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ARTICLES

NOTE

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A COMPARATIVE-EMPIRICAL ANALYSIS OF ADMINISTRATIVE COURTS IN MEXICO

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Adriana García**
Ana Elena Fierro***

Abstract. *The main function of administrative courts in Mexico is to resolve disputes between administrative agencies and citizens. Mexico is a federal system with 31 states and a Federal District. Twenty-nine states and the Federal District have administrative courts of this type. Most of these courts follow the French model of reviewing administrative actions in bodies that do not form part of the regular justice system. However, almost half of the states have deviated from this model and ascribed these administrative courts to the judicial branch. How does this change in the institutional framework influence the way administrative court judges review administrative action disputes? In order to answer this question we analyzed the rulings of judges from the different types of courts empirically. The Mexican federal court structure made this experiment possible because there are both administrative courts incorporated into the judiciary and autonomous courts. We used a database of more than 4,000 cases from over twenty local administrative courts. We analyzed the influence of the branch to which the court belongs, the procedures of appointment for judges, the length of a judge's term in office, and the protection of judges' salaries over their actual decisions. We classified decisions into two broad categories: pro-government decisions and case dismissals. The results point toward evidence that the branch to which the court belongs, the length of a judge's term in office and governor intervention in the appointment of judges affect judges' decisions.*

Key Words: *Administrative courts, French tradition, length of judges' terms in office, appointment procedures, salary protection.*

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Resumen: *La función principal de la justicia contenciosa en México es resolver conflictos entre particulares y servidores públicos. México es una federación compuesta por 31 estados y el Distrito Federal. Veintinueve estados y el Distrito Federal cuentan con un tribunal que resuelve este tipo de conflictos. La mayor parte de estos tribunales se constituyeron siguiendo la tradición francesa de revisión de actos de autoridad, no incorporando a estos tribunales al sistema de justicia común. Sin embargo, casi la mitad de los estados se ha desviado de esta tendencia incorporando sus tribunales al poder judicial del Estado. ¿Cómo puede influir este cambio de diseño institucional en cómo resuelven estas disputas los jueces? Con el propósito de contestar a esta pregunta en el presente artículo analizamos empíricamente las decisiones de distintos juzgadores en cada tipo de tribunal. La estructura federal de México nos permitió realizar este experimento pues al mismo tiempo coexisten dentro del país tribunales incorporados al poder judicial y tribunales autónomos. Utilizamos una base de datos compuesta por más de 4,000 decisiones en más de veinte tribunales del país. Específicamente estudiamos la influencia del poder al que el tribunal pertenece, los procedimientos de designación de jueces, los periodos de designación y la protección de los salarios de los jueces sobre las decisiones que estos toman. Para realizar este análisis clasificamos las resoluciones en dos grandes categorías: decisiones pro-gobierno y sobreseimientos. Nuestros resultados sugieren que tanto la adscripción del tribunal como la duración del encargo e intervención del gobernador en la designación de jueces influyen en sus decisiones.*

Palabras clave: *Tribunales contenciosos, tradición francesa, duración del encargo de jueces, procedimientos de designación, protección de salarios.*

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I. Introduction

For decades researchers have been questioning the pure legal prototype of courts that the architects of most of legal systems tend to assume exists.[1] Models of judicial behavior have emerged as systematic, empirical, theoretically-based attempts to explain what courts and judges do.[2] According to the literature on judicial behavior, courts are political complex structures that can be analyzed like other political institutions. Courts are bodies in which judicial power interacts with the executive and the legislative powers in a political context; huge organizations in which judges must administer employees and budgets; and institutions seeking to interpret rules, create law, and solve conflicts between parties.

Given this complexity, courts have to be analyzed not only from an ideal theoretical perspective, but also from an empirical one in order to obtain a real picture of what they do. Furthermore, judges have to be analyzed as agents affected by different factors, including the organization of the court; the rules applying to their jobs; their preferences, values, and political circumstances; and the interaction of the two other branches of the State.

Constitutional courts are certainly political actors, and this may be why scholars of judicial behavior have focused on them. Less attention has been

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[1] *E.g.,* "Legal scholars are today far less committed to the proposition that law and adjudication are *sui generis* subjects that can be understood only through the specialized techniques of the lawyer", Martin Shapiro & Alec Stone Sweet, On Law, Politics, and Judicialization (Oxford University Press, 2002). *See also* Martin Shapiro, Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence (Free Press of Glencoe, 1964); Martin Shapiro, Courts a Comparative and Political Analysis United States of America (University of Chicago Press, 1981); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 82 S. Cal. L. Rev. 913 (1983); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. Cal. L. Rev. 1631 (1994-1995); Aharon Barak, *The Role of a Judge in Democracy*, 53 Hastings L.J. 1205 (2002); Héctor Fix-Fierro, Courts, Justice and Efficiency: A Socio Legal Study of Economic Rationality in Adjudication (Hart Publishing, 2003); Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (Cambridge University Press, 2003); Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press, 2003); Tom Ginsburg, *The Global Spread of Constitutional Review, in* Oxford Handbook of Law and Politics 81 (Keith E. Whittington, R. Daniel Kelemen, Gregory A. Caldeira, eds., Oxford University Press, 2007); Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 Berkeley J. Int'l L. 53; Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean Politics*, *in* New Courts in Asia (Andrew Harding & Penelope (Pip) Nicholson, eds. Routledge, 2009) (Gr. Brit.)**;** Tom Ginsburg & Tamir Moustafa, Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press, 2008).

[2] John Ferejohn, Frances Rosenbluth, & Charles R. Shipan, *Comparative Judicial Politics, in* Oxford Handbook of Comparative Politics 727 (Carles Boix & Susan C. Stokes, eds., Oxford University Press, 2007).

given to the design of administrative courts, although they are one of the most widely used mechanisms for challenging agencies' decisions.

The design of administrative courts is not uniform and varies over time and across countries. A divergence in the interpretation of the separation of powers doctrine prompted the appearance of two main approaches to designing administrative courts —the French model and the judicial review model. In the French model, administrative justice belongs to the executive branch, under the logic that the separation of powers requires a more restricted scope of action for the judiciary[3] while the common-law interpretation places the administrative courts within the judicial branch, under the logic that any function of a truly judicial nature must be exercised by the judicial branch alone/only.[4] Some countries use a hybrid of the two models.

In Mexico, there is significant variation between these models in the institutional design of its administrative courts. Mexico followed the French model for the solution of controversies between the State and citizens. Of Mexico's 31 states and the Federal District, 29 jurisdictions have administrative courts that review agencies' decisions. More than 50% of the courts are part of the local executive branch, while the rest are part of the judiciary.

Questions that arise from this divergence speak to the implications of the choice of one or other design. Does choice of design have any impact on a court's outputs? Some scholars have shown interest in questions regarding judicial review of agency action.[5] Empirical analysis of administrative adjudication includes studies of the reasons for creating administrative courts;[6] as well as studies of administrative courts' performance and their role in agencies' performance. These studies include analyses of the performance

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[3] Caranta suggests that the French model refused to allow judiciary courts to review administrative decisions, relying on the principle of separation of powers. The main concern was that any judiciary decision regarding the executive's decisions would be a limitation to the exercise of executive power. *See* Roberto Caranta, *Evolving Patterns and Change in the EU Governance and their Consequences on Judicial Protection*, *in* Traditions and Change in European Administrative Law 15 (Roberto Caranta, Anna Gerbrandy, eds., Europa Law Publishing, 2011).

[4] The common-law tradition defends the supremacy of the judiciary over any dispute between parties without any distinction between individuals and the State. Government and citizens should be judged by the same rules and in equal conditions. Therefore**,** any authority can be brought before the common courts and judged by the judiciary. See Marion Gibson William, *The Colombian Council of State: A Study in Administrative Justice,* 5 The J. of Pol. 291 (2012).

[5] In the United States, Currie & Goodman analyzed different schemes of administrative review in order to propose the optimum forum for judicial review of administrative action. *See* David P. Currie & Frank I. Goodman, *Action: Quest for the Optimum Forum,* 75, Colum. L. Rev. 1 (1975).

[6] *See* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts,* 119 Harv. L. Rev. (2006); Simon Halliday & Colin Scott, *Administrative Justice*, *in* The Oxford Handbook of Empirical Legal Research (Peter Cane & Herbert M. Kritzer, eds. Oxford University Press, 2010)**;** C.F. Amerasinghe, *The World Bank Administrative Tribunal,* 31 Int'l & Comp. L.Q. 748 (1982); Lord Diplock, *Administrative Law: Judicial Review Reviewed,* 33 Cambridge L.J. 233 (1974).

of specialized courts in general;[7] specialized courts in Indonesia;[8] administrative courts in Colombia;[9] the expansion of US administrative law and the convenience of having specialized bodies to deal with it;[10] the performance of administrative courts and their role in controlling agencies;[11] the relationship between administrative courts and policy-making;[12] the role of administrative courts in agency performance;[13] the impact of specialized courts in intellectual property cases;[14] the role of the adversarial model in administrative tribunals' behavior;[15] the relationships between congress, executive, and judiciary;[16] and the relationship between courts and agencies.[17]

A number of scholars have done comparative administrative law analyses on the differences between French administrative law and other administrative law systems such as the Anglo-American, German or English systems.[18] But none

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[7] *See* Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 Va. L. Rev. 1267 (2012).

[8] *See* Adriaan Bedner, *Rebuilding the Judiciary in Indonesia: The Special Courts Strategy,* 23 Yuridika (2008).

[9] *See* William, *supra* note 4.

[10] *See* A.A. Berle, Jr., *The Expansion of American Administrative Law,* 30 Harvard L. Rev. 430 (1917).

[11] *See* Norman Lewis & Patrick Birkinshaw, When Citizens Complain: Reforming Justice and Administration (Open University Press, 1993).

[12] *See* Charles H. Koch, Jr., *Policy Making by the Administrative Judiciary*, 56 Ala. L. Rev. 693 (2005).

[13] *See* Richard Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. Rev. 1239 (1989).

[14] *See* Rohazar Wati Binti Zuallcobley, *Study on Specialized Intellectual Property Courts*, International Intellectual Property Institute (2012), *available at* http://iipi.org/2012/05/study-on-specialized-intellectual-property-courts-published/.

[15] *See* David E. Guinn, *Tracing the Unique Contours of Administrative Justice: Reconceptualizing the Judicial Model for Administrative Law,* SUNY Center for International Development (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017306.

[16] *See* Kevin Rhodes & Steven Calabresi, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev 1155 (1992).

[17] *See* P.P. Craig, *The Common Law, Reasons and Administrative Justice,* 53 Cambridge L.J. 282 (1994).

[18] *See* Claude-Albert Colliard, *Comparison Between English and French Administrative Law,* 25 Transactions of the Grotius Society 119 (1939); Georg Nolte, *General Principles of German and European Administrative Law—A Comparison in Historical Perspective*, 57 Mod. Law Rev. 191 (1994); Peter Lindseth, *"Always Embedded" Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance*, *in* The Political Construction of Modern Capitalism, 1 (Christian Joerges, Bo Stråthm & Peter Wagner eds., GlassHouse Press, 2004); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance,* 106 J. of Pol. Econ. 1113 (1998); Ernst K. Pakuscher, *Administrative Law in Germany—Citizen v. State,* 16 Am. J. Comp. L. 309 (2012); Roger Warren Evans, *French and German Administrative Law*, 14 Int'l & Comp. L.Q. 1104 (2012); Prosper Weil, *The Strength and Weakness of French Administrative Law*, 23 Cambridge L.J. 242 (1965).

of these studies has been able to compare actual outcomes of two variations of the French model of administrative adjudication within a single country.

The divergence in Mexico's design makes it an interesting laboratory to study the consequences of choosing different institutional designs to create administrative courts. We will use the two main traditions of administrative adjudication as a framework to describe the Mexican system. Based on this, we will develop two models to test two hypotheses related to the design of administrative courts. Our analysis will use two datasets: an analysis of state constitutions and administrative court statutes provides the data for the first, and an analysis of more than 4,000 cases decided by 23 administrative tribunals in Mexico provides the data for the second.[19]

Our first hypothesis is related to the so-called "independence guarantees" for judges, such as tenure, salary protection and limitations on the executive branch in the appointment procedure. We hypothesize that judiciary courts offer more guarantees of independence for judges than those courts that are part of the executive branch. Therefore, judiciary courts are more likely to protect judges' salaries and tenure.

Our second hypothesis examines the incentive structures for judges. We hypothesize that judges that are part of executive branch courts will decide cases differently than judges that work in a judicial branch court. We will compare pro-government decisions vs. pro-citizen decisions in both types of courts.

Although a possible approximation to evaluate judicial independence is to analyze the percentage of pro-government decisions, we believe it is very difficult to find a proxy for judicial independence. Pro-government decisions may reflect "good" administrative actions, rather than a failure to allow judges independence. Without a variable to distinguish between these factors, we will not consider administrative judges' actual independence.

To date, discussions regarding judges' incentives have been dominated by theoretical, rather than empirical analyses. Moreover, studies regarding Mexican courts had been focused on the federal level and on civil courts.[20] On the state level, there are only two empirical studies on civil courts both of which analyze civil justice issues.[21] Unlike other contributors to the debate on the institutional design of administrative courts, our study not only relies on real data, but it also analyses such design at the subnational level. This paper

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[19] The data was collected as a result of a large scale survey of administrative court decisions. *See* Sergio López Ayllón, Ana Elena Fierro Ferráez, Adriana García García & Dirk Zavala Rubach, *Diagnóstico del funcionamiento del sistema de impartición de justicia en materia administrativa*, www.tribunalesadministrativos.cide.edu (2010).

[20] See Héctor Fix Fierro, Courts, Justice and Efficiency: A Socio Legal Study of Economic Rationality in Adjudication (Oxford and Portland, 2003).

[21] See José Antonio Caballero & Hugo Concha, Diagnóstico sobre la administración de justicia en las entidades federativas: Un estudio institucional sobre la justicia local en México (National Center for State Courts and Instituto de Investigaciones Jurídicas, 2001); Matthew C. Ingram, *Judicial Politics in the Mexican States: Theoretical and Methodological Foundations*, 22 Documento de Trabajo División de Estudios Juridicos CIDE (2007).

sheds new light on the consequences of local legislators' choices in creating administrative courts.

The paper is organized as follows: Section II presents an overview of the history and characteristics of administrative adjudication traditions; Section III describes the Mexican system of administrative courts; Section IV describes the data and explains our empirical model and testable hypotheses; Section V presents the findings and lastly, we present our conclusions.

II. Models of Administrative Adjudication

There are different models of administrative adjudication.[22] In order to explain these models, we will first define administrative justice to better describe these models.

Although scholars have studied administrative adjudications for years,[23] the term administrative justice is recent.[24] Michael Adler defines administrative justice as the justice inherent to administrative decision-making.[25] This definition implies procedural fairness as well as substantive justice. Mashaw describes administrative justice as "the qualities of a decision process that provide arguments for the acceptability of governments' decisions and it is referred to initial and internal decision-making".[26] Other authors describe administrative justice as that concerned with the extent to which individuals affected by agencies' decisions are treated fairly and have the ability to redress grievances in cases of a breach of fairness.[27] Civil law tradition ad-

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[22] By adjudication we understand the "process in which a dispute between identifiable parties is referred to a third party for decision and in which the parties are entitled to present proof and reasoned arguments for a decision in their favor." *See* Tom Mullen, *A Holistic Approach to Administrative Justice?, in* Administrative Justice in Context 383 (Michael Adler, ed., Hart Publishing, 2010) at 387.

[23] For studies regarding grievances, remedies and the State, *see* Patrick Birkinshaw, Grievances, Remedies, and the State (Sweet & Maxwell, 1994); for studies regarding grievances, complaints and local government *see* Peter McCarthy, Bob Simpson & Michael Hill, Grievances, Complaints and Local Government (Avebury, 1992); for studies regarding complaints of citizens *see* Lewis & Birkinshaw, *supra* note 14; for studies of administrative justice *see* Administrative Justice in the 21st Century (Michael Harris & Martin Partington, eds., Hart Publishing, 1999).

[24] "The term 'administrative justice' has, until recently, been under almost constant review and has been the subject of legislative reform at regular intervals", Michael Adler, *Understanding and Analyzing Administrative Justice*, *in* Administrative Justice in Context XV, *supra* note 22.

[25] For a thorough explanation of what administrative justice is, *see* Administrative Justice in Context, *supra* note 22, at 129.

[26] *See* Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (Yale University Press) 24 (1983).

[27] *See* Andrew Gamble & Robert Thomas, *The Changing Context of Governance: Implications for Administration and Justice*, in Administrative Justice in Context 3, *supra* note 22.

ministrative justice is generally associated with all administrative adjudication processes.

Regarding administrative justice functions, Buck, Kirkham and Thomson proposed a typology based on three rings that mark its functional landscape.[28] The inner ring, "getting it right," refers to the initial decision-making process by public bodies, encompassing the relevant law and procedure. The middle ring, "putting it right," refers to the whole range of redress mechanisms available to citizens who question the initial decision-making process (courts, tribunals, ombudsman or other independent complaint-handlers). The outer ring, "setting it right," refers to the network of governance and accountability relationships surrounding both the public bodies tasked with first-instance decision-making and those responsible for providing remedies.

Following the above mentioned authors, we will use administrative justice as a broad term that encompasses the three main functions/rings and will focus on the middle ring related to the different mechanisms of redress. Hence, this paper focuses solely on the mechanisms for challenging an administrative decision, specifically in mechanisms for resolving disputes between citizens and the government that arise from decisions of officials and agencies. We will assume that the main purpose of this challenge is to determine whether or not the action of a public body is lawful.[29] Finally, we will focus only on those mechanisms in which decisions have to be made by a third party (different from the agency that made the initial decision).

Third parties include executive commissions (independent from the agency making the initial decision), tribunals, specialized courts and general courts.[30] Some scholars classify tribunals as specialized mechanisms[31] and courts as general ones. Tribunals are sometimes referred to as court substitutes, in that they have the power to make legally enforceable decisions, but they are regarded as having the advantages over courts in terms of speed, low cost, informality and expertise.[32] Other scholars[33] classify tribunals as redress

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[28] See Trevor Buck et al., The Ombudsman Enterprise and Administrative Justice (Ashgate, 2011).

[29] Whether or not the authority had exceeded its legal powers, abused its discretionary powers or failed to perform a statutory duty among others is established in specific statutes.

[30] It is important to note that we will not analyze the Ombudsman institutions since we lack data from these institutions and their decisions are not mandatory.

[31] In this case, a tribunal is an adjudicative body empowered to hear and decide disputes in particular circumstances.

[32] Other advantages for the creation of tribunals to solve administrative disputes were that judiciary might not be sympathetic to the objectives of some of the legislation, ordinary courts system would not have been able to cope with increased workload, and there is the figure of specialist adjudicators. See Diane Longley & Rhonda James, Administrative Justice: Central issues in UK and European Administrative Law (Cavendish Publishing Limited, 1999).

[33] Peter Cane, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals*, *in* Comparative Administrative Law (Susan Rose-Ackerman and Peter Lindseth, eds., Edward Elg., 2010).

mechanisms within the executive branch and courts as mechanisms within the judicial branch.[34] However, in the Mexican legal system, this distinction does not exist in practice. Ordinary courts within the judiciary that solve civil law cases, family cases and criminal cases are called tribunals.[35] At a federal level, the only body that is referred to as a court is the Supreme Court of Justice. At a state level, only a few constitutional courts are called courts. All other jurisdictional bodies within the judiciary are called tribunals. Since administrative tribunals in Mexico are designed and function as actual courts, we will use the term courts regardless of their actual name.

Regarding the purpose of administrative redress mechanisms, scholars agree with the idea that this purpose is dual: (i) individuals' redress and (ii) the achievement of better standards of public service and administration.[36] To fulfill these purposes, administrative courts should decide specific cases in which one of the parties is the government, acting as the problem-solver, and working like a fire alarm system to allow courts to monitor agency performance and create incentives so that bureaucrats do not harm citizens.[37]

Administrative courts, like every other institution, are composed of institutional tools as well as legal tools. Different models of institutional design using different institutional tools have been used over time and differ across countries. A court's institutional characteristics are the different manners in which a court as a whole can be arranged; they include the ascription of the court (judiciary or executive branch), specialization of judges, tenure, appointment processes, salary protection, and any other independence guarantee the legal

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[34] Cane identifies two main models of administrative adjudication: judicial review and merits review. Traditional courts conduct judicial review and administrative tribunals conduct merits review. The distinction relies on a clear differentiation in Australia of courts and tribunals because what tribunals do is categorically different from what courts do. Cane identifies three main differences: first, judicial review remedy sets aside the decision and remits it to the primary decision-maker for reconsideration, whereas merits review remedies imply a de novo review; second, judicial review mainly focuses on issues of law and legality of the decision, whereas merits review mainly focuses on issues of fact and the evidentiary foundation of the decision; third, courts scrutinize the decision for defects, whereas tribunals focus on making the correct or preferable decision.

[35] The collective name of these tribunals is the Superior Tribunal of Justice.

[36] For feedback purposes of administrative justice, *see also* Sir Andrew Leggatt, *Tribunals for Users: One System; One Service* (Lord Chancellor's Department, 2001), which focuses on the use of tribunals not only to resolve individual disputes, but also to provide feedback from their work to first-instance decision-makers. Regarding the feedback function, Harlow and Rawlings analyzed the ways in which a State can control excess State power and subject it to legal control and the role of courts at the center of the project to secure good administration *see* Carol Harlow & Richard Rawlings, Law and Administration (Cambridge University Press, 2009).

[37] *See* Marc Hertogh, *Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands,* 23 L. & Pol. 47 (2001) and Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. of Pol. Sci. 165 (1984).

system provides. A court's legal tools include all the rules that administrative judges may use to decide cases. These rules include procedural and substantive rules that differ from one system to the other.

1. *Institutional Design of Administrative Courts*

Two institutional designs characterize most administrative courts: one in which specialized judges operate within the executive branch and one in which common-law judges provide judicial review of administrative decisions.

The French model represents one of the extremes of the spectrum because, since its origins, administrative adjudication has been a function placed within France's executive branch. French law prohibits judges from controlling executive activities.[38] "French tradition refused to allow courts to review administrative decisions citing the principle of separation of powers but really was being worried of any limitation to the exercise of executive power."[39] The designers of the French model believed that the executive branch is best suited to decide on substantive issues in the relationship between government and citizens. During the Napoleonic period, the administrative courts evolved into the Conseil d'Etat. The Napoleonic Constitution of the Year VIII gave them the power to solve disputes that implicated administrative matters, claims against violations of economic rights and complaints from citizens deemed to have been aggrieved by any administrative authority's arbitrary act.[40] The French model is a result of the constitutional principle that establishes "juger a l'Administration c'est encore administrer." The model considers reviewing the acts of government part of the administrative function. Therefore, a specialized tribunal in the Conseil d'Etat, not the judiciary, revises the acts of government.

France has assigned geographical venues to a set of courts and specialized issues, such as budget supervision, to specialized courts. The *Conseil d'Etat* governs them all. The evolution of administrative redress mechanisms in France includes the creation of administrative tribunals to solve first-instance disputes in 1953 and second-instance disputes in 1987, but always under the authority of the *Conseil d'Etat* that is part of the executive branch. Finally, judges have suggested in some recent articles that the executive branch has sufficient mechanisms to achieve independence from the executive authority.[41]

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[38] Patrick Rambaud, La justicia administrativa en Francia (I) 277-302 (Javier Barnés Vázquez, ed., Civitas, 1993).

[39] Caranta, *supra* note 3.

[40] Eduardo García de Enterría & Tomás-Ramón Fernández, Curso de derecho administrativo (Thomson, 2006).

[41] *See* Jean Massot, *The Powers and Duties of the French Administrative Judge*, *in* Comparative Administrative Law, *supra* note 36, 415.

The common-law tradition, in contrast to the French model, arises from the principle that government and citizens should be judged by the same rules and under equal conditions. Therefore, any authority can be brought before the common courts and judged. The judiciary has the power to protect the Rule of Law and the Constitution; any dispute in the law should be brought before it. This is an appellate review model.

The US courts' role in reviewing agency action reflects a bipolar view of administrative action.[42] The first view stated that courts should review administrators' actions de novo. The second view stated that no judicial review should take place, and that Congress and the agencies should analyze these cases. Therefore, relief against unlawful government action was sought in ordinary courts of first instance. An injured citizen could file for one of the prerogative writs (chief mandamus, certiorari or habeas corpus), for an injunction or for damages in tort against the offending officer. Merril also argues that judicial review reforms in states, exemplified by the Model State Administrative Procedure Act, often retain the common-law principle that administrative action is to be reviewed by ordinary trial courts. From the beginning of this century, however, the United States has frequently deviated from this model to provide for review by three-judge trial courts, by courts of appeals generally, by a single court of appeals, or by a more or less specialized tribunal.

England also follows a common-law tradition. In this tradition, the separation of powers dictates that the general regime is part of the rule of law, and public authorities have no special legal regime.[43] Just as in France, the creation of many specialized administrative tribunals has accompanied the evolution of administrative justice in England; however, they form part of the ordinary judicial system and depend on the Supreme Administrative Court. Just after World War II, England created an independent system of adjudication that would be entirely isolated from government intervention. This reflected the view that administrative justice is part of the judicial system.[44] India is another example of a common-law country that has recently created administrative courts.[45]

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[42] *See* Thomas W. Merril, *The Origins of American-Style Judicial Review*, *in* Comparative Administrative Law, *supra* note 36, 389.

[43] *See* William Wade, Hans Ragnemalm & Peter L. Strauss, Administrative Law the Problem of Justice (Transnational Juris Publications, Inc., 1991).

[44] *See id.*

[45] *See* Arvind P. Datar, *The Tribunalisation of Justice in India, in* Comparing Administrative Justice Across the Commonwealth 288 (Hugh Corder, ed., Juta & Co LTD., 2006), which argues that India's administrative courts represent the tacit acknowledgement that the ordinary courts of law cannot adequately deal with a particular dispute or a category of cases.

As noted above, administrative tribunals following each model have proliferated. The cases of Germany,[46] Italy,[47] Spain,[48] Japan[49] and Morocco[50] exemplify this in that administrative adjudication has changed over time in all of these countries, all of which have placed it within the judiciary at some times and within the executive branch at others.

Finally, institutional design of administrative courts also includes variables related to the independence of judges. The variables affecting court independence include the process of judge's appointments, tenure, and salary security.[51] Traditionally, life tenure confers judicial independence. A number of scholars have also addressed the influence of other branches on the judiciary.[52] For example, Congress may have control over jurisdiction, court

[46] The German original model of administrative justice was based on the French system. Currently German administrative courts are specialized, but form part of the judicial branch. *See* Karl-Peter Sommermann, *La justicia administrativa alemana, in* La justicia administrativa en el derecho comparado, 1, *supra* note 41, at 40.

[47] Italy has also tried both systems. Before 1865, administrative justice in Italy followed the French model. After 1865, administrative justice was part of ordinary justice made by generalist judges. In 1889, administrative justice was mixed. This implied that some administrative cases were assigned to a State Council (like the French system) while the judicial branch courts solved the rest of the cases. Currently, specialized courts within the executive branch provide administrative justice in Italy, but rules to provide independence to judges are in place. *See* Giandomenico Falcon, *Italia. La justicia administrativa, in* La justicia administrativa en el derecho comparado, *supra* note 41, at 209.

[48] Spain has a disjunctive similar to Italy's. There the distinction between the discretional and non-discretional faculties of the executive drove the issue. The judiciary could review only non-discretional faculties of the executive. Specialized judges within the judicial branch currently dispense administrative justice in Spain. *See* José Escribano Collado, *España. Técnicas de control judicial de la actividad administrativa, in* La justicia administrativa en el derecho comparado, *supra* note 41.

[49] In the case of Japan, the Constitution of 1889 established specialized courts not forming part of the judiciary. After the Constitution of 1946, administrative justice was modified to follow the US judicial review system. *See* Takenori Murakami, *La justicia administrativa en Japón*, *in* La justicia administrativa en el derecho comparado**,** *supra* note 41, at 600.

[50] In Morocco, the Sultan solved administrative law cases until 1913. Then administrative justice became part of the ordinary justice system with specialized procedural rules. After 1957, a specialized section of the Supreme Court was designed to review second instance administrative law cases. *See* Abderramán El Bakriui, *La reforma de la justicia administrativa en Marruecos, in* La justicia administrativa en el derecho comparado, *supra* note 41.

[51] *See* Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 Law and Social Inquiry 761 (1992); Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo Law Review (2005); Bryan Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 American Journal of Political Science (1999); Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (Oxford University Press, 2005).

[52] For example, McNollgast proposes that judicial independence results from the equilibrium of forces between branches of government. Independence results from the degree of compliance on behalf of agencies and legislature to the courts' decisions. *See* McNollgast

creation, appointment, enforcement of court rulings, appropriations for the operation of the courts and the ability to impeach judges.[53] Other studies have argued that the judicial appointment process, lifetime appointments and prohibition to reduce judges' salaries influence judicial independence.[54]

In general, a reduced role of the executive in appointment process, longer judicial terms —up to lifetime and at least in excess of executive terms in office— and protecting judicial salaries from reduction by other branches promote judicial independence.[55] Although most scholars describing these aspects of independence refer to general courts, they also apply to administrative courts. Indeed, the particular role of administrative courts in addressing complaints against members of the executive branch makes isolation from the executive especially important.

2. *Procedural and Substantive Rules Applied by Administrative Courts*

Asimow and Lubbers' classification of adjudicating models provides a starting point for the description of the procedural and substantive rules administrative courts apply to decide cases. He describes five models of adjudication, depending on the type of initial decision, reconsideration and review mechanisms.[56] The first is the adversarial hearing/combined function/lim-

(1995), *supra* note 4. McNollgast argues that the amount cases a court can handle in a particular category affects its decisions, especially the Supreme Court's, in a given case. Furthermore, it ascribes influence to the agents the court can affect (administrative agencies and lower courts). With a large number of agents, the courts' decisions tend to be more general. *Brown v. Board of Education* exemplifies this. With fewer agents, the decisions are usually more specific, like in abortion cases that only require compliance from the legislature.

[53] *See* John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. Econ. & Org. 1 (1990).

[54] For example, in a study of the constitutions of 75 countries, the indicators used to measure independence were the appointment procedure for judges, judicial tenure, the power to set judges' salaries, the accessibility of the court and its ability to initiate proceedings, the allocation of cases to members of the court, the competencies assigned to the constitutional court and publicity. *See* Bernd Hayo & Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence. A Global Survey*, 34 MAGKS Joint Discussion Paper 4 (2010).

[55] *See* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 Southern California Law Review (1999); Stephen J. Choi et al., *Judicial Evaluation and Information Forcing: Ranking State High Courts and their Judges*, 58 Duke Law Journal 1313 (2008); Paul Brace & Melinda Gann-Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 Journal of Politics (1997); Melinda Gann-Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 Journal of Politics (1992); Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 American Journal of Comparative Law 201 (2009).

[56] *See* Michael Asimow & Jeffrey S. Lubbers, *The Merits of 'Merits' Rev.: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 Windsor Yearbook of Access to Justice 731 (2011).

ited judicial review in which the agency makes the initial decision through an administrative judge and the reconsideration phase occurs within the agency. Courts of general jurisdiction do judicial review; the review addresses the legality and reasonableness of the agency's decision; it is prohibited for courts to re-examine the evidence and to substitute judgment on the merits of the case. The United States provides an example of this model. The second model is the inquisitorial hearing/combined function/limited judicial review. The agency makes the initial decision; a different agent makes reconsideration; courts of general jurisdiction make judicial review. The European Union uses this model. The third model is the tribunal system, in which the tribunal is separate from the prosecuting and enforcing agency, which makes the initial decision and the reconsideration decision; judicial review occurs in generalized courts with limited powers over issues of fact or discretion. The fourth model is the de novo judicial review/general jurisdiction. The agency makes the initial decision and reconsideration; general courts make judicial review and may retry. China uses this model. Finally, the fifth model is the de novo judicial review/specialized jurisdiction. The agencies make the initial decision and reconsideration; specialized courts hearing only administrative law cases review the initial decisions. France, Germany and, as we will explain in the next section, Mexico, use this model.

The French model has always used specialized jurisdiction, which in France applies not only to institutional characteristics of the courts but to the procedural and substantive rules applied to the parties. The *Conseil d'Etat* has a specialized procedure to invalidate an act of the administration violates the law[57] while common-law judges use the same substantive and procedural rules for every case.

This specialization is precisely what distinguishes the French model from common-law. A number of scholars have studied the implications of having a specialized tribunal rather than a generalist court.[58] There are several studies of specialized courts such as tax courts,[59] bankruptcy courts,[60] military courts,[61]

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[57] *See* Eduardo García de Enterría, Transformación de la justicia administrativa (Thomson Civitas, 2007).

[58] For an extensive and comprehensive study of specialized courts, *see* Lawrence Baum, Specializing the Courts (University of Chicago Press, 2011). Papers on the specialization of judicial function include: *e.g.* Posner, *supra* note 4; Randall R. Rader, *Specialized Courts: The Legislative Response,* 40 Am. U. L. Rev. 1003 (1991); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Pa. L. Rev. 1111 (1990); Isaac Unah, The Courts of International Trade: Judicial Specialization, Expertise, and Bureaucratic Policy-Making (University of Michigan Press, 1998).

[59] *See* Robert M. Howard, Getting a Poor Return: Justice and Taxes (State University of New York Press, 2009).

[60] *See* Carroll Seron, Judicial Reorganization: The Politics of Reform in the Federal Bankruptcy Court (Lexington Books, 1978).

[61] *See* Jonathan Lurie, Arming Military Justice: The origins of the United States Court of Military Appeals, 1775-1950 (Princeton University Press, 1992), and Louis Fisher,

international trade courts,[62] drug courts,[63] community courts[64] and domestic violence courts,[65] among others. Several scholars sustain that specialized courts produce higher quality decisions in time and content, help to achieve legal coherence and uniformity of judicial decisions, and help to reduce regular courts' workload.[66] On the other hand, specialization has been seen as making judges more susceptible to external control or "capture."[67]

This paper will not analyze the consequences of specialization, but other scholarship suggests that specialization effects judicial independence. Baum, for example, hypothesizes that specialized courts will review administrative decisions aggressively because specialized judges gain the confidence to take assertive positions and because the private interests that contest government actions in those courts wield considerable influence.[68] Some other scholars[69] attach the benefits of the French system of administrative adjudication to the type of case. They suggest that depending on the specific issue, generalist courts are better than specialized courts and vice versa.

III. Administrative courts in Mexico

The Mexican State is organized in the form of a federation integrated by a Federal District and 31 states. The federal system is established in the Federal Constitution and distinguishes the powers of the federation and the powers of the states.[70] The supreme power of the federation is divided into legislative, executive and judicial branches.[71] Article 73 XIX-H of the Federal

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Nazi Saboteurs on Trial: A Military Tribunal and American Law (University Press of Kansas, 2003).

