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ARTICLES

Mexican Law Review
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THE MICHOACANAZO: A CASE-STUDY OF WRONGDOING IN THE MEXICAN FEDERAL JUDICIARY

Gabriel Ferreyra*

Abstract. *The Michoacanazo was a federal criminal trial in Mexico prosecuted by the Attorney General's Office against local and state public officials from the state of Michoacán who were indicted for having ties with the local drug cartel formally known as "La Familia Michoacana." With the indictment, more than 30 public servants were arrested and sent to prison in a roundup carried out by the federal police in May 2009. Within a two-year period, all of those arrested were eventually released. This case had strong legal and political implications nationwide because it pitted the state of Michoacán against the federal government, as well as President Felipe Calderon's administration against the Mexican Federal Judiciary. The Michoacanazo provides a glimpse into the inner workings of the Mexican federal judiciary when powerful interests collide, and corruption intermingles with politics, a drug cartel, and the complexities of handling drug-related trials.*

Key Words: *The Michoacanazo, Mexican Federal Judiciary (MFJ), judicial corruption, 'La Familia Michoacana' drug cartel, ethnography.*

Resumen. *El Michoacanazo fue un proceso penal federal promovido por la Procuraduría General de la República en contra de funcionarios estatales y municipales del estado de Michoacán acusados de tener vínculos con la organización delictiva conocida anteriormente como "La Familia Michoacana". Previo al juicio penal más de 30 funcionarios públicos fueron detenidos y enviados a un penal federal en una redada llevada a cabo por la policía federal en el mes de mayo del 2009. En un lapso de dos años siguientes a esa fecha, todos los detenidos fueron liberados. Este proceso penal tuvo y ha tenido repercusiones políticas*

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y jurídicas en todo el país en virtud de que antagonizó el gobierno federal con el gobierno del estado de Michoacán, así como la administración del presidente Calderón y el poder judicial federal. Este caso permite vislumbrar las entrañas del Poder Judicial Federal en un contexto donde intereses políticos poderosos se enfrentaron, a la par donde la corrupción se entrelaza con la política, una organización criminal local y dificultades para procesar y sentenciar casos de narcotráfico de alto impacto.

PALABRAS CLAVE: *El Michoacanazo, Poder Judicial Federal, corrupción judicial, organización criminal La Familia Michoacana, estudios etnográficos.*

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I. Introduction

1. *On Judicial Corruption*

Corruption is a complicated phenomenon to study, define, and understand. It has plagued Mexico for centuries, even before the country became an independent nation from Spanish colonialism. Government efforts made by every new President over the past 30 years to tackle corruption have not changed the fact that Mexico is one of the most corrupt nations in the world according to Transparency International.[1] Different authors at different times have studied, depicted, analyzed, and suggested possible means to deal with this ubiquitous issue.[2] Despite these Presidential efforts and academic studies outlining potentials paths to address corruption, the problem continues unabated. Given the current state of affairs in the Peña Nieto administration as regards blatant cronyism, conflicts of interest, impunity, and political corruption, the problem will not be properly addressed or changed in the near future.

The present manuscript makes a contribution to the debate on this topic by studying and analyzing corruption in the Mexican Federal Judiciary. This essay depicts a case-study based on the Michoacanazo trial and the main hypothesis centers on the premise that judicial corruption and its plethora of manifestations—influence peddling, favoritism, cronyism, bribery, and political influence, among others things—all came together to have a significant bearing on the development and outcome of the Michoacanazo case.

Unlike political corruption or any other form of wrongdoing, judicial corruption has not been fully studied in Mexico as an independent and separate phenomenon because it is understood as a ramification of political corruption. Although this may be partially true, the reality is that judicial corruption has a nature and characteristics of its own that differ considerably from the general conceptualization of corruption and political corruption in particular.

Judicial corruption goes beyond its classic and stereotyped manifestation in which a party bribes a judge to obtain a favorable sentence. It is much more complicated because there are different degrees and subtleties throughout the judicial process where corruption can occur. It also depends on how this phenomenon is defined and even the jurisdiction where corruption takes place. Judicial corruption mainly happens in two common scenarios: The first one

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[1] Transparency International, Corruption Perception Index 2013, http://www.transparency.org/cpi2013/results (last visited June 10, 2014).

[2] Edgardo Buscaglia, Vacíos de Poder en México (Random House Mondadori, 2013). Poder, Derecho y Corrupción (Miguel Carbonell & Rodolfo Vázquez eds., 2003). Vicios públicos, virtudes privadas: La Corrupción en México (Claudio Lomnitz ed., 2000). Stephen D. Morris, Corruption & Politics in Contemporary Mexico (The University of Alabama Press, 1991).

is to influence the judicial process to affect the impartiality of a trial in order to obtain an unjust outcome; and the second one is when corruption is used to navigate or circumvent bureaucracy or red tape.[3]

Regardless of the context of corruption there are two major types of judicial corruption: political interference and bribery. The former comprises various behaviors such as cronyism, influence peddling, use of connections, graft, and lobbying; the latter refers mostly to extortion (*concusión*) and bribery (*cohecho o soborno*). These modalities of wrongdoing are not exclusive to judicial corruption since they can occur in other realms of government corruption, but they are the most common ones to occur in the judicial process.[4]

In Mexico, the criminal law code does not classify judicial corruption per se as an independent legal typology; instead the federal criminal law code—and correlative penal statutes in every state— highlight specific public officials' behaviors, such as prevarication, extortion, and bribery, that fall under the category of judicial corruption. That being said, judicial corruption is defined here as "any inappropriate influence on the impartiality of the judicial process by any actor within the court system".[5] This definition is broad enough to include bribery, influence peddling, political influence or any behavior intended to affect the outcome of a trial.[6]

Judicial corruption in Mexico is difficult to unearth and prosecute for multiple reasons. First, like any type of wrongdoing, judicial corruption usually occurs in secrecy which makes it challenging to collect evidence and charge the perpetrator. Second, all magistrates, judges, and most of the personnel working in courtrooms have law degrees. They know the law and most are experts in their field. If engaging in any wrongdoing, they are savvy enough to cover their tracks and actions, hampering any effort to detect and investigate the problem. Third, for centuries the nature of the Mexican legal system—undergoing a complete overhaul today—has been legalistic, rigid and dogmatic. Judges have to follow strict adherence to the letter of the law to decide cases while at the same time they enjoy discretionary decision-making power to evaluate and interpret evidence and facts. This discretionary power

[3] Transparency International, Global Corruption Report 2007: Corruption in Judicial Systems (2007).

[4] *Id.*

[5] *Id.* at 21.

[6] Traditional petty wrongdoing such as grease payments (*mordidas*) are not included in this manuscript since this analysis addresses mostly high-impact corruption related to the Michoacanazo case. There is debate about whether or not *mordidas*—defined as grease payments to circumvent red tape—in courtrooms should be considered a form of corruption or not. Data collected from this research shows that some officials working on federal courtrooms consider *mordidas* a form of corruption while others think otherwise because—according to them—*mordidas* are usually used to circumvent bureaucracy only not to influence the final outcome of a trial. Regardless of the nature of this particular issue, it is not analyzed here since there is no evidence that *mordidas* took place in the Michoacanazo trial and interviewees make no mention of them at any time.

increases when the facts are blurry or the evidence is murky, thus creating a context in which corruption can take place without its being labeled as such. Fourth, there is a culture of impunity in the Mexican criminal justice system by which many crimes committed by public officials—or anyone for that matter—go unpunished. This trend has created a context where impunity has become the rule and prosecution and punishment the exception. Finally, the ambiguity of defining and understanding judicial corruption adds to the complexity of the problem. Phenomena such as cronyism (*compadrazgo*), the use of connections (*amiguismo*), and influence peddling (*influyentismo*) are often not considered corruption at all in courtrooms. Therefore, if there is no stigma attached to these practices but on the contrary they are admired, they can undermine judicial independence and encourage judicial corruption. Despite these shortcomings, it is possible to document incidents of judicial corruption under certain circumstances and contexts. One example is the case of the Michoacanazo trial that is analyzed in this manuscript.[7]

2. *The* Michoacanazo

The *Michoacanazo* case was a criminal trial against local and state public officials from the state of Michoacán who were indicted by the Attorney General's Office (AGO) for having ties with the local drug cartel known as "*La Familia Michoacana*" (LFM). More than 30 public servants were arrested and then sent to prison after a roundup led by the federal police in May 2009. Within a two-year period, all of those arrested were eventually freed. Besides the legal discussion supporting the facts of the case (e.g. corrupt local officials and official protection to organized crime), there were probably political motivations by the federal government (e.g. to influence state elections and to discredit the opposition party in Michoacán) to prosecute the local officials indicted in the case.

This *Michoacanazo* trial provides an opportunity to perform a holistic analysis of the context and circumstances regarding how corruption can operate within the MFJ when certain criteria are met. On the one hand, the case

[7] As part of a research project for graduate school, I conducted ethnographic work in the Mexican Federal Judiciary (MFJ) in summer of 2011. One of the goals of the research was to understand the institution from inside and hear first-hand what magistrates, judges, and personnel had to say about their jobs and daily routines, among other things.

I interviewed 45 people in total: 40 public officials working in the MFJ, three Mexican scholars whose expertise was related to this institution, and two attorneys whose work focused on federal courts. Out of the 45 people interviewed, 16 interviewees were females and 29 were males. Two-thirds of the interviews (32) took place at the interviewees' offices and one-third (12 interviews) in different settings, like coffee shops, restaurants, and the interviewees' homes. Interviews were conducted in six different cities in Mexico: Nogales, Tijuana, Mexico City, Puebla, Acapulco, and Morelia. It was during this fieldwork that I obtained access to the *Michoacanazo* file.

describes the social and political conditions that surround the federal administration of justice in Mexico. On the other hand, the case problematizes how judicial corruption is extremely difficult to track and why a combination of powerful interests (e.g. political, legal, criminal) still echo the institutional weaknesses that plagued the federal judicial system in the past during the authoritarian regime of the twentieth century. The aim of this case study is to gain a sharper understanding of the social and political contexts influencing the case, as well as why and how it happened.

The *Michoacanazo* case is also relevant because the political, legal, and criminal context in which it took place is far from over. Throughout 2014, several political public figures in Michoacán state were arrested—among them Jesus Reyna Garcia former Interim Governor and Minister of the Interior—for having close ties with the Knight Templars (formally known as *La Familia Michoacana* cartel). There are similarities between the *Michoacanazo* in 2009 and this new wave of local official arrests in 2014; a major difference though is that fact that now recorded meetings between those officials and Servando Gómez Martínez "La Tuta", one of the main kingpins of the cartel, have been leaked to the media. Uproar from those videos have prompted the Attorney General's Office—*Procuraduría General de la República* (PGR)—to initiate criminal investigations, and eventually indict, those public servants. I will address this issue in the final part of this article.

3. *Access to Files*

I first read about the Michoacanazo case in May 2009 when it became international news because of the number of people who were arrested and the context in which it took place. High-ranking state officials were among the detainees, and I personally knew two of them. One had been my classmate in law school, and I had met the other when I had worked as an attorney. Out of curiosity, I followed the case in the news to find out what the final decision in the federal courts would be. It is important to highlight that President Felipe Calderón was born in the state of Michoacán and most of his extended family lived there during his administration. Since he took office in 2006, he showed open interest in fighting the criminal organizations that operate in Michoacán. Apparently, the *Michoacanazo* case was of special interest to the President because it made it visible to society that his "war on drugs" approach was working, despite the huge increase in drug trafficking-related murders; however, it seems that other political motivation may have played a role in prosecuting this case.

During the final part of my fieldwork research, several interviewees brought up the *Michoacanazo* case as an example of potential corruption and influence peddling. Morelia was the place where the police operation to arrest the defendants in this case had been conducted. The district court that handled

most of the proceedings was located there. During my fieldwork in Morelia, some interviewees were familiar with the case, and once I heard about it, I began to question them. Several interviewees were reluctant to talk, arguing that they did not know anything about it, while others referred me to other potential respondents who had direct knowledge of the case. One of these referrals led me to interviewee Ignacio (in order to guarantee confidentiality, I am using pseudonyms throughout this manuscript, except when the person or fact is publically known in the media).

Ignacio has more than three decades of experience working in federal courts. He holds the MFJ in high esteem because he contends that the institution protects civil rights and keeps authorities who abuse their power at bay. Ignacio and I talked about the *Michoacanazo* case, and it turned out that he had direct knowledge of it and guided me to legally obtain copies of some proceedings and the verdicts. These documents from the original file and other public records available from different sources, such as media, journalists, informants, and political analyses are the base for this critical analysis.

II. La Familia Michoacana (LFM) Cartel (currently known as the Knight Templars—TKT)

It would not be possible to understand the *Michoacanazo* case study without first providing a brief background on the proliferation and powerful influence of the LFM drug cartel in the state of Michoacán and the surge of extreme violence in Mexico. Drug trafficking is a fundamental piece of the *Michoacanazo* case and it is intertwined with the performance of the federal judiciary because this problem is considered one of the most difficult social issues that Mexico has faced in modern history.[8]

Like other drug trafficking cartels that sprang up in the last decade, *La Familia Michoacana* or just *"La Familia,"* was born in the early 2000s as a collective of members from other cartels, such as *Los Zetas* and the Gulf, to fight local drug traffickers.[9] These members had a convenient alliance that mutually benefited everyone. Initially, the LFM cartel called itself *La Empresa* (The Company). Around 2006, *La Empresa* broke that alliance, severing ties with their former partners and got a new name—*La Familia Michoacana* (the Michoacán Family). The name comes from the idea that all members of the group were from the state of Michoacán and they would see themselves as a family. As a newly independent organization, LFM made its public debut in September 2006, when five severed heads were dropped onto a nightclub's

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[8] Salvador Mora, *El narcotráfico en México: cinco problemas transversales*. contralínea (2012), *available at* http://contralinea.info/archivo-revista/index.php/2012/09/09/el-narcotrafico-en-mexico-cinco-problemas-transversales/.

[9] George W. Grayson, Mexico: Narco-Violence and a Failed State? 199-200 (Transaction Publishers, 2010).

dance floor in the city of Uruapan, Michoacán. The new cartel left a sign with a message to rivals, authorities, and society: "The Family doesn't kill for money, it doesn't kill women, it doesn't kill innocent people—only those who deserve to die. Everyone should know: this is divine justice".[10]

LFM used fear and intimidation to pursue their criminal activities while simultaneously using a double discourse to gain social acceptance. On one hand, LMF proclaimed itself as protector of Michoacán's inhabitants against the criminals and drug dealers, usually pointing fingers at members of the *Los Zetas* cartel. On the other hand, the cartel kidnaped, extorted, sold drugs, and killed people who did not pay for 'protection'. According to an expert on Mexican organized crime, "La Familia's intense propaganda campaign [was] designed to intimidate foes, terrorize the local population, and inhibit action by the government. La Familia continually asserts its commitment to ridding the state of malefactors".[11]

La Familia successfully built a social base in regions of Michoacán that were poorly developed. It used a religious cult-like approach that highlighted family values to brainwash members and create support. It also challenged state authority by creating a parallel government demanding "taxes" (called *cuota* in Spanish, meaning share) from businessmen, mediating in legal conflicts, financing municipal projects, and even fighting petty crime.[12]

Along with violence and intimidation, *La Familia* took a silver or lead (*plata o plomo*) approach to "persuade" state and municipal politicians and law enforcement agents to join the organization as well. This meant that authorities either accept bribes or they—and their families—will be murdered. LFM showed no mercy to those who refused to follow their demands. During President Calderon's tenure, 21 local officials were killed in Michoacán.[13]

When the LFM cartel became an independent organization, it carried out an aggressive strategy to completely take control over small towns all over Michoacán. Convoys full of armed men arrived in these municipalities, outgunning the local police departments, and looking for the mayors. The LFM's deputy would then say that *La Familia* wanted to work there, that there would be no trouble, crime, or drunkenness, and that they would not cause problems. Then, LFM would own the town and enforce its own rules.[14] Around 2006, in a short period of time and in a well-organized manner, this strategy quietly took effect. The state government knew of these criminal activities because most mayors panicked and asked the governor for help or guidance.

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[10] William Finnegan, *Letter from Mexico: Silver or Lead*. THE NEW YORKER, May 31, 2010, at 40, *available at* http://www.newyorker.com/magazine/2010/05/31/silver-or-lead.

[11] Grayson, *supra* note 9.

[12] Finnegan, *supra* note 10.

[13] Jorge Grande, Grande, *Matan a 174 funcionarios en el sexenio; 83 eran jefes policiacos*. EXCÉLSIOR Nov 9, 2011, http://www.excelsior.com.mx/2011/09/11/nacional/767638 (last visited May 20, 2014).

[14] Finnegan, *supra* note 10.

The state government turned a blind eye, however, either to avoid an open confrontation with a powerful organization or because the government was already infiltrated by the cartel.

The infiltration of the state government by the LFM cartel became public news soon after the *Michoacanazo* roundup, when the Attorney General's Office requested a warrant of arrest for Julio César Godoy Toscano —the Michoacán governor's half-brother— who had been recently elected to the lower house of Congress. He was accused of being part of LFM, providing information and offering political protection. He denied the accusations saying they were politically motivated. When this case became a source of public confrontation between the governor of Michoacán and the federal government, the Attorney General's Office leaked a conversation between Godoy Toscano and a kingpin of LFM to the media. The brand-new politician was eventually impeached by the House, losing his parliamentarian immunity, which forced him to flee and become a fugitive.[15]

This is the context in which the *Michoacanazo* took place—a context in which criminal activities, politics, corruption, ideology, and a rigid criminal justice system all intertwined creating a dramatic legal confusion. Everything in the *Michoacanazo* files could be true, except that there is no conclusive evidence about whether or not the defendants are guilty or innocent. Or maybe there is enough evidence, but judicial rules or legalistic interpretations have limited its scope to convict defendants. Nevertheless, the case provides enough information to prove that some municipals and state officials had ties with LFM and that federal courts suffered from external pressure to rule on this case. To clarify, the LFM cartel changed its name to *Los Caballeros Templarios*—LCT (Knight Templars) in 2010 due to in-fights within the group and as a strategy to lower the profile of its leaders.

III. The *Michoacanazo* Trial

The *Michoacanazo* trial is a paradigmatic legal case of the tragic shortcomings of the Mexican criminal justice system. It shows the convergence of several problems that have plagued the country for decades or even centuries: influence peddling, abuse of power, political corruption, legalism, impunity, and connivance. At a closer look, the *Michoacanazo* case is a tangled web of controversy, inconsistent evidence, legal contradictions, half-truths, plus discretionary and legalistic interpretations of the law. After reading the evidence, it is impossible to tell whether the entire case is true or false. What is clear by the end of the trial is that all the defendants were freed. Mexican society will

[15] Roberto Garduño & Enrique Méndez, *Era enlace entre La Familia y gobierno del estado de Michoacán, sostiene PGR*. La Jornada, December 15, 2010, *available at* http://www.jornada.unam.mx/2010/12/15/politica/002n2pol.

never know if the case was a genuine attempt at curbing organized crime, a simplistic political maneuver to gain electoral benefits, or a little bit of both.

1. *The Raid*

On May 26, 2009, the Mexican federal government arrested three dozen municipal and state employees in the state of Michoacán. The federal Attorney General's Office headed this operation and 11 Michoacán mayors, one public security director, numerous police officers, a state judge, and the Michoacán Attorney General were among the detainees who were brought in. The federal attorney's office argued that these officials had ties with or gave protection to the powerful regional cartel known as *"La Familia Michoacana."*[16] This episode was dubbed the *Michoacanazo* because it took place in the state of Michoacán and the detainees were all authorities from this state.

The arrests were made by federal forces without prior notice to state law enforcement agencies or the local government. The news of this event made headlines nationally and internationally, and created a deep political conflict between the state and the federal governments.[17] State elections would take place only a few months ahead, and because the state government was under control by the opposition party (*Partido de la Revolución Democrática, PRD*), some pundits viewed these arrests as politically motivated to discredit the PRD party and influence the election.[18]

The detainees were sent to Mexico City and put under a provisional "house arrest," which is called *arraigo* in Mexican law. The *arraigo* is a 40-day detention period allowed by the Federal Law against Organized Crime (*Ley Federal Contra la Delincuencia Organizada*) to give time to the Prosecutor's office to collect enough evidence to indict someone under organized crime accusations. After the *arraigo* ended, the detainees were formally indicted of organized crime encouragement (*delincuencia organizada en la modalidad de fomento*), and most of them were sent to a federal prison located in the city of Tepic in the state of Nayarit. Because organized crime is a federal crime, a federal prosecutor handled the indictment and the federal judiciary, the criminal trial.[19]

Once the defendants' lawyers began to challenge both the indictment and the evidence, the defendants were transferred to a prison in Morelia, the capi-

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[16] Ernesto Elorriaga & Gustavo Castillo, *Inusitada detención en Michoacán de 10 alcaldes, 17 funcionarios y un juez*. La Jornada, May 27, 2009, *available at* http://www.jornada.unam.mx/2009/05/27/politica/003n1pol.

[17] *Id.*

[18] Eduardo I. Aguirre, *Maniobra política y ministerial*, Agencia Latinoamericana de Información, (2010), *available at* http://alainet.org/active/43110&lang=es.

[19] Michoacanazo File, Juzgado Primero de Distrito en el Estado, Causa Penal Número II-4/2010. Décimo Primer Circuito del Poder Judicial Federal [Mexican Federal Judiciary, Eleventh Circuit].

tal of Michoacán, and later on the case was also sent to a district court in this city. A year later, twenty suspects had been released, and eventually all of them were freed within a two-year period. This was mostly due to a lack of conclusive evidence as a result of legal technicalities, according to the MFJ. President Calderón defended the *Michoacanazo* operation, arguing that there was enough incriminatory evidence against all the detainees. After they were released, the President suggested that the judge who acquitted most of the defendants had not properly taken into account witness testimonies and telephone recordings, which were a crucial part of the indictment. Interestingly, this judge was dismissed later on by the Council of the Judiciary and is under federal investigation for money laundering. He is still at large.[20]

The trial evidence in the *Michoacanazo* case—and how it was interpreted by the federal courts—plays a crucial role in understanding the contradictions of the Mexican legal system and how corruption can operate within the realm of legality. These contradictions are the product of obsolete legislation and the rigidity of a legal system that requires strict adherence to the literalness of the law. The aforementioned contradictions are mostly reflected in a myriad of ways, such as discretionary interpretations of the law, the use of the prosecutor's office as a political tool, and rampant impunity.

2. *The Evidence*

Legislation dealing with organized crime in Mexico is relatively new. The current Federal Law against Organized Crime (FLAOC) [21] only dates back to 1996, when the last government of the authoritarian regime felt international pressure to take an active role against drug trafficking organizations. The law has forty-five articles, and has been amended many times in recent years. This high number of amendments shows that the government is trying to improve the law in order to better deal with criminal organizations, but it also displays how the law suffers from legal loopholes that make it quite unreliable.

Among the new legal statutes introduced by the FLAOC was a witness protection program (*programa de testigos protegidos*). Provision 35 of the FLAOC regulates when and how members of organized crime can collaborate with the prosecutor's office to incriminate other members and receive lesser sentences. The Mexican legal system had no prior experience of this program before 1996. It was basically borrowed from the US system and then adapted it to the Mexican reality. Little is known about how favorable the program has been given the secrecy and lack of transparency that characterizes law

[20] Alfredo Méndez, *Otorgan protección contra la PGR a ex juez que liberó a implicados en el michoacanazo*. La Jornada, January 8, 2014, http://www.jornada.unam.mx/2014/01/08/politica/013n1pol.

[21] Ley Federal contra la Delincuencia Organizada [LFCDO] [Federal Law against Organized Crime]. Diario Oficial de la Federación [D.O.] 7 de noviembre de 1996 (Mex.).

enforcement agencies in Mexico. However, whether or not this program has been effective, on November 30, 2009, a protected witness—a former commander at the federal police named Édgar Enrique Bayardo del Villar—was murdered by hitmen when he asked his guards to stop to get coffee at a Starbucks in Mexico City. While working as a high-ranking official, this official was an informant for both the Sinaloa cartel and the Drug Enforcement Agency.[22] Yet another one of the key protected witnesses in the *Michoacanazo* trial was also murdered.[23] There have been similar cases in which protected witnesses have been murdered or have disappeared. These examples suggest that there are serious deficiencies in the program that need to be addressed if the government wants to use it as a reliable tool against criminal organizations.

A. *Protected Witnesses (testigos protegidos)*

Three key witnesses of the *Michoacanazo* case were in the witness protection program. According to the files, three former members of *La Familia Michoacana* cartel, nicknamed in the indictment as "Ricardo," Emilio," and "Paco," decided to cooperate with the federal Attorney General's Office. They described the cartel's criminal activities, naming the *Michoacanazo* case detainees as collaborators of this organization. According to these witnesses, this collaboration between officials and the LFM cartel was done in several different ways: providing police protection, acting as an informant, and turning a blind eye to criminal activities.[24]

B. *Drug Trafficking Payroll (narco-nómina)*

An important piece of evidence was a so-called *narco-nómina* (drug trafficking payroll) found in the truck of one of the sons of LFM's kingpin during a police operation in the southern region of Michoacán. On January 27, 2009, federal police agents were conducting a criminal investigation in the Arteaga municipality to track Servando Gómez Martinez (a.k.a. *La Tuta*)'s illegal activities and arrest him. He had been the best-known face of this cartel, and the federal government wanted him behind bars. After a roundup, the kingpin was able to run away, but federal agents arrested his son Servando Gómez Patiño. Among the personal belongings in his possession, the son had

[22] María de la Luz González, *Matan a testigo protegido de la PGR en Starbucks del DF.* El Universal, December 1, 2009, *available at* http://www.eluniversal.com.mx/notas/643349.html.

[23] *Asesinan a testigo de El Michoacanazo.* Cambio de Michoacán (2013), *available at* http://www.cambiodemichoacan.com.mx/nota-195190.

[24] Michoacanazo File, *supra* note 19.

a couple of handguns, an AK-47 rifle, ammunition, and some sheets of paper with a list of names, employment positions, cities, salaries, and liaisons. The information on the sheets was distributed into five columns with 101 entries. This document had the names of dozens of high-ranking state officials in law enforcement agencies, as well as mayors, commanders of the state police, police officers, and other officials. Among those names were most of the public servants indicted in the *Michoacanazo* trial. This written record became known as the *narco-nómina* because it allegedly described the monthly "salary" officials received from the LFM cartel for providing protection. This document was used by the prosecutor as a fundamental piece to support the indictment.[25]

C. *Police Reports (partes policiacos)*

There were at least six police reports issued by federal agents conducting intelligence operations about the criminal activities of the LFM cartel during the first three months of 2009. One of these reports explains the police operation that led to the arrest of the kingpin´s son in January 2009. Other police reports provide information about different activities of LFM cartel members, such as searches and police reconnaissance operations. However, most of the content of these reports have general information about LFM, but nothing specifically about the defendants of the *Michoacanazo* case. The reports provide information on some of the cartel's illegal activities and how it operates without naming specific individuals linked to these activities.[26]

D. *General Evidence (pruebas generales)*

Other evidence includes a report from the federal prosecutor´s office about a search that took place in Mexico City in October 2008. During this search, a laptop computer containing several files of information regarding the LFM cartel was seized. Among these files were recorded conversations between LFM cartel members talking about their everyday criminal activities, using codes and the cartel's slang to communicate. This information was directly related to the *Michoacanazo* trial because the prosecutor used these electronic tapes to support the argument that the LFM cartel had ties with some of the defendants in the trial. I read the transcriptions of these tapes, but the content of the information is sketchy, and the people talking were careful enough to avoid giving full names. Some surnames mentioned in several tapes matched those of some of the defendants, but there was no clear evidence that the content of the tapes directly referred to any of the defen-

[25] *Id.*

[26] *Id.*

dants. At least, the federal prosecutor did not make a good case out of these tapes. In addition, there was no expert witness saying that the voices in the tapes matched those of the accused parties.[27]

On December 15, 2008, an anonymous report was filed. The federal prosecutor argued that on this date an unknown person had called the SIEDO —the abbreviation for the *Subprocuraduría de Investigación Especializada en Delincuencia Organizada* (Assistant Attorney General's Office for Special Investigations on Organized Crime)— to denounce the criminal activities of the LFM cartel and how local authorities supported these activities. In this report, the unknown person named several individuals indicted in the *Michoacanazo*.[28]

This was all of the relevant evidence that the prosecutor's office used to indict and request an arrest warrant for the defendants in the *Michoacanazo* case. The warrants were issued because in the Mexican legal system a criminal judge does not need to have conclusive evidence to put someone on trial. The prosecutor only has to provide evidence leading to a convincing presumption of culpability of the accused party. The verdict, on the other hand, requires the establishment of guilt beyond a reasonable doubt.

3. *Proceedings*

As mentioned earlier, organized crime and drug trafficking are considered federal crimes in Mexico and that only the MFJ has jurisdiction over these cases. According to the federal criminal procedural law (*Código Federal de Procedimientos Penales*), district court jurisdiction (*Juzgados de Distrito*) is decided by one simple rule: they have legal authority to handle crimes that take place in the same venue where the district court is located (e.g. city, state, region). District courts receive indictments from the prosecutor's office based on territorial jurisdiction. However, when dealing with organized crime indictments, the law allows federal prosecutors a few exceptions. In other words, when dealing with dangerous defendants, they can send an indictment to a particular judge or jurisdiction regardless of where the crime was committed.

Because the arrest warrants in the *Michoacanazo* case were issued by judge Carlos Alberto Elorza Amores —whose district court was located in the state of Nayarit, the case and the defendants was sent there. Once the trial proceedings began, twelve of the defendants were released by a higher court due to a lack of conclusive evidence because of legal technicalities through *Amparo* suits. In the meantime, the rest of the defendants asked to be transferred to Michoacán where the crimes had occurred. This request took several months to be processed before being addressed by the judges. Eventually federal judges sided with the defendants in their request to have the *Michoacanazo* file

[27] *Id.*

[28] *Id.*

transferred to Michoacán. A district court in Morelia began handling the trial and the defendants were sent to this state.

It is important to mention that a collegiate court upheld the detention order of some of the defendants who had appealed the charges at the beginning of the trial proceedings. This means that there were contradictory legal decisions issued by several MFJ courts. While some courtrooms initially confirmed the legality of the evidence, others rejected the case arguing that the evidence had not been gathered in strict adherence to the law.[29]

The *Michoacanazo* file was sent to the First District Court in Morelia headed by Judge Efraín Cázares López at the beginning of 2010. This district court and this judge in particular played a pivotal role in this case because the judge released most of the defendants. He also issued an injunction favoring the governor's half-brother that allowed him to be sworn in as congressman and obtain parliamentarian immunity, despite a detention order issued by another federal judge on felony charges.[30] During the ethnographic research, some interviewees said that this judge had a reputation for being corrupt and had favored the defendants of the *Michoacanazo* case one way or another.

4. *Verdicts*

Before the case was sent to the First District Court in Morelia, at least three different federal courts had already ruled that the evidence in the *Michoacanazo* trial was too inconclusive to prosecute the accused parties.[31] The defendants were gradually released by using different legal strategies to overturn the indictments. For instance, a cluster of defendants requested an *Amparo* suit, while others appealed the indictment. Another cluster proceeded to fight the evidence using new evidence to file motions for dismissal. Some defendants hung on for the entire trial until they were released in the final verdict.[32]

The First District Court's judge freed twenty of the defendants in a period of several months. According to the judge, the witnesses' testimonies were unreliable because they did not comply with procedural law. The prosecution presented their protected witnesses as eyewitnesses, and the judge concluded that they had no credibility because their testimony was inconsistent. He said that witnesses failed to provide the context and relevant knowledge of how

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[29] *Edil de LC gana amparo contra auto de formal prisión* Cambio de Michoacán (2010), *available at* http://www.cambiodemichoacan.com.mx/vernota.php?id=128206.

[30] Gustavo Castillo García, *Sólo castigo administrativo al juez que frustró el michoacanazo, si prospera queja de la PGR*. La Jornada, October 3, 2010, *available at* http://www.jornada.unam.mx/2010/10/03/politica/011n1pol.

[31] Elly Castillo, *Reprochan uso político de michoacanazo*. El Universal, October 5, 2010, *available at* http://www.eluniversal.com.mx/notas/713940.html.

[32] Michoacanazo File, *supra* note 19.

and why the defendants had given protection and/or information to the LFM cartel (*circunstancias de modo, tiempo y lugar*). The judge argued that the witnesses' testimonies only included general information about matters of general interest regarding the LFM cartel and were not specific about the circumstances of the crime.[33]

In addition, the judge ruled that the prosecutor had failed to present the witnesses before the court for confrontation and cross-examination with the defendants, despite requests from the defense and a subpoena issued by the judge. The judge also concluded that two of the witnesses were hearsay witnesses because they testified about something that someone else had told them. Unlike in the United States, criminal procedural law does not allow these types of witnesses in Mexican courts and therefore their testimony cannot be considered credible.

The judge of the First District Court also dismissed the *narco-nómina* document, arguing that it was not credible enough given that it was not authored by anyone in particular and that the prosecutor had failed to demonstrate who wrote it. The police reports were also disqualified as evidence because their content was not supported by any other evidence. The judge deemed these police reports insufficient to prove the defendants' guilt. The same argument was applied to the electronic tapes and files found in the computer seized in Mexico City, as well as the rest of the evidence that was brought to support the indictment. To conclude his argument, the judge argued that since there was no hundred percent certainty the defendants were criminally responsible, he had to apply the legal principle *in dubio pro reo.* This meant the defendants could not be convicted if there was legal uncertainty about their guilt—similar to the principle of *Beyond Reasonable Doubt* in the US legal system.[34]

Although the law has set up specific guidelines on how to assess trial evidence, judges still enjoy discretionary decision-making power. This power is more important when the evidence is blurred and inconclusive because the verdict can be either guilty or innocent. Either way the verdict goes, it would still be considered legal. In the case under analysis, my personal interpretation[35] is that some defendants could have been convicted with the evidence on the file had the case not been politicized and subjected to external influence. The judge of the First District Court certainly had enough independence to decide the *Michoacanazo* case. That being said, data from interviewees and the judge's own dismissal of the case from the MFJ suggests that corruption might have played a role at some point in the trial.

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[33] *Id.*

[34] *Id.*

[35] This legal interpretation is based on my several years of experience as a litigant in Mexican federal and state courtrooms.

IV. The *Michoacanazo* Federal Judge

According to information from the Council of the Judiciary, Judge Efraín Cázarez López received his law degree from the *Universidad Michoacana*, a public university located in Morelia. He worked in several government positions in the state of Michoacán, then as a litigant in his own law firm. Later on, he got a position in the MFJ as a secretary of a district court in Northern Mexico and eventually became a federal judge. In the early 2000s, he was appointed Judge in the First District Court in Morelia.[36]

Most federal judges enjoy independence and autonomy in their rulings. It is precisely because judges exert judicial independence when it comes to their duties that corrupt acts can occur. According to the interviewees in this research, corruption exists within the MFJ and although it is not a common practice, it could be as high as 10% or as low as 1%.[37] The clear message is that corruption happens. Even when the vast majority of interviewees agreed that corruption existed in the MFJ most of them avoided pointing fingers at those who engaged in such practices. However, in the case of Judge Efraín Cázarez López a few people suggested that he had a reputation of engaging in wrongdoing.

