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LEGAL CHALLENGES OF BIOMETRIC IMMIGRATION CONTROL SYSTEMS*

Vanessa Díaz**

Abstract. *This article analyzes the deployment of biometric systems in immigration control. It argues that public policy for biometric data collection and processing must be based on legal principles and involve the participation of diverse actors, including civil society organizations, industry associations, special privacy advocates and government officials. Such deployments must also involve control mechanisms that help ensure transparency and accountability. Based on a comparative study of biometric immigration control system deployment in four countries (Australia, Mexico, New Zealand and Spain), two types of asymmetries stand out: first, notable differences in the types of information collected, stored, processed, retrieved, updated, analyzed and exchanged; Second, the purposes for which biometric systems are currently used. In the latter case, wide divergence exists in areas for which these systems are employed, such as border control strategies and the use of travel documents, revealing that each nation chooses to use these systems at different points in the immigration process. These asymmetries pose both short and long-term challenges for international cooperation.*

Key words: *Biometrics, biometric systems, border controls, ePassports*.

Resumen. *A través de un estudio comparado se analiza la implementación de sistemas biométricos como política migratoria. Resalta la importancia de incluir no sólo la participación activa de diferentes actores, tales como la industria, la sociedad civil, juristas especializados y funcionarios públicos en todas las políticas públicas de implementación de tecnología biométrica, sino también establecer criterios de transparencia y rendición de cuentas como mecanismos de control en dicho despliegue de sistemas biométricos. Revela dos tipos de asimetrías en la implementación de este tipo de tecnología en materia migratoria. Por un lado, existen diferencias entre la información recogida, almacenada, recuperada, ac-*

* This paper is based on my ongoing PhD research concerning Transborder Biometric Information Flow: Legal Challenges to Personal Privacy and the Need for Public Debate. PhD research sponsored by Consejo Nacional de Ciencia y Tecnología (CONACYT) and the Instituto de Ciencia y Tecnología del Distrito Federal.

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tualizada, analizada e intercambiada en los cuatro países analizados, lo que lleva a suponer que el despliegue de los sistemas biométricos no es homogéneo. Mientras que, por el otro, en cada uno de los países examinados los sistemas biométricos se despliegan en diferentes áreas de migración, como estrategias de control transfronterizo y documentos de viaje. Por lo que los países no están implementando esta tecnología al mismo ritmo, lo que supone el planteamiento de controversias a corto y largo plazo para la cooperación internacional.

Palabras clave: *Biometría, sistemas biométricos, controles fronterizos, ePasaportes*.

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I. Biometrics Used in Immigration Control: Information Flow

This article analyzes Transborder Biometric Information Flow[1] (TBIF) in the wider context of immigration control. Four countries, two from the Civil Law tradition (Mexico and Spain) and two from Common Law (Australia and New Zealand), are compared to help identify several noteworthy TBIF-related challenges.

This article provides insights into (a) the interaction between biometric systems deployed to enhance border control; and (b) ways in which these systems are currently used in four different countries to collect, store, process and exchange immigration-related data. It also emphasizes the lack of public debate about responsible deployment of these systems within the TBIF framework, and analyzes the diverse types of immigration data utilized by these four nations. It concludes by arguing that integration of these systems in a comprehensive legal framework requires greater transparency, accountability and supervision.

[1] The term Transborder Biometric Information Flow (TBIF) refers to the biometric data collected by governments through the deployment of biometric systems with the intention to exchange biometric information nationally or internationally.

A comparative study of TBIF in these four countries shows an absence of international biometric treaties and industry self-regulation. As a result of this vacuum, standards on the deployment of such systems have been mostly based on the efforts of two organizations —the International Civil Aviation Organization (ICAO) and the International Organization of Migration (IOM). Two other regional organizations —the European Union (EU) and the Asia Pacific Economic Cooperation (APEC)— have also played a limited role through recommendations, specs and standards for biometric border control systems.

These organizations' work and publications have focused mostly on technical issues. Although discussion of these issues is useful, there has been a notable absence of discussion regarding the extensive framework needed for responsible public debate, transparency and adequate scrutiny.[2]

The TBIF comparison set forth in this article reveals two types of asymmetries: (1) differences between the types of data collected, stored, processed, retrieved, updated, analyzed and exchanged; and (2) differences in border control strategies and biometric travel requirements. One example is Mexico's recent issue of biometric passports, which poses both short and long-term challenges for world-wide cooperation.

The deployment of biometric systems for immigration control has generally helped increase efficiency at border control checkpoints through enhanced security and innovative methods to collect and record travelers' identities. These measures also aim to stop illegal immigration, help fight cross-border crimes and prevent terrorism. However, as is discussed below, biometric systems for immigration control cannot stop illegal immigration, cross-border crimes and terrorism.

Although all these measures are commendable public policy, they do not justify a complete absence of informed public debate regarding the deployment of biometrics for immigration control.[3] This article discusses this vacuum in light of major legal, political and ethical concerns.[4]

In light of the urgent need to establish both international and domestic immigration policy, this paper covers several other notable areas: (1) the interplay between biometric border control systems; (2) ways in which the four

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[2] Jasanoff has addressed this view in stating that "the pinpoint here are consequences for the day-to-day conduct of society, occur within elites, in the courts, the expert bodies that advice parliaments and presidents, and the professional classes that control much of the meaning making in advanced industrial societies. These are the groups, then, that can be observed enacting and performing some of the continuities of culture, with significant implications for convergence and divergence across national polities." Sheila Jasanoff, Designs on Nature, Science and Democracy in Europe and the United States 2 (Princeton University Press, 2007).

[3] *Id.*

[4] The legal concerns should be tested by the principle of proportionality, however is not the aim of this paper.

countries in this study currently collect, store, retrieve, analyze and handle immigrant data; (3) raise the question of how the legal frameworks established for privacy and data protection are operating effectively; and (4) the need for transparency, accountability and supervision of national and worldwide immigration controls.

II. Transborder Biometric Information Flows: The Need for Informed Public Debate

Although the deployment of biometric border control systems has increased notably, there has been surprisingly little public discussion outside industry circles and a small cadre of public officials working in this area. Despite the fact that "popular media and official discourse are two major ways in which people acquire "knowledge" for everyday life,"[5] little about these systems —and how they impact privacy and civil liberties— has entered public discourse.[6]

The dynamics of the interaction between popular media and official discourse are the major ways for society to know about the implementation of biometric systems. The author agrees with Pedro de Vega's assertion that public opinion plays an essential role in a democratic State.[7] This is especially true given the legal, political and ethical issues involved, including important privacy and data protection rights.

Immigration policy decisions made in each of the four countries studied shows that the decision-making process has been influenced not only by domestic concerns but also international security, including illegal immigration, cross-border crime and terrorism.

Apart from this disproportionate interest in security, surprisingly few multidisciplinary official studies have been made public regarding the pros and cons on biometric surveillance systems. There is also an absence of public discussion of potential privacy right violations posed by linking centralized biometric immigration data with criminal databases and TBIF between nations and organizations. Why is public discussion of these issues so important? Be-

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[5] *Id.*

[6] Interview with Ernesto Villanueva Villanueva and Issa Luna Pla, Researchers, Institute of Legal Research of National Autonomous University of Mexico, in Mexico City (November 23, 2011); interview with Charlotte Epstein, Professor, University of Sydney, in Sydney (October 28, 2011); interview with Katina Michael, Associate Professor, University of Wollongong (Sydney, 21 February 2012). This component of the research project received approval from the University of Tasmania Human Research Ethics Committee. Approval Ethics Ref: H0012013 of 29/08/2011.

[7] Pedro de Vega's research has focused on public opinion: Pedro de Vega García, *El principio de publicidad parlamentaria y su proyección constitucional*, 43 Revista de Estudios Políticos 45-66 (1985); Pedro de Vega García, *Significado constitucional de la representación política*, 44 Revista de Estudios Políticos 53-74 (1985).

cause countries need to balance properly the public interests in national security with individuals' civil rights and liberties, when biometric systems are deployed and TBIF between and within jurisdictions are implemented. The first scenario involves the linkage or exchange of biometric data between the requesting country and other countries. The second is the linkage of national and regional databases with those of international organizations such as Interpol, Eurodac, the Schengen Information System and APEC.

National governments commonly deploy four different types of biometric databases for immigration control. These databases are used by border control agencies at seaports, airports and overland crossings in each of the four countries examined. Mexican and Spanish immigration agencies utilize facial image and fingerprint databases. Australian and New Zealand immigration authorities, on the other hand, prefer iris pattern and facial image databases. Each of these linkages raises major privacy concerns and deserves open public discussion in the interest of transparency and civic responsibility.[8]

Domestically, the establishment of biometric databases raise privacy legal challenges and ethical concerns about: who can access immigration data; data integrity contained in centralized databases; immigration data protection for third parties; classification of individuals upon arrival (discrimination issues); data storage restrictions; as well as subsequent use of data for crime control purposes and its impact on privacy. On an international level, privacy legal challenges are magnified because the impact on privacy and data protection affects a wider range of people compared to those listed in national databases and not all countries are fully committed with privacy rights contained in different treaties and agreements. This is particularly true given the demands posed by globalization and a significant increase in TBIF for purposes of immigration control.

People should have ownership rights to their biometric data once border protection personnel have extracted them for identification and verification purposes.[9] Another commentator feels that "in a direct democracy a simple citizen must —should— know the issues over which he decides, as well as be competent on the topics assigned to his competence."[10] Citizens should be aware that they may exercise rights of access, rectification[11] and challenges to

[8] Jasanoff, *supra* note 2.

[9] Based on one prominent critic's argument of Jasanoff. *Id*. at 27.

[10] Giovanni Sartori, Homo Videns, la sociedad teledirigida 163 (Taurus, 2004).

[11] In countries with Civil Law tradition, the Data Protection principles and obligations relies in the exercise of ARCO rights. In Mexico and Spain the control over personal data is exercised by ARCO rights set in their legislation, ARCO rights are a set of forth rights of data subjects to protect effectively their personal information and control over it. This ARCO rights are: 1) Access their Personal Data; 2) Rectify erroneous or incomplete Personal Data and processors shall have the obligation of notifying data subjects of any errors or incomplete Personal Data; 3) Cancel the use of Personal Data and 4) Objection the use of Personal Data at any time. Data Protection and Privacy Jurisdictional Comparison (Monika Kuschewsky ed., Thomson Reuters, 2012).

the processing[12] of their biometric personal data under privacy and data protection laws. In a functioning democracy, citizens must *demand* transparency and accountability, specifically regarding (a) how biometric data is handled for immigration purposes; and (b) how TBIF is exchanged by nations and organizations. This includes the right to identify the national and international entities involved in processing biometric data and cross-border exchanges.

The principle of transparency has permeated beyond the idea of mere public acts or functions of State organizations. While "transparency" extends to ideas of State authorities' obligations to carry out their actions, as a general rule, according to prescribed powers that are publicly available. "Access to personal information" ideas' extends a right to request any recorded information held by a public authority. Both are important procedures used to "control State's power" and give "democratic legitimacy" of public institutions,[13] theoretically speaking. In both cases, governments should publicly debate or provide information regarding policies issues on the implementation and deployment of biometric systems and privacy rights regarding the collection and process of personal information by biometric systems. It does not matter if those requesting information are or non-citizens. Because at the end, national legislation sets the exemptions for the procedure to request public information and personal information, where at international level it could be possible that non-citizens request the access to their personal information by privacy and data protection agreements.

This article argues on behalf of the development of a legal framework that protects civil liberties through adequate levels of privacy and data protection. This framework must also be accompanied by increased public debate, transparency and accountability about the benefits and risks of biometric system deployment and TBIF. The policy issues must be available to citizens and foreigners in a plain language while privacy and data protection rights are promoted in a cross-border co-operation and collaboration mechanism by international agreements.

III. Personal Data: Data Collection Inconsistencies

Governments have adopted biometric systems for diverse reasons, including to reduce immigration services costs; decrease identity fraud; help restore public confidence in government; increase border processing efficiency; pre-

[12] In Mexico and Spain, individuals exercise ARCO rights, especially Cancellation and Objection. "Cancellation is individuals' right to block free of charge their personal data when it is inadequate, excessive or unnecessary or when it is stored in a period in excess of that which is established in Law whereas Objection is individuals' right to request that the processing of their personal data not be carried out." *Id.*

[13] Ernesto Villanueva, Derecho a la información 69-72 (Porrúa-Cámara de Diputados-Universidad de Guadalajara, 2006).

vent illegal immigration; reduce cross-border crime; and help prevent terrorism. This section compares the ways in which Australia, Mexico, New Zealand and Spain currently classify, collect and process immigration data. Notably, the comparison shows that these countries do not or cannot easily exchange immigration information mainly for practical reasons (*e.g.*, classification) rather than technical or legal reasons. The types of data collected by each country often differ, including *when* the data is collected in the immigration process and *how* this information is updated. In a word, the data is not *harmonized*. For example, the websites for immigration statistics published by Australia, Mexico, New Zealand and Spain all contain significant information regarding visa types and categories. This said, the four countries use differing terminology and expressions, as well as divergent classifications. Another inconsistency is the widely-varying time periods required between visas. Not only do terms and expressions diverge, many definitions set forth in each nation's immigration frameworks are inconsistent, vague and contradictory.[14]

For this reason, it is difficult if not impossible to directly compare statistical information about immigration information flow in the four countries under study. According to the Global Commission on International Migration (GCIM), it is not possible to achieve uniformity on immigration data collection as the GCIM reported to the United Nations in 2005: "that the data collection, composition, categorization, retrieval, collation and exchange reflect national legislative, administrative and policy imperatives."[15] Therefore, it is difficult to present this data in a consistent and uniform international manner.

Although the Organization for Economic Cooperation and Development (OECD) has access to robust countries databases, the OECD statistics mostly cover economic, population and labor immigration data rather than specific immigration categories.[16] The same is true of the International Organization for Migration (IOM), which lacks immigration data on a global scale.[17]

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[14] However, it is a common factor in the four countries to exclude citizens departing with the status of military personnel and their dependents and nomads, persons without a fixed place of residence who move from one site to another, are also excluded from their migration statistics.

[15] This GCIM closed in 2005. Kathleen Newland, *The Governance of International Migration: Mechanisms, Processes and Institutions* (Policy Analysis and Research Programme of the Global Commission on International Migration, 2005) *available at* http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TS8b.pdf.

[16] In its entry of international migration data, the OECD notes in material posted on its website under the headings "OECD Factbook 2010" and "Country Statistical Profiles 2010" that the sources of migration statistics in many of the countries it covers are population registries; residence or work permits; acceptances for permanent settlement; censuses; and, surveys. However, it observes that a wide variety of other data sources exists, such as border crossing counts, analyses of passenger landing cards and special surveys like labour force surveys.

[17] IOM collects and collates some regional data considered important to its operations, such as from the Commonwealth Independent States (CIS) and Statistical Information System on Migrations in Central America (SIEMCA), to obtain some of its data. IOM also sources

In 1998, the *Glossary to the UN Recommendations on Statistics of International Migration* was published.[18] The Glossary is a useful study about how countries should collect migration data and share this information for international immigration statistics —including terminology and definitions— with the aim of furthering understanding of the dynamics of international immigration, its causes and effects. In 2004, IOM published its *Glossary on Migration*.[19] Although significant, these reports fail to set mandatory standards for member countries to collect and present migration data, as they only represent non-binding recommendations.

Another problem in immigration data is the absence of universally accepted definitions. This lack of precise terminology and common standards for data collection frequently impedes meaningful data comparisons.[20] From 2008 to 2009, Australia and New Zealand adopted part of the *Glossary of the UN Recommendations on Statistics of International Migration*. Since that time Australia, Mexico, New Zealand and Spain have collected some consistent and complete series of immigration statistics based on standards established by the UN. Despite these accomplishments, definitions for short-term immigration data differ for visa categories, as well as other classification terms. These countries maintain their own databases for foreigners who enter as temporary residents. The problem lies in their current data collection systems and short-term migration categories for foreigners, as all four countries have not yet completely adopted the Glossary.

Australia maintains immigration-based databases that contain significant information, such as name, nationality, facial characteristics, iris characteristics, fingerprints, sex, address, employment, and religion. Data categorized by country of birth, age and sex are usually taken from periodic updates of data taken between censuses and death registries. The immigration data collected through periodical censuses raises concern related to reliability of data. Another example is data on immigrants' employment status, which is based on monthly labor surveys and periodic specific migrant surveys.[21] Statistics for certain immigration categories, such as country of birth, sex and address can be found since 2002.

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data back to the OECD, Eurostat, UN Population and Statistics Division, US Census Bureau and other UN agencies known to have reliable data on the subject matter it covers.

[18] U.N. Dep't of Int'l Econ. & Soc. Affairs, U.N. Recommendations on Statistics of International Migration, U.N. Doc. ST/ESA/STAT/SER.M/58/Rev.1, U.N. Sales No. E.98.XVII.14 (1998).

[19] Glossary on Migration, International Migration Law (Richard Perruchoud ed., IOM, 2004) http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/Glossary_eng.pdf.

[20] U.N. Dep't of Int'l Econ. & Soc. Affairs, U.N. Recommendations on Statistics of International Migration, *supra* note 18.

[21] *Annual Report 2011-2012 of the Department of Immigration and Citizenship*, Australia Government (Sep. 23, 2012).

As a "developed" country, Mexico has updated its electronic immigration data on a monthly basis since 2002. Since 1995, it has maintained statistics for categories.[22] This said, a comparison of Mexican and Australian visa classifications would reveal many inconsistencies. Australia, for example, classifies its visas as "temporary" or "permanent" with 140 visa subclasses. Mexico, on the other hand, classifies visas as "visitor" and "resident" with only 10 subclasses.

In New Zealand, many government agencies collect data on international immigration movements and their outcomes. The fact that diverse agencies collect and collate data often makes comparison extremely difficult. This has led to calls for the development of a cross-agency view based on a "risks and benefits" analysis performed by each respective agency. This said, historical statistics for some immigration categories is only available since 1998.

Spain maintains a mix of physical records and electronic data which is collected and updated every three months. This information is based on data collected from immigrants registered in city council neighborhood lists, required for education, academic employment as well as access to public health care. Historical immigration stats are available since 1996.[23]

The four countries under study all use biometric passports and visas. However, there are three mandatory types of biometric passport (ePassport) generations according to the International Civil Aviation Organization (ICAO):[24]

a) Biometric passports with Basic Access Control (BAC).
b) Extended Access Control (EAC).
c) Supplemental Access Control (SAC).

These biometric passports are known as Machine-Readable Travel Documents (MRTD) embedded with a secure element pursuant to specs established by the ICAO; each element contains a contactless microprocessor chip with biographical data about the passport holder (*e.g.*, name, date and country of birth); medical information; and a facial image.[25] It may also include fingerprints, iris patterns, a facial biometric image (mandatory in accordance with ICAO specifications) and other information approved by the ICAO. A contactless enabled reader is used to read this data.

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[22] National Institute of Migration (INM), historical statistics website http://www.gobernacion.gob.mx/es_mx/SEGOB/Series_Historicas ,Mexico, The Government Secretary.

[23] National Institute for Statistics (INE), Spain, http://www.ine.es/ss/Satellite?L=0&c=INEPublicacion_C&cid=1259924959454&p=1254735110672&pagename=ProductosYServicios%2FPYSLayout&param1=PYSDetalleGratuitas (*last visited* Nov. 27, 2013, 13:20 hrs.).

[24] The production and issue of biometric passports require different ancillary businesses such as printers, inlay manufacturers, chip makers, standardization manufacturers, high security paper manufacturers and security printer makers, among others.

[25] U.N. International Civil Aviation Organization [I.C.A.O.], Machine readable travel documents (MRTDS): History, Interoperability, and Implementation , U.N. Doc. ISO/IEC JTC1 SC17 WG3/TF1 (March 23, 2007). http://www.icao.int/Security/mrtd/Downloads/Technical%20Reports/ICAO_MRTD_History_of_Interoperability.pdf.

a) *Biometric passports with Basic Access Control (BAC)*. The BAC is a mechanism introduced to ensure that the biographic data and facial images stored on the passport microprocessor chip are read securely. Australia[26] and New Zealand[27] both collect facial and iris biometric info.
b) *Biometric passports with Extended Access Control (EAC)*. The EAC is a second-generation mechanism that restricts access to highly sensitive biometric data, including both optional and mandatory biometric characteristics. This passport is based on asymmetric cryptographic protocols and uses stronger encryption.
c) *Biometric passports with Supplemental Access Control (SAC)*. The SAC is a third-generation Password Authentication Connection Establishment (PACE) that further restricts access to highly sensitive biometric data, including optional and mandatory biometric characteristics. It implements asymmetric cryptography and bases data encryption on a key shared between the reading device and the chip. In December 2014, Spain will begin collecting facial and fingerprints in order to issue biometric passports with Supplemental Access Control (SAC).[28]

We are currently unaware of the type of access control used in Mexican biometric passports. Despite public information stating that biometric passports were first issued at the end of 2012[29] —including an electronic bar code and the holder's hologram in the center right of the document— the contactless microprocessor chip symbol does not appear on the passport's front page. The only biometric data collected in these passports are facial and fingerprints characteristics.[30]

The four countries mentioned above currently do not collect the same biometric data for passports. Data collected from Australian and New Zealand citizens include facial and iris characteristics, whereas Spain and Mexico collect only facial and fingerprints characteristics. For foreign visitors, all four countries use face recognition to verify individuals' identities and check blacklists. Verification, however, depends on the type of visa; not all visas issued are biometric.

Why do biometric border control systems deployed in these four countries differ so widely? Because the four countries differ in their approach on how to manage their borders; for Australia and New Zealand as island States, is very important to have a sustainable population. Note that apart from differences in data collection, all four countries use centralized databases and similar border control procedures. All four also check against criminal biometric databases and share common immigration control strategies.

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[26] Australia began issuing October 2005.

[27] New Zealand began issuing September 2005.

[28] Spain began issuing biometric passport with Basic Access Control (BAC) since July 2003.

[29] Mexico began issuing November 2012.

[30] The company which won the nationwide passport project in Mexico was Suprema Inc.

IV. Immigration Policy: International Context

Immigration occurs for many reasons: a search for better economic opportunities; the desire to join family members who have already migrated; or an escape from adverse political or social conditions. Article 13(2) of the *Universal Declaration of Human Rights* recognizes that "everyone has the right to leave any country, including his own and to return to his country."[31] The international community has declared this right as necessary to protect other human rights. The right to travel is a necessary attribute of a democratic constitutional State. Immigration and migration play important roles in the rapid, complex and violent change often present in many parts of the world. This change affects States, regions, societies, economies and policies.[32]

The international legal framework comprised of treaties, conventions, principles and agreements are balanced with States' sovereign rights to protect borders; confer nationality; admit and expel foreigners; combat trafficking and smuggling; and safeguard national and regional security. These international legal frameworks need to be balanced not only with citizens' civil rights but also with other human rights intrinsic to immigration issues,[33] including privacy and data protection rights. This international human rights framework undergird the main pillars of public policy for international immigration.

a) *Biometric Technology Deployment*. The legitimacy of biometric immigration control systems depends on their basis in law and democratic principles.[34] For this reason, elected officials in charge of authorizing and deploying these systems must be familiar with multi-faceted technical and legal issues.[35]

The implementation of biometric systems gives rise to many legal issues, especially regarding individual privacy and data protection rights. Addressing these legal concerns is critical to win political support and public acceptance.

b) *International Immigration Organizations*. Although no international treaties or conventions have been approved by the UN regarding the deployment of biometric immigration control systems, Article 13 of the *Convention on International Civil Aviation* deals with biometric technology and States.[36]

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[31] Universal Declaration of Human Rights, G/A/RES 217A, at 13(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[32] Leonard B. Boudin, *The Constitutional Right to Travel*, 56 Columbia Law Review 47-75 (1956).

[33] Trafficking in humans are a particularly abusive form of migration. States resolved to take measures to ensure respect for the protection of the rights of migrants and to intensify their efforts to fight trafficking in the Millennium Declaration.

[34] Eduardo García de Enterría, La Constitución como norma y el Tribunal Constitucional 43 (Civitas, 2006).

[35] Jasanoff, *supra* note 2.

[36] "The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to en-

Two key international organizations operate in the biometric immigration area: the International Civil Aviation Organization (ICAO) for international standards, recommendations and procedures regarding immigration practices. The ICAO —in charge of biometric passports and visa specifications— has been investigating biometrics and its potential to enhance travel document identification since 1995. Not until 2001, however, did they recommend the use of facial recognition as the primary biometric.[37]

The International Organization for Migration (IOM) is another leading organization focused on immigration issues.[38] The ICAO and IOM are the two main international organizations that make recommendations and establish specifications regarding the deployment of biometric border control systems.

c) *International Civil Aviation Organization (ICAO).* This is a specialized UN agency responsible for adopting standards and recommending immigration-related practices and procedures.[39]

The *Convention on International Civil Aviation* establishes the structure of ICAO.[40] It is noteworthy that Australia, Mexico and Spain are all Council member States.[41] ICAO has developed numerous standards regarding travel documents (*e.g.*, passports and visas) and border control identification policies. A passport is not only an identity certificate; it represents the government's promise of protection when travelling in foreign countries —with the caveat that such protection may be withheld if a citizen is considered unworthy.[42]

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try, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State." International Civil Aviation Organization, Convention on International Civil Aviation, art. 13, Dec. 7, 1944, Doc 730019.

[37] The IOM offers "advice, research, technical cooperation and operational assistance to States, intergovernmental and non-governmental organizations and other stakeholders, in order to build national capacities and facilitate international, regional and bilateral cooperation on migration matters." U.N. International Civil Aviation Organization [I.C.A.O.], Machine Readable Travel Documents (MRTDS): History, Interoperability, and Implementation, *supra* note 25.

[38] U.N. International Organization for Migration [I.O.M.], *available at* http://www.iom.int/cms/en/sites/iom/home/about-iom-1/mission.html.

[39] International Civil Aviation Organization [I.C.A.O.], *available at* http://www.icao.int/about-icao/Pages/default.aspx. See also Daniel C. Turak, The Passport in International Law 30 (Lexington Books, 1972).

[40] The Convention on International Civil Aviation is also known as the Chicago Convention. It took place in 1944. According to the terms of the Convention, ICAO is made up of an Assembly, a Council of limited membership with various subordinate bodies and a Secretariat. The chief officers of the ICAO are the Council President and the Secretary General. *See* International Civil Aviation Organization, Convention on International Civil Aviation, art. 13, Dec. 7, 1944, Doc 730019.

[41] See member States of ICAO, *available at* http://www.icao.int/about-icao/Pages/member-states.aspx (last visited Nov. 27, 2013).

[42] The standard states that "a valid passport shall be the basic document providing public

Biometric passports issued in compliance with ICAO specifications contain biometric data with controlled access, contactless microchips[43] and a minimum 32kb data storage capacity.

For the ICAO, the only secure way to use ID documents is by means of physiological characteristics accessible in a tamper-proof way. The biometric characteristics used by the ICAO[44] in passports are: (a) facial recognition (mandatory); and (b) fingerprint or iris recognition (optional).

Due to its non-intrusive nature, the ICAO requires facial identification for biometric verification. Face photographs can be utilized by either personnel or automated systems to: (a) confirm identities via database search (*recognition*); or (b) authenticate images (*verification*).[45]

Biometric fingerprint and/or iris characteristics may also be used for recognition purposes when agencies have access to information needed for verification.

d) *International Organization for Migration (IOM)*. Created in 1951 to collaborate with governmental, intergovernmental and non-governmental partners,[46] the IOM is increasingly called upon to assist States address complex border management issues.[47]

IOM works with national governments to assess and improve the integrity of their travel and identity documents. Working with ICAO and the company IBM, IOM helps oversee an "Identity Management" program[48] that covers travel documents and related issuance systems,[49] as well as travel document inspection.[50]

As part of this Identity Management program, IOM manages a Personal Identification and Registration System (PIRS) which facilitates the collection, processing and storage of traveler information, including biometric

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authorities with information relating to the individual passenger on arrival or departure of a ship." Turak, *supra* note 39, at 35.

[43] International Civil Aviation Organization [I.C.A.O.], *Why ICAO Selected the Face as Primary Biometric Identifier Specified to ePassports*, MRTD Report (2007).

[44] 2 International Civil Aviation Organization [I.C.A.O.], Machine Readable Travel Documents, DOC 9303 (Pt 1, 6th ed, 2006).

[45] Face photographs are used in passports, visas, driver licences or other identification documents. International Civil Aviation Organization [I.C.A.O.], *supra* note 43.

[46] http://www.iom.int/cms/about-iom.

[47] IOM's Immigration & Border Management Programs, http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/01-IOM-IBM-FACT-SHEET-IBM-Programme-general-overview.pdf (last visited Nov. 27, 2013).

[48] IOM's Identity Management, http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/06-IOM-IBM-FACT-SHEET-Identity-management.pdf (last visited Nov. 27, 2013).

[49] Such as visa application systems and language assistance, among others.

[50] OM's Identity Management, http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/06-IOM-IBM-FACT-SHEET-Identity-management.pdf (last visited Nov. 27, 2013).

data.[51] The PIRS can also be linked to Interpol's Lost Travel Documents Database via the service's I-24/7 Global Communication System.

As part of the Immigration and Border Management program, IOM operates the Immigration and Visa Support Solution project (IVSS)[52] which includes different types of support solutions.[53]

e) *Global Interoperability Challenges*. The global interoperability of biometric systems depends on uniform enrolment, data processing, personalization, issuance, storage, reading and image verification. This said, there are currently three classes of fingerprint systems: finger image-based systems, finger minutiae-based systems and finger pattern-based systems.[54] Systems for iris biometrics emerged based on the methodology of an ICAO-recognized technology vendor.[55]

These multiple fingerprint software systems are functional in the short-term, as biometric information stored on biometric passports are matched against information stored in national databases and verified on a citizen's return. In the long-term, however, this lack of uniformity may pose a challenge to global interoperability.

Longer-term challenges are posed by face, fingerprint and iris recognition systems, including:

1) Appearance, including their facial characteristic, hair style and accessories; as well as image capture conditions, such as the camera's field of view, focus and shutter speed, depth of field, background and lighting.[56] Many countries issue biometric passports under their own guidelines for producing and submitting face photographs following ICAO

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[51] IOM's Border Management Information Systems, http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/08-IOM-IBM-FACT-SHEET-Border-Migration-Information-System-BMIS.pdf (last visited Nov. 27, 2013).

[52] IOM's Immigration and Visa Support Solutions, http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/ibm/11-IOM-IBM-FACT-SHEET-Immigration-and-Visa-Support-Solutions-IVSS.pdf (last visited Nov. 27, 2013).

[53] These types of solutions are: "1) country information; 2) logistical assistance to support visa processing; 3) skills and language testing facilitation; 4) visa application assistance; 5) travel document handling; 6) visa application centers; 7) interview facilitation; 8) self-payer health assessments; 9) DNA services; 10) biometrics enrolment; 11) document integrity and verification; 12) self-payer travel assistance; 13) web-based visa appointment scheduling and visa issuance systems; 14) border management information systems; 15) information services and 16) family tracing." IOM's Immigration and Visa Support Solutions, *supra* note 52.

[54] Early on, the systems were not interoperable and as a result, three systems are currently used for fingerprint interoperability: image data storage, minutiae data storage and pattern data storage.

[55] International Civil Aviation Organization [I.C.A.O.], *supra* note 43.

[56] Face Image Data was approved as an international standard by ISO/IECJTC1 SC37 in 2005. This standard defines a data format for digital face images to allow interoperability among face image processing systems.

requirements:[57] this occurs with Australia,[58] Mexico,[59] New Zealand[60] and Spain.[61] ICAO's illustrative guidelines for Machine Readable Travel Document (MRTD) were updated in October 2013.

2) Image quality such as resolution, contrast and brightness affect the accuracy of face and iris recognition. Other factors include subject positioning, pose and expression, lighting uniformity and, in the case of facial recognition, the use of eyeglasses or makeup. Another major consideration is the time difference between compared photographs (iris recognition is considered overly intrusive).[62] During the enrolment process, an expert can determine whether the person suffers from common medical conditions like diabetes, arteriosclerosis or hypertension. The system can produce a false acceptance, false match or false rejection for a person whose iris has already been recorded but has been diagnosed with glaucoma.[63]
3) Fingerprints can also be sometimes hard to identify. Individuals who handle chemical products, for example, often experience false rejection because fingerprint quality is degraded by exposure to chemicals. Other subjects with imprecise fingerprints include the elderly and children under the age of six.

In 2004, the Non-Government Organization (NGO) Privacy International sent an open letter to the ICAO, signed by many other NGOs from around the world about the dangers of biometric passports. In this letter, the NGOs expressed their concern regarding the negative effects of the use of biometric travel documents on privacy and civil liberties. Their biggest concern was the creation of national centralized biometric databases.[64]

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[57] ICAO has consequently designed illustrative guidelines for portraits in a Machine Readable Travel Document (MRTD) for the next generation of electronic passports, the so-called biometric Passports. 2 International Civil Aviation Organization [I.C.A.O.], *supra* note 44.

[58] Australia general photo guidelines, https://www.passports.gov.au/images/photo_guidelines.pdf#zoom=100 (last visited Nov. 27, 2013).

[59] Mexico photo guidelines, http://www.sre.gob.mx/index.php/primera-vez/252 (last visited Nov. 27, 2013).

[60] New Zealand photo guidelines, http://www.passports.govt.nz/Passport-photos---adults (last visited Nov. 27, 2013).

[61] Spain photo guidelines, http://www.interior.gob.es/pasaporte-29/clases-y-requisitos-183?locale=es (last visited Nov. 27, 2013).

[62] ISO/IEC 19794-5:2005, Information Technology — Biometric Data Interchange Formats —Part 5: Face Image Data— AMENDMENT 1: conditions for taking photographs for face image data (2007). The International Organization for Standardization/International Electro-technical Commission (ISO/IEC) 19794-5 Biometric Data Interchange Formats defines a standard data format for digital face images to allow interoperability among face recognition systems, government agencies, and other creators and users of face images.

[63] Irma Van Der Ploeg, *Biometrics and Privacy: A Note on the Politics of Theorizing Technology*, 6 INFORMATION, COMMUNICATION & SOCIETY 85-104 (2003).

[64] "Privacy International was founded in 1990 and was the first organization to campaign

f) *Regional Organizations*. Aside from the ICAO and IOM, other major regional organizations that implement biometric systems for immigration purposes include the European Union (EU) and Asia Pacific Economic Cooperation (APEC).

Although immigration policies may never achieve uniformity on a worldwide basis (*i.e.*, too many diverging national interests), policy harmonization on a regional basis is becoming more common. In Europe, for example, the Schengen Information System (SIS) and EURODAC system[65] permits any visa issued by a member nation to be valid in any Schengen-zone country.[66] In the Asia-Pacific context, the APEC created a Business Travel Card (ABTC) that facilitates short-term entry to member countries (referred to as "economies").[67] These policies exist because member nations clearly benefit from the movement of travelers and workers through their respective territories.

Each of these regional organizations exerts influence over the interactions between the four countries examined in this paper. Australia, Mexico and New Zealand are APEC members, and interact with the EU —of which Spain is member. These interactions are significant when migration data is exchanged with these regional organizations.

g) *Introduction of Biometric Systems: Regional Organizations*. For the four countries mentioned, three main biometric systems have been identified: two in Europe and one in Asia-Pacific. These three examples are discussed below, including standards for interoperability, security and accuracy designed by ICAO.

In 2009 at the APEC Business Mobility Group, Australia submitted as part of the Proposed Business Mobility Group Goals for 2009 that: "[t]he document 'A guide to Biometric Technology in Machine Readable Travel Documents' has already been recognized as a unique and valuable document by ICAO and the ISO, and also by the IOM, which now has permission from APEC to translate the document into the other languages to assist other governments adopt e-Passports."

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at an international level privacy issues." Gus Hosein, *Privacy International was founded in 1990 and was the first organization to campaign at an international level privacy issues,* Privacy International (30 March 2004), *available at* https://www.privacyinternational.org/blog/open-letter-to-un-agency-on-dangers-of-biometric-passport-standard.

[65] Council Regulation No. 2725/2000, Concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, 2000 O. J. (L 316) 1-10.

[66] The Schengen zone includes 26 countries: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovenia, Slovakia, Spain, Sweden, and Switzerland, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last visited Nov. 27, 2013).

[67] Asia Pacific Economic Cooperation, http://www.apec.org/About-Us/About-APEC/Business-Resources/APEC-Business-Travel-Card.aspx (last visited Nov. 27, 2013).

— *EURODAC system*:[68] In 2000, the EURODAC system was linked to the "Dublin Convention" in order to establish a centralized European database of non-European Union nationals apprehended while illegally crossing borders into EU territory. This system includes fingerprints.[69]

Each Member State has national access points and works directly with individual national administrations. If a fingerprint matches one stored in the database, the asylum seeker is redirected to the Member State where his/her fingerprints were originally collected and stored.[70]

— *Schengen Information System*[71] *(SIS II)*: Schengen member States utilize the SIS II to monitor border crossings; this includes a "list" of people who have committed an offence, are filed as "missing" or are under observation.

Member States feed the system with information through national networks which are connected to a central system and supplemented by the SIRENE network[72] made up of representatives of the national and local police, customs agencies and the judiciary.[73]

— *APEC Business Travel Card (ABTC)*: This card is used to facilitate information exchange and enhance business travel. It relays information regarding lost and stolen travel documents to the International Criminal and Police Organization (ICPO-INTERPOL) database.[74]

Each individual Member State issues the Business Travel Card in compliance with card eligibility criteria, service requirements and manufacturing standards.[75] Although the system relies on passports,

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[68] Council Regulation No. 2725/2000, *supr*a note 65.

[69] EURODAC Automated Fingerprint Identification System (AFIS) was created by the company Steria.

[70] It is important to consider, that sometimes asylum seekers apply to different countries at the same time.

[71] Summaries of European Union Legislation, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm (last visited Nov. 27, 2013).

[72] SIRENE network is a system used by police to exchange information in compliance with the Schengen Convention for the purposes of preventing and detecting criminal offences in Schengen zone by SIS II.

[73] International Organization for Migration [I.O.M.], International Terrorism and Migration, Background Paper, Immigration and National Security 16 (June 2003). This system was reviewed after the "Prüm Convention." Summaries of European Union Legislation, *supra* note 73. The company Steria is leading the second generation of SIS II through increased collection, storage and exchange capabilities.

[74] Business Mobility Group, http://www.businessmobility.org/travel/index.asp (last visited Nov. 27, 2013).

[75] Asia Pacific Economic Cooperation [A.P.E.C.], Guiding Principles for PKI-Based Approaches to Electronic Authentication (2005), *available at* http://www.apec.org/Meeting-Papers/Ministerial-Statements/Telecommunications-and-Information/2005_tel/annex_d.aspx.

travelers from APEC member states do not need visas. Nonetheless, the TBIF requires clearance in advance and requesting card production. The TBIF is encrypted during transfer via a centralized database.

In sum, regional organizations have not only deployed centralized biometric systems but have also promoted TBIF for immigration control. All three regional biometric systems currently use ICAO and APEC technical security standards. The fact that these systems all rely on centralized databases, however, leaves them open to unauthorized access, hacking and other privacy risks.

V. Immigration Policy Framework in the Four Countries Studied

This section identifies the inclusion of biometric systems in immigration policy framework. This study revealed legal problems, limitations and challenges in TBIF. In Mexico, three governmental agencies (Interior Ministry through the National Institute of Migration (INM))[76] manage arrivals, departures and settlement of migrants. The issue of passports and protection of Mexican human rights overseas is handled by the Foreign Ministry. In Spain, two government ministries[77] also manage arrivals, departures and settlement of migrants. Despite these similarities —attributed to the Civil Law tradition shared by both nations— there is one major difference: in Mexico, the Interior Ministry is responsible for the nation's internal security.[78] Among the two Common Law countries in the study, New Zealand has four authorities involved in immigration[79] whereas Australia[80] has only one. The following figure shows immigration policy in the four countries.

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[76] National Institute of Migration of Mexico, http://www.inm.gob.mx/index.php/page/pagina_principal/en.html (last visited Nov. 28, 2013).

[77] General Minister for Migration and Immigration, http://extranjeros.mtin.es/es/Organizacion/ (last visited Nov. 28, 2013).