[62] *See* Unah, *supra* note 58.

[63] *See* Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. Rev. 1437 (2000).

[64] *See* Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 Fordham Urb. L.J. 897 (2003).

[65] *See* Rekha Mirchandani, *What's So Special About Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 Law & Soc'y Rev. 379 (2005).

[66] Nuno M. Garoupa et al., *Assessing the Argument for Specialized Courts: Evidence from Family Courts in Spain*, 24 Int'l J.L., 54-66 (2010).

[67] Shapiro, for example, suggested that specialization makes courts more like administrative agencies. *See* Martin Shapiro, The Supreme Court and Administrative Agencies (Free Press, 1968).

[68] *See* Baum, *supra* note 61.

[69] *See* Giuseppe Dari-Mattiacci, Nuno M. Garoupa & Fernando Gomez-Pomar, *State Liability*, 18 Eur. Rev. of Private L. 773 (2010).

[70] There some powers that can be exercised by the Federation and by the states. For the purposes of this paper, we will differentiate administrative issues at the federal level concerning all federal agencies from administrative issues within the states concerning only state agencies.

[71] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 49, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

Constitution provides for the review of federal administrative action. The Congress has the power to create autonomous administrative courts empowered to resolve the legal controversies between the federal public administration and individuals. At a state level, Article 116 of the Federal Constitution provides for the existence of local administrative tribunals to solve disputes between citizens and local governments. Local congresses may enact legislation to regulate the administrative tribunals' management, as well as the applicable legal procedures.[72] It is important to point out that local congresses can decide whether to create an administrative court.

1. *Institutional design of administrative courts in Mexico*

Administrative adjudication in Mexico uses the French tradition of specialized jurisdiction and the specialized procedural tradition of the French model. However, some jurisdictions established their administrative courts as part of the judiciary and others established them as part of the executive branch, while granting them autonomy in their decision-making process. Different amendments and statutes captured the issue as to whether administrative courts should be part of the executive branch or the judicial branch, and these discussions generally addressed the separation of powers principle.[73]

[72] *See id.*, Art. 116, V establishes that both the state constitutions and state statutes shall provide for autonomous administrative courts under whose jurisdiction all conflicts between state public administrations and private individuals will be solved. Such constitutional and legal provisions shall regulate the management of the administrative courts, as well as the applicable legal procedures and the system of appeals against the courts' resolutions.

[73] The first administrative court in Mexico was established in the first quarter of the sixteenth century and was referred to as *the Royal Hearings of Indias/the Indies*. People could appeal every decision of the Spanish government that they considered harmful. In 1812, specialized administrative judges were incorporated into the tax agencies as part of the executive power. These specialized judges survived until the Mexican Constitution of 1824, in which the administrative justice was established as part of the civil courts (judicial power) and no longer as part of the executive power. Later, with the centralist model these specialized judges reappeared as part of the executive power. In 1853, Mexico enacted an Administrative Justice Statute creating an administrative court, and its main purpose was to solve tax disputes. Juarez repealed this statute, saying the Mexican Federal Constitution prohibited a specialized court. Three years later, the Mexican Constitution of 1857 established administrative justice as part of the judicial power with the "amparo" trial. This system was maintained until the present Federal Constitution of 1917. In 1936, the Federal Administrative Court was created following the French tradition and was part of the executive branch. Mexico then recognized the possibility of the existence of these kinds of courts outside of the judicial system. Subsequent amendments to the Federal Constitution established the possibility of the existence of administrative courts as non-judiciary courts. The aggrandizement of executive power and the necessity of specialized administrative courts were the basis for subsequent amendments of constitutional Articles 116 in 1988 and 122 in 1996, articles on which the current State's administrative courts are based. To learn more about the history of administrative justice in

Within the executive power, administrative courts in Mexico support their design as being in the French model. The designers of these tribunals argued that separation of powers prohibits the judiciary from controlling executive actions, and since administrative cases differ from cases between individuals in many respects, judges must have greater specialization.[74] The fact that these administrative tribunals in Mexico follow the French model should not, however, be taken to mean that they are exactly the same as French administrative courts.

Mexico's administrative adjudication system consists of a Federal Administrative Court,[75] which is a specialized court within the executive branch,[76] and 30 state-level administrative courts. Chart 1 shows the years in which each jurisdiction created these courts.

CHART 1

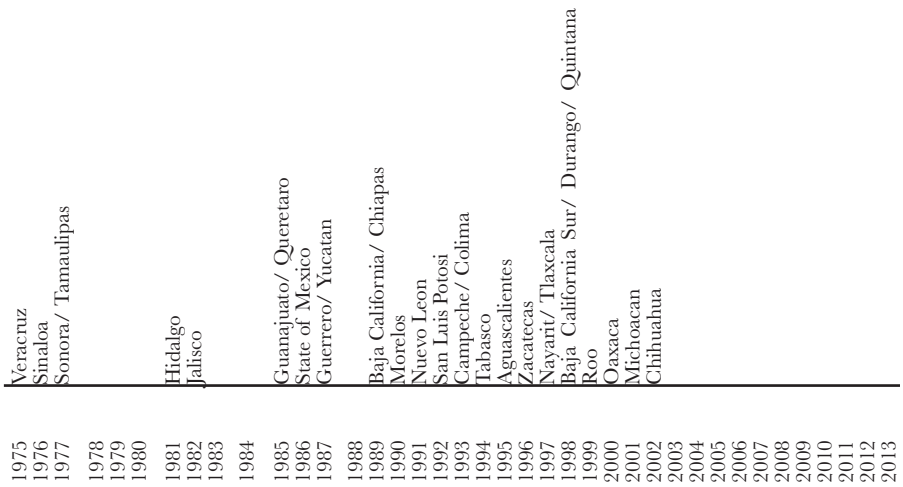

Table 1 shows each court's institutional characteristics in the period of analysis 2006-2009. Design variables include the ascription of the court, describing the branch to which a court belongs; the existence of guarantees of

Mexico, *see* Andrés Lira González, *Lo contencioso-administrativo, ejemplo difícil para el constitucionalismo mexicano*, *in* LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL: ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO.

[74] *See* Margarita Lomelí Cerezo, *El origen de la jurisdicción administrativa*, *in* LO CONTENCIOSO ADMINISTRATIVO EN LA REFORMA DEL ESTADO (Instituto Nacional de Administración Pública, A.C., 2001).

[75] This administrative court does not supervise the performance or decisions of local administrative courts in any manner.

[76] This tribunal is not part of the judiciary.

tenure, describing the existence of life-time appointments; salary protection, describing the existence of constitutional provisions prohibiting the reduction of judges' salaries; and the role of governors in judges' appointment procedures, describing the degree of governors' participation in the appointment process.

TABLE 1

State	*Branch*	*Tenure*	*Role of executive branch in appointment process*	*Regulated Salaries*
Aguascalientes[1]	Judiciary	No tenure	Some intervention	Protection
Baja California[2]	Executive	No tenure	Some intervention	Protection
Baja California Sur[3]	Judiciary	No tenure	Some intervention	Protection
Campeche[4]	Judiciary	Tenure	No intervention	Protection
Chiapas[5]	Judiciary	No tenure	No intervention	No protection
Colima[6]	Executive	Tenure	Some intervention	No protection
Distrito Federal[7]	Executive	Tenure	Some intervention	Protection
Durango[8]	Executive	No tenure	Some intervention	No protection
Estado de Mexico[9]	Executive	No tenure	Some intervention	No protection
Guanajuato[10]	Executive	No tenure	Some intervention	No protection
Guerrero[11]	Executive	Tenure	Some intervention	Protection
Hidalgo[12]	Judiciary	Tenure	Some intervention	Protection
Jalisco[13]	Judiciary	Tenure	Some intervention	Protection
Michoacan[14]	Executive	No tenure	No intervention	Protection
Morelos[15]	Judiciary	Tenure	No intervention	No protection
Nayarit[16]	Executive	No tenure	Some intervention	Protection
Nuevo Leon[17]	Executive	No tenure	Some intervention	Protection
Oaxaca[18]	Executive	No tenure	Some intervention	No protection
Queretaro[19]	Executive	No tenure	No intervention	Protection
Quintana Roo[20]	Judiciary	Tenure	Some intervention	No protection
San Luis Potosi[21]	Executive	Tenure	Some intervention	No protection
Sinaloa[22]	Executive	No tenure	Some intervention	No protection
Sonora[23]	Executive	No tenure	Some intervention	Protection
Tabasco[24]	Executive	No tenure	Some intervention	Protection
Tamaulipas[25]	Executive	No tenure	No intervention	No protection
Tlaxcala[26]	Judiciary	Tenure	No intervention	Protection
Veracruz[27]	Judiciary	Tenure	Some intervention	Protection
Yucatan[28]	Executive	Tenure	Some intervention	Protection
Zacatecas[29]	Judiciary	Tenure	No intervention	Protection

Notes:

[1] According to Article 51 of the Constitution of Aguascalientes, the Administrative Court of Aguascalientes (Tribunal de lo Contencioso Administrativo del Estado de Aguascalientes) shall be composed of one judge appointed for fifteen years, with only one term permitted. The governor proposes and congress approves such appointment.

[2] According to Article 55 of the Constitution of Baja California, the Administrative Court of Baja California (Tribunal de lo Contencioso Administrativo del Estado de Baja California) shall be composed of judges appointed for six years with possibility of one more term. The governor proposes and congress approves such appointments.

[3] According to Article 64.XLIV and XLV of the Constitution of Baja California Sur, the Civil-Administrative Court of Baja California's judiciary (Sala Civil Administrativa del Tribunal Superior de Justicia del Estado de Baja California Sur) shall be composed of judges appointed for six years. The governor proposes and congress approves such appointments.

[4] According to Article 82.1 of the Constitution of Campeche, the Administrative-Electoral Court of Campeche's judiciary (Sala Administrativa Electoral del Tribunal Superior del Estado de Campeche) shall be composed of judges appointed for six years with tenure possibility after this term. The judiciary proposes and congress approves such appointments.

[5] According to Article 17.c.III of the Constitution of Chiapas and Article 224 of the Judiciary Organization of the State of Chiapas, the Administrative and Electoral Court of Chiapas' Judiciary (Tribunal de Justicia Electoral y Administrativa del Poder Judicial del Estado de Chiapas) shall be composed of judges appointed for seven years with option to be selected for one more term. Congress appoints two of the judges and the Constitutional Court of Chiapas appoints the rest.

[6] According to Article 77 of the Constitution of Colima, the Administrative Court of Colima (Tribunal de lo Contencioso Administrativo del Estado de Colima) shall be composed of judges appointed for six years with tenure possibility after this term. The governor proposes and congress approves such appointments.

[7] According to Articles 2 and 3 of the Statute of the Federal District Contentious Administrative Tribunal (1995), the Administrative Court of the Federal District (Tribunal de lo Contencioso Administrativo del Distrito Federal) shall be composed of judges appointed for six years with tenure possibility after this term. The governor proposes and congress approves such appointments.

[8] According to Article 7 of the Constitution of Durango, the Administrative Court of Durango (Tribunal de lo Contencioso Administrativo del Estado de Durango) shall be composed of judges appointed for six years with option to be selected for one more term. The governor proposes and congress approves such appointments.

[9] According to Article 87 of the Constitution of the State of Mexico, the Administrative Court of the State of Mexico (Tribunal de lo Contencioso Administrativo del Estado de México) shall be composed of judges appointed for ten years. The governor proposes and congress approves such appointments.

[10] According to Article 82 of the Constitution of Guanajuato, the Administrative Court of Guanajuato (Tribunal de lo Contencioso Administrativo del Estado de Guanajuato) shall be composed of judges appointed for seven years with option to be selected for one more term. The governor proposes and congress approves such appointments.

[11] According to Article 118 of the Constitution of Guerrero, the Administrative Court of Guerrero (Tribunal de lo Contencioso Administrativo del Estado de Guerrero) shall be composed of judges appointed for six years with tenure possibility after this term. The governor proposes and congress approves such appointments.

[12] According to Article 97 of the Constitution of Hidalgo, the Administrative Court of Hidalgo (Tribunal Fiscal Administrativo para el Estado de Hidalgo) shall be composed of

judges appointed for six years with tenure possibility after this term. The governor proposes and congress approves such appointments.

[13] According to Article 65 of the Constitution of Jalisco, the Administrative Court of Jalisco (Tribunal de lo Administrativo del Poder Judicial del Estado de Jalisco) shall be composed of judges appointed for four years with tenure possibility after this term. The governor proposes and congress approves such appointments.

[14] According to Article 95 of the Constitution of Michoacán, the Administrative Court of Michoacan (Tribunal de Justicia Administrativa de Michoacán de Ocampo) shall be composed of judges appointed by the Congress for five years. Two more terms are permitted.

[15] According to Article 109BIS of the Constitution of Morelos, the Administrative Court of Morelos (Tribunal de lo Contencioso Administrativo del Poder Judicial del Estado de Morelos) shall be composed of judges appointed for six years with tenure possibility after this term. Congress appoints judges.

[16] According to Article 47.XXXVI of the Constitution of Nayarit, the Administrative Court of Nayarit (Tribunal de Justicia Administrativa del Estado de Nayarit) shall be composed of judges appointed for six years with option to be selected for one more term. The governor proposes and congress approves such appointments.

[17] According to Article 63.XLV of the Constitution of Nuevo León, the Administrative Court of Nuevo León (Tribunal de lo Contencioso Administrativo del Estado de Nuevo León) shall be composed of judges appointed for ten years with option to be selected for one more term. The governor proposes and congress approves such appointments.

[18] According to Article 1 of the Law of Administrative Justice in Oaxaca (2005), the Administrative Court of Oaxaca (Tribunal de lo Contencioso Administrativo del Estado de Oaxaca) shall be composed of judges appointed for eight years with option of being selected for one more term. The governor proposes and congress approves such appointments.

[19] According to Articles 72 and 73 of the Constitution of Querétaro, the Administrative Court of Querétaro (Tribunal de lo Contencioso Administrativo del Estado de Querétaro) shall be composed of judges appointed for four years with option of two more terms. Congress appoints judges.

[20] According to Article 106 of the Constitution of Quintana Roo, the Administrative Court of Quintana Roo (Sala Constitucional y Administrativa del Poder Judicial de Quintana Roo) shall be composed of judges appointed for six years with one more tem permitted. The governor proposes and congress approves such appointments.

[21] According to Article 124 of the Constitution of San Luis Potosí and Article 9 of the Administrative Justice Statute of San Luis Potosí, the Administrative Court of San Luis Potosí (Tribunal de lo Contencioso Administrativo del Estado de San Luis Potosí) shall be composed of judges appointed for six years with tenure possibility after this term. The governor proposes and congress approves such appointments.

[22] According to Article 129 Bis of the Constitution of Sinaloa, the Administrative Court of Sinaloa (Tribunal de lo Contencioso Administrativo del Estado de Sinaloa) shall be composed of judges appointed for six years with one more term permitted. The governor proposes and congress approves such appointments.

[23] According to Articles 64 XLIII Bis of the Constitution of Sonora and 3 of the Organic Statute of the Sonora Administrative Court, the Administrative Court of Sonora (Tribunal de lo Contencioso Administrativo del Estado de Sonora) shall be composed of judges appointed for six years with one more term permitted. The governor proposes and congress approves such appointments.

[24] According to Article 36.XL of the Constitution of Tabasco, the Administrative Court of Tabasco (Tribunal de lo Contencioso Administrativo del Estado de Tabasco) shall be composed

of judges appointed for six years with two more terms permitted. The governor proposes and congress approves such appointments.

[25] According to Article 92 of the Constitution of Tamaulipas, the Administrative Court of Tamaulipas (Tribunal Fiscal del Estado de Tamaulipas) shall be composed of judges appointed for six years with tenure possibility after this term. Congress appoints judges.

[26] According to Article 82 of the Constitution of Tlaxcala, the Administrative Court of Tlaxcala (Sala Electoral Administrativa del Tribunal Superior de Tlaxcala) shall be composed of judges appointed for six years. Congress appoints judges.

[27] According to Article 38 C of the Law of Administrative Justice of the State of the State of Veracruz Ignacio de Llave, the Administrative Court of Veracruz (Tribunal de lo Contencioso Administrativo del Estado de Veracruz) shall be composed of judges appointed for ten years. The governor proposes and congress approves such appointments.

[28] According to Article 1 of the Organic Law of the Contentious Administrative Tribunal of the State of Yucatan (1985), the Administrative Court of Yucatan (Tribunal de lo Contencioso Administrativo del Estado de Yucatán) shall be composed of a judge appointed for four years with tenure possibility after this term. The governor proposes and congress approves such appointment.

[29] According to Article 112 of the Constitution of Zacatecas, the Administrative Court of Zacatecas (Tribunal de lo Contencioso Administrativo del Estado y Municipios de Zacatecas) shall be composed of a judge appointed for six years with tenure possibility after this term. The judiciary proposes and congress approves such appointment.

According to Table 1, out of a total of 29 state courts in existence in 2009, 62% were part of the executive branch and 38% were part of the judiciary.[77] Currently, Chihuahua also created an administrative court and Oaxaca and Yucatan incorporated their administrative courts into the judicial branch. Therefore, currently 53% are autonomous tribunals and 47% are part of the judicial branch.

2. *Specialized Procedures of Administrative Trials in Mexico*

Mexico's administrative mechanisms of dispute resolution between the state and individuals have their own procedures and require specialized judges. This section outlines the process by which administrative courts operate. Citizens initiate the operations of the specialized administrative court when they decide to challenge an agency's action through a nullity trial.

The main function of administrative tribunals is to determine whether the administrative agency followed the rules of decision-making as established in statutes. Judges deal primarily with procedural requirements. To perform their functions, they use specific procedures called nullity trials.

After a proceeding, which includes a hearing and the opportunity to present evidence, the tribunal offers one of three decisions:

[77] In the states with no administrative courts, citizens are able to sue the government through an "amparo" trial in the federal judiciary.

1) *Judge dismisses the case.* In this case the judge does not analyze the challenged agency's actions. This most commonly occurs in Mexico because plaintiffs violate procedural rules, such as standing rules and ripeness.

2) *Judge upholds the agency's initial decision and declares its lawfulness (pro-government decisions).* After analyzing the formal requirements to sue, the judge analyzes the merits of the case. When the judge verifies that the defendant complied with administrative rules, the court upholds the agency's action. In these cases, administrative judges must analyze every argument the plaintiff made in challenging the government's decision.

3) *Judge invalidates governments' initial decision and declares it unlawful (against/anti-government decisions)*. When a judge verifies that the defendant did not comply with administrative rules, the court strikes down the government's action. The court may make a ruling of partial or total unlawfulness. In the first case, it orders the reversal of the agency's act and remands it to the agency for further consideration. In the second case, the court renders a judgment and directs the agency to provide remedy (de novo review).

IV. Data, empirical model and hypotheses

1. *Data*

We used two datasets to analyze the differences in the rates of dismissals and pro-government decisions between courts within the judicial branch and courts within the executive branch. The first dataset includes the characteristics of each court: its year of creation, the existence of guarantees of tenure and protection of salaries, and the governor's role in the judge appointment process. The state constitutions and the courts' web pages provide this information.

The second dataset describes the courts' decisions. A large-scale survey of administrative court decisions conducted by a group of Mexican researchers in the "*Diagnóstico del Funcionamiento del Sistema de Impartición de Justicia en Materia Administrativa a Nivel Nacional*"[78] provides this dataset of 5,400 cases decided by 23 administrative courts (22 local administrative courts and the Federal District).[79] The researchers sought to analyze the performance of administrative courts in Mexico at a state level, and therefore collected court budgets, judge's curricula, internal organization and case specifics, such as dates, subjects, parties, quantities, decisions and appeals. The cases analyzed concluded

[78] *See* Sergio López Ayllón et al., *supra* note 19.

[79] The Federal District participated in the study, as did the following states: Tamaulipas, Hidalgo, Querétaro, Guanajuato, Yucatán, Estado de México, Baja California, Veracruz, Nuevo León, Sinaloa, San Luis Potosí, Colima, Campeche, Tabasco, Zacatecas, Tlaxcala, Nayarit, Durango, Baja California Sur, Aguascalientes, Oaxaca and Chiapas.

in the years 2006, 2007 and 2008 (some courts were yet not created and therefore had no cases in 2006).[80]

We disregarded 380 cases from the second dataset that did not include the variables analyzed here. We recoded the final decisions for the 5,020 remaining cases, simplifying the categories and recoding the types of cases in each of the files. Table 3 summarizes the descriptive statistics of the outcomes of this dataset.

TABLE 3

State	*Dismissals*	*Pro-government decisions*	*Against/Anti-government decisions*
Aguascalientes	24%	1%	75%
Baja California	18%	26%	56%
Baja California Sur	51%	21%	28%
Campeche	38%	14%	48%
Chiapas	92%	3%	5%
Colima	4%	0%	96%
Federal District	9%	12%	80%
Durango	23%	7%	70%
State of Mexico	16%	18%	66%
Guanajuato	31%	8%	61%
Hidalgo	7%	0%	93%
Michoacan	84%	0%	16%
Morelos	56%	10%	34%
Nayarit	37%	0%	63%
Nuevo Leon	18%	27%	56%

[80] The sample of cases reviewed was different in each court. It was based on the total number of cases concluded in the years 2006, 2007 and 2008. The error estimations and sample sizes were calculated with the following formula:

$$e = k\sqrt{\left(1 - \frac{n}{N}\right)\frac{N}{N-1}\frac{Z}{n}}$$

Where:

n: size of the pre-assigned sample

N: total cases

k: theoretic percentile with a normal distribution (0,1) with a confidence level of 95%, k= 1.96

Z: variance P(1-P) of the dichotomic variable. For the purpose of the study, it will have a maximum of P=1/2, therefore Z=1/4

E: absolute error (unknown)

For a broader explanation of the methodology, *see* Sergio López Ayllón et al., *supra* note 22, at 13.

State	*Dismissals*	*Pro-government decisions*	*Against/Anti-government decisions*
Oaxaca	75%	2%	24%
Querétaro	29%	6%	65%
Sinaloa	26%	2%	72%
Tabasco	35%	19%	46%
Tamaulipas	64%	15%	20%
Tlaxcala	42%	15%	43%
Yucatán	43%	3%	54%
Zacatecas	21%	1%	78%
Overall Total	31%	10%	59%

2. *Variables*

We developed two models to predict the outcomes in the two datasets. Both models used the court's branch, judiciary (coded 0) or executive (coded 1), as the main independent variable. Since empirical analysis of judges' performance across different court designs raises many important issues regarding the homogenization of contexts and decisions of the compared courts, we added several control variables. The 10 variables across the models are as follows:

1) Executive nomination: The 23 courts use five types of appointments to designate judges, as found from a review of the local constitutions and the statutes of each local administrative court. The judiciary, legislative and executive branches have varying levels of responsibility for proposing and approving [or confirming] judges. For the purposes of the research, we classified all of the procedures into two categories: the ones where the executive branch nominates judges (coded 0) and the ones in which it does not (coded 1).[81]

2) Judges' tenure greater than appointer tenure: Appointments made for a term length greater than the appointer's term length were coded as 1 and 0 otherwise.

3) Protection of salaries: This variable describes whether a state constitution explicitly prohibits reducing judges' salaries. While the Supreme Court has also forbade the reduction of salaries in decisions that apply to administrative judges and we have no empirical evidence that an administrative judge has suffered an actual salary decrease, we believe the mere mention of the guarantee may have some effect on judges' behavior. We coded the prohibition as 1 and its absence as 0.

[81] *See* Baum, *supra* note 61. We focus on the role of the executive branch because some scholars have hypothesized that administrative courts tend to uphold administrative decisions because the executive branch typically makes appointments and because the federal government is a repeat player that appears in every case.

4) Panels: This variable refers to the number of judges required to decide a case. We classified courts into two categories —those requiring one judge to make the decision (coded 1) and those requiring more than one judge (coded 0).

5) Type of plaintiff: We divided the cases into those brought by individuals (coded 0) and those brought by companies (coded 1). This division reflects the fact that companies may be able to spend more money on their complaints than individuals, and may thereby increase their chances of winning.

6) Type of case*:* The two main categories of cases are administrative law issues and tax issues. Administrative issues include licensing, traffic fines, permit reversals, labor cases between the government and its employees (including police departments), expropriations and state liability, among others. The tax issues category includes property taxes and water consumption taxes. We classified cases in traffic ticket cases and non-traffic ticket cases in order to capture the real effect of the courts' design on the rest of the cases. We coded all traffic ticket cases 1 and 0 otherwise.

7) Age of the court: We decided to control for the age of the court because the experience level of the judges may influence outcomes.

8) HDI (2008): The Human Development Index is a United Nations index that controls specific state characteristics because it measures the general wellbeing of the state. We wanted to control for general wellbeing as an external factor influencing court outcomes. We used this index because it is the only one made for each state and it incorporates various measures of economic and social variables.

9) Year the trial ended: We controlled for specific changes over time in order to avoid omitted time-variable problems.

3. *Hypotheses and Empirical Models*

Our empirical models and hypotheses rely on the assumption that the internal organization of courts and judges' incentive structures should reflect each court's design.

Our first hypothesis is concerned with institutional design characteristics such as tenure, appointment procedures and the protection of judges' salaries. We predict that the branch to which an administrative court belongs will affect these characteristics. As explained, recent literature on judicial behavior relates tenure, salary protection and the appointment of judges to the actual independence of the court, which is a fundamental quality of administrative courts in which one of the parties is the state itself.

This analysis will not seek to measure the actual independence of administrative judges in Mexico, but rather to measure which models have more guarantees of judicial independence.[82] For the purpose of our analysis we

[82] Previous studies used different approaches to measure court independence. Most of

analyzed if judges' tenure was superior to their appointers' tenure, the limitation of the executive's participation in judges' nominations and the protection of judges' salaries, all of which are forms to guarantee judicial independence. We hypothesize that courts created within the judiciary will have more guarantees of independence for judges than those courts created within the executive branch. Below is our empirical model:

We acknowledge the limitations of a regression with only 30 variables (30 states and the Federal District); however, Mexico has only 30 administrative courts.

Our second hypothesis has to do with judges' incentive structures as a distinct influence on a judge's decisions. The influence of institutions[83] on judges' behavior has long been acknowledged. Judicial behavior literature has been focused on the choices judges make as rational individuals.[84] Developed models include how ideology,[85] aggregation schemes,[86] supra-subordination interactions[87] and precedents[88] affect judges' choices. We hypothesize that judges in executive branch courts would decide cases differently from judges that work in a judicial branch court (pro-government decisions or dismissals). Below our empirical model:[89]

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them focused on the approaches that courts use to decide cases. Some studies try to distinguish important cases from unimportant cases. This division always has a problem of arbitrariness because a judgment needs to be made for each particular situation.

[83] North defines institutions as the rules of the game of a society composed of informal rules like statute law, common law and regulations, informal constraints and the enforcements. *See* Douglass C. North, Institutions, Institutional Change, and Economic Performance (Cambridge University Press, 1990).

[84] For studies concerned with relationships between the courts' design and the courts' outcomes incorporated into the rational choice institutionalism literature that assume people design institutions consciously as means to advance their instrumental goals, *see* Mathew D. McCubbins, *Legislative Design of Regulatory Structure*, 29 Am. J. of Pol. Sci. 721 (1985); Mathew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation, in* Congress: Structure and Policy 409 (Mathew D. McCubbins & Terry Sullivan, ed., Cambridge University Press, 1987); McNollgast, *supra* note 4 (1994-1995); McNollgast *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243 (1987); Kathleen Bawm, *Political Control versus Expertise: Congressional Choices About Administrative Procedures*, The American Political Science Rev. 62 (1995); Ferejohn et al., *supra* note 5; Ferejohn & Shipan, *supra* note 5; Lewis & Birkinshaw, *supra* note 14.

[85] Sunstein Schkade et al., 2004.

[86] *See* McNollgast (1994-1995), *supra* note 4.

[87] *See* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L.J. 1897 (2009).

[88] *See* Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 15 J. of Political Economy 43 (2007).

[89] For the analysis of the second dataset, we developed a model that included decisions of real cases. We were looking for variances in decisions from one type of court or the other. We used the three possible outcomes of administrative court trials as dependent variables:

We ran regressions on dismissals and pro-government decisions of 5,020 administrative trials using as our independent variables the branch to which the court belongs, the judges' tenure greater than appointer tenure, executive nomination and the protection of salaries.

In order to add extra controls to our analysis, we ran the regression only on important cases and on tax cases. We will define important cases as those that are not traffic ticket cases. The second control has to do with tax cases. We decided to run the regression on these cases because there might be a difference in decisions associated with economic issues.

V. Findings

Model: Analysis of the Relationship between Branch and Independence Guarantees for Judges

The first hypothesis was confirmed only in the cases of judges' tenure being greater than appointer tenure and executive nomination. Indeed, those courts that were created as part of the judiciary had a higher probability of having provisions guaranteeing that judges' tenure would be greater than their appointers' tenure. Additionally, courts incorporated into the judicial branch guaranteed less intervention of the executive branch in judges' nominations. The protection of salaries was not significant; therefore, we cannot attach any effect of the branch to which a court belongs to the existence of judges' salary protection. The following table describes our findings:

Table 4

Regressor	Dependent variables with control variables		
	Judges' tenure greater than appointer tenure	Executive nomination	Salary protection
Administrative courts within the Executive Coefficient Standard Error P>|t|	-.4192327 * (.1675025) 0.019	.495001*** (.1646347) 0.006	.1484777 (.1812336) 0.420
Year of creation Coefficient Standard Error P>|t|	.0009544 (.0077686) 0.903	.0052484 (.0076356) 0.498	-.0140957 (.0084055) 0.106

dismissals, upheld decisions and partial unlawfulness decisions. We used the two types of models of administrative adjudication as an explanatory variable (Branch).

HDI Coefficient Standard Error P>|t|	 -4.704147* (2.203285) 0.042	 3.047897 (2.165563) 0.171	 -5.101426 (2.3839) 0.042
R_Squared	0.3386	0.3152	0.2152
N	30		

t statistics in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

As the table illustrates, when a court is within the executive branch, the probability of having judges' tenure greater than appointer tenure is negative (less) compared to courts that belong to the judiciary. Scholars have linked judicial tenure to judicial independence by alleviating fears about future jobs and earnings. Without tenure, judges might think of the governments as possible employers in the future, which would threaten their impartiality. Along the same line, when a court is within the executive branch, the probability of having governors as nominators of judges is greater.

Regarding our second hypothesis, we ran an OLS regression with TIME FIXED effects as a control for the years in which decisions were made. Table 5 describes the findings:

TABLE 5

Regressor	Dependent variables with control variables	
	Dismissals	Pro-government decisions
Administrative courts within the Executive Coefficient Standard Error P>|t|	 .0265423 (.0172636) 0.124	 .049347*** (.0185217) 0.008
Judges' tenure greater than appointer tenure Coefficient Standard Error P>|t|	 .321257*** (.0402684) 0.000	 .3142995*** (.0432036) 0.000
Executive nomination Coefficient Standard Error P>|t|	 .4224028 *** (.0413954) 0.000	 .440221*** (.0444079) 0.000
Salary protection Coefficient Standard Error P>|t|	 -.0826914*** (.013177) 0.000	 -.0771635*** (.0141397) 0.000

Panel decision Coefficient Standard Error P>|t|	 -.076566*** (.0157672) 0.000	 -.0196248 (.0169157) 0.246
Type of plaintiff Coefficient Standard Error P>|t|	 .0228991 (.0167275) 0.171	 .0531568*** (.0179466) 0.003
Traffic ticket cases Coefficient Standard Error P>|t|	 -.2488434*** (.0152331) 0.000	 -.3256305*** (.0163435) 0.000
Age Coefficient Standard Error P>|t|	 -.0042822*** (.0007103) 0.000	 -.0045647*** (.0007621) 0.000
HDI Coefficient Standard Error P>|t|	 -1.64775*** (.1750752) 0.000	 -.7715674 (.1878541) 0.000
R_Squared	0.1915	0.1789
N	5020	

t statistics in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Our results varied across the two outcomes and the four independent variables we were testing.

Regarding pro-government decisions we found that judges in courts within the executive branch support governments' decisions more often. While the coefficient is not very large, the two-model comparison does show a distinction. The "Judges' tenure greater than appointer tenure" variable was also significant in the analysis of pro-government decisions. Judges enjoying a lesser tenure than their appointer's more often decide cases in favor of the government compared with judges enjoying greater tenure. Protection of salaries was also significant. However, it had the opposite effect of what we had postulated. Therefore, the hypothesis suggesting that judges who enjoy explicit constitutional salary protection more often decide against the government was not confirmed. Finally, the executive nomination variable was also significant. Those judges whose nomination was made by the government decide cases in favor of the government more often.

Regarding dismissals, we did not find a significant correlation with the branch to which the courts belong. Dismissals are in a sense pro-government in that the judges dismissing cases do not invalidate the agency's action. However, judges may dismiss cases without notifying the government of the complaint against them. In these situations, executives will not appreciate these dismissals. Thus, publicity of judges' decisions might affect the meaning of

dismissals. However, dismissals may reflect lawyer's level of knowledge—that is, they may not bring poor-quality cases to court when the judge is part of the judiciary. This point is beyond the scope of our analysis. However, the age of the court also affects dismissals, suggesting that the younger the court, the less experienced the lawyers and the poorer the suits. "Judges' tenure greater than appointer tenure" is also significant and confirms our hypothesis. Judges without tenure will dismiss more cases than judges with tenure. The most obvious explanation for such finding is that dismissals constitute pro-government decisions. Judges hoping for future employability within the government make more dismissals. As in the case of pro-government decisions, those judges whose nomination was made by the government decide cases more often in favor of the government, again confirming the hypothesis. Finally, the case of salary protection is counterintuitive and our hypothesis was not confirmed.

