy. The most relevant events are the following:

1) January 1, 1994, Guerilla Uprising: On the day that NAFTA was to take effect, "a relatively unknown guerrilla movement calling itself the […] *Ejército Zapatista de Liberación Nacional, (EZLN)* […] seized control of three cities…in the southern state of Chiapas."[24] Political stability in Mexico was questioned by the international community.
2) March 23, 1994, the assassination of presidential candidate, Luis Donaldo Colosio, from the ruling party, PRI, during a campaign appearance in the border city of Tijuana, Baja California.[25]
3) September 28, 1994, the murder of the Senate majority leader, José Francisco Ruiz Massieu.[26]
4) The election year in which the opposition was gaining ground and social discontent was more present.

The impact of the above events was felt immediately. In 1994, "[…] Mexico's foreign currency reserves dropped from a high of $29.3 billion at the end of February to $25.9 billion at the end of March to $17.7 billion by the end of April."[27] The outflows of capital were rapid and Mexico sought the assistance of the United States. "On March 24, U.S. authorities agreed to make a short-term credit facility available to Mexico, and the peso was allowed to depreciate approximately 1 percent against the dollar, combining with a 7 percent devaluation that had taken place in the month preceding the assassination."[28] In April, the North American Financial Group was established. This group included the finance ministers and central banks of the United States, Canada and Mexico, and in a trilateral agreement it made available to Mexico

[22] Douglas W. Arner, *The Mexican Peso Crisis: Implications for the Regulation of Financial Markets*, 2 NAFTA L. & Bus. Am. Rev. 28, 34 (1996).

[23] *Id.*

[24] Burton Kirkwood, The History of Mexico 209 (Greenwood Publishing Group, 2000).

[25] Meyer, *supra* note 9, at 700.

[26] Kirkwood, *supra* note 24, at 210.

[27] Arner, *supra* note 22, at 34.

[28] *Id.*

a short-term credit facility of $6 billion from the U.S. and $1 billion from Canada.[29] Internally, the Bank of Mexico increased domestic interest rates from 10.1 percent on March 23 to 17.8 percent in April on short-term peso-denominated Mexican government notes (*cetes*) in order to reduce the outflow of capital.[30] "To compound the problem, an unexpected rise in U.S. interest rates took place over 1994: the average of the three-month T-bill rate went from 3.02 percent to 5.64 percent between January and December."[31]

By the end of 1994, with a new president, Ernesto Zedillo Ponce de León (1994-2000), and capital leaving rapidly, it was clear that Mexico was headed for a crisis. The initial actions, or inactions, by the new administration further complicated events. The president's consideration of military action against the EZLN movement caused further uncertainty and he was informed that because of the Chiapas situation, investors moved about one billion dollars out of Mexico in a single day.[32] The peso was devaluated on December 20th[33] which caused more reserve loss and finally the Mexican government was forced to freely float its currency on December 22nd.[34] Mexico was about to default on its dollar-indexed and dollar-denominated debt. The economy plummeted.

Mexico's response was to turn to the international community for assistance. Its new NAFTA partner, the United States, with the push of President William Clinton moved quickly to assemble a loan-guarantee package for Mexico. On January 12, 1995, Clinton proposed a $40 billion loan package as Mexico continued on its free fall.[35] However, he did not have support from Congress. Consequently, on January 31st, Clinton announced a $51 billion rescue plan for Mexico.[36] He was able to accomplish this under his executive authority and the plan consisted of the following: the U.S. Treasury line of credit was extended to $20 billion, by means of the U.S. Exchange Rate Stabilization Fund; a $10 billion increase in the IMF standby agreement was announced, for a total of $17.8 billion; the pledge made by the BIS was doubled to $10 billion; and $3 billion from commercial banks was confirmed.[37] The package raised controversy, particularly the $20 billion for the U.S. Exchange Rate Stabilization Fund and the $10 billion from the IMF. Debate ensued

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[29] *Id*.

[30] *Id*. at 35.

[31] Carlos M. Urzúa, *Five Decades of Relation between the World Bank and México*, in 2 The World Bank: Its First Half Century 100 (D. Kapar & Webb comps., Washington: Brookings Institution Press, 1997).

[32] *Id.* at 101.

[33] Arner, *supra* note 22, at 35.

[34] *Id.*

[35] Sidney Weintraub, Financial Decision Making in Mexico, To Bet a Nation 117 (University of Pittsburgh Press, 2000).

[36] Urzúa, *supra* note 31, at 102.

[37] *Id.* at 106.

because four-fifths of the Fund was committed and, according to the rules, it surpassed the IMF credit limit of $7.2 billion.[38] Despite the disagreement, the plan was endorsed.

International assistance came with a price. Mexico had to meet certain conditions, such as developing an economic plan. On March 9, 1995, Mexico released this new plan, with the goals to "restore financial stability, strengthen public finances and the banking sector, regain confidence, and reinforce the groundwork for long-term sustainable growth."[39] Some conditions are mentioned below.

Ultimately, the peso crisis and the need for international assistance did bring some lessons. "The main lessons of the recent Peso Crisis of 1994-1995 are that responsible financial and government leaders on both sides of the border failed to provide reasonable foresight, judgment, and supervision."[40] The Mexican government failed to foresee that the flow of incoming capital could easily change its direction, as it did, and "in the United States, little attention was paid to these risks, as Wall Street and other financial interests got involved in the speculative fever of a Mexican and 'emerging markets' investment boom."[41] Both the U.S. government and the Mexican government failed to supervise. "Top U.S. financial and trade officials largely left Mexico-U.S. trade investment flows to the marketplace, and to the Mexican government's policy-makers."[42] The consequences of such failure led to high unemployment, inflation, a sharp increase in non-performing loans and finally to the banking crisis and the bailout that followed.

2. *The Banking Crisis and Bailout*

In retrospect, in 1995, given the conditions of the peso crisis and the recent privatization of the banks, a perfect storm was brewing for a banking crisis. The exact causes leading to it are still subject of debate. However, some authors contend that the privatization of the banks produced disastrous results. "Some observers, particularly those who were directly involved in the 1991 sale of the banks, attribute the collapse of the banking system to a macroeconomic shock in 1994-1995, whose features included a balance of payment crisis, the collapse of the exchange rate, and the skyrocketing of interest rates."[43] Nevertheless, "a second, competing view, argues that the macro

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[38] *Id.* at 109.

[39] Arner, *supra* note 22, at 40.

[40] William A. Lovett, *Lessons from the Recent Peso Crisis in Mexico*, 4 Tul.J.Int'l&Comp.L. 143, 149 (1996).

[41] *Id.*

[42] *Id.*

[43] Stephen Haber & Shawn Kantor, *Getting Privatization Wrong: The Mexican Banking System 1991-2003*, in World Bank Documents, Nov. 10, 2003, *www.worldbank.org*.

shock of 1994-1995 only hastened the collapse of a banking system that was already in serious trouble. In this view the design of Mexico's bank privatization was fundamentally flawed."[44] Stephen Haber and Shaw Kantor concur with the second view and claim that "even had there been no peso crisis of 1994-1995, the Mexican banking system would have collapsed."[45]

According to Haber and Kantor, the collapse was forthcoming for several reasons. The banks were already amassing large portfolios of non-performing loans, whose collateral proved to be unrecoverable; banking institutions were undercapitalized as well as inefficient, and did not operate according to international standards.[46] They trace the flaws of the privatization process to three inter-related features of Mexico's political economy: The first factor, limitless discretion of the government, generated a high risk environment for bankers, because one president could expropriate at will and the next could then privatize the banks. The second component, the government's desire to maximize revenues, led to two governmental strategies that would later become a problem. One strategy was to signal to potential bidders that they would not have to operate in a highly competitive environment and the other was the structure of the auction rules themselves.[47] "Experience in banking was not a factor in deciding how to allocate banks to private investors."[48] Winners were decided only on the price offered by bidders. Additionally, Mexico's accounting rules were not in conformity with internationally accepted accounting standards, which made the market value of the banks higher. Lastly, the third factor, government's low capacity to enforce contract and property rights, also led to deficiencies. Investors in the banking sector had overpaid and wanted to recover their investments, but, as they "quickly found out, they neither had mechanisms to assess the credit worthiness of borrowers nor did they have the ability to enforce their contract rights once loans went bad […]."[49] An inefficient judicial system contributed to more risks for bankers. Default risk could not be assessed because there was no private credit reporting in Mexico. All of these factors created a high risk environment.

In addition to this, the banks themselves piled on more risks. Aggressive competition among banks, specifically in loans, also contributed to the problem. For example, the loans for housing and real-estate from December 1991 to December 1994 nearly tripled.[50] Non-performing loans increased as well. "In December 1991 the ratio of non-performing to total loans was 3.6 percent. By December 1992 the ratio had climbed to 4.7 percent, and by De-

[44] *Id.*

[45] *Id.* at 18.

[46] *Id.* at 2.

[47] *Id.*

[48] *Id.* at 7.

[49] *Id.* at 11.

[50] *Id.* at 13.

cember 1994 had reached 6.1 percent."[51] Aggravating this situation was the inability of bankers to repossess the collateral on past due loans due to the lack of enforcement of property rights. Finally, the exchange rate collapsed in December 1994, capital flight was rampant, and banks could no longer sustain the pressure. The banks failed.

The 1995 banking crisis was similar to other banking crises. Common characteristics were: "a massive expansion of credit in a short period of time, poor bank management, supervisory and regulatory loopholes, and a shock (both domestic and external)."[52] Sidaoui claims that it was precisely the weakness of the financial system and the loopholes within the regulatory and supervisory frameworks that exacerbated its aftermath. Additionally, he further states that "the unlimited deposit insurance scheme, which protected all banks' liabilities without any restriction, induced moral hazard and increased the cost of banking resolution."[53] Poor banking skills and conflicts of interests, specifically related to lending, were also contributing factors according to Sidaoui. He highlights the conclusions found by R. La Porta *et al.*,[54] on related lending and the crisis. Sidaoui claims that related lending increased the severity of the crisis. Like Haber and Kantor, Sidaoui claims that the judicial system was inefficient. "Many loans were written off because of the issues directly related to the inefficient judicial and regulatory procedures that involved the recovery of loans from bankrupted companies. The legal framework proved to favor debtors over creditors."[55]

The government's response to the banking crisis came through a series of actions, including the development of programs to restructure consumer and commercial payments, to provide new banking capital, and to reform laws to allow investment in the financial sector. "Preventive measures were also taken on the domestic financial markets to avoid contagion, by means of a rescue package in support of banks and borrowers alike, and prevent a widespread collapse of financial institutions."[56] One such program consisted of an injection of loans in U.S. dollars made by *Banco de México* [the Mexican central bank] to banks so they could fulfill their obligations and renew their loans.[57]

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[51] *Id.* at 14.

[52] José J. Sidaoui, *The Mexican Financial System: Reforms and Evolution 1995-2005*, 28 BIS Papers 277 (Aug. 7, 2006), *http://www.bis.org/publ/bppdf/bispap28s.pdf* (last visited May 15, 2011).

[53] *Id.* at 278.

[54] See R. La Porta, F. López-de-Silanes & G. Zamarrita, *Related Lending*, 118 Quarterly Journal of Economics, 231-36 (2003).

[55] *Id.*

[56] Guillermo Ortíz Martínez, *What Lessons Does the Mexican Crisis Hold for Recovery in Asia?*, 35 IMF Finance and Development 2 (1998), *http://www.imf.org/external/pubs/ft/fandd/1998/06/ortiz.htm* (last visited May 20, 2011).

[57] William Gruben & John H. Welch, *Distortions and Resolutions in Mexico's Financial System*, in Changing Structure of Mexico, Political, Social, and Economic Perspectives, 72 (Laura Randall ed., Sharpe, 1996).

This was to be done through the *Fondo Bancario de Protección al Ahorro* [Banking Fund for the Protection of Savings, FOBAPROA], which was created by the Salinas administration as a contingency fund to face extraordinary financial problems in times of economic crisis created by bank insolvency due to noncompliance of bank debtors and a massive withdrawal of funds.[58] The FOBAPROA received capital from a World Bank loan that will be discussed below. The use, or misuse, of this bailout fund was the cause of much debate within Mexico when the banks' debts were passed on to the taxpayers in 1998.

Other programs initiated in 1995 included the *Apoyo Inmediato a Deudores de la Banca* [Immediate Support Agreement to Bank Debtors, ADA] and the *Unidades de Inversiones* [Investment Units, UDIs]. The first program, the ADA, offered immediate interest rate relief for up to 18 months and allowed long-term debt restructuring.[59] The second program "was designed to assist mortgage holders and small business by establishing a repayment schedule based on inflation-indexing terms, thus reducing the cash flow burden on borrowers." [60]

Programs for raising capital were also initiated. One such program was the *Programa Emergente de Capitalización Temporal* or PROCAPTE [Emergent Program for Temporary Capitalization]. Under this program "troubled banks could raise capital by creating and selling subordinated debentures (bonds) to the nation's deposit insurance, FOBAPROA."[61] Additionally, many other programs were initiated to support debtors during this time.[62]

The above-mentioned programs were administered through the FOBAPROA, which was supposed to put the banking industry back on track. However, it is argued that "the opaque nature of the process left a large cloud of doubt, making it appear that assistance had been designed more to 'legalize' and cover up malfeasance than to actually put the banking system back on its feet."[63] The aid process "turned out to be more of a cover-up operation than a serious attempt to root out fraud. A large part of the non-performing loans which the government purchased were delinquent, often due to an intentional refusal by large industrial and financial groups to pay back loans

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[58] *See* Elvia Arcelia Quintana Adriano, Aspectos legales y económicos del rescate bancario en México 76 (UNAM, 2003). For a full discussion of the use, or misuse, of the FOBAPROA, see also Sigmond, *supra* note 1, at 74.

[59] John A. Adams, Mexican Banking and Investment in Transition 127 (Quorum Books, 1997).

[60] *Id.*

[61] *Id.*

[62] *See* Banxico, *Reformas al Sistema Financiero* [Financial System Reforms], http://www.banxico.org.mx/tipo/disposiciones/ReformaSisfin/ref_1995.html (last visited May 10, 2010).

[63] Irma E. Sandoval, *Financial Crisis and Bailout: Legal Challenges and International Lessons from Mexico, Korea, and the United States,* in Comparative Administrative Law (Susan Rose-Ackerman & Peter L. Lindseth, eds., Edward Elgar Publishing, 2010).

instead of a real inability to pay on the part of small- and medium-sized debtors."[64] In the end, the cost of the bailout was passed on to the taxpayers by executive actions that converted the FOBAPROA's liabilities into public debt. This was done despite constitutional restraints for acquiring debt and, therefore, many argue, illegal[65] and with a huge fiscal cost.[66]

3. *International Loans and Conditions for Reforms*

The role of the international loans in the reform of the Mexican financial system played a key part. The International Bank for Reconstruction and Development (World Bank) made several loans to Mexico with the objective of strengthening the financial system.[67] The first loan to support the restructuring of Mexico's financial sector was for the amount of US$1,000 million[68] and the objectives established in the loan proposal were designed to:

> (a) Restore the solvency and soundness of Mexico's banking system and improve confidence in the financial system;
>
> (b) Reform accounting standards and prudential regulations for banks, and strengthen supervision to prevent a future recurrence of systemic problems;
>
> (c) Improve management of the provision of liquidity on behalf of the *Banco de México* and development banks; and
>
> (d) Initiate reforms in the accounting practices and regulation of financial groups.[69]

The proposed loan would support actions to:

> […]
>
> (a) Determine the health of the banking system through an intensive inspection of commercial banks and a review of the situation of banks entering the temporary capitalization program (PROCAPTE);
>
> (b) Restructure banks that have experienced exceptional decapitalization;
>
> (c) Initiate reforms to accounting standards and prudential regulations for banks;

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[64] *Id*. at 556.

[65] *See* Quintana, *supra* note 58, at 76 (according to Article 73 of the Mexican Constitution, if the Federal Government had been acquiring debt during the bailout process, then Congress should have approved it, which was not the case).

[66] Sandoval, *supra* note 63 (originally, the cost of the bailout was supposed to be between 5 and 8 percent of the GDP in 1995, but ended up reaching 20 percent).

[67] The World Bank, Financial Sector Restructuring Adjustment Loan, www.worldbank.org (last visited May 10, 2010).

[68] *Id*.; *see also* Inter-American Development Bank, Report No. PIC2076 (Inter-American Development Bank is processing a parallel Sector Adjustment Loan amount of US$750 million under similar terms).

[69] *Id.*

(d) Strengthen bank supervision;

(e) Improve the regulatory framework to facilitate corporate work-outs and debt restructuring; […].[70]

Several World Bank documents associated with this loan include further conditions for the Mexican government[71] that would have a long term impact.

In the context of the IMF, "the set of conditions that apply to loans is what is commonly referred to as «IMF conditionality»"[72] and are basically policy prescriptions. "The policy prescriptions contained in IMF-supported programs essentially serve to provide the safeguards that the country will be able to rectify its macroeconomic and structural imbalances, and will be in a position to service and repay the loan."[73] Much has been written on whether these conditions are impositions and whether they in fact work.[74] In the case of Mexico, a strong argument can be made that policy recommendations did work for the financial system, given the performance of the banks during the most recent crisis.

However, not all scholars view international organizations, their loans and policy recommendations as seeking to prevent financial failures. One such scholar, Robert J. Barro, raised controversy in his viewpoint piece titled "The IMF Doesn't Put out Fires, it Starts Them."[75] In his note he states that with the help of the United States, the IMF encourages bad economic policy by rewarding failure with showers of money.[76] In particular, in the "Mexican Mess" as he calls it, "the IMF-U.S. lending package was effectively a reward for corrupt and risky bank lending and poor macroeconomic policies."[77] He further states that the bailout that followed kept foreign lenders whole and became a liability for Mexican taxpayers. Furthermore, "the real shame of the Mexican bailout is that it was judged by many observers to be a success, mainly because the U.S. Treasury got repaid."[78]

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[70] *Id.*

[71] *Id.*; *see also* Guarantee Agreement L3911, Financial Sector Restructuring Loan (June 23, 1995); Loan Agreement L3911 Financial Sector Restructuring Loan (June 23, 1995); Mexico Financial Sector Restructuring Adjustment (Sept. 5, 1997).

[72] Moshin S. Khan & Sunil Sharm, IMF Conditionality and Country Ownership Programs (IMF, Sept. 24, 2001).

[73] *Id.*

[74] *See* Williamson, *supra* note 15 (In Williamson's paper on the Washington Consensus, he refers to "Washington" as including international financial institutions [*i.e.* the IMF and the World Bank] and their suggested policy reforms. Thus, the conditions placed also follow the same theme).

[75] Robert J. Barro, *The IMF Does not Put out Fires, it Starts Them*, Business Week, Dec. 7, 1998, at 18, *available at* http://www.economics.harvard.edu/faculty/barro/files/bw98_12_07.pdf (last visited June 29, 2011)

[76] *Id.*

[77] *Id.*

[78] *Id.*

Despite conflicting opinions, the peso crisis, the bank bailout and the conditions imposed by international loans prompted a series of regulatory changes that sought to consolidate the Mexican financial system and prevent future meltdowns.

4. *Reforms in Mexican Financial Laws*[79]

The first set of reforms was published on February 15, 1995. As a whole, these were intended to strengthen the structure of financial institutions and their organization, as well as to improve their performance. The immediate intent was to stabilize the national economy and create policies that would lead to future growth.

In order to carry out the above objectives, capital for financial institutions was needed. The government, therefore, initiated a set of reforms that would strengthen and modify the share structure of financial institutions in order to allow access to national and international investment. The modifications discussed below sought to increase investment and the development of strategic alliances that would lead to increased levels of efficiency in the financial system. [80]

For banking institutions, reforms to laws that regulate the financial system were crucial. First, six articles in the *Ley de Instituciones de Crédito* [Credit Institutions Law, LIC][81] dealing with shareholder structure were modified.[82] All the modifications had a common denominator: to increase the ability of Mexican and foreign investors to hold shares, in greater percentages, in Mexican banks. An injection of capital was much needed and this was one way of reaching that goal.

The *Ley del Mercado de Valores* [Securities Market Law][83] was also modified to allow more investment in securities markets. The reforms made in 1995 gave more access by abrogating certain government limitations on foreign investment in brokerage houses.[84] Due to this modification, foreign investment was opened for certain shares that had previously been closed.[85]

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[79] For an in depth study of banking regulations and reforms, see Jesús de la Fuente, 1 Tratado de derecho bancario y bursátil, seguros, fianzas, organizaciones y actividades auxiliares del crédito, ahorro y crédito popular, grupos financieros (Porrúa, 2002).

[80] *See* Banxico, *supra* note 62.

[81] Ley de Instituciones de Crédito [Credit Institutions Law], Diario Oficial de la Federación [D.O.], July 19, Julio de 1990 (Mex.).

[82] The articles modified were articles 11, 13, 14, 15, 17 and 45.

[83] Ley del Mercado de Valores [Securities Market Law], *as amended*, Diario Oficial de la Federación [D.O.], Feb. 15, 1995 (Mex.).

[84] *See id.* article 17.

[85] *See id.* article 28 bis 7.

The *Ley para Regular las Agrupaciones Financieras* [Law to Regulate Financial Groups][86] was also modified in February 1995. As with the above laws, the means by which this was carried out was by increasing the percentage of certain shares that could be held by foreign investors.

Additionally, pursuant to the Law to Regulate Financial Groups, new rules were issued for the establishment of credit bureaus. This was an important step towards reducing risks in the future. Prior to these rules, banks were making loans without a full assessment of the risks, which often led to non-performing loans. Thus, the capability of carrying out credit background checks was vital.

Furthermore, institutional reforms were also made in 1995. In order to strengthen the supervision of the financial institutions the *Ley de la Comisión Nacional Bancaria y de Valores* [Law for the National Banking and Securities Commission, CNBV] was implemented.[87] Previously, there had been two separate commissions, one for overseeing the securities market and another for the banking industry. With this new law, both were consolidated into a single commission. The new commission was given additional authority to establish preventive corrective programs or agreements, which were of mandatory compliance for financial entities, and focused on eliminating financial imbalances that could affect liquidity, solvency or stability.[88] Further authority was given to the CNBV to issue prudential rules to preserve the liquidity, solvency and stability of the intermediators.[89] The new rules included rules for the diversity of risks, capitalization and the creation of preventive provisions. Finally, with the new consolidated structure, the capacity for supervision and oversight was strengthened. The hope was that with this new commission preventive actions could be taken with greater ease and speed in order to avoid complete meltdowns in times of financial crisis.

Further reforms to the financial laws were published in the *D.O.* in November 1995. These reforms were made to strengthen the protection of public interests and the modification of stock structure for certain financial intermediators, as well as to adopt measures that contribute to preventing and combatting money laundering.[90] For such purposes, several modifications were proposed and a motion passed to update the LIC and the law regulating the stock market. The primary objective was to grant more powers to the CNBV to effectively protect consumers of bank and credit services by allowing the CNBV to review the different contract models so as to verify that confusing

[86] Ley de la Comisión Nacional Bancaria y de Valores [Law for the National Banking and Securities Commission, CNBV], Diario Oficial de la Federación [D.O.], Feb. 28, 1995 (Mex.)

[87] *Id.*

[88] *See id.* article 4.

[89] *See id.* article 6.

[90] Banxico, *supra* note 62.

clauses that hindered the consumers from understanding the extent of the obligations agreed to were not contained in contracts.[91]

Modifications to the NAFTA were also made. In February 1995, foreign companies that could establish banks, subject to the approval of the Finance Ministry, would be allowed to acquire between 51 and 100 percent of the controlling interest in an individual bank, with some exceptions.[92] The protective measures established in NAFTA were removed.

The Foreign Investment Law[93] was also modified. Article 7 of this law regulated and restricted foreign investment in financial activities. In 1993, up to 30 percent foreign investment was allowed in multiple bank credit institutions.[94] After the bank crisis, this article was reformed on several occasions, raising the percentage, until the restriction was completely repealed and up to 100 percent foreign investment was allowed.

Despite the fact that 1995 had a shocking beginning in Mexico, by the end of that year, the dust was beginning to settle. Massive amounts of money were being injected into the financial system, legal reforms were made to financial laws, bailout funds were being disbursed, and credit programs were in place. On November 14, 1995, Michel Camdessus, Managing Director of the IMF, commented on Mexico's economic policy of that year stating that:

> The health of public finance has been restored, the necessary external adjustment has taken place, and the country has regained its access to the international capital markets. Although economic conditions remain difficult, growth is expected to resume, and the markets will stabilize as economic agents become convinced of the authorities' policy commitment.[95]

Additionally, he defended the actions of the IMF in the large loan arrangement made for Mexico. He argued that "[a] decade of unstinting international efforts to open markets and liberalize emerging economies would have been at risk. Instead, Mexico was able to address its problems, to put itself back on the path of recovery, while at the same time limiting the negative impact of the crisis on other countries."[96]

On the other hand, some authors state that the process of deregulating the banking system, through financial reforms, deepened the banking crisis.[97] Alicia Girón and Noemí Levy find that the privatization process of the

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[91] *Id.*

[92] Adams, *supra* note 59, at 127.

[93] *Ley de Inversión Extranjera.*

[94] *See id.* article 7 III (b).

[95] Michel Camdessus, *International Monetary Fund News,* Address at the Zurich Economic Society, *The IMF and the Challenges of Globalization – The Fund's Evolving Approach to its Constant Mission: The Case of Mexico* (Nov. 14, 1995), *available at* http://www.imf.org/external/np/sec/mds/1995/mds9517.htm (last visited May 15, 2011).

[96] *Id.*

[97] Alicia Girón & Noemi Levy, México: los bancos que perdimos (UNAM, 2005); *see*

early 1990s led to the *foreignization* of the banking system and the disappearance of credit channels by cancelling a regulated financial system without the construction of other channels of credit.[98] Their studies conclude that the foreignization process rapidly increased, without increasing efficiency and productivity in the banking industry, and without carrying out its primary function: the issuance of credit.[99] Therefore, according to these authors, the banking sector has since then failed to contribute to the economic growth of Mexico.

Nonetheless, others hold that "foreign participation has essentially rebuilt the sector, improving capitalization and the quality of bank assets and contributing to the accelerated decline in bad loans. Since 2004, foreign participation has helped to increase bank credit in the economy."[100] Then again, one must look to the type of credit (private industry, credit for consumption, housing, to name a few) referred to by the authors on both sides because if we look at private industry credit, both agree it remains stagnant.[101]

IV. Global Financial Crisis, 2007-2009

The most recent global financial crisis began in 2007 and became evident in 2008. This section will review the causes that led to this phenomenon and then ground the analysis in the Mexican context. The external causes and impacts in Mexico and the government and banks' initial response will be mentioned. Given the proximity of the events, it is too soon to tell what the long term impacts will be.

1. *The 2008 Crisis*

In the most recent financial crisis, most analysts point their fingers towards the United States. The causes of the crisis are still being debated as some experts point to some factors, while others highlight different ones. One author claims the following:

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also L. M. Galindo & C. Guerrero, *El impacto de la liberalización financiera sobre el ahorro privado en México, 1983-1998*, *in* De la desregulación financiera a la crisis cambiaria: experiencias en América Látina y el sudeste asiático (G. Mántey & N. Levy eds., UNAM, 2000).

[98] *Id*. at 66.

[99] *See id*. at 79; Salinas, *supra* note 14, at 172 (Carlos Salinas de Gortari, the president that initiated the privatization movement, later laments the foreignization of banks. He states that this loss of the system of payments to foreigners is a loss of Mexican sovereignty, similar to other historical moments such as the loss of half of the Mexican territory to the United States in 1847).

[100] Rubén Hernández-Murillo, *Experiments in Financial Liberalization: The Mexican Banking Sector*, 89 Federal Reserve Bank of St. Louis Review 415-32 (2007).

[101] Another set of important reforms took place which provided further prudential oversight and best practices for the banking sector. *See* De la Fuente, *supra* note 79.

> The candidate causes of the economic and financial crisis of 2007-09 fall into four broad categories: (1) macroeconomic failures, which have three subcategories: monetary and fiscal policies, global imbalances, and housing booms; (2) failures of financial-sector supervision and regulatory policies and practices, which have innumerable subcategories; (3) excesses of poorly understood innovations in financial engineering, which have several subcategories: subprime mortgages, credit default swaps, and new forms of securitization to name a few; (4) excesses, or imprudence, on the part of large private financial institutions, in particular those with a global reach.[102]

Once the crisis became evident, the spillover effects began. In an economy so closely tied to the U.S. market, Mexico quickly felt the crunch. Manufactured goods and petroleum exports decreased.[103] The remittances sent to Mexico from Mexican workers in the United States also dropped.[104] Volatility in the exchange rate of the peso was observed. The stock market also took a hit. Overall, economic growth expectations dissipated.

2. *Comparison of 1995 Crisis to that of 2008*

Analysts have now taken to the task of studying the recent crisis and questioning what was similar or different from previous crises. Already, we are beginning to see some common factors arise. "The crisis had four features in common with other crises: 1) asset price increases that turned out to be unsustainable; 2) credit booms that led to excessive debt burdens; 3) build-up of marginal loans and systemic risk; and 4) the failure of regulation and supervision to keep up with and get ahead of the crisis when it erupted."[105] On this occasion, the crisis began in the United States, with housing prices increasing in excess of 30% in the five years preceding the crisis and peaking six quarters prior to the onset of the crisis.[106] Credit expansion in the United

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[102] Edwin M. Truman, Lessons from the Global Economic and Financial Crisis (Peterson Institute for International Economics, 2009).

[103] *See* Guillermo Ortiz, *La crisis de 1994-95 y la actual crisis*, CNN Expansión, Feb. 3, 2009, *available at* http://www.cnnexpansion.com/economia/2009/01/30/la-crisis-del-199495-y-la-actual-crisis. Total Mexican exports to the United States went from 223,403.6 million dollars in 2007 to 184,878.5 million dollars in 2009. *See e. g.*, Secretaría de Economía, http://www.economia-snci.gob.mx/sphp_pages/estadisticas/cuad_resumen/expmx_e.htm (last visited May 5, 2010).

[104] On January 27, 2009, Banco de México published a statement indicating that family remittances had dropped 3.6% from 2007 to 2008, from 25, 145 million dollars, for a loss of 931 million dollars. *See, e.g.,* Banco de México, *Las remesas familiares en 2008*, http://www.banxico.org.mx/documents/%7BB7CBCFAF-AB7D-BE65-F78F-6827D524C418%7D.pdf (last visited May 10, 2010).

[105] Stijn Claessens et al., *Lesson and Policy Implications from the Global Financial Crisis* (IMF Working Paper WP/10/44, 2010).

[106] *Id.*

States, particularly in the subprime mortgage segment, was also a contributing factor, as well as the fact that those housing loans were being made to high risk borrowers. The U.S. government's prudential oversight of financial innovation was insufficient. "As happened often before, the focus of authorities remained primarily on the liquidity and insolvency of individual institutions, rather on the resilience of the financial system as a whole."[107]

As we can observe, some of the above-mentioned factors were present in Mexico's 1995 crisis. Common factors include: low international interest rates and investors' search for better rates; a wide availability of resources that promoted unmeasured growth of credit in a context of deficient banking practices; serious deficiencies in banking oversight and regulation; problems of opaqueness in the information; incentives that prompted financial institutions to take excessive risks; a financial crisis characterized by problems of systemic liquidity and solvency; direct intervention in several financial institutions by the authorities and a complicated political environment to implement the measures required to support the financial system.[108] Two salient common factors are the expansion of credit and the failure of regulation and supervision. Credit expansion, both in mortgages and credit cards was observed, as was an increase in non-performing loans. The "new" Mexican banks in 1994 were all too eager to offer credit and risk assessment was not the top priority. This has similarities with the subprime mortgage lending that took place in the United States. In both contexts, the banks were left unsupervised which led to catastrophic results and eventually huge bailouts at the taxpayers' expense.

In response to the subprime mortgage crisis, on October 3, 2008, U.S. President George W. Bush signed the Emergency Economic Stabilization Act (EESA), which contains the Trouble Asset Relief Program (TARP).[109] As stated in the EESA, the aims of the TARP are:

(1) To immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and
(2) To ensure that such authority and such facilities are used in a manner that

(A) Protects home values, college funds, retirement accounts, and life savings;
(B) Preserves homeownership and promotes jobs and economic growth;
(C) Maximizes overall returns to the taxpayers of the United States; and
(D) Provides public accountability for the exercise of such authority.

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[107] *Id.*

[108] Ortiz, *supra* note 103.

[109] Trouble Asset Relief Program (TARP) 110-343 (2008).

With the passage of this act, the Treasury Secretary was authorized to spend up to US $700 billion and under Section 101, had the authority to "establish the Troubled Asset Relief Program (or "TARP") to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary." Stated simply, the government would buy toxic mortgage assets and other bad debts made by the financial institutions that took on the risk and then passed the burden of those bad choices to the taxpayers.

The TARP was highly criticized for diverse reasons. First, Henry Paulson, the Secretary of the Treasury who made the initial proposal and headed the Bush financial team at the time of the financial meltdown, had formerly been the CEO of the Goldman Sachs Group. Goldman Sachs was not only a contributor to the crisis, but later benefitted from the bailout.[110] Thus, conflicts of interests concerns started even before the law was passed and claims were made that Paulson would help out his old friends.[111] Other scandals, dealing with excessive bonuses to top executives at financial institutions receiving TARP funds, soon came to light.[112] Consequently, the new Barack Obama Administration, similar to the Ernesto Zedillo Administration, inherited the crisis and then had to clean up the mess and put new regulations into place.

The most recent piece of legislation that responds to the financial crisis in the United States is the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was signed into law on July 21, 2010.[113] The aim of the legislation is to promote the financial stability in the United States by improving accountability and transparency of its financial system, to end the "too big to fail," to protect the American taxpayer by ending bailout, to protect consumers from abusive financial services practices, and for other purposes.[114] It is a comprehensive law that includes the creation of new agencies to in-

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[110] Goldman Sachs received $10 billion from the Treasury and then wanted to return the money because of restrictions placed by TARP. *See* Christine Harper, *Goldman Sachs wants to Repay Treasure, CFO Says,* Bloomberg, Feb. 4, 2009, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7vRpWuhek3k.

[111] *See* Ben White, *Details of Rescue Plan Unclear, but Some Already Benefit,* N. Y. Times, Sep. 19, 2008, *available at* http://www.nytimes.com/2008/09/20/business/20winners.html. *See also* Helene Cooper, *Obama orders Treasury Chief to Try to Block A.I.G. Bonuses,* N. Y. Times, Mar. 16, 2009, *available at* http://www.nytimes.com/2009/03/17/us/politics/17obama.html.

[112] *See* Liam Pleven, "AIG to Pay $450 Million in Bonuses", Wall St J., Mar. 15, 2009, *available at* http://online.wsj.com/article/SB123707854113331281.html?KEYWORDS=%22AIG+to+Pay+450+Million+in+Bonuses%22.

[113] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).

[114] *See* One Hundred Eleventh Congress of the United States of America, at the Second Session, H.R. 4173, Jan. 5, 2010, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt. pdf (last visited May 25, 2011).

crease oversight of financial institutions, promote transparency, and establish rigorous standards and supervision to protect the economy and consumers, among other new efforts to enhance the regulatory system. The complete coverage of this Act goes beyond the scope of this paper, but it is mentioned to draw a comparison with the modifications to the regulatory system post-crisis, as in the Mexican case.

In comparing government responses in the FOBAPROA and the TARP, one author claims, "the U.S. government behaved in a way dangerously similar to the Mexican government during the 1995 bailout."[115] Sandoval uses three basic rules, as established by Liliana Rojas-Suárez and Steven Waisbrod,[116] to guide her analysis and make her assertions of the similarities between the two bailout processes. The first rule is that those who benefitted from taking the risks should be the ones to carry the weight of the bailout,[117] or as Sandoval states, if someone must lose a part of their assets, "bank stockholders should be first in line." The second is to avoid moral hazard during the bailout process, and the third deals with involvement of society and the political will to make the bailout a priority, assign public resources and avoid inflation. Sandoval calls this third rule "the need to build social legitimization for the bank bailouts through communication with and support from society."[118] She examines each rule and draws parallels between both bailout processes by noting who benefits in both (the banks and the bankers) and the discretionary powers of those administrating the bailout monies in Mexico and the United States (FOBAPROA Technical Committee and the Secretary of the Treasury). Sandoval also notes the conflict of interests of those in charge of the TARP[119] and highlights the fraud and looting of public resources in both scenarios, which speaks to moral hazard. And, as to the third rule, she states that Mexico's bailout was riddled with fraud and self-dealing because there was little public scrutiny of the details of the process and that, although the U.S. bailout is more transparent, fundamental decisions can be taken with little oversight so that transparency only acts as an ex post check on Executive behavior.[120] Consequently, there is little communication and support from the

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[115] Sandoval, *supra* note 63, at 544.

[116] Liliana Rojas-Suárez & Steven R. Weisbrod, *Manejo de las crisis bancarias: lo que debe y lo que no debe hacerse*, *in* Las crisis bancarias en América Latina (Ricardo Hausmann and Liliana Rojas-Suárez eds., Banco Interamericano de Desarrollo, Fondo de Cultura Económica, 1997) (in this text, the authors compare the banking crises in Argentina, Chile and Mexico using the three rules to analyze economic policy).

[117] *Id.* at 137.

[118] Sandoval, *supra* note 63.

[119] For example, Sandoval notes that Henry Paulson was the CEO of Goldman Sachs Group, a beneficiary of the bailout, and then placed in charge of reforming the system that he helped bring into crisis. She parallels this to the Mexican case where government authorities hired some of the same bankers implicated in the crisis and put them in charge of the bailout process. *Id.*

[120] *Id.*

public. Furthermore, she states, "there are few mechanisms of accountability that have real legal bite."[121]

On the other hand, the main differences should be noted. First, the most recent crisis originated in the United States, not in Mexico. Thus, the scope and impact of the U.S. crisis had global reach and depth. For Mexico, capital flight, a huge problem in 1995, was not the primary issue in 2008. The exchange rate of the peso, since 1994, was allowed to float and, therefore, is now much more flexible. Furthermore, on this occasion, Mexican banks had much more experience, information was more transparent, and international accounting rules were followed. Because of more supervision and regulation, the banks had a more solid footing for this crisis.

Another difference that should be emphasized deals with accountability and criminal prosecution, that is, the enforcement of the law. In Mexico, the fraudulent actions by bankers and those involved in the FOBAPROA scandal were not prosecuted.[122] One blatant, and much publicized, example is the case of Carlos Cabal Peniche, who was the owner of Banca Cremi and accused of financial fraud, self-made loans, related lending and credits related to illegal activities linked with drug trafficking, money laundering and funding of the PRI electoral machine. After the prosecution had pressed on with the case for 16 years (in which time he fled from the country, was found in Australia and extradited to Mexico), Peniche was exonerated from all charges, except a minor tax evasion charge.[123]

On the other hand, in the United States, Neil Barofsky, who is overseeing the $700 billion TARP, says he has 20 criminal probes and call for changes to prevent fraud.[124] However, some critics say that these investigations will probably lead nowhere.[125] Nevertheless, in the United States, unlike in Mexico,

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[121] *Id.* at 556.

[122] *See Queda sin castigo delito en Fobaproa*, Reforma, Apr. 17, 2006 (in which it claims that 80% of the illegal actions committed in the Fobaproa went unpunished). See also *La extranjerización de la banca no la hizo más eficiente: CEPAL*, La Jornada, Sept. 25, 2006 (*La Jornada* cites a UN ECLAC study stating that in the majority of the countries in which a financial bailout of the banks has taken place, those responsible have been punished, this measure did not take place in Mexico. This same study is cited as stating that the foreignization of the banks in Mexico did not increase efficiency and productivity in the Mexican banking sector and that the FOBAPROA could have been avoided).

[123] Abel Barajas, *Cabal Peniche Derrota a PGR: Lo extraditaron, demandaron, juzgaron y resultó inocente; tampoco pagará 239 millones de pesos a Hacienda*, Tabasco Hoy, Jan. 29, 2010), http://www.tabascohoy.com.mx/noticia.php?id_nota=187297 (last visited Feb. 10, 2011). Another example is Ángel Isidoro Rodríguez Sáez, aka "El Divino", who was charged and extradited to Mexico from Spain only to be exonerated of all charges. *See Libre 'El Divino' de procesos judiciales*, Noticieros Televisa, Dec. 17, 2002, http://www.esmas.com/noticierostelevisa/mexico/269576.html.

[124] Jennifer Liberto, *Bailout Cop Busy on the Beat*, CNN.Money.com, Apr. 21, 2009.

[125] *See* Joe Nocera, *The States Take on Foreclosures,* N Y. Times, Oct. 29, 2010, *available at* http://www.nytimes.com/2010/10/30/business/30nocera.html ("a handful of federal investigations

states have taken on a more active role in investigating and prosecuting the mortgage foreclosure mess that led to the bank bailout. The state attorneys general had previously initiated actions against banks for predatory lending, but were stopped by federal regulators (the Office of the Comptroller of the Currency and the Office of Thrift Supervision) because of the pre-emption doctrine. National banks were governed by federal rules and pre-emption blocked state action under state consumer protection laws. Yet, the state attorneys general pushed forward. "In 2002, for instance, a coalition of attorneys general and the Federal Trade Commission settled a predatory lending suit against a subprime lender called First Alliance; it called for the company to pay up to $60 million to reimburse homeowners it had victimized. That same year the A.G.'s reached a settlement with Household Finance for $484 million."[126] In 2006, Ameriquest agreed to pay $325 million and reform its lending practices which eventually led them to shut down in 2008.[127]

Furthermore, post-financial crisis, "no federal regulator would have the nerve [...] to try to block the states from investigating the mortgage foreclosure scandal" and foreclosure is a state matter, not a federal one.[128] Thus, the state attorneys general have geared up and are ready to prosecute. Additionally, under the Dodd-Frank Law,[129] states can enforce their own state consumer laws against nationally chartered banks. Plus, the Consumer Financial Protection Bureau has been established which should facilitate the process.[130] Nonetheless, it is too early to tell, but prosecutions will surely come and those responsible for the mortgage foreclosure scandal will be held accountable.

Additionally, at the federal level, the Office of the Special Inspector General for Trouble Asset Relief Program, SIGTARP, was established by Section 121 of the Emergency Economic Stabilization Act of 2008 ("EESA").[131] This office is entrusted with the mission to advance economic stability by promoting the efficiency and effectiveness of TARP management, through transparency, through coordinated oversight, and through robust enforcement against those, whether inside or outside of Government, who waste, steal or abuse TARP funds.[132] In its latest quarterly report to Congress of January 26, 2011, it claims to have charged 45 individuals either civilly or criminally with fraud, 13 of whom have been criminally convicted. Thus, according to SIGTARP,

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have also been announces, but we all know that they´re not going to amount to a hill of beans").

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Law) established the Consumer Financial Protection Bureau (CFPB).

[130] The CFPB will go into effect on July 11, 2011. *See* The Consumer Financial Bureau, http://www.consumerfinance.gov/the-bureau/ (last visited Feb. 14, 2011).