[78] The flow of undocumented people from Mexico, Central and South America across the northern border to the United States continues while Mexico's southern border is increasingly used by citizens from Central and South America as their way into the United States. "Some 200,000 Central Americans attempt to irregularly enter the US via Mexico's southern border. Although 70 per cent of them are detained by Mexican migration authorities and returned to their countries of origin, an estimated 60,000–70,000 eventually reach the US or remain in Mexico." International Civil Aviation Organization, Migration Initiatives Appeal 2010 (2010), *available at* http://publications.iom.int/bookstore/free/Migration_Initiatives_2010.pdf.

[79] New Zealand immigration area of responsibility, http://www.dol.govt.nz/about/responsibilities/ (last visited Nov. 28, 2013).

[80] Department of Immigration and Citizenship (DIAC), http://www.immi.gov.au/ (last visited Nov. 28, 2013).

Figure 1. Immigration Policy

	Australia	*Mexico*	*New Zealand*	*Spain*
Authority	DIAC	Ministry of Interior National, Institute of Migration (INM) and Ministry of International Affairs	Department of Labour, Department of Internal Affairs (Citizenship Brand), and Electoral Enrolment Centre and Department of Internal Affairs (Births, Deaths and Marriages)	Minister of Labour and Migration by the Secretary of Migration and Immigration
Legislation	Migration Act 1995	Migration Law General Population Law Refugees and Complementary Protection Law	Immigration Act 2009	The 2/2009 Organic Law Royal Decree 1161/2009
Reform/amendments Immigration Policy (collection and process of biometrics)	yes yes	yes yes	No yes	yes yes
Biometric passports	yes	yes	yes	yes
Biometric visas	yes	yes	yes	yes
Other control strategies deployed	yes	yes	yes	yes

Source: Legislation of the four countries study, *Migration Act 1995* (Australia), *Migration Law*, *General Population Law*, *Refugees and Complementary Protection Law* (Mexico), *Immigration Act 2009* (New Zealand), *The 2/2009 Organic Law* and *Royal Decree 1161/2009* (Spain).

Immigration policy and the legal framework in each country also differ. Both Australia and New Zealand have just one law[81] dealing with immigra-

[81] Migration Act 1995, 1995 S.N.Z; *see also* Immigration Act 2009, 2009 S.N.Z. No. 51.

tion, whereas Mexico[82] and Spain[83] rely on several pieces of legislation. Australia, Mexico and Spain have recently been active in modifying or reforming their immigration frameworks.

All four countries have actively developed policies that govern the collection and processing of biometric information. Although all four nations issue biometric passports, implementation varies. As a member of the EU, Spain follows EU regulations, whereas Australia and New Zealand —as members of the Five Nations Passport Group— adhere to the common consensus on biometric passports technology.[84] Only Mexico is unilaterally responsible for its internal border control strategies.[85]

In regard to biometric info collected for visas, these four countries differ not only in terms of visa categories but also which nations they deem eligible for visas. Despite these differences, however, all four share common criteria for biometric data collection for refugees. Figure 2 illustrates the asymmetries of visa categories.

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[82] Ley de Migración [L.M.] [Migration Law], *as amended*, Diario Oficial de la Federación [D.O.], 25 de Mayo de 2011 (Mex.); Ley General de Población [L.G.P.] [General Population Law], *as amended*, Diario Oficial de la Federación [D.O.], 7 de Enero de 1974 (Mex.) and Ley sobre Refugiados y Protección Complementaria [L.R.P.C.] [Refugees and Complementary Protection Law], *as amended*, Diario Oficial de la Federación [D.O.], 27 de Enero de 2011 (Mex.).

[83] Organic Law 2/2009 amending Organic Law 4/200 on the Rights and Liberties for Foreigners in Spain and their Social Integration (B.O.E. 2009, 19949); Royal Decree on the Entry, Free Movement and Residence in Spain of Citizens of the Member States of the European Union and Other States Party to the Agreement on the European Economic Area (B.O.E. 2007, 4184).

[84] The Five Nations Passport Conference is a forum between the passport issuing authorities in Australia, Canada, New Zealand, the United Kingdom and the United States to "share best practices and discuss innovations related to the development of passport policies, products and practices." *Annual Report 2010-2011 of the Department of Immigration and Citizenship*, Australia Government (Oct. 14, 2011).

[85] A programme called the Security and Prosperity Partnership (SPP) was adopted by Mexico, Canada and the United States. Its spheres of action involved the movement of people and it discussed a number of issues not covered by the North American Trade Agreement (NAFTA), like border security and antiterrorism measures, energy sector integration, environmental protection, emergency preparedness and safety standards, among others. The principle of shared responsibility for immigration among sending and receiving countries was at the heart of ongoing reflection in Mexico. However, in 2009, the SPP was abandoned by the U.S. government and NAFTA was renegotiated. At the same time, the U.S. government implemented the Global Online Enrolment System (GOES). This includes the FAST Driver Programme between the United States and Canada or the United States and Mexico. FAST is the trusted traveller programme for commercial truck drivers along Canadian and Mexican land borders. FAST allows for the expedited release of approved commercial truck drivers making fully-qualified FAST trips between the United States and either Canada or Mexico.

Figure 2. Four Countries Type of Visa

Types of visa	*Australia*	*Mexico*	*New Zealand*	*Spain*
Permanent	6	3	2	2
Temporary	6	7	4	7

Source: Legislation of the four countries study, *Migration Act 1995* (Australia), *Migration Law*, *General Population Law*, *Refugees and Complementary Protection Law* (Mexico), *Immigration Act 2009* (New Zealand), *The 2/2009 Organic Law* and *Royal Decree 1161/2009* (Spain).

Given these asymmetries, it is difficult if not impossible to make a direct comparison between the visa category terms used by the four countries. Despite being Civil Law countries —as mentioned above— Mexico and Spain do not use the same terminology. Mexico employs "visitors and residents" whereas Spain utilizes "stays (estancias) and residence." Australia and New Zealand also differ; the former uses "permanent and temporary" while New Zealand employs "residence class and temporary entry class."

The differences in visa categories and subcategories used by each nation is astonishing. Australia uses six permanent visa categories and six temporary visa categories, with both categories broken into approximately 140 subclasses —each with their own eligibility criteria. New Zealand's residence class visa has two subcategories, while its temporary entry class visa has four subcategories (both subcategories have additional eligibility criteria). In Mexico, there are seven types of visitor visas and three types of resident visas. Spain uses seven types of visitor visas (*estancia*) and two types of residence visas.[86]

Despite the above, all four nations use common, though not uniform, standards for biometric border control.

1) *The Implementation of Biometrics in Immigration as Policy.* This section point out the inclusion of biometrics in the four countries' immigration policy.

In general, biometric immigration control systems are used to monitor incoming visitors and their movement information before their arrivals, departures and settlement of migrants. Biometric systems provide identification and verification by matching TBIF.[87] The following figure shows the biometric systems implemented by each nation:

[86] Minister of Immigration, New Zealand Government, Immigration Act Review (April 2006); *Annual Report 2008-2009 of the Department of Immigration and Citizenship*, Australia Government (Oct. 16, 2009); Ley de Migración [L.M.] [Migration Law], *as amended*, Diario Oficial de la Federación [D.O.], 25 de Mayo de 2011 (Mex.); Organic Law 2/2009 amending Organic Law 4/200 on the Rights and Liberties for Foreigners in Spain and their Social Integration (B.O.E. 2009, 19949).

[87] *Annual Report 2010-2011 of the Department of Immigration and Citizenship*, Australia Government (Oct. 14, 2011); Acuerdo por el que se expide el Manual de Criterios y Trámites Migratorios del Instituto Nacional de Migración [Criteria and Migratory Proceedings Manual of the National Institute of Migration of the Minister of Interior of 21 September 2010], Diario Oficial de la Federación [D.O.], 29 de Enero 2010 (Mex.)*;* New IT System for Immigration

Figure 3. Biometric Systems in the Four Countries Study

Countries	Information and Biometric ID Systems
Australia	SmartGates Business Travel Card (APEC) Movement Alert List (MAL)
Mexico	Foreigners and Refugees List Business Travel Card (APEC) Consular Management Integrated System (ACIS) Integrated Migration Operations (SIOM)
New Zealand	SmartGates Business Travel Card (APEC) Movement Alert List (MAL)
Spain	Eurodec Schengen List Visa Information System (VIS)

Source: Legislation of the four countries study, *Migration Act 1995* (Australia), *Migration Law*, *General Population Law*, *Refugees and Complementary Protection Law* (Mexico), *Immigration Act 2009* (New Zealand), *The 2/2009 Organic Law* and *Royal Decree 1161/2009* (Spain).

In sum, Australia's system permits cross-checking among diverse databases, including those for Immigration, Passports, Tax and Social Services departments. Provisions in Australia's migration legislation authorize information sharing among agencies. Mexico's electronic system allows cross-checking of registered foreigners and refugees who hold valid visas and wish to change their status inside the country. Mexican legislation also contains provisions for APEC Business Travel Card data exchange. New Zealand's immigration legislation authorizes the collection, storage and use of specific biometric information[88] for verification purposes. It also contains provisions which permit the sharing of personal information —including biometric data— with national and international agencies. Foreign national's personal data may also be shared with other New Zealand agencies to check their eligibility for publicly-funded services. Spain uses the EURODAC, Schengen System (SIS II) and Visa Information System (VIS).

2) *Current Biometric Systems and Passports.* This section describes the current biometric border control systems deployed in the four countries under study. It provides the actual collection, storage and TBIF during the border control process.

New Zealand http://www.immigration.govt.nz/migrant/general/generalinformation/newitsystems (last visited Nov. 28, 2013); Organisation for Economic Co-operation and Development [O.E.C.D.], *Recent Changes in Migration Movements and Policies: Country Notes* (2010); see also International Organization for Migration [I.O.M.], Migration Initiatives Appeal 2010 (2010).

[88] Fingerprints, iris and facial characteristics.

The biometric border control systems currently deployed reveals a dynamic interaction between governments, citizens and the biometric industry. For instance, the enormous information flow required by travelers of Australia and New Zealand have forced both countries to collaborate closely and utilize a fast track process called SmartGate.[89] Australia and New Zealand have also introduced an online immigration system for visa applications. The Australian version is called the Visa Entitlement Verification Online System;[90] whereas in New Zealand it is called the Immigration Global Management System.[91]

In contrast, Spain employs three regional systems: EURODAC, Schengen System (SIS II) and Visa Information System (VIS). The first two are discussed above; the VIS is a centralized biometric database of national systems that facilitates access by Schengen Member States.[92]

Mexico currently employs three biometric databases for: (a) refugees; (b) foreign visa holders who wish to change their immigration status; and (c) temporary and/or definitive APEC Business Travel Card holders. These biometric databases are operated by the National Institute of Migration (INM) and interconnected with the Consular Management Integrated System (ACIS) verifying migration real-time alerts at the time issuing visas the Electronic System for Migration Procedures (SETRAM).[93] The overall system is known as the Integrated Migration Operations (SIOM).[94]

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[89] This programme is a kiosk that checks whether Australian and New Zealand travellers are eligible for self-processing and the gate performs the identity check and clearance using Australian and New Zealand biometric passports with Basic Access Control (BAC). SmartGate is available at Sydney, Adelaide, Brisbane, Cairns, Melbourne, Perth, Gold Coast and Darwin international airports. In New Zealand, the SmartGate was implemented at Auckland International Airport in 2009 for arriving passengers from Australia and New Zealand. It is also operational for departing passengers from Australia and New Zealand at the Auckland, Wellington and Christchurch international airports. Australian Customs and Border Protection Service, SmartGate, http://www.customs.gov.au/site/page5552.asp (last visited Nov. 28, 2013); Customs Service website, http://www.customs.govt.nz/features/bordersector/transtasmantravel/Pages/default.aspx (last visited Nov. 28, 2013).

[90] Australia, Visa Entitlement Verification Online System, http://www.immi.gov.au/Services/Pages/immiaccount.aspx (last visited Nov. 28, 2013).

[91] New IT System for Immigration New Zealand, http://www.immigration.govt.nz/migrant/general/generalinformation/newitsystems/ (last visited Nov. 28, 2013).

[92] Each visa application contains 10 fingerprints and a digital photo. Schengen Member States and Visa Information System, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm (last visited Nov. 28, 2013).

[93] *Action Lines in Sector Programs Accountability, Transparency and Fighting Corruption Committed in 2009. Final Report*, National Institute of Migration, Mexican Government (2008-2012), *available at* http://www.inm.gob.mx/static/transparencia/PND/Formatos_A_y_B.pdf.

[94] The INM also launched the interconnection of the Integrated Migration Operations ("SIOM") with the INM's Electronic Immigration Procedures ("SETRAM"), the Consular Management Integrated System ("ACIS") of the Ministry of Foreign Affairs ("SRE"). This interconnection allows Mexican consulates to automatically verify migration real-time alerts

Biometric passports are a major component of biometric immigration systems, must generally be submitted by travelers to a border control officer. The border control officer will scanned the data page of the biometric passport and checked security features through the border control system while the border control officer makes some questions to the traveler. The border control system with facial recognition program reads the contactless chip from the biometric passport and checks data authenticity.

Then, the border control officer takes a photograph (face biometric verification)[95] and the border control systems validates the photograph taken in that moment with the photograph template stored in the biometric passport and the program runs a facial biometric verification through checking national blacklists and Interpol's databases.[96] This final step, the checking national and international blacklists, is a subsequent aggregated use of immigration information that may pose some challenges, such as false identification of a traveler.

Based on our analysis, information collected by the border control system is stored automatically in their national immigration databases. Each data point collected has a specific purpose.[97] We found that biometric passports and visas, have been used as identity-based filters and *not* to strengthen border control. The immigration information has a subsequent aggregated use within integrated data systems for cross-checking within a number of national agencies and international databases for national security and defense.[98] This subsequent aggregated use shall be voluntary or inform to the

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at visa-issue time in order to assess the issuance of the type of visa requested. The INM also informs the SRE of the permits granted to foreigners to obtain their visas at the corresponding consulates. Instituto Nacional de Migración, "Consolida INM simplificación de trámites migratorios" (Press Release, 7 September 2011), http://www.inm.gob.mx/index.php/blog/show/Consolida-INM-simplificaci%C3%B3n-de-tr%C3%A1mites-migratorios.html (last visited Nov. 29, 2013).

[95] Sometimes fingerprints are also requested.

[96] Interview with David Philp, General Manager-Passport, Department of Internal Affairs, in Wellington (Oct. 25 2011); interview with Francisco Villanueva Díez, Deputy General Director of Information Systems and Communications for Security Matters, Spanish Minister of Interior, in Madrid (Nov. 8 2011); interview with Alejandro del Conde, Secretary of Data Protection, Federal Access Information and Data Protection Institute, in Mexico City (Nov. 16 2011); interview with Jeremy Johnson, Director National Biometric and Child Protection Services, CrimTrac Agency, in Canberra (Oct. 18 2011); interview with Alex Webling, Policy Director, Biometrics and Identity, Attorney General's Department, in Canberra (Oct. 20 2011). This component of the research project received approval from the University of Tasmania Human Research Ethics Committee. Approval Ethics Ref: H0012013 of 29/08/2011.

[97] Pursuant to the Data Protection Principles theory, "the collection of information is necessary for a specific purpose." Data Protection and Privacy Jurisdictional Comparison, *supra* note 11.

[98] The subsequent aggregated use is prohibit in Data Protection Principles where "the personal information collected shall not be used for a purpose other than that for which it was collected." *Id.*

traveler the process of cross-checking personal information. In Australia and New Zealand, the TBIF for immigration control is generally realized by data exchange requests to specific agencies; in contrast, both Spain and Mexico employ systematic data sharing. As these procedures affect travelers' privacy and data protection rights, they should be properly reassessed and balanced based on law.

Why? Because too little public debate has focused on (a) the risks of centralized biometric databases for immigration purposes; or (b) the ways in which this information is used (*e.g.*, shared or exchanged) in relation to international criminal databases. This absence of public scrutiny, along with a lack of statistics regarding access, transparency about the difficulties encountered in biometric information processing and the way TBIF is implemented by countries raise several legal concerns. These issues relate not only to civil liberties, related to privacy and issues of intrusiveness, disclosure, purpose, misuse and consent, among others. It should be noted that there is, for example, asymmetry in the exercise of the right to access to personal information because this affects personal data protection nationally and internationally. The data protection legal framework in the four countries examined establish specific procedures for the right to access personal information, however, internationally these procedures are different.[99] These data protection legal framework also establishes restrictions regarding national security issues and these restrictions prevent Data Protection Commissioners from being able to properly monitor and supervise these databases.

Nationally, two scenarios surface with the exercise of the right to access to personal information: (1) certain data protection regimes set a direct procedure to be followed by national agencies when requesting access to personal information. In this case, citizens exercise their right by making their requests directly to the authority or agency; (2) data protection regimes set an indirect procedure for requests through a privacy commissioner, an ombudsman or a specific body. This situation means that citizens cannot directly access their information because the request is presented to the privacy commissioner, who then proceeds to request the information from the corresponding agency on the citizen's behalf.

c) *Commonly-Deployed International Immigration Control Strategies*. Deployment of biometric systems and TBIF for immigration purposes worldwide has intensified. Internationally, the implementation of biometric systems in immigration policies was marked by combined international cooperation and the facilitation of cross-border information.

There are three major areas in which these countries revealed biometric control strategies "as a trade-off for faster immigration processing, passengers will have to accept a system which has the potential to generate a vast

[99] International organisations set their own procedure or rules to access personal information.

amount of international traffic in their personal data."[100] These three common areas are:

— Transborder information flow, which includes passenger pre-inspection at departing country and advance passenger information before arrival.[101]
— Civil Aviation Security, which includes Immigration Liaison Officers (ILOs) working together with national and international law enforcement agencies to prevent irregular migration and help close down criminal operations;[102] and Airline Liaison Officers (ALOs) who are immigration inspection officers working together with airline staff to prevent individuals from traveling with fraudulent documents.[103]
— Carrier Sanctions within Civil Aviation Law. This national legislation aims to make carriers co-liable for transporting improperly documented travelers with fake biometric passports or without visas.[104] In Australia and New Zealand these sanctions form an integral part of pre-boarding activities for international flights.[105]

With their long sea borders, proximity to one other and relative distance from the rest of the world, Australia and New Zealand have implemented more extensive offshore clearance processes than both Mexico and Spain. In sum, each nation adopts the policies, structures and laws best suited to its own circumstances and needs.

VI. Conclusions

This article explored TBIF in the context of immigration mainly because immigration represents an extensive and growing area within TBIF. The pa-

[100] S. Davies, *The Brave New World of Biometric Identification*, 2 Privacy Law and Policy Reporter 30 (1995).

[101] Involves an agreement between countries, as well as between airlines and governments, permitting passenger manifests to be sent by the airlines ahead of flights to the immigration authorities of the country of destination for pre-checking before arrival. International Organization for Migration [I.O.M.], *supra* note 73, at 16.

[102] *Id.*; Civil Aviation Legislation (Mutual recognition with New Zealand) Act 2006, 2006 S.N.Z No. 102; Ley de Aviación Civil [L.A.C.] [Federal Civil Aviation Law], *as amended,* Diario Oficial de la Federación [D.O.F.] 12 de Mayo de 1996 (Mex.); Civil Aviation Act 1990, 1990 S.N.Z. No. 104. The most recent version of New Zealand Act excludes amendments that are not yet in force from 1992, 2007 and 2013. Law 21/2003 of security aviation (B.O.E. 2003, 13616).

[103] *Id.*

[104] *Id.*

[105] Australia and New Zealand link visa issuance abroad with entry clearance at the port of entry and departure, monitoring at the port of exit. International Organization for Migration [I.O.M.], *supra* note 73, at 16.

per considered short and long term challenges related to TBIF among the four countries examined and their interaction with international organizations. This debate should not be confined to the technical aspects of the types of data collected and processed in Australia, Mexico, New Zealand and Spain. Any credible discussion must involve ways to increase public engagement, transparency and scrutiny of the deployment of biometric immigration control systems.

The absence of debate regarding current deployment of biometric databases is exacerbated by a lack of international laws and regulations. Organization such as ICAO and IOM —as well as regional organizations such as APEC and EU— have taken the lead in establishing specifications and recommendations for the use of biometric info in travel documents and immigration control systems. Although these organizations have made considerable efforts to create a framework for the deployment of biometric systems and TBIF, widespread success requires the active participation of many diverse sectors, including government, industry and civil society. This is turn necessitates (a) an inclusive strategy to increase public debate about technical (security) risks and limitations on civil liberties; (b) promotion of privacy and data protection rights; and (c) transparency and accountability regarding the management of these databases.

Although the field of biometrics is not new, the automated systems that facilitate the collection and processing of huge volumes of immigration-related information *is*. The proliferation of these systems formed the basis for our four-nation comparative study, which revealed asymmetries and convergences within TBIF in immigration context. All four countries issue biometric passports and employ biometric systems to issue visas; in each nation, electronic Border Control Systems are operated by border control officers. Given these realities, many questions arise, including the efficacy of biometric border control processes; transparency about who can access immigration information; the reliability of immigration information (data integrity); clarification about the risks of data protection in third countries; assessment of potential misclassifications of individuals' data as a result of exchange of information; data storage restrictions; and subsequent use of immigration data through dissimilar system interoperability at both national and international levels. Finally, and in legal terms the most critical area, how TBIF affects individual privacy and data protection rights.

The current interactions of TBIF in the context of immigration information flow requires a common and harmonized framework with specific rules governing the subsequent use of biometric data, cross-border rights and cross-border challenges. In addition, each country should have the capability of addressing these legal challenges by balancing public interests (*e.g.*, national security and defense) with individual privacy and data protection rights. A strengthened common legal privacy and data protection framework is needed to protect individual rights, as well as to facilitate the TBIF in immigration.

The amount of biometric information collected, stored, retrieved and exchanged will progressively increase. Therefore, TBIF must be seen as an increasingly important part of a sensitive legal privacy or data protection regime that requires a high level response in national legal frameworks. Legislators and policy makers must establish specific rules for governing TBIF. Revised legal frameworks should be publicly available and written in a way that all citizens can understand the implications not only of the deployment of biometric systems, but also, of their right to access their own information, the subsequent use of their biometric information, updates made to their personal information and, critically, about transborder exchanges.

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REGULATING MEXICAN BIOBANKS FOR HUMAN BIOMEDICAL RESEARCH: WHAT CAN BE LEARNED FROM THE EUROPEAN EXPERIENCE?

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Abstract. *Biobanking presents significant governance challenges. This is especially evident in Mexico, where the legal framework has not kept up with significant industry expansion. Twenty years ago, Europe was in a similar position. More recently, Europe has developed a comprehensive framework for addressing biobank expansion within ever-growing scientific and biomedical research communities. Based on this experience, we can draw many lessons, including those involving the implementation of laws, procedures and stakeholders' consensus to ethically maximize the potential of samples. Mexican biobanking raises many issues, requiring solutions that are sensitive to its own particular needs. This article analyses the flaws of current biobanking regulations in Mexico by drawing comparisons with Europe. It pays special attention to informed consent; sample/data sharing systems; ethical tissue treatment and classification; governance models; best practices and the role of ethics committees. It argues that several European provisions regarding data protection and sharing can serve as guidelines for international research collaboration currently taking place between Mexico and Europe.*

Key Words: *Bioethics, biobanking, biobanks, governance, regulation, data protection, informed consent, genetics, genomic regulation, data sharing.*

Resumen. *Los biobancos presentan grandes retos de reglamentación. Lo anterior es evidente en México, donde la legislación no se encuentra a la par de la creciente expansión de los biobancos. Hace veinte años, Europa se encontraba en la misma situación, pero actualmente ha desarrollado instrumentos capaces de atender tal expansión en el marco del aumento de investigación científica y biomédica. Parece haber numerosas lecciones por aprender de Europa: la materialización de leyes, procedimientos específicos y el consenso de actores para maximizar el potencial de muestras biológicas éticamente. Los biobancos mexicanos implican problemas particulares y cualquier propuesta debe responder a*

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los mismos. Este artículo identifica deficiencias legislativas actuales sobre los biobancos en México y realiza comparaciones con Europa; prestando atención a temas como consentimiento informado, sistemas de intercambio de muestras e información asociada, tratamiento ético de tejido y su clasificación, modelos de reglamentación, mejores prácticas, y el rol de los comités de ética. La propuesta radica en qué instrumentos europeos son relevantes al establecer estándares de colaboración en investigación científica (la cual actualmente sucede entre México y Europa).

Palabras clave: *Bioética, biobancos, reglamentación, regulación, protección de datos genéticos, consentimiento informado, genética, derecho genómico, intercambio de datos genéticos.*

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I. The Emergence of Biobanking Regulations in Europe

Biobanks, which include collections of biological materials and associated data for present or future research projects, have emerged to pose a challenge both to individual nations and the international community. "With the rise of biomedical technosciences and the completion of the Human Genome Project, tissue collections worldwide have become increasingly important to scientific and economic interests."[1] As a result, most European countries have ratified basic guidelines on informed consent and research ethics, such as the Directive 2005/28/EC on human tissue and cells,[2] which requires that the donation of cells and/or tissues must be free and based on information provided to donors.[3] Current European guideline directives are compulsory prima facie, "binding as to the end to be achieved, but left to national governments to determine how to achieve the proposed ends."[4] In most European nations, international provisions become national law after a formal ratification process. Despite basic principles agreed to within a general European framework, each Member State is required to implement specific laws on the ethics of biological research material. The Council of Europe Conventions also influences EU Member States by recommendations, including the Convention on research of biological materials of human origin (2006).[5] The latter refers explicitly to biobanks and provides detailed advice regarding the "secondary use" of stored biological material and population biobanks.

1. *Tissue and Associated Data, the Core of Relevant Legislation*

Local apprehension regarding tissue for research purposes has given way to international concern, especially when "stakeholders have no assurance that the country of destination provides 'adequate protection' of their respective interests."[6] How these concerns are addressed and how safety can be assured are still significant issues for the ever-growing European research community.

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[1] M. Bister, *Discovering Informed Consent: A Case Study on the Practices of Informed Consent to Tissue Nonation in Austria*, in Human Tissue Research. A European Perspective on the Ethical and Legal Challenges 169 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press, 2011).

[2] Commission Directive 2005/28/EC, 2005 O.J. (L 91) laying down principles and detailed guidelines for good clinical practice regarding investigative medicinal products for human use, as well as requirements for authorization of the manufacturing or importation of such products.

[3] *Id.*

[4] Mark Taylor, *Regulating Personal Data in a Shared World: Limitations of the EU's Approach to Data Protection*, 4 Perspective 474 (2007).

[5] Council of Europe, Recommendation of the Committee of Ministers to Member States, Rec (2006) 4 on research on biological materials of human origin, OJ (2006).

[6] J. Bovenberg, *How to Achieve 'Free Movement of Tissue' in the EU Research Area*, in Human Tis-

The Directive 2004/23/EC[7] provides general guidance regarding the exchange of tissues and cells between Member States to ensure the traceability of tissues and cells, subject to quality and safety standards. Anonimization or coding procedures for biological materials —subject to authorization by sample donors— are used to reduce the potential risk for breach of participants' privacy. The European Data Protection Directive's approach is to not cover data processing when data does not relate to an identifiable individual.[8] When data has been made either anonymous or unidentifiable, however, this provision is subject to interpretation. "Under certain conditions two-way coded data can be considered as anonymous under the European data protection directive."[9]

2. *The Need for Informed Consent, a Booster for European Regulations*

Based on current research ethics within the European framework, each Member State adopts consent models based on their own specific needs. How this is achieved varies from country to country. Currently, no standard has been established for informed consent at the regional level. The diverse standards applied by each nation are in themselves subject to debate. A clear example of such variation consists of the different procedures following the adopted informed consent model. Procedures may range from "either broader, initial consent procedures or multiple requests for consent over time."[10]

The notable differences in informed consent regulations for biobanks —often in relation to cases of abuse— are frequently the result of national changes in medical consent. One example is the United Kingdom, where "the journey to the Human Tissue Act 2004 was driven by an ethical and legal failure to regulate the medical profession, which in turn acted in a way that society found deeply offensive."[11] This is a relevant point showing how common it is that solely medical regulations tend to evolve into more inclusive rules including research and therefore, biobanks. Currently, The Human

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sue Research. A European Perspective on the Ethical and Legal Challenges 13 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press, 2011).

[7] Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, 2004 OJ (L 102).

[8] Taylor, *supra* note 4.

[9] Evert-Ben Van Veen, *Obstacles to European Research Projects with Data and Tissue: Solutions and Further Challenges,* 44 Elsevier 1438 (2008).

[10] David M. Secko et al., *Informed Consent in Biobank Research: A Deliberative Approach to the Debate*, 68 Social Science & Medicine 782 (2009).

[11] José Miola, *Law, Ethics, and Human Tissue Research: Integration or Competition?*, in Human Tissue Research. A European Perspective on the Ethical and Legal Challenges 13 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press, 2011) 79.

Tissue Act of 2004 requires proper consent for storage and use for most purposes, including research.

II. Principle Biobanking Related Regulations in Mexico

The main regulation for human research in Mexico, the General Health Law, sets forth basic principles regarding informed consent. Informed consent has officially been regulated by the General Health Law (LGS)[12] and the Rules of the LGS.[13] Informed consent has also been regulated at the institutional level. One example is the rules governing IMSS health services.[14] Current health regulations require signed and written informed consent in cases such as hospitalization of psychiatric patients, surgical intervention, fertility treatment and participation in research projects. Also included are diagnostic procedures involving physical, emotional or moral risk; invasive procedures; procedures that produce physical or emotional pain; and socially invasive procedures that can provoke exclusion or stigmatization. These principles are primarily based on medical grounds. For example, the provision on consent withdrawal protects patients from discontinued treatments after they leave a study.[15] There has been no clarification, however, regarding the withdrawal of a non-patient research participant, or a sample donation for purely research purposes. For this reason, a distinction must be made between medical consent and research consent. The latter could apply to biobanking. Generally, informed consent in Mexico has been used more to protect patients than research subjects.

Currently in Mexico, no further clarification has been provided in terms of preservation periods and secondary uses of biological samples within biobanks. It is also unclear whether the initial consent covers the specific research project on which the sample collection is based, or whether it can be extended to additional research projects. In contrast, European regulations present different ways to include informed consent more specifically. The extent of informed consent can vary significantly, from specific (consent for a single purpose at a specific time) to broader options (consent for mul-

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[12] See Ley General de Salud [LGS] [The General Health Law], *as amended*, Diario Oficial de la Federación [D.O.], 7 de Febrero de 1984 (Mex.).

[13] See Reglamento de la Ley General de Salud en Materia de Investigación para la Salud [RLGSMIS] [Rules of the General Health Law on Research], *as amended*, Diario Oficial de la Federación [D.O.], 14 de Mayo de 1986 (Mex).

[14] See *Manual de Investigación Médica en el IMSS* [Medical Research IMSS Handbook], Instituto Mexicano del Seguro Social [IMSS] [Mexican Institute of Social Security] 1999 (Mex).

[15] See Reglamento de la Ley General de Salud en Materia de Investigación para la Salud, *supra* at art. 21, Reglamento de la Ley General de Salud en Materia de Investigación para la Salud [RLGSMIS] [Rules of the General Health Law on Research], as amended, Diario Oficial de la Federación [D.O.], 14 de Mayo de 1986 (Mex).

tiple purposes overtime). In Switzerland, consent is generally granted with the option to use additional possibility of further uses of samples and data for future research projects. Swiss biobanking rules regarding informed consent are based on a series of exceptional rules. In principle samples would be used for the primary purpose of their collection. However, exceptionally justified secondary purposes would be allowed "for further use of uncoded non-genetic health-related personal data.[16]" Presumed consent is sufficient for the use of pseudonymised non-genetic health-related personal data.[17] If consent and information requirements cannot be satisfied, exceptions allow the use of biological material or personal health data if consent is impossible or extremely difficult to obtain; exceptional use is also allowed if informing participants about their right to withdraw the project proves to be extremely difficult;[18] if no documented withdrawal is available[19] or the research interest for further use of the material/data exceeds the individual interest.[20] A right to withdraw consent does exist, however, in cases of identifiable samples and data that involve sample destruction.[21] In Switzerland, small amounts of post-mortem or transplantation material may be taken without consent for research purposes, whenever they have been anonymized and presumably authorized for that purpose (in the absence of any provisions on the contrary, it is assumed that donors authorize for this purpose).[22]

No single law covers the wide scope of consent related to biobanking. French biobank regulations resemble the traditional legal systematization based on written civil law and fragmented regulations of the Mexican system. This has not prevented the enactment of regulations that cover potential secondary uses. The sensitive character of research material for biomedical purposes permits the potential recovery of health material through re-consent procedures under the French Bioethics Act;[23] in order to ensure "that donors are informed of any secondary uses, and that they have a right to raise objections."[24] In Germany, where biobanks are also not regulated by a single law, both specific and broad consent can be justified depending on the

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[16] Botschaft zum Bundesgesetz über die Forschung am Menschen (Federal Council Dispatch regarding the federal law on research involving humans) 2009 art. 32, para. 1 (Switz).

[17] *Id.* at art. 32, para. 2.

[18] *Id.* at art. 33, lit. a.

[19] *Id.* at art. 33, lit. b.

[20] *Id.* at art. 33, lit. c.

[21] Dörr B 2011 *Research with Human Biological Material and Personal Data in Biobanks: Legal and Regulatory Framework in Switzerland*, in Human Tissue Research. A European Perspective on the Ethical and Legal Challenges 13 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press, 2011).

[22] Botschaft zum Bundesgesetz über die Forschung am Menschen (Federal Council Dispatch regarding the federal law on research involving humans) 2009 art. 32, para. 1 (Switz.).

[23] Law No. 2011-814 of July 7, 2011, Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], July 7, 2011.

[24] *Id.*

nature of the project. "Broad consent can be given for a range of research purposes"[25] and requires that tissue specimens become anonymized.[26]

Although diverse consent models now exist to protect scientific research and researchers, health regulations alone have been ineffective. The results now form an identifiable pattern: rules and regulations based mostly on medical research that evolved into more detailed rules that now applied to biobanks. These rules include procedures that help determine the scope of informed consent for sample use. In Sweden, for example, "informed consent depends on each biobank's purpose and extent." "If the donor has stipulated that the biological material may not be used for anything but a certain purpose, he should be able to insist on the material either being destroyed or returned if the purpose for which it is now intended does not agree with the donor's wishes."[27] The particular use of the sample must be specified in advance, as well as how the samples will be destroyed once the research objectives have been achieved.[28] The participant's free decision to withdraw the research project "often entails destruction of the relevant biological samples along with any personal information relating thereto,[29] where possible and, in some cases, upon a specific request by the participant/data subject."[30] For this reason, informed consent should be as specific as possible. If use is granted to only one institution —with no additional authorized use— this must be respected. Samples must also be prevented from freely circulating. In Mexico, nothing has been said in legal terms regarding accessibility of samples and data in practice. As of now, laws or regulations exist that govern essential matters; e.g., secondary uses of and data not established in the original informed consent, identification mechanisms (anonymity and coding) re-consent possibilities, participants' withdrawal, accessibility and legal implications.

III. Examples of Biobanking Regulations in Europe

"Existing biobanks differ in the way that they make their samples accessible."[31] Spain was a pioneer in implementing accessibility by using new

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[25] Die (Weiter-) Verwendung von menschilchen Körpermaterialien für Zuecke medizinischer Forschung [The use of human biological material for medical research], German Zentrale Ethikkommission bei der Bundersärztekammer [Central Commission for Ethical Principles on Medicine and Related Areas] (2003a). Deutsches Ärzteblatt, A1632 (Germany).

[26] *Id.*

[27] Li Westerlund & Annina H. Persson, Civil Law Reflections on the Use of Human Biological Material 69 (Centre for Research Ethics and Bioethics, 2001).

[28] World Health Organization, Biorisk Management Laboratory Biosecurity Guidance 12 (2006).

[29] See Swedish Biobanks in Medical Care Act (2002) Ch 3 § 6, and Latvian Human Genome Research Law art. 11 (2012).

[30] See Lov om biobanker [LOB] 2003 02-21 nr 12 [Act relating to Biobanks] Helse-og omsorgsdepartementet [Ministry of Health Attention] 1 of July 2003 (Norway).

[31] J. Bovenberg, *How to Achieve 'Free Movement of Tissue' in the EU Research Area*, in Human Tis-

technologies to facilitate access to genetic information, thereby making human samples carriers.[32] Casabona identifies the ethical and legal issues that led to the creation of the innovative Biomedical Research Law;[33] such as when "samples' further uses are different from those initially agreed."[34] Under the Spanish framework, expanded by the Royal Decree 1716/2011,[35] samples incorporated into a 'collection' can only be used by the soliciting researcher; they may not be transferred to third parties or used in projects not specifically cited in the original consent.[36] Although Casabona recognizes controversial aspects of the Spanish framework, he believes it may be useful as a model for international regulation.[37]

Regulations in several European countries' were enacted in response to conflicting cases of abuse; such as medical scandals within the past two decades. These have involved the retention and use of organs and tissue without proper consent. Bristol Royal Infirmary and the Royal Liverpool Children's Hospital (Alder Hey) were highlighted in Learning from Bristol, the public inquiry into children's heart surgery at the Bristol Royal Infirmary Inquiry (2001) and the Royal Liverpool Children's Inquiry Report (Department of Health 2001).The UK 1961 Human Tissue Act, for example, established to regulate the removal of organs and tissue, failed to include sanctions for non-compliance. The consequence was confusion "as to whether any breach of the statute should be dealt with in the criminal or civil courts."[38] The UK responded to the "emerging nature of regulatory practices" by processes carried out by different legal actors and agencies in the regulation of their clinical research trials.[39] The UK's regulatory agencies currently separate tissues and cells on the basis of their potential biological "riskiness."[40] The UK Bio-

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sue Research. A European Perspective on the Ethical and Legal Challenges 13 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press, 2011), 130.

[32] Javier Arias Díaz et al., *Spanish Regulatory Approach for Biobanking,* 1 European Journal of Human Genetics (2012).

[33] Ley de Investigación Biomédica [Act of Biomedical Research] 14/2007 (Spain).

[34] Carlos María Casabona, Informe final: implicaciones jurídicas de la utilización de muestras biológicas humanas y biobancos en investigación científica 7 (2007).

[35] Royal Decree 1716/2011 por el que se establecen los requisitos básicos de autorización y funcionamiento de los biobancos con fines de investigación biomédica y del tratamiento de las muestras biológicas de origen humano [on the minimal requirements for authorisation of biobanks for biomedical research], Boletín Oficial del Estado [BOE], 18 de Noviembre de 2011 (Spain).

[36] Arias, *supra* note 32, at 1.

[37] Casabona, *supra* note 34.

[38] I. Kennedy, *Further thoughts on Liability and the Human Tissue Act 1961*, in I. Kennedy, Treat me Right: Essays on Medical Law and Ethics 235 (1989).

[39] S. Weber, *The Regulation of Autologous Stem Cells in Heart Repair: Comparing the UK and Germany*, in Human Tissue Research. A European Perspective on the Ethical and Legal Challenges 16 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press, 2011).

[40] *Id.*

bank[41] does not release samples to researchers but does perform analyses for third-parties, unless physical samples are deemed necessary. The choice of solely internal analyses, in which samples cannot be released, may be dictated under considerations of data protection and limits established by the sample's original informed consent. Perhaps serious cases of abuse will be required to change Mexican regulations.

In Germany, uses of cells and tissue are integrated into a unified regulation,[42] focused mostly on advanced therapies and clinical trials. German biobanking regulations are one of the few European countries which, additionally, have established formal procedures. Switzerland has also enacted measures to reduce data protection threats, which continue to represent the main risk in biobanking. Other countries have implemented diverse frameworks, such as disseminated rules involving several legal frameworks. In this case, legal regulation remains associated to typical (civil, penal, constitutional, health and data protection) related rules and/or with references to instruments of a non-binding nature (ethical codes, recommendations and manuals).

