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ARTICLES

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THE RIGHT TO VOTE OF PRISONERS IN MEXICO

Humberto Fernando Cantú Rivera*

Abstract. *Ever since the promulgation of the Constitution in 1917, the right to vote in Mexico has been understood legally as a privilege for certain citizens, instead of a fundamental right granted to every Mexican national who is at least 18 years old. This situation contravenes the provisions of several international human rights conventions that the country has ratified, to which no reserve in that sense has been submitted. In particular, Mexico is flagrantly violating the electoral rights of persons in prison —convicts—, while failing to comply with its international obligations. A few suggestions are considered within this article, which aims at pointing out ways to improve the situation, as well as some possibilities to legally challenge the provisions which establish the prohibition to vote.*

Key Words: *Democracy, disenfranchisement, human rights, suffrage.*

Resumen. *Desde la entrada en vigor de la Constitución actual, en 1917, el derecho al voto en México parece ser un privilegio para ciertos ciudadanos, en vez de un derecho fundamental otorgado a todo mexicano mayor de edad. Esta situación es contraria a las disposiciones de diversos tratados internacionales en materia de derechos humanos que México ha ratificado, y ante los cuales no se ha opuesto reserva alguna en ese sentido. Por lo tanto, nuestro país podría estar violando flagrantemente los derechos electorales de las personas que se encuentran en prisión —reos—, así como incumpliendo sus obligaciones internacionales. En el presente artículo se hacen algunas sugerencias, a fin de señalar algunas maneras en que dicha situación podría mejorar, así como posibilidades para contrarrestar las disposiciones que prohíben el voto a través de un proceso constitucional.*

Palabras clave: *Democracia, suspensión de derechos políticos, derechos humanos, sufragio.*

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I. Introduction

In Mexico, any criminal sanction that involves incarceration includes a series of restrictions on the prisoner's other fundamental rights. Needless to say, the most fundamental of those restrictions is that related to the liberty of movement, one of mankind's sacred values. Nevertheless, by sentencing a person to jail for the time established in the judgment also means that another series of rights will be suspended, including the right to citizenship. Of these prerogatives, one of the most important is the right to vote, which is automatically suspended once the criminal indictment is issued.

The aforementioned situation entails a series of negative implications, both for the State and for the individual. For the State, it implies a violation of international human rights, which could also lead to a declaration of international responsibility against Mexico, if an individual claim is filed before any of the organisms responsible for the protection of human rights in the international legal fora. For the individual, the implications are related to discrimination by the rest of the community, social exclusion —well beyond depriving a prisoner of his liberty— that tends to devaluate the country's democratic culture and civic education, and exclude him from electing popular representatives, which also has negative effects on the prisoner's later social readjustment. Therefore, in order to avoid a possible violation of international commitments on human rights —and to develop deeper social cohesion and democratic values—, Mexico should reconsider its position on removing prisoners, whether they are convicts or people awaiting trial, of their right to vote,

This article aims to study this situation. In the first section, the framework of the Mexican Constitution is analyzed, as are the principal international human rights instruments that Mexico has ratified: the Universal Declaration

of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, or the Pact of San Jose. In addition to this legal context, the main doctrinal theories in favor and against felon disenfranchisement will be discussed.

The second section reviews recent developments in Mexican constitutional and electoral practices, from the standpoint of the principal judicial institutions in charge of ruling on these legal situations. In addition, some of the existing doctrine on this matter resulting from decisions issued by both the Mexican Supreme Court of Justice and the Electoral Tribunal will be discussed.

The third section argues that the common practice of restricting the right to vote is discriminatory and poses a threat to equality. It explores the legal panorama in other democratic regimes like those of countries the United States of America, Canada and France. There is also a brief analysis of the main jurisprudence on the subject as established by the European Court of Human Rights in the cases of *Hirst v. United Kingdom* and *Frodl v. Austria*.

In the last section, the discussion focuses on the need to adapt Mexican democratic culture to current international standards, in order to avoid continuing with the flagrant violation of citizens' political rights. Here the article emphasizes the requirement of compliance with the international instruments that have been ratified by the country, in an effort to achieve a further and more developed human rights protection and guarantees in Mexico.

II. The Right to Vote in Mexico and International Conventions on Human Rights

The Political Constitution of the United Mexican States identifies the main political rights of Mexican citizens in several articles. The constitutional prerogative of citizens to vote and be elected, that is, to exercise active and passive voting rights, is stated in the first and second section of Article 35 of the Constitution. Also, the third section establishes citizens' obligation to vote in the popular elections held on national territory to determine its political leadership and popular representatives.

As it is, the Mexican Constitution enumerates democracy's most representative political rights, in other words, their *sine qua non* characteristics:[1] temporary and effective rotations of popular representatives, who for the most part obtain offices through general elections (passive vote) in which electors emit their votes (active vote).

[1] *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 15-6 (2006) ("For one thing, it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves… For another, the people themselves should participate in government… Finally, the people, and their representatives, must have the capacity to exercise their democratic responsibilities").

In this sense, the Mexican Constitution includes two of the historically most representative political rights, which have been fought for since the French Revolution and later transcribed into the Universal Declaration of Human Rights of the United Nations, as well as in regional human rights instruments (the American Convention on Human Rights and the Treaty of Rome of 1950), and the International Covenant on Civil and Political Rights.[2]

For that matter, the principal human rights instruments have established the rights to vote actively and passively as part of any person's fundamental rights. For example, in Article 21, the Universal Declaration of Human Rights lists the right of all human beings to participate in the government of their countries, to have access to public office and basically, to democracy *stricto sensu*; that is, that their political will be demonstrated through effective and secret suffrage.

Likewise, the American Convention on Human Rights of 1969, also known as the *Pact of San Jose*, identifies those rights as human rights, codifying them in Article 23, while pointing out that any restrictions may be solely based on age, nationality, language, education or the absence of a criminal sentence. Keeping the aforementioned in mind, international law has granted political rights the character of *human rights*, and they are also included in the Mexican Constitution.[3]

However, the Political Constitution of the United Mexican States has also established a restriction on electoral matters and political rights in Article 38 —which is also included in the Pact of San Jose— regarding the possibility of restricting a citizen from voting or being elected when a criminal conviction or procedure has been filed against him. Said constitutional law establishes the causes for the suspension of citizens' political rights, among which the most important are sections II and III, which state that the suspension of rights will take place whenever an individual is subjected to a procedure for a crime punishable by imprisonment, as of the date on which the formal writ of imprisonment is issued, as well as while serving a prison sentence.

Notwithstanding the provisions in the Mexican Constitution and despite the normative restriction imposed by the American Convention on Human

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[2] Manuel Becerra Ramírez, *Los derechos humanos y el voto en el extranjero*, *in* Héctor Fix-Zamudio, México y las declaraciones de derechos humanos 181 (1999) ("Accordingly, …political rights or the rights to political participation have an evolution that started in the political thoughts of the 17th and 18th centuries, with the three classic authors: Locke, Montesquieu and Rousseau, and which were granted full force in the 1789 French Declaration of the Rights of Man and of the Citizen and the U.S. Constitution, both of known as the driving forces behind the Universal Declaration of 1948").

[3] *See* Felipe Tredinnick Abasto, *Derecho internacional de los derechos humanos: su aplicación directa*, *in* Konrad Adenauer Stiftung, Anuario de Derecho Constitucional Latinoamericano 350 (2002) ("The development of human rights obviously begins with the protection established in national Constitutions, incomplete and different in both their contents and forms. [Therefore,] they approach International Human Rights Law as a coinciding and convergent effort, to become non-negotiable, irrevocable norms anywhere in the world").

Rights, the 1948 Universal Declaration of Human Rights (UDHR) is still considered the interpretative standard for all international human rights instruments —a source of *jus cogens*, obligatory and irrevocable norms that apply equally to the entire international community, and derive from international custom. From the same standpoint as the UDHR, the 1966 International Covenant on Civil and Political Rights has determined in paragraph b of Article 25 that all persons shall have the right to vote and be elected, without unreasonable restrictions.[4] Therefore, it is important to point out the characteristics and intentions of said international instruments to determine which shall prevail and have direct applicability in the Mexican legal panorama, leaving the State without any excuse for it not to comply with international laws due to substantial differences in its national regulations.[5]

One of the fundamental pillars of the Mexican Constitution is found in Article 133, which regulates the interaction between the national and international laws to be applied or have legal effects on a national level. This constitutional article establishes a hierarchy, in which the Constitution is the primary law to which all other legal instruments, be they laws or international treaties, shall be subjected to. This hierarchy, however, has been challenged and even surpassed by a recent constitutional reform that entered into force on June 10, 2011, which clearly states that the human rights contained in international treaties ratified by the Senate will have the same legal standing as the Constitution itself. It is also true that Mexico has the direct and inescapable obligation of complying with the *pacta sunt servanda* principle expressed in each of the international treaties it is a Party to, including the international human rights instruments that the country has willfully ratified.[6]

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[4] In its *travaux préparatoires*, the ICCPR committee discussed as restrictions the problems of age and mental health and impairment, but did not address the situation of convicts, contrary to other international human rights instruments, as the Pact of San Jose. UN Document A/2929, July 1, 1955 ("While it was considered necessary to prohibit restrictions which amounted to discrimination, it was observed that in most countries the right to vote was denied to certain categories of persons, such as minors and lunatics, and that the right to be elected to public office and the right of access to public service were generally subjected to certain qualifications").

[5] *See* Germán Bidart Campos, *El derecho internacional de los derechos humanos*, *in* 20 Jurídica, Anuario del Departamento de Derecho de la Universidad Iberoamericana 104, 105 (1990) ("[I]nternational and national laws of each State share the problem of rights and their effective solution"). It is important to indicate that in accordance with the general principle of international law, there is an impossibility for the State to excuse itself from complying with a norm of international law by alleging contradiction to national law. Therefore, Mexico risks being accused of violating one fundamental principle of international human rights law and disregarding its international responsibility, and what is worse, the jurisprudence and current international practice on this matter.

[6] *See* Mara Gómez-Pérez, *La protección internacional de los derechos humanos y la soberanía nacional*, *in* Konrad Adenauer Stiftung, *supra* note 3, at 371 ("[D]espite the provisions of the internal laws of a State, and notwithstanding any resolution or decision by national authorities, inter-

Due to the above, the problem of defining the legitimacy of restricting the right to vote to people in prison arises.[7] This situation, a current and in-depth debate in international academia on suffrage and political participation, is a deep-rooted problem in several democracies. The first difficulty that stands out is the legitimacy of disenfranchisement itself, based on its principal intention. What is the goal of disenfranchising convicts, or people who have their political rights suspended even before being sentenced.

Political doctrine has identified several theories that back the argument for disenfranchising prisoners. Some of these theories expound reasons such as: maintaining the purity of the ballot box,[8] avoiding the possibility of subversive voting,[9] punishing the breach and expulsion from the social contract[10] or

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national treaties —and even more so those related to the protection of human rights— have a higher hierarchy than the Constitution of the States Party to it").

[7] It must be nonetheless noted that as soon as a convict has finished purging his sentence, he will automatically recover his political rights —the only exception being that the sentence itself was on his political rights, and not as a collateral sanction. Therefore, the discussion on this article is focused on people who are in prison, whether convicts or awaiting trial, and not ex-convicts.

[8] This theory supports the argument that the government must be composed of and elected by good citizens who are committed to their society, and therefore, including convicts and ex-convicts would be an impediment to maintaining immaculate electoral participation. *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and the Purity of the Ballot Box*, 101 Harv. L. Rev, 1313 (1989) ("The image suggests not only that former offenders are impure, but also that their impurity may be contagious. It reflects a belief that clear boundaries must be maintained between the tainted criminal and the virtuous citizenry, lest contamination occur"); *see also* Editorial, *Purity of the Ballot-Box*, N. Y. Times, March 26, 1870, available at *http://query.nytimes.com/gst/abstract.html?res=F50710FE385F137B93C4AB1788D85F448784F9* ("The theory of the purity of the ballot box aims to secure an honest expression of the popular will").

[9] *See generally* Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 Colum. Hum. Rts. L. Rev. 109, 116-19 (2004) ("The argument consists of two elements. First, the right to political participation should be conditioned on some kind of behavior or contribution. Second, allowing people lacking the requisite qualities to participate threatens the social order"). According to Ewald, the subversive-voting hypothesis dictates that convicts will use the right to vote for a criminal activity or to cancel other votes out, or even to support a candidate who holds a relaxed stance on criminality. He also mentions that "when felons demand the right to vote, they demand the right to govern others while rejecting the right of others to govern them."

[10] Following Rousseau's classic doctrine, this theory states that whenever an individual breaches a rule of society he is a part of, he exits that society, and therefore the existing social contract. Once the individual purges his sentence, he is reinstated into society, entering a new social contract, different than the one he left behind —which has also led some countries (and notably the United States) to impose new conditions on ex-convicts upon re-entry, such as a longer and even life disenfranchisement. *See generally* Angela Behrens, *Voting - Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 Minn. L. Rev. 231, 242 (2004) ("[T]hose who breach that [social] contract rescind their right to participate in the political sphere of society"); Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 Va. L. Rev. 109, 113 (2003) ("Incarceration removes

the lack of civil virtue,[11] among others. These theories look toward maintaining a society in which criminals who are "paying their debt" are denied the political right to participate in free and universal elections, reducing their social status to that of objects, rather than subjects, because they are not allowed to participate in the election of the representatives of their society.

On the other hand, there is also an even stronger argument supporting enfranchisement, according to which allowing a convict to vote implies the convict's inclusion in society, facilitating his reintegration into the community and playing an important role in the development of a democracy while arguing that maintaining the disenfranchisement is an excessive punishment that has no other end than penalizing the criminal, without proven effects of deterrence or rehabilitation.[12] It is also important to recognize the growing legal trend around the world that supports this doctrine —there is indeed transnational judicial discourse[13] in favor of prisoner enfranchisement. This discussion is not exclusive to U.S. political and legal doctrines, but has been undertaken by Mexican tribunals and scholars, who have argued both in favor and against disenfranchisement with different results. The constitutional results of this argument will be discussed in the next chapter.

Taking only legal framework into consideration, it is evident that the Mexican Constitution, as well as the rest of its laws on electoral matters, may be flagrantly violating imprisoned people's right to vote, using the —illegal— suspension of electoral rights which is directly contrary to the provisions established by the previously mentioned international human rights instruments as an argument.

Furthermore, legal doctrine by some Mexican jurists has leaned toward recognizing the right to vote as both a human and fundamental right, since it is established within the framework of the Constitution: "…in Mexico, giving

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the felon from society, and in this state, the felon does not have the capacity to be a party of the social contract").

[11] A republican version of this doctrine indicates that any individual that is not civically virtuous enough should be barred from participating in society's rules and government. However, as Reiman argues, the improvement of civic virtue through the enfranchisement of convicts would most probably have a rehabilitative or educational effect, rather than a negative one. I find this theory to be very close to the theory of the purity of the ballot-box, and therefore, not convincing enough for excluding convicts from voting. *See* J. Reiman, *Liberal and Republican Arguments against the Disenfranchisement of Felons*, 24 Criminal Justice Ethics 3, 16 (2005).

[12] *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1166 (2004) ("[D]isenfranchisement really can be justified only under a retributive theory of criminal punishment. Neither rehabilitation nor deterrence plays any plausible role at all in justifying the disenfranchisement of… offenders"). From this standpoint, Karlan even asks herself if disenfranchisement can be considered to be consistent with the prohibition on cruel and unusual punishment established in several international human rights treaties, a doubt —and possibility— that we share.

[13] *See* Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B. U. Int'l L.J. 196, 221 (2011).

suffrage the character of a fundamental right would also have the effect that its force as a human right would be backed up by the State's system of constitutional justice."[14] If the right to effective suffrage is considered a fundamental right —because it is included in the Constitution— and as a human right itself, it would obligate the State to comply with the international regulations on the subject.

III. The Right to Vote according to Mexican Courts: A Changing Pattern?

The suspension of political rights as a result of incarcerating or being subject to criminal proceedings has been the model followed in the Mexican legal system for a long time, and was an established doctrinal concept that could not be successfully challenged in court. It was not until the end of the 20th century that some cases were brought before the different judicial institutions, namely the Supreme Court of Justice (Suprema Corte de Justicia de la Nación, hereinafter SCJN) and the Electoral Tribunal of Federal Judiciary (Tribunal Electoral del Poder Judicial de la Federación, hereinafter TEPJF). However, an even clearer change in the interpretation and meaning of the right to vote as a fundamental right has recently emerged in the judicial practices of both judicial organisms.

Before considering the specific case law in which the suspension of political rights has been addressed, we must look deeper into the constitutional bases for this suspension. As stated above, according to Article 38 of the Constitution, the right to vote can be suspended for several reasons: for being subjected to criminal proceedings for a crime punishable by incarceration, from the moment the writ of indictment is issued (§-II); while serving a criminal sentence (§-III); for being a fugitive, as of when the detention order is issued and until the statute of limitations expires (§-V), and for a criminal sentence explicitly imposing the suspension as an autonomous penalty (§-VI).

Basically, the suspension of political rights —and specifically of the right to vote— we are discussing is the one contained in sections II and III: When a person is in prison while the criminal process is underway (following the writ of indictment), and is serving a criminal sentence. This political punishment, unless it is the specific sanction to be applied to a person (as it would in the case of section VI of article 38), is a *collateral sanction*. In the words of Demleitner, "Any conviction may trigger [some] collateral sanctions. These are sanctions that befall a criminal offender, either automatically or through an administrative process, after the conviction and independent of the sentence."[15]

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[14] Carlos Emilio Arenas Bátiz, *El voto como derecho fundamental de base constitucional y configuración legal. Concepto y consecuencias*, *in* Hugo Alejandro Concha Cantú, Sistema representativo y democracia semidirecta. Memoria del VII Congreso Iberoamericano de Derecho Constitucional 68 (2002).

[15] Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing and Collateral Sanc-*

This position has been zealously upheld by the SCJN, but recently challenged by a more dynamic, progressive and humanistic TEPJF, which has taken a different approach to the suspension of political rights as a Constitutional Court on electoral matters.

In the first place, the status of "being subject to criminal proceedings" is not reason enough for the suspension of political rights. Even before the entry into force of the aforementioned human rights reform, SCJN jurisprudence had already stated the implicit existence of the presumption of innocence in the Mexican Constitution, thus giving it the standing of a fundamental procedural right. The cited reform only enhanced its status since that provision is contained in several of the human rights treaties to which the country is a Party, and which Mexico must respect. Therefore, the non-existence of a criminal sentence imposing a penalty on anyone who is in prison while awaiting trial would automatically imply the presumption of innocence, making him ineligible to have his political rights suspended.

However, due to the fact that this reform has just entered into force, we must consider the case law made before the constitutional amendments were passed. One case of constitutional review was based on the existence of contradictory provisions and was brought before the SCJN, which had to determine which jurisprudence should prevail. In Case 29/2007-PS of the First Chamber, the Court debated whether the suspension of political rights should take effect as of the moment the writ of indictment is issued (pursuant to Article 38 of the Constitution), or until a final conviction has been pronounced (which, according to Article 46 of the Federal Criminal Code or FCC, would be the more appropriate moment). This second approach had been used by the 10th Collegiate Criminal Tribunal of the First Circuit in *Amparo* 1020/2005, which argued that since Article 46 of the FCC had a more constructive approach than that of Article 38 of the Constitution (*favor libertatis*),[16] and taking into account the presumption of innocence, the suspension of the accused's political rights should be lifted. This position had been held by the Tribunal in several other cases, since the Constitution only

tions, 36 Tol. Law Rev. 505, 514-15 (2005); *see also* Luis Efrén Ríos Vega, *El derecho al sufragio del presunto delincuente. El caso Facundo*, 6 Justicia Electoral 293, 296 (2010). (Discussing what he considers a better option to the suspension of political rights) ("[I]t is not, in my opinion, the presumption of innocence understood as a non-suspension of political rights due to the lack of a final judgment as a directing criterion, but mostly based on the principles of "strict legality" and "proportionality" of penalties that force any authority to strictly, proportionally and individually justify the privation of each political right as a provisory measure to a criminal cause, whenever there is a presumption of a future damage or clear risk…").

[16] A principle stating that whenever there is a doubt regarding the interpretation of a restrictive norm, the approach that best serves the interest of liberty of the accused should be used. It has a close relation to other legal principles, such as *pro homine*. For a further analysis of this principle, see Antônio Augusto Cançado Trindade, *Direito internacional e direito interno: Sua interação na proteção dos direitos humanos*, June 12, 1996, http://www.pge.sp.gov.br/centrodeestudos/bibliotecavirtual/instrumentos/introd.htm.

enumerates minimum guarantees, which can therefore be extended by other legal instruments, even those of lower hierarchy.[17]

The opposite argument had been posed by the First Collegiate Tribunal for Criminal and Administrative Matters of the Fifth Circuit, which said that Article 38 of the Constitution should be held as the obligatory norm, due to its hierarchical position in relation to Article 46 of the FCC, despite its more constructive approach. On reviewing the arguments of both courts, the First Chamber of the SCJN determined that Article 38 of the Constitution and Article 46 of the FCC referred to different procedural moments. Therefore, the SCJN determined that there was no contradiction since Article 46 referred to section III of Article 38 (when a final conviction had been reached) and the 10th Collegiate Tribunal had misinterpreted the procedural application of the rights set forth in the FCC.[18] What is remarkable, however, is one of the analyses made by the First Chamber, which stated that having a decent way of life, in respecting the law, enhanced legitimacy and the rule of law.[19] Therefore, the SCJN upheld its traditional view of the convict's disenfranchisement, which can be found in the argument put forth by Sigler: "[W]hen felons choose to violate societal laws, they break the social contract that guarantees their fundamental rights and freedoms."[20]

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[17] Manuel Becerra Ramírez, La recepción del derecho internacional en el derecho interno 60 (2006).

[18] "Therefore, Article 46 of the FCC does not intend to explicitly nor implicitly regulate the effects of the writ of indictment, but only the effects of the conviction regarding the suspension of rights." Ricardo García Manrique, *La suspensión de los derechos políticos por causa penal: El caso mexicano*, Address at the II Seminario Internacional del Observatorio Judicial Electoral (Nov. 19, 2009) http://www.trife.gob.mx/eventos/micrositio/ricardo_garcia_manrique.pdf. This same approach was taken by the SCJN. In ruling on the procedure of constitutional review 33/2009 —*Coahuila*, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXX, Septiembre de 2009, Acción de inconstitucionalidad 33/2009, Página 1955 y siguientes (Mex.)—, by comparing the decision reached in Case 29/2007-PS. Derechos políticos. Deben declararse suspendidos desde el dictado del auto de formal prisión, en términos del artículo 38, fracción II, de la Constitución Política de los Estados Unidos Mexicanos, 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, Novena Época, tomo XXVII, Febrero de 2008, Tesis 1a./J. 171/2007, página 215 (Mex.)— (on the different time frames to which Articles 38 of the Constitution and 46 of the FCC refer and apply), it declared the inexistence of situation of unconstitutionality between the norms of the Electoral Code of the State of Coahuila and the Federal Constitution.

[19] *See* Breyer, *supra* note 1, at 15 ("The concept of active liberty refers to a sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people").

[20] Jay A. Sigler, Civil Rights in America: 1500 to the Present 383-84 (1998). *See also* Virginia Pujadas Tortosa, *Cuestiones relativas a la naturaleza jurídica de la suspensión de derechos electorales por causa penal y su relación con la presunción de inocencia*, Address at the *III Seminario Internacional del Obser-*

2007 also marked an important year for the TEPJF in terms of the judicial debate over the suspension of political rights. Three hallmark cases were discussed: *Hernández Caballero*[21] (SUP-JDC-20/2007), *Pedraza Longi*[22] (SUP-JDC-85/2007) and *García Zalvidea*[23] (SUP-JDC-2045/2007). These cases were brought under the framework of the Juicio para la Protección de los Derechos Político-Electorales del Ciudadano [Trial for the Protection of Political-Electoral Rights of the Citizen], which was created as a solution to a political-electoral problem that arose in filing a human rights violation case, the *Castañeda Gutman* case, before the Inter-American Court of Human Rights, and served as a legal instrument designed to judicially review the situation of the plaintiffs' political rights.

In the *Hernández Caballero* case, the plaintiff argued that the Federal Electoral Institute (IFE) refused to issue him a voter's registration card because the plaintiff's political rights had been suspended. Omar Hernández Caballero had been convicted of an intentional crime, but due to good behavior, he was released on parole before his sentence had been completed. On receiving a negative response from the IFE, he brought the case before the TEPJF. The Electoral Tribunal ruled that since the plaintiff had his physical liberty restored, his other rights should no longer be suspended, basing its decision on foreign case law to be discussed in the next chapter. In other words, his freedom restored *ipso facto* his political rights, and since he was already reintegrated into society, the Tribunal found no reason to withhold his political freedom.[24]

The second case, *Pedraza Longi*, was based on somewhat similar circumstances, but had a more profound impact than *Hernández Caballero*. The IFE once again refused to grant a voter's registration card to the plaintiff, on the grounds that he had had his political rights suspended due to a writ of indictment issued against him. However, due to the fact that it was a minor crime,

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vatorio Judicial Electoral (Oct. 7, 2010), http://www.trife.gob.mx/ccje/IIIobservatorio/archivos/ponencia_virginia.pdf ("[T]he suspension of political rights effectively constitutes a 'guarantee to the legal security of the rest of the citizens'… [since] the objective of said suspension is contributing to maintain the legitimacy and the rule of law"). Behrens, *supra* note 10, at 241.

[21] Omar Hernández Caballero, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Gaceta Jurisprudencia y Tesis en Materia Electoral, Año 1, Número 1 (2008), Febrero de 2007, SUP-JDC-20/2007, Página 93 (Mex.).

[22] José Gregorio Pedraza Longi, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Gaceta Jurisprudencia y Tesis en Materia Electoral, Año 1, Número 1 (2008), Junio de 2007, SUP-JDC-85/2007, Página 96 (Mex.).

[23] Juan Ignacio García Zalvidea, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Noviembre de 2007, SUP-JDC-2045/2007 (Mex.).

[24] *See* Luis Efrén Ríos Vega, El derecho a la rehabilitación de los derechos políticos: el caso Hernández 44 (2010) ("The basis for the political suspension is the criminal conduct that harms the legal goods protected by political rights, while the basis for rehabilitation is the guarantee of social reinsertion…").

he was granted bail. In strict adherence to section II of Article 38 of the Constitution, the court determined that since the crime Pedraza Longi was accused of was punishable by incarceration, but entitled to bail, it could be implied that it was not necessary to suspend his political rights, moreover if he was not either legally or materially impaired[25] to exercise his right to vote. Therefore, the TEPJF determined the possibility that in cases in which the accused could be granted bail and awaited trial in freedom, the suspension of political rights would not be automatic.[26] This same criterion was later used in Case ST-JDC-22/2009[27] (also known as the *Facundo* case), in which the same authority equally resolved that citizenship cannot be suspended if a presumed criminal faces his trial in freedom.

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[25] According to Pujadas Tortosa, the two causes for suspending the exercise of political rights are the retribution for the crime committed, and the material and legal impairment to exercise that right. Pujadas Tortosa, *supra* note 20. Both causes were upheld by the SCJN in its ruling on the Case 29/2007-PS, which ruled that the suspension of political rights must take place from the moment the writ of indictment is issued. In *Pedraza Longi*, we can observe the divergence in the criteria applied by the SCJN and the TEPJF, a difference that lasted until the SCJN resolved Case Coahuila (6/2008) in May 2011. Case 29/2007-PS-Derechos políticos. Deben declararse suspendidos desde el dictado del auto de formal prisión, en términos del artículo 38, fracción II, de la Constitución Política de los Estados Unidos Mexicanos, 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, Novena Época, tomo XXVII, Febrero de 2008, Tesis 1a./J. 171/2007, página 215 (Mex.); José Gregorio Pedraza Longi, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Gaceta Jurisprudencia y Tesis en Materia Electoral, Año 1, Número 1 (2008), Junio de 2007, SUP-JDC-85/2007, Página 96 (Mex.); Case 6/2008-PL-Derecho al voto. Se suspende por el dictado del auto de formal prisión o de vinculación a proceso, sólo cuando el procesado esté efectivamente privado de su libertad, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Septiembre de 2011, Tesis P./J. 33/2011, página 6 (Mex.).

[26] This precedent and logic was later used by the SCJN in another case of contradictory jurisprudence (6/2008-PL), which was resolved three years after it was filed, in May 2011. In this case, the SCJN updated its criteria on the matter, stating that based on the fact that both the presumption of innocence and the right to vote are fundamental rights, any person who, while being legally bound to criminal proceedings, faces it in freedom on being granted bail, will be able to vote. Case 6/2008-PL-Derecho al voto. Se suspende por el dictado del auto de formal prisión o de vinculación a proceso, sólo cuando el procesado esté efectivamente privado de su libertad, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Septiembre de 2011, Tesis P./J. 33/2011, página 6 (Mex.) *See also* García, *supra* note 18, at 9. ("[W]e would need to determine why being bound to criminal proceedings requires that 'collateral consequence,' for we must not forget that any precautionary measure will only make sense if it effectively contributes to the success of the ongoing proceedings, or if it is certain to avoid the predictable commission of new crimes").

[27] Cirilo Facundo Hernández, Sala Regional Toluca del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Marzo de 2009, ST-JDC-22/2009 (Mex.).

The *García Zalvidea* case had the same premise as that of *Pedraza Longi*. The plaintiff, Juan Ignacio García Zalvidea, argued that the IFE did not issue him a voter's registration card, due to a "judicial situation." The TEPJF used the jurisprudence set forth in *Pedraza Longi* and ruled that since the plaintiff faced his criminal trial in liberty, his political rights could not be undermined, since doing so would contravene the international obligations of the State under Articles 25 of the International Covenant on Civil and Political Rights and 23.2 of the American Convention on Human Rights, as well as General Comment No. 25 of the UN's Human Rights Committee, which states that the application of the presumption of innocence guarantees the right to vote until a final conviction has been pronounced and executed. The Electoral Tribunal also cited the *in dubio pro cive* principle, which states that whenever there is a doubt in the application of a norm, the interpretation should be used in favor of the citizen.[28] The Tribunal also argued that the criminal policy on social reintegration directly implies the protection of human rights to its greatest extent, and due to the presumption of innocence, the right to exercise one's active vote should be preserved until a conviction is pronounced.[29]

Three similar cases were brought before the TEPJF in 2009 and 2010, but these cases dealt with other part of the sphere of political rights: the right to be elected. For the purposes of this article, however, we will focus on only two: Case SUP-JDC-98/2010[30] (also known as *Orozco*) and Case SUP-JDC-157/2010[31] (referred to as *Greg*). In the *Orozco* case, Martín Orozco Sandoval was competing as a pre-candidate for the governorship of the State of Aguascalientes. When trying to register as a candidate, the IFE denied him the right to contend, arguing that an order of detention and a writ of indictment had been filed against him, and therefore, his political rights had been suspended. Once more, the TEPJF used *Pedraza Longi* jurisprudence to grant the plaintiff the right to register as a candidate for the election since he had obtained an

[28] This resolution by the TEPJF High Chamber was in accordance with international standards set forth in human rights instruments, and now complies with the provisions provided in Article 1 of the Constitution, which entered into force with the human rights constitutional amendment. *See* María del Pilar Hernández, *Análisis y perspectivas de los derechos politico-electorales del ciudadano*, *in* Diego Valadés & Miguel Carbonell, El Proceso Constituyente Mexicano. A 150 años de la Constitución de 1857 y 90 de la Constitución de 1917, 553 (2007).

[29] Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos*, *in* Martín Abregú & Christian Courtis, La aplicación de los tratados sobre derechos humanos por los tribunales locales 163 (1997) ("[A]n interpretative criterion that exists in human rights law, according to which the widest norm or the most extensive interpretation shall be used whenever protected rights should be recognized… This principle coincides with the fundamental element of human rights law, that it shall always favor order").

[30] Martín Orozco Sandoval, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Mayo de 2010, SUP-JDC-98/2010 (Mex.).

[31] Gregorio Sánchez Martínez y Coalición "Mega Alianza Todos Por Quintana Roo", Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Junio de 2010, SUP-JDC-157/2010 (Mex.).

amparo that protected his freedom from the writ of indictment. However, the Electoral Tribunal explicitly stated that should the candidate's legal status change before taking the oath of office in the event of winning the election, his rights could be rightfully removed, and his right to take office could be waived. This decision was supported by the precedent of *Godoy Toscano*,[32] in which a writ of indictment had been issued against an elected federal representative, preventing him from assuming his duties because he was a fugitive. The TEPJF reinforced both instances of jurisprudence in the *Orozco* case, basically reaffirming the interpretation that whenever a person faced a criminal procedure in freedom, he could exercise his political rights.

The *Greg* case, however, was more controversial. A candidate for the election of Governor of the State of Quintana Roo, Gregorio Sánchez Martínez, was registered before the IFE. However, a month before the elections, a writ of indictment was issued against him and executed for charges of organized crime and other serious offenses, to which no bail could be granted. The candidate was then removed from the ballot. In this case, the literal interpretation of Article 38 of the Constitution was used, for the candidate could not exercise his electoral rights because these rights were both legally and materially impaired. Therefore, the case did not fall within the exceptions that had been jurisprudentially established by the Tribunal, and although the presumption of innocence was still considered, the candidate, if elected, would not be able to take office or otherwise serve as governor.

Following this description of the case law ruled upon by both the Supreme Court of Justice and the Electoral Tribunal, it can be said that the SCJN interpretation tends to be more traditional and sometimes outdated, while the decisions of the TEPJF are generally more directed at human-rights and transnational-discourse. However, both organisms —the former more than the latter— show a tendency to resolve its cases with a somewhat incomplete analysis and resulting decision. Both institutions have somewhat displayed profound reservations for reinstating or granting political rights in controversial cases, maintaining a distant approach to more liberal resolutions.[33] Both courts oscillate between several of the above theories, such as *civic virtue* or *breach of the social contract*,[34] while slowly advancing their interpretation and

[32] Julio César Godoy Toscano, Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Octubre de 2009, SUP-JDC-670/2009 (Mex.).

[33] Marco Olivetti, *Presunción de inocencia, limitaciones a la libertad personal y limitaciones al sufragio activo y pasivo*, Address at the *III Seminario Internacional del Observatorio Judicial Electoral* (Oct. 7, 2010) http://www.wwtrife.gob.mx/ccje/IIIobservatorio/archivos/ponencia_marco.pdf ("[The suspension of political rights has as]… its end the protection of society from the distortive effect that could be produced with the participation of criminals in the conformation of the will of the organs of the State…").

[34] Ríos Vega, *supra* note 24, at 47 ("[T]he law offenders renounce, by violating it, to the general protection: the equal treatment in relation to other citizens").

jurisprudence in less controversial cases. What is even less impressive is their continued use of the "hierarchy excuse" to persist in avoiding international responsibilities while denying citizens and convicts an updated, inclusive and internationally-oriented legal framework.[35]

However, the increasing use of dissenting opinions by both institutions can be seen as an important step toward setting new standards that could and probably will be later adopted as a general interpretation. In this sense, Judge González Oropeza's dissenting opinion in the *Greg* case deserves mention. Citing several foreign sources, such as those of the *Nicro* resolution in South Africa or the *Sauvé* case in Canada, the judge essentially ascertains and recognizes the importance of all international human rights treaties while declaring their preferential applicability when opposed to domestic law. Therefore, Judge González Oropeza states that section II of Article 38 of the Mexican Constitution is surpassed by section VI, declaring that the suspension of political rights of people who are in prison, whether already sentenced or facing criminal proceedings, is unconstitutional and contrary to international law since this measure goes against the main objective of convictions: the individual's social rehabilitation respecting his internationally and constitutionally recognized human rights (basically, the principles of *favor libertatis* and *pro homine*), as expressed in the human rights reform to Article 18 of the Constitution. The suspension of political rights undermines the effects of the presumption of innocence, and runs contrary to the principle of free and universal suffrage.[36]

It is our opinion that, while it is undeniable that both the Electoral Tribunal and the Supreme Court of Justice are slowly updating their interpretations techniques and opening up to internationally recognized standards and practices, it is necessary to continue along this path, in order to benefit our democratic society and values to the greatest possible extent. Judge González Oro-

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[35] A. Behrens, *supra* note 10 at 275 ("If the right to vote is fundamental, then felon disenfranchisement is impermissible and only courts can fully eliminate this practice"). There is a growing international movement towards minimizing *ius puniendi*, which is focused on excluding collateral sanctions from the main penalty. *See* Nieves Sanz Mulas, Alternativas a la prisión 238 (2004).

[36] Gregorio Sánchez Martínez y Coalición "Mega Alianza Todos Por Quintana Roo", Sala Superior del Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Junio de 2010, SUP-JDC-157/2010. Voto particular del Magistrado Manuel González Oropeza, Páginas 27-30 (Mex.). Doctrine supports the concepts mentioned by Judge González Oropeza: "…disenfranchising offenders is a 'form of punishment,' without any evidence that the sanction has retributive, deterrent or rehabilitative power; and that because offenders violate the 'social contract,' they forfeit political rights completely unrelated to the needs of incarceration." See also Ewald, *supra* note 9, at 110-11 ("[Criminal disenfranchisement statutes]…must serve some legitimate purpose, and they cannot rest on an impermissible one"); Karlan, *supra* note 12, at 1155 ("Only collateral sanctions that are based on a risk assessment can be continued… Any sanction that is not risk-based or is too broad as currently enforced, should be abolished"); Demleitner, *supra* note 15.

peza's dissenting opinion in the *Greg* case, as well as some considerations the TEPJF has contributed to international doctrine and transnational judicial discourse, are extraordinary exercises in protecting fundamental rights to their maximum extent. It would be desirable, however, for these judicial contributions and considerations to be less extraordinary and much more common, and not only in the Constitutional Court for Electoral Matters, but also in the Supreme Court of Justice, the highest judicial institution in Mexico, and other judicial bodies throughout the country. Regardless of their interpretation of international human rights law, it is a transnational judicial practice that could guide the interpreting methods and judicial practices of both institutions for the utmost protection of human rights and fundamental freedoms.

IV. The Right to Vote as a Practice of Equality and Non-Discrimination, and Perspectives from Foreign Legal Systems

Just as the Constitution establishes the electoral rights of citizens, several other articles tend to guarantee the equality that exists between all individuals within Mexican territory, regardless of origin, gender or social condition. Therefore, the prohibition of discrimination is established within the framework of the Constitution as a starting point for all the individual guarantees or fundamental rights to which every individual in Mexico is entitled. Obviously, the status of national or alien imposes certain limitations, essentially in political-electoral matters, but beyond that —as well as the condition of attaining legal age to obtain Mexican citizenship— the fifth paragraph of Article 1 of the Constitution stipulates the prohibition of all and any type of discrimination that infringes on the rights and freedoms of people, or those which are contrary to human dignity.

Due to the above, the Constitution established and magnifies the concept of legal equality based on the concept of non-discrimination. According to Rubio Llorente, "equality names a relational concept, not the quality of a person, of an object (material or ideal), or of a situation, whose existence can be confirmed or denied as a description of that barely considered reality; it is always a relation that occurs between two persons, objects or situations."[37] From the interpretation of this assertion, it might be understood that equality refers to equal standing in relationships between two similar subjects; that is, the capacity to sustain an equal relation between subjects with similar characteristics and in identical situations.

The Supreme Court of Justice has adopted certain jurisprudential criteria with an Aristotelian spirit, looking for equality between the relations and legal positions of individuals considered equals, as well as the one between those considered unequal. Nevertheless, these criteria evidently impose distinctions

[37] Francisco Rubio Llorente, La forma del poder. Estudios sobre la Constitución 640 (1993).

that are hard to overlook, creating a legal stigma that extends to those considered "unequal".

Due to the inequality of the political rights of convicted prisoners or those facing criminal proceedings and those of the rest of society as established in the Constitution, convicts are blocked from casting their votes as a direct consequence of the suspension of their electoral rights. Therefore, we perceive it as a wrongful application of the right of freedom that transcends and even transgresses the right to legal equality.[38] The fact that convicted felons are not permitted to vote imposes a form of discrimination against the rest of the population that restricts the exercise of their other fundamental rights.

The purpose of a conviction is to limit the right or liberty of movement[39] of a person found guilty of committing a crime, and not to restrict, either partially or completely, other rights.[40] Since a conviction aims at[41] an individual's readjustment and further reinsertion into society, the suspension of the right to vote while convicted tends to have a regressive effect on its purpose: it hinders interaction between the convict and the society to which he or she formally belongs. In the opinion of Bajo Fernández, "…the primary function of conviction is to motivate individuals to behave appropriately, inhibiting antisocial tendencies and promoting valuable behavior."[42] Therefore, electoral decisions are a fundamental right that has no relation whatsoever to freedom of movement, and in consequence, no restriction of this kind should be placed on convicts.[43]

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[38] *See* Jean Jacques Rousseau, Discours sur l'origine et les fondements de l'inégalité parmi les hommes 63-4 (2008) ("I conceive two types of inequality in mankind; I call the first one natural or Physical… The other we might call a moral inequality, or political, since it depends on a sort of convention, which is established or at least authorized by Men's consent. It consists in the different Privileges, some of which some enjoy in spite of others….").

[39] *See* Miguel Bajo Fernández, *Reflexiones sobre el sentido de la pena privativa de la libertad*, *in* Javier Piña y Palacios, Memoria del Primer Congreso Mexicano de Derecho Penal 111 (1981) ("[T]he conviction implies the suppression of the liberty of a person for a determined amount of time….").

[40] This concept, known as *residual liberty*, implies that a person's detention only limits or suspends some elements of his liberty, but there are other rights that to be suspended, require an independent justification. Ziegler, *supra* note 13, at 204. This concept is included in Principle 6 of the UN Basic Principles for the Treatment of Prisoners.