As explained, we also ran the regression with only important cases and tax cases. The following table presents our findings:

Table 6

Regressor	Dependent variables with control variables	
	Important cases	Tax cases
	Pro-government decisions	Pro-government decisions
Administrative courts within the Executive Coefficient Standard Error P>|t|	.0235593 (.0433357) 0.587	.0118864 (.0633406) 0.851
Judges' tenure greater than appointer tenure Coefficient Standard Error P>|t|	.291044* (.1274919) 0.023	.471319* (.2271253) 0.038
Executive nomination Coefficient Standard Error P>|t|	.2422731 (.1295834) 0.062	.5288321* (.2320203) 0.023
Salary protection Coefficient Standard Error P>|t|	.1079939*** (0334019) 0.001	.2047336*** (.0511714) 0.000
Panel decision Coefficient Standard Error P>|t|	-.0719693 (.0376943) 0.056	-.0742327 (.0547283) 0.175
Type of plaintiff Coefficient Standard Error P>|t|	.0521001 (.0320534) 0.104	.0091286 (.0396772) 0.818

Age Coefficient Standard Error P>|t|	 -.0047844*** (.001565) 0.002	 -.0021482 (.002073) 0.300
HDI Coefficient Standard Error P>|t|	 -2.262612*** (.4075289) 0.000	 -.751942 (.654552) 0.251
R_Squared	0.0717	0.0529
N	1342	690

t statistics in parentheses
* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

The branch to which the court belongs was not significant in any of the cases. The variable "Judges' tenure greater than appointer tenure" was also significant in the analyses of important and tax cases. Judges enjoying a lesser tenure than their appointer's more often decide cases in favor of the government compared with judges enjoying greater tenure. The executive nomination variable was only significant in tax cases. Those judges whose nomination was made by the government decided cases more often in favor of the government. Protection of salaries was also significant. Judges not enjoying explicit constitutional protection for their salaries decide in favor of the government more often.

VI. Conclusions

Administrative justice is an inexorable companion of public administration based on the rule of law in democratic governments and implies the existence of legal remedies against decisions of administrative authorities.[90]

In this paper we described the different models of administrative adjudication born within the French tradition of administrative law and within the judicial review doctrine of administrative law in order to accommodate the Mexican administrative system of justice in the spectrum of such models.

Institutional design, as well as procedural and substantive norms ruling administrative courts, has changed over time and across countries. Mexico is no exception and its system contains a number of different institutional designs. We identified administrative courts within the judiciary and administrative courts within the executive as a crucial distinction.

Our hypotheses focused on the impact of the distinction between executive and legislative branches, first on the way legislators design independence

[90] *See* Albertjan Tollenaar & Ko de Ridder, *Administrative Justice from a Continental European Perspective, in* Administrative Justice in Context 301 (Michael Adler, ed., 2010).

guarantees for judges and second on the way judges decide cases. The main purpose was to contribute to the discussion on institutional design of administrative courts with data.

We showed that the choice of creating an administrative court within the judiciary or within the executive branch has consequences both in the institutional arrangement of issues concerning the theoretical independence of judges and in the specific decision of cases. Regarding institutional design, we found out that the two variables that the executive branch affects were judges' tenure greater than appointer tenure and executive nominations. When a congress decides to create a court within the judiciary, the probability of guaranteeing that judges' tenure will be superior to the appointer's tenure is greater than when creating the court as part of the executive branch. In the same line, when a congress decides to create a court within the judiciary, the probability of guaranteeing that the executive will not participate in the nomination of the judge is greater.

After analyzing the institutional design we studied the influence of the same variables in court decisions. To carry out this analysis we examined the whole universe of cases first, only the important cases second and only tax cases third. Although both the branch to which a court belongs and the intervention of the executive branch in the nomination of judges were significantly correlated with decisions favoring the government, the analysis of important cases was not consistent with such findings. Therefore, the only variable that was consistent throughout the three different analyses made in this paper was judges' tenure greater than appointer tenure. This, again, is not surprising, but in analyzing our results it is important to recognize that attributes of courts within the executive branch apart from judges' tenure may not matter.

Judges within executive branch courts made more pro-government decisions than judges in judicial branch courts. However, when analyzing judges' behavior in important cases and in tax cases, the significance disappeared; therefore, we cannot derive a strong argument regarding the impact of the branch to which a court belongs with the decision judges make in these courts.

With these findings we want to address some effects that might shape them and some issues that require further analysis. A recurrent problem of studies of judicial cases is the selection effect of judicial cases, which arises when plaintiffs recognize the likely biases of the judge who will decide the case. Plaintiffs may invest less in bringing complaints to trial in those states where administrative courts are within the executive branch, or even refrain from bringing cases at all. If plaintiffs do not sue, then the results of the existing cases have no selection effect. In any case, the selection problem would be more of a problem when the stakes are low than when the stakes are high.

The interdependence of the control variables may also affect our results. Some of the findings with the incorporation of the control variables were mixed and we have no reasonable theory to explain our results. The char-

acteristics of the control variables drive this problem —most depend on the existence of another. For a future analysis, control variables should refer more directly to states' characteristics and not to the courts' characteristics.

Our findings were not surprising, but the use of real data makes this study important. Legislatures act more readily on information based on real data. As Part II of this paper discusses, administrative courts perform two main functions: the redress of individual disputes and improvement of government agencies by monitoring their performance. Independence guarantees for judges may be more helpful in the former case and less important in the latter. It would be interesting to find out whether legislators creating administrative courts within the executive branch were more concerned with providing the executive with an effective control over its agencies rather than creating mechanisms of redress. By contrast, legislators that have created administrative courts as part of the judiciary may be more concerned with providing citizens with redress mechanisms in which one of the essential characteristics is the independence of its judges. This account seems to provide a good explanation of our findings, but deeper knowledge of the motives for the creation of these courts is needed.

Finally, since pro-government decisions create many problems as proxies for judges' independence, this paper also gives rise to the question on how we should empirically measure judges' independence. This is an important question and implies the test of the effectiveness of theoretical variables such as tenure or protection of salaries as guarantees for judges.

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THE ROLE OF SHOCKS AND SOCIAL PRESSURES IN THE DEVELOPMENT OF CITIZENSHIP RIGHTS: GREAT BRITAIN AND MEXICO'S DIVERGENT PATHS

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In Memoriam, Peter B. H. Birks, Regius Professor of Civil Law, University of Oxford, 1989-2004

Abstract. *Drawing on T.H. Marshall's classic analysis of how civil, political and social rights evolved in Great Britain, this article follows authors, like Rose and Shin, who used a "social pyramid" to illustrate how the inverted development of such citizenship rights in other nations may weaken liberal democracy. In contrast, I argue that this sequence varies depending on a society's own unique history, and that no one single path can define the development of liberal democracy. In Mexico, the development of citizenship rights (mainly social, political and civil, following T.H. Marshall's categorization) was catalyzed by a series of economic and security-related crises that impacted a broad cross-section of Mexican society. The result of these pressures —both from above (organized elites) and below (organized popular groups)— has been greater enforcement of already existing political rights. This major change eventually led to competitive ballot elections (since the late 1990s) which in turn has forced politicians to focus on reshaping social rights (e.g., making their application universal rather than selective). Since President Felipe Calderon's (2006-2012) "war on drugs," there has also been notable legislation —backed by widespread public support— to strengthen civil rights (e.g., 2008 criminal justice reform; 2011 reforms to the amparo and human rights).*

Key Words: *Citizenship rights, changes to, Great Britain and Mexico, Shocks and social pressures, liberal democracy, degrees of.*

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Resumen. *Siguiendo el análisis de T.H. Marshall acerca del desarrollo histórico de los derechos ciudadanos en la Gran Bretaña —primero los civiles, después los políticos, y por último los sociales— este artículo sigue a otros autores, como Rose y Shin, que han identificado una secuencia histórica invertida en muchos países de la "tercera ola" democratizadora como causa de la debilidad de la democracia liberal en los mismos. Propongo que las diferentes secuencias de desarrollo de derechos ciudadanos no determinan permanentemente la posibilidad del desarrollo fructífero de la democracia liberal. En México, sucesivos shocks sistémicos, es decir, aquéllos que han afectado a muchos y muy diversos grupos sociales, detonaron la organización de presiones desde arriba (elites) y abajo (movimientos populares) que forzaron cambios al contenido y al grado de efectividad de implementación de los derechos ciudadanos. Las crisis económicas (1976, 1982, 1987-8, 1994-5) crearon presiones para el ejercicio efectivo de los derechos políticos, lo que creó elecciones relativamente competitivas desde fines de los 1990s y éstas, a su vez, presiones para la creación de derechos sociales universales en lugar de selectivos. Igualmente, la explosión de violencia generalizada detonada por la "guerra contra el crimen organizado" declarada por el gobierno de Felipe Calderón (2006-2012), otro shock sistémico produjo similares efectos en la organización de presiones de la sociedad civil que forzaron una revisión de los derechos civiles —parte de la reforma al sistema de justicia criminal en 2008 y cambios al recurso de amparo y al estatus de los derechos humanos en 2011—.*

Palabras clave: *Derechos políticos, Gran Bretaña y México, democracia liberal.*

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I. Introduction

During the official 96th celebration of Mexico's 1917 Constitution on February 5, 2013, President Enrique Peña Nieto acknowledged what "many Mexicans have believed for a long time: that in practice, their constitutional rights are not enforceable."[1] Mexico is not the only country with constitutionally-protected rights that are not enforceable; most of Latin America falls into this category.[2] Given this gap between theory and reality, debate about formal and on-the-ground democracy continues about Latin America and other nations which experienced the "third wave of democratization" between the 70s and 90s have become liberal democracies.[3] Although electoral democracy is characterized by free and fair elections, its existence depends on the effectiveness of governance and accountability.[4] It is not uncommon for governments to hold elections and, at the same time, suppress basic freedoms such as free speech, association, due process and fair trial. This incongruence results in what some scholars describe as "competitive authoritarianism"[5] or "electoral authoritarianism."[6]

What does the unenforceability of basic human and civil rights tell us about the prospects for liberal democracy in Mexico? In this essay, I analyze the arguments of economic historian and sociologist T. H. Marshall in his

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[1] Presidencia de la República, The Constitution is History but Also the Present and a Guide to the Future: Enrique Peña Nieto (2013), *at*: http://en.presidencia.gob.mx/articles-press/the-constitution-is-history-but-also-the-present-and-a-guide-for-the-future-enrique-pena-nieto/ (last visited May 7, 2013).

[2] The (Un)Rule of Law and the Underprivileged in Latin America (Juan E. Méndez et al., eds., University of Notre Dame Press, 1999); Philip Oxhorn, *From Human Rights to Citizenship Rights? Recent Trends in the Study of Latin American Social Movements*, 36 Latin American Research Review, 163, 82 (2001); Matthew M. Taylor, *Beyond Judicial Reform: Courts as Political Actors in Latin America*, 41 Latin American Research Review, 269-80 (2006).

[3] Richard Rose & Doh Chull Shin, *Democratization Backwards: the Problem of Third Wave Democracies*, 2 British Journal of Political Science 331-354 (2001).

[4] The Quality of Democracy: Theory and Applications 31 (Guillermo O'Donnell et al., eds., University of Notre Dame Press, 2004).

[5] Steven Levitsky & Lucan Way, *Assessing the Quality of Democracy*, 13 (2) Journal of Democracy 51-65 (2002); Steven Levitsky & Lucan Way, Competitive Authoritarianism: Hybrid Regimes after the Cold War 1 (Cambridge University Press, 2010).

[6] Electoral Authoritarianism: the Dynamics of Un-free Competition (Andreas Schedler, ed., Lynne Rienner, 2006).

classic account of how the development of citizenship rights influenced the social contract in Great Britain.[7] I then contrast the development of British liberal democracy (as articulated by Marshall) with Mexico's own experience of democratization. This comparison leads to the conclusion that although Mexico's so-called "third wave" led to electoral democracy —it is still not a real liberal democracy.[8]

Citizenship rights in Mexico were catalyzed by a series of economic and security-related crises between 1970 and the late 1990s that impacted a broad cross-section of Mexican society, triggering pressures on government —from social organizations at both the highest and lowest socioeconomic levels— to enforce rights that already existed under law.

Since the late 1990s, politicians have been pressured by voters to reform an incongruent system in which constitutional rights were often granted only to claimants with the resources to bring cases before the courts. In other words, constitutionally-protected rights were not considered universal entitlements. During this time, several major reforms were enacted, including amendments to the criminal justice system, human rights' law and the law of *amparo*. It would not be unfair to say that Mexican society now expects its leaders to exercise power in a less arbitrary manner. They also expect more effective enforcement of their civil rights.

Given Great Britain's struggle with citizenship rights since the seventeenth century, it is generally regarded as the birthplace of liberal democracy —free and fair elections and individual legal protections against the power of the state. This evolution involved many actors and ideas about basic individual rights to life, liberty and property, secured by the impartial action of public authority. Such ideas were developed and then diffused across time and space particularly by British moral philosophers of the seventeenth century like John Locke.[9] Clearly, Great Britain and Mexico differ on many levels, including widely-divergent legal cultures (common vs. Roman law); political systems (parliamentary constitutional monarchy vs. federal presidential republic); and historical roles in the world economy. Between the 19th and early 20th centuries, Great Britain ruled an enormous empire; and was home to the

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[7] T. H. Marshall, Citizenship and Social Class and Other Essays (Cambridge University Press, 1950).

[8] See Karla Zabludosky, *Mexico's Election Violence is Said to Be Worst in Years*, N.Y. Times, July 6, 2013, *available at* http://www.nytimes.com/2013/07/07/world/americas/mexicos-election-violence-is-said-to-be-worst-in-years.html?_r=0; Catherine E. Shoichet, *Political Tensions Flare after Presidential Vote*, CNN, July 3, 2012, *available at* http://www.cnn.com/2012/07/02/world/americas/mexico-elections/index.html; *See* Carlos Tello Díaz, 2 de julio: la crónica minuto a minuto *(*Planeta, 2006); John Ackerman, Deconsolidating Authoritarianism: Learning from Mexico's Failed Transition, Keynote Speech at University of New Mexico (Jan. 31, 2013).

[9] See John Locke, Two Treatises of Government (Cambridge University Press, 1999) (1698).

first Industrial Revolution. In contrast, Mexico —in spite of its expansive territory and resources— has been a developing country for most of its history, at the periphery of the global economy and economically dependent on its northern neighbor.

This paper does not consider Great Britain as an ideal or a perfect model for Mexico to follow. Instead, it compares the development of citizen rights in both nations to highlight their differences —and explain their faults and defects.[10] Although Great Britain is considered a liberal democracy —while Mexico is not— there is more than one path to liberal democracy. Despite the way in which citizenship rights and liberal democracy developed in Great Britain, nations with different historical experiences follow their own unique paths. In Mexico's case, economic and social pressures produced by four successive crises between the 1970s and 1990s —as well as widespread violence incited by President Felipe Calderon's "war on drugs"— catalyzed a series of major legislative, judicial and political reforms. As a result of these changes, Mexicans' individual and citizenship rights are now less arbitrary and more effectively enforced than ever before.

II. Argument

The differences highlighted by the comparison of these two countries help to identify civil rights and their long term evolution and general exercise in Great Britain but not in Mexico as a foundational difference. Whereas they were at the base of the pyramid of citizenship rights' historical development in the former, they are still an ineffective work in progress in the latter. This is not to idealize the British case or Marshall's interpretation —as I certainly don't. Marshall has been rightly criticized for excluding a majority of British subjects (including women, foreigners and followers of certain religions) from basic civil and political rights. This exclusion lasted well into the twentieth century.[11]

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[10] *See* Tom Bingham, The Rule of Law 3-36 (Penguin, 2011). For example, the sovereign (Queen or King) has immunity from prosecution in Great Britain while in most republican systems presidents can be impeached. Regarding judicial review, British courts cannot strike down primary legislation as American or Australian courts because of the parliament supremacy doctrine. *See* Daniel Boffey & Mark Townsend, *Scotland Yard's Finest Called to Account Over 'Culture of Collusion'*, The Guardian, July 16, 2011, *available at* http://www.theguardian.com/media/2011/jul/16/scotland-yard-collusion-john-yates-neil-wallis. On police deficiencies in England and Wales. *See* Martin Innes & Nicola Weston, Rethinking the Policing of Anti-Social Behaviour (Cardiff University, 2010), *available at* http://www.hmic.gov.uk/media/rethinking-the-policing-of-anti-social-behaviour-20100923.pdf (last visited June 10, 2013).

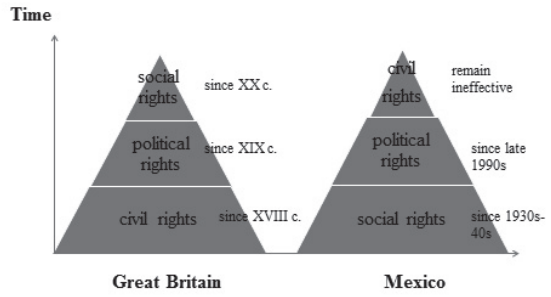
[11] Exclusionary Empire: English Liberty Overseas 1600-1900 (Jack P. Greene, ed., Cambridge University Press, 2010); Citizenship Today: The Contemporary Relevance of T. H. Marshall 11-23 (Martin Bulmer & Anthony M. Rees, eds., Routledge, 1996).

This said, each country's unique path (see figure 1) helps in part to explain why liberal democracy largely remains an unfulfilled aspiration in Mexico, as civil rights are selectively enforced in favor of those with power, money and influence.

In addition, successive economic crises between 1976 and the 1995 seriously eroded the social contract pyramid in Mexico, which rested on highly-politicized and selective enforcement of the law (figure 1). These successive crises led to organized pressure at both the highest and lowest levels of society for more effective enforcement of political rights —leading to relatively free and fair elections in the late 1990s. Since that time, there has been widespread public support for greater enforcement of citizenship rights. The changes have resulted in a shift of privileges reserved for the rich and powerful to more universal entitlements in social policy.[12]

Effective Exercise of Citizenship Rights in Time

Figure 1. Effective Exercise of Citizenship Rights in Time



Source: Elabotared by the author.

These pyramids of rights are used to illustrate a time sequence rather than a strict dependence of rights on the lower echelon of the pyramid on those on upper parts. The base of the pyramid represents rights which legitimized each nation's unique political system (*i.e.* "rule of law" in Great Britain; "revolutionary nationalism and social justice" from post-revolutionary Mexico until the 1982 debt crisis, which gave way to the "lost decade" in growth and development). The most notable issue in figure 1 is the particular way in which social rights were enforced in Mexico. Compared to Great Britain, Mexican enforcement was selective rather than universal; and characterized by high discretion and abuse that favored those in power and their close allies.

The new social contract that resulted from the Mexican Revolution (1910-20) was reflected in the 1917 Constitution. In the 1920s and 1940s, Mexican

[12] Examples of this move toward universal entitlements since electoral democracy started operating in Mexico are the public health *Seguro Popular* in 2003 and the call for a universal social security system expected before the end of 2018.

leaders turned the so-called *new order* into a systematic tool to repress social and political opposition. The resulting regime became a "perfect dictatorship," the longest-lasting one-party rule of the 20th century. Using cooptation, paternalism, and hegemonic control, the Mexican authorities manipulated civil rights to secure party loyalty rather than protect universal citizen rights. In effect, civil rights became a means used to acquire and maintain power, wealth and social prestige.[13]

III. Individual Rights and Equality before the Law in Liberal Democracy

Liberal democracy rests upon a foundation of both free and fair elections and equality before the law. Without such protections (which implies effective *enforcement*) basic civil and political rights inherent to liberal democracy (*e.g.*, freedom of expression, association, due process, fair trial, free voting, petitioning, and ballot elections) cannot exist. If this is the case, the empirical expression of this form of government is possible to a lesser rather than a greater extent. However lofty this prescription may sound it is not necessarily a panacea in practice. For example, left-leaning thinkers have traditionally criticized the principle of equality before the law because it promotes socioeconomic inequality protecting rich individuals from having to share their wealth through individual property rights. In contrast, many conservatives claim that the principle of equality before the law grants each and every individual one vote to choose his or her political representatives, and therefore different stakes in the present and future evolution of political and economic institutions and policies.

Moreover, equality before the law also allows for wrongs to go unpunished if authorities do not follow prescribed procedures (*i.e.* due process) in their prosecution. Yet, without equality under the law many cherished rights such as security, liberty and property cannot be guaranteed with a reasonable degree of certainty. It is also important to note that a permanent tension exists between the "liberal" and "democratic" components of liberal democracy as a type of political regime and a form of government. While the democratic component emphasizes majority rule (*e.g.*, collective decisions that may harm individual interests, beliefs and values) the liberal component stresses the primacy of individual rights. From this perspective, majority rule changes that

[13] *See* Arnaldo Córdova, La ideología de la Revolución Mexicana: la formación del nuevo régimen (Era, 1973). *See also* Luis Javier Garrido, El partido de la revolución institucionalizada (Siglo XXI, 1982). *See also* Rogelio Hernández Rodríguez, La formación del político mexicano: el caso de Carlos A. Madrazo (El Colegio de México, 1991); Enrique Krauze, La presidencia imperial (Tusquets, 1997). *Equality before the law*, also known as *equality under the law*, *equality in the eyes of the law*, or *legal equality*, is the principle under which all people are subject to the same laws of justice.

affect individuals can only be carried out by following pre-established general rules and procedures (i.e. due process) that specify when and how such traits, protected by the rights conferred through the status of citizenship, may be forced to change.

IV. T. H. Marshall on the Exercise of Individual Rights and the Evolution of Citizenship

1. *Citizenship: Bestowed and Enforceable, not Necessarily the Same*

Individual rights in most modern nation-states are based upon citizenship. According to T.H. Marshall, the concept refers to "a status bestowed on those who are full members of a community […] all who possess the status are equal with respect to the rights and duties with which the status is endowed."[14] Citizenship can thus be seen as providing the basis for a social contract which regulates (a) relationships between individuals; and (b) relations between individuals and the State. A basic attribute of citizenship in Marshall's view is the co-existence of legal equality and socioeconomic inequality. Despite the unequal distribution of talents and resources among individuals, all citizens are entitled to basic civil rights —and redress in case these are infringed.

This is an abstract claim which can remain a mere intent of purpose or an aspiration if it is not backed by the agency that can translate the aspiration of legal equality into fair decisions that change the distribution of liberties and resources on the ground irrespective of the unequal social, political, and economic influence and power of contending parties. Marshall was well aware that the development of individual rights did not necessarily translate into effective citizenship rights. Without fair and consistent enforceability by the state, individual rights could remain either an empty aspiration or a cynical and abusive way for the authorities to maintain their own privileges.[15]

Marshall identified two main barriers between the establishment of rights and the application of remedies. The first arose "from class prejudice and partiality" (*i.e.* the ability to influence the course of a legal process via networks of power, influence, kinship or the exchange of favors): and the second "from the automatic effects of the unequal distribution of wealth, working through the price system" (*i.e.* legal defense costs, economic benefits illegally

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[14] T. H. Marshall, *supra* note 7, at 28.

[15] Accountability of a justice system is a different problem from the bureaucratic capacity of such a system throughout a given territory. The latter problem is relevant to this discussion given less unevenly distributed, more standardized bureaucratic capacity in the British unitary state compared to the highly uneven, heterogeneous distribution of capacities in Mexico's federal system. But accountability is a necessary component that helps to lower the likelihood of partial, self-serving allocation of decisions even in systems with strong bureaucratic capacity.

bestowed on the agents responsible for enforcing justice).[16] The implication is that although citizenship may be granted, it means little without effective and impartial enforcement. Since its birth as a modern nation-state in the nineteenth century, Mexico's citizens have generally been unable to enforce their own rights.[17]

2. *Types of Citizenship Rights*

Even if certain citizenship rights are established and impartially enforced, a question remains regarding their nature and effects. Marshall divided these into three categories: civil, political and social. Civil rights are necessary for the exercise of individual freedom (*i.e.* freedoms of speech, association, religion, property, right to justice); political rights are those necessary to participate in the exercise of public authority (i.e. voting, holding office); and social rights are those necessary to "live the life of a civilized being according to the standards prevailing in society" (*i.e.* health, education, work).[18]

Such rights may not necessarily be deduced from universal principles or inferred from the observation of societies at different times and in different places. Marshall remained aware of the perils of "intuitive" generalization by recognizing that no principle can determine the types and number of rights and duties that should be included. Instead, he favored a pragmatic approach which acknowledged that "the ideal can be glimpsed through examples of countries where citizenship is developing and yielding better life to [all or most] citizens."[19] Likewise, inasmuch as the concept of citizenship and its attributes have changed in time, Marshall's definition seems to capture basic qualities which have been associated with it since the late twentieth century.[20] Given that the exact nature of "citizenship rights" is subject to continual debate based on first principles or empirical aggregation of diverse human practices, I believe that rudimentary civil, political and social rights are fundamental to liberal democracy.

3. *Evolution of Citizenship in a Liberal Democracy: the case of Great Britain*

Marshall claims that the development of citizenship rights in England (Great Britain was formed in 1707) began in the 1642 civil war against Stuart

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[16] T. H. Marshall, *supra* note 7, at 35.

[17] *See* Fernando Escalante Gonzalbo, Ciudadanos imaginarios (El Colegio de México, 1992).

[18] T. H. Marshall, *supra* note 7, at 10.

[19] *Id.,* at 29.

[20] Guillermo O'Donnell, David Miller & Laurence Whitehead, P*olitical Regime, the State, and Democratization*, Keynote Address at the Nuffield College (Feb. 18, 2005).

absolutism, and involved widespread battles over civil rights. This formative period lasted between 1642 and 1832; Marshall describes it as an eighteenth century phenomenon whose main aim was to establish the rule of law ("one law for all men" —which today means equality of all individuals before the law given a jurisdiction), and the institutions most closely associated with civil rights are the courts of justice.[21]

Marshall claims that the period between 1832 and 1918 was dominated by the fight over political rights through successive extensions of the franchise (in Great Britain in 1832, 1867, 1884, and 1918). The author defines this as a nineteenth century phenomenon even though, as in the previous period, it does not coincide with exact century dates. The main institutions associated with the effective exercise of political rights are the rules, procedures, and institutions that regulate popular election to public office.[22]

Marshall identifies a last period which corresponds to the development of social rights, starting with the passage of the Factory Acts (1878-1895) and fortified by the National Insurance Act (1911) and Education Act (1944). The author claims that these rights developed mostly during the twentieth century. In his view, the institutions most closely associated with social rights are education and social services.[23]

Whereas the development of citizenship rights can be rightly criticized for its rigidity (i.e. a so-called Whig reading of history emphasizing gradual, uninterrupted progress toward general liberty), this schematic presentation is useful because it highlights how certain rights impinge (and in some cases, depend on) others. The main right highlighted by Marshall is "justice [...] this means asserting all one's rights on terms of equality with others and by due process of law."[24] In other words, without justice, all other citizenship rights remain in jeopardy; due process, fair trial and proper redress serve as the foundation on which all other rights depend.

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[21] The enforcement of general civil rights in Britain was a long and protracted process. It should not be assumed that the base of the pyramid of citizenship rights developed in a smooth and constant way. *See* Simon Schama, 2 A History of Britain: the British Wars 1603-1776, 365-368 (BBC, London, 2001) for reminders that local dispensation of justice was carried out by magistrates, who were members of the gentry and acted more often than not on behalf of the aristocracy; the very profitable prison system, administered by wardens who compressed space and living conditions in prisons to maximize profit; and the hypocrisy of magistrates who aided professional criminals in the eighteenth century.

[22] The progress of political rights was also the product of significant conflict among elites, growing pressures from below, and bloody confrontations which took close to eighty years to transform restricted (income-based) into full male suffrage as pointed out above given several reforms —1832, 1867, 1884, 1918— that came after strong pressures from below and mass/police confrontations that in many cases left many dead behind.

[23] T. H. Marshall, *supra* note 7, at 11-27, for the discussion of the development of the three types of citizenship rights.

[24] *Id.*, at 11.

Taking reality into account, I realize that Marshall's analysis seems somewhat idealistic. I am also aware of many flaws in the way citizenship rights are implemented in Great Britain. The legal process is often violated, at least in spirit, by an adversarial system characterized by expensive barristers with disproportionate influence; abuse of power; plea bargaining (i.e. reaching a compromise to avoid a trial); and wrongful convictions, some of which have recently received media attention. This said, British officials who violate the law —from policemen to members of parliament— are generally thrown into jail upon conviction. This is a far cry from what happens in Mexico, where officials and wealthy businesspeople (and their friends and acquaintances) often transgress the law with few if any adverse consequences. A culture of impunity (from Latin *impunitas* —no punishment), fueled by a systematic abuse of power, influence and money (*i.e.* corruption in its broadest sense) has been and remains a defining feature of the Mexican justice system. I argue below that this is partly the outcome of the inverted development of citizenship rights in Mexico, at least in comparison with how they developed in Great Britain.

V. Evolution of Citizenship Rights and Liberal Democracy in Mexico

1. *Original Weakness of Civil Rights at the Base of the Pyramid*

The absence of the rule of law is deeply embedded in Mexican history. Spanish colonialism introduced a peculiar (*i.e.*, casuistry-based —a body of laws that grows out of the accumulation of many particular and therefore different cases) legal system based in the sixteenth century, when both civil and religious courts operated simultaneously. Although this did not differ notably from how the Catholic Church operated in other countries; in the American colonies, however, Spain created two distinct jurisdictions, "la república de españoles" and "la república de indios," each of which were governed by different rights and duties.

In addition to two jurisdictions with distinct rules, the system was also based upon a fundamental principle of Castilian law, "*obedézcase pero no se cumpla*" (roughly translated as "accept but without compliance or enforcement"). According to legal historians, this tradition predated by at least two centuries Spanish colonialism in the Americas.[25] It also reinforced the peculiar development of Mexican legality, in which the populace accepted laws issued by the central authorities with the understanding that they would be superseded by local customs, rules and norms. The result was a complex mosaic of tribu-

[25] José Antonio Algaba Quijano, *Obedézcase pero no se cumpla*, Garrigues, *available at* http://www.garrigues.com/es/publicaciones/articulos/Paginas/Obedezcase-pero-no-se-cumpla.aspx (last visited May 24, 2013).

nals, venues and jurisdictions. Enforcement of the law thus became contingent upon exceptions, including closed-door negotiations and impositions by local and federal authorities. More than anything, it became subject to favors and meddling by those with power and privilege.

2. *Persistence of Weak Civil Rights since Mexico's Independence*

The development of civil, political and social rights in post-independence Mexico differed radically from T.H. Marshall's depiction of Great Britain's three-hundred year process. Even though some of these rights were codified in British law, most notably the English Bill of Rights in 1689, the rest are part of the organic process of the British Parliament's law creation, change, and accumulation, which though in existence and enforceable, cannot be found in a single document like a written constitution. This is known as "statutory law," which is created by Parliament, and which can be identified as having a different source from "common law," which is "based upon societal customs and recognized and enforced by the judgments and decrees of the courts."[26] This entire body of accumulating rules, procedures and cases that can be used as precedents to establish the logic and direction in present trials is specific to the English-speaking countries (originating in Great Britain and then spreading to what would become the United States, Canada, Australia, New Zealand and other Commonwealth territories).

In great contrast, Mexico's basic legal skeleton and scaffolding followed the Roman or continental civil law tradition. This legal tradition started in 1791 with the enactment of the first French constitution, which incorporated the Declaration of the Rights of Man (1789) as its preamble, and created a distinctive way of practicing law compared to common law. Although it is important to also highlight points of contact between the two legal Western traditions (common vs. Roman law). For example, the French, who resurrected the Roman tradition, also followed the example of the United States which, despite its common law tradition, included a Bill of Rights in its Constitution (1791).

Similar to how the law developed in Spain and France, not to mention other Latin American countries, Mexico has had five constitutions: 1824 (federalist), 1836 (centralist), 1843 (centralist), 1857 (federalist) and 1917 (federalist).

A. *The "*Amparo*" Remedy*

In 1847, the *amparo* (*i.e.*, Mexican civil law remedy for the protection of constitutional rights) was created through an amendment to the 1824 consti-

[26] Legal Dictionary, Common Law *available at* http://legal-dictionary.thefreedictionary.com/Common+law.

tution. This legal instrument, recognized as Mexico's unique contribution to liberal constitutionalism and adopted by other Latin American countries,[27] tried to emulate the due process (or judicial review) protections granted to individuals under the U.S. constitution. I say "emulate" because of a now well-known misinterpretation of due process made by Mexican senator Mariano Otero, who first proposed its enactment. Mr. Otero stated:

> …the scope and respect for the judicial branch [is] the most secure sign of a nation's liberty… In the USA this protection was granted by the Constitution, and it has produced the best effects. American judges must adhere first and foremost to the Constitution, so that when they find conflict with secondary laws, they apply the former rather than the latter. This is done without making itself superior to the law or putting itself in opposition against the legislative power or annulling its dispositions in each particular case in which it could harm [individual rights], it makes it impotent.[28]

First, Otero mistakenly believed that the power of judicial review was not granted explicitly to the judiciary by the US Constitution, but rather implied given the interpretation Justice Marshall made of it in the case of Marbury vs. Madison (1803). Second, Otero radically altered the nature of judicial review by implying that laws struck down by courts as unconstitutional only applied to the claimants involved rather than all citizens. In fact, Otero's interpretation was more similar to Great Britain's claimant-only application of judicial review rather than how it is applied in the US. The result is that in Mexico, *amparos* are only granted by courts to individual claimants (*i.e.* laws or executive actions deemed unconstitutional continue to apply to everyone else). This varies significantly from the US, where federal and state judges' decisions regarding constitutionality apply to all citizens. In Mexico only the Supreme Court and federal *tribunales colegiados* can do so).

In sum, the lack of enforcement of individual rights in Mexico has effectively impeded the development of the rule of law. This fact can be highlighted by the following examples: (a) Mexican law deemed unconstitutional still remains in effect for everyone who has not sought legal redress; (b) only individuals with the knowledge and resources to seek legal protection by the Supreme Court and federal *tribunales colegiados* are afforded these rights. Given that every individual affected by a law must file a claim to seek redress, the court system is swamped with cases; as a result, most cases are never even tried. And for those brought before a judge, justice is rare without the influence of power, connections or money. It should be noted that the Mexican

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[27] Axel Tschentscher & Caroline Lehner, T*he Latin American Model of Constitutional Jurisdiction: Amparo and Judicial Review* (Social Science Research Network [SSRN)], Working Paper No. 2296004).

[28] José Luis Soberanes Fernández, *Algo sobre nuestros antecedentes de juicio de amparo*, Boletín Comparado de Derecho Mexicano 1069 (1988).

Supreme Court has held that "irreparable acts" (government acts whose effects cannot be undone) are not subject to protection under *amparos*.[29]

Popular pressure against the erratic application of the *amparo* forced politicians to enact sweeping reforms in April 2013. These changes came about after the introduction of ballot elections (as explained below). Since the 1990s, political rights have become the driving force for individual rights. These reforms have broadened the scope of the *amparo* and limited the "special regimes" derived from its prior claimant-only application. For example, the *amparo* now permits claimants to file suits for omissions made by the authorities (not merely *acts*); grants human rights protections under international treaties; limits the scope and duration of provisional injunctions; and, most notably, allows the *general* enforceability of legal precedents made by the Supreme Court to all citizens —not just claimants. Individuals now also have the right to file class action suits, which were not allowed before.[30]

Although it is too early to tell how these reforms will affect the enforceability of individual rights, the new provisions will hopefully lower legal costs, a weighty factor in addressing issues of basic fairness for equal quality access to the law in seeking redress (most claimants are low-income and therefore at a big disadvantage); expedites the filing of claims; and applies generally to all citizens, not just to claimants. Although this change is a key element of liberal democracy, enforcement will be a challenge.