IV. Mexican Ethics Committees

The Mexican ethics committees system is based on Local Research Ethics Committees (LRECs).[43] Historically, the two main reasons leading to the formation of most LRECs were: 1) recommendations by medical managers who considered it necessary (11.9%); and 2) provisions set forth in institutional rules (88.1%). LRECs in Mexico emerged based on a purely medical focus. LREC practices reflect the fact that (a) committees lack specialization; and (b) they are mostly self-regulated. Ethics committees in Mexico are responsible for authorizing research projects at public health institutions only at the start of projects. The formation of other types of ethics committees with different remits; *e.g.* research ethics committees, has proven difficult.

IMSS (National Institute of Social Security) committees and guidelines concentrate mostly on health ethics, even in cases involving biomedical research.[44] In fact, IMSS medical LRECs are mainly focused on rules, regulations and law; and the final solution of local committees, far from being carefully analyzed in ethical and legal terms, is seen as merely an adminis-

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[41] See *www.ukbiobank.ac.uk*.

[42] See The Medicines Act 1976 (Ger).

[43] Edith Valdez et al., *Understanding the Structure and practices of research ethics committees through research and audit: a study from Mexico*, 74 Health Policy 62 (2005).

[44] Kathrine Jáuregui-Renaud, *Health Research at the Mexican Social Security Institute, a Historical Review*, 49 Rev Med Inst. Mex. Seguro Soc. 579 (2011), available at http://revistamedica.imss.gob.mx/index.php?option=com_multicategories&view=article&id=1442:la-investigacion-en-salud-en-el-imss-resena-historica&catid=518:historia-y-filosofia-de-la-medicina&Itemid=676.

trative step which they have to fulfill. For this reason, committee members are often insensitive to the needs of research participants."[45] "The fact that LRECs are comprised exclusively of professionals makes them less responsive to vulnerable populations."[46] This created an issue of unbalanced representation, in which the opinions and needs of those involved need to be expressed directly. Most ethical challenges in Mexico are due to growth in the number of research biobanks; for this reason alone, more research ethics committees are needed. Another problem is that only direct threats to subjects' personal welfare are considered ethical violations. And the fact that Mexican ethics committees operate with ample discretion and little oversight continues to be problematic. Given that the only requirement for Mexican research ethics committees since 2012 is registration,[47] no sanctions currently exist for non-compliance.

V. Ethics Committees in Europe

Ethics-based authorization has gradually become mandatory for most biobanking research activities in Europe. In countries such as the UK, ethics committees are responsible for ongoing approval of research tissue bank projects. For this reason, "research tissue banks that are given generic or blanket approval subsequently bear responsibility for assessing and monitoring individual research projects that utilize them as tissue and/or data resources."[48] In Spain, regulations require compliance with "quality, legal, and ethical requirements."[49] The establishment of a biobank legally depends on a principal investigator (PI) responsible for the biobanks and one for data protection, management structure and two committees comprised of external experts (both scientific and ethical), whose identities are made known to the public. External committee members are independent from the biobank, and play an active decision-making role with respect to the integration of sample collections into large biobanks and sample transfers. The European experience demonstrates that research ethics depends largely on transparent rules and committees' ability to take consistent action. The UK's past experience with ethics committees has strong parallels with current Mexican LRECS. As a result of significant reform enacted to specify their competence and raise research standards, rather than the previous administration based on

[45] Edith Valdez et al., *Local Research Ethics Committees of the Mexican Institute of Social Security: Results of a National Survey,* 118 Public Health 333 (2004).

[46] *Id.*

[47] Ley General de Salud [LGS] [The General Health Law], as amended, art. 41 bis, 98, Diario Oficial de la Federación [D.O.], 7 de Febrero de 1984 (Mex.)

[48] Jane Kaye et al., Governing Biobanks. Understanding the Interplay between the Law and the Practice 78 (Hart Publishing, 2012).

[49] Arias, *supra* note 32, at 1.

local committees, the UK's LREC system has evolved; administratively "a complex intrinsic interdependency has evolved."[50] In fact, UK policy makers (specialists in the formulation of policies), lawmakers (legislators), regulators and the regulatory framework all are meant to rely upon RECs to monitor biobanks and biobanking activities."[51] In the 1970s, RECs were not formally regulated by law. Today, however, certain RECs —notably those recognized under the Clinical Trials regulations— enjoy limited binding status and authority o render ethical opinions on clinical trials involving medical product research. Rather than binding regulators, RECs are responsible for monitoring day-to-day operations, exercising significant control over biobanks and, in effect, acting as research "gatekeepers."[52] For this reason RECs depend heavily on the existence of formal and informal outside entities and mechanisms to ensure compliance, enforce ethics and punish violators.[53]

VI. How Does Mexico Currently Deal with Tissue and Associated Data?

With respect to the transfer of tissue to foreign countries, the Mexican General Health Law[54] establishes that organs, tissues and cells may not be taken outside national territory without authorization. The General Health Law[55] states that the transport of human tissues (blood, blood components and stem cells) —all of which can be a source of genetic material (DNA)— needs to be part of an ongoing research project. This policy helps reduce risks associated with biological material. It must be noted, however, that the material must be used in population research; for which reason, material transfers realized for other purposes are not covered. Requirements for transfer authorization, however, are confusing; human research is only allowed at medical facilities under the supervision of competent health authorities and with the approval of the INMEGEN (National Institute of Genomic Medicine). It would be desirable to clarify which government agencies are authorized to grant approval. The above mentioned approval of the INMEGEN, reportedly does not happen in practice. The requirements set forth in article 317 for transferring tissue outside national territory are still unclear; *e.g.* cases requiring urgency are mentioned but not defined. Regulations enacted to protect Mexico's genomic sovereignty —an attempt to control international tissue

[50] Kaye et al., *supra* note 48.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Ley General de Salud [LGS] [The General Health Law], as amended, art. 317, Diario Oficial de la Federación [D.O.], 7 de Febrero de 1984 (Mex.).

[55] *Id.* at art. 317 bis.

transfers—, has been criticized for being ineffective rules, where the bioethical approach is incipient.[56]

Current methods used to obtain biological samples vary according to investigation type. Blood, followed by tissue, are the most common samples taken. Biobanks use cerebral tissue, heart tissue, skin cells, blood plasma, brain spinal fluid, DNA, RNA, immortal lymphocytes, cellular lines and bone marrow fluid, components of several public biobanks in national health institutes, social security institutes, universities and technological institutes.[57] Current guidelines set forth in related legal areas cannot be directly applied to biobanking. The General Health Law needs to differentiate between the different purposes of organs, tissues; i.e. on whether they will be used for transplantation or research purposes. As legal consequences vary considerably, each requires its own specific rules. Mexico cannot remain indifferent to potential cases of abuse.

1. *Searching for Tissue and Associated Data Sharing Options*

Although coding generally prevents tracing back to individual patients, this method fails when variables require linking to databases in widely-divergent locations.[58] The use of data protection mechanisms, such as anonymization and coding, however, is highly controversial. On the one hand, incidental (and highly relevant) findings are often lost; on the other hand, the research value of samples is diminished. This is relevant, as genomic research requires continual monitoring of research participants (*e.g.*, in relation to illness stages) —rendered impossible by anonymity. Anonymization is thus an undesirable choice because (a) its scientific value is limited;[59] and (b) true anonymization of data and samples is impossible.[60]

The diverse requirements by many countries regarding the import and export of samples place countries with unclear regulations at a significant disadvantage; *e.g.*, authorization to utilize tissue for research under flexible rules must be re-evaluated by nations with stricter rules. Evidently, the absence of uniform legal requirements has had a negative effect, which has prevented

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[56] Ernesto Schwartz, *Filosofía para la nueva genética* (Philosophy for the new genetics). Available at *http://www.filosoficas.unam.mx/~afmbib/mayteAFM/Ponencias/30023.pdf*.

[57] Ingrid Brena, *Legal and Social Implications in Mexico,* in Latin Banks Study on the Legal and Social Implications of Creating Banks of Biological Material for Biomedical Research 261 (Carlos María Casabona and Jürgen W. Simon eds., Law, Science, Technology and Innovation, 2011).

[58] Marjanka K. Schmidt et al., *Regulatory Aspects of Genetic Research with Residual Human Tissue: Effective and Efficient Data Coding*, 45 Elsevier 2380 (2009).

[59] Stefan Eriksson & Gert Helgesson, *Potential Harms, Anonymization, and the Right to Withdraw Consent to Biobank Research*, 13 European Journal of Human Genetics 1074 (2005).

[60] Penélope K. Menasco, *Ethical and Legal Aspects of Applied Genome Technologies: Practical Solutions*, 5 Current Molecular Medicine 25(2005).

the development of an inclusive national infrastructure for biobanks and the sharing of data and samples from biobanks across borders for scientific purposes.[61]

Mutual concerns on biobank data sharing have given rise to several international agreements. Based on the "home-country principle,"[62] "the legislation of the country where the controller is based will be applicable when data are sent to a processor in another country."[63] For this reason, sending tissue from a country with strict regulations would not affect sending that same tissue to a country with less strict rules. The ethical approval obtained in a country with the most law rules would prevail. In sum, the tissue could still be used.[64] Under the principle of informed consent, the rules established by the first biobank would prevail. Principles that apply to the retention and circulation of biological samples normally coincide with those of data protection principles.

2. *Data Exchange Systems*

Sample exchange and data systems are governed at the European level by the Data Protection Directive (95/46/EC). Following the solution adopted by the Council of Europe Convention,[65] the Directive 95/46/EC also allows the use of personal data for research purposes (including sensitive data), providing Member States adopt suitable safeguards. The directive gives member states wide discretion in enacting measures for the processing of personal data, including scientific research purposes, with sufficient freedom. "The Directive contains a number of provisions that are broadly formulated and, explicitly or implicitly, leave Member States a margin of maneuver in adopting national legislation."[66]

Besides general guidance (provided by the European Union) on data protection, countries have also entered agreements at both local and international levels that try to balance divergent economic and scientific interests.

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[61] European Commission, Biobanks for Europe a Challenge for governance. Report of the Expert Group on Dealing with Ethical and Regulatory Challenges of International Biobank Research 47 (2012).

[62] Evert-Ben Van Veen, *Tubafrost 3: Regulatory and Ethical Issues on the Exchange of Residual Tissue for Research across Europe*, 42 Science Direct 2919 (2006).

[63] Evert-Ben Van Veen, *Obstacles to European Research Projects with Data and Tissue: Solutions and Further Challenges*, 44 Elsevier 1438 (2008).

[64] P. H. J. Riegman, *TubaFrost 1: Uniting Local Frozen Tumour Banks into a European Network: an Overview*, 42 European Journal of Cancer 2682 (2006).

[65] The Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, article 6 (1981).

[66] Commission of the European Communities, Communication from the Commission to the European Parliament and the Council on the Follow-Up of the Work Programme for better Implementation of the Data Protection Directive 2007 COM 87 (2007).

The data confidentiality principle in France, set forth in the *Loi Informatique et Libertés*,[67] requires the submission of an official declaration in order to gather samples used in a biobank. Access to data also requires that donors are told of potential research uses of their data as well as their right to raise objections, which need to be justified and proven. Data coding is required when personal data, such as identity remains associated to participants. Many countries have ratified the EU Data Protection directive; and joint efforts have been made to resolve other relevant issues in genomic medicine. Additionally, the creation of virtual database networks to tackle issues with often conflicting frameworks is now commonplace in Europe.

Mexican law is inconsistent with respect to data protection, reflecting an absence of integral policy. It was initially unclear whether genetic data was covered under the Federal data protection regulations issued by the Federal Institute of Access to Public Data (*Instituto Federal de Acceso a la Información)*. The Mexican Federal Transparency and Access to Public Government Information Law (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental)* (2003) (LFTAIPG) was intended to promote governmental transparency and ensure fair treatment of data by government agencies. Provisions under LFTAIPG were criticized for not including genetic data. This partial coverage only included data preserved by public institutions, leaving data dealt with by private institutions unregulated. Later, the Federal Law of Protection of Individuals' Personal Data (*Ley Federal de Protección de Datos Personales en Posesión de los Particulares*) was enacted to protect personal data stored in electronic databases and related networks. Under the Federal Law of Protection of Individuals' Personal Data, "sensible data are any information that affects the most intimate sphere, or whose misuse can cause discrimination or any other risks to individuals."[68] Note that the law fails to clearly specify whether genetic data forms part of the 9 Articles. If we assume that genetic data is included in personal data, then the use of such data can be consented only if a request is made. The law applicable to private companies, enacted to attract pharmaceutical investment,[69] left public health institutions out of legal scope. Current laws on personal data have not explicitly set forth what type of samples (blood, saliva, tissue) contain health data. The law also fails to specify data protection operations, inspection, data access, rectification or sanction mechanisms. "In biobank research it is not the tangible features of biological samples that are at issue but informational content."[70] Mexican

[67] See Law No. 78-17 of January 6, 1978, Journal Officiel de la République Francaise [J.O.] [Official Gazette of France], January 7, 1978.

[68] See Ley Federal de Protección de Datos Personales en Posesión de los Particulares [LFPDPPP] [The Federal Law of Protection of Individuals' Personal Data], *as amended*, art. 3, VI, Diario Oficial de la Federación [D.O.], 5 de Julio de 2010 (Mex).

[69] Eduardo Camacho, *Protecting Data will Attract foreign Investment*, El Universal, Feb. 22, 2012.

[70] European Commission, *supra* note 61, at 38.

data protection laws refer to personal data processing in general, failing to specify biological samples used in research.

3. *Material Transfer Agreements (MTAs)*

Best industry practices require that procedures used for international sample sharing and distribution are clear and transparent. Material transfer agreements (MTAs) —contracts that allow researchers or research organizations to use tissue sent by other organizations—[71] help ensure compliance with obligations owed to donor participants. These "means of defining and limiting the purposes for which the tissue will be used"[72] involves the establishment of certain protocols including the recipient's obligation to obtain ethical approval and its commitment to follow ethical procedures, including data protection mechanisms, detailed description of research objectives, incidental findings, etc.

VII. Absence of Biobanking Oversight in Mexico

In the absence of codified ethical standards, Mexico-based biobanks have resorted to self-regulation and internal decision-making. This said, two institutions are critical in the oversight of Mexican biobanks. First, the National Commission of Bioethics (CNB), an official advisory institute, was created to disseminate bioethical culture, with a focus on public policy, infrastructure and public awareness. Second, the Federal Commission for the Protection against Health Risk (*Comisión Federal para la Protección de Riesgos Sanitarios*) (COFEPRIS), part of the National Health Ministry, is responsible for protecting the Mexican general population against health risks. Although the National Commission of Bioethics is not an authority but an advisory institution, registration is compulsory, involving updates and academic diffusion for ethics committees. In time, it could play a more active policymaking role. The CNB could be key in providing the biobanking expertise needed by advise policymakers, lawmakers, biobanking professionals, members of the public and ethics committees in a formally established, rather than a purely advisory way.

According to the General Health Law Rules, health research through clinical trials can only be authorized by COFEPRIS, the Mexican health agency. As part of the National Health Ministry, this agency is administratively independent, responsible for protecting the population against health

[71] Evert-Ben Van Veen, *Obstacles to European Research Projects with Data and Tissue: Solutions and Further Challenges*, 44 Elsevier 1443 (2008).

[72] J. Bovenberg, *How to Achieve 'Free Movement of Tissue' in the EU Research Area*, in Human Tissue Research. A European Perspective on the Ethical and Legal Challenges 13, 131 (C. Lenk, N. Hoppe, K. Beier and C. Wiesemann eds., Oxford University Press 2011).

risks through regulations and administrative controls. In contrast to the CNB, COFEPRIS performs a monitoring function, imposing sanctions for "non-compliance with legal provisions, rules and regulations" regarding safety prevention.[73] Unless sanctions are established under law, this agency has limited oversight powers. Besides, COFEPRIS, as the main health care authority (in charge of drug, food and lab controls, among others) could be finding it challenging to deal with biobanks (amongst its other numerous functions) efficiently. Currently, no Mexican agency exists to regulate human tissue.

1. *Governance Models*

In response to challenges posed by the expansion of European biobanking infrastructure, new governance mechanisms have been proposed and adopted, mostly at the national level. In this regard, two schools of thought have arisen: (a) enact legislation that specifically deals with biobank activities (Iceland, Estonia, Hungary, Sweden, Spain and Belgium); and (b) integrate provisions that regulate biobanks or bio-collections into broader administrative regulations and laws (France and the United Kingdom).[74]

Provisions that deal specifically with biobanks normally include independent oversight, regular audits, activity reports, access measures for the release of samples and procedures for transfer and biobank closure.[75] In this respect, several common features are beginning to emerge:

— Biobanks' accreditation should be done by national authorities with specific competence.
— Notification should be given regarding biobank creation; and the authorities should establish official registries and oversight committees to monitor national data protection.
— Responsibility for biobank management should be given to a single individual or entity.
— Appropriate security measures should be implemented to protect biological samples.
— When anonymized data or biological samples are deemed unfeasible because of the type of research, stringent confidentiality rules should govern the use of data and samples after "coding."
— Research ethics committees should assess the objectives given for the establishment of a biobank.
— Limitations and/or specific safeguards should be applied when biological samples are transferred abroad.

[73] See Reglamento de la Comisión Federal para la Protección contra Riesgos Sanitarios [RCOFEPRIS] [Federal Commission for the Protection against Sanitary Risk Rules], Diario Oficial de la Federación [D.O.], 13 de Abril de 2004 (Mex).

[74] European Commission, *supra* note 61, at 39.

[75] See Council of Europe, *supra* note 5.

— Consent should be mandatory in cases involving children or other vulnerable parties.
— Research involving the use of biological samples from deceased parties must be expressly regulated.

In many cases, however, rules on the use of biological samples for research purposes "have to be pieced together taking into account a number of different regulatory instruments."[76] The emergence of biobanking rules in Mexico is similar what occurred in France, where biobanks are regulated not under specific biobanking laws but completely separate pieces of legislation.[77] These distinct approaches reflect different national styles, and underscore the fact that no single regulatory approach works for every country. We can only assume that each nation is justified in treating biobank research in a piecemeal fashion rather than a more integrative approach. What most matters is that regulatory bodies are established to deal with the numerous challenges associated with biobank governance.

2. *European Enforcement*

At the European level, the provision of common explanatory biobanking guidelines, additionally to general directives, would be essential. This necessity has already been targeted and will need of European consensus to be given effective proposals; initially at the local level. Inconsistent data protection policies may result in unfair treatment and contribute to risks of regulatory capture (the unfair preferential treatment of a public institution towards particular groups of interest). In many cases, data protection has been embraced as an investment strategy, often outweighing efforts to actually protect data. Ideally, "a dedicated, independent statutory authority could reduce this risk."[78] Principles of "independence, oversight and efficiency of control powers, including sanctions"[79] at the internal level, would be a good start.

Although European guidelines contain no explicit penalties for noncompliance, penalties are set forth on a national level by each signatory member state. This is notable in the case of the UK, where noncompliance with the Human Tissue Act or its codes may trigger the suspension and/or withdrawal of licenses. Serious ethical violations should prompt remedial action including notification, disciplinary action for professional misconduct or adjustment of practiced procedures.[80] Regulatory bodies such as the UK Human Tissue

[76] European Commission, *supra* note 61, at 39.

[77] Isabelle Budin-Ljøsne et al., *ELSI Challenges and Strategies of National Biobank Infrastructures*, 21 Norsk Epidemiologi 156 (2012).

[78] Susan Gibbons, *Regulating Biobanks: A Twelve-Point Typological Tool*, 17 MLR 324 (2009).

[79] A. Cambon-Thomsen, E. Rial-Sebbag & B. M. Knoppers, *Trends in Ethical and Legal Frameworks for the Use of Human Biobanks,* 6 ERS Journals 375 (2007).

[80] Human Tissue Act § 5 (UK).

Authority are considered "critical to the operation of the Act's governance framework."[81]

As for Mexico, principles such as institutional "independence of the oversight" "efficiency of control powers including sanctions"[82] could be a good start to reform the situation of biobanks. The publication of biobanking guidelines is essential. Despite significant legal gaps, currently enforced biobanking rules need to start becoming effective through practical mechanisms. Institutional coordination would be a good first step in resolving problems on a national level. Some have commented that "as genomic medicine develops in Mexico, the need for modern legislation related to its ethical and social implications will also increase."[83]

3. *A Single Regulation for Biobanks?*

Currently, no legal rules govern biobanks in Mexico. Rules for related issues are set forth in diverse sections and subsections rather than a single unified law. Most Mexican rules for human research are inconsistent. For example, rules are normally included in amendments rather than regulations or Acts. This has resulted in a patchy and often complex framework, where rules that apply to specific areas are not set forth in a single law or provision but in disparate regulations which fail to differentiate between ideas and ways to achieve them, a common practice under Mexican law. It is very difficult to determine the availability of effective biobanking legal guidance. Given a lack of regulations that specifically focus on biobanking, guidance in this area is subject to widely-divergent interpretation.[84] It is thus critical that Mexico establish an effective regulatory agency to help resolve urgent oversight challenges.

4. *E-Governance*

As a result of a spade of initiatives marking the evolution of biobanking from a collection of frozen specimens to virtual biobanks, new ideas for governance have recently gained traction in Europe.[85] New "e-governance" systems have emerged that allow consortia to function through self-regulation.

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[81] Miola, *supra* note 11, at 83.

[82] See Cambon-Thomsen, *supra* note 79.

[83] Gerardo Jiménez-Sánchez, Irma Silva-Zolezzi, Alfredo Hidalgo & Santiago March, *Genomic Medicine in Mexico: Initial Steps and the Road Ahead*, 18 Genome Research 1196 (2008).

[84] Panorama sobre la legislación en materia de genoma humano en América Latina y el Caribe (Alya Saada & Diego Valadés coords., UNAM, Latin American and Caribbean Bioethics Network of UNESCO, 2006).

[85] Y. G. De Souza & J. S. Greenspan, *Biobanking Past, Present and Future: Responsibilities and Benefits*, 27 AIDS 303-312 (2013).

And the internet is now used to facilitate collaboration among medical researchers and gain the consent of participants through web-based tools. One example is the EnCoRe[86] project, in which "dynamic consent," was presented as a possible solution for the endless dilemmas of potential future re-consent; as the consent of choice participants must be continually updated. Normally, it will correspond to an ethics committee to decide on the fate of biological samples after their first determined use. For further uses, ethical controversy could emerge from the concerns involving privacy and data protection of participants who are still alive. Re-contacting them can turn too difficult or unaffordable. If samples are anonymized and no privacy risks are involved, the ethics committee could determined that no further re-consent is necessary.

VIII. The Emergence of Population Biobanks

Population biobanks emerged in Europe to tackle new treatment alternatives for common population diseases. Common population biobanking research, consisting of continuous life-style studies and sample donations taken on a massive scale, have resulted in a notable increase in European population biobanks. Several Eastern-European countries (*e.g.*, Estonia and Latvia) were among the first to develop efficient controls for *population*-based *biobanks*, given their pioneering efforts in establishing national genome projects.

Estonia has been especially innovative in this area. In 2000, through its work on the implementation of the Estonian Genome Project, the Estonian government adopted the Human Genes Research Act, the most relevant framework governing tissue and associated data in this country. Under this framework, researchers were given unlimited future potential uses of genetic samples.[87] The Human Genes Research Act contains provisions regarding data collection, storage and use; participants' rights (consent withdrawal, the right to know and not to know (consisting of an individual's right to be informed of incidental findings); the role of ethics review; and the ownership of data and samples.

The Latvian Human Genome Research Law and regulations cover: (a) the voluntary nature of participation; (b) prohibition of discrimination on the basis of genetic data; (c) donor rights, including withdrawal at any time and the option to perform genetic research outside Latvia and protective measures for vulnerable populations, ethical review, coding, storage and use restrictions.[88] In Estonia and Latvia, materials may be removed from deceased parties for the purpose of scientific research without the participant's consent.[89]

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[86] EnCoRe / Oxford Radcliff e Biobank (UK), available at http://cyber.hwcomms.com/cyber/DynamicConsent.

[87] Judith Sandor & Petra Bard, *The Legal Regulation of Biobanks. National Report: Estonia*, 5 CELAB (2009).

[88] Human Genome Research Law, The *Saeima* and the President, 1 January 2004 (Latvia).

[89] Geenidoonori koeproovi, DNA kirjelduse, terviseseisundi kirjelduse ja tagasikodeerimist

"Because health data and genetic information are particularly sensitive personal information, this information should be protected by encryption codes and only be accessible to properly authorized biobank employees and researchers under strict conditions."[90] This includes not only individuals, but also groups; as the same risks are still involved. Group stigmatization is always an issue when samples are taken from specific individuals or populations, especially those involving vulnerable populations. In general, population are at risk of mistreatment if no data protection measures are taken. This situation becomes aggravated in the case of small isolated Mexican indigenous peoples, who may find that data conflicts with religious or cultural understandings about their ethnic, legal or political claims that relate to land or items of cultural patrimony.[91] Religious established beliefs established could be opposed to genetic studies; for example, cultural customs on the treatment of tissue in general and that from the deceased. Some people may still be fearful on the donation of body parts for religious reasons. In the case of tissue sample donations, there might not be social awareness because it would be something completely new. Discouragement needs to be prevented by planned actions regarding people's cultural views in balance with knowledge on the implications of sample donations.

The cultural background of the Latvian Human Genome Project —similar to what happened in Mexico— was closely related to issues of national identity. The HapMAP[92] Mexican population project involved the coding of the total number of samples collected for a genetics population project. Individuals were protected, but not participating vulnerable groups. These are still in risk of stigmatization coming from the particular genetic characteristics of the group (such as race and propensity to specific illnesses). In the absence of rules, subjects may be informed, most of the times informally; *e.g.* in an oral insufficient, rather than a way that guarantees full understanding. These could imply translators or forums where information for consenting is clear and accessible on the future use of their samples.

IX. Human Rights and Biobanking

"In Europe the laws that have been applied to biobanks have largely been drawn from the legal traditions and jurisprudence that have been developing around the protection of human rights and the advancement of public

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vôimaldavate andmete hävitamise kord [Decree No. 128 of the Minister of Social Affairs 2002] RTL 17 of December 2001 (Estonia).

[90] D. Blumenthal & J. Glaser, *Information Technology comes to Medicine*, 356 NEJM 2527 (2007).

[91] R. R. Sharp & M. W. Foster, *An Analysis of Research Guidelines on the Collection and Use of Human Biological Materials from American Indian and Alaskan Native Communities*, 42 Jurimetrics 165 (2002).

[92] The International HapMap Project is a multi-country effort to identify and catalog genetic similarities and differences in human beings.

health."[93] A number of biobanking human rights related instruments have been established as a result: The Universal Declaration of Human Rights 1948 and the European Convention on Human Rights (EHCR) 1950, provide bodily protection of the individual through their emphasis on freedom from inhuman and degrading treatment. Human rights in the health and research context were also developed through The Council of Europe's Convention on Human Rights (UDHGTHR) 1997, and the Universal Declaration on Bioethics and Human Rights (UDBHR) of 2005. Human rights instruments appear to view the individual as having an a priori right to be respected.[94] The Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine[95] serves to protect the rights of human subjects regarding scientific progress within Europe; such as dignity, autonomy and privacy. This convention sets forth general principles that are supplemented by additional protocols. In the run up to the adoption of the 1998 Act, the Data Protection Register praised the Government White Paper for recognizing in its proposals the idea that individuals were entitled to a right to privacy for personal data based on the respect for private life set forth in Article 8 of the European Convention on Human Rights.

1. *Human Rights Panorama in Mexico*

The Mexican non-jurisdictional human rights protection system (purely based on recommendations) is still believed to be "one of the most complete."[96] This said, the consolidation and implementation of human rights under international treaties has been severely lacking. This is partly due to the absence of a constitutional rationale on the topic. One major issue is the authorities' misconception that international rules do not apply unless they are enacted as federal law.[97] If a meaningful transition is happening at this time (one year after fundamental human rights reforms), this situation is likely to gradually improve. One possible solution would be to train and professionalize judicial authorities at both the local and federal levels.[98]

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[93] European Commission, *supra* note 61, at 35.

[94] Austen Garwood-Gowers, *Respect as a Precondition for Use of Human Tissue for Research Purposes*, in Human Tissue Research. An European Perspective on the Ethical and Legal Challenges 3 (C. Lenk, N. Hoppe, K. Beier & C. Wiesemann eds., Oxford University Press, 2011).

[95] European Union, Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Jan. 12, 1998, Europ. T.S. 168 (1998).

[96] UN High Commissioner Office Diagnostic on the Situation of Human Rights in Mexico (2003). Available at http://www.cinu.org.mx/prense/especiales/2003/dh_2003/diagnostico-completo.Pdf, 7.

[97] *Id.*

[98] *Id.*

There are three fundamental issues that hinder Mexico's adoption of human rights treaties: (1) lack of legislation to facilitate the integration of international law; (2) failure to hierarchize international treaties; and (3) wide discretional and interpretative margins on interpretative declarations in international treaties. The consensus or political will necessary to address such deficiencies makes change unlikely at this time. A key element necessary to address the ethical and legal conflicts caused by divergent frameworks is the implementation of harmonized agreements. Other possible solutions include the development of ethical and legal attitudes towards research participants, value and nature of the research project on a culturally sensitive basis. Researchers must also explore which models would be most acceptable in the communities where they plan to realize studies.[99] Selected governance models need to be sensitive to the needs of the different actors involved in biobanking. Hence, the case of vulnerable participants requires from specific attention through enforced measures protecting their rights; such as privacy at the individual level and prevention from stigmatization at collective level. This necessarily involves social expertise in defense of human rights. This is how remaining inconsistencies can also be resolved taking into account cultural sensitivity; by the promotion of interests focused, initially, individual level; *e.g.* an individual need for welfare's protection towards associated risks. Gradually, public awareness can be constructed through public scrutiny on the defense of individual and collective rights. In this particular case, once awareness is created on the rights which can be affected by the donation of a sample, the needs of those involved can be clearly identified, demanded and be the subject of legal protection.

Ariel Dulitsky[100] has stated that "before thinking on new laws, it is necessary to think of ways to guarantee enforcement." Well-written laws without implementation mechanisms are insufficient to remedy continual rights violations. For such a purpose of legal or political reforms governmental powers' commitment is necessary. In the case of biobanking laws, it will be necessary adopt implementation mechanisms through secondary legislation.

2. *Mexican Health Panorama*

The use of biological samples for research purposes has been addressed by some countries as part of health priorities; such as healthcare and diagnosis, a fact which presupposes adequate health systems and conditions. However, each country prioritizes health needs differently. "It is necessary to recognize that the developing world presents greater challenges from those of the de-

[99] Aceme Nyika, *Ethical and Practical Challenges Surrounding Genetic and Genomic Research in Developing Countries*, 112 Acta Tropica § 22 (2009).

[100] A. Dulitzky, Aplicación de las normas internacionales en derecho interno. Memoria del Foro: El marco legal internacional de derechos humanos y la normatividad interna 20 (2001).

veloped world in terms of substance and structure."[101] For example, in national grounds, Mexico has the second highest rate of obesity. One out of 11 Mexicans suffer from diabetes, which is currently the leading cause of death in Mexico —3 times higher than in Chile. 17% of public health funds are apportioned for the treatment of diabetes. Since 1960, Mexican life expectancy increased 2.8 years in men and 3.4 in women. In countries like Japan, men have gained 7 years and women 10. The average gain in the Organisation for Economic Cooperation and Development (OECD) countries is 4.4 years for men and 5.6 for women. 6.4 of the IPB is spent in health, in comparison with 9.6% from average OECD countries' IPB. A Mexican spends 249 dollars per year on medicines, whereas an average of OECD citizen spends 487 dollars annually. Regarding infrastructure, there are 1.7 hospital beds per 1000 habitants; whereas the average for OECD countries is 3.1.[102] Despite recent advances, statistics (2012) show that health conditions in Mexico are still relatively poor. One out of 11 children has low weight when born, compared with that from Chile (1 out of 17). Mortality in children under one is ten times that of Iceland and twice Chile's figures.

Limitations may prevail over intentions to reform biobanking regulations in a parallel form as with other health national priorities. There are still significant boundaries for the creation of specific regulations for biobanks and the most important are surrounded by the predominant cultural values. *E.g.* in the Mexican population is not aware of the risks involved by the risks of data protection when donating a sample, no protection will be demanded from authorities. Mexican biobanking requires agreements involving the sharing and exchange of materials between participants from diverse cultural backgrounds. In order for this to work, consent must be inclusive and designed according to the needs of the targeted population; "culturally sensitive." If an indigenous population does demand data protection in the same way as other populations, it means that special measures need to be taken; 1) to make that population aware of involved risks and 2) take the necessary measures to protect the group, given its character of vulnerable. Basic consent requirements in a purely ethical way are at risk of being considered optional. Hence, other more basic legal standards are necessary to make it compulsory.[103]

3. *Positioning the Biobanking Agenda in the Developing World*

The evolution of biobanking regulations in Europe has been largely spurred by an expansion of research activity and the priority given to biobank regulation. Emerging economies, following a delayed but similar expansion

[101] See Nyika, *supra* note 99.

[102] Miguel Carbonell, *El desafío de la salud*, El Universal, May 17, 2012.

[103] Neil C. Manson & Onora O'Neill, Rethink Informed Consent Bioethics 78 (Cambridge University Press, 2007).

in research, are just now confronting the often precarious balance between their homegrown legal framework and related legal and ethical issues. Ethical research, for example, requires not only recognition of the benefits of personalized medicine but also the moral issues involved. The potential of personalized medicine involves personalization and predictiveness, which is due to the ability to predict the risk of certain diseases based on "personal genome" information in combination with life style data, age, sex, occupation, etc.; and "preventiveness," that is based on individualized risk prediction. This requires an active "participation" of the individual concerned in proactively maintaining their health.[104] Moral issues are also associated to many other innovations. Biobanking research involves health priority areas and techniques that have the potential to revolutionize the treatment of a wide range of diseases, such as cancer and diabetes. "It should be pointed out that the majority of the populations in the developing world may not benefit from such high tech approaches due to prevailing socioeconomic factors, and stakeholders should always make concerted collective efforts to ensure availability and affordability."[105] Recognizing sensitive areas requiring protection within biological samples seems to be something difficult to afford in countries like Mexico at the moment. The Mexican health system currently faces significant challenges, in which the loaded bioethical agenda must not be left behind by policymakers next to other national areas of priority. E.g. health campaigning against chronic diseases is a priority; and so does the grounds to conduct genetic research to prevent them. Even in the face of other pressing concerns, regulatory efforts in this area may be well worth the effort. There are relevant reasons and incentives encouraging governments to be up to date with topics requiring international harmonization.

The Unification of biobanking standards in Europe currently remains unclear, due to a future consensus difficult to be envisaged at the moment. The adoption of consensual guidelines may be an interim solution. Even so, there are important lessons to learn from the European experience, but more specifically about European countries involved. The situation of each of them is different and each of them involves examples of clear similarities and discrepancies with the Mexican situation.

It is also clear that biobanking involved issues at the international level, in which the exchange of samples requires from participating countries sharing minimum standards. If rules were to be produced, more specific guidelines would still be needed to resolve ethical questions on benefit of sharing samples; *e.g.* whether the authorization to use tissue for research under flexible rules would have to be re-scrutinized if the material happens to be used in a country with stricter rules.

Mexico must not fall behind within this context.

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[104] European Commission, *supra* note 61, at 17.

[105] Nyika, *supra* note 99, at § 22.

Emerging nations must assume a larger role in the international harmonization of biobanking.[106] Collaborative research involving multiple centers *i.e.* at national and international levels is constantly increasing and producing new necessities. Even when various genomics projects are developed nationally, many of them are the result of international collaboration. The absence of consistent rules regarding research, tissue and associated data is not only a hindrance to domestic research but prevents Mexican investigators from fully participating in international projects. In the end, Mexico cannot afford to remain indifferent to the continual expansion of biomedical and biobank research.

X. What Can Be Learned from Europe?

Comparative law facilitates better research by placing many issues in a broader context. The main lesson learned from Europe is the need to successfully harmonize external frameworks with local contingencies. Comparative law presents advantages if implementation is developed taking into account the unique characteristics of the focused country. Every issue is based on national realities and connected to cultural and ethical perceptions. No foreign regulation can "fit" the unique conditions currently faced by Mexico. This said, many real-world initiatives have been made to inspire fresh thinking, including numerous examples of overseas biobanks. Awareness of prevailing biobanking rule limitations is critical, as biobanking must always be viewed within a larger context. The rationale of a fit for purpose proposal should combine legal and bioethical expertise and focus on limitations related to the special characteristics of Mexico, both in practical and legal terms. Since rogue companies and pirates make policing extremely difficult, it's possible that data protection may only work when users agree to be bound by rules.[107] For this reason, society needs to both recognize the vital importance of personal data and start demanding personal data protection. This applies to academics, judges, lawmakers, government agencies, human rights groups and society in general.

[106] Billie-Jo Hardy, *The Next Steps for Genomic Medicine: Challenges and Opportunities for the Developing World,* 9 Nature Reviews Genetics §5 (2008).

[107] Andrew Charlesworth, *Implementing the European Data Protection Directive 1995 in UK Law: The Data Protection Act 1998*, 16 Elsevier Science 234 (1999).

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TRANSITIONAL JUSTICE, HUMAN RIGHTS AND THE RESTORATION OF CREDIBILITY: RECONSTRUCTING MEXICO'S SOCIAL FABRIC

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Abstract. *Mexico is entering a phase of transitional justice. This can be observed in the numerous reforms and measures that are being taken to adapt the legal system to international standards, particularly those related to human rights and criminal justice. Some examples show an increased tendency to adhere to and enforce the rule of law and human rights; to recognize the official truth of authorized misconduct that took place in the past; to punish perpetrators, and above all, to ensure victims' rights to truth and reparation. If these tendencies continue, it could potentially lead to the restoration of public trust in the authorities and pave the way for reconciliation between society and the State. While many experiences of traditional transitional justice have taken place in post-authoritarian contexts, the convergence of the main elements used in those traditional cases lead us to suggest that these models could also apply to societies in transition, not from a particular form of government to another, but from a developing democracy into a law-abiding society. In this sense, a bottom-up approach that aims at attaining truth, reform and change will be necessary to break a cycle of impunity and develop social and government institutions that respect and enforce the rule of law and human rights.*

Key Words: *Transitional justice, human rights, international law, victims' rights, rule of law.*

Resumen. *México está comenzando a atravesar por una fase de facto de justicia transicional. Un matiz de ello puede observarse en las numerosas reformas y medidas que están siendo tomadas para adaptar el marco legal, y en particular aquellas áreas relativas a los derechos humanos y a la justicia penal, a los estándares internacionales. Algunos ejemplos en las esferas del sistema judicial y de las instituciones públicas de derechos humanos muestran una tendencia ascendente a adherirse e implementar el Estado de derecho y los derechos humanos; a reconocer una verdad oficial respecto a conductas inapropiadas, autorizadas*

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por el gobierno, que tuvieron lugar en el pasado; a castigar a los infractores de la ley y, sobre todo, a garantizar los derechos de las víctimas a la verdad y a la reparación del daño. La continuidad de estas tendencias podría conducir al restablecimiento de la confianza pública en las autoridades, y mostrar el camino hacia la reconciliación de la sociedad con el Estado. Mientras muchas de las experiencias tradicionales de justicia transicional han tenido lugar en contextos pos-autoritarios, la convergencia de los principales elementos que han sido utilizados en esos casos tradicionales nos llevan a considerar la idea de que dichos esquemas también podrían ser aplicables a sociedades en transición, no de una forma de gobierno a otro, sino de una democracia en desarrollo hacia una sociedad respetuosa de la ley. En este sentido, un enfoque que busque alcanzar la verdad, reformas y cambios será necesario para romper el ciclo de impunidad y desarrollar instituciones sociales y oficiales que respeten y garanticen la prevalencia del Estado de derecho y los derechos humanos.

Palabras clave: *Justicia transicional, derechos humanos, derecho internacional, derechos de las víctimas, Estado de derecho*.

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I. Introduction

Recent Mexican history, and in particular during the 2006-2012 presidential term of Felipe Calderón Hinojosa, could give the impression that the country —despite its relatively good economic condition- is either a failed State or about to become one.[1] There is a situation in which authorities and official institutions have been immersed in corruption scandals, rampant impunity

[1] Fletcher, Weinstein and Rowen argue that an effective government has three basic functions to perform: ensuring basic security (both against external and internal threats); meeting the basic needs of its citizens; and maintaining legitimacy (which requires that governmental structures are transparent, accessible and accountable). In the case of Mexico, there seem to be serious deficits in the effectiveness of its government, which would qualify it as a "weak"

has become widespread around the country and violence has escalated over the past seven years as a result of the "war on drugs" undertaken by President Calderón. This has led to a public outcry of disbelief in the system and even more recently to the formation of vigilante groups in some states.