[41] According to the National Consulting Commission of Human Rights of France [CNCDH], there are four main objectives to convictions: to give everyone what they deserve, to express the extent and reach of the law as a form of social representation, to open the temporary perspective of reparation, and to reestablish social cohesion. Considering this, the right to vote does not fall under any of said conditions since the deprivation of a convict's freedom of movement already implies the suppression of his most basic right, which is fundamental for the exercise of his other human rights. *See* 1 CNCDH, Sanctionner dans le Respect des Droits de l'Homme: Les Droits de l'Homme dans la Prison 18-20 (2007).

[42] Bajo, *supra* note 39, at 105.

[43] See Ewald, *supra* note 9, at 125-26, 130 ("People convicted of crime, it seems, are far more likely to endorse the laws they've broken —to "accept them as desirable guides for life"—

With this in mind, convictions impose a sanction that transgresses civil rights —basically the freedom of movement— while leaving the right to education, to health, to petition, to work and others intact. Nevertheless, the fact that said imprisonment trespasses civil rights to infringe upon political ones implies a discrepancy with the democratic standards the Political Constitution clearly states. William Powers asserts the fact that a convict has been deprived of his liberty does not imply that he shall lose the protection of his other fundamental rights as well.[44]

This situation has been found in two cases recently examined by the European Court of Human Rights (hereinafter ECtHR). The first case, *Hirst v. United Kingdom*,[45] has been transcendental in the European Union as well as in the international framework of human rights law. This petition was filed by John Hirst against the application of electoral rights in his country and its legislation,[46] which rescinds the right to vote and be elected from citizens who have been convicted as part of the judgment passed on them.

After exhausting all legal procedures and losing the appeal Hirst filed a complaint before the ECtHR, so that this supranational legal system could determine the legitimacy of the appeal decision issued by the British courts, as well as concurrence between the application of electoral laws in his country and international human rights standards, specifically Article 3 of Protocol 1 of the Treaty of Rome and the rest of the basic United Nations documents (the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights).

By examining the *Representation of the People Act* and Article 3 of Protocol 1 of the European Convention of Human Rights (hereinafter ECHR),[47] the ECtHR showed that by denying John Hirst his right to participate in general elections held in the country, the United Kingdom contravened and violated his political rights. Therefore, the State had the legal obligation to revise its

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than to join together and lobby for abolition of the criminal code… when citizens convicted of a crime vote, they are doing what all voters do: actively endorsing the political system").

[44] William Ashby Powers, *Hirst v. United Kingdom (No. 2)*, *A First Look at Prisoner Disenfranchisement by the European Court of Human Rights*, 21 Conn. J. Int'l L. 243, 271 (2006).

[45] A similar complaint had already been brought before the European Court of Human Rights. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the Court established that the right to vote is an inherent and fundamental part of the right to free elections, stated both in the European Convention on Human Rights and in other instruments that conform the *corpus juris* of International Human Rights Law. *See id.* at 18.

[46] *Representation of the People Act* of 1983, which clearly established that every convicted felon would have his or her political-electoral rights removed completely, therefore, eliminating their rights to active and passive votes.

[47] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, March 20, 1952, CETS 009 (stating that the Parties will hold free elections by secret ballot that will ensure the free expression and choice of the legislature and popular representatives).

national laws to coincide[48] with international human rights instruments and specifically with Protocol 1, which recognizes the right to participate in democratic elections.[49] The High Court basically challenged the British concept of voting as a privilege and turned it into a legal obligation for all citizens, whether in prison or not.

The second case reviewed by the ECtHR was *Frodl v. Austria*.[50] This case concerned an Austrian citizen, Helmut Frodl, who received a life sentence for murder. Austrian law stated that imprisonment longer than one year forfeits the right to vote. In view of the similarities of this case with that of *Hirst*, it was thought to be more likely to succeed. Although the Austrian government argued that it had not breached its conventional obligations under Article 3 of Protocol 1, the Court pointed out that there were three criteria the State had to fulfill to avoid breaching its international obligations:

1. Disenfranchisement should be directed at a restricted group of offenders, who must be clearly defined.
2. There must be a direct link between the crime and the sanction of disenfranchisement.
3. The conviction must be ordered by judicial decision.

The ECtHR found that in *Frodl v. Austria*, the Austrian government had respected only the first of the three criteria set forth in *Hirst*, but failed to judicially establish a direct link between the crime and disenfranchisement (the jurisprudential principle of "disenfranchisement as an exception, even in the case of convicted prisoners"),[51] by means of a single, reasoned decision that establishes the motives for disenfranchisement. Therefore, the ECtHR ruled that disenfranchisement should be an option only in cases in which democracy itself is in danger, and not as a systematic punishment.

This same idea has been contemplated by Manza, Brooks and Uggen, who point out that removing the right to vote of citizens who have been convicted is a cruel sanction in a democratic society —and even more if it supposedly

[48] *See* Powers, *supra* note 44, at 40 ("The Chamber reminded the U.K. Government that it could deprive a prisoner of his or her liberty of movement, and any other right that was necessary to achieve that aim, but that it could not use a prisoner's status as a *carte blanche* to deprive prisoners of their rights guaranteed under the Convention").

[49] *See* Estelle Fohrer-Dedeurwaerder, L'incidence de la Convention européene des droits de l'homme sur l'ordre public international français 80 (1999) ("The European Convention of Human Rights… might produce a mitigated effect in certain international situations, leaving a margin of appreciation to State Parties (which does not exclude the existence of some legal harmony). Nevertheless… the Convention shall not lose its formal value as a treaty and as an institutional treaty, and more specifically its hierarchic value and the fact that its transgression might give way to an individual claim").

[50] Frodl v. Austria, Eur. Ct. H. R. (2010).

[51] *Id.* at 35 (2010).

purports the standards of universal suffrage. According to them, it might even be comparable to the "civic death" of ancient times, in which citizen rights could be lost in their totality.[52] Cases like *Hirst v. United Kingdom* and *Frodl v. Austria* have begun to appear repeatedly in other democratic regimes, most notably the United States of America, Canada and France.

In the United States, this situation has had a growing impact on the population.[53] As a result, the U.S. Congress has decided to start amending the law —the *Democracy Restoration Act*— to allow ex-convicts to vote in the country's general elections. Notwithstanding the above, one of the most important precedents on the subject was the judgment issued at *Richardson v. Ramirez trial*,[54] in which the Court determined that the only constitutional exception for denying an individual his right to vote was that he had been previously convicted, despite Justice Thurgood Marshall's dissident opinion stating that the idea behind said resolution ran contrary to the spirit of America's government system, its democratic ideals.[55]

Nowadays, the U.S. election model can be compared to the Mexican one since some U.S. states allow ex-convicts to vote after their release from prison, but not those who are still convicted.[56] The general tendency, however, is that the right to vote must be considered an inalienable political right, regardless of the person's social situation, and most notably, their criminal situation. As expressed by the U.S. Supreme Court of Justice in their ruling on *Wesberry v. Sanders* in 1964,[57] "there is not one right that is most appreciated in a free country as the right to have a voice in the election of those who make laws under which, as good citizens, we must live. Other rights, including the most elementary ones, are illusive if the right to vote is transgressed."[58] Or, as the Warren Court said in *Reynolds v. Sims*: "the right to vote freely is the essence of a democratic society, and any restrictions are contrary to the notion of representative government. Voting is a fundamental right."[59]

Even some U.S. scholars, such as Reuven Ziegler, mention that:

> Due to its unique constitutional stipulations, as well as to its general reluctance to engage foreign legal sources, U.S. jurisprudence appears to be lagging behind an emerging global jurisprudential trend which increasingly views dis-

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[52] *See* Jeff Manza et al., *Public Attitudes Towards Felon Disenfranchisement in the United States*, 68 Pub. Op. Q. 275, 283 (2004).

[53] See *id*. at 276 ("Because virtually all incarcerated felons, and many non-incarcerated felons as well, are barred from voting, the size of the disenfranchised population has grown in tandem with the general expansion of the criminal justice system").

[54] Richardson v. Ramírez, 418 U.S. 24 (1974).

[55] Powers, *supra* note 44, at 30-1.

[56] The only two American states that allow convicts and ex-convicts to vote normally are Vermont and Maine, while the rest have different degrees of disenfranchisement.

[57] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[58] *See id.*

[59] Reynolds v. Sims, 377 U.S. 533 (1964).

> enfranchisement as a suspect practice, and subjects it to ever-stricter judicial review. The discourse follows a 'residual liberty' approach according to which convicts remain rights-holders, views universal suffrage as the democratic ideal, and rejects regulatory justifications for disenfranchisement.[60]

U.S. legal doctrine and practices consider the deprivation of the right to vote an anachronistic practice, a clear reflection of the Jim Crow era that tried to disguise the right to equality and non-discrimination through laws that incited racial segregation by prohibiting certain minorities from participating in democracy, directly transgressing the right to equality.[61] Therefore, in an era that extols human rights and international *pro homine* tendencies toward all situations that might put the rights of an individual at risk, the persistence of said legal stigmas is largely unthinkable and absolutely unjustifiable.

Canada has also dealt with this type of situations, most notably in *Sauvé v. Canada*.[62] The debate on this case centered on the existence of a norm in the *Canada Elections Act* that established a ban on the right to vote of every convict who had been sentenced to a term longer than two years, which did not coincide with the provisions of the 1982 *Charter of Rights and Freedoms of Canada*.[63] Due to the fact that this constitutional text did not contain any reference regarding the possibility of denying a person his right to vote or restrict it because of social differences, the Supreme Court of Canada had to determine justification for government infringement of this fundamental norm, through the double criteria of the legitimacy of the objective and the proportionality of the means.

In sum, after examining the totality of the elements of the case, the Canadian Supreme Court sought a "rational connection between governmental aims of enhancing 'civic responsibility and the respect for the rule of law, and [providing] additional punishment' and the government's action of disenfranchising prisoners. The Sauvé court found neither of these objectives to be rationally connected to an infringement on the right to vote."[64]

In that resolution, the Court determined that "denial of the right to vote to penitentiary inmates undermines the legitimacy of government, and the rule of law. It curtails the personal rights of the citizen to political expression and participation in the political life of his or her country. It countermands the message that everyone is equally worthy and entitled to respect under the

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[60] Ziegler, *supra* note 13, at 201.

[61] American Civil Liberties Union, *Democracy Restoration Act Needed to Restore Voting Rights of Millions of Americans*, July 14, 2009, http://www.aclu.org/racial-justice-voting-rights/democracy-restoration-act-needed-restore-voting-rights-millions-america (last visited February 2, 2012).

[62] Sauvé v. Canada, [2002] 3 S.C.R. 519.

[63] Part I of the Constitution Act, 1982, art. 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[64] Powers, *supra* note 44, at 32.

law —that everybody counts."[65] The Canadian court was of the opinion that a plausible object like temporary disenfranchisement forming part of a convict's punishment may not be reached by disproportionate measures. Denying a convict the right to vote transcends the circle of a citizen's fundamental rights since it affects the right to universal suffrage irrationally and disproportionately, and even more so if one considers the other rights restricted by being in prison.[66]

Canadian doctrine has also tended to consider disenfranchisement excessive punishment that essentially affects the rest of a convict's fundamental rights. Therefore, refusing participation in national elections because a person is in prison is a segregating and unequal punishment that transgresses the highest international standards of human rights. "Imprisonment may take away a prisoner's freedom, but it does not nullify a prisoner's right to equal treatment under the law, and it must never be allowed to sever the ties that link a prisoner to the brotherhood and sisterhood the Universal Declaration of Human Rights accords us all."[67]

In Europe, the French Republic is another example in which the right to vote and the restriction of liberty are compatible. To begin with, Article 3 of the 1958 Constitution of the Fifth Republic clearly establishes electors —under legally determined conditions— as all French nationals over the age of 18 who exercise their civil and political rights, as well as the fact that suffrage is universal, equal and secret. It does not mention any restriction whatsoever regarding the exercise of the freedom of movement as a requirement for exercising the right to vote.

Notwithstanding the above, in apparent contradiction to the Constitution, a law was passed to automatically suspend convicts' right to vote, regardless of the stipulation of equality in the right to suffrage set forth in Article 3 of the French Constitution. This situation was modified in 1994 through a reform that led to an explicit compatibility between the text of the French Constitution and its secondary laws. Today, there are government campaigns to promote voting among the prison population.[68]

In fact, Article 6 of the Electoral Code of France (Code Électoral) establishes that the only restrictions on the right to vote may take effect place when a court has determined that for a specific period of time the right to vote and to be elected is suspended. This legislative provision shall be understood in

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[65] *Id*. at 33-4.

[66] *See generally* Jim Young, Sauvé v. Canada (1983) – Voting Rights for Prisoners (2010).

[67] Michael Jackson, Justice Behind The Walls: Human Rights in Canadian Prisons 617 (2002).

[68] "Due to the fact that a great majority of convicts benefit of the right to vote, the penitentiary administration is looking forward to transform voting in prison into a numerical reality, since it has been recognized as a right since the law of 1994 that modified the Criminal Code." Ministère de la Justice et des Libertés, *Vote en prison: l'administration pénitentiaire se mobilise*, May 11, 2007, http://www.justice.gouv.fr/actualite-du-ministere-10030/vote-en-prison-ladministration-penitentiaire-se-mobilise-12561.html.

accordance with Article 131-26 of the Criminal Code of France, which sets forth that civic rights are to be suspended by express judicial decision.

> In France, the right to vote constitutes an attribute of citizenship and has been enhanced as such by the Constitutional Council… The CNCDH (National Consultative Commission on Human Rights) considers that all that favors the effectiveness of the right to vote within convicted population in penitentiary centers contributes to reinforce the interest of said population for the exercise of their citizenship, as well as the candidates' interest for penitentiary matters.[69]

Thus, the standpoint of the French Government on the right to vote as a human right has been expressed in Recommendation 24 of the CNCDH: "Each one of these measures constitute a phase to social reintegration, at least symbolically."[70] Hence, pursuing the main objective of imprisonment, the regeneration of individuals so they can later be reinserted into society, contributes to developing a sense of belonging and attention within the convicted population that far from affecting a country's democracy, reinforces it. As Ewald points out, "…retaining the right to vote would in fact involve [citizens convicted of crime] in a symbolic reaffirmation of the status quo."[71]

In the Mexican Constitution, however, there is no provision establishing that serving a sentence implies the prisoner's loss of citizenship, but only a temporary suspension of his political rights. Nevertheless, this measure does attack human dignity, for it vilifies it and diminishes a person's social situation, political capacity and democratic participation, engendering a situation of inequality that has no relation whatsoever with national origins or legal age, thus jeopardizing a person's right to equality and the exercise of political rights —specifically the right to vote.[72]

What is more remarkable about this statement is the social reduction that prisoners suffer. Although it is true that their situation generates a stigma and negative social perception, it is also true that contrary to the provisions in the Constitution, disenfranchisement implies discrimination regarding their social condition.[73] Consequently, by restricting the right to emit their universal suffrage, social exclusion ensues, transgressing the right to equality and non-discrimination purported by fundamental law and international human rights instruments.[74]

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[69] LDH Toulon, *Le vote : droit ou privilège ?*, Nov. 2, 2006, http://www.ldh-toulon.net/spip.php?article1594 (last visited February 2, 2012).

[70] CNCDH, *supra* note 41, at 62.

[71] Ewald, *supra* note 9, at 131.

[72] *See* Becerra, *supra* note 2, at 181 ("[T]he respect of human rights is a *sine qua non* condition of the rule of Law, as well as to create a democratic system").

[73] *See* Ziegler, *supra* note 13, at 265 ("Disenfranchisement fails to treat convicts as politically equal [albeit recalcitrant] community members, and it adversely affects them both as individuals and as members of social groups").

[74] *See* Powers, *supra* note 44, at 52-3 ("As opposed to the traditional view of voting as a privi-

Considering some studies on Latin American doctrine regarding the primacy and hierarchy of fundamental rights, as well as some general principles of Law, we can say that the constitutional norm that provides for the suspension of the right to vote might well have been derogated. Article 38 of the Political Constitution of the United Mexican States, which establishes the suspension of the rights and prerogatives of Mexican citizens —including the right to vote— is one of the few constitutional articles that has not been reformed since its enactment on February 5, 1917.

Considering that general principles of law in the Mexican legal framework have a special relevance regarding the application of the law, as provided by Article 19 of the Federal Civil Code, which establishes that said principles shall be used to solve judicial controversies that arise due to the absence of a legal provision regulating a specific situation, the application of the Latin principle of *lex posterior derogat priori* would be an interesting argument that could be used as a legal tool to invalidate the provisions of Article 38, and replace them for the more recent promulgation (August 14, 2001) of the paragraph 3 of Article 1 of the Constitution, which states the principle of non-discrimination.

Mexican jurist and scholar Miguel Carbonell states that:

> For this matter, the criterion that shall be applied is that of the posterior law… According to it, the most recent norm derogates older norms. By virtue of this, we might argue that the third paragraph of the first constitutional article derogated [fractions second and third] of Article [38] of the Constitution. Therefore, [such disposition]… is contrary to Article 1 and shall be declared unconstitutional by the corresponding legal bodies.[75]

The Mexican Supreme Court of Justice's declaration of unconstitutionality of a provision that is part of the Constitution would imply that as of that moment, Article 1 of the Constitution would have primacy over Article 38, which would in turn be invalidated and stripped of its legal force. This would also imply that the suspension of the right to vote would no longer have its origins in the Constitution and by becoming federal law —secondary, if included in the Federal Code of Electoral Institutions and Procedures (COFIPE), its effects would be in accordance with the constitutional and international provisions in force for electoral matters. The right to vote would then become a fundamental right that could not be transgressed against any person.

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lege for select members of society, the European Court of Human Rights has moved closer to recognizing the right to vote as fundamental to all citizens… as part of the foundation of a free and democratic society").

[75] Miguel Carbonell, Igualdad y libertad. Propuestas de renovación constitucional 99 (2007).

V. The Need to Adapt the Mexican Legal System to International Standards on the Right to Vote

As largely discussed in international law doctrine, after the codification of customary law on treaties in the Vienna Convention on the Law of Treaties, States cannot escape their international commitments by excusing themselves for contradictions with their national legal orders.[76]

What is even more remarkable is the fact that Mexico has officially presented several reservations on the human rights treaties it has ratified, but none concerning Article 38 of the Constitution, which limits the right to universal suffrage. Therefore, the provisions contained in the 1966 International Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights and other similar international instruments are legally binding for the Mexican State, which is then obligated to adopt any internal measures deemed necessary to guarantee the effectiveness and fulfillment of said provisions.

By virtue of this, it is important to examine the obligations derived from two articles of the American Convention on Human Rights, namely Articles 23 (on political rights) and 27.2 (on the rights/guarantees that are not subject to suspension). On these matters, Miguel Carbonell explains that "We must recall that the American Convention on Human Rights, in its Article 27.2, does not consider suspension for the rights set forth in Article… 23 (political rights)…"[77] Even though the suspension of guarantees might only occur in extreme situations, whether caused by men or acts of God, if these situations never specifically arise, it becomes impossible to suspend people's political rights, and the right to vote even more so. This same line of thought is set forth in fraction b of Article 25 of the International Covenant on Civil and Political Rights, which states that such rights are immovable for all people and shall be guaranteed without any unreasonable restriction.

The ideology of the Mexican government apparently continues to stand contrary to the current trends in International Human Rights Law on this matter. Although it is included in all transcendent international human right documents, voting is not yet considered a fundamental right within national legal framework. This situation deviates from international law and could therefore be subjected to in-depth modifications. "…[T]he right to vote must be considered a fundamental right as long as the legal framework has it set forth in a constitutional norm or another norm of like hierarchy, and as long as it is recognized that such right comprehends universal human rights as well, at least partially…"[78]

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[76] *See* Thomas Buergenthal et al., La protección de los derechos humanos en las Américas 485 (1990) ("In human rights… we must just take a look at the great number of treaties in force that have been ratified by many States; what we need is compliance. [This] makes the tasks of International Human Rights Law so much more difficult").

[77] Carbonell, *supra* note 75, at 44.

[78] Arenas, *supra* note 14, at 64.

We must mention that the position of the government is not just contrary to international treaties on the subject (hard law), but also to international jurisprudence that has begun to appear in Europe and in some democracies in the Americas. As a source of public international law based on the Statute of the International Court of Justice and conforming with the provisions of Article 11 of the *Ley sobre la Celebración de Tratados* [Law on the Adoption of Treaties], international jurisprudence stemming from the different human rights organisms, including the ECtHR and the Inter-American Court of Human Rights, shall be effective and recognized by the Mexican State.

Therefore, "…[I]n matters related to human rights, the national judge is obliged to apply international law [within the national legal order] with his sentences [and to] decide basing on international law, that is, [interpreting in accordance with] the international framework of human rights."[79] Consequently, considering the aforementioned case law (*Hirst v. United Kingdom, Frodl v. Austria, Mathieu-Mohin and Clerfayt v. Belgium,* and *Sauvé v. Canada*, among others), the Mexican State would be obliged to implement such criteria within its national legal system, to ensure its compatibility with the international sphere of human rights protection and thus comply with all its international obligations —including that of guaranteeing convicts' right to vote.

For this reason, adapting the Mexican legal system —on both constitutional and legislative levels— must take place to assert the government's official position on human rights. There are outstanding challenges that Mexico will face, as well as several options that will be explored in depth to modernize the humanist perspective of the nation, and eventually reach the levels of efficiency of human rights systems found in other democracies.

The true adoption of a humanist stance at all levels of government is one of the main objectives that Mexico must consider when facing these challenges. As Manuel Becerra says, "the *pro homine* principle… implies the flexible application of human rights norms in favor of individuals and [strengthens] the trend stating that human rights, in both its substantive and adjective aspects, are a fundamental part of international public order…"[80] On these grounds, Mexico must comply with this international public order —specifically with treaties that do not create reciprocal obligations, but actions or abstentions that favor the development of human beings, in order to ensure consistence growth.

If establishing the right to vote as a truly universal and inalienable right is its main objective, the State could begin adapting to the necessary requirements so as to attain full adhesion to political human rights standards by taking into consideration an interesting legal instrument: the *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the United Nations Economic and Social Council (ECOSOC) in 1955 as a non-binding instrument that compiles a series of principles to improve penitentiary administration.

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[79] Becerra, *supra* note 17, at 61.

[80] *Id.* at 60.

These rules set several parameters that must be considered to improve and maximize the efficiency of convicts' living conditions to avoid imposing excessive punishment and to aid in achieving its ultimate goal: social rehabilitation. Notwithstanding, depriving convicts of the right to vote seems to go directly contrary to this ideology, as well as the entire system of civil and political rights. As Jackson says:

> …[T]hree fundamental human rights principles emerge from the ninety-five individual articles of the *Standard Minimum Rules*. First, a prisoner's dignity and worth as a human being must be respected through the entire course of his or her imprisonment. Second, the loss of liberty through the fact of incarceration is punishment enough. Third, prisons should not be punishing places; rather, they should help prisoners rehabilitate themselves.[81]

Mexico has participated in drafting these penitentiary principles, and has later adopted and ratified the instrument to be used as a standard to be complied with in national territory. Nevertheless, its effectiveness is dubious and its mandatory status is null; ergo, Mexico has not taken any steps to fulfill these international principles. It should also be pointed out that this set of rules does not establish any regulations on the right to vote. However, it does mention that the appropriate measures must be taken to continue with the convict's social development. This development must include civic awareness and an education in democracy, and therefore, the right to vote must be considered a basic standard to achieve this integration.[82]

The right to vote is considered an important prerogative by some humanist and democratic regimes, as it is part of the fundamental rights inherent to individuals. It is also a parameter with which to measure true democratic development —and therefore the development and effectiveness of human rights— within a given country. The application of the penitentiary principles set forth in the Standard Minimum Rules for the Treatment of Prisoners, which Mexico has voluntarily ratified,[83] as well as the adoption of ECtHR jurisprudential criteria either directly or through normative harmonization,[84] are two basic actions the State could and should apply to improve its penitentiary

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[81] Jackson, *supra* note 67, at 613.

[82] Arenas, *supra* note 14, at 65 ("[I]n the future, the theory of vote-individual right should prevail while interpreting suffrage [according to which] the right to vote shall be construed as being inherent to men and morally inalienable…").

[83] In the sense given by the Vienna Convention on the Law of Treaties of 1969, any international treaty that is concluded, independently from the denomination it is given, will be compulsory for the contracting Parties.

[84] *See* Juan José Gómez Camacho, *Presentation* to Secretaría de Relaciones Exteriores & Delegación de la Comisión Europea en México, Memorias del seminario la armonización de los tratados internacionales 12 (2005) ("Normative harmonization is to combine federal or state provisions with those of international human rights treaties that are pretended to be incorporated or that have already been incorporated to the national legal order, aiming, first,

system, to allow convicts the right to vote, to increase its level of democracy, and to eradicate one form of discrimination that has no place in Mexico's current legal and humanist situation.[85]

By considering itself a nation in which the respect to human rights and democratic values is fundamental, undeniable and under constant development, Mexico has no option but to start working on the legal and constitutional reforms needed to ensure that the country's international image concurs with its reality. As William Powers says, "the right of citizens to vote for members of their government is fundamental in any democratic society… [Nevertheless,] the extent to which all citizens of a country participate in the democratic process, even those on the fringes of society, gives a stronger indication of the degree to which a country truly values its democratic system."[86]

Mexico is not the only country in which denying convicts the right to vote is the norm. However, it is important for our democratic regime to adapt to the international movement towards human rights so it may avoid perpetuating an anachronistic stance that is harmful to both civil society and the plural and representative democracy that characterizes Mexico.[87] As Manza says, "…conflicts over felon disenfranchisement reflect an enduring tension in the 20th century…political life: the clash between the desire to maintain social and political order versus the desire to extend civil rights and liberties to all citizens."[88] It is therefore necessary for Mexico to move towards the 21st century; this is, towards a humanist, inclusive and guarantor position regarding the international human rights to which every person is entitled.

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to avoid normative conflicts, and second, to give efficacy to international instruments at the national level").

[85] *See* Ziegler, *supra* note 13, at 211-12 ("[There is] a shared vision of a democratic paradigm, coupled with a perception of convicts as rights-holders who are *ab initio* entitled to vote and whose disenfranchisement thus needs to be independently justified").

[86] Powers, *supra* note 44, at 1.

[87] *See* José Miguel Vivanco, *Experiencias positivas y obstáculos para armonizar la legislación de derechos humanos en América Latina*, *in* Secretaría de Relaciones Exteriores & Delegación de la Comisión Europea en México, *supra* note 85, at 32 ("We must understand that these two legal values: citizen security and respect for fundamental rights are perfectly complementary to each other and they shall develop in that sense").

[88] Manza et al., *supra* note 52, at 276.

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INDIGENOUS ENVIRONMENTAL RIGHTS IN MEXICO: WAS THE 2001 CONSTITUTIONAL REFORM FACILITATED BY INTERNATIONAL LAW?

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Abstract. *This article argues that internal affairs (namely, the 1994 EZLN armed indigenous uprising and the rise to power of the right-wing PAN party) had much more influence on the reform of Article 2 of the Mexican Constitution in 2001 than did international law. In effect, it points out the fact that although international treaties are legally binding, they do not always have effect on domestic legislation, as the latter may ignore or even contravene international regulations. In practical terms, this means that international law does not necessarily impact amendments made to national constitutions and laws. In reviewing the 2001 constitutional reform, we come to realize that this amendment had two major drawbacks. First, it failed to comply with international norms, since specific provisions established in the CBD and C169 were not fully respected. Second, it established a series of provisions that fail to allow indigenous peoples to fully exercise their environmental rights (in particular, access to natural resources). As a result, the Mexican authorities never adequately responded to many indigenous peoples' claims based on the 1996 San Andrés Accords and Cocopa Law agreed upon with the Zapatistas.*

Key Words: *Indigenous environmental rights, international law, Mexican Constitution (2001 amendment), Zapatista Army of National Liberation (EZLN).*

Resumen. *Este artículo argumenta que la reforma del artículo 2o. de la Constitución mexicana en 2001 se debió a eventos internos y no al derecho internacional (específicamente, al levantamiento armado indígena del EZLN y a la llegada al poder del partido político de derecha, PAN). En este sentido, señala que si bien los tratados tienen aplicación directa en cuanto son ratificados, la reforma en cuestión los ignoró y contravino al establecer preceptos vagos, confusos e inadecuados. Esto lleva a considerar que el derecho internacional no necesariamente tiene un impacto en el desarrollo de las reformas constitucionales a nivel*

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doméstico. Al revisar la modificación de 2001 se señala que existen dos grandes retrocesos. Primero, no se tomaron en cuenta ciertas disposiciones internacionales del CDB y del C169. Segundo, se establecieron preceptos que no permiten el ejercicio pleno de los derechos ambientales de los pueblos y comunidades indígenas (particularmente, los de acceso a los recursos naturales), y por tanto, el Estado mexicano no cumplió con las demandas indígenas contenidas tanto en los Acuerdos de San Andrés como en la Ley Cocopa, ambos de 1996, según lo convenido con la guerrilla zapatista.

Palabras clave: *Derechos ambientales indígenas, derecho internacional, Constitución mexicana (reforma de 2001), Ejército Zapatista de Liberación Nacional (EZLN).*

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I. Introduction

Over the last few decades, indigenous environmental rights have been increasingly recognized in a diverse number of both "hard" and "soft" international instruments. These rights have been mostly related to the environment, natural resources or issues linked to environmental matters. Many nations have adopted such standards and, as a result, amended their constitutions or modified their statutes to implement and further enhance environmental commitments toward indigenous peoples and communities. International law, however, is not always the starting point for the development of domestic law (*i.e.* constitutional norms and statutes) in regard to indigenous environmental rights. Local conditions such as indigenous unrest, guerrilla movements or civil uprisings have also pushed many nations to create and implement regu-

lations. Improved democratic processes, innovative ways of governance and renewed political scenarios have all contributed to reshape certain aspects of the legal system, all of which may have little bearing on the role played by the State in incorporating international norms into domestic law.

Indigenous environmental rights as established in Article 2 of the Mexican Constitution represent a good example of the foregoing. In fact, the existence of such rights in Mexico is not so much the result of international law as a consequence of deep internal socio-political changes. While Mexico has adopted and ratified both legally and non-legally binding international agreements (in relation to both environment and indigenous rights) —used as references for the major constitutional amendment in 2001— the real reasons for the reform were the 1994 uprising in the southern Mexican state of Chiapas (led by the Zapatista Army of National Liberation, EZLN) and the rise in 2000 of the right-wing PAN party after more than 70 years rule by the alternatively left- center- and right-wing PRI party.

After identifying international environmental rights of (and obligations for) indigenous peoples and their communities, this article argues that internal Mexican affairs had much greater influence on this constitutional reform than international law. It also highlights the fact that despite the influence of ratified international treaties on domestic law (that is to say, once provisions become part of Mexican legislation and applied directly without any need for further incorporation), the 2001 amendment ignored their impact through vague, confusing and inadequate wording. Although the Mexican Constitution and international treaties are designed to be complementary, some provisions, as well as the reform process itself, have actually contravened international standards, which means that international law does not necessarily effect the development of constitutional changes at the national level.

In reviewing the outcome of the 2001 constitutional reform, this article argues that this amendment had two major setbacks. First, it failed to comply with international norms as illustrated by the fact that certain provisions stated in the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries and the 1992 Convention on Biological Diversity were not taken fully into account. Second, it established a series of provisions that fail to provide indigenous peoples and their communities the capacity to fully exercise their environmental rights (in particular, with respect to access to natural resources) and, as a result, did not adequately respond to indigenous peoples' claims pursuant to the 1996 San Andrés Accords and Cocopa Law as agreed to with the Zapatistas. As a consequence, the Zapatistas, who were not part of the constitutional reform process, rejected outright the 2001 amendment.

At this point, no formal talks have been held between the EZLN and the Federal Government, and neither the Executive nor Legislative branch has shown any intention of seriously addressing, revising or proposing any reform to Article 2 of the Mexican Constitution.

II. Identifying Indigenous Environmental Rights under International Law

Environmental rights of (and obligations for) indigenous peoples and communities under international law can be divided into four distinct categories. According to my own typology, such rights and obligations refer to *i*) those that are explicitly related to the environment as a whole; *ii*) those that refer to natural resources (*e.g.* water, forests or genetic material); *iii*) those that are linked to issues directly related to environmental matters (*e.g.* health, sustainable development, the land or the areas they inhabit); and *iv*) those that are related to other issues or rights (*e.g.* human rights). All are implemented by means of diverse agreements, both legally and non-legally binding, that have been signed or adopted by governments through conventions, declarations and other international instruments either under environmental or indigenous law.

Strictly speaking, the phrase "indigenous environmental rights" was not consolidated as a concept until the 1980's. Before that time, environmental rights, on the one hand, and indigenous rights, on the other, pursuant to international agreements were not really intertwined.

In fact, by the time the first international agreement that explicitly referring to indigenous rights was adopted (the 1957 Convention Concerning Indigenous and Tribal Populations, also known as Convention 107 of the International Labour Organization)[1] the term "environment" had not yet acquired the meaning it currently has within international law. Since the late 1950's and for many years afterward, "environmental rights" or "indigenous environmental rights" simply did not exist. It was not until the late 1960's and early 1970's that certain rights were termed "environmental" (but still with no explicit reference to indigenous peoples) as a result of emerging worldwide concern for preserving natural landscapes; taming pollution and negative health effects; preventing resource depletion; planning urban development; diminishing poverty, and so on.[2] As environmental awareness gained increasing importance globally, it led to what has been called the "internationaliza-

[1] Although there were previous international documents that addressed diverse indigenous peoples' matters, the Convention 107 is considered to be the earliest legal precedent that clearly made reference to indigenous rights. *See* Jorge Alberto González Galván, El Estado, los indígenas y el derecho 363-66 (2010).

[2] This is not to say that concerns about our surroundings were not present before these two decades; however, they were about nature (not properly the environment) and were mainly related to local occurrences. Anyway, what is important to remember is that at the time the perception of an emerging crisis that could be named "environmental" arose, not all nations shared the same view about the global environment. While the countries of the North focused on resource depletion and nature preservation, Southern countries focused on the "basic needs" argument and poverty alleviation. For more information on this, see César Nava Escudero, Urban Environmental Governance 12-14 (2001).

tion of environmental matters." In 1972, the international community convened to address human environment-related issues at the United Nations Conference on the Human Environment, held in Stockholm, Sweden. The most important non-legally binding instrument emerging from this conference —the Declaration of the UN Conference on the Human Environment (also the Stockholm Declaration)— made it clear that there was a need "for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment." Although it recognized the existence of environmental rights, it made no explicit reference to indigenous groups and their communities.

In the long run, environmental and indigenous issues eventually converged due to forceful and growing claims that environmental protection (at that time still under the umbrella of "conservation") was only feasible as long as indigenous peoples' interests (referred to as "native peoples") were fully included in international debates and agreements.

> We cannot accept to preserve fragile ecosystems while the native peoples who live in these areas are dispossessed and forcibly dislocated. This is the foundation of the emerging unity between native peoples and the international conservation movement. As ecologically-destructive megaprojects continue to penetrate the world's resource frontiers, the global problems of deforestation, desertification, depletion of fisheries and soil erosion are major concerns of both groups.[3]

For this reason, the idea of connecting environmental rights with indigenous rights under the mantel of international law began to be associated —along with other issues— with indigenous rights over land and natural resources, traditional knowledge and customs, consultation processes, health practices and —most significantly— the environment as a whole.

In December 1983, the Secretary General of the United Nations called upon the Norwegian Prime Minister, Gro Harlem Brundtland, to establish and chair an independent commission to address major environmental challenges to the world community. For this purpose, the World Commission on Environment and Development was created; after five years of research and monitoring, a report —known as the "Brundtland Report" or "Our Common Future"— was presented in 1987 to the UN General Assembly; it called for political action and an international conference to revise and promote proposed changes.

Our Common Future categorically acknowledged the importance of linking environmental and indigenous matters vis-à-vis the recognition of traditional rights and the need for indigenous groups to get involved in policy for-

[3] Al Gedicks, *Native peoples and sustainable development*, *in* Environmental Conflicts and Initiatives in Latin America and the Caribbean 36 (Helen Collinson ed., 1996).

mulation when resource management in areas where they live are the focus of debate and regulation. The report stated:

> The starting point for a just and humane policy for… [indigenous or tribal peoples]… is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life – rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.[4]

In 1989, the UN took on Brundtland Report's main proposal and called for a worldwide conference —the 1992 United Nations Conference on Environment and Development (hereinafter referred to as "UNCED" and known as the Earth Summit)— held in Rio de Janeiro, Brazil. As we shall see below, the Rio Conference, for some a "unique event in the annals of international affairs,"[5] inserted environmental indigenous rights into discussions and texts of agreements signed at the conference. At the same time, the international community adopted the most all-encompassing treaty ever signed with respect to indigenous rights: the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (also known as the 1989 Indigenous and Tribal Peoples Convention, or Convention 169 of the International Labour Organization or, simply, the C169), which included references to environmental rights.

By the late 1980's, a consensus was reached at the global level that all nations should abide by international legal regulations based upon the intertwined development of environmental and indigenous issues. The two decades following these events, however, have helped elucidate a clear distinction between provisions passed under the guise of international indigenous law and those under international environmental law.

Despite progress made in both these areas of law, we must consider that a greater number of ratified agreements have not in any way decreased the controversial nature of the environmental protection of indigenous peoples

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[4] World Commission on Environment and Development, Our Common Future 115-16 (1987).

[5] The significance of UNCED is partly explained due to the fact that it "brought more heads of state and government together than any previous meeting – well over 100, with 178 governments represented in all. Five separate agreements were signed by most of the participating governments. Thirty thousand people descended upon the city, and the Summit received a blaze of publicity around the world." *See* Michael Grubb et al., The Earth Summit Agreements: A Guide and Assessment 1 (1993).

and international indigenous law,[6] both on a national and international level. In fact, not all nations are even willing to ratify these types of instruments. When they do, they may fail to incorporate into their national legislation the full content of a treaty; or may deceptively and confusingly amend their constitutions and laws in ways that result in non-existent or ineffective implementation of indigenous environmental rights.

1. *International Regulations under Indigenous Law*

The most important legally-binding multilateral document under international indigenous law that refers to environmental issues, particularly in relation to rights, is the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter referred to as "C169"). Following our indigenous environmental rights' categorization, this legally-binding instrument includes rights and obligations related to the environment and natural resources, as well as concepts and issues closely linked to environmental matters. In a nutshell, these provisions include:[7]

- Special measures adopted for safeguarding the environment of indigenous peoples involved. Article 4 (1).
- Governments shall ensure that studies are realized in collaboration with indigenous peoples to assess the environmental impact on them of planned development activities. Article 7 (3).
- Governments shall take measures, in cooperation with indigenous peoples, to protect and preserve the environment of territories they inhabit. Article 7 (4).
- The rights to natural resources attached to lands inhabited by indigenous peoples shall be especially safeguarded; the latter include the right to participate in the use, management and conservation of such resources. Article 15 (1).
- When nations retain ownership of minerals, sub-surface resources or rights to other resources attached to their lands, these governments shall establish procedures to consult the indigenous peoples involved; and the latter shall share in any benefits derived thereof and receive fair compensation for damages sustained as a result of exploration or exploitation activities realized on their lands. Article 15 (2).
- Governments shall ensure that adequate health services are made available to indigenous peoples; or shall provide them with the resources to obtain such services. Article 25 (1).

[6] Patricia Birnie et al., International Law & the Environment 627 (3rd ed. 2009).

[7] *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

— Governments shall take measures to facilitate cross-border contacts and cooperation between indigenous and tribal peoples, including participation in environment-related activities. Article 32.

It is interesting to note that as of June 2011, the majority of ratifications of the 1989 Indigenous and Tribal Peoples Convention has been by nations located in Latin America and the Caribbean region (15 out of 22).[8] Surprisingly few are from nations in areas with significant indigenous peoples, particularly Africa (1 out of 22),[9] Oceania and Asia (2 out of 22).[10] While the treaty has only been ratified in four European countries,[11] two other countries with significant indigenous peoples have not regrettably ratified it: the United States and Canada.[12]

In contrast to the above, the most important international multilateral agreement regarding indigenous peoples —albeit non-legally binding— is the United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on September 13th, 2007. The preamble recognizes not only the "urgent need to respect and promote the inherent rights of indigenous peoples… especially their rights to their lands, territories and resources," but the fact that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment." The main provisions include:[13]

— The right to their traditional medicines and health practices, including conservation of vital medicinal plants, animals and minerals. Article 24.
— The right to maintain and strengthen their spiritual relationship with lands they own, occupy or use, including territories, waters, coastal seas and other natural resources; as well as to uphold their responsibilities to future generations. Article 25.
— Rights to the lands, territories and resources they have traditionally owned, occupied, used or acquired. Article 26 (1).
— The right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources. Article 29 (1).

[8] State parties to the C169 include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

[9] This is the Central African Republic.

[10] These are Nepal (Asia) and Fiji (Oceania).

[11] These are Denmark, Norway, Spain and The Netherlands.

[12] Depending on the preferred classification for indigenous peoples in these two countries, it may be possible to count up to 150 diverse peoples (referred to as tribes, bands, nations and communities) inhabiting in diverse geographical sites. For a good account on this, see Native Universe, Voices of Indian America (Gerald McMaster & Clifford E. Trafzer eds., 2004).

[13] *See* United Nations Declaration on the Rights of Indigenous Peoples, 2007.