At least two respondents explicitly suggested that this judge was known for being corrupt. Interestingly enough, they did not mention the judge's name, but instead they just said that the judge in charge of this court had that reputation. One of those interviewees was a magistrate who said: *"Aquí tenemos un juez que tiene fama de ser así [corrupto], todo mundo lo sabe"* (We have a judge here who is known for being like that [corrupt]. Everyone knows it). Even if they acknowledged the existence of corruption, most senior officials at the MFJ would never mention the names of those who engage in these practices. There is an unwritten rule among these officials, a sort of code of silence (or judicial *Omertá* so to speak) by which they do not accuse their peers or senior officials of any wrongdoing —at least not directly and openly— because it affects the prestige of the institution. Yet, some interviewees were extremely critical of the traditional practices like nepotism that still plague the MFJ. For instance, interviewee Patricio said that the *Michoacanazo* trial was not free from external influence. He argued that this case was a typical example of blatant corruption from all the parties involved. Patricio said:

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[36] Consejo de la Judicatura Federal http://www.cjf.gob.mx/ (Last visited December 28, 2011).

[37] The reason for this broad range is that it is extremely difficult to quantify corruption. First, there are no official or unofficial data available to determine how prevalent the problem is. Second, even if data existed, it would not be reliable since people tend to underreport illegal behavior that is socially stigmatized, such as drug use, prostitution, and of course, corruption. Finally, since corruption occurs in secrecy, there are no witnesses to testify when it happens, and even if it were possible to infer its existence through other means, subjectivity shapes how people perceive the seriousness of the problem. Therefore, the degree of pervasiveness of judicial corruption varies but what does not change is its constant presence.

> *El asunto del Michoacanazo es un caso típico de corrupción e intervención de muchos poderes, tanto a nivel federal como estatal. En los dos casos, tanto en el ministerio público como en los tribunales, para agarrar y soltar inculpados, intervino el poder del Estado. Una forma de deducir la existencia de corrupción se deriva de que existieron los mismos hechos, con las mismas fechas, pero se dieron diferentes resoluciones con criterios distintos.* (The *Michoacanazo* case is a typical example of corruption and external influence from different government sectors at state and federal levels. In both institutions, the Attorney General´s Office and the MFJ, the State's power intervened in the arrest and release of the defendants. One way to know that corruption took place comes from the fact that the same evidence with the same dates [and this case in particular] was assessed differently [by several federal courts] using diverse legal criteria. There was never a unanimous decision from all of the judges who looked at it).[38]

Patricio referred to the existence of contradictory decisions by the district courts and collegiate courts that confirmed the detention orders and the legality of the arraignment at the beginning of the trial and the others that did exactly the opposite. He also emphasized that the district court in Morelia that had handled the case was suspicious because it tended to favor one of the parties. Patricio did not mention the judge's name directly but implied his identity by naming the district court.

I informally asked a litigant with close ties with the federal courts in Morelia whether or not Judge Efraín Cázares López's reputation was based on fact. This litigant did not want to be interviewed, but told me off record that she personally knew the First District Court judge and his reputation as a corrupt official was true. I asked her how the judge could get away with it if verdicts could be challenged through appeals. The litigant said that there were also magistrates in collegiate courts who could be "bought." However, in some cases that was not necessary —this litigant said— because the collegiate briefs submitted by prosecutors tended to be flawed due to chronic underfunding of their office. Collegiate courts could simply dismiss such cases on technicalities. Besides, she added, judges are not stupid and they know how to use their discretionary sentencing power to favor a party without appearing that they are bending the law. This power is easier to use when the case is controversial and the evidence is blurred, which is what happened in the *Michoacanazo* trial, according to this informant.

Silver or Lead (plata o plomo)

Denouncing a judge as corrupt is a serious accusation that cannot be taken lightly. Normally, direct evidence would be necessary to prove that a particular judge has engaged in corrupt acts. For obvious reasons, this would be almost

38 Fieldwork Research, Interview with an interviewee named Patricio, Morelia, Mexico (summer 2011).

impossible to do because of the secrecy that characterizes and surrounds corruption. As a qualified professional of legal matters, a judge would make sure not to leave any shred of evidence if he or she dared to engage in wrongdoing. Nevertheless, it is still possible to infer whether corruption played a role in the case by looking at the context and circumstantial information available.

The *Michoacanazo* was a thorny case to handle for any of the judges who issued rulings before the trial was sent to Morelia because of the parties who were involved. The defendants were public officials, both federal and state governments had specific political interests at stake, and the powerful and dangerous local cartel LFM could use its influence to sway decisions. Since the defendants' arrests in May 2009, the case became a battleground between the federal government and the state government of Michoacán. On one hand, the President wanted to set a precedent that official protection to drug traffickers would not be tolerated anymore, and he put pressure on the Attorney General's Office to have a successful outcome. On the other hand, the state government assumed that the *Michoacanazo* was politically motivated and wanted to clear its name with an acquittal for its imprisoned public servants. Both governments were at odds with the case and were willing to invest any necessary means to reach their goals.

The federal government wanted the trial to be handled in a jurisdiction other than Michoacán because governors have influence and power in their states, sometimes even over federal institutions with branches in the state. The federal government gained the upper hand at the beginning of the trial by sending the file to a district court in the state of Nayarit. Once the case was moved to Morelia, the balance of power favored the governor —and the defendants— because the legal dispute went to state territory where powerful law firms, connections, and local politics could intervene, even if the trial was under federal court jurisdiction. More importantly, Morelia (the capital of Michoacán state and where the First District Court was located) was one of the most critical strongholds of LFM cartel. No doubt these facts put extra pressure on the federal judge handling the trial. This pressure is an important factor to take into account given the previous threats from the LFM cartel against senior MFJ officials in Morelia.

During fieldwork in Morelia, a couple of interviewees mentioned that senior officials in the Michoacán jurisdiction had recently been threatened by a drug cartel. According to these interviewees, officials did not mention any of this to anyone, not even to junior officials so as to avoid panic. None of these interviewees knew exactly what kind of threat was made or when it was received, but they knew that it had happened. It turned out that one of the last interviewees, Oscar, knew a little bit more about these threats. He explained that the LFM cartel had sent out a letter not too long ago to all judges and magistrates in the Michoacán jurisdiction with a short text reading: "*La Familia* los está observando" (The Family [cartel] is watching you). Oscar confirmed that both judges and magistrates agreed not to tell anyone about it to

prevent fear or anxiety in their employees, but the news leaked somehow and many junior officials like him ended up finding out about it.

It is known that the LFM cartel had instilled fear with its *silver or lead* approach to buying or controlling local authorities.[39] It is not difficult to imagine, then, the mounting pressure that was put on the judge who handled the *Michoacanazo* trial. Whether or not the judge was explicitly told to rule in favor of the defendants, he must have been wary enough of upsetting this criminal organization during the course of the *Michoacanazo* proceedings.

Interestingly, Judge Efraín Cázarez López went to law school and graduated from the local public university in Morelia. This meant that many of his former classmates and colleagues lived and worked in that city. Furthermore, former peers and classmates would be well-established litigants who came into contact with him as part of their everyday activities. It is also important to keep in mind that before becoming a federal judge he had been a state employee, which means he had a network of acquaintances and friends linked to state officials, a common situation in Mexican politics and among public officials.[40] All of these details are not silly assumptions about this judge's background, but important implications that help to understand how external forces may have influenced the results of the *Michoacanazo* case. From a Mexican legalistic perspective, these assumptions would be inadmissible since there is no concrete evidence to support them. However, they can be logically deduced from the records available because there is nothing that contradicts the information but much to confirm it.

V. The Prosecutor's Office

Interviewee Ignacio had in-depth knowledge of the *Michoacanazo* case. In general, he praised the MFJ, but he argued that sometimes federal judges followed orders by the Attorney General's Office and issued arrest warrants without sufficient legal grounds. Ignacio called these judges *'jueces de consigna'* (*ad hoc* judges) because they systematically sided with all of the prosecutor's requests. He explained that the reason for this was that judges either lacked experience or feared pressure from the SIEDO. Ignacio did not suggest that corruption or influence peddling were used by the SIEDO to gain the support of the judges. He said that in general federal judges are well trained and most enjoy independence in their verdicts —as confirmed by most interviewees. However, evidence from this research suggests that *ad hoc* judges do exist in the MFJ and that sometimes the Attorney General's Office does depend on them to indict certain people.

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[39] Finnegan, *supra* note 10.

[40] Peter H. Smith, Labyrinths of Power: Political Recruitment in the Twentieth-Century Mexico, (Princeton University Press, 1979).

The federal judge who issued the arrest warrant in the *Michoacanazo* case was Carlos Alberto Elorza Amores, who was located in the jurisdiction of the state of Nayarit in Western Mexico back then. He suffered an armed attack in August 2009 where one of his bodyguards died and he himself barely made it out alive. There is some suspicion that this judge favored requests from the Attorney General's Office to prosecute people without legal grounds. In May 2010, a year after the *Michoacanazo* roundup, the SIEDO wanted to arrest Gregorio Sanchez, the mayor of Cancun, a beach resort in the Caribbean. He was running for governor on behalf of the Party of the Democratic Revolution, the same party that governed the state of Michoacán at the time. He was accused of allegedly being linked to drug cartels and money laundering. It turns out that the SIEDO originally requested an arrest warrant against this politician from the Sixth District Court located in the state of Mexico. The federal judge there denied the warrant arguing that there was no evidence in the case, not even enough to arrest the politician under presumption as allowed by law.[41]

Later on, the SIEDO requested a second arrest warrant, this time sending the indictment to Judge Carlos Alberto Elorza Amores, the same judge who initially handled the *Michoacanazo* case. The warrant was issued this time and the politician was sent to jail. Fourteen months later he was acquitted by a collegiate court and released.[42] This case holds some resemblance to the *Michoacanazo* case. In both cases, politicians from the opposition party were arrested before a state election. Both indictments relied on testimonies from former drug cartel members who were part of the witness protection program. In both cases, the arrest warrants were issued by the same federal judge. Lastly, in both trials the defendants were released due to a lack of evidence.

Although it would be difficult to demonstrate with conclusive evidence that *ad hoc* judges exist, the aforementioned cases suggest some sort of favoritism towards the Attorney General's Office, by some federal judges at least. The reason for this apparent favoritism and whether or not this is a common phenomenon remains unknown.

It is well-known that during the rule of the authoritarian government, the prosecutor's office was used as a tool to pursue political outcomes either by falsely accusing opponents of the regime or by jailing dissents who opposed the government.[43] It seems opportunistic and suspicious that during election time the federal government pulled out indictments against members of opposition parties in the states they controlled. Whether these indictments ended up convicting the defendants is a different story since apparently the

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[41] Francisco Reséndiz, *Juez negó a PGR orden de arresto.* El Universal, May 27, 2010, available at http://www.eluniversal.com.mx/nacion/177981.html .

[42] *Id.*

[43] Reforming the Administration of Justice in Mexico (Wayne A. Cornelius & David A. Shirk eds., 2007).

goal was to have an impact on the media in order to vilify a political party or politician, and hence, influence the election.

This manipulation of the prosecutor's office is not difficult to carry out because the criminal procedural law requires only presumptive evidence of guilt to issue an arrest warrant. As mentioned previously, there are legal rules that dictate how to proceed, but judges have ample discretionary power when assessing the evidence of a case. A good analogy is the common expression of the glass of water being half-empty or half-full. A legal decision or verdict can be interpreted either way in some cases: as legally sufficient for a particular judge to issue an arrest warrant, while in the same instance, another judge could come up with an opposite perspective using different, yet valid arguments. I would not say that this is a common practice in the MFJ because in most trials the evidence is crystal clear, but given how the procedural law has been set up the door is always open to different interpretations and indeed potential manipulation.

Legal Inconsistencies in the 1st District Court in Morelia, Michoacán

The Attorney General's Office (AGO) began to notice a pattern of favoritism towards the defendants and the state government when the First District Court by means of an *Amparo* suit allowed the governor's half-brother to be sworn in as a congressman—which gave him parliamentarian immunity—despite the arrest warrant he had for organized criminal charges. There were other trials in the same district court in which the judge systematically rejected the federal prosecutor's petitions to allow the arrest of the governor's half-brother. These judge's rulings did not mean that the actions were illegal or the result of corruption, but they signaled red flags that suggested potential partiality against the AGO.[44]

The Attorney General's Office became suspicious of the judge's impartiality when all of the governor's half-brother's *Amparo* suits were "coincidentally" sent to the First District Court. According to the AGO, the judge also exceeded his authority by offering the half-brother legal benefits that were not allowed under the criminal code, such as keeping his political rights intact to avoid being arrested. In addition, the judge had freed several of the defendants of the *Michoacanazo* through motions of dismissal, which was unusual in organized crime trials due to the complexity and seriousness of the matters. Acquittals in these cases are normally granted at the end of the trial.[45] The straw that broke the camel's back was when the same judge authorized a joinder by which all the trials against the kingpin's son —the one arrested in January 2009 and who was found with the *narco-nómina*— would be jointed

[44] *PGR culpa al juez por pifia en michoacanazo*, Milenio October 1, 2010, *available at* http://impreso.milenio.com/node/8841155 .

[45] *Id.*

into the *Michoacanazo* trial and decided by the First District Court in Morelia. This last decision was later reversed by a higher court, and the joinder did not take place.[46] Based on these events, the AGO filed a formal complaint before the Council of the Judiciary against the judge, but the Council found nothing illegal at that time and the complaint was dismissed. It was not until October 2012 that the head of the MFJ finally dismissed Judge Efraín Cázarez López for gross misconduct.[47]

Overall, taking into account the political, social, legal, and drug cartel-related context of the *Michoacanazo* case, there is no doubt that there were clear intentions from most parties to influence the outcome of the trial by any means possible. Whether it was political corruption, influence peddling, abuse of power, fear of a drug cartel, bribery, or a combination of all of the above, the case was plagued with controversial decisions and sketchy legal facts disguised as strict adherence to the Rule of Law.

This wrongdoing can be identified in many different aspects of the *Michoacanazo* trial. First, the federal government acted wrongly by opportunistically rushing an indictment against the local government to gain political and electoral benefits without first building a solid case that would lead to clear-cut convictions. Second, the state government acted wrongly by framing the *Michoacanazo* case as politically motivated and by ignoring the possible ties between its public officials and the LFM cartel. It also engaged in a media campaign to challenge the case and providing active support for the defendants while ignoring the legal evidence that showed their officials were providing protection to LFM. Third, the defendants themselves acted wrongly first, by having ties with this criminal organization and second, for using their connections, money, and political power to find loopholes in the case and be freed. Finally, it may be difficult to determine to what extent the LFM cartel actively intimidated or bribed the *Michoacanazo*'s judge to help the governor's half-brother and the defendants. Given its reputation as a violent and ruthless organization and its total control of Michoacán territory, the cartel´s reputation alone could have been enough to frighten any judge handling the cartel's criminal activities. Maybe it was a combination of both fear and bribery.

After analyzing the judge's background and his reputation as a crooked official, a conclusion could be drawn that he probably favored the defendants and the governor's half-brother to a certain point. The judge was actually dismissed for those reasons, although the head of the MFJ never explained the exact cause for dismissal. Unfortunately, in the Mexican criminal justice system sometimes bribery is used to make sure a particular outcome for a verdict is guaranteed, and certainly this is easier to do when the evidence is

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[46] *Invalida tribunal resolución favorable al hijo de la "La Tuta."*, El Siglo de Torreón February 1, 2011, *available at* http://www.elsiglodetorreon.com.mx/mobile/?n=596451 .

[47] Jorge Carrasco Araizaga & Patricia Dávila, *Contra jueces, embate electorero*, Proceso, June 10, 2012.

inconclusive, contradictory, and prone to multiple interpretations—as in the *Michoacanazo* case.[48]

VI. The Verdicts from Collegiate Courts (*Tribunales Colegiados*)

I read two rulings from a higher court that had upheld the release of several defendants of the *Michoacanazo* case, and they were notoriously suspicious when it came to crucial legal grounds. Both rulings came from the same magistrate, and in both cases, the verdict did not take into account all the legal arguments that the prosecutor had included in the collegiate briefs. The prosecutor's arguments were dismissed based on technicalities, but the magistrate's legal reasoning showed a lack of a thorough analysis of the disputed evidence. The main argument for the dismissal (which in judicial argon is called *puntos finos*—fine points) was written in a couple of pages. Given the context and dimension of the trial, which consisted of thousands of accumulated pages, it was remarkable to read such a shallow argument in the collegiate verdict. After this court decision, the federal prosecutor did not have any other legal option with which to challenge the magistrate's verdicts.[49]

Contradictory rulings based on the same evidence and facts suggest the existence of corruption, or at least political influence, because these rulings did not occur between lower and collegiate courts, but among lower courts and then among collegiate courts. In democratic court systems it is not uncommon for lower court decisions to be overturned by collegiate courts based on different interpretations of the facts and the law. However, in the *Michoacanazo* trial, different lower courts ruled in opposing ways at different stages of the legal process using the same facts and information. For instance, at the beginning of the trial some district court judges accepted the evidence as legal while others did not. When some defendants appealed their indictments, some collegiate court magistrates upheld the decisions while others did not.[50] These inconsistent rulings suggest some sort of influence/corruption or a systematic lack of judicial criteria pervading the entire Mexican Federal Judiciary.

VII. Conclusions

1. *The Predicaments of the Mexican Federal Judiciary*

The *Michoacanazo* provides a dramatic example that the MFJ cannot always guarantee a judge's impartiality in trials involving powerful parties like

[48] Cornelius and Shirk, *supra* note 43.

[49] Michoacanazo File, *supra* note 19.

[50] *Id.*

the government, public officials, and drug cartels. This was not a typical trial in organized crime-related charges, nor was it the first time a state government and the President had a confrontation in a federal court. However, the political animosity and confrontational positions between the executive and judicial branches was unheard of in Mexico.

When the Attorney General's Office complained about the misconduct of federal judges in the *Michoacanazo* case, the head of the federal judiciary dismissed these criticisms as nonsense. Then President Calderon raised the issue and publically denounced that some federal judges were corrupt; the MFJ responded politically by requesting respect for the separation of powers principle and judicial independence.[51] The MFJ did not thoroughly investigate the judge or looked at the *Michoacanazo* trial early on to verify whether or not any wrongdoing had taken place. It was not until many months later that the MFJ conducted an internal investigation and found serious misconduct in the judge's actions. He was placed on administrative leave and was eventually fired.[52] What is astonishing is the reluctance of the MFJ to admit, first of all, that corruption occurs within the institution; and second, the lack of efficient and timely mechanisms to prevent, detect, and deal with bribery and wrongdoing.

Likewise, the different and contradictory rulings between judges and magistrates throughout this trial show a lack of unified judicial criteria in the MFJ to decide on controversial cases. Although this disparity of rulings could be interpreted as an expression of judicial independence, it is more a reflection of poor legal consistency and little supervision to maintain high standards in sentencing guidelines. It seems as if trial courts and collegiate courts have their own legal agendas based on judges' personalities rather than on institutional norms and values. Because the same facts, evidence, and circumstances of the trial were interpreted differently, using an extensive variety of legal perspectives did not contribute to the principles of certainty and legality that should characterize the judicial system, and sentencing in particular. The *Michoacanazo* confirms what most Mexicans think of the judicial system: that corruption exists in the MFJ. The misconduct of the judge in charge of this trial is a clear indication of this. Unfortunately, this is not the only instance where federal judges have engaged in wrongdoing. Recently, a judge and two magistrates were put on administrative leave while a criminal investigation was under way after the head of the MFJ found that they have favored a casino owner in northern Mexico in exchange for economic benefits.[53]

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[51] Jorge Carrasco Araizaga, *Ministro de la Corte responde a Calderón sus reproches y críticas*, Proceso, December 15, 2011, *available at* http://www.proceso.com.mx/?p=291500 (Last visited June 7, 2014).

[52] Méndez, *supra* note 20.

[53] Alfredo Méndez, *Suspenden a dos magistrados y un juez por presuntos nexos con el zar de los casinos*. La Jornada, May 9, 2014, *available at* http://www.jornada.unam.mx/2014/05/09/politica/013n1pol .

A courtroom offers many opportunities to attract corrupt practices —which are certainly more prevalent in criminal than in civil courts— because of the interests at stake. Several cases in recent years[54] have shown that corruption in the MFJ is more pervasive than previously thought; yet the institution's official version is that this phenomenon does not exist, and if found, it is a matter of personal dishonesty, a "rotten apple" problem and not an institutional issue. By denying that corruption exists, even if it is a minor problem, the MFJ is shooting itself in the foot because it ignores the reality and dynamics of litigation, and powerful interests in high profile trials that encourage this practice. There is a sociocultural context in Mexican society where nepotism, cronyism, and favoritism are part of informal norms and social conventionalisms. Directly or indirectly, these norms and conventions shape and influence judges' decisions; by ignoring them, the head of the MFJ reproduces the problem and relinquishes its responsibility of addressing wrongdoing holistically and efficiently. This official attitude also contributes to the lack of trust and confidence Mexican society holds towards the judiciary because the MFJ's official policy does not reflect an honest and transparent institution when dealing with internal corruption.

Depending on whom you talk to, the *Michoacanazo* case can be seen as a fiasco, a case of corruption, an example of judicial independence or a typical political maneuver to get rid of political opponents. The difficulty on drawing a systematic interpretation of the trial derives from the complexity of the case itself, but also from the way it was handled by the federal and state governments, prosecutors, the federal judiciary, and the media. The case became politicized because it was convenient for all parties involved: they looked for their own personal, political, and institutional interests. Meanwhile, the facts, evidence, and legal elements of the trial acquired less importance or were lost.

This politicization was evident from the beginning of the case when the federal government's decision to prosecute local and state officials in Michoacán was rushed to influence the state elections. The evidence of the criminal investigation was weak and inconclusive while the raid to arrest the defendants seemed to be advertised in the media —nationally and internationally— to improve President Calderon's declining support for his "war on drugs" approach to deal with organized crime.

Likewise, the Michoacán state government and all the defendants argued that the prosecution was politically motivated because the President wanted his political party to win the coming local elections in Michoacán, which apparently turned out to be true since the President's sister —Luisa Maria Calderón— ended up as the official party's candidate for governor of Micho-

[54] Alfredo Méndez, *Investiga el Consejo de la Judicatura a 14 jueces y magistrados federales.* La Jornada, August 11, 2014, *available at* http://www.jornada.unam.mx/2014/08/11/opinion/011n1pol.

acán. However this politicization was not the whole story since some of the defendants did have ties with the LFM cartel.

Regardless of the political and social outcomes of the trial, what is clear is that impunity prevails when prosecuting public officials in Mexico. It has been long documented that in Mexico impunity is the rule and not the exception.[55] There is mounting evidence that this phenomenon has been widespread throughout the entire Mexican criminal justice, regardless of the type of crime involved. However, during the Calderon administration, some high profile cases suggest that the federal government fabricated, criminalized, and politicized some criminal investigations motivated by political and personal interests.[56] The *Michoacanazo* case falls under this category.

It is revealing that despite the evidence available, the Attorney General's Office failed to produce a convincing case to prosecute officials with links to dangerous criminals. Even if judicial corruption played a role in the eventual acquittal of all defendants, there is no doubt that the prosecutor's office did a poor job in the criminal investigation and the handling of the case, thus failing to secure a conviction. The most obvious failure was the acquittal of the governor's half-brother. His voice was unmistakably distinguishable when the Attorney General's Office leaked the tape in which he was caught chatting with a LFM kingpin. This failure of the Attorney General's Office should not be a great surprise, however, given that prosecutors in Mexico have been traditionally underfunded and prone to be politically influenced.

2. *The Michoacanazo 2.0: Déjà Vu*

Even if one wanted to draw some positive outcomes from the *Michoacanazo* case, such as creating a deterrent effect and a precedent in order to let municipal and state authorities know that colluding with drug cartels is unacceptable, this is not the case. The current legal and political conditions in Michoacán state resemblances a new version of the *Michoacanazo* case, but with new ingredients. In 2014, at least 5 army majors, the Secretary of the Interior (Jesús Reyna García who acted as interim governor for six months in 2013), a former state lawmaker belonging to the PRI party, and former Governor Fausto Vallejo's son (Rodrigo Vallejo Mora) have been arrested for having ties with the Knight Templars (TKT). The charges were filed by the Attorney General's Office after a handful of leaked videos showed the defendants at different moments and in various situations meeting with Servando Gómez Martínez, a.k.a. "La Tuta", one of the leaders of TKT. Interestingly, videos of "La Tuta" and local public figures were still being leaked at the end of 2014, to the point that pundits have dubbed these videos "La Tutoteca,"

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[55] Guillermo Z. Leucona, Crimen sin castigo (FCE & Cidac, 2004).

[56] Ricardo Reveles, El Affair Cassez (Planeta, 2013).

a concept coined of the words 'La Tuta' and 'videoteca' —video library in Spanish— to refer to "La Tuta's" personal collection of videos.

Municipal elections in the state of Michoacán were held in November 2011. When the new mayors took office on January 1, 2012, dozens of them began receiving threats from the former *La Familia Michoacana* criminal organization. These majors contacted the state and federal governments requesting help and guidance. In early February 2012, the President sent 4,000 soldiers to protect those municipalities threatened by organized crime.[57] However these actions were probably too late since the Knight Templars' cartel had already co-opted and influenced the local elections to make a *de facto* alliance with many mayors and well known politicians who later became high ranking public servants.[58]

There are similarities and differences between these latest detentions of public servants and the *Michoacanazo* case. Among the similarities, we can find the same charges brought against the defendants, the involvement of local and state officials from the state of Michoacán, the same drug trafficking organization (albeit using another name), and apparently a large number of public servants at all levels of government providing protection or having ties with the cartel. Among the differences, we find that this time there is visual evidence about the crimes committed (leaked videos), the federal government did not rush to indict the public officials, there is no political motivation behind the arrests, the media has not overemphasized the arrests, and local, state, and federal governments are working together to create a common front to this new set of indictments. It remains to be seen whether or not the new trials will result in a criminal conviction against these officials.

One aspect that is imperative to highlight in this new wave of detentions of public officials in Michoacán is the existence of a new component in the conflict that was absent in the *Michoacanazo*: vigilante groups. The LMF and TKT stronghold has been the lowlands (*Tierra Caliente*) of Michoacán and many communities fed up with the exploitation and criminal activities of drug cartels have armed themselves to fight these cartels off. They formed self-defense groups (*Autodefensas*) in early 2013 and began armed confrontations to expel the Knight Templars from their communities. Eventually other communities joined the movement and many towns were cleared of drug cartel members. This movement led to the capture or death of most leaders of the Knight Templars and their criminal operatives. However, under pressure from the federal government, the movement eventually was transformed into a Rural Police group. The problem is that since its inception some of these

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[57] Luis Prados, *El Gobierno mexicano envía 4.000 soldados más a Michoacán.* El País, February 3, 2012, available at http://internacional.elpais.com/internacional/2012/02/03/actualidad/1328295885_247024.html.

[58] Ricardo Alemán, *Fausto Vallejo: ¿hasta cuándo será solapado?*, El Universal, April 28, 2014, available at http://www.eluniversalmas.com.mx/columnas/2014/04/106668.php.

self-defense groups were infiltrated by members from other drug cartels and even by ex-members of the Knight Templars organization.[59]

The current situation in Michoacán is one of tense calm under a new governor—with no political affiliation—recently appointed in the summer of 2014. Local elections will be held in June 2015 and the administration of President Peña Nieto wants to perform background checks on all candidates to make sure none of them has criminal records or ties with organized crime syndicates. The root of the problem, however, is not whether or not there is a vetting process for political candidates; the central problem is the social, economic, political, and cultural context that produces and reproduces drug trafficking, corruption, violence, poverty, and lack of employment in Michoacán. Decades of social and economic abandonment of regions in central and southern Michoacán cannot be changed overnight. Drug trafficking in Michoacán has been a source of employment, income, and social status for entire communities and towns for so long that reversing this trend seems insurmountable. Only if these phenomena are addressed with a long-term vision to overhaul the problems that have plagued the state, a solution would be viable. Otherwise, circumstances like the one leading to the *Michoacanazo* trial and the gross violence that has engulfed the state will repeat themselves over and over again.

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[59] Tracy Wilkinson, *Mexico vigilantes register weapons, are to disband.* L.A Times , May 12, 2014, *available at* http://www.latimes.com/world/mexico-americas/la-fg-michoacan-violence-20140512-story.html#page=1.

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ELECTORAL GOVERNANCE: MORE THAN JUST ELECTORAL ADMINISTRATION

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Abstract. *The meaning of "electoral governance" is often equated with "electoral administration". The process, however, can be divided into three distinct stages: 1) formation of regulatory bodies and norms; 2) implementation of these norms; and 3) dispute resolution. Given these three parts, electoral governance amounts to much more than just administration. In this article we explain why many academic studies of electoral governance have neglected the role of conflict resolution, focusing instead on the first two elements. In this way, electoral governance is mistakenly conceived as merely a mechanism for establishing regulatory bodies and rules. Our second goal is to show readers that electoral governance is a process that starts with the enactment of legislation, continues with administrative enforcement and judicial response, and concludes when the process returns to the beginning, either through judicial interpretation or recommendation by a legislative body. Our preliminary conclusion is that a proper understanding of electoral governance must take into account the role of conflict resolution, especially for disputed elections. Lastly, consideration must be given to a final phase which incorporates a cyclical conception explaining the returning process to the legislative dimension.*

Key Words: *elections, electoral governance, electoral bodies, political actors, electoral process.*

Resumen. *La gobernanza electoral ha sido considerada como la administración de elecciones. Sin embargo, el concepto integral está compuesto por tres dimensiones: 1) el diseño constitucional y legal de los órganos reguladores y de los estándares; 2) la aplicación de reglas y 3) la resolución de disputas, considerando estos tres niveles la gobernanza electoral es más que la administración de elecciones. En este artículo mostramos como los estudios sobre la gobernanza*

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electoral han olvidado la dimensión de la resolución de conflictos y se han centrado en las otras dos dimensiones, lo que ha propiciado que la gobernanza sea revisada solamente como un mecanismo para el diseño de órganos y reglas. Esto nos lleva al segundo propósito del trabajo: explicar cómo la gobernanza electoral es un proceso que inicia con la creación de leyes, continúa con la aplicación administrativa y con la resolución judicial, para terminar cuando el proceso reinicia el ciclo, ya sea mediante una interpretación jurisprudencial o por medio de una recomendación al órgano legislativo. Nuestra conclusión preliminar es que una noción integral de la gobernanza electoral debe considerar tanto elementos teóricos como empíricos: primero, el énfasis en la dimensión de resolución de conflictos, especialmente en contextos de elecciones disputadas; segundo, la consideración de una fase final que incorpora una perspectiva cíclica que regresa el proceso a la dimensión legislativa.

Palabras clave: *Elecciones, gobernanza electoral, órganos electorales, actores políticos, proceso electoral.*

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I. Introduction

The integral connection between electoral administration and the democratization process has been noted since studies first appeared on electoral governance.[1] In effect, these studies emphasized the role played by the electoral authorities,[2] as well as their respective duties to ensure success.

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[1] Robert A. Pastor, *The role of Electoral Administration in Democratic Transitions: Implications for Policy and Research,* 6 Journal of Democratization 4 (1999).

[2] Rafael López-Pintor, Electoral Management Bodies as Institutions of Governance (UNDP-ONU ed., 2000).

In a second phase, interest spread to additional levels of electoral governance, considering for the first time activities performed by electoral bodies as well as the multiple stages of elections.[3] In the third phase of this process, various scholars started to analyze both the stages and functions of electoral bodies, paying particular attention to the division between administrative and judicial roles during the electoral process.[4] Thanks to recent studies, we can now take a more comprehensive approach.[5]

As this article attempts to explain, electoral governance involves an ongoing cycle of stakeholders acting at different stages of the electoral process. The three distinct areas set forth above serve as reference points to analyze the multiple stages of elections, and show why democracy implies much more than voting booths and vote tallies. In sum, electoral governance is a complex process involving a wide range of actors, norms and authorities.

II. Conflicting Approaches

The study of electoral governance can generally be divided into two distinct approaches: first, emphasis on electoral bodies as institutions of governance; second, emphasis on the multiple stages of elections and the relation between the distinct bodies that comprise the electoral system, including both administrative and judicial elements. We analyze both approaches below.

1. *Electoral Bodies as Institutions of Governance*

The prominent role played by electoral bodies in analyzing electoral governance can be seen in studies realized by Pastor[6] and López-Pintor.[7] These studies, especially the first and last, tend to emphasize the role of electoral administration in the democratization process.[8]

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[3] Andreas Schedler, *Distrust Breeds Bureaucracy: Democratization and the Formal Regulation of Electoral Governance in México,* 3 Public Integrity 2 (2001); Shaheen Mozaffar and Andreas Schedler, *The Comparative Study of Electoral Governance, Introduction,* 23 International Political Science Review 5 (2002).

[4] Todd A. Eisenstadt, Cortejando la democracia en México. Estrategias e instituciones partidarias (COLMEX ed., 2004); Vitor Marchetti, *Electoral Governance in Brazil,* 6 *Brazilian Political Science Review* at 1, (2012); Diego Brenes Villalobos, El rol político del juez electoral. El Tribunal Supremo de Elecciones de la República de Costa Rica (Oct. 2011) (unpublished Ph. D. dissertation, University of Salamanca).

[5] Pippa Norris Et Al. Advancing Electroal Integrity (Oxford University Press, 2014).

[6] Pastor, *supra* note 1.

[7] López-Pintor, *supra* note 2; Rafael López-Pintor, Administración Electoral y Consolidación democrática (IDEA-Civil Transparency Association, 2004).

[8] Hugo Picado León, *Diseño y transformaciones de la gobernanza electoral en Costa Rica,* 51

Pastor establishes that "…elections are a prerequisite of democracy…",[9] hence the critical role played by electoral administration in ensuring proper elections, especially in democratic transitions. Although in developed countries electoral administration is usually not in dispute,[10] governments in developing nations often attempt to manipulate elections.

He proposes five ways to classify electoral bodies: (a) an electoral office with government supervision; (b) an electoral office supervised by a judicial body; (c) an electoral office accountable to parliament; (d) a multiparty electoral office; and (e) an independent electoral office.[11]

With the aim of safeguarding internal governance, countries in democratic transition often establish independent bodies to oversee proper electoral conduct.[12] These bodies are responsible for ensuring the integrity of the electoral process during three major stages: pre-Election Day, Election Day and post-election day. These three stages are then divided into 22 specific activities such as partitioning electoral districts; elaborating and distributing materials; monitoring polls; issuing announcements; emitting rulings; and certifying the final results.

As explained above, Pastor's work distinguishes between the electoral bodies themselves and the multiple stages of the electoral process. By focusing on the administrative bodies, the activities realized are reduced to a second level of relevance, and something similar occurs with the other author located on this interpretative line.