There have also been an important number of cases in which human rights abuses against detainees —who have been captured in shootouts with the police, the Army or the Navy and who are probably involved in drug-related or other criminal activities— have led them to be set free. This in turn has led the population to question the role of human rights in the country. Claims have been filed on behalf of the victims of the war on drugs, asserting that many civilians have died because of the military anti-drug strategy mandated by the President and that even innocent people have been murdered by the authorities as a result of "being mistaken" for criminals.

Although it is still early to issue a verdict on Calderon's presidential term[2] —the "truth" on the results of his military strategy is still coming out—,[3] this situation leads us to believe that it is necessary to implement a different strategy that could very well adopt the ideals and prospects of transitional justice, and ultimately embrace the standards of international human rights law to

State. Laurel E. Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 Hum. Rts. Q. 163, 197 (2009).

[2] In late 2011, a petition was filed before the International Criminal Court by a group of activists who demanded that the Prosecutor open an investigation of top Mexican officials, including President Felipe Calderón, as well as drug lords like Joaquín Guzmán Loera, known as "El Chapo." However, as of the time of writing, no information has been released on whether the Prosecutor intends to pursue this case. Sara Webb and Manuel Rueda, *Mexican Group Asks ICC to Probe President, Officials*, Reuters, November 25, 2011, *available at* http://www.reuters.com/article/2011/11/26/us-mexico-icc-idUSTRE7AO0TA20111126 (last accessed February 19, 2013).

[3] For example, under the new President, Enrique Peña Nieto, the Ministry of the Interior acknowledged that, figures showed the death of at least 70,000 people, the forced or involuntary disappearance of 25,000 and mass forced displacements during his predecessor's term. William Booth, *Mexico's Crime Wave Has Left about 25,000 Missing, Government Documents Show*, Wash. Post, November 30, 2012, *available at* http://articles.washingtonpost.com/2012-11-29/world/35584943_1_mexico-city-mexican-government-human-rights (accessed February 19, 2013); BBC, 'Mexico Enacts Law to Compensate Victims of Crime', BBC, January 10, 2013, *available at* http://www.bbc.co.uk/news/world-latin-america-20968899 (accessed February 19, 2013). Human Rights Watch also issued a report in which it documented the disappearance of 250 persons, 149 of which were enforced by state agents. Human Rights Watch considered this situation a national phenomenon; Human Rights Watch, Mexico's Disappeared: The Enduring Cost of a Crisis Ignored (2013). On the other hand, Amnesty International quoted official governmental statistics, highlighting the disappearance of 26,121 persons and the homicide of approximately 65,000, according to the National System of Public Security; see Amnesty International, *Confronting a Nightmare: Disappearances in Mexico*, June 2013. For a clearer picture on the issue of displacement and the role transitional justice can play in addressing it, see Roger Duthie, *Transitional Justice and Displacement*, 5 Int'l J. Transitional Justice 241 (2011).

the fullest extent. The proposal of using a transitional justice approach, as well as its justification, lies in the fact that this set of paradigms intrinsically links justice and politics from a perspective of redress; that is, the need to legally sanction and award reparation for former wrongs effected by a political elite, with the aim of helping rebuild a torn or fractured society and restore stability and civic trust in a political system and State institutions.

As Teitel explains it, transitional justice balances the ideals of justice and the realities of politics with the aim of effecting a radical transformation of the foundations of society, including its principles.[4] This transformation can therefore become a starting point that allows a given State to fully embrace the rule of law as its benchmark and pair it with social stability and the construction of a new social contract.[5] Thus, the idea of adopting the foundational principles that have worked in other transitional justice scenarios in the Mexican context[6] and having international human rights law as the guiding force behind the reform of the relationship between the State and the population that goes beyond mere rhetoric[7] can be useful to mend the situation that has led Mexico to socio-political fracture.

As identified by the UN Special Rapporteur on the promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, transitional justice is a strategy aimed at guaranteeing respect for and protection of human rights in the aftermath of widespread or serious violations. Transitional justice has four specific goals: providing recognition to victims, fostering trust both horizontally —among citizens— and vertically —in State institutions—, contributing to social reconciliation and strengthening the rule of law.[8] If these ele-

[4] Ruti Teitel, Transitional Justice 213 (2000) ["Transitional Justice… is a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalising change. [Its] paradigmatic rule-of-law principles are intimately related to these periods' quintessential and defining feature, namely the grounding within society of a normative shift in the principles underlying and legitimating the exercise of state power."].

[5] "Transitional justice communicates to the citizenry the 'trustworthiness' of the state; it exhibits improvements in state morality and thereby works to restore confidence in political institutions." Stephen Winter, *Towards a Unified Theory of Transitional Justice*, 7 Int'l J. Transitional Justice 224, 233 (2013).

[6] We refer specifically to truth-seeking, justice initiatives, reparation and guarantees of non-recurrence that lead to social reconciliation and cohesion, and collectively strive to strengthen the rule of law.

[7] Teitel argues, for example, that the use of international human rights law may be an element that helps in the reconciliation of internal reform within a specific and defined normative framework, and given its status, it constitutes a set of ideals that transcends legal and political perspectives. Teitel, *supra* note 4, at 222.

[8] U. N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, pars. 15, 21, UN Doc. A/HRC/21/46 (August 9, 2012). For a more detailed account of the development of transitional justice over the last three decades and some of the current challenges it faces, see Pablo de Greiff, *Some Thoughts on the Development and Present State of Transitional Justice*, 5 J. HUM. RTS. 98 (2011).

ments serve as a checklist, the need to achieve these mediate and final goals becomes evident. Furthermore, it points toward an ongoing or post-conflict situation that would benefit from a transitional justice perspective, one which could thrive in light of recent examples of application of said paradigms that have taken place in judicial and human rights spheres. Thus, the need to fulfill the goals of transitional justice to foster the socio-political reconstruction of the country, tied in with some ongoing attempts to employ some of the elements at different levels in other transitional contexts, leads us to believe that at this point Mexico may be entering a *de facto* situation of transitional justice.[9]

This note contains six sections: After this introduction, section II focuses on analyzing the need for a transitional process of justice and politics in Mexico as a direct consequence of the government's confrontational policy against drug cartels. This sheds light on the structural inadequacies and deficiencies of Mexico's prosecutorial, legal and prison systems, which has in turn led to a more widespread distrust of State institutions. Thus, it is argued that a legal and political transformation is required to restore public trust in its institutions, which could greatly benefit from the paradigms of transitional justice and the foundations of international human rights law.

Section III turns to analyze the role national human rights institutions could play in developing a victim-oriented approach in the proposed transitional process. Given their standing and attributions, such institutions could aid in the domestic dissemination and implementation of the international human rights standards that Mexico has ratified. In this sense, applying international provisions related to reparation due to victims of human rights violations could help in rebuilding public trust in the State, in addition to moving forward in the development of a more cohesive legal system based on the rule of law and the consistent application of international human rights standards. Moreover, the effective implementation and enforcement of some of the basic human rights standards, like the right to due process of law, are needed to help the mentioned socio-political transformation come true and the transformative civic process to start. In this sense, the consistent enforcement of these rights might be an important step in restoring civic trust in the State machinery, and ultimately in strengthening the rule of law.

Section IV serves to illustrate an important recent example that details the transcendence of victims' rights. In the Human Rights Commission of the State of Nuevo León recommendation regarding *Casino Royale*, several ele-

[9] As stated in the first report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the UN Human Rights Council, the measures normally used in traditional transitional justice contexts have progressively been applied to "…post-conflict contexts and even to settings in which conflict is ongoing or to those in which there has been no transition to speak of." U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, par. 16, UN Doc. A/HRC/21/46 (August 9, 2012).

ments that are normally present in transitional contexts appear and showcase how a victim-centered approach might bring important benefits to the establishment and the enhancement of a culture centered on the rule of law. At the same time, it shows how public human rights institutions can participate in a context of political and legal transition based on international human rights law.

Finally, another example appears in section V. The *Florence Cassez* judgment issued by the Mexican Supreme Court of Justice shows that a judicial transition is taking place in the country, one that aims at re-establishing the rule of law from the bottom based on the respect of the rights inherent to due process. In this sense, this case is a good example of how the actions of different institutions can lead to further developing a legal culture based on the rule of law, which may in turn help re-establish a connection between the people and the government leading to the reconstruction of the social fabric and the restoration of credibility in the State.[10]

Section VI offers some concluding remarks. This article strives to identify and discuss the elements that could indicate that Mexico is going —even if irregularly— through a *de facto* phase of transitional justice, as well as the effects and guidance international human rights law has had and potentially could have for the country while it tries to start anew in its quest to become a consolidated democracy in which human rights and the rule of law can be effectively enforced.[11]

II. Mexico and the Need for a Transitional Process of Justice and Politics

In 2000, Mexico started navigating through a transitional period in which after 70 years, a government belonging to the opposition, the PAN (National Action Party) was democratically elected. This change in government renewed hope in the people of Mexico, who saw the PRI (Institutional Revolutionary Party) as a bureaucratic, corrupt organization that had led Mexico

[10] While these two cases have been selected due to the important impact they have had on the current legal and political context, it must be noted that they are under no circumstance the only examples of international human rights law enforcement that indicate a decisive split from the previous legal system and culture. Besides, other cases might show different results. Thus, the cases referred to here are to be considered as significant legal benchmarks that help illustrate the constitutional changes after the 2011 constitutional reforms that incorporated international human rights into the Mexican legal framework.

[11] For an interesting contextual example of the challenges and difficulties in establishing the rule of law and the legitimacy of the State in Mexico, as well as the need to focus on strengthening civil society as a countermeasure to fight corruption and "unrule of law," see Stephen D. Morris, *Mexico's Political Culture: The Unrule of Law and Corruption as a Form of Resistance*, 3 (2) Mexican L. Rev. 327 (2011).

to several economic crises, electoral frauds, periods of mass human rights violations (particularly enforced disappearances, extrajudicial killings and oppression in the 1970s and 1980s)[12] and a loss of faith and credibility in official institutions.

Even though the 1990s brought several important changes in terms of economy (with the entry into force of the North American Free Trade Agreement), transparency (through the creation of an Electoral Institute to oversee electoral processes in the country and guarantee the validity of elections, as well as a human rights system headed by a National Human Rights Commission and 32 state commissions), supranational legal monitoring (by accepting to be placed under the jurisdiction of the Inter-American Court of Human Rights in 1998) and institutional reform —such as the one concerning the Supreme Court of Justice that transformed the court structure and accorded the Court most of its current powers—, it was not until the PRI lost the presidential elections that there was hope for a new process to begin. In the eyes of the general public, this would be the process that would set the foundations for a new democracy in which economic development, rule of law and the respect for human rights would be the norm and not the exception.

Thirteen years later, important advances have been made, such as the 2011 human rights reform[13] or the 2008 criminal law reform —which has not been implemented but in a few states of the country, that aimed to instate an accusatorial regime based on oral processes instead of the traditional written trials. Despite the progress made, different perspectives have emerged: the "war on drugs" undertaken by former President Calderón exposed several deficiencies in the prosecutorial, judicial and prison systems in Mexico.

For example, it is widely known that in prosecutions of detainees in relation to drug-related activities, few detentions ultimately end up in convictions.[14] This is mainly because suspects often experience abuse from the police

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[12] Gisela von Wobeser, Historia de México 249-277 (2010).

[13] This reform granted constitutional status to the human rights treaties ratified by the State while also instituting a diffuse conventionality control that allows any judge to invalidate a law in a specific case if said law contravenes a human rights treaty. Among other important modifications, the reform also imposed the duty to strive to protect human rights on every authority, making the application of the *pro homine* principle a standard throughout the country. Nevertheless, the Supreme Court decided to set forth a constitutional limit on the domestic enforcement of international human rights law, which would materialize if an international norm or standard contravenes the Constitution. While the publication of this precedent is still pending, the Court has reached its conclusion on this matter. Contradicción de Tesis 293/2011, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, Septiembre de 2013, Páginas 3-30 (Mex.). For a more precise insight into the new diffuse conventionality control, see Alfredo Narváez Medécigo, *Enforcement of Fundamental Rights by Lower Courts: Towards a Coherent System of Constitutional Review in Mexico*, 6 (1) Mexican L. Rev. 3 (2013).

[14] "The obligation to respect, ensure respect for, and to enforce international human rights and humanitarian law includes a State's duty to prevent violations, investigate violations, pun-

or army forces at the time of arrest or initial detention —including arbitrary arrest, illegal detention, torture and enforced disappearance. This situation opens a window of opportunity for detainees to demand constitutional protection of their human rights through the judicial remedy of *amparo*.[15] This situation has had obvious effects on the public's perception of the role human rights play, with little regard to the illegality and impunity with which the State's security forces carry out their operations, usually and systematically[16] committing human rights abuses.[17] An example will be presented and explained in detail in the chapter referring to the *Florence Cassez* case.

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ish violators, provide victims with equal and effective access to justice and provide for or facilitate reparation to victims." M. Cherif Bassiouni, *International Recognition of Victim's Rights*, 6 Hum. Rts. L. Rev. 203, 204 (2006).

[15] The judicial remedy of *amparo* is a constitutional mechanism that was created in 1847, for the purpose of protecting the individual —whether a natural or a legal person— from acts of authorities that could pose a risk to his legal sphere (to himself or his properties *lato sensu*). An *amparo* can perform the functions of several other legal instruments, such as *habeas corpus*, the control of constitutionality of the laws or the recourse to cassation –especially in cases in which judges allegedly and incorrectly apply and interpret the law without taking into account fundamental rights protected by the Constitution. There are two types of *amparo*: the *direct amparo*, which can be used as a last resort against definitive judicial or administrative decisions that infringe the person's human rights, against violations of due process or violations arising from interpretations made in the resolution; and the *indirect amparo*, which is used to challenge the constitutionality of any act by an authority that is final and that could cause irreparable damage to the plaintiff *other than* judicial or administrative resolutions that put an end to the trial. The *amparo* trial can be decided in three ways: granting, denial or dismissal, the latter generally for a lack of subject matter. As to the effects of its resolutions if granted, there are two types of *amparo*: a *full amparo* (*amparo liso y llano*, in Spanish), which implies that federal judiciary protects the citizen's right and invalidates the effects of the decision or judgment that would have caused a human rights infringement; and the *amparo for effects*, in which the federal judiciary orders that the procedures begin anew without the inclusion of the elements that led to the filing of the *amparo*. For an interpretation of the institution of *amparo* from a common law perspective, see Richard D. Baker, Judicial Review in Mexico. A Study of the Amparo Suit (1971). See also Eduardo Ferrer Mac-Gregor & Rubén Sánchez Gil, *Amparo y proceso acusatorio en México,* in Eduardo Ferrer Mac-Gregor & Alberto Saíd Ramírez, Juicios Orales. La reforma judicial en Iberoamérica 427-468 (2013), for a study of the new complexities and challenges of the new *amparo* trial.

[16] For example, Human Rights Watch has observed that "[d]uring [Calderón's] tenure, soldiers and police officers systematically tortured civilians to extract confessions in the fight against cartels, and they committed widespread executions. Almost none of these abusive soldiers and police have been punished. Of the roughly 5,000 investigations that military prosecutors opened into alleged abuses from… December 2006, through April 2012, only 38 soldiers have been sentenced." José Miguel Vivanco, *Nothing to Celebrate in Mexico*, The Wash. Post, January 24, 2013, http://www.washingtonpost.com/opinions/jose-vivanco-mexicos-human-rights-failures/2013/01/24/cf40db22-6413-11e2-9e1b-07db1d2ccd5b_story.html (accessed 20 February 2013).

[17] The Secretary-General of the United Nations recognized this problem in a report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societ-

Several issues have become more perceptible over the past years regarding the judicial system, such as a lack of preparation and knowledge from judges on how to effectively implement the human rights reform —and therefore, take into account the implications and State obligations deriving from the international treaties the country has ratified—, or the few actions taken, for example, in the field of torture prevention, which is a form of abuse that detainees commonly experience. Even though Mexico has signed the Istanbul Protocol and has ratified the corresponding international conventions concerning torture, such protocols and instruments are rarely used when allegations of torture are brought up in a judicial procedure, let alone at the start of a proper investigation into such allegations, thus perpetuating impunity. Another important pattern throughout the judiciary is the admission of flawed evidence, like confessions obtained through torture —prohibited not just by international human rights law and international criminal law, but also by numerous Inter-American Court of Human Rights judgments and the Mexican Constitution—, which obviously allow suspected felons to regain their freedom through the *amparo*.[18]

The prison system does not elude the institutional flaws that seem to be present in many other institutions. Instead of serving their purpose as social rehabilitation centers, prisons are at the mercy of drug cartels and other criminal groups, which have in most cases eroded the rule of law. A clear example of this was a massacre that took place on February 20, 2012 at the Apodaca Social Rehabilitation Center in Nuevo León where a group of convicts massacred 44 inmates from a rival drug cartel and a group of 37 convicts escaped.[19] This case was notorious because of the prison security's involvement in and acquiescence of the massacre and escape of the prisoners, as well as for lax prosecution against those involved in the massacre, including the prison warden at the time of the tragedy.[20]

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ies, where he stated that "…helping war-torn societies re-establish the rule of law and some to terms with large-scale past abuses… requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security." The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, par. 3, *delivered to the Security Council*, UN Doc. S/2004/616 (August 23, 2004).

[18] These situations have been documented and addressed by the UN Committee against Torture, which in its latest concluding observations on Mexico issued several recommendations regarding arbitrary detention, confessions obtained under duress, impunity and the application of the Istanbul Protocol, among others. U.N. Committee against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Mexico*, pars. 10, 15-17, UN Doc. CAT/C/MEX/CO/5-6 (December 11, 2012).

[19] CBS News, "Official: Guards aided Zetas prison break," http://www.cbsnews.com/8301-202_162-57381449/official-guards-aided-zetas-prison-break/ (accessed 20 February 2013).

[20] "Corruption, police misconduct, and poor prison conditions attest to weak state struc-

These situations, and many more, point to significant structural problems Mexico has to overcome in order to effectively make the transition to a peaceful environment conducive to development and civic evolution. As noted in literature on transitional justice, this sort of structural problems clearly show a State in which there is a need to implement a working system that can guarantee the establishment of the rule of law, so as to overcome current deficits and abuses, as well as re-build institutions even if it has not experienced an internal conflict *per se* —like those suffered under authoritarian regimes in Latin America, Europe or Asia, in which the State apparatus was used precisely to incur human rights abuses.[21]

The implementation of a transitional process should therefore be focused not just on the prosecutorial, judicial and prison systems that are partly in charge of preserving a social climate of justice, but also on the politics of the government in turn.[22] Many of these problems have been identified as the final episodes of a chain of events that started with inappropriate socio-economic policies designed as short-term remedies, low salaries and a macroeconomic stability that somehow did not end up improving the microeconomic finances of the general population, especially of those living in conditions of extreme poverty.[23] According to Pablo de Greiff in his capacity as UN Expert, these issues are the result of social conflicts that are usually marked by severe economic scarcity, which pose diverse challenges to the effectiveness of governmental policies designed to address socio-economic deficits.[24] In the

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tures to administer law fairly." See Laurel E. Fletcher et al., *supra* note 1, at 191.

[21] "…an honest attempt to reestablish the force of basic rights and norms grounds efforts to coexist peacefully and, in the long run, promotes the legitimacy and stability of a regime. In other words, *transitional justice measures provide reasons for citizens to trust one another and the institutions under which they live*…" Juan E. Méndez, *Editorial Note*, 3 Int'l J. Transitional Justice 157, 160 (2009) (Emphasis added). There is a need to move away from the conceptual definition of what transitional justice is in order to apply its standards based on the situations on the ground, and particularly on the needs of the population and society as a whole, in order to reconstruct the social fabric and thus build trust in institutions and restore peace under a regime based on the rule of law, human rights and justice.

[22] "…peacebuilding and transitional justice involve promotion of socioeconomic and political justice, as well as of legal justice, which combats a culture of impunity and sets up structures to ensure ongoing respect for human rights and the rule of law." Wendy Lambourne, *Transitional Justice and Peacebuilding after Mass Violence*, 3 Int'l J. Transitional Justice 28, 34 (2009). For a comparative approach of how peace-making, peace-keeping and peace-building have been used as strategies in different countries after internal conflict and for an argument on the need to uphold human rights and the rule of law during such efforts to prevent and avoid further conflict, see B. G. Ramcharan, *Human Rights and Conflict Resolution*, 4 Hum. Rts. L. Rev. 1 (2004).

[23] Though they are important in this context, socio-economic factors will not be studied in this article as they go beyond the object of the main topic and could potentially lead to discussions related to policy in areas other than justice, rule of law, truth and human rights.

[24] U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, par. 16, UN Doc. A/HRC/21/46 (August 9, 2012).

Mexican case, this situation made joining organized crime an interesting and attractive possibility for young people, who would normally earn more money in this environment than what a normal salary would pay, while having a better chance of not being caught or facing a criminal trial.

Mexico is not specifically 'emerging from conflict' for it has been in this situation since at least 2005. However, since the 1990s Mexico seems to have occupied itself in undertaking the economic and financial reforms needed to achieve the goals of obtaining international recognition and attracting foreign investment, while taking much slower steps in implementing the justice, prosecution and human rights standards[25] that should go along with economic development, and would comply with recommendations from international organizations and with its obligations under international law in general.

Any attempt to solve the problem that is currently crippling the country has to go through a transition period and effect a change in both the judicial and political operators in order to rebuild social institutions and thus re-establish a link with the population based on credibility and trust in the government,[26] while also attacking the problems created by social injustice, corruption and weak law enforcement.[27] The existence of a representative democracy leads us to believe that whatever transformation the country must undergo, it is a process that should start from the bottom-up, that is, getting the population to actively participate with institutions, in an attempt to locally implement the international human rights and criminal law standards that the international community expects from a consolidated democracy.[28]

Thus, to rebuild public trust in the authorities and the social fabric in the country, the government must take steps to ensure the implementation of the

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See also Fletcher et al., *supra* note 1, at 218. ["Attention to the underlying socioeconomic disparities and inequalities in the country, in conjunction with structural change in the way that the country is governed, may be the most important first steps in developing an appropriate response to perpetrators of violence."]

[25] For Turner, the imposition of internationally recognized standards of rule of law is the basis for obtaining stability and consolidating any State into a liberal democracy. Catherine Turner, *Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law*, 2 Int'l J. Transitional Justice 126, 127 (2008).

[26] Winter, *supra* note 5, at 232. ["Transitional justice works… by creating the institutional conditions for civic trust and civil recognition. Since civic trust and civic recognition are necessary conditions of reconciled and democratic politics, transitional justice's promotion of these mediate goals supports the ultimate aims."]

[27] As stated by Arias Marín, transitional justice processes can be complemented with a particular focus on retribution, without disregarding the need to establish and recognize the responsibilities of the wrongdoers. Alan Arias Marín, *Justicia transicional y derechos humanos. La relevancia de las víctimas*, 13 Derechos Humanos México. Revista del Centro Nacional de Derechos Humanos 13, 23 (2010).

[28] "Arguably, it is the local engagement with rights that will lead to the emergence of an embedded human rights culture, not the existence in law of contested international standards." Turner, *supra* note 25, at 133.

constitutional reforms on human rights and the criminal justice system, as a starting point to guarantee the continuity of its transitional process. Given the importance of enforcing human rights through structural, social and economic policies in a democratic society, any transition must start with respect for the most basic substantive and procedural rights, particularly due process of law, to generate coherence that the population can relate to and rely on. The success of a transitional process will depend on the effectiveness of the law and its being respected by authorities and the population, which would in turn contribute to the process of social transformation. As Teitel argues, since the defining feature of a transition is its normative shift, "legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation."[29] In this regard, the respect and enforcement of substantive and procedural rights throughout the prosecutorial, judicial and prison systems would become the catalysts on which the credibility on the State would be based, and which would allow the population and the authorities to establish a new rapport based on the respect for the law.[30]

This role can and should be assumed by the State as a unit, that is, in a transversal manner that involves the active engagement of the Executive, Legislative and Judicial branches. However, certain institutions could enhance the government's effort and play an active role in the promotion of human rights, justice, peace-building and social stability, in a way that would help the transitional process. In this sense, the role of national human rights institutions in any transitional process is paramount, given their specific appropriateness and technical knowledge in dealing with human rights issues. In the case of the National Commission of Human Rights, some comments will be shared in the next section as to how it could become a leading actor and improve its participation in the transitional process that the country is going through.

III. The Role of National Human Rights Institutions in Developing a Victim-Oriented Approach

National Human Rights Institutions (NHRIs) have been recognized and charged with the task of working *inter alia* as intermediaries in the implementation of international human rights standards in national law and jurisdictions.[31] In the case of Mexico, the *Comisión Nacional de los Derechos Humanos* (CNDH) was established in 1992 after the inclusion of Article 102-B in the

[29] Teitel, *supra* note 4, at 215.

[30] "Legal processes offer established means of changing public reasoning in the political order, for they are themselves predicated on authoritative representations of public knowledge. Transitional legal processes thus contribute to the public epistemological and interpretative changes contributing to the perception of transformation." *Id.* at 223.

[31] For a more detailed insight on the role of NHRIs under international law, see Richard

Constitution. This constitutional provision stipulates the protection of human rights is entrusted to the CNDH and to 32 state commissions, which are responsible for issuing non-binding recommendations to State agents and filing complaints before the corresponding judicial or administrative authorities for the human rights abuses committed by a given State agent or public official, in addition to challenging the constitutionality of a law considered as violating the human rights standards protected by the Mexican Constitution and international human rights treaties before the Supreme Court of Justice.[32] Recent reforms to the roles of the CNDH and state commissions[33] include a provision that whenever a public official does not accept or enforce a recommendation, this negative response can be made public and the official could be called to appear before the local or national Congress to explain the motives for not complying with said recommendation. This represents an effort to increase accountability of all public officials in terms of their performance regarding the respect of human rights.

Considering Mexico's legal tradition as a "positivist" system, as reflected by Human Rights Watch in its assessment Of the country's human rights system,[34] it is important to mention that the legislation that regulates the functions and organization of the CNDH does not address or even refer to the standing and rights that victims of human rights violations should be entitled to whenever party to any investigation carried out by the national *ombudsman*.

Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 Hum. Rts. L. Rev. 1 (2010).

[32] This last provision regarding international law has only been in force since June 10, 2011, with the publication of what is known as the "Human Rights Reform." Decreto por el que se modifica la denominación del capítulo I del título primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos [Decree to modify the title of the Chapter I and to reform various articles of the Constitution of the United Mexican States], Diario Oficial de la Federación [D.O.], 10 de Junio de 2011 (Mex.) [Hereinafter Human Rights Reform of June 10, 2011].

[33] Human Rights Reform of June 10, 2011.

[34] Human Rights Watch, Mexico's National Human Rights Commission: A Critical Assessment 1, 60 (2008), where it clearly demonstrated that the CNDH had interpreted its mandate with many limitations, considering that it could only investigate violations of human rights that were protected by either statutory law or the Constitution, but not those included in international human rights treaties for they did not form part of the Mexican system. Thus, the 'principle of legality' under which the Commission can only do what is expressly mandated or authorized by law would be violated if it extended its functions. It must be mentioned, however, that in a Court Opinion issued in 1999 the Supreme Court of Justice declared that international treaties have priority over national laws as long as they do not contravene the Constitution (Tratados internacionales. Se ubican jerárquicamente por encima de las leyes federales y en un segundo plano respecto de la Constitución federal. Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, Vol. X, November 1999, Tesis P. LXXVII/99, page 46 (Mex.)); along the same line, article 133 of the Constitution states that international treaties that have been ratified by the State are a part of the Mexican legal system. See also Carver, *supra* note 31 at 15.

Considering this situation, it is certainly alarming to perceive that the lack of a victim-oriented approach in its legal framework could potentially undermine not only the role of the CNDH in the persecution of human rights violations —turning the commission into a merely administrative procedure that only would seek to point out the violations committed by the authorities—, but it could also lead to the denial of the human rights-based compensation to which victims are entitled, particularly in cases of gruesome violations like the ones described in the opening paragraph of this article.

In the same sense, the CNDH usually limits its recommendations to suggesting that government officials receive human rights education and that the corresponding administrative or criminal legal actions are taken against officials who are found to have violated human rights directly or in collaboration with others. Regretfully, CNDH recommendations usually do not address victims' rights or advise the authority on the measures that could be taken to provide appropriate reparation, given the context and seriousness of the human rights violation. The recent enactment of the General Law of Victims[35] —which civil society has celebrated as a triumph— responds to society's demands to address the serious human rights violations that have come with the "war on drugs", and could be a step in the appropriate direction towards granting human rights violation victims appropriate standing in the legal system.

The aims of this law are to guarantee that victims have the right to protection, truth, justice, reparation, due diligence and non-repetition of the illegal acts or omissions by the authorities, as well as to deter human rights violations by sanctioning the Mexican State not just legally but also financially, and generally to give victims a sort of compensation for the abuses suffered. However, with the creation of a national organism in charge of enforcing the law, it seems unlikely that the CNDH will adopt a different stance in issuing its recommendations since the only main actions that the law attributes to it are the dissemination of victim's rights throughout the country (article 118-VI on the powers of the Federal Government) and to act in conjunction with state commissions in order to provide efficient service in enforcing victims' rights (article 173). Important criticism has arisen, particularly regarding the vagueness of the law (for example, it considers two types of victims: victims of crime and victims of human rights violations, but it does not define the difference between them) and that in its current state, the law cannot be applied effectively. In general terms, a more precise series of actions is required of the CNDH to act as the human rights champion it is supposed to be.

Given their status as the safe keepers of human rights within national systems, NHRIs do not only have the obligation to act in their quasi-judicial authority, but also to apply and implement the standards recognized under

[35] Ley General de Victimas [LGV] [General Act Victims], *as amended* 3 de Mayo de 2013, Diario Oficial de la Federación [D.O.], 9 de Enero de 2013 (Mex).

international law. Despite the fact that their jurisdiction is strictly over matters regarding human rights, the intersection of this field with international criminal law and transitional justice, along with the principle of interdependence of human rights —some of which are also contained in treaties regulating international criminal law, such as the Rome Statute— should support the principle of reparation and the standing of the victims. This is one of the pillars of international human rights law to which the field of transitional justice closely relates.

The use of these international standards can help both define the content of the rights they are supposed to protect under international law standards, customs and case law, and to extend the protection of these rights as conceived under national law according to the practices employed by its international counterparts. In this sense, it is remarkably important that NHRIs emulate the examples set forth by regional human rights systems —and particularly that of the Inter-American System of Human Rights— regarding the reparations victims are entitled to, to create a cohesive standard that can be applied internationally.

When a human rights violation occurs, sometimes the only thing that can help the victims cope with their pain is the reparation awarded to them[36] — considering that in many cases, regardless of the reparation, victims' grief and suffering cannot be assuaged.[37] In some cases, as repeatedly upheld by the Inter-American Court of Human Rights, this reparation serves to honor the memory of those affected by State activities or omissions, as well as a reminder that human dignity should always drive and limit the actions undertaken by States, in order to prevent future abuses.[38]

International human rights law, international criminal law and transitional justice are linked by the intrinsic aim to prevent and deter human rights violations, each in its own particular way. However, an underlying but very important aspect that all of them take into consideration is that the victims, those who are marginalized or under a greater risk of being subject to a violation of their human rights, not only deserve but have the right to be protected. Moreover, when injured, victims should be able to exercise the right to have access to remedies, reparation and compensation. With this in mind, it is crucial that NHRIs —like the CNDH in Mexico— take the necessary steps to realign

[36] "Reparations have come to occupy a special place in transitional processes, at least in part because they are a transitional justice measure that arguably has the greatest potential to make an immediate difference to the life of victims." The Secretary-General, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, par. 43, *delivered to the General Assembly*, UN Doc. A/67/368 (September 13, 2012).

[37] "…although justice will never be attained in any thoroughly satisfactory sense, the act of seeking it should demonstrate to the wronged and the aggrieved that there is always room to consider their claims within the framework of a democratic polity." A. James McAdams, *Transitional Justice: The Issue That Won't Go Away*, 5 Int'L J. Transitional Justice 304, 312 (2011).

[38] Radilla Pacheco v. Mexico, Inter-Am. Ct. H. R. (ser. C) No. 209 (Nov. 23, 2009).

their attention from the *goal* of attributing responsibility to public officials to a more comprehensive and victim-oriented approach that aims at helping in the reparation and coping *process* that victims usually need, for it is a fact that the victims of human rights violations are themselves the *process* and *goal* of every human rights system. It is through the process of victim protection and the reparation of their injuries that the goal of re-establishing the rule of law and the respect for human rights is more likely to be achieved.[39]

IV. *Casino Royale*: Applying the Principles of Transitional Justice

Despite the aforementioned critique of the CNDH, we must also recognize an emerging trend in the human rights system in Mexico —as well as in the Judiciary— that consists of trying to comply with its international obligations and have a more complete role in the protection of human rights, particularly for the victims of human rights abuses. A prominent example will be discussed in the next paragraphs, showing a specific case in which this human rights approach can incorporate some of the principles of transitional justice in order to try to better protect or compensate the victims.

On August 25, 2011, Mexico made the headlines all over the world with an organized crime attack against a casino in the northeastern city of Monterrey. In an unprecedented type of violence, a commando set the Casino Royale ablaze for not paying a "protection fee" demanded by a drug cartel, killing 52 people in the process, most of whom died of smoke inhalation since they were unable to escape the building. Expert analysis later revealed that some of the emergency exits were in fact blocked and that safety measures had not been implemented despite having obtained the corresponding permits from the Civil Protection Office, the agency in charge of ensuring that safety measures are strictly followed. The Human Rights Commission of the State of Nuevo León (CEDH-NL) started an investigation to determine if and what human rights violations had also occurred in the tragedy.

An analysis of Recommendation 103/2012 shows a detailed analysis and use of the jurisprudence of international organizations and tribunals, such as the Inter-American Court of Human Rights, as well as through direct reference to and the application of international human rights standards. The Commission arrived at the conclusion that several human rights violations had taken place (particularly regarding the rights to life, personal integrity and working conditions), all of which were associated with the State's duty to protect its citizens from human rights abuses, including from those at the hands of non-State actors.

[39] "…peacebuilding requires a transformation in relationships between people, in addition to the ending of violence and construction of the conditions for peace." Lambourne, *supra* note 22, at 35.

In particular, the Commission determined that a lack of actual monitoring by the Civil Protection Office (the agency in charge of issuing operating permits based on passing approval on the security measures at the premises), the Ministry of Urban Development and the Environment of Monterrey (the body in charge of authorizing the business's operation if the premises comply with the required fire prevention measures) and the General Office of Labor Inspection of the state Ministry of Labor (the body in charge of inspecting that appropriate working conditions and safety measures have been met, including safety training for employees). In other words, the lack of due diligence by the authorities caused a breach in their duty to prevent human rights abuses, as it is directly linked to their positive obligation to protect.[40]

An important characteristic of the *Casino Royale* case is that even though it was specifically centered on the authorities' responsibilities in the lack of due diligence that led to the death of 52 people and the ensuing human rights violations, it also had a particular focus on the rights of the victims,[41] even distinguishing between primary and secondary victims. For example, it stated that there was a human rights violation of the people who lost their lives and those who were injured, as well as of their families,[42] who were the indirect victims of the human rights violation, in compliance with the jurisprudence set forth by the Inter-American Court of Human Rights in its *Pacheco Teruel* judgment.[43]

In the same sense, the *Casino Royale* resolution stated that the CEDH-NL took into account the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[44] (the *Van Boven Principles*) to issue its recommendation on the different forms of State reparation to be awarded to the victims. Therefore, the Commission deemed it prudent to award economic reparation for lost earnings and the subsequent damage (particularly funerary costs and medical and psychological expenses), rehabilitation measures (including medical, psychological or psychiatric treatment), satisfaction (as defined in the *van Boven Principles*,

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[40] Comisión Estatal de Derechos Humanos de Nuevo León, *Recomendación 103/2012,* Exp. CEDH/242/2011 (December 31, 2012) [Hereinafter Recomendación Casino Royale], regarding the specific conditions that led to the human rights violations.

[41] For a description of what rights are understood explicitly as victims' rights (namely the rights to equal and effective access to justice; the right to adequate, effective and prompt reparation for the harm suffered, and the right to truth and their specific characteristics), *cfr*. Cherif Bassiouni, *supra* note 14, at 260-276.

[42] Recomendación Casino Royale, *supra* note 40, at 193.

[43] Pacheco Teruel v. Honduras, Inter-Am. Ct. H. R. (ser. C) No. 241, at para. 74 (Apr. 27, 2012). In this case, the Court considered that the family of the deceased would be a secondary victim to the human rights violation.

[44] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, UN Res. A/RES/60/147 (March 21, 2006).

including the verification of the facts and issuing a public apology, starting the criminal and administrative procedures against the public officials and other non-State actors whose acts or omissions contributed to the human rights violation, and the construction of a monument in memory of the deceased and those injured in the fire) and guarantees of non-repetition.[45] This recommendation especially focused on alleviating some of the victims' suffering, which would be accomplished through the recognition of public truth and bringing those directly and indirectly responsible to justice.[46]

Considering that this particular human rights violation was the result of a combination of factors, including omissions in due diligence on behalf of the authorities, a lack of corporate responsibility to respect by the casino operator and a violent attack from organized crime, several elements that are usually included in transitional justice contexts were analyzed. For example, the *Casino Royale* recommendation made explicit reference to the "right to truth that the victims of human rights abuses and their families have to know what happened," and that the "investigation and determination of historical truth constitute another measure to combat impunity, which in its own fosters the chronic repetition of human rights violations."[47]

Making reference to Inter-American Court of Human Rights (in particular to *Campo Algodonero*)[48] and the American Convention of Human Rights case law, the CEDH-NL recommended that the Prosecutor's Office of the State should initiate criminal investigations and prosecute those authorities involved in the human rights abuses, through either their actions or omissions, in order to thwart impunity and the repetition of human rights violations.[49]

The use of elements such as the quest for truth and justice, and in particular the building of a monument to honor the memory of the victims is a situ-

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[45] Ximenes Lopes v. Brazil, Inter-Am. Ct. H. R. (ser. C) No. 149, at para. 209 (July 4, 2006), where the Court stated that reparations should include *restitutio in integrum* and were it impossible, any other measure that aims to repair the consequences of the human rights violation, including measures of compensation and satisfaction.

[46] "A victim's right to access justice includes the State's duty to prosecute those responsible for human rights violations. [However, a] victim's right to prosecution… is not a substitute for the State's duty to ensure respect for international human rights and humanitarian law, but rather co-exists with it." Cherif Bassiouni, *supra* note 14, at 263.

[47] Recomendación Casino Royale, *supra* note 40, at 195-196. "[In the same sense], truth can help provide a historical record, educate people, promote forgiveness and prevent future victimisation. Truth is an imperative, not an option to be displaced by political convenience." Bassiouni, *supra* note 14, at 276. See also Penal Miguel Castro Castro v. Peru, Inter-Am. Ct. H. R. (ser. C) No. 160, at paras. 381, 393 (Nov. 25, 2006), regarding the need for a serious investigation and prosecution as a requirement to respect and fulfill the right to truth.

[48] González y otras ("Campo Algodonero") v. Mexico, Inter-Am. Ct. H. R. (ser. C), No. 205, at para. 454 (Nov. 16, 2009).

