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THE EXCESSIVE USE OF FORCE BY MEXICO CITY LAW ENFORCEMENT AGENCIES: CORRUPTION, NORMAL ABUSE AND OTHER MOTIVES*

Carlos Silva Forné**

Abstract. *Although several factors have been cited to explain the excessive use of police force, its relation to corruption has yet been little explored. This is a serious omission when dealing with law enforcement agencies in which corrupt practices are both widespread and deeply ingrained, as is the case in Mexico City. On the basis of an analysis of 575 complaints regarding violations of detainees' right to physical integrity received by the Mexico City Human Rights Commission between 2007 and 2011, many troubling patterns involving the use of excessive police force emerge, including: deeply-rooted and historically-conditioned ways of policing; a form of moral retribution or "punishment" for individuals who resist arrest or challenge authority; poor disciplinary oversight; and lack of professional training (and competence) in resolving conflicts. Above all, the use of excessive force by Mexico City law enforcement agencies is linked to divergent forms of corruption, including extortion, crimes and the misuse of police authority to resolve private matters, among others. In order to address these problems, it is first necessary to recognize their diverse nature and their complex relation to disciplinary structures, accountability and culture.*

Key Words: *Excessive use of force, Corruption, Human rights violations, Motivations.*

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Resumen. *La relación entre el uso excesivo de la fuerza y la corrupción policial ha sido poco explorada. Esta carencia es grave al estudiar instituciones policiales donde las prácticas de corrupción son extendidas, tal como es el caso en la Ciudad de México (Distrito Federal). A partir del análisis de 575 expedientes de queja por violaciones al derecho a la integridad personal que recibió la Comisión de Derechos Humanos del Distrito Federal entre los años 2007 y 2011, se observan distintos patrones problemáticos. El uso excesivo de la fuerza obedece a motivos diversos: como forma normalizada de realizar el trabajo policial cotidiano, como "castigo" a quien se resiste o falta el respeto a la autoridad, por impericia para resolver una situación conflictiva. Pero también el abuso en el uso de la fuerza se vincula a distintas formas de corrupción policial: extorsiones, delitos, resolución de problemas particulares, etc. Es necesario reconocer la heterogeneidad de los problemas de uso de la fuerza de la policía para pensar medidas con mayor probabilidad de éxito en su contención.*

Palabras clave: *Uso excesivo de la fuerza, Corrupción, Violaciones a los derechos humanos, Motivaciones.*

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I. Introduction

Studies of the excessive use of force by law enforcement agencies have generally ignored the correlation between police brutality and corruption.[1] This discrepancy is apparently the result of the different motives seen to be behind each kind of behavior.[2] In fact, a careful review of cases involving police corruption and other irregularities show that the two practices clearly overlap.[3] One example is the use of threats and excessive force as a means to obtain

[1] Kim Lersch & Tom Mieczkowski, *Violent police behavior: Past, present, and future research directions*, Vol. 10, *Aggression and Violent Behavior*, 552, 568, (2005). Philip Stenning *et al.*, *Researching the use of force: the background to the international project*, Vol. 52, *Crime Law & Social Change*, 95, 110, (2009).

[2] Sanja Kutnjak, Fallen Blue Knights. Controlling Police Corruption (Oxford University Press, 2005).

[3] For example, for the United States: The City of New York. The Knapp Comisssion. Report on Police Corruption (1973). The City of New York. Comission to Investigate

monetary and other benefits. As a result, there is usually a strong correlation between the deliberate use of excessive force by police agencies and institutional weakness, procedural abuse and rampant corruption.

The history and nature of law enforcement institutions in Mexico and Latin America require a careful analysis of this link. Despite recent legislative reform and infrastructure improvements, law enforcement agencies in Mexico City are still rife with corruption —both operative and administrative—[4] as well as recurrent human rights violations.[5]

This link between corruption and police violence has been brilliantly depicted in Paul Chevigny's classic work, *Edge of the Knife: Police violence in the Americas.*[6] Unlike other cities studied, he concludes that in Mexico City corruption and police violence stem primarily from the corrupt Mexican political system as well as the historical use of law enforcement for political ends. In a review of recommendations made by the Mexico City Human Rights Commission during 1997-2002, I pointed out the existence of three factors that drive police brutality:[7] a) as a common way to obtain confessions and/or information; b) as punishment for resisting or defying authority; and c) as a means to gain monetary benefits.