Studies realized by López-Pintor,[13] on the other hand, emphasize the importance of electoral bodies as a structuring element of governance. The second, "Electoral administration and democratic consolidation", clearly stresses the importance of proper organization and administration for successful democracy (e.g., "…the evolution of electoral bodies cannot be separated from the democratization process…").[14] López-Pintor's central finding is that "the independent electoral commission or tribunal of the executive branch is the dominating model of organization and electoral management".[15]

As a result, he finds that permanent electoral administrative bodies ("EAB") are both less costly than temporary administrations[16] and more professional. "…The EAB must ensure the participation of all political parties, promote transparency at all stages of the electoral process, be accountable to the leg-

América Latina Hoy 97 (2009); Jonathan Hartlyn et al., *La importancia de la gobernanza electoral y la calidad de las elecciones en la América Latina Contemporánea,* 51 *América Latina Hoy*, 17-8 (2009).

[9] Pastor, *supra* note 1, at 5.

[10] *Id.*, at 6-7.

[11] *Id.*, at 12-13.

[12] *Id.*, at 8-9.

[13] López-Pintor, *supra* note 7.

[14] *Id.*, at 16.

[15] *Id.*, at 13.

[16] Picado, *supra* note 8, at 97.

islature and the public, promote the dissemination of information and civic education for voters and implement cost reducing measures…”.[17]

Although the above recommendations are helpful (in many nations, necessary) they also inevitably lead to excessive activities realized by electoral bodies, which must not only organize elections but also provide education, promote its activities and seek cost-saving measures. As such, electoral bodies are tasked with wide-ranging functions, involving not only organization but also management:

> Establishing a permanent and independent EAB represents a big step forward towards institutional progress, as it can strengthen a nation's electoral system. Just like an independent tribunal or a professional politically-neutral police force, citizens and politicians often take their functions for granted. And like them, their absence or failure can open the doors to chaos and dictatorship.[18]

The above illustrates how electoral bodies evolved from primarily ensuring democratic transition to becoming arbiters and guardians of democratic consolidation. As such, it assumes a critical role with ever increasing duties. The conceptual weakness to this approach is that it neglects the distinct stages of the electoral process.

2. *Rules and Standards of Electoral Governance*

Partly in response to this excessive focus on electoral bodies and also as differentiating element, the second approach is based on a series of theoretical, historical and comparative perspectives that facilitate a wider understanding of electoral governance.[19]

A classic example of this approach is the 2002 volume of the International Political Science Association, which includes articles by several authors who address electoral governance from the introductory studies realized by Mozaffar and Schedler.

These authors views electoral governance as a set of interrelated activities that involve (a) the enactment of rules; (b) the application of these rules; and (c) dispute resolution.[20] Rule-making is legislative; implementation is administrative; and dispute resolution is judicial. There is also a preliminary stage in which decisions are made regarding who has the authority to determine the rules, goals and constitutional dimension.[21]

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[17] López-Pintor, *supra* note 7, at 16.

[18] *Id.*, at 43.

[19] Picado, *supra* note 8, at 99.

[20] Mozaffar and Schedler, *supra* note 3, at 5.

[21] *Id.*, at 7.

The difficulty of this approach is illustrated in the first chart, which shows three distinct phases of electoral governance with the elements that pertain to each phase.[22] For the purpose of this analysis, the authors propose that the initial phase –at which time the basic rules are established– be divided into two sublevels: the rules governing competition where the electoral formula appears, the partitioning of electoral districts and the size of the congress. which are the variables of the electoral system; and the electoral organization rules, where the voter registry is located, the nomination and registration of candidates, financing, taxation, the electoral observation, all which are organizational elements that in the chart appear as electoral governance.

The problem with this approach is that it disconnects two types of rules when both the definitions of the electoral system and those corresponding to the organization of the elections originated in the rule design process. In other words, at a constitutional level, what differentiating two related areas implies: organizational rules often influence how elections are determined. This is because both rules, those of competition and those of organization, allow us to understand the electoral process as a whole. Moreover, when proposing to separate them, the position of governance is unclear: should it be in the organizational sublevel of the rule design or in the three levels, with the sublevels and its elements as suggested by the chart.

The above situation becomes complicated when the text emphasizes the formulation and application of rules, but barely mentions dispute resolution, which we consider a notorious failure since it is precisely that level which enables the relationship between administration, organization and electoral management. When electoral candidates dispute election outcomes, there must be a proper mechanism for adjudication. As the authors suggest, the integrity of the electoral process depends on "…the impartial and expeditious resolution of disputes, which represents a cornerstone of the procedural legitimacy of democratic elections."[23]

The same publication includes an article about the subnational bodies responsible for dispute resolution in Mexico. The author indicates that although electoral disputes often occur, minimal attention has been given to the bodies responsible for resolution.[24]

Using Mexico as an example, we find several types of subnational electoral courts while classifying them according to the role they play in the local courts as ghost tribunals, lyricists, cleaners, employees and workers.[25] The first four are deficient tribunals either because they are ignored or because they may be amended by congress or by the government; the only acceptable court is the working court; Eisenstadt in his previous studies has insisted on this idea:

[22] *Id.*, at 8.

[23] Mozaffar and Schedler, *supra* note 3, at 11.

[24] Todd A. Eisenstadt, *Measuring Electoral Court Failure in Democratizing Mexico,* 23 International Political Science Review 5, 48 (2002).

[25] *Id.*, at 56.

> As opposed to the typically ideal autonomous courts which are static, the tension inherent in the construction of electoral courts during the transition lies on which will be favored, whether the short term interests of stakeholders or the broader and long term interests of the judicial autonomy.[26]

Thus we can see that acknowledgment for distinguishing the administration of the elections from the administration of justice in the context of the electoral process is already in place, even though it is still viewed from the body and not so much from the function that it must fulfill.

In order to illustrate the importance of the activities realized by electoral bodies, Medina,[27] Picado,[28] Fleischer and Barreto,[29] Brenes,[30] Marchetti[31] and Ramírez[32] take a broader view of the electoral process by examining election rulings from the perspective of the tribunals.

In both approaches, there was a series of contributions but also of shortcomings. Regarding the progress, the first approach highlights the importance of institutions in administering proper elections, to end the transition processes, specifically in the states of the third democratizing wave.[33] This approach made a hindrance of the centrality of the electoral process and emphasized electoral bodies rather than actors or norms, which was clearly deficient.

Given the inadequacy of this approach, the second method emphasizes the formulation of rules and their application. In this way it highlights the importance of generally-accepted rules and the centrality of the result became the objective to achieve. This methodology is best summarized by the expression: certain procedure, uncertain results. This line has faced the obstacle of recognizing that in addition to the design and implementation of the rules a necessity for a closing mechanism of the electoral process exists and it can be found in the adjudication of disputes carried out by the electoral tribunals, this has been its main deficiency. Therefore, the second interpretative line centered on the electoral justice bodies as the closing operators of the electoral process.

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[26] Eisenstadt, *supra* note 4, at 161.

[27] Luis Eduardo Medina Torres, *La justicia electoral mexicana y la anulación de comicios*, 1 Revista de Justicia Electoral 1 (2007).

[28] Picado, *supra* note 8.

[29] David Fleischer and Leonardo Barreto, *El impacto de la justicia electoral sobre el sistema político brasileño*, 51 América Latina Hoy (2009).

[30] Brenes, *supra* note 4.

[31] Marchetti, *supra* note 4.

[32] Edwin Cuitláhuac Ramírez Díaz, Gobernanza electoral en Centroamérica (27 November 2013) (unpublished Ph. D. dissertation, Autonomous Metropolitan University of Iztapalapa.

[33] Samuel Huntington, La tercera ola (Paidós, 1994).

III. Electoral Process: Norms, Actors and Bodies

In this section we reconstruct the object of study to revise the dimensions of electoral governance from the same electoral process with the participation of the actors and authorities responsible for implementing free and democratic elections.

The electoral process is a complex series of events that take place in several phases. The most highly-visible phase involves political campaigns such as the primaries; candidate nominations; nominations of parties; election propaganda; ballot elections; and the declaration of election results and winners. Governance-related activities take place between elections: voter registration; party registration and funding; auditing; and the eventual cancelation of adherent records, administrative actions subject to review by electoral authorities.

In this way, the electoral process is governed by rules that govern how elections are conducted and the respective duties of the authorities. In the enactment of norms, the legislature must first determine issues involving constitutionality. Judicial bodies (e.g., tribunals, courts and constitutional rooms) are responsible for dispute resolution.

The formulation and enactment of rules is largely extraneous, as this activity is realized by legislators, at times with the aid of the government and subject to revision by the judicial authorities. It should be noted that during electoral crisis, it is often necessary for politicians to reformulate and readjust the rules, including those that regulate the institutions that oversee elections. Hence, with the rule design dimension the governance circuit may restart.

Two actors involved in the formulation and enactment of electoral rules —legislators and judges— must often intervene to enact new rules.

Once electoral rules have been enacted, electoral bodies with both administrative and judicial functions must be established to oversee their implementation. Election administrators are directly responsible for electoral organization, while electoral judges rule on legal matters.

Political parties and candidates also participate in rule implementation, as their direct and continued participation make them key actors in election outcomes. Although winners are decided on Election Day, they must be confirmed by the appropriate judicial authorities.

The application of rules involves the participation of administrative bodies, political parties and citizens. No less important, the electoral courts are responsible for dispute resolution.

The actors involved in dispute resolution include political parties as well as candidates who challenge administrative decisions. It is worth noting that electoral judges have the authority not only to review elections but also invalidate election results. The role played by electoral judges are critical despite

a dearth of academic literature regarding their duties, as scholars often consider this to be outside their area of expertise.[34]

In many electoral regimes, especially in Latin America, there is a fourth phase of electoral governance that involves the review of human rights protection by regional authorities.

This review has two goals: first, to protect the aggrieved parties; and second, to issue a ruling that binds the state's electoral bodies. Hitters[35] has also proposed that these rulings become binding for member-states not involved in the specific controversy.

At the regional review stage, the actors include political candidates who seek protection of the regional system, the bodies responsible for the national state and, eventually, the public powers of the respondent state. This review is a final mechanism external to the electoral bodies of the national state and a different possibility of governance circuit closure.

Once the entire electoral process has been realized, including the enactment of rules, declaration of winners, and certification of results, we discover a link between each of the four phases of electoral governance to the following norms and actors:

— Enactment of rules: Legal and constitutional norms enacted by legislators with the collaboration of the government and review by constitutional control judges. Responsible body: legislature.
— Rules application: based on constitutional, legal and regulatory norms; administrative decisions involving parties, candidates, citizens and possible internal review by electoral judges. Responsible body: administrative agencies.
— Dispute resolution: based on constitutional and legal norms; decisions of a jurisdictional nature with the participation of parties, candidates and citizens with the internal revision of electoral judges. Responsible body: judicial authorities.
— Review of decisions: based on norms of the system of regional protection; administrative and judicial decisions subject to review by regional judges. Responsible bodies: commissions and human rights courts.

By linking each stage of the electoral process with decision-making authorities, we find that it is a circuit that begins with rules design and that various

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[34] Edwin Ramírez & Fernando Colmenero, *Votos particulares y disenso interpretativo* in Entre la libertad de expresión y el derecho a la información: las elecciones de 2012 en México (Citlali V. Robles & Luis E. Medina ed., 2013); Luis Medina & Ivette Córdoba, *Libertad de expresión en las sentencias del Tribunal Electoral con referencias al estándar de la jurisprudencia interamericana*, in Entre la libertad de expresión y el derecho a la información: las elecciones de 2012 en México (Citlali Villafranco Robles and Luis Eduardo Medina Torres coord., 2013).

[35] Juan Carlos Hitters, *Un avance en el control de convencionalidad. El efecto* erga omnes *de las sentencias de la corte interamericana*, 11 Estudios Constitucionales 2 (2013).

actions are executed by the administrative body and revised by the jurisdictional. In this framework, political parties, candidates and citizens become indispensable actors whose active participation in the electoral process are as crucial as the role played by the authorities.

It is a circuit which is constantly activated and can be restarted once the electoral court emits its final sentence. For this reason, it is necessary to factor in differences between each electoral authority and understand that the courts are necessary both to resolve electoral challenges and maintain the governance circuit active.

Thus, the electoral governance dimensions obtain their own characteristics through the rules, the bodies and the respective actors, assuming that the electoral process by being a cycle at some point will be likely to return to a previews phase or by the end, review the whole process or, moreover, once the whole process is finished, revise the design and the electoral institutions.

The previous explanations propose the need to link the rules with the actors and the procedures which involve electoral governance as a whole and not just a part of the rules which are related to Election Day but with the complete organization of the electoral process. Electoral governance is thus characterized by the relation between the rules, the actors and the procedures that are performed during the electoral process for its organization as well as for the resolution of disputes. This conceptual framework sheds light on each stage of governance; the differences between electoral bodies; and the importance of participation by political actors.

In the next section, we discuss the integral model of governance.

IV. Modeling Electoral Governance: Dimensions, Category Analysis and Case Comparison

Aguilar has proposed that electoral governance be broken into distinct modules in order to facilitate analysis. He also noted that the concept contains a teleological dimension as well as a causal one, making governance "...an institutionally structured process and technically in its activities of defining a sense of direction and the embodiment of sense, which joins the institutions with the political practices and the technical procedures of analysis and management…".[36] We consider it appropriate to carry out a similar procedure of segmentation into categories of analysis for the concept of electoral governance in order to design an integral proposal and to shape various cases.

Electoral governance is a cycle rooted in legislative design, passing through administration and internal electoral justice, with the possibility that it will conclude in the regional system of human right revision. As a model, we use categories based on the quantity and nature of electoral rules, government orders, electoral bodies and political actors.

[36] Luis F. Aguilar Villanueva, Gobernanza y gestión pública 92 (FCE 2013).

System of rules: regional, national or subnational.

Levels of government: national or subnational.

Electoral bodies: administrative, judicial and review.

Political actors: citizens, candidates and parties.

By system of rules we refer to the number and types of laws applicable to each election.

The state may only apply its own regulations; or perhaps the regional regulations; or even both the domestic and the regional regulations are considered a whole (legal monism).

In the case of norms, the first variation is between one or more systems of rules, in case of more than one system the variables maybe regional, national or subnational.[37] If a subordinate relation exists the sequence is reversed: subnational, national and regional.

The second line of analysis refers to the government entity responsible for implementing the norms. in the levels of government the first variation is also between one or more levels, the variables are subnational and national, the relation between levels depends on the constitutional definition of each state.[38]

The third line of analysis refers to electoral bodies, both electoral administration and judicial branches. In the electoral bodies, the variants are between one and more than one and the variables are between administrative and jurisdictional bodies. Something similar occurs with the regional revision authorities; here we also find a variation between one or more authorities.

The fourth category refers to political actors. The variables are (a) verification that the election involves at least two candidates; and (b) whether candidates are chosen by political parties or nominated directly by citizens.

With the relations between the rule design, their application by the electoral administration, the adjudications of disputes by the electoral court, the regional revision system with the internal normative systems, the levels of government and the political actors we obtain and integral cycle of the electoral processes.

To observe the relationship between the dimensions with the categories of the second variable, we analyze two emblematic cases, Brazil and Mexico. Both are federalisms of the region and have been subject to electoral governance studies.

In Brazil, norms are formulated and enacted by two legislative bodies: a federal congress and state legislatures. These two sets of norms are linked to the decisions of the Inter-American Human Rights System (IAHRS). Brazil

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[37] José María Serna de la Garza, El sistema federal mexicano. Un análisis jurídico 9-13 (UNAM, 2008).

[38] *Id.*, at 21.

has two levels of government: a national one for federal elections and a subnational one for local elections

Regardless of the government order in Brazil, electoral administration and justice is overseen by the electoral tribunal (whether federal or state), which oversees the implementation of electoral rules and the adjudication of disputes. In addition, all rulings by the Brazilian authorities are subject to review by the commission or the IAHRS.

In Brazil, citizens are not permitted to directly nominate candidates, who may be appointed only by political parties. Even so, the political rights of all candidates are subject to internal jurisdiction and the IAHRS.

In contrast, the Mexican federal congress retains exclusive authority to enact electoral rules. allows discretion for the local legislatures. Mexico has a normative system which incorporates de decisions made by de IAHRS and establishes two levels of government: a national one for federal elections and a subnational one for local elections.

The electoral and administrative justices are differentiated by the government levels as well as the corresponding authorities. First, whether they are administrative or judicial entities the first are responsible for the application of rules the latter for the resolution of disputes; second, whether they involve national or subnational authorities. Rulings made by the various electoral bodies are subject to review by IAHRS regional headquarters.

In Mexico, candidates may be subject to nomination either by political parties or citizens; in the latter case, however, restrictions normally apply. Those nominated either by citizens directly or a political party may resort to electoral courts to adjudicate disputes. Only candidates and citizens can turn to the IAHRS.

As can be seen, despite both Brazil and Mexico being federal states each nation defines electoral governance differently. Each country has assigned to different authorities the enactment of electoral rules and oversight for their implementation. They also differ with regard to the nomination of candidates. This said, both are similar with regard to government levels, systems of rules and dispute resolution. Each nation may also request review under the IAHRS.

It is worth mentioning that rulings by either nation are subject to review by the regional human right authorities. Note also that the results of any election in dispute are considered valid only after a ruling by an electoral court or a regional review committee.

The above illustrates how the four elements that make up electoral governance can be linked to the specific variables of each category, which allows for various types of comparisons both synchronic and diachronic. This is due to the fact that governance is a complex concept that links its dimensions and categories with the political actors, which generates a political definition by the end of the electoral process, this involves more than the administering of elections.

V. Discussion and Reflection

There have been several approaches to the issue of governance which have emphasized various points, first the authorities, then the rules, and levels; a recent proposal concerns electoral integrity. We consider that a comprehensive approach linking the dimensions with the categories and the actors in the various stages of the electoral process is necessary.

The above proposal is justified by the need to understand that elections are a cycle which begins with the convocation to electoral process and ends with the declaration of results, while governance is a process that can be observed in a circuit; the specific circuit is designed by each national state and to analyze it the dimensions and categories are pertinent.

From this perspective the analytical elements are necessary for a general approach, to denote the characteristics of each case, to highlight the similarities and differences between cases, whether they are close in space and time, also to obtain a series of observations that in a reasonable lapse of time allow comparisons between cases and of a single case with its many variants.

Ultimately the approach we propose is conceptual and methodological which serves for various cases without losing the richness of each specific design and generating points of contrast with others, whether similar or dissimilar. The focus on the definition of electoral governance is to achieve a better understanding of the elections, administration and electoral justice.

Notes on Mexico

In this short epilogue we will carry out a diachronic comparison of the Mexican case from 1996, when the electoral bodies turned autonomous until the most recent electoral reform of 2013-3014, which implies having three models, since a reform was also implemented in 2007-2008.

These three reforms had different purposes: the 1996 reform sought to establish the autonomy of the electoral bodies.[39] In 2007-2008, reforms were implemented to create conditions of equality in electoral processes.[40] The 2013-2014 reform aims to professionalize the electoral authority. Let us examine the terms of the reforms.

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[39] José Woldenberg et al., La reforma electoral de 1996: una descripción general (FCE, 1997).

[40] Carlos González, *Motivos, contenidos y alcances de la reforma electoral federal mexicana del 2007-2008. Lectura de implicaciones para una nueva reforma*, in México después. Las reformas postelectorales (Marco A. Cortés Guardado & Víctor A. Espinosa eds., 2009); Leonardo Valdés, *La aplicación de la reforma constitucional en materia electoral de 2007*, in México después. Las reformas postelectorales (Marco A. Cortés Guardado & Víctor A. Espinosa eds., 2009); for opposing view Giles Serra, *Una lectura crítica de la reforma electoral en México a raíz de la elección en 2006*, XVI Política y Gobierno 2 (2009).

In 1996, both federal congress and state legislatures enacted two sets of electoral rules, national and subnational, which were also replicated in the government levels: one for federal elections and one for local elections.

Since 1996, the administrations and the electoral justice are differentiated by the government levels as well as the responsible authorities. First, electoral bodies either have administrative or judicial authority. Second, electoral rules can apply at either national or subnational levels. At the time, IAHRS review was still at an early stage.

According to rules at that time, candidates could only be nominated by political parties. Even though citizens could turn to internal jurisdictions, their chances were limited.

Candidates and citizens, however, were entitle to protection under the regional protection system. One case in particular was critical: Castañeda Gutman vs. Mexico. In this ruling, the claimant, who was not registered by the administrative authorities, turned to the IAHRS for relief. The jurisdiction dismissed his claim. The regional human rights courts partially agreed with him and recommended that the Mexican state amend requirements for nonparty candidates.

The 2007-2008 reform did not radically modify the dimensions or categories of electoral governance procedures, except for rules applying to radio and television propaganda, in which case it determined that the national administrative body would solely define these guidelines. With regard to dispute resolution, it allowed citizens to go directly to electoral justice, as well as review by the IAHRS.

In the Mexican case of 2013-2014, the federal congress retained sole authority for electoral decisions, although local legislatures were given a modicum of influence. Mexico has a normative system which incorporates IAHRS decisions and establishes two government levels: national for federal elections and subnational for local ones.

The administration and electoral justice remain differentiated by the government levels as well as the responsible bodies with the exception that the local administrative authorities are linked directly to the national bodies. The decisions made by the various electoral bodies can be revised at regional headquarters or by the IAHRS.

In Mexico both parties and citizens can nominate candidates, although there are restrictions for the citizens. Both candidates and citizens maybe turn to internal jurisdiction for dispute resolution, although only candidates and citizens maybe turn to the IAHRS.

As we can see, between the reforms of 1996 and 2007-2008 there were no major changes. The 2013-2014 reform, however, has modified Mexican electoral governance: there is a great designer: the federal congress, the subnational bodies depend on the national body and both must apply federal rules, citizens can be nominated individually and turn directly to jurisdiction, and along with the candidates, they can turn to the IAHRS. It is quite a change for the architecture of Mexican electoral governance.

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MEXICAN TELECOM REFORM: PRIVATE INTEREST FIRST?

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Abstract. *Telecommunications reform, one of the pillars of President Enrique Peña Nieto's highly-publicized structural reforms, was enacted to recognize as human rights access to: (i) information and communications technology; and (ii) broadcasting and telecommunications services, including broadband and the Internet. The reform also gave the Mexican government the authority to sanction or even split up companies engaged in monopolistic practices, and to establish ad hoc restrictions to minimize undue market advantages for dominant industry players – defined as companies that capture 50 percent market share measured by number of users/audience, capacity or network infrastructure. This article explores several aspects of this new legislation, including regulatory agencies; media and plurality; audience and users' rights; restrictions to minimize market manipulation; mergers; data retention and geo-localization; and access for persons with disabilities. It also examines various aspects of the legislative process, as well as some broader implications of the new law.*

Key Words: *Telecommunications, broadcasting, audience, mergers, antitrust, plurality, competition.*

Resumen. *La reforma de telecomunicaciones en México fue uno de los pilares de las llamadas reformas estructurales, cuyo objetivo fue reconocer a nivel constitucional el derecho de acceso a los servicios de telecomunicaciones y radiodifusión, los derechos de la audiencia, así como fijar límites a los grandes grupos corporativos de telecomunicaciones y radiodifusión. Este artículo presenta los aspectos principales de la nueva ley mexicana de telecomunicaciones (el regu-*

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lador, pluralidad y medios, derechos de las audiencias y usuarios, la preponderancia, medidas contra los dominantes, concentraciones, conservación de datos y geolocalización, usuarios con discapacidad), los aspectos relevantes del proceso legislative y el análisis del proceso legislativo.

Palabras clave: *telecomunicaciones, radiodifusión, audiencia, concentraciones, competencia económica, pluralidad, competencia.*

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I. Background

Following the 1910 revolution, Mexico's economy was developed by monopolistic interests that operated on the local, regional and national levels. The telecom sector was no exception.[1] Since capital formation and economies of scale were so vital in developing a functional infrastructure, the government deemed competition as against the public interest.[2] Licenses were granted on a discretionary basis pursuant to loyalty both to the government and (most importantly) the PRI (*Partido Revolucionario Institucional*), the political party that ruled Mexico for over 70 years.[3] Without loyalty, no applicant was able to obtain a broadcasting license.

[1] Example in telecommunications can be found on the Ley de Vías Generales de Comunicación (1940). Also see Clara Luz Alvarez, Derecho de las Telecomunicaciones 391 (Fundalex and Posgrado de Derecho de la UNAM, 2013).

[2] InfoDev, *Forms of Market Failure,* ICT Regulation Toolkit, (Nov. 7, 2014, 12.44 PM) http://www.ictregulationtoolkit.org/en/toolkit/notes/practicenote/2609.

[3] Partido Revolucionario Institucional, *México, el PRI y sus Cifras* (Aug. 23, 2014, 1.30 PM) http://pri.org.mx/TransformandoaMexico/MexicoPRI/MexicoysusCifras.aspx.

The Broadcasting Law was enacted in 1960 to regulate free-to-air radio and TV, including digital content. Although this law was amended several times during the 20th century, the most significant amendment was the so-called *Ley Televisa*[4] enacted in 2006. In a case filed by a group of senators against it,[5] Mexico's Supreme Court later declared several major parts of this law to be unconstitutional.[6]

The 1990s was characterized by privatizations and economic liberalization. The Mexican government privatized the public telecom monopoly (Telmex, 1990),[7] a public TV broadcasting network (Imevisión - Canal 7 and 13, 1993), and the satellite monopoly (Satmex, 1997).[8] The Telecommunications Law enacted in 1995 helped open the telecom sector to competition, including the creation of a regulator (Cofetel, 1996-2013).[9] Increased competition was supposed to improve the quality of services, increase access and lower prices.

Although nearly two decades have passed since the supposed opening of the Mexican telecom market, the sector is still dominated by a few powerful players:

— Fix telephony = América Móvil (Telmex): 67.7%.[10]
— Fix data = América Móvil (Telmex): 66.9%.[11]

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[4] This amendment was known as *Ley Televisa* because of evidence that *Grupo Televisa* played a major role in both drafting the amendment and the legislative process.

[5] An action challenging the constitutionality of a law (*acción de inconstitucionalidad*) may be filed by at least 1/3 of the senators or deputies. Senators from the three major political parties (PRI, Partido Acción Nacional and Partido de la Revolución Democrática) signed the lawsuit against the *Ley Televisa.*

[6] Suprema Corte de Justicia de la Nación [S.C.J.N] [Supreme Court], *Sentencia relativa a la Acción de Inconstitucionalidad 26/2006 promovida por Senadores integrantes de la Quincuagésima Novena Legislatura del Congreso de la Unión, en contra del propio Congreso y del Presidente Constitucional de los Estados Unidos Mexicanos, así como los votos formulados por el señor Ministro Genaro David Góngora Pimentel*, Pleno, Diario Oficial de la Federación [D.O.], 20 de agosto de 2007 (Mex.).

[7] Álvarez, *supra* note 1, at 396-400.

[8] Álvarez, *supra* note 1, at 407-409.

[9] The regulator was named Comisión Federal de Telecomunicaciones. See Clara Luz Alvarez, *Órganos reguladores de telecomunicaciones*, año IV, número 10, México, *Praxis de la Justicia Fiscal y Administrativa del Tribunal Federal de Justicia Fiscal y Administrativa*, 1,34 (2012) (Nov. 12, 2014, 12:48 PM), http://www.tfjfa.gob.mx/investigaciones/pdf/organosreguladores.pdf.

[10] Instituto Federal de Telecomunicaciones, *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico del que forman parte América Móvil, S.A.B. de C.V., Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A. de C.V., Radiomóvil Dipsa, S.A. B. de C.V., Grupo Carso, S.A.B. de C.V., y Grupo Financiero lnbursa, S.A.B. de C.V., como agente económico preponderante en el sector de telecomunicaciones y le impone las medidas necesarias ara evitar que se afecte la competencia y la libre concurrencia*, Pleno, V Sesión Extraordinaria 2014, P/IFT/060314/76, p. 91 (Nov. 12, 2014, 12:51 PM) http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf, 6 de marzo de 2014 (Mex).

[11] *Id.*

- Mobile telephony = América Móvil (Telcel): 70.1%.[12]
- Mobile data and internet = América Móvil (Telcel): 62%.[13]
- Pay TV = Grupo Televisa: approx. 53.7%.[14]
- Free-to-air TV = Grupo Televisa: 70% (2012)[15] average share of transmissions computed from the beginning of the transmission to the end of it.[16]

II. Major Reform without Debate

One day after Enrique Peña Nieto's inauguration as President of Mexico (2012), the Pact for Mexico between the new administration and all major Mexican political parties was announced.[17] The Pact for Mexico was based on an ambitious policy agenda, including major reforms in both telecommunications and broadcasting.

In 2013, President Peña Nieto submitted several proposals for constitutional amendments that involved education, energy, tax, finance, telecom

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[12] *Id.*

[13] *Id.*

[14] See Ernesto Piedras and Carlos Hernández, *TV de paga y servicios convergentes 2012,* The Competitive Intelligence Unit, (May 30, 2014, 11:30 AM), http://www.the-ciu.net/nwsltr/119_1Distro.html.

[15] Instituto Federal de Telecomunicaciones, *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico del que forman parte Grupo Televisa S.A.B., Canales de Televisión Populares, S.A. de C.V., Radio Televisión, S.A. de C.V., Radiotelevisora de México Norte, S.A. de C.V., T.V. de los Mochis, S.A. de C.V., Teleimagen del Noroeste, S.A. de C.V., Televimex. S.A. de C.V., Televisión de Puebla, S.A. de C.V., Televisora de Mexicali, S.A. de C.V., Televisora de Navojoa, S.A., Televisora de Occidente, S.A. de C.V., Televisora Peninsular, S.A. de C.V., Mario Enríquez Mayans Concha, Televisión La Paz, S.A., Televisión de la Frontera, S.A., Pedro Luis Fitzmaurice Meneses, Telemisión, S.A. de C.V., Comunicación del Sureste, S.A. de C.V., José de Jesús Partida Villanueva, Hilda Graciela Rivera Flores, Roberto Casimiro González Treviño, TV Diez Durango, S.A. de C.V., Televisora de Durango, S.A. de C.V., Corporación Tapatía de Televisión, S.A. de C.V., Televisión de Michoacán, S.A. de C.V., José Humberto y Loucille, Martínez Morales, Canal 13 de Michoacán, S.A. de C.V., Televisora XHBO, S.A. de C.V., TV Ocho, S.A. de C.V., Televisora Potosina, S.A. de C.V., TV de Culiacán, S.A. de C.V., Televisión del Pacífico, S.A. de C.V., Tele-Emisoras del Sureste, S.A. de C.V., Televisión de Tabasco, S.A. y Romana Esparza González, como agente económico preponderante en el sector radiodifusión y le impone las medidas necesarias para evitar que se afecte la competencia y la libre concurrencia*, Pleno, V Sesión Extraordinaria 2014, P/IFT/060314/77, p. 408 (Nov. 11, 2014, 12:56 PM), http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_77.pdf, 6 de marzo de 2014 (Mex.).

[16] Please note that Grupo Televisa and Grupo TV Azteca (its direct competitor in free to air TV) jointly hold 94% of the commercial TV licenses in the Mexican Republic. At the same time both corporations have jointly owned the holding company of Iusacell that provides mobile telephony, until Televisa decided to sell its 50% back to Grupo TV Azteca (September 2014) and Grupo TV Azteca sold 100% of Iusacell´s holding to AT&T (November 2014).

[17] Presidencia de la República, *Pacto por México*, (Aug. 14, 2014, 3:10 PM) http://www.presidencia.gob.mx/wp-content/uploads/2012/12/Pacto-Por-México-TODOS-los-acuerdos.pdf, 2 de diciembre de 2012 (Mex.).

and antitrust. In Mexico, these bills are presented to either the Chamber of Deputies or to the Senate, and then such Chamber will be deemed the origin Chamber. The bill is then analyzed by one or more committees, and a report is prepared for debate before being put up for vote. The report is then submitted to the Chamber of origin for further debate. If approved, it goes to the reviewing Chamber which follows the same procedure. While ordinary legal amendments require a majority of votes to pass, constitutional amendments require 2/3 approval by both Chambers and a majority of State legislatures.[18]

At no point during the legislative process to amend the Constitution or enact new regulations was there any meaningful debate in either the Senate or Chamber of Deputies.

When discussion was opened to the floor, legislators opposing any part of the proposed changes faced no questions from other lawmakers.[19]

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[18] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.), articles 71, 72 and 135.

[19] Analysis of congressional sessions involving constitutional and legal reforms show a clear lack of debate. The senators or deputies took the floor to present their positions without any real questioning from the other legislators. See (1) Presentación, discusión y votación en el Pleno de la Cámara de Diputados de la reforma constitucional de telecomunicaciones 2013, *Diario de los Debates de la Cámara de Diputados*, Legislatura LXII, Segundo Periodo de Sesiones Ordinarias del Primer año, 21 de marzo de 2013, Volumen IV, Sesión 17, pp. 349-424, (Nov. 12, 2014, 11:20 AM) http://cronica.diputados.gob.mx/PDF/62/2013/mar/130321-4.pdf (Mex.); Presentación y votación en el Pleno de la Cámara de Senadores de la reforma constitucional de telecomunicaciones 2013, *Diario de los Debates de la Cámara de Senadores*, Legislatura LXII, Año I, Segundo Periodo Ordinario, 19 de abril de 2013, Diario núm. 27, pp. 28-562, (Nov. 12, 2014, 11.30 AM) http://www.senado.gob.mx/content/sp/dd/content/cale/diarios/62/1/SPO/PDF-WEB/D27-19-ABRIL-2013.pdf (Mex.); Presentación, discusión y votación en el Pleno de la Cámara de Diputados de la reforma constitucional de telecomunicaciones 2013, *Diario de los Debates de la Cámara de Diputados*, Legislatura LXII, Segundo Periodo de Sesiones Ordinarias del Primer año, 25 de abril de 2013, Volumen III, pp. 276-306, (Nov. 12, 2014, 11.35 AM) http://cronica.diputados.gob.mx/PDF/62/2013/abr/130425-3.pdf (Mex.); Presentación y votación en el Pleno de la Cámara de Senadores de la reforma constitucional de telecomunicaciones 2013, *Diario de los Debates de la Cámara de Senadores*, Legislatura LXII, Año I, Segundo Periodo Ordinario, 30 de abril de 2013, Diario núm. 32, pp. 661-798 (Nov. 12, 2014, 11.40 AM) http://www.senado.gob.mx/content/sp/dd/content/cale/diarios/62/1/SPO/PDF-WEB/D32-30-ABR-2013.pdf; Presentación, discusión y votación en el Pleno de la Cámara de Senadores de las leyes secundarias de telecomunicaciones 2014, *Diario de los Debates de la Cámara de Senadores*, Legislatura LXII, Año II, Tercer Periodo Extraordinario, 4 de julio de 2014, diario núm. 1, (Nov. 12, 2014, 11.45 AM) http://www.senado.gob.mx/content/sp/dd/content/cale/diarios/62/2/TPE/PDF-WEB/TPE_D1_04_JUL_2014.pdf (Mex.); Presentación, discusión y votación en el Pleno de la Cámara de Diputados de las leyes secundarias de telecomunicaciones 2014, *Diario de los Debates de la Cámara de Diputados*, Legislatura LXII, Año II, Tercer Periodo Extraordinario, 8 de julio de 2014, Volumen I (pp. 19-142) and Volumen II (pp. 143-224), (Nov. 12, 2014, 11.50 AM) http://cronica.diputados.gob.mx/PDF/62/2014/jul/140708-1.pdf ___ http://cronica.diputados.gob.mx/PDF/62/2014/jul/140708-2.pdf (Mex.).