[49] In the opinion of the current UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, it is necessary to break the cycle of impunity to prevent the repetition of similar human rights violations, a posture that has been repeatedly endorsed by the universal and regional human rights organisms. Méndez, *supra* note 21, at 161.

ation that recurs in the context of transitional justice, which aims at moving forward a society that has been afflicted by conflict.[50]

In the same sense, this resolution echoes Lambourne's model of *transformative justice* which is based on the principles of transitional justice with the combined aim of peacebuilding by addressing the roots of the problem.[51] This model holds that there are four pillars upon which social reconstruction and peacebuilding should built: *accountability* (legal justice), *truth* (knowledge and acknowledgement), *socioeconomic justice* (historical and prospective) and *political justice* (institutional reform, rule of law and respect for human rights). In comparison, the *Casino Royale* recommendation clearly fulfills and implements this model by demanding *accountability* in the criminal and administrative procedures of public officials (legal justice), revealing the *truth*, issuing a public apology, recognizing the shortcomings of state organs (knowledge and acknowledgement), awarding *remedies and reparations* that encompass the economic, medical, psychological, legal and social needs of the victims and their families (prospective justice), and requesting the respect of human rights and the rule of law through the criminal and administrative procedures against those found responsible[52] by means of human rights education and training of public officials and the private sector, as well as by a request to file an initiative to reform the laws that regulate private corporations to comply with the current international standards on corporate responsibility for human rights.[53]

This CEDH-NL resolution is a landmark case that shows a commitment not just to the respect of international human rights law, but also and more specifically to the central importance of victims in any human rights procedure. A particularly important point is that respect of the rule of law will necessarily include a respect for human rights, which are the foundations of a democratic society. Furthermore, it will also bring in a much needed scenario in cases in which a given State —like Mexico in this case— faces a transitional process in both its justice system and its politics.[54] The next chapter

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[50] Arias Marín, *supra* note 27, at 16.

[51] Lambourne, *supra* note 22, at 37.

[52] "…vetting of public officials must be accompanied by the creation of robust prosecutorial mechanisms if vetting is to be reasonably seen as more than an administrative, bureaucratic initiative." U. N. Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, para. 25, UN Doc. A/HRC/21/46 (August 9, 2012).

[53] "Transformative justice not only deals with the past but also establishes conditions and structures in order to ensure justice in the present and the future… In addition to accountability or legal justice, attention needs to be paid to psychosocial processes, socioeconomic conditions and political context in order for transitional justice to support peacebuilding." Lambourne, *supra* note 22, at 45, 47.

[54] Teitel, *supra* note 4, at 220. ["Transitional operative acts include pronouncements of indictments and verdicts; the issuing of amnesties, reparations and apologies; and the promul-

will argue that a turning point may have been reached through the Mexican Supreme Court's ruling on a case in which arbitrary detention and the lack of respect of the rule of law and human rights turned a presumed criminal into a victim of human rights abuses. This ruling emphasized the fact that law enforcement officials and other public authorities must pay attention to these aspects in order to avoid having both the criminals and the crime victims resulting in two sets of victims of human rights violations.

V. *Florence Cassez* and the Supreme Court: (Re)Creating the Rule of Law

The *Florence Cassez* case has been another paradigmatic and controversial situation for the Mexican judicial system that engrossed the international press, academia, activists and civil society in general in a very passionate debate on human rights, the rule of law and due process.

Florence Cassez, a French national, was detained by the police on December 9, 2005, during the raid of a ranch in the outskirts of Mexico City, after being informed that said ranch was being used to hold three kidnapping victims, including an 8-year-old boy, hostage. Apparently, Cassez's sentimental partner was the leader of the group, and "evidence" pointed out that she was involved in the kidnappings, at the very least. Judicial records show that they were "officially" captured by law enforcement agencies at 04:30 in the morning.[55] They were then brought to the ranch at around 05:00, to recreate a live television "capture" of a band of kidnappers at 06:47, which was broadcast by the main television stations in the country. Due to the recent rise of spiraling violence in Mexico, it was a much needed opportunity to build social trust in law enforcement institutions, as well as to portray an image of strength and legitimation of the police forces. However, after public outrage against the alleged kidnappings carried out by a foreigner and a live telephone confrontation between Cassez and a high-ranking public official on a TV show, on February 10, 2006, public authorities admitted that the arrest had been staged and that the kidnappers had been captured a day earlier under different circumstances. The public authorities pointed out that it would not change their guilt regarding the kidnappings they were accused of in any way.

After a long judicial process that lasted six years and condemned by all three instances (a District Court which imposed a 96-year prison sentence,

gation of constitutions and reports, for transitional practices share features namely as ways to demonstrate publicly new collective understandings of truth."]

[55] It was alleged numerous times in the judicial briefs that her detention actually took place at 11:00 on 8 December 2005, and that she was held captive by the police for an entire day before the live broadcast of her "arrest." Sentencia de Amparo en Revisión 517/2011, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Página 31 (Mex.).

a Unitary Circuit Court that reduced the sentence to 60 years and an *amparo* trial in which the Collegiate Circuit Court ratified the sentence given by the Unitary Court), Cassez filed an appeal (*amparo en revisión*) to the Supreme Court of Justice. In light of the constitutional fundamental rights that formed the merits of her case before the Collegiate Court, the appeal therefore requested a constitutional interpretation of the human rights protected by both the Mexican constitution and international human rights law.

On March 9, 2011, her case was assigned to the First Chamber of the Supreme Court in charge of criminal matters, where Justice Arturo Zaldívar Lelo de Larrea would prepare the project. On March 21, 2012, Justice Zaldívar presented his sentence project, in which he favored the immediate release of Florence Cassez based on what could be summarized as three important human rights violations: the lack of effective consular assistance,[56] an arbitrary detention in order to manipulate the circumstances and facts involving her capture without presenting her immediately before the corresponding judicial authority,[57] and in light of those two violations, the direct violation of her right to be presumed innocent and to have an adequate defense.[58]

To be able to grant the *amparo* and therefore release Cassez from prison, a majority vote in a chamber with five Justices was required. Nevertheless, only two voted in complete favor of the project (Justice Zaldívar and Justice Olga Sánchez Cordero), with two Justices voting to grant an *amparo* "for effects"[59]

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[56] *Id.* at 103. After her detention, Cassez was not informed of her right to have consular assistance, and the diplomatic representation of France did not have contact with her until 35 hours later. As analyzed by Justice Zaldívar, this position even went against the practice that Mexico has upheld before international courts, especially in the *Avena* case before the International Court of Justice and in an Advisory Opinion rendered by the Inter-American Court of Human Rights at the request of the Mexican Government regarding the obligation of the United States of America to observe the Vienna Convention on Consular Relations, which stipulates the right to consular assistance. Justice Zaldívar concluded that the lack of consular assistance was a situation that violated her fundamental right to be presumed innocent, which was reflected in the first three stages of the criminal trial.

[57] *Id.* at 107. In his project, Justice Zaldívar's argument was based on the fact that Florence Cassez was not immediately presented before the judicial authorities (in this case, the Prosecutor's Office), the police were permitted to stage the "live capture." Therefore, the entire process was corrupted while the police were allowed to present a case that was damaged by the flawed evidence, but which would nevertheless be considered valid by the courts that judged the case. Justice Zaldívar's main claim is that there is no constitutional or human rights premise that allows the authorities to not bring any detainee immediately after the arrest before the corresponding authorities, and thus the staging and delay in her presentation were fundamental violations of due process that affected her human rights.

[58] *Id.* at 120, 127. In his project, Justice Zaldívar explained that the effects of the lack of an effective consular assistance and of not being immediately presented before the Prosecutor's Office, as well as the staging, had an important effect on the public's perception —including that of the courts— of her innocence. As a result, she was judged under a partial basis.

[59] This concept means that the remedy would *only* have effect on some of the elements of the judicial case file so that the judicial authority could reassess the procedure and either take

that would send the case back to the Collegiate Courts to issue a new resolution, and another Justice voting against the project.[60] Due to a lack of a majority, the case was transferred to Justice Olga Sánchez Cordero to develop a new project.

On January 23, 2013, a new project was presented to the Chamber by Justice Sánchez Cordero. This project was intended to send the *Florence Cassez* case back to the Collegiate Courts by granting her an *amparo* "for effects" that would invalidate some of the evidence —particularly witness testimonies, which were significantly and radically altered throughout the procedure, and which were the main bases to convict Cassez— that was considered contaminated by staging the arrest and that also corrupted the entire criminal proceedings. In this second round, three Justices opposed Justice Sánchez Cordero's project. However, recently-appointed Justice Alfredo Gutiérrez Ortiz Mena also voted against the project, pointing out that the evidence should be invalidated because of the effects the staging of the arrest had in the process and because Cassez did not receive effective consular assistance.[61] With this explanation, Justice Sánchez Cordero discarded her project to adopt the one proposed by Justice Zaldívar in March 2012, in order to obtain a majority vote and grant an *amparo* that would immediately release Florence Cassez from prison.[62]

The Supreme Court judgment sparked another passionate round of arguments in Mexican society that has since been debated as to whether the subject matter of a case should be subjected to form while also arguing to the contrary that this precedent would provide jurisdictional arguments to other criminals to be released from jail in light of the due process violations that the police incur when arresting people or because of the lack of police and judicial authority's preparation in handling cases. Another important point that is essential to the topic of transitional process of justice and human rights is the

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into consideration an omission or re-evaluate a misinterpretation. In this case, it would imply that any evidence found to be either unconstitutional or in violation of her human rights would have to be discarded and a new resolution would have to be issued without considering the flawed elements in the judgment.

[60] María de la Luz González, *Desecha Corte Proyecto de Ministro Zaldívar*, El Universal, March 21, 2012 http://www.eluniversal.com.mx/notas/837281.html (accessed on February 25, 2013).

[61] Justice Gutiérrez Ortiz Mena's position could even be related to the argument made by Bassiouni since both implied that a remedy must be awarded, with the distinction that Bassiouni clearly mentioned that "[f]ailing to provide an alien with an effective remedy amounts to a denial of justice that subsequently gives rise to an international claim by the alien's State of nationality," possibly in the same sense as the International Court of Justice resolved in *Barcelona Traction*. Cherif Bassiouni, *supra* note 14, at 218.

[62] Elisabeth Malkin, *Mexican Court Frees Woman Imprisoned in Kidnapping*, N. Y. Times, January 23, 2013, http://www.nytimes.com/2013/01/24/world/americas/florence-cassez-is-freed-from-prison-in-mexico.html?_r=0 (accessed 24 February 2012).

argument of the previous chapter on the rights of victims.[63] This particular idea, however, should be analyzed carefully.

In the *Florence Cassez* case, the victims of the kidnapping may have been victims to organized crime and ultimately victims of the State for its omission to act to prevent a transgression of their personal liberty and security by non-State actors. This omission would eventually grant them the right to remedy against to the State, including compensation. However, in pondering the transcendence of the case, one can argue that the victims' desire to hold Cassez in prison —who, as was described above, only incriminated her and recognized her as their captor after their second deposition, and in one particular case, recognized her based on televised images— was probably not only guided by fear or the desire to see the rule of law enforced, but by a personal vendetta.[64] Without affirming it, it could be argued that in this case the prosecution should focus on those public officials that authorized and gave way to the violation of Florence Cassez's human rights, for their actions probably excluded the possibility of finding true justice —even if this meant that she was guilty of kidnapping, an issue about which the Supreme Court did not make any statement.

However, considering as the Justices did, that the police forces completely manipulated the proceedings and the evidence, what would be more important for a consolidating democracy, and particularly for a State going through a period of internal instability, would be to demonstrate that the respect for human rights and the rule of law are not to be ignored under any circumstances.[65] Under this premise, the Supreme Court of Justice upheld that the

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[63] An important clarification must be made at this point: while in the last chapter we argued that the *Casino Royale* victims had the right to remedy and reparation under international human rights law, a different perspective appears in this *amparo* trial. In reviewing the interpretation of what is argued as being a constitutional and human rights violation, the Supreme Court of Justice can only rule on matters of constitutionality and conventionality, but is not able to order either reparation or prosecution because its express obligation in reviewing *amparo* trials is to determine the constitutional or unconstitutional interpretation made by lower Courts. However, as noted above, given the fact that Cassez was granted an *amparo*, it could open the door for her to file a claim for reparation in light of the violation of several of her human rights, including what would have possibly been illegal detention.

[64] As stated by Pablo de Greiff, "…since criminal prosecutions without reparations may be thought to provide no direct benefits to victims other than a sense of vindication that otherwise does not change the circumstances of their lives, a policy based exclusively on prosecution is likely to be experienced by victims as an inefficient response to their own justice claims." U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, para. 24, UN Doc. A/HRC/21/46 (August 9, 2012).

[65] "Peace and stability can only prevail if the population perceives that politically charged issues, such as… unequal distribution of wealth and social services [and] abuse of power… can be addressed on a legitimate and fair manner." The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, para. 4, *delivered to the Security Council*, UN Doc. S/2004/616 (August 23, 2004).

value of a person's dignity is unparalleled and is to be respected, regardless of any internal conflict the country may be experiencing. On the other hand, Justice Sánchez Cordero recognized that the principal rights of the victims in the case were their rights to truth and justice, which should however not be obtained at the expense of a violation of the human rights of others.[66]

Through this interpretation, a clear message was sent: there is a need to reform the prosecutorial, judicial and penitentiary systems, in order for them to respect human rights and the rule of law, as well as to act according to the principle of legality that is so often invoked, but so rarely practiced. It is only though the respect and upholding of the rule of law that democratic ideals and the protection of human rights can be effectively achieved. Therefore, it is the way to build peace and achieve the necessary transformation of the social fabric for the State to concrete its transition into a developed democracy.[67]

VI. Conclusion

Recent quasi-judicial and judicial decisions —two of which were described above— show that Mexico may have started to travel down a road that holds human rights and the rule of law under closer scrutiny and in conditions that would comply with its international obligations under international human rights law and their correlative structures of international criminal law and transitional justice. As stated at the outset, recognizing victims' rights and fostering trust in the State are the starting points to achieve social reconciliation and to strengthen the rule of law. However, although the two cases discussed above are laudable and worthy of being used as examples to follow in a country that desperately needs them, it holds true that a deeper commitment to a cultural and social transformation is required at all levels and in all sectors of society if a permanent transition into a developed democracy is to be made.

Addressing the socioeconomic needs of the population, setting up long-term policies —different from the current six-year policies that are renewed with every change of administration— that will foster social and institutional development, and establishing defined parameters and expectations of public officials in terms of their respect of and abidance for human rights and rule

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[66] "…it is necessary to emphasize that every accusation must be based in solid and reliable evidence, obtained in respect of fundamental rights." Sentencia de Amparo en Revisión 517/2011, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Página 31 (Mex.).

[67] In his report, the UN Secretary-General considered that there is a need to have a comprehensive approach that balances accountability, truth, reparation, preservation of peace and the building of democracy and the rule of law, in order to meet the challenges posed by post-conflict environments. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 25, *delivered to the Security Council*, UN Doc. S/2004/616 (August 23, 2004).

of law standards would allow the State to grow prosperously. In this transitional process, victims must be heard and their demands must be met where possible in order to rebuild the social credibility of public institutions. Meanwhile, institutions should make an effort to follow international standards in areas relating to human rights and due process of law, while adding a distinctively local stamp to policies in other fields that affect and have effects on the general population.[68]

Victims of human rights abuses have an especially important role to play in this transition: they should strive for truth, memory and justice; they should strive for reform; and they should strive for change.[69] The number of victims reveals the increasing importance their voice must have down the road for the reconstruction of both Mexican society and institutions. During this process, they must however remember that just as they have been victims of human rights abuses or omissions, their quest for justice should be based precisely on those fundamental values to mankind that are capable of breaking the cycle of impunity.

[68] According to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, the goals of these measures are the recognition of the victims and their status as such, the fostering of trust between individuals and towards institutions, a social reconciliation and the strengthening of the rule of law. U. N. Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, paras. 28-46, UN Doc. A/HRC/21/46 (August 9, 2012).

[69] "By honouring victim's rights to benefit from remedies and reparation, the international community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law." Cherif Bassiouni, *supra* note 14, at 279.

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WHAT CAN MEXICAN LAW SCHOOLS LEARN FROM THE AMERICAN LEGAL REALISTS?

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Abstract. *This article offers (a) a basic exposition of what some members of a certain generation of legal scholars said with regards to legal education; and (b) an effort to link those ideas with a specific issue of legal education in general, and Mexican legal education in particular. With regards to these points, the idea is to go beyond the traditional approach to theory and practice, i.e., that theory is independent or even irrelevant in some cases with regards to matters of practical knowledge. Contrary to this approach, it is assumed that there is a strong relationship between theory and practice, and that they both complement each other. The purpose is to show: (a) that the ideas of the legal realists regarding training for practice during legal education is useful for general legal education; (b) that the implementation of some of these ideas in Mexican legal education would invariably help to graduate more conscious and prepared legal professionals; and (c) that the implementation of these ideas does not require much effort, only the willingness of universities and faculty to go beyond traditional, localist approaches to legal education, towards a more realistic view.*

Key Words: *Legal education, social sciences, legal realism, professionalism.*

Resumen. *Esto no es más que: a) una exposición básica de lo que algunos miembros de cierta generación de juristas dijeron con respecto a la educación legal, y b) un esfuerzo por vincular las ideas con un tema específico como la educación jurídica en general, y la educación legal mexicana, en particular. Con respecto a estos puntos, la idea es ir más allá del enfoque tradicional de la teoría y la práctica, es decir, que la teoría es independiente o incluso irrelevante en algunos casos con respecto a asuntos de conocimiento práctico. Contrariamente a este enfoque, se supone que hay una fuerte relación entre la teoría y la práctica, y que ambos se complementan entre sí. El propósito es demostrar: a) que las ideas de los realistas legales en materia de formación para la práctica durante la formación jurídica es útil para la enseñanza del derecho en general; b) que la aplicación de algunas de estas ideas en la educación jurídica mexicana invariablemente pueden ayudar a graduar profesionales del derecho más conscientes y*

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preparados, y c) que la aplicación de estas ideas no requiere mucho esfuerzo, sólo la voluntad de las universidades y de la facultad de ir más allá de los enfoques tradicionales, localistas a la educación legal, hacia una visión más realista.

Palabras clave: *Enseñanza del derecho, ciencias sociales, realismo jurídico, profesionalismo*.

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I. Mexico: Legal Culture, and Legal Education Reform

A 2006 survey, carried out by the Center for Economic Research and Teaching (CIDE) in three states of Mexico, shows that 80% of those accused never actually faced or spoke before a judge. In addition, 82% of the accused were "prosecuted for offenses against property and for amounts under 5,000 pesos (about USD 4009)."[1] Mexican legal culture is characterized by being excessively formalistic. Criminal proceedings (and the trials themselves) can take years to get finally solved. And, while cases get solved, most accused remain in pre-trial detention, as in Mexico one is guilty until proven otherwise. "The accused is considered an object under investigation rather than a subject with rights."[2]

Public defense is a right. Unfortunately, public attorney's salaries are very low, and they are not part of civil service career. An accused that cannot afford a private, independent lawyer would receive, more likely than not, insufficient legal advice by public attorneys. As most accused do not defend themselves properly, public prosecutors generally do not professionalize in

[1] Marcelo Bergman, Elena Azaola & Ana L. Magaloni, Delincuencia, marginalidad y desempeño institucional. Resultados de la segunda encuesta a población en reclusión en el Distrito Federal y en el Estado de México (CIDE, 2006).

[2] Criminal Justice Constitutional Reform, Chamber of Senators and Chamber of Deputies, Mexican Congress, 2008.

their respective fields of crime investigation (and neither are they asked for it by public institutions). This causes, at the same time, that most innocent, low income accused usually pay the price of staying in prison, while most guilty, high income accused are free.

Along with this circumstance is the fact that Mexico is facing a complex situation, given the high rise of crime rates and the presence of organized crime in several states of the country. The most notorious event lately[3] is still present in Michoacán, Mexico, where citizens perform law enforcement actions against organized crime, without governmental authorization.

To fight against these and other long-term, institutionalized irregularities, in 2008, the Mexican Congress passed a constitutional reform that turned the old, inquisitorial system into an accusatory, procedural criminal system that is supposed to gradually end with the number of irregularities that Mexican institutions have faced throughout decades, if not centuries. The deadline for each state of the country is 2016, that is, a period of eight years for each to gather enough economic resources, adapt their respective local criminal codes to what the constitution demands, build proper establishments for trials and administrative offices, equipped with video-recording systems, and train justices, judges, clerks, and legal officials in general. Professionalization of the police forces, both at a local and federal level, is also a pillar of the reform (fight against criminal corruption is the target).

As for the structure of the reform itself, it establishes an "accusatory court procedural system, regulated by the principles of public access, confrontation and cross-examination, concentration, continuity, immediacy and impartiality."[4] The principles just mentioned, according to the official description of the reform, published by Congress, are only possible under a set of procedural rules that establish that any judicial proceeding takes place in public proceedings, carried out orally by everyone present in court: judges, clerks, lawyers, prosecutors, witnesses, etc., all of them. No party is able to speak before the judge without its counter-party being present (today, any party can speak with the judge without the presence of others involved).

Another important feature of the decision making process established by the constitutional reform is the principle of free assessment of evidence, which requires that judges ground and explain in a professional manner their rulings, as article 16 of the Constitution establishes.

The rights of the victims and the accused are expanded in a positive way; alternative dispute resolution mechanisms are offered to avoid high prison rates (overpopulation is the case in most national prisons); and "a quality public defense service will be guaranteed for the general public, and public defenders will be ensured of the conditions to pursue a professional career

[3] I am writing in March, 2014.

[4] David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 (2) Mexican L. Rev. 189 (2011).

service, establishing that public defenders' salaries may not be lower than those of the Public Prosecutors."[5]

Regarding organized crime and the fight against it, the reform establishes the grounds for more powerful law enforcement institutions, and severe measures against growth of organized crime.

It is obvious that what comes in 2016 is somehow uncertain. True is that, as is shown below, efforts are being made by institutions to implement the system in a proper way in most states, and also at a federal level. However, the process for each state of gathering enough resources for future changes is of a significant complexity. Just imagine what it takes (and how much it takes) to redraft criminal codes, set up buildings of considerable size, infrastructure, and technology, and train hundreds, if not thousands, of legal officials.

Shirk argues[6] that there are both positive and negative aspects of the process of implementation that can be taken into account. On the positive side, many institutions, national and international, are working in the implementation.

First of all, there is the National Fund for the Strengthening and Modernization of Justice Promotion (Fondo Nacional para el Fortalecimiento y Modernización de la Impartición de la Justicia), which sponsors training programs for judges and officials, as well as the drafting of a model procedural code for the entire country (which is about to be enacted by Congress). Financial assistance and training has also been granted by the Rule of Law Initiative of the American Bar Association (ABA).

As for economic assistance, 266 million pesos were distributed federally in 2010 by the government, in 19 recipient states of the 32, for the implementation of the new process. The National Commission of Higher Courts of Justice (CONATRIB) continually offers courses to train judges and clerks at the state level.[7]

Regarding the negative aspects, it is true that educational materials are distributed for legal officials, especially judges, public defenders and prosecutors. However, there are around 40,000 lawyers and 400,000 law enforcement officers in the country, whom will also need some training.

With regards to law enforcement officers, Shirk says that "[i]f they are to develop into a professional, democratic and community-oriented police force, they will need to be properly vetted, held to higher standards of accountability, given the training and equipment they need to do their jobs, and treated like the professionals they are expected to be."[8] But how is that possible in a

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[5] Preamble and full text of the 2008 criminal justice constitutional reform, Chamber of Senators and Chamber of Deputies, Mexican Congress, 2008.

[6] See Shirk, *supra* note 4.

[7] Preamble and full text of the 2008 criminal justice constitutional reform, Chamber of Senators and Chamber of Deputies, Mexican Congress, 2008.

[8] See Shirk, *supra* note 4, at 226.

legal system in which the requisites to become a police officer are reduced to having studied only up to the secondary level of instruction?

Similarly, those who currently practice law as an independent, professional career, *i.e.*, lawyers, and also students that would become lawyers in a few more years (or eventually), will be part of the process. And being part of it at such an early stage will more likely than not bring about many unpredicted situations, and patience is required to get through and solve those issues. Some creativity is also welcomed.

It is true that the new legal system could be shaped by the most professional and uncorrupt lawyers and judges. But the opposite could also be true. The compromises of national higher education institutions are obviously more inclined not only to structure, but to promote that professionalism and the ethical considerations of each profession continue to be taught to students efficiently.

Nevertheless, why as of today just a few law schools have adapted their programs to the new legal system to be in place in 2016? Is that a sign of looking for professionalism? Currently, most programs were designed years, if not decades, ago, and the skills and methods needed back then, and those needed today, have changed in a fast-paced and characteristic way.

Is it impossible to modestly anticipate the issues to come for the new legal system? Moreover, would it be impossible to (again, modestly) avoid some of those potential, unpredicted situations mentioned above? "Enabling Mexico's legal profession to meet these higher standards will require a significant revision of educational requirements, greater emphasis on vetting and continuing education to practice law, better mechanisms to sanction dishonest and unscrupulous lawyers, and much stronger and more active professional bar associations."[9]

With regards to legal education in Mexico, it appears to be an unexplored subject in Mexican legal academia.[10] Since the 1950s, only a handful of books and articles regarding national legal education have been published. The most influential of those being the studies of Héctor Fix-Zamudio and Jorge Witker (for the period from the 1960s to 1970s), and more recently Fix-Fierro & López-Ayllón.[11] Up-to-date field work and research is scarce, with the recent exception of the writings and up-to-date research of Luis Fernando Pérez Hurtado.

What follows is a description of the structure of Mexican legal education, taking into account issues that go from standards of authorization for law

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[9] *Id.*

[10] Luis Fernando Pérez Hurtado, *An Overview of Mexico's System of Legal Education*, 1(2) Mexican L. Rev. 53 (2009).

[11] Héctor Fix-Zamudio, Metodología, docencia e investigación jurídicas (12th ed. 2004); Antología de estudios sobre enseñanza del derecho (Jorge Witker ed., 1976); 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).

schools, admissions standards for students, structure of curricula, academic process, graduation standards, to concerns regarding faculty, limited resources, etc. As mentioned above, the above subjects are described as they appear in the Legal Education Reform Index (LERI) for Mexico of the American Bar Association Rule of Law Initiative in Mexico of June, 2011.[12] Positive elements and weaknesses of the legal education system are identified, and proposals for change are offered. But first, some statistical information is necessary to take into account:

According to the latest LERI for Mexico, by 1998, 170,210 students were enrolled in 364 institutions, which in total offered 367 law degrees (Bachelor of Laws). In 2007, around 240,000 students were enrolled in 930 institutions, which in total offered 1,130 law degrees. That is, the increase in enrollment from 1998 to 2007 is of 41%, while there is a 156% increase in institutions of higher education that offer a law degree, and a 208% increase in law degrees. "In other words, in the past ten years, approximately every week a new law school begins to offer one or two new (Bachelor of Laws degrees) to 134 new law students."[13]

As for the job market for lawyers, the National Association of Universities and Higher Education Institutions (ANUIES) performed a study in the 1990s in which it found that law was one of thirteen programs that had a "high enrollment surplus", "critical" for the job market. The surplus was of 47% for law graduates. "The ANUIES study concludes that law graduates, like those in other critical programs, 'may be unemployed, and at best, they may find a low quality occupation that is not a professional career. This implies a considerable amount of sub-employment for professionals.'"[14]

It could be argued that there is a relationship between the quality of legal education, the quality of the services offered by lawyers, and the efficiency of the legal system. The better legal education is, the better services will be offered by lawyers and legal institutions in general. Unfortunately, the rules to follow for Mexican legal education institutions when establishing their respective law schools are flexible, and there are different ways to start up a law school.

What does it take to start up a law school in Mexico? A very straightforward answer would be as follows: "opening [law school]... does not require a large investment. All you need is a classroom and one or several part-time professors. There is no real need to invest in a library (maybe a basic one), nor [is there any need] for an ambitious research program and publications."[15]

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[12] Elaborated under the supervision of Luis Fernando Pérez Hurtado (director of Centro de Estudios sobre la Enseñanza y el Aprendizaje del Derecho, Mexico).

[13] See Pérez Hurtado, *supra* note 10, at 74.

[14] *Id.*

[15] Héctor Fix-Fierro & Sergio López-Ayllón, *¿Muchos abogados pero poca profesión? Derecho y profesión jurídica en el México contemporáneo*, in Del gobierno de los abogados al imperio de las leyes 1, 16 (Héctor Fix-Fierro ed., 2006).

Legal research is not conditional for a law school to function accordingly to the rules of national education. The reason why the system allows institutions to offer law as a degree in a flexible manner is because the rules that govern general education allow institutions to obtain the respective Official Recognition through a simple procedure, because it is the government's goal to offer more opportunities so people can get through higher education.

Even for law schools, which are supposed to achieve the highest standards, the requirements have diminished. "The way in which each [Institution of Higher Education] enters the system determines the degree of academic and administrative freedom the institution has and, consequently, the flexibility to define the requirements that its students must meet in order to obtain the law degree and the license to practice law."[16] The process for a higher education institution to become authorized for diploma awarding requires official recognition, granted by the National Education System after a review of the curriculum.

There are, however, alternate sources for an institution to obtain recognition of studies: by presidential decree (which is usually granted to high ranked institutions), through the Ministry of Education (National Education System), or through state agencies of the National Education System, established in each state of the country.

An institution can also obtain recognition through a different path: incorporation. Incorporation implies that either the federal government or each state government grants permission to a public higher education institutions to create decentralized institutions. In both cases, established private institutions of higher education can obtain recognition, strictly speaking, or recognition through incorporation. Most recognitions are granted by state authorities, 576 in 2006-07, or by federal authorities, 301 in the same year. 70 recognitions were awarded by presidential decree.

II. Specific Problems Regarding Mexican Legal Education

Generally speaking legal education is imparted almost exclusively through lectures. The "professor is the sole source of relevant information and the classroom exists to impart theoretical knowledge."[17] Unfortunately, training in alternative teaching methodologies for faculty is not the general rule.[18] There is a lack, also, of practice-oriented and up-to-date materials in most law libraries, which is part of the reason why faculty is still using the more traditional lecture method of education.

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[16] See Pérez Hurtado, *supra* note 10, at 84.

[17] *Id.*

[18] *Id.*

How is the legal curriculum structured? Mexican authorities have determined that programs under the label of Law and Legal Sciences are professional programs. Professional programs are "those whose graduates will, in general, have a professional practice and whose study plans do not require a high proportion of basic courses in sciences or humanities or courses exacting a large amount of time for student attention," according to Agreement 279, article 10.[19] Full-time faculty is simply not a requisite for institutions that offer law as a degree.

Law schools, through their respective higher education institutions, can structure and define in their own way (following their particular identity, ideology, etc.) the legal curriculum. Nevertheless, the curricula throughout the country is usually of the same nature: a 40 to 70 mandatory courses program that may or may not offer an area of specialization, which is determined by the institution if that is the case. Programs differ as to their "structure and development," "flexibility, division, duration and class shift."[20]

Law degrees in Mexico are generally oriented to offer a set of theoretical knowledge for legal practice, as opposed to practical knowledge (the know-what vs. the know-how). Professional skills, along with the ethical values that pertain to the legal profession, are subjects less explored by most law schools in the country.

The latter situation causes that students get their correspondent professional skills after working for some period of time at the side of a practicing lawyer or at a legal office. As of today, it must be recognized, only "some schools have started incorporating courses aimed at developing the skills needed for practicing law in the new adversarial criminal procedure system."[21]

What does it take to practice as a lawyer in Mexico? It usually takes three steps: First, studying and graduating from a Bachelor of Laws is required. Second, meeting the institution's requirements for graduation and, if so, a degree diploma to the student is granted. Finally, such diploma is registered at the General Office for Professional Practice for a license to be granted by the same organism. Such license is valid in any national court.

What to do? Which are the options at hand? Obviously, if there is a modification in the way the legal system works, then legal education would necessarily be in a position to change and adapt to it. According to two of the most

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[19] "Agreement 279 establishes a minimum percentage of courses that must be assigned to full-time faculty depending on the program. Law and Legal Sciences programs are classified as professional programs, which are defined in Article 10 as "those whose graduates will, in general, have a professional practice and whose study plans do not require a high proportion of basic courses in sciences or humanities or courses exacting a large amount of time for student attention." As a result, a full-time faculty is not required for bachelor, specialization, or master's law programs. However, for doctoral programs —regardless of the field— at least 50% of the courses must be taught by a full-time professor. Article 10 of Agreement 279." *Id.*

[20] *Id.*

[21] *Id.*

important reports on legal education in the United States, there are ex-ante issues that should be taken into consideration when planning and organizing both a legal curriculum and the way a law school functions. As it is shown below, past experiences in the U.S. could throw some light as to the potential issues that may present during the process of implementing a new type of legal education in Mexico

Some authors suggest an ex-ante commitment on the part of higher education institutions to improve themselves and their population by 1) preparing students for practice, 2) clarifying and expanding educational objectives, 3) improving methods of instruction, and 4) evaluating themselves and their respective curricula. Objectives, it should be noticed, are identified in terms of desired outcomes, which is "is becoming the norm throughout higher education." Institutions of higher education in some areas must not only structure those desired outcomes for their students, but they also need to prove that their students attain such outcomes. In the U.K., for example, most law schools follow an outcome focused type of curriculum. In the U.S., only a few.[22]

Other authors emphasize the fact that most America law schools have not started preparing their students through (a) a more practical-oriented teaching methodology, and (b) a focus in ethical and social skills. The same phenomenon occurs in many universities throughout the American Continent. Paradoxically, law being a professional degree entails that preparing law students in professional practice is necessary and conditional to perform properly as a lawyer (and not as, say, a legal technician). "The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients."[23]

On the other hand, Ethics, Legal Ethics, and similar subjects, are being taught in most law schools. Nevertheless, there is little attention

> …to the social and cultural contexts of legal institutions and the varied forms of legal practice. To engage the moral imagination of students as they move toward professional practice, seminaries and medical, business and engineering schools employ well-elaborated case studies of professional work. Law schools, which pioneered the use of case teaching, only occasionally do so.[24]
>
> Law school provides the beginning, not the full development, of students' professional competence and identity. At present, what most students get as a beginning is insufficient. Students need a dynamic curriculum that moves them back and forth between understanding and enactment, experience and analysis. Law schools face an increasingly urgent need to bridge the gap between

[22] Roy Stuckey et al., Best Practices for Legal Education (2007).

[23] William M. Sullivan et al., Educating Lawyers. Preparation for the Profession of Law (2000).

[24] *Id.*

> analytical and practical knowledge, and a demand for more robust professional integrity. At the same time, they open to legal education a historic opportunity to advance both legal knowledge—theoretical and practical—and the capacities of the profession. Legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice.[25]

However, how to define the correct balance between theoretical and practical knowledge? If Mexican legal education is to change for good, then such balance must be established beforehand. The next section deals with the experience of North America with regards to legal education. The purpose of describing a fraction of the evolution of such a system is to highlight the options at hand for Mexican universities and law schools to improve in their respective fields of knowledge and training.

III. What Can Mexican Law Schools Learn from the History of North-American Legal Education

According to Christopher Columbus Langdell

> …the method of teaching by cases… consists, first, in using a collection of cases on a given subject as a text-book, instead of using a treatise on the same subject. For each exercise the members of the class are expected to prepare themselves by studying thoroughly some ten or twelve pages of the cases. During the exercise each student has his volume of cases before him with facilities for taking notes. The instructor begins by calling upon some members of the class to state the first case in the lesson, *i.e.*, to state the facts, the questions which arose upon them, how they were decided by the court, and the reasons for the decision. Then the instructor proceeds to question him upon the case. If his answer to a question is not satisfactory (and sometime when it is), the question is put round the class; and if the question is important or doubtful, or if a difference of opinion is manifested, as many views as possible are elicited. The students also question the instructor and state their own views and opinions without being called upon.[26]

Before Christopher Columbus Langdell,[27] legal training in the U.S. was accomplished through basic apprenticeship in a legal office, under instruc-

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[25] *Id.*

[26] Bruce Kimball, The Inception of Modern Professional Education: C. C. Langdell, 1826-190, 143 (2009).

[27] The name of Christopher Columbus Langdell will be long remembered as the scholar that developed and implemented the case and Socratic methods of legal education that are currently in use in American law schools. In other words, he will be remembered as the founding father of legal education as a professional, postgraduate degree. But who was Christopher Columbus Langdell? For many of his school friends he was a "prodigy of learning and master

tion of a lawyer. Students learned the law from experience and practice, in a system of legal training that is usually referred to as the "apprentice system."

The first American law school, properly called, was founded by Judge Tapping Reeve in 1784, and it functioned in the same way as the apprentice system, but instead of one apprentice there were groups of apprentices experiencing, seeing the way in which courts functioned. After that, proper law schools were continuously introduced to colleges and universities, but it was only about lectures and calling students to "recite" what they learned (usually memorized) in legal textbooks and treatises, written by prominent legal scholars. The system's criteria for admission required no more than English literacy, and students could start law school at any time, and in any course.[28]

For all intents and purposes, however, Reeve's original concept eventually faded from the minds of legal scholars. The apprenticeship system was replaced by the "case method," introduced by Christopher Columbus Langdell at Harvard, in the beginnings of the nineteenth century. Given its characteristics, the case method improved the old system in the sense that it made of learning the law an active enterprise through participation, dialogue, and final examinations.[29] It is possible to find traces of the general idea of the case method in Locke's conception of general education, because it relied on the need to train students with advanced texts, for they to be able to think from particulars to universals, and to encourage their autonomy; as for the professorship's duties, the idea was to teach a method of learning, and to prompt students to go to the original sources of knowledge.[30]

"Justice and legitimacy of the legal system depend on the quality and legitimacy of the legal profession, which require, in turn, that lawyers acquire strong legal knowledge through demanding legal education."[31] In Langdell's idea, the latter would only be acquired by means of a method of education that consisted in the development of the student's expertise and self-confidence to understand the legal doctrines of the court's judgments by themselves, which required at the same time the study of the courts' rulings in particular, rather than hypothetical cases in textbooks. This is why many mainstream textbooks were banned in Harvard Law School. By means of the Socratic method —another name for the case method— the student would

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of research," a presiding genius among his colleagues.[9] His intellectual interests as a young student ranged from English, American, and French poetry, plays, and novels, Greek and Latin history, biography, and grammar, to natural history, theology, and philosophy. Favorite writers included Emerson, Watts, Bacon, and he had a special interest in the ideas of John Locke regarding general education. *Id.* at 35.

[28] *Id.* at 39.

[29] Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 Vanderbilt Law Review 342 (2007).

[30] *Id.* at 19.

[31] *Id*. at 129.

learn how to analyze particular and concrete controversies, not hypothetical propositions stated in books.

In class, Langdell usually exposed himself to questions and objections on the part of students, which sometimes conduced to a revision and correction of his own views on legal topics during discussions in lecture. The aim was to involve his students in an exercise of dialectic argumentation.[32] Langdell borrowed from Harvard Divinity School the requirements to study law, and further applied them to Harvard Law School. By 1895, Harvard Law School system, same as Harvard Divinity School, was a three-year, sequential, post-graduate (it required a college Bachelor of Arts as a precondition for admission), and professional school curriculum, with first-year and second-year required courses and examinations, consisting in real problems for solution, for every course. (As a result, high flunk-out rates, and selection of the most successful students to study law, were the case.)[33] Lastly, it replaced part-time teachers (judges, lawyers, former practitioners, etc.) with full-time professors, thus, legal practice and experience were no more a requirement for teaching law.[34]

"What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes —not experience, in short, in using law, but experience in learning law…"[35] Langdell's opinion that legal practice was detrimental for professorship was due to a belief, acquired during years of working as a practicing lawyer, that legal practice was accompanied with corruption. Therefore, in order to exclude corruption from the teaching of the law to students, an "experienced" faculty was no longer necessary in Harvard Law School.

A particular characteristic of the introduction of the case method is that it followed the "scientific" status quo of the end of the nineteenth century. During that period of time, Darwin's Origin of Species (1859) and The Descent of Man (1871), along with the birth of analytical positivism of late nineteenth-century Europe, were in vogue inside intellectual circles of scientists, logicians, philosophers, and, of course, lawyers. Moreover, the emergence of concepts and their strict definitions engendered by the case method supported the worldview of that time: students, for example, regularly searched for concepts and principles "hidden" behind court decisions, and assumed that an "eternal" *stare decisis* doctrine guided every decision. As for social change and the ways in which society develops and functions, it was not part of legal education, and such idea was explicitly acknowledged by Langdell and Harvard.[36] With the case method, law was established and confirmed itself as an

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[32] *Id.* at 144.

[33] *Id.* at 341. See Kimball, *supra* note 26, at 39.

[34] See Gordon, *supra* note 29, at 341.

[35] See Kimball, *supra* note 26, at 169.