B. *The Truncated Consolidation of Mexican Liberalism: Authoritarianism and Dictatorship*

Looked at from the British perspective the original claimant-only application of *amparo* in Mexico did not have to condemn the country to weak civil liberties. In addition to the original weakness of uniform civil rights, intense conflict among the ruling Mexican elites during the first half century after independence in 1821 hampered efforts to establish the rule of law. Mexico's leaders were too immersed in establishing and keeping power to put into practice their so-called commitment to liberal constitutionalism.

The 1857 Constitution, created by a generation of classic liberals opposed to conservative colonialist ideas (*e.g.*, weak separation between Church and State; special privileges (*fueros*) for the elite classes), contained an entire chapter dedicated to individual rights. The constitution also established the *amparo* remedy as a legal mechanism to protect individuals' rights from arbitrary laws and executive action.

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[29] Michael C. Taylor, *Why no Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 New Mexico Law Review 154-157 (1997).

[30] Arturo Zaldívar, *Un nuevo paradigma constitucional*, Canal Judicial, July 8, 2013, http://canaljudicial.wordpress.com/2013/07/08/ofrece-ministro-zaldivar-conferencia-el-juicio-de-amparo-ante-el-nuevo-paradigma-internacional/ (last accessed October 10, 2014).

Aside from the old principle of "*obedézcase pero no se cumpla*," a telling problem can be highlighted by observing the towering figure of liberalism and one of the creators of the modern nation-state in Mexico, Benito Juárez. An analysis of the effect Juárez' had on the development of civil rights in Mexico is well beyond the scope of this paper. The main issue I wish to highlight is the attitude of this champion of liberalism toward the law, which is best illustrated by his saying "To our friends, justice and grace; to our enemies, the law."[31] The tension between Juárez' liberal aspirations and his authoritarian political practice is a recurrent theme in texts devoted to his role.[32] Thus, since being lullabied in its modern cradle, constitutionally-protected individual rights have been cynically used for political power.

Porfirio Díaz, who ruled between 1876 and 1880 and then 1884 to 1911, thought about himself a direct heir of the liberal tradition. In fact, his regime legitimized its authoritarianism by the 1857 Constitution. The "*obedézcase pero no se cumpla*" principle continued to deepen its roots in Mexico's political culture as General Díaz allowed regional and local caciques (i.e., strongmen) to preserve their local privileges. At the same time, he sent *jefes políticos* to ensure compliance with Mexico City's main priorities. In his classic work about the *Porfiriato* and the roots of the Mexican Revolution (1910-1920, the armed phase) Francois-Xavier Guerra highlights the significant gap between principles enshrined in the 1857 constitution and old agrarian traditions (dominated by politico-economic elites) that characterized many parts of the country. As usual, order and stability were imposed in these areas through discretionary social networks which determined how and when the law was enforced. The corollary was the elite's use of the law and public institutions to punish non-conformity and dissent based precisely on the fair and just mediation, intervention, and application of punishment which such laws and institutions were supposed to carry out on the ground.[33]

3. *The 1917 Constitution and the Construction of Political Hegemony: Selective Use of Social Rights to Cement Loyalty, Circumscribe Political Rights, and Use Civil Rights to Secure and Maintain Power*

General Díaz was unseated by middle-class and popular uprisings between November 1910 and May 2011.[34] The bloodbaths that ensued, particularly

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[31] Héctor Aguilar Camín, Después del milagro: un ensayo sobre la transición mexicana 118 (Cal y Arena, 1988).

[32] *See* for example José Fuentes Mares and his four volume history of Juárez and his times. The classic study in English is Ralph Raeder, 2 Juarez and His Mexico: A Biographical History (New York, Viking, 1947).

[33] *See* Francois-Xavier Guerra, México: del Antiguo Régimen a la Revolución (Fondo de Cultura Económica, 1988).

[34] Héctor Aguilar Camín &Lorenzo Meyer, A la sombra de la Revolución Mexicana 28-32 (Cal y Arena, 1990).

between 1913 and 1920, were used to justify the political authoritarianism that evolved between the 1920s and the 1940s. The citizenship rights that resulted from events after the 1917 Constitution differ markedly from what happened Great Britain, as shown in Figure 1.

A. *The 1917 Constitution: Original Intent and "Day-to-day" Enforcement*

The Constituent Assembly called by Venustiano Carranza toward the end of 1916 was pluralistic and represented a mix of urban, rural, upper, middle, and working class interests. Historians have synthesized the dynamics of this assembly by identifying "radical" and "conservative" factions of legislators, the former led by Carranza and the latter by Álvaro Obregón. Among the radicals, a "Jacobin" faction, led by senators Francisco J. Múgica and Heriberto Jara, pushed the Assembly to the left. Basically, Carranza and Obregón wanted a constitution similar in spirit to the 1857 magna carta (*i.e.*, liberal principles, federal structure, separation between Church and State) but which strengthened the federal executive branch to lower the temptation among sitting presidents to become authoritarian given the strong checks and balances enshrined in that text.[35]

The Jacobin faction, emboldened by over fifty thousand armed men in distinct parts of Mexican territory, pushed for the adoption of many reformist elements in the new constitution, including the attributes for public education in article 3; increased control of federal land and natural resources in article 27; and government control and regulation over economic activity, capital accumulation (article 28), and robust workers' rights (article 123).[36] In effect, this constitution relegated the enforcement of social rights to the federal government, thereby giving power-holders a powerful mix of reformism, paternalism and authoritarianism to enforce their authority and secure the allegiance of the masses. Since Lázaro Cárdenas (1934-1940), this weapon has been used extensively by Mexican presidents.

The Constituent Assembly did not intend to create one-party rule. In fact, power remained fragmented throughout the 1920s; regional and nation-wide conflicts over power, influence and wealth between competing political factions flared up constantly; elections resulted in highly-fragmented legislative representation; and most of the "old" revolutionaries (those who survived the enactment of the 1917 constitution) were soon assassinated between then and 1928.

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[35] *Id.* at 76.

[36] *Id.* at 77.

B. *From Calles to Alemán: Forging Citizenship Rights to Consolidate Peace, Centralize Power, and Impose a New Social Contract*

The continuation of social and political conflict in the 1920s, augmented by the rivalry between the caudillos Álvaro Obregón and Plutarco Elías Calles, meant that politics on the ground during the first decade after enactment of the 1917 Constitution were far from concentrated in a cohesive nation-state. In his last address to the nation —right after the assassination of President-elect Obregón in 1928— Calles expressed his desire to form a national party that brought together the victorious revolutionary factions and, acting through local entities, stemmed the violent struggle over power and booty. As a result, a central platform was established to regulate and manage political conflict.[37] Despite the birth of the *Partido Nacional Revolucionario* (PNR) in 1929, no single party had consolidated political power.

a. *Continued Weakness of Civil Rights*

In spite of a long first chapter devoted to individual rights and the inclusion of the *amparo* in the 1917 Constitution, the tradition of "*obedézcase pero no se cumpla*" continued. For Mexico City politicians, "civil rights" became a negotiation tool, as well as a means of exercising power and cementing loyalties. On the reward side, regional elites were mostly allowed to dispense justice at the municipal and state levels. Subnational police and judicial systems depended on state governors, so they did the state executive's bidding —as they continue to do today. Crucially, subnational court systems could not hear *amparo* cases, and therefore state judges were excluded from ruling on issues of constitutionality. This not only detracted from the subnational judiciaries prestige and legitimacy, but also inhibited the protection of individual rights, taking away a key element of the "liberal" side (*i.e.* the one concerned with individual guarantees against majority rule) of liberal democracy.[38]

Sanctions for many criminal offenses were reserved for federal courts. The Supreme Court —at least on paper— became the final arbiter of rights violations committed by authorities at any of the three levels of government. Judicial appointments had to be passed by 2/3 of both congressional chambers. Justices were nominated by state legislatures and, once approved, received qualified lifetime tenure (*i.e.*, they could only be removed for bad conduct).

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[37] See Alan Knight, Mexico's Elite Settlement: conjuncture and consequences, in Elites and Democratic Consolidation in Latin America (John Higley & Richard Gunther, eds., Cambridge University Press, 1992) for an interesting comparison that draws explicitly on the British elite settlement between the Crown, the aristocracy, and the merchant-financial bourgeoisie of the Glorious Revolution.

[38] Michael C. Taylor, *Why no Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 New Mexico Law Review 154 (1997).

This changed with Presidents Calles and Cárdenas, who weakened the Supreme Court's independence by removing all sitting justices (against constitutional precept) and replacing them with allies. Calles changed the nomination process by assigning it to the executive branch, which required a 2/3 vote *only* by the Senate. The number of justices was expanded, which raised the costs of collective action, and between 1934 and 1944 lifetime tenure was abolished and substituted by six-year terms.[39] Another measure that tilted power in favor of the executive branch was the repeal in 1932 of legislators' right to be reelected.

During this time, the Supreme Court became fairly docile, tending to support the presidency. Between 1917 and 1960, however, around 1/3 of *amparo* rulings went against the government; most (2/3) of these wins were by large domestic and foreign enterprises. In the words of González Casanova, "[…] the Supreme Court […] can on occasions act as a break on the actions of the president and his collaborators [but only when this involves] major property owners and companies […] Workers and peasants are in a clear minority […] the Supreme Court follows in general the direction established by the executive, [thereby giving it] more stability."[40]

b. *Political Rights*

The rights to get elected and remain in office were not as suppressed in Mexico as in many totalitarian nations. Pursuant to applicable law —at least on paper— Mexican citizens were granted freedoms of expression, organization and ballot elections. Electoral law, enacted in 1918, led to a decentralized system in which municipalities and citizens' groups were placed in charge of elections management. The 1920s produced pluralistic, fragmented legislatures.

Real consolidation of authority began with the creation of the PNR in 1929 but only gained traction in 1933, when the party moved to dissolve regional parties working under its broad umbrella. Loyalties would then be owed directly to the central party leadership, bypassing regional caciques and leaders, most of whom were killed in the regional insurrections of 1923, 1927 and 1929.[41] During Cárdenas' presidency, centralized authority was consolidated through the creation of diverse organizations by workers, peasants and the military. The resulting umbrella organization, renamed the *Partido de la Revolución Mexicana* (PRM) in 1938, further cemented party loyalty. Even though the military was later excluded from the party in 1940, it was granted notable privileges and resources. A popular sector comprised mainly of public bureaucrats and other middle class associations was created in 1943.

[39] *Id.* at 145-148.

[40] Pablo González Casanova, La democracia en México 34-37 (Era, 1965).

[41] Arnaldo Córdova, *supra* note 13, at 50-51.

This move to de-militarize the party was strengthened by a new electoral law passed in 1946, which centralized election management under the Ministry of the Interior (*Secretaría de Gobernación*). Under this law, only political parties registered before the Ministry could get elected. Later that same year, the party changed its name to *Partido Revolucionario Institucional* (PRI) which continues today.[42]

The 1946 electoral law by itself did not suppress citizens' political rights. It channeled them through the increasingly dominant party by strengthening links between it and the government. With PRI officials in charge of the government and the government in charge of the organization, control was consolidated over both election procedures and participants. The stage was set for one-party dominance to become one-party hegemony.

c. *Social Rights*

The significant leverage given to the executive branch regarding social rights under Articles 3, 27, and 123 of the 1917 Constitution allowed every president since President Cárdenas to forge a new social contract. This transformation was based on considerable economic gains made by PRM-related grass-root organizations —in particular, for their leaders. These laws strengthened the federal government and placed it in a strong bargaining position with domestic and foreign capitalist classes. These in turn more often than not accommodated to a modicum of successive, popularly-backed demands, which in turn incumbents implemented to retain social cohesion, popular support, and a sense of renewed legitimacy. The problem of legitimacy was palpable to the political class inasmuch as intra-PRI conflicts spilt over during presidential elections as non-conformists with the official choice ran independently, produced significant protests and fraud allegations, and left many dead in 1929, 1940, 1952, 1988, and most recently in 2006.

From this author's perspective, the basis for citizenship rights in Mexico was built upon the social rights gained during decades of PRI hegemony. In the words of Córdova:

> […] social reforms created […] the base over which was built the scaffolding of social collaboration in post-revolutionary years […] Such reforms were used as instruments of power [against] social conflicts; in favor of thinking about the State as created for the people; [used] as weapons against old and new owners' classes; allowed State leaders to mobilize the masses; and gave the status quo such a solid consensus that not even violent internal quarrels could endanger it.[43]

[42] Juan Molinar Horcasitas, El tiempo de la legitimidad: elecciones, autoritarismo y democracia en México 23-26 (Cal y arena, 1991).

[43] Arnaldo Córdova, *supra* note 13, at 21-22.

The corporatization of society by President Cárdenas, and the 1946 electoral straightjacket alone could not alone have assured mass allegiance to the political system during the difficult years of the Calles and Alemán administrations. But these presidents had the ability to use social rights to strengthen the party's institutional machinery. The party in turn —at its sole discretion— doled out political rights in order to impose obedience and order.

A key difference between the development of social rights in Great Britain and Mexico is that in the latter, these rights were selectively enforced.[44] They became the carrots and sticks that sustained allegiance to the PRN and its transformations, the PRM and finally the highly effective, hegemonic PRI. Just as many people dream of winning the lottery, Mexicans dreamed of reaping the rewards of the Revolution (*i.e.* improved living conditions and future prospects). The difference, of course, is that winning a lottery is a random event whereas life improvement through revolutionary nationalism (as practiced by the PRI) required concerted effort, both by individuals and organizations. These efforts included loyal party affiliation; upstanding support for government policies; using any means to keep the party in power; and, at the very least, not rocking the boat or supporting opposition groups that represented viable threats. In other words, social rights were not granted to Mexicans in the form of universal entitlements (as they were in Britain) but rather as patronage, doled out by an elaborate political machine whose main function was to keep the PRI in power. This symbiosis continued as long as social rights grew, which was between the 1940s and 1970s.

C. *Successive Shocks; End of One-Party Rule in Mexico; and Changes to the Definition, Implementation, and Effectiveness of Citizenship Rights*

a. *Erosion of Selective Social Rights and Pressure for Universal Entitlements*

Between the 1940s and early 1970s, the PRI's one-party rule was supported by fairly high economic growth, low inflation and progressive social reform —the so-called "Mexican Miracle." This prosperity came to an end, however, with adverse global conditions and internal mismanagement (in large part due to the party's massive handouts to opposition groups to maintain its so-called democratic legitimacy). Between 1976 and 1982, Mexico experienced a series of severe financial crises which undercut the PRI's economic standing, including its ability to grant privileges, exert influence and

[44] This statement does not apply to all liberal democracies. See Gösta Esping-Anderson, The Three Worlds of Welfare Capitalism (Princeton University Press, 1990) where the early development of social rights in countries like Germany, France and Italy are depicted as tied also to statist, corporatist ideals of political integration and social control rather than as universal citizen entitlements.

bestow favors in return for loyalty, discretion and silence. The years of plenty finally ended in 1982, resulting in a long, painful and politically costly period of internationally-mandated fiscal and monetary contraction.

Since 2000, when the PRI lost power through relatively fair elections, Mexican politicians have been forced to appeal to broad voting constituencies (*e.g.*, teachers, *campesinos*, etc.) as much as smaller elites. For this reason, political parties now commonly advocate universal entitlements rather than the favors and patronage which defined PRI rule. Some examples include *Seguro Popular* passed by President Vicente Fox; universal social security coverage enacted by President Peña Nieto; and the conditional cash transfer program *Oportunidades* (originally Progresa), run by the federal government and based on fairly objective criteria. Though by no means a cure for deep-seated marginalization, the latter program has significantly improved health and education of minor children in jurisdictions under control by every political party.

b. *Pressures from Above and Below to Appropriate and Exercise Effective Political Rights*

As a result of the series of economic crises described above, the PRI lost much of its popular appeal, eventually giving rise to increased support for opposition political parties. Many in the business elite and urban middle classes, for example, aligned openly with the PAN (*Partido Acción Nacional*), a conservative party which gained strength in the 1985 mid-term elections and shortly later in Chihuahua. On the other hand, popular organizations such as trade unions, universities and left-wing parties aligned themselves with the National Democratic Front (*Frente Democrático Nacional*), led by notable figures such as Cuauhtémoc Cárdenas and Porfirio Muñoz Ledo, who broke away from the PRI in 1988 to contest the presidency after the PRI changed course and embraced neoliberalism.

Both the erosion of paternalist-based social rights and an ideological shift toward neoliberal market theory in the 1980s provoked widespread discontent and increased demand for fair elections. Why did this occur? Because the political rights enshrined in the Mexican constitution were often cited by the PRI itself to justify its own legitimacy. This differed sharply from military dictatorships such as those in Argentina and Chile, where political rights were legally suppressed; or in Leninist regimes where single-party rule was legitimized in the constitution.

In Mexico, PRI leaders and opposition parties played a game of "cat and mouse," inasmuch as political rights were at least codified in a pluralist way. In the face of growing opposition, the regime could either try to coopt, appease, or repress dissent. Likewise, the opposition could organize and express varying degrees of dissent consistent with such different outcomes. As long as socioeconomic conditions improved (as they did between the 1940s and

1970s) most political actors preferred cooperation. In spite of its occasional use of brutal tactics to suppress opposition, the PRI mostly relied on appeasement and cooptation, so much so that they became in effect part of the party's DNA such as in 1958 (against rail workers); in 1968 and 1971 (against students); and in 1994 (against the Zapatistas in Chiapas).

After 1976 (and especially after the 1982 economic crisis) both elite and popular organizations began demanding more of their constitutionally-guaranteed political rights. Although the regime continued its refusal to grant these rights (*e.g.*, fair elections, universal suffrage), its economic leverage had weakened considerably. Moreover, its embrace of neoliberalism enabled many opposition candidates —especially those on the left— to galvanize the support of massive constituencies and to begin an aggressive push for fair elections. In addition to the public's long memory of the PRI's brutality, the series of economic crises that broad swiped huge sectors of Mexican society —affecting every class, region, ethnicity, gender and age group for the worse— forced the regime to finally implement change. As one would expect (given the high costs of widespread repression) the regime did so reluctantly in a succession of electoral reforms in exchange for the left and right wing oppositions not to rock the boat in the aftermath of the successive end-of-sexenio financial crises between 1976 and 1994-5. In the end, its ability to coopt the opposition through material handouts dried out. Therefore, the means of bargaining became laws themselves, in particular electoral laws that led to a gradual dismantling of the hegemonic advantage of the PRI until the 1996 created a more or less level playing field.

The implementation of fairly competitive elections did not happen overnight. It took over two decades for genuine reform to take place, during which time the opposition won increased "rights" (usually passive) to express the public's staunch rejection of neoliberal reforms realized by presidents De la Madrid, Salinas and Zedillo (1982 to 2000) of the PRI, and continued under Presidents Fox and Calderón (2000 to 2012) of the PAN, and have resumed impetus since the return of the PRI presidency under Enrique Peña Nieto (2012-2018).

Going back to what forced full electoral democratization in Mexico, it took an indigenous uprising in Chiapas started officially on January 1, 1994; fratricide conflict inside the PRI which claimed the lives of the presidential candidate Luis Donaldo Colosio in March that year and of the PRI general-secretary and soon-to-be leader of the party majority in the Cámara de Diputados (*i.e.* the lower chamber of Congress), general social unrest, and a spectacular financial-economic collapses, dubbed the tequilazo that forced incoming President Ernesto Zedillo (1994-2000) to negotiate the 1996 political reform helped to produce a measure of free and fair exercise of political rights. Although much work needs to be done, this law has enabled diverse political parties to win elections at local, state and federal levels in a way unthinkable in prior decades.

c. *Civil Rights: New Shocks, Reforms, but Still a Work in Progress*

Though political rights evolved in the 1990s, civil rights have remained the weak link in Mexico's so-called liberal democracy. Regardless of which party is in power —PRI until 2000, PAN between 2000 and 2012 and, since the end of 2012, the PRI's return— these rights were historically granted solely those with money and political connections. In fact, during Felipe Calderon's presidency (2006-2012), civil rights for many Mexicans eroded significantly.[45] As a result of Calderon's "war on drugs" —relabeled a "war on organized crime"— over 80,000 people had died by the end of his administration in December 2012.

Similar to the activation of civil society organizations and protests to demand effective political rights during the erosion of paternalist-based social rights given the "lost decade" of socioeconomic development in the 1980s and the painful adoption of neoliberalism in the 1980s, 1990s, and 2000s, social pressures in favor of transparency, the rule of law, and protection of civil rights (increasingly cast in the language of internationally-sanctioned human rights)[46] acquired a sense of urgency and for many of despair during Calderón's government and his war on drugs, which similarly acted like a shock that triggered collective action from above and from below.

Similar to economic crises, the crisis involving organized crime and the government's violent response affected a large cross-section of Mexican society. Rich, poor, whites, mestizos, indigenous, men, women, northerners and inhabitants of central and southern areas were all forced to confront daily atrocities, including kidnapping, extortion, injury and murder. Similar to political rights, civil rights were already codified in Mexican law —if not effectively enforced. Just like in the twilight years of the PRIs one-party rule, the Calderón government— having been fairly elected in free and open elections —was pressured by massive constituencies to implement reform— resulting in amendments to criminal justice,[47] human rights and the law of *amparo* in

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[45] Francisco E. González, *Countries at the Crossroads,* Freedom House (2010), *available at* http://freedomhouse.org/report/countries-crossroads/2010/mexico#.U_XGl_ldUqQ. See also, *Countries at the Crossroads*, Freedom House (2012), *available at* http://www.freedomhouse.org/report/countries-crossroads/2012/mexico#.U_XGS_ldUqQ.

[46] In respect of the potential need to create a fourth category of citizenship rights (*i.e.* human rights) that adds to the classic civil, political and social rights, Guillermo O'Donnell held the commonsense view —with which this author agrees— that "human rights are good old civil rights." See Fernando Escalante Gonzalbo, Ciudadanos imaginarios (El Colegio de México, 1992). Regarding the significant pressures from below to make civil rights an effective rather than just a written instrument of legality and justice in Mexico *See* Marie Claire Acosta Urquidi, La Impunidad Crónica de México: una aproximación desde los derechos humanos 19-56 (Comisión de Derechos Humanos del Distrito Federal, 2012).

[47] *See* Matthew C. Ingram, Criminal Procedure Reform in Mexico: Where Things Stand Now (Woodrow Wilson Center for International Scholars, 2013), http://www.wilsoncenter.org/sites/default/files/Ingram_CrimProReformMexico_Jan_2013.pdf.

2008 and 2011, respectively. Once again, the general population used marches, blockades, lobbying abroad and mass media to pressure the government to make notable changes that will profoundly affect how civil rights are enforced in Mexico in the near to long-term future.

VI. Conclusion

T. H. Marshall depicted the development of liberal democracy in Great Britain as the product not of a necessary or logical historical process but rather as the result of the accumulation of contingent historical events, which in the case of that nation-state produced a rough sequence of citizenship rights characterized by first civil rights, then political, and lastly social.[48] More recently, authors such as Rose and Shin have referred to a diametrically opposed sequence of development (social or political rights *before* civil rights —"backwards democratization") that characterizes many third-wave democracies and explains why relatively free and fair elections are not enough to create liberal democracy.[49] Without the rule of law and one of its corollaries, *accountability*, this type of political regime can barely function much less thrive.

This work has compared the historical paths of Great Britain and Mexico to show that (a) citizenship rights developed in Mexico in a way diametrically opposed to how they developed in Great Britain; (b) that an alternate sequence does not necessarily prevent the development of liberal democracy; and (c) citizenship rights in Mexico were catalyzed by economic and security-related crises that deeply impacted society, triggered widespread opposition to the authorities, and led finally to the enforcement of already existing law.

At the risk of sounding over-optimistic, it is important to note that the general proposition I posited, namely, that the process of defining, changing and exercising of citizenship rights is dynamic rather than static, this should alert the reader that such a dynamic process cuts both ways. This means that although economic and security crises may have helped to trigger collective action for more inclusive enforcement of political, social and civil rights (as they have done, unevenly and not without setbacks but nonetheless effectively in Mexico since the 1980s), it would be naïve to rest on the laurels of achievements such as these to declare victory. Likewise, it would be morbid to wish for more negative shocks in Mexico to force the deepening and consolidations of such achievements by Mexican civil society over state power. Regardless of which party rules at any point in time in Mexico and wherever electoral

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Miguel Carbonell, La reforma constitucional en materia de derechos humanos: principales novedades, http://www.miguelcarbonell.com/articulos/novedades.shtml (last visited September 6, 2012).

[48] T. H. Marshall, *supra* note 7.

[49] Richard Rose & Doh Chull Shin, *Democratization Backwards: the Problem of Third Wave Democracies*, 2 British Journal of Political Science 331-354 (2001).

democracy is more or less effective at circling the elites that play the game of representative democracy, politicians will always try to prolong their stay in and enjoyment of power, money and influence. For this reason, citizenship rights are obstacles to them (when they operate effectively) which civil society has to continue cultivating and practicing. The fact that politicians dislike them give a strong signal that any civil society is doing a good job —organizing, questioning, and forcing change— as it continues sharpening through daily practice its check of power —*i.e.* holding it accountable. Without constant pressure by civil society for inclusive and effective enforcement, the government will always try to pull in the opposite direction.

This article has chronicled and analyzed recurrent the deep, broad and very painful economic and security-based shocks in Mexico (particularly between the 1982 economic crisis and the 2000s security and major violence crisis) that created the conditions that triggered the organization and exercise of pressures from above and below that forced a redefinition and better implementation of basic citizenship rights. A fundamental source of concern for anyone who believes in the limited and accountable rather than the unchecked and expansive exercise of power and authority in any contemporary society is if such pressures from above and below can be sustained in the absence of dramatic negative shocks. How a self-sustaining system where laws and norms are applied continuously and in a relatively equal, non-discretionary manner remains a question that has many empirical answers. In Mexico, organized civil society has shown that it can force the political class to change the definition and implementation of basic citizenship rights. Such an organized civil society has to show that it can do so not only in times of grave socio-economic and/or political crises, but permanently, as part of day-to-day social and political activity.

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REGULATORY CHALLENGES FOR PREVENTING FIREARMS SMUGGLING INTO MEXICO

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Abstract. *The recent surge in illegal firearms trafficking from the U.S. into Mexico has helped empower Mexican criminal groups to adopt highly confrontational strategies, contributing to a surge of violence throughout the country. This article addresses the regulatory asymmetries between Mexico and the U.S. with respect to the production, import, export, sales and possession of firearms. It reviews several important gun laws and explores why this asymmetry limits bilateral cooperation and encourages gray market activity. It also examines the autonomy of U.S. states to regulate firearms, as this creates a diverse regulatory map that complicates any effort to stem smuggling. The results are flourishing gray markets on one side of the border and violent criminal activity on the other.*

Key Words: *Organized criminal groups, regulation asymmetries, trafficking of firearms, gray markets*.

Resumen. *El tráfico ilegal de armas ha hecho posible que organizaciones criminales en México adopten estrategias más violentas y de mayor confrontación. Por lo tanto, contribuyendo al aumento en los niveles de violencia en todo el país. Este artículo aborda flujo ilegal de armas de Estados Unidos hacia México. Asimismo sugiere que la asimetría en las regulaciones de armas de fuego en ambos países limita su margen de acción a través de la cooperación bilateral. Se hace una revisión de las principales regulaciones con el propósito de facilitar una mejor comprensión de los retos que surgen a partir de estas asimetrías. La autonomía que posee cada estado en Estados Unidos para decidir sus propias regulaciones en materia de armas representa otro reto, ya que crea un mapa regulatorio amplio que necesita ser considerado para la creación de herramientas e instrumentos que ayuden a frenar el tráfico ilegal de armas. Además, estas*

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diferencias crean mercados grises que benefician las utilidades de la venta de armas en un lado de la frontera, mientras que fortalece a los grupos del crimen organizado en el otro.

Palabras clave: *Grupos del crimen organizado, regulaciones asimétricas, tráfico de armas, mercados grises*.

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I. Introduction

Since 2004, firearms trafficking into Mexico has added to the nation's rising violence. Most Mexico-based violence is attributable to organized criminal cartels. High-impact crimes in which these organizations engage, including homicide, kidnapping, extortion and armed robbery, have overwhelmed the capacity of Mexican law enforcement agencies. Since 2004, the percentage of crimes committed with firearms has grown steadily. In less than ten years, the percentage grew from 58 percent[1] during 2004 to 65 percent during 2012. It reached its highest peak during 2011, where 78 percent of crimes were committed with a firearm.[2]

The most common type of firearms found in Mexico are the AR-15 and the AK-47, both classified as assault weapons. Unsurprisingly, these are the main weapons used by criminal organizations.[3] The fact that a country with

[1] Instituto Ciudadano de Estudios sobre la Inseguridad (ICESI), Tercera Encuesta Nacional sobre Inseguridad 2005 (2005).

[2] Instituto Nacional de Estadística y Geografía (INEGI), Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública 2011 (2011).

[3] Colby Goodman & Michel Marizco, U.S. Firearms Trafficking to Mexico: New Data And Insights Illuminate Key Trends And Challenges, The Wilson Center 187 (2010) *available at* http://www.wilsoncenter.org/sites/default/files/Chapter%206-%20U.S.%20Firearms%20Trafficking%20to%20Mexico,%20New%20Data%20and%20Insights%20Illuminate%20Key%20Trends%20and%20Challenges.pdf.

highly-restrictive gun laws has high rates of violence in which most crimes involve the use of firearms raises important questions regarding the source of these weapons.

Although the illegality of firearms trafficking makes it difficult to measure, there have been several academic efforts to identify weapons sources. Studies published by diverse organizations including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) clearly place the United States as the main source of firearms trafficked illegally into Mexico.[4] Shirk, Muggah, McDougal and Patterson estimate that around 253,000 firearms are smuggled across the border each year.[5] The United States has one of the world's biggest firearms industry. Out of the 10 largest arms-producing companies in the world, 8 are U.S.-based.[6] Since the repeal of the Federal Assault Weapons Ban (FAWB) in 2004, American firearms manufacturers renewed their production of high-caliber weapons such as the AR-15 rifle. According to an ATF report, annual U.S. rifle production increased from 1.3 million[7] in 2004 to 3.1 million[8] in 2012.

As high-caliber firearms in the U.S. market became more available, confiscation rates by Mexican authorities also increased.[9] These weapons soon became the most common firearm type trafficked from the U.S. into Mexico.[10]

The United States has a different system to deal with gun laws than Mexico. While in the latter, all gun related laws and policies take place at the federal level, in the former, each state decides its own policies to regulate firearms with the exception of a few particular elements that are decided by federal law such as licensing and the oversight of gun dealers.[11] As a result, each state adopts different policies to regulate gun sales, trade, ownership and carrying. This creates different contexts that go beyond policy-making. It involves different cultures, backgrounds and opinions towards the same matter.

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[4] Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *International Firearms Trace Data Mexico 2008-2013* (2014) *available at* http://www.atf.gov/content/About/statistics.

[5] Topher McDougal, David A. Shirk, Robert Muggah & John H. Patterson, *The Way of the Gun: Estimating Firearms Trafficking Across the Border,* Trans-Border Institute 5 (2013) *available at* http://catcher.sandiego.edu/items/peacestudies/way_of_the_gun.pdf.

[6] Susan T. Jackson, *Arms Production and Military Services*, 2013 S.I.P.R.I. Y.B.

[7] *Annual Firearms Manufacturers and Export Report 2004,* Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

[8] *Annual Firearms Manufacturers and Export Report 2012,* Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

[9] Presidencia de la República, 2º Informe de Gobierno 2013-2014 (2014).

[10] Small Arms Survey, *Captured and Counted: Illict Weapons in Mexico and the Philipines*, Small Arms Survey 289-290 (2013) *available at http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2013.html.*

[11] Arkady Gerney, Chelsea Parson & Charles Posner, *America Under the Gun: a 50-State Analysis of Gun Violence and Its Link to Weak State Gun Laws,* Center for American Progress 27 (2013) *available at* http://cdn.americanprogress.org/wp-content/uploads/2013/04/AmericaUnderTheGun-4.pdf.

Despite much recent gun-related violence, efforts towards enacting stricter gun control laws have lacked support by a clear majority of Americans. As opposed to Mexico, where gun laws and regulations are highly restrictive, many Americans view their right to gun ownership as protected under the Second Amendment of the U.S. Constitution.

The two nations' diverse approaches have resulted in deep "regulatory asymmetry" and thriving gray markets at the U.S.-Mexico border. Unfortunately, this has increased criminal organizations' tendency to employ violence to protect and expand their markets, resulting in a dramatic rise of high-impact crimes.

This article analyzes both nations' contrasting legal frameworks in the hope of clarifying debate regarding how to stem cross-border weapons smuggling. Put differently, understanding how and why weapons cross the border can improve bilateral efforts to combat organized crime.

This article has been divided into five sections. Section I provides a general description of the firearms market and its contribution to rising violence in Mexico. Greater firepower has empowered criminals to become more confrontational towards government, and increased their use of violence and intimidation towards civilians.

Section II analyzes the types of firearms that are currently being smuggled into Mexico. Evidence suggests that most firearms smuggled into the country are classified as "Small Arms"; *e.g.*, AK47 and AR15, which may serve to focus efforts on these specific classifications.

Section III includes a study of firearms regulations and analyze their implications for Mexico. It examines international regulations, Mexican and U.S. gun laws making emphasis on Texas. As mentioned above, Mexican and U.S. firearms laws diverge widely. To exacerbate matters, international efforts have been scarce; the Arms Trade Treaty approved by the United Nations General Assembly in 2013 will come into force on December 2014. It represents a long-awaited first step towards unifying international efforts to tackle this deadly trade. Analysis of these regulations is provided in Section IV, which in turn leads to the conclusions presented in the final section.

II. Firearms Smuggling into Mexico

Not all firearms in Mexico are illegal or smuggled. As the next section explains, Mexico's Federal Law of Firearms and Explosives permits citizens to own certain types of guns, provided they are not classified for exclusive military use.[12] These include low-caliber pistols and hunting rifles. Since many

[12] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Articles 8, 9, 10, 11, Diario Oficial de la Federal [D.O.] Enero 23, 2004 (Mex).

types of firearms are prohibited, however, they are smuggled across the border for use by criminals.