[131] SIGTARP, http://www.sigtarp.gov/about_stat.shtml (last visited Feb. 10, 2011).

[132] *Id.*

this agency has helped prevent $555.2 million in taxpayer funds from being lost to fraud and it currently has 142 ongoing investigations.[133] One recent and much publicized conviction is that of Charles J. Antonucci, who has pleaded guilty to numerous criminal charges, including securities fraud, bribery and embezzlement. Antonucci has agreed to pay $11.35 million and faces up to 135 years in prison.[134] This may be the first of many cases[135] in the upcoming months and marks a stark distinction between accountability in the Mexican bailout context and that of the United States.

Another interesting difference is that banks in the United States are actually paying back TARP monies. On June 9, 2009, it was published by the media that several large U.S. banks with names such as Bank of America ($45 billion), JP Morgan Chase ($25 billion), Goldman Sachs ($10 billion), and Morgan Stanley ($10 billion) were paying the government back and in some cases, like Bank of America, two years ahead of the projected payback date.[136] Citigroup joined the group of banks paying back TARP funds in December that same year. "The banks are eager to escape TARP and the restrictions that come with it, particularly the limits on how much they can pay their 25 most highly compensated workers."[137] Overall, the $700 billion initially projected was not used by the Treasury and some analysts say that the actual cost to the taxpayer for this program may be nothing, once all borrowers pay.[138] More recent comments state that the TARP will end up costing U.S. taxpayers approximately 85% less than originally expected; that is, the bill will come to about $50 billion, far less than the $350 billion that the Congressional Budget Office initially estimated.[139] Unfortunately, in the Mexican case, this did not occur.

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[133] *Id.* Those ongoing investigations include banks like Bank of America, OMNI National Bank, Mount Vernon Money Center, and others.

[134] Andrew Martin, *Ex-Head of Park Avenue Bank Pleads Guilty to Fraud*, N. Y. Times, Oct. 8, 2010, *available at* http://www.nytimes.com/2010/10/09/business/09bank.html.

[135] Another recent highly publicized case is that of Lee Bentley Farkas who was arrested by SIGTARP agents and charged with bank fraud, wire fraud, and securities fraud and allegedly committed a massive multi-billion accounting fraud that included an attempt to fraudulently acquire more than 500 million in TARP funds for Colonial Bank. TARP funds were not actually disbursed. This is an on-going case. *See* Eric Dash, *Executive Charged in TARP Scheme*, N. Y. Times, June 16, 2010, *available at* http://www.nytimes.com/2010/06/17/business/17fraud.html.

[136] David Grant, *Why Are Big Banks Like Citigroup Rushing to Pay Back TARP Funds?*, The Christian Science Monitor, Dec. 14, 2009, *available at* http://www.csmonitor.com/Business/new-economy/2009/1214/Why-are-big-banks-like-Citigroup-rushing-to-pay-back-TARP-funds.

[137] Eric Dash, *10 Large Banks Allowed to Exit U.S. Aid Program*, N. Y. Times, June 9, 2009, *available at* http://www.nytimes.com/2009/06/10/business/economy/10tarp.html.

[138] *Id.*

[139] Danny King, *Treasury: Bailout Will Cost Taxpayers 85% Less Than Expected,* Daily Finance, Oct. 5, 2010, *available at* http://www.dailyfinance.com/story/treasury-bailout-will-cost-taxpayers-85-less-than-expected/19662064/.

3. *Impact of Global Crisis on Mexican Banking*

International observers evaluating the impact of the global financial crisis in Mexico have made some very positive comments. For example, the IMF has stated that policy reforms over the past decade have helped Mexico weather the global economic crisis.[140] The Article IV consultation on March 16, 2010, resulted in the following comment:

> The banking system is sound. The banking and financial sectors in Mexico came through the crisis in good shape, the IMF said. Non-performing loans seem to have peaked at only 3 percent of total loans by end-2009. Banks are well capitalized and should be able to absorb a possible additional deterioration in credit quality in the event that the economic recovery was to prove more sluggish than expected.[141]

Despite the optimism, the report goes further to state that Mexico could be affected by changes to global financial regulation because most major Mexican banks are owned by global banks and that these could face higher capital charges from regulators as a result of potential future reforms.[142] Mexican banks are now 85 percent foreign owned.[143]

Mexican bankers share a similar opinion as to the soundness of the banking system. In the recent meeting of the *Asociación de Bancos de México* [Mexican Bankers Association] held in April of 2010 the president of the Association, Ignacio Deschamps, stated that Mexico's banking system withstood the turmoil of the current situation because of its experience of 1995 and 1996.[144] He asserts that the country and the financial system were put to the test and that the system resisted. "The lessons learned during the 1995-1996 crisis that resulted in strict regulation allowed the Mexican banking system to withstand the shocks of the recent global financial crisis."[145]

Similarly, the position of the Mexican government is that the banking system is solid and that the capital flight experience of 1995 will not repeat itself. Undersecretary of the Ministry of Finance Alejandro Werner recently commented that the Mexican economy is safeguarded to withstand a possible outflow of capital due to the interest rates being raised in the United States for

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[140] See IMF survey, http://www.imf.org/external/pubs/ft/survey/so/2010/new031610a.htm (last visited May 10, 2010).

[141] *Id.*

[142] *Id.*

[143] Octavio Avendaño Carbellido, El sistema financiero internacional. Instituciones y crisis financieras 232 (Porrúa, 2010).

[144] *See* El Financiero, Apr. 19, 2010. http://www.elfinanciero.com.mx/ElFinanciero/Portal/cfpages/contentmgr.cfm?docId=257114&docTipo=1&orderby=docid&sortby=ASC (last visited Apr. 23, 2010) .

[145] *Id.* (Translation by author of this work).

the economic recovery of that country.[146] Because of the incentives granted by the U.S. government to face the crisis, interest rates are low and unattractive, making Mexico a better place to invest because it shows more profitability.[147] "Our economy is well prepared to face these eventual movements (outflow of capital), but we should continue to reinforce the elements that allowed us to be ready, such as the accumulation of international reserves, the free float regime (of the exchange rate), that have worked very well and a strong banking sector that is well capitalized."[148] He goes on to mention that international reserves in Mexico reached a historic maximum of 97,433 million dollars on April 16th, since the previous record of 96,220 million dollars the week before, pursuant to data from the *Banco de México*. The outlook for growth is positive, given a fall of 6.5 percent in 2009, the worst in six decades.[149] He further stated that the government focus is on rebuilding trust in the stabilization funds and in international reserves so that Mexico can be perceived as a solid economy.[150]

The one area that was hard hit by the crisis was consumer credit. Ignacio Deschamps reported that the global crisis led to restructuring the debt of 1.9 million bank clients, by extending terms and reducing interest rates.[151] The amount involved in restructuring was 2,600 million pesos, primarily for credit card consumers, personal loans and durable goods.[152] He also reported that the decrease of financing hit bottom in August 2009 and since then there has been a trend towards recovery. The month average growth of all portfolios from August 2009 to February 2010 has been 0.5 percent.[153] The number of default loans has also gone down from 4 percent in June 2009 to 3.3 percent in February 2010. Deschamps stated that the prudential measures adopted by banks in recent years have, unlike before, allowed the banks to face the recession and financial instability with strength.[154]

Other factors that are different for Mexican banks in this financial crisis are capitalization and market penetration. Deschamps reports that the capitalization level in December 2009 was 17.3 percent. He also states that the number of bank clients has increased by more than 15 million since 2003 and has almost doubled in credit and debit cards in the last 5 years.[155] Both

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[146] *See* Astrid Espinoza, *México resistirá salida de capitales,* CNN Expansión, Apr. 23, 2010, http://www.cnnexpansion.com/economia/2010/04/23/mexico-tasas-estados-unidos-cnnexpansion.

[147] *Id.*

[148] *Id.* (Translation by author of this work).

[149] *Id.*

[150] *Id.*

[151] Israel Rodríguez and Víctor Cardozo, *Reestructuran deuda de 1.9 millones de usuarios*, La Jornada, Apr. 22, 2010, *available at* http://www.jornada.unam.mx/2010/04/22/.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

factors demonstrate a more mature banking sector than that which existed in the previous decade.

Although most voices at the Bank Convention were optimistic, one critic did point out areas that needed improvement. Guillermo Babatz, the president of the CNBV, stated that the financial system still requires adjustments because it does not correspond to an economy the size and sophistication of the Mexican one.[156] He highlighted that the credit granted to companies was still low in comparison with the size of commercial activities.[157] Additionally, he criticized that over the last five years there have been more errors than appropriate actions in consumer credits.[158]

V. Learning from Financial Crises

As discussed in part III, the most recent crisis has similarities and differences with previous ones. This part will discuss the measures taken by the Mexican government in reaction to financial crisis and explore whether there are lessons that can be derived from these experiences.

1. *Mexico's Reactions to the Recent Crisis*

According to the U.N. Economic Commission for Latin America and the Caribbean, Mexico's economic policy reaction to the global financial crisis contained certain measures.[159] Pursuant to the initial summary report, the Mexican government did the following: in terms of monetary and financial policy, it provided liquidity in the national currency; in tax policy, it increased spending in infrastructure; in trade policy, it reduced tariffs; it provided support to small and medium-sized companies; and it created employment programs.[160]

Furthermore, to combat the crisis the *Banco de México* released into the market a maximum of 400 million dollars a day, while maintaining a healthy reserve of dollars in an effort to reduce volatility in the exchange rate.[161] Ad-

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[156] Jeanette Leyva et al., *Desfasado, el sistema financiero*, El Financiero, Apr. 23, 2010, http://www.efectoespejo.com/archives/11170 (last visited July 1, 2011).

[157] *Id.*

[158] *Id.*

[159] *See* Comisión Económica para América Latina y el Caribe, *Competitividad. La reacción de los gobiernos de América Latina y el Caribe frente a la crisis internacional: una presentación sintética de las medidas de política anunciadas hasta el 10 de diciembre de 2008*, http://competitividad.org.do/wp-content/uploads/2009/02/la-reaccion-de-los-gobiernos-de-america-latina-y-el-caribe-frente-a-la-crisis-financiera.pdf (last visited May 3, 2010).

[160] *Id.*

[161] Ortiz, *supra* note 103.

ditionally, a special liquidity window was made available to commercial banks to allow them to receive automatic financing, agreements were made at an international level to allow Mexico to have access to dollars from the Federal Reserve, if needed, and programs were put in place to foment growth and employment, to name a few of these measures.[162]

2. *Lessons Learned*

One can learn both from Mexico's past and recent financial crisis experience. In the 1990s, banks were left completely in the hands of the private sector and it soon became obvious that there would be no self-restraint. In the face of competition and in their attempt to gain market share, banks did not properly measure the risks. The government stood on the sidelines. The banks went from being a nationalized sector to being privatized in a short period of time. The government's position went from complete control to not supervising and regulating. The newly privatized banking sector was transformed from a protected sector, allowing little foreign investment, to almost completely foreign owned. The swings have been sudden and in response to crises. Nevertheless, although banks seemed to have matured and reacted more favorably recently, the issue of the impact of foreignization on the consumer leaves room for further research.

> The global nature of the financial crisis has made clear that financially integrated markets, while offering benefits in the long run, pose significant short-term risks, with large real economic consequences, and that reforms are needed to the international financial architecture to safeguard the stability of an increasingly integrated global financial system. Such reforms need to be guided by the right principles rather than being formulated as rushed responses to the public pressure.[163]

Apparently, Mexico learned its lesson in 1995. Its banking sector, albeit more regulated perhaps to the disdain of bankers, did weather the storm of the most recent financial crisis. Risks were reduced.

> Therefore, one lesson that the international community can learn from the Mexican experience is the importance of having a sound banking system in order to increase resilience of the economy to future shocks […] Overall, a sound financial system reduced significantly the vulnerability of the Mexican economy to the external shocks that were occurring since 2008.[164]

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[162] *Id.*

[163] Claessens *et al.*, *supra* note 105.

[164] Víctor Pavón-Villamayor, *Case study 3 – Mexico*, in Regulatory Reform for Recovery, Lessons from Implementation During Crisis (OECD, 2010).

Although there is no quick check list of lessons learned, some aspects are worth reviewing. In times of crises vulnerabilities and shortcomings become more evident. For this reason,

> […] international reform efforts in prudential supervision are currently focused on making the financial system more resilient to shocks. The reform proposals include measures to improve the quality and risk coverage of Basel II capital requirements, improving global liquidity standards to make financial institutions less vulnerable to fluctuations in short-term wholesale funding […] The new architecture for supervision and regulation has been labeled "macroprudential" in nature —that is, the focus is on maintaining the soundness and resilience of the financial system as a whole and its interconnecting parts rather than just the solvency of individual financial institutions.[165]

In 1995, Mexico rightly created the CNBV to supervise the financial system. The question is whether this can be done at an international level.

One thing that has recently been done at an international level, as a result of the crisis, has been the creation of new global rules that aim at balancing safety and growth.[166] In order to prevent a future financial collapse, financial authorities from 27 countries met in Basel, Switzerland, to draft new rules for the banking industry. According to Nout Wellink, chairman of the Basel Committee on Banking Supervision, "The system does not have the capacity for another round of bailouts, nor does the public have the tolerance for it."[167] As a result of this meeting, new rules, informally known as Basel III, have been drafted to raise the capital requirements banks must fulfill. "Under the current rules, banks must hold bank at least 4 percent of their balance sheet to cover their risks. This mandatory reserve —known as tier 1 capital— would rise to 4.5 percent by 2013 under the new rules and reach 6 percent in 2019".[168] Although some argue that this will safeguard against future risks, others, such as the Institute of International Finance, argue that the higher capital ratios could slow economic growth.[169] Because new regulations usually respond to the previous crisis, it is yet to be seen whether these new rules will help prevent the next crisis. What is certain is that, as the Mexican case has demonstrated, because of the strategic nature of financial services, govern-

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[165] Brevan Cook & Felix Delbruck, *The Crisis and the Reserve Bank's Stabilization*, http://www.rbnz.govt.nz/research/bulletin/2007_2011/Mar10_73_1Cook_Delbruck.pdf.

[166] *See* Greg Keller, *Global Banking Rules Aim to Balance Safety, Growth*, Wash. Post, Sept. 12, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/12/AR2010091202138.html.

[167] Andrew Ross Sorkin, *New Banking Rules Expected to Ease Shocks*, N. Y. Times, Sept. 10, 2010, *available at* http://dealbook.nytimes.com/2010/09/10/new-banking-rules-expected-to-ease-shocks/.

[168] *See* Greg Keller, *supra* note 166.

[169] *See* Andrew Ross Sorkin, *supra* note 167.

ment regulators need to keep a closer watch on this sector and not leave its regulation to the invisible hand of the market.

Finally, not only does the financial sector need to be kept in a healthy regulatory environment, but when bank failures arise, the manner in which the bailout is conducted also matters. Thus, in this case, a lesson to be learned from the Mexican experience is what not to do. In case of crisis, if one remembers the three basic rules set out by Rojas Suárez and Waisbrod, then future bailouts can be conducted in a manner that does not repeat the Mexican mistakes. Perhaps this is where the U.S. bailout plan differed. As Sandoval correctly claims, the TARP began with some of the same problems that the FOBAPROA had, primarily due to the lack of public information, the misuse of discretionary powers and had similar initial results (conflicts of interest, fraud and looting). However, in the United States, because of the public outrage and a new administration, the TARP bailout process changed its course. The new Obama administration went into the banks' guts (payroll) and said actions would be taken to cut top executives' pay between 50 and 90 percent.[170] "In a report released in July 2010, Kenneth R. Feinburg, President Obama's special master for executive compensation, said that nearly 80 percent of the $2 billion 2008 bonus pay was unmerited."[171] Because of greater scrutiny and supervision, as well as the U.S. public's voicing its contempt of the banks and bankers, results, thus far, appear to be different. Criminal prosecutions of those defrauding taxpayers' money (TARP) are applauded and the message that there will be consequences for such actions resonates in U.S. financial circles.

VI. Conclusions

As noted in this work, Mexico has had its share of crisis and of bank failure. The liberalization movement of the late 1980s and early 1990s, as part of the policy reforms advocated by the Washington Consensus, transformed the banking sector from a nationalized bank, to a privatized and protected sector. Those that bought the banks were inexperienced, perhaps overzealous, in their attempt to recover their investment, and not very careful in assessing risks. Whether because of an external shock or bad banking practices, the banks quickly failed and had to be bailed out of their own mistakes. The Mexican government learned, at the taxpayers' expense, that closer supervi-

[170] *See* Stephen Labaton, *U.S. to Order Pay Cuts at Firms That Got Most Aid*, N. Y. Times, Oct. 21, 2009, *available at* www.nytimes.com/2009/10/22/business/22pay.html.

[171] Louise Story, *Executive Pay*, N. Y. Times, Feb. 7, 2011, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/e/executive_pay/index.html?inline=nyt-classifier. However, in June 2010, six months into a compensation review of the country's 28 largest financial companies, the Federal Reserve found that many of the bonus and incentive programs that economists say contributed to the financial crisis remain in place. *Id.*

sion of this sector was needed. Additionally, a major incentive was there, international loans, to overhaul the regulation and supervision of the financial sector. Its new NAFTA partners and the international community were paying close attention to the changes made. Therefore, the reforms implemented post-crisis to provide for more oversight, preventive measures and establishing prudential rules were appropriate, and perhaps contributed to a more resilient banking sector in Mexico. In hindsight, other countries should have paid closer attention to the Mexican banking crisis and the measures implemented in consequence. The government response and bank bailout in Mexico presented an opportunity for other countries to learn what to do and what not to do. Given that studies demonstrate that certain common causes lead to bank failure, experience also shows that the responses of those involved may also be similar. Particularly, transparency is key and the bailout plan should maintain the public informed of how taxes will be spent, how much, and by whom. Furthermore, the misuse of such plans should be penalized. Enforcement is crucial. Consequently, governments must be cautious not to repeat the mistakes of the past and learn from the experiences, and mistakes, of other countries. Nevertheless, in 1995, nobody would have predicted that 12 years later the United States would face a very similar experience, with a much greater global impact, in which learning from the Mexican case would have been commendable.

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FEDERALISM AND CONSTITUTIONAL JUDICIAL REVIEW IN MEXICO AND THE UNITED STATES: A NORMATIVE ASSESSMENT OF TWO DIFFERENT JURISDICTIONAL SCHEMES

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Abstract. *This article argues that in federalist systems constitutional interpretation should be decentralized so that it is shared equally by federal and state level courts. It is commonly accepted that democracy and pluralism are two grounds for a federal system, since they allow experimentation in sub-national parts of the country and allow the legal system to reflect local differences. However, this rationale is often not extended to defend the decentralization of constitutional interpretation. The goal of this article is to present an argument in favor of this extension. Specifically, it explores the cases of Mexico and the United States, two federalist regimes which have resolved differently the issue of constitutional adjudication.*

Key Words: *Constitutional law, judicial review, federalism, comparative law, Mexico, United States, pluralism, democracy.*

Resumen. *Este artículo presenta una línea de argumentación para justificar en un sistema federal la descentralización de la jurisdicción constitucional igualmente entre jueces locales y federales. Son dos los principios que suelen justificar una Federación: el pluralismo y la democracia. La unión de ambos resulta en un sistema jurídico que acomoda las diferencias locales en los distintos contenidos de la ley. Sin embargo, estos principios no suelen extenderse al tema del control constitucional, en donde la menor o mayor centralización de esta función se suele determinar con base en variables distintas. El objetivo es explorar esta extensión. Para ello se analizan los sistemas de Estados Unidos y México, dos regímenes federales que han resuelto de manera distinta el tema de la descentralización del control constitucional.*

Palabras clave: *Derecho constitucional, control constitucional, federalismo, derecho comparado, México, Estados Unidos, pluralismo, democracia.*

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I. Introduction

Federalism is a system of organization of power in which, unlike a unitary scheme, subnational entities are assigned parts of power, inaccessible to the national government. The criteria according to which we might measure the degree of achievement of the federal ideal are: the promotion of efficiency, individual choice, experimentation, citizen participation and the prevention of tyranny. The debate is whether these social goals are more likely to be reached by a federal regime, rather than by a unitary scheme.

From a normative framework, the social goods more likely to be provided by a federalist system are pluralism and democracy. The former, as Roderick M. Hill Jr. says, is defended on the basis that pluralism "allows groups with different political preferences and values to express their differences by controlling subparts of the nation through subnational government."[1] The different political preferences will be reflected in the different contents of the law and the danger of a "depredatory" majority is less likely to appear since power is disseminated. Federalism also strengthens democracy on the basis that it fosters the ideal of self-government: "[a]s the population of electoral districts declines, it may become cheaper for politicians to communicate with voters and for voters to lobby politicians."[2]

The purpose of this paper is not to challenge these assumptions. The aim, instead, is to explore whether these assumptions are capable of being extended to the issue of constitutional judicial review. Most of the arguments given in favor of and against decentralization are usually thought to apply only to "the political branches of the government;" that is, only to the legislative and the executive departments, but not to the judicial power.

My hypothesis is that the centralization or decentralization of constitutional interpretation between federal and state courts is fundamental to the success of political branches may have in defining their own power limits. It

[1] Roderick M. Hills, Jr., address given to the seminar "Federalism: Law, Policy & History", Fall 2009, NYU (Document on file with NYU School of Law).

[2] *See id.*

is hard to find defenders of a federal regime in the realm of constitutional interpretation relying on an adaptation of both principles of "pluralism" and "democracy". It is difficult to find theoretical positions that defend the premise that state judges exerting constitutional interpretation should be permitted to have different opinions to reflect in the law or to provide citizens with further tools of accountability.

Probably, this is due to the "nature" of the judicial function. It is not desirable to have judges responding to the different political opinions of the people. Actually, we usually defend the opposite value, that of the independence of courts to decide independently of any political pressure. The application of law is a task that demands principled reasoning more or less objectively grounded in norms, rules and standards, and therefore, the two principles of "pluralism" and "democracy" do not apply here since people's preferences are not to be taken into account either to justify heterogeneity in the adjudication of the law or to make judges accountable to the people. As the U.S. Supreme Court said when denying the application of the "one-person, one vote" rule for electing judges: "Judges do not represent people, they serve people. Thus, the efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary."[3]

There is a robust debate, however, that focuses on federalism and constitutional interpretation. It does not revolve around the variables of "pluralism" or "democracy," but instead around a very specific kind of "efficiency:" the likelihood of a stronger disposition to protect individual rights in either state or federal courts. This debate is labeled as the question of "parity."[4] On one hand, some argue that federal judges are in an institutional context, like independence, tenure and better wages (all those derived from article III of the U.S. Constitution), in which they are better equipped to defend rights of the citizenry than state judges who are not guaranteed the same protections and are more linked to local politics. This is confirmed by the history of the federal judiciary in the United States. On the other hand, the argument is that in both jurisdictions judges are afforded the same kind of protections (and there is no reason to think that state judges are not trustworthy. Finally, there is a third position that questions the inherent value of having judges more likely to protect citizens against the government in most cases. This third position also focuses more on procedures rather than on outcomes.[5]

This debate about parity has had practical manifestations in the U.S. Supreme Court. The *Warren* Court aimed at extending the scope of federal jurisdiction over the states on the premise that this was a means necessary to protect constitutional rights, whereas the *Burger* Court had the opposite

[3] Wells v. Edwards, 347 F. Supp. 453 176 (M.D. La. 1972).

[4] *See* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1997).

[5] *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. Rev. 233 (1988).

goal, declaring that state courts were equally trustworthy in deciding the same kinds of cases.[6]

I do find persuasive Chemerensky's objection to this debate in terms of the efficiency of the federal/state jurisdiction, in the way that it "is permanently stalemated because parity is an empirical question —whether one court system is as good as another— for which there never can be any meaningful empirical measure"[7]. Nevertheless, I think that the debate can be brought to a more abstract level. Instead of measuring the likelihood of whether federal judges are more protective of individual rights as an empirical issue, the same claim could be made from a *functional* perspective. Along this line, Paul P. Peterson argues that there is a functional theory of federalism whereby the national government is said to deploy mainly "redistributive" actions, conversely to state officers who will deploy "developmental" ones. This is due to the fact that the national government respects the comparative advantages of local governments while states employ policies necessarily disciplined by market and political pressures. The national government with a national vision is able to allocate goods to achieve equality, after efficiency is handled by local authorities.[8] From the same theoretical standpoint, it is possible to argue for a functionalist role for federal judges that might justify what is otherwise difficult by empirical means.

But more than the "efficiency" of federalism, my concern centers more on the "democracy-and-pluralism" argument. In my view, there are some alternative ways to adapt these rationales to defend federalism in the realm of constitutional interpretation. But before exploring these possibilities, let me establish the foundations of this analysis by comparing two very similar federalist regimes with two opposite approaches to constitutional interpretation at the federal level.

II. Constitutional Interpretation in Mexico

Like the United States, Mexico has a Constitution that establishes a federal system. Thus, there are 31 states and one Federal District (Mexico City) as the capital of the country. Coexisting with the states, there is a national government, whose power is divided between three departments (judicial, executive and legislative). Although the current Constitution has been valid since 1917, the structural part about the principle of division of powers and federalism, was brought almost untouched from the original constitution of 1857. This is important because most scholars, in one sense or another, agree

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[6] *See id.*

[7] *See id.*

[8] *See* Paul E. Peterson, The Price of Federalism 268 (The Brookings Institution Press, 1995).

that federalism and the division of powers in the Constitution of 1857 was imported from the U.S Constitution. The change incorporated in the current Constitution, in comparison with the former, has to do particularly with the social rights that gave rise to the Mexican Revolution of 1914-1917 (the right to public education, to minimum labor conditions, etc.). In the current Constitution, the structural definitions of the former Constitution of 1857, those substantially imported from the U.S. Constitution, have remained in place.

In this sense, it is easy to point out the constitutional features of Mexican federalism that resemble the U.S. model. In first place, like Amendment X of the U.S. Constitution, article 124 of the Mexican Constitution says "[t]he powers not expressly granted by this Constitution to federal officials are understood to be reserved to the States." In Mexico, the federal government is one of limited powers, which is to say that, as far as Congress is concerned, it can only employ those listed in article 73, and those assigned to the federal executive and the federal judiciary expressly listed elsewhere in the Constitution.[9] The states, on the other hand, follow a residual principle to determine their powers: they keep those that are not granted to the national government and are not explicitly prohibited to them.[10]

Nonetheless, there are two exceptions to this general formula: "general statutes" and "concurrent powers." According to the Mexican Supreme Court, the first concept consists of statutes issued by the federal Congress to regulate not only federal issues, but general ones, that also include state and municipal issues.[11] The second are powers given to Congress to legally determine some specific subject matters and the way states and municipalities might participate (health, education, civil protection, etc.). As long as every level of government is allowed to have some rulemaking on the same issue to the extent determined by Congress, they are called concurrent.[12]

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[9] This has been confirmed by the Mexican Supreme Court in ruling that federal law does not have a hierarchal relationship with state laws, but one of scopes of powers. *See* "Legislaciones federal y local. Entre ellas no existe relación jerárquica, sino competencia determinada por la constitución", Tercera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tesis de jurisprudencia, T. VII, marzo de 1991, p. 56 (Mex.).

[10] In addition, Mexico establishes what is considered a third level of government, the municipal one, to which article 115 of the Constitution gives express powers, out of the reach of both states and the federation. *See* "Controversia constitucional. Distribución de competencias entre la Federación, las entidades federativas y los municipios, Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, P.J. 81/98, T. VIII, diciembre de 2008, p. 788 (Mex.).

[11] "Leyes generales. Interpretación del artículo 133 constitucional", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tesis VII/2007, T. XV, abril de 2007, p. 5 (Mex.).

[12] "Facultades concurrentes en el sistema jurídico mexicano. Sus características generales", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, P.J. 142/2001, T. XV, enero de 2001 (Mex.)

In second place, like the "dormant commerce clause," the privileges and immunities clause and the full faith and credit clause in the U.S. Constitution, article 117, sections IV, V and VI of the Mexican Constitution prohibit states to: "[l]evy duty on persons or goods passing through their territory; [p]rohibit or levy duty upon, directly or indirectly, the entrance into or exit from their territory of any domestic or foreign goods; [t]ax the circulation of domestic or foreign goods by imposts or duties, the exemption of which is made by local customhouses, requiring inspection or registration of packages or documentation to accompany the goods." These provisions are complemented in article 121 which establishes: "[c]omplete faith and credence shall be given in each State of the Federation to the public acts, registries, and judicial proceedings of all the others. The Congress of the Union, through general laws, shall prescribe the manner of proving such acts, registries, and proceedings, and their effect."

Thus, in Mexico, states are barred from discriminating against other states. Congress, on the other hand, has the power to make of federalism an efficient model by preventing the prisoner's dilemma from leading to a "race to the bottom." This is to say, that the federal government is in the position to prevent states from adopting depredatory measures against their neighbors in order to gain advantages by attracting investment.[13] This is confirmed in article 73, sections IX and X, Congress is empowered: [t]o prevent the establishment of restrictions on commerce from State to State; [and] [t]o legislate throughout the Republic on […] commerce […]."

Finally, following the "supremacy clause" of the U.S. Constitution, article 133 of the Mexican Constitution says: "[t]his Constitution, the laws of the Congress of the Union that emanate thereof, and all treaties that have been made and shall be made in accordance therewith by the president of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States."

These main provisions of the Mexican Constitution show that its federalism shares structural features with U.S. federalism in terms of 1) vertical federalism (states with residual powers and a limited federal government), 2) horizontal federalism (states barred from discriminating against each other, while the federal government is empowered to regulate when states acting on their own are not able to achieve efficiency), and 3) constitutional-federalism, whereby states are subject to the Constitution and may not go against its provisions.

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[13] For further reference on this issue, see Mathew Potoski, *Clean Air Federalism: Do States Race to the Bottom?*, 61 Public Administration Review 3, 335-42 (2001); Craig Volden, *The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?*, 46 American Journal of Political Science 2, 352-63 (2002).

If we add to this framework those provisions that establish that state officials are to be elected by the people and the "guarantee clause," which commands states to adopt the principle of division of powers (article 116), we then have a Mexican federal regime that certainly follows the *Madisonian* ideal of a government with a "double security" (dividing power not only among three branches of power, but also among subnational entities),[14] which can be defended, like the U.S. model, based on the values not only of the prevention of tyranny, but also of efficiency, individual choice, the promotion of experimentation and citizen participation.

Having described this general context, we can move forward to describe constitutional interpretation in Mexico. In this field, the trend to decentralization did not reach the point of institutionalizing a "double security" according to Madison's thought since, as we'll see, only one "sovereign," that is, the national government, and not two, has the power to interpret the Constitution and strike down any law going against it. This notwithstanding the Supremacy Clause of article 133, which presumably would give local judges the active role of reviewing local law in light of the Constitution. State courts are barred from striking down legislation and, thus, from "experimenting" with different constructions of the Constitution. This scheme, as we shall point out, is more a product of judicial interpretation at the federal level rather than an explicit institutional arrangement set in the Constitution.

There are two provisions in the Constitution, the content of which has led the Mexican Supreme Court to conclude that in Mexico there shall not be a "diffused" constitutional judicial review, as set forth in articles 103, pursuant to 107, and 105 of the Constitution. Articles 103 and 107 regulate a constitutional procedure actionable by all persons claiming a personal grievance because of an act of the authority is deemed unconstitutional. This is known as the "*Amparo*" and in this procedure, "[t]he federal courts shall decide all controversies." Article 105, on the other hand, is the grounds for two procedures actionable only by either the heads of the powers of the national government, states, political subdivision, political parties or the General Attorney for claiming that the statutes or acts of other public entities are unconstitutional because there is either an encroachment against the principle of the separation of power or a violation of federalism. These are "*Controversias Constitucionales*" and "*Acciones de Inconstitucionalidad*" and shall be resolved by the Supreme Court.

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[14] *See* The Federalist, at 240-44 (Ernest O'Dell ed., DMS Group Publications, Levell Land TX, 2010) (In The Federalist 51, James Madison said: "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself").

The Mexican Supreme Court has determined constitutional interpretation as a bestowal of power to the federal courts, whose scope has to be drawn under the "residual clause" of article 124, according to which states only have those powers not vested on federal officers and not prohibited to them by the Constitution. As the procedures regulated in articles 103, 107 and 105 have a constitutional interpretation nature, the ensuing conclusion is that it is an "exclusive" and not a "concurrent" power.[15]

For many years, it was disputed that constitutional interpretation might nonetheless be labeled as "exclusive" in favor of federal courts. The Supremacy Clause is called to have independent value, and since state judges are bound by the Constitution, anything in the constitution or laws of any state to the contrary notwithstanding, there must be cases in which state judges might exert a minimum degree of constitutional judicial review. In the early 20th century, the Supreme Court's declaration that state courts might be able to refute the application of laws that "openly" and "directly" violate the Constitution seemed to support this doctrine.[16] However, in 1998, the Supreme Court rejected this possibility.

The Court determined that the Mexican supremacy clause provision, establishing that state judges shall be bound by the Constitution in spite of any local law to the contrary, is not to be construed literally, but by taking a "structural" and "systematic" approach. Thus, those procedures established within the scope of federal courts are the only means of challenging laws deemed unconstitutional since that was the design in mind of the framers of the Constitution when regulating those procedures, otherwise useless if state courts had the same power.[17]

After this decision, the Supreme Court ruled that a state jurisdiction scheme, given by state law, was constitutional, in which the highest court of the state of Veracruz was given the power to resolve state constitutional claims involving the individual rights incorporated thereof. The Court's argument was that the state legislature acted within its scope of competence because it did not grant to its judicial power any power to interpret on the basis of the Federal Constitution, but instead the right to adjudicate solely on

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[15] *See* "Garantías individuales, los tribunales locales no están facultados para resolver sobre violaciones a las", Tercera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Quinta Época, tesis aislada, T. CII, p. 615, amparo civil en revisión 8564/48 (Mex.).

[16] *See* "Constitución. Su aplicación por parte de las autoridades del fuero común cuando se encuentra contravenida por una ley ordinaria", Tercera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Sexta Época, tesis aislada, T. LX, p. 177, amparo directo 6098/55 (Mex.).

[17] *See* "Control difuso de la constitucionalidad de normas generales. No lo autoriza el artículo 133 de la Constitución", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Tesis P./l. 74/99, T. X, agosto de 1999, p. 5 (Mex.).

the basis of state law. The decision stated that as long as the highest court of Veracruz does not purport to interpret the federal constitution, it is free to have all jurisdiction the local legislature decides so.[18]

In this general framework, a second point should be explained. In Mexico, high state level court decisions pertaining to local statutory interpretation are not final. The constitutional jurisdiction vested exclusively in federal courts is thought to encompass the power to review state court final interpretations of state law, as long as the parties to the federal procedure claim that the constructions are wrong so as to result in a violation to the constitutional right of "due application of law". If parties meet this formal requirement, the statutory interpretation of state law becomes a constitutional question and federal judges must then define the proper construction of state law.

The grounds of the above are found in articles 14 and 16 of the Mexican Constitution. The former establishes "[n]o person shall be deprived of liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and *in accordance with laws* issued prior to the act." The second says: "[n]o one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority *stating the legal grounds and justification for the action taken*."

The conclusion is: if the Constitution says that citizens have the right to be free from suffering government interference, unless the government is acting "in accordance with laws" and in the middle "stating the legal grounds and justification for the action taken", the Constitution imposes to public powers the duty to justify that they are acting upon the correct interpretation of any statute, ordinance or any given sub-constitutional source, which is to say that the Constitution establishes the right to have authority's acts *correctly* grounded in any legal source (the right to legality) and the correctness of any legal interpretation (no matter the source) is subject to constitutional control. As a right of a constitutional nature, it therefore falls within federal constitutional jurisdiction to say what the correct construction of any given legal source is —not only constitutional—.[19]

This is particularly relevant for the two procedures regulated in the Constitution in article 105. In these procedures in which only public actors may qualify as plaintiffs ("*Controversias Constitucionales*" and "*Acciones de Inconstitucio-*

[18] *See* "Controversia constitucional. La facultad otorgada a la sala constitucional del Tribunal Superior de Justicia del Estado de Veracruz-Llave para conocer y resolver el juicio de protección de derechos humanos, previsto en la Constitución Política de esa entidad federativa, no invade la esfera de atribuciones de los tribunales de la Federación, pues aquél se limita a salvaguardar, exclusivamente, los derechos humanos que establece el propio ordenamiento local", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, T. XVI, mayo de 2002, controversia 16/2000, p. 903 (Mex.).

[19] *See* Ignacio Burgoa Orihuela, El juicio de amparo (Porrúa, México, 2008).

nalidad"), this is true as well, although these procedures are designed to settle issues relating to the constitutional principles the separation of powers and federalism. The Court's reasoning in these kinds of cases was far-reaching when it had to define its scope of power because from its inception, the Court said, federalism and the separation of powers have been about forms designed to protect individual liberty and the way subconstitutional sources are interpreted by public powers might affect the liberty of citizens, and since the Supreme Court is the guarantor of the Constitution which mandates the guarding of the Constitutional *thelos* of liberty, its constitutional jurisdiction includes the power to review the correct interpretation and application of local law (a subconstitutional source) according to their merits.[20]

The important point to have in mind is that constitutional litigation in the Mexican context not only includes battles over the meaning of provisions included in the constitutional text, like in the American system (constitutional challenges), but also the correct interpretation of statutes, ordinances, and the rest of norms of sub-constitutional hierarchy. That is to say that if someone feels he is affected by an act of an authority that is based on an statute that is improperly interpreted, this issue might become constitutional in its nature if presented as a violation of articles 14 and 16 ("legality challenges"). In the case of "*amparo*" this is normally the case since individuals have the constitutional right to have public power's acts duly justified in any legal ground used. It is also the case for the two other procedures, "*controversias constitucionales*" and "*acciones de inconstitucionalidad*", because federalism and the division of powers, as constitutional principles, include any acting of authorities threatening liberty, which certainly include the assessment of the correct interpretation of any legal source.

Some critics have argued that this implies an undue broadening of the Supreme Court's powers, since opening questions related to pure "legality" (those pertaining exclusively to the correct interpretation of sub-constitutional sources) as constitutional issues turns these trials into completely open-ended processes.[21] In addition, there are concerns about a work overload for federal judges, when every legality-related issue is able to be litigated within either constitutional procedure, since practically every cause of action, no matter how far it is from proffering a discussion of the Constitution, might end up in the federal judiciary for it to be solved as long as the norm or act challenged is alleged to be incorrectly interpreted going against the "right to legality".[22]

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[20] *See* "Controversia constitucional. El control de la regularidad constitucional a cargo de la Suprema Corte de Justicia de la Nación, autoriza el examen de todo tipo de violaciones a la Constitución federal", Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tesis P./J. 98/99, T. X, septiembre de 1999, p. 703 (Mex.).

[21] *See* José Ramón Cossío Díaz, Bosquejos constitucionales 573-79 (Porrúa, México, 2004).

[22] José Ramón Cossío identifies this problem when the Court opened the issue in "*Controver-*

Carlos Arellano García argues that "the very means to control the constitutional status of public powers enactments becomes a means to control the legality of those very same enactments (to verify their correctly grounding in subconstitutional sources) because the constitution encompasses the "legality principle" (which demands a correct statutory-interpretation or of any other legal material)."[23] Meanwhile, Eduardo Pallares argues that the "*Amparo*" has a double nature: one that pertains to controlling the constitution and another that pertains to controlling legality. When it is aimed at controlling legality, it is an "*Amparo Judicial*" and, according to this author, this is explained by the historic tendency toward centralization that Mexico has experienced due to its Spanish tradition, and because of the largely perceived popular need to have higher courts for amending the injustices broadly committed at local levels.[24]

Felipe Tena Ramírez comments on this issue that in practice, the main means of constitutional judicial review in Mexico, the *Amparo*, has mainly become a way to check legality for the core aim of reviewing the "exact application of statutory law."[25] Stressing this feature, Ignacio Burgoa calls this means of constitutional judicial review an "extraordinary resource for protecting legality," which he believes is a logical implication of having the right to have the law (federal or local) exactly and duly applied to the cases at hand set forth in the Constitution.

As said before, not only in "*Amparo*" is this true, but also in "*Controversias Constitucionales*" and "*Acciones de Inconstitucionalidad*." Although constitutional issues come up more often in the latter trials, they accept legality-related challenges as well.[26]

The problem with the situation just described is not the underlying assertion that constitutional judicial review shall include a complete review of every legal underpinning (the correct interpretation of any legal source). This might seem to be a straightforward assertion at an abstract level: the constitutional order includes a concern for the Rule of Law in general. The problem some critics have identified is that this relationship is transferred to the idea

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sias Constitucionales" and "*Acciones de Inconstitucionalidad*" to problems dealing with legality. *See* José Ramón Cossío, *¿Otra tarea imposible?*, Anuario Iberoamericano de Justicia Constitucional 6, 623-50 (2002). Emilio Rabasa identifies the same problem. *See* Emilio Rabasa, El artículo 14, estudio constitucional, y el juicio constitucional, orígenes, teoría y extensión (Porrúa, 1955).

[23] Carlos Arellano García, El juicio de amparo 266-71 (Porrúa, 1982).

[24] *See* Eduardo Pallares, Diccionario teórico-práctico del juicio de amparo 146-47 (Porrúa, 1967).

[25] Felipe Tena Ramírez, Derecho constitucional mexicano 427-28 (Porrúa, 24th ed., 1990).

[26] For further reference, see generally José Ramón Cossío Díaz, La controversia constitucional (Porrúa, 2008); Joaquín Brage Camazano, La acción abstracta de inconstitucionalidad (UNAM, 2005).

that the power to review constitutional issues is exclusive to federal judges: this always places state judges under the scrutiny of federal judges as far as state statutory interpretation is concerned.

Based on this explanation, we can draw two conclusions:

1) In Mexican federalism, state judges and federal courts do not share constitutional jurisdiction. The power of constitutional review is vested exclusively in federal courts and the procedures established in articles 103, 105 and 107 are the only means to challenge the constitutionality of any law. In consequence, state courts are banned from striking down statutes on the basis of their violating the constitution. This rule is drawn out of a literal interpretation of the Supremacy Clause of article 133, but is set according to a systematic and structural construction of articles 103, 105 and 107 of the Constitution.
2) This exclusive federal scheme of constitutional jurisdiction includes a broad power to review every legal merit of public power´s enactments of every level (federal and state), since articles 14 and 16 turn statutory interpretation or of any other legal source into a constitutional issue. This removes from state courts the power to determine with *res judicata* effects the correct interpretation of state law, turning all their rulings subject to constitutional judicial review no matter how far their opinions are from discussing any provision of the Constitution. In exercising constitutional judicial review, then, federal courts are called to review state statutory interpretation given by state courts when parties claim there is a violation to these two constitutional provisions.

III. Constitutional Interpretation in the United States of America

According to Chemerinsky, the Federal Judicial Power created by article III of the Constitution at the Constitutional Convention was first thought to meet a single purpose: to establish the powers of the National Government since there was a fear that state courts "might not fully enforce and implement federal policies, especially where there were likely to be a conflict between federal and states interests."[27] However, it was also argued that a federal judicial power would be useful in settling disagreements among states, and particularly, to establish a uniform interpretation of the Constitution and the Federal Statutes.