Why did these reforms fail to generate any real debate in Congress? One explanation is that the ruling PRI party had forged an alliance with smaller parties that gave it an overwhelming majority of votes. Another reason is Congress was involved in at least 3 major reforms (political-electoral,[20] energy[21] and telecommunications),[22] each of which demanded full-time commitment. Can an ordinary individual assimilate such diverse topics within such a limited time frame? Since legislators often struggle to adequately understand just one area (e.g., energy), the idea of grasping all details necessary to formulate and decide on every amendment under consideration was clearly unrealistic. Thus, several major reforms were passed without due consideration.

III. Telecommunications in the Constitution

The Mexican Constitution was amended 9 times during 2013;[23] one of these amendments affects the telecom sector.[24] This section summarizes these

[20] The political-electoral reform comprised the enactment of 3 new laws (Ley General de Partidos Políticos, Ley General de Instituciones y Procedimientos Electorales and Ley General en Materia de Delitos Electorales), and the amendment of 3 other laws (Ley General del Sistema de Medios de Impugnación en Materia Electoral, Ley Orgánica del Poder Judicial de la Federación, and Ley Federal de Responsabilidades Administrativas de los Servidores Públicos).

[21] The energy reform comprised the enactment of 9 new laws (Ley de Petróleos Mexicanos, Ley de la Comisión Federal de Electricidad, Ley de Hidrocarburos, Ley de los Órganos Reguladores Coordinados en Materia Energética, Ley de la Agencia Nacional de Seguridad Industrial y Protección al Medio Ambiente del Sector Hidrocarburos, Ley de la Industria Eléctrica, Ley de Energía Geotérmica, Ley de Ingresos sobre Hidrocarburos, and Ley del Fondo Mexicano para la Estabilización y el Desarrollo) and the amendment of 12 other laws (Ley Federal de las Entidades Paraestatales, Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, Ley de Obras Públicas y Servicios Relacionados a las Mismas, Ley de Inversión Extranjera, Ley Minera, Ley de Asociaciones Público Privadas, Ley Orgánica de la Administración Pública Federal, Ley de Aguas Nacionales, Ley Federal de Presupuesto y Responsabilidad Hacendaria, Ley General de Deuda Pública, Ley Federal de Derechos, and Ley de Coordinación Fiscal).

[22] The telecommunications reform comprised the enactment of 2 new laws (Ley Federal de Telecomunicaciones y Radiodifusión and the Ley del Sistema Público de Radiodifusión del Estado Mexicano), and the amendment of 11 laws (Ley de Inversión Extranjera, Ley Federal del Derecho de Autor, Ley Federal de Responsabilidades Administrativas de los Servidores Públicos, Ley de Amparo, Ley del Sistema Nacional de Información Estadística y Geográfica, Ley Federal de Metrología y Normalización, Ley Orgánica del Administración Pública Federal, Código Penal Federal, Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, Ley de Asociaciones Público Privadas, and Ley Federal de Entidades Paraestatales).

[23] Cámara de Diputados, *Reformas Constitucionales en Orden Cronológico,* (Aug. 20, 2014, 10:00 AM) http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm (Mex.).

[24] Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6º, 7º, 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos,

changes and discusses the constitutionality of the new Telecommunications and Broadcast Law (LFTR).[25]

The Mexican Constitution recognizes human rights, demarcates national territory, and establishes the Federal system, the government structure and its divisions. The Constitution has been used by legislators as an instrument of public policy under the assumption that if a new right for citizens is included in the Constitution, then it will become a reality. However, such assumption is not supported by Mexican history. For example, the right to education is in the Constitution since the beginning of the 20th century, nonetheless, many Mexican children are still unable to enjoy their right to education. The same is applicable with the right to health, to a sound environment, to a dwelling, and so forth. Regarding the telecom reform, the same assumption was made in connection with the right to access information and communication technologies, telecom and broadcasting services, internet and broadband.

The telecom amendment was enacted to: (1) recognize a right to access information and communication technologies, broadcast, telecommunications, internet and broadband services; (2) recognize that media audience has rights, mandate Congress to establish them in the law and provide mechanisms to protect them; and (3) curb the dominance of big industry players like America Movil (Telmex and Telcel) and Televisa. In the case of Televisa its power is over public opinion formation and democracy, whereas America Movil's power impacts the economy and telecom service users insofar as they are able to set high prices for the services America Movil provides.

The amendment's mandate is to guarantee economic competition, content plurality and to encourage universal coverage, convergence, quality and, most importantly, user access. It granted the regulator with authority to sanction or even split up companies engaged, and to establish restrictions to avoid that preponderant carriers (*preponderantes*) abuse of their market power.

The amendment is very broad and includes the following:

- The right of access to information and communications technology, telecom, broadcast, broadband and Internet services.
- Telecom and broadcasting services[26] are considered public services of general interest.
- Unlike the then existing telecom regulator (Cofetel), the *Instituto Federal de Telecomunicaciones* (IFT) is independent from the executive and legislative branches, and will function as the telecom sector's exclusive antitrust agency. The IFT also has several faculties regarding au-

[Decree by which several provisions of articles 6º, 7º, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States are amended or added], Diario Oficial de la Federación [D.O.], 11 de junio de 2013, (Mex.).

[25] Ley Federal de Telecomunicaciones y Radiodifusión.

[26] Broadcasting services are considered free-to-air radio and television, whereas telecommunications include all other electronic communications services.

dience rights and content (programming and advertisement) delivered through broadcast stations and telecom networks.

- The only legal challenge to a regulation, act or omission of the IFT is through a special judicial review (*juicio de amparo indirecto*) and injunctions are prohibited.[27]
- The creation of an independent public agency to provide broadcasting services in Mexico.[28]
- Licenses that may be granted for commercial, private, public or social use. "Social use" includes use by communities and indigenous peoples.
- The creation of specialized judges and courts in broadcasting, telecommunications and economic competition matter to provide more certainty in this highly litigated field.
- Creation of the figure of preponderant carrier (see section VII below).
- Compulsory and free retransmission obligations of free-to-air signals through pay TV (must carry) and programming offer by free-to-air TV carriers of their signals for pay TV operators so that they are able to comply with must carry obligations (must offer).[29] The free of charge retransmission are not applicable for preponderant carriers.
- Increase of foreign ownership to 100% in telecom and 49% in broadcast (provided there is reciprocity in the investor's country of origin for broadcast licenses).[30]

IV. Independent Regulator?

Although the IFT was created as a constitutionally autonomous entity (*órgano constitucional autónomo)*[31] the Mexican Department of State (Segob)[32] re-

[27] The *juicio de amparo indirecto* is a type of legal proceeding whereby the constitutionality and legality of acts of authority are challenged. Although not the same as a judicial review of the US legal system, the juicio de amparo could be deemed as equivalent to judicial review.

[28] Sistema Público de Radiodifusión del Estado Mexicano.

[29] Under must carry obligation, pay TV licensee must retransmit the free-to-air channels that are broadcasted in the same area of service. Must offer obligation is for the broadcaster that must provide the free-to-air channels to the pay TV licensees so that they include such channels in their TV guide.

[30] Prior to the constitutional amendment, no foreign investment was allowed in the broadcasting sector; in telecom, there was a cap of 49%. The only exception was cellular services, which had no foreign investment cap. See Alvarez, supra note 1, at 420.

[31] This category is the maximum autonomy that the Mexican State grants to any public agency, and implies that the agency is not part of the Executive, neither it is from the Legislative, nor from the Judicial branch. Filiberto Valentín Ugalde Calderón, *Órganos Constitucionales Autónomos,* 29 Revista del Instituto de la Judicatura Federal 253 (Nov. 4, 2014, 2:00 PM) http://www.ijf.cjf.gob.mx/publicaciones/revista/29/Filiberto%20Valent%C3%ADn%20Ugalde%20Calderón.pdf (2010).

[32] Secretaría de Gobernación.

tained certain authority over audiovisual content and radio and television transmissions. The LFTR also recognized the authority of the Ministry of Communications[33] to issue opinions regarding licenses that are granted, revoked, transferred or whose controlling party will change; and to the Ministry of Finance[34] to issue opinions regarding payments to be received by the Mexican Treasury for telecom licenses. Do these faculties granted to executive agencies infringe upon the constitutional autonomy of the IFT?

In effect, the Senate report re-authorized Segob to oversee audiovisual content as it has since 1960, pursuant to the argument that the Constitution does not expressly confer such rights on the IFT.[35] This line of reasoning is debatable for several reasons, as explained below.

The Mexican Constitution expressly grants the IFT the authority to regulate telecom and broadcasting services[36]. Unlike the Ministry of Communications or the Ministry of Finance, Segob is not given any specific faculties neither express nor impliedly. For this reason, there is no basis for Segob's authority regarding audiovisual content; and no evidence exists of the legislature's intent to grant that authority in the 2013 amendment process.

Since the nature of radio and television depends on audiovisual content, any authority granted to the IFT regulator for telecom and broadcasting matters must include electronically transmitted content, as this is within its scope by nature.

Content transmitted via radio and TV involve the right of freedom of expression[37], as they are intertwined with the right to information. In a democracy, the regulation of radio and TV content should not be given to the same public agency that regulates internal affairs, public safety, national security and intelligence services (as is the case with Segob). Prior to Mexico's democratic transition, it was arguably understandable that Segob regulated these matters. In 1960, Mexico's executive branch did not respect human rights in

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33 Secretaría de Comunicaciones y Transportes.

34 Secretaría de Hacienda y Crédito Público.

35 Senado de la República, *Dictamen de las comisiones unidas de Comunicaciones y Transportes, Radio, Televisión y Cinematografía, y de Estudios Legislativos, con proyecto de Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en material de telecomunicaciones y radiodifusión*, [Report of the united commissions of Communications and Transportation, Radio, Television and Cinema, and of Legislative Studies, with a draft Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], pp. 179-197 and 255, 1 de julio de 2014 (Mex.).

36 Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.), article 28.

37 Libertad de expresión. La radiodifusión es un medio tecnológico para ejercer ese derecho, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, Libro IX, Junio de 2012, Tomo 1, Registro 160070, Tesis 1a. XIX/2012, p. 262 (Mex.).

general; freedom of expression was no exception and the right to information was not recognized as human right.[38] In the 21st century, however, there is no justifiable reason for Segob to have continued with regulatory authority over audiovisual content.

The Human Rights Commission of Mexico City made the following argument before the Senate:

> …the autonomy and faculties of the IFT help guarantee the impartial oversight of content, giving legitimacy to this work and avoiding as much as possible the involvement of other entities in regulating media expression. From a human rights perspective, losing this autonomy and impartiality by transferring these faculties to another agency may produce illegitimate controls and restrictions on freedom of expression, in accordance with international standards of freedom of expression, in effect sending a chilling message regarding free media expression.[39]

V. Media and Plurality

Mexico's free-to-air TV has long been dominated by two media conglomerates: Televisa and TV Azteca. In free-to-air TV, they directly or indirectly hold 95% of commercial licenses, 90% of audience share, and 99% of advertising revenue.[40] Federal and state governments own and operate certain free-to-air TV channels, and none of them have enacted regulation for assuring

[38] Ernesto Villanueva, Derecho de la Información, 63-65 (Miguel Ángel Porrúa and Cámara de Diputados) (México, 2006).

[39] "…la autonomía y facultades del IFT son garantías para que la supervision de los contenidos se lleve a cabo con plena imparcialidad, dando legitimidad a este trabajo y evitando lo más que se pueda la intervención de otros poderes en el ejercicio de la libertad de expression en medios de comunicación. Perder esta autonomía e imparcialidad al trasladar estas funciones a otro órgano, desde un enfoque de derechos humanos, podría devenir en controles y limitaciones ilegítimas de acuerdo a los estándares internacionales de libertad de expression, en mecanismos de censura o, incluso, en un mensaje amedrentador para la libertad de expression en medios de comunicación" [author's translation], Comisión de Derechos Humanos del Distrito Federal, Análisis sobre Iniciativa de Ley de Telecomunicaciones [Analysis of the Telecommunications Law Bill], CDHDF/OE/P/0141/2014, 11 de abril de 2014 (Nov. 7, 2013 1:17 PM), http://www.senado.gob.mx/comisiones/comunicaciones_transportes/docs/Telecom/Posicionamiento_CDHDF.pdf (Mex.).

[40] Instituto Federal de Telecomunicaciones, *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones determina el valor mínimo de referencia, a que se refiere el numeral 4.1.3.5 de las Bases de Licitación Pública para concesionar el uso, aprovechamiento y explotación comercial de canales de transmisión para la prestación del servicio público de televisión radiodifundida digital, a efecto de formar dos cadenas nacionales en los Estados Unidos Mexicanos (Licitación No. IFT-1)*, Pleno, XI Sesión Extraordinaria, P/IFT/EXT/150414/90, p. 22, (Nov. 11, 2014, 13:05 PM), http://www.ift.org.mx/iftweb/wp-content/uploads/2014/04/IFT_EXT_150414_90_valor_minimo.pdf, 15 de abril de 2014 (Mex.).

editorial independence (e.g. fix term for the general director, minimum annual budget). There are few social media channels such as community radio or indigenous radio stations. For this reason, broadcast media plurality is a major challenge for true democracy in Mexico. Although internet and broadband access could be deemed as alternative media to access to information, they are still not sufficiently widespread for the population in general to be considered an alternative news media.

Under the new amendment, telecom and broadcasting licenses shall be granted for social use, including grants to certain communities (e.g. non-profit organization for women´s rights, San Juan Ixcaquixtla community) and indigenous groups (e.g. mazateco people living in Puebla, yaqui people living in Sonora). This would go a long way toward encouraging plurality in Mexico.[41] This said, the LFTR includes several provisions that negatively (and unjustifiably) discriminate against communities and indigenous people, as evidenced below:

— Any license for commercial or private use of the spectrum may be granted for up to 20 years. For social use, however, the maximum is 15 years.[42] Nothing exists in the legislative record to indicate any intent to differentiate between commercial/private and social/public.
— The solicitation and acquisition process for a spectrum license for social use is subject to the IFT's discretion. The article of the law that expressly refers to the information that the applicants must provide to the regulator, is not an exhaustive list as it refers to a minimum of information ("at least provide") and not a maximum.[43] Note that a similar provision was held unconstitutional by the Mexican Supreme Court in a case that also dealt with broadcast spectrum licenses for not-for-profit entities.[44]

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[41] Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, paragraphs 26 to 37 (2010).

[42] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], articles 75 and 83, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[43] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 85, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[44] Suprema Corte de Justicia de la Nación [S.C.J.N] [Supreme Court], *Sentencia relativa a la Acción de Inconstitucionalidad 26/2006 promovida por Senadores integrantes de la Quincuagésima Novena Legislatura del Congreso de la Unión, en contra del propio Congreso y del Presidente Constitucional de los Estados Unidos Mexicanos, así como los votos formulados por el señor Ministro Genaro David Góngora Pimentel*, Pleno, Diario Oficial de la Federación [D.O.], 20 de agosto de 2007 (Mex.).Acción de Inconstitucionalidad 26/2006 resuelta por la Suprema Corte de Justicia de la Nación, publicada en el Diario Oficial de la Federación el 20 de agosto de 2007.

- Each year, the IFT must publish a spectrum program whereby it provides information of which frequencies will be given in public auction or which ones will be granted for social or public use. Also, IFT must enact compulsory guidelines for applicants.[45] No parameters currently exist to limit the nature of these guidelines.
- The IFT retains complete discretion to grant or deny a spectrum license for social use,[46] whereas the grant of commercial and private licenses are far more predictable. The Human Rights Commission of Mexico City, civil organizations and prominent academics have pointed out the unfairness of imposing stricter requirements for social use than for commercial use.[47]
- Social use licensees are prohibited from receiving advertising income,[48] which runs counter to the Freedom of Expression Standards for Free and Inclusive Broadcasting.[49] The latter expressly states that "legal provisions regulating community broadcasting must recognize the special nature of these media and contain, as a minimum, the following elements: (a) simple procedures for obtaining licenses; (b) no demand of severe technological requirements that would prevent them, in practice, from even being able to file a request for space with the State; and (c) the possibility of using advertising to finance their operations…".[50]
- The Supreme Court also ruled that the Mexican government had no right to prevent community media (e.g. radio or TV station owned and operated by the people of a local community) from receiving advertising income from public entities.[51] The Human Rights Commission of Mexico City believes that social media restrictions "…limit the possi-

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45 Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 90, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

46 Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 85, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

47 Comisión de Derechos Humanos del Distrito Federal, Análisis sobre Iniciativa de Ley de Telecomunicaciones [Analysis of the Telecommunications Law Bill], CDHDF/OE/P/0141/2014, 11 de abril de 2014, p. 6 (Nov. 7, 2013 1:17 PM), http://www.senado.gob.mx/comisiones/comunicaciones_transportes/docs/Telecom/Posicionamiento_CDHDF.pdf (Mex.).

48 Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 89 section III, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

49 Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, *Freedom of Expression Standards for Free and Inclusive Broadcasting*, 2010 (Nov. 12, 2014, 6:15 PM) http://bit.ly/XGOb5i.

50 See *Ib.* number 101.

51 Suprema Corte de Justicia de la Nación [S.C.J.N] [Supreme Court], *Sentencia definitiva del Amparo en Revisión 531/2011*, Primera Sala, 24 de agosto de 2011.

bility of financial autonomy and independence, as these organizations are prohibited from receiving income from advertisements of public entities…".[52]

- Under the LFTR, the only exception for a community media station to receive income from advertisement is when this is from public agencies, but such income is restricted to the equivalent of 6% of transmission time for TV and 14% for radio.[53] In addition, public agencies are prohibited from using over 1% of their advertising budget for these types of social use licenses.[54]

The debate over the prohibition of advertising revenues by social use licensees must be viewed in relation to the National Broadcast Industry Chamber (CIRT).[55] The CIRT has publicly stated on numerous occasions that neither public media nor social media should be allowed to receive advertising income as this would amount to "unfair competition".[56] The "unfair competition" argument is based on the fact that arguably the commercial media do not receive any government subsidies, that advertisement generates income and a not-for-profit organization must not receive such income as that would be equivalent to perceiving earnings. Such unfair competition, however, makes no sense in light of the fact that social media do not compete with commercial media, and receiving income is not the same as having earnings or pursuing a commercial purpose.[57]

- The IFT may grant spectrum licenses for any type of use (commercial, private, public or social) at any broadcast FM or AM radio bands with

[52] "…limita las posibilidades de autonomía financiera de estos medios y su posibilidad de ser independientes, en tanto les impide obtener ingresos por publicidad privada…" [author's translation] Comisión de Derechos Humanos del Distrito Federal, Análisis sobre Iniciativa de Ley de Telecomunicaciones [Analysis of the Telecommunications Law Bill], CDHDF/OE/P/0141/2014, 11 de abril de 2014, p. 5 (Nov. 7, 2013 1:17 PM), http://www.senado.gob.mx/comisiones/comunicaciones_transportes/docs/Telecom/Posicionamiento_CDHDF.pdf (Mex.).

[53] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 237 section III, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[54] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 89 section VII, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[55] Cámara Nacional de la Industria de Radio y Televisión.

[56] Cámara Nacional de la Industria de Radio y Televisión (CIRT), Comunicado 8/2014, (Nov. 9, 2014, 11:18 AM) http://www.cirt.com.mx/portal/index.php/comunicacion/prensa/1034-la-cirt-advierte-riesgos-por-competencia-desleal (Mex).

[57] Clara Luz Álvarez, *CIRT, ¿falso discurso?*, *El Financiero*, 2 de junio de 2014 (Nov. 12, 2014, 6.20 PM), http://telecomysociedad.blogspot.mx/2014/07/cirt-falso-discurso-publicado-2-de.html.

one sole exception: licenses for communities or indigenous people. In that case, the IFT may only grant licenses on the extended mediumwave broadcast band, commonly known as the AM expanded band, or the upper frequencies of the FM band.[58] The problem, however, is that broadcast quality at these frequency allocations are inferior. In effect, this amounts to a *per se* unjustifiable discrimination against communities and indigenous people.

— Social use licenses for indigenous people are defined as those utilized to promote, develop and preserve indigenous languages and culture.[59] In this way, the IFT may deny a license if it fails to fulfill this purpose, as well as those intended for political propaganda. In other words an indigenous community has limited rights to obtain a licenses for purposes that other ordinary citizens could apply for. This could amount to a discrimination and a restriction to freedom of expression of indigenous people. Moreover, article 2 of the Mexican Constitution mandates an affirmative action to promote indigenous media, whereas the LFTR establishes restrictions without reason and against the interests of indigenous people.

VI. Audience and User Rights

Audience rights are related with content (programs and advertisement) delivered by telecom network or broadcast stations, whereas users rights are referred to those rights of a person as a user of telecom services (e.g. telephony, mobile phone, internet access). For the first time in Mexico, the Constitution acknowledges audience and users rights, and mandates that the law must provide mechanisms for protecting them. The Constitution refers also that there must be a balance between programming and advertisement, in other words, that there must be a maximum time allowed for advertisement.

Audience rights. Although the LFTR was enacted in 2014, it was based almost entirely on 20th century concepts, e.g., audience rights are considered only in relation to broadcasting.[60] No reference is made to other digital media platforms such as mobile TV, IPTV or on-demand internet services (e.g. Netflix).

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[58] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 90, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[59] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 67 section IV, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[60] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 256, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

The LFTR requires that all broadcasters maintain a code of ethics, and an ombudsperson established to defend audience rights. Anyone who considers radio or TV content to violate an audience right may file a claim before the channel's ombudsperson, who will review the claim and issue a ruling.[61]

The process for defending audience rights gives the appearance of an ordinary self-regulation procedure through an ombudsperson.[62] However, under the LFTR there is no remedy if the licensee fails to comply with the ombudsperson's recommendation; nor is there any sanction for violating audience rights through content broadcast or pay TV transmissions. During the process at the Senate, the ombudspersons of broadcasting stations in Mexico issued a public declaration against the LFTR draft because, in their opinion "…audience rights may become meaningless, as compliance is completely subject to the discretion of both licensee and ombudsperson".[63]

Advertising. The Broadcast Act of 1960 (no longer in effect) established that advertising by TV broadcasters could not exceed 18% of the total transmission time; radio broadcasters were limited to 40%.[64] It is important to realize that in 1960, broadcasting stations transmitted for less than 24 hours per day. In 2006 an amendment to the Broadcast Act of 1960 (also known as *Ley Televisa)* granted broadcasters the right to increase advertising as a percentage of total broadcast time an additional 5% *if* they dedicate at least 20% of programming to independent national productions.[65]

Mexico had the chance to update its legislation in at least two significant ways: (1) ensure compliance with the constitutional mandate to balance advertising and programming;[66] and (2) adapt to the 21st century reality that

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[61] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], articles 259 and 261, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[62] See Ernesto Villanueva, La defensoría de la audiencia 49-64 (Instituto de Investigaciones Jurídicas de la UNAM and Radio Educación, Mexico) (2012).

[63] See Francisco Prieto et al., El dictamen y los derechos de las audiencias. Posicionamiento de las Defensorías, 3 de julio de 2014 (Aug. 23, 2014, 9:15 AM) http://gabrielsosaplata.com/2014/07/03/el-dictamen-y-los-derechos-de-las-audiencias-posicionamiento-de-las-defensorias/ [Translation by the author].

[64] Reglamento de la Ley Federal de Radio y Televisión, en materia de Concesiones, Permisos y Contenido de las Transmisiones de Radio y Televisión [R.L.F.R.T.] [Regulations of the Broadcast Law of 1960, governing licenses, permits and broadcasting content], article 40, Diario Oficial de la Federación [D.O.], 10 de octubre de 2002 (Mex.).

[65] Ley Federal de Radio y Televisión [L.F.R.T.] [Broadcast Law], as amended and nowadays repealed, article 72-A, Diario Oficial de la Federación [D.O.], 19 de enero de 1960 (Mex.).

[66] Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6º, 7º, 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, [Decree by which several provisions of articles 6º, 7º, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States are amended or added], Diario Oficial de la Federación [D.O.], 11 de junio de 2013, (Mex.), article Eleventh transitory.

most stations already transmit 24 hours a day and that the maximum amount of advertising must be computed per hour in order to prevent that advertisements at prime time could be of half the time of the programming, for example. Both the European Union[67] and Argentina[68] limit advertising to only 12 minutes per hour.

The above notwithstanding, the LFTR reused the same provisions of the Broadcasting Act of 1960. Neither the bill itself,[69] nor the Senate reports[70] nor the Chamber of Deputies reports[71] went beyond out-of-date provisions, nor compared them with regulations in other countries.

TV broadcasters may thus transmit more advertising during prime time and less during off-peak hours. For example, in prime time a station may decide to transmit 50% of advertising per hour, and at 3 am only 1%. The audience's constitutional right during prime time would in fact be infringed, although the law would not be violated.

The LFTR includes another provision that increases the audience exposure to more advertisements without a reasonable cause: if a broadcaster includes at least 20% of national production[72] as part of its programming,

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67 European Parliament and Council Directive 2010/13/EU (Audiovisual Media Services Directive), 2010 O.J. (L 95/1) article 23 section I (EC).

68 Ley 26.522 de Servicios de Comunicación Audiovisual [Audiovisual Communication Services Law 26.522], article 82 section b) (Arg.).

69 Presidente Enrique Peña Nieto, *Iniciativa de Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión de México; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión,* [Bill of the Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], 24 de marzo de 2014 (Mex.).

70 Senado de la República, *Dictamen de las comisiones unidas de Comunicaciones y Transportes, Radio, Televisión y Cinematografía, y de Estudios Legislativos, con proyecto de Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en material de telecomunicaciones y radiodifusión*, [Report of the united commissions of Communications and Transportation, Radio, Television and Cinema, and of Legislative Studies, with a draft Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], 1 de julio de 2014 (Mex.).

71 Cámara de Diputados del Congreso de la Unión, *Dictamen de las Comisiones Unidas de Comunicaciones, y de Radio y Televisión, con proyecto de decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión,* [Report of the united commissions of Communications, and Broadcast, with a draft Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], 8 de julio de 2014 (Mex.).

72 National production is defined as content or programs created by a person with the majority of fundings or Mexican origin. Ley Federal de Telecomunicaciones y Radiodifusión

then it may increase advertising as a percentage of total transmission time by an additional 2%. This national production is different from the national independent production, adding both percentages then the maximum time of advertisement may be increased in 7% more.[73] The Mexican President´s bill did not provide any arguments for such increases beside stating that such provision would foster national production.

The Senate reports stated:

> In content-related matters, it is important to promote national production pursuant to the Constitution, for which reason this Decree allows commercial broadcasters who choose to use national and/or independent programming during at least 20% of their total programming time may increase the percentage of advertising time. This arrangement incentivizes licensees to use national programming and benefits national independent producers.[74]

The Chamber of Deputies did not provide any further argument regarding this matter, limiting discussion to wording and basically repeating the Senate's same arguments.[75]

[L.F.T.R.] [Telecommunications and Broadcasting Law], article 3 section XLVII, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[73] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 247, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[74] "En materia de contenidos, también resulta relevante impulsar la producción nacional y atender lo señalado por la Constitución, por lo que el presente Proyecto de Decreto establece que los concesionarios de radiodifusión para uso comercial que cubran con producción nacional o producción nacional independiente, cuando menos un veinte por ciento de su programación, podrán incrementar el porcentaje de su tiempo de publicidad. El anterior esquema genera un incentivo para dichos concesionarios y a su vez beneficia a los productores nacionales independientes" [author's translation], Senado de la República, *Dictamen de las comisiones unidas de Comunicaciones y Transportes, Radio, Televisión y Cinematografía, y de Estudios Legislativos, con proyecto de Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en material de telecomunicaciones y radiodifusión* [Report of the united commissions of Communications and Transportation, Radio, Television and Cinema, and of Legislative Studies, with a draft Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], p. 252, 1 de julio de 2014 (Mex.).

[75] Cámara de Diputados del Congreso de la Unión, *Dictamen de las Comisiones Unidas de Comunicaciones, y de Radio y Televisión, con proyecto de decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión* [Report of the united commissions of Communications, and Broadcast, with a draft Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], pp. 121-122, 8 de julio de 2014 (Mex.).

Broadcasters in other countries are legally obligated to include a certain percentage of national production but without a *quid pro quo* of increased advertising, as this would in fact affect the audience which must bear more advertisements and less programming. For example, member states of the European Union encourage TV broadcasters to allocate at least 10% of their transmission time to independent European productions; or invest at least 10% of their budget in independent European productions.[76] In Colombia, TV broadcasters must comply with certain minimum national programming percentages on a quarterly basis that depends on the time of day. For example, Colombian national channels must include at least 70% of national production from 19 to 22.30 hours; between 10 and 19 hours and between 22:30 and 24 hours at least 50% must be national production. On Saturdays, Sundays and holidays at least 50% of the programming must be national production from 19 to 22.30 hours.[77]

Moreover, the LFTR defines national production as "content or programs generated by an individual or an entity financed primarily with resources of Mexican origin".[78] This definition essentially permits that audiovisual or audio content may be produced abroad by a non-Mexican entity, with content relevant to another country with no reference to Mexico or its culture, but as long as such content is primarily financed by Mexican resources, then it complies with the LFTR definition and thus broadcasters may increase advertising time.

In contrast, Colombian legislation defines national production as: (1) programming which has been realized at all stages by Colombian artistic and technical personnel, with the participation of national actors in leading and secondary roles; and (2) foreign actors are allowed as long as they do not exceed 10% of leading roles, and are from nations that give the same or similar rights to Colombian actors.[79]

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[76] European Parliament and Council Directive 2010/13/EU (Audiovisual Media Services Directive), 2010 O.J. (L 95/1) article 17 (EC).

[77] Ley 185 de 1995 por la cual se reglamenta el servicio de televisión y se formulan políticas para su desarrollo, se democratiza el acceso a éste, se conforma la Comisión Nacional de Televisión, se promueven la industria y actividades de televisión, se establecen normas para contratación de los servicios, se reestructuran [sic] entidades del sector y se dictan otras disposiciones en materia de telecomunicaciones [Law 185 of 1995 by which the television service is regulated and policies for its development are enacted, the access to television service is democratized, the National Television Commission is created, the television industry and activity is fostered, the norms to contract these services are established, the sector entities are restructured and the other provisions in telecommunications are enacted], as amended, (Col.).

[78] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 3 section XLVII, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[79] Ley 185 de 1995 por la cual se reglamenta el servicio de televisión y se formulan políticas para su desarrollo, se democratiza el acceso a éste, se conforma la Comisión Nacional de Televisión, se promueven la industria y actividades de televisión, se establecen normas para contratación de los servicios, se reestructuran [sic] entidades del sector y se dictan otras

User rights. Politicians, legislators and media companies in favor of the LFTR claimed that it included several new rights for telecom users. These same rights, however, already existed in consumer regulation (NOM-184).[80] Additionally, certain rights are better protected in the consumer regulation rather than in the new law. For example, when services are not rendered pursuant to the terms and conditions offered by the operator, consumer regulation entitles consumers to receive both a compensation equivalent to the time where services were not provided as they should, and at least a 20% bonus.[81] The LFTR eliminated the minimum 20% bonus, hence the bonus will be unilaterally decided either by the telecommunications operator in its adhesion contract or by the authority and may be less than 20%.[82]

The consumer regulation cited above states that binding contracts may not include a clause allowing the telecom operator to unilaterally modify the terms and conditions entered into with a consumer, unless such modification implies a reduction of prices or an increase in services offered to the consumer at the same price.[83] The LFTR allows the operator to include a clause that enables the operator to modify the terms and conditions subject to prior notice to the consumer.[84] This LFTR provision fails to enhance telecom consumers' rights. In fact, it does the exact opposite insofar as the new LFTR allows operators to modify conditions without having to acquire prior consent.

VII. Public or Private Interests First?

Although the telecom amendment was supposedly enacted to enhance democracy and increase access to culture, education, health and, in general, the

disposiciones en materia de telecomunicaciones [Law 185 of 1995 by which the television service is regulated and policies for its development are enacted, access to television service is democratized, the National Television Commission is created, television industry and activity is fostered, norms to contract these services are established, industrty entities are restructured and other telecom provisions are enacted], as amended, (Col.).

[80] Norma Oficial Mexicana NOM-184-SCFI-2012 Prácticas comerciales-Elementos normativos para la comercialización y/o prestación de los servicios de telecomunicaciones cuando utilicen una red pública de telecomunicaciones [Official Mexican Norm NOM-184-SCFI-2012 Commercial conduct-Provisions for commercialization and/or for providing telecommunication services when they involve the public telecommunication network] Diario Oficial de la Federación [D.O.] 24 de agosto de 2012 (Mex.).

[81] *Ib.* Section 5.2.14.

[82] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 191 section XIII, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[83] Norma Oficial Mexicana NOM-184-SCFI-2012, *supra* note 70, at section 5.1.3, a).

[84] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 192 section I, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

full exercise of human rights, the bill clearly reflects monopolists' battle to prioritize their own private interests over public welfare.

Preponderant carrier. The Constitution requires the IFT to determine preponderant carriers telecom and broadcast groups that hold more than 50% of national participation in such services based on the number of users, audience, network traffic or capacity, and impose special obligations in order to limit their market power. The only problem is that the Constitution refers to "sectors" in one paragraph and "services" in another one. For this reason, much LFTR-related debate was devoted to whether national participation should be based on sector (telecom and broadcast) or services (fixed telephony, mobile telephony, pay TV, internet access, radio and free-to-air TV).

Whether this calculation is based on sector or services produces very distinct results. Based on sector, for example, América Móvil (holding company of Telmex and Telcel) would be the preponderant carrier. Televisa, on the other hand, would not be preponderant, as it does not hold a majority share in radio broadcasting. If based on services, however, both América Móvil (fixed and mobile telephony and internet access) and Televisa (free-to-air TV and pay TV) would be deemed preponderant carriers.

The Senate and Deputy Chamber reports proposed an interpretation that preponderant would be by sector rather than by services. The LFTR simply copied the constitutional provision regarding preponderance ad verbatim and described the special obligations that could be imposed to the preponderant in telecom and to the preponderant in broadcast. Apparently one purpose of the telecom reform was to limit big corporate groups powers that affected competition, if so were the case, then the LFTR should have based its calculation on services (not by sector) to limit the market power as described in the paragraph above.

Before the LFTR was enacted, the IFT declared América Móvil as preponderant carrier in the telecom sector based on its number of users,[85] and Grupo Televisa as preponderant carrier in the broadcast sector based on its audience. IFT stated that for determining Grupo Televisa as preponderant it would not consider free-to-air radio as it was a different market.[86] Grupo

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[85] Instituto Federal de Telecomunicaciones, *Resolución mediante la cual el Pleno del Instituto Federal de Telecomunicaciones determina al grupo de interés económico del que forman parte América Móvil, S.A.B. de C.V., Teléfonos de México, S.A.B. de C.V., Teléfonos del Noroeste, S.A. de C.V., Radiomóvil Dipsa, S.A.B. de C.V., Grupo Carso, S.A.B. de C.V., y Grupo Financiero Inbursa, S.A.B. de C.V., como agente económico preponderante en el sector de telecomunicaciones y le impone las medidas necesarias para evitar que se afecte la competencia y la libre concurrencia*, Pleno, V Sesión Extraordinaria, P/IFT/EXT/060314/76 (March 5, 2015, 20:40 PM), www.ift.org.mx/iftweb/sector-de-telecomunicaciones/, 6 de marzo de 2014 (Mex.).