Unconventional Weapons such as nuclear or biological weapons will not be analyzed in this paper as no evidence currently exists that suggests their use by Mexican cartels. Conventional Weapons, on the other hand, form an integral part of bilateral agreements, including the Merida Initiative.[13]

Arms trade experts debate whether Small Arms and Light Weapons should be considered Conventional Weapons. The truth is, there is no universally accepted definition of what constitutes a small arm. However, during the 1997 UN Panel of Governmental Experts,[14] there was a consensus on its distinctive characteristic: its portability, making it possible to be operated by a single person. These include handguns, revolvers, carbines, small machine guns and assault weapons.[15]

According to information gathered by the Small Arms Survey, 51 countries currently manufacture Light Weapons, of which the U.S. is the number one producer.[16] In addition to leading production, the U.S. is one of only three countries (also the U.K. and Switzerland) which allows ordinary citizens to purchase light weapons such as machine guns with relatively minimal restrictions.[17]

The Small Arms Survey offers some useful examples to help understand the difference between small arms and light weapons (see Table 1). In this paper, emphasis will be given to small arms and light weapons, as they are the weapons most commonly smuggled and used by criminal groups.

Table 1. Arms classified in the Small Arms and Light Weapons Categories

Small Arms	*Light Weapons*
Revolvers and Self-loading Pistols	Heavy Machine Guns
Rifles and Carbines	Hand-held under-barrel and mounted grenade launchers

[13] *See* Merida Initiative's First Pillar: Disrupting the Operational Capacity of Organized Crime as discussed by Clare R. Seelke & Kristin Finklea, *U.S.-Mexican Security The Merida Initiative and Beyond*, Congressional Research Service, 13 (2014) *available at* http://fas.org/sgp/crs/row/R41349.pdf.

[14] Small Arms Survey, *Definitions of Small Arms and Light Weapons*, Small Arms Suvery, *available at* http://www.smallarmssurvey.org/weapons-and-markets/definitions.html.

[15] Sarah Parker & Marcus Wilson, *A Diplomat's Guide to the UN Small Arms Process 2014*. Small Arms Survey, 14, 24 (2014) *available at* http://www.smallarmssurvey.org/fileadmin/docs/Q-Handbooks/HB-02-Diplo-Guide/SAS-HB02-Diplomats-Guide-UN-Small-Arms-Process.pdf.

[16] Small Arms Survey, *Light Weapons 2014*, Small Arms Survey, *available at* http://www.smallarmssurvey.org/weapons-and-markets/products/light-weapons.html.

[17] *Id.*

Small Arms	*Light Weapons*
Sub-Machine Guns	Portable anti-tank guns
Assault Rifles	Recoilless rifles
Light Machine Guns	Portable anti-tank missile launchers and rocket systems
	Mortars of calibers less than 75 mm

SOURCE: Small Arms Survey, Definition of Small Arms and Light Weapons.

Amongst arms classified in the small arms and light weapons category are the assault rifles. This term is used to refer to automatic and semiautomatic rifles. In the United States the inclusion of semiautomatic rifles as assault weapons in the Crime Bill of 1994,[18] formalized a categorization of assault weapons that many organizations still oppose.

Legislative attempts to reinstate the 2004 Federal Assault Weapons Ban continue to classify semiautomatics as assault weapons. In opposition, many organizations —including the Shooting Sports Foundation[19] and the National Rifles Association ("NRA")— argue that the assault weapon classification should not apply to semiautomatics but only to automatic firearms.

Although Mexican criminal cartels employ both small arms and light weapons, their frequency of use varies widely. The 2013 Small Arms Survey[20] suggests that about 80 percent of the illicit firearms recovered in Mexico between 2009 and 2013 were small arms; while the remaining 20 percent were mostly hand grenades and grenade launchers (classified as light weapons).

According to reports from Goodman and Marizco,[21] AR-15 and AK-47 rifles are the most common firearm smuggled into Mexico, followed by pistols, shotguns and revolvers, in that order. In sum, U.S.-Mexico arms traffickers favor semiautomatic rifles and pistols.

The Violence Policy Center, a Washington, D.C.-based NGO, reports that firearms used in Mexico include: Colt AR-15 (0.223-caliber assault rifle); AK-47 and its variants (7.62-caliber assault rifle); FN 5.57-caliber pistol, better known in Mexico as the "*Mata Policías*" (Kill Police); and the Barrett 50-caliber rifle. According to the Mexican Federal Police, 4,300 AK-47s, AR-

[18] A subsection of the Violent Crime Control and Law Enforcement Act of 1994 - also called the "Crime Bill." The U.S. law banned the manufacture and transfer of certain newly-manufactured semi-automatic firearms and ammunition feeding devices (magazines).

[19] An illustration of the distinction between these types of firearms is available at: http://www.nssf.org/factsheets/semi-auto.cfm.

[20] *See* Matt Schroeder, Captured and Counted Illicit Weapons in Mexico and the Philippines, SMALL ARMS SURVEY 1-2 (2013), *available at* http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/sp/Small-Arms-Survey-2013-Chapter-12-summary-SP.pdf.

[21] Goodman & Marizco, *supra* note 3, at 187.

15s and 9mm pistols were confiscated between 2007 and 2012,[22] comprising over 25 percent of total firearms recovered by this agency.

Firearms recovered through the controversial program "Fast and Furious,"[23] which involved over 2,000 weapons, including AR-15 and AK-47 rifles. An investigative report by the Department of Justice's Office of the Inspector General found that law enforcement officials created a significant danger to public safety under this operation by allowing weapons to go to the streets and cross the border for the sake of constructing their investigation.[24] The public safety threat became real when U.S. Customs and Border Protection Agent Brian Terry was shot and killed with a firearm linked to the Fast and Furious Operation.[25]

It is worth mentioning that semiautomatic weapons are not the only problem faced by Mexican authorities. Mexico's army regularly confiscates high-caliber 0.50 rifles capable of shooting down helicopters. Hand grenades also pose a significant risk. According to EGAP *Gobierno y Política Pública*, 19 out of 32 Mexican states reported at least one grenade attack in 2010.[26]

Aside from small arms and light weapons, conventional weapons also include armored combat vehicles, combat helicopters, combat aircraft, warships, small arms and light weapons, landmines, cluster munitions, ammunition and artillery.[27] Though regularly used by military forces, they have been rarely used by criminal groups. The overriding concern for these weapons is adequate protection and proper handling by government agencies. Unconventional weapons, which include weapons of mass destruction, are currently a minor concern as no cases have yet been reported of the production or trafficking of these weapons.

Light weapons, on the other hand, are a major concern, as they have been used frequently by Mexican cartels. Hand grenades used in Michoacán against the civil population in a 2008 Independence Day celebration illustrate why

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[22] This information was obtained through a request made to the *Instituto Federal de Acceso a la Informacion* (IFAI).

[23] Fast and Furious was a failed gun investigation carried out by the ATF involving many firearms permitted to cross into Mexico in order to allegedly investigate how firearms flow into the hands of criminal groups.

[24] *ATF's Fast and Furious Scandal,* Los Angeles Times, (Los Angeles) June 20, 2012, *available at* http://www.latimes.com/news/nationworld/nation/atf-fast-furious-sg,0,3828090.storygallery#axzz2rCHjZ9xm.

[25] Oversight and Review Division, *A Review of ATF's Operation Fast and Furious and Related Matters,* Office Of The Inspector General 289-295 (2012), *available at* http://s3.documentcloud.org/documents/435443/fast-and-furious-oig-report.pdf.

[26] Tecnológico de Monterrey, Informe de Avances sobre el Pronunciamiento y las Propuestas del Tecnológico de Monterrey para Mejorar la Seguridad en México (2012).

[27] International Peace Bureau, *Weapons and their Impacts on Communities: Conventional Weapons* (Oct, 2, 2014) *available at* http://www.ipb.org/web/index.php?mostra=content&menu= Weapons%20and%20their%20impacts%20on%20communities&submenu=Conventional%20Weapons.

these weapons pose a major risk. This said, small arms such as semiautomatic AR-15s, AK-47 rifles and 9mm pistols pose the biggest challenge to Mexican authorities. As explained below, the presence of these weapons increased significantly in Mexico after the repeal of the Federal Assault Weapons Ban.

The fact that semiautomatic Small Arms are the most commonly smuggled and used weapon in Mexico should be enough evidence to develop a more comprehensive study of this category and how it shapes the illicit trafficking of firearms that is taking place across the border.

III. Firearm Regulations: Small Arms

This section will first address international regulations regarding small arms and analyze their implications for Mexico. We also examine current U.S. and Mexican regulations for semiautomatic firearms, with special emphasis on Texas, as this is the U.S. jurisdiction from which most illegal firearms originate.[28]

1. *Firearms and International Regulations*

The UN adopted the Arms Trade Treaty (ATT) as a landmark agreement to regulate international trade in conventional arms. As of October 2014, it has been signed by 121 countries and ratified by 53. It is scheduled to come into force on December 24, 2014.[29]

The treaty's objective is to establish strict international norms to better regulate the trade of conventional arms. With this objective, it intends "to reduce the illegal flow of conventional weapons in order to contribute to peace, reduce human suffering and promote international cooperation."

The ATT is meant to serve as a multilateral agreement to regulate exports, imports, transit, transshipment and brokering of weapons at an international level. It establishes common standards for the authorization of international conventional weapons transfers between nations.[30] One example is its prohibition of weapons shipments that will knowingly be used to commit genocide, crimes against humanity, breaches of the 1949 Geneva Convention, attacks against civilians, or any other war crime pursuant to international agreements to which it is a signatory.[31]

The ATT also requires arms shippers to keep records of exports and imports for a minimum of ten years, as well transportation of weapons within

[28] Goodman & Marizco, *supra* note 3, at 187.

[29] U.N. Arms Trade Treaty, Article 22.

[30] U.N. Arms Trade Treaty, Article 1.

[31] U.N. Arms Trade Treaty, Article 6.

each market.[32] Despite these requirements, parties are not obliged to keep records of weapons produced within their own territory, including the manufacture of tanks, helicopters, light weapons, small arms and other conventional categories.

The ATT defines brokering —a key component of the weapons trade— as "the action of acting as an agent for others in negotiations, sales, purchases or contract in return for a commission." It stipulates that "each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2. Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering." Given the significant role played by brokers, and the relative freedom for each individual state to regulate them, the ATT leaves room for the creation of tremendous loopholes, making the regulation of both legal and illegal arms brokering virtually impossible.

It is fairly clear that the ATT alone will not have a major impact on arms smuggling into Mexico. The reality is that it fails to address in-country production (*i.e.*, goods sold legally in the producer's country but not in others) which seriously undermines its purpose.

In order to address gray markets that thrive on their shared border, Mexico and the U.S. have signed several agreements, most in relation to drugs and narcotics.[33] However, no bilateral treaty or agreement existed intended to reduce arms smuggling.[34] Agreements such as the Merida Initiative were enacted to dismantle criminal cartels, relegating arms smuggling to a minor role within a much broader strategy. For this reason, current agreements can be improved by exploring alternative ways to achieve bilateral cooperation to address firearm trafficking.

2. *Regulations in Mexico*

One major difference between gun laws in Mexico and the U.S. is the relative autonomy of each state. Mexican gun laws are enacted at a federal level; individual states within the federation have very little control. On the other hand, U.S. federal law has limited reach; under the U.S. Constitution, primary jurisdiction for firearms control belongs to the states.

Comparatively speaking, the Mexican Constitution and the Federal Firearms and Explosives Law (*Ley Federal de Armas de Fuego y Explosivos,* "LAFE") are much more restrictive than U.S. law. Pursuant to the LAFE, all Mexican nationals who purchase a legal firearm must register it first in the Federal Firearm Registry *(Registro Federal de Armas),* which serves as a national firearm

[32] U.N. Arms Trade Treaty, Article 12.

[33] United States Department of State. *Treaties in Force: A List of Treaties And Other International Agreements of the United States in Force on January 1, 2014* 189-198 (2014) *available at* http://www.state.gov/documents/organization/218912.pdf.

[34] *Id.*

database. The Federal Firearm Registry is managed by the National Defense Ministry (*Secretaría de Defensa Nacional*, "SEDENA") and shared with federal and local police institutions for intelligence gathering and other law enforcement activities.[35]

In Mexico, states and municipalities do not enact arms control laws; they are mostly involved in the implementation of programs designed to reduce illegal possession. In addition to the difference of how gun laws are made, Mexico and the United States also differ on how they regulate gun ownership. In Mexico, the type of firearms allowed to be owned by citizens is much more limited. Several types of small arms are reserved exclusively for military use.[36]

The Mexican executive branch has the exclusive faculty to authorize the establishment of firearm factories and business. SEDENA is responsible for the monitoring and management of activities and industrial operation that involve firearms, ammunitions, explosives and chemical substances.[37]

LAFE also regulates the transport and carry of firearms. The law defines "transport" as firearms use by law enforcement personnel such as police officers or private security agents. "Carry" refers to use by private owners who must register their weapons with the SEDENA and show the following: 1) they make a legitimate living; 2) they do not have a criminal record; 3) they do not consume drugs or have a record of drug consumption; 4) they demonstrate mental and physical capacity to handle firearms; 5) they have served in the military; and 6) they demonstrate a legitimate need based on job or special living circumstances.[38]

LAFE also regulates the weapons trade, including sanctions for noncompliance. Pursuant to Article 84, any individual who attempts to introduce into Mexican territory firearms, ammunitions or explosives reserved exclusively for military use face between 5 to 30 years in prison. Public officials found

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[35] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 2 and 7, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

[36] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 11, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

Including: Revolvers .357 caliber Magnum and any above .38 Special. 9 mm caliber pistols Parabellum, Luger and similar, 38 Super and Commando and all higher caliber pistols. .223, 7 mm, 7.62 mm caliber rifles, muskets and carbines; and all models of .30 caliber carbines. Pistols, carbines and guns with a burst system; sub-machineguns and machineguns of all calibers. Shotguns with a canon inferior to 635 mm; shotguns with caliber 12 (0.729 or 18. 5 mm) Ammunition for all the above firearms All categories of conventional and light weapons and their ammunition.

[37] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 37, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

[38] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 26 , Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

guilty of this violation receive the same sentence and are dismissed from their duties.[39] If the violator is a foreign resident, the jail sentence may be commuted to an administrative fine if it's a first offenders; or 3 to 10 years in prison for second offenders.[40]

There have been several cases involving arms trafficking by US Citizens. In 2011, The DEA and the ATF with cooperation from local authorities of New Mexico arrested a firearm smuggling ring in involving the Police Chief, Mayor and Village Trustee of Columbus, New Mexico. They were indicted in a federal firearms trafficking case for smuggling around 200 firearms, mostly AK-47, into Mexico between January 2010 and March 2011.[41]

Mexican authorities have also arrested US citizens that have attempted to traffic firearms in the border. One case is that of Marine Sergeant Tahmooressi, who crossed the border into Tijuana with high-caliber weapons and ammunitions. The case gained international attention since he allegedly entered Mexico without realizing it. Tahmooressi is currently awaiting trial under arms trafficking charges.[42]

3. *Regulations in the United States and Texas*

In the U.S., firearm regulations are driven by the Second Amendment of the Bill of Rights. This amendment literally states: "A well-regulated Militia, being necessary to the security of a Free State, the right of the people to keep and bear Arms, shall not be infringed."

The interpretation of the Second Amendment has been subject to debate by diverse parties and coalitions. For some, it creates an individual constitutional right for citizens of the United States. This individual right approach is based on the second part of the Amendment that reads "the right of the people to keep and bear Arms."[43] Under this approach, the Amendment implies that prohibition and restrictive regulation of firearms is unconstitutional.

Others have a different interpretation based on the first part of the Amendment. "A well regulated Militia" is then interpreted not as an individual but as a collective right. Under this approach the Second Amendment refers to

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[39] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 84 , Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

[40] *Id.*

[41] Diana Apocada, *Police Chief, Mayor and Village Trustee of Colombus New Mexico Indicted in Federal Firearms Trafficking Case*, Drug Enforcement Administration, (Sept. 11, 2014), *available at* http://www.justice.gov/dea/divisions/elp/2011/elp031011.html.

[42] Sandra Dibble, *U.S. House Hearing Scheduled for Tahmooressi*, UT San Diego (Sept. 3, 2014), *available at* http://www.utsandiego.com/news/2014/sep/12/marine-andrew-tahmooressi-house-representatives.

[43] Legal Information Institute, *Second Amendment,* Cornell University Law School, (Sept. 3, 2014), *available at* http://www.law.cornell.edu/wex/second_amendment.

"the collective right of each state, and not an individual right to bear arms for citizens." In other words, the forces and authorities designated by each individual state, such as the police, are the only individuals protected by this amendment.[44]

Most organizations, however, do not share the collective right interpretation, in particular the National Rifle Association (NRA), which has considerable influence in promoting its own interpretation. Its arguments entail a vision of the Bill of Rights as a set of individual rights, including freedom of religion and speech.

The widely divergent views about the 2nd Amendment held by different groups from the public and private sector in the U.S., creates a scenario in which institutions, political parties, associations and individuals actively promote their own positions creating a vigorous ongoing debate about firearms regulation.

Until 2008, District of Columbia law banned handgun possession, making it a crime to carry an unregistered firearm and prohibiting the registration of handguns. Also, it required that all legally-owned firearms be kept unloaded, dissembled or bound by a trigger lock or similar device.[45] In 2008 the case District of Columbia et al vs. Heller[46] set a revision to the DC gun law as it held that this proposed legislation violated U.S. citizens' rights under the Second Amendment.

Supreme Court Justice Antonin Scalia, who formed part of the majority in Heller vs. DC, referred to the Second Amendment as a Law with limits.[47] Given the opinion of Supreme Court Justice Antonin Scalia, and the ongoing arguments presented by gun control advocates, regulations to firearms can still be legislated.

The Gun Control Act of 1968 regulates federal laws regarding the manufacture, purchase, sales and possession of firearms in the U.S. In terms of manufacturing, any person may produce firearms as long as they possess a proper license under the provision of this Act. The ATF is responsible for granting licenses to individuals who meet these requirements.

In 1994, the U.S. passed the Violent Crime and Law Enforcement Act in response to several violent incidents involving firearms, including the 101 California Street shooting in 1994.[48] With exceptions, the Act prohibits indi-

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[44] Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

[45] Legal Information Institute, *District Of Columbia V. Heller (No. 07-290),* CORNELL UNIVERSITY LAW SCHOOL, , (Sept. 3, 2014), http://www.law.cornell.edu/supct/html/07-290.ZS.html.

[46] District of Columbia et al. v. Heller 128 S. Ct. 2783 (2008).

[47] Thomas M. Defrank, *Supreme Court Justice Antonin Scalia said that the right to bear arms is not unlimited, and noted that future limitations will have to be decided in future cases.* NY DAILY NEWS, (Sept. 3, 2014), *available at* http://www.nydailynews.com/news/politics/supreme-court-justice-antonin-scalia-bear-arms-unlimited-noted-future-limitations-decided-future-cases-article-1.1124408.

[48] It consists of 33 chapters; title 11 - which regulates Assault Weapons - is a modification of title 18, section 922 of the U.S. code.

viduals from manufacturing, transferring or possessing semiautomatic assault weapons.

Before 1993, it was legal to transfer or possess assault weapons.[49] The Act brought with it a Federal Assault Weapon Ban. It was only effective for 10 years, which meant that in 2004, restrictions on their manufacture, transfer and possession ended. Although several attempts[50] were made to retain the ban during George W. Bush's administration (2000-2008), they were largely unsuccessful.[51] As of 2004, it became legal to manufacture high-power assault weapons such as the AR-15 rifle and 9mm pistols with higher magazine capacity.

The term "assault weapon" is interpreted in widely-divergent ways, depending on one's views regarding firearm possession. For some politicians such as Jerry Patterson of Texas, semiautomatic firearms should not be considered assault weapons.[52]

Dube, Dube and Garcia-Ponce[53] show that the repeal of the Assault Weapons Ban in 2004 was followed by an increase in executions and violence in Mexican municipalities along the border with California. On the other side of the border, California has one of the most restrictive regulations of the country. This is also true when compared to other border states. Texas, Arizona and New Mexico are considered amongst the most lax states in terms of gun regulations.

California passed a gun control bill to ban assault weapons in September 2013. Thus, making it illegal to sell or purchase firearms defined as "assault weapons." This bill was drafted as a response to the tragic events such as Sandy Hook, the Sikh Temple in Wisconsin and the movie theater killing in Colorado. Prior to this bill, California already banned rifles with large-capac-

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[49] 1) Colt AR-15 prototype, 2) Poly Technologies Avtomat Kalashnikovs (all models), 3) Action Arms Israeli Military Industries UZI and Galil, 4) Beretta Ar70 (Sc-70), 5) Fabrique National Fn/Fal, FN/Lar and FNC, 6) Grenade launchers, 7) SWD M-10, M-11, M-11/9, and M-12, 8) Steyr AUG, 9) INTRATEC TEC-9, TEC-DC9 and TEC-22, 10) Revolving Cylinder shotguns such as the Street Sweeper and Striker 12.

Pistols with two of the following features are also banned: 1) An ammunition magazine that attaches to the pistol outside of the pistol grip, 2) A threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer, 3) A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned.

[50] The most recent attempt to pass this bill occurred when Senator Diane Feinstein from California submitted it for a vote in 2013. The Senate voted it down by a 60-40 margin.

[51] There was a dismissal of the ban by house majority leader Tom Delay. Juan A. Lozano, *Tom DeLay Sentenced to 3 Years In prison.* Huffington Post, October 1, 2011, *available at* http://www.huffingtonpost.com/2011/01/10/tom-delay-sentenced-to-th_n_806951.html.

[52] Interview with former State Senator Jerry Patterson of Texas in Austin, in Austin Texas (Sept. 25, 2013).

[53] Arindrajit Dube, Oeindrila Dube and Omar Garcia Ponce, *Cross-Border Spillover: US Gun Laws and Violence in Mexico,* 107 American Politican Science Association 3, 397-417 (2013).

ity magazines which cannot be removed. However, the new bill added semiautomatic weapons with removable large-capacity magazines to the ban.

The ATF is responsible for granting Federal Firearm Licenses (FFL) that allow private owners or companies to import, produce or sell firearms pursuant to the 1968 Firearms Act.[54] The ATF also grants licenses to pawnbrokers,[55] who accept firearms in exchange for money in the same way that they take other goods such as televisions and furniture.

In 1989, former President George H. W. Bush issued an executive order to halt the importation of nearly all semiautomatic rifles.[56] The executive order followed a mass shooting in California in which five children were killed and 29 others were wounded. Although this ban affected weapons such as the AK-47, it did not restrict the manufacture of assault weapons in the U.S. or any previously acquired.[57] Not much later, President William Clinton issued an executive order to update and tighten the ban with additional enforcement. This law, however, was not enforced during George W. Bush administration (2000-2008).[58]

In spite of efforts to increase the ban's enforcement, assault weapons are still frequently imported as a result of legal loopholes that can classify them as sporting rifles. As Boggs and Rand argue,[59] firearms brokers have succeeded in using this classification to import assault rifles as sporting weapons. During April 2014, House Democrats urged President Obama to use his executive power to push for further enforcement of the ban.[60]

With regard to the sale of firearms, the federal government requires all FFLs to run background checks on its customers. This procedure is operated by the Federal Bureau of Investigation (FBI) through the National Instant Criminal Background Check System (NICS). Its main objective is to "de-

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[54] Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Federal Firearms Regulations Reference Guide 46 2005* (2005) *available at* http://www.google.com.mx/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.atf.gov%2Ffiles%2Fpublications%2Fdownload%2Fp%2Fatf-p-5300-4.pdf&ei=v5BGVI7lONiTgwSQIDYAw&usg=AFQjCNEGI90lMUITE7lP-W2FWk9lOWndNg&bvm=bv.77880786,d.eXY.

[55] *Id.*

[56] Department of the Treasury, Study *on The Sporting Suitability of Modified Semiautomatic Assault Rifles* (1998) *available at* https://www.atf.gov/files/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf.

[57] Susan Rasky, *Import Ban on Assault Rifles Becomes Permanent,* New York Times, July 8, 1989, *available at* http://www.nytimes.com/1989/07/08/us/import-ban-on-assault-rifles-becomes-permanent.html.

[58] Clay Boggs and & Kristen Rand, *Fully Enforce the Ban on Imported Assault Weapons*, Washington Office On Latin America W.O.L.A. (2013) *available at* http://www.wola.org/commentary/fully_enforce_the_ban_on_imported_assault_weapons.

[59] *Id.*

[60] Dan Friedman, *House Democrats Push Obama to Restore Import Ban on Miltary Style Guns,* New York Daily News, April 10, 2014, *available at* http://www.nydailynews.com/news/politics/house-democrats-push-obama-restore-gun-import-ban-article-1.1751704.

tect prior criminal records, drug abuse, home violence and other concerns which could endanger society or the individual itself." Nevertheless, there has been concern about its effectiveness from keeping weapons out of criminals' hands, as many individuals with a history of dangerous behavior can still pass background checks. One of this cases, is the shooting in Navy Yard in Washington DC during 2013, where Aaron Alexis shot 12 people and injured 3 others with a legally purchased firearm.[61]

In April 2013, a bill to place additional restrictions on firearms was introduced by Joe Manchin (D-WV) and Pat Toomey (R-PA).[62] This legislation required background checks on all sales, including those by private sellers and at gun shows. On April 17, 2013, the amendment garnered 54 votes, falling 4 votes short of the minimum required to move forward.

One major loophole in this system is that private individuals can sell their own firearms to buyers without first running a background check. Firearms may also be sold at gun shows and online, as background checks are not required for these settings either. This is known as the Gun Show Loophole, as opposed to purchases made from FFL dealers. Jonathan Lowy from the Brady Campaign cites this as a major concern, since buyers can acquire firearms "in bulk" and later resell them for a profit.[63]

Loopholes also exist in other commercial firearm transactions.[64] Even though FFL dealers are required to run background checks at Gun Shows, they often skip this procedure due to a lack of supervision.

Firearm regulations also prohibit the purchase of firearms on behalf of third parties. This is known colloquially as "Straw Purchasers", individuals who sell their legal right to purchase a firearm to other individuals, usually brokers. Federal law prohibits straw purchases by sanctioning materially false statements made to FFL's. Pursuant to this provision, sanctions will be applied to any individual who: "Knowingly makes any false statement or representation with respect to the information required by Federal Firearms Law to be kept in the records of a person licensed under Federal Firearms Law or in applying for any license or exemption or relief from disability under the provisions of Federal Firearms Law."

These false statements or representations are punishable by a fine of up to $250,000 and up to 10 years in prison. Any deliberate sale of a firearm by a FFL to a straw purchaser represents a violation of the federal firearms law,

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[61] Josh Horwitz, *Expanding Background Checks Necessary, But not Enough.*, Huffington Post, July 1st, 2014, *available at* http://www.huffingtonpost.com/josh-horwitz/expanding-background-chec_b_4554161.html.

[62] Manchin-Toomey Ammendment.

[63] Interview with Jonathan Lowy, Director of Legal Action Project, Brady Center to Prevent Gun Violence, in Washington, D.C. (January, 2013).

[64] *See* Governing, Gun Show Background Checks State Laws, (2012) *available at* http://www.governing.com/gov-data/safety-justice/gun-show-firearms-bankground-checks-state-laws-map.html.

which prohibits gun owners from selling firearms to any individual whom they know or have reason to know is a criminal or other prohibited buyer.

During March 2013, another bill was introduced and sponsored by Patrick Leahy (D-VT) called the S.54 "Stop Illegal Trafficking in Firearms Act of 2013." This bill amends the federal criminal code to prohibit any individual, other than a licensed firearms importer, manufacturer, collector or licensed dealer, from knowingly purchasing a firearm for any individual who they know or have reasonable cause to believe may not meet the criteria for possessing a firearm.

It also directs the U.S. Sentencing Commission to review and amend its guidelines and policy statements to ensure that individuals convicted of offenses involving straw purchases of firearms and firearms trafficking are subject to increased penalties. If an individual was convicted of affiliation with a gang, cartel, or organized crime, he will be automatically subject to increased penalties.

No clear and effective federal statute makes gun trafficking a federal crime.[65] However, the U.S. has implemented some efforts to avoid gun trafficking into Mexico. It has created several programs with the objective of detecting possible firearm crossing points into Mexico. Much attention has been paid to southbound checkpoints; they serve as cross-border detention areas where officials implement random inspections to detect unlawful shipments of firearms and cash. Despite these efforts, there has been little gain, as U.S. priorities in the border remain terrorism, migration and drug trafficking.

Among southern U.S. border states, gun laws differ significantly. While some states strictly regulate monthly firearm purchases, others allow unlimited acquisitions. California, for example, permits the purchase of one handgun per month, while Arizona, Texas and New Mexico have no purchase restrictions.

According to the Brady Campaign Index,[66] California is the border state with the strictest gun laws, while New Mexico and Arizona are the most permissive. Although Texas is a bit more restrictive than its neighbors, it still remains more permissive than states such as California or New York.

Despite the fact that Texas state law requires purchasers to show a valid state ID and pass background checks, it does not require registration or waiting periods. Firearms owners may carry guns in their vehicles and, if they have licenses, carry concealed weapons. They are also entitled to carry firearms (without the need for a license) on their own property. At the same

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[65] Law Center to Prevent Gun Violence, Gun Trafficking & Straw Purchases Policy Summary, *available at* (2013) http://smartgunlaws.org/gun-trafficking-straw-purchasing-policy-summary/.

[66] Brady Campaign, 2011 Brady Campaign State Scorecard, (2011) *available at* http://www.bradycampaign.org/sites/default/files/2011%20Final%20state%20scoresA3-2%20Sheet1.pdf.

time, landholders are free to restrict firearm use on their own property as they see fit.

Overall, the state of Texas follows federal regulations that permit the production, importation, sales and possession of semiautomatic firearms such as the AR-15, AK-47 and 9mm pistol. It has certain restrictions on where these firearms may be used (e.g., shooting ranges, sporting events, and on private property for self-defense).

4. *Implications*

Legal asymmetry between Mexico and the U.S. has systematically obstructed efforts to stem the illegal flow of weapons across the border. The nations' gun regulations differ in nearly every respect, from production to possession. For this reason, collaboration aimed at reducing firearms smuggling is a complex and difficult task.

Table 2 summarizes key legal differences for the production, importation, exportation, sales and possession of the firearms mentioned above. It summarizes the differences in Mexican and U.S. law, addressing key components at each level:

TABLE 2. REGULATION OF SEMIAUTOMATIC FIREARMS

	Production	*Import*	*Export*	*Sales*	*Possession*
International (ATT Treaty)[67]	Neither prohibited nor regulated by international laws. Subject solely to national legislation.	Importations should be reported and records kept for a minimum of ten years.	Exports should be reported and record kept for a minimum of ten years. Exports prohibited in case of knowledge that firearms will be abused.	No limitation on domestic sales within nations. Brokers must be registered.	No restrictions on national law regarding possession.
Mexico[68]	Only by SEDENA and used by military or security institutions.	Import prohibition for ordinary citizens or private companies.	There are no exports.	No legal brokers operate in Mexico. Sales are prohibited, except by SEDENA.	Solely by military and police forces.

[67] U.N. Arms Trade Treaty.

[68] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

	Production	*Import*	*Export*	*Sales*	*Possession*
USA Federal Laws[69]	Production limited to ATF-licensed companies.	Importation allowed to ATF-licensed individuals and companies.	Exportation allowed provided it is reported to the ATF.	Firearms sales allowed under federal law, but FFL dealers must run background checks. This is not required for online sales and gun shows.	Regulated by each state.
Texas Laws[70]	Production limited to ATF-licensed companies.	Importation allowed to ATF-licensed individuals and companies.	States cannot export.	No limit on the number of firearm purchased. Must prove residency and pass background check.	No limit on the number owned by a particular individual.

SOURCE: Authors' elaboration.

In this complex scenario Mexico faces two main challenges. The first challenge is that in order to push the issue of illegal trafficking in the bilateral agenda with the U.S., it must consider the significant role played by American States. Even though the U.S. has federal firearms laws, individual states have primary jurisdiction within their territory over gun laws. This explains the difference between California, which has its own Assault Weapons Ban, and is a relatively small source of firearms trafficked into Mexico; and Texas, where gun regulations are widely opposed, and has become the source of about 50 percent of all illegal firearms confiscated in Mexico and traced back to the U.S.

The second challenge goes beyond regulations, and involves each nation's willingness and ability to cooperate. On the one hand, Mexico has been overly protective of its sovereignty throughout its history as an independent nation… and not without justification. This said, security cooperation has recently become a vital part of the bilateral agenda. As a result, closer cooperation between institutions like SEDENA and its northern counterparts has been characterized by mutual mistrust. On the other hand, the U.S. perspective on firearms is unlikely to change —despite tragedies such as Sandy Hook. U.S. citizens' right to own and carry firearms is as culturally significant as Mexicans' sense of sovereignty.

[69] Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Federal Firearms Regulations Reference Guide 46 2005* (2005) *available at* http://www.google.com.mx/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.atf.gov%2Ffiles%2Fpublications%2Fdownload%2Fp%2Fatf-p-5300-4.pdf&ei=v5BGVI7lONiTgwSQIDYAw&usg=AFQjCNEGI90lMUITE7lP-W2FWk9lOWndNg&bvm=bv.77880786,d.eXY.

[70] Gun Laws in Texas , http://gunlawsintexas.com/ (Last visited Sep. 28, 2014).

IV. Conclusions

As higher caliber weapons became more available in the United States after the removal of the FAWB, semiautomatic rifles such as the AR-15 and AK-47 became the most popular type of firearm smuggled into Mexico. Unsurprisingly, they are the weapons of choice of criminal organizations.

The asymmetry of Mexican versus U.S. gun laws has encouraged the development of significant gray markets throughout the border region. The U.S.-Mexico border, like many international crossings, has a long and tumultuous history of smuggling, including drugs, money and firearms. Recent U.S. policy shifts, including the removal of the AWB in 2004, have helped increase the smuggling of higher-caliber firearms into Mexico. These weapons are used regularly by criminal cartels to commit homicide, threaten authorities, intimidate civilians and commit high-impact crimes such as robbery, kidnapping and extortion.

Despite efforts to regulate firearms at an international level (*e.g.*, the Arms Trade Treaty), there has been a general lack of consensus among participating nations to ratify and implement meaningful regulations. Moreover, while the proposed treaty addresses important issues, it still leaves out key concerns, including the proliferation of cross-border gray markets. In order to succeed, each nation must be fully committed to monitoring firearms brokers and sales.

While U.S. states have primary jurisdiction within their territory over gun laws, southern border states need to give special consideration to the fact that they directly impact the behavior of firearm trafficking in their border with Mexico. Their interpretation of the 2nd Amendment, and the protection of their right to bear arms, should also consider the gray markets it creates and how they impact violence on the other side of the border. In the battle of freedom vs. responsibility regarding firearm regulations, American states struggle to implement measures to avoid illegal trafficking within the United States and to Mexico.