— The right to maintain, control, protect and develop cultural heritage, traditional knowledge, cultural expressions, manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, and so on. Article 31 (1).
— The right to be consulted to obtain their free and informed consent prior to approval of projects that may affect their lands, territories and other resources, particularly in connection with the development, utilization, or exploitation of mineral, water or other resources. Article 32 (2).

Given the fact that exclusion of indigenous peoples is a global concern and a matter of proven injustice, one of the biggest flaws of the 2007 Declaration is that it does not bind signatory-States. In spite of the fact that the international community took quite a long time to reach this agreement —almost 25 years since meetings and deliberations began in the early 80s— there were 4 votes against it and 11 abstentions.[14] Nonetheless, its adoption by the UN Generally Assembly was an achievement for the consolidation of indigenous rights.[15] After many years, the question remains whether the international community needs another 25 years before signing a legally-binding agreement.

Another notable albeit regional agreement is the 1991 Arctic Environmental Protection Strategy. Signed by eight countries (Canada, Denmark, Finland, Iceland, Norway, Sweden, the then Union of Soviet Socialists Republics and the United States of America), this non-legally binding document seeks to protect the Arctic environment "and its sustainable and equitable development, while protecting the cultures of indigenous peoples." It recognizes that such strategy and its implementation "must incorporate the knowledge and culture of indigenous peoples," and states clearly that "the cultures and the continued existence of the indigenous peoples have been built on the sound stewardship of nature and its resources."[16]

One of the main reasons why this "soft law" (*i.e.*, non-legally binding) agreement is mentioned is because the indigenous peoples living in the Arctic region played an active role in its making. In fact, this instrument was built in part upon initiatives already undertaken by indigenous peoples to protect the Arctic environment. This said, two of the five main objectives refer explicitly to indigenous peoples:

[14] The States that voted against it are Australia, Canada, New Zealand and the United States of America (all with indigenous peoples); the abstentions came from Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine. More details in Birnie et al., *supra* note 6, at 627.

[15] González, *supra* note 1, at 368.

[16] Quotations can be found in the 1991 Arctic Environmental Protection Strategy.

> ii) To provide for the protection, enhancement and restoration of environmental quality and the sustainable utilization of natural resources, including their use by local populations and indigenous peoples in the Arctic;
>
> iii) To recognize, and to the extent possible, seek to accommodate the traditional and cultural needs, values and practices of the indigenous peoples as determined by themselves, related to the protection of the Arctic environment;

Representatives of eight governments signed the Declaration on the Protection of the Arctic Environment on June 14th, 1991, which emphasized their "responsibility to protect and preserve the Arctic Environment" and recognized "the special relationship of the indigenous peoples and local populations to the Arctic and their unique contribution to the protection of the Arctic Environment."[17]

Again, "soft law" may be viewed as a weak approach for achieving real environmental protection in fragile regions inhabited by indigenous peoples. As much as this approach represented a "first step" in the right direction, suggestions have already been made that "it will be necessary to establish appropriate institutional arrangements and substantive rules… to ensure that agreed obligations are respected and enforced."[18]

2. *International Regulations under Environmental Law*

As mentioned above, the concept of the environmental rights and obligations for indigenous peoples began to consolidate in the mid- and late-80s of the last century. Indigenous rights within international environmental law, however, did not really gain recognition before the 1992 UNCED. In fact, some instruments discussed or adopted at this Conference addressed diverse environmental issues related to indigenous peoples.

First, the legally-binding 1992 Convention on Biological Diversity (hereinafter referred to as "CBD"), points out in its Preamble the importance of the relationship between indigenous lifestyles and biological resources:

> Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitable benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of the biological diversity and the sustainable use of its components.[19]

While not making reference to the term "right" in the preamble or any other part of the document, it provides that States shall respect, preserve

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[17] *See* Declaration on the Protection of the Arctic Environment, 1991.

[18] For more details, see Philippe Sands, Principles of International Environmental Law 731 (2nd ed. 2003).

[19] *See* Convention on Biological Diversity, 1992.

and maintain certain indigenous practices and knowledge in relation to the conservation and sustainable use of biological diversity. Criticized for being ambiguous and overly flexible, Article 8 (j) states:

> Each contracting party shall, as far as possible and as appropriate:
>
> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[20]

Second, the 1992 Rio Declaration on Environment and Development, while not considered "hard law," emphasizes the role indigenous peoples and their communities play —based on their knowledge and traditional practices— in environmental management and development. Principle 22 establishes that:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[21]

Third (and wider in content and scope) the 1992 Agenda XXI, a non-legally binding instrument, established a whole chapter addressing the relationship between environmental and indigenous issues. Chapter 26, *Recognising and Strengthening the Role of Indigenous People and Their Communities*, outlined a set of activities and objectives that made reference to the goals contained in the C169 and the draft version of the universal declaration on indigenous rights (now the 2007 United Nations Declaration on the Rights of Indigenous Peoples). The starting point in Agenda XXI establishes the following:

> 26.1 Indigenous people and their communities have an historical relationship with their land and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

[20] *See id.*

[21] See Rio Declaration on Environment and Development, 1992.

> Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.[22]

The three main objectives in this instrument include *i*) empowerment of indigenous peoples and their communities; *ii*) active participation in the national formulation of policies, laws and programs; and *iii*) involvement in resource management and conservation strategies as well as other programs established to support and review sustainable development strategies.

Agenda XXI acknowledges that some indigenous peoples and their communities may require greater control over their lands, self-management of their resources, and more participation (specifically, in establishing and managing protected areas). For this reason, governments are encouraged to ratify or implement international conventions; and to adopt policies and laws to protect indigenous intellectual and cultural property, among other rights. Furthermore, governments should incorporate "in collaboration with the indigenous people affected, the rights and responsibilities of indigenous peoples and their communities in the legislation of each country, suitable to the country's specific situation."[23]

While more precise than the international environmental accords cited above, Agenda XXI is basically an action plan for sustainable development; clearly non-binding, a significant agreement that establishes notable guidelines to be considered and implemented by States.

Finally, two CBD Protocols are worth mention. The Cartagena Protocol on Biosafety, which entered into force on 11 September 2003, and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation, adopted on 29 October 2010, with 37 State signatures (but no ratifications) so far.

The Cartagena Protocol places the interrelationship of indigenous peoples and their communities with biodiversity under the label of "socio-economic considerations." The only two provisions established therein do not refer strictly to the rights of indigenous peoples but rather obligations for them.

> 1. The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustain-

[22] U.N. Agenda XXI, § 3 (26), 1992.

[23] *Id.*

able use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities.

2. The Parties are encouraged to cooperate on research and information exchange on any socio-economic impacts of living modified organisms, especially on indigenous and local communities.[24]

By contrast, the Nagoya Protocol consists of provisions about the environmental rights of, and obligations for, indigenous peoples in relation to the access to genetic resources aiming at strengthening their ability to benefit from the use of their traditional knowledge, innovations and practices. In its Preamble, the Protocol recognizes "the right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources, within their communities" and refers to the 2007 UN Declaration on the Rights of Indigenous Peoples.[25] Even so —and as attractive as regulations regarding indigenous peoples' involvement in genetic resources related-matters may appear— this agreement shall not take effect until it has been ratified by at least 50 States (or organizations representing economically integrated regions) that are Parties to the CBD.

III. International Law Does Not Necessarily Explain the Development of Domestic Law

International law is concerned with the regulation of relationships within the international community, historically consisting primarily of States.[26] As a system of rules and principles (conventional or customary) as well as court decisions, international law affects not only the way in which States behave beyond their borders but also how governments create the conditions for the internal implementation of international regulations. These circumstances represent something commonly referred to as *the relationship between international law and domestic law*.

In regard to the nature and existence of this relationship, scholars have addressed the issue whether this constitutes one body of law or two separate bodies.[27] The debate on the nature of the interaction between international

[24] *See* Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000.

[25] *See* Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, 2010.

[26] Traditionally, the only subjects of international law have been the States; however, it is now common to also include as part of the international community other subjects that are entitled to rights and duties, such as international organizations, *de facto* regimes, peoples, individuals, or even multinational enterprises. For a better account on this, see Hermilo López-Bassols, Los nuevos desarrollos del derecho internacional público 92-130 (3rd ed., 2008).

[27] Jorge Palacios Treviño, Tratados. Legislación y práctica en México 183 (4th ed. 2007).

law and domestic law has been traditionally encompassed by two main conflict theories, known as the monist and dualist approaches. Broadly speaking, the former posits that both domestic and international law are part of a single system in which international law prevails; the latter postulates that the two systems represent two separate bodies of law with no need by either to justify its existence vis-à-vis the other.[28] On the whole, the debate has focused on the impact of international legal regulations on a given system of domestic law; that is to say, with a focus on normative hierarchy.[29]

Beyond the theoretical importance of the dualist-monist dichotomy, most writers would agree that international law does not exist to be ignored by States, but rather to be adopted and put into effect domestically. Although this can be achieved in diverse ways, discussions have focused on the need to evaluate how international provisions are implemented in specific domestic legal systems a process that has been described as the incorporation, adoption and transformation of internal law.[30] The diverse ways in which international provisions can be incorporated depend greatly on the system of domestic law itself: it is very much a matter of constitutional law. This, in turn, depends on the interpretation and practice of law in each specific State.

For instance, some legal regimes (*e.g.*, Canada) embrace the constitutional principle that no treaty is self-executing,[31] which means that international treaties are considered neither law nor a source of domestic law. As the treaty-making process is executive by nature, and lawmaking is performed by legislatures, the executive branch cannot *ipso facto* make laws; for this reason, treaties "must not be law." As a result, treaties require, for instance, primary legislation or statutes that "effectively discharge the state's treaty-derived obligations" to take full legal effect under Canadian law.[32] A similar example can be found in England, where international agreements become part of law only after they are given effect by Parliament. How treaties are made, ratified and implemented is considered by courts as a matter pertaining to the executive branch of government. For this reason, legislation enacted by Parliament is

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[28] For a more detailed description on these two schools of thought, see Ian Brownlie, Principles on Public International Law 31-3 (7th ed. 2008); Mathias Herdegen, Derecho internacional público 166-68 (Marcela Anzola trans., 2005).

[29] *See* Palacios, *supra* note 27, at 189; Bernardo Sepúlveda, Derecho internacional 67 (20th ed. 2000).

[30] In this respect, see Brownlie, *supra* note 28, at 41.

[31] In this context, "self-executing" refers to the principle adopted by a system of law on whether international law requires some sort of incorporation through domestic legislation in order to take effect locally. It does not describe the nature (self-executing or otherwise) of the provisions themselves.

[32] Besides conventional law, the Canadian reception system also contemplates that rules of customary international law may be directly incorporated into the common law without any legislative action. For more on this, see Gib Van Ert, *Dubious Dualism: The Reception of International Law in Canada*, 44 Val. U. L. Rev. 927, 927-28 (2010).

required: "In England… the conclusion and ratification of treaties are within the prerogative of the Crown… and if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent. As a consequence treaties are only part of English law if an enabling Act of Parliament has been passed."[33]

On the other hand, certain systems of domestic law adopt the rule that when a treaty is adopted pursuant to the Constitution then no enacted legislation is required (self-executing principle); as a result, courts and tribunals are automatically bound.[34] Once the treaty has been concluded and ratified by the executive branch, it becomes law, enjoying full implementation within the legal system. In these cases, the executive branch implements the international agreement[35] after being officially published. In so doing, it may make secondary or subordinate legislation (*e.g.*, regulations, decrees, rules, statutory instruments, or their equivalent) in order to flesh out a norm, or simply, to make the agreement fully effective.

This process most closely resembles Mexico's legal system. Once a treaty is ratified, it becomes part of Mexican law[36] and takes full effect upon being officially published. Under this system, treaty provisions must comply with the Mexican Constitution; in cases of conflict, however, the treaty may not be ratified unless the executive decides otherwise due to its special significance. In these cases, the Constitution must be subsequently amended.[37] While Senate approval is constitutionally required before a treaty may be ratified,[38] it never attains the formal *status* of statute or law, as lawmaking (i.e., primary legislation) is reserved solely to the Legislative Branch through the intervention of both chambers, the Senate and the Chamber of Deputies. Certainly,

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[33] See Brownlie, *supra* note 28, at 45. Apart from the conventional issue, it must be said that something different occurs when it comes down to customary international law, which may be directly incorporated by the common law as part of English law. Here, as it happens in Canada, no legislative intervention is required.

[34] *See id.*, at 47-9.

[35] *See* Sepúlveda, *supra* note 29, at 75.

[36] Article 133 of the Mexican Constitution states that the Constitution, Congressionally-passed laws and treaties reached pursuant to the Constitution comprise the *Supreme Law* of the Union.

[37] For more information on this, see Palacios, *supra* note 28, at 198-99.

[38] According to Article 76 (I) of the Mexican Constitution, the Senate has exclusive powers to approve all treaties celebrated by the Executive. Once a multilateral treaty is approved by the Senate, the Executive usually publishes the act of approval making reference to the treaty but without publishing its contents. The Executive then elaborates the instrument of ratification and proceeds to make deposit of this instrument in the international organization designated for this purpose. It is a common practice that only after the treaty enters into force internationally the Executive publishes the contents of the entire treaty, thus beginning legal implementation at the national level. For more details, see César Nava Escudero, *Guía mínima para la enseñanza del derecho internacional ambiental en México*, 113 Boletín Mexicano de Derecho Comparado 125, 143-44 (2005).

Congress may pass laws regardless of the existence of treaties; however, when a treaty does exist, legislation cannot contravene it. With or without primary legislation, the executive branch can implement international agreements by means of secondary or subordinate legislation, particularly by executive decrees.

Pursuant to this reasoning, it can be argued that irrespective of the means utilized for implementation, international law encourages States to amend constitutions, enact legislation, and adopt new ways for judicial adjudication. This can take the form of constitutional and statute amendments, the enactment of new laws, and the issuance of secondary legislation. To a certain extent, this explains why domestic law within States has expanded. In fact, for certain countries, international law has become the main engine for legal transformation in the field of environmental law.[39]

As much as international provisions stimulate continual constitutional and legal reform, however, the development of domestic law does not respond solely to international influence. While this may not be surprising (as domestic law clearly evolves with or without international law) it is interesting to note that even as international commitments exist, local circumstances tend to influence constitutional change and enactment of new legislation much more than international law. In these situations, any or all of the following may occur:

— Only after internal changes take place can international treaties (including legal-binding instruments) be incorporated as part of domestic law. This in itself does not guarantee, however, that the spirit and substance of international provisions are adopted by a State.
— If reform of one or several areas of domestic law takes place as a result of internal factors, the wording of the modifications may differ significantly from that obtained in the international text. If the writings of each instrument are compared, the domestic provisions could appear vague, confusing or even deceptive.
— As a result, States may be unable to comply with international commitments and, as a result, conflicts between international and national law may arise. For this reason, domestic legal reforms may not always conform to international provisions.
— Finally, constitutional amendments are often completely unrelated to either international provisions or internal demands.

[39] This situation was thoroughly documented at the beginning of this century in the case of the Latin American and Caribbean region. *See* Programa de las Naciones Unidas para el Medio Ambiente, el desarrollo del derecho ambiental latinoamericano y su aplicación. Informe sobre los cambios jurídicos después de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo 1992, 20 (2001). Not too much has changed since this report was published.

One example that falls within this category is the Mexican constitutional amendment of 2001 regarding the recognition of the environmental rights of indigenous peoples and their communities. As we shall see below, *i*) a major constitutional reform in Mexico occurred in 2001 regarding indigenous environmental rights; *ii*) although there are some similarities in the wording of certain constitutional provisions *vis à vis* international instruments, others diverge, giving the impression that some of them were intentionally and/or maliciously worded in the Mexican Constitution, in particular regarding the protection and effect of indigenous environmental rights and natural resources; *iii*) the origins of this reform only came about after the emergence of two major internal events despite the existence of prior international instruments adopted by Mexico; and *iv*) while international regulations advance and Mexico continues to adopt international agreements regarding these matters, no constitutional reforms to improve the current situation have been proposed, discussed or approved by the central government or legislature.

IV. The 2001 Constitutional Amendment

On August 14, 2001, the Political Constitution of the United Mexican States (hereinafter referred to as the "Mexican Constitution") underwent a profound transformation with respect to indigenous peoples' affairs. For the first time in contemporary Mexican history, a major constitutional reform recognized the existence of indigenous peoples *and* indigenous communities, providing for a series of rights to which they are entitled and a set of obligations for the federal, state and municipal authorities.

The main provision prior to the 2001 amendment (*i.e.* Article 4, first paragraph, amended in 1992)[40] made reference to indigenous peoples but not "communities," and instead of properly recognizing their rights, simply stated that a federal law or statute would protect and promote the development of their languages, culture, customary practices, resources, ways of social organization, as well as providing limited access to local and federal justice.

Some scholars have acknowledged that two of the most important reasons for including indigenous peoples at the constitutional level in 1992 resulted from the fraudulent presidential elections in 1988 and/or pressure to do something regarding the "celebration" of 500 years of the "discovery" of the Americas by Christopher Columbus in 1492. These reasons led to a description of this reform as an *opportunist amendment* and a political declaration of *goodwill*.[41]

[40] This amendment was made to the Mexican Constitution on January 28th, 1992. A few days before, on January 6th of the same year, another amendment —quite trivial and shortsighted, in fact— was made to the Constitution regarding the protection of the integrity of the lands of indigenous groups by statute. See Constitución Política de los Estados Unidos Mexicanos [Const.], art. 27 (VII) para. 2.

[41] *See, e.g.*, González, *supra* note 1, at 215; Adelfo Regina Montes, *San Andrés: el lugar de las*

Whereas indigenous rights (environmental or otherwise) were mentioned, they were never formally recognized and —most importantly— never went into full effect, as the Mexican Congress failed to pass any statute after the 1992 amendment.

1. *Comments on the Content. A Few Notes on the Relationship between International and Constitutional Provisions*

Contrary to the 1992 constitutional reform, the 2001 amendment states that either or both categories, *indigenous peoples* and/or *indigenous communities*, are entitled to certain rights and subject to certain obligations. These two categories are defined in Article 2 (paragraphs two, three and four) as follows:[42]

> The Nation has a multicultural composition, originally sustained on its indigenous peoples, who are those regarded as indigenous on account of their descent from the populations that originally inhabited the Country's current territory at the time of colonization, who retain some or all of their own social, economic, cultural and political institutions.
>
> The fundamental criteria to determine to whom the provisions of indigenous people apply shall be the self-identification of their indigenous identity.
>
> Those communities which constitute a cultural, economic and social unit settled in a territory; that recognize their own authorities according to their uses and customs are the ones that comprise an indigenous folk.

It must now be taken into account that the 2001 constitutional change (a) explicitly recognizes indigenous environmental rights; (b) refers to natural resources; (c) includes concepts and issues closely linked to environmental affairs (specifically to the land or areas inhabited by indigenous peoples); and (d) mentions other related issues such as human rights. Article 2 (A. II, V and VI) states:

> A. This Constitution recognizes and protects the right to self-determination of indigenous people and communities and, consequently, their right to autonomy, so that they may:
>
> …
>
> II. Enforce their own legal systems to regulate and solve their internal conflicts, subject to the general principles of this Constitution, respecting constitutional rights, human rights, and in a relevant manner, the dignity and integrity of women. The Law shall establish the cases and validation procedures by the corresponding judges or courts.

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muchas verdades y de los muchos caminos, *in* Acuerdos de San Andrés 273 (Luis Hernández Navarro & Ramón Vera Herrera comps., 1998).

[42] Constitutional texts in English have been taken from Mexican Supreme Court, Political Constitution of the United Mexican States (2d ed., 2008).

> …
>
> V. Maintain and improve their habitat and preserve the integrity of their lands as provided in this Constitution.
>
> VI. Attain preferential use and enjoyment of any natural resources located in the sites inhabited and occupied by the communities, save for the ones pertaining to strategic areas as provided in this Constitution. The foregoing rights shall be exercised respecting the nature and classes of land ownership and land tenure set forth in this Constitution and the laws on the matter, as well as the rights acquired by third parties or by members of the community. To achieve these goals, communities may constitute partnerships under the terms established by the Law.

Other constitutional provisions, though not considered rights *per se*, refer to governmental "obligations" or "tasks," to establish institutions and develop policies that help facilitate the full application and effect of indigenous rights, including those related to environmental matters. In addition, the Mexican Constitution makes reference to specific authorities' obligations in relation to concepts or issues strictly linked to certain environmental matters, such as health and sustainable development. Article 2 (B. III, V and VII) states:

> B. In order to promote equal opportunities for indigenous people and to eliminate any discriminatory practices, the Federation, the Federal District, the States and the Municipalities, shall establish the institutions and shall determine the policies needed to guarantee full force and effect of indigenous people's rights and the comprehensive development of their towns and communities. Such policies shall be designed and operated jointly with them.
>
> In order to decrease the needs and lags affecting indigenous towns and communities, authorities are obliged to:
>
> ……
>
> III. Assure effective access to health services by increasing the coverage the national system of health, but benefiting from traditional medicine, and also to support better nutrition for indigenous people through food programs, especially for children.
>
> ……
>
> V. Foster the incorporation of indigenous women to development by supporting productive projects, protecting their health, granting incentives to privilege their education and their participation in decision making processes regarding community life.
>
> ……
>
> VII. Support productive activities and sustainable development of indigenous communities through actions aimed at, allowing them to attain economic self-reliance, applying incentives for public and private investments which foster the creation of jobs, incorporating technology to increase their own productive capacity, and also insuring equitable access to supply and marketing systems.

The existence of several constitutional provisions regarding indigenous environmental rights leads us to wonder to what extent international law in-

fluenced the process for drafting these reforms. As pointed out above, the influence of international treaties can be seen in the texts of several constitutional provisions. For instance, similar texts on the definition of "indigenous peoples" are reflected in the Mexican Constitution and in the C169 (see Table 1).[43]

Nevertheless, many existing environmental rights and mandates contained in international law have been vaguely stated, inadequately worded, or deceptively included in the Mexican Constitution.

Table 1. Mexican Constitution and the C169 on the Definition of Indigenous Peoples

Mexican Constitution	*Indigenous and Tribal Peoples Convention*
Article 2, paragraphs two and three The Nation has a multicultural composition, originally sustained on its indigenous peoples, who are those regarded as indigenous on account of their descent from the populations that originally inhabited the Country's current territory at the time of colonization, who retain some or all of their own social, economic, cultural and political institutions. The fundamental criteria to determine to whom the provisions of indigenous people apply shall be the self-identification of their indigenous identity.	Article 1, 1(b) and 2 1. This Convention applies to: … (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. … 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

At least three examples explain the latter. First, the case where State duties exist regarding the respect, preservation and maintenance of traditional knowledge, innovations and practices of indigenous peoples and their communities in relation to the conservation and sustainable use of biological di-

[43] The Convention 169 entered into force internationally on September 1991; Mexico ratified it one year before, on September 1990.

versity and the equitable sharing of the benefits arising from the use of such traditional knowledge, innovations and practices, all of which are derived from the 1992 Convention on Biological Diversity.[44] Despite the ambiguity and flexibility of the international legally-binding agreement that allows each signatory State to take action "as far as possible" and "as appropriate," the Mexican Constitution does not even bother to mention the relationship between indigenous peoples and biological diversity. It may be argued, however, that some recognition exists of the latter, as the Constitution addresses the existence of indigenous rights to natural resources. The concept of biodiversity is commonly used to describe "species," and this notion (which refers to organisms such as plants and animals) is one of the many components usually included within the definition of "natural resources." Even so, the full implementation of indigenous rights to natural resources (as discussed below) is not only too general but overly restrictive. In sum, let us emphasize that the Constitution failed to take into account this particular provision of a legally-binding international instrument ratified by the Mexican State.

A second case involves the limited recognition of ownership rights of indigenous communities. The C169 clearly states in Article 14 that "the ownership and possession rights of peoples who inhabit lands which they have traditionally occupied shall be recognized." Despite the recognition contained in Article 2 (A. V) of the Constitution regarding indigenous peoples and communities' right to preserve the integrity of their lands, it fails to recognize indigenous *communities* as subjects of law pursuant to Article 2, last paragraph of the same Constitution. That is to say, indigenous communities are constitutionally regarded as "entities of public interest" under the tutelage or protection of the State; this means they have no legal capacity (unless legally granted) to fully exercise their ownership rights.

Finally, another example where no clear evidence is present of international treaties influencing domestic law, can be seen in the wording of the 2001 constitutional amendment. This issue regards the removal of indigenous peoples from their lands in accordance with Article 16 of the C169.

> Article 16
>
> 1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
>
> 2. When the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. When their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
>
> 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

[44] The Convention on Biological Diversity entered into force internationally on December 1993; Mexico ratified it on February 1993.

> 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express as preference for compensation in money of in kind, they shall be so compensated under appropriate guarantees.
>
> 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Pursuant to the content of the C169, the text of Article 2 of the Mexican Constitution does not include one single reference to this effect. It may be argued that these rights, *i.e.* those prohibiting that indigenous peoples be removed from their lands or otherwise displaced without their free and informed consent, as well as other related procedures, belong to states and municipalities' jurisdiction rather than to the federal government's, and thus they have not been explicitly mentioned in the Constitution. It could also be argued that the Constitution addresses these issues by determining that they be decided by statutes but not by the Constitution *per se*. In any case, the fact is that no provision makes clear reference to this matter. Again, international agreements seem to have had little real impact on the wording of these constitutional provisions.

In sum, is there any need to incorporate the texts of legally binding international treaties into the Mexican Constitution given the fact that under Mexican law, ratified treaties are part of domestic law? For example, the C169 became part of Mexican law upon ratification (*i.e.* with no need to be incorporated) and enjoyed full implementation.[45] In fact, no requirement exists that the Constitution include, either wholly or in part, the contents of a ratified treaty, especially regarding the recognition of rights, mainly because the Constitution and international treaties often complement each other.[46] This does not mean, however, that the Constitution shall never or cannot willingly incorporate international regulations. Moreover, it does not mean that if incorporation is not realized, the Constitution can ignore or go against

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[45] In this respect, see, for example, Patricia Kurczyn Villalobos, *Reflexiones sociojurídicas acerca de las reformas constitucionales "en materia indígena,"* in Miguel Carbonell & Karla Pérez Portilla, Comentarios a la reforma constitucional en materia indígena 83-4 (2001).

[46] For a good explanation of this, see Manuel González Oropeza, *Aplicación del Convenio 169 de la OIT en México*, *in* Estudios en homenaje a don Jorge Fernández Ruiz. Derecho constitucional y política 259 (David Cienfuegos Salgado & Miguel A. López Olvera coords., 2005); Manuel González Oropeza, *Nueva constitución y nuevo derecho indígena*, *in* Constitución y derecho indígenas 244-46 (Jorge A. González Galván coord., 2002). Additionally, one should take into account that the Constitution has been recently amended (June 2011) and has stated in Article 1, second paragraph, that any human rights' regulations shall be interpreted in accordance with both the Constitution and treaties. As interesting as the human rights side of indigenous environmental rights may appear, this article does not discuss this issue.

international law (even if some may correctly argue that it may) through an inadequate wording of an amendment.

In the end, failure to consider international law poses the risk of legal conflict based on domestic wording that differs or runs counter to provisions agreed upon internationally. In the long run, failure to adhere to the provisions of international agreements underlies the notion that international law must have a decisive impact on constitutional and legal modifications made in individual States.

2. *Understanding the Origins. The Zapatistas and the Changing Political Scenario*

In spite of the fact that Mexico had ratified before the 2001 constitutional amendment two "hard law" agreements (*e.g.* the CBD and the C169) as well as other non-legally binding instruments (such as the Rio Declaration and Agenda XXI) —all related to indigenous environmental rights— the origins of such amendment are more directly related to domestic events than to international commitments. The two main reasons for the Mexican constitutional reform were, firstly, the 1994 indigenous uprising in the Southern Mexican state of Chiapas; and, secondly, the rise to the presidency of the right-wing party *Partido Acción Nacional* (hereinafter called the "PAN"), in effect ending more than 70 years of national rule by the alternatively left- center- right-wing party *Partido Revolucionario Institucional* (hereinafter called the "PRI").

On January 1st, 1994, a guerrilla movement in Chiapas, the Zapatista Army of National Liberation[47] (hereinafter called "EZLN"), comprised mainly of indigenous groups, urban intellectuals such as *Subcomandante Marcos*, their chief spokesman, and supported by local liberation theology priests, declared war (through the First Declaration of the Lacandon Jungle) on the Mexican Government and Army. Through their slogan "Today we proclaim: enough is enough!" the EZLN declared at the beginning of its first declaration (six in total) that indigenous peoples had no health care, no land and —among other environmentally-related issues— demanded the end of the exploitation of natural resources in areas controlled by them.[48] The government responded by sending in thousands of troops to combat the indigenous insurgency and some areas of Chiapas were bombarded.

After twelve days of armed conflict between the Zapatistas and the Mexican army, then President Carlos Salinas de Gortari (1988-1994) announced a unilateral ceasefire, and "peace talks" between the EZLN and the Federal Government began. After two years of negotiations, representatives of both the EZLN and the government agreed in February 1996 on a document called the San Andrés Accords (hereinafter called the "ASA")[49] which

[47] In Spanish, *Ejército Zapatista de Liberación Nacional*.

[48] *See* First Declaration of the Lacandon Jungle, 1993.

[49] In Spanish, *Los Acuerdos de San Andrés Larráinzar.*

included, among other things, rules for recognizing the rights and cultures of indigenous peoples, including various environmentally-related rights. As first conceived, the ASA was a framework that served as the basis for the creation of a legal document intended to reform the Constitution, being one of many legislative steps in the negotiation process.[50]

By the time the ASA was signed, Ernesto Zedillo Ponce de León had already assumed power, and became the last PRI President of Mexico, 1994-2000. But even after voluminous negotiations and the government's apparent commitment to reach an accord, it became clear that there was no real intention to peacefully resolve the conflict.[51] Indeed, the Zedillo administration failed to fulfill basic commitments signed as part of the ASA; as a result, the armed conflict continued. In fact, the conflict continued throughout the remainder of his administration.

In the face of growing conflict and apparent willingness on the part of the government to secure an "ongoing peacekeeping process," the Mexican Congress presented in November 1996 a proposal for a constitutional amendment —commonly known as the Cocopa Law—[52] which, though not a formal legal initiative, was nonetheless referred to as a "Law." While the Zapatista guerrilla accepted the terms in which the Cocopa Law had been drafted, the Federal Government refused; as a result, the process effectively ended.[53]

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[50] A detailed description of the contents and scope of the San Andrés Larráinzar Accords can be found in José R. Cossío Díaz, Los problemas del derecho indígena en México 43-136 (2002).

[51] It is now well documented that during and after the 1995-1996 negotiation process, the Mexican Army did not leave their designated detachments in Chiapas and did actually carry out a series of hostile actions against indigenous peoples and Zapatista sympathizers. Military harassment provoked, among other consequences, the removal of certain indigenous peoples from their lands. Side by side, the Federal Government persecuted and detained non-indigenous persons because of their political relationship with the Zapatista movement: the most famous, to name a few, were Javier Elorriaga, María Gloria Benavides (Elisa), and Fernando Yáñez, allegedly accused of being members of the EZLN. Additionally, more than sixty foreign Zapatista supporters (mainly from Canada, France, Italy, Norway, Spain, Switzerland and the United States) were deported. Information can be obtained from human rights organizations (such as Human Rights Watch or Amnesty International). For a historical review, the following are recommended: Gloria Muñoz Ramírez, *EZLN: 20 y 10 el fuego y la palabra, in* La Jornada-Revista Rebeldía (2003); Manuel Vázquez Montalbán, Marcos: el señor de los espejos (1999).

[52] Cocopa stands for Commission of Concord and Pacification, which in Spanish means *Comisión de Concordia y Pacificación*, created in 1995 by the Legislative in order to ameliorate the conflict. This Commission was integrated by representatives (senators and deputies) of the three major political parties: the aforementioned PRI and PAN, and the left-wing *Partido de la Revolución Democrática* (PRD).

[53] The Federal government rejected the Cocopa Law in January 1997. From then onwards other similar legal documents were elaborated: one by the Zedillo administration, another by the PAN, and another by the Green Party. None of them succeeded. For a detailed evaluation of the significance of the Cocopa Law, see César Nava Escudero, *La primera reforma constitucional*

Environment-related issues such as the right to own land, among other matters, never gained the government's support.

> In January 1996 an important agreement on a future constitutional acknowledgment of Indian rights was reached, but negotiations concerning political reform and economic matters ultimately failed. A difficult issue seemed to be the claim by the Indian communities to keep ownership of their land, including their underground resources, a demand adamantly rejected by the Mexican government since it is widely believed that Chiapas is rich in hydrocarbons below ground.[54]

After several years, the 1996 Cocopa Law (which was founded on many but not all the principles and mandates sketched out in the ASA)[55] began to serve as the framework for the realization of the 2001 constitutional amendment. As described below, however, Mexican legislators made significant changes to the Cocopa Law when it reached Congress at the end of 2000; as a result, the 2001 amendment failed to follow or even respect the substance of what had been agreed upon in 1996.

For this reason, many commentators —both EZLN sympathizers and otherwise— have generally agreed that, irrespective of the importance attached to international law, the current provisions came about as the result of the 1994 indigenous uprising.[56]

The second source of the 2001 constitutional amendment was the new Mexican political scenario at the end of the twentieth century. While the Zedillo administration completely opposed any explicit recognition of indigenous rights at the constitutional level during his six-year term, the elections of July 2000 emerged as a unique opportunity not only to end more than 70-years of rule by the same political party (*PRI*), but to change things for indigenous peoples and their communities.

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ambiental del nuevo milenio: el acceso de los pueblos indios a los recursos naturales, *in* Derecho comparado Asia-México. Culturas y sistemas jurídicos comparados 429-36 (José María Serna de la Garza coord., 2007).

[54] Manuel Castells, The power of identity 86-6 (2d ed. 2004).

[55] Some writers still believe that the Cocopa Law fully included all the contents of the ASA; see, for example, Oswaldo Chacón Rojas, Teoría de los derechos de los pueblos indígenas. Problemas y límites de los paradigmas políticos 146 (2005). However, I believe this point of view is far from realistic, at least in relation to such environmental issues as access to natural resources.

[56] This, of course, does not undermine previous local indigenous movements fighting for recognition of their existence and rights. Some sources that acknowledge the decisive role of the 1994 Zapatista guerrilla in the reform of the Mexican Constitution are Miguel Carbonell, Los derechos fundamentales en México 1003 (2005); Cossío, *supra* note 50, at 145; Chacón, *supra* note 55, at 149; González, *supra* note 1, at 328-29; González Oropeza, *in* Estudios en homenaje a don Jorge Fernández Ruiz. Derecho constitucional y política, *supra* note 46, at 258-60; Kurczyn, *supra* note 45, at 69-70; Marcia Muñoz de Alba Medrano, *La reforma indígena y el acceso a los servicios de salud*, *in* Carbonell & Pérez, *supra* note 45, at 128.

Indeed, the strongest opposition candidate at that time, Vicente Fox Quesada from the right-wing PAN, promised during his campaign to create the political conditions necessary to peacefully resolve the Chiapas conflict.[57] Like most politicians, however, Fox made big and splashy campaign promises, including his infamous declaration that he could resolve the Chiapas conflict in "fifteen minutes"!

Vicente Fox (2000-2006) ultimately won the general elections and publicly declared that his first duty as the President of Mexico would be to send to Congress the Cocopa Law and continue to fight for a major constitutional reform of indigenous rights and culture.[58] The incoming President kept his promise and, after only a few days of taking office, sent the Cocopa Law to Congress, specifically to the recently-elected Senate. For this reason, the Cocopa Law immediately became a reference point for the elaboration of the legal initiative to reform the Mexican Constitution.

During the following months, however, the Senate profoundly altered the Cocopa Law, re-drafting the entire document and creating in effect a new one, which it finally approved in April 25th, 2001. This was subsequently sent to the Chamber of Deputies for revision and, after a short three-day period for debate, was approved on April 28th; it should be noted that some left-wing legislators approved the new proposal.[59]

Inexplicably, the Zapatistas were never consulted during this process. This meant that the Mexican State clearly failed to conform to that established in the C169 (and even the Agenda XXI). When the final draft was ready to be sent to the Federal States for their legal consent at the end of April, the EZLN decided to reject the document.

With no political will left to approach the EZLN during the legislative discussions, Vicente Fox finally decided to promulgate the Senate's proposal for a constitutional amendment on August 3rd. This was then published a few days later, on August 14th.

As much as the 2001 amendment explicitly recognized diverse indigenous environmental rights, the published text differs considerably from commitments agreed to between the EZLN, the prior Congress, and the Federal Government pursuant to that established in the ASA and the Cocopa Law. In the end, the Senate's final proposal took into account certain provisions of the Cocopa Law (in a partial and fragmented way) but failed to integrate many commitments outlined in the ASA.

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[57] This commitment (together with ten others) was made on May 2000 during a speech given in Mexico City. More information can be obtained at www.mexicomaxico.org/Voto/4A/FoxCompromisos.htm#DIEZ.

[58] This commitment was publicly announced on December 1st 2000 before the Congress (Senators and Deputies) during the first day of his six-year mandate. The exact words of his speech can be found in Nava Escudero, *supra* note 53, at 433.

[59] Some opposing views can be acquired from González Oropeza, *in* Estudios en homenaje a don Jorge Fernández Ruiz. Derecho constitucional y política, *supra* note 46, at 258-60.

For instance, the 2001 constitutional amendment established a number of restrictions for full implementation in regard to access to natural resources, most of which were not part of the Cocopa Law and/or the ASA; in addition, such access was not even considered collective. In fact, the ASA established a *collective* and *preferential* access to natural resources; for its part, the Cocopa Law recognised the former but not the latter. Not only did the 2001 amendment fail to consider the collective nature of this right, but also included preferences subject to many legal restrictions.[60]

Pursuant to Article 2 (A, VI), the amendment —as re-written by Congress— nullified any realistic chance for exercising preferential (and collective) access rights to natural resources. The main limitations to this right include: *i*) it is reserved to indigenous *communities* but not to indigenous *peoples*; *ii*) it can only be put into effect as long as ownership and land tenure pursuant to that set forth in the Constitution is respected; *iii*) the communities can use and enjoy resources located only on sites they inhabit or occupy; *iv*) they are not allowed to manage natural resources in strategic areas (*i.e.* oil, hydrocarbons, and so on); *v*) they must respect rights acquired by third parties or by members of the same community; *vi*) indigenous communities are not subjects of law but entities of public law; and *vii*) recognition of the latter are subject to provisions established under local and state law. I have argued elsewhere that limitations imposed to exercise a supposedly "preferential right" implies the creation of a non-existence right or, rather, a *virtual right*.[61]

Shortly after the publication of the 2001 amendment, more than 330 local authorities (municipalities) that govern in areas mainly inhabited by indigenous peoples went to the Supreme Court to contest alleged breaches in the amendment procedures pursuant to that established in the Constitution itself. Unbelievably, the Supreme Court claimed that it lacked the authority (competence) to review the amendment and decide the issue, arguing that the Legislature was a sovereign power.[62] This led to a "rule of law crisis" as the decision by the majority of Supreme Court justices implied that the constitutional amendment process could be realized without any revision! As a result, a major legal uncertainty suddenly arose: if the nation's highest court of law had no authority to review the constitutional reform process, then who does?

Since that time, indigenous and non-indigenous unrest (particularly the Zapatista movement and their supporters) —with unrelenting focus on the procedures and contents of the 2001 constitutional amendment— provoked a complete break-off of relations between EZLN representatives and the Federal Government.

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[60] For a comparative exercise on this particular environmental issue, see Nava Escudero, *supra* note 53, at 436-439.

[61] A more detailed description of this critique can be found at César Nava Escudero, *De los derechos indígenas ambientales o del por qué existen preceptos constitucionales virtuales*, *in* Derechos humanos y medio ambiente 101- 22 (Jorge U. Carmona & Jorge M. Hori Fojaco coords., 2010).

[62] González, *supra* note 1, at 351-52.

Several proposals have been subsequently made (unsuccessfully) to revise the entire Mexican legal system (including Article 2 of the Constitution)[63] in order to secure and safeguard the rights —both environment-related and otherwise— of indigenous peoples and their communities.

> The Special Rapporteur's mission to Mexico in June 2003… had found that human rights violations occurred mostly in the frequent local and municipal agrarian and political conflicts, and in the administration of justice, which was seriously deficient. The 2001 reform of the Constitution had not met the aspirations and demands of the indigenous movement and had also failed to establish constructive dialogue between indigenous representatives and the government of the State of Chiapas, where there was ongoing internal conflict, triggered by the Zapatista uprising in 1994. The Special Rapporteur recommended that the Government of Mexico should pay urgent attention to preventing and resolving such social conflict, that it should carry out judicial reform to guarantee protection of indigenous peoples' human rights and that it should revise the constitutional reform of 2001 so that such rights could be safeguarded and peace in Chiapas could be achieved.[64]

The Fox administration's "interest" in engaging the Zapatistas began to fade after the Supreme Court reached its decision. Another election took place in 2006 and, as a result, the same political party (PAN) remained in office —despite allegations of electoral fraud.

Is the current administration under President Felipe Calderón Hinojosa (2006-2012) committed to revising (or proposing to Congress) recommendations for eventually amending the 2001 constitutional amendment? Is there any interest in addressing these topics? These are difficult questions to answer in light of the Mexican government's double-talk regarding the Zapatista conflict and nearly all environment-related matters —including the catchy worldwide climate change campaign which has become the Federal Government's main political-action propaganda.