This article applies this matrix to 575 files submitted to the Mexico City Human Rights Commission between 2007 and 2011 concerning violations of the right to physical integrity by Mexico City law enforcement agencies. These files clearly show a significant correlation between corruption and the excessive use of force by Mexico City's diverse police agencies. This is relevant both for academic and policy-making purposes, as the reduction of police brutality can only be achieved by first recognizing its multitudinous forms, causes and conditioning factors.[8]

Allegations of Police Corruption and The Anti-Corruption Procedures (1994). Kutnjak, *supra* note 2.

[4] Arturo Alvarado, The Industrial Organization of Police Work (2008) (unpublished work presented at the Annual Meeting of the American Sociological Association). Elena Azaola & Miquel Ruiz, Investigadores de Papel. Poder y Derechos Humanos entre la Policía Judicial de la Ciudad de México (Fontamara 2009).

[5] Azaola & Ruiz, *supra* note 4. Carlos Silva, Policía, Encuentros con la Ciudadanía y Aplicación de la Ley en Ciudad Nezahualcóyotl (Instituto de Investigaciones Jurídicas, 2011).

[6] Paul Chevigny, The Edge of the Knife. Police Violence in The Americas (The New Press 1995).

[7] Carlos Silva, *Police abuse in Mexico City*, in Reforming the Administration of Justice in Mexico 175,194 (W.A. Cornelius & D. Shirk (eds.), 2007).

[8] Every time a "scandal" occurs regarding the excessive use of force in Mexico City, there are general calls for improved police training (for the New's Divine nightclub case, see Carlos Silva, *Policía, uso de la fuerza y controles sobre la población joven*, in Sin Derechos. Exclusión y Discriminación en el México Actual 175, 197 (Institute for Legal Research, UNAM 2014), and the need for specialized protocols (in recent years, many regulations have been enacted regarding the Mexico City police). These measures, however, have been clearly inadequate.

This article is organized as follows: (1) the first section summarizes the proposed factors presented in the explanation of police brutality in Mexico City; (2) the second section establishes the link between police corruption and violence, and why this connection is critical to a proper analysis of Mexican law enforcement practices; (3) the third section explains the study's methodology, noting the difficulties posed by currently available information sources and justifying the use of citizens' complaints before Mexico City's Human Rights Commission; (4) the fourth section analyzes key aspects of these complaints, uncovering several links between corruption and police violence; and (5) the last section discusses how the study's results may be utilized to help transform Mexico City's law enforcement agencies.

II. Theories and Research into the Excessive use of Police Force

In any critical study of law enforcement practices, the use of force has always played a central role. Its importance lies in the fact that policing, by its nature, depends on the legitimate use of force.[9] This said, the use of force by law enforcement agencies has also been heavily scrutinized because of its major political and social implications. This scrutiny has been particularly acute with regard to police brutality.[10]

Any study of the use of police force presents several obstacles. If we wish to ascertain how frequently "force" is used by the police, for example, we must first define what types of behavior fall into this category. Although this definition normally takes into account the use of physical force, it may also be broadened to include verbal threats, commands and orders. We may also limit the definition to include solely the use of lethal force (especially with firearms). The broader the definition, the more cases must be analyzed. For this reason, the number and types of situations in which the use of force is studied depends on how "force" is defined.[11]

Training and protocols do not, in and of themselves, change anything without changes in deeply-entrenched institutional practices (e.g., police accountability).

[9] Egon Bittner, *The capacity to use force as the core of the Police Role*, in The Police and Society (Victor E. Kappeler (ed.), 2006).

[10] William Geller & Hans Toch, Police Violence. Understanding and Controlling Police Abuse of Force (Yale University Press, 1996).