[36] Laura Kalman, Legal Realism at Yale 1927-1960, 13 (1986).

(apparently) autonomous discipline, detached from others, due, in part, to the focus on professional specialization of the era. The study of the law as a discipline that is structured over social, political, economical, and historical sources was thus avoided.[37] Public law was no longer important for the legal curriculum, and private law became the predominant focus of the Harvard legal curriculum (except for the mandatory Criminal Law course in the first year, and the third year elective Constitutional Law course).[38]

Other factors that contributed to the Harvard Law School method's success were that (a) it was inexpensive for the university administration (it required one teacher for every seventy five students), (b) it was available mostly to upper-class students (given the Bachelor of Arts requirement), which preserved hegemony between them and "banned undesirables" from the profession,[39] and (c) that the law faculty believed in the case method as a successful tool for teaching and learning law.[40]

Nevertheless, despite its success, the well-established Harvard Law School and its case method system had its detractors and alternative proposals, but, at the end, American law schools rejected all of them. As casebooks and the case method were being spread among American law schools, the the further rejection of public, interdisciplinary and theoretical approaches to law by almost every university was the case. "These alternative curricula all resembled one another, in that their aims were to educate publicly minded lawyers as well as private practitioners-lawyer-statesmen and public civil servants capable of large-minded reasoning about issues of constitutional structure and legal policy, viewed in comparative and historical perspective."[41] This generation of alternative legal curricula comprised three movements that shared the same characteristics, namely: the education of the law as a discipline that cannot be fully understood without reference to other disciplines, types of knowledge, and methodologies; the education of the law, so to speak, as a complex social system. Three particular proposals, sketched by detractors of the case method, are worth mentioning: (a) Law as Statesmanship, (b) Law as Policy Science, and (c) Social Law and Progressive Economics. It is somehow surprising how and why the rest of the law schools in America systematically rejected all these alternative and more efficient (at least at first sight) models of legal education, as the case method spread to almost every university in the country. The first system combined the knowledge of political economy, American and comparative constitutional law, the law of nature, the law of nations, comparative law, Roman and legal history, the common law system, equity, and pleading. It is interesting how this system was divided into two

[37] *Id*. at 348.

[38] See Gordon, *supra* note 29, at 341.

[39] This point is carefully exposed by Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (2nd edition, 1995).

[40] See Kalman, *supra* note 36, at 13.

[41] Gordon, *supra* note 29, at 342.

models of legal education, which were attractive to students because the legal profession was construed over the assumption that the lawyer was a statesman. The first model was designed to educate lawyers as policy makers in a liberal commercial society, and was conceived by Adam Smith and David Hume in the eighteenth century Scottish School of Jurisprudence, Moral Philosophy and Political Economy. They called this model the Science of the Legislator. Similarly, the second model was designed to educate students over the liberal-humanist ideal of the orator-statesman, and Cicero was an exemplary figure in this kind of teaching. The second system of legal education never materialized. Woodrow Wilson (who later became President of the United States) conceived it in New Jersey by 1890, after he was asked to design a new law school curriculum for Princeton University. His idea was a Public Law curriculum, and "not a duplicate of those [law schools] already in full blast all over the country, but an institutional law school, so to speak, in which law shall be taught in its historical and philosophical aspects, critically rather than technically, and as if it had a literature besides a court record, close institutional connections as well as litigious niceties —as it is taught in the better European universities." The subjects of his proposal ranged from constitutional, administrative, and international law, to public corporations, conflicts of laws, and even legal history and general jurisprudence and its history. Alas, Wilson's system never materialized, as noted above. Finally, the last system of education of that time found its sources in the historical and comparative study of legal institutions. It could be said that it resembles quite a lot to the current, predominant Law & Economics movement in American legal education and scholarship, as it studied legal concepts and institutions from an economical perspective, *i.e.*, finding their economic functions and purposes in society, their costs and benefits, and their utility to economic agents.[42]

By the second decade of the twentieth century, policy and social studies in law schools were almost completely driven out by a case method curriculum, with a strong focus on private law, designed by Langdell.[43] As a consequence, these alternative curricula were moved, in the best of the cases, to other university departments.[44]

What types of legal knowledge were lost as the Harvard Law School model spread through America? Apparently, almost everything that was not private case law, namely: subjects related to public law, legal theory, jurisprudence, Roman and comparative law, legal history, the sociology of law and institutions, etcetera.[45] In a few words, with the case method, legal interpretation was substituted by case law.[46]

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[42] *Id.* at 343-345.

[43] *Id.* at 347.

[44] *Id.*

[45] *Id.*

[46] Surprisingly, professors of the founding generation of the Harvard Law School method

1. *Legal Realism and Legal Education*

What were the Legal Realists trying to change? Harvard Law School professors were not the only scholars that tried to modify, or reject, the case method system and its implications in training law students. As a product, or as a reaction, to this type of legal education, a further generation of scholars was born into the legal profession at the end of the second decade of the twentieth century, namely: the American Legal Realists,[47] scholars that did "some empirical legal research and… turn their policy preference into law in such areas as civil procedure, commercial law, and securities law."[48] Also, they were lawyers and scholars that tried to understand the law through a multidisciplinary perspective, through its social, economic, and cultural sources.[49]

Why a sudden change in the orthodox, conventional understanding of the law in legal scholarship? To answer these questions, one must look to what was happening in the rest of the academic fields of the social sciences and humanities.

At the beginning of the twentieth century, a new worldview was present in diverse disciplines, such as sociology, psychology, anthropology, economics, history, religion, linguistics, and law as well. As Cohen said, "The problem of eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities is not a problem peculiar to law."[50]

Functionalism theory, a non-autonomous, empirical, and relativistic worldview that purported that every aspect of society was a necessary function for its own existence and evolution, was gradually adopted by most social-scien-

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were international, interdisciplinary, and cosmopolitan American scholars. Their casebooks were drafted as they exchanged their ideas with analytical legal scholars from England and the rest of Europe. Nonetheless, as their objective with the Harvard system was to teach their students "how to think like a lawyer," they remained with the case method but improved on it in the sense that, instead of "finding" the principles hidden behind courts' decisions, they treated those cases as a way to train the students' minds in legal reasoning, and to exercise their "mental muscles." Although, in Robert Gordon's opinion, "Harvard's missionaries and epigones pushed for their constricted curriculum simply because they had become fanatically committed to the case method of teaching law students as a uniquely rigorous and effective method, one they were convinced took a full three years to master successfully." See Gordon, *supr*a note 29, at 342, 348, 349.

47 What was the American Legal Realism movement, and who were the American Legal Realists? American legal realism was, on the one hand, a movement in legal scholarship that intended to introduce empirical social science, along with other disciplines of the humanities, to the study of law; on the other hand, American legal realism was a movement that contributed to the general jurisprudence of the era. See John H. Schlegel, American Legal Realism and Empirical Social Science (1995).

48 *Id.* at 8.

49 See Kalman, *supra* note 36, at 1.

50 *Id.* at 42.

tific departments and scholars, not only legal scholars. With functionalism in law, judicial decisions were no longer seen as the product of a judge's formal reasoning about legal rules and conceptualism, but as a psychological activity which carried with the judge's idiosyncrasy and psychological conditions.[51] Therefore, formalism and conceptualism, as the only sources of legal decisions, were driven out by the new worldview of the American legal realists[52] (whom certainly "were not blind idealists under the spell of the social sciences; they were hardboiled lawyers who were concerned because the uncertainty of law made it difficult to forecast their client's chance of winning a case. They felt that the uncertainty of judge-made law meant that judges could hide the true reasons for their beliefs").[53]

The interdependence between the social system and the law was the focus of the realists, which lead them to believe that, in order to choose the best social policy, lawyers and judges must look directly to the vast knowledge of the social sciences. As a result, there was a point in which legal realists acknowledged that law was a discipline that pertained to the social scientific collection of disciplines, and that this view was the best way to propose social policy and change. (It may seem as if the legal realists' general jurisprudence was constructive.)

Through the study of the recent discoveries in the theory of language, the legal realists exposed the ambiguity of legal rules and of judicial language, as those categories arise in the context of diverse phenomena. Thus, in their conception of legal rules, these were ultimately incomplete,[54] which

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[51] *Id.* at 6.

[52] See Schlegel, *supra* note 47, at 20; see Kalman, *supra* note 36, at 29.

[53] Kalman, *supra* note 36, at 23-24. "The list of Realists who served, sometimes only for summers that somehow stretched into fall, sometimes for years, in the administration's emergency and permanent bureaucracy includes Thurman Arnold, who came to Yale early in Clark's deanship; Douglas; Abe Fortas, who barely had a chance to teach at his law school before heading off; Frank; Walton H. Hamilton, an economist hired by Hutchins; Oliphant; and Wesley Sturges." See Schlegel, *supra* note 47, at 19. It is interesting to notice that when the whole business of Langdellian legal education resided in the "scientific" nature of law, legal realists' conception was, at the same time, to make the law more "scientific" and "objective," even when the realists were explicitly against Langdellian conceptualism and formalism. Consequently, it could be possible that what really changed between the end of the nineteenth and the beginning of the twentieth century was not just a bunch of disciplines, but specifically the concept of "science" itself. Let us not forget that Euclidean geometry stopped being used by mathematicians that found other types of geometry, and that Albert Einstein formulated his theory of general relativity in 1905. Likewise, many legal realists were conducting empirical and statistical studies of the way in which courts functioned, whereas (naïve) case-method professors were "finding" the principles behind justice decisions. The only difference here is that the realists did have the goal of reforming the law taking as a basis the products of such new insights, and this was not the case with Langdellian professors and scholars. See Kalman, *supra* note 36, at 35-36.

[54] Kalman, *supra* note 36, at 21, 30.

only means: rule-skepticism. In the Realists' view, it was necessary to focus in the interrelationship between law and society to determine what actually determined judicial decisions, besides rules and precedent.[55]

The latter could be said to be the more apparent objectives of the legal realists, although there was not an agreement on this and other matters between them.[56] But, if the legal realists' goals are viewed through an intellectual microscope, it is possible to think that they were trying to change not only law, but legal institutions and the legal profession as well.[57] How? As they believed in a government of people, not of rules, their aim was to improve the education of social agents to manage the system's rules through a legal education that viewed the law as a complex system, developed with the knowledge of social disciplines such as political science, history, psychology, economics, sociology, ethics, logics, and philosophy.

However, how would a realist train students when the very basic activities of writing and reading were not enough for students? Not only that, but how would an enterprise like this would be accomplished if basic disciplines such as logics, grammar, and argumentation, among others, were disappearing from the curricula in that period of time? As a product of this scenario, it is not hard to picture how complicated was for law students to completely understand the language of the high courts' legal decisions, which was a product of logical reasoning and years of experience. So, in Hutchins words, "we had the spectacle of students and professors wrestling in the law schools with logical problems of the greatest difficulty and doing it without any equipment except that with which they had been gifted by nature."[58]

During the early-twentieth century legal education, there was an assumption from the part of the law schools that a law student possessed a strong background in the social sciences and the humanities. Again, the legal education system relied on the assumption that students possessed such knowledge, but fact is that, according to Frank, law students finished their legal education with the "vaguest recollections" of what they learned before law school in college.[59] How would future lawyers be grounded "in the social, economic and political material in which their technique must be exercised"?[60] How to teach a particular type of "knowledge which is the common possession

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[55] *Id*. at 5.

[56] *Id.* at 23. "But if one looks carefully there is more than a modest antagonism, sometimes in print and sometimes in private, between the individuals featured in the longer story and the individuals who would need to be added to make the enlarged group of Realists." See also Schlegel, *supra* note 47, at 21.

[57] *Id.* at 45.

[58] Robert M. Hutchins, *Legal Education*, 4 The University of Chicago Law Review 358 (1937).

[59] Jerome Frank, *Why Not a Clinical Lawyer School?*, University of Pennsylvania Law Review and American Law Register 922 (1933).

[60] Max Radin, *The Education of a Lawyer*, 25 California Law Review 687 (1937).

of an educated minority and which has almost always a distinct literary and aesthetic coloring"?[61] How to reach such goals if legal education lacked the most basic preconditions for acquiring such type of specialized knowledge?

2. *The Social Sciences and the Legal Curriculum*

In an era in which conceptualism was so intertwined in legal education even for the most radical legal scholars, the first argument against Langdellian legal education was made by Oliver Wendell Holmes Jr., in his book The Common Law. Holmes believed that judges were fallible human beings, and that they reasoned according to their own political, economical, and moral biases.[62]

> To accomplish the task [of learning law], other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.[63]

Almost three decades after Holmes' criticisms, Hutcheson would publish "The Judgment Intuitive" in 1929, which provided a direct critique against the law school curriculum and its methods and purposes of teaching. For Hutcheson, it was this faculty of the mind, the "hunch,"[64] which made the

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[61] *Id.*

[62] One year before, Holmes' all-famous sentence "The life of the law has not been logic: it has been experience" first appeared in a review of Langdell's Selection of Cases on the Law of Contracts, in which he described the author as the greatest living theologian, a Hegelian in disguise, whose "ideal in law, the end of all his striving, is the elegantia juris, or logical integrity of the system as system." See William P. LaPiana, Logic and Experience. The Origin of Modern Legal Education 89-91, 110, 119, 121 (1933).

[63] Oliver W. Holmes, The Common Law 1, 2 (1881).

[64] "A strong, intuitive impression that something is about to happen."

most prepared legal agents and "the great scientists of the world."[65] From that point on, the ideas of the legal realists covered different areas. Regarding legal education, reform was necessary given the existence of judges and lawyers dealing with "uncertainties, contingencies, imponderables, unpredictables"[66] on a daily basis. Teaching statutes and decisions to law students, therefore, was not enough to deal with these types of phenomena. If there were some requisites for admission (earning a previous B.A., for example), they were there not only for the student to count with huge amounts of ideas before enrolling in law school (as it was the case), but to develop a "power to reason, power to think consecutively, power to weigh and appraise material, with habits of getting to the bottom of things, of going to the sources, and of clear thought and expression."[67] Contrary to this, Roscoe Pound lamented the students' lack of general, cultural knowledge, social scientific frameworks, and "power to reason". (Leaving behind, of course, the fact that Pound never attempted to follow his own remarks on legal education. He continually subscribed to the Langdellian case-method for twenty years as dean of the Harvard Law School...)[68]

Pound was one of the first scholars that published proposals on legal education of national and local character, which meant training future lawyers in the realms of the legal, political, and economical conditions of the country; that is, as trial lawyers, as advocates before appellate courts, and as office lawyers; as legislators, as judges, as law professors, and as legal scholars.

Legal education was about training these characters and social agents with "solid all round cultural training" on the appraisal and interpretation of cul-

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[65] Joseph C. Hutcheson Jr., *The Judgment Intuitive: The Function of the 'Hunch,'* in Judicial Decision, Cornell Law Quarterly 14 (1929). In the last paragraph of the article, it is clearer: something ought to be changed in law schools, both in its methods of studying and of teaching law. The imaginative and intuitional mental faculties were essential, and the mere study of logical legal relations was not enough. Something more should be provided to the law student, that is, the sharpening of the mental processes by which such decisions are achieved, the proper channels of legal reasoning. "If these views are even partly sound, and if to great advocacy and great judging the imaginative, the intuitional faculty is essential, should there not be some change in the methods of the study and of the teaching of the law in our great law schools? Should there not go along with the plain and severely logical study of jural relations study and reflection upon, and an endeavor to discover and develop, those processes of the mind by which such decisions are reached, those processes and faculties which, lifting the mind above the mass of constricting matter whether of confused fact or precedent that stands in the way of just decision, enable it by a kind of apocalyptic vision to 'trace the hidden equities of divine reward, and to catch sight through the darkness, of the fateful threads of woven fire which connect error with its retribution?'" *Id.* at 903.

[66] Jerome Frank, *Are Judges Human? Part Two: As through a Class Darkly*, University of Pennsylvania Law Review and American Law Register 259 (1931).

[67] Roscoe Pound, *What is a Good Legal Education?*, 19 American Bar Association Journal 630 (1933).

[68] See Kalman, *supra* note 36, at 46.

tural phenomena in the day-by-day experience; agents able to understand the techniques and ends of the social sciences, with knowledge on the history of the common law and its system, the ends of the legal system, the judicial and administrative processes, and the history, organization, and standards of the legal profession. Pound's proposal aimed to push the student to grasp the techniques of developing and applying the legal materials, which, it must be said, is different than knowing or memorizing each statute or decision.[69]

Other proposals were more inclined to the fields of uncertainty, such as Frank's. How would a law student know —he asked— if a question of fact will be posed by their counterpart in trial?, how would they manage with conflicting testimonies, and, more important, how will the judge and the jury react to that? How is a law student supposed to learn the law if the object of study is an upper court decisions?[70] To solve such issues, the following were measures to take: obligatory requirement of previous experience in legal practice to become part of the faculty, use of casebooks for just six months,[71] and the allowance of law students in "legal surgery" at legal clinics (which did not exist in any law school during that period of time, and maybe neither today in the way in which Frank describes it, *i.e.*, as, literally, legal firms). Along with these ideas, there was a conviction that law was a discipline of the social sciences, and that law students would learn it only by practicing it and by submerging themselves in the social sciences.[72]

The concept of legal education was also seen as something similar to the general idea of medical education. Frank thought of legal education as if it were the medical education of the "doctors of society," of the lawyer as a gatekeeper of liberty and property, and who also helps in the development of the legal systems' rules and institutions. A return to Judge Reeve's idea of

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[69] See Pound, *supra* note 67, at 631.

[70] See Frank, *supra* note 66, at 253.

[71] Frank believed that the so-called case system failed in spending too much time with casebooks, three years to be exact (a law student's whole law school…).

[72] When Frank is talking about the "social sciences" he is referring not only to economics, sociology, history, politics, psychology, sociology, anthropology, and philosophy, but also to logics. He made clear that first-rate courses in logics should be taught to law students, in order to provide them with a frame of reference to really start "thinking like a lawyer." With logics, potential lawyers would learn to identify fallacies and dogmas, but more importantly, "the provisional, experimental and tentative nature of most conclusions —particularly those relating to the conduct of human beings." Along with such courses, a place should be given to factual studies on litigation. Attention should also be paid to the "art of the judge" (in case some student wanted to pursue such a career). Professional ethics would be impressed in the student's minds while they experience first-hand encounters with ethical problems that arise through the practice as a lawyer. And they would also experience the customs and social conventions of the bar. Finally, Frank proposed courses related to pedagogy: "For the sake of those students who may become teachers, there should be some courses in the art of teaching law." Jerome Frank, *Why Not a Clinical Lawyer School?*, University of Pennsylvania Law Review and American Law Register 922-923 (1933).

teaching law students through the apprentice system in group,[73] but on a more sophisticated level, was imperative: Not law schools, but "lawyer-schools,"[74] where the arts of the judge, of the lawyer, of the critic of the work of lawyers (and judges), and of the teacher of these three arts, are always present (the theorist points out how long ago judges actually instructed, taught, law students who were present in courts during trials…)[75]

As Pound, Frank pointed out the deficiencies of college education in terms of the training of students in the realms of the social sciences. For that matter, "men who need not have first-hand experience in practicing law, but who are skilled economists, historians, political scientists, anthropologists or psychologists might well be made full-time or part-time members of the law faculty" (and he actually mentions the name of Max Radin as an exemplary, interdisciplinary legal scholar of such characteristics).[76]

Another, relevant program for the reform of legal education was posed by Hutchins in 1937. The scholar was sure that, in that period of time, at that moment in history, such program would have been disliked by most legal practitioners given their conservative standpoints, and because their limited notion of the concept of the lawyer and of education. (Is this still the case today?)

Legal education, as a method, is both speculative and practical. On the speculative side, history of the law as is seen taking into account its intellectual, political, and economic developments. The philosophy of law is the main aspect of the speculative side of legal education. The "philosophy of law, therefore, attempts through psychology to understand the law in terms of the analysis of man as a rational animal engaged in making and administering laws."[77] On the practical side, training law students to perform operations of legal thinking through legal analysis is the case. (Legal analysis means dealing with problems of moral and political philosophy in the formulation of legislation and the interpretation of legal language.) Regarding the actual contents of legal education, there are: study of cases, along with the legal history of each of them, is also taken into account; Sociology and Economics, which serve to interpret how lawmaking functions; Moral and Political philosophies,

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[73] The first American law school, properly called, was founded by Judge Tapping Reeve in 1784, and it functioned in the same way as the apprentice system, but instead of one apprentice there were groups of apprentices experiencing, seeing the way in which courts functioned.

[74] Jerome Frank, *What Courts do in Fact*, 26 Illinois Law Review 781 (1931-1932).

[75] It is in this sense in which some argue about law's necessary educative function. See Brian Burge Hendrix, *On Law's Necessary Educative Function, Alternative Methods in the Education of Philosophy of Law and the Importance of Legal Philosophy* in The Legal Education. Proceedings of the 23rd World Congress on the International Association for Philosophy of Law and Social Philosophy (Imer Flores & Gülriz Uygur eds., 2010).

[76] See Frank, *supra* note 72, at 922.

[77] Robert M. Hutchins, *Legal Education*, 4 The University of Chicago Law Review 358-367 (1937).

along with psychology, logic, and grammar, in order to interpret legal rules and the cases themselves. Jurisprudence, *i.e.*, general philosophy of law, is the discipline that covers all of them. "The members of a learned profession must be learned and they must practice their profession for the welfare of the community."[78]

Few law schools today follow the ideas of the legal realists regarding the legal curriculum. Independently, of course, of the ideas' theoretical success, which seems to be plausible. The very notion of uncertainty, which appears to be impossible in Harvard's rigid system, placed the legal realists one step above Langdell's. Nevertheless, the case and Socratic methods are still in use in almost any American law school. (Not to mention most Latin American countries' programs of legal education, which are about the same level.)

IV. Towards a More Comprehensive Legal Education for Mexico

It is true that, as general legal education and curriculum design methodologies are divergent in both their means, ends, and geographical location, it is somewhat difficult to sketch a rigid classification of the alternatives at hand for a further development of a step-by-step program to reform legal education accordingly. To this it must be added that external factors could and would jeopardize the whole enterprise if not considered properly.

As of today, regarding the legal curriculum design and teaching techniques, it is more than obvious that the social, economical, ecological, and political context of local and federal institutions are important factors to consider, especially today when the global market grows fast enough for governments to regularly fail to detect ex-ante possible future failures in the legal system.

More generally, a curriculum design that does not adapt its contents to the current, global scenario, will, more likely than not, fail. Solving a problem of this nature requires to "go further in time" and "foresee" what type of problems would lawyers be dealing with in a near future, for future lawyers to actually professionalize or become more professional during legal education. (Not after. It seems preferable to make mistakes during legal education, not after.)

Law schools are meant to provide the necessary means for the students to achieve the highest levels of understanding and reasoning, let alone basic fact-finding and research abilities. And our capacities to understand and reason will not improve or get better (of necessity) by following what already is not the best option. If the world has changed, then legal education must change too, or at least adapt.

A first obstacle to emphasize in current legal education is the student's (and sometimes the professors') lack of awareness of the sequencing of the learn-

[78] *Id.* at 368.

ing process. In a recent article, attention is placed in an ex-ante pedagogical tool which aims to guide and take the student up to the confines or limits of her own cognitive processes, a sort of metacognition. By means of such techniques, students tend to become more efficient learners. If in the old days students used to recite from memory paragraphs and paragraphs containing legal facts, today, a law student that can only declaim what is contained in codes and statutes is as useful as the books that contain such codes and statutes themselves: a certain, particular form of reasoning is needed to perform as a lawyer in the Twentieth-First Century. But, how to identify which form of reasoning is needed, if we do not yet know how to teach it and learn it?[79]

A second obstacle is the underestimation of disciplines such as Jurisprudence, Ethics and Moral Philosophy, the Arts and Humanities, Logics and Mathematics, etc. Such underuse of alternative techniques to develop sharper forms of reasoning in the student tend to produce mold-lawyers. For example, Del Mar argues that overuse of textual resources undermine the student's capacity to recognize human states of mind such as suffering and vulnerability. In the author's opinion, appreciation of visual and movement arts, along with moral philosophy, are plausible ways to balance students attitudes towards their fellow citizens.[80] Other authors have argued that the use of humor, strange questions, impossible scenarios, and brainteasers would be useful too.[81] Same goes for the inclusion of pedagogical (or, should I say 'epistemological'?) techniques as mind-mapping and mental imagery, let alone the stimuli for creativity.

If closely observed, our legal education institutions seem to alienate students from the valuable results that can be achieved through the use of these techniques, as these are not means to keep legal education stable, but on shaky grounds.[82] In the same line of reasoning, studies have been performed to identify cultural experiences, biases, and perspectives of law students to better understand how the learning process should be undertaken, especially when activities such as mediation, counseling, and negotiation are fundamental for today's lawyers.[83]

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[79] Edwin S. Fruehwald, *Teaching Law Students How to Become Metacognitive Thinkers*, *available at* http://ssrn.com/abstract=2243128 or http://dx.doi.org/10.2139/ssrn.2243128.

[80] Maksymilian T. del Mar, *Beyond Text in Legal Education: Art, Ethics and the Carnegie Report*, 56 Loyola Law Review 101-144 (2010), *available at* http://ssrn.com/abstract=1087790.

[81] Hershey H. Friedman, *Talmudic Humor and the Establishment of Legal Principles: Strange Questions, Impossible Scenarios, and Legalistic Brainteasers*, 21 Thalia: Studies in Literary Humor 14-28 (2004), *available at* http://ssrn.com/abstract=2236456.

[82] Our current forms of life seem to be an impediment to develop the intellect, as activity, doing, is what appears to count. On the other hand, not-doing, e.g., thinking, contemplation, remains as the cheapest way to strengthen the mental muscles. Contemplation, in this case, would be the key to creativity.

[83] Andrea Anne Curcio et al., *Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process*, 16 U. W. Sydney L. Rev. 98-126 (2012).

A third obstacle is the legal curricula lack of adequacy to what the current economical and political changes worldwide demand from lawyers. Van Bemmelen summarizes this point very well:

> In the past, between the years 1800 and 1950, legal education was a local, generalist, apprentice-based, non-corporate, and highly academic self-explanatory affair. Most of the legal professionals regarded themselves as involved in ex-post private law and criminal litigation/trials. Legal theory and the curriculum, correspondingly, could focus mainly on local private and criminal law contained in approximately 10.000 pages. At the start of the 21st century a number of things have changed. Around 100 specialized areas of legal theory and practice have emerged, along with millions of pages of new material. The sources of these new rules are increasingly international and regional, especially in Europe. The legal profession has also industrialized. The sole practitioner is outnumbered by legal professionals that are mass producing legal services and legislative instruments, as well as adjudicative products. Client demand has changed the emphasis to be more focused on ex ante: preventing disputes. Employers are expecting more than ever that graduates are well on their way through this increased volume of material, plus well versed in critical thinking, advocacy and research techniques. Moreover, in the countries where legal education is subsidized, universities are expected to educate more pupils for less money, plus accepting lower entry qualifications favoring historically less privileged groups. This process includes attempts, again especially in Europe, to harmonize the higher education degree structure across states. Law school traditions have not responded to these developments yet. The curriculum and teaching techniques have remained largely the same as in the 1800 to 1950 era.[84]

Where are we left? If the legal curriculum does not comprise emphatically the development of the capacity to learn how to learn, if subjects and topics in the curriculum are such that law students cannot become Statesman, but at most successful technicians, and if such subjects are not adequate enough to what society and clients demand from their lawyers, then maybe what follows is a profound, subsequent reform to legal education programs. Or maybe starting from scratch.

Is Law & Economics the way out? There are more than two features of today's proposals regarding legal education that relate to, and improve some of, the Realists ideas. I argue that most of the ideas that the Legal Realists pointed out regarding legal education are more than plausible today, and would apply to the current status of the legal profession.

Parisi, commenting on Ulen, recently argued that a multidisciplinary approach to legal education will serve to improve lawyering skills, especially when such approach takes into account disciplines that adhere to the Law

[84] Ernst Van Bemmelen van Gent, *Legal Education: A New Paradigm*, Bynkershoek Law Review 2-18 (2012).

and the Social Sciences approach. In addition of such approach, Parisi explains how the Law and Economics approach rigorously improves the student's analytical skills (which were left behind long ago). The farther legal education is from multidisciplinary coursework, the farther the law student is from understanding the law as it functions in the world. In addition to that, we "may be shortchanging our students if we continue using these outdated methods,"[85] that is, the Socratic and case-based methods. Instead of these, the legal curricula could take the same direction as the one taken by the home of two Law and Economics scholars, recognized with Nobel Prizes: James Buchanan (1986) and Vernon Smith (2002) of George Mason University.[86]

At George Mason Law School, analytical methods for law is a required first-year course, and Economic Foundations is one the courses with the highest number of units, which means that most law students are familiar with topics and disciplines such as decision theory, constitutional political economy, and public choice theory. The reason for the inclusion of these particular subjects in the curriculum is that, as it is known, Professor Henry Manne's Law and Economics Center was incorporated to George Mason Law School, and in 1971 the Center offered to the law faculty courses in microeconomic theory, taught by recognized economics scholars. Legal issues there were not the issue at hand: most of it was pure microeconomic theory. As of today, more than 600 law professors are graduates of this course, some of whom are recognized Law & Economics scholars and federal judges; also, since the institution constantly relies on economic analysis of law, six joint-degree programs —between the Law School and the Department of Economics— have been opened since.[87]

Law and Economics is not, and should not become, the one and only methodology of legal education in general. Although its method in particular has given insight as to which are the ways to make legal rules and contracts more efficient, and the creation of incentives for compliance, that does not mean that other methodologies are not desirable in the legal curriculum. Other, particular approaches to law are and would be necessary for a proper understanding of law and of the means to solve legal disputes in a peaceful and civilized way.

There are examples of North-American universities that incorporate alternative methodologies to the legal curricula besides Law and Economics, as in the case of the University of Minnesota School of Law, and its team-taught course "Perspectives in Law," which is offered both in first and upper years, and each of the three course's requires the student to tackle a practical situation using a particular methodology outside the law. The courses are taught by professors with training in alternate methodologies to law.

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[85] Francesco Parisi, *Multidisciplinary Perspectives in Legal Education*, 6 University of St. Thomas Law Journal 1-11 (2009).

[86] *Id.*

[87] *Id.*

Many, many universities could be doing the same. However, the legal curricula remain as decades ago, with the same techniques. Today, as the world changes in the way it does, many Law Schools seem to be focused in adding to the legal curriculum courses such as "Human Rights", "Alternative Dispute Resolution", "International Legal Research," etc. Such efforts are valuable. However, they seem to solve only a small fraction of the issue at hand. Measures like the ones chosen and applied by George Mason University are good efforts that go beyond the mere addition of subjects to the curricula.

Judges and policymakers lack the knowledge to determine when a legal rule is efficient, independently of the vast amounts of knowledge on mathematics and economic analysis. A market failure will not get solved with the type of political measures that governmental offices apply. Something else is needed.

Future lawyers, judges, and policymakers could thus undertake the kind of functional analysis that is imparted throughout law school at George Mason University. Such an analysis starts with an inquire into the incentives underlying the legal or social structure that produced a legal rule, rather than "weighting" the costs and benefits of individual rules. Based on this premise, the best choice of law depends on the needs of individuals: Allow parties to contract away from existing law; allow for a market for rules; foster competitive market for rules; allow multiple suppliers of law.

> The functional approach to law and economics is informed by an explicit recognition that whatever social reality we seek to explain at the aggregate level, ought to be understood as the result of the choices and actions of individual human beings who pursue their goals with an independently formed understanding of the reality that surrounds them.[88]

Now, imagine a legal education that paid attention to the ex-ante identification of political failures in the formation of law, stressing the importance of market-like mechanisms in the creation and selection of legal rules… Or a legal education in which public choice theory were present at all times… This may be the education that lawyers would sooner or later ask for, as well as Realists could if they were still present today.

[88] *Id.*

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THE ROLE OF CHINA AND THE BRICS PROJECT

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Abstract. *BRICS is an exogenous invention that was institutionalized as a convenient geopolitical market strategy, which favored each of the five BRICS countries to a greater or a lesser degree. As such, it is now a political group without deep roots and its future will be conditioned by any dividends it might yield over the coming years as a result of political, economic and social correlations and divergences.*

Key Words: *Brazil, Russia, India, China and South Africa.*

Resumen. *El grupo de los BRICS es una invención exógena que se institucionalizó bajo la conveniencia de una estrategia geopolítica de mercado, que en mayor o menor grado ha favorecido a cada uno de los cinco países que lo conforman. De esta manera, hoy en día es un grupo político que carece de raíces profundas y cuyo futuro estará condicionado por los dividendos que pueda producir en los próximos años como resultado de sus correlaciones y divergencias políticas, económicas y sociales.*

Palabras clave: *Brasil, Rusia, India, China y Sudáfrica.*

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I. Framework

The concept of BRICS countries (Brazil, Russia, India and South Africa) first appeared in late 2001, as the result of a prospective study by a private firm (Goldman Sachs). According to the study, the levels of growth these countries had attained in previous years, the firm stated that these countries were destined to reach high economic levels by the end of the 21st century. Since then, some opinions have come to support the economic growth of BRICS countries. But at the same time, other voices have questioned the truthfulness of this prediction. After the initial speculations, it was not until eight years after this prospective study that the BRICS countries decided to meet for the first time in 2009 to discuss the essence of their association and explore different possibilities for working together.

Is the Goldman Sachs prospective study actually based on facts? Is it true that BRICS countries will become top world economies by the mid-21st century? Will the United States and other Western countries passively allow this to happen? What consequences will arise from this new partnership and how will they affect global society? These and other questions have surfaced with the BRICS project. However, beyond the strength or limitations of this idea, Mexico, Latin America and Western countries in general cannot afford to lag behind, especially in view of the vague information on what is currently happening in Eastern Asia. This mistake has already led them to ignore China's exponential development with all the implications this entails.

Along this line and moving beyond the support of this proposed grouping, the main purpose of this work is to help weigh the strengths and weaknesses of the BRICS hypothesis so as to opportunely clarify the nature of this prediction within the context of the interests of a global society, which now more than ever is interested in everything that happens around it.

Therefore, this article discusses the framework of a global economy currently under construction. It also tries to explain the important role of China in the BRICS group. Finally, it gives some general considerations of Goldman Sachs's irreverent proposal and predictions.

II. Introduction

To speak of BRICS is to speak of the future. Hence the complexity of embarking on a topic within the framework of the beginning of a century. Just like the two centuries before, this one challenges us, not so much to construe what will follow, but to understand what is happening today. We are experiencing ever-growing globalization that leaves us without answers to most of the questions that have now emerged and needed harmonious coexistence. We are witnesses to the end of the political and economic certainties that in

multiple ways attest to the unresolved transformation. This in turn translates into a discontented global society that wonders about individual solutions every day. To a certain extent, we have become hostages of our own success.

For that reason, to speak of BRICS, or rather, Brazil, Russia, India, China and South Africa as a group,[1] requires that we not fall into simplistic observations of the past or global speculation of the present, focusing only on the displaced and the winners. The intense integration that all countries currently forming part of the global community are witnessing, be it welcome or imposed, does not allow us to simply observe the scene of transformations, the results of which greatly depend on the possible success of a committed world society.

To know whether this is China's century or not, if we are witnessing the decline of the United States or if India, Russia or Brazil will replace Japan, Germany or France in the first half of the 21st century is not the information global society needs at this moment. What matters is to know the reasons for this shift, how things will be rearranged, and to what degree these changes will affect or benefit the shared inheritance of certain non-renewable assets that now more than ever belong to global society and can only be passed on collectively to future generations in the medium and long-term. Thus, the success of BRICS countries in the 21st century, as well as that of any other nation, can only be understood within the framework of a future global society that bears in mind and satisfies the requirements of sustainability for all its members.

This approach was clearly not taken in the 18th century when the Watts and Cartwrights of the early Industrial Revolution invented steam engines and cotton spinning machinery. This marked the creation of the global society and was the most palpable and successful period of an unstoppable race that had just commenced while paving the way for its own self-destruction. Nor did Great Britain take this approach in using new technologies to aggressively assert its domination in 1815 at the battle of Waterloo and imposed a type of coexistence and economic exploitation upon the new global world in such a way that it came to control 25% of the land and population at that time. Great Britain and the early industrial countries did not know or even wonder about the effects this form of "development" and exploitation could or might have in the future. In 250 years, the consequences are seen in record concentrations of greenhouse gases in the Earth's atmosphere, much higher than those present 800,000 years ago and rapidly approaching the levels to have supposedly existed 15 million years ago.[2] During the "century of Great Britain," so called because of Great Britain's leading position in the Indus-

[1] South Africa was not integrated into the bloc until April of 2011 and is therefore not included in the analysis of this work for editorial reasons.

[2] Laurence C. Smith, El mundo en 2050: Four Forces Shaping Civilization's Northern Future (2011).

trial Revolution, industrial participation grew from 2% in 1750 to 23% in 1880. In this same year, Europe jointly amassed 62% of further developing the industrial world.[3] By the early 20th century, a less satisfied global society with ever-increasing demands and still suffering the same afflictions found in the early 19th century was wondering whether the 20th century would be the century of the United States and the downfall of Great Britain. Moreover, questions began to arise as to whether we were on the road to the "Americanization of the world"[4] or if the world would join to defend itself from "colossal American business."[5]

Ironically, in the early 21st century this same global society, more distressed than ever and with the same maladies from before, now asks itself whether this century will be that of China or of BRICS.

Global society is also wondering who is winning or losing in view of the multiple alliances and interests that abound. Unfortunately for today's global society, the time of simple speculation has passed by. Statistics speak out with serious implications, making it easy to convert these figures into the sixth massive extinction in the planet's history, the "first since the extinction that was projected in the Cretaceous-Tertiary Period, that ended the dinosaurs some 65 million years ago."[6] The decline of the old superpowers like the United States or the United Kingdome and the appearance of new economic players like Brazil, Russia, India and China should be viewed in the light of the fact that everything that happens today in global society's economic and commercial sphere can directly generate repercussions on all the countries involved with significant effects on their social and political welfare.

Today, it is no longer enough for new successfully economic parties to be applauded under a simplistic philosophy of winners or losers. Dominant nations have irrationally and irresponsibly consumed shared natural resources since 1750. However, there is no justification for old and new economies to continue to do so, as it has a negative impact on collective sustainability and awareness of the finite nature of these resources has grown. One or two hundred years ago, it was not known how long consumables would be available. It is now known that there is only enough oil for 41 years, copper for 35 years, natural gas for 60 years, silver for 14 years, iron for 72 years and so on. Moreover, levels of $C0_2$ concentration have increased 40%, from 280 ppm in the pre-industrial era to 387 ppm in 2009, which in turn is causing the greenhouse effect on the planet, which has only been scientifically documented since 1958.[7]

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[3] Paul Kennedy, Preparing for the Twenty First-Century (1994).

[4] William Thomas Stead, The Americanization of the World (1902).

[5] Kennedy, *supra* note 3.

[6] Smith, *supra* note 2, at 186.

[7] *Id.*

During the early years of the Industrial Revolution (1800), there were "only" about one billion inhabitants, the highest figure in approximately 10,000 years of human history. With the consolidated ascendancy of the United States in the 20th century (1930), the world population had doubled. Now at the time of the emergence of the BRICS countries (2011), we are looking at a precarious future for 7 billion people who live in a global society six times the size of that at the time of British supremacy. It has been estimated that by 2050, world population is expected to exceed 9.2 billion people, equally in search of progress and well-being as the people of today. L. Smith observes that if "development and welfare" were standardized to the levels currently found in developed countries, natural resources would not be needed to satisfy the wants of 7 or 72 billion people, but for 105 billion people by 2050.[8] Such a future would be impossible to sustain because the planet lacks the amount of natural resources to offer all of its present inhabitants this level of goods and services.

Hence, when speaking of BRICS or looking towards the future, a comparative study of winners and losers does not have bearing, at least from an academic standpoint because the mid- and long-term future of global society is compromised now more than ever; by 2100, we will be analyzing the balance sheet not of the new winners of the 21st century, but of the damage control set in motion by a broken and failed civilization.