It is worth noticing that there was opposition to this argument at the Convention, on the grounds that many thought state courts capable of dealing with these issues without the need of federal courts. In the end, article III embodied a compromise: it establishes one Supreme Court and as many lower

[27] Erwin Chemerinsky, Federal Jurisdiction 7 (Aspen, 5th ed., 2007).

federal courts as Congress deems fitting so there would be a chance for Congress to reconsider the need for establishing lower federal courts, and thus leaving state courts to exert jurisdiction under the condition that their decisions could be reviewed by the Supreme Court along its appellate jurisdiction so defined by Congress.[28]

Article III of the Constitution grants power to the Federal Judicial Power to rule on cases "arising under the Constitution, treaties and laws of the United States," and the power to decide on controversies, which can be labeled in general terms, as those that arise among states (and their citizens), those pertaining to foreign law and those in which the Union has an interest. Since we are concerned with constitutional interpretation, we shall focus only on the rules related to this point.

It should be noted that article III does not give federal courts the power to declare neither federal law nor state law unconstitutional, let alone the exclusive power to exert this power. Equally important, as Chemerinsky notes, "article III does not specify the relationship between the jurisdiction of the federal and state courts."[29]

The underpinning of constitutional jurisdiction is found in the famous case *Marbury v. Madison*, in which, according to Chemerinsky, five principles were established: 1) the power of the federal courts to review the actions of the executive branch of government, 2) the doctrine of "political questions" not reviewable by federal courts, which are those committed at the discretion of political branches, in opposition to those in which individual rights are involved, 3) the assertion that article II creates the ceiling on the Supreme Court's original jurisdiction so Congress is not permitted to broaden this Court's jurisdiction, 4) the power of the federal courts to declare federal statues unconstitutional (It was argued "that the Court's authority to decide on cases arising under the Constitution implied the power to declare laws conflicting with the basic legal charter unconstitutional"), and 5) the Supreme Court as the authoritative interpreter of the Constitution. This assertion is supported by the famous premise that "it is emphatically the province and duty of the judicial department to say what the law is."[30]

While the Supreme Court established itself as the authoritative interpreter of the Constitution, it was implicitly recognized as an obvious fact that state courts would possess concurrent constitutional jurisdiction directly derived from article VI of the Constitution, which establishes that "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in

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[28] *See id*. at 50.

[29] *See id.*

[30] *See* Brest, Levinson et al., Processes of Constitutional Decisionmaking 108-21 (Aspen, 5th ed., 2006).

every states shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The relationship between the two kinds of judicial powers then is understood as follows: whereas federal judges have limited powers because "they are restricted in what cases they may adjudicate and may exercise jurisdiction only if it is specifically authorized," state courts "have general jurisdiction and may therefore hear all causes of action unless there is a statute denying them subject matter jurisdiction."[31]

The limited jurisdiction of federal courts is encompassed in the nine categories of cases listed in article III of the U.S. Constitution, and, as Chemerinsky affirms, those can be encompassed in two major provisions: 1) the authority to justify and enforce the powers of the federal government (including foreign policy), generally known as "federal question jurisdiction," and 2) the authority to serve in an interstate mediating role, settling controversies between states and their citizens, although with the limitation imposed by the Eleventh Amendment.[32]

Federal jurisdiction has been interpreted by the Supreme Court as follows: "claims under the Constitution of the United States, has been held to include all constitutional provisions except for the full faith and credit clause of article IV, S 1," which does not independently justify federal jurisdiction.[33]

This limited jurisdiction vested in federal courts is of paramount importance in the United States because it helps preserve the role of state courts, which, with their general jurisdiction, have the role of ruling on most of the conflicts arising in the community. This principle has had pervasive effects in Supreme Court doctrine, which has established that states have concurrent jurisdiction with federal courts over federal questions, unless exclusive power has been explicitly granted to federal judges. In the words of the Court: "the presumption of concurrent jurisdiction that lies at the core of our federal system."[34]

Moreover, if state courts are to carry out the principal judicial function, the Supreme Court has stated that when federal judges exercise one of their limited powers, they must take state court interpretations of state statutory and state constitutional provisions as binding to federal courts, for instance, in "diversity" cases, when they must apply state law.[35] This lies on the assumption that states' highest courts are the authoritative interpreter of the local law. This rule has had a far-reaching scope' for example, when the Supreme Court ruled that in the absence of disposing state law, federal judges should try to predict how the state's highest courts would most probably decide on

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[31] *See* Chemerinsky, *supra* note 27, at 265.

[32] *See id*. at 266.

[33] *Id.* at 275.

[34] *See* Taffin v. Levitt, 493 U.S. 455 (1990).

[35] *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842).

the case at hand.[36] The latest rule on this issue was phrased by the Supreme Court in *Commissioner of Internal Revenue v. Bosh*: "[t]he State's Highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court."[37]

Still there is a constitutional provision that remains to be considered. The 11th Amendment that states that: "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." This provision was introduced to grant an additional safeguard for states to protect their autonomy. As Chemerinsky says, it is an amendment based on a view that stresses the need for federal deference to state governments and for the use of federalism to protect states from federal encroachments.[38] However, the Supreme Court has established that the 11th Amendment does not prevent the United States Supreme Court from hearing claims against states as part of its appellate jurisdiction.[39]

Moreover, *Ex Parte Young* established the doctrine that this amendment did not bar federal courts from solving causes of actions regarding a federal question against states as long as the relief to yield remains prospective rather than retroactive on the basis that "[a]n injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."[40]

Following Chemerinsky, we can identify three doctrines that shed light upon the boundaries between federal judges and state courts that keep the former from intervening in final judgments made by the latter concerning state law: 1) the requirement that federal courts give *res judicata* effect to state courts decisions, 2) that federal courts shall not interfere with pending state court proceedings and 3) the *Rooker-Feldman*[41] doctrine, which provides that a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court based

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[36] *See* Fidelity Union Trust Co. v Field, 311 U.S. 169 (1940).

[37] Commissioner of Internal Revenue v. Bosh's Estate, 387 U.S. 456, 87 S.Ct. 1776, 18, L.Ed. 2d 886 (1967).

[38] Chemerinsky, *supra* note 27, at 419.

[39] *Id*. at 425.

[40] Ex Parte Young, 209 U.S. 123 S.Ct. 441, 52 L.Ed 714 (1908).

[41] *Rooker v. Fidelity Trust Co.* 263 U.S. 413 (1923), the plaintiff attempted to have a state court judgment declared null and void and the Supreme Court ruled that federal district courts have no jurisdiction to entertain a proceeding to reverse or modify a state court judgment; in District of Columbia Court of Appeals v. Feldman 460 U.S. 462 (1983), the Supreme Court ruled that a district court has no power to review the final judgments of a state court in judicial proceedings. *See* Chemerinsky, *supra* note 27, at 481.

on the losing party's claim that the state judgment itself violates the loser's federal rights.[42]

Then, we can conclude that the only way in which final state courts judgments can be reviewed is the appellate jurisdiction of the Supreme Court. Nonetheless, there are restraints to be respected, namely, those which advise to take seriously into consideration the state statutory and local constitutional constructions as granted.[43] In the rest of cases, final state courts decisions have preclusive effects, either by collateral estoppel[44] or by *res judicata*[45] doctrines.

As Chemerinsky affirms, "[b]ecause state courts decisions generally are not reviewable in the lower federal courts, only the Supreme Court can ensure the supremacy of federal law." This is when the Court revises state court decisions, a task only performed to decide questions of federal law, since the Supreme Court has not authority to decide matters of state law in reviewing the decisions of state judges. The rule followed by the Supreme Court is that review only might be granted when there is a substantial federal question.[46]

As noted, the Constitution does not establish the Supreme Court's power to review state court decisions. This is derived from different statutes. First, there is Section 25 of the Judiciary Act of 1789, which allowed the Supreme Court to review state court decisions by writ of error to the state's highest court in several specific situations (decisions ruling against federal law or federal government interests). As there is an exception to every rule, one can be found in *Standard Oil Co. of California v. Johnson*, in which the Supreme Court said it had the power to review issues on state law when they are intrinsically tied to a federal question.[47]

The appellate jurisdiction of the Supreme Court over state courts is in 28 U.S.C. S. 1257, which provides for a review of final judgments issued by the highest courts of a state in which a decision can be had (there are some exceptions to this finality rule that are mostly related to the concern of possible federal questions that need to be resolved by the Supreme Court).[48] In this respect, what is important is to highlight a doctrine that has already been

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[42] *Id*. at 481-82.

[43] We should note there is an exception consisting of the writ of *habeas corpus*, whereby districts judges can intervene in criminal proceedings when constitutional challenges are claimed. However, this is an arena where arguments of federalism are also made both for and against. For instance, there is the Supreme Court doctrine that 4th Amendment claims cannot be subject to federal trial. For further reference, see *id.*

[44] Once a court decides on an issue of fact or law necessary for a ruling, that decision precludes re-litigation of the same issue on a different cause of action between the same parties. *See id*. at 589.

[45] This doctrine bars parties from litigating in subsequent action issues that were or could have been litigated in earlier proceedings. *Id.*

[46] *Id*. at 656-57.

[47] *Id*. at 664.

[48] *Id*. at 685-97.

hinted at: independent and adequate state grounds. This doctrine asserts that the Supreme Court lacks the jurisdiction to review a state court decision if the outcome might be supported on grounds of local law regardless of the federal questions.[49]

Chemerinsky finds that this rule of review of state court decisions, interpreted under the independent and adequate state grounds doctrine, finds motive in a underlying purpose pertaining federalism: "[t]he argument is that any federal court reversal of a state court ruling is a possible source of friction. By confining review to instances where the Supreme Court decision might make a difference, the Courts avoid unnecessary tension between federal and state courts."[50] The exception to this doctrine, in accordance with *Marbury*, is found in claims that assert that a state law is unconstitutional.

In the U.S. system, deference to state courts has reached a broad scope. For instance, in procedures in which federal judges might review state court decisions (such *habeas corpus*), the Supreme Court has established that federal judges shall decline jurisdiction in order to allow state judges to clarify any ambiguous state law that would preclude federal judges from the task of solving constitutional questions.[51] Justice Frankfurter has justified this doctrine in the following terms: "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." Julie A. Davies goes further in interpreting this doctrine: "[f]riction is greater if the federal court invalidate a state law than if the state court voids its own statute. Additionally, misinterpretations of state law by a federal court are a potential source of friction between federal and state judiciaries."[52]

Based on the prior analysis we can draw two conclusions that are relevant to this paper:[53]

1) Constitutional jurisdiction is shared by federal courts and state courts, both having the power not only to interpret the Constitution, but also to strike down statutes going against the Constitution. In the case of federal courts, grounds are found in article III of the Constitution, which states that the judicial power of the national government, that is vested in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish, "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authori-

[49] *See* Murdock v. City of Memphis 87 U.S. (20 Wall.) 590, 22 L.ED. 429 (1875).

[50] *See* Chemerinsky, *supra* note 27, at 708.

[51] See the leading case, Railroad Commission of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1841).

[52] *See* Chemerinsky, *supra* note 27, at 708.

[53] For further reference on the subject, see Doernberg, Wingate and Zeigler, Federal Courts, Federalism and Separation of Powers (Thomson West, 4th ed., 2004).

ty." This is known as "federal questions," which includes "constitutional questions." The grounds for state constitutional jurisdiction are found in the Supremacy Clause, which establishes that "judges in every State shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

2) Nonetheless, state judges and federal judges are co-interpreters of the Constitution; the Supreme Court, in which is vested part of the federal judicial power, is the ultimate interpreter of the Constitution, which is to say that its constructions of the text in question are binding for any kind of judge. This power to impose its authoritative interpretation of the Constitution includes the power to review state court decisions, namely, in the form of appellate jurisdiction in the *writ of certiorary* (see 28 U.S.C. s. 1257), a power that has been also extended to lower federal judges in other procedures (such as the *habeas corpus* or original jurisdiction). However, the framework of reviewability in federal jurisdiction is very deferential. In this sense and as a general rule, neither federal judges nor the Supreme Court is able to interpret state law, and both instances have to take for granted state courts' interpretation of local law. In second place, federal constitutional jurisdiction is only to be exerted when state courts do not have the possibility of solving the issue on the grounds of state law, in which case, the issue is remanded to the Supreme Court. The idea is to exhaust not only all procedural chances to get the case solved, but also every kind of legal argument to solve the point in dispute at the local level.

IV. Comparison

The distinction between the two systems is straightforward and twofold:

1) Whereas the Mexican system gives federal courts the exclusive power of constitutional judicial review, barring state courts from participating in this function in any degree, the U.S. system shares interpretation between state courts and federal judges, both being able to interpret the Constitution and to strike down any piece of legislation going against it, with the sole proviso that the Supreme Court reserves for itself the power to establish the authoritative interpretation of the Constitution, which is to say that the Supreme Court has the "last word" in a constitutional question, but not the "only one."
2) Whereas the Mexican system gives federal judges the power to review state court decisions pertaining to state law (interpretation of local statutes, for example) when presented as a constitutional violation, the U.S. system establishes a general ban on federal judges to review decisions grounded in state law when there is not involved a constitutional issue

properly understood. Moreover, in the American system if a case is reviewable by federal judges, because it proffers a constitutional question or a federal one, it may be remanded to state judges, instead of resolved at the federal level, if there are sufficient state law grounds to resolve the question. In the Mexican system, the application of state law on its own can involve constitutional questions, meanwhile for the American system the application of state laws on their own do not involve a constitutional question.

On the other hand, there are also two central similarities between both systems:

1) Both are federal schemes with horizontal and vertical structures of relationships between states and the national government that are principled in the ideas of a national government of limited powers, states with residual competences, and the non-discrimination principle.
2) Both federalisms are constitutionally determined. That is, states and the national government shall act according to what is stated in the Constitution, notwithstanding federal and state regulations to the contrary. Moreover, in both systems there is the same Supremacy Clause, which establishes that state judges shall give preference to constitutional law over state law (article VI of the U.S. Constitution-article 133 of the Mexican Constitution). Likewise, in both the federal judicial power jurisdiction shall extent to those cases arising under the Constitution (article III of the American Constitution-articles 103, 103, 107 of the Mexican Constitution).

Finally, there is a conclusion useful for the last part of this paper: in neither system is there a provision in the Constitution that gives or denies explicitly to either level of government the power to exert exclusive or concurrent constitutional review. In other words, in the case of the Mexican Constitution there is not any literal provision that qualifies the federal constitutional jurisdiction as "exclusive", since articles 103, 105 and 107 grant this power to the Federal Judiciary but there is no article which removes this power from the state courts nor is there one in the U.S. Constitution that qualifies the same jurisdiction as "concurrent" for both levels. Therefore, most of the main features of both systems rely on judicial interpretation of their Supreme Courts. From the point of view of the Constitutions, both Supreme Courts could later change their mind and adopt an scheme opposite to the present one; in the case of the United State the Court could determine the monopoly of federal courts over the interpretation of the Constitution, and in the case of Mexico the Supreme Court could decide that the same task in concurrently workable for state courts.

My argument is that in the end, both systems are the products of judicial doctrines that are not unequivocally grounded in the text of the Constitution and, as with any judicial interpretation, these doctrines are reviewable on the grounds of its underlying justifications.

V. Pluralism, Democracy and Constitutional Jurisdiction

1. As stated at the beginning of this paper, pluralism justifies federalism since it allows different opinions to be reflected in the law. Of course, this is a claim particularly directed at legislatures: since subdivisions have control over subparts of the community, groups with different political weight in these localities, otherwise imperceptible in the national scope, will have a substantial chance of being represented in legislature and influencing the outcome of political processes.

In my opinion, an analogous argument, but cast at a different level, can be made about state judges and constitutional jurisdiction. The argument could have the following structure. Constitutional interpretation is in the middle with regard to the level of discretion. On one hand, it is not an absolute act of discretion, such as when a legislature must choose between two public policies. On the other hand, neither is it a mechanical application of the law, as we would expect from the task of some executive agencies in charge of enforcing certain statutes with very clear rules and an undisputed underlying purpose. In the words of Justice Kennedy, writing for a majority, in *Lawrence v. Texas*: "as the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[54]

Robert Post argues that constitutional interpretation involves choosing one of three approaches: historical, doctrinal and responsive. To pick one of these methods is to choose an authority that justifies the force of law of the Constitution. If a historical approach is used, then the authority is placed in the pact made by the political forces that gathered to enact the Constitution, and those founding fathers's intent shall be obligatory. If a doctrinal approach is chosen, authority is placed on the Rule of Law and the stability, generality and steadiness of the use of precedents shall control. Finally, if a responsive approach is used, the *ethos* embodied in the general clauses of the Constitution shall determine the final sense in adjudicating the Constitution.[55]

In other words, interpreting the Constitution means choosing from among a *plurality* of modalities, each one rooted in a specific position facing the Constitution, which can be traced to and justified in a broader philosophy. This idea is not as new for U.S. judicial review as it is for Mexican judicial review. There are two salient cases along the same lines that illustrate this point.

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[54] *See* Brest, *supra* note 30.

[55] Robert Post, *Theories of Constitutional Interpretation*, Representations 30 (1990).

In the seminal case of *Chevron U.S.A. v. Natural Resources Defense Council*, the Supreme Court acknowledged that interpretation of statutes might involve the choosing from among different modalities. The choice, it was said, depends on choosing the one that accords with some underlying policy reasoning. The Court stated that there are some cases where the law is clear and unambiguous: "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress". But if the statute is silent or ambiguous with respect to the specific issue, the matter becomes one of a "permissible interpretation", a test that becomes one of rationality. The holding of the Court in this latter category of cases is that it would not substitute its judgment for that of the agencies in charged with administering a statute, unless "they are arbitrary, capricious, or manifestly contrary to the statute."[56]

Commenting on this latter case, Justice Scalia has claimed that interpretation of law, even in those cases in which an unambiguous outcome is claimed, there are political reasons that circumscribe one alternative over another: "[t]he traditional tools of statutory construction include not merely text and legislative history but also, quite specifically, the consideration of policy considerations. […] Policy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of *Chevron* —the step that determines, before deferring to agency judgment, whether the law is indeed ambiguous."[57]

The second case does not involve the relative indeterminacy of the law, but the nature of social perception of the world which might equally determine one reading of the Constitution over another. One such case is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court gave an important account of the principle of *stare decisis*, relevant to the case at hand for not overruling *Roe v. Wade*. The Court said that the rule of *stare decisis* is not an "inexorable command," but a judgment "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective cost of reaffirming and overruling a prior case." One of the several factors the Court announced was "whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification."[58]

Under this framework, in the case of *Casey*, the Court characterized its overruling of *Plessy* and *Lochner*, respectively, for *Brown* and *West Coast Hotel*. The reason for switching approaches was the change in the social perception of reality: in one case, "white supremacy" was refuted and in the other,

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[56] Breyer et al., Administrative Law and Regulatory Policy 242-46 (Aspen Publishers, 6th ed.).

[57] *See* Scalia, *Judicial Deference to Agency Interpretation of Law*, 1989 Duke L.J. 511.

[58] *See* Brest, *supra* note 30, at 1424-43.

"*laissez-faire*." A change in either a social or an economic perception might, in turn, influence a change in constitutional interpretation.

In this context, we can conclude that constitutional interpretation is not free from the demands of pluralism. Constitutions admit various serious grounds for interpretation. If we exclude state courts from constitutional jurisdiction and only grant that power to federal courts, we are impeding a wide range of people litigating from accessing important channels of expression. In the case of the United States, there are 50 channels open to welcome plurality, besides federal courts; in the case of Mexico, there are 32 channels closed to this possibility and only federal judges are open to this possibility.

As an example of the pluralism that might be brought about by the concurrence of constitutional jurisdiction, it is worth noting same-sex litigation that has been brought forward and resolved in several U.S. states. States like Vermont, Massachusetts, Hawaii and California have experimented with their individual interpretations of the "equal protection clause," either by appealing to the federal or local constitution to determine whether a ban on same-sex marriage is unconstitutional. This legal issue involves a lot of underlying competing policy reasons that may be grounded in different "permissible" constructions of the Constitution that have been accommodated within the judicial style of reasoned judgment.[59] This bundle of experience makes state courts "laboratories of constitutional interpretation," which along with the "laboratories of democracy," help produce more information than unitary states.[60] This is not to defend a chaos within constitutional interpretation among disconnected judges issuing rulings at different levels, but rather a dialogue of different points of views within a complex structure of power. In the end, the Supreme Court might give "uniformity" to the constitutional system, "stating what the Constitutions really says" but, this, after considering a rich and substantial exercise of discussion in the different judiciaries.

2. Likewise, in one attenuated sense, the principle of "democracy" displays an argument in favor of decentralizing constitutional jurisdiction. Citizen participation is furthered here, but not in the traditional way: people should not be expected to vote against state judges that do not think like the people do. This is the very kind of evil addressed by those institutional guarantees that ensure independence to judges. Judicial processes should not be equaled to the procedural lines of political processes. Nonetheless, I believe it might be that both political and judicial processes can be described as serving the same principle of participation.

Robert A. Dahl describes the main feature of the U.S. political process as follows: "I define the normal American political process as one in which there is a high probability that an active and legitimate group in the population can

[59] *Id.* at 1545-68.

[60] Roderick M. Hills, Jr., *Federalism and Public Choice*, in Law and Public Choice 23 (Anne O'Connell & Dan Farber eds.) (unpublished article).

make itself heard effectively at some crucial stage in the process of decision."[61] In my opinion, Dahl's characterization of the political process falls under the philosophy that identifies democracy with deliberation. According to Robert A. Dahl, "the making of governmental decisions is not a majestic march of great majorities united upon certain matters of basic policy. It is the steady appeasement of relatively small groups."[62]

The principle of participation, in this sense, is not the mere fact of voting as a collective body for the sole purpose of counting how many supporters certain pre-political and fixed preferences have. Participation should be for reasons weighed in public discussion, a process that helps build, and not mirror, a social rule. Jeremy Waldron says that "[o]ne of the most striking features of modern legislatures is their size: we seem to go out of our way to ensure that a plurality of voices may be heard, but that many voices, a large variety of different dissenting voices, may be heard in the deliberation that takes places in the legislative chamber."[63]

If democracy is understood not as a right to vote, but as a right to participate in public deliberation that results in a decision that shapes social life, then state courts with constitutional judicial review competence proffer an arena to enhance the possibilities of citizen participation, otherwise not available if interpretation is exclusively given to federal courts, since arguments of policy (social, economical and political) might form legal argument that renders a law interpretation "permissible".

I think necessary to point out that the acceptance of "democracy" as a value that supports concurrence in the exercise of constitutional jurisdiction in a federal regime depends on the acceptance of the law as an arena for different "reasoned judgments," that are not excluded because of their different claims or underlying policies, but only if these judgments are not deemed "permissible interpretations" of the legal material. Law shall be conceived as a practice of deliberation that needs to meet some requirement of rationality. Of course, legal reasoning is a technical way of reasoning, but it does not exclude because of that the encompassing of social, economic and political claims. The U.S. legal experience has shed light on the fact of how constitutional interpretation has to do with advancing certain philosophies (liberal, conservatives or other tags that we might think of) in a way that accords to the ideal of the Rule of Law, and this is possible only because judicial review is an open practice that accommodates different voices.

If so, a conclusion can be easily drawn: a federal regime in which constitutional interpretation is shared by both state and federal judges enhances the chances of citizen participation by means of litigation capable of shaping

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[61] Robert A. Dahl, A Preface to Democratic Theory, Expanded Edition 145 (The University of Chicago Press, 2006).

[62] *Id*. at 146.

[63] Jeremy Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373 (2004).

society in ways that are often unattainable by majorities, as in the case of overruling the white supremacy or attaining a new economic arrangement, as in the cases of *Brown* and *West Coast Hotel*.

When exerting constitutional judicial review, state courts help channel wide-ranging public discussion, enriched by many voices. It is true that in both federal schemes analyzed in this paper both Supreme Courts will ultimately always retain the power to interpret the Constitution with final effects, but, in a system like that of the United States and unlike that of Mexico, that final decision is followed by considerable plural discussion, probably initiated in one of the fifty states that open their courts to citizens so they can bring their views out for consideration. Pluralism and participation, in my view, support a scheme of constitutional adjudication shared by the national government and subnational entities.

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CONSTITUTIONALISM AND CITIZENSHIP: FACING THE MULTICULTURAL CHALLENGE

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Abstract. *Citizenship, as it was originally conceived, does not satisfy the current expectations of contemporary multicultural societies. In order to better understand the current problems of citizenship and ethno-cultural diversity, this article briefly contextualizes citizenship within the three main historical periods of Western constitutionalism. Notwithstanding that constitutionalism has addressed citizenship through two different models, the national and the republican ones, the article questions these old models and offers new arguments in order to build a transnational and multicultural citizenship. A core proposal of the paper is the creation of a new and more flexible conception of citizenship for ethno-cultural minorities. The new citizenship should meet the following characteristics: 1. Enable ethno-cultural minorities the access to basic rights and liberties; 2. Integrating cultural elements; 3. Including a set of basic socio-economic rights; 4. Incorporating residence as an essential rule for the acquisition of citizenship; 5. For migrants en route, it is essential to recognize the freedom of movement by granting temporary citizenship status.*

Key Words: *Citizenship, minority rights, constitutional history, multiculturalism.*

Resumen. *En la actualidad, el diseño original de la ciudadanía no satisface las expectativas de las sociedades multiculturales contemporáneas. Con el objetivo de comprender los principales problemas entre la ciudadanía y la creciente diversidad etnocultural, este artículo contextualiza a la ciudadanía en los tres principales periodos históricos del constitucionalismo occidental. No obstante, el constitucionalismo ha abordado el concepto de ciudadanía a través de dos modelos básicos: el nacional y el republicano. Ambos modelos se cuestionan y se presentan argumentos para construir una ciudadanía multicultural y trasnacional. La propuesta central del artículo es la creación de una ciudadanía más flexible para las minorías etnoculturales; esta nueva ciudadanía debe cumplir con las siguientes características: 1) Facilitar el acceso de las minorías a los derechos y libertades básicas; 2) integrar los aspectos culturales; 3) incluir el conjunto fundamental de derechos socioeconómicos; 4) incorporar a la residencia*

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como elemento para adquirir la ciudadanía; 5) para los migrantes en tránsito de un país a otro, el derecho de movimiento debe ser reconocido para otorgarles un estatus temporal de ciudadanía (ciudadanía en movimiento).

Palabras clave: *Ciudadanía, derechos de las minorías, historia del constitucionalismo, multiculturalismo*.

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I. Introduction: Contemporary Ethno-Cultural Diversity

Contemporary constitutionalism faces an enormous challenge originating from the growing ethno-cultural diversity in constitutional democracies. Over the last two decades, we have witnessed how ethno-cultural minorities have gained more presence in national and international forums to demand that the principle of equality contained in constitutions become reality. Of the existing minorities, three of them stand out the most due to the constitutional challenges they have presented: on the one hand, there are nationally based minorities, specifically indigenous peoples and sub-state nations; and on the other, there are those minorities that arise as a consequence of the international migratory process.[1]

Indigenous people occupied defined territories before national States were created and were frequently excluded from accessing the rights that were given to the members of the predominant society. To ensure the segregation of indigenous peoples, they were often even expelled from their original territories. Normally, indigenous peoples do not compete with national States in terms of wanting to form a different State. Their principal claim lies in the recognition of their political autonomy and equal access to basic rights and freedoms.

Sub-state nations, however, did compete with nation-states to form their own state, but lost the battle through conquest or were transferred from one state to another. This is the case of the Quebecois, Catalans, Basques and the Northern Irish, for instance. These minorities often fought to create a nation-

[1] Will Kymlicka, Multicultural Citizenship. A Liberal Theory of Minority Rights (Oxford University Press, 1995).

state and having been unable to achieve their own state, they have sought to emphasize the need to obtain the autonomy needed to reproduce their culture inside the dominant state.

With regard to immigrants that came as part of the international migratory phenomenon, there are two main causes that explain this occurrence. There is migration for economic reasons that causes millions of people to move from one state to another in search of a job or educational opportunities. This migration segment includes regular and irregular workers who work in the most important national economies. And there is also migration due to political reasons, as in the case of refugees and asylum seekers.[2]

To measure the challenge that these minorities pose, according to UN estimates, in 2008, there were nearly 214 million immigrants worldwide, of which 49% were women. In other words, these immigrants represent 3.1% of the global population.[3] If all of them were in a single place, it would be the fifth most populated country in the world.[4] Likewise, it is estimated that in 2008 global remittance flows exceeded $444 billion dollars, of which $338 billion were sent to developing countries.[5] Besides, there are between 20 and 30 million irregular migrants in the world, representing around 15 percent of the total immigrant population.[6]

In 2009, there were 43.3 million displaced persons from around the world,[7] 15.2 million of which were refugees —a number that includes 938,000 asylum seekers— and 27.1 million internal displaced persons in 52 countries.[8] The UN also identified 6.6 million people without a nationality.[9]

In regard to indigenous peoples, there are around 370 million individuals that fall under this category which comprises more than 5,000 different

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[2] Stephen Castles & Alastair Davidson, Citizenship and Migration, Globalization and the Politics of Belonging (Macmillan Press LTD, 2000).

[3] United Nations, Department of Economic and Social Affairs, *Trends in International Migrant Stock. The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008). http://esae.un.org/migration (last visited June 21, 2010).

[4] US Census Bureau, *International Database — Country Rankings*, http://www.census.gov/ipc/www/idb/ranks.php (last visited June 21, 2010).

[5] World Bank, *Migration and Development Brief 11* (November 3rd, 2009): *Migration and Remittance Trends* 2009, http://go.worldbank.org/5YMRROVW80 (last visited June 21, 2010).

[6] International Labour Organization, *En busca de un compromiso equitativo para los trabajadores migrantes en la economía globalizada*, Geneva, 92nd meeting, 2004, Report VI, at 12 in http://www.ilo.org/global/Themes/Labour_migration/lang--en/docName--KD00096/index.htm (last visited June 21, 2010).

[7] Office of the U.N. High Commissioner for Refugees, 2009 Global Trends. Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons http://www.unhcr.org/4c11f0be9.html (last visited June 21, 2010).

[8] Norwegian Refugee Council, Internal Displacement Monitoring Center's Internal Displacement, Global Overview of Trends and Developments in 2009, http://www.internal-displacement.org (last visited June 21, 2010).

[9] Office of the U.N. High Commissioner for Refugees, *supra* note 7.

peoples, whose forms of knowledge and organization are some of the greatest cultural reserves in the world.[10]

Today, ethno-cultural minorities have demanded different constitutional modifications to eliminate or reduce inequalities. These claims go from recognizing cultural rights (especially, linguistic rights) to the modification of constitutional design to allowing minorities political participation (group representation and other mechanisms associated with consensual democracy). One of the minorities' demands that deserves special attention is a more flexible approach to citizenship-granting since citizenship is necessary to access basic rights and liberties.

Citizenship, as it was originally conceived, does not fulfill the current expectations of contemporary multicultural societies or the growing ethno-cultural diversity. Currently, it is undergoing a transformation that will give it a new face in the future. Once the period of crisis is over, citizenship will be transformed and will continue to be one of the most important constitutional institutions, not only to allow political participation, but also to establish a common identity among the population.

Before explaining the place of citizenship in the history of constitutionalism and the theoretical possibilities of adapting it to ethno-cultural diversity, it should be noted that Latin American countries, with the exception of Argentina, Brazil and Uruguay, have made a distinction between citizenship and nationality in their constitutions. For these countries, being national is enough to have access to fundamental rights, while citizenship is a concept that refers only to political rights. Conversely, most world constitutions do not differentiate between nationality and citizenship, referring only to citizenship as a requisite to enjoy all fundamental rights, including political ones.

As stated by Diego Valadés, the distinction between nationality and citizenship originates in Latin American constitutionalism and goes back to the 19th century when these countries gained their independence. After the colonial ties with Spain were broken off, there was still a segment of the European population that remained loyal to the Spanish crown and whose political participation in the nascent nation-states had to be limited.

> The first constitution that differentiated between nationals and citizens was the Peruvian Constitution of 1823. In Mexico, the distinction has formed part of the constitutional order since 1836. Currently, except for Argentina, Brazil and Uruguay, all other Latin American Constitutions make this distinction. It is an institution proper to Latin-American constitutionalism, and therefore, understanding it is difficult in other systems. In general, it has been understood for almost two centuries that nationality is a legal link between a person and a state, whereas citizenship is a requisite for exercising political rights. Nationals are entitled to all the fundamental rights recognized by constitutions, except rights of

[10] International Labor Organization-International Training Center, Indigenous and Tribal Peoples: Rights and Development, http://www.ilo.org/indigenous/Resources/lang--en/index.htm (last visited June 22, 2010).

> an electoral nature. Thus, Latin American constitutionalism incorporated the trend of fundamental rights that was drawn up by the United States and France in the 18th century and, at the same time, it built a defense against the presence of numerous persons that still maintained loyalty to the Spanish crown.[11]

In this article, I will only refer to citizenship as the essential condition for the recognition of fundamental rights, without ignoring the fact that there are constitutional orders that make a distinction between nationality and citizenship. With this in mind, we will go on to examine the place ethno-cultural diversity and citizenship has in modern constitutionalism.

II. Constitutionalism and Ethno-Cultural Diversity

By placing the concept of citizenship in three main periods of Western constitutionalism helps to better understand the current problems of citizenship and ethno-cultural diversity.[12] In general terms, the earliest period took place in the late 18th and first half of the 19th centuries when the first American and European constitutions appeared, establishing the division of powers (as a way to control political power) and recognizing classic civil rights (the right of ownership, due process of law, the freedom of movement and freedom of expression, among others).

The second period occurred during the 20th century and its central characteristic was the recognition of socio-economic rights. Although the fight for the recognition of these rights began in the second half of the 19th century, it was not until the 20th century that they were incorporated into national constitutions. In this movement, the Mexican Constitution occupies a significant place as it was the first to establish the principal social rights at the time.[13]

The third period of constitutionalism appeared after World War II and marks the beginning of the gradual recognition of human rights. Unlike the first two periods in which constitutionalism was implemented in only some national States (principally in the United States, as well as in some European and Latin American countries), this third phase had a much wider dimension. Its reach was global and spread throughout the five continents, primarily influencing the decolonization processes in Africa and Asia following the fall of the traditional colonial powers after World War II. This third period has three sub-stages related to the development of international human rights.

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[11] Diego Valadés, Los derechos políticos de los mexicanos en Estados Unidos 12 (Instituto de Investigaciones Jurídicas, UNAM, 2004).

[12] Pedro de Vega, *Apuntes para una historia de las doctrinas constitucionales del siglo XX, in* Teoría de la Constitución. Ensayos Escogidos 3-44 (Miguel Carbonell ed., Instituto de Investigaciones Jurídicas, UNAM-Porrúa, 2004); *see also,* Carlos de Cabo, *La función histórica del constitucionalismo y sus posibles transformaciones*, *id*., at 45-66.

[13] On the history of Mexican social constitutionalism, see Jorge Sayeg Helú, Introducción a la historia constitucional de México 361 (PAC, 2006).

The first of these sub-stages is symbolically linked with the *Universal Human Rights Declaration* adopted by the UN General Assembly in December 1948. The second sub-stage includes the emblematical event of the signing of the *International Covenant on Economic, Social and Cultural Rights* adopted in 1966 by United Nations, which played an important role in developing second generation human rights. The third sub-stage is associated with the advance of the third generation human rights, which include heterogeneous rights, such as environmental rights, the right to peace, minority rights or guarantees against genetic manipulation. Concerning minority rights, there are three international documents that support these rights: in 1989 the International Labor Organization approved the Convention on Indigenous and Tribal Peoples (No. 169), the first international document to recognize the collective rights of indigenous people;[14] in December 1992, the UN approved the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*; and finally after 20 years of discussion, in September 2007, the UN approved the *Universal Declaration on the Rights of Indigenous Peoples.* This significant evolution of international human rights and the growing presence of minorities have had an impact on constitutional law, which has seriously begun to rethink how to accommodate ethno-cultural diversity at a constitutional level.

In other words, the challenges posed by ethno-cultural minorities have just recently presented themselves to constitutional law and correspond, to a certain degree, to the development of human rights since the mid-20th century. The advance of minority rights and subsequent recognition in constitutionalism has manifested itself in many ways in the State, especially in the adoption of more flexible constitutions that recognize these rights[15] and the creation of constitutional courts that advocate the defense of these rights.[16] Obviously, the slow acceptance of minority rights into constitutions has highlighted the *aporias* regarding citizenship in view of the growing multiculturalism in divided ethno-cultural societies, which will be examined in the next section.

III. The *Aporias* of Citizenship and the Appearance of Minority Rights

The citizenship crisis occurred because of three significant problems: first, citizenship as a concept was not able to generate adequate political represen-

[14] *See* José Emilio Ordóñez Cifuentes, *Aplicación del Convenio 169 de la OIT. Análisis Interdisciplinario*, *in* XIV Jornadas Lascasianas Internacionales 262 (José Emilio Ordóñez Cifuentes coord., Instituto de Investigaciones Jurídicas, UNAM, 2006).

[15] *See* Giuseppe de Vergottini, Derecho constitucional comparado 126-49 (UNAM-Segretariato Europeo per le Pubblicazioni Scientifiche, 2004).

[16] *See* Francisco Ibarra Palafox, *La Suprema Corte de Justicia y consolidación democrática*, *in* Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea, La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus 50 años como investigador del derecho. Tribunales constitucionales y democracia 773-98 (UNAM, 2008).

tation in governmental bodies; second, the concept of citizenship traditionally has been resistant to the incorporation of socioeconomic rights; and third, it has not recognized the diverse identities generated by ethno-cultural diversity, due to which citizenship status has been frequently denied to minorities.

As to not generating adequate political representation, citizenship was not problematic in the beginning while it was bound to restricting voting rights to privileged people with a certain economic level (by income or means of livelihood) or with a certain level of education (literate or professional qualifications) or by membership in a group or organization (the aristocracy or the government). Under these circumstances, very few were qualified to vote and when they did, they inevitably chose their equals, men with wealth, education and superior social standing. This was the nature of voting rights during most of the 19th century in the United States, the United Kingdom and Latin America.

Political representation and citizenship became an issue when voting rights acquired a universal character. As the ideas of the French *Declaration of the Rights of Man and of the Citizen* spread throughout Western societies and the revolutionary movements of the 19th century demanded universal suffrage, the principal problem of political representation became apparent: the increasing difficulty of elected politicians to represent the interests of voters. In other words, when larger masses of citizens could exercise their voting rights, their representatives moved away from representing the interests of their constituents and the distance between representatives and citizens grew.

Insufficient representation has been a strong characteristic of extended citizenship in modern States.[17] When citizenship was linked to universal suffrage, which consolidated the institutions of representative democracies, citizens lost presence in State institutions and in the political decision-making process.[18] Universal citizenship was born into an extreme paradox: as universal suffrage spread and citizens were given the right to participate in politics, their public presence was gradually diluted since governing was left to professional politicians.

This association between citizenship and universal suffrage had very few things in common with the early concept of citizenship in the Greek polis, in which citizens governed directly. Today, considering the vast demographic dimensions of modern national States, direct democracy is impractical. Demographics have significantly changed the original Greek concept of citizenship; modern democracies can only aspire to be representative democracies and direct democracies are now a part of history.

Before the Modern Era, when States did not exist and cities were not very large, some people could devote their attention, to some extent, to politi-

[17] *See* Richard Sennett, The Fall Of Public Man 390 (Penguin Books, 1978).

[18] *See* David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Stanford University Press, 1995).

cal matters and government. But when national States appeared in the early 19th century, these States were demographically large and the need for political representation arose. For instance, in 1804, Mexico had a population of 6.5 million people; Spain, 11.5; the United States, 10.2. France reached a staggering amount of 30.6 million inhabitants while the Russian empire had 54 million.[19] Without doubt, the problems of representation intensified as national States continued to grow exponentially. In 2010, these same countries have the following demographic figures: Mexico, 112.5 million people; Spain, 40.5 million; United States, the third largest country in the world with 310 million; France, 64.7 million; and Russia, 140 million. These figures may seem large, but are insignificant if compared to the imposing populations of the two biggest States on the planet, China and India with 1.33 billion and 1.173 billion people respectively.[20]

In short, while the rupture of ancient regimes, the demographic pressure of modern national States and the universalization of rights made institutions of representative democracies necessary, the distance between representatives and the citizens grew despite the fact that universal citizenship was a revolutionary concept. The problem worsened during the 20th century when the right to vote extended to women, for the simple reason that women's electoral strength did not correspond to women's presence in the government: while half of the electorate were women, very few of them could access public office.

In terms of resistance to incorporating socioeconomic rights, the capitalist transformations that took place in the 19th century brought to light the fact that if socio-economic circumstances were disregarded, citizens could not be equals. Hence, during the second part of the 19th century, an economic and political thought that tried to breach the gap of material inequality in society proliferated throughout Europe and America. This school of thought had various branches, ranging from those who wanted to make capitalism more humane to those who fought for the abolition of private property and for the creation of collective ownership of the means of production. Such theories proliferated and influenced second generation constitutionalism in the first half of the 20th century. For example, in European and Latin American States, some constitutions were promulgated or reformed so as to incorporate socio-economic rights; other constitutional movements, such as those in the USSR, China and Cuba, were more radical, declaring State control of the means of production and a State-planned economy.

Social constitutionalism spread throughout the first half of the 20th century and was first established in the 1917 Mexican Constitution. The Great Depression of 1929 and two world wars heightened the need for national

[19] Alejandro Von Humboldt, Ensayo político sobre Nueva España 289-90 (Arnao Vicente González trans., Librería de Lecointe, 1836).

[20] US Census Bureau, http://www.census.gov/ipc/www/idb/ranks.php.

constitutions to recognize socio-economic rights. Formal equality of citizens was not enough to fight the socio-economic inequalities. As a result, constitutions began to recognize social security, labor rights and universal basic education. Social constitutionalism raised the need for citizenship that was comprised not only of classic first generation rights and liberties, but also of basic socio-economic rights. This reassertion of citizenship with social attributes is found, for example, in T.H. Marshall's essay.[21]

However important social constitutionalism may have been in the 20th century, in the 1970s the global economy was restructured, which led many countries to limit privileged monetarist economic policies, prices stability, inflation control, reduction in public spending, accumulation of capital and international commerce made many countries limit socio-economic rights.[22] In fact, in the last quarter of the 20th century when social constitutionalism was just starting to build a concept of citizenship with the main socio-economic rights, a new economic order with its own new theoretical approach appeared to challenge it.