[11] International research that takes in the whole universe of contacts between police and the public indicates that cases involving the use of force are quite infrequent (see Christopher Birkbeck & Luis Gerardo Gabaldón, *La disposición de agentes policiales a usar la fuerza contra el ciudadano*, in Violencia, Sociedad y Justicia en América Latina 229, 244 (Roberto Briceño (ed.), 2002), Matthew Durose *et al.*, *Contacts Between Police and the Public. Findings from the 2002 National Survey*, Bureau of Justice Statistics 2005, available at *http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf.* Durose *et al.*, 2005). In studies of urban environments, the percentage of encounters in which force is used ranges between 1% and 3%. For this reason, many investigations focus on situations in which it is most likely that the use of police force is exercised (especially detentions

As there is no single, universally agreed-upon definition, a more difficult question is how to distinguish between (a) reasonable and necessary use of force; and (b) the deliberate use of excessive force. The International Association of Chiefs of Police has described use of force as the "amount of effort required by police to compel compliance by an unwilling subject."[12] One common yardstick for defining *excessive* use of force is based on what a highly-qualified policeman would consider "greater than necessary."[13] In other cases, a distinction is made between *reasonable* and *unreasonable* force:[14] reasonable (or necessary) force is that which must be applied in order to (a) control a suspect if he or she resists arrest; or (b) eliminate an immediate threat. The "reasonableness" of the force is based on the type of resistance and/or degree of immediate threat, either towards persons in the vicinity or the police themselves. Such force must cease when the suspect is subdued and the threat removed.

The only problem with these definitions is that they are too vague to determine *prima facie* whether the degree of force used in specific situations is "reasonable" or "excessive."[15] Since bias and inherent conflict of interest often prevent law enforcement agencies from realizing credible investigations of police misconduct, the use of excessive force can be evaluated by examining administrative records, judicial files and citizens' complaints.[16]

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of suspects of having committed a crime or minor offense). It is, however, necessary to know whether contacts in which force is used are also infrequent in Mexico). The few studies available indicate that the use of police force is fairly common. In a survey carried out in 2005 in the municipality of Nezahualcóyotl, 12% of the population who had contact with the police last year reported either threats or the use of force directed against them. See Silva, *supra* note 7.

[12] The international principles most commonly referred to are those contained in *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*: U.N. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (August 7 to September 7, 1990); and *Code of Conduct for Law Enforcement Officials*: Gaor 34/169 (December 17, 1979). In these documents three guiding principles for the use of force by police organizations stand out: absolute necessity, rational use, and proportionality, see Geoffrey Alpert & Roger Dunham, Understanding Police Use of Force (Cambridge University Press 2004).

[13] Carl Klockars, *A Theory of Excessive Force and Its Control*, in Police Violence 1, 22 (William A. Geller & Hans Toch (eds.), 1996).

[14] Geoffrey Alpert & William Smith, *How reasonable is the reasonable man: police and excessive force?* Vol. 85 No. 2 *The Journal of Criminal Law & Criminology* 481, 501 (1994).

[15] Within the category of inadequate use of force, a distinction has been made between two types according to the way in which the actor views his own behavior: *extralegal* and *unnecessary* force. "Extralegal" force involves the *voluntary* and *conscious* use of force that police officers know surpasses established limits. The unnecessary use of force occurs when officers, albeit with good intentions, cannot deal with a situation without recourse to excessive force or to force in general. See James J. Fyfe, *The split second syndrome and other determinants of police violence*, in Violent Transactions (A. Campbell & J. Gibbs (eds.), 1986).

[16] Kenneth Adams, *Measuring the prevalence of police abuse of force*, in Police Violence 52, 93 (William Geller & Hans Toch (eds.), 1996).