The diversity of stakeholders and state gun laws throughout the border creates a very complex scenario in which actors have contrasting interests and concerns. In this context, the scope of bi-national cooperation to address the illegal traffic of firearms seems to be too broad to be able to effectively deal with the sharp asymmetries.

Mexico can recur to its current bi-national strategy under Merida Initiative, it can rely on the good intentions of the ATT, or it can turn to its own capacity to stop firearms from crossing the border. Whichever the means, it is important to consider that addressing the traffic of firearms is going to impact Mexican criminal group's access to these weapons.

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THE BEST INTERESTS OF THE MINOR AS A PRINCIPLE OF INTERPRETATION IN MEXICAN CIVIL LAW

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Abstract. *From a doctrinal perspective and based on a case study, this article analyzes the way in which the best interests of the minor has become an important principle of interpretation in Mexico's legal life. This is observed in the evaluation of different situations in which the federal Judicial Branch has resolved conflicts dealing with fundamental rights, taking into account family law-related issues. Moreover, there are important cases that neither the state nor local courts have resolved as they specifically deal with the protection of minors in the printed media. Therefore, as of the constitutionalization of Civil Law, the traditional form of this particular branch of law has been revised, considering the rescue of the person and in compliance with the international treaties that Mexico has signed, as a form of legal argument.*

Key Words: *Best interests of the minor, family law, weighting, personality rights of minors, a child's right to identity.*

Resumen. *El presente artículo analiza de forma doctrinal y a partir de un estudio de casos la forma en que el interés superior del menor entra como un principio interpretativo importante a la vida jurídica mexicana a través de la va-*

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loración de distintas situaciones donde el Poder Judicial de la Federación ha dado solución a conflictos de derechos fundamentales, considerando temas propios de derecho de familia. Además, existen casos relevantes que ni los Tribunales Locales ni Estatales han resuelto como es precisamente la protección del menor en los medios de comunicación impresa. Es así que a partir de la "constitucionalización" del Derecho Civil se ha reconsiderado el Derecho Civil tradicional, en función del rescate de la persona y en cumplimiento de los tratados internacionales que ha suscrito México, como un camino de argumentación jurídica.

Palabras clave: *Interés superior del menor, derecho de familia, ponderación, derechos de la personalidad de los menores, derecho a la identidad del menor.*

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I. Introduction

The constitutional scope of the best interests of the minor as part of Mexico's constitutional provisions was incorporated at the beginning of the 21st century. This has been yet another sign of rekindling Mexican law after the completely positivist tendency the law adhered to during most of the 20th century. The significance of this study goes beyond a philosophical analysis since the rescue of the *pro homine* principle in the structure of rights has become much more apparent in the structure of the Mexican legal system.

The above seems to disrupt traditional civil law, which according to Mexican theory was asset-based and dogmatic to an extreme. Thus, the freedom of choice was limited by social interests while the family hierarchy would fall apart in the face of the interest of the weakest, and especially in the case of children, the so-called minors.

This work starts from the hypothesis that the principle of the best interests of the child, as part of family law, has the distinction of being a fundamental essential right, which is also called a "hard law" in the theory of fundamental rights. The reason for this is that this principle is found within the generic wording of the values established in the current Mexican legal system, the function of which is not only that of filling in loopholes, but also that of assisting in the interpretation and weighting of fundamental rights.

In this article, a brief study is made of the weighting performed in international treaties regarding any possible conflict with other rights. In the case of freedom of expression, related conflicts are apparently solved by some Mexican laws. However, flagrant violations appear in the media, especially in southern Mexico, in terms of identifying child victims through images, names and addresses. Minor detainees who have yet to stand trial are also identified in the same way, thus contributing to a violation of the presumption of innocence. From our point of view, this is a very socially sensitive issue as it is a

form of generating even more psychological and social violence in a country already steeped in violence. The importance of the freedom of expression must be tied in with social responsibility, without implying a limitation on this right because caring for a country's children is the main social responsibility of professionals and of society in general.

The general objective of this work is to explain how the best interests of the minor has inserted itself as an important principle of interpretation in Mexico's legal life by examining various situations in which the Federal Judicial Branch has ruled on conflicts between fundamental rights. However, there are extremely difficult cases that neither the State nor local courts have been able to resolve as said cases deal specifically with the protection of minors in the media. This issue forms part of an applied research project on the protection of minors' right to personality in the printed media carried out in the State of Tabasco.

Therefore, this work aims to show that Mexican law has revised its traditional civil law based on the rescue of the person and in compliance with the international treaties Mexico has entered into, breaking with the radical positivism in judicial and legislative spheres which has undoubtedly affected Mexican society in solving conflicts of a social and political nature.

II. The Principles of Interpretation in Mexican Civil Law: From Interpretation to Argumentation

The concept of general principles[1] of law has varied in different national legal systems depending on the philosophical current on which each political, social and legal organization bases its theory of the law. In terms of doctrine, two ideologies have defined the content of the general principles of law: the positivist one and natural law.[2] The first sees the legal system as a complement and support for the principles sought by legislation itself that will in turn make up for certain loopholes in the law. The natural law current is based

[1] While upholding a positivist position, Mexican doctrine covered a very wide range of thoughts on the matter. See Ignacio Galindo Garfias; *Interpretación e Integración de la ley*, XIV 56 Revista de la Facultad de Derecho de México, 1013-1033 (1964); Eduardo García Máynez; *Los Principios Generales del Derecho y la Distinción entre Principios Jurídicos Normativos y no normativo*, in Ensayos Filosóficos-Jurídicos 282 (Universidad Veracruzana, 1959).

[2] Recasens Siches, a defender of natural law in Mexico, pondered the matter, stating that "...in any case, the principle that, from among all human interests, there are those of a higher hierarchy that consist of providing the means to fulfill the values that can be met are found in the individual and their free choice must always be kept in sight." *See* Luis Recasens Siches; Introducción al estudio del Derecho 326 (Porrúa, 1981).

on philosophical, ethical and humanist values in which the concept of justice and equity is highlighted through legal provisions.[3]

An exception to the positivist nature[4] that characterized Mexican law in the 20th century was established for civil matters in the civil sector in the last paragraph of Article 14 of the 1917 Constitution.[5] It can be argued then that the Mexican courts have oscillated between both trends. The Judiciary has been charged with the duty of not only determining the nature of these principles,[6] but also the scope of civil trials. The Mexican Constitution expressly mentions the latter, stating that *matters of a civil nature are not seen as restricted in the way that might be concluded from a strict interpretation of the cited constitutional article, but even without the positivization of other items of business, it is often admitted to the degree in which they are deemed the more general wording of the values inherent in current understanding of the law*.[7]

In Mexican doctrine, the general principles of law have been identified as:

— Dogmas, which link principles with the concept of immutability and without the need for further proof.[8]
— Maxims, which are proposals generally accepted by those engaged in the science of the law and that do not necessarily coincide with the

[3] Other authors have pointed out that the principles of law, its purposes and legal values are strongly linked. Thus, these values tend to be confused and are understood as criteria for judging and acting; they are considered ways to facilitate the means to an end or even principles of law. Legal values are an important part of the law, and as such, principles may stem from said values. A three-dimensional perspective of the law also implies that in the case of shortcomings or flaws in the law, the overall objectives of a legal system can be met when principles are applied. See Juan Espinoza; Los Principios contenidos en el Título Preliminar del Código Civil Peruano de 1984, 423 (Pontificia Universidad Católica del Perú, Fondo Editorial, 2005).

[4] This is in terms of the philosophical theory.

[5] Article 14 of the 1917 Mexican Constitution states that "…En los juicios del orden civil, la sentencia definitiva deberá ser conforme a la letra o a la interpretación jurídica de la ley, y a falta de ésta se fundará en los principios generales del derecho." [...In civil suits the final judgment shall be according to the letter or the juridical interpretation of the law; in the absence of the latter it shall be based on the general principles of law.] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex).

[6] In the Mexican legal system it has been traditionally thought that, in deciding on matters brought before them, judges are subject to the observance of not only positive legal law, but also the general dogmas that form and give coherence to all legal provisions, which are known as General Principles of Law. *See* Principios generales del derecho. Su función en el ordenamiento jurídico. Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Octava Época, tomo III, Enero-Junio 1989, Tesis P./J. 228881, Página 573 (Mex).

[7] *Id.*

[8] See Fausto Rico-Álvarez et al., Introducción al estudio del Derecho Civil y Personas 154 (Porrúa, 2009)

> laws themselves. We concur with this position in that the principles are guidelines that emanate validity to all that is construed from said principles.[9]

The Introductory Provisions of the 1928 Civil Code for the Federal District[10] sets forth some rules that have come to be regarded as general principles of law, although not the only ones,[11] of the Civil Law itself.[12] Some authors have argued that the more contemporary Mexican law assumes the position of natural law[13] since Mexican legislation contains an extensive variety of

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[9] "...toda institución jurídica se rige por principios generales de derecho, que responden a ideales como la equidad y la justicia y a principios como son: la buena fe, la idea de responsabilidad y la apariencia legal del acto." [...all legal institutions are governed by general principles of law, which respond to ideals like equality and justice and to principles like: good faith, the idea of liability and semblance of legal right.]. Sea Sociedades cooperativas. Nulidad de asambleas por falta de publicación de la convocatoria con la anticipación debida. No es aplicable supletoriamente la ley general de sociedades mercantiles, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, libro XV, Diciembre 2012, Tesis I.3o.C.1042 C, Página 1567 (Mex). All translations are by the authors unless otherwise indicated.

[10] By Decree of the Congress of the Union published in Diario Oficial de la Federación (DOF), May 29, 2000 (Mex), on being adopted at a federal level the Civil Code of 1928 changed its name to Código Civil Federal [CCF] [Federal Civil Code], *as amended*, Diario Oficial de la Federación [D.O.], 26 de mayo de 1928 (Mex.). *See* Gisela M. Pérez Fuentes Et Al., El Derecho en México 36 (2012).

[11] Article 2 of the Civil Code for the Federal District establishes legal equality. Article 16 refers to the fact that no person shall cause damage to another. Article 17 regulates the principle of unjust enrichment. See Código Civil para el Distrito Federal [C.C.D.F.] [Civil Code of the Federal District], *as amended*, Diario Oficial de la Federación [D.O.], 26 de mayo de 1928 (Mex.).

[12] Artículo 18. El silencio, obscuridad o insuficiencia de la ley, no autorizan a los jueces o tribunales para dejar de resolver una controversia [Article 18. Silence, obscurity or insufficiency of the law do not authorize judges or courts to leave a conflict unresolved]. Artículo 19. Las controversias judiciales del orden civil deberán resolverse conforme a la letra de la ley o a su interpretación jurídica. A falta de ley se resolverán conforme a los principios generales de derecho. [Article 19. Legal disputes for civil matters shall be resolved to the letter of the law or its legal interpretation. In the absence of law, said disputes shall be settled according to the general principles of law.] Artículo 20. Cuando haya conflicto de derechos, a falta de ley expresa que sea aplicable, la controversia se decidirá a favor del que trate de evitarse perjuicios y no a favor del que pretenda obtener lucro. Si el conflicto fuere entre derechos iguales o de la misma especie, se decidirá observando la mayor igualdad posible entre los interesados [Article 20. When there is a conflict of laws, and in the absence of a specific applicable law, the dispute will be decided in favor of the one that attempts to prevent damages and not in favor of the one seeking profit. If the conflict were between rights that are equal or of the same kind, it will be decided by adhering to the greatest measure of equality possible among the interested parties]. *See* Código Civil Federal [C.C.F.] [Federal Civil Code], *as amended,* Diario Oficial de la Federación [D.O.], 26 de Mayo de 1928 (Mex).

[13] Edgar Baqueiro Rojas & Rosalía Buenrostro Báez, Derecho Civil. Introducción y Personas 36-37 (Oxford, 2000).

abstract concepts with a wide-ranging scope of interpretation, such as the principles of solidarity, social utility, collective interests, justice and equality. However, it should be noted that the tendency to protect human rights and, as an extension, to protect the rights of personality and weaker social groups, at least in terms of legislation, reflects a neoconstitutionalism[14] in which the principles of the civil law cease to be apolitical and begin to intertwine with and expand to form part of the constitutional system.

Mexico has understood that it needs to update its Civil Law and the provisions regulating it so as to enrich the social community, given the historical conditions that have shaped family law provisions[15] in the country.

The defense of human rights in the Mexican Constitution and recent reforms in this direction, coupled with the differences in the composition and defense of family law in Mexico, have allowed for new interpretive guidelines that mark substantial changes, as embodied in other interpretative principles in the constitution and some civil legislation.[16] As primarily revealed in its social and political norms, the Mexican Constitution has ceased to be an exclusive source of public law to become a framework law.[17] Thus, the *pro-persona* principle, the protection of the family and the protection of weaker social groups, in which children are placed at the top of the list, have become priority issues in the constitution, at least in terms of legislation.

It cannot be denied that the Civil Code has formally lost its exclusively supplementary nature to attain constitutional status. Thus, the traditional principles of law have come to form part of constitutional law.[18] In response to the critics of civil law who support the de-codification and, therefore, the disintegration of civil order,[19] we defend the resurgence of the common

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[14] For the defenders of this position, the Constitution is not limited to establishing areas of responsibilities or dividing public powers. It contains high levels of material, secondary or procedural rules or substantive laws that are grounded on the exercise of the State and of the constitutional judiciary branches that apply the principles of weighting, proportionality, reasonableness and maximization of fundamental rights. *See* Miguel Carbonell, Teoría del neoconstitucionalismo. Ensayos escogidos 10 (IIJ-UNAM, 2007).

[15] About the composition of Mexican law, *see* El Derecho en México, *supra* note 10, at 34.

[16] Mexican Supreme Court opinions have gone beyond the use of formal logic in their legal interpretation criteria. See Eduardo García Máynez; Introducción a la lógica jurídica 10 (Colofón, 2001); Galindo Sifuentes, *¿Qué es argumentar?: Retórica y lingüística*, in Argumentación Jurídica 10-15 (Porrúa, 2011).

[17] The decree modifying the name of Chapter I of Title I to 'Of Human Rights and Their Guarantees' and the amendment of various articles so as to include the scope of human rights in the Federal Constitution of Mexico was published in the Official Federal Daily Gazette on June 10, 2011. See El Derecho en México, *supra* note 10, at 86.

[18] The doctrine upheld by Joaquin Arce and Flores-Valdes is reflected in today's Mexican legal system; *see* Joaquin Arce & Flores-Valdes El Derecho Civil-Constitucional 59-60 (Civitas, 1986).

[19] Sea Miguel Acosta Romero, *El fenómeno de la descodificación en el Derecho Civil*, 7-8 Revista de Derecho Privado 611-628 (1989).

grounds of any legal system, in this case, civil law, based on its fundamental institution: the individual[20] set forth at both constitutional and jurisprudential levels in Mexico through the *pro homine* principle.[21]

The use of the general principles of law goes beyond cases of legal loopholes to apply to the needs of the Mexican legal system,[22] with the best interests of the minor standing out as a constitutional principle.

In the field of neo-constitutionalism, principles are standards for demanding justice,[23] while the rules can be binding provisions with a purely functional con-

[20] Principio Pro homine. Su aplicación. "El principio pro homine, incorporado en múltiples tratados internacionales, es un criterio hermenéutico que coincide con el rasgo fundamental de los derechos humanos, por virtud del cual debe estarse siempre a favor del hombre e implica que debe acudirse a la norma más amplia o a la interpretación extensiva cuando se trata de derechos protegidos y, por el contrario, a la norma o a la interpretación más restringida, cuando se trata de establecer límites a su ejercicio" [*Pro homine* principle. Its application." Incorporated into many international treaties, the *pro homine* principle is a hermeneutic criterion that corresponds to the fundamental feature of human rights, by virtue of which it must always be in favor of man and implies that the most comprehensive law or the most extensive interpretation must be turned to when it comes to the protection of rights and, conversely, to the most restrictive law or interpretation, when setting limits to its exercise"]. *See* Principio Pro homine. Su aplicación. Tribunal Colegiado de Circuito [Collegiate Circuit Court] [T.C.C.], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XX, Octubre 2004, Tesis I.4o.A.441 A, Página 2385 (Mex).

[21] See Principio pro homine. Su aplicación es obligatoria. "El principio pro homine que implica que la interpretación jurídica siempre debe buscar el mayor beneficio para el hombre, es decir, que debe acudirse a la norma más amplia o a la interpretación extensiva cuando se trata de derechos protegidos y, por el contrario, a la norma o a la interpretación más restringida, cuando se trata de establecer límites a su ejercicio, se contempla en los artículos *29 de la Convención Americana sobre Derechos Humanos y 5 del Pacto Internacional de Derechos Civiles y Políticos*, publicados en el DOF el siete y el veinte de mayo de mil novecientos ochenta y uno, respectivamente. Ahora bien, como dichos tratados forman parte de la Ley Suprema de la Unión, conforme al artículo *133 constitucional*, es claro que el citado principio debe aplicarse en forma obligatoria" [*Pro homine* principle. Its application.] Incorporated into many international treaties, the *pro homine* principle is a hermeneutic criterion that corresponds to the fundamental feature of human rights, by virtue of which it must always be in favor of man and implies that the most comprehensive law or the most extensive interpretation must be turned to when it comes to the protection of rights and, conversely, to the most restrictive law or interpretation, when setting limits to its exercise, as set forth in Articles 29 of the American Convention on Human Rights and 5 of the International Covenant on Civil and Political Rights, published in the DOF on the seventh and twentieth of May one thousand nine hundred and eighty-one, respectively. However, as said treaties are part of the Supreme Law of the Union, in accordance with Article 133 of the Constitution, it is clear that the above-mentioned principle should be applied as mandatory]. *See* Principio pro homine. Su aplicación es obligatoria, Tribunal Colegiado de Circuito [Collegiate Circuit Court] [T.C.C.], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXI, Febrero 2005, Tesis I.4o.A.464 A, Pagina 1744 (Mex).

[22] One important explanation of the general principles of law and its integrating role is given in Sergio Azúa Reyes, Los Principios Generales del Derecho 101 (Porrúa, 2007).

[23] See Marco Aurelio González Maldonado, La proporcionalidad como estructura argumentativa de ponderación; un análisis crítico 2-3 (Novum, 2011), upholding the crite-

tent. This is precisely what the theory of the individual and the family brings to the principles of law contained in the Mexican Constitution in the case of the best interests of the minor, which has been expressly set forth as follows:

> All State decisions and actions shall ensure and comply with the principle of the best interests of the child, thus fully ensuring their rights. Boys and girls have the right to the satisfaction of their needs for food, health, education and healthy recreation for their comprehensive development. This principle should guide the design, implementation, monitoring and evaluation of public policies aimed at children.[24]

For years, some academics have defended State intervention in family law issues that limit the autonomy of the will in favor of the social or public rights of weaker groups.[25] In this sense, the most renowned Mexican experts in civil law -in our opinion- have questioned these different positions in which the standing of the family within law which have the same characteristics as those found in social law.[26] Baqueiro has also held that while it is true that the family is a social group of public interest as it is the basis of society, relationships between the members of a family are first and foremost relationships between individuals. As such, family law is rightly placed within private law.[27]

Under this consideration, Rogel Vide notes that it is very important to recognize the family as an institute. Its content or bases vary throughout history, and it would be better to speak of families, instead of simply family.[28]

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ria in Robert Alexy, Los derechos fundamentales en el Estado constitucional democrático, in Neoconstitucionalismo 31-47 (Miguel Carbonell ed., Trotta, 2003).

[24] See article 4, paragraph VIII of the Mexican Federal Constitution. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 4, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex).

[25] Article 2 of the Civil Code of the Federal District: *"La capacidad jurídica es igual para el hombre y la mujer. A ninguna persona por razón de edad, sexo, embarazo, estado civil, raza, idioma, religión, ideología, orientación sexual, identidad de género, expresión de rol de género, color de piel, nacionalidad, origen o posición social, trabajo o profesión, posición económica, carácter físico, discapacidad o estado de salud, se le podrán negar un servicio o prestación a la que tenga derecho, ni restringir el ejercicio de sus derechos cualquiera que sea la naturaleza de éstos."* [The legal capacity is equal for men and women. No person may be denied a service or benefit to which that person is entitled based on age, sex, pregnancy, civil status, race, language, religion, ideology, sexual orientation, gender identity, gender role expression, color of skin, nationality, social origin or status, work or profession, economic position, physical nature, disability or health condition, nor can the exercise of said person's rights be restricted regardless of the nature of these.], see Código Civil para el Distrito Federal [C.C.D.F.] [Civil Code of the Federal District], *as amended*, Diario Oficial de la Federación [D.O.], 26 de mayo de 1928 (Mex.).

[26] Jorge Domínguez Martínez, Derecho Civil. Parte General, Personas, cosas, negocio jurídico e invalidez 24 (Porrúa, 2000).

[27] *Id*.

[28] Along this line of thought, *see* Alfonso De Cossío, II Instituciones de Derecho Civil 713 (Madrid, 1975); Carlos Rogel Vide, Derecho Civil. método y concepto 269 (Reus-Ubijus-Zavalia-Temis, 2010).

The federal Mexican Judiciary has pronounced itself in favor of the distinctive quality of family proceedings. It has stated that even though controversies of a family nature are contained in civil matters at trial level, strict criteria of a civil nature should not be applied in determining the appropriateness or inappropriateness of the *amparo* trial subject to the principle of finality, given the importance of the individuals governed by such matters. Therefore, it should be noted that family matters and issues regarding minors and the incapacitated in particular have been the subject of repeated constitutional and legal reforms, which outline said issues as an independent field of law and feature greater protection to minors and freedom of action for the judge to intervene. The Supreme Court of Justice has acknowledged this by establishing specific principles that allow family matters to be handled with a policy of procedural simplification and of a practical nature, limited only by caution and good judgment.[29]

While it is possible to observe Antonio Cicu's classical assessment of acknowledging family law provisions being provisions of public order in Mexico, this is a false criterion to differentiate public and private law even though this does not exclude it from forming part of private law.[30]

In view of the intended separation of family law from civil law, it is important to recognize that the regulation of the legal personality of the individual and the attributes of the person is at the core of the law. In other words, this is essentially the right of the person known as civil law. Therefore, civil law is the right of the individual in all its manifestations for the person's fulfillment as a human being and a social being.[31]

We insist on the need to rescue civil law, the right of the individual and as such the following consideration seems very appropriate for the Mexican context:

> The primary purpose of an individual, due to his own and indomitable individuality, is his mission to fulfill his destiny and personal purposes.
>
> At the same time, there is a family purpose. Family renders the most elementary reality of man's coexistence, its most basic emotions. Man's life is inseparable from family reality, which the law cannot ignore and must protect.[32]

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[29] See Definitividad. Excepción al principio en materia familiar cuando el acto reclamado ocasiona a un menor de edad un perjuicio de imposible reparación. Tribunal Colegiado de Circuito [Collegiate Circuit Court] [T.C.C.], Semanario Judicial de la Federación y su Gaceta, Novena Época, Libro XV, Deciembre 2012, Tesis I.3o.C.1056C, Página 1312 (Mex).

[30] Antonio Cicu, cited by Castán Tobeñas, *La ordenación sistemática del Derecho Civil*, 105 (1954).

[31] In Mexican law, Jorge Alfredo Domínguez Martinez is a staunch supporter of this position. See Domínguez, *supra* note 26, at 29.

[32] Rogel Vide, s*upra* note 28, at 329.

In the Mexican judicial system, protection provided to the institution of family is legitimatized. Therefore, several legal criteria have been implemented following this line of thought, by considering that in disputes that affect the family, the family court judge can intervene *ex officio* and must even compensate for the parties' shortcomings in their approaches to the law because the legislators' intention was to go beyond the principle of *"da mihi factum dabo tibi ius*,"[33] under the condition that not only should inaccuracies in citing legal precepts be rectified, but an inadequate defense that could affect the family should also be avoided.[34]

III. The Best Interests of the Minor: A Legal and Argumentative Framework through International Treaties and Comparative Law

From a legal perspective and entirely in line with the international treaties Mexico has signed, it is important to define the meaning of "minor."[35] The legal perspective also implies a social dimension, which is aptly stated in national and foreign doctrine.[36] It is also essential to differentiate the minor from a person declared incompetent because the minor is subject and object of all a person's inherent rights, dignity and present and future fulfillment. Therein lays the principle of the best interests of the minor in terms of both content and purpose.[37]

In the Mexican legal system, international agreements are a source of law, specifically and based on Article 133 of the Mexican Constitution.[38] Accord-

[33] Give me the facts that I will give the law.

[34] See Derecho de familia. Suplencia de los planteamientos de derecho, conforme a lo dispuesto en el artículo 941 del código de procedimientos civiles para el Distrito Federal, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXII, Octubre 2010, Tesis I.3o.C.850C, Página 2986 (Mex).

[35] Nuria González Martín, Familia internacional en México: adopción, alimentos, sustracción, tráfico y trata 71 (UNAM-Porrúa, 2009).

[36] For example, Rivero Hernández holds that (a) the child is, first and foremost, a *person*, in its most essential and transcendent sense and not only in its legal dimension (a holder of rights), but also in its human dimension (a being that feels and thinks); (b) in addition, [the child] is a *human reality in the making* because his evolution (his future) is more important than only his current reality. If everything and everyone changes over time, this is more noticeable and, especially more important in [the case of] a minor, for whom every day of life leads him nearer to cease being [a minor], reaching the age of majority and the legal status to which he aspires. See Rivero Hernández, El interés del menor, Dykinson 56 (2007).

[37] Regarding its international scope on the definition of minors, Advisory Opinion on status and human rights of children, OC-17/2002 Inter-Am. Ct.H.R. (Aug. 28 2002) states that "For the aims sought by this Advisory Opinion, the difference established between those over and under 18 will suffice. […] Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act."

[38] Article 133 of Mexican Constitution states that "esta Constitución, las leyes del Con-

ing to jurisprudence, international treaties have been positioned at an *infraconstitucional*, but *supralegal* level, which gives importance to ratified international agreements on this issue.

Mexico has signed important international instruments on the protection of minors. For the purposes of this paper, the following documents will be highlighted:

— *Convention on the Rights of the Child.*[39] The Convention recalls that in the Universal Declaration of Human Rights, the United Nations proclaimed that childhood is entitled to special care and assistance.
— *The 1969 American Convention (Pact of San José).* In the legal political system of the Americas, the Organization of American States (OAS) stands out as a human rights protection agency. It has a jurisdictional supervisory body, the Inter-American Court of Human Rights.[40] The Convention is notable for its dual recognition of human rights, or as by some authors, rights for all and specific rights, which include children, youth or minors.[41]
— *Inter-American Court of Human Rights.* The Inter-American Court is an autonomous judicial OAS institution. Its goal is the implementation and interpretation of the American Convention on Human Rights and other treaties on the same subject. Established in 1979, it is formed of jurists of the highest moral authority and recognized competence in the field of human rights elected for their personal capacity.

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greso de la Unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el presidente de la República, con aprobación del senado, serán la ley suprema de toda la Unión. Los jueces de cada estado se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las constituciones o leyes de los estados" ["This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it, that have been concluded and that are to be concluded by the President of the Republic with approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or laws of the States."]. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 133 Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex).

[39] Adopted and opened for signature and ratification by the General Assembly in its Resolution 44/25 of 20 November 1989, passed by the Senate on 19 June 1990, as published in the DOF on 31 July 1990. The order for its enactment was published in the Diario Oficial de la Federación [D.O.F.] on January 25, 1991.

[40] Mexico recognizes the Inter-American Court and is subject to its competence and jurisdiction on ratifying the American Convention on Human Rights. Mexico also recognized the contentious jurisdiction of the Inter-American Court through a statement from the Government of Mexico dated December 16, 1998.

[41] Nuria González Martin & Sonia Rodríguez Jiménez, El interés superior del menor en el marco de la adopción y el tráfico internacional, contexto mexicano 71 (Instituto de Investigaciones Jurídicas, UNAM, 2011).

There are other international instruments that comprise the Inter-American system for the human rights of children and adolescents, including:

1) Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (OAS, May 25, 1984).[42]
2) Inter-American Convention on the International Return of Minors (OAS, July 15, 1989).[43]
3) Inter-American Convention on Support Obligations (OAS, May 24, 1984).[44]

1. *Comparative Law*

European countries with a Romano-Germanic legal system, such as Spain, recognize the right of youth and children to protection as being vulnerable groups. In order to balance the right to inform and the rights of the child, Directive 2/2006 from State Attorney General's Office in Spain, it should be assumed that the dissemination of accurate information of public interest is justified even though it may affect a minor, provided that it does not go against his interests or that his anonymity is guaranteed. This directive imposes certain requirements or procedures: If a minor appears in the media, the public prosecutor must have knowledge of it. Although this premise is rarely complied with, the violation of a minor's rights of legal personality are prosecutable *ex officio*.[45]

The Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime for professionals and policy makers[46] recommends steps to be taken to protect minors in such cases. Reference to these international guidelines is very important because a minor's right to privacy and to the protection of his image and identity are consistent-

[42] This convention was ratified by Mexico on June 12, 1987, to enter into force on May 26, 1988.

[43] This convention was ratified by Mexico on October 5, 1994, to enter into force in Mexico on November 4, 1994.

[44] This convention entered into force in Mexico on May 26, 1988. Mexico issued the following interpretative declaration: "The Government of Mexico declares, in accordance with Article 3 of the Convention, that it recognizes as support creditors, in addition to those indicated, concubines, collateral kinsmen, such as minors or incompetent persons up to the fourth degree and the adopted in relation to the adopter. The obligation to give support is reciprocal. The person giving such support in turn has the right to request it."

[45] Directive 2/2006 from State Attorney General's Office (Spain), on the Public Prosecutor and the Protection of the Child's Right to Honor, Privacy and Self-Image (March 15 2006).

[46] *Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime* , United Nations Office on Drugs and Crime, Criminal Justice Handbook Series, New York, 2010.

ly violated by the Mexican media, especially in the southeastern region of the country. This handbook clearly stipulates what should be done in such cases.[47]

When a child suffers because inappropriate information about his image and private life was made public, especially by the media, several future hypothetical scenarios can occur, none of which are good. First of all, the child is at risk. Similar cases took place in the State of Tabasco, in February 2010, when information was released about a military serviceman's family and the children living in that house were murdered.

Secondly, the child may experience extreme embarrassment in his social setting that will cause him to suffer humiliation or later being singled out. These situations will not only repress communication, but also aggressive attitudes in the future.[48]

In comparative law research on the issue of child protection based on the best interests of the child, we observe a void in child protection in the case of due process of law and in media practices. The solution provided in the Handbook on how to implement the guidelines on justice is of utmost importance since it considers judges,[49] civil servants, lawyers, legislators and especially the media as actors with obligations. The Handbook also includes the organizations that allow for minors to be protected in the case of violations caused by the media, by raising awareness on the role and responsibility of the media with regard to the rights of children.

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[47] The Handbook highlights the specific recommendations set out in the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Chapter X, The Right to Privacy): "26. Child victims and witnesses should have their privacy protected as a matter of primary importance. 27. Information relating to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to the identification of a child who is a victim or witness in the justice process. 28. Measures should be taken to protect children from undue exposure to the public by, for example, excluding the public and the media from the courtroom during the child's testimony, where permitted by national law."

[48] A measure to prevent such situations, we find for example in the article 8 paragraph e) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography states that necessary measures to protect the privacy and identity of children should be adopted.

[49] Judges: respecting the confidentiality of information on child victims and witnesses of crime; where necessary to safeguard the privacy of child victims or witnesses, ordering the full exclusion of the public and in camera proceedings; Law enforcement officials: respecting the confidentiality of information on child victims and witnesses of crime; in particular, refraining from disclosing such information to anyone without prior authorization; Lawyers: respecting the confidentiality of information on child victims and witnesses of crime; in particular, refraining from disclosing such information to anyone without prior authorization; requesting measures for the protection of the identity of the child victim or witness, in case these measures do not automatically apply; Media: adopting and respecting self-regulation measures to protect the privacy and personal data of a victim; […]. See *Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime, supra* note 46, at 62.

The violation of human dignity as a principle and the content of human rights has legal consequences defined in the Handbook, which establishes a type of moral damage as found in the Spanish-Mexican system.[50]

The way the legal protection of minors is handled in terms of the information disclosed by the media is especially important in the north and center regions of Mexico. With regard to southern Mexico, as a case in question, we point at the State of Tabasco where its constitution was amended in September 2013[51] to include a list of human rights that coincides with those contained in the Federal Constitution and the American Convention on Human Rights. Furthermore, Tabasco has implemented special laws such as the Law for the Protection of the Rights of Children and Adolescents,[52] in which the state executive branch controls the information that goes against or violates the principles of peace, non-discrimination and respect to all people, as well as any information that promotes violence towards or advocates criminal acts against minors. However, there are no precautionary measures or procedural mechanisms that objectively weigh the work of the media in the State of Tabasco so as to determine the behaviors that contravene the rights of minors and the applicable penalties. We took a sampling of the four most important newspapers with the largest circulation in the State of Tabasco, as well as two tabloids associated with the chosen newspapers and known for their sensationalist news. In a 6-month period that analyzed 716 newspaper issues, we found that 126 contained articles that affected the rights of the youth to legal personality, such as: personality rights, the right to honor, privacy and the presumption of innocence.

The study showed that young people are increasingly being represented as problems. It seems that children in conflict with the law are no longer considered children. It is as if a breach with the law excludes them from exercising their right to the protection as children. To be dealt with in exactly the same way as adult perpetrators or, worse, to abuse their vulnerability as children is detrimental to their overall psyche. For example, one of the articles in question proves the effects on the rights to honor, privacy and the presumption of innocence. This particular article displayed a headline that read "the devil's kids" [*chamacos del demonio*] to report on two 16-year-olds who were arrested for driving in the opposite direction and third degree driving while under the

[50] Chapter 10: The right to reparation. Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, chapter XIII, The right to reparation 35. Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive. In this regard, *see id.* at 95.

[51] Political Constitution of the Free and Sovereign State of Tabasco, published through a solemn proclamation on April 5, 1919, with its latest reforms published in the Official State Gazette on June 21, 2014.

[52] Ley para la Protección de los Derechos de Niñas, Niños y Adolescentes [Law for the Protection of the Rights of Children and Adolescents], Periódico Oficial del Estado [P.O.E.] [State Official Gazette] 3 de Enero de 2007 (Mex.).

influence of alcohol. The newspaper also published their full names and that of the "judge" handling the case. The irresponsibility of this type of reporting was made apparent when the young people implicated were beaten by highway agents.