Just as this attack against socio-economic rights took place, a third problem appeared. This happened when ethno-cultural diversity intensified on a global scale and required the creation of multicultural citizenship. This demand was more groundbreaking because when modern citizenship was created in the late 18th century, it was based on homogenous national identities in the process of consolidation, as in the case of many European States. For a long time, these States assiduously fought to build a single national identity. This was why 19th century liberal constitutionalism and its concept of citizenship were not open to ethno-cultural diversity; they were conceived with the idea that constitutional institutions were for homogenized populations, even though almost all modern States had multicultural societies with more than one ethno-cultural identity. With these early efforts to build a homogenous population, citizenship was used as a tool to build a "unique nation."[23]

At the end of the 20th century, the national objective upheld during the first and second generations of constitutionalism began to change with the presence of indigenous peoples, increasing flows of immigration and pressure for minority rights. After nearly two hundred years of including citizenship in constitutions, it was possible to believe citizenship could reflect ethno-cultural diversity. Third generation constitutionalism saw how the old dream of building a mono-national State went into crisis. Hence, building a plural citizenship has become a crucial project for the 21st century. This movement follows the trend set by the 1948 Universal Declaration of Human Rights and the 2007 Declaration on the Rights of Indigenous Peoples.

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[21] *See* T. H. Marshall, Citizenship and Social Class (Cambridge, 1950).

[22] *See* Jeffrey Sachs and Felipe Larrain, Macroeconomics in the Global Economy (Prentice Hall, 1993).

[23] *See* Ernest Gellner, Nations and Nationalism (Blackwell Publishers, 1983).

To a certain extent, minority rights differ from first generation human rights: first of all, minority rights are assigned to persons of ethno-cultural minorities facing situations of disadvantage or inequality in their access to basic rights, while first generation human rights are assigned to every person, regardless of their belonging to a minority group; secondly, minority rights, such as those stated in Declaration on the Rights of Indigenous Peoples may recognize collective rights, uncommonly found in first generation human rights, which are essentially individual rights.

Until very recently, almost none of the Latin American countries with important indigenous communities had developed a multicultural constitutionalism that recognized this diversity. The Latin American constitutions that recognized the rights of these peoples have done so only recently, mainly in the 1990s: Argentina in 1994; Belize in 1981; Bolivia in 1995; Brazil in 1988; Chile in 1981; Colombia in 1991; Ecuador in 1998; El Salvador in 1992; Guatemala in 1986; Honduras in 1986; Mexico in 2001; Nicaragua in 1995; Panama in 1994; Paraguay in 1993; Peru in 1993; Uruguay in1996; and Venezuela in 1999.[24] The fact that these constitutions accepted some kind of indigenous peoples' rights does not imply that all constitutions accept the right to autonomy, one of the most important rights in view of its political implications. Until 2010, only eight countries in the region had recognized the autonomy of these peoples: Bolivia, Colombia, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.[25]

In summary, the constitutional incorporation of minority rights is the result of a long process of recognizing rights that began after the end of World War II, when constitutional systems gradually began to include human rights. This lengthy process coincided with the development of third generation constitutionalism, the starting point of which lies in the 1948 UN Universal Declaration of Human Rights. Since then, human rights have slowly left their marks on constitutions that rested on nationalistic assumptions and closed systems. Since then, constitutions have acquired more open distinctions for recognizing minority rights. This extension of rights had a significant impact on the constitutional theory of citizenship, which had begun to question its old concepts and put forth new arguments to build multicultural citizenship.

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[24] *See* Jorge González Galván, *Los derechos de los pueblos indígenas*, *in* Derechos de los mexicanos: introducción al derecho demográfico 401-29 (Luz María Valdéz coord., Instituto de Investigaciones Jurídicas, UNAM, 2009); *see also* Cletus Gregor Barié, Pueblos indígenas y derechos constitucionales en América Latina: un panorama 36 (Comisión Nacional para el Desarrollo de los Pueblos Indígenas-Editorial Abya-Yala, 2nd ed., 2003).

[25] Regarding indigenous peoples autonomy and its effects in Latin American, *see* Francisco Ibarra Palafox, *Multiculturalismo y Estado de bienestar en Latinoamérica, Introduction* to Keith Banting y Will Kymlicka, Derechos de las minorías y Estado de bienestar (Instituto de Investigaciones Jurídicas, UNAM, 2007).

IV. Classic Models of Citizenship

Traditionally, constitutionalism has addressed citizenship by using two different models: a national one and a republican one.[26] In the national model of citizenship, society had its own cultural life, which was independent of the State. There is a cultural, ethnical and linguistic heritage, a common religion or a shared historic experience.[27] Normally, the national idea of citizenship forms a hegemonic culture within the State that is imposed on the other cultures that coexist in it.

Under the national model of citizenship, a human community forms a dominant nation and takes over the State. It later tries to impose its cultural heritage on other communities so that citizenship is essentially assigned to whoever shares said cultural heritage. Through its governmental organs, the State may also try to shape a core population with a common national identity. In this case, national identity will be a State construct. In either case, the national model of citizenship makes citizenship accessible to those who claim membership in the dominant national culture, regardless of where they live. Therefore, the national concept holds that cultural and historical affinities give rise to a homogenous national identity that the State must adopt and promote. This model may at times require reproducing an ethnic identity or a particular religion that tends to be associated with said culture.

This model privileges the rules of citizenship transmission through generations and reflects an ideal auto-reproduction of national membership, considering *jus sanguinis* as the best form of transferring citizenship. In this model, *jus soli* also occupies a significant place for citizenship adscription as it considers those born in the territorial space historically occupied by the national State citizens.[28]

However, in places where national culture, ethnic background, religion or race mark the boundaries of citizenship, minorities will find strict obstacles for integrating themselves and will normally be excluded from acquiring citizenship. This exclusion originates from the fact that minorities that have come about by immigration have recently begun the long and complicated process of integration. In places where national languages or hegemonic cultural traditions are invoked, ethno-cultural minorities are required to assimi-

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[26] *See* Rainer Bauböck, *The Crossing and Blurring of Boundaries in International Migration. Challenges for Social and Political Theory*, *in* Blurred Boundaries: Migration, Ethnicity, Citizenship 33 (Rainer Bauböck & John Rundel eds., Ahsgate Publishing, European Centre Vienna, 1999); *see also* Francisco Ibarra Palafox, Minorías etnoculturales y Estado nacional, 196-216 (UNAM, 2005).

[27] About the idea of an imagined community as a base of national identity, *see* Benedict Anderson, Imaged Communities: Reflections on the Origin and Spread of Nationalism (New Left Books, 1983).

[28] *See* Rainer Bauböck, *supra* note 26.

late in order to qualify as full citizens, which implies a huge sacrifice for these minorities in terms of cultural rights.

In fomenting a single national identity, the national model involves a disregard for the cultural identities of immigrants who have just begun the integration process in the receiving nation. Furthermore, the model ignores preexisting national minorities, such as indigenous peoples or sub-State nations (Basques, Catalans, etc.), which are excluded from integration. This also affects their ability to enjoy basic liberties and fundamental rights.

In contrast to the national conception, the second model conventionally assumed by constitutions is the republican one that favors political society and political participation. Here, political society takes priority over any other affiliation, such as national, ethnic, religious or cultural. This concept encourages patriotism and civic virtues while promoting political participation. Thus, citizenship is given to those engaged in public affairs and not necessarily to those who have the same national affiliation.[29]

With regard to ethno-cultural diversity, the republican model has a serious problem: it often excludes minorities from citizenship since it privileges the exercise of political rights that minorities do not have. Since republicans only consider as full citizens those who have continuously participated in the political life of the State, this is almost impossible for minority members. Neither is the republican model suitably designed to value minority cultures. On the contrary, it tries to overcome any national, ethnic, religious or cultural identity to assign citizenship only to those who share a common public life. In other words, while for the national model only a culture is relevant, for the republican one, nations and cultures are irrelevant. Negating peoples' cultures is problematic because they give the context for persons decisions and, in doing so, individuals are free; that is to say, because it is the culture which gives meaning to options, people can only be free when they have a culture in which they choose between different significant alternatives. It should be added that the republican model frequently tends to be elitist. For instance, in the Greek polis and in the cities of Venice and Florence (in the early stages of the Renaissance), citizenship normally combined a republican element with an elitist one, such as property ownership. Thus, according to the republican-elitist concept, the only recognized citizens were those who were qualified, namely, those owning property, well-educated or willing to participate in politics, excluding working classes, women, any ethno-cultural minority and slaves.

It is clear that neither of these two models is suitable for incorporating the growing ethno-cultural diversity of contemporary States. These models were more appropriate for homogenous political societies than for existing ones. While political realities have changed, the theory of citizenship has been adamant in issues regarding cultural plurality. In consequence, it is essential to rethink citizenship in terms of this cultural diversity.

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[29] *See id.*

V. Citizenship and Ethno-Cultural Diversity

A new and more flexible concept of citizenship for ethno-cultural minorities should integrate cultural elements, territorial residence and mobility rights. In essence, the new citizenship should meet the following characteristics:

1. Granting members of ethno-cultural minorities access to basic rights and liberties.
2. Integrating cultural aspects.
3. Including a set of basic socio-economic rights for individual development.
4. Incorporating residence as an essential rule for acquiring citizenship (*jus residenci*).
5. Adding freedom of movement as a right of citizen status (*jus transitus*).

Each of these characteristics can apply to assigning citizenship to the main existing minority groups, except for numbers 3 and 4, which concern minorities formed by the international migratory process. Each point will be examined below.

1. First, an essential prerequisite to any concept of citizenship is to provide everyone, including members of ethno-cultural minorities, access to basic rights and liberties on equal terms. Some of these rights include freedom of expression, freedom of thought, the right of conscience, right of transit, freedom of association and the right to due process of law. These characteristics should be established from the beginning because ethno-cultural minorities are often excluded from access to basic rights and freedoms. In consequence, any model that tries to establish a balance between minorities and the dominant society must begin by giving priority to the recovery of these basic rights. Moreover, the fulfillment of this requirement is consistent with the first principle of justice, as established by Rawls.[30]

The intention behind this is not to create a privileged position for minorities; on the contrary, it aims at reducing the inequality gap between members of the dominant societies and those of ethno-cultural minorities since the current conditions for citizenship (established mainly by the national and the republican models) have become exclusionary rather than equalitarian, restricting minorities from full access to their basic rights.

2. Citizenship must incorporate a cultural element since culture is the framework that allows people to enjoy their basic rights and freedoms. As explained by Kymlicka, Raz and Tamir, culture is indispensable for assigning value to different options; only through a particular culture can we identify what is really valuable for us.[31] In other words, a person is truly free if he can

[30] *See* John Rawls, A Theory of Justice (Oxford University Press, 1973).

[31] With regard the relationship between culture and freedom, see generally Will Kym-

distinguish what is valuable in order for him to live a "good life", and only through a particular culture can a person or group identify what is really worthwhile. Without assigning a value to different options, it would not be possible to make a choice and without the ability to choose from meaningful options, it would not be possible to exercise the right of freedom. In short, without a culture, we could not be free nor truly exercise our rights.

Therefore, it is of the utmost importance for countries with high levels of immigration and those with indigenous peoples to promote bilingual education. This is an indispensable bridge between minority cultures and the State's dominant culture. Bilingual education is also an essential vehicle to enjoy basic rights and liberties. How else can immigrants and native peoples exercise their fundamental rights, if they do not have enough court translators? It would simply not be possible.

In cultural terms, the national and the republican models are not suitable for integrating the different cultures that coexist in contemporary States. On one hand, the nationalist model, which could be called uninational, favors the construction of a single cultural identity or a dominant culture, which is imposed on the members of ethno-cultural minorities. On the other hand, cultures are almost irrelevant to the republican model as it tries to build citizenship on the basis of people exercising their political rights; for republicans the most important rights are the "civic rights", not the cultural ones.

Only a multicultural model of citizenship will allow the coexistence of different identities to be fully appreciated and valued. However, this model does not intend to create "cultural islands" within national States. For example, the fact that significant place is given to the cultures of indigenous peoples does not imply the dismantling of the dominant national culture, nor the formation of cultural ghettos, but an opportunity for minorities to implement all their cultural practices. In the long term, such practices will promote social integration among minorities within the dominant society.

A multicultural model of citizenship must build a common background, so that different cultures may coexist within the same State and with mutual respect. From an essential agreement on the basic rights and liberties, a kind of plural citizenship can be built. These basic rights and liberties would serve as the foundations on which a consensus on multicultural citizenship can be built. In other words, from those basic rights and liberties that must be respected by all, overlapping agreements could be created around the different ethno-cultural identities that coexist in contemporary national States.[32]

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licka, *supra* note 1; Joseph Raz, *Multiculturalism, a Liberal Perspective*, in Dissent (1994); Yamir Tamir, Liberal Nationalism (Princeton University Press, 1993).

[32] Regarding the overlapping consensus, *see* John Rawls, Political Liberalism (Columbia University Press, 2nd ed., 2005); Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, *in* Ronald Beiner, Theorizing Citizenship (State University of New York Press, 1995).

3. As stated above, since the appearance of social constitutionalism, any design for a civic institution should incorporate basic socio-economic rights, which principally consist of the right to basic subsistence, and not only referring to the typical first generation rights. These socio-economic rights are also a prerequisite for people to access their basic rights and liberties. For instance, without a minimum wage to ensure adequate food and medical care, it would not be possible to enjoy other rights. Among the socio-economic rights provisions we can find the rights to housing, health care, food, water and social security.

Hence, any concept of citizenship should include the main socio-economic rights for an individual's well-being, as T.H. Marshall established in his seminal book *Citizenship and Social Class,* written when the welfare State was still in its initial phases. In fact, Marshall´s main contribution to the theory of citizenship was in determining that any citizenship policy should take into account basic socio-economic rights, instead of only focusing on the traditional rights common in the 19th century.

4. In response to intense international migration, it is necessary for residence to become a key element for acquiring citizenship. Unlike national and republican models, citizenship should be more flexible and recognize the possibility of granting citizenship to immigrants based on simply living for a long period of time in the national State territory. Hence, these immigrants, whether irregular or not, would be able to obtain citizenship after proving a minimum period of residence in the receiving State and demonstrate their desire to acquire citizenship.

A citizenship model that incorporates the rule of residence is the only one suitable to accommodate ethno-cultural minorities formed by international migration. Considering that the organization of modern States is determined by well-defined internal borders, citizenship that incorporates the rule of residence (*jus residenci*) and creates citizen status that corresponds to the resident population in the State, would be the only one of the three models that includes foreign workers, asylum seekers and undocumented migrants, the three main categories of foreign migrant residents in receiving countries.[33]

Jus residenci allows the unification of citizens and all the groups of immigrants who had been subjected to the exclusion of citizenship and were, for a long time, considered foreigners. If it does not suppress all the differences, it at least weakens them by extending rights, the traditional prerogatives of formal citizenship, to the members of minorities who have not yet been naturalized and can prove the residence time required by the receiving State. Of course, this residence period should never be too long because it would discourage people from completing the process of incorporation: between three and five years might be enough for immigrants who wish to acquire the new citizenship.

[33] *See* Rainer Bauböck, *supra* note 26.

This does not mean that *jus soli* and *jus sanguinis* should be ignored as rules for granting citizenship. These rules are essential for determining citizenship, inasmuch as they apply to the vast majority of the population in every national State. *Jus residenci* or rule of residence, however, recognizes anyone who has decided to live in the territory of the State and has lived there for a certain time. Whereas *jus soli* and *jus sanguini* allocate citizenship from the beginning of a person's life and look at a person's past, *jus residenci* should be viewed as forward-looking and implies an act of will on behalf of those who have moved to a country different from that of his birth and decided to settle there.[34]

In other words, the rule of residence serves as an adjustment to *jus soli* and *jus sanguinis* and produces a full nominal order of origin. As a result, *jus residenci* can be used to correct the granting of citizenship made either by *jus soli* or *jus sanguinis* and when there is a permanent discrepancy between the place of birth and the country where someone lives. Thus, the rule of residence might be considered "a rule of inclusion".[35]

Indeed, the master rule of citizenship should always be a rule of automatic transmission (through *jus soli* or *jus sanguinis*) from one generation to the next. However, when a corrective rule is necessary, the rule of residence (*jus residenci*) regulates what might be called "secondary admission"; that is, granting citizenship to immigrants, whether irregular or not, who want to acquire it and have permanently resided in the receiving State.[36] It should be pointed out that combining *jus soli* and *jus sanguinis* with *jus residenci* does not completely exclude irregularities like those arising from the existence of people without citizenship or with multiple citizenships. However, it can significantly reduce the problems that arise from transnational migration for either economic or political reasons.[37]

5. Finally, the right of transit (*jus transitus*) must be added to granting citizenship for migrants in transit from one country to another. In attention to the important developments in means of communications and transportation during the 20th century, the phenomenon of transnational migration has acquired a dimension and intensity never experienced before. In consequence, for example, an important number of immigrants that are dispersed in receiving States regularly go back to their countries of origin to renew their cultural and family ties. This is particularly true for Mexican immigrants who live in the United States since the extensive border between the two countries facilitates territorial movement.[38] Nonetheless, this phenomenon is not exclu-

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[34] *See* Rainer Bauböck, Transnational Citizenship. Membership and Rights in International Migration 32 (Edward Elgar Publishing Limited, 1994).

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] Jorge Bustamante, Migración internacional y derechos humanos (Instituto de Investigaciones Jurídicas, UNAM, 2002).

sive of Mexican-Americans: an important number of immigrants around the world do the same. In Europe, for example, similar trips are made by Turkish immigrants between Germany and Turkey.

It is not enough to grant citizenship after a long period of residency. It is also essential not to prevent immigrants from going back to their country of origin to renew their cultural ties. Without the opportunity of coming in contact with their first culture, it is not possible for minorities to make significant choices since culture is indispensable to accessing basic rights and liberties, as explained above.

Special attention should be given to migrants who are *en route* to settle in another country, as in the case of Mexican and Latin-American migrants who go across Mexican territory to enter the United States. This is the same situation for thousands of migrants traveling through Northern African countries with the intention of entering Europe, or transiting through certain European countries to enter another. The vulnerability of this type of migrants is overwhelming and there are abundant cases of human rights violations. Not only do they have to travel hundreds of miles in high-risk conditions, but they are also subject to constant abuse by public and private security forces, as well as by criminal groups.

The obvious vulnerability of this category of migrants makes it imperative to create a *transnational transit right* or a *right of transit for economic reasons* (if we consider that most migrants are seeking work) that might be recognized by constitutions of national States that are experiencing these migration flows. This right of transit should be assigned as a temporary citizenship that can be named *migrant or moving citizenship* to provide sufficient security to those travelling through one country to reach another.

The transit right should be a non-territorial right or a transnational one since freedom of movement can no longer be regarded as a purely national-State right without creating a legal fiction that is unsustainable according to the socioeconomic realities imposed by migration. That is to say, the transit right should recognize not only citizens of the State, but also migrants in transit to another national State. Notwithstanding the fact that a right of transit would remain limited by State boundaries as national States continue to exist, this right must be open to migrants as a transnational right as it is a right inherent to any migrant who is forced to leave his country of origin for economic or political reasons. Only then, it would be possible to create a temporary status of citizenship to guarantee the migrant transit from one country to another, for as long as said transit lasts.

The transit right as a condition for the creation of a special status for migrants contradicts the State-centered approach in which it is the action of the State alone that defines what is political and who are citizens. For this approach, which is dominant in constitutional studies, it is only the State that has the right to determine who are citizens and who are foreigners or intruders. A migrant or moving citizenship moves to an approach in which

the individual fits into a structural framework which compels the individual to move on to another country for economic, political or cultural reasons. As a result, these individuals have the right to move and to be protected during their journey.[39] Leaving the State-centered approach would also help decriminalize migratory flows around the world,[40] as well as help introduce human rights into the concept of citizenship.[41]

A last word: building a more flexible theory of citizenship for ethno-cultural minorities is a project that will take time and is barely beginning. However, the five points listed above could serve as a guide to start on the main pillars of a multicultural citizenship.

[39] Elspeth Guild, Security and Migration in the 21st Century (Polity Press, 2010).

[40] Marta Monclús Masó, La gestión penal de la migración. El recurso al sistema penal para el control de los flujos migratorios 544 (Editores del Puerto, 2008).

[41] Yaffa Zilbershats, The Human Right to Citizenship 257 (Transnational Pub., 2002).

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DEAD HAND CONSTITUTIONALISM: THE DANGER OF ETERNITY CLAUSES IN NEW DEMOCRACIES

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Abstract. *The 2009 Honduran constitutional crisis, in which sitting President Manuel Zelaya was captured from the Presidential Palace and flown to Costa Rica under the cover of night, illuminated the danger of entrenched and eternity clauses in fledgling democracies. This article discusses the way such clauses have been used in the past, identifying three general categories of historical eternity clauses. These categories include clauses that address the character of the government, the spirit or principles of the constitutional regime and finally the character of the country. The article also discusses potential problems that arise when such clauses are written into Constitutions of transitional democratic regimes.*

Key Words: *Eternity clause, entrenched clause, constitutional development, amendment process, democracy, Honduras.*

Resumen. *La crisis constitucional de Honduras en 2009, en la cual el presidente en turno, Manuel Zelaya, fue capturado en el Palacio Presidencial y llevado a Costa Rica en el transcurso de la noche, reveló el peligro que conlleva la existencia de las "cláusulas de eternidad" para las democracias nuevas. Este artículo analiza la manera en que dichas cláusulas han sido utilizadas en el pasado, identificando tres categorías generales que históricamente las caracterizan. Estas categorías distinguen entre cláusulas que abarcan el sistema de gobierno, el espíritu o los principios del régimen constitucional y, finalmente, el carácter del país. Este artículo también analiza los problemas potenciales con las cláusulas de eternidad en contextos de transición democrática.*

Palabras clave: *Cláusulas de eternidad, desarrollo constitucional, reforma del Estado, Manuel Zelaya, democracia, Honduras.*

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I. Introduction

On June 28, 2009, a group of soldiers entered the residence of Honduran president Manuel Zelaya in Tegucigalpa. Over the next several hours, Mr. Zelaya would be taken from his residence while still in his pajamas and forced onto a plane bound for San Jose, Costa Rica.[1] While the event would set off months of political distress and wrangling to attempt to figure out who the rightful head of the country was, the legal issues that led up to that fateful moment shed tremendous light on the state of constitutional development in the Global South and throughout the world.

During the Cold War, as in many Latin American countries, Honduras had experienced much political turmoil. This included successive experiments with military rule and several coups. Finally, in 1980, during a decade long period of military rule, a Constituent Assembly was elected to draft a Constitution. This Constitution would come into effect in 1982, just a week after the election of a civilian president.[2]

The Constitution of Honduras does many things. As any country's Constitution should, it creates guaranteed rights for the people of Honduras. The document sets up the government and how it should work. Among the decisions that were made by the Constituent Assembly, it was determined that a Presidential term should last four years and no president can run for re-election.[3]

However, the country's experience during the Cold War had influenced the Constituent Assembly and colored its views. Among these views was a firsthand understanding that elected officials do not always relinquish power on their own volition, often even changing the law in an effort to hold on to

[1] Elisabeth Malkin, *Honduran President is Ousted in Coup*, N. Y. Times, June 28, 2009, *available at* http://www.nytimes.com/2009/06/29/world/americas/29honduras.html?_r=1 (last visited June 30, 2011).

[2] U.S. Dept. of State Bureau of Western Hemisphere Affairs, *Background Note: Honduras: History*, http://www.state.gov/r/pa/ei/bgn/1922.htm#history.

[3] Honduran Constitution, articles 237, 239.

and consolidate their own power.[4] With this in mind, the Constitution was drafted containing article 374, which states in that the Constitution "may not be reformed, in any case […] the constitutional articles that relate to […] the presidential term […]".[5]

The first use of an unamendable constitutional provision began with the world's first experiment in democratic constitutionalism, the American Constitution of 1787. In this document, without the consent of the state being prejudiced, no act can change a state's equal suffrage in the United States Senate.[6] While this particular stipulation may seem simple, "entrenched" or "eternity" clauses have become an extremely complex and vastly important element of modern constitutional design. Such provisions can be found in foundational documents from throughout the world related to many different areas of law.

Often such entrenched principles are related to a country's past experiences. For example, one of the first modern constitutions to contain an eternity clause was Germany, in its first Constitution after the National Socialist Party ran rampant throughout Europe.[7] The entrenched elements of this document mainly create assurance that such atrocities will never again be committed.[8] Similarly, eternity clauses can be used to cement a national identity. This is the case of Constitution of Turkey, which contains the assurance that the secular identity of the Constitution cannot be altered.[9]

While such provisions can have tremendous benefits, such as the preservation of unity and the protection from tyranny presented above, there is often a complaint of "dead hand" democracy, in which constitutional decisions made by past generations cannot be changed by the current population, without regard to the current demographic or political feeling.[10] Additionally, past societies have been adamant in entrusting all lawmaking to the current populace. As Melissa Schwartzberg writes, the ancient Athenians believed in an "ideology of pragmatic innovation" that would have been fundamentally altered by entrenchment.[11] While this may be contrary to modern constitutionalism, it does demonstrate the risk involved in the creation of eternity clauses.

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[4] Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 Loy. U. Chi. L. J. 327, N. 96 (2010).

[5] Honduran Constitution, article 374.

[6] U.S. Constitution, article 5.

[7] *See* Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 Flor. J. Int'l. L. 169, 208 (2008).

[8] *See Id*.

[9] Posting of Tom Ginsburg to ComparativeConstitutions.org, http://www.comparativeconstitutions.org/2009/08/puzzle-of-unamendable-provisions-debate.html (Aug. 12, 2009).

[10] *See generally* Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Penn. L. R. 1025, 1033 (2010).

[11] Melissa Schwartzberg, Democracy and Legal Change 31 (2007).

By creating an eternity clause, the constitutional drafters reduce "pragmatic innovation" of the country's future leaders.

This type of decision is particularly dangerous when applied to social or moral choices that can change with future generations. Take, for example, the Corwin Amendment to the United States Constitution during the run up to the United States Civil War. If the amendment had been ratified in 1861, it would have forbidden the Federal Government from abolishing or interfering with slavery.[12] As an entrenched amendment, the amendment could not have been altered. Needless to say, such a moral judgment is an unacceptable exercise of "dead hand" democracy.

Such complaints pose particular problems in the developing world where the temptation to use extra-constitutional means for achieving goals is much stronger. There is a strong correlation between low income countries and the potential for civil war, coup or continuing civil strife.[13] The study of unamendable provisions is vital for constitutional analysis because when such provisions fail, they "[…] risk the unintended consequence of premature constitutional death […],"[14] an all too realistic possibility in the already fragile political system of new democracies.

This is precisely the purpose of this article. In examining past eternity clauses, one can hope to establish a rough sketch of what makes a successful one. The first step in doing this will be to examine three particular types of eternity clauses. The first is what will be referred to as the "character of government" clause. In such sections, it is determined that the government will be run or designed a certain way. Such clauses can ingrain term limits or power sharing agreements, protecting them from alteration for the whole of the constitutional regime. The second such provision that will be discussed is perhaps the most important. I will call these sections "spirit" or "principle" clauses. There are several democracies in the world that have either included stipulations that the "spirit" or "principles" of the Constitution cannot be altered and, in extreme settings, the Judiciary has struck down amendments on grounds that said amendments fundamentally alter the judicially determined spirit of the constitution. Finally, we will analyze what will be referred to as the "character of country" clause. In such stipulations, mentioned above for Turkey, the drafters of the Constitution envision a type of country that cannot be changed.

After examining the above types, this paper will analyze what lessons can be drawn from the successes and failures of the three types. Hopefully, this will create a window into the importance of careful analysis when creating

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[12] Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 Col. J. L. & Soc. Prob. 251, 276 (1996).

[13] *See generally* Paul Collier, *The Bottom Billion*, at 17-19 (73% of the world's poorest people live in countries that have either recently been in a civil war or currently are involved in one. Additionally, by halving a country's income, its statistical likelihood of civil war is doubled).

[14] *See* Ginsburg, *supra* note 9.

eternity clauses in new democracies. Whether taking certain issues completely off the table is a positive thing for developing countries or not is certainly a matter for debate; however, whenever that decision is made there should be a tremendous amount of thought beforehand. Additionally, this study should provide some insight on what happened in Honduras in June of 2009.

II. Case Studies & Categories

It is important to note that the categorization of eternity clauses is an imperfect science. There are many entrenched provisions that could feasibly be included in all three of the sections below. Many of these clauses contain elements about the way a given government is crafted in an effort to determine the country's character. Other clauses also either expressly include or have been interpreted to include a designation of what the inviolable spirit or principle of a Constitution is. Despite this difficulty, I have attempted to break them down into what I believe is the element of the clause that is the most important and worthwhile to our analysis.

1. *Character of Government Clauses*

The two major "character of government" clauses that will be discussed in detail here are article 5, the guarantee of equal suffrage in the United States Senate, and the 2009 constitutional crisis in Honduras mentioned above. Despite being relatively similar provisions, the American guarantee of equal suffrage (each American state has two senators and two votes in the Senate without regard to population) has been relatively uncontroversial for more than two hundred years while the Honduran eternity clause was unable to last three decades without being the subject of well-deserved international headlines.

Briefly, the "Connecticut Compromise of 1787" was a part of the U.S. Constitutional Convention that would assuage the fears of smaller states that they would be overrun by larger states in any type of national union. This agreement created the bicameral legislature with a lower house, consisting of state representatives based on population and an upper house that would have two members from each state. Additionally, this clause was permanently entrenched in order to ensure that larger states would not simply amend the Constitution after the smaller states had joined the union.

The language of the clause reads "[…] Congress […] shall propose amendments to this Constitution […] provided that […] no state, without its consent, shall be deprived of its equal suffrage in the Senate."[15] In the long constitutional history of the United States, this clause has not received much attention. It is presumed that based on the history of the provision including

[15] U.S. Constitution, article 5.

the Constitutional Convention debate and the debate over ratification, legal scholars and historians have very little doubt as to what was intended by the clause.[16] In this rather peculiar case, the entrenched stipulation regarding the makeup of the United States Senate has caused virtually no strife or interest from litigants or politicians in the more than two hundred years of American Constitutional history.

The second example of a "character of government" clause is the Honduran Constitutional entrenchment of the presidential term limit. As previously mentioned, the Honduran Constitution limits each president to a single four-year term. It is further clarified that this particular provision cannot be altered by amendment.[17] In fact, the Constitution stipulates that any elected official who attempts to alter this restriction be immediately removed from office and banned from public office for ten years.[18]

While this clause may seem relatively innocuous, it is not without complications. The background that resulted in a pajama-clad Manuel Zelaya being deposed and flown to San Jose sheds certain light on the care that must be exercised when imposing even the most seemingly straightforward eternity clauses, especially in new democracies or the developing world.

The Constitution of Honduras places a great deal of importance on citizen participation in democracy. The Constitution specifically establishes that referenda and plebiscite are "[…] of vital importance in national life."[19] Similarly, the Constitution makes citizen participation in these exercises mandatory.[20] Additionally, under article 5 of the Constitution, the president of the Republic has the right to call for such citizen consultation.

It is the combination of vital citizen participation and the entrenched Presidential Term Limit that triggered the removal of President Zelaya from office. Zelaya, in the lead up to the country's 2009 general elections, proposed a ballot referendum. This referendum asked whether the citizenry supported convening a new National Constituent Assembly that would draft a new constitution. This new Constitution would allow a president to serve more than one term in office. This referendum was adjudged to be illegal by nearly every legal body in Honduras including the Judiciary, the Bar Association and many others.[21]

In response to these rulings, then-President Zelaya withdrew his attempt to hold a referendum and instead chose to order an "opinion poll."[22] It is

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[16] *See generally* Vincent J. Samar, *Can a Constitutional Amendment be Unconstitutional?*, 33 Ok. C. Uni. L. R. 667 (2008).

[17] *Id.* article 374.

[18] *Id.* articles 237-239.

[19] *Id.* article 5.

[20] *Id.*

[21] *See* Miguel A. Estrada, *Honduras' Non-Coup*, LA Times, July 10, 2009, at 2, *available at* http://articles.latimes.com/2009/jul/10/opinion/oe-estrada10.

[22] *Id.*

important to note that the "opinion poll" would not, in itself, convene a new National Constituent Assembly. Instead, the ballot would merely ask voters if they wanted to hold a referendum in the 2009 general elections to that effect.[23]

The change in the referendum did not modify the Honduran Supreme Court determination that President Zelaya was illegally abusing his power. Just days before the ballot was to take place, the Supreme Court of Honduras issued a warrant to the military, calling for the president's arrest.[24] This warrant lead to President Zelaya's previously discussed arrest and deportation.

It is important to realize that even seemingly innocuous eternity clauses can cause tremendous upheaval. While the clause seemed to simply lock in a permanent term limit for future presidents of the small, Central American country, complications arose when Mr. Zelaya either did not understand the breadth of that restriction or chose to ignore it. Whether it is to be called a coup or a legal state action, Mr. Zelaya's actions and the response of the Supreme Court and the Honduran Military with regard to the state's eternity clause brought about the premature removal from office of a sitting president. Regardless of one's personal feelings towards Mr. Zelaya and his actions, a president's forcible removal from office by the nation's military is not the desired end of a Constitutional regime.

2. *Spirit or Principles Clauses*

The second type of eternity clause to be analyzed is the prohibition from introducing any amendment that will fundamentally alter either the "spirit" or the "principles" of the Constitution. Such prohibitions exist in many advanced democracies throughout the world. In this paper, the experiences (and non-experiences) of India, Germany, Norway, France and Italy will be discussed.

India is a much different case than those discussed above. Its importance to the analysis of eternity clauses stems from what would be referred to in American jurisprudence as an activist judiciary. In its relevant part, article 368 of the Indian Constitution states "Notwithstanding anything in this Constitution, Parliament may […] amend by way of addition, variation or repeal any provision of this Constitution […]."[25] While this may seem straightforward, the Indian Supreme Court interpreted it to include another stipulation. In *Kesavananda Bharati v. State of Kerala*, the Supreme Court stated that while

[23] *See* Will Weissert, *Honduran Leader Pushes ahead with Divisive Vote*, NEWSVINE.COM, June 25, 2009, http://www.newsvine.com/_news/2009/06/25/2968321-honduran-leader-pushes-ahead-with-divisive-vote.

[24] *See* Estrada, *supra* note 21.

[25] Indian Constitution, article 368(1)

the Constitution allows amendment to any provision, it "[…] does not enable Parliament to alter its basic structure or the framework of the Constitution."[26]

It was through this decision that the "basic structure" doctrine was born into Indian legal parlance. By the reasoning of the Supreme Court, the term "amend," as written in the Constitution, does not include the ability to fundamentally change the character of the Constitution. Any amendment that would create this vast a change is not just an amendment, it is something more.[27]

In this way, the drafters of the Indian Constitution may not have contemplated the fact that they were including a "spirit" or "principle" type of eternity clause when they wrote the Constitution; however, recent legal history in India has treated the document as though one were contained. Thus, for our purposes, the treatment given to it by the Supreme Court is the same as if the words were included on the document.

When considering the Court's decision, it is useful to examine the political context that brought about the Basic Structure doctrine. Perhaps most important for the doctrine structure is the relative ease with which the Indian Parliament has traditionally amended the Constitution. Through 2005, in only fifty-five years of existence, there have been more than ninety amendments to the Constitution,[28] a tremendous contrast to the difficulty of amending constitutions in many constitutional regimes. Thus, through the ease of the amendment process, it was prone to abuse by overzealous members of Parliament.[29]

In *Bharati*, the Indian Supreme Court was asked to examine three amendments all of which would have greatly enhanced Parliamentary power. The first of these was the 24th Amendment undoing a past Supreme Court case by amending the Constitution to allow for constitutional amendments that take away from the fundamental rights section of the constitution. Secondly, the 29th Amendment immunized land reform statutes from judicial review and finally the 25th Amendment allowed all state and federal statutes to avoid judicial review of the governing body simply by stating they were "Directive Principles of State Policy."[30]

Delivering its opinion on April 24, 1973, the Court determined that the first two amendments were constitutional, stating that there is nothing inherently unconstitutional about insulating certain statutes from judicial review. However, the Court's reasoning on the 25th Amendment brought about the "Basic Structure" doctrine. In the reasoning of Justice Khanna,

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[26] Kesavananda Bharati v. State of Kerala, AIR 1973 S.C. 1461, 1510.

[27] *See* Sam Brooke, *Constitution Making and Immutable Principles*, at 63, *available at* http://dl.tufts.edu/view_pdf.jsp?pid=tufts:UA015.012.DO.00074.

[28] The 93rd Amendment was passed in 2005 and came into effect on Jan. 20, 2006.

[29] *See* Brooke, *supra* note 27, at 65.

[30] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 Yale J. Int'l L. 207, 226 (2009).

> […] the word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form […] Provision regarding the amendment of the Constitution does not […] embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by article 368.[31]

Ingrained in this opinion is a judicial reading of what the basic structure of the Indian Constitution contains. The Justices signing onto the majority opinion included federalism, rule of law, the separation of powers, secularism and judicial independence. This was not meant to be exclusive, but there was also no test or method given that would allow a future court to determine whether something was a part of the "Basic Structure."[32]

This ruling would inflame passions both for and against the amendments. It should also be noted that the fervor for and against the basic structure doctrine did not escape the Judiciary. In fact, the case had been reviewed without a petition to the High Court, something that frustrated many of the Justices.[33]

While those in favor of radically changing the country's Constitution claimed that it was Indira Gandhi's "defeat," Ms. Gandhi acted quickly to prove them wrong. The day following the decision the government appointed the most senior Justice from the dissent to become the next Chief Justice.[34] Before that time, nearly since the birth of modern India the next most senior justice had ascended to the Chief Justice seat of the Supreme Court. In this case, three more senior justices were passed over in favor of the pro-government A.N. Ray. All three Justices immediately resigned in protest.[35] As tensions continued to run high, critics accused Ms. Gandhi of attempting to undermine judicial independence.[36]

The doctrine would again be tested in 1975 during another period of high political tension in India. Prime Minister Indira Gandhi declared emergency rule, consolidating her power after a court adjudged her previous election to

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[31] *Id.* at 227 (quoting Kesavananda Bharati v. State of Kerala, *supra* note 26, at 1860).

[32] *Id.*

[33] Venkatesh Nayak, *The Basic Structure of the Indian Constitution* 8, Human Rights Initiative, http://www.humanrightsinitiative.org/publications/const/the_basic_structure_of_the_indian_constitution.pdf.

[34] Chief Justice Sikri, the Chief Justice of the Court and a member of the majority opinion, was due to retire two days after the opinion was released.

[35] *See* Inder Malhotra, *Whose Constitution is it Anyway?*, Indian Express, Aug. 7, 2009, *available at* http://www.indianexpress.com/news/whose-constitution-is-it-anyway/499111/0.

[36] *Id.*

have been fraudulent.[37] The emergency rule gave the Prime Minister and her cabinet vast powers to pass legislation. The group would use this emergency power to pass the 39th Amendment, insulating all elections from judicial review. However, on appeal in the fraud case against Ms. Gandhi, the Indian Supreme Court found the amendment to have violated the basic structure of the Indian Constitution.

Demonstrating the difficulty with vagueness in "spirit" or "principle" eternity clauses, the learned Justices of the Indian Supreme Court could not agree on just what element of the "Basic Structure" doctrine was offended by the amendment. Interpretations from the Justices included that the amendment was an affront to the rule of law, that the principle of democracy was wounded because it prevented free and fair elections, and finally that the principle of judicial independence was frustrated along with the dismissal of judicial review.[38]

In recent litigation involving the "Basic Structure," the Supreme Court of India has maintained the concept and has even extended it to other areas. For example, in *Minerva Mills* the Court struck down an amendment that would completely strip all courts of the power to review any amendments. This decision lead commentators to believe that there was a minimum core of judicial review that would forever be protected as part of the "Basic Structure."[39]

In comparison to the tremendous experience of India above, Germany has had very little turmoil with regard to its eternity clause. Article 79 of the German Basic Law creates a set of principles that are inviolable, even by Constitutional Amendment. These include human dignity, other human rights, the dissolution of the Federal State and the principle of popular sovereignty, among others.[40] The entrenchment of human rights and dignity is generally seen as a response to the Nazi belief in rights of the community over human rights.[41] Collectively, the concepts entrenched in Germany's eternity clause have come to be known as the "immutable principles."[42]

Unfortunately for our analysis, jurisprudence at the Federal Constitutional Court of Germany regarding the eternity clause is extremely limited. In three cases that have been presented before the Court, an incredibly broad interpretation of the clause has been proposed repeatedly, though there is some doubt whether it is the current state of the law. As observed by Sam Brooke,

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[37] Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 Yale J. Int'l L. 207, 228 (2009).

[38] *Id.* at 229.

[39] *Id.*

[40] German Basic Law, articles 1, 20 ,79(3),

[41] Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 Flor. J. Int'l. L. 169, 208 (2008).

[42] Brooke, *supra* note 27, at 68.

> […] such concepts as human dignity, the separation of powers, and the rule of law, could all serve as grounds for declaring an amendment unconstitutional. Other concepts, such as militant democracy, the party state, justice, and the idea of a moral code, are viewed by commentators as being underlying principles of the German Constitution, and thus, they, too, could hypothetically be invoked to void an amendment.[43]

Such a broad reading of the entrenchment clause is particularly significant when one compares the large number of possible "immutable principles" with the potentially expansive reach of the amendment. In fact, the wording of article 79 section 3 uses terminology that refers to any amendment which "touches" articles 1 or 20.[44] This language could open the door for an interpretation that would not require an amendment to violate the principles in order to be struck down. Instead, this reading would allow the Federal Constitutional Court to strike down amendments that merely affect the fundamental principles, regardless of what that effect is,[45] a proposition that would no doubt create tremendous tension between the elected branches and the Judiciary.

To date, however, the Court has chosen to interpret the eternity clause quite narrowly. Despite the insistence of a group of four dissenting Justices, the Court refused to use the "immutable principles" clause to strike down an amendment that allowed secret electronic wiretapping and took jurisdiction of lawsuits surrounding wiretapping from the courts to an administrative panel created by Parliament.[46] While the Court was willing to put strict restrictions on the process, it found that the use of wiretaps were an important part of anti-terrorism investigation and therefore did not run afoul of the inviolable right of human dignity.[47]

In the German example, we see an interpretation that differs sharply from the Indian case. While the "immutable principle" doctrine has the potential to be extremely broad and could affect nearly every amendment to the Basic Law, the Federal Constitutional Court has chosen to read it narrowly. While the Court has not used the eternity clause to strike down amendments that run afoul of the "immutable principles," it has used the article to ensure strict limits are placed on perceived violations of human dignity. While this approach shows tremendous deference to the elected branches of German government, it also ensures that they are bound by the Basic Law.[48]

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[43] *Id.* at 62.

[44] Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case*, 3 Int'l. J. Con. L. 680, n. 20 (2005).

[45] *See id*. at 684.

[46] *See id.* at 685.