[86] Instituto Federal de Telecomunicaciones, *Resolución mediante la cual el Pleno del Instituto Federal de telecomunicaciones determina al grupo de interés económico del que forman parte Grupo Televisa S.A.B., Canales de Televisión Populares, S.A. de C.V., Radio Televisión, S.A. de C.V., Radiotelevisora de México Norte, S.A. de C.V., T.V. de los Mochis, S.A. de C.V., Teleimagen del Noroeste, S.A. de C.V., Televimex, S.A. de C.V., Televisión de Puebla, S.A. de C.V., Televisora de Mexicali, S.A. de C.V., Televisora de Navojoa,*

Televisa and its independent affiliates filed judicial reviews (*amparos*) against the preponderance, arguing inter-alia that free-to-air radio service is part of the broadcast sector and IFT had failed to include in its calculation the free-to-air radio audience.

Whether preponderance will ultimately be declared by sector or by service will depend on the criteria that the specialized tribunals adopt.

Cross-ownership. Cross-ownership of telecom and broadcasting licenses may be limited by the IFT pursuant to the Constitution. Such limits do not include any reference to other media (e.g. magazines, newspapers). "Limits to media cross-ownership are an instrument to prevent freedom of expression and the right to information from being affected by an over-concentration of media outlets in one corporate group. Media may be newspapers, magazines, radio and television stations, pay television and may even include the internet".[87]

The LFTR has a chapter for cross-ownership which over time will prove to be ineffective because the measures enacted do tackle the absence of plurality and limited access to diverse information through broadcast and telecom networks. The LFTR regards cross-ownership as a three-stage process:

1st stage: If there is limited access to plural information in certain markets and geographic areas, then the IFT may demand that the licensee of pay TV: (1) include certain news or public interest channels; and (2) include at least three channels with productions of mostly independent national programming which are independent from carriers.[88] The main objection to this stage

S.A., Televisora de Occidente, S.A. de C.V., Televisora Peninsular, S.A. de C.V., Mario Enríquez Mayans Concha, Televisión La Paz, S.A., Televisión de la Frontera, S.A., Pedro Luis Fitzmaurice Meneses, Telemisión, S.A. de C.V., Comunicación del Sureste, S.A. de C.V., José de Jesús Partida Villanueva, Hilda Graciela Rivera Flores, Roberto Casimiro González Treviño, TV Diez Durango, S.A. de C.V., Televisora de Durango, S.A. de C.V., Corporación Tapatía de Televisión, S.A. de C.V., Televisión de Michoacán, S.A. de C.V., José Humberto y Loucille, Martínez Morales, Canal 13 de Michoacán, S.A. de C.V., Televisora XHBO, S.A. de C.V., TV Ocho, S.A. de C.V., Televisora Potosina, S.A. de C.V., TV de Culiacán, S.A. de C.V., Televisión del Pacífico, S.A. de C.V., Tele-Emisoras del Sureste, S.A. de C.V., Televisión de Tabasco, S.A. y Ramona Esparza González, como agente económico preponderante en el sector radiodifusión y le impone las medidas necesarias para evitar que se afecte la competencia y la libre concurrencia, Pleno, V Sesión Extraordinaria, P/IFT/EXT/060314/77 (March 5, 2015, 20:45 PM), www.ift.org.mx/iftweb/sector-de-radiodifusion/, 6 de marzo de 2014 (Mex.).

[87] "Los límites a la propiedad cruzada de medios son un instrumento para evitar que se afecte la libertad de expresión y el derecho a la información por la concentración en un grupo corporativo de diversos medios de comunicación. Éstos pueden ser periódicos, revistas, estaciones de radio y de televisión, televisión de paga e incluso se podría llegar a incluir el internet", [Author's translation], Clara Luz Álvarez, *Propiedad cruzada de medios y pluralidad*, Gaceta del IFT, Instituto Federal de Telecomunicaciones, Año 1, número 1, abril-mayo 2014, pp. 10-15 (June 30, 2014, 10:00 AM) http://www.ift.org.mx/iftweb/wp-content/uploads/2014/04/Gaceta_IFT_Abril2014.pdf.

[88] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 285, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

is that in a country like Mexico, most people still primarily watch free-to-air TV. Only a minority of homes in Mexico have access to pay TV. For the sake of plurality, these measures should be applied to TV broadcasters rather than pay TV licensees.

2nd stage: In the event that a licensee fails to comply with the first stage, then the IFT may impose limits regarding (1) the number of broadcasting spectrum it may hold; (2) new spectrum broadcast licenses; and (3) cross-ownership of diverse media (broadcast/telecom) by one corporation in the same market and area.[89]

3rd stage: In the event that the first and second stages have failed, then the IFT may order divestment of the corporate group.[90]

Despite these cross-ownership rules, it will be difficult for the IFT to successfully implement each and every stage of this process because (a) the procedures are highly cumbersome; and (b) the legal tools are inadequate to achieve plurality.

Exemption to merger review. All telecom mergers that exceed a fixed amount must be authorized by the IFT.[91] The IFT analyzes whether the merger will have adverse effects on competition, and may grant authorization, rejection or approval depending on compliance with certain conditions. The only exception to this review is set forth in the Antitrust Law of 2014, when the merger is (i) between agents that are not competitors, (ii) such agents are not from related markets, and (iii) it is notorious that there will be no negative impact on competition.[92] Even in these exceptional cases Antitrust Law requires that the authority receives a filing prior to merger so that the authority analyses the case and confirms that the merger is one that notoriously does not affect competition.

During backdoor sessions in the Senate —outside public scrutiny— a provision was worked out to bypass the merger review. This became known as the *Cablecom Clause* because Televisa had announced in 2013 that it had acquired several debt instruments that could give it control of Cablecom, one of its pay TV competitors.[93] Exemption would be permitted if (a) there is a preponderant; (b) a reduction of certain levels of the dominance index and

89 Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 286, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

90 Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 288, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

91 Ley Federal de Competencia Económica [L.F.C.E.] [Antitrust Law] articles 61 and 86, Diario Oficial de la Federación [D.O.] 23 de mayo de 2014 (Mex.).

92 Ley Federal de Competencia Económica [L.F.C.E.] [Antitrust Law] article 92, Diario Oficial de la Federación [D.O.] 23 de mayo de 2014 (Mex.).

93 Bolsa Mexicana de Valores, *Evento Relevante 1 de agosto de 2013, Grupo Televisa S.A.B.*, (November 11, 2014, 5:50 PM) http://www.bmv.com.mx/eventore/eventore_473142_1.pdf.

the Herfindahl index would take place with the merger in the relevant sector (either telecom or broadcast sector); and (c) the merger would not give over 20% market share in the relevant sector to the acquirer.

Any acquirer that would like to be benefitted by the Cablecom Clause must provide notice to the IFT for review after the merger took place. If this review determines that the merger would give the acquirer a dominant position or adversely affect competition, then the IFT must initiate a new investigation to gauge the acquirer's market position and adopt measures to minimize adverse effects to competition.[94]

The rationale for approving the Cablecom Clause was arguably to foster competition and develop feasible long run competitors. However, an exception to the Antitrust Law (prior review and approval of a merger) must have had a better reason other than a fast-track merger process with no review in advance by the regulator and no possibility of imposing conditions to the merger. Moreover, article 28 of the Constitution prohibits the concentrations and acts that affect consumer welfare due to lack of effective competition, and Cablecom Clause essentially allows any merger (even between competitors of the same market and the same service) without the analysis of the IFT. This deprives the regulator of its faculties to overview the telecommunications development under a competitive market.

The same day that the LFTR entered into force, Grupo Televisa announced that it had acquired 100% of Cablecom.[95] The provision analyzed in this section prevented the IFT from rejecting such merger, and the IFT did not impose conditions on Televisa-Cablecom from the merger post-review.[96] Note that prior to the existence of the Cablecom Clause, the mergers by Televisa of other pay TV companies in 2006 and 2007 were subject to several conditions that purported to diminish the risk of anticompetitive behavior.[97] On January 2015, Grupo Televisa announced that it had acquired one of its

[94] Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión [Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], article 9th transitory, Diario Oficial de la Federación [D.O.], 14 de julio de 2014, edición vespertina (Mex.).

[95] Bolsa Mexicana de Valores, *Evento Relevante 14 de agosto de 2014, Grupo Televisa S.A.B.*, (November 11, 2014, 5:55 PM) http://www.bmv.com.mx/eventore/eventore_544884_1.pdf.

[96] Instituto Federal de Telecomunicaciones, *Acuerdo mediante el cual el Pleno del Instituto Federal de Telecomunicaciones emite resolución en el expediente UCE/AVC-001-2014, de conformidad con lo establecido en los párrafos primero a cuarto del artículo Noveno Transitorio de la Ley Federal de Telecomunicaciones y Radiodifusión*, Pleno, XXXVI Sesión Extraordinaria, P/IFT/EXT/101214/27 (March 5, 2015, 20:45 PM), www.ift.org.mx/iftweb/sector-de-radiodifusion/, 6 de marzo de 2014 (Mex.).

[97] Miguel Flores Bernés, Telecomunicaciones y Competencia Económica 102-105, (Novum, 2012).

major competitors in pay TV in Mexico, Cablevisión Red.[98] Grupo Televisa has already filed its notice before the IFT, and it most certainly be processed in the same terms as the Cablecom acquisition.

VIII. Human Rights Concerns

The initial bill presented by president Peña Nieto posed major threats to human rights, as pointed out by the Human Rights Commission of Mexico City.[99] Although several changes were made to minimize these transgressions, several provisions of the LFTR regarding data retention by telecom operators and geolocation could affect human rights of Mexican telecom users as the right to privacy, for example.

Data retention. The LFTR requires telecom carriers to retain certain data from users' communications for a period of 24 months. The data must be: communication type (voice, data, SMS, voice mail, call forwarding); originating and recipient points; and date, hour and length of each communication, among others.[100] These transmissions contain information that are capable of revealing personal data, including political ideology, sexual preference and mental health problems, for example.

It is important to note that the European Court of Justice ruled on April 2014 that data retention by telecom carriers for investigation of grave crimes as set forth in the Data Retention Directive violated human rights because of infringement of the proportionality principle.[101]

Geolocation. Geolocation is used to identify the real-time location of a mobile device through carrier-held data. Although geolocation was already contemplated in Mexican law,[102] its use was limited to: (1) investigations of serious crimes, e.g., organized crime, kidnapping, extortion, threats, and drug deal-

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[98] Bolsa Mexicana de Valores, *Evento Relevante 8 de enero de 2015, Grupo Televisa S.A.B.*, (March 5, 2015, 9:00 PM) http://www.bmv.com.mx/eventore/eventore_569778_1.pdf.

[99] Comisión de Derechos Humanos del Distrito Federal, Presidencia, *Análisis sobre iniciativa de Ley de Telecomunicaciones,* CDHDF/OE/P/0141/2014, April 11, 2014, http://www.senado.gob.mx/comisiones/comunicaciones_transportes/docs/Telecom/Posicionamiento_CDHDF.pdf (Date of consultation: August 21, 2014).

[100] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 190 section II, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[101] See European Union Court of Justice, Press release 54/14 of April 8, 2014 regarding the final judgement of C-293/12 y C-594/12 of Digital Rights Ireland and Seitlinger et al., (May 30, 2014, 7:30 PM) http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054es.pdf.

[102] Ley Federal de Telecomunicaciones (hoy abrogada) [L.F.T., now repealed] [Telecommunications Federa Law], article 40 bis, Diario Oficial de la Federación [D.O.], 7 de junio de 1995 (Mex.).

ing; and (2) solicitations by Federal and State Attorney Generals or prosecutors with due authority.[103]

Under the bill introduced by Mr. Peña Nieto, geolocation data requests were permitted by "security authorities", which include the Investigation and National Security Center (CISEN),[104] Federal Police, Defense Ministry and Naval Ministry. The bill permitted these agencies to request geolocation data to performrealize "intelligence services,"[105] defined in the National Security Law as "knowledge obtained through the collection, processing, dissemination and use of information for national security purposes".[106] Notably, the bill contains no reference to "grave crimes"; thus geolocation by "security authorities" could be justified by many reasons as collection of information even if the person has committed no crime, nor is he/she related to any criminal investigation or to a national security threat.

The Senate amended the bill to allow any "competent authority to request geolocation data pursuant to applicable law".[107] Under the LFTR, a citizen would need to be a legal specialist to know which laws, under which circumstances and which authorities could request the telecommunication operators to provide information regarding the geolocation of an equipment. As an example, on February 2015 the federal Attorney General delegated the power to request geolocation data and communication data of telecom users on basically all the heads of units, which include those that persecute intellectual property infringements, tax related issues, environmental investigations, public servant illicit conducts, and so on.[108] Those units do not investigate nor

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[103] Ley Federal de Telecomunicaciones (hoy abrogada) [L.F.T., now repealed] [Telecommunications Federa Law], article 40 bis, Diario Oficial de la Federación [D.O.], 7 de junio de 1995 (Mex.).

[104] Centro de Investigación y Seguridad Nacional.

[105] Presidente Enrique Peña Nieto, *Iniciativa de Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión de México; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión,* [Bill of the Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], article 189, 24 de marzo de 2014 (Mex.).

[106] "Se entiende por inteligencia el conocimiento obtenido a partir de la recolección, procesamiento, diseminación y explotación de información, para la toma de decisiones en materia de Seguridad Nacional." [Author's translation] Ley de Seguridad Nacional [L.S.N.] [National Security Law], as amended, article 29, Diario Oficial de la Federación [D.O.], 31 de enero de 2005 (Mex.)

[107] Ley Federal de Telecomunicaciones y Radiodifusión [L.F.T.R.] [Telecommunications and Broadcasting Law], article 190 section I, Diario Oficial de la Federación [D.O.], 14 de julio de 2014 (Mex.).

[108] Procuraduría General de la República, Acuerdo A/018/15 por el que se delega en los servidores públicos que se indican, diversas facultades previstas en el Código Nacional de Procedimientos Penales [Decree A/018/15 by which several faculties set forth in the National

prosecute grave crimes, nor are they related with national security. Finally, the LFTR does not require prior judicial review, nor can requests be made to file claims against abusive use of this data.

IX. Positive Aspects

The LFTR does include certain positive elements, including provisions for ICT accessibility by persons with disabilities in Mexico, and the elimination of long distance charges, as explained below.

ICT accessibility. Although Mexico is part of the Convention on the Rights of Persons with Disabilities, it had never enacted a single law or regulation related to ICT accessibility. President's bill of law initially presented to the Mexican Congress had only three lines on ICT accessibility, providing for subtitles in news programs for multiprogramming channels in digital TV.[109]

During the legislative process an initiative was introduced by disability rights activists demanding that Congress address ICT accessibility on the basis of human rights.[110] This initiative was supported by several senators from different political parties, the Human Rights Commission of Mexico City, and diverse media. The LFTR included two chapters and several provisions in relation to ICT accessibility that serve as a starting point.

The most relevant include:[111]

Criminal Proceeding Code are delegated on the public servants referred to therein], articles First, Second and Third, Diario Oficial de la Federación [D.O.], 23 de febrero de 2015 (Mex.).

109 Presidente Enrique Peña Nieto, *Iniciativa de Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión de México; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión,* [Bill of the Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], article 161 section II, 24 de marzo de 2014 (Mex.).

110 Clara Luz Álvarez and Katia D'Artigues, *Exposición de motivos, propuesta de capítulo de accesibilidad a telecomunicaciones y radiodifusión por personas con discapacidad,* presented to the Senado de la República (Mex.), 11 de abril de 2014 (Nov. 13, 2014, 4.15 PM) http://claraluzalvarez.org/wp-content/uploads/2014/11/Cap%C3%ADtulo-Ax-Pers-Discap-c-Exp-Motivos-11abril2014-final-www.pdf.

111 See Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión [Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], articles 161 section II, 199 to 203, 257 and 258 of the LFTR, and 43º and 44º transitory, Diario Oficial de la Federación [D.O.], 14 de julio de 2014, edición vespertina (Mex.).

- Pulbic agency web sites must comply with accessibility criteria and be updated as technology evolves.
- Subtitles and sign language must be included in a minimum of one news program with national coverage.
- Closed captions must be featured in all programs scheduled between 6 am and midnight by commercial free-to-air TV channels with coverage exceeding 50% of national territory. Federal agency channels must also include closed captions.[112]
- Telecom carriers and mobile virtual network operators (MVNOs) must offer accessible formats for persons with disabilities.
- Broadcasters must provide accessible means for individuals with disabilities to file complaints about programming violations before the ombudsperson.
- The programming guides must be in accessible formats through a telephone number or a website.

Free long distance calls. The LFTR prevents telecom carriers from charging for long distance calls within national territory starting from January 1, 2015.[113] This provision was designed to benefit low-income users, provided that the telecom service packages of telecom operators that included free long distance calls for a given price, were unaffordable for an average citizen.

X. Final Remarks

Media convergence in the digital era has erased all distinctions between broadcasting and other forms of telecommunications. For this reason, the nation needs a single legal framework for all electronic networks with the following characteristics: (a) competition in telecommunications is as important as plurality; (b) protection of the public interest instead of giving privileges to private interests; (c) a direct relationship between the legal rationale for provisions and public interest objectives; (d) coherent laws; and (e) content through different technological platforms should be governed by another law. Telecommunication services are more than just technology; they are essential for full enjoyment of several human rights.

[112] This obligation must be complied with by August 2017.

[113] See Decreto por el que se expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se reforman, adicionan y derogan diversas disposiciones en materia de telecomunicaciones y radiodifusión, [Decree by which the Federal Telecommunication and Broadcasting Law and the Public Broadcasting System of the Mexican State are enacted, and by which several telecommunication and broadcasting provisions are amended, added and repealed], article 118 section V of the LFTR, and 25º transitory, Diario Oficial de la Federación [D.O.], 14 de julio de 2014, edición vespertina (Mex.).

Although the reform had the potential to increase democracy and enhance living standards, the real public interest (e.g., user and audience rights) never played a key role. Instead, the debate revolved around balancing benefits and costs between the same media oligarchs. The absence of real debate and discussion in both the Senate and Chamber of Deputies reflects how far Mexico must still travel to attain real democracy.

In light of these inadequacies, perhaps we must rely on digital technology to curtail Mexican media oligopolies and inject real competition into the telecom sector. The IFT mandate —namely, to guarantee economic competition and content plurality, and to encourage universal coverage, convergence, quality and access— has yet to be fulfilled.

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MEXICAN ADMINISTRATIVE LAW AGAINST CORRUPTION: SCOPE AND FUTURE

Daniel Márquez*

Abstract. *This work gives a synopsis of the evolution of public administration control mechanisms in Mexico. It highlights the instrumental nature of oversight, as well as regulatory and assessment aspects, and discusses issues like the historical design of the control instruments used in Mexican public administration. Certain social and political aspects from a legal perspective of administrative anti-corruption regulations are then underscored. The article concludes by drawing attention to the fact that neither the newly designed political-administrative anti-corruption structure in Mexico (the National Anti-Corruption Commission) nor the new mechanism to emerge from draft legislation (the National Anti-Corruption and Oversight Institute) will not eliminate corruption in the country because they replicate the same model established for reforming legal institutions. This article aims to show how the Mexican model has repeatedly designed administrative rules and structures that are unable to rise above the political and social spheres in which the complex phenomenon of corruption is deeply entrenched and creates a schism between legislative development and Mexico's social-political experiences in its fight against corruption. These observations can serve to help other countries design anti-corruption instruments. China is cited in this article because this article was presented as a speech regarding the Mexican experience in that country. It should be noted that the intention of this study was not to make a comparison of corruption or of the legal structures in these countries, but to analyze the case of Mexico.*

Key Words: *Control, administrative law, corruption, evaluation, internal and external control, Ministry of Public Administration/Internal Affairs, Office of the Auditor General of Mexico.*

Resumen. *En el presente trabajo se aborda de manera sintética la evolución del control de la administración pública en México. Se destaca el carácter ins-*

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trumental de control, su carácter normativo y valorativo. Además se abordan cuestiones como el diseño histórico de las herramientas de control de la administración pública mexicana; el enfoque legal de la norma administrativa contra la corrupción, se destacan algunos aspectos sociales y políticos, para concluir destacando que el nuevo diseño de la estructura político-administrativa contra la corrupción en México: La Comisión Nacional Anti-Corrupción o la nueva herramienta derivada de la ley en proceso legislativo: El Instituto Nacional Anticorrupción y de Control no eliminarán la corrupción en el país porque se repite el modelo sustentado en la reforma de institucionales legales. La pretensión es modesta: mostrar cómo el modelo mexicano tiene una experiencia integral en el diseño de normas y estructuras administrativas, que no logran trascender al ámbito político y social donde la corrupción, como fenómeno complejo, se enraíza, destacando la desarticulación entre el desarrollo legislativo y la experiencia socio-política del Estado Mexicano en el combate a la corrupción, lo que puede servir de experiencia para que otros países diseñen sus herramientas para combatir la corrupción, en el artículo se cita a China, porque este artículo fue presentado como ponencia de la experiencia mexicana en ese país, es prudente aclarar que no se pretende ni se pretendió realizar una comparación sobre la corrupción y las estructuras legales entre ambos países, lo trascendente es analizar el caso mexicano.

Palabras clave: *Control, derecho administrativo, corrupción, evaluación, control interno y externo, Secretaría de la Función Pública, Auditoría Superior de la Federación.*

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I. Historical Design of Mexican Anti-Corruption Law

From the perspective of control, the law is a tool and a technique. It is instrumental since it incorporates into the law specific behaviors to be imposed as mandatory for social agents, especially public servants, enforcing obliga-

tory margins of action through control by objectives. As a technique, the law defines the processes, methods and forms of action of controlled entities in performing their activities. It also provides a framework of understanding between society and the government, which identifies the law as a means of interpreting authoritative decisions.

Mexico's administrative law has various anti-corruption mechanisms: constitutional provisions and principles; means for entering public service, the law of competence, and responsibility and accountability laws.

The design of Mexico's anti-corruption law can be divided into four phases: 1. from the pre-Hispanic era to the Colonial era; 2. from Mexican Independence to 1867 with the enactment of the so-called Ley Juárez [Juarez Law]; 3. from the Ley Juárez to the reform under Lopez Portillo; and lastly, 4. from the 1982 Anti-Corruption reform to now, when Mexicans are discussing the creation of an Anti-Corruption Commission.

A. In the early days, the *Mexica* political organization consisted of a *Tlatoani* ("the speaker, the boss"), the highest civil, military, judiciary and religious authority. There also was a *Cihuacóatl* ("female serpent"), who accompanied the *Tlatoani* in all public acts (military, political or religious) and who could stand in for him in the performance of any of his functions. Together, they represented the duality of cosmic forces: the celestial and the astral, day and night, masculine and feminine.

The highest authority in the *Mexica* fiscal organization in charge of controlling revenues was the *Cihuacóatl*, who monitored the distribution and appropriate use of resources. Under his authority, there was the *Hueycalpixque* or Grand *Calpixque*, in charge of bookkeeping and the collection of what the minor *Calpixque* gave him. These were the first anti-corruption institutions in Mexico.

In the Colonial era, the king was the absolute master of finances in the government of the New Spain. The Council of the Indies performed district inspections and reviewed books. The House of Trade in Seville governed all trade issues. The Treasury Board was the direct representative of the king's authority and as such, it oversaw all the branches of the administration, including finance and the army. Despite the power invested in the Treasury, its counselors were subject to a trial called "*Residencia*" [judicial review].[1]

On the viceroy depended the kingdom's checkboxes, private treasuries, and the court of auditors, and finally in the administration of New Spain were other royal officials. Another anti-corruption mechanism in place was the impeachment process.

According to Carmelo Viñas Mey, all members of civil government, the Church and the military, from the Viceroy to the lowest-ranking officer could be subjected to an impeachment trial. *Residencia* judges announced the ope-

[1] *Residencia* was a kind of judicial review that applied to public officials in Mexico at that time. It was basically an impeachment trial in which public officials were liable for the charges against him.

ning of such trials, so that anyone who wished to file any grievances could do so. A trial of this type would be duly evaluated within six months, and sent to Spain for the Indies Council to issue the corresponding ruling. If found guilty, the public servant was required to pay compensation to the injured party; if he did not, the State would.[2]

B. Independent Mexico modeled its own constitution on the Constitution of the Spanish Monarchy promulgated in Cadiz on March 19, 1812. It was enacted in in Mexico on September 8, 1812. Article 227 of the Mexican Constitution of 1812 imposes the obligation of the Secretaries of State to draft annual budgets and pay any expenditure incurred. Article 331 sets forth the duty of the Secretaries of State to submit their budgets to the Congress in order to establish the costs and contributions needed to cover said expenditures. Article 345 established a national treasury that could dispose of any State revenue as it saw fit. As an internal control mechanism regarding the revenues in the Treasury, Article 348 established the Accountants Securities and Distribution of Public Accounts that could audit the general treasury to verify that the accounts were kept with due "transparency". Furthermore, Article 350 created the Senior Accounting Office/Controllership to examine all accounts of public funds/public fund accounts. To complete the system, Article 261 allowed the Supreme Court to hear matters of residencia.

Two trends were vying for office's finance organization: the concentration of income and expenses, and the separation between the roles of income and expenses.

The first model of control in the 19th century was developed by José Ignacio Esteva, the Finance Minister of the Guadalupe Victoria administration.[3] Its legal expression can be found in the "Arrangement Treasury Management Law" of November 16, 1824, which placed public finance management and administration under the domain of a single ministry. A Department of Account and Reason was created to take over the responsibilities of the defunct General Accountant's Office, budgets and public accounts were regulated, and the Federal Treasury and the Office of the Auditor General were established to review and keep executive accounts.

The second model was sponsored by Rafael Mangino, who was finance minister under Anastasio Bustamante[4] and an advocate for anti-centralization. Under Mangino's influence, Article 9 of the Law of October 26, 1830, extended the powers of the Treasury to relieving the Department of Account and Reason from elaborating the second part of the public account. The organization of this office was the responsibility of the Treasury, and therefore, the general police and other subordinate federal offices had to render their accounts to this office.

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2 Carmelo Viñas Mey, El régimen jurídico y la responsabilidad en la América indiana 55-56 (UNAM 1993).

3 President of Mexico from 1824 to 1829.

4 President of Mexico from 1830 to 1832 and from 1837 to 1839.

Article 14 of the Constitutional Bases of December 15, 1835, legally established the organization of public finances in all its branches, the use of the "double entry" method, the organization of a court of auditors and procedures of economic and contentious jurisdiction. The implementation of internal accounting, external control and legal-administrative control is clearly derived from this article.

Articles 47-50 of the third of the Seven Constitutional Laws of 1836 authorized Congress to hear common crimes and official crimes committed by certain officials, through a declaration of origin in the first case, and a hearing in the second. If found guilty of the charges against him, the accused could be removed from his post.

On May 25, 1853, the Decree and Regulations for the Settlement of Administrative Litigation was issued. This document establishes that administrative matters did not correspond to the judiciary. On June 1, 1853, the Commissioner General of the Army and Navy was changed and the Department Treasurers or Substations were ascribed to the new Commissioner. On June 28, 1853, the Code of Ethics for Finance Employees, which criminalizes embezzlement of public funds, entered into force.

Under Title IV "Accountability of Public Officials", Articles 103 to 108 of the 1857 Mexican Constitution provided that members of Congress, Supreme Court officials and Secretaries of Office, were responsible for common crimes, misdemeanors or omissions incurred during their terms in office.

State governors were also accountable for any violations to the Constitution and federal laws. The same considerations applied to the nation's president; however, during his term in office, he could only be charged for treason, explicit violation of the Constitution, any attack against electoral freedom or local felonies.

In the case of common crimes, Congress acted as a grand jury to hear the charges filed against the accused. The grand jury aimed to declare with absolute majority of votes, whether the accused was guilty or not. If a guilty verdict was reached, the accused would be removed from his position and be subject to ordinary court action. If the outcome resulted in an acquittal, the official on trial could continue in the exercise of his duties. Without the required number of votes, all subsequent proceedings are dismissed.

Meanwhile, the Supreme Court functioned as a sentencing jury for these cases. After hearing the accuser, the prosecutor and the defendant, the Supreme Court would proceed to apply, by absolute majority, the corresponding penalty stipulated by law. In civil lawsuits, no privileges or immunity were granted to any public official.

For other matters, Congress appointed employees of the Office of the Auditor General (Article 73) to review the accounts in question. Congress then proceeded to apply the corresponding sanctions for any legal or financial violations.

The Juarez Law of November 3, 1870, established the crimes, errors and omissions of federal senior officials. The official crimes included any attack against democratic institutions, the form of government or electoral freedom; the usurpation of authority; any civil rights violation and any serious breach of the Constitution. The sanctions consisted of removal from office and ineligibility to hold public office for 5 to 10 years. In the case of crimes, misdemeanors and omissions committed by officials, the grand jury established the guilt or innocence of the accused and the sentencing jury imposed the sanction.

C. The Porfirio Diaz Law dated June 6, 1896, called the "Regulatory Law of Articles 104 and 105 of the Federal Constitution", established responsibility/accountability for crimes, misdemeanors, omissions and common crimes. The procedure in these cases was carried out before the grand jury and the sentencing jury.

The Constitution of 1917, promulgated on February 5 of that year, entered into force on May 1st. The Constitution established various rules regarding the internal control of the administration. For example, Article 73, Section VII, granted Congress the authority to impose the contributions/revenue required to cover the budget of expenditures while Article 74, Section IV, gave the Chamber of Deputies exclusive powers to approve the annual budget.

Article 75 stated on approving this budget, the Chamber of Deputies may not fail to set the remuneration corresponding to holding office, which is established by law. In the event of failing to do so, the amount fixed for the previous budget shall be tacitly renewed.

Article 90 established that the Congress shall establish the number of federal secretaries by law. Under the terms prescribed in Article 93, state officials are accountable to Congress for the state of their administrative branches.

Furthermore, Articles 108 to 114 under Title IV marks the differences between crimes and official misconduct. In the case of crimes, it is the responsibility of the Chamber of Deputies to set up a Grand Jury to establish whether there are grounds to proceed against the accused. In the case of official misconduct, it is the Senate which forms a grand jury to impose sanctions such as deprivation of office and ineligibility to hold public office.

Article 126 states that no payments may be made that is not included in the budget or provided for by a subsequent law. Likewise, Article 134 requires that all government contracts for public works should be awarded by auction, after a call for bids submitted in sealed envelopes and opened in a public meeting.

The Lázaro Cárdenas Law of December 30, 1939, called the "Act of the Responsibility of Officials and Employees of the Federation, the Federal District and Federal Territories and the High State",[5] regulated responsibility for crimes and official misconduct, allowing any citizen to report any such beha-

[5] Ley de responsabilidades de los funcionarios y empleados de la Federación del Distrito y Territorios Federales [L.R.F.E. F.F.T.F] [Act of the Responsibility of Officials and Employees

vior. This law established the responsibility for crimes and acts of official misconduct committed by federal senior officials and employees. Official crimes consist of attacks against democratic institutions, the form of government and electoral freedom; the usurpation of authority; violations of civil rights and serious breaches of the Constitution.

This law contains five procedures: two for cases of official crimes and common crimes committed by senior officials, three for other employees brought before a jury of peers, and the last for unaccountable enrichment.

The Lopez Portillo Law of December 27, 1979[6], called the "Act of Responsibility of Officials and Employees of the Federal District and the High State Officials", follows the system set in place by the Cardenas law. It established the responsibility of public officials for common crimes, official crimes and official omissions. This law defines official crimes as acts or omissions committed by officials or employees of the Federation or the Federal District, committed during their office or by reason thereof, which are to the detriment of public interest and the good offices.

Those considered official crimes were attacks against democratic institutions, the federal form of government and electoral freedom; the usurpation of authority; violations of the Constitution; serious omissions; civil and social rights violations, and acts that are detrimental to the public interest and the good offices.

D. Articles 108 to 114 under Title IV "Responsibility of public servants" of the Mexican Constitution were amended on December 28, 1982. This reform created the Office of the General Comptroller of the Federation, the now defunct General Accounting Office and the Ministry of Public Administration (currently being phased out). The Federal Law of the Responsibilities of Public Servants was also formed.

The importance of this reform was the establishment of the definition of a public servant, the obligation of federal and state governments to issue regulations on the responsibilities of public servants, the delimitation of the areas of political responsibility (faults or omissions that run contrary to public interest or the good offices), criminal responsibility (acts or omissions that constitute a crime) and administrative responsibility/accountability (actions affecting legality, honesty, loyalty, fairness and efficiency in the course of employment, position/term in office or commission), a list of matters of political judgment, and provisions for the establishment of secondary legislation on the responsibilities of public servants (liabilities, penalties, procedures and authorities to enforce them) and the corresponding statutes of limitations.

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of the Federation, the Federal District and Federal Territories and the High State] *as amended*, Diario Oficial de la Federación [D.O.], 21 de Febrero de 1940 (Mex.).

[6] Ley de responsabilidades de los funcionarios y empleados de la Federación del Distrito Federal y de los altos funcionarios de los Estados [L.R.F.E.F.D.F.A.F.E.] [Act of Responsibility of Officials and Employees of the Federal District and the High State Officials] *as amended*, Diario Oficial de la Federación [D.O.], 4 de Enero de 1980 (Mex.).

The Mexican Constitution currently in force regulates the responsibility of public servants in Articles 108 to 114 under Title IV. The articles 108, 109, 113 and 114 refer to the administrative control. Articles 110 and 114, first paragraph governs the impeachment process and Articles 111 and 112 the statement of origin[7]. We will briefly discuss this constitutional basis.

Thus, the legal instruments to combat corruption in Mexico appear to have been guided by clear objectives: a) to set ethical standards, b) to establish standards for public servants to follow, c) to regulate impeachment proceedings, statement of origin and criminal and administrative responsibility/accountability, d) to determine penalties, and e) to respect civil equality.

II. The Legal Scope of Mexico's Administrative Law against Corruption

The legal scope of Mexico's administrative law leads us to the sphere of internal control, which can be understood as the set of policies and procedures an institution establishes to obtain reasonable assurance that it will meet the proposed ends. Internal control is carried out by bodies within the administrative body. In the field of Mexico's public administration, specialized organs called internal comptrollers are responsible for this control. In the case of active public administration external control is directed by the Court of Accounts, as bodies with the legal authority to review public accounts and establish the responsibilities of public servants for any misuse of public resources.[8]

In addition to the legal instruments mentioned in the previous section, Mexico has other tools to tackle corruption. These include the National Human Rights Commission (1990), the Federal Law on Administrative Procedure (1995), the Organic Law of Federal Public Administration (1996 legal reform), the Federal Law of the Responsibility of Public Servants (1999 legal reform), and the Chief Audit Office of Mexico (1999). Furthermore, amendments were made to the Federal Tax Code and the Regulations of the General Accounting Office (2001), the Federal Law of Administrative Accountability of Public Servants and the Federal Law of Transparency and Access to Public Government Information (2002).

On April 11, 2003, the Law on Professional Career Service in Federal Public Administration was approved. It is expected that this statute will bring stability and permanence to the public servants in their employment, office or commission.