On the one hand, Calderón's administration has admitted that the so-called changes made to the Constitution on August 2001 do not resolve the armed conflict nor respond to the central claims of indigenous peoples in Mexico; this amendment has been labelled *legislative simulation* whereby no

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[63] In this respect, see the Report elaborated by the FIDH, an international non-governmental organization on human rights (created in 1922 and founded by Pierre Dupuy); after a thorough revision, it concluded that the 2001 constitutional reform does not permit full implementation of indigenous peoples rights because it fails to conform either to domestic expectations or recent international norms. Federación Internacional de los Derechos Humanos, Informe 331/3. México. Los pueblos indígenas en México 44 (June 2002).

[64] Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Australian Indigenous Law Reporter 102, 17, 9(1) (2005) *available at* http://www.austlii.edu.au/au/journals/AUIndigLawRpr/2005/17.html.

indigenous rights have been categorically recognized.[65] On the other hand —and despite the admission of a need to revise the 2001 constitutional amendment— the current administration has not done anything to revive the peace process; as a consequence, no formal talks have been initiated with the EZLN.

Is there any hope of reviving the peace process through a constitutional reform initiated by the Executive branch and consultations with the indigenous movement? This is difficult to envision, as President Calderón has devoted five years of his six-year mandate in fighting organized crime (his so-called "war on crime") and, as a result, has ignored a political opportunity to resume momentum gained on behalf of indigenous rights in Mexico.

At the time of this writing (June 2011), one thing is certain: the conflict considered to be one of the two main motivating forces for the 2001 constitutional amendment (whose content apparently permits full application of indigenous environmental rights) has not yet been resolved. In spite of new federal statutes, secondary legislation, and legal changes made at the local level since the reform of the Mexican Constitution,[66] the fact remains that the Zapatistas have independently started to create and build government structures and new ways of governance, as well as the means for protecting their environment, lands, habitat, and natural resources.

V. Conclusions

Mexico has adopted and ratified international agreements (both "hard" and "soft" law) that have established the environmental rights of indigenous peoples and their communities as well as duties for signatory States. Although no constitutional obligation exists to incorporate treaties (or their contents) into domestic Mexican law —since they are deemed part of domestic law immediately upon ratification— the Mexican government passed a 2001 constitutional amendment on indigenous environmental rights.

These constitutional changes, however, blithely ignored the spirit and substance of important indigenous environmental rights provisions contained in several international agreements; e.g., the C169 and the CBD. In fact, the way in which these rights have been worded in the Mexican Constitution gives the impression that constitutional amendments —when compared to international treaties— often express divergent purposes and goals as a result of vagueness, and inadequate wording.

Some examples used in this article to explain this are: *i*) no constitutional recognition of the relationship between indigenous peoples and biological diversity; *ii*) the lack of recognition of indigenous communities' right of owner-

[65] *See* Secretaría de Medio Ambiente y Recursos Naurales, Programa de los Pueblos Indígenas y Medio Ambiente 2007-2012, 22 (2009).

[66] For some examples, see Nava Escudero, *supra* note 61, at 113-15.

ship, as they are not considered subjects of law but *entities of public interest*; and *iii*) the lack of clear and explicit references to the rights of indigenous peoples and their communities in relation to the government's duty to ensure that they shall not be removed from their lands without their free and informed consent.

Domestically, the 2001 constitutional amendment (which was not formally accepted by the EZLN) failed to adequately respond to indigenous demands because, paradoxically, it established a series of legal impediments to guarantee the protection and force of indigenous environmental rights to natural resources. This is but one of many instances that support the view that the only way to resolve the Chiapas conflict —and thus permit the full exercise of these rights— is for the Mexican government to begin discussion of a subsequent reform to this amendment.

The latter requires three conditions. First, indigenous peoples must be consulted (including those that comprise the Zapatista guerrilla); second, prior agreements (*i.e.* the 1996 San Andres Accords and the 1996 Cocopa Law) should be properly integrated into the Mexican constitutional and legal (both federal and local) regime; third, proposals to change the Mexican Constitution should not contravene or ignore, as they surely have so far, any international provision contained in documents previously adopted or ratified by Mexico.

Although international law's influence (albeit minimal) on the Mexican Constitution is reflected in parts of Article 2, the two main sources for the 2001 constitutional reform were (a) the 1994 EZLN uprising; and (b) the fall from power (by means of democratic elections) of a political party that had ruled Mexico for over 70 years. Had it not been for the indigenous uprising and political momentum achieved at the beginning of the millennium, indigenous environmental rights would have never been recognized at the constitutional level. This is not necessarily good news, however, for indigenous peoples and indigenous communities in Mexico. The road to the full exercise of indigenous peoples' environmental rights is still long and fraught with legal obstacles.

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THE MEXICAN SUPREME COURT AS A PROTECTOR OF HUMAN RIGHTS

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Abstract. *This article studies the behavior of Mexico's Federal Supreme Court (Suprema Corte de Justicia de la Nación) (SCJN) regarding human rights during its Ninth Epoch (1995-2011). According to the empirical data obtained, after a twelve-year period (1995-2006) of inactivity in this área, the SCJN recently (2007-11) has begun to gradually take action. The change is evident in three aspects: a) the increased use and reinterpretation of its powers in Amparo proceedings; b) the increased use, interpretation and regulation of Powers of Investigation for serious violations of individual guarantees (abrogated in 2011), and; c) the inclusion of deliberative elements in preparing proceedings on grounds of unconstitutionality (Acción de Inconstitucionalidad). The change in the SCJN's behavior towards human rights since 2007 is explained by the institutional independence it has gained in the fragmented political system in assuming the role of arbitrator in important conflicts between political actors. The SCJN has also developed strategies that legitimate its greater involvement in protecting human rights before the political system and society. In general, the political system under which the Court acts has not reacted to provoke a reversal of this tendency in favor of human rights. In the 16-year period studied here, the incremental change in the SCJN's behavior is observed along with its evolution from a weak court with marginal participation into a court that has won its independence before political power and is currently looking for greater participation in protecting human rights.*

Key Words: *Human rights, Mexican Supreme Court, institutional change, court behavior, juicio de amparo, acción de inconstitucionalidad, facultad de investigación.*

Resumen. *El presente artículo estudia el comportamiento de la Suprema Corte de Justicia de la Nación respecto de los derechos humanos durante la Novena Época. La evidencia empírica obtenida muestra que después de un periodo de doce años (1995-2006) en el que la SCJN fue inactiva al respecto, reciente-*

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mente (2007-2011) modificó incrementalmente su comportamiento. El cambio es evidente en tres aspectos: a) el incremento en el uso y reinterpretación de sus facultades en el juicio de amparo; b) el incremento en el uso, interpretación y regulación de la facultad de investigación de violaciones graves de las garantías individuales (derogada en 2011), y c) la inclusión de elementos deliberativos en la integración de la acción de inconstitucionalidad. La modificación en el comportamiento de la SCJN con respecto de los derechos humanos que comienza en 2007 es explicada mediante factores como la independencia institucional que ha ganado en el sistema político fragmentado a través de su papel como árbitro de conflictos relevantes entre actores políticos durante la Novena Época. Adicionalmente, la SCJN ha desarrollado estrategias de legitimación frente a la sociedad y el poder político para apoyar un mayor involucramiento en la protección de los derechos humanos. En general, el sistema político en el que actúa la SCJN no ha reaccionado lo suficientemente represivo al incremento en su participación en los derechos humanos para detener esta tendencia. El cambio incremental en el comportamiento de la SCJN es observado junto con su desarrollo de una Corte débil con una participación marginal en la materia, a una Corte que ha ganado independencia ante el poder político y que actualmente está en la búsqueda de mayor participación en la protección de los derechos humanos.

Palabras clave: *Derechos humanos, Suprema Corte de Justicia de la Nación, cambio incremental, comportamiento, juicio de amparo, acción de inconstitucionalidad, facultad de investigación.*

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I. Introduction

The *Ninth Epoch* of the SCJN started in 1995 with expectations that the Court would play a critical role in protecting human rights in Mexico, hand in hand with the perception of democratic change at the end of the 20th century.[1]

[1] For some years the relationship between building democracy in Mexico and the existence of a constitutional jurisdiction that protects human rights has been studied. *See, e.g.*, Suprema Corte de Justicia de la Nación, Tribunales constitucionales y democracia (SCJN, 2008). *See also* Guillermo O'Donnell, *The Judiciary and the Rule of Law*, 1 J. Dem. 25 (2000). The author has pointed out that the democratic expansion in Latin America have been accompanied by the idea of electoral democracy, but display deficiencies when it comes to the legal State and

During the *Partido Revolucionario Institucional* (PRI) [Institutional Revolutionary Party] regime, the SCJN was part of the authoritarian tradition in the exercise of power, far removed from protecting human rights and limited from doing so by its very institutional design.[2] The *Amparo* trial, a historical measure of protection embodied in the Constitution, was limited by its legal standing and *inter partes* clauses, thus minimizing, the impact of the SCJN jurisdictional work. In addition, the technicality of the Court's work distanced broad sectors of society from using it.[3] The SCJN participated in building the PRI's presidential system. It operated as a weak court in the face of the the political power, a situation which decreased any participation it could have had in protecting human rights through its constitutional jurisdiction.[4]

The idea of an in-depth study of the SCJN's character as a court that protects human rights is inspired in the work of some judicial powers and constitutional courts in consolidated democracies, as well as in the global expansion process of a new constitutionalism that promotes greater judicial intervention by the courts in the political field of countries in transition to democracy.[5]

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the validity of rights, and therefore do not fulfill the requirements of democracy. He points out that for the idea of democracy to be restricted to the electoral, citizens would require the effective exercise of their civil and political rights in order for the political process to be adequate.

[2] The PRI (Institutional Revolutionary Party) governed for seventy-one years, from 1929, when the precursor to the party was created, until 2000, when it lost the presidency to the longstanding opposition party, the PAN (National Action Party). During this period parties other than PRI were allowed to compete. *See* Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, *in* Tamir Moustafa, Rule by Law: The Politics of Courts in Authoritarian Regimes 180-207 (Cambridge, 2008).

[3] Arturo Zaldívar Lelo de Larrea, Hacia una nueva Ley de Amparo, XXI-XXIII (Porrúa, 3rd ed., 2010).

[4] José Ramón Cossío has dealt with law's involvement in the PRI presidental system, highlighting the characteristics of the legal phenomenon of the time. *See* José Ramón Cossío Díaz, Cambio social y cambio jurídico (Miguel Ángel Porrúa, 2001). Beatriz Magaloni reviews the SCJN and the judicial power's participation during the PRI presidential period, concluding that the judicial power had an "limited constitutional space" in order to keep it weak in the face of political power. *See* Magaloni, *supra* note 2.

[5] *See* Martin Shapiro, *Courts in Authoritarian Regimes*, *in* Tom Ginsburg & Tamir Moustafa, Rule by Law 327 (Cambridge, 2008) ("[T]he religion of human rights that has dramatically swept the world for the last half-century leads its believers to push for effective courts everywhere. No doubt in large part due to the American experience and its readings and misreadings by others, courts, and in particular constitutional courts, have come to be seen by many as the premier protector of human rights. Given that many of the students of courts, and of constitutional law in particular, are themselves true believers in the rights religion, or at least keen observers of it, they necessarily find themselves moving from the study of an American excepcionalism to the study of a hope-for worldwide phenomenon."). With respect to the expansion of judicial power in the world, see The Global Expansion of Judicial Power (C. Neal Tate and Torbjörn Vallinder eds., NYU Press, 1995); Carlo Guarnieri & Patrizia Pederzola, Los jueces y la política (Miguel Ángel Ruiz Anzúa trans., Taurus, 1997); Ran Hirschl, Towards Juristocracy (Harvard, 2004)

After World War II, a new constitutionalism emerged in Europe and North America to allow the courts to become involved in the protection of individuals' human rights began to be part of the courts' activities.[6] After the end of the bipolar world and a growing globalized, economy institutional designs from developed democracies gave way for a constitutionalism to be reborn in Latin America, based on the idea of building up democracy in the region, as well as in other regions such as Africa, Eastern Europe and Southeast Asia.[7] Under this new constitutionalism, the role of the courts regains relevance in contexts wherethe role of the courts had historically been neglegible. By the end of the 20th century, new constitutions or reforms to existing ones modified the institutional design of the judicial branches in Latin America with the purpose of giving this branch a new identity in the transition from authoritarian regimes to democracies.[8] The institutional restructuring in these countries has been successful to varying degrees: in Latin America, the cases of Costa Rica and Colombia have been the most lauded while those of Brazil, Chile and Mexico have been among the least prominent.[9]

Institutional restructuring in Mexico went through various stages in the late 20th century. The new constitutional design was not successful in modifying the formal rules of constitutional jurisdiction so as to give the SCJN more authority in protecting human rights.[10] Although normative modifica-

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[6] Mauro Cappelletti suggests that the development of constitutional jurisdiction of human rights in the United States occurs at the same time as among contemporary democracies which arose after the World War II, such as Austria, Japan, Italy and Germany, because it is only in post-war reflection that the topic gains validity in the world, even in the North American nation. *See* Mauro Cappelletti, The Judicial Process in Comparative Perspective 85 (Oxford, 1989).

[7] According to Tom Ginsburg, the so-called third democratizing wave in the world has brought: (a) at least a process of constitutional review, and (b) specific jurisdiction for at least one court over these processes. *See* Tom Ginsburg, Judicial Review in New Democracies 98-100 (Cambridge, 2003).

[8] For a general panorama of institutional redesign in Latin America, see Patricio Navia & Julio Ríos Figueroa, *The Constitutional Adjudication Mosaic in Latin America*, 38 Comp. Pol. Stud. 189 (2005).

[9] On the Latin American experience of institutional redesign of judicial powers, see En busca de una justicia distinta: Experiencias de reforma en América Latina (Luis Pásara ed., UNAM, 2004); Rule of Law in Latin America: The International Promotion of Judicial Reform (Pilar Domingo and Rachel Sieder eds., Institute of Latin American Studies, 2001); Siri Gloppen et al., Courts and Power in Latin America and Africa (2010); María del Refugio González & Sergio López Ayllón, Transiciones y diseños institucionales (UNAM, 2000); and Courts in Latin America (Gretchen Helmke & Julio Ríos Figueroa, eds., Cambridge, 2011).

[10] For an analysis of the process of Mexican institutional redesign, see Héctor Fix-Fierro, La reforma judicial mexicana: ¿de dónde viene? ¿Hacia dónde va? (UNAM, 2002); Héctor Fix-Zamudio & José Ramón Cossío Díaz, El Poder Judicial en el ordenamiento mexicano (Fondo de Cultura Económica, 2003); José A. Caballero et al., Libro blanco de la reforma judicial en México (SCJN, 2006).

tions were made in favor of greater protection of human rights, such as the introduction of the abstract proceedings on grounds of inconstitutionality (*acción abstracta de inconstitucionalidad*),[11] restructuring the SCJN and Ministers new jurisdictional guarantees, these changes proved insufficient. In terms of *Amparo* proceedings, the historical means used to protect human rights in Mexico, the formulas for accrediting legal standing and *interpartes* where preserved although broad sectors of society do not have Access to this means of protection. In addition, the authority of the SCJN in *Amparo* proceedings was reduced, and transferred to the *Tribunales Colegiados de Circuito*.[12] Finally, with the creation of the *Comisión Nacional de los Derechos Humanos* as the constitutional organization for protecting human rights in Mexico, above and beyond what the SCJN could realize.[13]

With the aforementioned exception of the introduction of the abstract proceedings on grounds of unconstitutionality, the institution redesign in the alte 20th century did not give the SCJN with the ideal formal rules needed to create an identity for itself as protector of human rights. The expectations of this ocurring depended on the assumption that the new Ninth Epoch SCJN Ministers would take a stance as fundamental rights activists. In order to do so the SCJN would have had to contest its traditionally weak role in the Mexican political system and decide to *take up the baton* of human rights protection, and thus, extend the narrow limits of the institutional design of its constitutional jurisdiction.[14]

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[11] Joaquín Brage Camazano, La acción abstracta de inconstitucinalidad (UNAM, 2000).

[12] On the deficiencies of institutional redesign in providing an ideal framework for the protection of human rights by the SCJN, see Domingo Pilar, *Rule of Law, Citizenship and Access to Justice in Mexico*, 15 Mexican Studies/Estudios Mexicanos 151 (1999); Ana Laura Magaloni & Arturo Zaldívar, *El ciudadano olvidado*, 342 Nexos 36 (June 2006); Ana Laura Magaloni, *¿Por qué la Suprema Corte no ha sido instrumento para los derechos fundamentales?*, *in* La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho (UNAM, 2009). Regarding the competences' transfer to the Tribunales Colegiados de Circuito, see Raúl Mejía, *Acuerdos generales de la Suprema Corte de Justicia de la Nación. Una aproximación sistemática*, in 3 Boletín Electrónico del Instituto Tecnológico Autónomo de México (2004), http://boletin.itam.mx/detalleArticulo.php?id_articulo=67.

[13] On the political system´s preference for assigning the Comisión Nacional de los Derechos Humanos the constitutional protection of human rights, see John M. Ackerman, Organismos autónomos y democracia. El caso de México (Siglo XXI Editores-UNAM, 2007); Miguel Carbonell, Los derechos fundamentales en México (2004); José de Jesús Gudiño Pelayo, El estado contra sí mismo (CNDH-UNAM, 2001).

[14] This expression is used by Ana Laura Magaloni and Arturo Zaldívar, *supra* note 12. ["For that matter, it is of paramount importance for the country that the Supreme Court takes the baton of the citizen's rights and freedoms and then starts and arranges the public debate around the values that the democracy (and, therefore the Constitution) protects. Having done that, the Court would perform a leading roll on the construction of a sustantive democracy."] (trans.)

In autumn 2007 little could be said in favor of the idea of the court taking on the above role. With the exception of two or three isolated events, the SCJN had remained at a distance from this issue. The new Ninth Epoch Ministers were not very interested in having greater participation in the matter during the first 12 years of its operation (1995-2006).[15]

SCJN participation in protecting human rights in the constitutional proceedings envisaged by the Constitution, such as *Amparo* trial, abstract proceedings on grounds of unconstitutionality and the power of investigation were restricted. With the use of its power to send *Amparo* trials to the lower judicial organs, the possibilities of its active intervention in establishing jurisprudence on human rights were limited, given that it practically transferred this function to the lower courts.[16] In addition, the use of its authority to assert jurisdiction, a means for choosing the important issues to resolve in *Amparo* trials.[17] Regarding the power of investigation, a non-jurisdictional powerthat was in article 97 of the Constitution until it was removed by a constitutional reform in 2011, the Court drew up jurisprudence establishing complete freedom of choice admitting cases, rejecting all citizen requests to exercise this power arguing inadmissability of the petition presented by individuals, and using this power on making use of the faculty in only two occasions.[18] Only in case 003/1996 did the SCJN truly intervene by using the power granted it by Article 97, by the express will of then President Ernesto Zedillo.

As for proceedings on grounds of unconstitutionality, which probably aroused greater expectations, the subjects who in principle could legitimately utilize it, made such infrequent use of it that its impact was limited.[19] More-

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[15] There is consensus among the consulted and interviewed authors on the deficiency of the SCJN's labor with respect to the protection of human rights. See *supra* note 12.

[16] *See* Ana Laura Magaloni, *supra* note 12.

[17] In accordance with the information obtained from SCJN databases, from 1996 to 2006 an average of 25 cases of *atracción* were argued in the *Pleno* and in the First and Second Courtrooms. From 2007 to 2010 an average of 107 cases were argumed in the same organs. Database elaborated with information available at, http://www2.scjn.gob.mx/expedientes/.

[18] *Plenaria* P. XLIX/96 opinion help building this idea, being the interpretative mean of support in deciding to reject the requests from civil organizations. *See* Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court] Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo LXVI, Abril de 1996, Tesis P. XLIX/96, III. Between 1995 and 2006 only two requests were admitted. The first was presented by then-president Ernesto Zedillo, on serious violations of individual guarantees in Aguas Blancas, Gro. Expediente Facultad de Investigación 003/1996. The second was presented by the Congress of the Union, on the serious violations of the individual gaurantees of journalist Lydia Cacho, Expediente Facultad de Investigación 002/2006. Only in the first case was judgment passed confirming the existence of serious violations.

[19] According to the information obtained from SCJN databases, from 1996 to 2006 an average of 26 Acciones de Inconstitucionalidad were discused anually in the SCJN. From 2007 to 2010 the average was 131 cases. Database created by the SCJN available at http://www2.scjn.gob.mx/alex/diagramaAcciones.aspx.

over, the Ministers assumed a declarative attitude in which the possibility of arguing abstract constitutionality was limited to the discussions held in Plenary Session, without providing deliberative means for the society to participate in the grand discussions.[20]

Up until 2006, the attitude the SCJN displayed in its use of constitutional jurisdiction does not provide evidence of a role as protector of human rights in Mexico. The expectations of an increase in the SCJN behavior toward human rights, already limited by an inadequate institutional redesign, were unfulfilled because the SCJN did not take up the baton of the protection of human rights, maintaining an inactive position in the use and expansion of its constitutional faculties. In addition to the inadequate institutional redesign, the history of being a weak court within the political system influenced the SCJN's not claiming new prominence in the subject from 1995 to 2006.

II. The Incremental Change in SCJN Behavior Toward Human Rights

It is only beginning in 2007 that the SCJNbegan to change its behavior regarding the constitutional jurisdiction of human rights and has continue to move in the direction it holds today. More than a decade after the *Ninth Epoch* was opened, the SCJN began to show intentions to incrementally change its attitude.

Douglas North's notion of institutional change is central to this article. According to North, human interaction is governed by an institutional framework that serves to reduce the uncertainty of everyday life.[21] The institutional framework is made up of two types of institutions: informal ones, which evolve over time, such as language; and formal ones, which are created, such as Constitutions, laws, and settlements. Every part of the social phenomenon appears to be limited by and organized within an institutional framework. Organizations evolve from the institutional framework as bodies conceived by a group of individuals for the purpose of maximizing objectives or goals within the context of opportunity of opportunity provided by the societal institutional framework.[22] For North, organizations in turn, through their work pursuing objectives, change the institutional structure incrementally. The latter is called institutional change. The author points out that institutional change is a complicated process because the institutional change could be produced by changes in informal and/or formal institutions. The institution-

[20] *See* Francisco Alberto Ibarra Palafox, *La Suprema Corte de Justicia y consolidación democrática en México*, *in* La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho (UNAM, 2009).

[21] *See* Douglas North's concept of institutional change is used here. Douglass North, Instituciones, cambio institucional y desempeño económico (Fondo de Cultura Económica, 1997).

[22] *See id.* at 8.

al is usually incremental and not discontinuous because costums, traditions and behaviors are resistant to the change as the formal rules do.[23]

Taking these elements of North's theory into account, the difficulty of generating rapid changes in the SCJN on the protection of human rights by the SCJN is clear, given that institutional frameworks tend to change incrementally even with attempts to do so intensively. This situation is aggravated by the fact that the protection of human rights was not a clearly established objective when the formal structure was redesigned at the end of the 20th century. Thus, in principleprinciple, it can be supposed that —as long as there are no major modifications in the informal institutions which, along with institutional design, make its institutional structure— the Court's work in this area is stable compared to previous periods. For the SCJN to assume a stronger role in this, protection of human rights must become an institutional objective, insofar as possible within the institutional structure, and the political system needs to grant the Court institutional autonomy. As many of the authors cited here have pointed out, did not occur.

How can the behavioral change in the work of the SCJN between 2007 and 2011 compared to that of the previous twelve years be detected? The results of the empirical research undertaken demonstrate that three proceedings for the protection of fundamental rights mark the way in which the SCJN has changed its behavior: (a) The increased use and reinterpretation of its powers in *Juicio de Amparo*; (b) The inclusion of deliberative elements in assembling proceedings on grounds of unconstitutionality, and (c) The increased use, interpretation and regulation of power of investigation proceedings (derogated in 2011). As to (a) the increased use, interpretation and regulation of, from 2007 to 2011 four investigative commissions on serious violations of individual guarantees were launches, in contrast with only two between 1995 to 2006. The SCJN redefined its power as an *ordinary* one, ending the jurisprudential stigma of *extraordinary* power which it had carried since the 1940s. Since the reinterpretation of the power the SCJN increased the number of times the power was used.[24] In addition, the court regulated the power via *Acuerdo General*, in the absence of legislative regulation, in order to establish parameters regarding its use and scope as well as criterio so it may serve for discussing and defining human rights and the legal regulatory systems.[25]

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[23] *See id.* at 17.

[24] See Dictamen que valora la investigacion constitucional realizada por la Comision designada en el expediente 3/2006 integrado con motivo de la solicitud formulada por el ministro Genaro David Góngora Pimentel, para investigar violaciones graves de garantías individuales, Suprema Corte de Justicia de la Nación [S.C.J.N.], 6 de Febrero de 2007 (Mex.).

[25] See Acuerdo General número 16/2007, del Pleno de la Suprema Corte de Justicia de la Nación, en el que se establecen las Reglas a que deberán sujetarse las Comisiones de Investigación que se formen con motivo del ejercicio de la facultad consignada en el artículo 97, párrafo segundo, de la Constitución Política de los Estados Unidos Mexicanos [General Agreement 16/2007], Diario Oficial de la Federación [D.O.], 27 de Agosto de 2007 (Mex.).

By bringing this power which had been practically forgotten since the 1940s, the SCJN has investigated some serious violations of individual guarantees that have occurred during the last four years. One explanation of this change in the use of this power is the fact that most petitions for investigation reviewed by the SCJN have been presented under the scope of human rights. In the PRI era the use of the *power of investigation* was rejected because it involved the capability of the SCJN to review electoral matters, against the political principle that the judicial power should be apart from political issues.[26] Another reason for this increase is that the subjects with legal standing, among them the SCJN's own ministers, finally started to make use of their constitutional power to request the creation of an investigative Commission.

Redefining the nature of the power of investigation was achieved with case 003/2006 and was maintained for cases 001/2007 and 001/2009, thus allowing the SCJN to create criteria of admission for the cases. Redefining the concept of seriousness, which began with case 003/1996, continued to be developed in cases 002/2006, 003/2006, 001/2007 and 001/2009. The fact that the seriousness of the facts is no longer measured by national interest, but rather by criteria like the effects on the community or the agreement among authorities to violate rights, has given way to the study of new cases. The abstract study of human rights of the use public force and the surrogacy of public services of childcare that has been used in the cases 003/2006, 001/2007, and 001/2009, showed a new purpose achieved by the power of investigation in the protection of human rights. This emerges from the analysis of concrete facts as well as the abstract legal issues. With this work the SCJN managed not only to modify its criteria, which it had already done on previous occasions, but also to repeatedly use the new criteria in its work on gathering proceedings according to Article 97 of the Constitution, and generate new jurisprudence to govern all its work. Accompanying the change in behavior toward the power of investigation, we find the SCJN's decision to establish certain rules for carrying out its investigations and, along with it, overcoming one of the greatest historical limits to its labor, the lack of regulation. With General Agreement 16/2007 the SCJN was able to consolidate the last three Comissions according to certain requirements and protocols, that make it easier to understand its work, find the core substance of the argument, and identify the scope of its work.

Unfortunately, the power of investigation that the Court used over the past four years, was derogated from the Constitution in June 2011. The evolution seen in the use and interpretation of the power was dramatically stopped by the action of the Congress, leaving the impression that something else could have happened in the protection of human rights if the power of investigations would have remained granted to the SCJN in the Constitution.

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[26] *See* Jorge Carpizo, *Nuevas reflexiones sobre la función de investigación de la Suprema Corte a 35 años de distancia*, *in* 13 Cuestiones Constitucionales 4 (2005).

As for (b), the inclusion of deliberative elements in preparing proceedings on grounds of unconstitutionality, tools such as public trials,[27] broadcasting sessions on live television,[28] making information of the proceedings available on its online portal,[29] and the use of *amici curiae* have been incorporated to support certain Court rulings.[30] The proceedings on grounds of unconstitutionality that deal with cases of family, sexual and reproductive rights in Mexico have provided means to further elaborate on discussions of most polemical cases, thus allowing the participation of social, political and academic organizations that do not have legal standing in trials.[31] These elements allow the SCJN to move toward a deliberative model in discussions on abstract constitutionality, an aspect that has been highlighted by an important sector of academics as it contributes to making and allowing the Court to legitimize its decisions before society in cases that cause greater controversy.[32]

The Proceedings of Grounds of Unconstitutionality Case No. *146/2007* and its Consolidated Case No. *147/2007* is of particular interest. In this case, on August 28, 2008, the Mexican SCJN ruled that the reform to the Mexico City Penal Code approved by the Mexico City Legislative Assembly (ALDF) and the Mexico City Health Law, published in the Mexico City Official Gazette on April 26, 2007, decriminalizing abortion during the first twelve weeks of pregnancy in Mexico City and instructing public health institutions in Mexico City to provide related medical services and counseling, was valid.[33]

The decision was made after more than fifteen months of deliberation that involved live broadcasts of the sessions discussing the issue, the participation of more than eighty social organizations and public officials at the hearings, consulting experts, stances taken by every political party with national and

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[27] *See* Acuerdo General número 2/2008, de diez de marzo de dos mil ocho, del Pleno de la Suprema Corte de Justicia de la Nación en el que se establecen los lineamientos para la celebración de audiencias relacionadas con asuntos cuyo tema se estime relevante, de interés jurídico o de importancia nacional [General Agreement 2/2008], Diario Oficial de la Federación [D.O.], 2 de Abril de 2008 (Mex.).

[28] Reglamento Interior de la Suprema Corte de Justicia de la Nación, Diario Oficial de la Federación [D.O.], 1 de Abril de 2008 (Mex.), art. 141.

[29] Specifically, the Internet microsite for the Acción Inconstitucionalidad 146/2007 and its addendum 147/2007, relative to the decriminalization of abortion in the Distrito Federal, *available at* http://www.scjn.gob.mx/Micrositios/AbortoForoSCJN/Paginas/IndiceAborto.aspx.

[30] *See* José Antonio Caballero Juárez et al., *supra* note 10.

[31] In order to achieve better communication with society on these topics, the SCJN created two interior offices: *La Dirección General de Planeación de lo Jurídico* and *La Coordinación General del Programa de Equidad de Género*.

[32] *See* Ibarra Palafox, *supra* note 20.

[33] Engrose de la sentencia definitiva de la Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court] [Unconstitutionality Case no. 146/2007 and its Consolidated Case no. 147/2007], Agosto de 2008, *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/07001460.019.doc.

local representation, permanent media follow-up of the discussions and the creation of a microsite on the court's webpage, which served as an interface for communication with the general public.[34] This trial brought much attention to the SCJN. The very nature of the case made it stand out from all of the trials that fill the Court's agenda.[35] The diverse interest of the actors who took part in the debate placed the Court in a delicate situation. The intervention of government, educational, and religious institutions, the mass media and civil organizations in a proceeding conducted by the SCJN gives an idea of how much women's rights issues can be discussed in Mexico today. The case of proceedings on grounds of unconstitutionality on decriminalizing abortion in Mexico City is the most representative yet of the constitutional jurisdiction of human rights that involves women's rights.

Regarding (c) the increased use and reinterpretation of its powers in *Amparo* proceedings, the number of cases the SCJN has drawn from lower courts has multiplied, and the types of cases have diversified, principally between 2008 and 2010. By means of this faculty, the SCJN has accumulated a large quantity of *amparos.* The First Chamber (*Primera Sala*) of the SCJN, has drawn a number of cases that allows them to define issues regarding human rights, particularly those related to due process and other criminal law issues.[36] Another key aspect is that, the First Chamber handles a variety of cases that allow to define human rights issues by modifying the criteria held regarding the rule of interest and origin of jurisdiction established by Article 107, fractions V and VIII.[37] Finally the Court has construed some of its power in order to uphold the criteria of having the power to review a constitutional reform.[38] Although these events are a positive step in the Court's behavior

[34] The electronic record of these events can be consulted at http://informa.scjn.gob.mx/inicio.html.

[35] Guillermo Ortiz Mayagoitia, *Apertura del Primer Periodo de Sesiones de 2008*, *in* Guillermo Ortiz Mayagoitia, Conferencias de los ministros de la Suprema Corte de Justicia de la Nación 2008 (SCJN, 2009).

[36] For example, in 1996, the *Primera Sala* discussed jurisdiction over fourteen cases, the *Segunda Sala* three, and the Pleno none, for a total of seventeen cases. In 2001 the *Primera Sala* discussed three, the Second Court seven, and the *Pleno* four for a total of fourteen cases. By 2008 the figure rose to 68 cases in the *Primera Sala*, 36 in the *Segunda Sala* and 26 in the *Pleno* for a total of 130 cases. By 2009 the total figure is equal to 129 cases taken. For the first eight months of 2010 the number of cases undertaken was 125. Statistics elaborated with the data available at http://www2.scjn.gob.mx/expedientes/.

[37] The First Chamber has taken jurisdiction over cases dealing with gender equality in Social Security, the requirement of no pre-existing conditions for the use of Social Security the *amparo* for the tzotzil Indians for the right to criminal defense in their language, the identity protection for trans sexuals, religious freedom, among others. Information available at www.scjn.gob.mx.

[38] *Revisión de Amparo 139/2009-1*. With regard to this matter, see generally Pedro Salazar, *Una Corte, una jueza y un réquiem para la reforma constitucional electoral*, *in* Lorenzo Córdova & Pedro Salazar, Democracia sin garantes. Las autoridades vs. la reforma electoral 29-

toward greater participation in human rights protection, they show only negligible advance in the SCJN's unresolved agenda in the matter of *amparo*, which continues to lag far behing.

These events indicate a gradual change in the SCJN's attitude toward the human rights protection. The change began by intensifying its activities in the constitucional jurisdiction of human rights, by actively using its powers and by attempting to extend its limited institutional design. The semblance conveyed is that of SCJN that, aware of the difficulty of its institutional design and institutional history as a weak court, yields actions by which it attempts to reinterpret and enhance its participation in this matter. These events challenge the desings of the political system's prominent actors to suppress the appropiate means for defending human rights, and confront its own institutional history of maintaining itself within the narrow limits the political power has imposed on it. A response to this change in behavior, as well as its description, raises the need to find an explanation for this change, which is one of the most important aim of this paper.

III. How Can the Recent Changes in the SCJN's Behavior Be Explained?

Several factors can help the SCJN's change in behavior regarding human rights protection. For example, internal events, such as the arrival of new ministers, help trace the advent of new ideas and strategies in the SCJN, that pay more attention to human rights.[39] An increased budget for hiring and training new personnel leads to asume the SCJN works more professionally and, has therefore redefined the Court's internal objectives.[40] Transparency and social communication policies show greater SCJN's awareness of its social context, and lead it to pay more attention to accountability and its contact with its surroundings. Creating public policy planning offices has made it possible for the SCJN to make decisions based on studies complied by professionalized areas with specialists in diverse branches of knowledge.[41]

In addition to all of this, changes in Mexican society have created a cultural context in which the SCJN's defense of human rights in Mexico has gone from an "expectation" to a "demand." Little by little, elements that

58 (UNAM, 2010); Julio Ríos Figueroa & Andrea Pozas, *¿Puede ser inconstitucional una enmienda constitucional?*, 370 Nexos 134 (Oct. 2008).

[39] With respect to the importance of the arrival of new Ministers to the modification of the SCJN's behavior, see Beatriz Magaloni *et al.*, *Activists vs. Legalists: The Mexican Supreme Court and its Ideological Battles*, *in* Courts in Latin America (Cambridge University Press, 2011).

[40] On this topic, see Fix-Fierro, *supra* note 10; Caballero et al., *supra* note 10.

[41] See the with respect to the objectives and mission of the *Dirección General de Planeación de lo Jurídico* and the *Coordinación del Programa de Equidad de Género*. SCJN. Manual General de Organización de la SCJN (2008).

have a greater impact on the SCJN's internal process are emerging. The international context of the defense of human rights has made possible the growth of civil society organizations, as well as the success of certain issues in advancing a political agenda in Mexico, thanks to financial support and human resources. [42] The growth the public and private legal profession has also served to generate points of reference for the SCJN, whether by means of criticism of work done, methodological proposals and even litigation established for the defense of certain topics within the SCJN's jurisdiction.[43] The attention that the media pays to the SCJN is, on its own, a factor that puts the court in the "public eye," and means that the Ministers' labor is contantly being analyzed, criticized and observed not only by academic specialists, but also by the general public.[44]

Factors that are both internal and external to the SCJN assist in creating a change in the Court's behavior toward human rights, obligating the SCJN to pay attention to the topic and seek to integrate it into its daily functions.[45] One of the most important issues that explains a tendency toward greater participation in the arena of human rights is the building up of institutional independence in the political system as a precondition for the SCJN's increased participation in these activities[46]. This starting point makes it posible to observe the SCJN's behavioral change regarding with respect to its participation in the jurisdiction of human rights can be attributed to the autonomy it has gained due to its efficient fulfillment of its role as arbiter between prominent political actors (1995-2011). Its performance in settling constitutional controversies, has given it greater independence from public powers and political parties, distancing itself from the shadow of the presidential figure that pursued the Court during the PRI presidential regime.[47]

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[42] *See* Jorge Carpizo, *Tendencias actuales del constitucionalismo en América Latina*, *in* Tendencias del constitucionalismo en América Latina (Miguel Carbonell *et al.*, eds., UNAM, 2009).

[43] For important articles on the legal practice in Mexico, see Del gobierno de los abogados al imperio de las leyes. Estudios sociojurídicos sobre educación y profesión jurídicas en el México contemporáneo (Héctor Fix-Fierro ed., 2006). For a sociological analysis of the growth of educational institutions for the teaching of law, see generally Luis F. Pérez Hurtado, *An overview of Mexico's legal system of education*, 2 Mexican L. Rev. 151 [Jan.-June 2009]. The participation of human rights clinics held by academic institutions in Mexico City such as the CIDE and the ELD represent a gap in the research, but a reality in practice.

[44] For leading proponets concerning this matter, see James K. Staton, Judicial Power and Strategic Communication in Mexico (2010).

[45] *See* Julio Ríos Figueroa, *Justicia constitucional y derechos humanos en América Latina*, 3 Revista Latinoamericana de Política Comparada 53 (Jan. 2010) (reviewing the factors that allow Latin American Courts to increase their protection to human rights).

[46] *See* Guarnieri & Pedarzoli, *supra* note 5.

[47] *See generally* Julio Ríos Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico*, 49 Latin American Pol. and Soc'y 49 [Spring 2007]; Beatriz Magaloni & Arianna Sánchez, *An Authoritarian Enclave? The Supreme Court in Mexico's Emerging Democracy* (paper presented in the American Political Science Association, Annual Meeting, September 2, 2006);

To back this explanation, this research uses theories that explain the Court's behavior as the result of institutional design, of the political, social and economic context in which it operates, and the decision-making possibilities these factors grant the court.[48] These studies have been used to analyze various courts around the world, and reach the conclusion that the principal obstacle for a court to decide to undertake a change toward extending its constitutional jurisdiction over human rights, is the fact that the courts are weak organizations within the political system, especially in authoritarian systems, making them cautious in action and, therefore, preventing them from easily promoting change in that sphere. For a court to do so it must first obtain independence from the political system.[49]

On occasion, principally in the case of a constitutional court, acquiring independence can be directly related with the Court's function in constitutional jurisdiction expressly in dealing with human rights if the institutional design is ideal for such an action, which makes for a smoother road toward the judges' taking action on the topic. However, in the case of courts like the SCJN, whose jurisdiction over the field does not appear to be the express intent of the legislature, these courts must gain independence within the system by other means before increasing their participation in human rights. Only when the court is perceived as independent is it possible to seek greater participation in the jurisdiction of human rights. Once the court has achieved sufficient independence to attempt to expand its constitutional jurisdiction over the topic of human rights, it begins to pay attention to the reaction of the political social and economic context, attempting to legitimate its jurisdictional intervention into human rights. If it receives a favorable response, it continues such participation. If it receives a negative reaction, the tribunal may moderate its ambitions or the rejection is might be such that the political power moves to restrict the court's labor via legislative action or via the repositioning of some or all of the members of the court. In order to achieve such

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Karina Ansolabehere, Cortes supremas, gobierno y democracia en Argentina y México (Fontamara, 2007); Susana Berruecos, *The Mexican Supreme Court Under New Federalism: An Analysis of the Constitutional Controversies (1995-2000)*, *in* Separation of Powers in New Democracies: Federalism and the Role of the Judicial Power in Mexico, Working paper (London School of Economics and Political Science, 2000); Alba Ruibal, *Definition of the New Institutional Role of the Supreme Court in Argentina, with Reference to the Mexican Case*, paper presented in the *Law and Society Association Annual Meeting* (Montreal, May 29-June 1, 2008).

[48] These are the neo-institutionalist studies. For neo-institutionalism as a social science method, see North, *supra* note 21. Regarding this method applied to the study of courts, a good anthology is Supreme Court Decision-Making, New Institutionalist Approaches (Cornell W. Clayton & Howard Gillman eds.,1999).