[47] *See id.*

[48] Brooke, *supra* note 27, at 60 ("[i]n the *improbable* event that a provision of the Basic Law

On the other extreme, in sharp contrast to India, sit Norway, Italy and France. The Constitution of Norway reads, in relevant part, "[…] amendment must never […] contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution […]."[49] While this broad and aspirational statement provides a guide for the judiciary to ensure that the character of the Constitution remains fundamentally the same, it has been almost completely ignored by the country's courts. The common interpretation of the provision is that it is simply a guide for the legislature. In fact, that section of article 112 had been determined to be un-justiciable by the Norwegian judiciary.[50]

The same is true for the prohibitions in the French and Italian Constitutions. Both have provisions that forbid amendments to the Constitution that change the Republican form of government.[51] While it is not clear whether these provisions are justiciable, their value in court has never been determined. Whether that means that the respective nations find them of limited value or they are unenforceable in the judiciary is unknown.[52]

It may seem at first glance that the Italian and French Constitution's demand that the Republican form of government never be changed is either a "character of country" or a "character of government" eternity clause. I have placed it in this category because of the political reality behind the language of the Constitution. While like the Italian and French constitutions, the Turkish Constitution also demands that the Republican form of government never be changed, political reality has proven the Constitutional requirement of secularism much more important, putting it clearly within the "character of country" archetype. In the case of France and Italy, the lack of political and legal attention paid to the clauses makes it a much broader "spirit" or "principles" type of eternity clause.

Above we see the full range of judicial methods for handling broad "spirit" and "principle" eternity clauses. While the clause was created by the Indian Judiciary, the first served to protect the Judicial Branch against an overzealous parliament. This interpretation lead to extreme conflict between the Judiciary and the two elected branches of government, where the executive power attempted to "suborn" the Judiciary that was using the clause to strike down amendments in pursuit of government policy.[53] The second possible interpretation, chosen by the German Constitutional Court is an effort to take the middle road. While the article has not been used to strike down amendments, it has been used as a reminder of the Court's power to keep the Par-

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exceeded the outer limits of the higher-law principle of justice, it would be the Court's duty to strike it down". (quoting *Southwest State Case* 1 BverfGE 14 (1951)) (Emphasis added)).

[49] Norwegian Constitution, article 112(1).

[50] Brooke, *supra* note 27, at 68.

[51] *See* Italian Constitution, article 139; French Constitution, article 89(5).

[52] *See* Brooke, *supra* note 27, at 71.

[53] Inder Malhotra, *supra* note 35.

liament within the bounds of the Basic Law and to set limits on challenged amendments. Finally, Norway, Italy and France have all chosen to interpret the clause to mean virtually nothing. At most, the countries have interpreted the broad terminology to be a loose guidance to the legislature, rather than a justiciable requirement of their respective Constitutions.[54] This approach has not created vast rifts or tensions between the judiciary and the elected branches of government.

3. *Character of Country Clauses*

The predominant example of a "character of country" eternity clause is found in the Turkish Constitution. Pursuant to article 4, there are several "irrevocable provisions" in the first three articles of the Turkish Constitution.[55] These provisions include the Republican form of government and the characteristics of the Republic, including democracy and secularism.[56] A brief look at the history of the Republic of Turkey provides an important glimpse into this proviso.

In 1923, a General Assembly officially declared the Republic of Turkey. Prior to this time, the Turkish people and the land surrounding Constantinople was the center of the Ottoman Empire, an Islamic Caliphate. At the founding of the modern state, the Caliphate was abolished and replaced with a Republican form of government. Mustafa Kemal Ataturk was declared president of the young Republic. Five years later, in 1928, the clause in the Constitution retaining Islam as the state religion was removed and the Republic of Turkey officially adopted its secularist stance. Finally, five years after this, Ataturk died while enormously popular, as the president and military leader of the Turkish Republic.[57]

During these ten years, Turkey experienced a rapid transition from an Islamic Caliphate to a Western-style secular democracy. With this incredible transition came an extreme popular nationalism that centered on the ability of the once Islamist state to join the modernized international community in such a short period of time.[58]

It must be noted that since 1960, there have been three military coups in the Turkish Republic. A major reason that is often given for these coups is that the military sees itself as the protector of Ataturk's legacy and the protector of the country's secular nationalist identity. Whenever an elected government

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[54] *See* Brooke, supra note 27, at 68, 70-1.

[55] Turkish Constitution, article 4.

[56] *Id.* articles 1, 2.

[57] *Turkey Timeline*, BBC News, Feb. 27, 2010, http://news.bbc.co.uk/2/hi/europe/1023189.stm.

[58] *See generally* Nazim Irem, *Turkish Conservative Modernism: Birth of a Nationalist Quest for Cultural Renewal*, 34 Int'l J. Mid. E. Stud. 87 (2002).

strays too far from the so-called Kemalist model, the military stages a coup to put the country back on the secular track. In line with this political reality, the current Constitution was written after the most recent coup in 1982.

The Justices of the Constitutional Court have not been forced to deal with any direct challenges to secular identity, such as an amendment to create a state religion or merely remove the clause involving secularism. However, there have been many amendments struck down under the secularism requirement during Turkey's long and tumultuous history. In the interest of brevity, this paper will only discuss the most recent conflicts between the elected branches and the Constitutional Court.

The current dominant party in Turkish Politics is the Justice and Development Party ("AKP"). While the party leadership denies the label, often, especially in Western media, this party has been portrayed as a religious party with "Islamist Roots."[59] That title, along with the policy of the party, has frequently put it at odds with the country's Constitution and military. While it is well beyond the scope of this paper to determine whether this label is a fair or correct one, the party has pushed forward legislation and amendment packages that have appealed to its "conservative" social agenda.[60] This party currently holds the majority of seats in Turkey's unicameral legislature, the Grand National Assembly of Turkey as well as the seats of executive power including the prime minister and president.

The first experience of the ruling AKP with the Constitutional Court was in regard to the country's decades-old ban on Islamic headscarves. The ban did not allow the garments to be worn by public employees. An amendment to the ban, passed in 1997, also forbade female students at Turkish universities from wearing headscarves. It had been a campaign promise of Prime Minister Erdogan that he would rescind the ban.[61]

On February 9, 2008, the Grand National Assembly voted to ease the ban to allow women in Turkish universities to wear headscarves, in line with the prime minister's promise.[62] This was, however, only the first step in the drama that would unfold regarding the religious garments.

On appeal to the Constitutional Court, the amendment was annulled on grounds that it offends the Constitution's secular requirement.[63] While this was a tremendous defeat to the AKP's policy goals, it was not the most im-

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[59] *New to Turkish Politics? Here's a Rough Primer*, Turkish Daily News, July 23, 2007, *available at* http://arama.hurriyet.com.tr/arsivnews.aspx?id=-610584.

[60] *Id.*

[61] *See* Annette Grossbongardt, *Turkish Prime Minister Erdogan: Leader Says Headscarf Ban at Universities 'Unfortunate'*, Spiegel Online, Sept. 20, 2007, http://www.spiegel.de/international/world/0,1518,506896,00.html.

[62] *Turkey Eases ban on Headscarves*, BBC News, Feb. 9, 2008, http://news.bbc.co.uk/2/hi/europe/7236128.stm.

[63] *Court Annuls Turkish scarf reform*, BBC News, June 5, 2008, http://news.bbc.co.uk/2/hi/europe/7438348.stm.

portant potential outcome of the amendment for the Party. In response to the "violation" of secular principles, Turkey's chief prosecutor brought a case against the Party for anti-secular activities, a charge that could carry with it the party's disbanding and the lustration of up to seventy-one members of the AKP.[64]

While such a heavy handed punishment may seem extreme, it is not unprecedented in Turkish law. Throughout the course of the Constitutional Court's history, it has used its article 69 authority to dissolve parties for violating the entrenched principles with relative frequency. In fact, two parties had previously been dissolved for advocating the end of the headscarf ban.[65] Luckily for the AKP, the party was able to avoid immediate dissolution at the hands of the Court. As an illustration of how profoundly the Court takes its responsibility to uphold secularism, if one more member of the eleven Justice Constitutional Court had voted in favor of dissolution, the party would have been disbanded.[66]

As previously mentioned, this was only the *first* experience of the AKP with the Turkish Constitutional Court. Over the past few years the ruling AKP has proposed a series of amendments that would fundamentally change the country's Constitution.[67] There are tremendous arguments as to the positive and negative aspects of these reforms. As a brief rundown, the ruling party claims that the reforms are necessary to bring the country in line with traditional democracies in an effort to join the European Union; however, the opposition parties claim that the moves are just an attempt by the AKP and Prime Minister Erdogan to consolidate power.[68] Again, it is well outside the scope of this paper to comment on the arguments of each side; however, I will discuss the potential effect of the amendments on the relationship between the elected branches and the Judiciary.

The package includes twenty-six amendments designed to fundamentally alter the country's judiciary. It has been alleged that these amendments would greatly expand the president's power by allowing the executive to appoint a

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[64] *Id.*

[65] Yusuf Şevki Hakyemez, *Constitutional Court and the closure of Political Parties in Turkey*, Today's Zaman, May 13, 2008, *available at* http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=141728 ("[…] Welfare Party [RP, 1998] and the Virtue Party [FP, 2001] because they advocated the lifting of the headscarf ban. In the Welfare Party decision, moreover, its advocacy of the plurality of legal systems, and its reception to the Residence of the Prime Ministry of those who were wearing clothes, which violated the Revolution Laws, were held to be grounds for dissolution.").

[66] *See* Alex Stevenson, *Turkey Party AKP Saved from Extinction*, In The News, July 31, 2008. http://www.inthenews.co.uk/news/world/features/view-from-abroad/analysis-nine-lives-turkeys-akp-$1234119.htm.

[67] *See* Sabrina Tavernise & Sebnem Arsu, *In Turkey, Proposed Changes aim at Old Guard*, N. Y. Times, April 2, 2010, *available at* http://www.nytimes.com/2010/04/03/world/europe/03turkey.html.

[68] *See id.*

greater number of Justices on the Constitutional Court.[69] Such a possibility frightens staunch Turkish secularists, as the current president is a member of the AKP whom the Constitutional Court had previously forbidden from taking part in elections.[70]

The amendment package has not been ignored by the secularist Judiciary and military in the country, either. When asked about the reforms, a prosecutor of the Court of Appeals stated that "the secular democratic state in Turkey is in danger,"[71] a not-so-subtle hint of the watchful eye of prosecutors over the AKP's policy.

While it is unclear which came first in Turkey, the fervent secular nationalist identity or the entrenched clause, an entrenched clause in the country's foundational document can be used to cement a national identity. In the current case, that secular national identity has played a tremendous role in the shaping of Turkish politics and the creation of Turkish policy.

The Constitutional Court has played an important role in maintaining the character of the country envisioned by the Turkish Constitution. It is important to note that interfering with a country's "secular" character is not an exact standard; however, as the AKP is quickly learning, it does have tremendous consequences, including the potential dissolution of a ruling party.

The vagueness of the eternity clause is a reminder of the "spirit" or "principles" entrenchments above, with the addition of the passion that religion and secularism can enflame. Such ardor can allow for the creation of a "keeper" of that identity. In the case of Turkey, the self-appointed keepers of that identity, the military, have used a stray from the secular nationalist character as a justification for three coups over the past half century.

Viewed in the light of new democracies, this is a particularly dangerous proposition. In the event that the drafters of a new Constitution create an identity that will forever define the country's character, they simply cannot know what will become of the burgeoning democracy. Even if the drafters can truly be said to be speaking for the people they represent at the time and the country is overwhelmingly of the character that is stated, entrenching the identity ensures that that identity can never be modified, even if the State's populace and/or national identity were to significantly change. This, of course, is in addition to the fundamental vagueness and lack of democracy associated with judicial interpretation of what does and does not offend the character of the country, discussed in great detail in the "Spirit" or "Principles" section.

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[69] *See id.*

[70] *See* Ercan Yavuz, *Evidence Indicates Ergenekon Tried to Block Presidential Election*, Today's Zaman, July 31, 2008, *available at* http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=148988.

[71] Sabrina Tavernise & Sebnem Arsu, *In Turkey, Proposed Changes aim at Old Guard*, N. Y. Times, April 2, 2010, *available at* http://www.nytimes.com/2010/04/03/world/europe/03turkey.html.

III. Conclusions

There is a unique context in every law, every regulation and, of course, every Constitution that must take into account the social and economic history of the country, prevailing norms of behavior, conflict and hundreds, if not thousands, of other factors. With this in mind, this paper will not presume to be able to provide a checklist of things that must be contained or considered when crafting a constitutional eternity clause. However, the case studies above do shed a certain amount of light on things that must be avoided if the clause is not to encourage extra-constitutional means of achieving goals contrary to the entrenched clauses.

The first lesson that must be discussed may seem obvious to any reader of the case studies above. That is, the melding of high enforcement by the Judiciary and constitutional vagueness is dangerous for constitutional survival. If an eternity clause that is extremely vague is included, it gives the (often unelected) judiciary a tremendous amount of power while tying the hands of the elected branches. Judicial review is not only a common element of new democracies, it is an imperative one; however, that review cannot be allowed to completely control policy choices by the executive or legislative branches. While conflict between the branches of government is inherent in any regime with a set of checks and balances, tremendous conflict, such as that brought about by vagueness in India, could trigger greater problems elsewhere in the developing world.

Consider, for example, the Turkish example above. The broad language of the secularism clause gives the Judiciary a vast amount of power. The Judiciary has chosen to apply this power by not only striking down legislation and constitutional amendments, but also by disbanding political parties. This level of interference from a judiciary could be difficult for the differing powers and factions of a new democracy to accept.

This is in sharp contrast to the Italian or French examples in which, either implicitly or explicitly, the countries Judiciaries realized that the language of the eternity clause was overly broad and would give judges too much power. In exercising restraint, the Judiciary was able to escape the inevitable conflict that would come from a stringent enforcement of an overly vague clause. If a French judge were able to strike down a constitutional amendment every time it offended his or her sense of Republican government, the country could be headed down a dangerous road. The same can be said of Norway and Germany's relative lack of enforcement of their respective principles.

It is not a difficult proposition to ensure that eternity clauses are sufficiently specific, but what about Constitution writers who wish to make broad and aspirational statements about the future of the country? How does one guard against the possibility that a judiciary will use these articles as justiciable? Perhaps the easiest way is simply to use language that ensures the clauses are interpreted in the way they are intended. For example, imagine the conflict

and civil strife that can be saved simply by changing a proposed article to the Constitution from "*There shall be no amendments that conflict with the Republican form of government*," to "*It is the responsibility of the legislature to ensure that no amendments conflict with the Republican form of government*." Where the former has the potential to be used by a judiciary to strike down amendments that it feels interfere with its own vision of Republican government, the latter ensures that anyone interpreting such a Constitution knows that the Republican governance clause is meant as guidance for the legislature and nothing more.

While it is difficult to ensure that an activist judiciary does not read a "basic structure" into a Constitution without textual basis, as was the case in India, there are ways to discourage such action. One method would be to include in the section that sets forth how the Constitution is amended a clause that explains that all parts of the Constitution can be amended except what is specifically made off limits by entrenchment and eternity clauses.

In order to avoid the argument from *Bharati* that when something is outside the Constitution's basic structure it is not an amendment, it is more, a final stipulation to the amendment procedure could be included to state that "*any modification to the Constitution that uses the process set forth above is considered an amendment*." Another method would also be to simply include a clause that states that there are no "basic structures" or "immutable principles" that are not enumerated in the Constitution; however, this may have dangerous and unintended consequences.

The second lesson to be drawn from the examples above is that entrenchment clauses should not be used in countries with a clear history of coups or other extra-constitutional regime changes. This is especially prevalent for countries that have a recent history of coups. Contrast, for a moment, the examples given by the American "Connecticut Compromise" and the Honduran eternity clause above. While both are substantially similar in form, the latter was taken advantage of by a politician accused of attempting to consolidate his power. The former has never experienced tremendous problems.

Regardless of the specificity of an eternity clause, there is no way to ensure that all possible avenues it *could* be violated will be addressed. Prior to June of 2009, many people would have been of the opinion that a constitutional clause could not be made any more specific than the Honduran provision on presidential term limits. It is now readily apparent that there are ways to frustrate this goal and violate the spirit of the law without violating its letter.

Once an eternity clause creates gridlock or conflict, the temptation to alter the Constitution is immense. In states where coups have historically been a viable option for constitutional change, this temptation can foment a desire to use extra-constitutional means for constitutional modification or even regime change. Greater still is the temptation to go outside the Constitution when partnered with a country where coups took place in recent memory. The current politicians most involved with the current constitutional gridlock and angst will often have been a part of the last coup and therefore, will consider

a coup as a possibility and be adept at its commission.[72] At the very least, current politicians (and the current military) will have experienced the effects of the last extra-constitutional regime change.

In states transitioning to democracy from the turbulent system that had gripped Honduras, involving experiments with democracy, coups and military juntas, gridlock should be avoided. While there is considerable scholarly debate as to the cause of gridlock in differing democratic regimes in the developing world, there tends to be a consensus that such gridlock is a dangerous thing, especially in the case of countries with a history of coups.[73]

The final lesson that I believe can be drawn from the above cases is the danger of enshrining an unchanging identity in a heterogeneous society. It may seem that Turkey is an errant example of religious diversity; however, the recent struggles show the trouble that can arise. 99.8% of Turkey's population is Muslim;[74] however, as in all religions, there are varying degrees of religious practice. The country contains devout Muslims who wear headscarves, non-religious Muslims and every type of observer in between. This can create great problems in a country as committed to secularism as in the case of Turkey.[75]

By enshrining this identity in the country's Constitution, it forever put forth the image that non-religious Muslims will be favored by the political and legal systems. This is further enhanced by the actions of the Constitutional Court in dissolving political parties for non-secular actions and reinstating the ban on headscarves.

Turkish nationals who support social policy influenced by Islam are not some small minority of backwards Turks. In fact, they are the majority, electing and re-electing the AKP, a party that has pledged to change many secularist policies during its electoral campaign. However, any attempt to change this entrenched clause will be struck down by the Constitutional Court, or, in the worst potential case, the military.

For a moment, envision this possibility in the context of a new democracy. Much as was the case in Turkey, it may be the case that the new ruling elite's commonality is that they all believe the country should have a certain identity. It is even possible that this is an inclusive identity. However, in a heterogeneous

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[72] *See generally PBS* Newshour, PBS Broadcast, June 17, 2009, http://www.pbs.org/newshour/bb/middle_east/jan-june09/iran2_06-17.html (Reza Aslan discussing the ability of the leaders of the Iranian Resistance to use the same tactics as the 1979 Revolution because of their participation and, indeed leadership, within it).

[73] *See generally* José Cheibub, *Minority Governments, Deadlock Situations, and the Survival of Presidential Democracies*, 35 Comp. Pol. Stud. 284 (2002).

[74] CIA World Factbook, *Turkey*, https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html#People.

[75] Sebnem Arsu, *Generation Faithful – Youthful Voice Stirs Challenge to Secular Turks*, New York Times, Oct. 13, 2008, *available at* http://www.nytimes.com/2008/10/14/world/europe/14turkey.html?pagewanted=2&_r=1.

society, there are bound to be those who do not feel a part of this common identity. Indeed these rifts are bound to only grow with time. While the first generation of people may only have a few dissenters, future generations may gain more support. Entrenching an identity within the Constitution ensures that future generations must abide by the common identity of the drafters, without regard to the country's current populace or national identity. While always dangerous, this is particularly problematic in diverse societies.

This potential lesson assumes that entrenched "character of country" clauses are made in good faith. Any eternity clause regarding the country's identity that either intentionally or implicitly alienates a minority group is inherently wrong in its own right and can create even greater problems for the fledgling democracy, one that is likely to have no remedy other than a completely new Constitution and political system.[76]

There is no perfect constitution. Readers of history or scholars of comparative law are well aware of this. Any founding legal document requires a tremendous amount of interpretation and amendment in order to be a coherent part of national policy. Additionally, many constitutions simply do not reflect social or political realities.

This does not, however, mean that it is unimportant to intensely scrutinize every singular detail when drafting a new constitution. In countries with histories of civil wars, strife or coups, this is particularly important in an effort to end the cycle of extra-constitutional regime change. One such choice is the inclusion or omission of any sort of eternity clause. As previously mentioned, these clauses have been used to do many different things from set a general guide to the legislature to creating affirmative obligations on amendments. As unanamendable provisions, they have particular dangers that are not associated with other, amendable, sections of new constitutions.

The inclusion of eternity clauses within a new Constitution ensures that whatever topic is kept off limits cannot be changed by future generations. This, rather simply, means that in order to change the particular entrenched clause, the future generations must create an entirely new constitution, whether through constitutional means or through illegitimate means such as a coup or civil war. These possibilities do not warrant the conclusion that all entrenched clauses are a poor decision for constitutional drafters. It could be that in some societies some topics are better left out of the "marketplace of ideas." Removing topics from debate does, however, require tremendous amounts of care in order to avoid extreme conflict and a potential "premature death"[77] of a constitutional regime and potentially of the country's experiment with democracy.

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[76] One example of this kind of action is South Africa's Apartheid regime. Instead of a good faith character of country clause, the white minority wrote a series of laws and amendments ensuring that the Black African minority was subjugated. This could only be fully changed through a new Constitution and the ills of the Apartheid era are still being remedied today.

[77] *See* Ginsburg, *supra* note 9.

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NOTES

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NOTES ON CRIMINAL PROCESS AND CONSTITUTIONAL REFORM IN MEXICO TODAY*

Carlos F. Natarén**

Abstract. *The constitutional reform on criminal justice and public security enacted on June 18, 2008 represents the most significant change to the Mexican criminal justice system in over 100 years. By laying the groundwork to replace the current "mixed" procedural code with a more adversarial model, the reform completely alters not only the institutional framework of the Mexican criminal justice system but also its modus operandi. A reform of this magnitude can only be explained by the enormous difficulties currently faced by Mexico's justice system. In order to better understand the nature of this reform, we shall first consider the problems it intends to address. After defining these in detail, we shall explore how these legislative changes may eventually affect the normal criminal process*.

Key Words: *Constitutional reform, criminal justice, public security, Mexico, accusatory model*.

Resumen. *La reforma a la Constitución Política de los Estados Unidos Mexicanos en materia de seguridad pública y justicia penal, publicada el 18 de junio de 2008, representa el cambio más importante en el último siglo para el sistema de justicia penal en México. Establece las bases para sustituir el actual modelo procesal "mixto" por un sistema penal acusatorio, lo que conlleva modificar no sólo el entramado legal sino su modus operandi. Una reforma judicial de esta magnitud sólo puede ser entendida al observar los problemas que el sistema de justicia penal actualmente afronta. En consecuencia, con el fin de lograr un mejor entendimiento de este proceso, en este trabajo se realiza un breve recuento de los problemas que se pretende afrontar, para posteriormente comentar el proceso legislativo de la reforma constitucional*.

Palabras clave: *Reforma constitucional, sistema de justicia penal, México, proceso penal acusatorio, reforma judicial*.

* Translated by Lawrence Weiner, The Inter-American Group. Revised and edited by the author.

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This note begins with an overview of the key elements of the criminal process in Mexico today and the most important challenges faced in this process. It then explores the political context and background for the approval of the constitutional reform and concludes with an overview of the content of the reform itself.

I. Pre-trial Investigation

The initial stage of an ordinary Mexican criminal proceeding is called the pre-trial investigation ("*averiguación previa*"), where several problems often arise. For clarity, we shall divide this discussion on the basis of where exactly these problems take place.

1. *Problems from the Perspective of the Victim or Injured Party*

A. *Limited Participation in the Pre-trial Investigation*

In Mexican criminal courts, the victim or injured party normally faces various uncertainties. Despite legislative efforts to strengthen victim's legal status, his situation remains precarious. Nevertheless, agents of the Public Prosecutor ("*Ministerio Público*") encourage victims to actively collaborate in the process. They require the issuance of sworn affidavits and their help to identify witnesses, that later on becomes evidence and a critical part of the investigative file. However, the victim is relegated to a marginal role once this first phase ends, as every decision regarding the use of evidence then reverts to the public prosecutor. Although in practice the victim bears much of the weight of the criminal process, the public prosecutor alone is responsible for evaluating the evidence and deciding whether or not to proceed —in essence, monopolizing the decision to file criminal charges.

These issues must be re-analyzed in light of recent legislative and judicial reforms that now permit victims to challenge public prosecutors who choose not to file criminal charges. Without any doubt, these changes shall help reduce the lack of transparency that characterizes Mexico's public prosecutors. Nonetheless, it must be acknowledged that this new framework shall not resolve all the problems it intends to address.

B. *Issues of Restitution Damages*

Cases involving restitution damages not only directly affect the victim but also reveal critical institutional deficiencies. In general, the pre-trial investigation and criminal procedures fail to address this important situation. Although victims' rights during criminal proceedings are at best tenuous, he/she must assume the burden of proof and take aggressive action to present any claim for damages.

For instance, goods confiscated in connection to the alleged crime often remain in precarious storage conditions for long periods of time and are subject to constant deterioration. This not only generates significant losses for victims, but also results in high storage costs for the authorities.

2. *Institutional Problems during the Pre-trial Investigation Stage*

A. *Ineffective Criminal Investigation*

One of the most serious problems facing the Mexican criminal justice system is the ineffectiveness of the main actors during pre-trial investigations. Generally speaking, agents of the Public Prosecutor and the police at their command are often less than competent. For example, empirical studies have shown that the more time has passed after a crime occurs, the less likely the offender will be apprehended. An incontrovertible piece of evidence appeared in a study called "Crime, Poverty and Institutional Performance,"[1] showing that only a small percentage of prisoners are arrested more than 24 hours after a crime occurs. Based on responses to this survey, 48% of accused parties were arrested within sixty-four minutes immediately following the crime; and 22% were arrested within the next 24 hours. In sum, this finding reveals the limited effectiveness of investigations carried out by Mexican police and public prosecutors; if criminals are not caught *in flagrante delicto* or apprehended within hours after the crime, the probability of their apprehension drops precipitously. This phenomenon has resulted in both a significant rise in impunity and distrust in law enforcement institutions by the general public. In fact, most Mexicans refuse to even report crimes to which they are victims since they regard the procedures as time-consuming, onerous, and most significantly, a waste of time.

Another notable issue related to Mexican authorities' maladroit investigative work concerns human rights violations against both defendants and victims. Not infrequently, inadequate training and lack of resources lead authorities to choose interrogation techniques that violate citizens' constitutionally guaranteed rights.

Among causes often mentioned to explain these deficiencies are: the excessive workload of both public prosecutors and police; lack of adequate equipment and training; corruption; lack of incentives to perform proper investigations; and the limited use of expert services. In practice, limited training and incentives for public officials in charge of the justice system seem to be the most serious problems faced by these institutions.

Other problems include lack of training (both police and public prosecutors); ineffectiveness or inexistence of controls to help monitor and evaluate investigations; and a lack of transparency during the entire process. All these factors are combined to reinforce corruption and promote irregular practices within these entities. This situation is especially egregious in areas where high police corruption has been reported.

[1] Marcelo Bergman et al., Delincuencia, marginalidad y desempeño institucional. Resultados de la encuesta a población en reclusión en tres entidades de la República Mexicana: Distrito Federal, Morelos y Estado de México (CIDE, 2003).

To be fair, it should be pointed out that police officials and prosecutor's agents have serious difficulties in coordinating their work. This institutional flaw limits the effectiveness of criminal investigations and often leads to an inefficient use of resources.

B. *Problems with Expert Services and Underused Facilities*

Several serious issues hinder the current situation for expert services. First, specialized services generally play a limited role in the pre-trial investigation. They are rarely employed, with the exception of public prosecutors looking to support allegations regarding the defendant's guilt. In fact, both defendants and victims have difficulty obtaining access to expert findings, and they do not often understand the methodologies used. At the same time, multiple irregularities have occurred as a result of the close connection between expert services contractors and the Public Prosecutors. Individuals contracted directly by the Public Prosecutor perform most expert findings, which has resulted in serious questions concerning the partiality of experts.

C. *Lack of Incentives to Perform Proper Investigations*

Article 287 of the Federal Code of Criminal Procedures and article 59 of the Code of Criminal Procedures for Mexico City stipulate that the Public Prosecutor cannot take an accused party into custody based solely on a confession. More importantly, article 249 of the second code aforementioned, stipulates that a confession is not valid if circumstantial evidence exists that makes the allegations seem improbable.

As we will address in detail below, while the defendants are at the prosecutor's office, the police who conduct the interrogation often coerce them into confessions or force them into providing information about the alleged crime. In other cases, police interrogations resort to physical violence and other aggressive measures. This practice has conveniently enabled law enforcement personnel to "prove" many defendants' guilt. Based only on the need for a confession, the police skirt the need for serious investigative work, facilitate the prosecutor's job and allow the judge to deliver a guilty verdict.

Additional data has shown that documentary evidence and expert findings are rarely presented to judges. One investigation done about Mexico City criminal courts[2] found that the evidence most frequently used in criminal proceedings are testimony provided by the complainant or victim; followed by testimony of the defendants, police, and witnesses. This was confirmed by a

[2] Luis Pásara, Cómo sentencian los jueces del Distrito Federal en materia penal (UNAM, 2006), *available at* http://www.bibliojuridica.org/libros/libro.htm?l=1951.

later quantitative study carried out by the Superior Court of Mexico City and the National Center for State Courts, which concluded that documentary evidence and expert findings are rarely used either by the Public Prosecutor or the defense.[3]

The above seems to confirm that: *(a)* most evidence used to support pretrial investigations in Mexico are rudimentary; and *(b)* the effectiveness of investigative work performed by the Mexican authorities is limited at best.

Perhaps the main reason why confessions and witness testimony are the most common forms of evidence in Mexican criminal proceedings is because defendants have difficulty raising objections, as information provided directly to authorities other than the judge are difficult to refute. To make matters even worse, appellate courts and tribunals for writs of protection ("*amparos*") regularly use illicitly obtained confessions as a legal basis to dismiss judgment. In sum, Mexican law clearly tends to favor the complainant's position.

In a widely disseminated study on individual rights guarantees in Mexico, the United Nations has said that Mexican investigators prefer torture simply because public prosecutors and police officers are unfamiliar with alternative techniques.[4] In our view, torture is often employed for several reasons. First, police officers, public prosecutors and judges suffer from severe work overload and use torture to help move cases along more quickly. Second, the legal basis validating the accused party's first testimonial evidence (see section above), provides a strong incentive to continue this practice. Third, when a defendant accuses the authorities of torture, he must bear the burden of proof.

3. *Problems from the Accused Party's Perspective*

A. *Validity of the Accused Party's Testimony before the Public Prosecutor*

As mentioned above, judges tend to assign greater weight to testimony given to the public prosecutor despite objections raised by the defendant. This situation generates significant procedural imbalances. First, the situation in which statements are issued in criminal proceedings is generally highly adverse for the defendant. Accused parties often have no contact with a defense counsel and/or submit to pressures and other types of abuse by security forces that coerce them into testifying in support of the prosecutor's allegations.

To understand this situation in greater depth, we shall first analyze the criteria used to evaluate defendants' and witnesses' testimonial evidence de-

[3] Seminar Superior Court of Mexico City, Distrito Federal and National Center for State Courts (TSJDF-NCSC) (Sept., 2002).

[4] See also the chapter about Mexico in Human Right Watch, Report 2009, Country Summary: Mexico (Jan. 2010), *available at* http://www.hrw.org/sites/default/files/related_material/mexico_0.pdf.

spite their later retraction. These criteria deeply affect how criminal proceedings take place, and their application subverts the reasoning used to evaluate evidence; undermines procedural rules; and obstructs the legal principle of immediacy.

The legal theory used to validate the "principle of immediacy", which gives priority to the initial testimony given to prosecutors, is based on the idea that the first testimony provided by defendants or witnesses is "closer" (or more "immediate") to the disputed facts.[5] Another argument given is that the first testimony is inherently more spontaneous, since the witness has not yet received instructions nor been able to deeply reflect on ways to avoid responsibility or otherwise seek advantage.[6]

From a legal perspective, however, the criteria used to evaluate the "principle of immediacy" are not always obligatory. Criteria exist under Mexican law that allow exceptions to this rule. Unfortunately, these exceptions refer to situations in which the "immediacy" would have benefited the defendant. In fact, we discover that the "principle of immediacy" is only deemed valid when the accused party's first testimony is self-incriminating. In other words, if the defendant first pleaded not guilty but later gives testimony that can be used against him, the first statements are no longer valid to support his innocence. This same exception applies to witness testimony.[7]

As mentioned above, these criteria have had a negative impact on criminal proceedings. Pursuant to this legal theory, for example, a defendant's con-

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[5] Prueba testimonial. Principios que rigen la inmediatez procesal para su valoración, Tribunales Colegiados de Circuito [T.C.C], Semanario Judicial de la Federación y su Gaceta, Novena Época, T. XX, octubre de 2004, tesis I.6o.P. J/6, p. 2251, Registro No. 180282 (Mex.), *available at* http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=180282 (last visited June 16, 2011).

[6] Inmediatez procesal en materia penal. Es válido que la autoridad judicial otorgue valor probatorio a las primeras declaraciones de los testigos realizadas años después de cometido el hecho imputado al indiciado, siempre que la retractación de dichas testimoniales no se corrobore con algún medio probatorio y aquéllas se encuentren confirmadas con otras pruebas, Tribunales Colegiados de Circuito [T.C.C], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Octubre de 2007, tesis VI.2o.P.92 P, página 3199, Registro No. 171155 (Mex.), *available at* http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=171155 (last visited June 16, 2011).

[7] See the following: Retractación, inmediatez, Tribunales Colegiados de Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo IV, Agosto de 1996, tesis VI.2o.J/61P, página 576, Registro No. 201879 (Mex.), *available at* http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=201617; Declaraciones del reo. Inmediatez procesal, Tribunales Colegiados de Circuito [T.C.C], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo IV, Julio de 1996, tesis IX.1o.6 P, página 385, Registro No. 201879 (Mex.), *available at* http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=201879; Inmediatez. Principio de, qué debe entenderse por, Tribunales Colegiados de Circuito [T.C.C], Semanario Judicial de la Federación y su Gaceta, Octava Época, tomo 86, Febrero de 1995, tesis VII.P. J/48, página 43, Registro No. 209212 (Mex.), *available at* http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=209212 (last visited June 16, 2011).

fession would normally suffice to prove charges against him, regardless of the non-existence of further evidence. Since there is no incentive to obtain additional evidence, investigators are more likely to use coercion to obtain a confession.

It should also be pointed out that the criterion used to evaluate the defendant's testimony during criminal proceedings goes directly against the principle of the "free assessment of evidence" ("*libre valoración*") ostensibly used by Mexican judges. In this sense, the "principle of immediacy" becomes an obstacle to the independence of courts and judges, and causes needless delays in the application of already obsolete evidentiary procedures ("*sistemas de prueba legal o tasada*").

As a consequence, the judicial criteria applied to the "principle of immediacy" in Mexican criminal proceedings, actually hinder authentic immediacy. For instance, if the application of immediacy requires that the judge personally evaluates all evidence, nothing goes against this more than the requirement that the judge grant full evidentiary value to the defendant's testimony when the judge was not "immediately" present. These criteria are clearly an obstacle to a real adversarial system.

B. *Ambiguity of the Concepts of "Flagrancy" and "Urgency"*

Flagrancy normally takes place when the perpetrator of the alleged crime is caught *in flagrante delicto*.[8] In the Mexican legal framework, flagrancy is tied to the protection of fundamental rights. In fact, the fourth paragraph of article 16 of the Constitution stipulates that all detentions must comply with the criteria described in the preceding paragraphs, namely: a judicial order; an accusation or complaint; behavior of an illicit nature; and probable guilt. From a protective point of view —which seeks to establish minimal conditions for any type of detention— the principle of flagrancy (based on a necessary response to unlawful behavior) permits the immediate detention of an alleged criminal.

The development of this legal concept has nonetheless deeply altered the meaning of how flagrancy is applied, broadening its scope to the point of debilitating the protection of fundamental rights. Article 193 of the Federal Code of Criminal Procedures —pursuant to reforms implemented on February 8, 1999— sets forth three types of flagrancy: The first section refers to conventional flagrancy (*in flagrante delicto*) which, as has been noted, occurs when the accused party is physically caught in the act of a crime. The second section refers to when the accused is caught *right after* committing the alleged criminal act.

[8] Álvaro Búnster, *concepto de Flagrancia*, *in* Nuevo Diccionario Jurídico Mexicano 1710 (IIJ-UNAM-Porrúa, 2000).

The third section describes three additional "sub-types" of flagrancy: first, when the victim, a third-party witness or somebody involved in the crime identifies the defendant as the guilty party; second, when the accused party is caught *in flagrante delicto* with the object, instrument or product of the crime; and finally, when fingerprints or other circumstantial evidence leads to a reasonable presumption of the accused party's guilt.

For these conditions to apply, the third section of article 193 stipulates the conditions necessary in case of serious crimes; namely, that no more than forty-eight hours pass after the alleged crime; that the pre-trial investigation is already in process; and that no interruption occurs in the criminal proceedings.

The importance of the forty-eight hour period (or longer) pursuant to that set forth in many state codes cannot be over emphasized. In fact, these provisions seem to further restrict fundamental constitutional rights.[9]

C. *Limited Participation of the Defense*

During the pre-trial investigation, the position of the accused party in respect to that of the public prosecutor is tenuous at best. This situation adversely affects the options available to the defense. In the public prosecutors offices, it is not uncommon to see defendants and defense counsel inactive during the entire prosecution phase. There are several explanations for this phenomenon, all related to the attitude displayed by agents of the public prosecutor, who tend to discourage procedural motions raised by the defense; limit communication between the defense counsel and the accused; and hinder the defense's ability to present additional evidence.

During the pre-trial investigation, contact between defendants and their counsel is sporadic and communication is severely limited. Moreover, agents of the public prosecutor usually wait until the end of interrogations before they allow the defendant to testify, at which point the forty-eight hour period stipulated in article 16 of the Constitution is nearly over. This causes several problems for the defense. First, the likelihood that the defendant takes action is significantly reduced, given that this is normally when he/she first hears the charges against him and he/she is first allowed to have contact with his attorney. Second, the defense's arguments are excluded from the line of inquiries developed during the earlier phase of the investigation. By the time the accused is allowed to testify, the file is nearly ready for submission. This limits the defense's ability to effectively prepare arguments to counter the charges against him and hinders his ability to present evidence. This situation becomes even more complex if state procedural codes are taken into

[9] With regard to this and various other issues mentioned herein, see Human Rights Center: Miguel Agustín Pro Juárez & Lawyers Committee For Human Rights, Legal Injustice (Human Rights Center: Miguel Agustín Pro Juárez A. C., 2001).

account. For example, article 53, section VI, third paragraph of the Code of Criminal Procedures of the State of Coahuila establishes that "the public prosecutor shall not be obligated to notify (the defense) of the admissibility of evidence. In addition, criminal charges may be filed without the need to consider evidence submitted by the defendant or their counsel, the judge having sole authority to decide the admissibility of the same." In addition, article 128, paragraph E of the Federal Code of Criminal Procedures stipulates that "witnesses shall be received as well as other evidence […] provided their admission does not obstruct the investigation […]". In practice, this translates into significant limitations for the defense if the authorities fail (for whatever reason) to properly exercise their discretionary powers.

D. *"Any Trusted Person" as Defense Counsel*

Prior to its reform, article 20, paragraph A, section IX of the Political Constitution of the United Mexican States stipulated that accused parties had the right to a proper defense by *(a)* acting on their own behalf; *(b)* hiring an attorney; or *(c)* utilizing any trusted person throughout the entire duration of the proceedings. Consequently, provisions exist in diverse codes that establish the accused right to be heard on his own behalf or vis-à-vis any trusted person or both, pursuant to his election. In case the trusted person or persons designated by the defendant are not lawyers, he also has the right to appoint an attorney-at-law. In case this right is not exercised, a public defendant with a license to practice law is usually appointed.

Despite these so-called protections, public defendants' jobs are severely limited and their independence compromised. This reality tends to complicate matters for the defendant. First, the public prosecutor's agents have difficulty finding adequate public defenders to guarantee accused parties an adequate defense during the pre-trial investigation. As a result, they seek lawyers or "any trusted person" among those available at the public prosecutor's office or the surrounding geographical area. In general, the talents and abilities of these public defenders have been limited. In this respect, the Supreme Court of Justice has ruled that the Constitution does not require that individuals who assume the role of defense counsel have a law degree[10] or even, law expertise.[11]

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[10] Defensores de oficio en materia penal. El artículo 20, fracción IX, de la Constitución federal no exige que tengan título profesional, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tomo XI, Abril de 2000, tesis P.LI/2000, página 70 (Mex.), *available at* http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=191975&cPalPrm=LI/2000,&cFrPrm= (last visited June 28, 2011).

[11] Declaración ante el Ministerio Público de la Federación. No constituye requisito legal que la persona que asista a los inculpados en su desahogo sea un licenciado en

In addition, the public defenders' lack of independence and, in general, their shortcomings have significantly impacted the relation between defense counsel and public prosecutors. Often, the defense counsel becomes in effect subordinate to the public prosecutor, with severely limited abilities to operate effectively. In other cases, the public prosecutors appoint "any trusted person" to assist the accused party in the proceedings but, in reality, this individual never even meets the defendant. On a visit to Mexico, the Inter-American Human Rights Commission stated that many "trusted persons" pursuant to that set forth in the Constitution are in fact appointed by the public prosecutor; or a public defender is appointed but never appears at the proceedings, showing up only to sign documents as a formality.[12] In addition to the above situation, a recent empirical investigation has shown that 54% of defense counsels at pre-trial investigations were "trusted persons"; 27% were public defenders; and only 17.8% were private attorneys.[13]

E. *Inadequate and Impartial Registry of Detained Parties*

Procedural laws contain several provisions that establish the authority's obligation to immediately record all detentions. Article 134 of the Code of Criminal Procedures of Mexico City, Distrito Federal and article 197 of the Federal Code of Criminal Procedures, respectively, stipulate that those who make an arrest pursuant to a court order ("*orden judicial*") must inform the judge of the date, time, and place in which the detention was executed. Similarly, article 269 of the first Code and article 129 of the second Code stipulate that when a defendant has been detained or voluntarily surrenders to the public prosecutor, the latter must verify the time, place, and date of the arrest and whenever appropriate, the name and function of the individual who gave and executed the order.

Despite the above, however, many cases exist in which the authorities fail to comply with that stipulated under law. In other words, the information that must be registered regarding detentions is either incomplete or improperly recorded. To make matters worse, irregularities that arise during the detention are usually never recorded.

In practice, registered information about the time and circumstances of detentions are often falsified. This encourages physical, psychological, and

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DERECHO. Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, tomo XVII, Junio de 2003, tesis P.LI/2000, página 51, Registro No. 17610 (Mex.), *availaible at* http://www2.scjn.gob.mx/ius2006/UnaEj.asp?nEjecutoria=17610&Tpo=2 (last visited June 28, 2011).

[12] Comisión Interamericana de Derechos Humanos, *Informe sobre la situación de derechos humanos en Mexico, 1998*, § 321 (Sept. 24, 1998), *available at* http://www.cidh.org/countryrep/mexico98sp/capitulo-4.htm (last visited June 28, 2011).