The Federal Anti-Corruption Law in Public Contracts was created on June 11, 2011. This law is based on international conventions for the prevention

[7] This is a procedure that is followed to remove the constitutional protection granted to public servants.

[8] Daniel Márquez, Función jurídica de control de la administración pública 32-33 (Instituto de Investigaciones Jurídicas, UNAM, 2005).

and combat of corruption, such as the Inter-American Convention against Corruption, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the United Nations Convention against Corruption.

The work of corruption control is performed by formal and material administrative bodies. It consists of the use of legal methods to remove or correct illegal or ineffective governance through technical means called "administrative procedures", which are, properly said, administrative controls, audits and processes for determining the legality of the acts of administrative authorities.[9]

In this manner, the first paragraph of Article 108 of the Constitution establishes who should be considered public servants for the purpose of the accountability for their acts, omissions or administrative violations incurred in the performance of their duties. Thus, public servants are elected representatives, members of the Federal Judiciary and the Mexico City Judiciary, officials and employees and in general, anyone who holds a position, office or commission of any kind in the federal public administration, the administration of the Mexico City administration or the Federal Electoral Institute.

Article 109 refers to the types of offenses which may be incurred by public servants, namely of a political, criminal and administrative nature. Section III of this law stipulates that: administrative sanctions apply to public servants for acts or omissions that affect the legality, honesty, loyalty, fairness and efficiency that should be observed in the performance of their jobs, positions, or commissions. It also establishes the autonomy of the procedures for the application of sanctions for liabilities incurred by public servants and notes that penalties of the same kind cannot be imposed twice for a single act.

Article 113 outlines the necessary content for laws on administrative responsibilities. Subsequent statutes must set out the obligations of public servants, the sanctions for any breach of these, the procedures for the application of the sanctions and the competent authorities to enforce them. The article states that, in addition to those provided by law, sanctions shall consist of dismissal, suspension, disqualification and fines not to exceed three times the profits made or damage and injury caused. Lastly, the final paragraph of Article 114 states that the laws shall determine the statute of limitations, but when the acts or omissions are serious, it may not be less than three years.

At the federal level, the Federal Law on Administrative Responsibilities of Public Servants is regulated by Title IV of the Mexican Constitution, as regards the subject of administrative accountability, the obligations of public service, responsibilities and administrative sanctions, the competent authorities and rules for the implementation of sanctions, and the registry of public servants' assets.

It consists of four sections. The first sets out the general provisions, the second deals with "administrative responsibilities", the third is related to the

[9] *Id.*, at 30.

"Registry of Assets Declarations of Public Servants" and the fourth refers to the "preventive actions to ensure the proper exercise of public service."

The above-mentioned law applies to federal public servants and all persons who handle or utilize federal resources. This leads us to conclude that hypothetically, public servants pertaining to the states or municipalities or even any individual who handles federal resources can be penalized under the terms of this statute.

The bodies responsible for enforcing the law include the Congress, the Federal Judicial Power, the Ministry of Public Administration, the Federal Tax and Court, labor and agrarian courts, autonomous bodies like the Federal Electoral Institute, Chief Audit Office, National Human Rights Commission, the Central Bank and other courts and institutions established by law.

The internal comptrollers and the audit leaders, as well as the complaints and accountability departments of the internal control bodies have the authority to investigate, process, substantiate and resolve the procedures and remedies provided by law. When the acts or omissions regarding the allegations are found in more than one case to be sanctioned, the respective procedures are carried out autonomously in the corresponding jurisdictions, but always following the "non bis in idem" principle.

Twenty-four rules regulate the obligations of public servants. Any failure to fulfill the obligations will lead to prosecution and the corresponding sanctions, without prejudice to the rules governing the armed forces.

One innovation is that it establishes a series of prohibitions applicable to public servants after they leave their jobs, positions or commissions. These include prohibiting counselors and electoral magistrates from participating in any public office in the administration headed by whoever won the election they organized or certified.

A regression in this matter is the obligation imposed on the accuser or petitioner stating that "complaints and denunciations shall contain data or any evidence of the alleged responsibility". The Federal Law of the Responsibilities of Public Servants (1982) only regulated grievances or complaints, without requiring data or evidence of responsibility. The Federal Law of the Administrative Accountability of Public Servants (2002) was drafted with the ordinary citizen in mind because it requires evidence of the responsibility. This leads to the conclusion that the administrative authorities failed to fulfill their duty to investigate acts of presumptive responsibility, wrongly forgetting the nature of public procedures. This is even more absurd when it comes to complaints in which the plaintiff lacks evidence. It is well known that on several occasions evidence is destroyed, altered or hidden. Therefore, it follows that plaintiffs' complaints should be sufficient grounds to initiate an investigation.

The Federal Law of the Administrative Accountability of Public Servants regulates the administrative sanctions to be imposed on offenders: *a)* a public or private reprimand, *b)* suspension of employment, position or commission

for a period of no less than three days or more than one year, *c)* removal of the post and economic sanctions, or *d)* temporary disqualification. It also eliminates the private or public caution (amonestación) as an administrative sanction, which is a step forward because it prevents confusion with a warning formulated in a process against one of the parties. It also establishes rules regarding gains or loss or when damages are incurred, and states that disentitlement cannot be for a term less than ten or more than twenty years. In the case of serious behavior, the offender must be debarred.

In the event of the hiring of a person who has been debarred, the Ministry of Public Administration must be notified with the proper grounds and justification for this re-hiring.

This law also typifies offenses that should be considered serious. These offenses are performing duties of employment after the period of designation; authorizing the selection, recruiting or appointing disabled staff; intervening in matters in which the public servant has a personal interest; soliciting, accepting or receiving a gift; unduly intervening in the selection, nomination, appointment, hiring, promotion, suspension, removal, dismissal, termination or sanction of any public servant; refraining from responding promptly to instructions, requests or orders from the Ministry of Public Administration; refraining from submitting timely and truthful information required by the National Human Rights Commission; taking advantage of one's hierarchical position to prevail upon another public servant to perform or not perform acts for personal gain; and purchasing properties related to public or private investments that may yield gains of which the public servant becomes aware of in the performance of his duties. This is commendable because it breaks with the discretion of the previous law and gives legal certainty to public servants.

It also sets up three goals for imposing economic sanctions when there is harm or gains.

Another innovation is regulated in Article 16, which refers to the provisional seizure of goods. In the opinion of the Ministry of Public Administration, the comptroller or head of the area of accountability can confiscate assets when the suspects disappear or there is imminent risk of concealment, disposal or squander, which again opens a wide margin of discretion.

To date, this is the state of Mexico's anti-corruption instruments, its values, rules and procedures. However, it is necessary to show how efficient these instruments are. In this study, we will analyze the political problem and the social aspect of corruption.

III. Evaluation of Legal and Administrative Tools against Corruption

In order to face the problem of corruption, specialized administrative structures can be found within the inter-organic and intra-organic sphere of

the State: internal and external control, like venues for social defense in the fight against corruption or to act against corrupt practices. These agencies are given specialized functions: internal control bodies aid in the management, internal control and evaluation of public administration performance; external control agencies are reserved the right to perform external audits; that is, an ex-ante review of public expenditures using government auditing techniques, the review of public accounts and the evaluation of its activities.

Two paradigmatic examples of this are the Ministry of Public Administration and the Federal Office of the Auditor General.

According to the 1st Progress Report for 2012-2013, the Ministry of Public Administration has focused on closing loopholes against corruption, not only those that can arise from the interaction between public servants and citizens during routine activities concerning the goods and services provided or acquired, but also those that are caused by not complying with their responsibilities in the line of public administration.[10]

The report also sustains that Federal Government management is primarily overseen by the Internal Control Bodies through the performance of its Annual Auditing Programs. The Ministry of Public Administration follows up on the audits carried out and assists in the process to eliminate findings. In the first half of 2013, 844 audits were performed and 4,536 of 7,682 findings were dealt with. In 248 cases, it is estimated that the improper behavior of public servants and/or possible harm to institutional assets totaled $980.7 million Mexican pesos. If the no explanation or justification for this amount is not provided, the cases will be turned over to the corresponding Internal Control agency departments for them to determine where the responsibilities lie and recover the public funds, where appropriate.[11]

Some of the most important activities of this federal public administration agency are that:

> …it oversees the proper behavior of public servants by means of annual statements of personal assets. Between January 1 and June 30, 2013, a total of 297,500 statements were received, 33,474 of which were statements rendered for the first time; 240,147 were annual amendment statements and 23,879 were statements rendered on the completion of their assignment.

Citizen complaints and reports are another source that provides information about public servants' possible violations of the law. Between December 1, 2012 and July 29, 2013, 18,369 complaints and reports were processed and attended by internal control bodies and the Ministry's Internal Comptroller.

To unequivocally detect acts of corruption involving public servants, a User Simulation mechanism was implemented 5 times between December 1,

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[10] Secretaría de la Función Pública, 1er. Informe de Labores 2012-2013, "Presentación", September 1, 2013, p. 8.

[11] *Id.*, at 10.

2012 and July 31, 2013. As a result, administrative and criminal proceedings were initiated against 6 public servants.

After several interventions, 6,031 administrative sanctions were carried out on 5,149 public servants in the Federal Public Administration: 1,165 officials were disqualified, 1,757 were suspended and 2,353 received a public or private caution.[12]

However, a comparison of the main actions found in the above reports shows that:

Action	*2000*[13]	*2003*[14]	*2006*[15]	*2011*[16]	*2013*
Statements of Personal Assets			204,808	284,970	297,500
Complaints and Reports	978,118	407,000	7,910	1,181	18,369
User Simulation		55	6	28	5
Criminal and Administrative Proceedings from User Simulations		55	6	31	6
Public Servants Involved in Acts of Curruption	51,017	9, 220	2,455	7,117	5,149
Administrative Sanctions	11,781	13,133	3,278	8,333	6,031
Disqualifications		3,481	645	1,167	1,165
Dismissals		1,297	181	358	292
Suspensions		2,392	852	2, 828	1,757

[12] *Id.*, at 8.

[13] The report is not available on the SFP website. The network was consulted and the figures were obtained from the La Jornada San Luis, *available at:* http://www.lajornadasanluis.com/2000/11/15/014n1pol.html, accessed on June 14, 2014.

[14] Source: Informe de Labores que presenta el C. Francisco Barrio Terrazas, Secretario de Contraloría y Desarrollo Administrativo, March 31, 2003, *available at:* http://www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/informe_final.pdf, accessed on June 14, 2014.

[15] Source: Sexto Informe de Labores, 1° de septiembre 2006, *available at:* http://www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/informeSFP06.pdf, accessed on June 14, 2014.

[16] Source: Quinto Informe de Labores , *available at:* http://www.funcionpublica.gob.mx/web/doctos/temas/informes/informes-de-labores-y-de-ejecucion/5to_informe_labores_sfp.pdf, accessed on June 14, 2014 (Note: the 2011 report was used because there was no access to the 2012 report).

Cautions		3,470	1,013	3,180	2.353
Warnings		659	8		
Financial Sanctions	4,945	1,834	579	800	464
Amounts of the Fines (millions)	3,179	2,210	586.5	9,664.1	N/D
Criminal Charges		278	11	92	3 projects

With reservations and keeping it in proportion, it can be observed that 978,000 complaints and charges were filed in 2000. After that year, this figure gradually decreases so that by 2013, only 18,000 complaints and reports were filed. If the figure for 2000 represents 100%, the number of complaints and reports drops to 1.84%. In other words, either Mexico substantially improved its federal public administration, or people stopped believing in one of the tools to fight corruption.

In 2000, the number of public servants involved in acts of corruption stood at 51,000, but by 2013, there were only 5,000. This shows a 9.8% decline in the number of public servants involved in corruption. This leads us to think that either public administration is more honest or that concealment and impunity mechanisms are not produced by the bodies in charge of internal control.

In terms of administrative sanctions, it can be seen that the figure went from 11,000 to 6,000 over the same period, which translates into a reduction of 54.5%. Again, it must be noted that this is due to either successful changes in Mexico's public administration or the inefficiency of organic internal control mechanisms.

The above can be compared with what Transparency International's Global Corruption Barometer[17] has published on Mexico, as seen in the following table:

	Over the past two years how has the level of corruption in this country changed?
Increased a lot	52%
Increased a little	19%
Stayed the same	21%
Decreased a little	7%
Decreased a lot	1%

[17] Transparency International, Global Corruption Barometer, National Results, Mexico, *available at*: http://www.transparency.org/gcb2013/country/?country=mexico, accessed on June 14, 2014.

	To what extent do you think corruption is a problem in the public sector in this country?
A serious problem	79%
A problem	14%
A slight problem	5%
Not really a problem	1%
Not a problem at all	1%

	To what extent is this government run by a few big entities acting in their own best interests?
Entirely	26%
Large extent	36%
Somewhat	25%
Limited extent	11%
Not at all	2%

	How effective do you think your government's actions are in the fight against corruption?
Very ineffective	30%
Ineffective	43%
Neither effective nor ineffective	17%
Effective	10%
Very effective	1%

However, when asked about the percentage of corruption in the country's institutions, the vast majority of the respondents felt that institutional structures were highly corrupt, as shown below:

Political Parties	Parliament / Legislature	Military	NGOs	Media	Religious Bodies
91%	91%	42%	43%	55%	43%

Business	Education Systems	Judiciary	Medical and Health Services	Police	Public Officials and Civil Servants
51%	43%	80%	42%	90%	87%

When asked if they or anyone in their households paid a bribe in the last 12 months, 55% of the respondents reported having paid a bribe to the judiciary, 61% to the police, 17% for education services, 31% for land services,

16% to the tax revenue, 17% for utilities, 27% for registry and permit services, and 10% for medical and health services.

According to the Corruption Perceptions Index, Mexico stands in 106th place out of 177, with a score of 34/100, with scores ranging from 0 (highly corrupt) to 100 (very clean). The Bribe Payers Index puts Mexico in 26th place out of 28 with a score of 7.0/10, noting that the higher the score, the lower the likelihood of companies from this country to pay bribes when doing business abroad.[18]

The only plausible conclusion from this information is that it highlights the negative aspects of the information the government has submitted on internal control, which in turn shows that the legal and organic structures are insufficient and inefficient to fight corruption.

Meanwhile, in the scope of external control, as a technical body of the Chamber of Deputies, the Office of the Auditor General performs audits to the three branches of power, constitutionally autonomous federal agencies and any public institution that use federal funding, including states, municipalities or individuals. Moreover, it has the authority to establish responsibilities for damages directly and impose fines and sanctions.

As seen, there is an oversight body with the authority to audit revenues and expenditures; the handling, custody and use of funds and resources by the three branches of power and federal public entities; and the compliance of the objectives set forth in federal programs, among its many functions associated with proper administrative management.

On analyzing the contents of the Report of the Office of the Auditor General of Public Accounts for 2010, 2011 and 2012, we can see:

Item	Report of the Office of the Auditor General of Public Accounts 2010	Report of the Office of the Auditor General of Public Accounts 2011	Report of the Office of the Auditor General of Public Accounts 2012
Audited Entities	153	161	379
Reviews or Audits	1,031	1,103	1,173
Financial and Compliance Audits	626	610	527
Performance Audits	205	287	478
Audits on Investments in Federal Physical Property	143	141	141
Special Audits	44	54	
Forensic Audits	11	11	17

[18] Source: Transparency International, Corruption Measurement Tools, Mexico, *available at*: http://www.transparency.org/country#MEX_DataResearch, accessed on June 14, 2014.

Audits on Federal Expenditures	558	640	689
Reviews of Exceptional Situations	2		
Other Concepts			3
Findings	14,543	13,413	13,824
Resolved Findings	5,504	5,448	4,768
Findings Pending Resolution	9,039	7,965	9,056
Promoting Actions	10,778	9,865	10,911
Complaints filed before the Public Prosecutor	98	134	
Scope of the audit simple in comparison with total income[19]	N/A	31.7%	33.2%
Scope compared to net expenditures[20] in the budget	N/A	19.9%	22.0%

N/A = no available information.

Furthermore, the Report on the Resources Recovery by the Office of the Auditor General of Public Accounts between 2001 and 2012[21], dated March 31, 2014, shows that the Office of the Auditor General recovered:

Executive Branch	Judicial Branch	Legislative Branch	Autonomous Bodies	Public Institutions of Higher Education	Federal Resources Transferred to states, municipalities and boroughs
29,829.5	306.3	131.9	70.4	70.4	55,382.5
(Numbers shown in millions) Total					86,099.2

If we divide this amount by the twelve months that the ASF spent on this activity, it can be said that the ASF is recovering approximately 7.42 billion

19 In the 2012 Findings Report, the information is presented under the following heading: As to the scope, the audit simple is estimated at 33.2% of the total revenue and 22.0% of the net expenditure of the Budget for the public sector (See page 19). However, since it does not include the "financial" universe (that is, the total amount of money that was audited or the total "revenues" or "net expenditures"), it is impossible to determine whether this percentage should be considered a measurement of the effectiveness of the work of the ASF.

20 See Note 22.

21 Auditoría Superior de la Federación: http://www.asf.gob.mx/uploads/67_Recuperaciones/Opinion_Inf_de_Recuperac_ASF-Mzo14.pdf, (last accessed on June 14, 2014).

pesos. However, on comparing this amount with the total budget handled by the Mexican public spheres, the following can be observed:

Federal Expenditures Budget Decree 2009	Federal Expenditures Budget Decree 2010	Federal Expenditures Budget Decree 2011	Federal Expenditures Budget Decree 2012
3,045,478.6[7]	3,176,332.0	3,438,895.5	3’706,922.2
7,425	7,425	7,425	7,425
0.24%	0.23%	0.21%	0.20%

What it does show is that only 0.2% of the annual budget has been recovered.

However, it should be pointed out that the actions the Office of the Auditor General takes against corruption is hindered by many factors. First of all, there are the absurd principles of “annuality” and “posterity”, which hamper more efficient actions in terms of government audits. There is also the problem of forwarding its findings regarding administrative responsibility to the federal, state or municipal internal control bodies, which do not recognize the work carried out by the ASF and begin their own “investigation”. This leads to losing precious time to establish responsibilities. Another problem can be seen in criminal matters, since oftentimes public prosecutors and judges are not aware of the nature of the ASF’s legal authority. Thus, these judicial authorities require the ASF to ratify expert opinions on authorship, give scant value to the ASF investigations, and in extreme cases, argue that the crime manifested in the ASF’s filing charges is not “typified” regardless of all the evidence presented.

All of the above shows the dysfunctional nature of the Mexican anti-corruption model: it has the laws and the institutions, but little or no effectiveness.

IV. The Political Problem

Corruption involves activities that take place in the public space, but which transcend the public space and are rooted in the private space. One example is the word “corruption” and its delimitations. For Susan Rose-Ackerman, “corruption is a symptom that something has gone wrong in the management of the state. Institutions designed to govern the interrelationships between the citizen and the State are used instead for personal enrichment and the provision of benefits to the corrupt. The price mechanism, so often a source of

economic efficiency and a contributor to growth, can, in the form of bribery, undermine the legitimacy and effectiveness of government".[22]

Dontella Della Porta and Alberto Vannului hold that "corruption refers to the abuse of public resources for private gain, through a hidden transaction that involves the violation of some standards of behavior".[23]

In an analytical approach, Robert Klitgaard believes that corruption may be represented by the following formula: C=M+D-A (corruption equals monopoly plus discretion minus accountability). In his opinion, corruption is usually encountered when an organization or person has the monopoly over a good or service, has the discretion to decide who will receive it and how much that person will get, and is not held accountable. Furthermore, corruption is a crime of calculation not of passion.[24]

In the Mexican legal system, public servants are constrained in their actions by the entreaty they make and that is enforced by the Constitution and the laws deriving from it. The Federal Law of the Responsibilities of Public Servants establishes an ethical framework with which compliance is imposed on public servants to safeguard fairness, honesty, legality, effectiveness and efficiency in public employment.

The problems in the use and allocation of public resources are recurrent in societies like Mexico where corruption resizes the forces of the institutions responsible for its eradication. No need for further discussion on the subject since there is a rich history that can inform us on this matter.

In our opinion, the principal problem relates to the "politicization" of control. The administrative authority steers this type of control. However, senior officials and employees are members of political parties, which is a reason why the controls do not work properly. We can find many examples of violations of the legal procedure and material law in cases in which politicians are involved.

The succeeding list presents recent cases where we can find public servants engaged in the illegal use of power:

A) Governors of many states —including those from Tabasco, Coahuila, Aguascalientes, Tamaulipas, Baja California Sur, Chiapas, and Quintana Roo— have been some of the most well-known cases of offenders, with allegations involving missing public funds (reaching hundreds of millions of dollars), collaboration with drug traffickers, murder, and money laundering. Public figures once considered untouchable, such as

[22] Susan Ackerman, Corruption and Government 2 (Cambridge University Press ,1999).

[23] Dontella Della Porta and Alberto Vannului, Corrupt Exchanges 16, (Aldine de Gruyter, 1999).

[24] Robert Klitgaard, *International Cooperation against corruption*, in Finance and Development 4, *available at* http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaar.pdf, *see also*: Robert Klitgaard, Controlando la corrupción. Una indagación práctica para el gran problema social de fin de siglo 85 (Sudamericana, 1994).

the former head of Mexico's Teachers Union, Elba Esther Gordillo, were publicly pilloried and arrested.[25]

B) Andrea Benítez (the daughter of Humberto Benítez, the head of Mexico's Office for Consumer Protection) became known as #LadyProfeco when she threatened to shut down a trendy bistro in Mexico City, after being denied her preferred table.[26]

C) The former governor of the southern state of Tabasco went before a judge at a Mexico City prison and was arraigned on charges of tax evasion and use of illicit resources. He declined to enter a plea.[27] Andrés Granier has a sumptuous wardrobe and lifestyle. He has bragged about owning 400 pairs of shoes, 300 suits and 1,000 shirts, purchased from luxury stores in New York and Los Angeles.[28]

In these corruption cases, the common denominator is the pursuit for income. In words of Anne O. Krueger, in many market-oriented economies, government restrictions upon economic activity are pervasive facts of life. These restrictions give rise to income of a variety of forms, and people often compete for this income. Sometimes, such competition is perfectly legal. In other instances, income seeking takes on other forms, such as bribery, corruption, smuggling, and black markets.[29]

V. The Social Aspect

In Mexico, citizens experience palpable discomfort when approaching the authority to carry out administrative procedures. Given the complexity of the bureaucracy, the number of requirements to be covered for any process and the long lines to wait, many prefer to recur to various forms of corruption. Administrative and management procedures are insufficient to guarantee a civil service that serves the governed.

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[25] Shannon O'Neil, *Corruption in Mexico*, Huffington Post, *available at* http://www.huffingtonpost.com/shannon-k-oneil/corruption-in-mexico_b_3616670.html, accessed on October 26, 2013.

[26] *Id*.

[27] Eduardo Castillo, *Mexico Corruption: State Government Scandals Reveal Lack of Disclosure, Enforcement*, Huffington Post, *available at* http://www.huffingtonpost.com/2013/06/26/mexico-corruption-scandals-disclosure_n_3505478.html, accessed on October 26, 2013.

[28] Karla Zabludovsky, *Official Corruption in Mexico, Once Rarely Exposed, Is Starting to Come to Light*, The New York Times, *available at* http://www.nytimes.com/2013/06/24/world/americas/official-corruption-in-mexico-once-rarely-exposed-is-starting-to-come-to-light.html?_r=0

[29] Anne Krueger, *The Political Economy of the Rent-Seeking Society*, The American Economic Review, *available at* http://blog.bearing-consulting.com/wp-content/uploads/2012/09/The.Political.Economy.of_.the_.Rent-Seeking.Society.pdf, accessed on October 26, 2013.

Society should be able to seek a communitarian purpose into the future. That purpose is the common good. This is important for our study since our concepts of control and the application of rules and procedures are set within a frame of reference: that amorphous element called society. Control, justice and procedures are specific to this medium called society.

The individual and society must share principles by which rules are made effective, but the public and private sectors also interact in ways that cannot be solved through regulations. The law is always expressed in some kind of language. However, there is a separation between words and deeds. Laws are tools that are limited in the fight against corruption.

The Business Anti-Corruption Portal said, "*Corruption is on the increase, with the total bribes paid in Mexico rising by 18.5% to USD 2.75 billion in 2010, according to a TI Mexico survey*".[30] In its "Corruption Perceptions Index 2012, International Transparency places Mexico in 105th of 176, where 1 is less corrupt and 176 is more corrupt, with a score of 34/100. This shows that Mexico is a highly corrupt country. In the 2011 Bribe Payers Index Report 2011, Mexico was in the 26th place with a score of 7.0/10, which means that Mexican companies pay bribes when doing business.[31]

According to Nubia Nieto, the democratic transition in Mexico and the development of globalization have contributed to the increased power of organized crime, making it more difficult to fight against narco-trafficking. Historical social problems (high levels of unemployment illiteracy, the exclusion of indigenous communities, alcoholism, drug addiction, the disintegration of families, low levels of social mobility, high levels of social inequality, a decline in ethical and moral principles, disappointment in political changes and democratic values, impunity and corruption, and a negative perception of the police and the judiciary) are some of the main causes that have contributed to increase levels of narco-trafficking in Mexico.[32]

Mexico's "democratic transition" focuses on free market reforms. In this sense, Jagdish Bhagwati states his opinion, saying, "let me say emphatically that the absence of economic freedom is an ally of corruption. True, corruption has many fathers. But the most fertile and fecund father is what Indians call a "permit raj", i.e. an economic regime where governments demand that permits be procured to produce, to import, to invest, to innovate, to do al-

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[30] Business Anti-Corruption Portal, Mexico Country Profile, Snapshot of the Mexico Country Profile, http://www.business-anti-corruption.com/country-profiles/the-americas/mexico/snapshot.aspx, (Last accessed on October 26, 2013).

[31] Transparency International, *Corruption Perceptions Index 2012, available at* http://cpi.transparency.org/cpi2012/results/, and *Bribe Payers Index Report 2011*, *available at* http://bpi.transparency.org/bpi2011/results/, (Last accessed on October 26, 2013), The last report said: *Countries are scored on a scale of 0-10, where a maximum score of 10 corresponds to the view that companies from that country never bribe abroad and a 0 corresponds to the view that they always do*.

[32] Nubia Nieto, *Political Corruption and Narcotracking in Mexico*, *available at* http://www2.hu-berlin.de/transcience/Vol3_Issue2_2012_24_36.pdf, accessed on October 26, 2013.

most anything! It needs no particular gifts to see that such an economic regime leads to cataclysmic levels of corruption, as it did in South Asia. It also corrupts even democratic and quasi-democratic regimes into "crony capitalism" as in some segments of the economy in Indonesia".[33] Paradoxically, the free market is an open space for corruption.

VI. The Future of Mexican Legislation against Corruption: "The National Anti-Corruption Commission" and the "National Anti-Corruption and Control Institute"

The new administration under Enrique Peña Nieto proposed the creation of National Anti-corruption Commission in November 15, 2012. The proposal aims to form a new National Anti-Corruption Commission which will have an impartial system of accountability and administrative responsibility.

Rodrigo Aguilera affirms that "with the PRI keen on presenting itself as a renovated political force, it was not surprising, therefore, that Peña Nieto announced an anti-corruption bill as one of his first initiatives. The bill, sent to Congress on November 14th, seeks to create an anti-corruption commission (Comisión Nacional Anticorrupción or CNA) which will be tasked with investigating corruption cases at a federal level and against individuals. It will also have the ability to tackle cases at a state and municipal level, but only if they have national repercussions. Crucially, the commission will be able to sidestep legal hurdles such as bank and fiscal secrecy which would, in theory, make it a powerful tool against money laundering. In order to avoid duplication of roles, the existing Secretaría de la Función Pública (a public administration ministry) would be eliminated, and its current duties shared between the CNA and the treasury".[34]

The proposal emphasizes that the new body will act on its own in matters concerning the notification of other organs of State or public complaints or reports that indicate probable cases of corruption. A highpoint in the powers proposed by the president for this National Anti-Corruption Commission is the fact that their investigation will not be hampered by bank, fiduciary or tax secrecy.

In addition, within the functions of the proposed anticorruption commission, the commission will be able to exercise drawing authority on corruption cases that arise in states and municipalities when it is necessary to be more

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[33] Jagdish Bhagwati, Economic Freedom: Prosperity and Social Progress, text of the Keynote Speech delivered to the Conference on Economic Freedom and Development in Tokyo, June17-18 1999, http://time.dufe.edu.cn/wencong/bhagwati/freedom_tokyo.pdf, accessed on October 26, 2013.

[34] Aguilera, Rodrigo, Corruption: Tackling the Root of Mexico's Most Pervasive Ill, in Huff Post World, http://www.huffingtonpost.com/rodrigo-aguilera/mexico-corruption_b_2206967.html, posted November 28, 2012, accessed on October 26, 2013.

partial due to the relevance of the investigation. Besides the proposal for the creation of the National Anti -Corruption Commission, there is the intention of forming a National Council for Public Ethics that will be comprised of experts who can make recommendations on transparency.

In his article entitled "Myths and Realities of the National Anti-Corruption Commission", Mario Ismael Amaya Baron[35] affirms "one of the lines of action of the government headed by Enrique Peña emphasizes the fight against corruption, whose levels estimate 9% of the GDP." For this, he has proposed the creation of a national anti-corruption system charged with establishing a National Commission and state commissions with powers of prevention, investigation, administrative punishment and to denounce any act of corruption to the authorities, among other measures.

Amaya Baron mentions three current reforms on corruption and transparency as proposed by the President: 1. The creation of a National Anti-Corruption Commission (CNA) 2. The expansion of the powers of the Federal Institute for Access to Information and Data Protection (IFAI) to include the affairs of states and municipalities, and 3. The creation of a body comprised of citizens to monitor official advertisement bought from the media.

Moreover, Amaya Baralso sustains that "public corruption is an unlawful behavior (act or omission) of the special duties the public servant has towards the State, to unduly favor himself or a third party for a benefit. The concept of corruption should avoid empty or indeterminate categories that threaten the democratic State, and therefore, statutory categories or administrative offenses of corruption must be specifically established."

In the design of Mexico's Anti-Corruption Commission, Amaya Baron holds that:

In the labor of developing the National Anti-Corruption Commission, on November 15, 2012, Revolutionary Institutional Party Senator Lizbeth Hernandez Lecona and Green Party Senator Pablo Escudero Morales presented the initiative that empowers Congress to enact laws to combat corruption, such as the Federal Anti-Corruption Act and the approval of the decree establishing the commission.

The Anti-Corruption and Citizen Participation Commission of the Senate, established on October 2, 2012, and comprised of PRI Senators Arely Gomez, Ana Lilia Herrera and Daniel Amador Gaxiola Alzado; PAN Senators Marisela Torres Peimbert, Laura Rojas and Roberto Gil Zuarth; PRD Senators Angelica de la Peña and Manuel Camacho Solis, and PVEM Senator Pablo Escudero, is responsible for reviewing the initiative and presenting it to the Senate.

Let us discuss the initiative to create the National Anti-Corruption Commission, amending Articles 22, 73, 79, 105, 107, 109, 113, 116 and 122 of the Federal Constitution.

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[35] Doctor in Law from the National Autonomous University of Mexico and a specialist in administrative law, article published in "The World of the Lawyer" (*El Mundo del Abogado*).

The first article of the draft decree, which amends the second paragraph of Article 22 of the Constitution, does not consider administrative offenses related to corruption that gives rise to forfeiture since forfeiture can be a criminal or administrative sanction.

The second article, which amends Section XXIX-H and adds Section XXIX-A of Article 73 of the Constitution, abolishes the legal power of the Federal Tax Court, that was never used, regarding the imposition of sanctions to public servants for administrative responsibility as determined by law, establishing the rules for its organization, operation, procedures and appeals against its decisions, as stated in the constitutional reform, published in the Official Federal Gazette on December 4, 2006.

Regarding Article 5, which amends Section V of Article 107 of the Constitution, it should be considered that the National Anti-Corruption Commission is an autonomous body, not a court *per se*, so its decisions can be argued before district courts dealing in with administrative matters.

As to Article 6, which amends and supplements Section III of Article 109 of the Constitution, the laws of the administrative responsibilities of public servants should enshrine the rights within the context of disciplinary proceedings, congruent with the constitutional reform on human rights, published in the Official Federal Gazette on June 10, 2011.

When discussing and approving the initiative, the permanent legislature must consider that sanctions are not only imposed, but also executed. Therefore, the implementation phase of disciplinary proceedings under the auspices of the National Anti-Corruption Commission should also be considered. In regards Article 7 that amends and supplements Article 113 of the Constitution, we believe that the procedures to combat corruption are: the procedure of administrative liability of public servants and the criminal procedure. However, corruption can be fought through the procedure of responsibility for damages, which is carried out by the Office of the Auditor General, and the civil procedure to redress the damage and the liability of the State, among others.

Furthermore, a new law for the National Anti-Corruption Commission should be created. It must give an in-depth description of its powers, composition, and disciplinary procedures for majority decision- making, among other things. It must be stated that the committee will apply the Federal Law of the Administrative Responsibilities of Public Servants and the Federal Anti-Corruption Law, which shall establish the alleged administrative offenses (acts or omissions) that cause corruption, procedures, penalties and administrative execution. The resolutions of the commission should not be considered judgments since this body is not an administrative court. But if the National Anti-Corruption Commission investigation results in an act (or omission) that constitutes a crime of corruption, the Federal or local Prosecutor should be notified, where appropriate. In addition, it should be noted that corruption cases do not prescribe administrative responsibilities for a period of less than

five years and that any act of corruption is serious, so once the investigation begins, temporary suspension of public service ensues.

The National Council for Public Ethics should reiterate the ethical values of public servants, issuing a Single National Code of Public Ethics, enforceable in all areas whether federal, local or municipal.

This comprehensive reform should be about jurisdiction in disciplinary liability for acts or omissions that give rise to corruption. For example, the Federal Judiciary Council and internal comptrollers of both houses of Congress should be stripped of administrative responsibilities, with which the existence of these public bodies is unlikely, since their disciplinary roles would become part of the role of the National Anti-Corruption Commission.

Finally, Amaya Baralso concludes that a "Single Anticorruption Code that encompasses any misconduct in the three branches of government, judicial, legislative and executive, as well as autonomous bodies, should be created since such conducts are dissimilar".[36]

However, the creation of the National Anti-Corruption Commission is still under deliberation in the Mexican Congress. Additionally, no political will for the combat of corruption is perceived. Therefore, we are not optimistic about the future of this commission.

The various points of views of corruption can be found in works of Alberto Ades and Rafael Di Tella, are found based on different perspectives *a)* legal (Italian Judge Antonio Di Pietro), *b)* commercial (Robert Klitgaard, Timothy Besley and John McLaren), and *c)* economic (Susan-Rose Ackerman). They sustain that

> lawyers often argue that the way to reduce corruption is to reform the legal system so as to increase the punishment for malfeasance. Businessmen sometimes suggest that the problem of corruption lies in the low salaries bureaucrats receive compared to those of private-sector employees with comparable responsibilities. Accordingly, they argue that bureaucracies should be run like private companies and the wages of public servants should be raised. The economist's natural approach to corruption control is to appeal to the concept of competition, as it is argued that bribes are harder to maintain where perfect competition prevails.[37]

As seen, the Mexican State wants to combat corruption with ineffective formulas. Examples of this can be found in the case of the debate regarding the reform to Articles 16, 21, 76 and 109 of the Constitution and the enactment of the Organic Law of the National Anti-Corruption and Control

[36] Amaya Barón, Mario Ismael, *Mitos y realidades de la Comisión Nacional Anticorrupción*, *El mundo del abogado*, on February 5, 2013, available at http://elmundodelabogado.com/2013/mitos-y-realidades-de-la-comision-nacional-anticorrupcion/, accessed on October 18, 2013.