[49] On this subject, see generally Matias Laryczower *et al.*, *Judicial Decision-Making in Unstable Environments*, 46 Am. J. of Pol. Sc. 699 (2002); Lee Epstein *et al.*, *The Role of Constitutional Courts in the Establishment of Democratic Systems of Government*, 35 Law & Soc'y Rev. 117; Javier Couso, *Consolidación democrática y Poder Judicial: los riesgos de la judicialización de la política*, *in* SCJN, Tribunales constitucionales y democracia 429-57 (2008).

legitimacy in the subject, the court must use strategies of legitimation that permit it to negotiate negative reactions that might emerge from the social context and the political system.[50]

One of the most illustrative examples with respect to the behavioral change of the tribunals is found in Martin Shapiro's classic article, which attempts to answer the question of when tribunals are successful in modifying public policy through their behavior.[51] To do so he takes on the study of the United States Supreme Court, considered one of the most successful cases in the history of the world. The author establishes that the history of the US Court can be defined by the success it has had in helping to implant a federal system in the United States, regularly supporting national powers, but restricting them enough to conserve its validity as an arbiter in conflicts between federal and local powers.[52] Because of what this does to relations between the Congress and the Executive, Shapiro's conclusion is that the Court has practically been a spectator in disputes between them.[53] Specifically with respect to human rights, he points out the topic penetrated the Court only after the World War II and had its apogee in the Warren Court, but that before that, only property rights, especially those of corporations, had been protected by the US Court. In the opinion of the author the Court has a long history protecting the interests of corporations prior to protecting the interests of unprotected sectors. His conclusion is that the US Court, through its assistance in implementing federalism, and through its historical protection of the interests of particular corporations, managed to legitimize its institutional role before being able to participate in the defense of human rights.[54]

If we take Shapiro's idea as a possible explanation of contexts outside of the US Court, it is possible to explore the hypothesis that, through successful participation in diverse spheres, a court builds its institutional autonomy, which allows it to increase its participation in the protection of human rights. Bringing this to the Mexican case, it is possible to say that, before establishing an active position regarding human rights protection, the SCJN has successfully fulfilled other institutional roles that allow it to generate sufficient institutional autonomy to explore having greater participation in the protection of human rights.

By applying these ideas to the SCJN, it can be observed that at the time of institutional redesign in the late 20th century, the SCJN's position was too weak to promote changes in the constitutional jurisdiction of human rights, due to its history in the face of the presidential system and the inefficiency of the institutional redesign. With the exception of the abstract proceedings on

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[50] *See* Martin Shapiro, *Revisión judicial en democracias desarrolladas*, *supra* note 5; Javier Couso, *La política de la revisión judicial en Chile durante la era de la transición democrática 1990-2002*, *id.* at 459-88.

[51] *See* Shapiro, *supra* note 5, at 233-34.

[52] *See id.* at 234-37.

[53] *See id.* at 237-38.

[54] *See id.* at 239-42.

grounds of unconstitutionality in which the political system's express order for the SCJN to begin to take abstract control over human rights protection is apparent, the court was not given enough tools to iniciate a change toward greater participation in the matter. In this context, it is not surprising that the SCJN's role in the years after the *Ninth Epoch* was established in the protection of human rights was as poor as it had been during *PRI* presidentialism regime. As mentioned above, at this time, the Court opted to focus its work on building its identity as an arbiter of important conflicts between actors of the political system, as ordered by the Congress.

The fulfillment of this role within the context of the fragmentation of the political system has caused the SCJN to gradually distance itself from the presidential figure. In the context of political fragmentation in Mexico which was founded in 2000, the various public actors (political parties, federal and local executives and legislatures) have regularly turned to the SCJN to legally settle some of the most prominent tensions within the political system, which helps the court to construct independence from the political power, specifically from the Presidency. Along with creating independence within the political system, there are demands that the SCJN extend its intervention in the protection of human rights, an issue which Mexican society has considered unresolved in the SCJN's work and the importance and necessity of which the SCJN itself has recognized. In the last years of the *Ninth Epoch* the first signs of change in the matter were exhibited with the reinterpretation and increased use of the Court's powers and in its manner of compiling proceedings. Once the SCJN has taken its first steps toward greater intervention in the protection of human rights, sending signals to its surroundings, it is posible that the politcal, social and economic context might respond. Such a response conditions the SCJN to continue in this direction or, on the contrary, if it were to experience repressive actions, principally from the other branches, it would be obligated to modify its behavior. The SCJN is developing legitimization strategies to avoid such a negative reaction from the political and social system that commonly arises in the political contexts when the Courts suddenly shift to a greater participation in the field of human rights.

However, the establishment of institutional autonomy that the SCJN has fostered is explained not only by the existence of the pluralization of the political system, but also by the creation of public policies that tend to avoid a repressive reaction from the political context toward the Court's work. It is extremely important to resolve this issue because in the process of its institutional redesign, the SCJN opted not to delve much into the suitable resources for exercising human rights protection in Mexico. Thus, if the Court assumes greater participation in fundamental rights protection, the political context may either react repressively or legitimize this move.

Comparative history shows that on several occasions the political system reacts repressively to a certain extent when the courts take stronger action, especially when the Court directly challenge the ruler's public policies. One

of the most well-known cases that illustrates this point is that of the clash between US President Theodore Roosevelt and the US Supreme Court over the New Deal economic policies, which resulted in the replacement of the Court justices with ones who agreed with the president's policies, and the implementation of the new rules regarding the composition of the Supreme court. Deriving from this experience, the heightened importance the administration placed on the selection of new justices. Even today, the nomination process is closely followed by different political actors and the mass media since, presidents are disposed to sending the Senate nominees who do not represent a high risk of opposing presidential public policies and that, on the contrary, will most likely defend said policies in the future.[55]

The US example is only one of many that have occurred throughout history in different parts of the world. One of the most dramatic cases took place in the first Constitutional Court of Ruisa. The Court was created in 1991 in the style of European constitutional courts, with power to attend to a wide range of constitutional proceedings presented by citizens and different political actors. One of the Court's powers was the abstract constitutional review of all acts of the State. The new institutional design represented a strong break with the Soviet past, in which the judicial branch was not a significant actor in the political system. In carrying out its functions, the first Constitutional Court of Russia made some decisions that annoyed the other government branches, especially the local executive brach. The reaction of the local executives to the Court's imposition of limits on their public policies by the Tribunal was one of disobedience and of disagreement with the jurisdictional function of the new body. By 1993 the discord in the political system regarding the use of the wide-reaching functions of constitutional jurisdiction that the institutional design granted the Court caused then-President Boris Yeltsin to order the suspension of its functions until a new Constitution could be drafted. The work of the first Constitutional Court of Russia was then suspended due to dissension within the system caused by the Court's exercising the wide-reaching powers bestowed by its institutional design. The life of the first Constitutional Court of Russia was very short, given the violent reactions from the political system. In 1994, with the approval of a new law, a new Constitutional Court was created, this time with a more limited institutional design. The new Court has gradually established its legitimacyby assuming the policy of avoiding direct confrontation with the political system.[56]

In Latin America, there have also been violent reactions to the increase in Court's work. For example, in Argentina in 1993, then-President Menem promoted a reform by which the number of justices would increase from five to nine. He thereby gain the possibility of naming four candidates who

[55] *See* Joseph MacKenna, Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937, 1-12 (2002).

[56] *See* Epstein *et al.*, *supra* note 49.

sympathized with his public policy, and thus ending the important work that the Court had carried out in terms of human rights protection under ex-President Alfonsín. Another important and recent case is that of the Constitutional Court of Bolivia. According to Aníbal Pérez Liñán and Andrea Castagnola, the combination of feeble support from society, legislative limitations for nominating new justicies to the Supreme Court, and incipient Constitutional Court activism led to the collapse of the 1998 model of constitucional review between 2006 and 2009. During this period the Constitutional Court lost all of its members with the exception of one who has retained her position.[57] Other similar experiences have occurred in Peru under President Fujimori in the 1990s, and today in Venezuela under President Chávez. In both cases the concentration of power in the hands of the president and the intent to advance public policy program with no opposition has constrained the Court intervention in these countries' public life.[58]

Cases like these appear and reappear around the world.[59] These experiences have led courts with constitutional jurisdiction to be cautious in the use of their powers as there is the possibility of their being repressed. This in turn creates a judicial prudence that avoids any violent reaction from the political system, especially in authoritarian contexts.[60] An example of this can be found in the work of the second Constitutional Court of Russia, which has avoided direct confrontation with the political system.[61] Another is found in the Chilean case. Prior to the present day incipient judicial activism described by Couso and Hilbink, Javier Couso had pointed out that the Chilean courts

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[57] *See* Andrea Castagnola & Aníbal Pérez Liñán, *Bolivia: The Rise (and Fall) of Judicial Review*, *in* Courts in Latin America (Gretchen Helmke & Julio Ríos Figueroa eds., Cambridge, 2011) ("The combination of weak public support for the judiciary, legislative deadlocks preventing the appointment of Supreme Court Justices, and fledgling activism on the part of the Constitutional Tribunal created an explosive mix that led to the downfall of the model of judicial review inaugurated in 1998 between 2006 and 2009. In just three years, the Constitutional Tribunal lost all of its members until only Justice Silvia Salame Farjat remained in office.").

[58] *See* Rogelio Pérez Perdomo, *Law and Legal Culture in Venezuela in Revolutionary Times (1999-2009)* (Stan. L. Sch. Papers, 2009); Domingo García Belaunde, *Sobre la problemática constitucional en el Perú de hoy (reflexiones al inicio de 2000)*, *in* Diego Valadés & Miguel Carbonell, Constitucionalismo Iberoamericano del siglo XXI 195-209 (2002).

[59] One of the recent cases refers to the process of removing from the *Audiencia Nacional Española* Judge Baltazar Garzón, one of the most activist judges in the investigation of cases of genocide in various regions of the world in the last few decades, from office when Judge Garzón decided to review the abuses suffered during the Franquista dictatorship, he was subjected to a political trial to remove him fromhis position for violating the Law that prohibits investigating abuses occurring during Franquismo. As a result, the judge finds himself suspended while his case is being resolved, and self-exiled in the Court of The Hague.

[60] *See* Shapiro, *supra* note 5, at 17 ("Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.").

[61] *See* Epstein *et al.*, *supra* note 49.

tribunals had followed a policy of moderation in their interventions in the field of human rights protection between 1990 and 2002, even before social demands for the reparation of harm done during the Pinochet's dictatorship, as a strategy to achieve its legitimacy.

The *Ninth Epoch* SCJN employed various types of legitimization strategies. First of all, there was the strategy of moderate increases in its activity.[62] The SCJN did not challenged the political system by creating new criteria that would allow it to use its constitutional jurisdiction for a more involved paticipation in human rights protection. One clear example of this is the fact that the criteria legal standing and the *inter partes* clause in Amparo *proceedings* were not challenged, both of them key points in the institutional design proposed by the political system to limit the SCJN's involvement in the matter of human rights. The SCJN preferred not to challenge these issues via constitutional interpretation and maintained an attitude of moderation so as to avoid excessively disrupting the political system. The SCJN also moderated its interventions in other issues as well. For example in the power of investigation, the Court declined to asign responsabilities to high-level politicians or to provide means of restitution to the victims. In proceedings on ground of unconstitutionality, Court ministers desisted from providing definitions to rights and jurisprudence in cases of an ideological clash between the political left and right.

Other legitimization strategies observed are basically media-related. The SCJN works to establish an identity before society as a protector of human rights via the media. The *Canal Judicial* and the use of electronic media, besides aiding the Court's transparency and accountability, have been used to promote the legitimization of its work in human rights protection.[63] The SCJN aims at establishing a rapport with society to legitimize its work and, in this way, legitimize itself before the political system, avoiding violent reactions to its work and in this way gring about an in-depth institutional redesign in political system so as to provide the SCJN with the ideal means to intensify its involvement in human rights protection.

The reactions of the political system and society to the SCJN's behavioral change regarding its constitutional jurisdiction and icreased participation in the area of human rights, are, usually, diverse and not very repressive. In a country with a long authoritarian tradition like Mexico, in which until 2011 there was no expressed intent to grant the SCJN an institutional design suitable for the protection of human rights, a negative reaction to the Court's greater involvement may be expected.

However, evidence shows that the reactions to the Court's work were not repressive enough so as to prevent the SCJN from continuing in this direc-

[62] Another case of this moderation strategy is described in the chilean judiciary by Couso, *supra* note 49.

[63] *See* Staton, *supra* note 44.

tion. The most hostile reaction from the political system to the SCJN's increase in its labor for the protection of human rights refers to the derogation of the constitutional power of investigation. The political system always denied granting legal content to the decisions connected to these proceedings, which in the best of the cases only established historical truth of the facts of serious violations.[64] In 2011, the legislative attempts to remove the *power of investigation* from the SCJN's sphere succeeded, and the power was transfered to the *Comisión Nacional de los Derechos Humanos*.[65]

In contrast, the political system's reactions to proceedings on grounds of unconstitutionality have apparently been positive, a situation which could stem from the fact that the SCJN's control over abstract constitutionality was endorsed by the political power, leading to the political system's general approval of the SCJN's execution of this work. While this activity was limited at first, the number of proceedings initiated by elected individuals has increased, evidence of the usefulness of proceedings on grounds of unconstitutionality as perceived by political actors. Proceedings on grounds of unconstitutionality has been added to the catalog of proceedings that the public actors in the political system use for issues that go against their ideology or interests and in an attempt to promote their own agendas. The Office of the Attorney General (*Procuraduría General de la República*) in particular is making extensive use of proceedings on grounds of unconstitutionality as a means to control spending, while political parties use these proceedings as a way to control over political and electoral reforms.[66] Recently, proceedings on grounds of unconstitutionality were also used to vent to ideological confrontations on issues of right to life and family and sexual and reproductive rights. Furthermore with proceedings on grounds of unconstitutionality the political power has found a way to control the economic elites via the judiciary more efficiently than by other means.[67]

The SCJN's policy of openness and communication in proceedings on grounds of unconstitutionality has sometimes led certain powerful groups, such as media executives or the Catholic Church, to more strongly reject the Court's actions, given that the Court has opened discussions that have limited these groups' influence over public policy making in Mexico in legisla-

[64] None of the processes followed by the SCJN in the power of investigation have led to sanctions against those responsibles because of the inaction of the other governmental branches at local and federal levels.

[65] The Senate has approved a constitutional reform in this sense that recently was also approved in the lower chamber. The project is back at the Senate and there are high probabilities that will be approved in the following months.

[66] Almost half of them have been initiated by the Office of General Attorney.

[67] *Acción de inconstitucionalidad 26/2006* is the biggest example of this phenomenon. In this case the Court declared unconstitutional a law that allowed current media owners refrend their public concessions automaticly.

tive processes.[68] In contrast SCJN communication and transparency policies have encouraged other types of actors, such as civil society organizations and academic centers, to participate in the great political discussions of Mexico therefore reacted favorably to their inclusion in this procedures.[69]

In the case of *Amparo*, the reactions may be less apparent because the SCJN's activities in this area have been less noteworthy. But this is the proceeding in where the political power shows a better reaction to the increase or the SCJN human rights protection. In the same constitutional reform that derogated the power of investigation in 2011, a new set of constitutional rules for *Amparo* trial were adopted to expand the importance of this proceeding in the protection of human rights, situation that implies a greater involvement of the judicial branch and the SCJN in the matter. Specially changes in the legal standing rule leave the possibility to think in a better use of Amparo trial for protection human rights. Even more, the new constitutional drafting says explicity that Amparo trial is the means to defend human rights.[70] Given the above, it can be concluded that the political system's reaction to the SCJN's greater intervention in the constitutional jurisdiction over human rights in the last years of the *Nine Epoch* has been varied but is generally not as repressive so as to reverse the trend of the Court's increased participation in matters dealing human rights. Even more, there is an explicit agreement with the 2011 constituticional reform, that the SCJN must have a greater participation in the human rights protection through Amparo trial. Hopes that the SCJN will extend its constitutional jurisdiction to better include human rights protection are starting to come true. After 16 years the SCJN has achieved its independence and gone from being a weak court when confronted with political power to enhance its involvment in the matter concerning human rights. The change it has undertaken has been gradual and is seen, changed interpretation and use of the Court's powers and in the way it compiles. These are some of many issues that allowed SCJN from the *Ninth Epoch* to assume greater role in the protection of human rights. This change should not be seen as a revolutionary change that mends all of the gaps in the SCJN's in this field. The day when the SCJN establishes its identity as a protector of

[68] Bishop of Guadalajara Juan Sandoval Íñiguez acused the SCJN ministers of have been bribed by the Mexico's City mayor in a case on same sex marriage which was validated by the SCJN. *See* Claudio Bañuelos *et al.*, *Ebrard maiceó a los ministros para que se permitieran bodas gays: Sandoval Íñiguez*, La Jornada, Aug. 16, 2010, http://www.jornada.unam.mx/2010/08/16/sociedad/038n1soc.

[69] Several scholars interviewed during 2008-2010 from different fields and universities in Mexico City expressed their pleasure in participating in some proceedings on grounds of Unconstitutionality regarding this a positive factor in the trials in which they participated.

[70] Mex. Const. Art. 103 ["The federal courts shall solve any dispute on: I. General norms, authority acts or omissions that violated human rights and there warranties recognized and given for their protection by this Constitution and by the International Treaties in which the Mexican state participates…"] (trans.)

human rights is still a long way off, but the Court of the late years of *Nine Epoch* (2007-2011) started to emit the first signs of this happening. Considering the the independence gained and that reactions from the policital system have not been repressive enough to put a stop to it, it is posible to say that in the SCJN's participation in the protection of human rights will continue to grow in the *Tenth Epoch*.[71]

[71] The Tenth Epoch started October 4th, 2011.

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INSTITUTIONAL CHANGES IN THE PUBLIC PROSECUTOR'S OFFICE THE CASES OF MEXICO, CHILE AND BRAZIL

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Abstract. *Given the critical role played by the Public Prosecutor's Office in the criminal justice system, the reform of its powers and underlying framework is fundamental in enhancing the rule of law and democracy. This paper analyses two important aspects of reforms introduced in Brazil, Chile and Mexico that affect the way in which the Public Prosecutor's Office (the "PPO") performs its daily duties: 1) criminal procedure; and 2) institutional location. This paper takes a comparative approach to evaluate efforts carried out by politicians to modify key aspects of the criminal justice system, as well as overcome key challenges. Emphasis is placed on recently enacted changes to the Constitution, organic laws, criminal codes and criminal procedures.*

Key Words: *Judicial System Reform, Public Prosecutor, Institutional Framework, Criminal Procedure, Political Autonomy, Rule of Law, Democracy.*

Resumen. *La reforma al Ministerio Público (MP) es considerada un paso fundamental para fortalecer el Estado de derecho y el régimen democrático, dado que la institución es un jugador clave en el sistema de justicia penal. Este documento analiza las reformas introducidas en Brasil, Chile y México a dos dimensiones que afectan la manera en que el MP realiza sus actividades diarias: 1) el procedimiento penal, y 2) su ubicación institucional. Desde una perspectiva comparada este trabajo señala cuáles son los principales esfuerzos llevados a cabo por los representantes para cambiar el entramado institucional de la procuración de justicia y cuáles son los principales retos a superar. Este documento se concentra en el análisis de diversos textos legales como Constituciones, leyes orgánicas, códigos penales y códigos de procedimientos penales con el objetivo de observar hasta qué punto ha sido reformada cada una de las dimensiones aquí estudiadas.*

Palabras clave: *Reforma al sistema de justicia, configuración institucional del Ministerio Público, procedimiento penal, autonomía política, Estado de derecho, democracia.*

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I. Introduction

Since democratic politics are fundamentally incompatible with the previous authoritarian system, elected officials normally change many institutional features —including electoral rules, system of government (*i.e.* parliamentarian or presidential) etc.— in the years immediately following democratic reform. Following these changes, further reforms are also often considered necessary, including major changes to the criminal justice system. In newly-formed democracies such as Brazil, Chile and Mexico, systematic reform of the Public Prosecutor's Office (PPO) has been critical in advancing the rule of law, implementing democratic processes and codifying international human rights provisions in domestic law. Under authoritarian rule, PPOs were often used by the executive branch to punish political enemies; and due process was often granted as a privilege to the regime's supporters.

Chile serves as a notable example. There the entire legal system was subservient to Augusto Pinochet's military junta, which exploited it to punish enemies of the State. During the investigative stage, torture and preventive imprisonment were widely used to extract information and repress political dissents.[1] In Mexico and Brazil, access to justice was (and often still is) a privi-

[1] *See* National Commission of Truth, Report of the Chilean National Commission on Truth and Reconciliation (Oct. 4, 2002), *available at* http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf. Piedrabuena, Guiller-

lege reserved only for those with economic means (Mexico)[2] or social standing (Brazil).[3] It is clear, however, that a criminal justice system that fails to facilitate equal access and due process for its citizens shall always be subject to undue influence and, as a result, violate basic democratic principles.

In this article, I describe changes to the PPO realized at a national level during the recent democratic transition periods in Brazil, Chile and Mexico,[4] and analyse what these countries did to modify this institution's rules and procedures. Below, I describe how the PPO was restructured in two major areas after legislative reforms were approved: 1) criminal procedure; and 2) the PPO's institutional framework.

With respect to the first area, it should be noted that the criminal justice system implemented by Spain and Portugal in Latin America during the colonial era was by nature inquisitorial. In this system, the judge's role is predominant whereas the participation of defendants is limited. Indeed, "the accused is conceived as an object of the (criminal) process more than a subject with rights."[5] When Brazil, Chile and Mexico transitioned to democracy, major efforts were made to modify the rules of criminal procedure through the adoption, either whole or in part, of the accusatory model. According to many scholars and activists, the inquisitorial model lacked transparency and reliability since it represented "an authoritarian organizational culture."[6] In effect, the accusatory model not only enhances the protection of victims' and defendants' rights but also helps curb human rights abuse in general.

The second area refers to organic structure; in particular, the institutional location of the PPO and thus the autonomy of the public prosecutor. Historically, most Latin American countries placed the PPO within the framework of the Executive branch, meaning that the public prosecutor was considered part of the presidential cabinet and, as such, subject to dismissal at the President's sole discretion. When democracy expanded in the region, many

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mo, *Función del Ministerio Público en la realización del Estado de derecho en Chile*, Revista de Derecho (1999).

[2] Roberto Hernández & Layda Negrete, *El túnel: justicia penal y seguridad pública en México* (2005).

[3] Daniel Brinks, The Judicial Response to Police Killings in Latin America. Inequality and the Rule of Law (Cambridge University Press, 2008).

[4] Given that Brazil and Mexico are federal countries while Chile is unitary, reforms to the PPO analyzed here were introduced nationally in order to control for variation that might occur at the state level in either country.

[5] Mauricio Duce & Rogelio Pérez Perdomo, *Citizen Security and Reform of the Criminal Justice System in Latin America*, in Frühling Hugo, Joseph S. Tulchin & Heather A. Golding (eds.), Crime and Violence in Latin America. Citizen Security, Democracy and the State (The Woodrow Wilson Center, 2003, 71).

[6] Alberto Binder, *Funciones y disfunciones del Ministerio Público penal*, 9 Revista de Ciencias Penales (1994), *available at* http://www.cienciaspenales.org/revista9f.htm (Last visited May, 2008); Julio Maier, Derecho Procesal Penal (1996).

proposals were discussed to promote higher levels of autonomy for the public prosecutor and modify his or her appointment, promotion and dismissal.

This article analyses several recently enacted laws and regulations including constitutional reforms, organic laws, criminal codes and criminal procedures for the purpose of evaluating the extent of institutional change as well as specific areas which require further reform. It is worth noting that any evaluation of changes made to the PPO's rules and procedures is strongly linked to the general implementation of the rule of law; not necessarily how these new rules have been implemented in practice. "Constitutional engineering" or *de jure* legal reform is an important and necessary (but clearly insufficient) step for newly-formed democracies that aspire to cast off authoritarian practices.

This article is organized as follows: Part II presents a synopsis of the PPO's institutional structure before reforms were implemented. Part III discusses changes made to criminal procedures and the PPO's institutional location in all three countries. Part IV offers a comparative analysis of the reforms; pointing out some notable differences between the three nations, and the main challenges ahead to implement these rules and help achieve modernization.

II. A Brief History of the PPO's Institutional Structure

A quick overview of the history of the Public Prosecutor's Office in both Chile and Mexico shows that it was originally established by the Spanish PPO to help prosecute and adjudicate crimes and heresy.[7] In Brazil, the PPO was based on Portugal's *Ministério Público* which featured a *Promotor Público* who represented the interests of the Emperor.[8] For several decades after independence, it was not considered necessary to establish an institution similar to the current PPO.[9] In fact, a Code of Criminal Procedure (CCP) was never enacted; criminal matters were regulated pursuant to laws dating back to colonial times. When the first criminal codes were introduced, their development followed the inquisitorial tradition.[10] The Codes of Criminal Procedures en-

[7] *See* Guillermo Colín Sánchez, Derecho mexicano de procedimientos penales 112 (Porrúa, 1964).

[8] The Brazilian *Ministério Público* is currently the institution that investigates and prosecutes crimes. In Brazil it emerged as the institution in charge of protecting the interest of the Portuguese crown that during the first years of the 19th century was established in this country.

[9] The main concern of political leaders at the time was to redesign the State and (often) fight either internal or external wars to maintain power or define territory.

[10] According to José María Rico, the legal system adopted by Latin American countries after their independence wars was mixed, but the inquisitorial features were predominant *de facto*; that is, in reality, the system was inquisitorial. *See* José María Rico, La administración de la justicia en América Latina. Una introducción al sistema penal (Centro para la Administración de la Justicia, 1993). On the other hand, Duce and Riego argue that the legal system adopted by Latin American countries was inquisitorial and no country (except Cuba

acted by Brazil (1832), Chile (1906) and Mexico (1880) were inspired by the legal framework governing medieval Europe, a considerable time before Napoleon's *Code d'Instruction Criminelle*; in other words, before the consolidation of what eventually became a "mixed" criminal procedure system. In all three countries, no change occurred until the late 20th century.

In the long constitutional history of Brazil, the PPO was mentioned at times but was mostly absent from the nation's legal texts. This discrepancy was the result of the perpetual switch from authoritarianism to democracy and vice versa. As a result, the PPO was never formalized until the enactment of the Crown's CCP of 1832,[11] when it first appeared as a means to "safeguard society."[12] In the Judiciary Chapter, the 1891 Constitution includes a reference to the Public Prosecutor but makes no mention of the *Ministério Público*; in other words, the institution's powers and duties were never adequately described. This situation remained until the 1934 Constitution, when the PPO was —for the first time— properly defined. According to this document, the Public Prosecutor would be established "in the Union, in the Federal District and in the Territories pursuant to federal law; and in the States pursuant to local laws."[13] With the enactment of the 1946 Constitution, the PPO figure was further delineated, including a special Chapter outlining the *Ministério Público*, its functions and organization. During the last dictatorship in Brazil (1964-1985), all constitutional powers granted to the PPO were annulled and the office became an extension of the Executive branch. This changed, however, with the enactment of the 1988 Constitution in which the PPO was restructured on the basis of unity, indivisibility and functional independence.[14]

In Chile, the PPO did not come into existence until 1925, after the enactment of eight different Constitutions. Although the PPO was stated by name, its functions and duties were not mentioned until reforms to the 1980 Constitution were introduced in 2000. In the 1925 Constitution, the PPO was designated as part of the judicial branch, since it only appeared in relation

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and Puerto Rico) followed the system proposed by the Napoleonic *Code d'Instruction Criminelle. See* Mauricio Duce & Cristian Riego, Introducción al nuevo sistema procesal penal (Universidad Diego Portales, 2002).

[11] The Constitution of 1824 only mentioned the *Tribunal de Relação* and the Crown's Prosecutor who was in charge of diverse functions, including the prosecution of criminal cases.

[12] Victor Roberto Corrêa de Souza, *Ministério Público: aspectos históricos*, Jus Navigandi, 2003, *available at* http://jus2.uol.com.br/doutrina/texto.asp?id=4867.

[13] *See* João Gualberto Garces Ramos, *Reflexões sobre o Ministério Público de ontem, de hoje e do 3o. Milenio*, 63 Justitia 51, 51-75 (2001).

[14] Unity refers to the fact that members can have only one institutional affiliation; indivisibility to the possibility of members being substituted among them; and functional independence refers to members of the institution being protected from external influences. *See* María Tereza Sadek & Rosangela Batista Cavalcanti, *The New Brazilian Public Prosecution. An Agent of Accountability*, *in* Democratic Accountability in Latin America 201-27 (Scott Mainwaring & Christopher Welna eds., Oxford University Press, 2003).

to judges.[15] The first CCP was drafted in 1894 but not enacted until 1906[16], nearly a century after Chile's war of independence. In this code, diverse functions of the PPO and the *Promotores Fiscales* were defined. As noted earlier, scarce attention was paid to the institution itself. To complicate matters, a 1927 presidential decree abolished the PPO in the first instance, that is, from this year on the PPO's participation was not necessary, and victims were due to present their cases directly to the judge in the Supreme Court or Appeal Court, effectively eliminating PPO's criminal and civil powers and transferring all authority to a single judge. According to the 426 Decree, the PPO was deemed superfluous and, for this reason, its powers and functions were transferred to judges sitting on the Supreme and Appeal Courts.[17] This situation remained until 2000, when the institution, its structure, location and duties were included as part of the Constitution[18], making it one of the most modern institutions in both Chile and Latin America. At this time, the 1906 CCP was replaced and a PPO Organic Law[19] promulgated. After 2000, the PPO became a constitutionally autonomous entity responsible for prosecuting and investigating crimes, exercising criminal action and offering protection to crime victims and witnesses.[20]

In Mexico, the figure of *Ministerio Público* during the first years of independence was highly similar to what it had always been in colonial times, with no distinction between entities responsible for prosecuting and adjudicating crimes. Both the 1824 and 1857 Constitutions placed the PPO within the Judicial Branch,[21] but never fully specified its powers and functions. In fact, they appeared virtually identical to activities realized by the lower courts. In the words of Hernández Pliego, "the real functions of the PPO were not known and defined until the enactment of the Public Prosecutor Organic Law in 1903 under Porfirio Díaz."[22] This law defined the PPO not as an "assistant of

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[15] Chilean Constitution.

[16] Duce & Riego, *supra* note 10, at 54.

[17] Decreto con Fuerza de Ley 426, art. 1, 2 (1927).

[18] *See* Mauricio Duce, Criminal Procedural Reform and the Ministerio Público: Toward the Construction of a New Criminal Justice System in Latin America (Thesis Submitted to the Stanford Program in International Legal Studies at the Stanford Law School, Stanford University, 1999); Rafael Blanco, La reforma procesal penal en Chile. Reconstrucción histórico-política sobre su origen, debate legislativo e implementación (2005), *available at* clashumanrights.sdsu.edu/Chile/libro_historia_de_la_reforma.doc (last visited May 2008).

[19] An "Organic Law" is a secondary law created in order to organize a public service or an institution.

[20] Chilean Constitution, art. 80-A.

[21] *See* Juventino Castro, El Ministerio Público en México. Funciones y disfunciones (Porrúa, 2008).

[22] Julio Antonio Hernández Pliego, El Ministerio Público y la averiguación previa en México 16 (Porrúa, 2008).

the criminal courts, but as an active party in trials, responsible for initiating criminal prosecutions on behalf of society."[23] The PPO, however, did not realize this duty on an exclusive basis, since prosecutors were still subject to orders issued by tribunals.[24] In the 1917 Constitution (and subsequent reforms), the PPO in Mexico was granted exclusive powers to investigate and prosecute crimes with the assistance of police, who remained subject to its control.[25] This Constitution placed the PPO within the Executive branch and granted it the exclusive right to file criminal charges.

During the last authoritarian regimes in Brazil, Chile and Mexico (and most other Latin American countries) it can be argued that the PPO operated on the basis of inquisitorial procedures and was located within the Executive or Judicial branch.

III. Analysing the Reforms to Criminal Procedure

1. *Brazil*

After the military junta fell in 1985, efforts were made to re-direct the nation and put it back on track to democracy. The Constitution of 1988 best expresses this determination to alter the political and judicial framework. It was during this period that many significant efforts were made to change legal assumptions and principles for the sake of fairer and more effective procedures as well as greater respect for international standards and the rule of law. Unfortunately, at that time, few if any of these efforts were codified in the nation's body of law. For example, no significant change was ever made to the Code of Criminal Procedure (CCP) during the first transition years. Amendments were in fact introduced between 2008, 2009 and 2011[26] to resolve conflicts resulting from a clash between a progressive Constitution and a CCP that, given its inquisitorial nature, reflected values similar to the Italian Rocco Code created under Mussolini's fascist government.[27]

Generally speaking, there are two legal principles upon which Brazilian criminal procedure rest: *1)* the 1988 Constitution; and *2)* the 1942 CCP

[23] Jesús Martínez, Glosario procesal del Ministerio Público. Pruebas, conclusiones y agravios 46 (Porrúa, 2009).

[24] Reforms introduced in 1900 removed the PPO from the judiciary and made it part of the executive branch. From 1900 on, the Executive was responsible for appointing the Federal Public Prosecutor. *See* Héctor Fix-Zamudio, Función constitucional del Ministerio Público. Tres ensayos y un epílogo (IIJ-UNAM, 2004).

[25] Mexican Constitution, art. 21.

[26] Laws that introduced more changes to the 1942 CCP included Law 10.792 of 2003 but especially Laws 11.689, 11.690 and 11.719 of 2008. There was a total number of 48 Laws or Decrees that have amended the CCP since 1942 to 2009 (CCP 1942, last modification 2009).

[27] *See* Eugénio Pacelli, Curso de Processo Penal (Lumen Júris, 2008).

(amended version).[28] The following table shows how the PPO is now structured and the changes introduced:

Table 1. Brazil's Criminal Procedure under Democratic Rule

Formal Guarantees of an Accusatorial Criminal Procedure	*Yes*	*No*
Are the roles of prosecutor and judge separated under law?	•	
Must defendants be informed under law of the crime for which they are accused?	•	
Are defendants assumed under law to be innocent until proven guilty?	•	
Are defendants and their attorneys legally entitled to provide evidence of their innocence during the pretrial investigation?		•
Are citizens legally entitled to present claims before a judge?	•	
Are preliminary inquiries considered under law to be public and oral?		•
Do alternative mechanisms of dispute resolution exist under law?		•
Is preventive imprisonment vigorously regulated under law?		•
Can information obtained illegally be deemed inadmissible under law to prove a defendant's guilt?	•	
Total number of indicators included in legal provisions	5/9	

Source: Information from the 1988 Constitution (last amendment 2009); 1942 CCP (last amendment 2008).

Notice that every indicator listed above clearly reflects an accusatorial model. Indeed, mostly all of them have been promoted by judicial reform's projects in Latin America.[29] After reviewing an extensive body of literature on the subject,[30] I conclude that the nine (9) characteristics listed in Table I may

[28] The Code of Criminal Procedure used here was last amended in January 2009.

[29] For more information, see Linn Hammergren, Envisioning the Reform. Improving Judicial Performance in Latin America (The Pennsylvania State University Press, 2007).

[30] John Henry Merryman, The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America (Stanford University Press, 1985); Alberto Binder, La justicia penal en la transición a la democracia en América Latina, *Biblioteca Virtual Miguel de Cervantes*, Alicante, http://www.cervantesvirtual.com/FichaObra.html?Ref=14381&portal=157 (1994); Mirjan Damaška, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (Yale University Press, 1986); Car-

be used to reflect the predominant type of legal system as well as the extent of legal reform. For the sake of analysis, we shall assume that if every indicator (9) listed above appears in a nation's Constitution, laws and regulations, the reform toward an accusatorial system has been *fully enacted*; if 5 to 8 indicators appear, *almost enacted*; if 1 to 4 indicators appear, *scarcely enacted*; and if no (0) indicators appear, *not enacted*.[31]

Pursuant to Article 129 of the 1988 Constitution, criminal prosecution is an activity *exclusively* realized by the PPO, meaning that the judiciary shall no longer, as before, activate the *criminal action*. For the purpose of criminal prosecution, the 1988 Constitution grants the PPO authority over the judicial police. This means that in every criminal case, the police must comply with the PPO's orders to investigate and present information, at which point the PPO may: *1)* request more data; *2)* exercise criminal action; or *3)* suspend the case. The 11.719 Law enacted in 2008 amended Article 257 of the 1942 CCP to make criminal prosecution a task performed *exclusively* by the PPO.[32]

Recent changes to the CPP provide defendants with the right to know the crime for which they are being accused. Accordingly, article 306 states that within 24 hours after imprisonment the authority must inform the defendant the reason of detention as well as the person issuing the accusation.[33]

With respect to the presumption of innocence, the 1988 Constitution is clear; Article 5, No. LVII states that "No one shall be considered a criminal until a verdict has been issued." Some scholars argue that this right was reinforced[34] when Brazil signed the American Convention on Human Rights, also known as the *Pacto de San José*, which declares in Article 8 that "every individual accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been determined pursuant to law…" Since 1988,

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lo Guarnieri, Pubblico Ministero e Sistema Politico (Casa Editrice Dott. Antonio Milani, 1984); Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 The American Journal of Comparative Law 617, 617-76 (2007); Mattei Ugo & Luca G. Pes, *Civil Law and Common Law: Toward a Convergence?*, *in* The Oxford Handbook of Law and Politics (Daniel Kelemen & Gregory Caldeira eds., Oxford University Press, 2008).

[31] Please note that this mode of observing the shift from an inquisitorial into an adversarial model is entirely *de iure* and not *de facto*; in other words, based on the indicators listed in Table I, we do not know whether these reforms are being implemented or not, but only if an adversarial model has been introduced in the Constitution or other legal texts.

[32] Before the amendment, the article only said that "the PPO shall promote and supervise the execution of law," Brazilian CCP (1942). See also Art. 257, 11.719 Law (2008).

[33] Law 12,403 that introduced modifications to the 1942 CCP, 2011, *available at* www.planalto.gov.br/ccivil. I thank Professor Eliezer Gomes da Silva from University of Pernambuco for this remark.

[34] Some authors claim that the 1988 constitutional assembly did not want to fully embrace the right of presumption of innocence and, for this reason, the statement *not culprit* appears in Article 5, No. LVII rather than the latter term. *See* Antonio Gomes Filho, *O Princípio da Presunção de Inocência na Constituição de 1988 e na Convenção Americana sobre Direitos Humanos*, 42 Revista do Advogado 30, 30-4 (1994).

all criminal suspects in Brazil have the right to be presumed innocent until otherwise proven guilty.

Brazilian citizens may only take certain cases directly to court.[35] It is worth noting that in Brazil two types of criminal actions exist; one public and the other private. The PPO is legally bound to realize public actions; in some cases, it may also realize private action. The difference is that public criminal prosecution occurs only after a crime is officially reported to the police or PPO;[36] whereas a private action requires the victim to present the claim.[37] Private action may also be exercised when the prosecutor fails to act within the legal term.

Prosecutors are constitutionally obliged to prosecute crimes.[38] As a result, there is no opportunity principle[39] during the preliminary inquiry; hence the prosecutor is unable to apply alternative mechanisms for the resolution of minor crimes as in many other nations. In Brazil, the only way to resolve conflicts is through adjudication.

Torture, coercion and other types of intimidation are constitutionally prohibited as a means to obtain confession. Article 5, No. III and LVI of the CCP state, respectively: "no one shall be subjected to torture or inhumane or degrading treatment" and "evidence obtained through illegal means shall be inadmissible."

Nothing in the Brazilian Constitution limits the use of preventive imprisonment for serious criminal offenses. The 1942 CCP, Article 312, sets forth the three principles that legitimize preventative imprisonment: *1)* as a guarantee to public and economic order; *2)* to allow criminal investigations to proceed without restriction; *3)* to assure the proper application of criminal law.[40] As a result, Brazilian police stations often act as *de facto* detention centers,[41] openly violating the presumption of innocence principle.

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[35] Cases regarding crimes against honor, rape, harassment and the corruption of minors may be denounced by claimants but only if the PPO fails to activate the case within the stipulated period.

[36] Art. 5, Brazilian CCP (1942).

[37] The type of crime requiring private action include harassment, rape, corruption of a minor, or crimes against honor.

[38] Except for those crimes that require private action. In this case, as mentioned above, the PPO must wait for the victim to first report the crime.

[39] The principle of opportunity refers to the discretion that a prosecutor has to decide not to prosecute a crime in which, for example, defendants guilt is not relevant and then apply an alternative mechanism of dispute resolution. It opposes to the principle of legality by which a prosecutor must compulsorily prosecute all crimes.

[40] Art. 312, Brazilian CCP (1942) —amendment introduced in 1967—. There is much controversy around the first of these three circumstances, given that it conflicts with the constitutional right of "not guilty until proven otherwise." *See* Pacelli, *supra* note 27.

[41] A further consequence of this fact is the worsening of prison conditions and the overpopulation of penitentiaries. Indeed, Brazil is world famous for the conditions of its penitentiaries. According to a report on Brazilian criminal justice issued by the International Bar

In sum, after 20 odd years of transition from authoritarian rule, Brazil has still a path to walk in order to install a legal system with accusatorial procedures. As a result, we can state that the Brazilian reform is *almost enacted*, as only five (5) of the nine (9) indicators listed above are found in legal provisions. Brazilian criminal procedure contains still several *inquisitorial* features. As already noted, this situation is the result of a Code of Criminal Procedure similar to that under authoritarian rule; the amendments introduced during the last 70 years have been inadequate to establish an accusatorial model that meets international standards.[42]

2. *Chile*

After the fall of General Pinochet's authoritarian regime (1973-1989), President Patricio Aylwin and the newly-elected parliament sought to introduce several reforms to the criminal justice system to match the democratic institutions they were trying to build.[43] *Leyes Cumplido* were instituted to safeguard individual and defendants' rights, as well as to assure that national laws met international human rights standards.[44] Although no deep reforms of the criminal justice system were realized during the Aylwin administration (1990-1994), the work done by diverse institutions and organizations[45] during this period prepared the way for the "reform of the century," as the transformation of Chilean criminal justice came to be known.

During Eduardo Frei's presidential term, several bills were introduced in the Chilean Congress for approval. These included the new Code of Criminal Procedure; the PPO Organic Law; the constitutional reform reintroducing the PPO in the first instance; and the Public Defense law.[46]

Association "many people are imprisoned irregularly (and) spend years in pre-trial detention… judges use their broad discretionary powers under Brazilian law to order mass pre-trial detentions." *See* International Bar Association Human Rights Institute. One in Five: The Crisis in Brazil's Prisons and Criminal Justice System (The Open Society Institute, 2010).