[13] *See* MARCELO BERGMAN ET AL., *supra* note 1.

other types of abuse of defendants. In accordance with recent studies, police and soldiers frequently apprehend individuals and detain them for hours or days without filing a report.[14] Several cases presented before the Mexican Commission for the Defense and Promotion of Human Rights demonstrate that defendants are often kept for hours without the ability to communicate; and that during these periods, they are sometimes tortured and forced to sign confessions.[15] Other sources indicate that many detentions are arbitrarily performed at both federal and state levels.[16]

In May 2002, the National Human Rights Commission issued a report[17] that denounced the impunity of cases involving torture, illegal detentions, disappearances and extrajudicial executions. In addition, it said that torture, arbitrary detention and mistreatment continue to be "habitual practices" utilized by the Mexican Army and police departments on federal, state and municipal levels. The last report that covers the period between January 1st and December 31, 2010 indicates that illegal detention is the most frequent complaint filed before the commission, with 346 cases reported.[18]

II. Intermediary Stage / "Indictment"

In the Mexican criminal justice system, once the public prosecutor makes a formal accusation before a judge, a 72 hour period begins —which can be duplicated at the accused party's request. At the end of this period, a judge decides if sufficient evidence exists to continue the process. This is called the pre-evidentiary phase (*pre-instrucción*) and is similar to the intermediary stage in other legal systems.[19]

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[14] Recent empirical studies in show that 33% individuals are detained at least three hours (in some cases for days) before the police file a report. Elena Azaola & Marcelo Bergman, Delincuencia, marginalidad y desempeño institucional. Resultados de la tercera encuesta a población en reclusión en el Distrito Federal y en el Estado de México 36 (CIDE, 2009), *available at* http://es.scribd.com/doc/28582675/Delincuencia-marginalidad-y-desempeno-institucional.

[15] University of Minnesota, Human Rights Library, *Abstract, Alejandro Ortiz v. Mexico*, *available* at http://www1.umn.edu/humanrts/cases/S101-05.html (last visited June 28 2011).

[16] *See* Víctor Ballinas, *La PGR y el Ejército encabezan lista de detenciones arbitrarias*, La Jornada, Nov. 5, 2002, *available at* http://www.jornada.unam.mx/2002/11/05/010n2pol.php?origen=politica.html. *See also* Víctor Ballinas, *El plan cero tolerancia aumentaría detenciones ilegales, advierte ONU*, La Jornada, Nov. 9, 2002, *available at* http://www.jornada.unam.mx/2002/11/09/035n1soc.php?origen=soc-jus.html.

[17] Also see Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los Casos de Homicidios y Desapariciones de Mujeres en el Municipio de Juárez, Chihuahua, 2003, sección VI.E, *available at* http://www.cndh.org.mx/lacndh/informes/espec/juarez2003/index.htm.

[18] CNDH, Informe de actividades 2010, at 391, http://www.cndh.org.mx/lacndh/informes/anuales/2010activ.pdf.

[19] Julio César Hernández Pliego, Proceso penal mexicano 408 (Porrúa, 2002).

During this stage, we shall focus on one overarching problem that reveals not only how courts function in practice but how accused parties must defend themselves: the limited constitutionally-dictated period for the issuance of a formal indictment.

Once the public prosecutor places the defendant at the judge's disposition, the court has a period of seventy-two hours to resolve the defendant's legal situation. This period, at the defendant's request, may be doubled to allow more time to gather evidence. Judges normally have 72 hours to resolve the legal predicament of criminal defendants placed before them and, in extraordinary cases, 144 hours.

There are three types of constitutionally-mandated deadlines. First, the court order to dismiss charges (*auto de libertad*) issued when the judge believes that the public prosecutor's allegations fail to support the filing of criminal charges. Second, the order for trial (*auto de sujeción a proceso*), a recognition that elements exist to continue the process to determine whether the defendant is guilty, but without preventive imprisonment. Finally, a formal indictment is issued in which the judge finds the necessary elements to proceed with criminal charges and, in addition, orders the accused party to serve in preventive prison. In the latter two cases, judges are obligated to issue rulings that meet the requirements set forth in article 161 of the Federal Code of Criminal Procedures: *(a)* pre-trial testimony of the accused party; *(b)* proof of the "body of a crime" sanctioned by imprisonment; *(c)* probable guilt; and *(d)* no verifiable circumstantial evidence that may relieve the accused party of guilt or abrogate the criminal charge.

The above criteria require that the judge realize a series of important steps during a seventy-two hour period or, as the case may be, one hundred forty-four hours, a time period clearly inadequate to avoid the risk of error. We must keep in mind that during this period, the judge must settle the matter, monitor the detention and take the pre-trial statement. In addition, judges are responsible for many cases, all involving voluminous details and urgency. For this reason, pressure exists not only as a result of time deadlines but also significant workloads.

In practice, the time periods stipulated in article 19 of the Constitution are inadequate to properly evaluate each case. These periods are also insufficient to satisfy the requisites in a diligent and timely manner. As a result, the risk of improperly assessing evidence is extremely high.

One reason for allowing extensions to one hundred forty-four hours is to provide the defendant more time to prepare a proper defense. Even with this extension, however, the time is inadequate; in most cases, it is simply not possible. In fact, it isn't usually until the start of the pre-trial statement within the first forty-eight hours of the constitutionally-mandated term that the defendant is permitted to have any contact with his defense counsel and first learns the details of the pre-trial investigation. In other words, until that time the accused is unaware of the formal charges and evidence to be used against him.

As a result, judges tend to formally indict an extremely high percentage of individuals taken into custody. Given the time constraints, judges often end up lowering the standards required to properly evaluate criminal indictments.

It is often pointed out that the formal indictment does not represent final judgment but rather the beginning of a multiple-staged legal process; in practice, however, studies show that this ruling is mostly influenced by the constitutionally-mandated deadline ("*auto de término constitucional*").[20] In criminal proceedings carried out in Mexico City, not only are templates used to facilitate detention orders and formal indictments, but also their content.

III. Court Investigation

Once the judge issues a formal indictment or an order for trial ("*sujeción a proceso*"), the third phase of the criminal investigation begins. At this stage, the following problems frequently appear:

1. *Problems from the Point of View of the Victim or Injured Party*

As described in the section about the pre-trial investigation, the victim's precarious procedural situation hinders his full participation in the proceedings. This is a major problem, not only because the victim's full participation in the investigation is indispensable to clarify the charges brought against the defendant but also because it hinders the victim's own ability to protect his interests, such as the restitution of damages. As a result, the victim is often unable to defend his basic rights.

2. *Institutional Problems*

A. *Judges' Failure to Attend Hearings*

Non-compliance with procedural immediacy is another major problem in Mexico's criminal justice system. Judges often fail to attend important proceedings and limit their participation to "delicate matters or complicated cases". For instance, one of the most important procedural steps, the pre-trial statement —critical to the fate of the accused party— is rarely if ever heard by the judge. In spite of a total lack of immediacy, the judge never directly

[20] Hugo Alejandro Concha & José Antonio Caballero, Diagnóstico sobre la administración de justicia en las entidades federativas. Un estudio institucional sobre la justicia local en México 204 (National Center for State Courts-Instituto de Investigaciones Jurídicas, 2001), *available at* http://www.bibliojuridica.org/libros/1/47/6.pdf.

hears the defendant's version of the facts or considers irregularities that may have occurred during the pre-trial investigation.

Despite the judges' obligation to diligently follow the proceedings and be present at hearings, this rarely occurs in practice. Evidence of this emerged from a survey carried out in 2002,[21] where one of the questions —whether the judge was present at the pre-trial statement— was answered affirmatively by merely 30% of those interviewed. Even more significantly, 90% of respondents reported that the defendant never had an opportunity to speak with the judge. In this sense, it appears judges have delegated many of their procedural duties to court clerks. Which leads to the response to another question asked in the same survey: "Who do you think controls the hearings?" 51% of respondents said the court clerk, whereas only 8.5% mentioned the judge.[22]

Some commentators believe that as a result of the judges' loss of control, it is likely that procedural rules and guidelines are often inadequately followed. This may not only cause deficiencies in procedural protection ("*tutela de garantías*") but also —not infrequently— erroneous judgments. It is said that judges who fail to attend hearings run a higher risk of misinterpreting evidence.[23] It isn't unreasonable to assume that judges who are absent at key points in the proceedings may not only create a distance between themselves and defendants, but also between themselves and the process.

Nevertheless, it would be unfair to comment on this lack of immediacy without also mentioning the conditions under which judges and their clerks work. An accurate assessment of this situation leads us to believe that the workload assumed by Mexican judicial institutions is often excessive. As a result, judges have no choice but to conduct several hearings simultaneously. Nevertheless, the emphasis placed on recording every act in writing produces an important body of documentary work that contains every detail of the hearings in a way that allows judges to access relevant information at any time.

B. *Limited Transparency of the Hearings and, in General, Criminal Proceedings*

The limited transparency in the Mexican criminal justice system is closely tied to the way in which proceedings take place. First, courtroom conditions tend to be far from adequate; the physical space utilized for hearings, for example, is usually limited. The opportunity for defendants to establish adequate contact with their defense counsel is practically non-existent. In addition, the emphasis placed on recording every detail in writing often prevents proper observation of what actually happens at the hearings. It wouldn't be

[21] *See* Marcelo Bergman et al., *supra* note 1, at 52.

[22] *Id*. at 52-53.

[23] Centro de Derechos Humanos "Miguel Agustín Pro Juárez" & Lawyers Committee for Human Rights, *Injusticia legalizada* 66 (Centro de Derechos Humanos "Miguel Agustín Pro Juárez" A. C., 2001).

far from the truth to say that hearings actually revolve around typewriters and computers used to capture what happens.

Even though important privacy-related issues exist for the parties involved, we believe that transparency in and of itself helps to reduce irregularities throughout the entire course of criminal proceedings.

C. *Judges' Limited Independence*

Judicial independence is an indispensable element to assure that judges are able to impartially exercise their duties and protect defendants' rights. Since the mid-1990s, Mexican states have been implementing judicial reforms designed, among other things, to strengthen judicial independence. The results have been uneven, as different geographic regions grant different degrees of independence to their judges.[24]

One issue that generates significant conflict in matters related to judicial independence involves judges' assessment of evidence presented by the public prosecutor. This situation has given rise to tension between judicial authorities and public servants, since the former must authorize or disapprove allegations made by the latter. In this sense, judges are not infrequently viewed as "caving in" to the public prosecutor, who may threaten them with legal action with respect to their rulings. To make matters even worse, elected officials occasionally realize media witch-hunts that put into question judges' integrity.

As judicial independence becomes more precarious, the capacity of the parties involved in the proceedings to properly defend their rights become more limited. In large measure, this phenomenon is reflected in the attitudes of judges who tend to unconditionally favour the complainants or simply invert the principle of the presumption of innocence, as shall be analyzed in the next section.

3. *The Defendant's Perspective*

A. *Writ of Protection* ("Amparo") *Inadmissible for* Fait Accompli ("Actos Consumados")

Writs of protection ("*amparos"*), understood as means to protect defendants against abuse by the authorities in criminal proceedings, are designed to safeguard the individual rights of all citizens. This may take the form of a demand requiring the authorities to respect accused's rights; or a request for a remedy to address victims' rights violation.

As a way to avoid abuses in criminal proceedings, however, writs of protection are limited. For instance, some provisions restrict the chance to request a

[24] *See* Concha & Caballero, *supra* note 20.

writ of protection when the case has already proceeded to the following stage. As a result, an accused party found guilty in a court of first jurisdiction who alleges coercion by the authorities often loses access to *any* type of protection, as the violation of his individual rights is deemed irreparable.[25]

Pursuant to criteria used by the Federal Judicial Branch, when guarantees stipulated in article 16 of the Political Constitution of the United Mexican States are violated, grounds for their admissibility based on a change of legal status only apply in cases where there is no judgment in a court of first jurisdiction.[26]

B. *The Lack of Extraordinary Remedies to Address Basic Rights Violations*

Another way to confront violations of basic rights in the criminal process is the recognition of innocence ("*reconocimiento de inocencia*"). Due to their peculiar nature and history, however, Mexican judicial institutions have been generally unable to resolve due process violations. In effect, the "recognition of innocence" is an extraordinary remedy that permits an accused party to present circumstantial evidence to show that the judgment was made in error. In accordance with Mexican judicial theory, however, this remedy is of an "extraordinary and exceptional nature that recognizes the principle of judicial security based on the fact that final judgment seeks to correct genuine injustices committed by courts in cases where defendants have been condemned and can subsequently show, without any doubt, that they are innocent."[27]

In sum, the objective of the "recognition of innocence" does not permit the reparation of fundamental rights violated during the criminal process. The defendants seeking the "recognition of innocence" insist that the Supreme Court of Justice of the Nation or a state Superior Court of Justice review the final judgment, re-evaluate the evidence, examine alleged procedural violations and, when appropriate, modify the verdict. This approach, however, has resulted in many groundless "recognition of innocence" cases.

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[25] *Cf.* Miguel Ángel López Aguilar, *Análisis del artículo 59, fracción XV, párrafo segundo del proyecto de Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, 16 Tepantlato 10 (2010), *available at* http://www.tepantlato.com.mx/tepantlato/revistas_pdf/16.pdf (last visited Oct. 15, 2010).

[26] Article 73, section X, of the Law of Amparo states that violations to the rights of defendants contained in articles 19 and 20 of the Constitution are deemed irreparable once the sentence of first instance has been pronunced. Orden de aprehensión. Interpretación de la fracción X del artículo 73 de la Ley de Amparo, vigente a partir del nueve de febrero de 1999, Novena Época, Tribunales Colegiados de Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, tomo XIV, Octubre de 2001, tesis VIII.1o. J/17, página 970 (Mex.).

[27] Novena Época, Tribunales Colegiados de Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, tomo V, Febrero de 1997, tesis I. 1º. P.22P, página 785 (Mex.).

In fact, only one real and well-grounded case involving "recognition of innocence" ever succeeded in Mexico: in 1990, Alberto Saba Musalli.[28]

4. *Presumption of Innocence in Mexican Criminal Proceedings*

Finally, we dedicate a section to explore the defendant's right to the "presumption of innocence". In practice, we discover that problems encountered in the exercise of this right clearly show that due process, in general, is often absent in Mexican criminal justice. The lack of this basic right is especially worrisome as —in my opinion— it adversely affects the entire criminal justice system.

If one carefully considers the aforementioned problems, it becomes clear that the Mexican criminal process severely restricts defendants' rights to the presumption of innocence. There is in practice no presumption of innocence during the first phases of the process, which is to say during the pre-trial investigation and pre-evidentiary stages, as a result of the procedural imbalance between the public prosecutor and defendant. Among factors that explain this absence is that the presumption has not always been part of the Mexican legal tradition; that until the reform of June 2008, the Mexican Constitution never explicitly mentioned it. Even more importantly, Mexican jurisprudence never developed a similar criterion to the concept of "beyond a reasonable doubt" in the common law tradition. In this sense, we observe that personal injunction proceedings ("*medidas cautelares personales*") such as pre-trial detention ("*arraigo domiciliario*") and preventive imprisonment ("*prisión preventiva*"), are so widely accepted in Mexican criminal law that the authorities rarely consider the defendant's specific circumstances. In other words, the general rule is that the defendant —regardless of the offense— remains in prison during the entire legal process. Another example in which the presumption of innocence is hardly recognized is during the judgment phase ("*fase del juicio*"). In practice, little or no attention is given to the fact that sufficient proof of having committed a crime must first exist in order to supersede the presumption of innocence.

In general, the application of preventive imprisonment in Mexico is one of the main violations to the fundamental right to the presumption of innocence. The Inter-American Commission of Human Rights (IACHR) has established that preventive imprisonment, as a general rule in criminal proceedings is contrary to the standards of the American Convention, since it violates both the right to individual liberty and the presumption of innocence.

The text of article 18 —still applicable, as the reform established a period of eight years before it goes into effect— establishes the use of preventive

[28] Reconocimiento de inocencia 8/89, Ministro ponente: Luis Fernández Doblado. Secretaria: Lic. Edith Ramírez de Vidal, Suprema Corte de Justicia de la Nación [S.C,J.N.], Mayo de 2007 (Mex.).

imprisonment in cases involving corporal punishment, which is especially permissive within the context of comparative constitutional law. For the IACHR, preventive imprisonment should only be used in special cases where individual circumstances require its application, or when a threat exists against society and/or public order.[29] The objectives set forth in the Mexican doctrine[30] are the streamlining of criminal proceedings, the improvement of detention center conditions and periodic monitoring of detentions. For these reasons, the relation between the presumption of innocence and preventive imprisonment continues to be subject to widespread debate.

Given the imbalance that exists in the first stages of Mexican criminal proceedings, the right to the presumption of innocence has been inverted in such a way that starting from the pre-investigation stage, the defendant bears the burden of disproving all evidence presented against him. For this reason, the public prosecutor is rarely required to prove the defendant's guilt. Thus, the problem begins in the pre-trial investigation. During the constitutionally mandated phase, the judges review the foundation of the pre-trial investigation and, on this basis, issue a formal indictment or an order for trial. However, in reality judges find it easier to rubberstamp the allegations contained in the pre-trial investigation rather than go against the public prosecutor.

IV. Background of the Legislative Reform

We can say that an indirect precedent for the constitutional reform enacted on June 18, 2008, was the constitutional reform bill called the structural reform of the Mexican criminal justice system presented in 2004 by President Vicente Fox. This bill consisted not only of an important series of constitutional reforms[31] but also significant legislative changes.[32] For various reasons, it

[29] Informe N 2/97 de la CIDH sobre Argentina (Report No. 2/97 of the Inter-American Commission of Human Rights on Argentina). In its Report, the IACHR also pointed out that preventive detention of a person for a prolonged period can only by justified on legitimate grounds. However, the Commission expressed the conviction that in all cases the universal principles of presumption of innocence and respect for individual freedom must be taken into account. The justifications mentioned by the IACHR in its report are the following: the presumption that the defendant has committed a crime; the danger of flight, the risk of new crimes, the need to investigate and to prevent colusion, the risk of pressures on witnesses, and the conservation of public order.

[30] *See* Julio César Hernández Pliego, *Presunción de inocencia y prisión preventiva*, 1 Iter Criminis 127 (2001); Sergio García Ramírez, Manual de prisiones (Porrúa, 3rd ed., 1994).

[31] The proposal included reforms to articles 16, 17, 18, 19, 20, 21, 22, 29, 73, 76, 78, 82, 89, 93, 95, 102, 105, 107, 110, 111, 116, 119 and 122 of the Political Constitution of the United Mexican States.

[32] The bill proposed a new Federal Code of Criminal Procedure, as well as new texts for various laws: the Federal Law for the Implementation of Criminal Penalties, the General Law of Criminal Justice for Adolescents, the Law of the National Attorney's General Office, the

never received sufficient support in Congress. Its main effect was therefore to initiate a debate about the effectiveness of the Mexican justice system.

Immediately following this bill, several Mexican entities implemented criminal justice reforms at a state level. In the summer of 2004, the border state of Nuevo Leon was the first entity to implement a partial reform by introducing oral testimony at the intermediate or pre-investigative stage of proceedings, applicable for a series of minor crimes in accordance with that set forth in state legislation. In 2004, the State of Mexico also performed a similar reform by introducing oral testimony applicable to crimes involving negligence (*delitos imprudenciales*), starting from the preliminary investigation stage.

It was in the states of Oaxaca and Chihuahua, however, where new codes of criminal procedure were first drafted and modifications done to the structure and organization of judicial institutions, especially in local judicial entities. On January 1, 2007 in Chihuahua City and September 9, 2007 in the Istmo de Tehuantepec region in Oaxaca, new criminal adversarial procedures were first introduced. These new models notably influenced the drafting of the new constitutional text.

In the June 18, 2008 reform, the legislative process started with the introduction, between September 2006 and October 2007, of 10 constitutional reform bills and one bill to reform the Organic Law of the Federal Judiciary Branch;[33] most of the proposals were sent to Mexico's Chamber of Deputies. At first, only the Constitutional Points Committee was intended to issue an assessment (*dictamen*), but in December 2006 the procedure was modified so that the assessment would be issued jointly with the Justice Committee.

Among the bills under consideration, the one presented on December 19, 2006, by representatives César Camacho, Felipe Borrego Estrada, Raymundo Cárdenas Hernández, and Faustino Javier Estrada González of the parliamentary groups of the *Partido Revolucionario Institucional* (PRI), *Partido Acción Nacional* (PAN), *Partido de la Revolución Democrática* (PRD), and the *Partido Verde Ecologista de México* (PVEM) stand out.

Organic Law of the Federal Police, and the Public Security Law, Regulations of Paragraphs 7 and 8 of Article 21 of the Political Constitution of the United Mexican States. Similarly, proposals were introduced to reform the Federal Law Against Organized Crime, the Organic Law of Federal Public Administration, the Organic Law of the Federal Judiciary Branch, the Federal Law of Public Defenders, the Regulations of Article 5 of the Constitution in relation to the exercise of Professions in Mexico City, Distrito Federal, the Federal Criminal Code, the Regulations for the Law of Writs of Protection of Articles 103 and 107 of the Political Constitution of the United Mexican States, and the Regulations of Sections I and II of Article 105 of the Political Constitution of the United Mexican States.

[33] *See* Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, Cámara de Diputados (Jun. 18, 2008), *available at* http://www.diputados.gob.mx/LeyesBiblio/proceso/lx/089_DOF_18jun08.zip (for the texts of the initiatives and rulings) (last visited Oct. 10, 2010).

Two other bills presented on March 7, 2007, by the representative César Camacho Quiroz of the PRI parliamentary group are also notable, since they both assume the position of the "Red para los Juicios Orales", a civil society network promoting criminal justice reform. By means of these proposals, we encounter the origin of the texts that helped advance the adversarial system as it then operated in several States of the Federation.

On March 9, 2007, President Calderon introduced two bills[34] to the Senate in matters related to security and criminal justice, with the intention of fighting impunity, strengthening citizen security and providing additional powers to the Federal Police and Public Prosecutor in the national fight against organized crime.

Other proposals were introduced on April 2007, by the parliamentary groups of the PRD, *Partido del Trabajo* (PT) and *Partido de la Convergencia* (*Convergencia*), complemented by five additional bills presented on October 4, 2007, by the PRD which in essence defines the opposition's stand.

All these bills were based on the idea that the Mexican criminal justice system was no longer effective and, for this reason, required urgent reform; and coincided with the need to recover citizens' trust in the legal institutions responsible for maintaining and imparting justice. As a result, the debates both in committee hearings and plenary sessions, centered on identifying options available for restructuring the criminal system and, above all, redefining the scope of powers granted to the police and public prosecutor.

Most discussions regarding the reform's content were held in the committees established in both the Chamber of Deputies and the Senate. The assessment that won the most agreement between the political parties was presented on December 12, 2007, in the Chamber of Deputies. On that date, the majority of deputies rejected the PRD's request to re-initiate the debate and voted to approve the measure.

Once approved, a draft was sent to the Senate where it was discussed on December 13, 2007. At this time, the majority of senators decided to modify two important aspects of the text: first, the elimination of direct access by the public prosecutor to "tax, financial, trust, stock, electoral, and other information that is considered private or confidential by law, when related to the criminal investigation;"[35] and second, the modification of terms that permit-

[34] *See* Decreto por el que se reforman diversos artículos de la Constitución Política de los Estados Unidos Mexicanos, Gaceta Parlamentaria, Senado de la República, 13 de Marzo de 2007 (Mex.), *available at* http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=2486&lg=60; Proyecto de Decreto que reforma el artículo primero de la Ley Orgánica de la Procuraduría General de la República, initiative, Senado de la República, 13 de marzo de 2007 (Mex.), *available at* http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=2492&lg=60 (last visited June 16, 2010).

[35] This authorization was included in the tenth paragraph of article 16 of the Mexican Constitution. This can be seen in the minutes received any House of Deputies on February 1, 2008, page 3.

ted police to break into private homes without a court order in cases "when information or knowledge exists of an actual or imminent threat to the life or physical integrity of others."[36]

Upon completing this change in accordance with procedures established for the reform of the Political Constitution of the United Mexican States, the modified draft bill was returned to the Chamber of Deputies. Given that on December 13th was the last annual session of Congress, the reform bill was not discussed again until February 26, 2008; at this session, the deputies decided to eliminate the paragraph granting authorization to the police to enter private homes without a court order.

Once this draft was approved, it was sent back to the Senate where it was discussed and approved on March 6, 2008. Upon approval, the modified drafts were sent to the legislatures of each of the 32 states in the Mexican Republic so they could debate the measure and, as the case may be, grant approval. On May 28, 2008, after officially announcing that the draft had been approved by 19 state legislatures, the Permanent Commission of the National Congress formally authorized the constitutional reform. The Executive Branch published this reform on June 18, 2008.

V. Content of the Reform

For readers unfamiliar with the content of the constitutional reform decree published on June 18, 2008, it will probably be simpler to describe its scope and content by using three separate parts of the reform as points of reference. Although these sections are related among and between themselves, they each have a distinct objective:

The first part of the reform is intended to strengthen two aspects of the institutions that comprise the criminal justice system: the creation of a public security system and the modification of principles upon which the prison system is based.

With respect to public security, changes were made to articles 21 and 73, section XXIII, and article 115 of the Constitution in order to implement new regulations that establish a basis for coordinating elements of the National Public Security System. These changes represented a clear attempt to coordinate the Public Prosecutor and federal, state, and municipal police forces; as well as to integrate public security on a national level. In sum, this reform seeks to update the system created in 1995 that, despite significant financial investment, failed to generate the results expected in matters related to Public Security.

In the definition of the section of the reform related to the National Public Security System, conditions prevailing at police departments on a local, state,

[36] *Id.*, at 4.

and federal level were evaluated. The constitutional reform process openly recognized significant regional differences with respect to waste, corruption and, in some cases (as has been recognized), the infiltration of drug traffickers in state institutions. While certain states and municipalities were found to have well-trained and effective police departments, others were less favorably positioned. Despite undeniable progress, the federal police institutions have not yet been able to consolidate their work.

The reform thus established the need to pass a public security law which clearly facilitates the coordination of the National Public Security System based on the regulation of several elements: first, the selection, acceptance, training, commitment, evaluation, recognition and certification of the members of public security institutions; and second, the establishment of a uniform and nation-wide law enforcement career. In addition, specific regulation will eventually be implemented to certify police officers and public prosecutors, requiring not only their registration in a national system to avoid the admission of felons or members of organized crime, but also a way to guarantee that police personnel acquire the knowledge and abilities necessary to perform their duties within a framework based on respect for human rights. This law officially went into effect on January 2, 2009.[37]

In this part of the reform, it may be pointed out that article 18 of the Constitution, which establishes the basis of the Mexican penitentiary system, was also modified. These changes were mainly related to terminology and focused on operations. On the one hand, the health of imprisoned individuals was included as a basic human right; on the other, the words "corporal punishment" ("*pena corporal*") were replaced with the term "imprisonment" ("*pena privativa de la libertad*"). As a result of its degrading meaning, the word "prisoner" or "convict" ("*reo*") was also replaced with the term "defendant" ("*sentenciado*"). Similarly, the term "social rehabilitation" ("*readaptación social*") was deemed inappropriate to describe defendants who already finished their sentences and returned to society. For this reason, the term was changed to "social reintegration" ("*reinserción social*").

The new wording of article 18 establishes a prison system organized around the principles of work, training, education and health as means to help defendants socially reintegrate to society and avoid relapse into crime.

Second, the reform contains a series of modifications that grant increased powers to the public prosecutor and police in order to combat organized crime. In this part of the reform, we shall first point out the constitutional regulation of the "restriction order" or "pre-charge detention" ("*arraigo*").

This legal concept permits the deprivation of an individual's personal freedom by means of a judicial order for a determined period of time —up to

[37] Ley General del Sistema Nacional de Seguridad Pública (L.G.S.N.S.P.), *as amended*, Diario Oficial de la Federación [D.O.], 2 de enero de 2009 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/LGSNSP.pdf (last visited Jun. 17, 2011).

80 days— by means of a request made by the public prosecutor during the preliminary phase of the criminal investigation, before formal charges are filed before a judge, in order to prevent the accused party from leaving the jurisdiction, hiding from the authorities or influencing other individuals involved in the investigation.

The *arraigo*, one of the most controversial legal procedures under Mexican law since it involves depriving defendants of liberty without a hearing, was first introduced in the legal system via procedural codes and applies in cases involving serious felonies and organized crime. In addition, a new definition of organized crime was inserted into the text of the Constitution based mostly on elements of the existing legal framework.

Within this section of the reform, we encounter the legal precedent already accepted by federal courts that in cases involving certain crimes (such as kidnapping), family members of the victim can record conversations with the alleged criminals and later use these tapes as evidence in criminal procedures as an exception to the general rule of the inviolability of private communication. Under certain circumstances, this evidence shall henceforth be admissible at hearings.

In matters related to the prison system, the reform establishes the existence of high security centers built for members of organized crime and other prisoners requiring special security. A proposal was also presented to restrict the communication of these prisoners with third parties —except with defense counsel— and impose special security measures.

Similarly, the possibility of preventive prison was established in cases involving allegations of organized crime. The judge shall make rulings involving preventive prison.

In addition, a suspension of the terms of the statute of limitations was established for criminal acts and processes related to organized crime. In order to prevent individuals arrested for their participation in organized crime from escaping justice, the statute of limitations may be suspended once a relation to organized crime has been established.

In these cases, the constitutional reform carves out an exception to the principle of immediacy when it is no longer possible to replicate the evidence at trial because a witness died as a result of an act attributable to the defendant; or because a real risk exists for witnesses or victims willing to testify.

With respect to the accused person's right to know the reason for his detention at the time of his arrest or at his initial appearance before the public prosecutor, an exception was also made in cases involving organized crime. Under the reform, authorization may be given to maintain the name of the accusing party in secret.

This part of the reform is especially important because it introduces the procedure of asset forfeiture ("*extinción de dominio*"). With this legal concept, the State seeks to benefit from goods seized based on information that confirms their use as instruments, objects or products of activities related to organized

crime, drug trade, kidnapping, car theft or human smuggling; or when they are intended to hide or mix merchandise acquired as a result of said offences.

Enacted to find effective tools to help dismember criminal organizations, limit their pernicious effects, prevent their reproduction and expedite the forfeiture of assets, these reforms are considered necessary to help creating effective criminal procedures and an independent judiciary.

In relation to the fight against criminal organizations, section XXI of article 73 of the Constitution was modified so that Mexico's Congress may now solely and exclusively legislate in matters related to organized crime, which means that only the Federation shall be considered competent to judge crimes of this nature.

It should be pointed out that the section of this reform related to national public security, the prison system and the new rules to help combat organized crime already entered into effect the day after their publication on June 19, 2008.

Finally, the third part may be categorized as the new adversarial model pursuant to that set forth in article 16, second and thirteenth paragraphs; article 17, third, fourth and sixth paragraphs; articles 19, 20 and 21, seventh paragraph.

This third part is intended to establish a criminal system that guarantees due process and the presumption of innocence; assures the civil rights of victims and defendants; and generally protects all citizens from abuse by the authorities. With this purpose, an adversarial criminal system was established governed by the principles of public access, confrontation and cross-examination, concentration, continuity and immediary, all intended to assure procedural balance between the defendants, prosecution and crime victims.

To achieve this, profound changes were made to the judicial structure in order to create the figure of preliminary proceedings judges ("*juez de control*") who shall be responsible for overseeing issues involving the constitutional guarantees of both the defendant and victim. In this way, practices based on written procedures were abandoned so that this judge may quickly resolve requests by the authorities for injunction proceedings and investigative work while, at the same time, respecting the parties' constitutional rights.

Defendants' rights shall now be regulated with greater clarity, including the explicit introduction of the right to the presumption of innocence. The use of preventive imprisonment shall now be restricted unless the public prosecutor clearly demonstrates that other injunction proceedings would be insufficient to protect the victim or community and/or avoid interference with the investigation. Similarly, crime victims' rights shall be strengthened. In this part of the reform we also find changes in the evidentiary parameters used by public prosecutors to make accusations.

This new system shall go into effect eight years after the day following publication of the Decree, meaning that it shall not become effective until June 18, 2016.

In this part of the reform, the greatest challenge shall in fact be its implementation; although it should also be mentioned that as of October 2010, six states of the Federation have already implemented or initiated the implementation of this reform: Chihuahua (starting on January 1, 2007); Oaxaca (September 9, 2007); Morelos (October 30, 2008); Zacatecas (January 5, 2009); the State of Mexico (October 1, 2009); Durango (December 14, 2009); and Baja California (August 3, 2010).[38]

[38] Consejo de Coordinación para la Implementación del Sistema de Justicia Penal, *Reporte: Reforma legal en los estados*, available at http://www.setec.gob.mx/reformac2.htm (last visited Oct. 10, 2010) (report on the implementation process may be accessed on the site of the Technical Ministry of the Coordination Council for the Implementation of the Criminal Justice System).

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PREAMBLE AND FULL TEXT OF THE 2008 CRIMINAL JUSTICE CONSTITUTIONAL REFORM*

Chamber of Senators and Chamber of Deputies,
Mexican Congress**

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* Translation by Carmen Valderrama, reviewed by Carlos Natarén, edited by John Ackerman.

** The following is a selection by professor Carlos Natarén of the most important sections of the various different preambles written by both the Chamber of Senators and the Chamber of Deputies during the almost two years of negotiation and exchange of different versions of reform bills between the two chambers. See Natarén, Carlos, *Notes on Criminal Process and Constitutional Reform in Mexico Today*, Mexican Law Review, this issue, for a full description of the legislative process which led to the final version of the reform. The Constitutional text included at the end of this document is the definitive version after the reform.

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I. General Considerations

[…] As to the proposal put forward, it proposes the establishment of an accusatory system, abiding by its fundamental principles and characteristics, and adapted at the same time to our nation's imminent need to efficiently fight the high crime rates that afflict the citizens and go against our institutions, so that it can thus be gradually consolidated into Mexican legal culture and tradition.

It is a commonly accepted opinion that [criminal] proceedings are very lengthy and have an excessive number of formalities; the public prosecutor takes a leading role and during the preliminary investigation phase, a type of "mini-trial" is held. This "mini-trial" is given considerable weight during the

proceedings, to the extent that the evidence is reproduced almost exactly during the real trial, thus undermining the importance of a trial and the objective assessment of the arguments presented by the parties involved, with the inevitable result of the public prosecutor not being very competitive, which weakens his actual performance. In the opinion of citizens, the fact that the proceedings are usually presented in writing has been interpreted, in most cases, as opacity, since a judge is not present at most trials because judges often delegate functions to assistants. A representative survey carried out by CIDE in 2006 at prisons in Morelos, Mexico City and the State of Mexico, showed that 80 percent of those accused never spoke with the judge.[1]

Regarding provisional remedies, the most drastic among them, that is, pretrial detention, is usually the general rule. The abovementioned survey reveals an alarming figure: 82% of the accused are prosecuted for offenses against property and for amounts under 5,000 pesos [about USD 400]. In addition to the obvious effects it has on the accused, this also affects his immediate social environment and inevitably interferes with other important guarantees.

Likewise, our current system does not encourage the use of alternative justice and there are various procedural problems that stand in the way of effective restitution of damages.

In saying that the current system is mainly inquisitive, we mean that the accused is guilty until proven otherwise. The accused is considered an object under investigation rather than a subject with rights. While the Office of the Public Prosecutor indisputably has more infrastructure for acting than the defense does, the accused does have the right to an attorney. There is also the legal concept of "a person of his trust," which, when this occurs, has given rise to unequal conditions in attempting to prove the innocence of the accused. In addition to this, public defense attorneys receive low salaries, there is no civil service career in some states of the nation, and they generally do not have the necessary infrastructure, which is why defense attorneys often use areas in investigative agencies or courthouses.

At the trial, the judge substantiates the process by himself, a situation that obstructs his performance. Moreover, it should not be overlooked that executing the sentence has an administrative character, pre-release benefits and sentence enforcement is under the responsibility of the General Office of Prevention and Social Reinsertion, and awarding benefits depends on the unanimous opinion of the Interdisciplinary Technical Council. Thus, rehabilitation has not been very effective since the convicted person is quite unlikely to be assimilated into society.

Broadly speaking, the above leads us to conclude that the current model of criminal justice has been surpassed by the reality in which we find ourselves. Therefore, a system of guarantees is proposed so that the rights of both the

[1] Marcelo Bergman, Elena Azaola & Ana L. Magaloni, Delincuencia, marginalidad y desempeño institucional. Resultados de la segunda encuesta a población en reclusión en el Distrito Federal y en el Estado de México (CIDE, 2006).

victim and the offended party, as well as those of the accused are respected, starting from the presumed innocence of the accused. This system would be governed by the principles of public access, confrontation and cross-examination, concentration, continuity and immediacy, of an accusatory and oral nature. The accusatory aspects would ensure a three-part proceeding in which the public prosecutor is the prosecution, the accused has the opportunity to defend himself and that in the end, a judge determines the outcome. The oral aspects would lend weight to encouraging transparency while also guaranteeing a direct relationship between the judge and the parties, to in turn give rise to more agile and simplified criminal proceedings.

The establishment of a due process judge is contemplated to resolve immediately and by any means the requests for provisional remedies and investigation techniques employed by the authorities, if necessary, to ensure that parties' rights are respected and that prosecution acts according to law. The trial judge shall be responsible for the case from the moment the accused is subject to the proceeding until the corresponding sentence has been issued, and the sentencing implementation judge shall oversee and direct the implementation of the sentence.

As to pretrial detention, it has the intention to be applied only when other provisional remedies are insufficient to warrant the appearance of the accused at the trial, the progress of the investigation, the protection of victims, witnesses or society, or when the accused is being processed or has previously been sentenced for committing a willful crime. In cases of organized crime, intentional homicide, rape, kidnapping, violent crimes involving weapons or explosives, as well as serious crimes considered as going against national security, the free development of personality and of health, pretrial detention is recommended to be applied in all these cases.

Alternative dispute resolution mechanisms expressly established by constitutional decree is also deemed necessary in order to ensure the restitution of damages. These mechanisms would be subject to judicial legal oversight under the terms set forth in secondary legislation. This measure would result in procedural economy, in addition to the fulfillment of the essential objective of ensuring that the victim of a crime is protected and that the accused assumes responsibility for his actions, compensating, as far as possible, for the damage caused.

In terms of the defense of the accused, the intention is to eliminate the concept of "person of [the accused's] trust" and to guarantee the right to adequate defense by an attorney. To consolidate this objective and ensure equal terms, a quality public defense service will be guaranteed for the general public, and public defenders will be ensured of the conditions to pursue a professional career service, establishing that public defenders' salaries may not be lower than those of the Public Prosecutors.

As to organized crime, given the complexity of this issue due to the harm it inflicts on society, a special system is proposed. Starting with its legislation,

this task will be exclusively under the authority of the Federal Congress. At a constitutional level, organized crime will be defined as a *de facto* organization made up of three or more people for the purpose of permanently or repeatedly committing crimes under the terms of the corresponding law. For these cases, the due process judge is authorized to order the detention of a person at the request of the office of the public prosecutor, based on the time and place as stipulated by law, as long as it is deemed necessary for the success of the investigation, the protection of persons or legal interests, or when there is a real risk of the accused evading legal action. This period cannot exceed forty days, and can only be extended when the Public Prosecutor can prove that the causes that gave rise to the order still exist. Under no circumstances can this period go beyond eighty days.

The above gives us a general overview of the comprehensive reforms to the criminal justice system. Regarding the text of the proposed decree approved by the Joint Committees of Constitutional Issues and Justice, we present the following necessary arguments and grounds to be guided through and understand the accusatory criminal procedure system, currently under deliberation in Mexico.

1. *Article 16*

A. *The Standard of Proof for Issuing Arrest Warrants*

Considering that the criminal justice system to be adopted is geared toward the defense of civil liberties, fully respecting human rights and fomenting access to criminal justice by both the accused and the victims or offended parties as a sign of legal certainty, it is necessary to establish a reasonable level of evidence to issue an arrest warrant and thus prevent most complaints or accusations from being filed by the Public Prosecutor, which alleges that the information uncovered by the investigation is not enough to present the facts to the competent judge. An arrest warrant is one of the first steps toward the judicial proceedings that establishes a happy medium between the accused's legitimate right not to be subjected to ungrounded nuisance actions and his fundamental right of having the inquiry into his possible participation in an allegedly criminal act brought before a judge with all the guarantees and rights internationally accepted as part of the due process in a democratic justice system and not unilaterally by an administrative authority that in the end will accuse him before a judge with a collection of evidence obtained without the participation of the accused or without proper defense. It is also in the best interest of society to subject individuals to fair criminal procedures if there is evidence of their participation in a criminal act.

Thus, the legislative proposals to explain the current evidentiary demands for the Public Prosecutor to present the facts before a judge and request an ar-

rest warrant are considered suitable and at an internationally accepted level. Therefore, the prosecution can simply present the judge with the evidential information that establishes the material execution of the act defined by law as a crime and the probable participation of the accused in said act, whether as the person behind said crime or a participant, to issue said warrant; the sufficient elements to rationally validate the act of bringing the accused before the trial judge, being informed of the charge of an act defined as a crime punishable by criminal law with imprisonment and being able to fully exercise his right of defense in criminal proceedings that respect all the principles of an accusatory system like the one proposed.

The proposed standard of proof is accepted because within the context of an accusatory procedural system, which is internationally distinguished by its performing what we know as a preliminary investigation as an initial and basic investigation, and not an extensive administrative examination of fact as occurs in inquisitive systems, for it is during the trial when, under equal conditions for both parties, the evidence previously gathered by the parties is presented and acquires the corresponding probative value, and not during the preliminary stage of the investigation as occurs in the present system. Therefore, it will be impossible to uphold such a high standard of proof for requesting an arrest warrant under the new system since the Public Prosecutor will no longer present formalized evidence proving the act and let alone the criminal responsibility of the accused because in this case it would not fulfill the purpose of lessening the formality of a preliminary investigation and strengthening the importance of criminal proceedings and trials in particular.

There is no reason for this diminution of the standard of proof needed for an arrest warrant to give rise to its misuse in view of the counterweights in place to deter those who may be tempted to do so since the criminal proceeding will be equally balanced for both parties and will fully respect the rights of the accused. Therefore, if an arrest warrant is obtained without having to resort to unlawful means to satisfy the standard of proof needed, the accused will undoubtedly be absolved as it will be expressly included in the principles of the Constitution, along with the presumption of innocence, the burden of proof and the exclusion of unlawfully obtained evidence. In other words, it would be counterproductive for the Public Prosecutor to request an arrest warrant without the likelihood of being able to prove the crime and criminal responsibility during the trial since the prosecution would not have another opportunity to indict the accused.

In view of the above, we believe these advisory commissions are the adequate means to temper the current compilation of evidence the judge must receive from the office of the public prosecutor in order to issue an arrest warrant. Thus, the information provided must establish the existence of an act contemplated in criminal law and the accused's probable participation (in the broadest sense of the term) in said act, and not prove the *corpus delicti* or the presumed responsibility of the accused, which requires an analysis of the

evidence provided from the beginning of the proceedings and not during the trial, which where it should be carried out.