III. The Important Role of China within the BRICS Group

It is no exaggeration to say that BRICS emerged when China opened up its first Special Economic Zones (SEZs) between 1978 and 1985 in the provinces of Guangdong (Shenzhen, Zhuhai, and Shantou), Fujian (Xiamen), and Hainan. The country later went on to build a project to attract foreign capital and established Economic and Technological Development Zones (ETDZ), Financial Zones (FZ), New and High-Tech Industrial Development Zones (Touch), Border Economic Cooperation Zones (BECZ), Export Processing Zones (EPZ), and so on. According to Chi Fulin, "[t]he birth of the Special Economic Zones is the most important event in China's policy of openness and reform and the most evident sign of its change toward the outside world. Over the last impressive fifteen years, an enormous amount of information derived from SEZs, which have been considered a miracle by most observers, has been gathered."[9] SEZs are the innovative instrument Deng Xiaoping developed to attract the foreign investment that was required to give work to an economically active population of more than 400 million people, most of whom were found in the countryside, hungry and desperate, trying to survive

[8] *Id.* at 36.

[9] Arturo Oropeza García, México-China, culturas y sistemas jurídicos comparados 455 (2007).

the economic failure of the Great Leap Forward and the cultural revolution (1959-1976). With this strategy, China received more than 8.5 billion dollars from Foreign Direct Investment (FDI) from 1995 to 2009, making it the second highest ranking destination for FDI in the world, just behind the United States. China's industrial sector, which in 1990 already represented 41% of its GDP, grew to 46% by 2009. In 1980, China exported less than 10 billion dollars a year; now, it is the biggest exporter in the world, bringing in more than 1.1 trillion dollars in 2009, outstripping Germany and the United States. Since 1980, China has become the industrial hub between the East and the West. This has been accomplished through the implementation of the SEZ development model and the "cat" policy.[10] In contrast, the United States saw its industrial GDP drop from 35% to 22% between 1995 and 2010 while the European Union fell from 29% to 25% in the same period (World Fact Book, 2011).

China's development model is based on a philosophy of simplification so as to attract industrial FDI. The success of this model is clearly seen in its increased GDP per capita. Meanwhile, other countries following the so-called low-cost "Asian model" saw their per capita income go up by 160% between 1980 and 2000, 120 percentage points higher than the 40% increase attained by developed countries in the same period while developing countries were left even further behind with an average increase of 20%.[11] If its growth continues at this rate, estimates say that China could make up more than 50% of the world's industry by 2030,[12] based on the hypothesis that identifies China as the "world's factory," a description that 100 or 200 years ago would apply to the United States and Great Britain, respectively. China is already the greatest producer in the world in 9 of the 16 most relevant industrial sectors. For instance, in 2007, in the textiles, garments, leather and leather products, China held 37%, 29% and 39%, respectively, of the sector in the world while in basic metals, electric machinery and transportation, 27%, 31% and 35%, respectively. Among the predominant Chinese-made products, we also find footwear (34%), plastic products (18%), tobacco products (51%), non-metallic mineral products (16%) and basic metals (37%), positioning China as the second largest producer worldwide of food and beverages, chemicals and chemical products, and several others (ECLAC, 2011). One of the most important results of the implementation of this model has been China's commercial balance, which has grown uninterrupted from 1995 to date. Just in the period of 2000 to 2009, China has accumulated commercial profits of 2.2 trillion dollars with the European Union and 1.6 trillion dollars with Japan. During

[10] This is an analogy of the Chinese proverb, in the sense that regardless of the cat's color (capitalist or communist), what matters is that cats hunt mice (the means by which development is measured).

[11] Geoffrey Garret, *El punto medio flotante de la globalización*, Foreign Affairs en Español, Enero-Marzo 2005.

[12] Jean Mandelbaunn & Daniel Haber, China la trampa de la globalización (2005).

this same period, China added close to 2 trillion dollars through trade with the United States. The above figures show the re-export of products to the West [United States 24%, European Union 18%, Japan 4%, others 4%, of the total Chinese exports (ECLAC, 2011)], a phenomenon that opens up an on-going debate regarding not the use of the model, but the country that benefits most from it.

This process points toward an explanation of China's tremendous growth (10% annual average of the country's GDP), which increased more than 14 times in a period of 30 years (1980-2010), an unprecedented economic phenomenon in modern history. It also helps understand the reasons for the wealth in its international reserves, which came to 2.6 trillion dollars at the end of 2010 and represented 27% of the world's reserves (ECLAC, 2011).

The initial concept of simplifying the entry of FDI into China in 1980 was for the purpose of establishing a manufacturing process that offers the cheap labor of nearly 1 billion people living in impoverished conditions. The model has exceeded the expectations of all the forecasts from both those implementing it and those observing from the outside.

It is evident that China's economic success has transformed the world's economy and global commerce that was in place in 1980. The results have sparked discussion about the implications of the Bretton Woods model and of the low-cost Asian model. Regardless of the different positions on this issue, it is a fact that the same industrial concentrator process has had the foresight to prepare for the large amounts of raw materials and natural resources needed for production. This in turn has led to boosting economic and commercial activity, either directly or indirectly, in most countries in the world, that see themselves as having benefitted from China's success. These countries include those that form the BRICS as they have much of the raw materials needed to sustain their unstoppable growth. Furthermore, BRICS have the food supplies to satisfy the increased demands of a Chinese population with higher levels of buying power.

China is currently the most important buyer on of aluminum (42%), pewter (45%), zinc (43%), lead (42%), nickel (41%), copper (38%), primary steel (35%), and so on. As to food, it monopolizes 28% of world consumption of soybean oil and 23% of soybean grain, among other foodstuffs (ECLAC, 2011). The BRICS group has found its origin and synergy precisely in China's overwhelming need for raw material and food, which has significantly benefitted BRICS economies by contributing to their economic success. Reciprocal need and trade among these countries have become a binding force that will unite them as long as China continues to grow.

Hence, the significant increase of imports to each BRICS country is easily noted. For instance, in 1999-2010, purchases from China went up 24 times in Brazil, while this import boom increased 25 times in India and 400% in Russia. During this same period, China consumed 133 billion dollars' worth of raw materials from Brazil, 180 billion dollars-worth from Russia and 103 billion dollars-worth from India, making China a strategic partner in BRICS

trade activities. China's imports tended to center on two or three segments corresponding to primary products: 55% of Brazil's exports to China were soybean and iron; 52% of Russia's exports were oil and oil derivatives and 55% of India's exports were iron, cotton and copper (Comtrade, 2010).

Brazil, the "world's food factory," has most benefitted from China's success. When a Brazilian analyst ponders Brazil's superior performance, "[h]e takes a breath, and with a slightly theatrical smile he says: China."[13] In 1998, Brazil was selling China little more than one billion dollars in products; by 2010, this figure exceeded 25 billion dollars, making China its most important trade partner, representing 16% of its exports and an annual growth of 47% from 2009, leaving behind Brazil's second more important export destination: the United States. Along with the rest of Asia, China represents 28% of all of Brazil's shipments abroad (Secex/MDIC). Meanwhile, Russia exports worldwide is currently based on the sale of primary products with oil and gas making up 55%, which in turn provide the country with an average of 37% of its revenue and allowing it to recover its economic stability.[14] Russia is currently the fifth largest oil-producing nation with approximate reserves of 80 billion barrels and exporting 11 million barrels a day. China has few energy resources other than carbon and is therefore gradually becoming the largest oil buyer in the world in view of its current average demand of 8 million barrels a day needed for it to sustain an annual growth of 10%. Like Brazil, Russia is also directly benefitting from the "Asian model." Although it is not a truly commodities export country, India is notable for its technological services and industrial products. As such, India is also benefitting from the Chinese model by exporting oil-derived products, gems and precious stones, food, medicines and so on. As a result, India's export participation has increased 1.7% between 1996 and 2000. From 2001 to 2010, China's market grew 14% (UN/Comtrade). Given the parallels between these two Asian countries in terms of population and poverty, India has closely followed the "Asian model" of industrial production that China implemented in 1980 through the creation of SEZs as a way to bring food and employment to its impoverished rural population. India has now established more than 400 SEZs, many of which are already in operation.

IV. Goodbye Neo-Liberalism? Welcome Market Socialism?[15]

The void that has debilitated multilateral economic "order" has given way to a principle of economic chaos in which the policy of the highest profit

[13] H. Iglesias, *Brasil no es un modelo para México*, Revista Expansión, January 2010 at 18.

[14] Ana Teresa Gutiérrez del Cid, *El papel de Rusia en el Marco de los países BRIC*, in Brics: el difícil camino entre el escepticismo y el asombro 213-250 (2011).

[15] Market Socialism is an economic syncretism that emerged from the need of a communist country, like China, to transact economically with free market economies. Its creator Deng

prevails, in which the most audacious or the most astute stand out. Identifying the first ones to break this agreement is now irrelevant; whether developed countries like the United States, Japan and Germany stopped encouraging changes to create a more just and efficient new global economic model, or whether the countries that implemented the low-cost "Asian model" as a way to respond to their social needs have gradually moved away from international organism standards and use discourse as a smokescreen to cover up irregular economic activities. This has jeopardized global society's deteriorated "economic order" since everyone contributes to this disorder and no one takes steps to mend it; they simply make do. For example, a leading county like the United States is unable to decipher the problem and much less solve it. It has lost its tempo and direction, and has fallen into serious economic problems (90% foreign debt; 10% unemployment; 10% public deficit; more than 100% private debt, etc.). It now finds itself mortgaged to the hilt and has ceased to be efficient decades ago. It also seems that amid worrisome levels of debt (90% of the average GDP), high public deficits (5% of the average GDP) and destabilizing ranges of unemployment (an average of 10%), a significant number of European economies (most European Union nations) are losing ground in their privileges as welfare States. Along with this group of nations, there is a brotherhood of countries filling the role of parishioners; they continue to believe in the economic gospel that was instilled in them in the 1990s and have been converted into most zealous economic players of the free market liturgy and rites. However, since these countries want for high technological development, they are stuck in the middle of the disorder unable to compete with the low cost production of less developed countries or the new technological growth monopolized by the more advanced countries. As Garret Geoffrey points out: "[f]riends and enemies of globalization do not realize one of their critical effects: although it has served the rich countries and better the poor, globalization has left the middle income countries fighting to find a niche in the world markets. As these countries cannot compete in knowledge or in the low salary economy, without help, they will remain on the side of the road."[16]

Within the context of this economic "disorder," we find BRICS countries situated in the middle of the turmoil and uncertainty of a global economy. To a greater or lesser degree, these countries have come up with an unorthodox

Xiaoping summed it up by saying that "there are currently two models of productive development. To the extent that each of them serves our purposes, we will use them. If socialism is useful to us, the measures will be socialist; if capitalism is useful to us, the measures will be capitalist" (See Oropeza García, *supra* note 9, at 450). Regarding the formalization of the term, a "Socialist Market Economy" was officially declared a priority at the 14th National Congress of the Chinese Communist Party. On a legal basis, Article 15 of the Chinese constitution was changed in 1993 by means of a second constitutional amendment to establish that "the State practices a Socialist Market Economy."

[16] Garret, *supra* note 11, at 99.

and pragmatic policy that has produced notable results so far. This has led several economic analysts (Goldman Sachs, Price Waterhouse Coopers and the International Monetary Fund, among others) to call them the new leaders of the 21st century, and in turn validate an economic performance to be imitated by other nations.

The case of China has been widely commented because of its use of unconventional policies in a unique approach for applying standards. Chinese pragmatism has never tried to fool anyone. China has been open about this from the beginning when the West "took advantage" of with without any consideration as to the repercussions of their actions, repercussions that are apparent today. China chose to embark on a different path in 1978 with the goal to establish a new economic project, the main purpose of which was to develop a way to satisfy the social needs of more than 900 people. In the early 1980s, Deng Xiaoping stressed that the new model aimed at bringing basic goods and services to the people of China. In his own words, Deng said: "In this century, we will take two steps that represent the solution to the problems of adequately feeding and clothing our people. In the next century we will take another thirty or fifty years to achieve the goal of the other step, that is, to reach the level that the moderately developed countries in the world have." In the 1980s, China was under the pressure of not going back to a time in which millions of Chinese died of hunger, which is why Deng urged his people on by saying, "We have to be more audacious than before in order to carry out the reform and the opening to the exterior and to have the courage to experience." He pointed out that "We should not act like women with their feet tied. Once we are sure that something must be done, we should dare to experience, to break and to plot new routes with it. This is the important lesson that we should learn from Shenzhen. If we do not have a pioneer spirit, if we are afraid to assume risks, if we do not have the energy and the direction, we cannot break and plot a new route, a good route, or carry out something new…" To this end, the road was clearly marked: "Currently there are two productive development models. Insomuch as each of them serves our purposes, we will make use of it. If Socialism is useful to us, the measures will be Socialist; if Capitalism is useful to us, the measures will be Capitalist." So as not to leave any room for doubt, he declared that "[t]here are no fundamental contradictions between Socialism and the Market Economy."[17]

The transfer of wealth from the West to the East, and particularly to China, was never a secret. In the early 1980s, China publically declared its intention to produce low-cost goods (based on a policy of no job security, no social benefits and no environmental protection) as a way to solve China's food problems. The Western world accepted this as an "opportunity," triggering a war to find the highest production at the lowest cost. The economic world lost all prudence and good judgment, as well as the progress it had made over

[17] Oropeza García, *supra* note 9, at 447-450.

the last 100 years in building the foundations for the economy of a global world. Once the "interests of the world population" reached the pocketbooks of global consumers, the economic world shook off its sense of social responsibility. By placing "national interest" in the cheapest products for the middle classes without caring how these products were produced, nations lost control, as well as the stability, of their development.

From 1979 to 1987, approximately 10,000 investment projects were approved in China with a foreign participation of some 2 billion dollars. From 1988 to 1991, interest grew and approximately 30,000 investment projects were authorized with an investment of nearly 3 billion dollars. By the end of 1991, both indicators for 42,000 investment projects worth more than 5 billion dollars were set in motion. By 2000, between 200 and 500 of the most important multinational companies in the world from the United States, Japan, Germany, France and Taiwan, to name a few, had invested large amounts of capital in China.[18] This capital flowed through the SEZ economic structure under an unorthodox tax policy (fiscal dumping) to attract capital. This stimuli, which ranged from full tax exemptions to lower or preferential income tax duties of 10% to 40-100% tax refunds and a 0% tax on technological imports was strategically managed for exporting or high technology development.[19]

In terms of its monetary policy (monetary dumping), from January 1, 1994 to June 22, 2005, China set in place a policy of a fixed exchange rate of 8.28 yen in an unusual support of public policy to simplify and increase the number of exports. Despite it being called into question by developed countries like the United States and Japan, this policy was upheld for more than eleven years. Although it underwent a slight transition period in 2005 (to reach approximately 20% by 2010) as a result of "pressure" from the West, China continues to change its monetary policy at its convenience (40% undervalued, ECLAC, 2011) as a strategy to boost its exports to the rest of the world.

As far as "trade dumping," Oded Shenkar and Ted Fishman, among other authors, have described the irregularities found within the framework of the World Trade Organization (WTO) in detail. According to Shenkar, while considerable progress has been made in certain areas, violations abound and these can no longer be attributed to implementation problems.[20] Based on the 2003 American Congressional Report on the China-WTO relationship, Shenkar finds there was a policy of discrimination against foreign competitors, as well as continued subsidies to domestic producers in order to further lower prices of products ranging from machinery and petro-chemicals to biomedicine in both China and global markets.

In sectors like those of semi-conductors and fertilizers, value added tax discounts are given preferentially to domestic companies, but not to foreign

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[18] Arturo Oropeza García, China, entre el reto y la oportunidad 102 (2006).

[19] *Id.* at 300.

[20] Oded Shenkar, The Chinese Century 167-168 (2005).

companies. As in the case of tariffs, many Chinese producers pay less than the declared value, which serves as a basis for tax rebates or even annulment. This can be attributed to a protectionist and competitive environment among China's own provinces fighting for capital and employment opportunities. Domestic producers also receive preferential treatment in trade and distribution rights. WTO commitments regarding wholesale services offered by foreign companies and commission agents were fulfilled with Chinese-made products, but not with imports. Various non-tariff barriers still prevail and limit foreign competitors as in the case of administrative guidelines, while raw material and intermediate product exports supplied by domestic producers receive support.

China has created new standards for areas in which international ones already exist. However, it should be noted that China is not the only country to do so. It has also been proven that foreign firms that wish to enter the retail sector have to go through a tangled web of procedures to obtain authorization while national producers are exempt from going through this process.[21]

Likewise, the transfer of technology is commonly used as a way to obtain investments or incentives. Unfortunately, the clause in the original adhesion project to the WTO that disallowed pressuring China this way was cancelled. However, issues of intellectual property have instigated the most criticism against Chinese trade, especially in connection with the agreements signed with the WTO. It should be noted that "technological expropriation," as Fishman calls it, is an inherent part of Asian Development Model policy and has been an element of its growth strategies since 1978. By copying the manufacturing model used in Mexico in the late 1970s and the appropriation and development of new Chinese technology developed between the 1980s and early 21st century, innumerable cases have been presented against the violation of intellectual property in the pharmaceutical industry, garment industry, electronic sector and automotive sector. In the first case, the violation of patented medicine either through falsification or piracy represents 80 billion dollars in losses. With its sensitive nature due to its links to health, life and well-being, the pharmaceutical industry has been one of the sectors most affected by Chinese informality because of both patent violations and the enormous difference in cost. Medicine produced informally in China can cost one tenth, or even less, than its patented equivalent in a developed country because consumables are substituted, low quality medicines are distributed or medicines are simply manufactured with the same formulas at a cheaper cost.[22]

Lastly, in discussing economic unorthodoxy, the aspect of ecological deterioration or Environmental Dumping cannot be ignored. Authors like Pang Zhonying speak of China's enormous "ecological debt" cause by certain as-

[21] *Id.* at 168.

[22] Oropeza García, *supra* note 18, at 102.

pects of its economic success. Despite having such a large surface area (9.5 million km^2), China lacks the natural resources needed for its development. For example, it has only 0.094 hectares per capita of farmland, which places it 40% below the world average and 2.25 cubic meters of fresh water per capita, 30% less than the world average. This situation is mirrored in forest area, mineral resources and petroleum, where its levels are 20%, 60% and 11% lower than the world average per capita, respectively. At the same time, its accelerated economic growth has led it to consume 48%, 40%, 32% and 25% of the world production of cement, crude carbon, steel and aluminum oxide in the world. The result has been an imbalance of both supply and demand in terms of pollution. Statistics show that the volume of emissions in China has already exceeded the environment's capacity for self-purification. Of its seven principal hydrological systems, more than half are suffering the effects of serious contamination (90% of the Haihe River is polluted while the figure for the Huang He, Huasihe and Liaohe Rivers stands at 60%, levels that are raising alarm worldwide). Acid rain affects a third of the country's surface area. Around 360 million hectares show signs of water loss and soil erosion (38% of the country's land surface), a figure that increases by 15,000 km^2 every year. Desertification has already gripped nearly 20% of the national territory. The problem of environmental decay in China in its present state poses a significant challenge for development and an annual cost of up to 8% of the nation's GDP.[23]

The above is but a brief summary of some the actions China has implemented in building its economic model. While this overview does not intend to play down all the effort and talent that have gone into it, it does point at the fact that a large part of its success stems from an unorthodox model that does not follow generally accepted rules. Now that Goldman Sachs has set China as the model to be followed in the 21st century, it sends a troubling message to the rest of the nations that have observed the "success" of other countries either passively or spellbound despite the unequal conditions.

This kind of development has been closely followed by the other BRICS countries, which have implemented similar economic policies in their own ways and at their own pace. For instance, on seeing the success of the "Asian Model" SEZs in China, India has established more than 400 Special Economic Zones, 178 of which were in operation by 2005 with an investment of more than 9 billion euros. These zones include Kandla and Surat (Guajarat), Cochin (Kerala), Santa Cruz (Mumbai, Maharashtra), Falta (West Bengal), Chennai (Tamil Nadu), Visakhapatnam (Andhra Pradesh), Noida (Uttar Pradesh) and Llamdaikulam Madurai (Tamil Nadu).

Like China, India has grouped its manufacturing by sector, as in the case of the footwear industry located in southern India (the states of Karnataka,

[23] Ediciones de Lenguas Extranjeras, Desarrollo de China dentro de la globalización 59-68 (2009).

Tamil Nadu, Haryana and Uttar Pradesh, as well as around New Delhi). Its textile industry has been placed mostly in India's meridian area, in the cities of Chennai and Tirupur. The pharmaceutical sector is fund in the state of Maharashtra. And the pattern repeats itself.

At the same time, like China yet again, India has implemented a policy to protect its internal markets, clearly seen in various sectors, especially in retail. Although the market has begun to open gradually, foreign investors must commit to trading minimum quotas of Indian-made products.

In other sectors like information technologies, the government has played a decisive role in its development, supporting its export boom through the creation of special economic units designed to fulfill all the requirements and consumables needed for their success. Examples of these are found in the Electronic Hardware Technology Parks (EHTP) and Software Technology Parks of India (STPI). Moreover, the government gives multiple incentives, including: 100% tax exemption when exporting Information Technology (IT) products, tax exemption to software suppliers, tax exemption for donations, accelerated depreciation for IT products, exemption from tariffs on capital goods, raw materials, components and accessories for economic units dedicated to exports, a 60% depreciation for computers and so on.

In the agricultural sector, on which more than 1 billion people depend for food, India offers a wide variety of State assistance programs which range from subsidies for fertilizers; free electric energy; a National System of Minimum Prices that are announced before each planting season and set by the Agricultural Prices Commission of the Agricultural Ministry. In the face of market fluctuations, this producer protection system works alongside a Public Distribution System that was created to protect consumers from extreme price increases. This applies to wheat, rice and sugar, the basic staples of the Indian diet. These protection policies are fortified with the Law for the Commercialization of Agricultural Products, which imposes export and product transfer restrictions on the country's different provinces in the name of protecting its own internal supplies.

The above gives a brief example of India's unorthodox public policy which is strengthened through economic strategies, such as a monetary strategy in which the government has developed a "sterilized" participation (currency purchase in combination with a compensatory sale of public instruments from the Reserve Bank of India)[24] to maintain the competitiveness of the country's exports.

Any comparison between the unorthodox policies implemented in China and in India should be done within the context of the particular dynamics of each of their economies. China, for instance, publically declared its decision

[24] Pang Zhongying, *La nueva participación de China en el entorno global: Un ejercicio de "soft power"* 267-284; Shrawan Nigam, *El papel de la agricultura en la economía India* 401-422; Badar Alam Iqbal, *La economía india en el siglo XXI: sus fortalezas* 535-560; in BRICS: EL DIFÍCIL CAMINO ENTRE EL ESCEPTICISMO Y EL ASOMBRO (Arturo Oropeza coord., 2011).

to open trade with the outside world and join the international economic community in 1978 from its Socialist platform. This position was reaffirmed in 1982 through the first ever amendment added to its Political Constitution: Article 18, which reads: "The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China." Then, on July 11, 1986, China submitted a formal application to join the General Agreement on Tariffs and Trade (GATT). Despite the constitutional amendment, China did not enact the Law of Property Rights until 2008 and did not gain admittance into the GATT-WTO until 2001. Therefore, from the 1980s to now, China put into operation an unorthodox policy in different ways and by different means, which has simultaneously coexisted with an international institutionalization of trade.

In the case of India, since its independence in 1947, the country has chosen to follow a Socialist economic model. Using central planning, five-year plans and State property, the nation sought to develop both its industrial sector and the countryside. From 1947 to 1990 [under the administrations of Jawaharlal Nehru (1947-1964), Indira Gandhi (1966-77, 1980-84) and Rajiv Gandhi (1984-1989), as well as the Indian National Congress], India implemented an economic program that was found to have problems in fulfilling the social needs of the "new" country. In 1990-1992, India embarked on a political transformation process and an economic liberalization project that has combined the State policy that has prevailed for more than forty years with a series of free market measures to give way to the "cat" economic model explained above. Thus, it applied an unorthodox and pragmatic public policy to reach its goal of having an average GDP annual growth of 9%. This goal was reached in the 2004-2008 period and it plans to scale it up to 10% so as to surpass China.

Russia's economic history began much earlier than those of China and India with a policy of far-reaching State participation. With the Soviet Revolution in 1917 and the formation of the Union of Soviet Socialist Republics (USSR), Russia built itself on the framework of a Socialist project based on five-year plans aimed at industrializing the country and collectivizing the fields. Russia failed in its attempt to reach the levels of Western pre-eminence like those of the United States and its plans fell along with the Berlin Wall in 1989. After nearly 70 years, the USSR's totalitarian economic model succumbed to its inefficiency, as happened with Mao Zedong's model in China that ended along with his death in 1976. It should be noted that India's Socialist proposal from 1947 to 1990 (called the 3.5% Proposal because its projects could not surpass the country's average GDP within the proposed period) could not give the desired results, as mentioned above, so as to satisfy the economic needs of its immense population.

The fact that these three countries originally followed Socialist economic policies is an important key to understanding their new economic stance, as well as the unorthodox and pragmatically outlined policies in place for the creation of new development models that can be catalogued as "Market Socialism." This situation has not been particularly easy for any of these three countries since they have had to operate on the basis of trial and error from different platforms.

With the fall of the USSR, Russia hastily opted for a shock therapy strategy based on the IMF model of open privatization (*laissez-faire*) which was abruptly implemented in the so-called 500 Days Program. The results were reflected in a mass shutdown of companies and a significant loss of many of the State's strategic assets. By completely opening its market and allowing the free exchange of its currency, Russia ended up as an enormous debts and a financial crisis amounting to a loss of 4.2 times its GDP between 1992 and 1996, a figure equivalent to 2.5 times the losses Russia experienced during World War II. In addition to this, 60% of the population saw their income fall to such levels that 40% of the population would be living in extreme poverty while only 10% would have access to wealth. The development of the Russian economy was set back by around 20 years.[25] If this were not enough, Russia then chose to follow the Neo-liberal model in the same way, China did —without caution or any steps to ease into it— throwing the country into economic-political chaos from which it is now barely starting to recover.

In economic terms, the 1990s in Russia can be viewed as one of the most traumatic episodes, other than military conflict, seen in any country. After having been a close competitor to the United States for more than four decades, Russia's GDP in 1991 was barely a third of that of the United States; by 1999, it had decreased to one-tenth. Compared to other countries during that same period, was one-sixth that of China, one-fourth that of Japan, one-third that of Germany and half of those of India, the United Kingdom and Italy. Russia's GDP was even lower than those of Spain, Brazil and Mexico.[26] Thus, one of the two great post-war powers had fallen to the levels of underdeveloped countries because it was unable to understand the changes of a global economy run wild.

The case of Russia might be viewed as one of the most emblematic of all BRICS countries. For 70 years it was one of the leading economies of the 20th century and after World War II it competed closely with the United States, making it a leader vying for position of political-economic supremacy in the creation of a new world. Neither China nor India, much less Brazil or South Africa, was ever in the same position. Hence, the fact that a once leading country (or a union of countries) was downgraded to an intermediate

[25] Wang Mengkui, China's Economic Transformation over 20 Years (2003).

[26] Pablo Telman Sánchez Ramírez, *El modelo económico de Rusia durante la última década. Sus modificaciones y adaptaciones*, in BRICS: El difícil camino entre el escepticismo y el asombro 485-508 (Arturo Oropeza coord., 2011).

position in the ranking of world economies in the early 21st century had a tremendous impact. Unlike Russia, China opted for more prudent measures, touching on every "rock in an unknown river" and taking the time to analyze the best time, manner and place for its insertion in global economy. In this way, China avoided IMF and the WB *shock* and *fast-track* measures to salvage its economy. Having resisted the temptation of the "end of its history," India embarked on its market insertion process little by little, turning it into a territory of mixed economies. Russia decided not to follow the examples of China and India and instead burned the ships it launched under the leadership of Boris Yeltsin and Yegor Gaidar. The project resulted in the worst free market model possible, which put no limits on establishing tax austerity measures, price increases, increased taxes, credit reductions, land privatizations, the privatization of food and distribution networks and State industry privatizations, to name a few. By 1999, this lethal combination had already "produced" 65 million poor, with a GDP at barely 55% of what it had been 10 years before.[27]

In an analysis of BRICS countries like this, this period of Russian economic history is important because it allows us to observe how it tried to insert itself into the world of Neo-Liberalism in a way so unlike other Socialist economies —China and India. It is also possible to notice that 10 years of failed Neo-Liberalism reached higher levels than more than seventy years of Socialism, which led to both Vladimir Putin's rise to power (1999-2000) and a new kind of "Market Socialism" that Russia has followed since the early 21st century, thus enabling it to be included as a BRICS country. According to Ana Teresa Gutiérrez, "…if Russia currently projects itself as a probable power for 2050, this is due precisely to the fact that today's political class in power in Russia rejected the orthodox application of Neo-liberal policies supported by the so-called Washington Consensus." On the new vision of Russia, she adds that

> The Russian State… clearly understands that the Russians who live in poverty could not survive the demands of the free market, which is why for Putin, the recovery of the Russian economy has as his greatest strategy the control of Russian-Western joint companies over resources and the economy, and at the same time he hopes that the number of Nationalist-cut Russian businessmen grows.[28]

The reasons behind Russia's decision to implement a Neo-Socialist economic model within the framework of global Neo-Liberalism need no clarification. Vladimir Putin has acknowledged this on various occasions. With his 2000 State of the Nation Address and countless public appearances, Putin has reiterated his interest in restructuring public policy by returning to great-

[27] *Id. See also* Gutiérrez del Cid, *supra* note 14.

[28] Gutiérrez del Cid, *supra* note 14.

er State participation by reminding the West that "Russia always developed itself as a super-centralized State. This makes up part of the genetic code, of the tradition, and the mentality of its people." To this Telman Sánchez adds,

> The States and the Russian society have conserved similar characteristics throughout the centuries. The full control of the State over the interests of society and individuals; the weak role of the political parties in the course of economic reforms; the absence of independent social classes from the Kremlin's central power; the non-existence of individual liberties, are just some of the characteristics that have varied very little in more than 500 years of Russia's history…

For this reason, as of 2000, "the new nationalist ideology that was consolidated establishes a consensus around the so-called Russian idea, which is based on the traditional pillars of its culture, knowledge, patriotism, confidence in Russia's greatness, Statism and social solidarity."[29]

Russia is now peering out of the "economic hell" of a badly instrumented neo-liberalism. By breaking with the inertia, it now upholds a new current to insert itself into the global world through economic and political reform in a way that it has not seen in 500 years. The failure it has faced puts the country back into well-known territory: a similar situation to the one it found itself in 1989, but now accompanied by a sense of profound economic and political defeat. Learning from its mistakes, Russia has gone on to a new phase of construction under Putin's leadership and especially under the influence of China's model of Market Socialism that applies both Capitalist and Socialist mechanisms (the "cat" model) in the various degrees required by national interest and feasibility. As in the cases of China and India, the Russian State grants significantly different advantages to other economies, limiting those for countries that stand by the principles of the Washington Consensus. With these new dynamics, conditions in Russia for foreign investment have improved with the drafting of a State regulation system. The country's tax and financial systems have been modernized while the State has intervened in regulating prices. The country is moving from economic integration towards global insertion, certain sectors have been re-nationalized (oil) and State agendas have been set for national producers. And these are just a few examples.

Brazil, on the other hand, has maintained minimal State participation in its economic development. While it might be the least statist of all the BRICS countries, it is one of the most statist in Latin America. Brazil does not have as long a history as China, India or Russia nor has it gone through recent political changes that have led it to implement State Socialism. However, in terms of economics, Brazil's economy has been relatively stable since it was a colony when all economic activities were endorsed by the Portuguese Empire. Its most successful period was from 1930 to 1980 when its average an-

[29] Sánchez Ramírez, *supra* note 26.

nual GDP grew by a minimum of 6%. It should be noted that a so-called "economic miracle" came to exist between 1968 and 1973 during which time Brazil's GDP increased by an average of 11% a year.

An import substitution strategy was implemented over the course of 50 years of industrialization. After the 1929 global crisis and World War II, the Brazilian State participated directly to support and further develop various economic sector that sought to carve a place for itself in the reorganization of the new global world. At this time, State participation aimed at boosting nation industry to satisfy the needs of its internal market through a series of protection and defense policies for national businesses. Support was also given to businesses serving external markets, the most emblematic of which is the coffee sector. For many years, Brazil was the most important coffee producer and exporter in the world. Its government strategies and measurements to consolidate itself as such (to the extent of destroying 4.7 million tons of coffee from 1931 to 1944 as part of its regulatory policies[30] were followed by other nations as a way to defend markets and prices.

During this bonanza period of Brazilian economy, we can see: a leader State that uses a variety of exchange, tariff, credit and other policies to advance the industrialization of the country; a regulating State that regulates and delimits worker-employer relationships to prevent them from becoming an obstacle in attaining the principal economic objective —industrial development; a producer State that began to produce a good part of the public services such as railways, maritime transport, water, electricity, communication services, as well as other more specific products like mines, oil and chemicals in an effort to become a successful and organized nation (as examples of the success of this public policy, some 231 State-run companies were created, including Petrobras, Vale Do Río Doce and Embraer between 1968 and 1973); and a financing State that created both the Bank of Brazil and the Brazilian National Development Bank (BNDES) which practically became a national long-term productive credit agency, which currently handles an investment portfolio greater than the World Bank (WB) and the Inter-American Development Bank (IDB) combined.[31]

Like most Latin American economies, Brazil made the most of the post-war period and the new regional industrialization by implementing a State policy, like Mexico, Argentina, Columbia and other nations, that proved to be important within the framework of the new global economy, especially in terms of focusing attention on its internal market, creating employment and bringing about social improvements. At the same time, since the 1970s it was incapable of restructuring the model on more sustainable lines. As it did not look after its productivity and direction, Brazil experienced a "lost decade" in

[30] Carlos M. Peláez, Mauro Motinho Malta & Magnolia Maciel Peláez, Essays on Coffee and Economic Development (1973).

[31] Amaury Patrick Gremaud et al., Economía brasileira contemporánea 572-573 (7th ed. 2010).

the 1980s and was not able to recover until 2004 when it showed significant growth (5%). This was possible by enforcing new sustainability principle that, among other reasons, led to consider Brazil a BRICS country.

Like other Latin American nations and in the face of the unresolved problems of the 1908s, several Brazilian political leaders began to instrument a series of economic changes under the Washington Consensus. With the failure of the Cruzado Plan (1986), Bresser Plan (1987), Verao Plan (1989), Collor Plan I (1990), Collar Plan II (1991), the 1994-95 Royal Plan was launched under the leadership of Fernando Henrique Cardoso. Among other measures, this last plan continued to dismantle the mixed Brazilian economy through the privatization of State assets. To forge ahead with the Neo-Liberal canon, a destatization plan was put in place between 1980 and 2000, giving priority to105 public companies and divesting itself of State assets.[32]

Although today Brazil does not have the same degree of State participation as China, Russia and India, the State displays active participation in and commitment to the country's economic development. While less than the average BRICS, this participation can be seen as being greater than the *laissez faire, laissez passer* formulas that other regional countries like Mexico and Chile "boast" of having implemented. According to Alicia Puyana, "Brazil liberalized its economy, with a lesser degree and rhythm than the majority of the Latin American countries."[33] This is clearly seen with the public policies that have been implemented as well as the declarations of recent Brazilian presidents who have assumed the task of repositioning Brazil's economy in that of a globalized world (2003-2010). During his administration, President Lula Da Silva extolled the benefits of the Brazilian Social Development Model and current President Dilma Rousseff has openly declared her desire for the Brazilian Socialist Model to make the State more effective, "but not smaller."[34]

Under Rousseff's vision, the State is primarily responsible for the social ascent of 15 million people from 2000 to 2010; the State must directly deal with the effects of the 2008 financial crisis by allowing State-owned banks to buy the stock and portfolios of institutions facing financial problems; the State is the one to authorize R$3 trillion Brazilian reals for public works. Through its remarkable vehicle for development, the BNDES, the State put R$10 trillion reals of working capital at the disposal of export companies via the Bank of Brazil and allotted R$4 trillion Brazilian reals for the automobile purchases. The bank garnered extraordinary support for the agricultural sector with an investment of R$5 trillion Brazilian reals, gave R$2 trillion Brazilian reals in export incentives and set up tax incentives to lower costs for Brazilian companies. The bank has gone on to build up a world class petrochemical industry

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[32] *Id.*

[33] Alicia Puyana & Vanesa Rebollar, *Brasil: mito o realidad*, in BRICS: El difícil camino entre el escepticismo y el asombro (Arturo Oropeza coord., 2011).

[34] The Economist, *Brazil Takes Off*, The Economist, November 12, 2009.

(Petrobras) and a leading aeronautical company (Embraer). In 2004, the State controlled 14 public banks and 82 private banks operating with national capital. The State also has 25% direct participation in credit operations and approximately 50% of the credit operations involving national capital in private banks. The State founded the Brazilian Agricultural Research Corporation (Embrapa), one of the most important of its kind in the world and a leading center for agricultural research and development, which has driven Brazil to become the "food factory" of the world. And the State protects its industrialists with tariff borders that range from 12% to 35%, the highest percentage of all BRICS.[35]

From the above it can be said that 41% of the world population (2.8 billon people), 15% of the world's GDP, 15% of the world trade and above all, the best economic growth rates (indistinctly) over the last thirty years are found collectively in China, India, Russia and Brazil. As a group, they are situated in a new economic zone of global development that has yet to be clearly defined or accepted by a large number of experts who still employ euphemisms like "Market Socialism" (China), "Economic Nationalism" (Russia) and "Social Developmentalism" (Brazil). With the emergence of such a group, it is now necessary to define the course of these new, pragmatic and unorthodox post-Neo-Liberal economic impositions that demand aligning economy and trade with international norms and institutions while most countries, especially developing countries, find themselves at a disadvantage in their struggle to grow under these standards. In referring to the extinction of developed nations in the context of the 2007-2009 crisis, Rubin says, "The Recession and the plunge in the financial markets have already put our faith in free trade and the freedom of markets to the test. To speak of, 'The State's intervention,' has always sounded very bad, but today it is a paragon of new politics from Washington to Brussels." What is happening? Are BRICS in default? Or have they simply advanced to a strategy that will become necessary? Knowing the playing field is a *sine qua non* condition today for any economy that is worried about its growth. Knowing what rules will apply to the competition has become a starting point for any development model. On the topic of anarchical rearrangement of the production factors, Martin and Schuman say that their lack of control and depth are leading us to a situation of, "Save yourself if you can," but add with terrible irony, "It's just that: Who can?" In this sense, the BRICS group (each country in its own way, as explained above) is simply a launching point for economic anarchy that both sacrifices lambs every day at the altar of "lowest cost" products and resorts to direct State intervention to develop its economy and international trade.

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[35] Gremaud et al., *supra* note 31; Alexandre de Freitas Barbosa & Ricardo L. C. Amorin, *Sobre el estancamiento en el dinamismo económico de Brasil: los dilemas de la inserción externa y la desigualdad social*, in BRICS: El difícil camino entre el escepticismo y el asombro 339-362 (Arturo Oropeza coord., 2011).

V. The World According to Goldman Sachs?

BRICS is an extrinsic invention that has been institutionalized for the convenience of geopolitical market strategy that has shown its preference, to a greater or lesser degree, to each of the five countries that form BRICS today. As such, it is now a political group with shallow roots and whose future will be conditioned by the profits it yields in the coming years that result from their political, economic, and social correlations and divergences.

China, for example, is the standard-bearer for the five countries as the one that gains the least out of its association and the one that casts a shadow on the rest of the countries because of its enormous economic success. Without China's vast success, it would not be possible to speak of a BRICS group. In contrast with that of its partners, China's road to triumph started more than thirty years ago while Russia began 11 years ago; India, 9 years ago and Brazil, 8 years ago. China also stands out for the strength of its sustainability (an annual average of 10% for the period in question). It does not compare with the rest of the group members that show a lower rate of growth (Brazil 4% average; India 8.4% average, and Russia 6.2% average in their respective periods). Hence, China's GDP represents more than 50% of that of the group (2009), has more than 70% of its monetary reserves (2.62 trillion dollars in 2010), more than 50% of the income derived from FDI between 2000 and 2009 (6.29 billion dollars) and holds the best ranking in world competitiveness in 2010 (in 27th place) compared to India (51st place), Brazil (58th place) and Russia (63rd place).