[42] Although the Senate approved a new Project Code of Criminal Procedure in December 2009, it is still awaiting discussion in the National Congress.

[43] In Chile, as in nearly all Latin American countries, the judiciary was the first institution to be reformed after the breakdown of authoritarianism. For the Chilean case, see Lisa Hilbink, Judges Beyond Politics in Democracy and Dictatorship. Lessons from Chile (Cambridge University Press, 2007).

[44] *See* Carlos de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 Southwestern Journal of Law and Trade in the Americas 323, 323-64 (1998).

[45] For instance, Corporación de Promoción Universitaria, Citizen Peace Foundation and USAID; academics and professional lawyers' organizations, as well as the bar association established a Technical Commission in charge of collecting agreements based on the discussions and design of new procedural rules. *See* 1 Lennon Maria Horvitz & Julián López Masle, Derecho procesal penal chileno 21 (Editorial Jurídica de Chile, 2002).

[46] *See id.* at 23.

As the following Table shows, these proposals were all eventually enacted into law,[47] dramatically changing the criminal justice system in Chile:

Table II. Chile's Criminal Procedure under Democratic Rule

Formal Guarantees of an Accusatorial Criminal Procedure	*Yes*	*No*
Are the roles of prosecutor and judge separated under law?	•	
Must defendants be informed under law of the crime for which they are accused?	•	
Are defendants assumed under law to be innocent until proven guilty?	•	
Are defendants and their attorneys legally entitled to provide evidence of their innocence during the pre-trial investigation?	•	
Are citizens legally entitled to present claims before a judge?	•	
Are preliminary inquiries considered under law to be public and oral?	•	
Do alternative mechanisms of dispute resolution exist under law?	•	
Is preventive imprisonment vigorously regulated under law?	•	
Can information obtained illegally be deemed inadmissible under law to prove a defendant's guilt?	•	
Total number of indicators included in legal provisions	9/9	

Source: Information from: 1980 Constitution (last amendment in 2008); 2000 Code of Criminal Procedure (last amendment in 2008).

The Laws 19.696 and 19.519 introduced significant changes both to the 1980 Constitution and Chilean criminal procedure. After more than 70 years, the institution was reintroduced in the first instance as *exclusively* in charge of criminal investigation and accusation.[48] The changes made to criminal procedure were even more significant. In 2000, the passage of Law 19.696 created the new Code of Criminal Procedure (CCP), in which the separation of prosecution and adjudication was clearly delineated. Article 3 states: "Exclusivity of the criminal investigation. The PPO shall be exclusively in

[47] Law 19.696 (2000) created the new Code of Criminal Procedure; Law 19.649 (1999) created the PPO Organic Law; Law 19.718 (2001) created the Public Defender; Law 19.519 (1997) introduced several amendments to the Constitution to restore the PPO in the first instance.

[48] Chilean Constitution, art. 80-A (1980), last modification 2009.

charge of conducting investigations of the facts that constitute a crime, those that determine criminal participation and those that prove the defendant's innocence…" Chile started the 21st century under new legal regulations that included the hallmark principle of an accusatorial system, namely, the separation of the investigative and adjudicative functions.

At the moment of their arrest, defendants in Chile now have the right to know why they are being detained; if this is not possible given extraordinary circumstances, this information must be provided when they confront the police or public prosecutor.[49] Article 93 grants defendants the right to "be clearly informed about the facts for which they are accused and the rights granted to them by the Constitution and other legal provisions."[50] This same Article also provides additional rights to the accused including: (a) assistance of a lawyer starting from the initial stages of investigation; (b) requirement that prosecutors carry out investigations to justify charges against defendants; and (c) the prohibition of torture or other types of cruelty. As can be seen, the accused parties are expected to assume an active role; remain informed about the charges filed against them; and request that prosecutors investigate any facts that may help prove their innocence.

The facts of criminal cases are kept secret to individuals outside the proceedings. Defendants and other parties, however, may examine and obtain photocopies of all records and documents compiled during the investigation.[51] This same Article, however, declares that under certain conditions, the prosecutor may order select acts, records or documents to be withheld from the defendant or other related parties for a period up to 40 days.[52]

In Chile, individuals accused of criminal offenses are presumed innocent until proven guilty. Article 4 of the CCP declares "Presumption of the innocence of defendants: No person shall be considered guilty nor treated as such until a guilty verdict is issued."

Paragraph 4, Article 139 to Article 154 of the 2000 CCP states why and when preventive imprisonment may be justified:[53] "All persons have the right to personal liberty and individual security. Preventive imprisonment shall proceed only when other precautionary measures are deemed insufficient by the judge to assure proper investigation or to safeguard either the offended party

[49] Furthermore, this article stipulates that four matters shall be recorded in the police station: *1)* that information was provided to the defendants about why they have been arrested and their respective rights; *2)* the way in which this information was provided; *3)* the person who solicited the information; and *4)* the individuals present during this act. Chilean CCP, art. 135 (2000).

[50] Chilean CCP, art. 93 (2000).

[51] Chilean CCP, art. 182 (2000).

[52] The defendant or any other intervening party may request that the due process judge end or limit the amount of time documents or records are normally kept in secret. *See id.*

[53] The Law 20.074 in 2005 and Law 20.253 in 2008 recently introduced reforms to the section of preventive imprisonment.

or society."[54] Contrary to what happened prior to reform, the prosecutor must now first formalize the investigation and provide evidence to the judge before applying precautionary measures such as preventive imprisonment.[55]

Consistent with Article 80-A of the Constitution, the victim may in certain circumstances file criminal charges. In Article 173, the CCP states that "the accusation of any offense may be presented before the police (*Carabineros de Chile*), investigative police or any competent criminal court, which shall immediately refer it to the PPO." In cases in which the prosecutor decides to discontinue criminal action, the victim or offended party has the right to request that the *Ministerio Público* reopen proceedings and carry out further investigation. If discrepancies exist between the victim and prosecutor regarding the extent of the defendant's involvement in the alleged crime, the victim or his representative may take the claim to court.

This reform to criminal procedure also included the principle of opportunity. The CCP stipulates the types of cases in which prosecutors (with authorization from the due process judge — *juez de garantía*) are allowed to discontinue criminal charges. According to Article 170 of the CCP, Chilean prosecutors may decide to discontinue prosecutorial action when the alleged crime (a) does not seriously affect the public interest;[56] (b) there is insufficient evidence that the crime was committed; or (c) when the statute of limitations has expired.[57] Given the case victims disagree with the discontinuance of the criminal action, they may appear before the due process judge and present their interest on the accomplishment of the prosecution, which obliges the prosecutor to continue the investigation. One important part[58] of the Chilean CCP is the introduction of plea-bargaining (*Juicio Abreviado*) that allows the prosecutor and defense team to agree upon a reduction of charges (solely for minor sentences) in exchange for a guilty plea by the defendant.[59] This mechanism may only be applied to criminal cases carrying less than five years of imprisonment. The final decision regarding the plea bargain is made by the due process judge "who has ultimate control over the sentence and responsibility for reviewing the evidence."[60] Similarly, Article 237 provides for "conditional suspension of the proceedings;" namely, an alternative way to resolve crimes.[61] In order to qualify for conditional suspension of the proceedings,

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[54] Chilean CCP, art. 139 (2000).

[55] Chilean CCP, art. 230 (2000).

[56] A crime that does not endanger the public interest is considered minor, which implies sentences of less than 18 months in prison. The same article also states that this rule does not apply for criminal offenses or wrongdoings committed by public servants.

[57] *See* Blanco, *supra* note 18.

[58] Law 19.806 and Law 20.074 recently reformed this article in 2002 and 2005 respectively.

[59] Article 406 points out when the victim can oppose the *procedimiento abreviado*.

[60] *See* Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform to the Criminal Justice System in Chile*, 2 Loy U. Chi Int'l L. Rev. 253 (2006).

[61] Law 20.074 and Law 20.253 recently reformed this article in 2005 and 2008 respectively.

the prosecutor —with the defendant's agreement— must submit a request to the due process judge. This type of alternative dispute resolution is valid only in cases whereby (a) the crime involved is not punishable by more than three years of prison; and (b) the defendant has no prior convictions. Another alternative known as a "restitution agreement" takes place directly between the victims and accused parties. Article 241 states that the defendant and victim have the right to agree on restitution in the presence (and with the approval) of the due process judge. Restitution agreements are valid only for disputes involving personal property, lesser crimes or criminal negligence.

The CCP specifically proscribes certain investigative methods. Article 195 stipulates that criminal suspects shall not be subjected to coercion, intimidation or promise;[62] the law forbids all forms of "mistreatment, threats, psychic or corporal violence, torture, deceit, hypnosis or the administration of psycho-medication."

More than 20 years after democratic transition, legal reforms have radically changed the rules of criminal procedure in Chile. These reforms spread beyond the courts into other aspects of criminal justice. For this reason, we can rate the reforms in Chile as *fully enacted*; namely, every indicator (9) listed above has been codified in the Constitution or the Code of Criminal Procedure. As a result, the Chilean criminal system may be considered *fully accusatorial*. Nearly 200 years after Independence, Chile has left behind (at least formally) the inquisitorial model bequeathed by the Spaniards.

3. *Mexico*

The defeat of the PRI in 2000 was a turning point in Mexico's political system; for nearly the entire 20th century, the nation was subject to one-party rule. Although this occurred in the year 2000, this transformation had to some extent[63] already started; prior to 2000, the PRI had lost significant power at both federal and local levels.[64] The most significant reforms to the

[62] Promise refers to the prosecutor offering something in exchange to the defendant if he declares his responsibility on the crime. I sincerely thank Christian Cuevas for this explanation.

[63] In this regard, the judiciary was reformed in 1994 and independence granted to Supreme Court justices; the Electoral Federal Institute (IFE) was created in 1996 as an autonomous organ in charge of overseeing electoral processes; a National Human Rights Commission (CNDH) was instituted in 1990 and later (1999) transformed into an autonomous organ; and finally, the Electoral Tribunal of the Federal Judiciary was established to fully and irrevocably resolve challenges to electoral results.

[64] During 1988 presidential election, the PRI faced a competitive process; it held on to the presidency despite widespread fraud claims by opposition parties. During this process, the PRI acknowledged that the left-center coalition known as the National Democratic Front (FDN) had won four seats in the Senate —the first time that opposition party representatives were accepted into this chamber. A year later, an event that marked the beginning of the PRI's fall from power was when it accepted the loss of the state governorship of Baja California.

criminal justice system, however, occurred in 2008. The Constitution and other legal texts (including the 1932 CCP) were reformed for the purpose of establishing an accusatorial model. This reform included major changes in criminal procedures, including the presumption of innocence and a new police role in investigation.[65]

But how significant were these steps toward an accusatorial system? The following Table indicates that many important changes were introduced with the 2008 reform to the criminal system:

Table III. Mexico's Criminal Procedure under Democratic Rule

Formal Guarantees of an Accusatorial Criminal Procedure	*Yes*	*No*
Are the roles of prosecutor and judge considered separate under law?	•	
Must defendants be informed under law of the crime for which they are accused?	•	
Are defendants assumed under law to be innocent until proven guilty?		•
Are defendants and their attorneys legally entitled to provide evidence of their innocence during the pre-trial investigation?	•	
Are citizens legally entitled to present claims before a judge?	•	
Are preliminary inquiries considered under law to be public and oral?	•	
Do alternative mechanisms of dispute resolution exist under the law?	•	
Is preventive imprisonment vigorously regulated under law?		•
Can information obtained by illegal means be deemed inadmissible under law to prove a defendant's guilt?	•	
Total number of indicators included in legal provisions	7/9	

Source: Information from 1917 Constitution (last amendment 2009); Code of Criminal procedure (last amendment 2009).

As stated above, the 1917 Mexican Constitution clearly separated the accusatory and sentencing functions. In fact, scholars have argued that Article

[65] The Federation, States and Federal District have a period of eight years to adapt their Constitutions and laws to the reforms introduced to criminal procedure by the Decree that amended Articles 16, 17, 18, 19, 20, 21 and 22 of the Constitution (Mex. Const. transitory art. 2). *See also* Matt Ingram & David A. Shirk, Judicial Reform in Mexico. Toward a New Criminal Justice System (Transborder Institute-University of San Diego, 2010).

21 had been misinterpreted, as the PPO claimed exclusive power over all indictments;[66] as a result, no individual or entity could challenge the PPO's decision not to press charges or its failure to exercise criminal action.[67]

The same applies for defendants' right to know the crimes of which they are accused; since the enactment of the 1917 Constitution, this right has existed, though the 2008 reforms strengthened it significantly. In Article 20, Letter B, section III, defendants are granted the right "to be informed, both at the time of their arrest and during their appearance before the PPO or judge, of the facts of the accusation against them and all rights on their behalf."[68]

The 2008 Constitutional reform also extended defendants' rights during the pre-trial investigation. Article 20, letter B, section I, states that during prosecution, defendants have the right to be presumed innocent until judged guilty in a court of law (Article 20, letter B, section I). An exception, however, is made in cases involving organized crime. A controversial provision introduced in the 2008 reform of Article 16 of the Mexican Constitution (*arraigo*) openly violates the presumption of innocence by subjecting defendants suspected of organized crime to solitary confinement in so-called *high security residences*[69] for a period of 40 days (with a possible extension of 40 additional days). At the PPO's discretion, the communications of accused parties may be limited to their attorney. As the presumption of innocence principle is not equally applied for all defendants,[70] the presence of this indicator is considered negative in Table III.

Article 20, letter B also prohibits torture and coercion as a means of obtaining confessions, which are considered valid only when acquired in the presence of a defense attorney: "confession delivered without the assistance of an attorney shall lack probative value."

Article 20 of the Constitution further states that during the preliminary inquiry, accused parties and their attorneys have the right to see all records compiled by the prosecutor in order to help prepare their defense and offer

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[66] *See* Sergio García Ramírez, *Consideraciones sobre la reforma procesal penal*, *in* Retos y perspectivas de la procuración de justicia en México 57 (Miguel Carbonell coord., IIJ-UNAM, 2004).

[67] As stated above, this monopoly was broken by a 1994 reform package that introduced judicial review for cases in which prosecutors decide not to prosecute crimes.

[68] This article also states that in cases involving organized crime, the judge may decide to keep the accuser's name in reserve.

[69] High security residences are special detention houses where organized crime suspects are kept while under investigation.

[70] As a matter of fact, several months before the reform was passed, the Mexican Supreme Court stated in a jurisprudential thesis (XXII and XXIII/2006) that the *arraigo* was unconstitutional because it violated personal and transit liberty guaranteed by the Constitution in articles 16,18,19,20 and 21. With its decision the Supreme Court established that persons against which the *arraigo* is used can avoid the measure through an *Amparo* writ. *See* Pleno de la Suprema Corte de Justicia [S.C,J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXIII, Febrero de 2006, Tesis no. P. XXII/2006 (Mex.).

evidence to rebut charges against them.[71] During the investigation, the prosecutor compiles a written dossier that is presented before the judge for discussion in a public oral hearing.

Consistent with Article 19, preventive imprisonment may be used "only when other precautionary measures cannot ensure the appearance of the accused party in court; when the proper realization of the investigation or the safety of the victim, witnesses or community are jeopardized; or when the defendant has been previously sentenced for a premeditated crime." This Article also stipulates that preventive imprisonment may only be applied in cases involving serious crime such as terrorism, organized crime, first-degree murder, treason, and so forth. However, those provisions are severely undermined by the constitutionalization of the *arraigo*,[72] since individuals suspected of participating in organized crime —which according to some recognized scholars and international organizations is poorly defined in the Constitution—[73] are to be detained in "pseudo-prisons" (high security residences) while the PPO carries out the investigation. For this reason the presence of this indicator is considered negative in Table III.

With the 2008 reform, several alternative measures for dispute resolution were also introduced.[74] For instance, Article 2 of the CCP states that the PPO may facilitate conciliation between the parties involved.

In Mexico, victims are entitled to take their claim before a judge but only in certain cases pursuant to applicable law.[75] No further detail is explicitly mentioned in the Constitution. Even before the 2008 constitutional reform, victims had the right to judicial review but only when the prosecutor failed to press charges or decided to discontinue criminal action. This review, however, was limited to the PPO's obligation to investigate, not whether the victim's case would be finally heard in court.

Although the Mexican criminal system has undergone many alterations, the 2008 reform has been the most significant change in over a century. This reform represents a turning point, a historical shift towards a more accusatorial model of criminal procedure. On this basis, we can rate the 2008 reform

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[71] This article also mentions that some cases withholding information may be justified in order to facilitate the success of the investigation.

[72] I thank Professor Gerardo Ballesteros and the MLR reviewer for this remark.

[73] *See generally* Amnesty International, *Reformas al sistema de justicia penal: avances y retrocesos, Public Statement* (2008), *available at* http://amnistia.org.mx/contenido/2008/02/08/reformas-al-sistema-de-justicia-penal-avances-y-retrocesos/ (last visited Oct., 2010); Miguel Carbonell, Los juicios orales en México (Porrúa-RENACE, 2010).

[74] These measures were introduced especially for the trial phase. In this respect, Article 27 of the 1932 Criminal Code (last amended in 2009) sets forth several alternative mechanisms for dispute resolution which can be grouped into three sections: *1)* probation, including labor, education and rehabilitation aimed at socially reintegrating the convicted; *2)* semi-release, or alternating periods of probation and imprisonment; and *3)* community work, or non-paid labor in public education or social assistance programs.

[75] Mex. Const. art. 21.

in Mexico as *almost enacted*, since seven (7) out of the nine (9) indicators in Table III are now codified in the Mexican Constitution or Code of Criminal Procedure.

4. *Comparative Overview*

The criminal justice reforms realized in Brazil, Chile and Mexico vary significantly, especially between Brazil and the other two nations. Chile has undoubtedly made the most significant reforms, but Mexico also took major steps in the same direction. Both countries implemented significant measures to improve victims' rights during the pre-trial phase and defendants' rights during the investigation phase. In the case of Brazil, legislators appeared less than eager to modernize the criminal justice system, despite guarantees included in the 1988 Constitution and later reforms, Brazilian criminal justice contains various inquisitorial (and authoritarian) features. For this reason, we can argue that the reform toward an accusatorial criminal justice system was *almost enacted* in Brazil, *fully enacted* in Chile and *almost enacted* in Mexico.

TABLE IV. COMPARATIVE OVERVIEW OF CRIMINAL PROCEDURES UNDER DEMOCRATIC RULE

Formal Guarantees of an Accusatorial Criminal Procedure	*Brazil*		*Chile*		*Mexico*	
	Y	*N*	*Y*	*N*	*Y*	*N*
Are the roles of prosecutor and judge considered separate under law?	•		•		•	
Must defendants be informed under law of the crime for which they are accused?	•		•		•	
Are defendants assumed under law to be innocent until proven guilty?	•		•			•
Are defendants and their attorneys legally entitled to provide evidence of their innocence during the pre-trial investigation?		•	•		•	
Are citizens legally entitled to present claims before a judge?	•		•		•	
Are preliminary inquiries considered under law to be public and oral?		•	•		•	
Do alternative mechanisms of dispute resolution exist under law?		•	•		•	
Is preventive imprisonment vigorously regulated under law?		•	•			•
Can information obtained illegally be deemed inadmissible under law to prove a defendant's guilt?	•		•		•	
Total number of indicators included in legal provisions	5/9		9/9		7/9	

These reforms occurred at different times relative to the democratic transition period experienced by each nation. In Brazil, reform to some parts of the criminal system occurred mostly in 1988, at the same time the Constitution was enacted. In Chile, two periods of time were critical: 1997 and 2000. In 1997, for example, the PPO was reinstalled in the first instance —in effect, a separation of the prosecution and adjudication functions— after more than 70 years under the umbrella of the judiciary. The year 2000 therefore represents a major shift in the history of criminal justice in Chile, as a new CCP was created after more than a hundred years of rule under a Code that its own drafters criticized as regressive and antiquated.[76] For Mexico, the reform was introduced eight years after the end of 70 years of single party rule; as such, it represents one of the most significant changes to criminal procedure in Mexican history.

In all three countries, victims may only file claims directly before courts in certain cases; for instance, when the prosecutor fails to act in a timely manner (Brazil); or when the victim disagrees with the results of the prosecutor's investigation regarding the defendant's involvement (Chile). In none of these countries does the PPO retain the exclusive right to file criminal charges.

Defendants gained additional guarantees regarding the presumption of innocence both in Chile and Brazil; defendants in these countries are now presumed innocent until proven guilty. Although the presumption of innocence was also included in Mexico's Constitution, it does not apply for organized crime-related matters. In all three nations, information obtained illegally (*i.e.*, by torture, intimidation, etc.) may not be used to prove a defendant's guilt. Furthermore, in Chile, prosecutors may not use defendants' confessions as evidence to support or prove their accusations.

In addition, several alternative dispute resolution mechanisms are now formally available to defendants in both Chile and Mexico during the pre-trial investigation. In Chile, for example, the prosecutor may consider alternative dispute resolution in exchange for a defendant's guilty plea, whereas in Mexico, prosecutors are allowed to promote conciliation between the parties. In Brazil, however, there is no legal basis for alternative dispute resolution.

IV. Changes to the PPO's Institutional Framework. Consequences for its Autonomy

1. *Brazil*

By the mid-1980s, political liberalization in Brazil seemed irrepressible. Many actors had been busy organizing and preparing for this transition. The National Confederation of the Public Prosecutors (CONAMP),[77] for example,

[76] *See* Biblioteca del Congreso Nacional, Historia de la Ley 19.696. Establece el Código Procesal Penal (2000).

[77] The *Confederação Nacional dos Membros do Ministério Público* is an institution of prosecutors

was a very active player throughout this period. Its priority was to restructure the PPO based on democratic principles and, above all, guarantee the institution's autonomy by moving it out of the Executive branch. Activities realized by this organization included surveys of the nation's prosecutors for the sake of (a) discovering what powers and duties they expected of the institution; (b) how the PPO could be re-positioned within the existing political framework; (c) what constitutional guarantees were necessary for prosecutors to adequately perform their jobs; and so forth. According to Professor Nigro Mazzilli, the CONAMP sent 5,793 questionnaires to members of the PPO and received 977 back. Prosecutors were asked whether the PPO should be located within the Executive, Judicial or Legislative Branch or whether it should become an autonomous organ of the State, being this last option the most preferred by prosecutors. Regarding how the Public Prosecutor should be appointed, most prosecutors answering the questionnaire agreed that the Attorney General must be appointed by all prosecutors through a direct election.[78]

These surveys provided important insights; the results were presented in 1986 at the National Summit of Attorneys General in Paraná, where Members of the CONAMP and other related organizations including the National Association from the Republic's Prosecutors,[79] published the *Carta de Curitiba*,[80] an excellent proposal that created a new prosecutorial mechanism based on indivisibility, unity and autonomy.[81] Two years later, the *Carta de Curitiba* served as the basis of the new constitutional re-defining the PPO.

The following table illustrates the changes to the PPO's institutional location following the reforms:

Table V. Brazil's Formal Prosecutorial Autonomy under Democratic Rule

Formal guarantees of the Public Prosecutor's Autonomy	*Yes*	*No*
Is the Public Prosecutor required under law to be appointed by two political actors? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•	

from every Brazilian State founded to improve the PPO's performance and enhance the professional careers of prosecutors. *See* Histórico da CONAMP, *available at* http://www.conamp.org.br/outros/historico.aspx (Last visited Oct., 2011).

[78] Hugo Mazzilli, O Ministério Público na Constitutição de 1988 (Editora Saraiva, Brazil, 1989).

[79] *Associação Nacional dos Procuradores da República (ANPR)*.

[80] The *Carta de Curitiba* took also many of the proposals concerning the PPO from the project designed by the Afonso Arinos Commission —the commission in charge of designing a new Constitution. *See* Mazzilli, *supra* note 78, at 30.

[81] Carta de Curitiba, art. 2 (1986).

TABLE V. BRAZIL'S FORMAL PROSECUTORIAL AUTONOMY UNDER DEMOCRATIC RULE (continued...)

Formal guarantees of the Public Prosecutor's Autonomy	*Yes*	*No*
Are the reasons which justify the removal of the Public Prosecutor stipulated under law?		•
Is the participation of at least two political actors required under law to remove the Public Prosecutor? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•	
Is the Public Prosecutor's term in office stipulated under law?	•	
Is the Public Prosecutor's salary protected under law from arbitrary adjustment during his term in office?	•	
Total number of indicators included in legal provisions	4/5	

SOURCE: Information from 1988 Constitution; 1993 Organic Law (Law 8,625).

The five (5) indicators in Table V were selected after an extensive revision of academic literature about the judiciary, specifically with respect to its independence.[82] Even if the judiciary and public prosecutor's office perform different tasks and are considered distinct institutions, there is no reason they cannot share formal guarantees of autonomy, especially given that the PPO essentially acts as a gatekeeper for the entire criminal justice system. The presence of all 5 indicators in legal provisions shall be evidence that the institutional reform was *fully enacted* and the PPO *fully autonomous*; when 3 to 4 indicators are present, then it shall be rated *nearly enacted* and the PPO *nearly fully autonomous*; between 1 and 2 indicators shall indicate *weak enactment* and the PPO *weakly autonomous*. When no indicator exists, it shall be considered *not at all enacted* and the PPO *not autonomous*.[83]

Article 128, No. 1 of the 1988 Constitution states that "the head of the Public Prosecution of the Union[84] shall be the federal Public Prosecutor, appointed by the President of the Republic from among candidates over the age

[82] *See generally* WILLIAM PRILLAMAN, THE JUDICIARY AND THE DEMOCRATIC DECAY IN LATIN AMERICA. DECLINING CONFIDENCE IN THE RULE OF LAW (Praeger Publishers, 2000); Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Democracy and Dictatorship*, 96 AMERICAN POLITICAL SCIENCE REVIEW 305, 305-20 (2002); CARLO GUARNIERI, GIUSTIZIA E POLITICA. I NODI DELLA SECONDA REPUBBLICA (Il Mulino, 2003); BILL CHÁVEZ, REBECCA, THE RULE OF LAW IN NASCENT DEMOCRACIES. JUDICIAL POLITICS IN ARGENTINA (Stanford University Press, 2004); COURTS IN LATIN AMERICA (Gretchen Helmke & Julio Ríos eds., Cambridge University Press, 2010).

[83] Same warning as above: this observation of the change from a dependent to an autonomous PPO is entirely *de iure* and not *de facto*; in other words, based on Table IV, one cannot tell if the institution is in reality autonomous.

[84] But also of the Federal Public Prosecution.

of thirty-five; with the approval of an absolute majority of the national Senate." Thus, after this reform, at least two actors must now participate in the appointment process. The same Article stipulates that the Public Prosecutor's tenure shall be two years (with reappointment allowed).

If the President wishes to remove the Public Prosecutor, the request is now subject to the prior authorization of an absolute majority of the Senate; in other words, the President may no longer unilaterally dismiss the Public Prosecutor it often happened prior to the enactment of the 1988 Constitution.

This said, the Constitution and the 1993 Organic Law fail to stipulate reasons that justify the removal of the Public Prosecutor. Reasons are only set forth in relation to the dismissal of lower ranking members of the judiciary.

The Brazilian 1988 Constitution introduced several provisions concerning the PPO's budget and other financial issues. For instance, Article 127, No. 3 to 6, states that the institution "shall prepare its budget proposal within the limits established in the law of budgetary directives… If the proposed budget fails to conform to these limits… the Executive branch shall make all necessary adjustments for the purpose of consolidation." Article 128, No. 5 of the 1988 Federal Constitution also stipulates that Prosecutors' salaries (including the Public Prosecutor) can never be reduced. Article 129, No. 4 establishes that all salary procedures followed by the PPO must be similar to those established for the Judiciary in Article 93. Prosecutors are granted not only constitutional protection against salary reduction, but salary equivalence to the Judiciary, which represents the top echelon in the Brazilian public service system and serves as a reference for all other public salaries. For this reason, if the Judiciary's pay does not rise, neither do those of any other government worker.[85] In sum, the PPO in Brazil has been nearly completely reformed to ensure its autonomy in relation to other branches of the State. We can therefore assert that four (4) out of the five (5) indicators in Table V have been codified either in the 1988 Constitution or in secondary laws. For this reason, the Brazilian PPO can be described as *almost fully autonomous*.

2. *Chile*

In the reform of criminal justice, the restoration of the PPO in the first instance is fundamental given the need to separate the prosecutorial and adjudication functions and establish an accusatorial system. After years of discussion,[86] the reform that created and defined the general functions, organization and structure of the PPO was finally published in 1997. Law 19.519

[85] I sincerely thank Professor Eliezer Gomes da Silva from the University of Pernambuco for this remark.

[86] Since 1992, the president had sent to the Senate a project to reform the 1980 Constitution and reintroduce to the Chilean criminal justice system the figure of the PPO. Later on, in 1996 Eduardo Frei Ruiz sent to the Senate the project that started the constitutional reform to create the Public Prosecutor. *See* Biblioteca del Congreso Nacional, Historia de la Ley

introduced a special chapter in the Constitution (Chapter VI-A) which granted the institution notable importance. The first Article of this Chapter stipulates that the institution shall be an autonomous public entity with a hierarchical nature.[87] With this Law, the long-standing ambition of separating the roles played by prosecutors and judges was finally achieved.

In 1999, Law 19.640 introduced the PPO Organic Law, which provides specific details about the principles that guide the institution as well as how the national and regional prosecutor's offices shall be structured and organized. The Law also establishes how members shall be appointed and removed; and their terms of duration in office. These reforms have been implemented in various stages in all 13 regions of Chile.[88] The following Table describes the full extent of the these amendments:

Table VI. Chile's Formal Prosecutorial Autonomy under Democratic Rule

Indicators. Formal guarantees of the Public Prosecutor's Autonomy	*Yes*	*No*
Must the Public Prosecutor under law be appointed by two political actors? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•	
Are the reasons which justify the removal of the Public Prosecutor stipulated under law?	•	
Is the participation of at least two political actors required under law to remove the Public Prosecutor? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•	
Is the Public Prosecutor's term in office stipulated under law?	•	
Is the Public Prosecutor's salary protected under law from arbitrary adjustment during his term in office?		•
Total number of indicators included in legal provisions	4/5	

Source: Information from 1980 Constitution (last amendment 2005); Law 19.519; 1999 PPO Organic Law (Law 19.640).

19.519. Crea el Ministerio Público (Santiago de Chile, 1997), *available at* http://www.bcn.cl/histley/lfs/hdl-19519/HL19519.pdf.

[87] The project presented by Eduardo Frei includes a brief discussion of the different types of institutional frameworks (Executive, Judicial, Legislative) and their respective shortcomings. His proposal was to create a constitutionally autonomous entity to enhance the performance of the new accusatorial model in which prosecution and adjudication are separated. *See id.*

[88] There were five implementation stages. The first stage took place in 2000 and covered regions IV and IX; the second stage was in 2001 for regions II, III and VII; the third stage was in 2002 and covered regions I, XI, XII; the forth implementation stage took place in 2003 and covered regions V, VI, VIII and X; finally, the five stage in 2004 covered the Metropolitan region. *See* Andrés Baytelman & Mauricio Duce, Evaluación de la reforma procesal penal. Estado de una reforma en marcha 35 (CEJA-JSCA, 2003).

In line with Article 80-C of the 1980 Constitution and Article 15 of the PPO Organic Law, the President of the Republic shall appoint a National Public Prosecutor —with the required approval of 2/3 of the Senate— from five candidates proposed by the Supreme Court. As part of this process, the Supreme and Appeals Courts are required to make a public call for the selection of five candidates whose names are then sent to the President.[89] Consequently, three actors actively participate in the selection of the National Public Prosecutor. Since more actors involved in the appointment process increase the autonomy of the appointed position, this has resulted in greater autonomy for the PPO.

The removal of the National Public Prosecutor in Chile requires at least two actors. Article 80-G of the Constitution stipulates that this can be accomplished only by the Supreme Court upon the request of the following actors: 1) the President; 2) the Chamber of Deputies (or ten of its members). The reasons to dismiss the National Public Prosecutor are: *a)* incapacity; and *b)* misconduct or proved negligence in developing her/his duties. As a result, the National Public Prosecutor may not be removed from office without the approval of two different institutions and only for reasons stipulated under law.

Article 16 of the PPO Organic Law states that the National Public Prosecutor is appointed to office for a ten-year period; re-election is not allowed. In addition, a special section in the Organic Law establishes a system of remuneration for various levels of public servants working in the PPO. This section, however, fails to prevent the arbitrary reduction of the National Public Prosecutor's remuneration during their term in office, nor specifies the reasons necessary for a reduction. This said, it does require that the National Public Prosecutor's income be equal to that of the President of the Supreme Court.

Since these reforms were implemented, most of the safeguards necessary for prosecutorial autonomy have been codified in law. Based on Table VI, four (4) out of five (5) indicators have been satisfied; for this reason, the reform to the PPO can be called *almost enacted*, as most guarantees for prosecutorial independence are now formally part of Chilean law. As a result, the Chilean PPO is *nearly autonomous*.

3. *Mexico*

The 1917 Constitution made the PPO dependent on the Executive branch not only because legislators at that time failed to envision any compromise in its independence,[90] but also because the judicial branch had few active supporters. At that time, legislators were pre-occupied with separating the in-

[89] Chilean Constitution, art. 80-E (1980); Chilean PPO Organic Law, art. 16 (1999).

[90] Portes Gil, 1932, quoted by Fix-Zamudio, *supra* note 24.

vestigation, accusation and sentencing functions, as all these duties had been traditionally assumed by a judge with the prosecutor acting as assistant.[91]

Despite a long democratic transition period in which several reform packages were introduced, no significant change to the PPO's institutional location was ever realized. The most significant reform occurred in 1994, when President Ernesto Zedillo sent a proposal to Congress modifying the way in which the Attorney General was appointed to office.[92] This reform failed to significantly change anything, however, as the Attorney General could still be dismissed at the sole discretion of the President.

After the PAN won the presidency in 2000, many proposals have been submitted by legal scholars and others to change this situation; up to now, however, no legislation has been enacted. At this time, a proposal awaits discussion in the Chamber of Deputies. This proposal involves the creation of two distinct entities: 1) the *Fiscalía General del Estado*, a constitutionally autonomous public entity outside of any State Branch and responsible for criminal investigation and prosecution; and 2) the *Ministerio Público*, an organ of social representation in federal judicial processes and dependent on the Executive branch.[93]

As shown in Table VII, the institution is still dependent on the Executive which have several consequences for the PPO's autonomy:

Table VII. Mexico's Formal Prosecutorial Autonomy under Democratic Rule

Formal guarantees of the Public Prosecutor's Autonomy	*Yes*	*No*
Must the Public Prosecutor under law be appointed by two political actors? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•	
Are the reasons which justify the removal of the Public Prosecutor stipulated under law?		•
Is the participation of at least two political actors required under law to remove the Public Prosecutor? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)		•
Is the time period during which the Public Prosecutor serves in office stipulated under law?		•
Is the Public Prosecutor's salary protected under law from arbitrary adjustment during his term in office?		•
Total number of indicators included in legal provisions	1/5	

Source: Information from 1917 Constitutional text (last amendment 2009); 2009 PPO Organic Law.

[91] The idea of establishing the PPO as an autonomous public entity was not discussed.

[92] After this reform was implemented, the Senate was still expected to approve the President's appointment of the Attorney General.

[93] For further details, see IIJ-UNAM, Propuesta de reforma política 19 (2009), *available at* http://www.juridicas.unam.mx/invest/RefEdo.pdf.

In the 1917 constitutional text (last amended in 2009), the PPO is addressed in the Judicial Chapter. Article 102 of the Constitution, however, grants the Executive and the Legislative Branch the possibility to appoint the public prosecutor: "The Federal Public Prosecutor's Office shall be headed by the Attorney General (*Procurador General de la República*), whose appointment shall be made by the Executive with the ratification of the Senate (2/3 majority) or the Permanent Commission during Congressional recesses."[94] These prerequisites, however, do not apply for dismissal. As a result, the President of the Republic is entitled to remove the Attorney General at his sole discretion. This fact severely undermines the autonomy of the PPO; if the President of the Republic is not satisfied for any reason with the Attorney General, he or she can be easily replaced. Neither the Constitution nor any other law or regulation specifies reasons for the removal of the Attorney General; the Constitution only states, in Article 102, letter A, that the "President can freely remove the Attorney General."

In addition, no legal texts mention the duration of the Attorney General's term in office; even if these existed, they would make little sense given that the President has complete discretion to remove him or her at any time. During the last two presidential terms, for example, four prosecutors (two for each administration) served in office; when the last Attorney General was removed, the President didn't even explain why.

Similarly, no provision exists to safeguard the Attorney General's salary; or protects the entity's financial autonomy (as in Brazil or Chile).

In sum, Mexico has not yet made any serious efforts to confer autonomy to the PPO. Only one (1) out of the five (5) indicators listed in Table VII has been met. For this reason, Mexico's reform toward prosecutorial autonomy can be characterized as *weakly enacted*. As noted above, although the biggest problem remains the procedure used to dismiss the Attorney General office's lack of tenure and salary protection are also major issues.

4. *Comparative Overview*

After the reforms, the PPO's in Brazil and Chile have been placed outside traditional State powers. They are now constitutionally autonomous entities that boast functional and budgetary independence. The 1980 Chilean Constitution (amended version) and the 1988 Brazilian Constitution devoted a special Chapter to the PPO in which its prosecutorial structure, duties and restrictions are clearly delineated. In the case of Mexico, however, no important reforms have yet been introduced; the PPO is still located within the Judiciary Chapter and all powers to appoint and remove high-ranking members belong to the Executive branch.[95] In fact, the Mexican Constitution contains only

[94] Mex. Const., art. 102; Mexican PPO Organic Law, art. 17 (2009).

[95] Although the 1917 Assembly in Mexico decided to transfer prosecution services from

one Article (102) that addresses the PPO's institutional framework; whereas both the Brazilian and Chilean constitutions devote an entire special chapter. The most significant differences between the nations involve removal and tenure; both have already passed in Brazil (1988) and Chile (1997), whereas in Mexico they are still awaiting discussion by representatives of the National Congress.

Table VIII. Comparative Overview of the Public Prosecutor's Autonomy under Democratic Rule

Indicators. Formal guarantees of the Public Prosecutor's Autonomy	*Brazil*		*Chile*		*Mexico*	
	Y	*N*	*Y*	*N*	*Y*	*N*
Must the Public Prosecutor under law be appointed by two political actors? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•		•		•	
Are the reasons which justify the removal of the Public Prosecutor stipulated under law?		•	•			•
Is the participation of at least two political actors required under law to remove the Public Prosecutor? (*i.e.*, Executive and Legislative, Judicial and Legislative, Judicial and Executive)	•		•			•
Is the time period during which the Public Prosecutor serves in office stipulated under law?	•		•			•
Is the Public Prosecutor's salary protected under law from arbitrary adjustment during his term in office?	•			•		•
Total number of indicators included in legal provisions	4/5		4/5		1/5	

Pursuant to Table VIII, Chile and Brazil have taken greater steps to reform the institutional framework of the PPO, as four indicators are already codified in their respective constitutions. Mexico is in last place, satisfying only one out of the five listed criteria. It can thus be argued that reform of the PPO's institutional framework has been nearly *fully enacted* in both Brazil and Chile but only *weakly enacted* in Mexico.

In all three countries, the appointment of the Public Prosecutor is made by at least two actors: the President and the Senate. In the case of Chile, this procedure is enhanced by the participation of the Supreme Court, which is responsible for sending the list of eligible candidates to the President. In Brazil, the President is required to choose the Public Prosecutor from the ranks

the Judicial to the Executive branch, they decided to respect the format of the 1857 Mexican Constitution and include Article 102 in the Judicial Chapter. Up to now, no change has been made in this respect; the PPO still appears in the Judicial Chapter; and the appointment and removal of Federal Public Prosecutors is made by the President.

of the PPO; this selection must then be approved by the Senate. In Mexico, the President chooses any attorney he trusts, and submits this proposal to the Senate for its approval; the candidate is not required to be part of the PPO but rather have a law degree and 10 years' experience in the practice of law.

In Brazil and Chile, the Public Prosecutor may be removed only with the participation of two actors: the Senate at the request of the President (Brazil); or the Supreme Court at the request of the President or House of Representatives (Chile). Only in Chile are reasons for the prosecutor's dismissal clearly stipulated in the Constitution. In Mexico, only one actor (the President) is required to dismiss the Public Prosecutor; this may be done without any specific reason, as the motives for removal are not specified in the Constitution or any other legal text.

In Mexico, the Public Prosecutor's term in office is not specified in any provision; he or she may be removed from office at any time at the sole discretion of the President. On the contrary, tenure is assured in Chile and Brazil; public prosecutors are appointed for a ten (10) year-period without the possibility of reappointment (Chile) and for two (2) years with (an unspecified) possibility of reappointment (Brazil).

In conclusion, only Brazil protects the Public Prosecutor's salary in accordance with law. In the case of Chile, an entire section sets forth in detail the PPO's budgetary matters and financial organization; but no protection is granted to the Public Prosecutor's salary.

V. Concluding Remarks: Comparison of Reforms to the PPO in Brazil, Chile and Mexico

Reforms to the PPO differ across nations. Chile shows more changes regarding the criminal procedure and the political autonomy of the PPO than Brazil and Mexico. It fully adopted an accusatorial legal system and granted constitutional autonomy to the PPO; in other words, the reforms changed nearly every feature that needed change, enabling higher levels of autonomy for both the Prosecutor and the PPO. In sum, Chile had a solid head start before initiating work to strengthen and consolidate the rule of law.