B. *The Definition of* In Flagrante Delicto ["Flagrancia"]

The concept of *in flagrante delicto* as a justification for a person's detention without a judicial order is used worldwide, only that the scope of this concept is found to be used differently in various laws. It is internationally accepted that *in flagrante delicto* not only includes the moment of committing the crime, but also the period immediately after when the physical pursuit of the individual identified as participating in the crime is carried out. Thus, if the person is detained during his physical escape or immediate hiding, the concept of *in flagrante delicto* is considered applicable and hence detention is justified.

This concept of *in flagrante delicto* does not cause any major debates, but there is another approach to this definition known as comparative flagrancy, which consists of extending the opportunity for the authority to detain an individual for a period of forty-eight or seventy-two hours after a serious crime as defined by law was committed. After the investigation of said crime has been formally opened and when indicated by the victim, a witness or an accomplice to the crime; when an individual is identified as a participant in the criminal activity; or when material objects, other traces or the individual's fingerprints are found in the area, secondary legislation considers it justifies the detention of the person without a warrant and holding said person for investigation for up to forty-eight hours before deciding whether to bring the person before the corresponding judge or to release the person pursuant to the law.

While it is understood that the high crime rate that afflicts our nation has created the need to give the authorities new legal instruments in order to increase their success in investigating and prosecuting crimes, it is believed that excesses have been incurred in regulating the concept of *in flagrante delicto* by allowing comparative flagrancy, given that the police authority can carry out arbitrary detentions, when the spirit of our Constitution is that flagrancy only encompasses the moment the crime is committed and immediately after that time during the pursuit of the accused.

In view of this, it is deemed fitting to explain the concept of *in flagrante delicto*, by limiting its scope to comprise the moment the crime is committed, that is, the *iter criminis*, until the period immediately after in which the person involved is being physically pursued. Consequently, the purpose is to limit flagrancy to the point known in doctrine as "quasi-flagrancy" in order to bar any possible legislative excesses that have given rise to comparative flagrancy, which is not in accordance with the internationally accepted meaning of this concept.

C. *Investigative Pre-Charge Detention* ["Arraigo"]

Without a doubt, an innovative proposal is that of including in the Constitution a provisional remedy to prevent the accused from evading the prosecutorial authority at first, and ultimately judicial authority, or else that the accused might obstruct the investigation or affect the integrity of the persons involved in the act in question.

It is clear that the growth of organized crime, even that of a transnational nature, has placed the traditional judicial and procedural institutions in peril to a certain extent, which is why legislators have extended the range of effective measures to counterbalance its impact on the perception of public insecurity. One such instrument is that of pre-charge detention.

This concept consists of depriving an individual of his personal freedom for an established period of time during the preliminary investigation or the criminal proceedings by means of a court order requested by the office of the public prosecutor so as to prevent the accused from fleeing from the place of the investigation or hiding from the authority, or affecting the persons involved in the act in question. There is detention at the place of residence of the person under investigation or detention that is served elsewhere, even other than the territory in which he resides. The first instance has been used for crimes defined by law as serious and the second, only for alleged members of organized crime groups. In both cases, judicial authorization must always be obtained beforehand.

The measure is extremely useful when applied to individuals who live clandestinely or do not reside in the place under investigation, but it is especially so when individuals belong to complex criminal organizations that can easily elude international checkpoints or there is reasonable doubt that if released they will obstruct the authority or encumber the institutions or and evidence, and go against those for whom an arrest warrant has yet to be obtained due to the complexity of the investigation or the need to wait for evidence to come through international cooperation.

All the same, the Supreme Court of Justice of the Nation issued a final judgment in Constitutional Action ("*Acción de Inconstitucionalidad*") case number 20/2003 filed by legislators from the State of Chihuahua against the state congress and governor, in which the court declared the invalidity of article 122 bis of the former local Code of Criminal Procedures in force, arguing that it fundamentally constitutes a restriction on the right of personal freedom that is not set forth in the General Constitution of the Republic. Therefore, the case stated that it is inadmissible in view of the principle set forth in article 1 of said Constitution requiring that any exceptions to constitutional rights must be stated in the Constitution itself.

In this sense, it is proposed to include the concept of pre-charge detention in article 16 of the Constitution, exclusively for cases involved with organized crime, establishing the cases of admissibility, the authority to request the de-

tention and authorize it, the period for which it can be granted, the option of having the judge determine the place and other conditions for serving said detention, the possibility of extending the duration of detention for up to an equal amount of time, and the justification for said extension, thus addressing the extremes of any exception to a person's right of personal freedom.

Therefore, the proposal to include the concept of pre-charge detention in cases of organized crime investigations and proceedings in progress was deemed admissible. In the case of proceedings, it shall encompass circumstances in which pre-charge detention is not carried out under the terms and conditions established by the judge and based on the corresponding law, as well as the period of up to forty days with the possibility of an extension for up to another forty days, as long as the circumstances for which it was initially authorized are still in effect.

D. *Definition of Organized Crime*

Since the 1990s, when the concept of "organized crime" was included for the first time in the Constitution, it aimed at establishing specific rules and some exceptions to the provisions applicable to most individuals subject to criminal proceedings. This situation derived from the need to have new and more severe legal instruments that would allow the authorities in charge of the investigation, prosecution and punishment of the members of actual criminal organizations, which have been acquiring much more influence and power than the traditional criminal organizations.

Unfortunately, this crime phenomenon has continued to grow exponentially, not only in Mexico but worldwide. This fact has compelled the international community to draft a convention that would establish, recognize and enforce, and manage mechanisms to fight this kind of crime, which puts State sovereignty and viability at risk. Thus, the United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention as the political signing took place in that city, was agreed upon and has entered into force. Mexico has ratified this Convention and is a member State.

This Convention provides for measures of a different nature, but specifically for rules on the investigation, prosecution and punishment of this type of crime which due to its intensity implies forms and limits on the traditional rights granted to the accused during criminal proceedings, according to procedural law. Therefore, our country opted to institute most of the specific rules for this crime in a special law enacted by the Congress of the Union and in only a few cases were the rules elevated to constitutional level.

Even when the Supreme Court of Justice of the Nation's interpretation of certain articles of the Federal Law against Organized Crime has been in the sense that the articles must accommodate individual, and therefore constitutional rights, it is true that on distinctly emphasizing the accusatory nature of

the outlined criminal proceedings, by explicitly including various principles and fundamental rights that until now had only been implicitly suggested in the Constitution, it is necessary to include some specific rules that apply to organized crime. These rules pose certain restrictions on rights in order to opportunely comply with that set forth in article 1 of the Constitution, in the sense that the exceptions to the fundamental rights acknowledged by the Constitution must be included in it and consequently, the number of references to organized crime will increase in the articles of the dogmatic section. Therefore, in the interest of the clarity the supreme law should exhibit to make it accessible to any of the nation's inhabitants and thus generate legal certainty, it is important to establish a general explanation of what is meant by organized crime.

For these reasons, a definition has been incorporated into the Constitution. This definition is essentially an abridgement of the main components of the concepts contained in the current legal framework, and serves to delimit the scope of application of the limitations on individual rights, naturally making it possible for secondary legislation to provide a broader account of the restricted rights, based on the constitutional definition since, as is known, rights are established in the Constitution, but laws of a lower hierarchy can be elaborated on, as in the case of a legal definition that may include more elements than those set forth in said constitutional clause.

E. *Requests for Search Warrants*

One of the concerns is the speed of ruling on the requests for provisionary measures and investigation techniques presented by the Public Prosecutor to the judge so as not to lose the opportunity of implementing said measures. However, one measure that stands out is the search warrant, which had usually been filed and processed through the traditional written procedures, which sometimes overly delayed the activities of the Public Prosecutor, which as a result posed the risk that the evidence sought would disappear, be altered or be destroyed.

In order to set the standards for a special rule that allows the request for such warrants and ruling on them by any means, leaving always a record of the communications, there is a proposal to eliminate the specific obligation of fulfilling this proceeding in written form along with other changes, such as appointing certain judges to promptly and expeditiously attend requests for said provisionary and other measures. This will make it possible for the Public Prosecutor, whether in person or through less direct means, to file the request and for the judge to respond immediately. If the warrant is granted, the agent of the Public Prosecutor can immediately proceed to enforce the measure, notwithstanding the fact that the documentation supporting the authorization may be sent at the same time or at a later date for the records.

Furthermore, by establishing that judicial hearings must be governed by the principles of the accusatory system, hearings must be oral and it is feasible that procedural law specify the procedure for this process.

Along this line, the eleventh paragraph of article 16 of the Constitution should be modified to eliminate the special rule stating that search warrants must be requested in writing. Taking into account the fact that with the due process judges assigned by the judicial branch to focus on ruling immediately on the above-mentioned requests, the procedure is expected to be carried out orally, contributing to the effectiveness of the corresponding authorities.

F. *Recording Private Conversations between Individuals*

Ongoing debates surround the existing technological possibility that one of the parties to a private conversation can record said conversation and later use it without the other speaker's consent for it to be made public. However, it is different when one of the parties records a conversation with information about a criminal incident or behavior because in this case, it is the will of one of the participants who discloses the conversation without interference from a third party, and even more so when the content is unlawful or provides information that apprises of or explains a potentially criminal incident, for which there are provisions for public order and in public interest that requires its denouncement or the collaboration of the person who participated in the conversation.

Under this premise, for crimes like false imprisonment, as in the case of kidnapping, federal courts have allowed victim's relatives to present recordings of their conversations with the probable kidnappers as evidence in the criminal proceedings, and for these recordings to be included in the corresponding rulings.

While this might be deemed sufficient for resolving the problem, it is also true that, as in the case of police searches, it is illegal to apply this measure to the general public due to the widespread conviction that private conversations are invariably confidential. Furthermore, since this is under the authority of the judges, court jurisprudence is an interpretation of a given text at a specific moment in history that may be suspended at any time and rendered null and void. Therefore, it is necessary to establish the lawfulness of these acts under explicitly defined, general and permanent circumstances.

In view of this, establishing this restriction on the constitutional right to the inviolability of private conversations is legally warranted, except when ordered by legal decree, if one of the participants has taped the conversation without the consent of the other participant, as long as it does not infringe the obligations of reserve set forth in the laws.

G. *Preliminary Proceeding Judges* ["Jueces de Control"]

Since it is linked to several of the modifications to be made to article 16 of the Constitution, one proposal with a wide-ranging effect is that of establishing federal and local judges, called preliminary proceeding judges, who will basically focus on ruling on the prosecutorial requests for provisionary measures and investigation techniques to be resolved immediately to minimize the risk of any delay in executing the proceedings.

Aware of the complex reality our nation is facing and the rate at which favorable circumstances for carrying out the abovementioned proceedings change in particular, there are also concerns about upholding the Rule of Law and especially fighting high impact crime. Therefore, notwithstanding the responsibility the Public Prosecutor has and now, based on this ruling, the police will have in investigating crimes, it is deemed necessary to set down the establishment of "preliminary proceedings" ["*jueces de control*"] judges to focus on ruling on temporary measures and other proceedings that require judicial oversight in a timely and responsive fashion, that rulings may be issued by any legally unquestionable means and that rulings contain the required information, without this meaning that rulings will no longer be grounded or their motives not duly explained.

Another function of "preliminary proceedings" judges ["*jueces de control*"] will be to deal with appeals against conditional rulings, the non-exercise of criminal action, desisting and suspending criminal proceedings, to control its validity and in all these cases safeguard the rights of the accused, the victims and the offended party.

This type of judge could be the one to conduct proceeding hearings, before the trial, which will patently be governed by the rules of due process set forth in article 20 as proposed in this ruling. This will depend on the organization established by laws, as well as workloads and available resources since court circuits with high crime rates will surely require one or more judges to solely deal with ruling the abovementioned remedies and techniques, some judges limited to reviewing the appeals against Public Prosecutor findings, which may number in the thousands, and other judges to be responsible for handling the proceedings until before the trial takes place, even for abbreviated proceedings.

Thus, the fundamental powers should be established only at a constitutional level and further elaboration on the rights should be referred to secondary legislation so as not to overregulate our Constitution.

For all these reasons, it is deemed relevant to establish due process judges to be responsible for quickly ruling on prosecutorial requests for searches, detentions, interventions of private communication, search warrants and other issues that require judicial oversight, as well as for ruling on appeals against Public Prosecutor findings and carrying out procedural hearings prior to the

trial based on the principles of an accusatory system, according to the rules of organization issued for that purpose by each judicial branch.

2. *Article 17*

A. *Alternative Dispute Resolution Mechanisms*

The text proposed for article 17 establishes the alternative dispute resolution mechanisms that guarantee access to prompt and expedited justice for the general public. These alternative mechanisms to jurisdictional processes for solving disputes, which include mediation, conciliation and arbitration, among others, will make it possible first of all to change the model of restorative justice, lead to the public's more active participation in finding other forms of interacting that promote personal responsibility, respect for others and the use of negotiation and communication for collective development. These mechanisms will also assist in reducing the heavy workloads of the jurisdictional agencies and for victims to obtain restitution of damages more promptly, which is a pending matter of our legal system.

For criminal matters, it will be necessary to regulate the use of these mechanisms by administrators of the law, considering the nature of the rights that are protected and those that can be waived; and in all cases, it will be manifestly necessary to cover the restitution of damages beforehand and in full for it to proceed since this, as mentioned above, is a longstanding complaint of society that must be addressed. In view of the two aspects noted above, the forms of alternative justice for criminal matters will need to be reviewed by the authority performing them in favor of the victims and offended parties. Therefore, it is deemed important to appoint a judicial supervisor to fulfill this role.

B. *Quality Public Defense Services*

The regulations needed to allow effective access to justice for all the general public, and especially those who are most vulnerable, is another contribution found in the text proposed to modify article 17. Convinced that the "criminal law of the enemy", which attempts to label those who oppose the decision of the groups in power as dangerous using predefined and contrived concepts is not the solution for the peaceful and democratic life of our society, the Public Defender was established as an institution that safeguards the individual and collective rights of the Mexican people.

The progressive evolution of human rights has led to the conclusion that the States' obligation of guaranteeing the free exercise of these rights is not only limited to a prescribed matter, but it also entails an obligation for the

State to provide all the necessary means so that the subject of said rights can make them effective. In other words, it is the State's obligation to guarantee effective access to justice, as the renowned Italian legal scholar Mauro Cappelletti accurately pointed out some 30 years ago.

This is one effective way of guaranteeing the general public's access to justice, mindful of the inequalities in Mexican society, of which a high percentage is subject to extreme poverty, and with the aim that the State guarantees quality legal defense services for the most vulnerable sector of society. If the justice system is decidedly acceptable for only prosecution agencies and trial courts and not for the defense of the most vulnerable, it will result in social injustice, a costly consequence for everyone.

Therefore, this institution of defense services must ensure quality with a professional, trained, career staff earning as much as public prosecutors, with the mission of adequately defending the people who so request it and the vision of being a defender of the rights of people in disputes with other individuals or in conflict with the law.

3. *Article 18*

A. *Changing the Expression "Corporal Punishment"*

The first paragraph of article 18 of the Constitution is changed in order to adapt the expression "corporal punishment" to the laws in force in the Constitution. Before reforming various constitutional instruments to eliminate capital punishment, the expression corporal punishment, that is, the punishment that can be inflicted upon the accused's body, comprehended both imprisonment and capital punishment. Given the fact that the Constitution now only allows imprisonment, it is necessary to adjust the text so it will correspond to said conditions. Therefore, the only term to be used hereinafter will be that of imprisonment.

B. *Changing the Expression "Convict"* ("reo") *for that of "Convicted Person"*

In accordance to the above and for the purpose of adapting the terminology of our Constitution to that of the international treaties to which Mexico is a part, it has been proposed to eliminate this word since it considered degrading and insulting, and to replace it with convicted person.

C. *Changing the Expression "Rehabilitation" for "Reinsertion"*

On the other hand, the term "social rehabilitation" is considered inadequate in referring to the moment in which convicted persons have completed

their sentences are reinserted into their social environment. Considering the fact that the fundamental nature of prison is that of a complete and exclusionary institution, we conclude it is not possible for convicted persons to achieve social rehabilitation during their stay at said institution. An institution whose main trait is exclusion cannot incorporate or readapt anyone to society. In view of this, support is given to the motion of changing the term "social rehabilitation" to that of "social reintegration" and to establish the new objective of inducing inmates not to commit crimes again.

D. *Maximum Security Centers for Organized Crime and Other Inmates Who Require Special Security Measures*

A prison sentence affects one of a person's most prized possessions: his freedom. However, sometimes, a citizen who breaks the law must be punished by having this valued possession restricted. Maximum security prisons must be reserved for persons who have been processed for or convicted of organized crime, and other inmates that require special security measures. Regarding this last premise, we refer to cases in which the crime is not one of those contemplated in the system for organized crime, but such a measure can be justified given the inmate's ability to evade the course of justice or to continue committing crimes from penitentiaries, as well as in cases in which third parties pose a clear risk to the inmate himself —as in the case of former members of police institutions— or when there is a psychological condition that can put the entire prison community at risk, among other circumstances.

E. *Exceptions in Cases of Organized Crime*

It is deemed fit to prohibit the accused and those convicted of organized crime from serving their prison sentences in penitentiaries closest to their homes, and on the other hand, to designate special prisons for these inmates. Likewise, it is considered proper to approve restrictions on communications between these inmates and third parties, with the exception of their defense counsel, and impose special surveillance measures given the fact that these prisoners are extremely dangerous.

These Committees believe it appropriate to change the penitentiary system, but this will not be possible if prisons remain under the exclusive control of the Executive Branch. Therefore, it is accepted that the power of the Executive will be limited exclusively to the administration of prisons and the judicial branch will be granted the power to ensure a sentence is carried out.

With this separation, each branch of power will be given its corresponding share: the Executive Branch will deal with prison administration and the Judicial Branch with that of carrying out the sentences, which implies safe-

guarding the rights of the inmates and rectifying any abuses, discrepancies and compliance with the statutes that may arise within the prison system.

4. *Article 19*

A. *Change of Name: Trial Binding Order* ["Auto de Vinculación a Proceso"]

In this reform, the traditional name of indictment is replaced by that of trial binding order. The concept of indictment specifically denotes an inducement that is usually accompanied by some kind of deprivation of rights; while a binding to process order only refers to the formal notification that the public prosecutor receives regarding the accused, for the purpose of the accused being properly informed of the reasons for which the investigation is being carried out and so the judge can intervene to control the actions that could affect fundamental rights. Even then, the material substance of the case shall still be required.

B. *Standard for the Material Substance*

As in the case of article 16 of the Constitution, the new text of article 19 aims at modifying the standard of proof for the binding to process order to be issued. The reason for this is basically the same as that rendered for article 16 above. Regarding this point, it should be added that the extreme standard of proof that has been used until now creates the effect that, within the period of time established by the Constitution, the procedure is carried out in such a way that it culminates in a writ that is practically a sentence against the defendant. This weakens the trial, the only stage in which the accused can defend himself with effective guarantees, and unduly gives more strength to the unilateral procedure of the public prosecutors gathering of evidence during the investigation, which has not been subjected to the oversight of the accused. The horizontal control exercised by the defense at the trial assures the quality of the information provided by the public prosecutor; therefore, it is not appropriate for judgements to be anticipated before the trial before a judge.

C. *Precautionary Measures and Pretrial Detention*

In order to avoid the excesses committed until now during pretrial detention, it was decided to establish the principle of subsidiarity and of exception for this institution to act. The use of precautionary measures, which are genuine acts of interference, shall proceed solely when there is the need for precaution during the process or victim protection. This means that the

use of a precautionary measure will proceed only when there is the need to guarantee the appearance of the accused at the trial; the progression of the investigation; the protection of the victim, of witnesses or the community, as well as when the accused is on trial or has been previously convicted of a willful offense. Pretrial detention shall only proceed when no other precautionary measures can ensure these ends will be achieved.

This new design follows the principle of presumption of innocence. Several classical and contemporary authorities on procedural law have rightly noted the inevitable conflict of authority that is thought to affect the rights of persons who are subjected to pretrial detention without having their presumed innocence defeated beforehand at a trial in which all the guarantees of due process are respected. Conflict of authority in itself is insuperable, but in order to mitigate it by a certain degree, the admissibility of such effects is expected to be the exception.

Another aspect that should be taken into account is that provisional remedies should be proportional to both the crime ascribed to the accused and the need for preventive measures. The above-mentioned risks allow for adjustments and are never all or nothing; modifications will depend on each specific case. Therefore, the public prosecutor must always appraise the need for preventive measures and justify said measures before the judge, allowing both the accused and his defense the possibility of exercising the right of reply at a hearing.

Lastly, the admissibility of provisional remedies must be governed by the principle of subsidiarity so that whenever it is decided to apply this provisional remedy, it should be as least intrusive to an individual's legal domain as possible. The aim in this case would be to cause the least interference possible.

D. *Pre-trial Detention and Serious Crimes*

In regulating precautionary measures, cases dealing with serious crimes and organized crime are handled differently. The aim is to prevent what has happened so far in terms of serious crimes and organized crime; that is, that the lawmaker has been the one to make the final decision regarding which cases should be governed by the Constitution and which ones call for special treatment since the cases deal with serious crimes or organized crime. It should be noted that special rules for provisional remedies are needed for these cases; however, the exceptions must be set forth in the text of the Constitution because if it is cross-referenced with the law, it will inevitably weaken the principle of constitutional supremacy.

When the system of serious crimes was first created to admit release on bail, it intended this remedy to be the exception. However, state and federal experience has shown that his exceptional system has taken over the rest of the body of laws. Nowadays, there is tremendous abuse of pretrial detention,

inasmuch as most crimes meet the criteria of serious crimes in ordinary law. In order to overcome this situation, it has been decreed that the Constitution itself must determine the exceptional cases for which in principle it would suffice to prove the alleged material substance for pretrial detention to proceed.

Article 19 of the Constitution itself establishes the possibility that state and federal procedural laws incorporate an exception to the design of the regulations governing provisional remedies and pretrial detention as explained above. The judge is expected to order pretrial detention in cases of organized crime, intentional homicide, rape, kidnapping, violent crimes involving weapons or explosives, as well as serious crimes against national security, the free development of personality and health, if the public prosecutor is able to satisfy the requirements called for to entail a proceeding for these crimes during the hearing.

The decision regarding precautionary measures can obviously be revised, so much so that it expressly states that it will be possible to revoke the liberty of individuals already subject to the proceedings when extreme cases as set forth in the Constitution can be proven and according to that directed by law.

E. *Suspension of the Statute of Limitations for Criminal Action and Proceedings against Organized Crime*

To prevent those accused of organized crime to evade the law easily, the suspension of the statute of limitations for criminal and procedural action has been provided for in case the formal binding to process order has already been ruled for said crime.

5. *Article 20*

A. *The Accusatory Process*

A key element for reaching the fulfillment of the object of this reform is to create the bases for a completely accusatory court procedural system, regulated by the principles of public access, confrontation and cross-examination, concentration, continuity, immediacy and impartiality.

One of the most important characteristics of an accusatory court process is the strict separation that should exist between the investigative agencies and jurisdictional agencies. This principle is already recognized in article 21 of the Constitution, as well as in article 18, which establishes the Comprehensive Juvenile Justice System. However, Mexican legislative tradition has established a mixed process that veers away from this important principle. Therefore, the first paragraph of article 20 of the Constitution reiterates the accusatory nature of the process.

This ruling establishes that the process will be accusatory and oral. Orality in itself is not a procedural principle; however, it is the instrument that makes it possible to renovate and give efficiency to the rest of the principles as explained below. It is not possible to conceive public proceedings if legal proceedings are carried out in writing. In this type of procedure, judges and people learn about all the proceedings at the same time. Nor would it be possible to give it the corresponding continuity as the hearings develop and to focus on the evidence presented if the proceedings do not take place orally. Without orality, there is no place for the proactive interrogations that make confrontation and cross-examination possible.

It should be noted that orality is not only a characteristic of a trial, but of all the proceedings in which the accused should take part. Orality implies abandoning the system or methodology of putting together a case file as has been done until now, to be replaced by a hearing system.

The hearing system inherent to this new process implies that judicial decisions, especially if these decisions affect rights, are to always be taken before the parties after said parties have been given the opportunity to contradict the evidence and to be heard. Thus, orality is not a characteristic of trials alone, but of all proceedings in general, including the preliminary stages of a trial. Exceptions would naturally be made in cases in which, without the knowledge of the accused or his defense attorney, the public prosecutor requests an arrest warrant, a search warrant, intervention in private communications, or an order to withhold procedures, as well as other judicial proceedings that due to their nature require stealth.

B. *The Structure of Article 20*

The creation of the accusatory process requires article 20 to be restructured so as to include the principles of due legal process. In order to focus to the highest degree on the rules that govern this type of processes, the article has been restructured under three headings.

Section A encompasses the design and the general rules of criminal proceedings throughout their various phases, investigations submitted to judicial control, the preparation stage for the oral trial, the hearings that require confrontation and cross-examination. Sections B and C set forth the rights of the accussed and of the victim or offended party, respectively.

C. *Section A. The Principles of the Process*

Sub-section I establishes the object of the criminal process, which simply consists of clarifying the facts, protecting the innocent, and striving to ensure that the guilty party does not go unpunished and that the damage is redressed.

In addition to that stated above concerning the hearing system, it should be noted that the principles of the criminal process do not apply to the trial itself, but to all the hearings in which evidence is discussed in the presence of the parties. Sub-section II of this section sets forth the principles of immediacy and free assessment of the evidence.

The principle of immediacy implies that all the pieces of evidence that are presented during a process and that contribute to taking preliminary decisions during the process and to determining person's criminal responsibility, whether witnessed by a judge at a hearing without compromises or intermediaries in such a way that the judge is able to decide on the decision in question after a free assessment of the evidence provided. This method significantly enhances the quality of the information based on which the decision is made, provided that it allows for direct contact with the source of the evidence; the ruling is then issued after hearing both parties.

The principle of free assessment of evidence is applied in decision-making. This principle is employed because the other systems traditionally used for assessing evidence in modern law are notoriously ineffective for guaranteeing the rational nature of judicial activities. This approach pertains to systems in which judges are separated into those of fact and those of law; that is, in systems that have a trial by jury. In these traditions, the jury is not obligated to explain its decision. This will not be the case in Mexico since decisions of fact shall be pronounced by professional judges who will be required to ground and explain their decisions as ordered in article 16 of the Constitution.

A weighted evidence system leads to unsatisfactory results. In this system, a pre-established legislative assessment of the evidence prevails over the judicial ruling —conclusive and semi-conclusive evidence. Despite the objectivity this system strives for, the results are genuinely poor in terms of the quality of the information used for decision making. The appearance of objectivity comes from its disguisedly deductive nature, which does not admit any authentic grounding from the facts. Empirical knowledge in law is primarily inductive inferential. Therefore, systems based on free assessment and healthy criticism are ideal for making the knowledge obtained during criminal proceedings more reliable.

Sub-section III of Section A establishes the prohibition of issuing sentences if evidence is not presented at a trial. The article itself sets forth the exception of preliminary evidence which, although it is in keeping with all the formalities pertaining to a trial, is presented before a due process judge before the trial has taken place.

Preliminary evidence is admissible in cases in which the evidence runs the risk of being lost if it is not promptly collected. Once the legal proceeding regarding preliminary evidence has been carried out, the results are incorporated into the trial by reading them.

An exception to this principle is also set forth for cases in which the accused expressly waives his right to an oral trial and admits to the act he is accused of

in exchange for some legal benefit. In these cases, the accused shall be judged by the due process judge with the evidence that come to light in the investigation carried out by the public prosecutor.

Lastly, a third exception to this principle is provided for cases of organized crime in which it is not possible to replicate the evidence at a trial either because the witness died due to an act attributed to the accused or because there is a proven risk for witnesses or victims. This possibility does not prevent the accused from objecting to and challenging the evidence presented.

In order to guarantee legal impartiality and to prevent judges from being influenced by information that has not been presented at a trial, sub-section IV stipulates that evidence is to be presented before a judge or a court different from the one that had previously handled the case. This focuses on the separation of the criminal courts of law at the trial level.

Once the investigation has been closed and an accusation has been prepared, the due process judge who issues the sentencing order and determines that trial proceedings be initiated has no longer jurisdiction over the trial. The reasoning behind this precautionary measure is that the judge or the court presiding the trial will only have the summary of the case and admissible evidence prior to trial that indicates the accusation and the evidence to be presented at the trial and that the decision-making body will hear for the first time.

Sub-section V establishes a fundamental principle of the accusatory process that states that the *onus probandi* corresponds to the accusing party and to the principle of equality between parties.

Sub-section VI prohibits the judge from coming into contact with any of the parties without the presence of the other. The reasoning for this approach is once again to prevent the judge from only obtaining unilateral information and that it predispose his criteria. This provision naturally has its exceptions for the proceedings requested by the public prosecutor and deemed necessary to guarantee the effectiveness of the investigation.

Sub-section VII states that once criminal proceedings have begun, early termination can be ordered if the accused does not oppose said termination under the conditions established by the law for such cases. If the accused admits complicity in the crime and there is sufficient evidence to corroborate the accusations, the judge must schedule a sentencing hearing. The law shall establish the benefits that may be granted in these cases.

Sub-section VII sets forth the standard of proof for a conviction, which is none other than the grounded proof for a conviction. As stated above, this is not about an intimate conviction, but of one that can be justified by the factual elements of which the public prosecutor can give proof.

Sub-section IX refers to the clause for excluding illegally obtained evidence. The prohibition of illegally obtained evidence is essential for preserving procedural loyalty on behalf of the police and the public prosecutor, as well as for professionalizing the investigation.

The text was drafted to adhere to the need for properly dimensioning this procedural concept. In view of the other alternatives that were discussed, it was decided to adopt the one that says that any evidence gathered by violating fundamental rights, and not only legal rights, would be declared null and void. This is because some violations of legal provisions can be amended and corrected during the process without this meaning that rights are affected. Broadening the scope of excluding evidence of assumptions that do not imply defenselessness or the violation of other guarantees could result in a repetition of useless procedural acts or the annulment of decisions purely on the basis of formalities, which could affect the effective procurement of justice.

Lastly, sub-section X states that all the principles explained above must also be observed in the preliminary hearings of the trial.

D. *Section B. The Rights of the Accused*

Section B now establishes the rights of the accused. A list of these rights is given below. First of all, the right to the presumption of innocence is expressly recognized.

The principle makes it possible to establish the process as a way of obtaining proof that an individual has committed a crime, and until this requirement is fulfilled, no individual can be considered guilty or subject to punishment. Guilt and not innocence must be proven.

In the Mexican legal system, this principle is already recognized as the country has signed various international instruments that expressly grant the presumption of innocence as a guarantee. This principle has been included in several international human rights instruments, some directly binding and others indirectly binding. Among the international documents with a legal binding effect are the Universal Declaration of Human Rights (article 11, paragraph 2) and the American Declaration of the Rights and Duties of Man (article XXVI) dated December 10 and May 2, 1948, respectively; the International Covenant on Civil and Political Rights of December 19, 1966 (article 14.2); the American Convention on Human Rights of November 22, 1966 (article 8.2); as well as by the Standard Minimum Rules for the Treatment of Prisoners (article 84, paragraph 2) adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955. Despite its widespread influence within the international framework of human rights, in our environment it has been very difficult to establish recognition of this principle. In fact, until 1983, the Federal Criminal Code stated exactly the opposite, that is, the presumption of guilt.

In addition to being a fundamental principle for prosecution, the presumption of innocence represents an obligation in the treatment of the accused. Thus, the regulation of provisional remedies has been designed as mentioned above.

Sub-section II establishes the right to render a statement or to remain silent. The right to a preliminary statement has traditionally been a concept used in Mexico's social setting to allow the accused to answer to the charge the accusing party has made against him. It is now deemed necessary to reform this right so as to give it a broader scope that is not subject to a statute of limitations —the traditional 48 hours when charges were filed with the accused in custody— nor with the excessive formalities that are now required. The right consists of allowing the accused to declare if he desires to do so, or to remain silent, without the latter being used as an indication of guilt against the accused. The moment this right can be claimed is precisely when the accused is detained.

Sub-section III establishes the accused's right to be informed of the charges against him from the moment of his detention or at his first appearance before the public prosecutor or judge, as well as the rights to which he is entitled. An exception is made for cases of organized crime. In these cases, it is possible to authorize that the name of the accuser not be revealed. The possibility of granting benefits to those who effectively collaborate in the prosecution of organized crime is also foreseen.

Sub-section IV establishes the already existing right to offer material evidence. One of the cornerstones of the right to defense is comprised of the right to present evidence. The way in which this right is structured consists of establishing the appropriate conditions to present evidence, as well as the assistance that might be needed to ensure the appearance of witnesses in court.

Sub-section V establishes the right to be tried in a public hearing before a single or collegiate decision-making body. An oral trial is the last stage in the entire criminal justice system. Only the presence and effectiveness of trial rights make the existence of other practices feasible and legitimate from a democratic perspective. Some of these practices include alternative procedures, the rescission of cases and the admissibility of an abbreviated trial procedure. Without an oral trial, the criticism many direct against the so-called plea-bargaining or consensual justice would be valid since it admits criminal proceedings without evidence and without truth. Even then, the possibility of a trial with guarantees such as the fundamental rights of the accused makes it possible to anticipate what will happen at the trial and to determine the best way to face criminal prosecution. Whoever knows himself innocent will always opt for an oral trial that absolves him.

Public access may however be limited. When it is necessary to limit public access to trials in order to protect the assets of a higher importance; that is, when it is indispensible for the protection of victims, witnesses or minors. Restrictions to public access should not be interpreted as affecting the right of defense.

Protecting the personal information of third parties, as in the case of industrial secrets, can also be considered for restricting public access to trials.

Lastly, it should be noted that since public access is an exception to a general rule regarding rights, this exception should in turn be enacted with cer-

tain limits; that is, to the degree to which it is strictly needed to fulfill its purpose of protecting.

Sub-section VI guarantees the right to information. As mentioned above, the right to information is an absolutely fundamental right. The general rule is that the accused should be given all the information needed, in a timely fashion, so he may exercise his right to confrontation and cross-examination, as well as to defend himself. The information from the investigation carried out should be disclosed to the accused if the accused is detained; at the moment of being summoned to appear as a likely suspect; or else when he is involved in the proceedings. As of these moments, the accused should be provided with all the information he may request for his defense and that are found in the records of the investigation.

One of the basic premises of this constitutional reform is that human rights protection and the instruments for an effective criminal prosecution are completely compatible. The fact that the accused has the right to access all the information cannot be interpreted as opening the door to the destruction of evidence and of the means of evidence needed for the successful outcome of criminal investigations. Along these lines, this Committee believes it is indispensible to include in the text of sub-section VI the possibility of ordering secrecy in the investigation, even when the accused has already been formally "binded" to the process.

This discretion shall only be admissible for the purpose of upholding the success of the investigation and when discretion is essential for this end. The due process judge would be the official in charge of authorizing the discretion of the investigation at the request of the public prosecutor. As with any other exception to a constitutional guarantee, its admissibility should be limited and proportional to the specific conditions of the case. The information, however, will have to be provided in a timely manner to the accused before the trial so that the accused may exercise his right to defend himself.

Sub-section VII refers to the required term for a trials. The rule that the accused shall be judged within four months in cases in which the maximum punishment does not exceed two years in prison and within a year if the punishment exceeds that period of time, unless an extension has been requested for the defense of the accused, shall remain in force.

Sub-section VIII establishes the rule of the right to adequate defense. It is deemed essential to adopt the proposal, object of this ruling, in order to establish the right to an adequate defense by a lawyer as an inalienable constitutional right, thus eliminating the traditional concept of person of trust. The person of trust does not actually guarantee anything and the possibility of that person actively participating in the accused's defense has only translated into corrupt practices and a lack of professionalism.

Sub-section IX sets forth the new rules to limit the term of pre-trial detention. In addition to limiting the term, which cannot exceed the maximum sentence for the crime in question, there is already a new rule for the maxi-

mum term of this provisional remedy, which states that pre-trial detention cannot last for more than two years if the delay can be attributed to the State.

E. *Section C. The Rights of the Victim or the Offended Party*

Section C of article 20 of the Constitution now confers new rights for crime victims. Basically, this consists of a more active participation in the process by embracing innovative concepts.

In this reform, important rights that have been recognized before are preserved. Such is the case of the victim's right to receive legal advice from the public prosecutor, to be informed of his rights and to receive information throughout the development of the criminal proceedings, if so requested.

The rights to receive medical and psychological assistance are also preserved, as well as having access to other measures for protection and assistance.

A new constitutional aspect of assistance is established in such a way that the victim can directly intervene in the trial and seek remedies under the terms established by law. Several states, such as Baja California, Chihuahua, Morelos, Oaxaca and Zacatecas, have incorporated the concept of "assisting party" in their procedural statutes. This recognizes the victim as a genuine party to the proceeding; that is, it allows the victim to join the accusation presented by the public prosecutor. In these statutes, the victim is given the possibility of naming a legal representative to directly litigate at the oral trial. This concept is now embodied as a new constitutional guarantee so that victims can have the opportunity to directly defend their interests. Naturally, this does not mean that the public prosecutor is no longer obligated to give victims effective, quality service and represent the interests of the victim.

The newly established rights for victims include the possibility of protecting their identity in cases of minors, or in cases of victims of rape, kidnapping or organized crime, whenever the judge deems it necessary for their protection.

Likewise, the public prosecutor' duty to design strategies to protect victims and offended parties, witnesses and all others involved in the proceeding is also established.

In addition to the above, the scope of the right to contest the decisions not to prosecute a criminal action for all the legal purposes comprised in all the forms in which this could occur; that is, in cases of waivers and of confidentiality. Case law had already foreseen these extremes, which are now expressly recognized in the Constitution.

6. *Article 21*

In the draft proposed for article 21, the creation of a new national, general code of coordinating principles for agents that form part of the National

Public Security System is deemed pertinent. The regulation expressly contemplates coordination between the Public Prosecutor and the police forces at the three levels of government in order to attain nationwide integration of public security efforts, but always within a framework of respect towards the federal system.

Thus, the law enacted on this matter, which contains the coordinating principles for the National Public Security System, should specifically establish at least certain components. The first one should regulate the recruitment, admission, training, duration in service, evaluation, knowledge and certification of the members of public security institutions. The second component should establish an essentially homogenous police career nationally as a basic part of these principles. Moreover, the certification of police forces and Public Prosecutors should be specifically regulated. This not only implies putting them into the database to prevent those who have committed crimes or are members of illegal organizations from entering police institutions, but also, and primarily, establishing a certification system to ensure that police forces have the knowledge and skills needed to perform their duties, always within an unrestricted framework of respect for human rights. Thus, for instance, for a member of the municipal, state or federal police not assigned to a state or federal investigation agency to be able to carry out the work of preliminary investigation or assist the public prosecutor, should be fully certified and have knowledge of legal issues and of the protection of human rights, as well as the abilities and skills that allow him to do his job effectively.

This means that, in the federalist spirit that inspires this reform, the general laws established by the Congress of the Union must be adapted to each of the realities and situations of each region in the country by means of laws that state legislative bodies shall enact under the terms of the system.

On the other hand, article 21 of the Constitution has been reformed to establish the relationship between the Public Prosecutor and the police during the investigation of crimes, as well as for investigations dealing with intelligence and prevention.

Just as happens in most countries in the world, police officers will be under the auspices and the direction of the Public Prosecutor when exercising the duty of criminal investigation. These police officers will be able to perform the work of analysis and investigation but with certain restrictions. At the moment in which the police officer discovers the crime, he must notify and report it to the Public Prosecutor immediately. This first paragraph of article 21 should be read as an integral part of the last paragraphs of article 21 and, as a result, police officers that perform investigative functions should be certified, and have not only the knowledge and skills to do their job technically, but also the legal regulations and unrestricted respect to human rights while investigating. The principle upheld by the permanent legislature for enacting these changes implies the absolute need for coordination between

the agents of the Public Prosecutor and police officers for reasons of public security. Coordination in performing the investigation means that both agents and police officers must perform their duties in such a way that the objective of the investigation is achieved, but always in dealing with the investigation of crimes under the auspices and direction of the Public Prosecutor in the exercise of this duty.

Carrying out the investigation under the auspices and direction of the Public Prosecutor represents an operative direction of the work of investigation and this direction is separate from the hierarchy of the police, as the police may be administratively assigned to other bodies, ministries or even municipalities; or else to the ministerial or judicial police assigned to state or federal Attorney General as in the case of crime investigation agencies. This means that state or federal legislatures will determine the nature of this relationship.

A. *Private Criminal Action*

Along another line, the victim will have the possibility of exercising criminal action directly, without prejudice that the Public Prosecutor may intervene in these assumptions to safeguard public interest. Two forms are established: one pertaining to the possibility that the public prosecutor's accusation is adhered to, which was already explained on discussing the issue of trial intervention, and the autonomous exercise of that right for certain cases as set forth in the law. The exercise of criminal action in these situations will clearly be the exception, only in those cases in which the interest of the affected party is not general. As in the case of assistance, this possibility should not translate into the Public Prosecutor neglecting cases, but should intervene since the authority to do so has already been given him by article 21.These possibilities will allow the procurement and administration of justice to become more transparent, provided that it gives way to citizen control over the functions involved in procuring justice.

B. *Plea Bargaining*

The duty of rationalizing and creating a coherent policy for criminal prosecution is already a manifest standard to efficiently manage public resources, handle economic problems and maximize the available resources to their highest level, as well as to accomplish the desired political-criminal objectives.

The unconditional use of the principle of full responsibility in criminal investigation overloads the justice system with minor crimes that have no bearing on public interest, but that criminal investigation authorities are obliged to pursue these crimes in view of a misunderstood non-discretionary nature of criminal prosecution that generates ongoing investigation costs for issues that

do not merit it. Under these circumstances, it is deemed necessary to grant to the Public Prosecutor the power to use plea bargaining so as to allow the office to manage the resources available for investigation and use said funds for crimes that offend and harm the legal interests of the greatest consequence.

It is clear that plea bargaining will not apply in cases of public interest of capital importance. Likewise, the possibility of objecting to the non-exercise of criminal action before legal authorities is also upheld.

7. *Article 22*

The current first paragraph of article 22 intends to establish the principle that all punishment must be proportional to the crime punished and the assets affected. The intention is to have legislators always looking for correspondence between the punishment and the value of the legally-protected property when determining sentences. Thus, the greater the effect, the greater the punishment, and vice versa.

[…]

The use of forfeiture seeks to create a newer and less complicated concept to apply, one that allows the State to exact assets on which there is information demonstrating that said assets are the instruments, objects or products of organized criminal activities, crimes against public health, kidnapping, auto theft and human trafficking, or activities aimed at hiding or interspersing the assets that result from such crimes.

This modification aims at confronting crime systemically, directly having an impact on criminal finances, increasing the costs and lowering the profits, as well as being a frontal attack against the factors that cause, correlate, give way to or promote criminal behavior.

It should be noted that currently the destiny of the assets instruments, objects or products of a crime depends, first of all, on the seizure of said assets. Likewise, it is essential to wait for the official statement of full criminal responsibility of one or several people. However, sometimes, the assets may not have be directly related to the accused, even when there is evidence indicating that the assets are the instruments, objects or products from criminal activities, or activities aimed at hiding or interspersing the assets that result from a crime.