[37] Ades, Alberto and Di Tella, Rafael, Rents, *Competition, and Corruption*, *The American Economic Review*, 4 (Sep., 1999), 982-993, http://conferences.wcfia.harvard.edu/files/gov2126/files/aerentscorruption.pdf, accessed on October 26, 2013.

Institute,[38] approved by the Chamber of Senators and under deliberation in the Chamber of Deputies. This simply reflects how the past experience described above can be forgotten.

In creating an anti-corruption agency, there are several lessons to be learned, but three stand out: *a)* considering the problem to be addressed, it should not be forgotten that corruption has multiple facets, *b)* developing legal and organizational tools to fight corruption should be aimed for a specific sector of society; and *c)* citizens should be wisely involved in this effort. Corruption is not eliminated by creating "laws" and "agencies", but by generating an important impact on the political-social conventions so as to reject this practice.

Within this context, we cannot forget Article 3 of the Chinese Constitution, which states that "The State organs of the People's Republic of China apply the principle of democratic centralism. The National People's Congress and the local people's congresses at different levels are instituted through democratic elections. They are responsible to the people and subject to their supervision. All administrative, judicial and procuratorial organs of the State are created by the people's congresses to which they are responsible and by which they are supervised." In this article, the principle of responsibility stands as an important tool against corruption. Therefore, it is possible for Chinese positive law to take advantage of Mexico's experience in the struggle against corruption.

[38] The initiative aims at creating the National Anti-Corruption and Control Institute and the Specialized Prosecution for the matter. The institute would be a permanent body with technical, operative, budgetary and decision-making autonomy, with its own legal personality and assets. Its main purpose would be to establish an honest and transparent government through oversight, follow-up, control, inspection, evaluation and sanctions to the public administration, where applicable. Furthermore, the institute would be able to investigate crimes committed by public servants and if necessary proceed to file suit before the corresponding courts. It would also have the power to act on administrative complaints against public servants and sanction those responsible. It would be composed of a plenary, a president of the board, a secretary general, the Control and Administrative Improvement Committee and a Special Prosecutor.

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NATURAL PERSONS, JURIDICAL PERSONS AND LEGAL PERSONHOOD

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Abstract. *The study of commercial law can be divided into four basic categories: (a) individuals (natural persons); (b) objects of commerce; (c) legal instruments and (d) administrative and legal procedures. Business relations between individuals and business entities requires significant legal documentation, including atypical or nonstandard business contracts. A central feature of all business transactions is the "legal entity", used by organizations worldwide to conduct business. In order for many businesses to carry out routine activities, they must have many of the same legal rights and responsibilities as natural persons. In a word, these entities require "legal personhood". Which leads us to the question of Legitimation. The most widely used legal instruments are nonstandardized business contracts. In essense, this is the delineation of contracting parties as entities with well-defined rights and obligations. This authority depends, in turn, on the legitimacy of the "personhood" of the contracting parties, which is often a point of dispute in business relations. Regardless of whether one accepts the use of terms "legal entity" and "legal personhood", they often give rise to immeasurable and diverse conflicts domestically, regional and at global level. This had led to efforts to improve the rules of the International Chamber of Commerce and improve legal models that provide guidance to diverse nations. We have reviewed the works of different authors concluding with the personal insights of Elvia Arcelia Quintana.*

Key Words: *Commercial, person, legal entity, personhood, legitimation, business contracts.*

Resumen. *Para facilitar el estudio de la ciencia del derecho mercantil, se ha delimitado éste en 4 grandes Universos: el de las personas; el de los objetos de comercio; el de los instrumentos jurídicos que derivan de las relaciones comerciales*

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que se desprende de los dos anteriores y por último el de los procedimientos administrativos y jurisdiccionales. Dentro del universo de las relaciones comerciales, en donde se conjugan personas y objetos, se encuentran todos los instrumentos jurídicos de los que se sirven los intercambios comerciales como son, los contratos de carácter mercantil, denominados atípicos. En el gran mundo del intercambio comercial, la figura central es la de las empresas de carácter mercantil, persona jurídica. Las empresas para exteriorizar su actividad requieren de personalidad jurídica, la cual trae aparejada el ejercicio de los derechos y el cumplimiento de las obligaciones, que nos lleva al estudio de la Legitimación. Los instrumentos jurídicos más utilizados son los contratos mercantiles atípicos. Esto nos lleva a analizar a la persona jurídica, de ésta se desprende otro campo de estudio, la delimitación de la competencia de las partes que intervienen en el contrato como entes generadores de derechos y obligaciones, que gira en torno a la legitimación de la personalidad; que a su vez, es centro generador de conflictos en las relaciones comerciales. La problemática anterior, aparentemente acepta los términos persona jurídica y personalidad; los alcances de las consecuencias jurídicas de ambas, provocan incalculables y diversos conflictos domésticos, regionales y mundiales; que ha enriquecido las normas de la Cámara Internacional de Comercio y las leyes modelo de apoyos judiciales trasfronterizos. Para analizar el estudio del tema planteado se han revisado diferentes autores, concluyendo con la aportación personal de Elvia Arcelia Quintana.

PALABRAS CLAVE: *Relaciones comerciales, persona jurídica, juridical person, personalidad, legitimación, contratos de caracter mercantil.*

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I. Introduction

Legal scholars have divided the study of commercial law into four broad areas: (a) persons (both natural persons and juridical); (b) business entities; (c) legal instruments that facilitate relations between the first two groups; and (d) administrative and legal procedures.

In business, a significant array of legal instruments are used to validate, clarify and enforce transactions. These often include, among others, contracts that are atypical or non-standard.

In fact, nearly every organization conducts business as a "legal entity", as their activities require legal personhood to exercise certain rights and fulfill certain obligations. This leads us to the next topic, legitimation.

The legal instruments used most often in business are non-standard business contracts, which leads us to the "legal entity", the basic component of the legal rights and obligations accruing to each contracting party. Whether or not a party qualifies as a "legal entity" depends on the legitimacy of legal personhood, which can often be a point of dispute in business relations.

Regardless of whether one uses the terms "legal entity" or "legal personhood," their importance has given rise to diverse conflicts, not only domestically but also at regional and global levels. This has led to encouraging efforts to improve the rules of the International Chamber of Commerce and improve model laws to enhance cross-border legal guidance. On the other hand, they have also caused the incurrence of large and substantial costs in administrative and judicial proceedings.

In order to better comprehend this subject, debated since the nineteenth century, we reviewed the works of authors such as Bonnecase, Carnelutti, Savigny, Hans Kelsen, Nicolai Hartman, Ferrara, De Benito, García Máynez, and Rodolfo Von Ihering. We conclude the paper with personal insights of the author, Elvia Arcelia Quintana.

II. Person

Merchants may be legally classified as natural persons or juridical persons.[1] The first group refers to individuals, innately capable of assuming obligations and exercising rights. The second group refers to entities with legal personhood, often referred to as collective entities,[2] juridical persons,[3] or corporations. In this paper, the term "entity" will often be used to refer to this second group.

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[1] Arcelia Quintana, Commercial Law Science 270 (Porrúa, 2004).

[2] The term collective legal entity is used by Francisco Carnelutti and has been the subject of studies in various areas of general law. See Francisco Carnelutti, General Theory of Law, 153 (Private Law Publiser, 1955).

[3] Jose L. de Benito, The Legal Personhood of Companies and Corporations, 32 (Private Law Publisher).

III. General Concept

1. *Etymology*

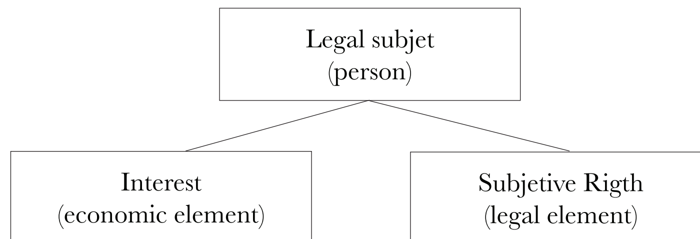
The word "person" has multiple meanings.[4] It is etymologically derived from *personare*,[5] a term related to histrionalis larva, which means mask. In this sense, the person is understood as the mask covering the face of an actor who recites verses during a scene in a play; the mask's purpose was to make the actor's voice vibrant and loud. Later, people came to use the term "person" to refer to the masked actor himself. In view of the above, it is quite understandable to associate a person as a natural being of the human species.[6]

2. *Doctrine*

Historically, legal scholars have had difficulty precisely defining "person".

Below are examples of several definitions[7] that have served as benchmarks for this legal entity.

Carnelutti[8] conceives "person" in a triangular sense. He views the subject as the vertex where personal interests (economic element) and substantive law (legal element) meet vis-a-vis a legal relationship.



For Carnelutti, the person is the "meeting point of these two elements; i.e., the crux reached by both".[9]

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[4] Eduardo García, Introduction to Law, 273 (Porrúa, 1980).

[5] García Máynez determined the origin of the word "person" is unclear but perhaps, it derives from the word pesonare.

[6] Royal Spanish Academy, voice Person, Dictionary of Spanish Language, 1593 (Espasa).

[7] Francisco Ferrara, Hans Kelsen, Carnelutti Francesco, Savigny, José L. de Benito, and Eduardo García Máynez are the reviewed authors in this article.

[8] Carnelutti, *supra* note 2.

[9] *Id.*

Moreover, he says that the legal entity includes more than man in his natural sense, that is, as an individual. It also includes those instances in which there is a collective interest uniting several men to act as in concert as if they were one.

Indeed, the collective legal entity is created when the economic element and the legal element of the legal relationship coincide, thereby creating the foundation of the collective interest.

To Carnelutti,[10] legal entities include both natural persons (individuals) and collective entities. Both types share a point of convergence between economic and legal elements; although the latter is notable for consisting of multiple individuals (not just one) united by a common interest.

Bonnecase[11] has defined the right of legal personhood as a set of rules and institutions that apply to the person, either as individuated (differentiated from others) and in its actions. For Bonnecase, legal personhood can be divided into three parts:

1. The existence and individuation of persons, that is, the elements that distinguish an individual and determine his or her legal status. Differentiating elements include name, physiological features, and place of domicile.
2. The legal capacity of individuals (natural persons) and their differences. On the one hand, this is based on the legal capacity of natural persons defined by the organization's bylaws. On the other hand, it includes the study of entities meant to make up for the shortcomings of natural persons.
3. The existence, individuation, and capacity of legal entities or juridical persons, which is the focus of this paper.

Savigny is the strongest proponent of the traditional theory, better known as the fiction theory.

Savigny[12] sees the legal entity as an artificially-created being that is capable of owning property but that lacks free will. He regarded corporations as exclusive creations of law having no existence apart from their individual members who form the corporate group and whose acts are attributed to the corporate entity.

This led Savigny to the conclusion that a "person" is any entity capable of exercising obligations and rights. Because legal entities are a legal fiction and lack free will, they cannot be a subject of law. According to this line of thought, an ordinary human being is a "person" only when he or she has the free will to acquire rights and obligations, and becomes a subject of law.

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[10] *Id.*, at 153.

[11] JULIEN, BONNECASE, ELEMENTS OF CIVIL LAW 281 (Jose M. Cajica trans., Civil Law, Volume I, Porrúa, 1945).

[12] It was his book, MODERN ROMAN LAW SYSTEM, elaborated on the foundations of his theory of fiction, which dominated from the mid-nineteenth and twentieth centuries.

Hans Kelsen,[13] mentions that, based on the fiction theory, a "subject of law is that which is the object of a legal obligation or subjective right" (the latter term is understood as the legal authority to demand the performance of an obligation, though it is not a thing but rather a form of being).

For Kelsen,[14] natural persons and juridical persons are defined by rights and obligations which, when taken together, are metaphorically expressed through the concept of "person." Kelsen denied any difference between the legal personhood of companies and that of natural persons. Personhood in the legal sense is only a technical personification of a complex of norms, rights and duties.

García Máynez[15] defines a "person" as "any entity capable of having powers and duties." He mentions that legal entities are divided into natural persons and juridical persons. The first group refers to individuals with rights and obligations; while the second focuses on associations endowed with legal personhood such as unions or corporations. Máynez prefers to differentiate between the two groups by using the terms individual legal entity and collective legal entity.[16]

In a moral or ethical sense, a "person" is endowed with free will and reason that enables it to freely plan goals and find means of bringing them about.

Máynez says that from an ethical perspective —and based on the ideas of German philosopher Nicolai Hartmann—[17] a "person" is capable of making moral judgments, although he makes clear that these judgments do not necessarily determine its conduct. As such, free will is a critical element of legal personhood.

The legal significance of the natural person (or individual) is related to whether legal personhood is a necessary outgrowth of the characteristics of that individual, such that the legal personhood of a physical person is not derived from his human existence.

Regarding the concept of legal entity, Máynez notes that it should be seen through the lens of the "theories of legal personhood of collective entities".[18]

a) Fiction Theory (Savigny): Claims that juridical persons, e.g., corporations and other collective entities, are legal fictions, without any effective existence in the real world. As such, a legal person includes any entity capable of exercising obligations and rights.[19]
b) Purpose Theory (Brinz): Teaches that corporate property is not owned by fictitious entities created by the state but by no person at all. In es-

[13] Hans Kelsen, Pure Theory of Law, 178 (Porrúa, 2000).
[14] *Id.,* at 183.
[15] Máynez, *supra* note 4, at 21.
[16] *Id.*
[17] Máynez, *supra* note 4, at 274.
[18] *Id.,* at 278.
[19] *Id.*

sence, corporate property belongs not to individuals but to a purpose – "Zweckvermögen". Although the so-called "purpose theory" has few followers, it contains an important element of truth; that the property of every corporation, not merely charitable foundations but also business companies, is dedicated to a specific purpose.[20]

c) Realist Theories: Hold that legal entities, both private and public, are real. As such, those with rights include not only humans but every being which possesses a will and life of its own. According to this thinking, a corporation exists as an objectively real entity and the law merely recognizes and gives effect to its existence. Thus, the law cannot create entities but merely recognize them. These theories include "organicism,"[21] the collective soul theory[22], and social organism theory.[23]

d) Formalist theory or Theory of Technical Reality (Francisco Ferrara). The word "person" has three meanings for Mr. Ferrara: (a) biological, referring to a rational being; (b) philosophical, referring to a rational being capable of proposing and carrying out objetives; and (c) legal, which treats the person as a subject of law with rights and obligations.[24] Mr. Ferrara regarded the last as merely a status or state of being, which includes only companies and social organizations.[25]

Reviewing Ferrara's ideas, Eduardo García Máynez[26] believes that the recognition of legal personhood for the right target has constitutive effectiveness. Which is to say that legal persons are not created by legislative act but already exist; the law merely recognizes and gives effect to their existence.

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[20] Garcia Máynez states, "The rights and obligations of collective persons are not, according to the Brinz thesis, the obligations and rights of a subject, but of its assets. The acts carried out by the former's agents are not exactly those of the legal person but rather those of the agents that carry out the objectives and reach the goal toward which the assets are dedicated. Despite this, all rights are, a fortiori, the legal power of someone and any obligation necessarily implies the existence of an oblige." *Id.*, at 282.

Organicism is based on the notion that "collective entities are real entities compared to the human individual." *Id. at* 287.

[21] *Id.,* at 287. Organicism is based on the notion that "collective entities are real entities compared to the human individual".

[22] According to this school of thought, in every society there exists a soul or collective spirit that is different than the individual souls of those who make up the group, which is why it is not problematic that collective legal entities coexist alongside physical persons.

[23] *Id.,* at 287. The chief proponent of the theory of social organism is Otto Gierke, who says that "the collective person is not like a third party compared to its members, it is the organic link that binds them together, from which stems the possibility of connecting the rights of the unit and the whole. The corporative person is undoubtedly above, but not separate from, the collective group of persons who make it up;... it is an entity that is both unique and collective."

[24] *Id.,* at 288

[25] Francisco Ferrara, Theory of Legal Persons, 342 (Reus Publisher 1929).

[26] Máynez, *supra* note 4, at 294.

IV. Characteristics of the Legal Entity

1. *Doctrine*

For Kelsen, both natural persons and juridical persons are subject to rights and obligations. In general, only humans can be considered natural persons, since it is through their conduct that they can obtain rights and fulfill (or violate) obligations. Both natural persons and juridical persons have actions, which are understood as the legal obligations and subjective rights that make up this entity.

Regarding the duties of juridical persons, the articles of incorporation and bylaws of each entity serve as a benchmark to govern the actions of individuals who, as agents of said entity, fulfill (or violate) certain obligations. This situation, called "fictitious attribution",[27] allows one to consider the legal entity as capable of being bound by obligations.

As to the subjective rights of the legal entity, these are exercised by agents pursuant to that set forth in the articles of incorporation.[28] According to Kelsen, the validity of these articles stems from a legal transaction specified by the applicable laws.

Finally, Kelsen[29] discusses the legal obligations and rights of juridical persons, subject to applicable law and regulations.

Elements of the juridical person under Kelsen's theory are:

- Artificial entity.
- Conduct.
- Legal capacity.
- Subjective rights.
- Obligations.
- Free will.
- Legal personhood.

De Benito[30] requires the following for the existence of a legal entity:

- Multiple individuals.
- Cooperation.
- Organization.
- Exclusive ownership of property.
- Social purpose.

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[27] Kelsen, *supra* note 13, at 191.

[28] *Id.,* at 196.

[29] *Id.,* at 199.

[30] De Benito, *supra* note 3, at 42.

Carnelutti claims that legal entities are characterized by:

— Legal capacity.
— Legal personhood.
— Economic element.
— Legal element.

2. *Concept*

In the author's opinion, the features that give rise to the formation of a legal entity are:

a) Existence of an entity or subject: A subject of law is all those beings capable of acting as a holder of the powers or duties for which they are liable in a legal relationship. The term "subject of law" or "legal entity" refers to an unspecified person.
b) Free will of the entity or subject: Free will is based on the subject's conduct realized with the intent of producing certain legal effects, for which it is important that the law (that will be externalized in some manner) have legal consequences.
c) Subtantive rights: This refers to the effectiveness of the law to protect the legal entity.
d) Legal personhood: See below.
e) Obligations, and
f) Economic interests.

3. *Legal Personhood*

In the study of law, the word "personhood" has several meanings. In effect, legal personhood endows the subject with certain legal rights and obligations within a particular legal system, e.g., entering into contracts, owing property, incurring debt, etc. Legal personality is a prerequisite to legal capacity, the ability of any legal person to amend (enter into, transfer, etc.) rights and obligations.

A. *Theories of Personhood*

In this article, we analyze several theories that attempt to explain "legal personhood" as it applies to business entities. These include the theory of affectation, apparent subject theory, atomistic theory of the state, fiction theory, theory of legal action, and the corporate veil theory.

a. Theory of Affectation

This theory takes claims that the protection given to the legal relationship between a material good and a person is the same as the protection given a legal relationship created between an asset and its purpose.

According to this theory, there are no elements to identify what is legal personhood. However, an inert asset is not susceptible to creating a legal relationship. Doing this requires either a natural person or juridical person with free will. In order for a subject of law to have a legal manifestation, it requires free will since this is necessary to have a legal effect and also has the added effect of distinguishing it from the other parties involved in that legal relationship.

b. Apparent Subject Theory

This theory was developed by Rudolph Von Ihering,[31] who holds that law consist of two elements. One is substantive, involving a specific purpose and the use or enjoyment of something with economic or moral value. The other is formalistic and refers only to the protection of that right.[32]

A natural person only has legal personhood to the extent that he or she is the sole recipient of these protected interests, which legal entities lack.

Corporate personhood is a concept not exclusive to humans, since personhood cannot stem from the will of natural persons as there are many who lack it. However, they remain individuated as holders of rights and obligations.

Despite the fact that juridical persons have their own interests or rights, personhood is not based solely on laws that grant these interests or rights. Rather, the person is the legal subject or substance of which rights and duties are attributed. An individual having such attributes is called by jurists a "natural person". Many basic human rights are implicitly granted only to natural persons. For example, a law that prevents discrimination or forbids the government from denying certain rights based on gender, apply solely to natural persons. Another example of the difference between natural and legal persons is that a natural person can hold public office, but a corporation cannot. [33]

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[31] Rudolf Von Ihering was born in Aurich, Germany in 1818. His legal training took place at the universities of Heidelberg, Munich, Göttingen, and Berlin. He served as a teacher in Basel, Rostok, Kiel, Gissen, Vienna, and Göttingen, where he died in 1892. His methodological points of view had a great impact on the field of historical legal research and the science of law in general.

[32] Rudolf Von Ihering, *The Spirit Of Roman Law*, Law Review Collection, Art Law Section, 1033 and 1040 (Comares Publisher, 1998).

[33] The law is "a set of substantive and procedural rules issued by the state and that govern, during the time in which they are in effect, members of a society in a given territory."

c. Atomic State Theory

Lingg,[34] who advocated this theory, starts with the idea that only human beings are real and can perform labor; ergo legal personhood can only be ascribed to individuals and not states.

The legal business entity in private law is conceived as a state of being governed by the legal system. This doctrine considers personhood as the existence of a number of individuals exercising their powers in pursuit of a common goal and recognized by applicable law in the same manner as if they were a single person. This situation emerges by linking that statement with a factual situation recognized by the legal regime as a factor of individualization of the entity with free will, without implying that this sole statement can create personhood, given that one requires both recognition by the legal regime and free will of the entity that the regime individualizes.

d. Fiction Theory

Friedrich Carl von Savigny[35] theorized that only a natural person is capable of exercising rights and obligations. This is considered to be the oldest and most prevalent theory in Germany (since the mid-nineteenth century) and Italy and France (since the mid-twentieth century).[36]

In fiction theory, the juridical person or corporation is an exception to the rule that only natural persons can exercise rights and obligations. This exception is facilitated by a legal fiction that recognizes the artificial capacity of a fictitious entity to possess or own goods. Savigny defines the legal entity as an artificially created subject of property[37] and that this entity develops its capacity or legal personhood only through property ownership. Property is the means to achieve the objectives for which the legal entity was created.

In sum, the fiction theory equates personhood with the ability to exercise certain rights. It similarly compares legally incapacitated natural persons with juridical persons, given how both fictional subjects of law and natural persons suffering from capitis deminutio cannot, by themselves, exert their will within a legal relationship and instead require a representative to exercise their rights granted to them by law.

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[34] Ferrara, *supra* note 25, at 237.

[35] He was born in Frankfurt, Germany in 1779. He studied in the universities of Gitinga and Merburg, and ultimately served as a professor of law in Merburg, as well as in Landshut and Berlin. A leader in the field of legal history, he died in 1861.

[36] Carlos Fernández, The Legal Notion of Person, 106 (San Marcos, 1962).

[37] *Id.,* at 59.

e. Legal Action Theory

In discussing corporate personhood, Ferrara[38] asserts that juridical persons are not things but rather a state of being. In a sense, legal personhood is like an organic garment with which certain collectives or organizations clothe themselves, a configuration used for the purpose of engaging in commerce. This "label" is imposed on collectives (either business or social organizations) regardless of the subject matter involved.

For this reason, there is no substantial difference between informal associations (those unrecognized by law) and corporations. In both cases, the subject matter is the same and the act of recognizing either's legal personhood has no value other than to provide the natural persons involved with the most appropriate type of legal status.[39]

As this paper attempts to clarify, juridical persons are not created by law but recognized as legal entities with already existing rights and obligations. This recognition forms the basis for their legal personhood.

f. Corporate Veil Doctrine

One could argue that legal personhood is like a "veil" that protects a corporation, subject to removal or "piercing" when used abusively by corporate officers for their own personal gain; to harm third parties; or circumvent laws that they would be unable to avoid except for the legal personhood of the corporation.

The German[40] jurist Serick is credited with pioneering the study of law by systematically analyzing previous court rulings. The doctrine of piercing the corporate veil originated in American law as the disregard theory[41] or the doctrine of corporate disregard.[42] Powell,[43] in turn, defined this theory as "the removal of legal personhood of a corporation in a particular case in order to

[38] Ferrara, *supra* note 25, at 342.

[39] *Id.*

[40] With the publication of his book, "*Apariencia y realidad en las sociedades mercantiles. El abuso de derecho por medio de la personalidad jurídica,*" Rolf Serick succeeded in expanding his theory not only to Europe but also to Spanish-speaking countries, thanks to the translation by the Spaniard, Puig Brutau. However, the original idea is recognized as having been a product of American jurisprudence with the development of the disregard theory. Carmen Boldo, Lifting the Veil and Legal Person in Spanish Private Law, 30-31 (Navarra Publisher, 1997).

[41] Acosta Romero translates this to Spanish as the "teoría del allanamiento de la personalidad," or the theory of disregard of personhood. M. Acosta Romero et al., Corporations Treaty with Emphasis on the Corporation, 693 (Porrúa, 2001).

[42] Boldó, supra note 40, at 30.

[43] Ana Brian Nougreres, *The legal status of commercial companies. Some modern doctrinal trends*, 10 Journal of Private Law, Mexico, UNAM Legal Research Institute, January-April 1993,19-20.

reach the natural or legal persons behind the same and the underlying economic reality, to apply the substantive law relevant to the specific situation." [44]

The rationale underlying this theory stems from the corporate officers' "abuse" of the corporation's legal personhood by using it a "screen" for their own personal motives, thereby shielding themselves from liabilities arising from their contractual breach. In so doing, they injure the interests of others and flout the law.

In English law, Gower[45] distinguishes cases in which the corporate veil is pierced into four categories: 1) tax-related cases; 2) companies involving a single owner; 3) the use of corporations for fraudulent purposes; and 4) cases involving subsidiaries and holding companies.

In a harsh criticism of corporate personhood, supporters of the contractual theory yexactinve scrutity, especially if the protection provided by its legal personhood is abused.

However, the application of this theory has resorted to the technique of disregard of legal entity to ignore the legal status of the entity, penetrate it so a to reach its shareholders, "lift the veil" of the legal entity.

In Mexican law, the application of the corporate veil theory, abuse of legal personhood, elimination of personhood, and veil lifting (to mention just some of the names that this theory is known by) imply a lack of such personhood, an essential element of the corporation. Accepting the application of the corporate veil theory necessarily involves denying that corporations possess rights other than those held by the partners who established it.

This conflicts with the principle contained in Article 2 of the Law of Mexican Corporations, according to which legal personhood is recognized for both regular and irregular corporations, with the caveat that this second type is required to hold itself out as a corporation to third parties.

In conclusion, we can say that a "veil" which protects the legal entity can be lifted or "pierced" when it is abused by corporate officers, either for their own personal benefit in detriment of third parties; or to circumvent certain laws to which they would be bound as natural persons.

B. *Requirements for Legal Personhood*

The requirements that help create or establish legal personhood are:

First, the involvement heritage theory, the apparent subject theory, the atomic state theory, and the fiction theory regard legal personhood as something natural to man, which is why these theories generally use the terms person and personhood synonymously, even when they are different. They similarly amalgamate personhood with free will or capacity. That is why these theories

[44] *Id.*

[45] *Id.*

claim that only natural persons have true personhood, since only individuals have free will. In this way, collective entities are a legal fiction.

Unlike these theories, the legal action theory recognizes the legal entity, distinguishing between the person and personhood.

In order to identify the subject of law, three requirements must be met:

a) The existence of a subject of law,
b) A factual situation that individualizes it in terms of the ownership of rights and fulfillment of obligations, and
c) The recognition of that individualization by existing law.

In sum, legal personhood arises when a legal construct becomes a reality. That legal construct pertains to a particular factual situation in which the subject of law or an undetermined person finds itself individualized as the holder of certain rights and certain obligations in a legal relationship.

V. Personhood in Commercial Statutory Law

In Mexican commercial statutory law, there is no provision defining legal personhood even though this term is employed, especially in adjectival or procedural aspects. In this way, legal rulings about legal personhood usually do so in terms of the requirements that must be met for a person to intervene in a particular act or business transaction.[46]

In other business laws,[47] the term legal personhood is used to refer to the fact that certain state-owned entities that regulate the operations of business have legal personhood, though these laws do not specify what this means.

When legal personhood is mentioned in legislation, it is generally done so in a negative way; i.e., in regard to the lack or loss of personhood. This suggests that people should demonstrate the existence of that element in order to perform certain legal actions.

The Commercial Code[48] does not include any definition of personhood, but nonetheless explains its meaning by requiring judges to examine each respective party's personhood. They even provide litigants that a litigant can challenge the opposing party's personhood when it appears that the plaintiff or defendant lacks a legal prerequisite.

Based on an analysis of diverse business laws, we can conclude that the concept of legal personhood suffices for the practical applications for which it is used.

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[46] The article 391 of the Code of Commerce refers to the assignment of letters of credit that are not endorsable.

[47] Among these bodies of regulatory law are the Law of Chambers of Commerce and their Confederations (Art. 4); Law of the Mint of Mexico (Art. 2), Law of Protection and Defense of Financial Services Users (Art. 4) and the General Law of Corporations (Art. 2).

[48] Articles 1056 to 1062 regulate personhood and the legal capacity of the parties.

VI. Personhood in Jurisprudence

Based on criteria set forth by the Mexican federal courts, there is no clear concept of what constitutes legal personhood. This is because Mexican courts have limited themselves to simply duplicating (with some variations) the text of the law, stating that "personhood is an issue that must be considered at any stage of trial and even informally due to the being the foundation of the proceeding."

For a business association involved in a legal proceeding, it is necessary to demonstrate two personhoods: that of the association itself as a legal entity and that of its representative who must demonstrate that he or she has sufficient authority to act on behalf of the entity. This has been considered in the jurisprudence of the Second Chamber of the Supreme Court of Justice.[49]

However, there are other criteria[50] in which the personhood of the representative of a legal person continue being seen as an outgrowth of its principle. Given the absence of uniform criteria in Mexican law, the personhood of business entities (or corporate personhood) remains a matter of dispute.

VII. Elements of the Legal Entity in Mexican Law

The Federal Constitution in Articles 5, 13, 14, 16, 20 sections V and IX, among others, uses the term "person" to refer to both natural persons as well as corporations, considering them as subjects of law governing generic hypotheses of these precepts. Based on these provisions, it is clear that the constitutional text refers to those who possess individual rights, including both juridical persons and natural persons. Then, it follows the main element recognizes the legal person is related to the subjective rights and guarantees enshrined.

For its part, the Federal Civil Code's first chapter, called "on natural persons", is devoted to discussing the natural person; while the second chapter focuses on corporations. This law considers the following as juridical persons: the nation, states, municipalities, public organizations recognized by the Code, professional associations, and others entities referred to in Section XVI of Article 123 of the Federal Constitution; mutual cooperative associations; other associations with diverse political purposes; organizations devoted to scientific, artistic, recreation or any other lawful purpose not unknown to law; and private foreign legal entities.

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[49] *See* Jurisprudential Thesis, Personhood in the Labor Process. Requirements That Notarial Testimony Must Satisfy Regarding Corporations, Judicial Weekly of the Federation and its Gazette, Ninth Period, Volume XII, September 2000, p. 112.

[50] *See* thesis 892, under voice: Personhood Derived Representation or Support in the Appendix of the Judicial Weekly of the Federation from 1917 to 1995, Volume VI, Common Law, Part Two, p. 613.

Under the provisions of the Federal Civil Code that governs the person being studied in this paper, the following elements are apparent: substantive rights, obligations and free will.[51]

Corporate statutes[52] that refer to natural persons or juridical persons classify both under the rubric of merchants, which consist of objective and subjective criteria for the former, and formalistic criteria for the latter.[53]

The Commerce Code's merchant classification of the legal entity and corporation is a result of its legal status, as with the Federal Labor Act, which classifies workers as natural persons who provide personal services and are subordinate to another (natural or juridical) person that pays them a salary.

Therefore, the characteristic that follows from the Comerce Code is the legal personhood of the corporation, which is a characteristic that allows the corporation to identify itself as a merchant.

Under the General Law of Business Corporations, another feature pertains to the free will of the business entity. This free will, however, refers to activities of the legal person itself and is reflected in the legal relationships established or created as a result of those volitional acts from which there necessarily stem subjective rights and obligations that emerge.

Elements of the legal entity arising from these statutes are: legal personhood, free will, subjective rights, and obligations of an entity or subject, which coincide with the same element as those specified in the section discussing this author's personal insights.

VIII. Elements of Jurisprudence

The corporation as a subject of law has also been a focus of attention within the criterion that federal courts have issued. In one such criterion, the federal Circuit Courts discuss the nature and legal personhood of the juridical person, stating that "a corporation is a fictional entity whose legal personhood is expressed and exercised through its representatives; which is understandable given that its very nature requires the involvement of natural persons, managers or administrators to represent it and work on its behalf, given that fictional entities cannot labor on their own behalf.

In analyzing these criteria, other elements of legal entities include:

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[51] The doctrinal elements define the legal entity.

[52] Reviewing the Article 3rd Code of Commerce.

[53] According to the subjective criterion, those who conduct themselves according to law are merchants, regardless of whether or not they have a fixed place of business. According to the objective criterion, merchants are persons with legal capacity to enter into contracts and bind a business, engage in commercial transactions, and make this their ordinary job. According to the formal criterion, merchants are the *personas morales* formed upon satisfaction of the requirements of commercial statutes or and other applicable laws.

— The powers and subjective rights of the legal entity.[54]
— The free will of the entity or social will.[55]
— Obligations of the entity.[56]

Based on Mexican jurisprudence, the concept of juridical person includes the following elements:

I. Existence of a legally-recognized entity;
II. Free will of that entity, set forth in its articles of incorporation and manifest through its agents;
III. RIghts and obligations accruing to the business entity; and
IV. Legal identity independent from that of its shareholders and subject to law in its own right.

IX. Conclusions

> A legal entity is a legal construct, created by the combination of five elements: an entity or subject of law, free will, subjective rights, obligations, and legal personhood.

As a practical matter, the juridical person distinguishes itself through the recognition of its legal personhood, which allows it to acquire certain rights and be subject to certain obligations. As such, the actions of a legal entity demonstrate its will.

In addition to identifying the holder of rights and obligations, legal personhood helps ensure that actions realized by the business entity have legal effect.

The factual situation that gives an identity to the juridical person and the relevant legal regime's recognition of it are what gives the juridical person its legal personhood, which is a factor that distinguishes it from other subjects that also possess free will and are capable of exercising rights and fulfilling obligations.

Having set forth arguments in support of this thesis, we can state that the focus of this study does not form part of the physical person. Therefore, it can be applied to juridical persons, which are fictional entities in the real world but very real ones in the world of law.

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[54] *See* Thesis, Directors. The Inherent Powers of a Trustee are Governed by the General Law of Business Corporations, in the Judicial Weekly of the Federation and its Gazette, Volume XVI, July 2002, p. 1237

[55] *See also* Thesis, Legal Representation and Corporate Manager. Differences Between Functional or Organic Representation and Mandates, in the Judicial Weekly of the Federation and its Gazette, Volume XIII, June 2001, p. 759.