Table IX. The Institutional Structure of the Public Prosecutor's Office in Comparative Perspective

Political Period	*Criminal Procedure*			*Political Autonomy*		
		Country	*NInd*		*Country*	*NInd*
Democratic Rule	1	Chile	9/9	1	Chile	4/5
	2	Mexico	7/9	2	Brazil	4/5
	3	Brazil	5/9	3	Mexico	1/5

Dimension I = Criminal Procedure; Dimension II = Institutional Framework/Autonomy; NInd = Number of Indicators.

With respect to the PPO's autonomy, Brazil and Chile reformed three more elements than Mexico. The aspect with fewest changes was criminal procedure. In comparison to the other two nations, Brazil instituted few modifications of the inquisitorial nature of its justice system; in contrast, major advances were made in Mexico and Chile. The inquisitorial nature of criminal procedure in Brazil remains the Achilles' heel of reforms to the PPO in that country. This in spite of the fact that guarantees would confer real advantages to Brazilian citizens and users of prosecution services, in particular defendants; among these would be the possibility of alternative mechanisms for dispute resolution.

Mexico implemented two more accusatorial elements than Brazil, but two less than Chile. The steps taken by Mexico to reform its criminal system have been noteworthy. This said, Mexico still rates poorly with respect to the PPO's autonomy; Mexican politicians have yet to take any necessary steps to achieve autonomy for prosecutors. As a result, the nation boasts of only one (1) out of five (5) prosecutorial guarantees. For this reason, many important issues must be first addressed before change is realized in the Public Prosecutor's dependence on the President (it is worth noting here that the appointment of Mexican public prosecutors at the local level also relies on the local Executive). A crucial step toward prosecutorial autonomy would be to change the way in which Public Prosecutors are dismissed by requiring the participation of more actors in the decision-making process, as well as clearly specifying the reasons required for dismissal.

Although Brazil, Chile and Mexico have made undeniable progress in reforming the structure, procedures and duties of the PPO, various critical issues still remain unresolved for both Mexico and Brazil. These elements must still be faced by elected officials and other actors to help re-formulate rules that would enhance the criminal justice system and strengthen the rule of law. In either case, the scenario offered by these countries suggests that elected officials are gradually realizing that democracy means more than just elections and that a modern system of justice requires more than independent judges and oral trials.

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NOTES

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FOREIGN PRECEDENTS IN MEXICAN CONSTITUTIONAL ADJUDICATION*

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Abstract. *This note is about how Mexican Courts with constitutional jurisdiction have used foreign precedents to support their judgments. It provides an initial overview of the central issues with the objective of stimulating a broader discussion on the topic. The authors have reviewed several judgments from the Mexican Supreme and other Courts that are influenced by foreign judicial opinions. They conclude that this comparative practice by Mexican Courts lacks publicity and standards that could ease its review and application.*

Key Words: *Comparative law, foreign precedents, Mexican courts, constitutional adjudication.*

Resumen. *Este ensayo refiere cómo los tribunales mexicanos que poseen competencia constitucional han usado precedentes extranjeros para apoyar sus resoluciones. En una primera aproximación a esta temática, pretende aportar un punto de vista que sirva para comenzar una discusión más amplia al respecto. Los autores han revisado varias resoluciones de la Suprema Corte y otros tribunales mexicanos que de alguna manera están influidos por decisiones judiciales extranjeras. Concluyen que a esta práctica comparativa de los tribunales mexicanos falta publicidad y parámetros que pudieran facilitar su control.*

Palabras clave: *Derecho comparado, precedentes extranjeros, tribunales mexicanos, juicio constitucional.*

* A former version of this paper was presented at the VIII[th] World Congress of the International Association of Constitutional Law (Mexico City, December 2010). Workshop 12: Foreign Law: Jurisprudence Cross-Fertilization (Chairs: Tania Groppi (Italy) and Marie-Claire Ponthoreau (France)).

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I. Introduction

Taking into account the influence of foreign precedents when making a judgment is today one of the most important tools used in constitutional adjudication. Notwithstanding national peculiarities, most constitutional systems are based upon a few general principles: the supremacy of the Constitution, the recognition of fundamental rights, and the need of a specialized court that enforces these basic rules. This encourages intense interaction between jurisdictions.

There are different reasons why Courts often take into account precedents from foreign tribunals. Marie-Claire Ponthoreau points out two: the quest for democratic legitimacy and the lack of domestic solutions to new problems.[1] The purpose of this note is to establish the extent (if any) that the Supreme Court and other tribunals in Mexico utilize foreign precedents in constitutional adjudication. We will focus on Mexican Supreme Court rulings, as this tribunal is the final interpreter of the Mexican Constitution. Nevertheless, we will also take into account some precedents from Circuit Courts and the Federal Electoral Court.

In general, as a result of legal tradition, Mexican courts seldom explicitly cite foreign precedents. It is therefore often difficult to determine when references to foreign precedents indeed occur. In part, this derives from the silent "comparative practice" of our Courts, which shall be treated in the last section of this article.

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[1] *See* Marie-Claire Ponthoreau, *La circulation judiciaire de "l'argument de droit comparé" Quelques problèmes théoriques et techniques à propos du recours aux précédents étrangers par le juge constitutionnel*. A Spanish translation of this work will appear on 14 Revista Iberoamericana de Derecho Procesal Constitucional. This work is a continued version of the author's paper included in Ferdinand Mélin-Soucramanien, L'interprétation constitutionnelle 167-84 (2005).

Nevertheless, our research has confirmed that very important constitutional practices recently added to the Mexican legal system by the Supreme Court, were taken from other countries. Moreover, Mexican Courts occasionally cite foreign precedents as collateral support for their own opinions. Supreme Court justices also often cite international comparative references in their individual opinions. This includes an important opinion issued by Justice Genaro Góngora in the case regarding the Action for Unconstitutionality 26/2006 containing a clear reference that supports the use of foreign precedents.

This note identifies a key challenge: Mexican courts need to more seriously and systematically reflect upon the comparative international approach. Standards and procedures for legal comparison need to be more fully developed, since Mexican courts are already engaged in practice in this process.

II. The Mexican Legal and Historical Tradition

As a result of its Spanish heritage, Mexico's legal system is part of the civil-law tradition. Combined with the principles of the French revolution, civil law is based principally upon written law enacted by a legislature that represents —at least in theory— the people. Broadly speaking, the court's role in Mexico has traditionally not been critically important; nevertheless, we shall consider certain political and historical factors described below.

In fact, judges' decisions were not important until the introduction of the *juicio de amparo* (action for relief) in the Mexican Constitution in 1847, and the creation in 1870 of the *Semanario Judicial de la Federación* (Federal Judicial Week Report), the official report of federal precedents.[2] As the Constitution was considered a "political program" and not "higher law," Mexican judges did not apply the constitutionally-guaranteed right of *amparo* for two years. This issue was resolved in 1849 when Judge Pedro Sámano granted an *amparo* through the application of article 25 of the Reform Act from 1847.[3]

Afterwards, the *amparo* was progressively restricted by the Supreme Court. This occurred when Porfirio Díaz was President of Mexico —for approximately 30 years— and Ignacio Vallarta was a Justice of the Supreme Court. Justice Vallarta was responsible for the current interpretation of the *amparo* in Mexico. As a result of Vallarta's work in this area, as well as his admiration of the American judicial system, two important legal doctrines were established: (a) the use of precedents in legal proceedings; and (b) the use of foreign precedents to help decide constitutional law.

[2] The *amparo* judgment was created in the 1841 Constitution of the present State of Yucatán, which during that time was politically separated from Mexico. In the federal Constitution, the *amparo* was not previewed until it was reformed in 1847.

[3] *See* Héctor Francisco Aldasoro Velasco, *La primera sentencia de amparo dictada a nivel federal*, *in* Instituto de Investigaciones Jurídicas, La actualidad de la defensa de la Constitución 1-13 (1997).

In an interesting work comparing the *juicio de amparo* with writs of habeas corpus, Vallarta explained his ideas on legal precedents.[4] In his opinion, *amparo* judgments have the "highest" function of "fixing public law," as they represent the "supreme, definitive and final interpretation of the Constitution." He also emphasized that due to the thought that "constitutional questions" are only resolved through "legislative acts," judges fail to think of the doctrinal aspect of decision-making, which explains why "after a hundred, a thousand judgments have re-confirmed the unconstitutionality of an act," it still remains intact. Vallarta's ideas on the use of precedents were finally written into legislation: Articles 34 and 70 of the *Amparo* Act of 1882 established the duty of lower court judges to adhere to any constitutional interpretation,[5] this has been the main procedure used by Mexican judges to establish "*jurisprudencia*,"[6] which means a precedent that should be observed by lower courts.[7]

As already stated, Mexican comparative tradition could be traced to Vallarta's judicial opinions. In these opinions, he displays broad legal knowledge and familiarity with American constitutional law. The classic on this matter is an opinion regarding an *amparo* (action for relief) filed by a textile factory against the government for taxes; in it Vallarta correctly cited some American precedents established by Chief Justice John Marshall,[8] arguing its validity in the following way:

> Lacking doctrines, precedents and court rulings, these serious issues are both novel and indisputably important. Given the delicacy and difficulty of this case, and wishing to trust more than just my own reasoning, I have consulted sources of our constitutional law,[9] specifically US case law, to find doctrines that help

[4] *See* Ignacio L. Vallarta, El juicio de amparo y el writ of habeas corpus 316-22 (Francisco Díaz de León, 1881).

[5] Regarding the changes to the *amparo* issued on June 6th 2011, published in the Diario Oficial de la Federación [D.O.].

[6] Especially in Mexico, "*jurisprudencia*" refers to the said precedent, unlike the sense that the term "jurisprudence" has in English, referring to legal philosophy or theory. For further discussion, see José María Serna de la Garza, *The Concept of 'Jurisprudencia' in Mexican Law*, 1 Mex. L. Rev. 131 (2009).

[7] We have to distinguish between "*jurisprudencia*" and "*tesis aislada*" (isolated thesis). The first one is compelling due to the circumstances of its creation (repeating judgments, number of votes, etc.); the second is only persuasive because it does not fulfill the said requirements.

[8] McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 428, 430 (1819); *Providence Bank v. Billings*, 29 U.S. (4 Peters) 514, 563 (1830).

[9] Mexican public law has always been influenced by foreign doctrines. It is readily employed to object to any ideas that seem overly influenced by foreigners, especially the U.S. Even now, however, the Mexican Constitution contains relics of its American counterpart: the text of Article 133, for example, is practically identical to the text of Article VI of the American Constitution. Furthermore, it is widely accepted that the *juicio de amparo* rose from American judicial review. More recently, constitutional law in Mexico has been influenced by European "New Constitutionalism."

> illustrate my judicial opinion, and provide grounds for the vote I am about to cast.[10]

A new period of Mexican precedents (the fifth) started in 1917 when the current Constitution was enacted after the Revolution that toppled Porfirio Díaz. Remarkably, the Supreme ruled that "the application of foreign doctrine to resolve cases, is not [illegal] if the judgment is based upon clearly applicable domestic law."[11] Although the Court was referring to scholarly doctrine and not legal precedent, we can —upon a re-reading of these texts— appreciate the justices' open-mindedness toward domestic jurisprudence. A nationalist legal approach developed in Mexico during the 30's. From this point of view the law became subject to politics and an overly powerful presidency which left judges room to properly interpret federal law. In cases involving political issues, justices were often unable to fully or effectively interpret the Constitution.[12]

The Mexican transition to democracy finally lead to constitutional reform in 1994, at which time important changes were enacted regarding the role and power of the Supreme Court. A federal reform was also enacted in 1996 which allowed constitutional challenges of electoral regulations and resolutions. Nowadays, nearly any law —except those involving certain "political questions" (in the sense that we will explain later)— can be challenged on the basis of its constitutionality. Currently, the highest court has considerable weight in the Mexican political system, often issuing the final word on important national issues.

During the reign of "constitutional minimalism" —as Justice José Ramón Cossío Díaz referred to it— prior to the said democratic transition, derived from a "political" and not a "legal" approach to constitutional law, the Constitution and especially the *amparo* were sort of "fetish objects" of political speech. At the risk of simplicity, we could broadly state that two opposing tendencies existed: firstly, the idea that the Mexican Constitution and, specifically, the *amparo* were unique national doctrines that needed protection from unwanted foreign influence; and, secondly, that foreign experience and knowledge could be helpful in the interpretation of domestic legal matters.

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[10] 2 Ignacio L. Vallarta, Votos 16, 22, 27, 28 (Francisco Díaz de León, 1881).

[11] Tercera Sala de la Suprema Corte [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Quinta Época, Tomo LXI, Página 3543 (Mex.).

[12] *See* José Ramón Cossío Díaz, La teoría constitucional de la Suprema Corte de Justicia especially 116-17 (2002). In 1982-1983, a well-known attorney and legal scholar filed an *amparo* suit to obtain information about the federal public debt involved in the worst economic crisis in Mexican history up to those years, based on the freedom of information contained in Article 6 of the Constitution. The Supreme Court affirmed that this provision grants no right to citizens, but establishes an information system for political parties. *See* Segunda Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación, Octava Época, tomo X, Agosto de 1992, Tesis 2a. I/92, Página 44 (Mex.).

For many decades, the former approach was the most "popular," giving rise to the traditional theoretical foundation of the *amparo*.

As a result of a greater need for legal instruments to help resolve problems of a non totally-binding Constitution —not to mention increased academic exchange between Mexico and other countries (especially Spain)— a new approach to constitutional law and the *amparo* has recently gained important ground.

Adhering to an orthodox approach, the Supreme Court —and lower ones— have avoided explicit citation of foreign precedents in their decisions. For this reason, it is difficult to assess when (and how) Mexican courts base their decisions on foreign law. Nonetheless, it is possible to notice some cases in which our courts have been *very clearly* influenced by precedents in other countries.

II. Foreign Judicial Doctrines Adopted by Mexican Courts

1. *Proportionality and Balancing*

The so-called "proportionality test" of German origin[13] was embraced by Mexican courts as a result of the influence of Spanish judgments.[14] This test is a comprehensive tool used to establish the limits and range of constitutional rights, comprised of three steps: suitability, necessity and narrow proportionality. The last step is commonly knew as "balancing."[15]

Based on our research, the Supreme Court was the first one to use the proportionality test; this happened in a tax-law case regarding tax equity.[16] Duplicating a well-known Spanish precedent[17] but without stating so, it introduced to the Mexican legal system in 1996 a "balancing judgment (*juicio de equilibrio*)" regarding means and ends as a standard to determine the reasonability and validity of a varying legislative treatment.[18] Unfortunately, the said "transcription" did not followed the Spanish original but cutted off some

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[13] *See* 19 Decisions of the German Federal Constitutional Court ("BVerfGE;" *Entscheidungen des Bundesverfassungsgerichts*) 342, 348-49.

[14] Amaya Alvez, *¿Made in Mexico? El principio de proporcionalidad adoptado por la Suprema Corte de Justicia de la Nación. ¿La migración de un mecanismo constitucional?*, 253 Revista de la Facultad de Derecho de la UNAM 381 (2010).

[15] Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 Ratio Juris 135, 135-36 (2003).

[16] "Tax equity" is just a mode of the principle of equality. It orders that persons under a similar situation should be given the same treatment, and those in a different situation should not be given the same treatment.

[17] TC, 26 de abril de 1990 (76/1990, F.J. 9, A).

[18] S.C.J.N., Apéndice al Semanario Judicial de la Federación 1917-2000, volumen I, Página 240 (Mex.).

words from it; as a result, the idea was not properly understood by Mexican courts and lawyers.

Although lower courts, including several Circuit courts and the Electoral Court,[19] also issued rulings that established the "proportionality"[20] and "balancing" tests, they never specifically cited foreign law. Nonetheless, it is clear that they were influenced by European (in particular, German and Spanish) concepts regarding these doctrines.[21]

The Supreme Court continued the development of the proportionality standard, especially regarding the analysis of unequal legislative regulations.[22] In 2007, it finally ruled that the reasonability test's three steps must be utilized by judges to establish fundamental rights' range and limits; it also decided that the theoretical basis for this test is contained in Article 16 of the Constitution and the prohibition of arbitrariness.[23]

2. *"Heightened" Equal Protection*

Clearly influenced by American constitutional doctrine regarding a "heightened equal protection scrutiny,"[24] the Mexican Supreme Court recog-

[19] The only domestic court with the authority to correct the interpretation of Mexican constitutional law is the Supreme Court. Although some courts, such as those mentioned above, may adjudicate certain constitutional issues, its constitutional constructions are generally not binding and, as a result, are not considered as precedents. They are nonetheless persuasive and taken as a "mere" illustrative example. See Acuerdo 5/2003 de la Suprema corte de Justicia de la Nación [Agreement of the Supreme Court 5/2003], §IV, I, No. 11.

[20] *See* Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F.] [Federal Electoral Court], Compilación Oficial de Jurisprudencia y Tesis Relevantes 1997-2005, S3EL J 62/2002, Página 235 (Mex.); Cuarto Tribunal Colegiado en Materia Administrativa del Primer Circuito (4th Administrative Court of the 1st Federal Circuit), Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXII, Septiembre de 2005, Tesis I.4o.A.60 K, Página 1579 (Mex.) (explicitly using Alexy's "theory of principles").

[21] Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito [1st Administrative Court of the 1st Federal Circuit], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XVIII, Noviembre de 2003, Tesis I.1o.A.100 A, Página 955; Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito [4th Civil Court of the 1st Federal Circuit], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XVII, Marzo de 2003, Tesis I.4o.C.57 C, Página 1709 (Mex.). (Also imitating the very influential judgment number 171/1990 of the Spanish Constitutional Court.)

[22] 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, Novena Época, tomo XXIV, Septiembre de 2006, Jurisprudencia 1a./J. 55/2006, Pagina 75; and 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 XXV, Marzo de 2007, Jurisprudencia 2a./J. 31/2007, Página 334 (Mex.).

[23] Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Diciembre de 2007, Jurisprudencia P./J. 130/2007, Página 8 (Mex.).

[24] *See* Romer v. Evans, 517 U.S. 620 (1996).

nized the need for a "strict" analysis of the legal classifications of explicit discrimination prohibitions[25] based on the Constitution, using higher standards to test their validity.[26] This precedent was established by the First Chamber of the aforementioned court; and was recently adopted by the second Chamber, which mentioned a "special intensity" and "careful scrutiny," but without obtaining the legally required votes for it to become binding precedent.[27]

3. *German* Existenzminimum

The Mexican Supreme Court has closely followed the doctrine of "vital minimum" (*mínimo vital*). Due to the name used by the Mexican Court, we could say that this doctrine is clearly of Spanish origin and hence of German origin as deserving of human dignity as supreme constitutional value.[28]

The First Chamber of the Mexican Supreme Court established that certain minimal conditions are necessary for the sake of human dignity; *e.g.*, legislators are prohibited from taxing individuals who earn minimum wages because if taxes were levied, these people would be unable to provide for their own "elementary needs" and, as a result, lose their autonomy and capacity to fully participate in the democratic system.[29] In order to establish the *mínimo vital* required under Mexican law, the Court based this doctrine on the Kantian definition of "human dignity," used by the German Federal Constitutional Court.[30]

This precedent was implicitly followed by the Second Chamber of the Mexican Supreme Court. Since 2007, several decisions by said Chamber invoked Article 123 of the Mexican Constitution, which forbids any seizure or taking of minimum wages "to prevent workers from receiving lower income," in effect prohibiting the imposition of taxation. This opinion intended to pro-

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[25] Gender, preferences, health, etc. See Mex. Const., art. 1, third paragraph.

[26] 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, Novena Época, tomo XXVII, Abril de 2008, Jurisprudencia 1a./J. 37/2008, Página 175 (Mex.).

[27] Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C,J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVII, June 2008, Tesis 2a. LXXXV/2008, Página 439 (Mex).

[28] TC, 22 de junio de 1989 (STC 113/1989); 82 BVerfGE 60, 85-6.

[29] 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, Novena Época, tomo XXV, Mayo de 2007, Tesis 1a. XCVIII/2007, Página 792; 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, Novena Época, tomo XXV, Mayo de 2007, Tesis 1a. XCVII/2007, Página 793; 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, Novena Época, tomo XXIX, Enero de 2009, Tesis 1a. X/2009, Página 547 (Mex.).

[30] *See* 30 BVerfGE, 25-6.

tect "human dignity and liberty referred to [as a general principle] in Article 25, first paragraph, of the Constitution," part of the economic chapter of Mexican constitutional law.[31] As a result of the number of cases in which it was used as *ratio decidendi*,[32] the aforementioned doctrine —unlike other precedents established by the First Chamber— is binding on every Mexican court; this is especially important because of the uniform adherence of constitutional principles.

Based on our knowledge, there has not yet been any ruling that properly outlines this doctrine or elucidates its implications and consequences.

4. *Political Questions*

On August 15th 2007, the First Chamber of the Mexican Supreme Court decided constitutional controversy 140/2006. This case stands out from other Mexican case law because it did not just rely upon a foreign court decision as a reference or point of departure but rather made a direct citation to an American Supreme Court ruling.

In this case, the Governor of the Mexican State of Oaxaca challenged a "point of agreement" (*punto de acuerdo*) issued by the Chamber of Deputies (*Cámara de Diputados*) of the Federal Congress, in which the latter exhorted the former to resign from office as a result local civil unrest.[33] Although this controversy was preliminarily admitted,[34] it was ultimately rejected because the issues involved could not be adjudicated by courts of law as they were deemed "political questions."

The Mexican Supreme Court assumed that "purely political questions" are not subject to judicial review, because allegedly there is no legal standard to test them. As an example, it cited the opinion of the US Supreme Court in *Baker v. Carr*, which held that:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve

[31] Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Septiembre de 2007, Jurisprudencia 2a./J. 172/2007, Página 553 (Mex.).

[32] Article 192 of the Amparo Act (*Ley de Amparo*).

[33] At that time, Oaxaca teachers held several demonstrations demanding better work conditions, to which the local government did not respond. Many organizations joined the teachers, and afterwards their movement made bigger demands in protest against a host of social problems. The city of Oaxaca was occupied by demonstrators, and the situation caused diverse social, political and economic difficulties.

[34] See the related precedent established in Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Febrero de 2007, Tesis 1a. LXIV/2007, Página 1396 (Mex.).

> a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[35]

It is generally accepted that *Baker* is the leading case regarding the "political question" doctrine of the American Supreme Court.[36] Based on our reasoning, the Highest Tribunal in Mexico considered this to be an indisputable and well-established doctrine. The Mexican Court failed, however, to adopt the *"golden rule" of comparative law*; which in Marie-Claire Ponthoreau's words means: "*il faut avoir une connaissance des concepts juridiques dans leurs propres contextes pour éviter précisément des erreurs d'interprétation*."[37]

The "political-question doctrine," is not settled down as a "universal" principle of constitutional procedural law.[38] Upon a careful reading of *Baker*, however, the Mexican Court would have noticed that this precedent considered "political questions" to be highly unusual, since several norms underlie the Constitution and that these had to be taken into account to consider whether "judicially discoverable and manageable standards" are applicable. In *Baker*, the American Supreme Court reversed the challenged judgment that denied standing to the appellants on the grounds that the issue involved was allegedly a "political question," thereby applying the "equal protection clause" principle for which "Judicial standards [that] are well developed and familiar."[39] In addition, Laurence Tribe reports "only two cases since *Baker v. Carr* in which the Supreme Court has invoked the political question doctrine

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[35] Baker v. Carr, 369 U.S. 186, 217 (1962).

[36] *Cf.* John E. Nowak & Ronald D. Rotunda, Constitutional Law 127 (St. Paul West, 8th ed. 2010); 1 Laurence H. Tribe, American Constitutional Law 375 (New York, Foundation Press, 3rd ed. 2000).

[37] *See* Ponthoreau, *supra* note 1.

[38] For instance, the German Federal Constitutional Court has not developed a "political question" doctrine since German constitutional law is considered "ubiquitous," governing all matters and pertaining to everything. This understanding of Constitution law makes constitutional courts into "King Midas," because they are able to turn every question in "constitutional-law gold." *See* Klaus Von Beyme, *Génesis de la revisión constitucional en los sistemas parlamentarios*, *in* Tribunales constitucionales y democracia 277 (2nd ed., 2008); Tribe, *supra* note 36, at 367; Rainer Wahl, "Lüth und die Folgen. Ein Urteil als Weichenstellung für die Rechtsentwicklung," in Das Lüth-Urteil aus (rechts-) historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts 389 (Thomas Henne & Arne Riedlinger eds., BMV 2005).

[39] Baker 369 U.S. at 226.

to hold an issue non-justiciable;" and that this doctrine was to be used to evaluate the justiciability of the question posed to the Court.[40]

Under the American constitutional system, the "political questions doctrine" is more related to the ability of the Courts to find "enforceable rights from constitutional provisions" and to "create judicially manageable standards," than the "assumption that there are certain constitutional questions that are *inherently* non-justiciable."[41] The Mexican Supreme Court should have considered the original context of the doctrine it upheld in order to apply it correctly; for this reason, constitutional decision 140/2006 represents a *very important lesson* regarding the future use of foreign precedents in Mexico.

5. *Incidental Quoting of Foreign Precedents*

Mexican courts have cited foreign precedents to support their opinions, especially regarding fundamental rights.

The First Chamber of the Supreme Court established two remarkable precedents in criminal matters. In the first, a ruling regarding cautionary measures in *amparo* cases, the Mexican Court used a *European Court of Human Rights* decision —as well as one by the Inter-American Court of Human Rights—[42] to affirm their opinion that any restriction on personal liberty should be based on text explicitly contained in the Constitution.[43] In regard to the efficacy of criminal defence rights, it quoted several precedents by these same international courts, as well as the German Federal Constitutional Court.[44]

The use of foreign precedents by the Federal Electoral Court is not only important but, if anything, even more extensive. Although we cannot assert

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[40] *See* Tribe, *supra* note 36, at 376-83. The mentioned cases are: *Gilligan v. Morgan* 413 U.S. 1 (1973) and *Goldwater v. Carter* 444 U.S. 996 (1979).

[41] *Cf.* Tribe, *supra* note 36, at 367-71 (emphasis added); Nowak & Rotunda, *supra* note 36, at 137.

[42] These circumstances are meaningful in a Mexican context. Many Mexican judges and lawyers have stridently rejected the influence of international courts, even the Inter-American Court of Human Rights; for this reason, the Supreme Court's citations of international human rights precedents gain added significance. It must also be considered that since Mexico is not (obviously) a party of the European human rights system; it wouldn't be wrong to assume that Strasbourg precedents may be considered *foreign decisions*; as Mexico is under the jurisdiction of the Inter-American Court of Human Rights, and the *Pacto de San José* is part of its domestic legal system.

[43] Explicitly citing *Baranowski v. Poland* (case 28358/95): 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, Novena Época, tomo XXV, Marzo de 2007, Página 151 (Mex.).

[44] Explicitly citing *Kamasinski v. Austria* (case 9783/82), *Stanford v. United Kingdom* (case 16757/90), *Tripodi v. Italy* and 9 BVerfGE 89, 95: 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, Novena Época, tomo XXV, Mayo de 2007, Página 104 (Mex.).

that the Court has explicitly based decisions upon foreign precedents, it has indeed invoked them to advance its viewpoints on important issues: the limitations of passive voting rights;[45] freedom of speech as the cornerstone of a democratic society (and possible restrictions);[46] "spot war" cases of the fierce presidential campaign of 2006;[47] political rights and limitations due to criminal sentences; and the tribunal's opinion for the Supreme Court regarding independent candidates.[48]

The cases mentioned herein do not use foreign precedents to substantiate their conclusions, but rather to support basic and general opinions regarding human rights. Nevertheless, their importance lies in providing a window into the legal thinking and reasoning of Mexican courts.

Finally, we can expect more references to European precedents —and to precedents from "foreign" human-rights protection systems— as a result of the "conventionality review" implemented by Mexican Courts in compliance with the rulings of the Inter-American Court of Human Rights, that laid down that all domestic authorities should review that the *Pacto de San José* is not breached. In Mexico and other countries, there has been recent discussion regarding whether non-constitutional courts can study and decide the conformity of laws and other aspects of international law.[49]

IV. Foreign Precedents in Individual Opinions

Just as in the US, Germany and other countries, Mexican Supreme Court justices, as well as lower court judges, can add their individual opinion (*voto particular*) to a judgment in order to provide their reasons for opposing the majority (dissenting opinions); or other reasons upon which they think the decision should have been based (concurring opinions). As an accurate reflection of the justices' personality and legal knowledge, these opinions often contain

[45] Tribunal Electoral del Poder Judicial de la Federación [TEPJF], SUP-JDC-037/2001, 25 de Octubre de 2001 (quoting the European Court of Human Rights and the Spanish Constitutional Court).

[46] TEPJF, SUP-JDC-393/2005, 24 de Agosto de 2005 (referring to the *Handyside case* [5493/72] of the European Court, the American Supreme Court in *Murdock v. Pennsylvania* 319 U.S. 105 [1943] —and the preferred position of that freedom— and *New York Times v. Sullivan* 376 U.S. 254 [1964], and judgment 12/1982 [March 31st 1982] of the Spanish Constitutional Court).

[47] TEPJF, SUP-RAP-31/2006, 23 de Mayo de 2006 (quoting European cases *Oberschlick* [case 11662/85] and *Lingens* [case 9815/82], as well as the American precedents mentioned above).

[48] TEPJF, SUP-AG-2/2007, 2 de Febrero de 2007 (European case *Refah Partisi [Parti de la Prospérité] et autres c. Turquie* [Case 41340/98]).

[49] See Eduardo Ferrer Mac-Gregor, *El control difuso de convencionalidad en el Estado constitucional*, *in* Héctor Fix-Zamudio y Diego Valadés, Formación y perspectiva del Estado mexicano 151-188 (2010).

clear citations of foreign precedents; in fact, one of them recently even called for the Supreme Court —extensible to any other legal operator— to be more open-minded in the use of foreign precedents in Mexican constitutional adjudication:

> …from my point of view it is not possible that to this day, precedents of international or regional courts, *as well those from other countries of the free world*, are still alien to us or barely appear as a little atoll in our judgments. Notwithstanding that the Mexican State is under the jurisdiction of some [international] courts whose precedents are binding to us, such as the Inter-American Court of Human Rights, the essence of fundamental rights is universal.
>
> In order to prevent this Court's isolation (in these matters), it is necessary to fully discuss international precedents (*coloquio jurisprudencial*) as well as to integrate [legal] comparison as a method of constitutional interpretation. We must take advantage of that developed in other countries as part of humanity's patrimony.[50]

The importance of these quotes is not only their substance but also the situation which prompted their citation by Justice Genaro Góngora. They are taken from his personal opinion in the unconstitutionality decision 26/2006, the so-called *Media Act Case* (*Ley de Medios*), perhaps the most significant Mexican constitutional case in the last twenty years, regarding legal reforms that were purportedly enacted to enhance the profits of powerful media companies against the interests of the Nation and Government. These reforms were ultimately struck down. In the same opinion, the author —practicing what he preached— cited constitutional precedents from Germany,[51] Italy[52] and France[53] to support his views, and linked them to an Inter-American Court of Human Rights decision which he recognized as binding on Mexican courts.[54]

An incidental reference to foreign precedents took place in the debate in connection to another very important issue: the *Budget Veto case*. This case resulted in the most controversial judgment ever made by Mexico's Supreme Court: that the President had the right to veto legislative decisions regarding the federal budget without any clear Constitutional basis for this power. In his personal opinion, Justice Góngora[55] again invoked a foreign precedent:

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[50] Diario Oficial de la Federación [D.O.], 20 de agosto de 2007, Tercera Sección, Página 80 (Mex.). (Emphasis added).

[51] 73 BVerfGE 118.

[52] Judgment 420/94 of the Constitutional Court.

[53] Decision of October 10th and 11th 1984, of the Constitutional Council.

[54] *See supra* note 50, at 99.

[55] This Justice who most regularly cites foreign precedents in his personal opinions, although his colleague José Ramón Cossío Díaz was the author of the leading Court opinions containing the aforementioned foreign legal doctrines (proportionality, "heightened" equal protection and *Existenzminimum*) were acknowledged in Mexico.

the *Line Item Veto II* (US case),[56] supports his dissenting view that the Mexican Supreme Court should follow the example of Washington which, through "daring" interpretation resolved to restrict itself in light of the "Constitution's silence," and not to grant the President any "exorbitant power" that curtails congressional faculties.

V. Final Comments

The first challenge to fully employ foreign precedents in Mexican constitutional decision-making is to establish the comparative approach as an absolutely necessary tool. It would not be unfair to point out that in Mexico the struggle between a traditional, isolated approach and a comparative one has been largely silent, although the use of foreign precedents was clearly an important tool in the early days of constitutional interpretation. Due to nationalist tendencies, the comparative approach has until recently been either avoided or rejected; but the tables have turned as a result of new generational perspectives and the impelling reality of our "global village:" young legal scholars are influenced by foreign modes of legal thinking. As a consequence, the Mexican Supreme Court has finally acknowledged the importance and usefulness of foreign precedents in constitutional and human rights decision-making.

The second challenge is that –despite token progress of the comparative approach in constitutional adjudication– Mexican courts are still somewhat reluctant to explicitly cite foreign precedents in their legal opinions. When a foreign legal decision is referred to or even quoted, it is usually only as support for a previously established opinion, or as a secondary argument in favour of it. In broad terms, *it is often difficult to assert when Mexican constitutional law has been clearly based upon specific foreign precedents*.

Evidence suggests that many foreign precedents that influenced Mexican court decisions were intentionally omitted; the best example could be the "migration" of the principle of proportionality from Spanish courts. This silence over the origin of foreign-influenced judicial opinions denies to any party (litigants, legal scholars or citizens) the opportunity to trace the kin of many standards or procedures used by Mexican courts; for this reason, a proper review cannot be made whether their use is proper and suitable.[57] This lack of citation also diminishes the transparency of Mexican constitutional adjudication, as judges would be well-off to indicate the grounds for their decision-making so that the legal community and society can review their reasoning.[58]

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[56] Clinton v. City of New York, 524 U.S. 417 (1998).

[57] *See* Alvez, *supra* note 14, at 387.

[58] *See* Ronald Dworkin, Freedom's Law. The Moral Reading of the American Constitution 31 (3rd ed. Cambridge, Harvard University Press, 1999).

A third challenge facing Mexican courts to develop an effective comparative approach is methodological. As a consequence of scant attention paid to the use of foreign precedents and their implication, a serious debate about these issues has never taken place in Mexico. Our judges and scholars must address —at the very least— the following issues: (i) when to look for foreign precedents to help resolve domestic legal issues; (ii) which jurisdictions should be taken as "models" and why;[59] (iii) what are criteria to utilize foreign precedents as "soft sources" —non-legally binding law for national adjudication; and (iv) how should a comparative approach be made between a "standard procedure" to help resolve a national issues (considering which elements are meant to be taken into account —especially considering the inherent differences between common-law and civil-law systems— and how judges should construct their arguments).[60]

Nevertheless, *there are some foreign judicially-constructed legal precedents that have been recently adopted by the Mexican Supreme Court and lower courts*, so we can reasonably conclude that their adoption was caused by increased comparative influence in our legal theory and adjudication. This influence has resulted in the fact that Justices and other judges now take into account with greater frequency the international *state of the art* of the issues they have to settle, at least generally —especially in regard to fundamental rights. Hopefully, this will increase the strength of this approach and serve to enrich Mexican constitutional law, because "there is no other legal science than the universal one."[61]

[59] This list would include (in a kind of "order of appearance"): the United States, Germany, Spain, Colombia and South Africa, among national courts, and Strasbourg and Luxembourg among international tribunals.

[60] See Ponthoreau, *supra* note 1.

[61] René David & Camille Jauffret-Spinosi, Los grandes sistemas jurídicos contemporáneos 11 (Jorge Sánchez Cordero trans., 11th ed., UNAM-CMDU-FLDM, 2010).

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PROTECTION OF NATIONALS ABROAD: THE MEXICAN STATE AND SEASONAL AGRICULTURAL WORKERS IN CANADA

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Abstract. *Due to the adverse economic conditions in Mexico and the need for offshore labor in Canadian agriculture, Mexico entered the Seasonal Agricultural Worker Program (SAWP) in 1974 as a source country, becoming the country that exports the highest number of agricultural workers to Canada. While abroad, these workers have genuine needs that should be addressed by the Mexican government, but unfortunately the government has failed to provide adequate protection to its nationals. This note offers an overview of the operational aspects of the program and violations of the rules. It identifies workers' needs and the most important national and international documents that regulate the protection of nationals abroad. This research is a critique of the role of the Mexican government in the protection of the seasonal agricultural workers in Canada, identifying the limitations the State faces to provide its national with protection.*

Key Words: *Labor migration, Mexican consulates, Seasonal Agricultural Worker Program, rural Mexico, protection of nationals abroad.*

Resumen. *Debido a las condiciones económicas en México y a las necesidades de los agricultores canadienses, México suscribió el Programa de Trabajadores Agrícolas Temporales (PTAT) en 1974, convirtiéndose en el mayor exportador de trabajadores agrícolas a Canadá. Durante su estancia en el extranjero, estos trabajadores tienen necesidades que deben ser atendidas por el gobierno mexicano, pero desafortunadamente éste no ha podido proporcionar la protección adecuada a sus connacionales. El presente ensayo ofrece un panorama de los aspectos operacionales del programa, así como las violaciones a éste; identifica las necesidades de los trabajadores y los marcos jurídicos internacionales y nacionales para la protección de los connacionales en el exterior. Esta investigación representa una crítica del papel que el gobierno mexicano desempeña en la protección de los trabajadores agrícolas temporales en Canadá, identificando las limitaciones que enfrenta el Estado para dicha tarea.*

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Palabras clave: *Migración laboral, consulados mexicanos, Programa de Trabajadores Agrícolas Temporales, México rural, protección de connacionales en el exterior*.

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I. Introduction

Unlike most Canadian immigration programs, the Seasonal Agricultural Workers Program (SAWP) is a temporary migrant labor program with no option for permanent residency, even though the average time most workers spend in Canada is between four and eight months a year. In addition to this long period of time, the nature of the employment contract restricts worker mobility, as it binds workers to a single employer. Due to farm workers' inability to negotiate the terms of their employment elsewhere, they are forced to endure all sorts of abuses committed by their employers, especially given the fact that workers can be easily repatriated. Furthermore, the temporary status of the workers makes them ineligible for many employment benefits,

social assistance programs, and severe disability benefits, even though they do contribute to Employment Insurance and the Canada Pension Plan.

The SAWP was implemented in 1964 and Mexico was included as a source country in 1974. This program was introduced as a result of constant demands from Canadian growers for a cheap, "unskilled"[1] agricultural workforce, which was unavailable in the national workforce. The rural population of developing countries (unable to find employment in their own countries) could meet the growers' demands. In addition to filling employment gaps, the foreign workers are subject to exploitative conditions that increase the productivity of Canadian farms. Nowadays, offshore labor is not only more convenient for Canadian growers, but it has become a "structural necessity" for Canada's agriculture[2] and I would also argue that this "structural necessity" has expanded to SAWP source countries, as temporary migrant labor is no longer the exception, but has now become the rule.

In spite of the exploitation workers are subjected to, both the workers themselves and the Mexican government benefit from the SAWP. On the one hand, the workers' livelihood slightly improves with their enrollment in the program, although the SAWP represents a "poverty alleviation strategy as opposed to a development program."[3] On the other hand, for the Mexican government, it represents a constant source of remittances, as well as the employment for the rural population that is not possible to create at a national level given current economic conditions and the state of rural poverty.

The Mexican government is both legally and morally compelled to assist and protect the workers enrolled in the SAWP: the State has the legal obligation to protect its nationals abroad, and since the government has been unwilling or unable to develop the necessary conditions for the workers to find employment within the country, then the State (by means of the appropriate institutions) is responsible for the well-being of its nationals abroad. Due to the inadequate and insufficient protection provided by the Mexican government, workers have engaged in grassroots NGO community-organizing activities that oftentimes offer workers the assistance they do not receive from the Mexican State.

This note argues that despite the responsibility of the Mexican State to assist its nationals abroad, seasonal agricultural workers have genuine needs that are not being addressed by the Mexican government. Due to the scarce sources of literature on the topic, I also conducted interviews to complement the secondary research. Literature on the SAWP and the protection of nationals abroad, along with the analysis of relevant international agreements

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[1] Although the labor performed by foreign farm workers in Canada is generally considered "unskilled," certain types of skills are indeed required to work in agriculture.

[2] *See* Tanya Basok, Tortillas and Tomatoes. Transmigrant Mexican Harvesters in Canada 3 (2002).

[3] Leigh Binford, The Seasonal Agricultural Worker Program and Mexican Development 1 (Canadian Foundation for the Americas, 2006).

and Mexican laws, has allowed me to explore the following questions: What are the needs of workers in Canada that are not being addressed by the Mexican government, and why are these needs not being addressed?

While this note is a critique of the Mexican government with respect to the protection of farm workers in Canada, it also sheds light on the difficulties faced by Mexican officers, who are under pressure to protect the workers' rights without interfering in their competitiveness vis-à-vis workers from other source countries.