In some states of Mexico, as seen in the case taking place in Tabasco, a child's rights may be violated by the media in a number of ways through inappropriate exposure and stereotypes. The media's social responsibility should look after the welfare of minors and not focus on negative role models. Otherwise, it is the child who is harmed the most. Moreover, the nature of the freedom of expression as a means to disseminate information of public interest is lost. It identifies a system of responsibility as a type of mechanism used to ensure that the media is socially responsible —as an inducement for the media and journalists to respect the ethical standards established by the profession and the new legal models.

In weighting the exercise of freedom of expression after the analysis of four Tabasco state newspapers, which include those with the largest circulation, the following was observed: (a) coverage of issues relating to children tends to focus on the negative and sensationalist aspects of the activities of said children; (b) reports about children are not usual and contain no further analysis or follow-up; and (c) respect for confidentiality involving information on children or protecting the principle of presumption of innocence is not perceived.

The way the legal protection of minors is handled in terms of the information disclosed by the media —in spite of signing international treaties on the matter— has not been able to penetrate this fundamental fact of its application of the best interests of the child. We will now go on to explain the main human rights regulations in force in Mexico.

2. *Domestic Legal Framework*

The political Constitution of the United Mexican States recognizes and protects human rights, including:

— Right to education.
— Right to a family.
— Right to preferential health care.
— Right to not be forced to work.
— The right to adequate food.

With the constitutional reform in 2000 the rights of children and youth rose to the level of constitutional status. Some amendments are:

— The concept of "child" is incorporated in an effort to gradually replace the term "minor". It establishes the State's obligation to provide what is necessary for the respect of the dignity of children and the effective-

ness in their exercise of these rights. It also takes into account the duty of parents and guardians to preserve such rights.

In 2001, important reforms were made to the Constitution. Article 1 establishes the prohibition of any form of discrimination. Meanwhile, the constitutional reform of June 10, 2011 replaced the term "individual guarantees" in the Mexican Constitution with "human rights", thus incorporating the rights contained in the international human rights treaties to which Mexico is a State party. This means that the group of internationally recognized rights and obligations now form part of the national legal system, which in turn implies the application of the principles of *pro persona* or of conforming interpretation. According to the content of Article 1 of the Constitution, it must be understood that the Convention on the Rights of the Child is an internal law, so the rights of children and adolescents were expanded as of June 10, 2011.

Lastly, after the constitutional reform regarding human rights on October 12, 2011, the reform to Article 4 of the Mexican Constitution was approved. This article embodies the principle of the best interests of the child, as well as its incorporation into Mexican government policies. Both the Federal Congress and local congresses can legislate on the matter under the terms of Article 4 of the Mexican constitution, Article 3 of the Convention on the Rights of the Child —ratified by Mexico and published in the Federal Official Gazette on January 25, 1991— and Articles 3, 4, 6 and 7 of the Law for the Protection of the Rights of Children and Adolescents.

However, the term "best interests of the child" is undoubtedly still an open clause and it is the court that must equitably and not arbitrarily define the contents of such principle. In this regard, the Federal Judicial Branch has proclaimed that "the expression 'best interests of the child' [...] implies that the child's development and full exercise of his rights should be considered criteria governing the drafting of standards and their application in all aspects related to the life of the child."[53]

The Mexican legal system establishes various prerogatives of a personal and social nature in favor of minors, which are reflected in both the constitution and international treaties, as well as in federal and local laws, where it is implied that the best interests of the child means that policies, actions and decisions related to this stage of the human life must at all times be upheld in a way that strives to ensure the direct benefit of the child to whom they are directed.[54]

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[53] Judicial Opinion issued by the First Chamber, see Derechos derivados de la patria potestad (Código Civil del Estado de México), Suprema Corte de Justicia [S.C.J.N.] [Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVIII, Diciembre 2008, Tesis 1st. CXI/2008, Página 236 (Mex).

[54] *See* Interés Superior del Menor. Alcances de este principio, Tribunal Colegiado de

The civil laws in the various Mexican states have been adapted to expressly include the principle of the best interests of the child in their local legislations.[55]

3. *Law for the Protection of the Rights of Children and Adolescents*

The law[56] is based on the sixth paragraph of Article 4 of the Mexican Constitution. Its provisions are of *ordre public*, social interest and general ob-

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Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIII, Marzo 2011, Tesis I.5th.C. J/14, Página 2187 (Mex).

[55] For example, in article 404 repealed in April 2013 of Federal Civil Code: "La adopción simple podrá convertirse en plena, debiendo obtenerse el consentimiento del adoptado, si éste hubiere cumplido doce años. Si fuere menor de esa edad se requiere el consentimiento de quien hubiese consentido en la adopción, siempre y cuando sea posible obtenerlo; de lo contrario el juez deberá resolver atendiendo al interés superior del menor.

En este supuesto, con base en el interés superior del menor, éste quedará bajo los cuidados y atenciones de uno de ellos. El otro estará obligado a colaborar en su alimentación y conservará los derechos de vigilancia y de convivencia con el menor, conforme a las modalidades previstas en el convenio o resolución judicial."

[A simple adoption may be fulfilled, having obtained the adoptee's consent, if the adoptee has reached the age of twelve. If the adoptee is under this age, the consent of whoever had consented to the adoption is required, provided it is possible to obtain said consent; otherwise, the judge must decide based on the best interests of the child.

In this case, based on the best interests of the minor, the minor shall remain under the care and attention of one of them. The other is obligated to contribute to the minor's sustenance and will retain the rights of supervision and of coexistence with the minor, according to the provisions set forth in the legal agreement or judgment.] *See* Código Civil Federal [C.C.F.] [Federal Civil Code], *as amended,* Diario Oficial de la Federación [D.O.], 26 de Mayo de 1928 (Mex).

See also Article 416. "En caso de separación de quienes ejercen la patria potestad, ambos deberán continuar con el cumplimiento de sus deberes y podrán convenir los términos de su ejercicio, particularmente en lo relativo a la guarda y custodia de los menores. En caso de desacuerdo, el juez de lo familiar resolverá lo conducente oyendo al Ministerio Público, sin perjuicio de lo previsto en el artículo 94 del Código de Procedimientos Civiles para el Distrito Federal. En este supuesto, con base en el *interés superior del menor,* éste quedará bajo los cuidados y atenciones de uno de ellos. El otro estará obligado a colaborar en su alimentación y conservará los derechos de vigilancia y de convivencia con el menor, conforme a las modalidades previstas en el convenio o resolución judicial".

[In the event of the separation of those exercising parental authority, both must continue to fulfill their duties and may agree to the terms of its exercise, particularly with regard to the guardianship and custody of the minors. In the case of a disagreement, the family court judge shall decide on the matter, listening to the Public Prosecutor, without contravening that set forth in Article 94 of the Code of Civil Procedure for the Federal District. In this case, based on the *best interests of the minor*, the minor shall remain under the care and attention of one of them. The other is obligated to contribute to the minor's sustenance and shall retain the rights of supervision and of coexistence with the minor, according to the provisions set forth in the legal agreement or judgment]. *See* Código Civil Federal [C.C.F.] [Federal Civil Code], *as amended,* Diario Oficial de la Federación [D.O.], 26 de Mayo de 1928 (Mex).

[56] Ley para la Protección de los Derechos de Niñas, Niños y Adolescentes [Law for the

servance in all of Mexico. Its aim is to ensure the protection of children and adolescents and the respect of their fundamental rights as recognized in the Constitution.

The law uses inclusive language to define the concept of boy and girl.[57] The protection of the rights of children and adolescents aims at ensuring them full and comprehensive development, which implies the opportunity to develop physically, mentally, emotionally, socially and morally in conditions of equality.

The guiding principles for the protection of the rights of children and adolescents are:

a) The best interests of the child.
b) The principle non-discrimination for any reason or circumstance.
c) Equality without distinction of race, age, sex, religion, language, political or other opinion, ethnic, national or social origin, economic standing, disability, circumstances of birth or any other condition of his or his parents, guardians or legal representatives.
d) The right to live in a family, as an essential space for development.
e) The right to have a life free of violence.
f) Shared duties among the members of the family, the State and society.
g) The full and equal exercise of human rights and constitutional guarantees.[58]

The law also defines the content of the principle of the best interests of the child. It states that the rules applicable to children and adolescents are to be understood as aimed at securing for them principally the care and assistance they need to achieve their full growth and development within a safe environment of family and social well-being. According to this principle, the exercise of adults' rights may not, at any time or under any circumstance, supersede the exercise of the rights of children and adolescents.

The general principles will be specifically applied in the absence of an express provision in the Constitution, this law or international treaties under the terms of Article 133 of the Constitution.

4. *The Best Interests of the Child: Weighting as an Argumentation Framework*

The explanation about the evolution of the general principles of civil law to fundamental rights has recently been established by the Supreme Court of

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Protection of the Rights of Children and Adolescents] [L.P.D.N.A.], Diario Oficial de la Federación [D.O.] 29 de Mayo del 2000 (Mex)

[57] *See Id*. at art. 2. "Para los efectos de esta ley, son niñas y niños las personas de hasta 12 años incompletos, y adolescentes los que tienen entre 12 años cumplidos y 18 años incumplidos" [For the purposes of this law, people under the age of 12 are [considered] children, and teenagers are those between the ages of 12 and 18]..

[58] *See Id.* at art. 3.

Justice in a sentence of a jurisprudential nature. In summary, this sentence laid down the following:

> The classical formulation of fundamental rights as limits directed solely at public authorities has proven insufficient to respond to the violations of those rights through acts carried out by individuals. In this sense, it is undeniable that relationships of inequality that are found in contemporary societies and establish privileged positions for one party can lead to the possible violation of fundamental rights at the expense of the weakest party. The Political Constitution of the United Mexican States offers no textual foundation that allows the assertion or denial of the validity of fundamental rights among individuals. However, this is not an insurmountable impediment, because in order to give an adequate response to this issue, it should start from the specific examination of the norm of fundamental right and those characteristics that determine their function, scope and development within the legal system. Thus, it is necessary to examine, first, the tasks that comply with the fundamental rights in the legal system. In the opinion of this First Chamber, the fundamental rights set forth in the Constitution are two-fold because on the one hand, they are established as subjective public rights (subjective function) and on the other hand they are translated into objective elements which inform or permeate the entire legal system, including those that arise between individuals (objective function). In a legal system like ours —in which constitutional provisions constitute the Supreme Law of the Union— fundamental rights occupy a central and undisputed position as the minimum content of all legal relationships that occur in the law. Along this line of thought, the dual role fundamental rights play in the regulation and structure of certain rights form the basis that makes it possible to affirm its occurrence in dealings between individuals. However, it is important to highlight that upholding fundamental rights in relations between individuals cannot be sustained as dominant and in its totality in each and every one of the relationships that occur in accordance with private law in virtue of the fact that in these relation, unlike those involving the State, we usually find another holder of rights, which causes a conflict of these rights and necessary weighting by the interpreter. Thus, the fundamental task of the interpreter is to analyze, in a unique way, the legal relations in which fundamental rights often come up against other goods or constitutionally protected rights; at the same time, the structure and content of each right will make it possible to determine what rights are only enforceable against the State and what other rights enjoy purported multi-directionality.[59]

According to the ways in which the *constitutionalization* of civil law operates, three paths are discussed: legal reform, constitutional interpretation and the weighting of constitutional principles in the case of conflicts between

[59] See Derechos fundamentales. Su vigencia en las relaciones entre particulares, Primera Sala de la Suprema Corte de Justicia de la nación [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo XIII, Octubre 2012, Tesis 1st./J. 15/2012, Página 798 (Mex).

individuals.[60] However, the legislative gaps in the occurrence of conflicts between individuals must be specifically resolved through weighting techniques carried out by judges on the basis of judicial interpretation and the principle *pro homine*, which highlights the best interests of the child in the theory of the protection of the right to personality. It is the exercise of fundamental rights in dealings between individuals that cannot be understood because its hegemonic form cannot be overlooked as a role of the nuclear law and common civil law in terms of private law in general and of the entire legal system.

The following section explains how the highest Mexican judicial body has weighted issues according to principles or fundamental rights which include the best interests of the child.

IV. Case Studies from Mexican Jurisprudence

As seen, the best interests of the child have ceased to have a void in its content in terms of principle. The Supreme Court of Justice rulings on cases are shaping new content that will serve as a weighted judgment. However, the protection of minors and their rights of personality has not yet been an issue to be decided on by the highest judicial authority in Mexico, nor has it been addressed in courts of different States. In our view as researchers, a declaration must soon be made on this issue due to its importance in the country and based on the cases which have given new meaning to the best interests of the child over other human rights in Mexican courts.

1. *Balancing between the Rights of Privacy of Minors and the Right to Expert Evidence Presented by the Opposing Party*

If at a trial a ruling that might affect the interest of the minor is issued, such as the expert in the field of gynecology that which must necessarily take place prior to the physical examination of a teenage minor, it is clear that this a fact that it can affect the rights to intimacy and privacy. Thus, in these cases, first rights, along with those of the audience, enshrined in the Constitution must be respected regarding minors and according to the principle of the best interests of the minor.[61]

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[60] See Hernán Corral Talciani, Algunas reflexiones sobre la constitucionalización del Derecho privado 3 (2004) *available at* http://corraltalciani.files.wordpress.com/2010/05/constitucionalizaciond-privado.pdf

[61] See Derechos de privacía e intimidad de menores de edad. Previamente a la admisión de pruebas en juicio que puedan afectarlos, debe dárseles vista para que expresen lo conducente como parte interesada, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXII, Noviembre 2005, Tesis II.2o.C.502 C, Página 860 (Mex).

2. *Principle of Equality between Men and Women and the Minor's Right to Sustenance*

The Mexican Supreme Court of Justice has not only determined what should be understood by the principle of equality ("the constitutional requirement to give equal treatment to those who are equal and unequal treatment to those that are unequal, so that the distinction that are sometimes made will be forbidden, while in other cases it will be allowed, or even required constitutionally"), but has also decided on a set of criteria to complement the scope of this principle, as well as to define when a distinction or preference set by legislators between two similar cases are justified without constituting an act of discrimination and when it is considered unjustified and therefore implies discrimination.

On these grounds and according to the provisions of Article 303 of the Civil Code for the Federal District, both parents are obligated to fulfill the requirements of providing the food that the minor needs. The best interests of the minor are above the rights of both parents. Thus, this burden is not only imposed upon the man, but it also falls on the woman. Therefore, the fact that a procedural obligation is imposed on one of the parents to provide a certain percentage of their salary for his or her child's sustenance, despite earning less than his or her counterpart, it is not a case of discrimination due to gender, nor does it violate the principle of equality. According to Article 309 of the aforementioned code, the specific way of fulfilling this obligation is that when the child forms part of the mother's household, the mother must provide the items not covered by the amount set for the father to pay. If both parents have jobs and earn an income, they have the obligation to contribute, to the extent of their possibilities, to that which is necessary for the survival of the child.[62]

3. *Content and Scope of the Minor's Right to Identity Based on the Best Interests of the Minor*

Article 7 of the Convention on the Rights of the Child (ratified by Mexico and published in the DOF on January 25, 1991) establishes that the child has the right from the birth to a name, to acquire a nationality and, as far as possible, to know and be cared for by his or her parents. In keeping with the above article and paragraph 3 of the Law for the Protection of the Rights of Children and Adolescents (of *ordre public*, social interest and general observance in all of Mexico), the guiding principles for the protection of minors are the best interests of the child and the protection of the full and equal

[62] See Igualdad del hombre y la mujer y no discriminación por razones de género. Son principios que no se violan cuando se involucra el derecho de un menor a recibir alimentos de ambos progenitores, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIII, Marzo 2011, Tesis I.14o.C.77 C, Página 2355 (Mex).

enjoyment of human rights and constitutional guarantees, among others. On the same note, Article 22 of the above law establishes the right to an identity, which consists of the right to have a name and the surnames of parents as of the moment of the child's birth, to have a nationality and to know his parentage and his origin, except in cases where the law prohibits it. The fact that the minor has the certainty of who his parent are is a principle of *ordre public* that is part of the nucleus of the fundamental right to legal personality. The importance of this does not only lie in the ability to request and receive information about his origin, the identity of his parents and knowledge of his genetic origin, but these elements can also lead to fulfilling his right to a nationality on one hand, and the right to have his ascendants satisfy his needs of sustenance, health, education and healthy recreation for his full and comprehensive development.[63]

4. *The Minor's Right to an Identity and the Very Personal Act of Acknowledging Parentage*

In accordance with the Mexican Constitution, various international standards and other domestic law statutes that enshrine the principle of the best interests of the minor and because the regime of rights is a genuine protectionist system, the child has the right to preserve his identity, name and family relations, as well as to be provided with assistance and care when he is deprived of any of the elements of identity so it can be restored immediately to the child.

Hence, the voluntary acknowledgment of a child as one's own before an official at Civil Registry is a very personal legal act. Through this proceeding, the person appearing and the person being acknowledged acquire all the rights and obligations attributed to parentage. Given that the law does not require the alleged father to undergo paternity testing in order to acknowledge a minor, it is feasible to do so, both in the case in which there are no blood ties (like when there is doubt) and even when there are sufficient elements that give certainty that the person to be acknowledged is the true descendant of the acknowledging party. Thus, any action revoking acknowledged parentage on a birth certificate of a child born outside wedlock is procedurally irrelevant; when the intention is to contest such acknowledgement, the legal act must be ruled null and void since the lack of a biological link is not enough evidence.

In these cases, it is essential to accredit the nullity of the acknowledgement; that is, the lack of a real declaration of paternity issued by a person with the capacity required by law or circumstances at the time that were the result of

[63] See Derecho a la identidad de los menores. Su contenido, Primera Sala de la Suprema Corte de Justicia de la nación [S.C.J.N.] [First Chamber of the Supreme Court of Justice] Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Julio 2007, Tesis 1st. CXLII/2007, Página 260 (Mex).

error, deception, physical violence and intimidation. This procedure basically consists of informing the Civil Registry Office of the defect in consent at the time of acknowledging the child.

The above does not contradict the principle of irrevocability of the acknowledgement of a child. Just as with any other legal act, this proceeding may be subject to annulment. However, an annulment granted by court ruling should not be confused with a revocation of the acknowledgement by way of withdrawal.[64]

5. *The Minor's Right to an Identity and the Rights Derived from the Concept of Family*

The Constitution protects certain goods and supreme inalienable values, including the protection of the organization and the development of the family. However, the article 4o of the Constitution establishes the rights of children on equal standing, as seen in paragraphs 5, 6 and 7, which state that "children have rights, which include, that the State must provide what is necessary to promote respect for the dignity of children and the full exercise of their rights". This makes it apparent that the Constitution establishes a single normative hierarchy for the protection of both the family and the child. In this context, in the weighting of the stated values (that is, balancing or counterbalancing one right with another), the right of children to know their true identity has greater weight because the possibility of knowing their exact genetic origin gives them certainty as to their true ancestry. This is a psychological and emotional benefit because knowing who their real parents are awakens a feeling of confidence, moral support and belonging towards his real family in knowing that he is protected and being brought up by his real parents. Ultimately, this benefits the child more than the alleged protection to the household under the intention of unduly forcing family unity by trying to preserve said ties even when it is apparent that one or several members are under the suspicion of not having genuine familial bonds.

Therefore, according to the national and international laws that give priority to the best interests of the minor, the protection of the rights of the child deserves greater protection because it is the weaker party in the concept of the family, and it is the child who may suffer greater damage depending on the measure to be implemented. Therefore, when a judge is faced with the need to weigh constitutional values of the same category (*i.e.*, choosing between protecting the family and the child's right to know his true parentage), the first must yield with respect to the latter.[65]

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[64] See Revocación de filiación de hijo nacido fuera de matrimonio. Previamente a demandarla, debe impugnarse la nulidad del reconocimiento efectuado en la partida de nacimiento, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXII, Agosto 2010, Tesis III.2o.C.183 C, Página 2358 (Mex).

[65] *See* Menores de edad. El derecho para conocer su origen genético constituye un

6. *The Right of Paternity and the Right to an Identity*[66]

When the alleged parents refuse to undergo genetic testing, it gives way to the assumption of controversial parentage. As long as the corresponding court based its decision on an analogical interpretation and the general principles of law, it was conceivable to assume said parentage. With that assumption, the Mexican judiciary specifically estimates that it is possible to reach this conclusion through civil legislation, taking into account this kind of legal interpretation, as well as the exact application of Article 4 of the Constitution; Articles 3, 6, 7 and 8 of the Convention on the Rights of the Child and Article 22 of the Law for the Protection of the Rights of Children and Adolescents. Therefore, if these provisions indicate the right of the child to know his identity and that the importance of this fundamental right lies not only in the possibility of learning his biological origin (ancestry), but that this knowledge leads to the fulfillment of a child's constitutionally established right to have his ascendants satisfy his needs of sustenance, health, education and healthy recreation for his comprehensive development, which may involve the right to a particular nationality.

On the other hand, the Code of Civil Procedure establishes enforcement measures through which judges can ensure that their judgments are fulfilled. When in a paternity lawsuit the judge orders DNA testing and the presumed parent refuses to be tested, the abovementioned measures can constitutionally be applied to comply with the judge's directive. However, if it is not possible to overcome the parent's refusal to undergo testing by means of said measures, this does not mean that the best interests of the child should be at the mercy of the presumed parent, and that such refusal or opposition to the testing go without any legal consequences. In every case, the assumption of controversial parentage should apply. Although the laws of the State of Veracruz do not contain a provision that expressly requires it, the best interests

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BIEN JURÍDICO CONSTITUCIONALMENTE LEGÍTIMO CON MAYOR RELEVANCIA FRENTE A LOS DERECHOS DERIVADOS DEL CONCEPTO DE FAMILIA, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXX, Agosto2009, Tesis I.10o.C.73 C, Página 1661 (Mex).

[66] *See* JUICIOS DE PATERNIDAD. EN LOS CASOS EN QUE A PESAR DE LA IMPOSICIÓN DE MEDIDAS DE APREMIO LOS PRESUNTOS ASCENDIENTES SE NIEGAN A PRACTICARSE LA PRUEBA PERICIAL EN MATERIA DE GENÉTICA (ADN), OPERA LA PRESUNCIÓN DE LA FILIACIÓN CONTROVERTIDA, SALVO PRUEBA EN CONTRARIO, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVII, Febrero 2008, Tesis VII.2o.C.111C, Página 2313 (Mex). *See also* JUICIOS DE PATERNIDAD. EN LOS CASOS EN QUE A PESAR DE LA IMPOSICIÓN DE MEDIDAS DE APREMIO LOS PRESUNTOS ASCENDIENTES SE NIEGAN A PRACTICARSE LA PRUEBA PERICIAL EN MATERIA DE GENÉTICA (ADN), OPERA LA PRESUNCIÓN DE LA FILIACIÓN CONTROVERTIDA (LEGISLACIONES DE NUEVO LEÓN Y DEL ESTADO DE MÉXICO), Primera Sala de la Suprema Corte de Justicia de la nación [S.C.J.N.] [First Chamber of the Supreme Court of Justice] Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Marzo 2007, Tesis 1a./J. 101/2006, Página 111, (Mex).

of the child and an extensive analogous interpretation of Article 257 of the Code of Civil Procedures, which establishes the assumption of tacit confession, should be taken into account. Thus, it can be concluded that in the event of the presumed parent's refusal to undergo this testing the assumption of parentage applies, unless there is a test or law to the contrary; otherwise, the best interests of the child would be at the mercy of the presumed alleged parent and the child's their fundamental right to know his heir identity would not be respected.

7. *A Child's Right to Express His Opinion in the Jurisdictional Procedures that Affect His Legal Sphere*

According to Article 12 of the Convention on the Rights of the Child, States Parties shall ensure to the child who is capable of forming a judgment of his own the right to express his views freely in all matters affecting the child. Taking due note of a child's views depending on age and maturity is extremely important. In addition, the article states that the child shall be given the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the rules of procedure of the national law of the country concerned.

From its interpretation of the above Convention and in line with Article 4 of its Constitution, the Mexican Judiciary has established the guidelines[67] to be observed when children participate in any legal proceeding that may affect his legal sphere. These guidelines always take the best interests of the child into account. For instance:

1) For the admission of the proof, the biological age of children is not considered the determining criterion to reach a decision regarding their participation in a legal proceedings, but their maturity. The common practice of interviewing children relentlessly or unnecessarily should be avoided in these procedures and their right to participate should be respected.
2) To prepare for an interview in which children will participate, the child must be informed in accessible and friendly language about the procedure and his right to participate, and it is necessary to ensure that his participation is voluntary.
3) For the submission of the evidence, the child's statement or testimony must be given at a hearing under the structure of an interview or con-

[67] See "Derecho de los menores de edad a participar en los procedimientos jurisdiccionales que afecten su esfera jurídica. Lineamientos para su ejercicio", Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [First Chamber of the Supreme Court of Justice] Semanario Judicial de la Federación y su Gaceta, Decima Época, libro XVIII, Marzo 2013, Tesis 1st. LXXIX/2013, Página 884 (Mex).

versation, which must comply with certain requirements. It is advisable that, prior to the interview, the judge will meet with a specialist in child welfare, either a psychiatrist or a psychologist, to clarify the terms of what they intend to discuss with the child, so as to make it easier to understand and continue the conversation. The interview should take place, whenever possible, in a place that does not represent a hostile environment for the best interests of the child. This should be somewhere he can feel safe and respected when freely expressing his views. In addition to the presence of the judge or the judicial authority, the specialist in child affairs who has previously met with the judge must also appear during the diligence and whenever the child so requests or it is deemed appropriate to protect the child´s best interests, a trusted person may also be present, provided it does not generate a conflict of interest. To the greatest possible extent, the child's statement or testimony should be recorded in full, either through a transcript of the entire proceeding or technological means in a court environment that enables audio recording.

4) Children must participate directly in the interviews, but this does not imply that they do not have legal representation during the trial, the responsibility of which will fall on those who are legally called to exercise it, except in the case the need to appoint a child advocate is deemed necessary.
5) The child should be consulted about the confidentiality of his statements, although the final decision lies with the judge, to avoid any conflict that may affect his mental health or general well-being.

Finally, the right of minors to participate in judicial procedures contributes to the comprehensive protection that is directly linked with the principle of equality as an essential element of formality in the procedure.

8. *Cases of Cohabitation of Parents with the Child for Reasons of Divorce, Guardianship and Custody, Parental Rights and Adoption*

The provisional measures that can be adopted in a divorce trial have legal bases.[68] This consists of having the opposing party present at the hearing to determine the provisional guardianship and custody of the minors of the marriage and the corresponding visitation arrangements. In the case of any disagreement, the minors should be heard so that their best interests are respected. It should be noted that as it is a provisional measure, the Court does not have all the evidence needed to issue judgment in strict adherence to the

[68] This can be viewed in Articles 282, 941 Bis and 941 Ter from 282, 941 Bis and 941 Ter; Código de Procedimientos Civiles para el Distrito Federal [C.P.C.D.F.] [Civil Procedure Code of the Federal District], *as amended*, Diario Oficial de la Federación [D.O.], 26 de mayo de 1928 (Mex.).

real situation and must therefore observe the legal and human presumptions, as long these are not distorted, which will depend on the subsequent actions to be verified during the trial. The absence of evidence regarding the parent's actual behavior does not constitute an impediment to issuing decision to protect the best interests of the child, insofar as it deals with determining who shall exercise the guardianship and custody of children and the visitation and cohabitation arrangements, which will influence the child's physical and emotional development. In order to do so, judge requires minimum weighting to enact his decision.[69]

9. *The Principle of Guardianship, Custody and Parental Authority of the Parents Consisting in the Fact that Minors Should Not Be Separated from Their Parents against the Will of the Parents in Weighting the Best Interests of the Child*

If there is any indication that following the transfer of a minor to the care of one of his parents as ordered by the sentence, the child's psychological and physical integrity is affected due to harmful behavior after the ruling is enforced, resulting in clear signs of violence, and if the family court judge knows of any indication that puts the best interests of the child at risk, compliance with the final ruling must be reconsidered under said principle. Prior to ordering the execution of a sentence, the judge must have at his disposal all the evidence needed to assess whether the sentence should be enforced or not.

Another constitutional principle in place is that of *legal security*, meaning that final sentences of *ordre public* and *general interest* must be enforced, but this does not apply in the case of family disputes. This principle cannot be set above the best interests of the child. In this case, the fulfillment of such a sentence would lead to exposing the child to all kinds of dangers ranging from physical and psychological aggression to sexual molestation that can mark a child for life.[70]

10. *Legal Adoption by a Same-Sex Partnership and the Principle of the Best Interests of the Child*

Just like any human being, children enjoy fundamental rights recognized in various international instruments which have established that due to their

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[69] *See* Medidas provisionales en un juicio de divorcio que afectan a menores. Datos que deben tomarse en cuenta para decretarlas. Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIII, Abril 2011, Tesis I.3o.C.923 C, Página 1340 (Mex).

[70] See Interés superior del menor. Debe ponderarse su preferencia en relación con otros principios constitucionales atento al caso concreto, Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, libroVI, Marzo 2012, Tesis I.3o.C.1022 C, Página 1222 (Mex).

lack of physical and mental maturity, children need protection and special physical, mental and legal care, both before and after birth. This protection is guaranteed when the State seeks to provide the necessary means so that the child's family can give this care and protection. It is thus deemed that the ideal setting for a child's optimum development is found in the bosom of a family in an environment filled with happiness, love, respect and understanding, with the participation of both parents, insofar as this does not go against the best interests of the child.

Consequently, it is the obligation of both the Mexican State and the parents to ensure the normal development of a minor –the one that is produced when the child's environment allows or makes this development possible according to the child's physical and mental capabilities to prepare for an independent life in society with a perception of respect since others also have rights. But the legal possibility of adoptions for same-sex unions does not constitute automatic or indiscriminate authorization to do so, nor does this happen with heterosexual couples. Adoptions must adhere to the legally established system, as it aims to ensure the best interests of the child as a fundamental right of the adoptee.[71]

11. *The Best Interests of the Child and the Tender Years Doctrine*

The Mexican Supreme Court of Justice has interpreted Article 4 of the Constitution to mean that the best interests of the child should be the guiding rule that applies equally to the father and the mother in terms of satisfying a child's needs and consequently the attainment of his comprehensive development. Meanwhile, the State also has the constitutional ability to separate the child from one or both of his parents in order to provide the child greater protection. The Constitution does not establish a general rule stating that a child's comprehensive development can only be guaranteed when he is with his mother. The judge is entitled to assess the specific circumstances of each case to guarantee the child respect for his rights. Consequently, if men and women are equal before the law and in particular with regard to the care and protection of their children, both are responsible for ensuring the best interests of the child are met. It is clear that if a child must be separated from one of his parents, the Article 4 of the Mexican Constitution does not establish a fundamental principle that automatically gives custody to the mother.[72]

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[71] *See* Matrimonio entre personas del mismo sexo. La posibilidad jurídica de que puedan adoptar no debe considerarse como una autorización automática e indiscriminada. (art 391 del Código Civil para el Distrito Federal), Tribunal Colegiado de Circuito [T.C.C.] [Collegiate Circuit Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Agosto2011; Tesis P./J. 14/2011, Página 876 (Mex).

[72] *See* Interés superior del menor. En caso de que deba ser separado de alguno de sus padres, Primera Sala de la Suprema Corte de Justicia de la nación [S.C.J.N.] [First Chamber

V. Conclusion

The Mexican legal system establishes different rights of a personal and social nature in favor of children. This can be observed at the level of the Constitution and international treaties, as well as in federal and local laws.

In the various regulations, the legal protection of minors allowed the best interest of the child to be recognized as a principle. This implies that the policies, actions and decisions related to this stage of human life are carried out in such a way that the direct benefit of the child at whom it is directed takes first place. With this aim in mind, work is being carried out from a legal and jurisprudential perspective to shape the content of this constitutional principle, which also pertains to family law.

The best interests of the child have entered the ranks of what the Supreme Court of Justice of the Mexican nation calls the "hard core of rights". These are identified as those that do not admit any restriction whatsoever, and therefore also touch upon legislators when the legal regulations expressly recognize the cluster of rights and order that the mandate be made effective. With an updated legal assumption to achieve the function of this principle, a series of obligations have arisen that State authorities need to meet, including a case-by-case analysis. This aspect implies the recognition of a "hard core of rights", which are rights that do not allow any restrictions and therefore, constitute an insurmountable limit that particularly has a bearing on legislature. In addition to protecting the best interests of the minor, it also protects the right to life, the right to nationality, the right to identity, the freedom of thought, the freedom of conscience, the right to health, the right to education, the right to an adequate standard of living and the right to engage in age-appropriate activities.

The best interests of the child as a guaranteed principle also denotes an obligation to prioritize public policies aimed at ensuring the "hard core" of rights, but that is not all. It is imperative to turn to the argumentative method of weighting, which consists of analyzing each individual case when conflicting situations arise that involve the interests of third parties. This must be carried out in such a way that the scope of the best interests of the child is set according to the particular circumstances of the case and may not entail the exclusion of the rights of others.

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of the Supreme Court of Justice] Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIII, Febrero 2011; Tesis 1st. VII/2011, Página 615 (Mex).

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THE OBJECTIVE INTERNATIONAL RESPONSIBILITY OF STATES IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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Abstract. *The international responsibility of States is based on two legal precepts: first, a State must be subject to international obligations; and second, a State must be responsible for noncompliance with such obligations. Specific and concrete damages are not required for the allocation of international responsibility to a State. Given these elements, the Inter-American Human Rights System, through the Inter-American Court, will not hear disputes involving a State's international responsibility without the existence of a specific and concrete human rights violation. While this seems appropriate, rulings by the Inter-American Court have subsequently opened the door to States' objective international responsibility; i.e., responsibility under the American Convention on Human Rights that require no showing of a specific violation. In the author's view, the international responsibility of States, similar to Public International Law, should be based on noncompliance without the need for a victim –especially in human rights cases. For this reason, the Inter-American Court is correct in holding States responsible for domestic laws that contravene its own human rights commitments under international treaties– regardless of whether or not these norms have been enforced.*

Key Words: *International Human Rights Law, Objective International Responsibility of the State, Internationally Wrongful Acts, Inter-American Court of Human Rights.*

Resumen. *La responsabilidad internacional del Estado, parte de dos premisas esenciales. Por un lado debe de existir una obligación a cargo del Estado y, por el otro, la conducta violatoria a dicha obligación debe ser atribuible a ese Estado. Siendo así, que la causación de daños específicos y concretos, no es un requisito indispensable para una eventual determinación de responsabilidad internacional del Estado. Sin embargo, el sistema interamericano de derechos humanos, a*

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través de la jurisprudencia de la Corte Interamericana ha determinado que para estar en capacidad de resolver la responsabilidad internacional de un Estado, se debe demostrar la violación específica y concreta a un derecho humano en particular. Si bien es una premisa correcta, la jurisprudencia de la Corte Interamericana ha abierto la posibilidad para determinar la responsabilidad internacional objetiva del Estado, a través de la cual, se puede determinar responsabilidad por el hecho de haber emitido alguna norma contraria a la Convención Americana sobre Derechos Humanos, sin que esta haya sido efectivamente aplicada a un caso en particular. En ese sentido, la responsabilidad internacional de un estado, de manera destacada en materia de derechos humanos, se debe de determinar en principio, al igual que en materia de Derecho Internacional Público, por la transgresión a sus obligaciones y no, como elemento indispensable, por la existencia de una víctima. Es así, que si bien debe de existir una causa de pedir, el análisis que realice en su caso la Corte Interamericana, debe de partir de la premisa de que un Estado puede ser responsable por la emisión de una norma que contraviene sus compromisos internacionales en materia de derechos humanos, aún cuando está no haya sido aplicada a un caso en concreto.