Diverse theories and factors have been used to evaluate the excessive use of police force, each relying on distinct units of analysis. The three most commonly cited approaches are: *individual*, *situational* and *organizational*.[17] *Socio-structural* levels are also frequently taken into account.[18]

At the *individual* level, the "rotten apples" theory suggests that certain attitudes and psychological profiles of individuals within law enforcement agencies make them more prone to use excessive force than others. This has been confirmed by studies showing that most police brutality cases were instigated by a relatively small number of officers.[19] Other studies have shown a correlation between gender and the use of excessive force (female officers are less prone to violence).[20] A 2007 study in Criminal Justice and Behavior, "Police Education, Experience and the Use of Force," found that officers with more experience and education may be less likely to use force. Other case studies suggest that certain training programs and accountability structures can also help diminish police brutality.[21]

At the *situational* level, there seems to be a correlation between police brutality and circumstantial factors, including: time and place of the encounter (day vs. night, public vs. private);[22] the gravity of the misconduct (serious vs. minor offense); the level of resistance;[23] and general respect (or lack thereof)

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[17] Robert J. Friedrich, *Police Use of Force: Individual, Situations and Organizations*, 452 *Annals of the American Academy of Political and Social Science* 82, 97 (1980). Robert E. Worden, *The causes of police brutality: theory and evidence on police use of force*, in Police Violence 23, 51(William Geller & Hans Toch (eds.), 1996).

[18] David Jacobs & Robert O'Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, Vol. 103 No. 4 *American Journal of Sociology 837, 862 (1998)*. Tim Newburn & Robert Reiner, *Policing and the police*, in The Oxford Handbook of Criminology (Oxford University Press 2007).

[19] Hans Toch, *The violence-prone police officer*", in Police Violence. Understanding and Controlling Police Abuse of Force 62, 80 (William Geller & Hans Toch eds. 1996). Kim Lersch & Tom Mieczkowski, *Who are the problem-prone officers? An analysis of citizen complaints*, Vol. 15 *American Journal of Police* 23-44 (1996). Adams, *supra* note 16.

[20] Sean A. Grenan, *Findings on the role of officer gender in violent encounters with citizens*, Vol. 15 *Journal of Police Science and Administration* 78, 85 (1987).

[21] Kim Lersch & Tom Mieczkowski, *supra* note 1. Brandl *et al.*, *Who are the complaint-prone officers? An examination of the relationship between police officers' attributes, arrest activity, assignment, and citizens' complaints about excessive force*, 29 *Journal of Criminal Justice* 521, 529 (2001). William Terril & Stephen Mastrofski, *Situacional and Officer-Based Determinants of Police Coercion*, Vol. 19 No. 2 *Justice Quarterly* 215, 248 (2002).

[22] Tim Phillips & Phillip Smith, *Police violence occasioning citizen complaint. An empirical analysis of time-space dynamics*, 40 *British Journal of Criminology* 480, 496 (2000).

[23] John MacDonald et al., *Police Use of Force: Examining the Relationship Between Calls for Service and the Balance of Police Force and Suspect Resistance*, Vol. 31 *Journal of Criminal Justice* 119, 127 (2003).

for authority.[24] The socioeconomic and/or racial profile of apprehended suspects (in particular their social status) have also been frequently cited.[25]

If a standoff situation occurs in public, officers often feel compelled to maintain the appearance of authority,[26] especially when witnesses are present. Any challenge to the officers' authority in these circumstances generally provokes the use of strong-arm tactics to prevent a "loss of face."[27] All too often, this involves the use of excessive force.[28] It also explains why police departments generally receive low marks for holding officers accountable for abuse of authority. Instead, charges are usually brought against those placed under arrest for having challenged police authority.[29]

The *social* (or structural) level addresses general characteristics of the different social groups or spaces of police activity. Based on one theory of social control, societies characterized by social stratification and/or economic inequality often favor police coercion to assure the social dominance of pri-

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[24] Robert J. Friedrich *supra* note 17, Lonn Lanza-Kaduce & Richard G. Greenleaf, *Age and Race Deference Reversals: Extending Turk on Police-Citizen Conflict*, Vol. 37 No. 2 *Journal of Research in Crime and Delinquency* 221, 236 (2000). Robin Shepard Engel, *Explaining suspects' resistance and disrespect toward police*, 31 *Journal of Criminal Justice* 475, 492 (2003).