II. Legal Aspects and Implementation of the Seasonal Agricultural Worker Program

According to Human Resources and Skills Development Canada (HRSDC-RHDSC) the SAWP allows the organized entry of workers to meet the needs of Canadian agriculture in sectors like vegetables, tender fruits, tobacco, apples, apiary products, ginseng, nurseries, greenhouse vegetables and sod.[4] Ever since 1964, Canada has employed foreign nationals to work on farms. First, it admitted 264 seasonal migrant workers from Jamaica and in 1967 Trinidad and Tobago and Barbados joined the program. In 1974, Mexican workers were added to the foreign labor force on Canadian farms.[5] In that year, only 195 Mexicans were employed, but current statistics of the program indicate that up to May 2011, the Mexican states that have sent the most workers are the State of Mexico (1,977), Tlaxcala (1,333), Guanajuato (734), Veracruz (649), and Puebla (672), with a total number of workers sent standing at 10,290.[6]

The legal basis for the SAWP is Section 10 (c) of the 1978 Immigration Act and Immigration Regulations that deals with noncitizens who are authorized to work in Canada. This section allows the entrance of foreign workers provided that there is an agreement between Canada and the workers' country of origin.[7] The program is drafted by a specific bi-lateral agreement called a Memorandum of Understanding (MOU) along with a set of Operational Guidelines and an Agreement for the Employment of Mexican Workers, that

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[4] Human Resources and Skills Development Canada, Temporary Foreign Worker Program. Labour Market Opinion (LMO) Statistics. Foreword. Seasonal Agricultural Worker Program (2010) [hereinafter HRSDC 2010]. Para. 1. http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/foreword_sawp.shtml.

[5] *See* Basok, *supra* note 2, at 18.

[6] Dirección de Movilidad Laboral de la Coordinación General del Servicio Nacional de Empleo. Programa de Trabajadores Agrícolas Temporales México-Canadá. Reporte de acciones de vinculación laboral, cifras al mes de mayo de 2011 (2011), www.stps.gob.mx/.../Prog%20de%20Trab%20Agric%20Migr%20Temp%20MC.xls.

[7] Commission for Labour Cooperation, Protection of Migrant Agricultural Workers in Canada, Mexico, and the United States, Washington, Secretariat of the Commission for Labor Cooperation (2002), http://www.naalc.org/english/pdf/study4.pdf.

contain the guidelines and responsibilities of the Canadian and Mexican governments as well as those of the workers and employers.[8] According to the MOU, the Mexican government is responsible for assisting in the recruitment, selection, and documentation of bona fide agricultural workers; maintaining a pool of workers who are ready to depart to Canada when requests are received from Canadian employers; appointing agents at their embassies/consulates in Canada to assist Citizenship and Immigration Canada (CIC) and Human Resources and Skills Development Canada (HRSDC-RHDC) staff in the administration of the program; and to serve as a contact for workers (*e.g.* working conditions, employer complaints, etc.).[9]

Canada has designated HRSDC and CIC as the main operators of the SAWP. When Canadian growers are interested in employing foreign workers, they have to submit proof that they unsuccessfully tried to recruit Canadians for the vacant jobs through a Labour Market Opinion (LMO). HRSDC is in constant communication with CIC and the Canadian Embassy in Mexico to recruit and issue the appropriate documentation for workers.[10]

The Mexican institutions involved in the operation of the SAWP are the Ministry of Health, the Ministry of Foreign Affairs, and the Department of Labor and Social Welfare. The Health Ministry ensures that the workers are in the best possible condition to work abroad. The Ministry of Foreign Affairs is in charge of the political matters surrounding the program, issuing traveling documents and protecting workers' rights through consulates. Through its General Coordinating Employment Office (*Coordinación General de Empleo*), the Department of Labor is in charge of managing program and recruiting workers.[11]

Foreign Agricultural Resource Management Services (FARMS) and Fondation des Entreprises en Recrutement de Main-d'oeuvre Agricole Étrangère (FERME) (in Quebec, Prince Edward Island and New Brunswick) are private institutions responsible for SAWP operations in Canadian provinces.[12] The program currently operates in nine provinces, namely Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia.[13]

In order to have a better understanding of workers' needs and how the Mexican government addresses them, it is important to discuss the rights and responsibilities of employers and workers as defined by the Agreement for the Employment.

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[8] *Id. See also* HRSDC, *supra* note 4.

[9] HRSDC 2010, *supra* note 4.

[10] *Id.*

[11] Alba Delgado-Bailón, Funcionamiento del Programa de Trabajadores Agrícolas Temporales México-Canadá (2008) (Unpublished dissertation, Universidad de las Américas, Puebla), http://catarina.udlap.mx/u_dl_a/tales/documentos/lri/delgado_b_a/.

[12] *See id.*

[13] HRSDC, *supra* note 4.

1. *Employers' Rights and Responsibilities*

Employers in Canada are responsible for providing adequate housing and meals;[14] cooking utensils, and fuel; partial roundtrip transportation;[15] at least two 10-minute rest periods, paid or unpaid, depending on provincial legislation; paying weekly wages equal to the minimum wage paid to Canadians for the same type of job; maintaining work records and statements of earnings; meeting and transporting the worker from the point of arrival in Canada to the place of employment, and transporting the worker to the place of departure from Canada when the contract has ended; getting the worker's consent and HRSDC approval before a worker's transfer to another employer; providing the worker with protective clothing and formal or informal training; paying a recognition fee of $4 per week to a maximum of $128 to workers with five or more consecutive years of employment; taking the worker to obtain health coverage when applicable and arranging his or her transportation to a hospital or clinic; and cooperating with the Consulate to ensure proper medical attention.[16]

2. *Workers' Rights and Responsibilities*

Depending on the province, workers are subject to different labor rights, as these vary from province to province. According to the Provincial Employment Standards Act of Ontario, workers have the right to vacation and public holiday pay if they have been employed for at least 13 weeks and are registered members of the Ontario Health Insurance Plan. Since workers make contributions to Employment Insurance (EI) and Canada Pension Plan through regular deductions from their salaries, they are entitled certain benefits from said pension plan.[17] However, given their temporary status and the fact that they are bound to one employer, they are ineligible for regular EI benefits (which include unemployment benefits) and are only entitled to receive maternity/parental benefits, compassionate care benefits, and, in certain circumstances, sickness benefits.[18]

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[14] The employer may deduct a sum that should not exceed $6.50 per day from workers' wages to partially cover the cost of the meals. See Human Resources and Skills Development Canada, *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico-2011*, 2011, *available at* http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp_contracts.shtml#c01.

[15] The transportation is initially paid by the employer and then periodically deducted from the workers' paycheck up to the amount of $632 CAD. *See id.*

[16] *Id.*

[17] Tanya Basok, *Post-national Citizenship, Social Exclusion and Migrants' Rights: Mexican Seasonal Workers in Canada*, 8 Citizenship Studies 47, 53-4 (2004).

[18] Justicia 4 Migrant Workers & Center for Spanish-Speaking People (CFSSP), *Migrant*

The Employment Agreement states that the work schedule shall not exceed 240 hours in a period of 6 weeks or less, nor shall the term exceed the 8 months. The agreement establishes the normal working day as consisting of 8 hours, but the hours can be extended up to a maximum of 12 hours a day. The contract grants workers one day of rest for every 7 days of work, but it also allows this day to be deferred.

The agreement also states that other deductions include non-occupational health insurance, which the employer shall recover through regular payroll deductions at a rate of $0.60 per day in Ontario, Quebec, and Saskatchewan and $1.28 in all other provinces. The worker must also obey all the employer's rules regarding safety, discipline and care of property. Furthermore, growers may deduct the cost of keeping quarters clean from the worker's wages. Under certain circumstances, the worker is responsible for covering the expenses of premature repatriation. Workers are also required to return to Mexico at the end of the labor contract and are bound to one employer per season.[19]

According to my personal communication with a public servant, the workers also have authorization for re-entry (*permiso de doble retorno*), which grants them the right to travel to Mexico and return to Canada during the working season if there are conditions in the home country they consider require their presence. These conditions may range from family emergencies to local holidays or celebrations. The cost of the transportation is negotiated between the employer and the worker.

Having examined the rights and responsibilities of employers and workers, workers are clearly at a disadvantage, and that their legal rights (such as days of rest and cleaning and maintenance of their living spaces) can easily be removed, since they are subject to farm productivity and employers' whims. Furthermore, workers may have to pay unexpected expenses due to situations that are out of their control, such as premature repatriation and re-entry authorizations. We can clearly observe that preserving the competitiveness of Canadian farms has priority over workers' human rights and the rights granted them through the Agreement for the Employment.

3. *Violations to the Agreement for Employment with Mexico*

Working in agriculture is considered one of the most dangerous jobs in Canada. There is a high risk of occupational accidents and illnesses due to pesticides and other chemical products, as well as handling machinery. Even though the Agreement stipulates that the employer must provide the worker with appropriate clothing, and "formal or informal training and supervision

Workers and Employment Insurance. What You Should Know, Ontario, The Law Foundation of Ontario (on file with author).

[19] HRSDC 2011, *supra* note 14.

where required by law,"[20] a high percentage of workers do not receive either appropriate training or the required equipment, which puts them at even more at risk. Furthermore, since the clause specifies that the training can be "formal" or "informal," employers can easily say that informal training was given, and thus justify their compliance with the Agreement while saving the expense of providing formal training.

According to the Agreement, the normal working day should be 8 hours long, but can be extended to 12 hours in urgent harvest conditions.[21] However, a study conducted by Verduzco-Igartúa found that workers were self-reporting working days that averaged 9.3 hours, and some even 17 hours. Again, the flexibility of the working hours permitted by the agreement makes workers legally exploitable. Since the employer is supposed to pay for extra hours, workers do not mind exceeding the permitted limit, and employers benefit from the economic vulnerability of farm workers.[22] Moreover, the isolated locations of most farms may have a certain influence on workers' decision to work overtime since there are no places for entertainment or leisure activities available nearby.

In terms of housing, there have been complaints of overcrowding, air conditioning or heating system malfunctions, unsanitary conditions, and lack of appliances.[23] This unsuitable accommodation violates Clause II-1 of the Agreement that stipulates the employer's obligation to provide workers with suitable accommodation that meets the approval of the authority responsible for health and living conditions or the corresponding government agent. The fact that workers are housed near their employers also represents a disadvantage: the short distance between them makes it easier for employers to ask workers for "favors," such as working on weekends or late in the evenings.[24]

With regard to salary, a survey conducted between 2001 and 2003 in Ontario revealed that Canadian citizens were paid between 9% and 14% more than migrant workers,[25] a fact that contradicts Clause III-3 of the Agreement that states that Mexican workers should be paid the same amount as Canadian workers for the same type of work. As mentioned before, the workers

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[20] *Id*. Clause VIII-3.

[21] Id. Clause I-2.

[22] Gustavo Verduzco-Igartúa, *Lessons from the Mexican Seasonal Agricultural Worker Program in Canada. An Opportunity at Risk*, *in* Mexico-U.S. Migration Management (Agustín Escobar-Latapí & Susan F. Martin eds., 2008).

[23] Basok, *supra* note 17; Kerry Preibisch & Luz María Hermoso-Santamaría, *Engendering Labour Migration: The Case of Foreign Workers in Canadian Agriculture*, *in* Women, Migration and Citizenship: Making Local, National, and Transnational Connections 119-25 (Evangelia Tastsoglou & Alejandra Dobrowolsky eds., 2006).

[24] Personal and private communication with an activist, June 25th 2011; Vic Satzewich, *Business or Bureaucratic Dominance in Immigration Policy Making in Canada: Why Was Mexico Included in the Caribbean Seasonal Agricultural Workers Program in 1974?*, 8 International Migration and Integration 255, 261 (2007).

[25] Satzewich, *supra* note 24.

also have the right to paid holidays and vacations. However, since there is a misunderstanding in the application of the Employment Standards Act between "harvest" and "farm" workers',[26] some growers pay for vacations only as a reward.[27] Another violation to the Agreement is the right to one day off for every six consecutive days of work. Since the Agreement also allows the employer to defer the day off "until a mutually agreeable date,"[28] many workers are asked to work the full week, including half day on Sunday, during the harvest season.

Although workers have the right to receive EI benefits, they are considered ineligible for some of these benefits. Since one requirement is to be "ready, willing, and able to work" and agricultural workers are bound to one employer, once they stop working for this particular employer they are considered unavailable to work and are therefore ineligible. Moreover, most benefits require the worker to remain in Canada, so for those who have left the country or have been deported, receiving these benefits is even more difficult.[29]

Even though worker mobility is restricted due to the conditions of the MOU and the Agreement for the Employment, which bind them to one employer, Canadian farmers further restrict the workers' mobility and control their activities by withholding their passports and forbidding them to go out at night, even on their days off.

III. "Protection" of Nationals Abroad and the Seasonal Agricultural Worker Program

As a principle of international law, every individual has the right to be protected while in a foreign State. Nowadays, the protection of nationals abroad is considered a right to which all humans are entitled as a means for safeguarding their liberty, life, personal security, property, and so on.[30] Accordingly, Mexican seasonal agricultural workers in Canada have the right to be protected by the Mexican State, and the Mexican State has the responsibility to provide them with adequate protection. This section analyzes the diverse national and international mechanisms that regulate the protection of nationals abroad and that are pertinent to the SAWP. It then discusses the

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[26] According to Basok, *supra* note 17, at 62, paid public holiday and vacation benefits are only available to harvest workers who have been employed as harvesters for 13 weeks. Even though most Mexicans work over 13 weeks, they perform diverse tasks and not all of them are related to harvesting.

[27] *See id*.

[28] *Id.*

[29] *See* CFSSP, *supra* note 18, at 12.

[30] *See* Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Houston Journal of International Law (1997), http://findarticles.com/p/articles/mi_hb3094/is_n2_19/ai_n28684112/.

limitations that the Mexican State faces when protecting seasonal workers and the assistance provided to them by grassroots organizations.

1. *International Framework for the Protection of Nationals Abroad*

The Charter of the United Nations is an important instrument that outlines an individual's fundamental rights and thus serves as a tool for States to protect their nationals abroad. Article 55 of the Charter states that the UN "…shall promote …universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." Article 56 reiterates the commitment of all member States to cooperate with the UN to achieve respect for human rights. These articles shed light on the universality of human rights, which are inalienable to the person, regardless of the State jurisdiction he or she may be subject to.

There are also several international conventions and agreements that regulate the relationship between the States with regard to the protection of their co-nationals on foreign soil and of migrant workers specifically. In the context of the SAWP, I consider the most relevant documents are the Vienna Convention on Consular Relations (VCCR) of 1963 and the North American Agreement on Labour Cooperation (NAALC) of 1994.[31]

2. *1963 Vienna Convention on Consular Relations*

An important way in which a State provides protection to its co-nationals abroad is by means of their consular posts. The right to consular protection is initially based on the State's sovereignty and is a way in which individuals ensure the respect of their rights through the support of their State of nationality when abroad. In 1949, the UN declared that consular relations should be universally and uniformly regulated by a multilateral treaty and on April 24, 1963 the VCCR came into force.[32]

The duties of the consul are not expressly mentioned in the Convention and vary according to the circumstances of each case. However, Article 5 enumerates some of the most common functions of consular officers relevant to this topic:

> …the protection and assistance of co-nationals in the sending State; the protection of the interests of the sending State and of its nationals, both individuals

[31] Other important conventions are the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on Migration for Employment, the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. However, since Canada is not a signatory State to any of them, and Mexico has only ratified the first one, they are not applicable to the SAWP.

[32] *See* John Quigley et al., The Law of Consular Access. A Documentary Guide 7 (2009).

> and bodies corporate, in accordance with the laws of the receiving State; the representation or arrangement of appropriate representation for co-nationals before local tribunals and other authorities insofar as the laws of the receiving State permit…[33]

This list is not exhaustive and consuls can perform any activity that does not contravene the laws of the receiving State.

The provision of consular protection may vary. The consular assistance provided to nationals who find themselves in difficult situations is referred to as "protection activity," and the consulate employee in charge of assisting nationals is the designated "protection officer."[34] Assistance is provided in the form of advice and information on local proceedings; representation before local authorities; contacting interpreters, translators and law firms during judicial procedures; visiting and interviewing nationals that are imprisoned about the treatment and conditions in the facilities; objecting to and trying to amend any harm against a national; providing special assistance to people with disabilities, minors, the elderly, or people with limited legal capacity.[35]

There are two main approaches that States can take regarding the right to consular protection. The first one is that it is the *obligation* of consular officers to provide protection to their nationals. The second approach is that consular protection is a *discretionary decision* of the State of nationality. Uribe believes that the Mexican State has taken the first approach, since its consular officers must provide assistance for Mexicans dealing with local authorities, and assist co-nationals in detention centers, prisons, hospitals or any other problematical circumstance.[36] However, this statement is only true in theory, as in practice, the Mexican consulates have shown huge failures in the protection services they offer.

3. *The 1994 North American Agreement on Labor Cooperation*

In 1994, the governments of Canada, Mexico and the United States signed the North American Agreement on Labor Cooperation (NAALC), which entered into force on January 1, 1994. Under this agreement, the obligations for each State are the improvement and enforcement of their labor laws, the working conditions and the living standards in their territory and access to impartial courts.[37] This is the first agreement that provides a mechanism for governments to ensure workers' rights and improve workers' living and working conditions without any interference in the sovereignty of the parties

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[33] U.N., Vienna Convention on Consular Relations, Article 5 (1963).

[34] Quigley et al., *supra* note 32, at 6.

[35] *See* Uribe, *supra* note 30.

[36] *Id.*

[37] Commission for Labour Cooperation, supra note 7.

involved. The agreement provides for the establishment of working groups, intergovernmental consultations, independent evaluations and dispute settlement related to national labor law enforcement.[38]

Each country may implement a National Advisory Committee and Governmental Committees to issue recommendations on the improvement and implementation of the Agreement. The parties can also establish consultations with regard to another party's labor law, its enforcement, or the conditions of the labor market. If a matter is still unsolved after its evaluation by the Committee, then any of the parties can request the establishment of an Evaluation Committee of Experts (ECE). The agreement also discusses the resolution of disputes through an Arbitration Panel concerning the enforcement of "occupational safety and health, [and]… minimum wage technical labor standards" (Article 27). The Panel acts as a mediator so that the parties commit to an Action Plan.[39]

One of the principles of the NAALC is the protection of migrant workers. The first addendum of the agreement states that the parties are committed to grant equal legal protection to migrant workers and nationals and that the Council will promote cooperation agreements in the area of migrant workers. As stated above and with the objective to protect its farm workers, Mexico has the option to implement an Evaluation Committee of Experts to assess Canada's compliance with these regulations and its refusal to allow the unionization of agricultural workers. Unfortunately, this measure has not been taken yet, despite the clear violations to the NAALC committed by Canadian authorities.

A possible explanation for Mexico's unresponsiveness with regard to requesting the creation of a Committee to evaluate the conditions of seasonal agricultural workers may be the lack of enforcing labor laws in Mexico itself. If Mexico decides to demand that Canada enforce certain NAALC regulations, it would imply that Mexico has to comply with labor standards as well, and it is unlikely that Mexico would be willing to accept this commitment. Moreover, the Mexican government is aware of the cheap labor pool that other developing countries represent for Canada. Mexican representatives are afraid that the more complaints there are about unfair treatment to Mexican workers and protection to its co-nationals, the more likely it is that Canadian farmers will cease to employ Mexicans, turning instead to workers from other nations.

4. *Mexican Framework for the Protection of Nationals Abroad*

The most important Mexican law for the protection of nationals abroad is the Law on the Mexican Foreign Service and its regulations. The 1829

[38] Commission for Labour Cooperation, *The North American Agreement on Labor Cooperation*, (1994).

[39] *Id.*

legislation on the Mexican Foreign Service was the first legal document that referred to Mexican consuls and protection of foreign nationals. The subsequent legislations of 1910 and 1923 stated that the primary responsibility of the consular officers was "…the protection of the rights and interests of Mexican nationals."[40]

The Ministry of Foreign Affairs regulates the Mexican Foreign Service. Article 1 of the Law of the Mexican Foreign Service (*Ley Orgánica del Servicio Exterior Mexicano*, 1994) defines the Foreign Service as the permanent body of public servants in charge of representing the country abroad and of executing foreign policy according to the Mexican Constitution. Article 44 of the Law of the Mexican Foreign Service authorizes direct intervention by Mexican consular officers, in accordance with international laws and the laws of the receiving country, to protect the rights of Mexican nationals under international law. Moreover, Article 65 of the "*Reglamento*" (regulations corresponding to this legislation) establishes the "primary importance" of protecting the rights of Mexicans abroad. Mexican consular officers are required to assist Mexican nationals in their relations with local authorities, visit Mexicans who are detained in prisons, and represent those who cannot personally defend their interests.[41]

In 1981, the Mexican Ministry of Foreign Affairs created the "consular protection officer," who is a special employee of the consulate whose sole responsibility is the protection of Mexicans abroad. By 1983, all consulates in the USA had at least one consular protection officer. The Mexican consulates in Canada also have one or more consular protection officers.[42]

5. *The Mexican State "Protecting" SAWP Workers*

The Ministry of Foreign Affairs is the main actor responsible for the protection of all Mexicans living abroad, and thus of seasonal agricultural workers. The General Office of Protection to Mexicans Abroad (*Dirección General de Protección a Mexicanos en el Exterior*) is part of the Under-Secretary for North American Affairs. The latter is responsible for policy issues regarding protection, and the duty of the former is more pragmatic and consists of implementing protection measures for Mexicans, their interests and human rights

[40] Mark Warren, *Mexican Consular Protection* (2008), http://www.stratongina.net/glp/node/23.

[41] *Id*. *See also* Ley del Servicio Exterior Mexicano, 1994 (Mex.).

[42] *See* Alma Arámbula-Reyes, *Protección consular a los mexicanos en el exterior* (2008), www.diputados.gob.mx/cedia/sia/spe/SPE-ISS-15-08.pdf; Embassy of Mexico in Ottawa, Programa de Trabajadores Agrícolas Temporales México-Canadá y la asistencia brindada por los consulados a los trabajadores mexicanos en el exterior. Taller "Trabajadores migrantes: protección de sus derechos laborales y programas del mercado de trabajo" (2006), www.sedi.oas.org/ddse/migrantes/contenidos/...%20Nov.../Mexico_ESP.ppt.

through accredited consular posts in different countries.[43] In fact, one of the most important purposes of consular posts is the protection of nationals, which could be considered the underlying goal of all other consulate tasks.[44]

According to the Mexican public servant interviewed and the literature reviewed, the most frequent cases in which Mexican seasonal workers need consulate protection are derived from accidents in and outside the workplace, salary deductions, access to benefits, income tax paperwork, illnesses and insurance, and definite repatriations. In response to these needs, consulates perform the following tasks: regularly visiting farms; supervising workers' living and nutritional conditions; acting as an intermediary between the worker and the employer in any dispute that may arise between them; meeting workers at the airport upon their arrival; assisting workers in cases of occupational accidents; ensuring proper working conditions for the workers; taking workers' calls; providing them with all the necessary legal information; acting on behalf of workers' rights in case of their absence; assisting workers with insurance paperwork and their relationship with the provincial and federal government.[45]

Mexico has five consular offices in Canada located in Calgary, Leamington, Montreal, Toronto and Vancouver. The consulates in Calgary and Leamington are career consulates, and the rest are consulate-generals. Career consulates are usually smaller and depend on a consulate-general. In terms of consular districts (which outline the jurisdiction of consular posts), the consulate-general in Montreal has jurisdiction in Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, and Nunavut. The consulate-general in Toronto has jurisdiction in Ontario and Manitoba, and the career consulate in Leamington reports to it. The consulate-general in Vancouver has jurisdiction in British Columbia, Alberta, Saskatchewan, Northwestern Territories and Yukon, and the career consulate in Calgary reports to it. As for protection officers, all consulates have at least one, except for Calgary.[46] In addition to the services provided at consular posts, the Mexican Ministry of Foreign Affairs has implemented a program called *Consulados Móviles* (Mobile Consulates). This program already existed in the United States, and its main objective is for consular officers to visit places with large Mexican communities and that are located far from consular posts.

Despite the aforementioned arguments, the general belief in Mexico (and in Canada) is that the program is beneficial for both workers and employers. This position is also upheld at an institutional level. During a workshop given at the Mexican Embassy in Ottawa in 2006 by representatives of the Ministry

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[43] *See* Reyes, *supra* note 42; personal communication with a public servant, June 7, 2011.

[44] *See* Uribe, *supra* note 30.

[45] Embassy of Mexico in Ottawa, *supra* note 42.

[46] Secretaría de Relaciones exteriores, Consulados de México en el Exterior (2011), http://sre.gob.mx/index.php/representaciones/consulados-de-mexico-en-el-exterior.

of Foreign Affairs and the Department of Labor, the speakers said that the program was a successful measure for international cooperation and management of migrant workers' flows in a "regulated, dignifying and organized" way. As mentioned, when the public servant provided me with statistics on the number of Mexican workers in the program, he argued that the high numbers of the Mexican workers indicated that their protection was adequate. The public servant's interpretation of the rising numbers of Mexicans in the program has little to do with the protection services offered to them. Actually, these numbers reflect the deteriorated condition of the country's rural areas and the workers' vulnerability. Moreover, it is improbable that one of the factors that encourage workers to apply to the program is the protection offered by the Mexican State.

It is also important to acknowledge the existence of measures that Mexican authorities have implemented to improve the protection of SAWP workers. Since 2010, workers can also evaluate their employers, the living and working conditions, transportation, payments and deductions. Workers in British Columbia were given a booklet that contained security measures to reduce and avoid risks at the workplace when using chemicals and pesticides.[47] Furthermore, the consulate-general in Toronto has an 800 number for workers to contact the office.[48]

6. *Limitations to the Protection of Mexican Agricultural Workers in the SAWP*

There are several limitations that hinder the capacity of the Mexican State to protect workers, some of which are inherent in the legal structure of the program itself and others related to the lack of training and insufficient human resources and budget appointed to the Mexican consulates in Canada, in addition to the unwillingness of the Mexican government to act on behalf of workers. After reviewing the literature and conducting the interviews, it is my opinion that the biggest obstacle to the protection of Mexican farm workers is the Mexican State's fear that the protection offered would compromise the competitiveness of Mexican workers vis-à-vis other workers from developing countries.

As to the limitations that derive from the program's legal structure, we have seen in earlier sections that the MOU, its Operational Guidelines, and the Agreement for the Employment provide excessive freedom to employers in decision-making over aspects such as working hours, days of rest, living quarter maintenance and premature repatriations. Due to the obligatory and binding nature of these documents, the consulate's capacity is limited. None-

[47] Poder Ejecutivo Federal, Cuarto Informe de Ejecución del Plan Nacional de Desarrollo 2007-2012 (2011), www.indaabin.gob.mx/leyinfo/informes/informes.pdf.

[48] *See* Verduzco-Igartúa, *supra* note 22.

theless, the public servant denied any legal limitations and mentioned that the *Consultoría Jurídica* (Department of Legal Affairs) of the Ministry of Foreign Affairs believes there are no legal limits imposed by the MOU or any other documents regarding the operation of the SAWP.

However, the public servant in Mexico did mention two other factors that restrict the performance of the Mexican State: provincial labor laws and the Canadian Privacy Law. In terms of the limits posed by provincial labor laws on working conditions and wage deductions, the public servant argued that Mexico has always been very respectful of domestic laws and has acted within the legal limits of the receiving State.

According to the public servant, the Canadian Privacy Law forbids the authorities to disclose any kind of information concerning an individual without prior consent. He mentioned this with respect to workers that are in hospitals and do not give consent for the consulates to learn of their situation.

Concerning the limitations derived from the deficiencies of the Ministry of Foreign Affairs, in spite of the five Mexican consulates and the *Consulados Móviles* program, consulates fail to reach some of the workers due to the large regions over which the consulate has jurisdiction, the scattered locations of the farms, and the limitations in human and monetary resources. Furthermore, consulates do not employ enough staff to visit the farms and do not provide workers with the help they need to claim their rights and benefits. The public servant interviewed commented that the Ministry of Foreign Affairs annually approves a budget for the protection of Mexicans living abroad, and that there is a special allocation for SAWP workers, but he refused to give concrete numbers.

Unfortunately, the capacity and budget of the consulates are insufficient to support the migrant workers who need their services. The field research conducted by Verduzco-Igartúa shows that nearly 3,000 workers per season need consular assistance, and that the massive numbers of seasonal workers has surpassed the human capacity and space of the Mexican consulates. This is supported by his statistics that show that less than one quarter of the workers interviewed considered that the services received by the consulate were adequate, 44.4% think that the Consulate does not represent them properly, and 21% did not reply because they had not used any consular services.[49]

Even in Mexico, there are misconceptions and discriminatory attitudes against the rural population that are unfortunately reflected in institutional responses to the protection of agricultural workers. For instance, the public servant thinks farmers prefer Mexican workers because they are very "adaptable." The public servant did not seem to be aware of the vulnerability of Mexicans due to discriminatory stereotypes, economic conditions and a lack of fluency in English, which are actually important assets that employers take into account when choosing the source country of the workers. By

[49] *See id.*

using the word "adaptable," the public servant perpetuated the misconception that Mexicans are more suitable for agriculture (and "low-skilled" jobs in general) as an inherent part of their ethnicity, corroborating the idea of "Mexicanness."[50]

Despite the flow of Mexican workers to Canada and the fact that the program is now 37 years old, Mexico still regards the United States as the main arena in which protection to co-nationals takes place, and has made little effort to implement protection programs designed specifically for farm workers in the SAWP. Most consular protection activities in Canada do not differ from the programs implemented in the United States (which are also inefficient), disregarding the difference between the migration experiences of the Mexican rural population in Canada under the SAWP and those in the United States.

As to the dilemma the Mexican State faces regarding the protection of workers and their competitiveness, Binford puts this situation into perspective arguing that

> …consular representatives are under pressure to maintain good relationships with… growers, who have the right to choose the source countries from which they draw their workers. The more vigorously the consulate advocates on behalf of Mexican migrant workers, the greater the likelihood that growers will opt for Caribbeans rather than Mexicans in the future.[51]

Lowe supports this argument by commenting on one case in which a Mexican consulate blacklisted a particular farm that mistreated the workers, and thus the Mexicans working on that farm lost their jobs. Instead of forbidding that particular grower to hire any workers at all, the farm stopped hiring Mexicans for the following season and hired Guatemalans instead under the Temporary Foreign Worker Program, which is less regulated.[52]

The pressure for Mexican consulates to preserve seasonal jobs has led consulates to be unresponsive to workers' needs. Binford's research shows that less than half of Mexican workers that reported mistreatment by their employers sought help from the consulate, and 15 out of 34 workers that used consular services claimed that they did not receive adequate attention or were ignored, and that "the consulate does not resolve anything."[53] He also con-

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[50] According to Hermoso-Santamaría and Prebisch, *supra* note 24, and Satzewich, *supra* note 25, this term refers to the social construction of the Mexican, which confers Mexicans characteristics deemed to be natural or intrinsic to their ethnicity.

[51] Leigh Binford, *From Fields of Power to Fields of Sweat: The Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada*, 30 Third World Quarterly 503, 510 (2009).

[52] *See* Sophia J. Lowe, *Plus ça change? - A comparative Analysis of the Seasonal Agricultural Workers Program and the Pilot Foreign Worker Program for Farm Workers in Quebec* 42 (2007) (Unpublished dissertation, Ryerson University). Retrieved from: http://bit.ly/uviKxM).

[53] Binford, *supra* note 51.

siders that the Consulate chose a "negotiation strategy" over an "advocacy strategy," which has led the workers to believe that they have no support from the consulate to be able to claim their rights.[54]

In personal communication, the activist corroborated the inefficiency of the consular services arguing that consulates do not provide workers with effective assistance. She brought to my attention the case of a female Mexican worker in Ontario who was harassed by a consular officer who wanted her to sign forms in which she gave up the right to treatment and benefits in Canada after having had an accident at the workplace. The officer also wanted her immediate repatriation to Puebla, Mexico. More recently, on May 2011, the Mexican consulate in Vancouver was accused of blacklisting two workers who were union sympathizers and had successfully unionized. The consulate did not want them to return to Canada the following season and warned other Mexican workers to stop visiting union support centers. The United Food and Commercial Workers (UFCW) filed charges against the consulate.

Nonetheless, the public servant argues that "protection" does not interfere with the hiring of Mexican workers, and that employers are generally satisfied with the program. The public servant believes employers' satisfaction is related to the adequate intervention of the Consulate. I would differ with the public servant's opinion, as the more exploitable and unprotected the workers are, the more profitable it is to hire them, and thus the more satisfied some farmers are. Employer satisfaction is also due to the fact that consular officers often side with them instead of the workers in order to save workers' jobs.[55]

The fact that farmers are comfortable with Mexican workers could actually reflect the poor intervention of the consular officers who, due to the demands of the Ministry of Foreign Affairs and the Department of Labor, feel compelled to maintain high hiring rates, even at the expense of violations to workers' rights.

The public servant interviewed also mentioned that there are labor unions demanding that the Mexican government intensify its activities for the protection of seasonal workers. However, the public servant believes that the protection framework is adequate, since the farmers are content and labor migration takes place legally and in an organized manner. However, at the end of the conversation, the public servant admitted that "there is still a lot to be done" with regard to the program and the protection of the workers, but he reiterated that the SAWP was a good opportunity for Mexican farmers to obtain a better income, acknowledging that the current situation in rural Mexico did not leave the farmers with any other options.

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[54] *See id.*

[55] El contrato (documentary) (Karen King-Chigbo & Silva Basmajian, Producers; M. Sook Lee, Director, Montreal: National Film Board of Canada 2003).

7. *Grassroots Organizations and Unions as an Alternative for the Protection of Mexican Agricultural Workers*

Migrant workers have found enormous support in community centers, grassroots organizations and unions such as Justicia 4 Migrant Workers, Dignidad Obrera Agrícola Migrante (DOAM), UFCW, etc. Due to the community-based nature of these organizations and the fact that some were founded by migrant workers themselves (such as DOAM), they know the workers' real needs and have a better understanding of the obstacles they experience while in Canada. Since these organizations do not pursue any political aims or commitments, they are better able to support the workers than institutional channels such as consulates and government offices (both from Mexico and Canada).

Another advantage of these associations is that they are in constant communication with the workers, either through the centers they have established in locations where there is a considerable number of migrant workers[56] or by visiting the farms. Furthermore, they have the ability to organize resistance movements with workers, such as the "Pilgrimage to Freedom."[57] According to the activist I interviewed, they do not impose their own ideologies on the workers and neither do they tell them how they should organize. On the contrary, they support workers' ideas and help them build their own resistance movements based on what the workers want. Grassroots organizations have also been able to constitute a social network of allies that can assist workers with particular needs, such as referrals for legal firms and hospitals that offer pro bono services.

The public servant I interviewed did not seem to know much about grassroots organizations. However, he suggested that a survey should be conducted on the farms, asking Mexican workers their opinion concerning the services offered by the consulate, and that the latter should foster and improve relationships with pro-immigrant NGOs. I agree with the public servant, as grassroots organizations can be powerful allies for the consulates in terms of helping them gather workers, facilitating informative workshops, lending facilities for meetings, and informing consular officers of the real living and working conditions of Mexican workers. However, grassroots organizations are very critical of the performance of the Mexican consulates, and thus establishing a working relationship with them is an enormous challenge that

[56] The UFCW has established Migrant Agricultural Worker Support Centres in places such as Leamington, Bradford, Simcoe, Virgil, Saint-Rémi, Abbotsford, Portage la Prairie, and Kelowna.

[57] The "Pilgrimage to Freedom" was coordinated by Justicia 4 Migrant Workers. It was a march carried out by migrant workers, allies and activists from Leamington to Windsor on Thanksgiving Day in 2010. The objective was to shed light on the reality of food processing in Ontario and the working conditions of migrant workers.

implies a shift in consular officer's attitude toward workers, changing from a "negotiation strategy" to an "advocacy strategy."

IV. Discussion

The inclusion of Mexico in the SAWP has represented enormous disadvantages for the workers; it has affected their personal and family lives and exposed them to dangerous and exploitative working conditions and discrimination, while slightly improving their livelihood. The large pool of cheap labor available to Canada represents a reduction in bargaining power not only for Mexicans, but also for all the other developing countries involved in this "race to the bottom." Due to the number of foreign workers willing to participate in Canadian agriculture, the Memorandum of Understanding and the Agreement for the Employment between Canada and Mexico are becoming less favorable for Mexicans every year. In addition, employers often violate the regulations, but receive no real sanctions.

With regard to the first research question which concerns the workers' needs that are not addressed by the consulate, I argue that these needs mainly derive from the violations to the Agreement for the Employment and provincial laws that regulate compensations; accidents in and outside the workplace; illnesses; definite repatriations; insurance and tax return paperwork, and the rights and benefits that workers are unable to claim due to their lack of status or knowledge of the official languages.

Not only does the Agreement for the Employment institutionalize exploitation, but the growers also commit violations to the already exploitative conditions. Furthermore, the Agreement contains several stipulations left intentionally "unspecified," so that employers can interpret them at their convenience. Therefore, Mexican workers are in need of institutions that can give them the protection they need when working abroad under such vulnerable conditions. In spite of national and international regulations providing for the protection of co-nationals abroad, the Mexican State has not made use of the legal resources provided by the NAALC, such as requesting the implementation of Advisory and Evaluation Committees to assess Canada's compliance with the objectives of the agreement. Mexico has also failed to comply with the regulation stated in the VCCR with regard to "the protection of the interest of the sending State and of its nationals…"[58] Furthermore, the State has also disregarded some of the stipulations contained in the Law of the Mexican Foreign Service, which authorize direct intervention of the Foreign Service members to protect the rights and interests of Mexicans abroad under international laws.

Regarding the research question concerning why the workers' needs in Canada are not being addressed, the Mexican State is unable to address the

[58] U. N., *supra* note 33.

workers' needs due to various limitations that, in my opinion, derive from three main factors:

1. *Legal and policy limitations*: The MOU, the Operational Guidelines, and the Agreement for the Employment leave little space for Mexican public servants to file a complaint for non-compliance with SAWP regulations. These documents institutionalize unfree labor and grant the employer enormous control over the workers.
2. *Inadequate protection measures*: Consular posts are the most important instrument that States have for protecting their nationals abroad. In spite of the fact that there are five Mexican consular posts in Canada, the large number of agricultural workers surpasses their budget and human capacity. The personnel does not receive adequate training to deal with the specific needs of the workers, and the Ministry of Foreign Affairs has not developed any special programs to address the specific needs of seasonal agricultural workers, other than visits to farms, which are not carried out as often as needed.

   The public servant I interviewed corroborated the general belief that the program is a success, and perpetuated the idea of Mexicans being "adaptable" to agricultural work. However, he did acknowledge that as long as the conditions in rural Mexico remain unfavorable, this program represents perhaps the best job opportunity many Mexican farmers have. Bureaucrats in the Ministry of Foreign Affairs, whether in the central headquarters or at consular posts, must realize that, albeit needed, neither the program nor worker protection is a "success" and the SAWP is not a sustainable option. Since the Ministry's sole responsibility under the SAWP is the protection of Mexican workers and it has no control over Mexico's participation in the program, it must try to improve the services delivered to the workers. But this is not an easy matter, as Mexican workers are in a race to the bottom against other developing countries and the more protection the workers have, the less competitive they are.
3. *Competitiveness vs. protection*: I consider this the most important and biggest limitation the Mexican State faces in protecting its nationals. The Ministry of Foreign Affairs must find a balance between the "protection" it offers workers and how it may affect workers' jobs. In extending the Foreign Worker Program to include agriculture, every country with a surplus of "low-skilled" workers can join the program and work for Canadian farms, and since employers can choose the source country of their workers, the bargaining power of all source countries involved decreases. The rationale of the consulates to protect workers' rights and keep employers interested in hiring Mexicans has been to negotiate rather than to advocate the workers' well-being, incurring in practices that leave the workers in even more vulnerable situations.

The Vienna Convention and the Law of the Mexican Foreign Service stipulate that consular posts and members of the Foreign Service must protect the interests of both the State they are representing and their citizens abroad. However, the adequate protection of SAWP workers can sometimes compromise the State's interests. Since the SAWP represents constant remittances for the Mexican government as well as a source of employment, the Ministry of Foreign Affairs is under pressure to keep as many Mexicans as possible in the program, even if it means ignoring abuses, exploitation, discrimination and violations to workers' human rights.

As I have argued, consular protection is not a factor that workers even take into consideration when applying for the SAWP. In fact, even though a considerable number of workers think consulates do not represent them properly, they still sign up for the program. Therefore, the Ministry has given priority to the protection of State interests over worker protection. For this situation to revert itself, there needs to be a change in rural Mexico and the national agriculture needs to be developed, which is no simple matter.

The last topic discussed in the paper is the role of grassroots organizations in the protection of Mexican migrant workers. Indeed, these organizations are able to assist and somehow make up for some of the State's deficiencies in assisting workers. Their community-based nature, the fact that they do not pursue any political interest and that they are not constrained by any protocols allow them to organize resistance movements and help workers more humanely and more appropriately. Although members of these organizations could potentially be very good allies of Mexican consulates, their role as activists and their relationships with workers would be compromised if they were to partner with institutions that do not have a good reputation among the workers. Therefore, unless the Mexican State implements more effective protection activities, it is unlikely that pro-immigrant NGOs will side with the State in the fight for migrant rights.

To conclude, the Mexican State is not complying with its responsibility to protect the seasonal agricultural workers in Canada. There are legal boundaries, as well as deficiencies in the protection activities carried out by public servants at the Ministry of Foreign Affairs, that hamper the proper protection of Mexican workers. Nonetheless, the most important limitation is the limited bargaining power the Mexican State has to negotiate the living and working conditions of its workers in Canada, given the priority it places on remittances and the need to find employment for its rural population. The Mexican government must improve the conditions of the country's rural areas in order to be in a position to demand better treatment for its workers and offer them adequate protection. Slight developments in Mexican agriculture will lead to small but significant changes in the conditions of the Agreement for the Employment with Mexico, which would drastically improve in favor of the workers. Only then would the program really be an *alternative* to employment, rather than a *necessity*.

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