Palabras clave: *Derecho internacional de los derechos humanos, responsabilidad internacional objetiva del Estado, actos internacionalmente ilícitos, Corte Interamericana de Derechos Humanos.*

Table of contents

I. Introduction

This note analyzes the objective international responsibilities of States pursuant to the Inter-American Human Rights System. Under this legal frame-

work, a State can only be held accountable for an internationally wrongful act if such act (a) is attributable to the State under international law; and (b) constitutes a breach of the State's international obligation.[1] Under this framework, specific damages caused by a wrongful act need not to be shown in order to establish the State's culpability.

In a recent advisory opinion, the Inter-American Court of Human Rights held that "the promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty. Furthermore, if such a violation affects the protected rights and freedoms of individuals, it may give rise to international responsibility for the state in question" [2]. Notably, this opinion manifests a contradiction between the International Law Commission and the Inter-American Court of Human Rights regarding the need for specific damages or a human rights violation to trigger State culpability for an internationally wrongful act.

The principles of state responsibility govern when and how a state is held responsible for a breach of an international obligation. As such, they do not establish specific obligations, but rather determine when an obligation has been breached and the legal consequences of that violation. This note addresses the nature of such international responsibility, specifically whether or not international responsibility under the Inter-American Human Rights System requires a showing of specific damages or a human rights violation. It argues that even if a human rights violation is necessary to trigger international responsibility under the Inter-American Court's rules, a strong argument can be made to foster abstract control of a given law; i.e., objective international responsibility without the need for a specific human rights violation.

The first part of the note provides a general framework, including the differences already mentioned between Public International Law and International Human Rights Law. The second part there discusses the general obligations of States under: (a) the Vienna Convention on the Law of Treaties of 1969 (hereinafter referred to as the "Vienna Convention"); (b) International Human Rights Law; and (c) the American Convention on Human Rights (hereinafter referred to as the "American Convention"). Special attention is paid to Articles 1 and 2 (obligation to adapt domestic laws) and Article 63.1 (obligation to make reparation) of the Convention.

The third part of the note examines the objective international responsibility of States in the Inter-American System, based mainly on theories developed by former Inter-American Court of Human Rights Judge A.A. Cançado Trinidade, who contributed several concurring opinions to the Court's rulings. The fourth and final part will examine several rulings made by the Inter-American Court regarding the objective responsibility of States under international law.

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[1] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int´l L. Comm´n, U.N. Doc. A/56/10.

[2] International Responsability for the promulgation and enforcement of laws in violation of the Convention, Advisory opinion, 1994 Inter-Am.Cr.H.R.

Before discussing the Vienna Convention, it should be noted that of the 34 member nations of the Organization of American States, only 24 belong to the American Convention. Of these 24, only 21 recognize the Inter-American Court's jurisdiction. This is significant, as several opinions and rulings cited herein do *not* include: the United States; Canada; Antigua and Barbuda; Bahamas; Belize; Dominica; Grenada; Guyana; Jamaica; Saint Kitts and Nevis; Saint Lucia; St. Vicente; and Trinidad and Tobago.[3]

II. Public International Law and International Human Rights Law

Several notable differences exist regarding State responsibility under Public International Law and International Human Rights Law. The Inter-American Court of Human Rights has stated that "modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the Contracting States. Their object and purpose is the protection of the basic rights of individual human beings […] The States […] assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."[4]

For this reason, the European Commission on Human Rights concluded that "obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather

[3] The Commission exercises different powers depending on the member of the OAS towards which it is acting. In this regard, in relation to all State members of the OAS it has the authority to: develop an awareness of human rights; draft recommendations for State governments to adopt progressive measures that favor human rights; prepare studies or reports deemed appropriate; request reports from State governments; reply to member state inquiries regarding human rights; and practice *in loco* observations.

With regard to member States of the American Convention on Human Rights, the Commission has the authority to: fill individual requests or communications from States; appear before the Inter-American Court of Human Rights; request the Court to take interim measures; and consult the Court regarding the interpretation of the Convention or other treaties on the matter.

Finally, with regard to non-member States of the American Convention on Human Rights, the Commission specifically has the authority to: pay attention to the observance of human rights mentioned in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration of Rights and Duties of Man; consider communications submitted to it and any other available information; request information and make recommendations; check whether internal processes and resources of each State were duly applied and exhausted (with respect to the power to examine communications submitted to it). About these countries, the Commission bases its authority in accordance with the American Declaration of Rights and Duties of Man and of the Charter of the Organization of American States.

[4] The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982).

to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves."[5]

In his concurring opinion in Blake v. Guatemala (regarding reparations and costs), former Inter-American Court Judge A.A. Cançado Trinidad stated:

> The tension between the precepts of Public International Law and those of the International Law of Human Rights is not difficult to explain: while the juridical concepts and categories of the former have been formed and crystallized, above all at the level of *inter-State* relations (under the dogma that only the States, and subsequently in international organizations, are subjects of that legal order), the juridical concepts and categories of the latter have been formed and crystallized at the level of *intra-State* relations, that is, in relations between the States and the human beings under their respective jurisdiction (the latter elevated to subjects of that legal order).[6]

The State's obligations under International Human Rights Law transcend the classical definition of State responsibility under International Law, since the primary objective of Human Rights law is to protect the rights of individuals. This distinction significantly alters the nature of States' obligations under these treaties. In this respect, "the objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect victims and provide for reparation of damages."[7]

III. Objective International Responsibility of States

International Responsibility arises when a State has incurred in an internationally wrongful act; *i.e.*, "conduct consisting of an action or omission that is attributable to a State under International Law and constitutes a breach of the State's international obligation."[8] A State will generally only be liable for the official conduct of its agencies or officials.[9] As well, State conduct may include "positive acts, omissions, failure to meet a standard of due care, or diligent control or pure lack of vigilance that is lawful according to the national law of the State."[10] Regarding the elements required under Article Two of

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[5] Austria vs Italy, App. No. 788/60, 4 Y.B. Eur. Conv. On H.R 116, 140 (1961).

[6] Blake, 1999 Inter-Am.Ct.H.R., (ser C.) No. 48., at 5 (Jan. 22, 1999).

[7] Fairén-Garbi and Solís-Corrales, 1989 Inter-Am.Ct.H.R., (ser. C) No. 6, at 136 (Mar. 15, 1989).

[8] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int'l L. Comm'n art. 2, U.N. Doc. A/56/10.

[9] *Id.*, at art. 4.

[10] Goran Lysén, State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles 59 (Lustus, 1979)

the Draft Articles on the Responsibility of States for International Wrongful Acts, Alain Pellet said:

> The most striking feature of this new approach compared to the traditional understanding of the notion of responsibility is the exclusion of damage as a condition for responsibility. In order for an internationally wrongful act to engage the responsibility of a State, it is necessary *and sufficient* that two elements (breach and attribution) are present. This is certainly not to say that, in this system, injury has no role to play; however, it fades into the background, at the level not to the triggering of the mechanisms of responsibility, some of which (the principal being, without doubt, the obligation of reparation) are dependent upon injury for their existence.[11]

In this regard, the objective international responsibility of States renders international responsibility to the State to the extent that there is no need for specific damage or violation to the rights of a third party. "The requirement that there should be a breach of obligation is therefore sufficient."[12]

1. *International Responsibility of States under the Vienna Convention on the Law of Treaties*

As legal entities, nations that sign international treaties agree to be bound by their terms. Article 2.1.d) of the Vienna Convention refers to a "contracting party" as a "State which has agreed to abide by a treaty, whether or not the treaty has entered into force". This is the basis for States' international obligations: legal responsibility pursuant to the terms of mutual agreement. International law rests on other legal principles and, as such, its duties and obligations extend beyond treaties, including customary law and norms of *jus cogens*.[13]

Article 18 of the Vienna Convention defines the State's main obligation as "refrain(ing) from acts which would defeat the object and purpose of the treaty." As obvious as this may appear, it forms the basis for the international responsibility of States, as it requires that each signatory nation act in accor-

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[11] Alain Pellet, The Law of International Responsibility Oxford Commentaries on International Law 9 (James Crawford, Alain Pellet & Simon Olleson eds., Oxford, 2010)

[12] *Id.*

[13] Vienna Convention on the Law of Treaties, art. 18, May, 23, 1969, 1155 U.N.T.S. 331.

This investigation will only refer to the international responsibility of the States resulting from conventional obligations.

2 Sections a. and b. of Article 18 of the Vienna Convention establish:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

dance with the terms of the treaty. More importantly, each party is obligated to make a good faith effort to actively support the main principles of the accord.

This general obligation is complemented by the *pacta sunt servanda* and *bona fide* principles of international law. Article 26 of the Vienna Convention establishes that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". In this way, it establishes the obligatory nature of international agreements, particularly States' obligation to proactively act in ways that promote compliance. Article 27 of the Vienna Convention states that "a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty."[14] This norm codified the rule that domestic law is irrelevant to international law. Roberto Ago, former Special Rapporteur of the United Nations International Law Commission, said that "for the national legal order, the organization of the state —structures and functioning of which are determined wholly by legal norms pertaining to that order— has a legal character. On the other hand, the formation and regulation of the same organization are entirely alien to the legal provisions of the international order; for the latter system, the internal organization of the State is as a whole, merely a fact."[15]

Although the Vienna Convention imposes many legal obligations, the agreement to abide by the treaty's purpose (*pacta sunt servanda* and *bona fide)*; and its signatories' commitment not to justify noncompliance with domestic law, provide a clear idea of the nature of State responsibilities under international accords.

2. *Responsibility of States under International Human Rights Law.*

Although it is difficult to assess a general category of State responsibilities under International Human Rights Law —mainly because of the broad array of human rights— the way they are exercised, the social and cultural conditions needed to fulfill them and the position (mainly economic) of a given State towards negative and positive rights; in essence, three basic elements comprise the core of human rights obligations assumed by States: "the obligation to respect, to protect and to fulfill."[16] As such, the "failure to perform any of these three obligations constitutes a violation of such rights."[17]

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[14] Vienna Convention on the Law of Treaties, art. 46, May, 23, 1969, 1155 U.N.T.S. 331. This rule is supported by Article 46 of the Vienna Convention, referring to the provisions of internal law regarding competence to conclude treaties.

[15] Roberto Ago, *Third Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility,* [1971] 2 Y.B Int'l L. Comm'n par. 117,, UN Doc. A/56/10.

[16] Olivier de Schutter, International Human Rights Law 242 (Cambridge University Press, 2010)

[17] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Eco-

The first obligation ("respect") requires that States "avoid interfering with the enjoyment of economic, social and cultural rights"[18] (including also civil and political rights). The second obligation ("protect") requires that States "prevent violations of such rights by third parties"[19]. And the third obligation ("fulfill") requires that States "take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights."[20]

In the Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies in 2005, the Office of the High Commissioner for Human Rights stated:

> All human rights —economic, civil, social, political and cultural— impose negative as well as positive obligations on States, as is captured in the distinction between the duties to respect, protect and fulfill. The duty to respect requires the duty-bearer to refrain from interfering with the enjoyment of any human right. The duty to protect requires the duty-bearer to take measures to prevent violations of any human right by third parties. The duty to fulfill requires the duty-bearer to adopt the appropriate legislative, administrative and other measures towards the full realization of human rights.[21]

3. *Responsibility of States under the American Convention*

Under Articles 1 and 2 of the American Convention, the obligations and duties of States to respect, protect and fulfill human rights are considered "primary" norms, or substantive rules of international law. Article 62.3, 63 and 68 address basic issues of responsibility and availability of remedies; these norms are considered "secondary".

A. *Obligations of States under Articles 1 and 2 of the American Convention*

Article 1.1 sets forth the obligation of States to respect and guarantee human rights as follows: "The State-Parties to this Convention undertake to *respect* the rights and freedoms recognized herein and to *ensure* that all persons

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nomic, Social and Cultural Rights, 26 January 1997, para. 6, *available a*t http://www.refworld.org/docid/48abd5730.html (last accessed 27 October 2014)

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Office of the High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, 2005. par 47. Regarding social, economic and cultural rights, the quote continues: "Resource implications of the obligations to respect and protect are generally less significant than those of implementing the obligations to fulfill for which more proactive and resource-intensive measures may be required. Consequently, resource constraints may not affect a State's ability to respect and protect human rights as its ability to fulfill human rights".

subject to their jurisdictions enjoy the free and full exercise of those rights and freedoms, without discrimination […]."

On the other hand, Article 2 of the Convention states:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State-Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

In the Inter-American Human Rights System, Articles 1 and 2 of the Convention are the cornerstone of States' international duties and responsibilities. The Inter-American Court once declared that Article 1 "specifies the obligation assumed by the State-Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated."[22] In other words, for every right recognized under Article 3 to Article 27 of the Inter-American Convention, a corresponding obligation exists for each State to protect and guarantee this right.

The Inter-American Court has stated that Article 1 "is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to the State-Party. In effect, that Article charges the State-Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention."[23]

The first obligation assumed by States under Article 1 is to "respect the rights and freedoms", which implies certain limits in the "exercise of public authority based on the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State."[24] The States' second obligation under Article 1 is to "guarantee" the free and full exercise of those rights and freedoms. This obligation implies the "duty of the State-Parties to organize the governmental apparatus […], so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence, the States must prevent, investigate and punish any violation of the rights recognized by the Convention."[25]

In Article 2 of the Convention, the Court requires that States "include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of said guarantees."[26] This obligation covers several important points.

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[22] Velázquez-Rodríguez, 1988 Inter-Am.Ct.H.R., (ser. C) No. 4, at 162 (Jul. 29, 1988).

[23] *Id.* para. 164.

[24] *Id.* para. 165.

[25] *Id.* para. 166.

[26] Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 85 (Feb. 5, 2001).

Firstly, it considers the States and Inter-American Human Rights system as the main entities responsible for formulating and ensuring the protection of human rights. In this view, the Commission and Court act to adjudicate disputes when States fail to comply with their obligations. Article 2 also defines the principle of *effet utile*, which requires each State to ensure legal and practical enforcement of the Convention's human rights norms. The Court has held that

> […] in international law, customary law establishes that the State that has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure proper compliance of the obligations it has assumed […] This general obligation implies that the measures of domestic law must be effective; this means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system.[27]

In sum, Article 2 was enacted to ensure that States harmonize their national norms with the Convention. These articles, in effect, establish two benchmarks: (a) to ensure compliance with the Convention; and (b) to defend human rights. For this reason, "the efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the State-Parties."[28]

Former Judge A.A. Cançado Trinidade has said that "the two general obligations enshrined in the American Convention —that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2)— appear to be ineluctably intertwined. Hence, the breach of Article 2 always brings the violation likewise of Article 1(1). The violation of Article 1(1) takes place whenever there is a breach of Article 2. And when Article 1(1) is violated, there is a strong presumption of non-compliance with Article 2."[29]

Given that a major element of "respect" and "assurance" of human rights lies in States' domestic laws and regulations, this is significant. For this reason, States' international responsibilities through the analysis of general, impersonal and abstract acts of the State, such as laws or regulations, that infringe a human right, violate key obligations set forth in Article 1 of the Convention.

B. *Obligations of States under Article 63.1 of the American Convention*

Under Articles 1 and 2 of the Convention, the State-Parties agree to a third obligation: make reparation for human rights violations for which they

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[27] *Id.* para. 87.

[28] *Id.* para. 9; Concurring Opinion of A.A Cançado Trinidade (Jan. 29, 1997)

[29] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at Concurring opinion A.A, Cancado Trinidade (Jan. 29, 1997).

are culpable. "When an unlawful act imputable to the State occurs, said State becomes internationally responsible for a violation of international law. It is out of this responsibility, that a new juridical relationship for the State emerges, which is the obligation to make reparation."[30] The State's obligation to remedy human rights infringements is set forth in Article 63.1 of the American Convention as follows:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be *ensured* the enjoyment of the right and freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be *remedied* and that *fair compensation* be paid to the injured party.

What do each of these elements mean? Reparation is any measure taken by the State to redress gross and systematic violations of human rights law or humanitarian law through the administration of some form of compensation or restitution to the victims. There are four major categories of reparation: *restitutio in integrum*, compensation, satisfaction and guarantees of non-repetition. To refer to the forms of reparation, is useful to defer to the definitions employed by the Draft Articles on Responsibility of the States for Internationally Wrongful Acts (2001),[31] developed by the International Law Commission of the United Nations (hereinafter referred to as the Draft).

Article 34 of the Draft states that full reparation of the injury caused by the wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination. In Article 35, the Draft sets forth that a State responsible for an internationally wrongful act is obligated to make restitution; that is, to re-establish the situation that existed before the wrongful act occurred, unless "it is not materially impossible" and "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".

It is a principle of international law —as set forth in Article 36 of the Draft— that any breach of a treaty engagement involves an obligation to make reparation for a wrongful act, insofar as such damage is not made good by restitution. This compensation must cover all financially-measurable damages.[32]

As a form of reparation, "satisfaction" is made by the State when reparation is not feasible either by restitution or compensation. Article 37 of the

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[30] Garrido and Baigorria, 1998, Inter-Am.Ct.H.R., (ser. C) No. 39, at 40 (Aug. 27, 1998).

[31] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int´l L. Comm'n, U.N. Doc. A/56/10.

[32] In addition to financial damage, the Inter American System has developed an array of jurisprudence that states that compensation shall cover both financial and non-financial damages.

Draft establishes that "satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality." The Inter-American Court has said that guarantees of non-repetition are "positive measures that the State must adopt to ensure non-recidivism of injurious acts."[33]

C. *Considerations Regarding State Responsibilities: Source and Types of Acts Committed by States*

It is noteworthy that under the American Convention, the internal laws of signatory nations are not subject to international law; they are considered a simple matter of fact. This said, the Inter-American Court has held that "the international responsibility of the State may be engaged by acts or omissions of any power organ of the State, whatsoever its rank, that violate the American convention".[34] In effect, this means that any entity, agency or official acting on behalf of a public authority may be liable for a human rights violation.

It has long been universally recognized that a "State is responsible for violations of international law committed by its agents."[35] Referring to State judicial power in its 1969-II Yearbook, the International Law Commission quoted the French-Italian Arbitration Panel (1955) which said that

> [...]the judgment or order of a court is something issuing from an organ of the State, just like a law promulgated by the Legislature or a decision taken by the executive authorities. The non-observance by a court of a rule of international law creates international responsibility on the part of the collectivity of which the court is an organ, even if the court has applied municipal law in conformity with international law.[36]

The Court also stated that "any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State."[37] In this way, a State may be liable for human rights violations even if the agent who acted unlawfully did so pursuant to law. Which means that when agents act outside their scope of authority, or violate domestic norms, the State may still be responsible for their acts and omissions.[38]

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[33] Balucio, 2003, Inter-Am.Ct.H.R., (ser. C) No. 100, at 73 (Sep, 18, 2003).

[34] Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 72 (Feb. 5, 2001).

[35] Roberto Ago, *supra* note 15, at 105 para. 10.

[36] *Id.* at 106, para. 19.

For a reference in the Inter-American System, *see* Tristán Donoso, 2009, Inter-Am.Ct.H.R., (ser. C) No. 193, at 85 (Sep. 1, 2010). Here the Inter-American Court decided that the Supreme Court of Justice of Panama had violated Article 8.1 of the American Convention, due to the lack of motivation in a resolution regarding the disclosure of a telephonic conversation.

[37] Velázquez-Rodríguez, 1988 Inter-Am.Ct.H.R., (ser. C) No. 4, at 172 (Jul. 29, 1988).

[38] *Id.* para. 170.

According to the classical approach to the international responsibility of States, each nation is solely responsible for the positive acts and omissions of its agents. The Inter-American Court's "due-diligence theory", however, holds that "an(y) illegal act which violates human rights and which is initially not directly imputable to the State, can lead to international responsibility, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."[39]

IV. Objective International Responsibility of States in the Inter-American Human Rights System

Roberto Ago said that "one of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law."[40]

The underlying basis for objective international responsibility requires that each State's domestic norms be compatible with the American Convention –whether or not these norms have ever been enforced. This responsibility implies "that the very existence of a legal provision of domestic law can create a situation *per se* that directly affects rights protected under the American Convention, by the risk or the real threat that its applicability represents, without it being necessary to wait for the occurrence of damage".[41] In other words, analyzing the compatibility of a domestic norm with the American Convention is not purely hypothetical, since "the moment a violation of a protected right is found […], the examination is no longer an abstract question […], is in fact a concrete question."[42]

Former Inter-American Court Judge A. A. Cançado Trinidade states that "it is the existence of victims that provides the decisive criterion for distinguishing the examination simply *in abstracto* of a legal provision, from the determination of the incompatibility of such provision with the American Convention in the framework of a concrete case […]."[43] A concrete case is one in which victims of human rights violations have been shown to exist.

Based on this theory, a signatory nation's law could trigger liability for an international wrongful act without any need to show a connection between the law and a human rights infringement. Despite this, Judge Cançado Trinidade said that it was impossible to address the illegal norm *in abstracto*,

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[39] *Id.* para. 172.

[40] *Second Report on Responsibility of the State*, *International Law Commission*, 205, par. 30, 1971

[41] Olmedo Bustos, 2001, Inter-Am.Ct.H.R., (ser. C) No. 73, at 3 (Feb. 5, 2001).

[42] El Amparo, 1996 Inter-Am.Ct.H.R., (ser. C), No. 28, at 7 (Jan 18, 1996).

[43] *Id.*

e.g., based on the legal provision itself. In his view, "the existence of victims renders juridically inconsequential the distinction between the law and its application, in the context of a concrete case."[44]

Thus, the existence itself of a law entitles the victims of violations of the rights protected by the American Convention to require its harmonization "with the provisions of the Convention, and the Court is obliged to pronounce on the question, without having to wait for the occurrence of an additional damage by the continued application of such law".[45]

The opposing argument is that laws must be first enforced to determine their compatibility with the American Convention. "If one attempts […] to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order."[46] Most international human rights treaties (including the American Convention) are enacted based on the assumption that internal laws must be harmonized with their provisions —not vice versa.

"The American Convention, seeks to have in the domestic law of the State Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws which do not conform to its standards of protection."[47] In fact, it would be completely unrealistic to attempt to adapt the American Convention to the provisions or regulations of the internal laws of any particular State.

In Articles 1 and 2, the American Convention stipulates that States must (a) ensure compliance with their international human rights obligations; and (b) harmonize domestic law with the Convention. For this reason, all laws enacted by States are subject to review by the Inter-American Commission and Court. Thus, the question would not be based on why or what, but on when the Court must check on a norm that presumptively infringes the international obligations of the State.

It is notable that under the Inter-American Human Rights System, an actual human rights violation must occur for a party to seek redress. Pursuant to objective international responsibility, once a legitimate claim is filed, both the Commission and Court may review any State law relevant to the case.

In analyzing the State's international responsibility, there is no question whether or not the legislative power and its actions can be held liable for breaching the international obligations of the State. The issue here is whether or not the law must be first enforced to qualify for review by either the Inter-American Commission or Court.

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[44] *Id.*

[45] Genie-Lacayo, 1997, Inter-Am.Ct.H.R., (ser. C), No. 30, at 10 (Jan. 29, 1997).

The concept of continuing violations comprises violations of human rights which, e.g., cannot be divorced from the legislation from which they result (and which remains in force).

[46] *Second Report On Responsbility Of The State* , *International Law Commission*, 205. par. 30, 1971

[47] El Amparo, 1996 Inter-Am.Ct.H.R., (ser. C), No. 28, at 14 (Jan 18, 1996).

It is also worth noting that any legal provision that violates human rights as a self-executing or self-binding norm is not included in this analysis. The specific types of norms examined are those whose enactment violates per se Article 2 of the Convention, whether or not they were applied to a specific case.

In our opinion, the Inter-American Commission and Court of Human Rights may legally review internal norms that create a situation *per se* that directly affects rights protected under the American Convention for any of the following four reasons:

1) The internal norm breaches the State's obligation under Article 2 to adopt "legislation needed to give effect to the conventional norms of protection, filling in eventual lacunae or insufficiencies in the domestic law, or else the modification of national legal provisions so as to harmonize them with the conventional norms of protection."[48]

   Although the primary purpose of International Human Rights Law is to protect human rights, the Inter-American Court is the only legal entity with the jurisdiction to interpret and adjudicate the Convention's provisions. For their part, the States must harmonize their own laws to foster respect for and compliance with their obligations under the Convention. In cases of infringement, however, the only entity with legal competence to decide is the Court.
2) A State fails to comply with its human rights obligations under Article 1if it fails to harmonize its internal laws or openly contradicts the Convention.
3) When a law exists that openly and perpetually violates human rights *per se*, "the Court is obliged to pronounce on the question, without having to wait for the occurrence of an additional damage by the continued application of such law."[49] That means that there is no necessity to "wait for the subsequent application of the law, generating additional damage."[50]
4) Article 63.1 of the American Convention, in relation to the general obligations of the States under Articles 1 and 2, "accords perfectly on the duty to make reparation for damages resulting from violations of the protected human rights."[51] Article 63.1 provides for satisfaction as a measure of reparation, as well as for the duty to ensure enjoyment of the protected rights.

   The obligation of the States under Article 63.1 covers all measures, including legislative ones; the Court "should proceed to the determina-

[48] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at 9 (Jan. 29, 1997).

[49] El Amparo, 1996 Inter-Am.Ct.H.R., (ser. C), No. 28, at 7 (Jan 18, 1996).

[50] *Id*., para. 22.

[51] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at 11 (Jan. 29, 1997).

> tion of both the indemnizations (*sic*) as well as the other measures or preparation resulting from the duty to ensure and guarantee the enjoyment of the rights that were violated."[52]

In addition to these four reasons, International Public Law requires signatory nations to fulfill and promote the object of the treaty and refrain from invoking internal law to justify noncompliance. Provide by themselves additional elements to why the Inter-American Commission and Court of Human Rights may legally review national laws that directly affect *per se* rights protected by the American Convention, and eventually determine its incompatibility with the Convention.

Finally, it should be noted that the "the reparation itself for proven human rights violations in concrete cases may require changes in domestic laws and administrative practices. Enforcement of human rights treaties has not only been known to resolve individual cases, it has also brought about such changes, thus transcending the particular circumstances of concrete cases."[53]

V. Objective International Responsibility of States in Rulings by the Inter-American Court of Human Rights.

The Inter-American Court has reviewed several cases involving the compatibility of the domestic laws of signatory parties with Article 2 of the American Convention. The following section examines several notable rulings by the Court:

1) In Genie Lacayo v. Nicaragua (Merits, 1997), the Court limited its own ability to rule on the objective international responsibility of States. In his concurring opinion, former Inter-American Court Judge Trinidade stated that the court took to an extreme the legal theory that a hearing under the American Convention requires that a law be first enforced. Regarding decrees No. 591 and 600 (of 1980); the Court distinguished between provisions that had already been applied, as evident by a comparison of paragraphs 83, 91 and 92. In sum, the Court's ruling limited its own ability to enforce States' legal obligations.[54]
2) Suarez Rosero v. Ecuador (Merits, 1997) was the first case in which the Court endorsed the theory of objective international responsibility. In this ruling, the Court held that a provision of the Ecuadorean Criminal Code failed to comply with Article 2 of the Convention. The Court

[52] *Id.*, para. 13.

[53] Caballero-Delgado and Santana, 1997, Inter-Am.Ct.H.R., (ser. C) No. 31, at 11 (Jan. 29, 1997).

[54] Genie-Lacayo, 1997, Inter-Am.Ct.H.R., (ser. C), No. 30, concurring opinion of Judge A. A. Cançado Trinidade, at 10 (Jan. 29, 1997).

stressed that although "the rule has been applied to the specific case […], the law violates Article 2 of the Convention *per se*, whether or not it was enforced in the instant case."[55]

3) In Last Temptation of Christ (Olmedo Bustos et al.) v. Chile (Merits, 2001),[56] the Court ruled —under the theory of the objective international responsibility of States— that a provision of the Chilean Constitution used to permit censorship contravened Articles 2 and 13 of the Convention. The Court stated that "by maintaining cinematographic censorship in the Chilean legal system (Article 19(12) of the Constitution and decree law 679), the State is failing to comply with its obligation to adapt domestic law to the Convention in order to make effective the rights embodied in it, as established in Convention Articles 2 and 1(1)."[57]

   In paragraph 4, the Court ruled that "the State must amend its domestic law within a reasonable period, in order to eliminate prior censorship […]."[58]

4) In Barrios Altos v. Peru (Merits, 2001), the Court held that amnesty laws No. 26479 and No. 26492 were incompatible with the Convention and, as a result, lacked legal effect. Consequently, the Court found Peru liable for failing to comply with Articles 1(1) and 2 of the Convention.

   In this case, the Court held that "the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation embodied in Article 2 of the Convention."[59] It also declared that said laws lacked legal effect and thus could not be used to (a) obstruct continued investigation of the case; (b) identify and punish those responsible; and (c) be applied to other Peruvian cases involving alleged violations of the American Convention.[60]

5) In Gelman v. Uruguay (Merits, 2011), the Court held that Uruguay's Expiry Law was incompatible with the American Convention and Inter-American Convention on the Forced Disappearance of Persons, and thus lacked legal effect. Uruguay was ordered to ensure that the Expiry Law would not impede factual investigation, identification and punishment of culpable parties.

   In the Court's view, "the fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct

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55 Suárez-Rosero, 1997, Inter-Am.Ct.H.R., (ser. C) No 35, at. 97 (Nov 12, 1997).

56 Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 85 (Feb. 5, 2001).

57 *Id.* para. 88.

58 *Id.* para. 4.

59 Barrios Altos, 2001, Inter-Am.Ct.H.R., (ser. C) No. 35, at 43 (Mar 14, 2001).

60 *Id.* at 44.

democracy, does not automatically or by itself grant legitimacy under International Law."[61]

6) In Castañeda v. Mexico (Merits, 2008) —involving political rights— the Court held that the "State shall complete the adaptation of its domestic law to the Convention, in order to adapt the secondary legislation and the norms that regulate the action for the protection of the rights of the citizen to the provisions of the constitutional reform of November 13, 2007, so that, using this remedy, the citizens are effectively guaranteed the possibility of contesting the constitutionality of the legal regulation of the right to be elected."[62]

   This ruling is notable because it involves a violation in the absence of laws or an adequate legal framework to protect valid rights. In this sense, Castañeda addressed States' objective international responsibility by omission.

7) In four distinct cases (Radilla-Pacheco v. México (2009), Fernández Ortega v. México (2010), Rosendo Cantú v. México (2010) and Cabrera García and Montiel-Flores v. México (2010)), the Court ruled that Article 57 of the Mexican Military Code violated the American Convention, and ordered the Mexican government to harmonize its legislation with International and Inter-American Human Rights standards.

   In all four cases, the Court held that Article 57 of the Military Criminal Code was "incompatible with the American Convention" and ordered the State to "adopt, within a reasonable period of time, appropriate legislative reforms in order to make this provision compatible with the international standards of the field and of the Convention."[63]

Notwithstanding comments made in Advisory Opinion OC-94/1994,[64] we believe that these cases define the Inter-American Court's approach to the objective international responsibility of States. As a result of these rulings, States may be held responsible for international wrongful acts by the enactment of legislation that violates *per se* Article 2 of the Convention.

It is worth noting that the Inter-American Court still requires a cause of action to hear cases. Once that threshold has been met, however, any law that alleged violates a human right —whether it has been enforced or not— must be carefully analyzed in order to avoid potential future human rights violations.

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61 Gelman, 2011, Inter-Am.Ct.H.R., (ser. C) No. 221, at 238 (Feb 24, 2011).

62 Castañeda-Gutman, 2008, Inter-Am.Ct.H.R., (ser. C) No 184, at 231 (Aug 6, 2008).

63 Radilla-Pacheco Inter-Am.Ct.H.R., (ser. C) No. 209, at 342 (Nov 23, 2009).

64 Advisory Opinion OC-14/94, 1994, Inter-Am.Ct.H.R., (ser. A), No. 14, at 1, (Dec.9, 1994). "The promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the Convention is a violation of that treaty. Furthermore, if such a violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the state in question."

If no victim is required under International Public Law,[65] this same principle should also be applied to International Human Rights Law. Notwithstanding the Inter-American Court's apparent ruling on this issue, it should disregard the criteria set forth in Advisory Opinion OC-94/1994 and establish new standards by which international objective responsibility is recognized under the Inter-American Human Rights System.

VI. Conclusion

The International Human Rights Law holds signatory nations to a complex regulatory framework. On the one hand, it obligates parties to ensure human rights protection and, in case of infringement, make reparations. On the other hand, the States are left responsible for enforcing their own compliance with international obligations.

Under Articles 1 and 2 of the Inter-American Convention, signatory nations are legally bound to ensure by negative and positive means human rights protection within their territory. By virtue of this accord, each State agrees to respect its international obligations, adhere to the purpose of the treaty; subscribe to *pacta sunt servanda* and *bona fide* principles; and refrain from using domestic law to justify noncompliance.

In this light, when a State fails to harmonize its internal norms with the provisions of the American Convention, it may be responsible for human rights violations *per se*, as well as international obligations under the Convention.

The legal basis for the objective international responsibility of States was made to deter States from infringing on human rights. The only caveat is that it requires them to comply with international obligations. When properly implemented, this becomes a virtuous cycle by which States embed a systemic international approach to the protection of human rights through the creation of their own internal laws and regulations.

As we have seen, the Court's rulings represent a major step towards human rights protection on an international level. For "the efficacy of human rights treaties (and the level of human rights protection) is measured, to a large extent, by their impact upon the domestic law of the State Parties."[66] As stated above, there must be an actual human rights violation (cause of action) in order for the Inter-American Human Rights Court to hear a case involving a particular State's international responsibility. By doing so, the Court may determine that a specific law, notwithstanding if it was applied to the specific case or not, which infringes an international obligation renders international responsibility.

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[65] *Draft Articles on Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B Int'l L. Comm'n, U.N. Doc. A/56/10.

[66] Olmedo Bustos et al, 2001 Inter-Am.Ct.H.R., (ser. C) No. 73, at 85 (Feb. 5, 2001).

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