Thirty years after the days in which Deng Xiaoping, Zhu Rongji, Jiang Zemin and others pondered over the best model to follow in the face of the enormous need for China to open itself to the rest of the world, China has gained much experience of how to handle its economic strategy. The "experiment" of which Deng spoke has turned it into the most successful economic model in the world. The phenomenon of Western deindustrialization motivated by profit has been the main incentive for the "Chinese miracle. This, however, does not disregard the fact that Chinese talent has not limited itself to having become the largest "assembly plant," in the world, one aspect that the West did not take into account and was unable to understand and foresee China's economic overflow. From this platform, China has decided to move on to greater challenges: to improve all of its sectors by all means possible to become the greatest power of the 21st Century.

But beyond the success attained in terms of growth and development, China, along with the rest of the countries around the globe, will have to face changes in its economic growth formula. Although it did give the country an average annual growth of 10% for more than thirty years, this rate is no longer sustainable. Economic success based on destroying the environment, paying starvation wages and having no universal policy for social benefits, in addition to growing uneasiness worldwide, is forcing China to answer to pro-

tests from its "trade partners," who through the WTO have made China the most investigated country in the world having given rise to 784 complaints, as well as the country with the most lawsuits against it (563) between 1995 and 2010. This kind of growth has given way to much speculation from the West: "Only naïve theorists or short-sighted politicians will believe that it is possible, as is currently occurring in Europe, to deny millions of people work and social security year after year without paying a political price for it at some point. It is something that cannot work."[36] Meanwhile in China itself, Pan Zhongwang, a 55 year-old steel polisher who works in Zhenhua, arrives at 7:00am, leaves at 11:00pm, frequently works seven days a week, lives in a company dorm and earns approximately 12 dollars a day, protests: "Everything is getting more expensive. They should increase our salary."[37]

In the coming years, China will need to resolve the issue of its demographic structure, currently made up of 1.3 million people, of which 44% are in urban areas. The problem of keeping the other 56% in the countryside has a direct impact on employment, income and poverty. This situation will grow to be even more sensitive taking into account that the average age of the population is 35 years old, but is expected to increase to 45 years old by 2050. The resulting conflict will be seen in a young workforce and the need for pensions for its older adults. By 2050, 75% of China's population will be residing in urban areas, with all the challenges one billion people living in cities implies.[38] Thomas Friedman says that China is one fifth of all humanity, the greatest emitter of carbon in the world, the second largest oil importer after the United States and the biggest importer of nickel, copper, aluminum, steel, iron and other metals. Therefore, it can be said that as it goes for China, it will go for the planet. In other words, if China manages to make a change to renewable energies, there will be greater possibilities for mitigating the climate problem.[39] This is a very important issue for China's future that the Chinese themselves should bear in mind. The Minister from the Environmental Protection Agency, Pan Yue, has been pointing out since 2005 that one of China's main challenges is that the country does not have enough raw materials, that it did not have the necessary land and that its ever-increasing population would reach the level of 1.5 billion people while cities would continue to grow, but desert areas would also expand at the same rate. Pollution was not stopping as seen with the acid rain falling on one-third of China's territory, the contamination of half the water in the country's seven most important rivers while one-fourth of the cities did not have access to clean water. He has also noted that one-third of the urban population breathes pol-

[36] H. P. Martin & H. Schumann, La trampa de la globalización: el ataque contra la democracia y el bienestar 17 (2005).

[37] D. Barboza, *Tiende EU un puente "Hecho en China*", Periódico Reforma, July 2, 2011.

[38] Smith, *supra* note 2.

[39] Thomas L. Friedman, Hot, Flat and Crowded: Why We Need a Green Revolution 344 (2008).

luted air and less than 20% of the trash in the cities is sustainably treated and processed. Finally, he added that five of the most polluted cities on the planet were found in China.[40]

China's insertion into the global economy is irreversible and this fact deserves our utmost attention. China is no longer just the "assembly line" of the world as it was in the 1980s. Its low-cost economy now exists alongside another economy of innovation and high technology. While China conserves its endless reserve of cheap labor (approximately 800 million people), it will continue to try operating at different levels and at different speeds as part of its comprehensive SEZ policy, as currently seen in its central and western territory. Therefore, it is necessary for China to look beyond the happy figures of its GDP and along with the rest of the world reflect on what has been achieved to date in terms of economics. The collective development strategy for upcoming years will have to be sustainable by both BRICS and other dominant economies. As Tofflers points out, "…unless the United States, Europe, and the rest of the world understand what is really occurring in China —China hides under a deluge of unreliable financial and economic statistics— it will be difficult to make sense of what is about to happen. What is occurring will, in one way or another, radically redistribute the wealth and rock the planet."[41]

Meanwhile instead of thinking about its future, Russia readjusts the guidelines for its stability and development day by day. Despite the above and with its immense reserves of natural resources, Russia emerges as one of the BRICS countries with the greatest future potential. As indicated above, according to the British Geological Service, the probable life span for oil and natural gas stands between 41 and 60 years, respectively and Russia has the largest reserves of natural gas and the fifth largest oil reserves in the world. It is estimated by 2030 there will be a 30% greater demand for oil in the world (106 million barrels per day) and Russia with its 80 million barrels will have ensured its development and financial stability. As Smith points out with Western Siberia, the Russian Federation is now the greatest world producer of natural gas and the second largest producer of oil. Furthermore Russia has the longest coastline and the widest Continental platform in the Arctic Ocean, which will grant it sovereignty over large portions of the seabed and most of the natural gas estimated to be in the North Pole. Russia is perhaps the country with the greatest natural resources for the future: land, food, water, fuels, minerals and so on. However, despite this promising future, some of the main challenges Russia will be facing will be the problem of a smaller population unlike China: "The Russian Federation confronts the most dismal perspective. Its demography is in free fall: sixteen people die for every ten that are born. Its total population is now losing almost eight hundred thousand people per year."[42] In addition to this, Russia will have to work on building

[40] *Id.* at 348.

[41] Alvin Toffler & Heidi Toffler. La revolución de la riqueza 433-434 (2006).

[42] Smith, *supra* note 2, at 263.

up a credible rule of law within the framework of a new democracy, which after the economic collapse of the 1990s will have to face the challenge of sustainable restoration or risk turning into an oil-based dictatorship. For Telman Sánchez, "Russia needs to overcome its current state of weakness and internal crisis, to strengthen the State and to restore its political and economic role in the international system. All these tasks are indispensable and complex for the Russian State, but they should be undertaken fundamentally by means of effort and with the help of internal resources." And he adds that in speaking of the future we are no longer looking ahead to 2050, but to 2020. "The Russian people cannot wait another decade and then watch their hopes be dispelled again."[43]

In spite of an average annual growth of 8.4% over the last nine years, India[44] appears as one of the weakest BRICS countries based on its huge population, economic underdevelopment and poverty. Despite its small and yet uncertain economic boom in the first decade of the 21st century, India's GDP per capita is the lowest of the BRICS countries (1,192 dollars in 2009). The percentage of its rural population is still very high on the global scale (71% which represents more than 800 million people) in enormously complicating the possibilities for greater development and its proper allocation. Because of this, its Human Development Index (UNDP) is the lowest of all the BRICS countries (0.519 in 2010) reflected in the average years of schooling (4.4 in 2010), its healthcare spending (4.1% of the GDP in 2010) and education budget (3.1% of the GDP in 2010). Poverty in India is an age-old problem. According to data from Maddison, India did not experience any per capita growth between 1600 and 1870. From 1870 to 1947, it grew at a rate of 0.2% a year.[45] In 1960, 33% of the rural population and 49% of the urban population lived below the poverty line, barely surviving with Rs.324 and Rs.489 rupees, respectively.[46] With the reforms made in the early 1990s, India was able to significantly push down the poverty indexes. However in 2001, 35% of the total population still lived on less than one dollar a day.[47] In 2009, there were still more than 300 million poor people in India, 25% of who live in extreme poverty. This will prove to be one of India's biggest challenges to overcome.

Furthermore, India is encumbered by a long history of poor economic results over the last decades, which casts considerable shadow over its future economic project. For instance, from 1990 to 2010, the country's balance registered 17 years of losses. And considering only the period it has formed part

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[43] Pablo Telman Sánchez Ramírez, Razón y Poder: Rusia una potencia del siglo XXI (2005).

[44] Figures from the WV, IMF, and WTO.

[45] Jeffrey D. Sachs, El fin de la pobreza 255 (2006).

[46] Ramachandra Guha, India After Gandhi: The History of the World's Largest Democracy 467 (2007).

[47] J. Chai & Kartik Chandra Roy, Economic Reform in China and India: Development Experience in a Comparative Perspective 467 (2006).

of BRICS (2002-2010), it has showed losses six times while the balance sheet is in the red (-108 billion dollars in 2010). Just like China, India needs to create 8 million jobs a year. For that to happen, its GDP needs to grow at a minimum rate of 8% annually. Given that this level of growth has been attained in the last nine years, India is under the pressure of having to obtain better and long lasting results in the future. Two India's are often spoken of: the India of overwhelming poverty and underdevelopment that has been unable to resolve its problem of basic education and food supply, and the India of advanced technology that used in biotechnology, for instance, could generate $5 billion and up to 1 million jobs in the coming years. However, as the Tofflers point out, "…India knows that it cannot delay a new assault on poverty, and that it will not win the attack only with smokestacks. Nor will it win if the majority of its population continues to be condemned to a low-productivity, rural existence, no matter how much, 'appropriate technology,' it introduces on a small scale. Nor will a second wave strategy suffice, rather a first wave strategy."[48]

Brazil,[49] which is the only non-Asian country in the BRICS (70% of Russia's surface area is in Asia), has incongruous relationship with the group.[50] Like India, it has recently presented exceptional economic results in the last eight years (2004-2009), but its average growth is the lowest of all the BRICS countries in that same period (4%). Also like India, from 1990 to 2010, Brazil has had negative results in its balances in 15 out of 21 years (71%) and has ended up in negative numbers 6 in 11 years between 2000 and 2010. However, unlike the rest of the BRICS countries with success stories that came after failed Socialist projects, Brazil's economy comes from and is nourished by a surplus that for 50 years (1930-1980) yielded an average annual growth of 6%,[51] placing it as the BRICS country with the second highest level of human development (0.699 in 2010 UNDP) and that allots more funding for healthcare (9% of the GDP in 2009) and education (4.5% of the GDP in 2005). With its strategic focus on its internal market, Brazil is the least open of the BRICS countries (26% between 2000 and 2008). However, the upsurge of growth over recent years was attained through the export boom to Asia, and especially China. In 2006, 58% of Brazil's shipments consist of commodities (45%) and agro-industrial products (13%).

When one speaks of the future, it is necessary to speak of natural resources like oil, water, land and food. Within its 8.5 million square kilometers, Brazil's greatest potential wealth lies precisely in producing such consumables. With these resources, Brazil has all it needs to become the "food factory of the 21st century" to fill the increased world demand, which estimated to grow 70% by 2050 (FAO). Brazil has put 65 million hectares to use, but more than 300 mil-

48 Toffler & Toffler, *supra* note 41, at 409.

49 Figures from the WB, IMF and WTO.

50 Renato Baumann, Brasil y los demás BRICS 46 (2010).

51 Barbosa & Amorin, *supra* note 3.

lion hectares are still available, making Brazil one of the few countries other than Russia that is able to easily expand its agricultural activities to reach extraordinary proportions. This starkly contrasts with the situation in either China or India, where the land available for agricultural purposes is occupied and the potential for growth is almost nonexistent in view of having the largest populations in the world and increased buying power. Brazil is the country with the most total renewable water resources with 8,233 square kilometers/year, which also makes it the first country with this measurement per capita.[52]

In spite of its valuable assets, the challenges Brazil faces for the future are similar to those of other developing countries. Brazil has had its "imperial" aspirations, its geography and its resources for over 200 years, and yet for various internal reasons, it has not been unable to consolidate itself as a leader in South America. Vast problems of poverty, a very unequal distribution of land and wealth, and even social and political organization will continue on its agenda. Brazil's strong dependence on the model and on China's success poses a challenge, but it is also an opportunity, and the outcome will be determined in the decades to come. As in the case of the rest of BRICS, Brazil will have to focus on balancing its growth in such a way that benefits its activities and a majority of its inhabitants to avoid catching the development syndrome as suggested by the Tofflers: "The waves can be found overlapping themselves and displacing themselves in unison: remains of hunters and gatherers that disappear as peasants from the first wave take their lands; peasants that relocate themselves to the cities to work in second wave factories, and cyber-cafés, and rising software initiatives as the third wave arrives."[53]

To speak of BRICS is to speak of the future, and to that extent and with that drive, every country should be BRICS, or rather, aspire to a good future.

The ways in which countries and people coexist within the boundaries of Rifkin's Third Industrial Revolution cannot mimic the environmentally and socially irresponsible economic climbs observed in the 19th and 20th centuries. The fact that we are now part of a global village compels us to show respect for the success of others and not achieve success at the expense of an impoverished neighbor, but through effort and innovation. For Jacques Attali, "It is today when the world we will have in 2050 is decided and when the base for 2100 is laid. In our hands is the ability of our children and grandchildren to live in an inhabitable world or to have to put up with hell, hating us for it. In order to leave them a planet on which one can live —he points out sensibly— we must make an effort to think about the future, to understand where it comes from and how to act in it, and to make it possible."[54] Matt Ridley expresses it from the perspective of a rational optimism, in that "…the hu-

[52] Marco Antônio Rodrigues Diniz & José Luciano de Asis Pereira, *Brasil: la fábrica de alimentos del siglo XXI*, in BRICS: El difícil camino entre el escepticismo y el asombro 455-484 (Arturo Oropeza coord., 2011).

[53] Toffler & Toffler, *supra* note 41.

[54] J. Attali, *Breve historia del futuro* 13 (2006).

man species has become a collective problem-solving machine —which we do not doubt— and that it resolves problems through change."[55] The one who best frames the question of the future of the BRICS model is L. Smith, who points out that "The question is not to compare how many people there, or how many barrels of petroleum are left, or hectares of working land, or drops of water in the water cycle. The question is not whether the consumption of resources can or cannot be absorbed by the global ecosystem." To this, he adds, "In my opinion, the most important question is not that which refers to capacity, but that which formally questions the desire: what kind of world do we want?"[56] And in the end, we go back to the beginning: Goldman Sachs extolls a model of maximum profit, environmental deterioration and social irresponsibility. Is it the one we want?

[55] M. Ridley, *El optimismo racional ¿tiene límites la capacidad de progreso de la raza humana?* 271 (2010).

[56] Smith, *supra* note 2, at 336.

NOTE

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THE REGULATION OF CORPORATE BRIBERY IN BRAZIL

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Abstract. *This note explains the new legal initiatives in the regulation of private corporate bribery in Brazil. Corruption is an endemic problem in many States, including ones with an emerging economy such as Brazil. The development and implementation of anticorruption policies necessarily goes through Klitgaard's "Principal-Agent-Client" model. According to this theory, it is important to create a system of punishment and incentive that focuses also on the "client," the private sector, a subject often forgotten in the drafting of anti-corruption laws. This note argues that previous Brazilian corruption laws did not foresee a consistent legal framework capable of preventing and punishing companies' use of bribery. In this scenario, one can observe that Brazil began a process of institutional change over the course of recent years, which consisted of developing new anti-corruption mechanisms. The creation of The Office of Comptroller General (Controladoria Geral da União), a federal government organ specialized in corruption control, is a landmark. The implementation of Law No. 12.846, which will enter into force in 2014, shows great promise. The new law predicts harsher punishments to companies involved in bribery. One interesting aspect is the creation of incentive mechanisms directed at co-operation with government inspection, leniency agreements and a provision to decrease punishment when compliance programs are implemented. Although in order for it to be put into practice, the latter demands a more precise definition. The authors are optimistic about this new initiative and await further developments.*

Key Words: *Corruption, Bribery, Business, Compliance, Brazil.*

Resumen. *Este documento analiza las nuevas iniciativas legales en la regulación de soborno corporativo en Brasil. La corrupción es un problema endémico*

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presente en muchos países, incluyendo países de economía emergente, como Brasil. El desarrollo y la implementación de políticas de lucha contra la corrupción implica necesariamente el modelo de "gestor-agente-cliente" de Klitgaard. Basándose en esta teoría, es importante crear un sistema de sanciones e incentivos que también se centren en la figura de "cliente", el sector privado, sujeto muchas veces a no ser tenido en cuenta en las leyes de anticorrupción. En la presente investigación, se constató que las antiguas leyes brasileras sobre corrupción no proporcionan un régimen jurídico consistente capaz de prevenir y sancionar el uso del soborno por las empresas. Desde este escenario, se observa que el país inició, en los últimos años, un proceso de cambio institucional, desarrollando nuevos mecanismos de lucha contra la corrupción. La creación de la Contraloría General de la Unión, órgano gubernamental federal especializado en el control de corrupción es un hito. La gran promesa es la implementación de la Ley No. 12.846, que entrará en vigor en 2014. La nueva ley prevé sanciones muy graves para las empresas envueltas en soborno. Un aspecto interesante es la creación de mecanismos de incentivos destinados a la cooperación con la fiscalización de gobierno, como los acuerdos de tolerancia y la previsión de reducción de la pena en la existencia de programas de cumplimiento, cuya utilización carece de una definición precisa. Los autores siguen siendo optimistas acerca de esta nueva iniciativa, a la espera de su evolución.

Palabras clave: *Corrupción, soborno, negocios, Compliance, Brasil.*

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I. Introduction

Long perceived as a highly corrupt country, Brazil has recently embarked on a journey toward anti-corruption. In early 2012, the Brazilian Supreme Court ruled on the most high-profile case in its history and sent several congressmen and leading figures of the ruling political party involved in corruption to jail. More recently, ordinary citizens in different Brazilian cities have gone to the streets to protest against the President of the Senate regarding

charges of corruption. Simultaneously, foreign governments and international organizations have increased pressure to make the end of corruption a top government priority. In response to these claims, Brazil has ratified the most important anti-corruption treaties and has implemented changes in its internal laws to set the country in the right direction.

The changes underway are grounded on the perception that corruption affects everyone in the country: from the poorest to the richest, and its consequences, in the long run, are welfare reducing.[1] The private sector is surely not excluded from the corruption equation, bribery being the most common type of corrupt activity affecting corporations. For that reason, all the international treaties Brazil has ratified and the proposed changes in its domestic laws in the area of corruption are aimed at bribery, and more precisely, at the bribe payer.

In this note, we address the status of Brazilian law in relation to corporate bribery. The note is structured in four sections and a conclusion. In Section 1, we start by defining corruption and demonstrating that bribery is one of the many forms in which corruption can occur. We frame the bribery dynamics under the "Principal-Agent-Client" approach, indicating the importance of placing strong emphasis on the role played by the client, *i.e.*, the bribe-payer/the corporation, in the design of anti-bribery policies. Section 2 captures the historical lack of Brazilian anti-corruption laws that have an impact on corporations in Brazil. Section 3 deals with companies connected to Brazil in some way that have been investigated and prosecuted in foreign jurisdictions under corruption charges. Section 4 focuses on the Brazilian recent experience concerning institutional changes and the approval of a new anti-bribery law.

II. Corruption and Corporate Bribery

Corruption is an endemic problem present in many countries, including emerging economies such as Brazil. Defined as the "abuse of public office for private gain"[2] and perceived as a major obstacle to development, corruption has long been associated with the inappropriate use of public funds,[3] inefficient public policies,[4] a loss of public confidence in democracy,[5] procurement

[1] Marilda Rosado de Sá Ribeiro & Carolina Araújo de Azevedo, *Corruption and Foreign Investments in Brazil*, 1 Panorama of Brazilian Law 39, 48 (2013).

[2] The World Bank, Helping countries combat corruption 8 (Poverty Reduction and Economic Management Network, 1997) available at http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf.

[3] Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross Country Analysis*, *in* Corruption and the Global Economy 83, 87 (Kimberly Ann Elliott ed., 1997).

[4] Andrei Schleifer & Robert W. Vishny, *Corruption,* 108 Q. J. of Econ. 599, 616 (1993).

[5] Vito Tanzi, *Corruption around the World: Causes, Consequences, Scope and Cures*, 45 IMF Staff Papers 559, 583 (1998).

frauds and other anti-competitive conducts,[6] and a decrease in foreign direct investment inflows.[7] As a product of human creativity, corruption can take several forms, the most common being patronage, embezzlement, trading influence, abuse of functions and, of course, bribery.[8]

This note employs the term bribery to refer to "use of a reward to pervert the judgment of a person in a position of trust."[9] Reports of bribery have existed since the beginning of human history in different cultures around the globe.[10] (Public) bribery[11] is a result of constant interaction between public and private interests within the structure of the State. Accordingly, there will be incentives for corrupt practices whenever a public authority exercises her or his discretion on the distribution of a benefit, or a cost to the private sector.[12] In other words, on one side of the bargain, there is the State, empowered to buy and sell goods and services, offer concessions and distribute subsidies [benefits], as well as to collect taxes, enforce regulations and require authorizations [costs]. On the other side, there is the private sector, with economic power and willing to pay for benefits or to reduce costs. Given the central role of the State in many countries and the great influence of the private sector in most countries of the world, the existence of bribery —at varying degrees— is intuitive.

Scholars have long been concerned with bribery as a public policy issue and in response, have created models to help understand and solve bribery-related problems. One way of approaching the bribery dynamics is through the "Principal-Agent-Client" model proposed by Klitgaard.[13] The "principal" is portrayed as a superior officer in the public administration; the "agent" as a petty officer acting as a liaison between the "principal" and the "client;" and the "client" is represented by the private sector. "Principal," "agent" and "client" hold different interests.

The "principal," who is responsible for creating and implementing anti-corruption policies, should have knowledge that the "agent" balances the benefits of taking a bribe against the costs of being caught. Meanwhile, the "client" feels compelled to corrupt the "agent" in order to obtain benefits un-

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[6] Fritz F. Heimann, *Combating International Corruption: The Role of the Business Community*, *in* Corruption and the Global Economy 147, 148 (Kimberly Ann Elliot ed., 1997).

[7] Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 Rev. of Econ. & Stat. 1, 1 (2000).

[8] *See* Oxford English Dictionary (1970) (explaining that the word "bribery" comes from Old French, "briberie", a small piece of bread that was usually given to beggars).

[9] Joseph S. Nye Jr., *Corruption and Political Development: A Cost-Benefit Analysis*, *61* Am. Pol. Sci. Rev. 417, 419 (June 1967).

[10] John T. Noonan Jr., Subornos 35 (Bertrand Brasil ed., 1989).

[11] Due to the limited space for the article, we will not deal with "private-to-private" bribery.

[12] Susan Rose-Ackerman, *The Political Economy of Corruption*, *in* Corruption and the Global Economy 31, 31 (Kimberly Ann Elliott ed., 1997).

[13] Robert Klitgaard, A Corrupção sob Controle 83 (Jorge Zahar ed., 1994).

less he can foresee real chances of being punished. Accordingly, corruption can be defined as a "crime of calculation" and a matter of opportunity.[14]

Traditionally, policy makers and scholars have centered their anti-bribery efforts on the role of the "agent," in this case, the "bribe taker." Despite the undeniable importance of this strategy, a more comprehensive approach has been widely adopted in recent years. This new approach emphasizes the role of the "client" (the "bribe payer") in the bribery dynamics since the private sector plays a fundamental role of providing economic resources for the machinery of corruption.

Milton Friedman once said that the "only social responsibility of business is to increase its profits."[15] This assertion reflects the economic rationale that drives enterprises, but does not correspond to today's societal expectations on the behaviour or the private sector. Nowadays, the concept of governance prevails: the problems of society shall not be administered only by the State, but also by private actors, at local and global levels.[16] In a governance environment, companies should be accountable for the impact their "activities may have on the social, political, economic and development aspects of society."[17] Under this new approach, the accountability for monitoring corrupt practices is shared by the State and corporations. It is the State's responsibility to create a system of incentives and punishments to render corruption less attractive to corporations. The development of anti-corruption laws focused on business practices can be an important mechanism for this purpose.

III. The Historical Lack of Brazilian Anti-Bribery Laws Affecting Corporations

Like many other Latin American countries, Brazil is perceived as highly corrupt.[18] In a recent poll conducted by Transparency International,[19] an

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[14] Robert Klitgaard, Ronald Maclean-Abaroa & Lindsey H. Parris, Corrupt Cities: A Practical Guide to Cure and Prevention 27 (World Bank Publications ed., 2000).

[15] Milton Friedman, *The Social Responsibility of Business is Increase Its Profits*, N.Y. Times, Sep. 13, 1970, at 01.

[16] Comissão sobre Governança Global, Nossa Comunidade Global 02 (FGV ed., 1995).

[17] A. Adeyeye, *The Role of Global Governance in CSR*, 9 Santa Clara J. Int'l L. 147, 149 (2011).

[18] *See* Matthew M. Taylor, *Corruption, Accountability Reforms, and Democracy in Brazil*, in Corruption and Democracy in Latin America 150, 151 (Stephen D. Morris & Charles H. Blake eds., 2009) (noting that all post-dictatorship administrations have been investigated on suspicions of corruption).

[19] The 2012 Corruption Perception Index measured the perceived levels of public sector corruption in 174 countries and territories around the world. The ranking is carried out through interviews conducted by respectable institutions, reflecting the views of observers around the world. They are consulted experts, risk analysts and businessmen, including people who live and work in the countries evaluated.

NGO committed to stopping corruption and promoting transparency, Brazil scored 4.3 in its corruption perception index,[20] which places the country closer to highly corrupt than to clean. Although Brazil has ratified the most important international anti-corruption treaties,[21] the country has an incomplete legal framework on matters related to bribery. While its laws punish public servants involved in corrupt practices, they undermine the role of businesses in this process. Until 2013, there were few laws that could be enforced against "clients," which clearly shows that the Brazilian anti-corruption laws and policies then in place contradicted the theoretical model proposed by Klitgaard.

At first, Brazil did not possess strong substantive laws to punish individuals and corporations engaged in bribery. Over the course of regulating this matter, the country has legislated in a piecemeal manner. The first piece of legislation dealing with corruption in our analysis is the Brazilian Criminal Code [Decree Law No. 2.848].[22] Article 333 provides criminal penalties for anyone who offers or promises undue advantage to a public servant in exchange for having her or him exercise, or refrain from exercising, her or his official duties. In 2002, Brazil reformed its criminal code and criminalized the practice of bribery in the context of international commercial transactions.[23] Although important, this legislation is insufficient to control corruption in businesses since Brazilian law does not contemplate criminal liability for corporations, except in the case of environmental crimes.

Another piece of legislation worth analyzing is Law No. 8.666,[24] which regulates biddings and contracts with the public administration, and establishes fines and temporary suspension from participation in future bidding procedures for corporations that have engaged in corruption. In such instances, the competent authorities issue a certificate of ineligibility [*Declaração de inidoneidade*], a formal prohibition to celebrate contracts with the public administration (municipal, state, and federal levels) for a certain period of time. Under this law, sanctions are enforced through different channels. First,

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[20] Transparency International, Corruption Perception Index (Transparency Int'l ed., 2012). http://www.transparency.org/cpi2012/results.

[21] Brazil has ratified the Organization of American States (OAS) Inter-American Convention against Corruption, the Organization for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations (UN) Convention against Corruption. The main goal of these international law instruments is to establish a commitment from countries currently facing bribery issues through the exchange of experiences and the harmonization of national laws. All treaties contain obligations to prevent and punish bribery, with a focus on the supply side, usually a corporation.

[22] Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, Diário Oficial da União [D.O.U.] de 31.12.1940 (Brazil).

[23] Código Penal [C.P.] [Penal Code], art. 337B, 2002 (Brazil).

[24] Lei No. 8.666, de 21 de Junho de 1993, D.O.U. de 6.7.1994 (Brazil).

the public authority responsible for the bidding procedure, either at the municipal, state, or federal level puts into effect the sanction. Alternatively, sanctions can be levied by another internal body of the public administration, the Office of the Comptroller [*Controladorias*][25] or an external body like the Audit Courts [*Tribunais de Contas*].[26]

Aside from Law No. 8.666, corporations acting as bribe payers in Brazil may also be residually subject to Law No. 8.429,[27] commonly referred to as the Administrative Misconduct Law [*Lei de Improbidade Administrativa*]. This law establishes the sanctions applicable to public servants who engage in unjust enrichment during the course of their activities. The available sanctions vary from political sanctions (*i.e.*, the suspension of political rights) to civil sanctions (*i.e.*, damages, fines, and suspension from contracting with the government or from obtaining subsidies). Procedurally, a lawsuit is filed by the Public Prosecutor's Office [*Ministério Público*],[28] or by the Office of Public Advocacy [*Advocacia Pública*].[29]

The objective of the Administrative Misconduct Law is to prevent and punish acts of this type. The focus lies on the public sector, but civil sanctions against private actors are extended only if a private actor instigates, aids or benefits from an act of misconduct committed by the public servant. Since punishment is conditioned upon proof of actual misconduct, a burden rarely met, this law does little to combat corruption in businesses in Brazil.

In sum, these laws are clearly insufficient to establish an effective deterrent system against bribery. The current Criminal Code is unable to establish an effective system of criminal liability for corporations engaging in bribery. Although it imposes fines and temporary suspensions from contracting with the public administration, Law 8.666 is too limited in its scope to be able to change the *status quo*. The Administrative Misconduct Law, the scope of which is more general, does little to punish corrupt corporations, for the standards currently in place for burden of proof are so high that they are only rarely met. Not without reason did OECD experts recently conclude that

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[25] The Offices of Comptroller are bodies in the executive branch (at federal, state, and municipal levels) responsible for internal audits. At the federal level, it is called the Office of Comptroller General (Controladoria Geral da União).

[26] Audit Courts are bodies in the legislative branch (federal, state, and in some cases, municipal) responsible for external audits. At the federal level, it is called the Federal Audit Court (Tribunal de Contas da União).

[27] Lei No. 8.429, de 2 Junho de 1992, D.O.U. de 3.6.1992 (Brazil).

[28] The *Ministério Público* [Public Prosecutor's Office] is a body of independent public prosecutors acting at state and federal levels to prosecute criminal offenses and to defend other collective interests, such as environmental protection, consumer rights and human rights.

[29] The *Advocacia Pública* [Office of Public Advocacy] has the function to defend the State's interests in courts and to provide legal counsel to the Executive Branch (at federal, state, and municipal levels). It is not part of the Public Prosecutor's Office and is not independent body, as it reports to the head of Executive Branch.

Brazil lacks a proper legal framework endowed with dissuasive sanctions to establish an effective system against corporate bribery.[30]

IV. Brazilian Corporations as (Indirect) Subjects of foreign Anti-Bribery Laws

Despite the lack of bribery laws applicable to "clients" in Brazil, Brazilian corporations have been at least indirectly subject to investigation and sanctions in foreign jurisdictions, as a result of the extraterritorial aspect of foreign anti-bribery laws. The most effective legal system against bribery committed by Brazilian corporations is exercised by the United States with its Foreign Corrupt Practices Act [FCPA], a statute that punishes U.S. corporations and foreign companies connected to U.S. jurisdiction[31] engaged in bribery abroad.[32] Several cases can be cited to illustrate this situation. The cases that follow describe instances in which American parent companies of Brazilian affiliates were investigated, and some were even punished for corrupt practices incurred by their affiliates. Although the Brazilian affiliates were not directly involved in the litigation, indirect consequences, such as firing employees with dirty hands, changing the internal structure of the corporation, improving internal control systems against bribery and so forth, should have ensued.

The first such case that effectively stopped bribery involving a Brazilian company took place in the safety equipment manufacturing business. In 2006, Tyco International faced prosecution by U.S. authorities when it bought a Brazilian company, Earth Tech Brazil, which was accused of corruption in Brazil.[33] A $51 million fine followed.

Similarly, in 2009, Nature's Sunshine Products, a company in the business of health supplements, had to pay a $600,000 fine for acts committed by its Brazilian subsidiary. Nature's Sunshine Products was sued before a U.S. court after it was revealed that its Brazilian affiliate had bribed customs officials to ease restrictions on its products.[34]

In August 2010, U.S. authorities initiated proceedings against the American parent company Universal Corporation for acts committed by Universal

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[30] Org. for Econ. Cooperation and Development, Brazil Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations 3 (2010), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45518279.pdf.

[31] This legislation applies not only to U.S. companies, but also to their subsidiaries operating in foreign countries, joint ventures, and even foreign companies with operations or mere registration in the United States, as well as companies that trade on the U.S. stock exchange (issuers).

[32] Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L. J., 929 (2012).

[33] *SEC v. Tyco International Ltd.*, No. 06-CV-2942 (S.D.N.Y. 2006).

[34] *SEC v. Nature's Sunshine Products, Inc. et al.*, No. 09-0672 (D. Utah 2009).

Leaf Tobacco LTDA [Universal Brazil], a limited liability company incorporated under Brazilian laws and headquartered in the city of Santa Cruz do Sul, in Southern Brazil. Universal Brazil is affiliated with the U.S. Universal Corporation, the world's leading tobacco merchant and processor. The Brazilian affiliate corporation was charged with bribing a State company in Thailand in exchange for purchasing Brazilian tobacco. The dispute ended with Universal Corporation's paying a fine in the amount of $4.4 million.[35]

Presently, a bribery investigation is underway against EMBRAER, a giant Brazilian aircraft manufacturer. EMBRAER is subject to the U.S. FCPA since its shares are issued and traded on the New York Stock Exchange. Following the United States' footsteps and with stronger anti-bribery laws in place, several other jurisdictions are directing their investigations and enforcement mechanisms against Brazilian corporations that are allegedly engaged in bribery. According to a 2011 Transparency International report,[36] four Brazilian corporations were investigated for corruption in the United Nations "Oil-for-Food" program.[37] Charges of bribery committed by Brazilian corporations in Argentina, Bolivia, the Dominican Republic, Italy and Russia have also been reported.[38]

V. Institutional Change: The Creation of the Office of the Comptroller General and the Emergence of a New Anti-Bribery Law

In 2003, Brazil created its first governmental body specializing in anti-corruption policies. The Office of Comptroller General [*Controladoria Geral da União - CGU*] is in charge of assisting the President of the Republic in matters within the Executive Branch which are related to defending public assets and enhancing management transparency through internal control activities, public audits, corrective and disciplinary measures, corruption prevention and combat, and coordinating ombudsman's activities.[39] It exercises the dual

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[35] *SEC v. Universal Corp.*, No. 10-cv-1318 (D.D.C. Aug. 6, 2010). *See also* Transparency International, Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention 21 (Transparency Int'l ed., 2011).

[36] *Id.*

[37] The program "Oil-for-Food" was established by the United Nations in the 1990s during the economic embargo imposed on the regime of President Saddam Hussein. For humanitarian reasons, the sale of Iraqi oil on the foreign market was authorized in exchange for food and medicine. In 2005, an independent commission (Independent Inquiry Committee into the United Nations Oil-for-Food Programme) identified a number of illicit payments from companies desirous of participating in the program.

[38] Transparency International, *supra* note 35, at 22.

[39] As a central agency, CGU is also in charge of technically supervising all of the departments that make up the Internal Control System, the Disciplinary System and the Ombudsman's units of the Federal Executive Branch, providing normative guidance as required. CGU

function of internal auditor and as a disciplinary body for federal public servants. Although the scope of the Office of the Comptroller General is limited to corruption cases within the federal administration, it represents a positive difference in the overall anti-corruption culture in Brazil, which can influence anti-corruption practices outside the federal structure.

In its first few years of existence, the Office of Comptroller General created the "National Registry of Inapt and Suspicious Enterprises" [*Cadastro Nacional de Empresas Inidôneas e Suspeitas - CEIS*], a database that contains information on individuals and companies that have been suspended from participating in bidding procedures at any government level. In addition to data about the penalties imposed by federal authority, *CEIS* also contains information related to the sanctions imposed by the Federal Audit Court [*Tribunal de Contas da União*] and the Court's decisions on administrative improbity. Currently, twelve states[40] and the Federal District already include this information in their information systems. In the future, a public administrator from any part of Brazil will be able to access this database and prevent these companies from participating in government contracts. On the other hand, if substantive anti-corruption laws have limited effectiveness, there is only so much the Office of the Comptroller General can do.

Repeated bribery condemnations from abroad, and international and internal pressure for a bribery-free country seemed to have echoed in the Brazilian legislative branch recently. After three years of discussions, Law No. 12.846,[41] which deals with civil and administrative corporate liability involving corrupt practices, was approved by Congress and will enter into force in 2014. Originally proposed by former President Lula da Silva, this law is the result of a joint initiative between the Office of the Comptroller General, the Ministry of Justice and the Office of Federal Public Advocacy.

Law No. 12.846 creates a strict liability regime for corporate entities that engage in bribery or procurement fraud. The administrative penalties provided in the Law include fines from 0.1% up to 20% of the gross sales of the previous year, and publication of the decision in the press, which in turn affects the company's image. According to the text of this law, penalties may be milder upon the proven existence of "integrity mechanisms, audit and whistle blowing, and proof of implementation of codes of ethics" within the corporation. This requirement would fall under the category of a "compliance program." This law also has a section on "leniency agreements." In other words, by signing an agreement, a corporation can avoid severe penalties after pledging to cease corrupt practices and agreeing to cooperate with public authorities on the identification of irregularities. At a federal level, the Office

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also fulfills the important role of being the representative of Brazilian government in global forums that discuss corruption.

[40] These states are Acre, Alagoas, Bahia, Ceará, Espírito Santo, Goiás, Minas Gerais, Pernambuco, Piauí, Sergipe, São Paulo and Tocantins.

[41] Lei No. 12.846, de 1 de agosto de 2013, D.O.U. de 2.8.2013 (Brazil).

of the Comptroller General is the public authority in charge of prosecuting cases concerning corporations involved in bribery.

In addition to administrative penalties, Law No. 12.846 stipulates that both the Office of Public Advocacy and the Public Prosecutor's Office may bring lawsuits against corporations on claims involving the loss of property rights, requests for partial suspension of corporate activities or the compulsory dissolution of legal entities involved in bribery.

Prior to being approved, Law No. 12.846 generated much debate in Brazil. Appraising the initiative, the Brazilian Institute for Business Law [IBRADEMP], a non-profit organization, highlighted the importance of an anti-bribery system based on compliance programs which transfers part of the cost of corruption prevention to corporations. However, the Institute notes that, unlike from anti-bribery laws in force in other countries, the Brazilian Law does not provide for a minimum requirement in compliance programs, nor does it clearly define what the exact benefits accrued from maintaining such programs are.[42] It bears mentioning that although a compliance mechanism is not yet provided in Brazilian laws, several corporations with activities in the country, especially those aimed at foreign markets, have already adopted such programs. Large auditing companies and specialized law firms offer this service to Brazilian corporations.[43]

VI. Conclusion

Brazil seems to have finally embarked on the difficult journey to eliminate corporate bribery. Such a journey started with the adoption of criminal, administrative, and civil sanctions for those who chose to engage in such activities. Unfortunately, the results of these early laws demonstrate that they have not been sufficient to achieve the overall goal of the elimination of corporate bribery. Part of the reason for this unsuccessful story may have to do with the fact that these statutes were not addressed to the specific case of corporate bribery as such. In addition, some of the flaws of these laws may be attributed to their content and others to matters involving procedure. In terms of procedure, the creation of Brazil's first governmental body specialized in anti-corruption policies, the Office of Comptroller General, certainly makes a positive difference. In terms of substance, the approval of Law No. 12.846 marks unprecedented progress for Brazil. It is the first statute in the country's history to target the "client" in the bribery equation, as prescribed by Klit-

[42] Comitê Anticorrupção e Compliance do Instituto Brasileiro de Direito Empresarial, Comentários ao Projeto de Lei no. 6.826/2010 [Comentaries on Draft Bill No. 6.826] 11-18 (2011) *available at* http:// www.ibrademp.org.br.

[43] The "Big Four", the world's largest auditing firms (KPMG, Ernest & Young, Deloitte and PricewaterhouseCoopers), offer the corruption prevention services in Brazil. The largest Brazilian law firms also have begun to work with compliance programs in corporations.

gaard's theoretical model. It does so through a system of disincentives and benefits, which involves heavy sanctions for bribe payers and advantages for those companies that conduct their activities ethically. Law No. 12.846 also innovates by adopting compliance mechanisms and "leniency agreements." Although this new legal framework looks good on paper, its actual capacity to dissuade corporate bribery is yet to be seen.

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