[25] Situational theories indicate that the police use force to a greater extent against individuals of lower social status (poor or marginalized people, etc.) for a variety of reasons (see Geoffrey Alpert, *Police use of deadly force: The Miami experience*, in Critical Issues in Policing 480, 495, Roger Dunham & Geoffrey Alpert eds. 1989). Christopher Birkbeck & Luis Gerardo Gabaldón, *La disposición de usar la fuerza contra el ciudadano: un estudio de la policía en cuatro ciudades de las Américas*, Vol. 2 No. 31 *Capítulo Criminológico* 33,77 (2003). On the one hand, being regarded as individuals of lesser value render them "deserving" of punishment when committing an offense or showing lack of respect. On the other hand, police officers learn from experience that a greater degree of violence is "appropriate" when dealing with individuals who "do not understand other approaches." This arises on the basis of what William Ker Muir once called the "paradox of dispossession:" the more difficult it is for the police to "threaten" a person with nonphysical harm (e.g., a legal recourse that may affect their prestige or wallets), the greater the likelihood of physical force (see William Ker Muir Jr., Streetcorner Politicians, The University of Chicago Press 1977). This tendency is reinforced by the diminished likelihood of complaints filed by individuals of lower socioeconomic status. Police also tend to exert greater force against suspects who they label "assholes", i.e., those with "less to lose" and thus more prone to confrontation (see John Van Maanen, *The Asshole*, in Policing: A View From the Streets 302, 328, John Van Maanen & Peter Manning (eds.), 1978); or suspects they classify as "symbolic assailants" (Skolnick, Justice without Trial: Law Enforcement in Democratic Society, Macmillan, 1994); i.e., those who speak and behave in ways that reflect violent tendencies (see Jerome Skolnick, Justice Without Trial, New York, Wiley 1994).

[26] Erving Goffman, La presentacion de la persona en la vida cotidiana, (Amorrortu 1971). Geoffrey Alpert & Roger Dunham, *supra* note 14.

[27] Muir, *supra* note 25, Penny Green & Tony Ward, State Crimes. Governments, Crime and Corruption, (Pluto Press 2004).

[28] Silva, *supra* note 7.

[29] Satnam Choongh, *Policing the Dross. A social disciplinary model of policing*, Vol. 38 No. 4 *British Journal of Criminology* 623, 634 (1998).

vileged groups.[30] Unsurprisingly, those within these privileged sectors are in a much better position to exert their demands. Although members of the underclass are most often victims of police brutality, they generally have little influence over law enforcement policy. A second theory on the socio-structural level, social disorganization theory, hypothesizes that a greater use of excessive force by the police corresponds to a lower level of communal life and informal control.[31] Another theory suggests that the level of force used by police is directly proportional to the degree of violence they face in their daily work environment. Based on this line of reasoning, the probability of abuse increases in response to hostile and violent social conditions.[32]

At the *organizational* level, several theories emphasize the importance of formal and informal rules in governing police behavior. These case studies suggest that certain training programs and accountability structures can significantly diminish police brutality.[33] Other studies emphasize the importance of subculture within law enforcement agencies, which often legitimizes police hostility and the excessive use of force.[34]

To date, there have been few attempts to connect these disparate perspectives in one integral theory. In this respect, the ideas of Janet Chan,[35] based on Pierre Bourdieu's concepts of habitus and field, are those most often cited. From this perspective, the situational and organizational theories are linked to the formation of "*habitus*" which police bear in their professional work, while the organizational factors, together with the structural ones —taking into account the particular history of each society, the relations between the police and the different social groups— make up the particular "field" that structures and constitutes the practices proper to police work.[36]

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[30] David Jacobs & Robert O'Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, Vol. 103 No. 4 *American Journal of Sociology* 837, 862 (1998). Malcolm Holmes, *Minority Threat and Police Brutality: Determinants of Civil Rights Criminal Complaints in U.S. Municipalities*, Vol. 38 No. 2 *Criminology* 343,367 (2000).

[31] Kane, Robert Kane, *The Social Ecology of Police Misconduct*, Vol. 40 No. 4 *Criminology* 867, 882 (2002).