In this sense, in order to find an efficient tool that helps dismantle criminal organizations and limit their negative effects, prevent these organizations from spreading, and principally seize the assets of these groups, establishing a procedure that is jurisdictional and unconnected to criminal matters is deemed necessary.

By this means, ordering the seizure of property will be allowed for assets that:

a) Are instruments, objects or products of a crime, even when a sentence has not been issued to determine criminal responsibility, but there is sufficient proof to determine that the criminal act took place.
b) Are not instruments, objects or products of a crime, but have been used or intended for concealing or merging property that is the product of a crime.
c) Are being used by a third party to commit crimes if the owner of the property was aware of the fact and did not notify the authority or did something to hinder it.
d) That are owned by third parties, but there is sufficient evidence to prove that said assets are the products of offenses against property or of organized crime and the person accused of these crimes acts as the owner of said assets.

Lastly, in order to respect every person's constitutional right to due process of law, it should be noted that remedies to prove the lawful origin of the assets in question and acting in good faith, as well as the impossibility of knowing about the unlawful use of said assets may be applied against procedures regarding the seizure of assets.

8. *Articles 73 and 115*

The first proposed reform is that of section XXI of article 73 of the Constitution. This reform aims at granting the Congress exclusive power to legislate on matters of organized crime, which means that only the Federal Government will deal with crimes of this kind. During the transition period, which will be discussed below, state laws on such matters shall continue in effect until the Congress exercises the power now granted to it.

Meanwhile, as established in the reforms set forth in articles 21, 73 section XXIII and 115 of the Constitution, the National Public Security System will allow activities regarding this matter to be coordinated envisioning federal, state and municipal levels, along with basic agents supervising on behalf of the National System. This reform will make it possible for the System created in 1995 to evolve as the system has not been able to fully guarantee the quality of the public service rendered by Public Security despite the major budgetary investments that have been made.

The current state of both the system and of federal, state and municipal police institutions was analyzed to draft the reforms to the National Public Security System. It was observed that there are different standards and attributes, which vary in regions and even in processes of deterioration, corruption and sometimes, admittedly, by drug-trafficking infiltrating the ranks. Thus, while there are states and municipalities with well-trained, prepared police forces, there are others in conditions that are not as favorable. Despite

the undeniable progress that has been made, even federal institutions have not been able to establish themselves as professional, state-of-the-art institutions. Despite having been established more than ten years ago, the Federal Preventive Police is still trying to establish an action plan to achieve efficiency.

Therefore, it is necessary to revise the entire public security system in order to make it consistent with the realities of our country, endowing the institutions with the attributes needed to fulfill their duties. Naturally, this will necessarily be balanced, an indispensible aspect to prevent any abuses or, what is worse, violations of citizens' fundamental rights.

Thus, the first paragraph of article 21 stipulates that the work of crime investigation corresponds both to the police and the Public Prosecutor. This is necessary, considering that, in the literal meaning of the text, the control of the investigation currently corresponds exclusively to the Public Prosecutor. As a result, the interpretation given to this has been that police officers, even ministerial ones, cannot participate in absolutely any of the phases of the investigation.

This interpretation is erroneous considering that, according to the most advanced models of investigation, it is the duty of the police to perform basic tasks like preserving the crime scene, gathering information or evidence that will be essential for ensuring successful criminal proceedings immediately after a crime has been committed.

It is very important to make it clear that in the exercise of their investigative duties, the police officers shall always conduct themselves under the auspices and management of the Public Prosecutor; in other words, with the reform, the latter shall not lose its role as the controller and the key player during the investigative phase.

Without a doubt, another enhancement lies in the fact that the new proposed text does not predetermine an organic structure for the investigative police. This means that both the Federal Government and the states will be in charge of deciding, by means of their own legislation, the best possible location for this police force: whether as part of the same investigative institution (the attorney general office) or in another public administration agency as done in most countries.

Regardless of the above, these Committees believe it necessary to develop a wide-ranging security system based on coordination, but one that also establishes the basic requirements for regulating police institutions nationwide. Therefore, the establishment of a National Public Security System is being proposed.

This system would be conceived, in the first place, to set forth the regulations for police career services; that is, the selection, admission, training, tenure, evaluation, recognition and certification of members of public security institutions. Of course, the operation and development of the police career will basically be carried out in municipalities, states and the Federal District, but that will be subject to these bases.

In second place, the bases are intended to cover aspects regarding criminalistics and personnel.

Prevention is especially important, in the sense that, once the system is implemented, no one shall be able to join these institutions without having been duly certified and registered.

Social participation is an essential component for success of the system. Therefore, it is deemed fit to include that the bases of the system must imperatively take community participation into account so that society can assist, among other things, in evaluating crime prevention policies, as well as the results of the institutions themselves.

Finally, a law now in force for budgetary provisions is contemplated to be included in the text of the Constitution so as to specify that the funds the Federal Government allots to states and municipalities for public security may not be used for a different purpose.

In order to make the system congruent, an additional reform to section VII of article 115 stipulating that a law in state legislatures shall govern preventive police forces for the purpose of establishing basic standardization has been proposed.

It should be pointed out that this modification does not change the fact that the law states that the preventive police are under the command of the municipal president; this means that as upheld by Supreme Court doctrine, the power to name the head of the municipal police shall still be the responsibility of this municipal official.

9. *Article 123*

The principles of legality, integrity, loyalty, impartiality and efficiency are the mainstay on which the behavior of every public servant is based. This is especially important when dealing with members of police, law enforcement and crime investigation institutions.

The interest in having efficient, honest and reliable judicial police agents and police officers, who can fight crime professionally, ethically and effectively, gave rise to the March 3, 1999, reform to article 123 of the Constitution. At that time, lawmakers strove to include more efficient mechanisms to dismiss those officers who, for whatever circumstance, act against the principles governing police careers. For this purpose, the following was established:

> […] The good officers in police and public security institutions should have systems that allow them to make a decent career as a professional and recognized by society. However, these systems should also allow the authorities to expediently dismiss members of these institutions who abuse their position and corrupt the institutions […].

This measure strives to remove the bad elements in public security and law enforcement institutions, without allowing them to be reinstated, regardless of the outcome of the court ruling on the trial or means of defense brought before court; and if the case is ruled in favor of the plaintiff, the plaintiff is only entitled to a worker's compensation.

However, various legal criteria later allowed these officers to be reinstated in their positions. This was due to the fact that even when *amparo* sentences only deal with the legal implications, they have the effect of restoring things to the way they were and, as a result, have a bad public servant remain in the institution.

In view of this, this reform to article 123, Sub-Section B, Section XIII is intended to establish that in cases of non-compliance with laws stating the rules of continuance or of becoming liable in the performance of their duties, public prosecutors, experts and members of Federal, Federal District, state and municipal police institutions shall be removed or dismissed from their positions without the possibility, under any circumstance, of being reinstated or restored to their positions. In other words, even though the public servant may file a legal remedy against his dismissal, cessation or removal and were able to obtain a ruling in his favor, whether due to errors in the proceeding which lead to a retrial or a definitive ruling on the merits of the case, the State may not reinstate said public servant. However, under these circumstances, the State would be obligated to compensate the affected party.

It was considered important to include agents of the Public Prosecutor and experts in this constitutional statute, as they are essential parts of the process of law enforcement and investigation and their performance must be maintained under the principles of absolute professionalism, ethics and efficiency in their work environment.

The reliability of expert opinions is a vital component for the rulings issued by a court of law within its jurisdiction, and may allow the ministerial authority to better reinforce the investigation to therefore better prosecute crimes, so that the accused is granted more defense mechanisms in the face of a potentially ungrounded accusation.

In view of the above, it is proposed that the constitutional system in place for public prosecutors and police officers, in terms of systems regarding removal, cessation or dismissal, also apply to experts, who already have the incentive of career service.

As a measure to fight corruption in police and law enforcement institutions, the reform is conclusive in asserting that members who have incurred in non-compliance or serious misconduct as set forth in its disciplinary or work regulations may not be reinstated in their positions since it denotes an offense to the institutional values of honesty and high ethical standards needed in the public security and law enforcement system, a cornerstone of the spirit of this reform.

As seen, this reform gives rise to a healthy balance between the need of providing a career service, needed to motivate personnel by having the prospect of professionalization and growth, and the imperative of having efficient mechanisms to purge the system of agents who deviate from ethical principles and soil and damage the institutions.

Finally, according to the bill to reform Sub-Section B Section XIII of article 123 of the Constitution presented last November 15 before the Senate sitting *en banc*, it is again a priority to elevate the standard of quality of life for agents of the Public Prosecutor, members of police institutions and experts, as well as that of their families and dependents, by means of complementary social security systems that can be established by federal, state and municipal government authorities.

10. *Transitory Regime*

The justice reform is undoubtedly an undertaking of enormous importance and as such, one that requires great effort, as well as extreme care. Errors in its implementation may cause serious problems that have even led to the failure of similar reforms in other localities.

The federal system emphasizes the need to pay attention to the temporary nature of its implementation since, unlike States under a unitary or centralist regime, in Mexico, a change like the one proposed requires the participation of the Federal Congress, state legislatures and the legislative body of the Federal District.

Moreover, the above must be done gradually and in such a way that it allows members of the Union to advance at their own pace; obviously, with a maximum time period that will assure all Mexicans that, on reaching the deadline, Mexico will have a fairer, more efficient and more expeditious criminal procedure. Thus, Congress proposes a detailed transitory system that includes the abovementioned imperatives.

The first consideration established is that the Decree for the reform shall enter into force the day after its publication in the Federal Official Gazette. However, it then states there will be a series of exceptions, which are explained as follows:

a) The new accusatory criminal procedure system shall enter into force when established by secondary legislation (federal or local) without, under any circumstances, exceeding a period of eight years, as of the day after the publication of this Decree to reform the Federal Constitution.
b) As a result of the above, the second transitory article establishes the obligation of the Federal Government, states and the Federal District to issue and implement the modifications —or even new statutes— deemed necessary to be adopted in the new system in their corresponding jurisdictions.

One important consideration lies in instructing the various levels of government to adopt this system gradually, either by implementing the system regionally or that the new process be applied to certain criminal behaviors until it can be applied to all types of crime.

c) Due to the complexity of the reforms, the different people involved in criminal procedures, that is, public prosecutors, judges, the accused and victims, among others, must be given complete legal certainty with the implementation of a criminal procedure that will effectively come to modify age-old customs and behaviors, as well as redefine or increase the guarantees established in this matter.

   To do so, it has been proposed that when the legal provisions implementing the constitutional reform are published, the corresponding legislative branches should issue a statement. This is a formal act that expressly stipulates the exact moment at which the accusatory criminal procedure system enters into force and has been incorporated into the corresponding laws. This action shall also serve to explain to the citizens of each state the principles and guarantees that will govern the form and terms under which criminal procedures shall be put into effect. This statement will obviously be published through official means of communication.

d) This Congress is well aware of the fact that some states of the nation have already initiated reforms that lead to the establishment of an accusatory system in their corresponding jurisdictions. For these cases, the Constitution should set forth a rule of procedure in a third transitory article that will allow these states to uphold their own reforms and that, furthermore, the states should be given the guarantee that any court proceedings and trials that may have been carried out are entirely valid and not affected by the entry into force of the reforms made to the Federal Constitution. Thus, any risk of contesting such processes and trials with the argument that there were no constitutional bases for said trials to take place is eliminated.

   On the other hand, some of these states are waiting for the reform now being approved in order to make adjustments to their provisions and supplement or promote their own reforms. States may do so within the above-mentioned term of eight years.

e) The starting point for implementing the new accusatory system is a vital aspect in the reform in question, since it consists of defining the moment at which the new system shall be put in practice.

   In this regard, international experiences in the same field show that it is not recommended that the new system be used for criminal proceedings currently underway. In fact, the ideal solution for these kinds of measures is to begin at zero; that is, that the reform only be applied to proceedings that have been initiated after the said system has entered into force. The explanation established in the fourth transitory article is

undoubtedly also necessary to prevent, at all costs, the accused subject to proceedings from availing himself of the later rules considered more beneficial for his case that are set forth in the new system. In other words, the success of the reform implies making an exception to the principle of retroactivity, in one's favor, on criminal matters.

f) Along another line of thought, and given the fact that the reform now approved transfers the power of legislating on organized crime to the domain of the Federal Congress, it is also necessary to clarify two important matters: First of all, it is important to uphold the validity of local legislation on this matter until the Congress exercises the powers granted to it in article 73, Section XXI of this Constitution, in order to circumvent any legal loopholes that make it impossible to prosecute organized crime. Secondly, it is essential to clarify that the criminal proceedings opened on the grounds of said legislation, as well as the sentences issued based on said legislation, shall not be affected by the entry into force of federal legislation. Therefore, these criminal proceedings should be concluded and carried out, respectively, according to the provisions in force prior to the entry into force of the latter legislation.

Regardless of the above, this elected government body believes it necessary to establish a maximum term of six months for the Federal Congress to discuss and approve the law that creates the National Public Security System. States should follow suit within a year of the entry into force of this Decree.

The above is mandatory given the importance of the matters contemplated in these laws and their impact on the future development of police institutions nationwide, in addition to the imperious need to move toward standardized processes for recruitment, selection, promotion, certification and professionalization, as well as the creation and networking of databases as indispensible tools to enhance the fight against crime nationwide.

Meanwhile, international experience has also shown that such an important reform requires a significant amount of financial resources. Without said funds, the reform would be condemned to failure since it is necessary to invest particularly in training public prosecutors, judges, magistrates and public defenders, among others, as well as in the physical infrastructure to adapt it for carrying out trials. Hence, the seventh transitory article manifests the obligation of the Federal Government and state legislatures to allocate the funds needed for the criminal justice system reforms.

It is also important to have an agency to coordinate national efforts to ensure the success of the reform at both federal and state levels. In addition to the branches of government, other agencies, like social or academic organizations that can contribute their knowledge, statistics and experience to the proceedings, should participate to enhance the implementation of the new criminal proceedings.

The eighth transitory article of the Decree declares the creation of this agency and provides for its establishment within the first two months after the

entry into force of the reform. Logically, this agency will be endowed with a technical secretariat that will act as the executive or operational department to advocate for and support the various branches, agencies or states along the course that has now been taken.

Finally, and regardless of the issues dealing with the transitory regime for the implementation of the new system a tenth transitory article has been provided to govern house arrest.

The transitory nature of this provisional remedy lies in the fact that its existence is deemed incompatible with or unnecessary in accusatory criminal systems.

Even then, it must be admitted that the abrupt elimination of this remedy will deprive federal and local law enforcement agents of a tool that is currently provided in most secondary codes and must therefore continue to exist at least until the accusatory procedure system enters into force.

To prevent the indiscriminate use of this remedy, it is deemed fitting to establish the exact premises for it to proceed, as well as its maximum term, in the transitory articles.

II. Executive Branch
Ministry of the Interior

Decree by which Various Provisions of the Political Constitution of the United Mexican States are Reformed and Added

(In the margin there is a seal depicting the National Seal that reads: United Mexican States. Presidential Office)

Felipe de Jesús Calderón Hinojosa, President of the United Mexican States, makes it known to its inhabitants:

That the Permanent Commission of the Honorable Congress of the Union has brought before me the following

Decree

"By the Powers Granted to it by Article 135 of the Constitution and Previously Approved by the Chamber of Deputies and the Chamber of Senators of the United Mexican States as Well as the Majority of the State Legislatures, the Permanent Commission of the Honorable Congress of the Union

Decrees:

The Amendment and Addition of Various Provisions of the Political Constitution of the United Mexican States

Sole Paragraph. Articles 16, 17, 18, 19, 20, 21 and 22 are amended; Sections XXI and XXIII of Article 73; Section VII of Article 115 and Section XIII of Subsection B of Article 123, all of which are from the Political Constitution of the United States of Mexico, shall be as follows:

Article 16. No one's person, family, residence, documents or possessions can be disturbed unless by virtue of a warrant from the competent authority, duly based on law and fact and which sets out the legal justification for such proceedings.

An arrest warrant can only be issued by the judicial authority, [and must be] preceded by an accusation or complaint about the commission of an act stipulated by law as a crime punishable by imprisonment and information is on file which establishes that the act was committed and that there is probable cause ["*existe la probabilidad*"] that the suspect committed or participated in the commission of said act.

The authority executing an arrest warrant must bring the suspect before the judge without delay and under his full responsibility. The contravention of this rule shall be punishable by criminal law.

Any person may detain a suspect at the moment he is committing a crime or immediately afterwards, delivering him without delay to the nearest authority, who shall in turn bring him before the Public Prosecutor without delay. The detention shall be recorded immediately.

Only in urgent cases, when dealing with serious crimes defined as such by law and in the face of a reasonable risk that the suspect might evade justice, or cannot be brought before a judicial authority due to the time, place or circumstances, the Public Prosecutor may, under his own responsibility, order his or her detention, stating the legal, factual and evidentiary justifications for ["*fundando y motivando*"] this decision.

In cases of urgency or *in flagrante delicto*, the judge assigned to the case shall immediately ratify the arrest of the suspect or order his or her release according to law.

At the request of the Public Prosecutor and when dealing with organized crime, the judicial authority can order the pre-charge detention ["*arraigo*"] of a person, with the specifics of place and time as stipulated by law, for a period not exceeding 40 days, as long as the action is deemed necessary for the success of the investigation, the protection of persons or legal interests, or when there is a credible risk of the accused evading legal action. This period can be extended provided that the Public Prosecutor can prove that the original causes for imposing said detention remains. In any case, the total period of detention may not exceed 80 days.

The term organized crime is understood as referring to an organization made up of three or more persons for the purpose of committing crimes permanently or repeatedly, according to the terms of the corresponding law.

No suspect is to be held by the Public Prosecutor for more than forty eight hours, a period during which the suspect must be ordered released or brought before the judicial authority. This period may be doubled in cases classified by the law as organized crime. Any abuse of the aforementioned provisions will be punished under criminal law.

All search ["*orden de cateo*"] warrants, which can only be issued by the judicial authority at the request of the Public Prosecutor, shall state the place to be searched, the person or persons to be apprehended and the objects to be seized, conditions to which the action shall be solely restricted. At the conclusion of said action, a detailed report shall be prepared in the presence of two witnesses named by the occupant of the place being searched or, in his absence or refusal, by the authority that carried out the search.

Private communications are inviolable. Any act that threatens the freedom and privacy of such communications shall be punishable under criminal law, except when such communications are offered voluntarily by any of the individuals participating in them. A judge shall evaluate the significance of these

communications, provided that they contain information related to the commission of a crime. In no case shall communications that violate the obligation of confidentiality established by law be admitted [by the court].

Only the federal judicial authority, at the request of the federal authority empowered by law or by the corresponding state Public Prosecutor, shall authorize the interception of any private communications. For this, the corresponding authority shall cite the grounds and legal causes for the request, disclosing also the type of intervention requested, the subjects of this action and the duration thereof. The federal judicial authority may not grant such authorizations in electoral, tax, commercial, civil, labor or administrative matters, nor in the case of communications between a detainee and his or her attorney.

The Judicial Powers will have preliminary proceedings judges ["*jueces de control*"][2] who shall resolve immediately, and by any means, requests for precautionary measures, injunctions and warrants, guaranteeing the fundamental rights of the suspect and of the victims or offended parties. There should be a reliable record of all the communication between judges and the Public Prosecutor and other relevant authorities.

Authorized interceptions shall conform to the requirements and limits stipulated by law. Results of interceptions that do not comply with the aforementioned shall have no probative value.

The administrative authority may inspect private facilities only to ensure that sanitary and police regulations have been complied with; and to view books and documents indispensable to proving that tax provisions have been complied with, operating under the respective laws and the prescribed formalities for search warrants in the performance of these duties.

Sealed correspondence going through the post office shall be exempt from search and any violation shall be punished by law.

In times of peace, no member of the Armed Forces may be billeted in a private home against the will of the owner nor exact any benefit from said owner. In times of war, the armed forces can demand lodging, equipment, food and other benefits under the terms established in the relevant martial law.

Article 17. No one shall take the law into his or her own hands, nor resort to violence to claim his or her rights.

Everyone has the right to seek justice through the courts, which shall be prompt in providing it under the terms and conditions stipulated by laws, issuing rulings in an expeditious, complete and impartial manner. The services of the court shall be free, and as a result, judicial fees are prohibited.

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[2] This "due process judge" *controls* the actions of the Public Prosecutor, when the fundamental rights of the suspects —or of the victim— are at stake and therefore accomplishes a similar function to the "Judge for the preliminary investigations" and "Judge of the Preliminary Hearing" in other criminal systems [Ed.].

Laws shall provide alternative mechanisms for settling disputes. For criminal matters, the laws shall regulate the application of these procedures, ensure the reparation of damages and establish those cases in which judicial supervision shall be required.

Those rulings that put an end to oral proceedings must be explained at a public hearing with the parties duly notified in advance.

Federal and local laws shall provide the necessary means to guarantee the independence of the courts and the full enforcement of their judgments.

The Federation, the states and the Federal District shall ensure the existence of quality public defender services for the general public as well as the conditions for a professional career civil service for the defenders. The salaries of the public defenders shall not be inferior to those of agents of the Public Prosecutor's Office.

No one can be imprisoned for debts of a purely civil nature.

Article 18. Pretrial detention shall only be applied in cases of crimes punishable with imprisonment. The place of detention shall be different and completely separate from that holding persons already serving prison sentences.

The prison system shall be organized on the basis of work, training for such work, education, healthcare and sports as a means of reintegrating the prisoner into society and ensuring he or she does not return to crime, taking into account the benefits stipulated by law. Women shall serve their prison terms in places different from those designated for men.

The Federation, the states and the Federal District may enter into agreements to have those convicted of crimes within their jurisdiction serve their sentences in penal institutions elsewhere.

Within their respective jurisdictions, the Federation, the states and the Federal District shall establish a comprehensive system of justice that shall apply to those accused of a prohibited conduct stipulated by criminal law and are between the ages of 12 and 18, in which the fundamental rights recognized by this Constitution for each individual, as well as those specific rights to which they are entitled as still developing persons, are guaranteed. Persons under the age of 12 who have committed a crime under the law shall only be subject to rehabilitation and offered social assistance.

The operation of the system at every level of government shall be in the charge of institutions, courts and authorities specialized in the administration of justice for adolescents. Orientation, protective and treatment measures may be applied as deemed necessary for each case and in observance of the full protection and best interests of the adolescent.

Alternative forms of justice must be observed in the application of this system [of justice for adolescents], provided that said forms are legally warranted. Throughout the procedures, due process of law shall be observed as well as the independence between the authorities involved in the indictment and those who enforce the measures. Each measure imposed shall be

proportionate to the act committed and shall be aimed at reintegrating the adolescent to his or her family and society, as well as the full development of his or her person and capabilities. Imprisonment shall only be used as an extreme measure and for the shortest possible period and can only be used for adolescents older than 14 years of age, who have committed antisocial acts deemed serious.

Mexican nationals serving time in foreign countries may be transferred to Mexico to serve their sentences in the Republic based on the social reintegration system established in this article, and sentenced individuals of foreign nationality convicted of federal or local crimes can be transferred to their country of origin or residence, subject to the International Treaties in effect for that purpose. Such transfers can only be carried out with the express consent of the inmate.

In those cases and conditions stipulated by the law, sentenced individuals may serve their sentences in the prison closest to their home, so as to facilitate their reintegration into the community as a form of social reintegration. This provision shall not apply in the case of organized crime or for inmates who require special security measures.

There shall be specialized prisons for preventive custody and for serving sentences related to organized crime. The corresponding authorities shall be able to restrict communication between the accused and those convicted of organized crime and third parties, except in the case of access to his or her defense attorney, and can impose special means of surveillance on inmates in these facilities. The foregoing shall apply to other inmates who may require special security measures under the terms of the law.

Article 19. No detention by a judicial authority may exceed a period of 72 hours, beginning from the time the accused is taken into custody, without the issuance of a trial binding order ["*auto de vinculación a proceso*"] which must specify: the crime attributed to the accused, the place, time and circumstances of its execution, as well as sufficient information in order to establish that an act described by the law as a crime has been committed and that there is probable cause that the suspect committed or participated in its commission.

The Public Prosecutor may only request from the judge pretrial detention when other precautionary measures are insufficient to guarantee the appearance of the accused at the trial, the progression of the investigation, protection for the victim, witnesses or the community, as well as when the accused is on trial or has been previously convicted of a willful offense. The judge shall order pretrial detention *ex officio* in the case of organized crime, intentional homicide, rape, kidnapping, violent crimes committed with weapons or explosives, as well as serious crimes against national security, the free development of personality and health.[3]

[3] Mexico's Federal Criminal Code, title seven, states that "Crimes against health" are those related to the production, possession, transportation, promotion of illegal narcotics [Ed.].

The law shall establish the cases in which the judge shall be able to revoke the liberty of individuals subject to criminal proceedings.

The period for issuing a trial binding order may only be extended at the personal request of the suspect as stated by the law. Extending detention to his detriment shall be punishable by criminal law. If the authority responsible for the facilities in which the suspect is confined does not receive an authorized copy of the trial binding order that orders pre-trial detention, or the request for an extension of the constitutional term limits, within the abovementioned term, said authority shall bring the matter to the judge's attention on the conclusion of said term and, if such documents are not received within the following three hours, the suspect shall be released.

The criminal proceedings can only be carried out for the criminal act or acts set forth in the trial binding order . If during the development of the proceedings a crime other than the one object of the proceedings should appear, this crime shall be object of a separate proceeding without the prejudgment that a joinder may be ordered if so deemed.

If after a trial binding order has been issued on the grounds of organized crime and the defendant escapes from custody or is presented before another judge who brings charges against the accused in another country, the proceedings and the prescribed terms of the statute of limitations shall be suspended.

Any mistreatment during the arrest or while in prison, any disturbance incurred for no legal reason, any excise tax or contribution made in prison constitute abuses that shall be rectified by laws and curtailed by the authorities.

Article 20. Criminal proceedings shall be accusatory and oral. They shall be governed by the principles of public access, confrontation and cross-examination, concentration, continuity and immediacy.

A. Regarding general principles:

I. Criminal procedure shall have as its objective the clarification of the facts, the protection of the innocent, preventing the guilty from acting with impunity, and the reparation of the damages caused by crime;

II. All hearings shall be conducted in the presence of a judge who may not delegate to any other person the filing or evaluation of evidence, which shall be evaluated freely and logically;

III. For the purposes of the sentence only the evidence presented at public hearings shall be taken into consideration. The law shall establish the exceptions and requirements for admitting evidence presented beforehand, which by its nature requires previous presentation, at the time of the trial;

IV. The trial shall take place before a judge with no previous knowledge of the case. The presentation of arguments and evidence shall be public and oral and may be confronted;

V. The burden of proof to demonstrate guilt is to be borne by the accusing party according to that established in criminal law. The parties shall have procedural equality to argue the accusation or defense, respectively;

VI. No judge may take up matters of the proceedings with any of the parties without the presence of the other, respecting at all times the principle of contradiction, except for the exceptions established in this Constitution;

VII. Once criminal proceedings have begun, the early termination of said proceedings may be ordered under the causes and in the manner set forth by the law, provided that there is no opposition from the accused. If the accused voluntarily and in full understanding of the consequences admits participation in the crime before a judicial authority,[4] and there is sufficient evidence to support the accusations, then the judge shall schedule a sentencing hearing. The law shall establish the benefits that may be granted to the accused when he or she accepts their responsibility;

VIII. The judge shall only convict when there is conviction of the defendant's guilt;

IX. Any evidence obtained in violation of fundamental rights shall be null and void, and

X. The principles set forth in this article shall also be observed in the preliminary hearings of the trial.

B. Regarding the rights of the accused:

I. To be presumed innocent until the trial judge issues a ruling declaring the guilt of the accused;

II. To render a statement or to remain silent. From the moment of his or her detention the accused shall be informed of the reasons for their detention and their right to remain silent, which shall not be used against them. Holding the accused in isolation and the use of intimidation or torture are forbidden and shall be punishable under the law. Testimony of the suspect without the presence of a defense attorney shall have no evidentiary value;

III. To be informed upon arrest and on his or her appearance before the Public Prosecutor or the judge, of the charges against them and of their rights. With regard to organized crime, the judicial authority may authorize the withholding of accuser's name and personal information.

The law shall set out the benefits in favor of the accused, the indicted or the convicted person, who provides valid assistance in the

[4] Equivalent to "pleading guilty" in U.S. criminal proceedings [Ed.].

investigation and prosecution of crimes associated with organized criminal groups;

IV. To have the witnesses and evidence accepted when presented within the time specified by the law and to be assisted in securing the presence of persons whose testimonies the accused may require, under the terms stated in the law;

V. To be tried in a public hearing before a judge or a court. Public access shall be restricted only in cases declared as exceptions under the law, for reasons of national security, public safety, the protection of victims, witnesses and minors, when legally protected information may be disclosed or when the court deems that there are sound reasons for doing so.

With regard to organized crime, the proceedings carried out during the investigative phase may have probative value even when said proceedings cannot be reproduced during the trial or it poses a risk to witnesses or victims. The foregoing shall not cancel the accused's right to object to or challenge said proceedings or to present evidence against them;

VI. All the information the accused may request for his or her defense and that is on record in the proceedings shall be made available.

The accused and his or her attorney shall have access to investigation records upon detention and when called upon to render a statement or to be interviewed. Likewise, as of his or her first appearance before a judge the accused may consult said records, in due time in order to prepare for their defense. From this moment on investigative proceedings may not be withheld, except for in the exceptional cases expressly stipulated by the law when it is crucial to safeguard the success of the investigation and as long as it is eventually revealed so as not to affect the right of defense;

VII. The accused shall be tried within four months, if his or her alleged crime is punishable by a maximum sentence of no more than two years in prison, and within one year if the penalty exceeds this sentence term, except in the case of a petition for more time to prepare his or her defense;

VIII. The accused shall have the right to an adequate defense by an attorney, who shall be freely chosen even at the moment of his or her detention. If the accused does not want to or cannot appoint an attorney, after being required to do so, the judge shall assign a public defender to the accused. The accused shall also have the right to have his attorney present at all the procedural actions and said attorney is obligated to appear as many times as he or she is required, and

IX. Under no circumstances may the imprisonment or detention of the accused be extended for failure to pay the fees of his defense attor-

neys or any other claims for money, caused by civil liability or any similar grounds.

Pre-trial detention shall not exceed the maximum sentence prescribed by law for the crime charged and in no case shall it exceed a period of two years, except if the extension is due to the accused's exercise of his or her right to defense. If a ruling has not been issued upon the completion of this term, the accused shall be released immediately for the remainder of the proceedings, an act that shall not hinder the imposition of other precautionary measures.

Any prison term imposed as a sentence shall factor in the detention time.

C. Regarding the rights of the victim or offended person:

I. To receive legal advice; to be informed of their rights established in the Constitution and when requested, to be informed of the development of the criminal proceedings;

II. To cooperate with the Public Prosecutor; to receive all the information and evidence available during both the investigation and the proceedings, so that the corresponding proceedings may take place and to take part in the proceedings and to submit the remedies under the terms established by the law.

When the Public Prosecutor considers that presenting evidence at the proceedings is no longer necessary, the reasons for this shall be ground in law and explained;

III. To receive, from the moment the crime has been committed, medical attention and psychological assistance;

IV. To be compensated for damages. In appropriate cases, the Public Prosecutor shall be obligated to request redress for damages, without undermining any similar request the victim or the offended party may make directly, and the judge may not acquit the accused from such restitution if the judge has issued a sentence against the defendant.

The law shall establish expeditious procedures to carry into effect rulings regarding the restitution of damages;

V. To have his or her identity and other personal information protected in the following cases: when they are minors; when it involves the crimes of rape, kidnapping or organized crime; and when the trial judge deems it necessary for the protection of the victim, safeguarding in every instance the rights of the defense.

The Public Prosecutor shall guarantee the protection of victims, the offended parties, witnesses and in general all those involved in the proceedings. Judges shall monitor the due fulfillment of this obligation;

VI. To insist on the precautionary measures necessary to ensure protection and the restitution of his or her rights, and

VII. To call into question before the judicial authority the omissions of the Public prosecutor during the investigation of the crimes, as well as the decisions to withhold information, not to exercise, waive criminal action or suspend procedures when the reparation of the damage has not been fulfilled.

Article 21. The investigation of crimes is the sole responsibility of the Public Prosecutor and the police forces that shall act under its auspices and direction in the exercise of this duty.

The exercise of criminal action before the courts is the Public Prosecutor's preserve. The law shall set forth the instances under which individuals may bring criminal action before a judicial authority.

The imposition of sentences, their amendment and duration are fully and exclusively the domain of the judicial authority.

It is the duty of the administrative authority to apply sanctions for the violations of government and police regulations. Such sanctions shall consist of fines, arrest of up to thirty-six hours or community service; but if the transgressor does not pay the fine imposed, this will be exchanged for a period of arrest that under no circumstances shall exceed a period of thirty-six hours.

If the transgressor of the government and police regulations is a day laborer, an unskilled worker or employee, he or she may not be punished with a fine greater than one day's wages.

In the case of non-salaried workers, the fine for violating government and police regulations shall not exceed the equivalent of one day's income.

The Public Prosecutor may consider the principle of opportunity to cancel the prosecution of a crime, in the cases and under the conditions set forth in the law.[5]

The Federal Executive may, with the approval of the Senate in each case, recognize the jurisdiction of the International Criminal Court.

Public security is one of the responsibilities of the Federation, the Federal District, the states and municipalities and this responsibility includes crime prevention, investigation and prosecution to make such prevention effective, as well as sanctions for administrative violations under the terms of the law, in the respective jurisdictions set forth in this Constitution. The performance of the public security institutions shall be governed by principles of legality, objectivity, efficiency, professionalism, honesty and respect for the human rights recognized in this Constitution.

The public security institutions shall be non-military ["*civil*"] in nature, disciplined and professional. The Office of the Public Prosecutor and the

[5] This refers to the possibility of "plea bargaining" and the exercise of "prosecutorial discretion", as per U.S. criminal justice proceedings [Ed.].

police institutions at the three levels of government shall coordinate among themselves to fulfill the objectives of public security and shall form part of the National Public Security System, which shall be subject to the following minimum rules:

a) The regulation of the selection, admission, training, permanence, evaluation, recognition and certification of members of public security institutions. The operation and development of these acts shall be under the responsibility of the Federation, the Federal District, the states and the municipalities within the area of their corresponding powers.
b) The establishment of criminal and personnel databases for public security institutions. No person shall be admitted into the public security institutions without having been duly certified and registered in the system.
c) The drafting of public policies aimed at preventing crimes from being committed.
d) Community participation to assist in the process of evaluation of crime prevention policies, among others, as well as public security institutions shall be established.
e) Nationwide public security funds shall be distributed to states and municipalities, which shall use said funds exclusively for the above purposes.

Article 22. Capital punishment, mutilation, cruel punishment, branding, lashes, beatings, torture of any kind, excessive fines, the confiscation of property and any other unusual or transcendental punishments are prohibited. Every sanction must be proportional to the crime and to the affected legal interest.

It is not considered confiscation when an individual's property is ordered to be seized for the payment of fines or taxes, nor when it is ordered by a judicial authority for the payment of civil liabilities incurred in committing a crime. Nor is it considered confiscation when the judicial authority orders the impoundment of property in cases of illicit enrichment under the terms of Article 109, the State use of the goods seized as a result of abandonment under the terms set forth in the corresponding provisions, nor asset forfeiture. In the case of the asset forfeiture, a procedure shall be established and governed by the following rules:

I. It shall be before court and separate from criminal proceedings.
II. It will proceed only in cases of organized crime, crimes against public health, kidnapping, auto theft and trafficking in persons, regarding the following types of property:

    a) Those which are instruments, object or products of the crime, even when a sentence has not been issued to determine criminal respon-

sibility, but there is sufficient proof to determine that the criminal act took place.

b) Those which are not instruments, objects or products of the crime, but have been used or intended for concealing or merging property that is the product of the crime, as long as the extreme cases of the above clause is met.

c) Those which are being used by a third party to commit crimes, if the owner of the property was aware of the fact and did not notify the authority or do something to hinder it.

d) Those which third parties have title, but there is sufficient evidence to prove that said property is the product of offenses against property or organized crime and the person accused of these crimes acts as the owner.

III. Any person considered an affected party may present the corresponding redress to show that the lawful origin of the property and his or her good faith, as well as the fact that he or she could not have known the unlawful use of his or her property.

Article 73. The Congress has the power:

I. to XX. …

XXI. To establish the crimes and offenses against the Federation and to determine the punishment that for said offenses should be imposed, as well as to legislate on matters of organized crime.

…

…

XXII. …

XXIII. To enact laws that establish the bases for cooperation between the Federation, the Federal District, the states and municipalities, as well as to create and organize the public security institutions for federal matters, according to that established in Article 21 of this Constitution.

XXIV. to XXX. …

Article 115. …

I. to VI. …

VII. The preventive police shall be under the command of the mayor under the terms set forth in the State Law on Public Security. This police force shall obey the orders the state governor may issue in the cases the governor considers of *force majeure* or a serious public disturbance.

…

…

IX. and X. …

Article 123. Every person has the right to decent and socially useful employment; to this effect, the creation of jobs and the social organization of work shall be advocated, according to the law.

Without violating the following rules, the Congress of the Union shall issue laws on labor-related matters, which shall be governed:

Section A. …

Section B. …

I. to XII. …

XIII. Military personnel, naval personnel, foreign service personnel, Public Prosecutors, experts and members of the police institutions shall be governed by their own laws.

Public Prosecutors, experts and members of the police institutions of the Federation, Federal District, states and municipalities, may be removed from their positions if they do not comply with the requirements the laws in force at the time of the act stipulate for remaining in said institutions or be removed for incurring liabilities in the performance of their duties. If the jurisdictional authority rules that the firing, removal, dismissal, suspension or any other type of termination of employment was unjustified, the State shall only be obligated to pay redundancy payment and the other benefits to which the individual is entitled, without it being admissible under any circumstances for said individual to be reinstated, regardless of the result of the trial or means of defense filed.

Federal State, Federal District and municipal authorities shall put into effect supplementary social security systems aimed at strengthening the social security system for the personnel of the Office of the Public Prosecutor, police forces and expert services, their families and dependents.

The State shall grant active members in the Army, Air Force and Navy the benefits referred to in paragraph f), Section XI of this clause, under similar conditions and by means of the body in charge of social security for the members of said institutions.

XIII bis and XIV. …

Transitory Articles

First. This Decree shall enter into force the day after its publication in the Federal Official Gazette, with the exception of that set forth in the following transitory articles.

Second. The accusatory criminal procedure system set forth in Articles 16, paragraphs second and thirteenth; 17, paragraphs third, fourth and sixth; 19; 20 and 21, paragraph seventh, of the Constitution, shall enter into force at the time stipulated by the corresponding secondary legislation, without exceeding a term of eight years, as of the day after the publication of this Decree.

As a result, the Federation, the states and the Federal District, within the scope of their corresponding powers, must issue and put into effect the modifications or pieces of legislation needed to consolidate the accusatory criminal procedure system. The Federation, the states and the Federal Dis-

trict shall adopt the accusatory criminal system in the manner they deem suitable, albeit regional or by the type of crime.

At the moment the pieces of legislation referred to in the above paragraph are published, the competent branches of government or legislative bodies must likewise issue a statement that shall be published in the official channels of information, and it shall expressly state that the accusatory criminal procedure system has been included in said laws and, therefore, that the guarantees embodied in this Constitution shall begin to govern the manner and terms in which criminal procedures are pursued.

THIRD. Notwithstanding that set forth in the second transitory article, the accusatory criminal procedure system established in articles 16, paragraphs second and thirteenth; 17, paragraphs third, fourth and sixth; 19; 20 and 21, paragraph seventh, of the Constitution, shall enter into force the day after the publication of this Decree in the Federal Official Gazette, in the states that have already incorporated said decree in their laws in force, making any court actions performed founded on said laws valid, regardless of the date in which said laws entered into force. To this end, the statement set forth in the second transitory article must be issued.

FOURTH. The criminal proceedings initiated prior to the entry into force of the new accusatory criminal procedure system set forth in Articles 16, paragraphs second and thirteenth; 17, paragraphs third, fourth and sixth; 19; 20 and 21, paragraph seventh, of the Constitution, shall be concluded according to the provisions in effect prior to this Decree.

FIFTH. The new reinsertion system set forth in the second paragraph of Article 18, as well as the rules for the modification and duration of the sentences established in the third paragraph of Article 21, shall enter into force at the time established by the corresponding secondary legislation, without exceeding a term of three years, as of the day after the publication of this Decree.

SIXTH. State laws for matters of organized crime shall continue to be in effect until the Congress of the Union exercises the powers conferred to it in Article 73, Section XXI, of this Constitution. The criminal proceedings initiated founded on said laws, as well as the sentences issued based on said laws, shall not be affected by the entry into force of this federal legislation. Therefore, said proceedings should be concluded and executed, respectively, according to the provisions in force prior to the entry into force of this legislation.

SEVENTH. Within a maximum term of six months after the publication of this Decree, the Congress of the Union shall enact the law that creates the National Public Security System. The states shall enact the laws for this matter within a maximum term of one year as of the entry into force of this Decree.

EIGHTH. The Congress of the Union, state legislatures and the legislative body of the Federal District must allot the funds needed to reform the

criminal justice system. Budgetary allocations must be specified in the budget next following the entry into force of this decree and in the subsequent budgets. This budget shall be allocated for the design of the legislative reforms, organizational changes, the building and running of the infrastructure and the necessary training for judges, agents of the Office of the Public Prosecutor, police officers, public defenders, experts and attorneys.

NINTH. Within two months after the entry into force of this Decree, a coordinating body composed of representatives of the Executive, Legislative and Judicial branches, including the academic sector and civil society, as well as Public Security Conferences, Administration of Justice and Chief Justices shall be created. Said body shall have an executive secretary, which will aid and assist local and federal authorities, as requested.

TENTH. The Federation shall create a special fund to finance the activities of the technical secretary referred to in the eighth transitory article. The funds shall be granted on the basis of compliance with the obligations and the aims established in the law.

ELEVENTH. In the interim for the accusatory procedural system to enter into force, Public Prosecutors may request from a judge the pre-charge detention of the accused in dealing with serious crimes and for up to a maximum term of forty days.

This measure shall be legally warranted when deemed necessary for the success of the investigation, the protection of persons or legal interests, or when there is a risk based on the fact that the accused may evade legal action.

Mexico City, Federal District, May 28, 2008.- Sen. Santiago Creel Miranda, President.- Dep. Susana Monreal Ávila, Secretary.- Signatures"

In compliance with that set forth in Section I or Article 89 of the Political Constitution of the United Mexican States, and for its due publication and observance, I issue this Decree at the Residence of the Federal Executive Branch, in Mexico City, Federal District, on the sixteenth of June of the year two thousand eight.- Felipe de Jesús Calderón Hinojosa.- Signature.- Minister of the Interior, Juan Camilo Mouriño Terrazo.- Signature.

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