[56] *See also* Thesis, General Managers. Cases in Which they Lack Standing to Obtain an *Amparo* Remedy, in the Judicial Weekly of the Federation and its Gazette, Volume III, June 1996, p. 846.

Indeed, legal entities have five elements:

First, they must have the ability to possess rights.

Second, they must have free will pursuant to that set forth in its articles of incorporation.

The third and fourth elements, which are related to its subjective rights and obligations, exist within a corporation because it has will. However, there are cases in which express authority is necessary to create rights and obligations, due to conduct and circumstances that establish authority without the volitional aspect.

> Based on the ideas above, we can confirm that legal personhood is a creation of law, whose role is to identify the subjects of certain rights and obligations, and grant legitimacy to actions realized pursuant to those rights and obligations.

The fifth element of legal personhood, on the other hand, encompasses several elements. One of these is a factual situation identifying it and that occurs when it adopts one of the types of business associations provided for in the General Law of Business Corporations. In addition, upon recognizing these types of business associations we find another aspect of legal personhood; namely the law's recognition of the legal entity's separate identity.

In sum, we can conclude that the legal entity can be defined as follows: A juridical person is an abstract subject created under law and having free will, rights, obligations, and legal personhood, which give it a separate identity within legal relationships and make it a generator of economic, financial, and commercial obligations.

Personhood is the individualization of the legal entity through a factual situation in which it finds itself overseen by a legal rule that allows one to distinguish it from other entities in the business law relationships within the area of law in which the matter unfolds.

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MEXICO'S UPSTREAM BUSINESS MODEL

George BAKER*

ABSTRACT. *A fundamental question concerning the upstream business model that is incorporated into the 2014 Energy Reform in Mexico concerns the intended evolution of the energy policy framework in which it appears. The situation of "before," as alluded to in President Peña's remarks on March 18, 2015, was one in which Pemex served as the iconic state monopoly, and through which, by virtue of Article 6 of the now-abrogated Petroleum Law of 1958, all contracting was required to take place under restrictive terms that excluded the business model of an oil company. The government is now offering a mineral contract that approximates the business model of a mineral lease as understood diverse jurisdictions, including the U.S. and Mexico. There are important differences, however, ones that represent for the State and the prospective operator and layers of uncertainty and regulatory discretionality. As for the broader benefits for the country that the new involvement of oil companies might bring, there are a priori reasons for concern: the government seeks to sharply restrict the reporting of statistical data on the operations and discoveries of the oil companies, including Pemex. All such data are to be funneled through and managed by a single government agency (CNH), redolent of the way the way that Pemex has traditionally reported data. A decade will be needed to recast the national oil narrative in a way that allows for an evolution of the upstream regime in 2026 in which a mineral lease will be offered to oil companies.*

KEY WORDS: *Energy Reform of 2014, Round 1, upstream regime, National Hydrocarbon Commission (CNH), Pemex, biddable variables, Petroleum Law of 1958, Lázaro Cárdenas del Río, Mexico's petroleum narrative, Energy Reform of 2026.*

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Resumen. *El autor estima que la Reforma Energética de 2014 representa un planteamiento transicional para otra reforma que tomará una década más para redimensionar la figura de Lázaro Cárdenas y para incorporar los conceptos pertinentes de la nueva legislación en un nuevo marco de la Ley Minera. La próxima reforma abrazará los valores de un mercado abierto, tanto en productos como en el comercio de información sobre el subsuelo. Se ve que la legislación de 2014 contempla un ajuste técnico para crear un espacio restringido para que el capital privado pueda invertir en los procesos de explorar y extraer hidrocarburos, y así revertir la producción declinante de la última década. El Estado seguirá siendo la operadora ficticia. Así, se denomina la operadora que gane una licitación en una ronda "contratista." Estima que no es el propósito del nuevo marco cambiar la narrativa tradicional, en la cual seguirá girando alrededor de Pemex como la figura icónica de la gestión pública en material petrolera. Se ve que en el contrato contemplado por el nuevo marco, el contratista recibirá compensación bajo un régimen de tarifa (o precio) por pieza energética, a diferencia de la condición de la operadora por los conceptos de la Ley Minera: para él, se establece por el contracto que toda la producción es de su propiedad. El autor identifica conceptos problemáticos como la limitación del contracto a un máximo de 35 años y reserva como propiedad del Estado; ofrece su visión del sector petrolero en una reforma energética de 2026.*

Palabras clave: *Reforma energética de 2014, Ronda 1, régimen upstream, Comisión Nacional de Hidrocarburos (CNH), Petróleos Mexicanos, variables de adjudicación, Ley Petrolera de 1958, Lázaro Cárdenas del Río, narrativa petrolera mexicana, reforma energética de 2026.*

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I. Introduction

Among his remarks at the 77th commemoration of the Oil Expropriation on March 18, 2015, President Enrique Peña boasted that Mexico now has the "vanguard model" for the development of the hydrocarbon patrimony of Mexico. He characterized the energy reform as the most important development for Pemex and the country in over fifty years.

From the standpoint of legal scholarship as well as for commercial understandings, it will be useful to seek clarity about both the prior and current models; and it is not too soon to look ahead to a future point when the Energy Reform of 2014, which went beyond the reach of the Energy Reform of 2008, will itself need to be succeeded by a third reform.

This way of framing the subject suggests an outline in which the salient features of the past, present and future legal and commercial frameworks are described. A convenient, preliminary starting point is consideration of the legal concepts that apply, in general, to the ownership and extraction of minerals.

1. *Scope of Discussion*

We shall first examine the nature of a mineral lease as it is understood in the lower 48 states of the American Union (as the U.S. is sometimes referred to in Mexico) and then turn to similarities and differences in the concept of concession in the Mining Law and the concept of mineral contract in the Hydrocarbon Law.

We shall describe some of the salient features of the business model that emerges from the choice to create a constitutional and legal regime for hydrocarbons that is separate from those that apply to other minerals.

In the final section, we shall look ahead to a future energy reform which, at the soonest, will take place in 2026.

Before entering into those topics, however, we shall examine the evolution of the mineral regimes in Mexico, and the emergence of the oil sector as a contiguous, but separate, domain of law. We shall look carefully at Mexico's Mining Code of 1884 and the first Petroleum Law of 1901.Moving forward, we give attention to the Mining Law that was promulgated June 26, 1992, and which was amended on August 11, 2014, as one of the pieces of the energy reform legislation.

The oil regime put in place by the Energy Reform of 2014 is best understood as a moment in the evolution of legal theory regarding the mining of minerals in Spanish America. For more than four centuries, in the Spanish empire minerals *in situ* of whatever nature belonged to the Crown; their extraction would be carried out by concession with close public oversight regarding the payment of royalties. After independence from Spain, min-

ing as a topic of jurisprudence did not appear in any constitution in Mexico prior to that of 1917. In its Article 27, it was established as a principle that only Mexicans by birth or naturalization could obtain concessions; but the same treatment could be extended to foreigners under the condition that they would agree to be regulated and protected exclusively by Mexican law.[1]

In between the Spanish regime and the Mexican regime of 1917 there was a period of 33 years (1884-1917) in which a completely different regime was in place. The *Mining Code of 1884*, in its Article 4, granted mineral rights to private parties for an unlimited period *(tiempo ilimitado)*, provided that the activities of exploitation were continued in accordance with regulations in force. By Article 6, foreigners could acquire mining rights on the condition of accepting treatment under Mexican law. By Article 7, titles to mining properties could be transferred freely, "like any other real estate." By Article 10, the surface owner of a property, without prior official adjudication, could carry out activities of exploration and extraction.

The Mining Law of 1892, in Art. 4, established that the surface owner may exploit, without the need of a special concession "combustible minerals," including oils and "mineral waters." In Art. 13, "any inhabitant of the Republic could freely carry out exploration conducive to the discovery of mineral deposits."

The Petroleum Act of 1901 established a regime in which, in its first article, permits would be issued for the purpose of exploration, but, by Article 2, only for one year, and in relation to which a tax of five cents/hectare[2] would be payable with fiscal stamps. Patents for commercial exploitation would be issued, but only for ten years (Art. 3). Property owners would continue to enjoy privileges of exploration and extraction of petroleum resources (per Art. 4 of the Mining Code) with certain safeguards of public policy.

It was during this period that international investment, led by British and American entrepreneurs, built the foundations of the Mexican oil industry. Starting from zero, by 1921 Mexico was the second-highest oil exporter in the world —after the United States.

It would be Article 27 of the Constitution of 1917 that brought an end to this open-market regime, not only in relation to petroleum but in relation to the entire mining sector: henceforth, all subsurface minerals would belong to the Nation, a fictive legal entity that stood above, or behind, the State as public authority. In the Petroleum Law of 1925, it would be concession-holders, not property-owners, who would have the right to explore

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[1] Foreigners would not have recourse to production of the governments of their respective nationalities, a principle known as the Calvo Doctrine, named after Argentine legal scholar Carlos Calvo.

[2] Equivalent to Ms$5/km2 (not adjusted for inflation). The concept of an exploration fee based on the area of property reappears in the 2014 Hydrocarbon Revenue Act where (in Art. 23) a tax of Mx$1,150/km^2 is applicable for the initial 60 months, and, beyond 60 months, $2,750/ km^2.

and extract petroleum (Art. 4). The entire petroleum value chain became the subject of federal jurisdiction. The surface property owner who was not the concession-holder would receive a minimum of 5% of gross production as compensation (Art. 8).

At the level of legal theory, it would be the Federal Executive that authorizes the activities required by the petroleum industry (Art. 2). This legal construction differs sharply from the one that would be put forward 33 years later in 1958 when it would be the Nation as a fictive entity that carried out those activities through the agency of Petróleos Mexicanos (Art. 2). This new framework would continue in force for the next 55 years, and be preserved in the Hydrocarbon Act of 2014 (Art. 3).

2. *The 1992 Mining Law in Mexico*

The basic terms in the Mining Law[3] are cognate to those in the Hydrocarbon Law[4] in the sense that prospective acreage (called a "mineral lot" in the Mining Law, and measured in hectares, not square kilometers) may be assigned to a state agency or awarded, by public tender, to a private party. In both cases, real estate to which a state agency has a legal right is an *asignación*.

The similarities largely end at this point: In the Mining Law, the work of exploration and the determination of commerciality are assigned to the Mexican Geological Service (SGM),[5] which is given 6 years in which to make a recommendation to the Economy Ministry about the suitability of a lot for commercial development. The period of a concession is much longer than in the Hydrocarbon Law: In first instance, 50 years (with the possibility of extending it for an equal period), but in the second instance, just 25 years with two optional five-year extensions.

An auction for the commercial rights to a lot is called a *concurso*, not a *licitación*, as in the Hydrocarbon Law. The rights are granted as a matter of eminent domain, as in the Hydrocarbon Law. There are mineral taxes (*derechos sobre minería*). By Article 13-bis (III), the biddable variables are 1) the payment that the concession-holder is willing to make to the government *(contraprestación económica)* and 2) the bonus payable upon a commercial discovery *(prima por descubrimiento)*. The nature of the payment is to be defined, in each case, in the terms and conditions of the bidding guidelines *(bases del concurso)*. For a given auction of a lot, the Economy Ministry may establish a minimal royalty *(regalía minima)* for the discovery bonus, payable to the SGM. Article 32 of the

3 Ley Minera [L.M.] [Mining Law] *as amended*, Diario Oficial de la Federación [D.O.], 11 de Agosto de 2014 (Mex.).

4 Ley Hidrocarburos [L.H.] [Hydrocarbons Law] *as amended*, Diario Oficial de la Federación [D.O.], 11 de Agosto de 2014 (Mex.).

5 Servicio Geológico Mexicano, http://www.sgm.gob.mx (last visited Dec. 15, 2014)

Regulations *(Reglamento)* of the Mining Law provides that a discovery bonus may be a fixed or variable percentage.

Neither the law nor its regulations specify the commercial rights of the concession-holder. Article 19 states that "Mineral concessions confer the right to: ...dispose of the mineral products that are obtained in the said mineral lots …during the period of the concession." By Roman law, "to dispose" includes the *sale* of production in national or international markets; also, given that the concession-holder has paid a lease for a commercial discovery, the size of the discovery is in the public record. In theory, the concession-holder's reserves (in metric tonnes) are publicly posted, but, in practice, they are not.

Tellingly, the term "*Nación*" appears only twice in the Mining Law and not at all in its regulations. Although all minerals are, by law, property under the jurisdiction of the State, there is no specification of the delivery point at which title is conveyed to the concession-holder.

II. General Discussion

In this section we shall first try to make clear the nature of a mineral lease as understood in U.S. and Mexican jurisdictions. We shall argue that the business model as embedded in the 2014 Energy Reform is not a mineral lease but a mineral contract.

We seek clarity about how the Mexican figure of *mineral concession* matches with the U.S. *mineral lease*, and how the figure of *contractor* in the Hydrocarbon Law differs from both a Mexican mineral *concession-holder* and a U.S. mineral *lease-holder.*

In order to have an adult conversation about a mineral lease in Mexico or anywhere else, a small number of basic concepts need to be put in the table for discussion (Table 1).

Table 1. Common terms in U.S. mineral leases

Term in USA usage	*Translation per 2014 Reform*
Access (to lease area)	Servidumbre legal
Contractor (of oilfield services)	Tercero (contratado por el contratista)
Exploitation (commercial)	Explotación
Landman	Asignatario o contratista
Lease	Concesión
Lessee	Concesionario
Liability	Responsabilidad (jurídica)
Mineral estate	Patrimonio (sobre recursos naturales)
Period (of lease)	Período

Royalty	Regalía
Severance	Extracción
Severance tax	Derecho (sobre extracción)
Signing bonus	Bono a la firma
Surface damage	Afectación superficial
Surface owner	Superficiario
Title conveyance (hydrocarbons)	Transmisión onerosa

We say that these topics *are for discussion*, not for definition, as their precise definitions will vary from one commercial agreement or another, and from one legal regime (or jurisdiction) to another (as between civil- or Roman-law and common-law jurisdictions).

The starting point for a discussion of the topic of mineral lease is the presumption that the minerals are the property of someone. Such a conversation cannot (yet) take place about leases for minerals that are known to exist on the Moon or beyond the 200-mile limit of the exclusive economic zone of a country that borders an ocean. On land, the condition that minerals are the property of someone does not, however, establish that the surface owner of the real property is the owner of the associated mineral estate. It may turn out that the mineral rights have been severed in the conveyance of title to the surface owner.

It is the mineral owner (be the party the surface owner or a third party party) who enters into a mineral lease for the exploration and commercial exploitation of a specific mineral (such as silver or oil and gas). In negotiating a lease, the mineral owner obtains, on an exclusive basis, the right to explore and extract specific minerals for the commercial benefit of the lessee and the financial benefit of the mineral owner.

Payments and taxes under the terms of a lease take one form or another, but, minimally, they include a royalty on commercial production (volumes net of water and impurities).

The lease provides that the lessee will bear all costs of exploration, extraction and abandonment, and assume liability for environmental damages or injuries.

The lease will be granted for a specific period, such as 25 years, but with the provision that the period of the lease will extended provided mineral production continues in paying quantities (meaning, in commercial volumes). When a leased area is deemed to have no further commercial production (given the cost structure of the operator), mineral rights revert to the mineral owner.[6]

An entirely different, but no less important, topic for discussion concerns the access to the surface property to which the mineral lease pertains. Wichita

[6] It routinely happens in open-market jurisdictions that the same property will be re-leased to an operator with a lower cost structure and for whom the field still has commercial life.

oilman Ronald D. Smith tells the story of the situation in Wyoming where the U.S. federal government granted free land to settlers but with mineral rights to their properties severed. "The government kept 70% of the mineral rights in Wyoming".[7] When the Bureau of Land Management (BLM) issued oil and gas leases to operating companies, ranchers objected in court that they would suffer damages to their properties and were providing a service but without receiving compensation either from a signing bonus or as a royalty.

The situation of the rancher in Wyoming is analogous to that of any landowner in Mexico, except that the severance of mineral rights from those of the surface owner is nationwide. It is in anticipation of conflicts between the surface owner and the oil-and-gas lessee that the Hydrocarbon Law gives so much attention (all of Chapter IV, Articles 100-118) to ways to reach an amicable agreement short of court-ordered expropriation.[8]

1. *Title to Hydrocarbons*

The matter of conveyance of title to production is handled in different ways around the world and it is common for an oil-and-gas title attorney to be engaged in the negotiation of a lease. Several related concepts get easily confused, so it's worthwhile trying to sort them out. The basic idea is that the ownership of the mineral estate always stays with the mineral owner. The relationship of the lessee to the mineral estate by the terms of the contract is not one of ownership; it is rather, a relationship analogous to a lien on a property, where the enforceability of the lien is contingent on the lessee's having complied with all the terms and conditions of the lease.[9]

This topic routinely gets confused in Mexico: the Government, representing the Public Interest, is the de facto mineral owner. Any leases of mineral rights to a state-owned oil company (Pemex) or to other oil companies does not change the basic fact of public ownership of the mineral estate (that is, hydrocarbons *in situ*). A lease creates an exclusive right to their commercial exploitation by an oil company (Pemex or otherwise) for a given period. Article 6 (b) of the Hydrocarbon Revenue Act provides that title conveyance to the contractor of hydrocarbons takes place once they are extracted (that is, no longer are *in situ*). The law does not state, but it is understood, that the delivery point where title transfer takes place is at an outgoing metering point (that is, on net, commercial production).

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7 Telephone Interview with Ronald D Smith, oil business development manager, Houston (Dec. 5, 2014).

8 It is a contentious, and yet-unresolved, topic as to how (if at all) the surface owner will be compensated from commercial production on his property.

9 Lien is used not as a precise legal equivalent but to indicate that the lessee's interests are litigable.

2. *Posting Reserves*

Where the matter of the relationship of the lessee to the mineral estate gets most confusing is in relation to the understanding of the concept of reserve: A reserve is a *numerical estimate* of recoverable volumes. Said differently, reserves exist in the Mind, not in the Earth, and, as mental events, the concept of real property right does not apply.

A lessee who reports reserves in a lease does not thereby take ownership of the minerals *in situ* in the volumes reported. The reported volume is about his expectations of future benefits under the lease, expressed as barrels of liquids and cubic feet or meters of gas. The Hydrocarbon Law (Art. 45) affirms the right of an oil company to report, for accounting and legal purposes, the "expected benefits" that are associated with a given contract; but the term "expected benefit" is ambiguous, as is may be interpreted in a restricted sense to refer only to net present dollars, not reserves by volume.

III. Mexican Mineral Contract

To make the comparison with the regime of concession clear, we shall use "mineral contract" where, to be precise, we should use "hydrocarbon contract."

1. *Legal Personality of the Commercial Actor*

The mineral contract differs from the mining concession in an important philosophical sense: in a concession, it is the concession-holder *(titular de la concesión)* who is the developer, that is, the legal and operational agent who is responsible for mineral production; whereas, in the mineral contract, it is the "Nation" that is deemed the legal actor that carries out both exploration and production. For a private oil company, what this requirement means is much less clear than *what it doesn't mean*: what it doesn't mean is that an oil company will be in an analogous position to that of a mining concession-holder on the Mexican side or to a lessee or licensee on the U.S. side.

In U.S. jurisdictions and in Mexico's Mining Law it is the lease- (or concession-) holder who is simultaneously the operator as well as the principal commercial actor. All other parties are contractors or sub-contractors to the lease- (or concession-) holder.

In the legislation of the 2014 Energy Reform (on both the oil and power sides), it is the State that is the fictive operator. The logic would seem to be that, on the oil side, as hydrocarbon resources *in situ* belong to the Nation, it follows that the State is the automatic, fiduciary lease-holder responsible for their stewardship, including exploration and extraction.

The State, in turn, looks to contractors and state-owned agencies to carry out the tasks of exploration and extraction. Thus, the 8th paragraph of Constitutional Article 27 reads, in part,

The Nation will carry out the activities of exploration and extraction of petroleum and other hydrocarbons by means of allotments to [Pemex] or by means of contracts with private parties by the terms of [enabling legislation].

This requirement arises from the prohibition, carried forward since the constitutional amendment of Art. 27 of Jan. 20, 1960, against granting concessions in relation to hydrocarbon deposits.[10] The practical and legal consequence of prohibiting hydrocarbon concession was to force the emergence of two parallel regimes: in the one, the operator is the lease-holder and the commercial actor; in the other, it is the State that is the fictive operator and lease-holder. The legal and commercial consequences of creating this bipolar mining universe have been profound.

The important point for this discussion is that this dual framework is preserved in the 2014 Energy Reform.

The government, representing the State (and the Public Interest, or Nation), continues as the exclusive owner of Mexico's mineral estate, onshore and offshore. The National Hydrocarbon Commission (CNH) has a legal faculty analogous to a power of attorney to act on behalf of the State in the award of mineral contracts. Thus, as we have seen, the State is not offering to lease its mineral rights to a state-owned enterprise or to a private oil company. Instead, it is asking for both conditions to be true:

The state enterprise or oil company carries out the investments and assumes risks and liabilities of a block to which he has been awarded a contract; but

It is the State that is the producer-of-record who aggregates production and reserve estimates on behalf of the owner of the mineral estate (the Nation).

Said differently, in the Peña regime the government is offering a lease-like arrangement by which the winning consortium of a public tender will be compensated for its investment and operating costs by obtaining title to production (all or a share), at a delivery point near the wellhead (as in a standard U.S. lease); but with the difference that entitlement of production will not be defined in the lease. What will be defined is a mechanism for the contractor to be paid from production, on a barrel-by-barrel basis.

But for how long? Of particular concern to prospective bidders is the arbitrary limitation on the period of the contract to 25 years with two 5-year, contingent extensions. In other jurisdictions (as in the United States), there are oil fields that have been in production for over a century (as in Kern River, Calif.). Just as the abandonment of the field could have been expected, a new

[10] Antorcha.net, *Párrafos de la reforma promovida por el Lic. Adolfo López Mateos en cuanto titular del Poder Ejecutivo al artículo 27 constitucional el 20 de enero de 1960*, *available at* http://www.antorcha.net/biblioteca_virtual/derecho/legislacion_petroleo/10.html

technology appeared that justified a new cycle of investment —but only on the premise that the operator would have uninterrupted rights to production for the commercial life of the field.

2. *Consequences of a Dual Regime*

By this logical and judicial reasoning, the government's lexical choice, "contractor," best fits the proposed legal framework: the contractor is an at-will agent of the State, which represents the Mexican public interest. Since it is the State that is the producer of record, the contractor cannot post reserves in the fashion of the concession-holder in the mining regime.[11]

The government's proposed regime for hydrocarbons provides that the investor-operator, as contractor, will have the right to production (or a percentage thereof, if a production-sharing agreement) once the minerals are produced and delivered to the outgoing metering point, provided that taxes to the government and royalties to the Oil Fund are current. These legal contingencies are not found in Mexico's mining concession, as all production in an official mineral lot is automatically deemed to be the property of the concession-holder to "dispose of" (quoting Article 19 of the Mining Law)[12] as he pleases.[13]

IV. Looking Ahead to the Energy Reform of 2026

The upstream business model proposed in 2014, in which the Nation is deemed to be the fictive developer of Mexico's petroleum estate, may be regarded as a transitional regime that will last, at most, two presidential terms. A third energy reform will take then take place; it will be a mixed-market regime in which the legal figure of concession will be restored for the oil sector (Table 2).

[11] This right is implicit, given that he will make a payment for a commercial discovery, the amount of which will be indexed to volume.

[12] Energy lawyer Raúl Nocedal observes that in civil (or Roman) code, property entails the right to use, enjoy and dispose of something *(ius utendi, fruendi et abutendi)*, where "dispose" includes commercial exploitation.

[13] The legal and commercial role that a CNH-contracted crude oil marketer might have is yet to be clearly defined.

Table 2

Evolution of Mexico's Mining and Oil Regimes

The Energy Reform of 2014 is seen as a transitional regime

			Regime		Operator
Period	Dates	Legal disposition	Minerals	Oil	(of record)
Hapsburg	1519-1700	Alexandrine Bulls Royal decrees	Concession	n/a	Concessionee
Bourbon	1700-1821	Ordenanzas de Mineria (1783)	Concession	n/a	
Independence	1821-1884		Concession	n/a	
Porfirian	1884-1917	Mining Code (1884) Petroleum L (1901)	Concession	Surface owner	Surface owner Oil company
Constitutional	1917-1958	1917 Const. Art. 27 Petroleum Law (1925) Petroleum Law (1940) Petroleum Law (1941) Pemex Law (1938)	Concession	Concessionee	Oil company under contract with Pemex
Fictive Agency	1958-2003	1917 Constitution Arts. 27, 28 & 25 Petroleum Law (1958) Public Works Law Public Procurement Law Pemex Law (1971; 1992)	Concession	Pemex entitlement	La Nación
	2003-2013	Public Works Law Pemex Law (2008) CNH Law (2008) Disp. Admin. de Contratacion (2010)	Concession	Pemex entitlement Farm-in service companies as contractors	La Nación
	2014-2026	Hydrocarbon L (2014) Pemex Law (2014) Hydrocarbon Revenue Law (2014) Hydrocarbon Regulator Law (2014)	Concession	Pemex entitlements & farm-outs Contracts to companies	La Nación
Mixed Market	2026-2038	1917 Const. Art. 27 Allows oil concessions offshore; wildcatting onshore	Concession Mineral lease	Concession Mineral lease	Concessionee Lease-holder

Chart: Mexico Energy Intelligence®

1. *Unitary Minerals Regime*

The next reform will feature a unitary minerals regime, one that absorbs the pertinent concepts of the 2014 Hydrocarbon Law and Hydrocarbon Revenue Act into the Mining Code. The legal and constitutional distinction between hydrocarbons and all other minerals would be eliminated. The argument might be made along the lines of "One country, one mineral law," meaning that the precepts of the Mining Law would also apply to hydrocarbons as minerals. A lease-holder who complies with regulations and who

offers a reasonable investment program would be given the option to extend the period of his lease to the commercial life of a field.

The charter of the SGM would be amended to remove its present role in exploration and the State would no longer seek to have a legal monopoly over subsurface data. Lease holders would be free to post reserves. Some way (perhaps in the fashion of the Petroleum Law of 1925), will need to be found to reward the surface landowner from commercial production on his property.

Pemex would be chartered as a stock-issuing company with a portion of its shares placed on a major stock exchange and with a mandate to operate also outside of Mexico. Pemex and CFE employees would be categorized into a separate personnel system that would not be subject to the Public Servant Accountability Act (LFRSP). The energy and finance ministers would be removed from Pemex's corporate board on the grounds of irreconcilable conflicts of interest.

Global hiring of managerial and professional staff would replace the current system by which executive appointment of the directors general of Pemex and CFE are automatic presidential prerogatives from a labor pool of Mexican candidates.[14] In the same spirit, the president of Mexico would maintain a healthy distance from the oil and power sectors, and he or she would desist from attending the March 18th commemoration of the 1938 oil expropriation.

Toward the goal of establishing a market-driven understanding of regional geology in relation to a given mineral, the State would no longer seek a legal monopoly over subsurface data obtained from drilling and seismic studies. Instead, the state would promote a role for reservoir engineering firms who offer data products that describe geological trends from the results of multiple contractors.

The management of award criteria would be transferred from the Finance Ministry (SHCP) to an inter-agency commission chaired by the president-commissioner of the Hydrocarbon Commission (CNH). Award criteria would consider the total value potential of a bid, not simply raw numbers as at present in the Hydrocarbon Revenue Act of 2014.

While the future mixed-market regime will be an improvement over that of 2014, it also will not last beyond two presidential terms.

2. *Revisionist Critique of the National Oil Narrative*

For any of the features of the imagined Energy Reform of 2026 to take place, Mexico's national oil narrative will need to be revised, starting with a

[14] With Pemex seeking production in deepwater reservoirs, nothing could be clearer than the immediate need to hire an executive vice president for deepwater operations who has global experience.

down-sizing of the importance of Lázaro Cárdenas and the oil expropriation of 1938. Revisionist economic and constitutional histories by Mexican historians and legal scholars will be needed.[15]

Legal scholars will need to reassess the constitutionality of Art. 6 of the Petroleum Law that was promulgated on the last working day of the presidency of Adolfo Ruiz Cortines (1952-58) and which radically restricted the upstream business model to one in which only Pemex could be the operator of an oilfield. They will also need to rethink the significance of the constitutional changes of Art. 27 in 1960 during the presidency of Adolfo López Mateos (1958-64) which created, out of political convenience, a separate legal regime for hydrocarbons, eliminating the contractual figure of a minerals contract. Reconsideration will also need to be made of the amendments of Constitutional Art. 28 in the presidency of Miguel de la Madrid (1982-88), ones which further isolated Mexico from global practices in the oil and power sectors.

Economic historians will need to assess the economic and environmental opportunity costs to the country of a half-century of isolation from the global oil industry, considering the period as a failed experiment in public policy in which Pemex as a state agency would acquire new technology only second-hand through global oilfield service companies. Such costs would include the energy poverty of the southern half of the country, the lack of resource development and infrastructure in refining, pipelines, power and storage.

Econometricians will need to model the value destruction caused by a procurement regime of lowest price and by a system of administered prices for all energy products.

For such changes and scholarship to take place, at least a decade will be needed.

V. Observations

In the Transboundary Hydrocarbon Agreement of 2012 the administration of Felipe Calderón of the National Action Party (PAN) invented the term "*licenciatario*" as a euphonious counterpart to the American "licensee" (see extract). The administration of Enrique Peña of the Labor Party (PRI) rejected this term in favor of "*contratista,*" for reasons, as we have seen, that go beyond a matter of lexical choice. The intent of the change was to emphasize that the investor-operating company would not have the benefit of a mineral lease.

Had the PAN won the presidential elections in 2012, and had the new government the political will to offer a new, market-driven design for the energy sector, then the constitutional changes promulgated on Dec. 20, 2013, might have been such to have made the term *licenciatario* the equivalent of *licensee*.

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[15] Reformas Constitucionales por Periodo Presidencial, http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_per.htm (last visited June 29, 2014). A useful chronological guide to constitutional changes, by presidential period.

The Energy Reform of 2014 preserves Mexico's populist, bipolar minerals regime: one legal framework for hydrocarbons (excluding coal), a second framework for all other minerals. It is "populist" in that it consciously follows the contours of the government's petroleum narrative that has circulated since 1938, which is that a dimension of Mexico's national identity is associated with the exclusivity of the ownership of the country's hydrocarbon endowment.

Why do oil companies insist on reporting reserves in volumetric terms? Answer: it is the most transparent, reliable way for investors and the general public to evaluate the management performance and the potential worth of the company. While it is true that a barrel of light oil that is replaced by a new barrel of heavy oil is an imperfect commercial equivalent, it is still a better measure than any other metric devised thus far in the oil industry.

The definition of "Hydrocarbons in the subsurface" in Article 3 (XXI) of the Hydrocarbon Law lacks, in addition to a legal foundation, commercial or practical sense. An *estimate* of recoverable hydrocarbons (that is, a reserve) cannot be in the subsurface and cannot be owned by anyone other than the oil company or reservoir engineer who produced it. Such a definition, however, *does make ideological sense*, as it serves to underscore the contractor's arms-length relationship to the mineral estate. Such a definition is also consistent with the provision that in a contract in which the contractor takes physical possession of all or a portion of production, title conveyance is always contingent on a contractor's full compliance with tax and royalty obligations. Finally, the definition serves to remind all parties that, cosmetically, it is the State that is the producer-of-record, not the contractor. From this, it follows naturally that it is the State, not the contractor, who posts reserves in volumetric units.

The Mining Law is silent regarding the indemnity that might be owed the concession-holder for the expropriation of his discoveries in the case of the cancellation or revocation of his concession; since he paid a tax on the volume of the discovery, it could be argued that in making the payment he acquired an asset in the form of a commercial interest in that volume of minerals. It could be argued that this asset is not voided by the cancellation or revocation of his concession. This is not the situation of the contractor: if his contract is rescinded administratively, he has no residual assets in his contract area.

The clarity of the hydrocarbon laws is impaired by an ideologically-informed lexicon in which "Nation" refers to a fictive developer of petroleum resources, while a "contractor" is an oil company, and its contractors are "third parties." As if with the intent to conceal the meaning from the general public, the conveyance of title of hydrocarbons is described as the *"transmisión onerosa de los Hidrocarburos"*.[16]

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16 Ley de Ingresos sobre Hidrocarburos [L.I.S.H.] [Hydrocarbon Revenue Act] *as amended*, Diario Oficial de la Federación [D.O.], 11 de agosto de 2014 (Mex.). A favor del contratista, la transmisión onerosa de los hidrocarburos una vez extraídos del subsuelo, siempre que, conforme a los términos del contrato, se cubran las contraprestaciones señaladas en el apartado A anterior.

We find "public interest" to be the best translation of *"La Nación"* in the text where public policy is concerned. There is a new, undefined meaning implied in the use of *"Nación"* where it reads "all property …within the national territory corresponds originally to the Nation" (and ignoring the opacity of "originally" and the redundancy in the use of "national" and "Nation").

The use of formal terms from Roman law to describe the aims of commerce is technically correct; but, at the same time, their use for the benefit of upstream investors and operators who are mainly from common-law jurisdictions creates impediments to commercial understandings. Avoidance, on principle, of terms for "to sell" and "title conveyance" makes lucrative work for lawyers, but the reliance on the terminology of Roman law blurs the impression that the government is serious about creating mindsets in which market conditions and competition matter.

VI. Conclusions

Insofar as it was contractually possible, the upstream the government's business model maintained the logic and spirit of the Public Works Law (LOPSRM). Compensation to the contractor is to be strictly controlled by means of an R-factor and other mechanisms that limit the upside to what the government determines to be a reasonable return on investment. The compensation model approximates that of a fee/barrel where the upper and lower limits of the fee are set by formulas informed by market prices.

Regarding the biddable variables, where, in the LOPSRM the conventional viable is (lowest) price, in the new regime the variables are (highest) price, expressed as the percentage of government take, and the amount of capital to be committed. The use of these seemingly objective variables is understandable, given that public officials are subject to the Public Servant Accountability Act (LFRSP); their use protects them from suspicion by future auditors, but the public interest is thereby questionably served.

Meanwhile, the Energy Reform of 2014 was lexically designed, consciously or otherwise, to echo terms found in other Western countries, giving a false sense of familiarity.[17] The grammar of the present, transitional oil regime, however, is pure Latin: *Caveat emptor.*

[17] Edith Grossman, Why Translation Matters (Yale University Press 2002).

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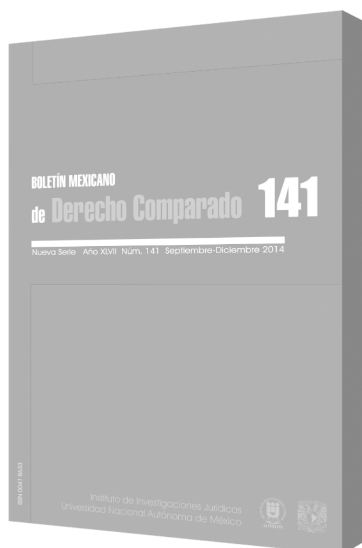
BOLETÍN MEXICANO de Derecho Comparado



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