[32] William Terrill & Michael D. Reisig, *Neighborhood context and police use of force*, Vol. 40 No. 3 *Journal of Research in Crime and Delinquency* 291, 321 (2003). Tim Newburn & Robert Reiner *supra* note 18.

[33] James J. Fyfe, *Administrative intervention on police shooting discretion: An empirical examination*, Vol. 7 *Journal of Criminal Justice* 309, 323 (1979). Samuel Walker, The New World of Police Accountability (Sage, 2005). Fridell, Lorie Fridell, *Use-of-Force Policy, Policy Enforcement and Training*, in Critical Issues in Policing: Contemporary Readings 513, 531 (Roger Dunham & Geoffrey Alpert (eds.), 2010).

[34] William Westley, Violence and the Police (MIT Press, 1970). William Terrill *et al.*, *Police Culture and Coercion*, Vol. 41 No. 4 *Criminology* 1003, 1034 (2003).

[35] Janet Chan, *Changing police culture*, in Policing Key Readings 338, 363 (Tim Newburn ed. 2005). Janet Chan, Fair Cop: Learning the Art of Policing (University of Toronto Press, 2003).

[36] Jyoti Belur, Permission to Shoot? Police use of Deadly Force in Democracies (Springer, 2010).

Studies that point to the importance of organizational factors tend to focus on: (a) a subculture of concealment and protection that condones (or even encourages) strong-arm practices as necessary for carrying out police duties, in effect creating a "blue code of silence" among officers that conceal even the most outrageous examples of misconduct; and b) the absence or inefficacy of rules and regulations that may help discourage diverse forms of "bad policing behavior."

The weakness of organizational mechanisms of control that seek to ensure police accountability also tends to foster corruption, especially in societies where corrupt practices are considered "normal." This said, there have been few studies on how corruption itself favors the excessive and brutal use of public force.

III. Corruption and Police Violence

Analyzing the factors above, their impact on fostering excessive use of force by the police passes via the subjectivity of the police officer principally by two types of motivations: the officer's duty, both formal and informal, to "arrest offenders" or "maintain order;" and the morally justified urge to seek retribution against those who "deserve it," either because they break the law or challenge police authority.[37] These justifications, however, ignore the motivation to use force to obtain monetary benefits, either on a personal or institutional level.

From an *institutional* perspective, the use of excessive force is often rationalized to "combat crime," protect the public against violence and aggression, and maintain police authority. From a *socio-structural* perspective, the use of force is justified as a tool for political control. Stated differently, most studies regarding the excessive use of force assume that police officers, whether legally or illegally, seek to prevent crime and uphold public order. In societies characterized by acute inequality, law enforcement is seen as an instrument of control over subordinate groups. Fewer studies exist, however, that regard the excessive use of police force as "predatory,"[38] in which extracting mone-

[37] Such punishment allows police to maintain their "image" as an authority in control of areas where they carry out their work. On occasion, the need to "punish" those who behave aggressively or without respect is so acute that it prevails over the need to uphold professional integrity. See Friedrich, *supra* note 17.

[38] Gerber and Mendelson point out the existence of two law enforcement models: the "functionalist" model, common in developed democracies where police provide services to the public, enforce the law and maintain public order; and the "divided society" model common in authoritarian societies or those with a polarized social structure in which the police protect the interests of elites and repress subordinated groups such as the poor or political opponents. A third model is termed "predatory," in which *"police officers prey on their society by using their positions to extract rents in the form of money, goods, or services from individual members of the public. They apply*

tary benefits become one of the central aims of officers' daily tasks (without necessarily neglecting their main duty to maintain order, as well as occasionally exert political control).

To better understand the link between corruption and the excessive use of force, it may be useful to distinguish between "*predatory corruption*" and "*strategic corruption*."[39] Chevigny describes this difference by describing policemen who are either "*bent as a job*" or "*bent for the job*."[40] The first term refers to the most commonly used definition of "corruption:" police officers, availing themselves of their position, act to procure a personal or group benefit.[41] This usually takes the form of personal enrichment in exchange for not arresting someone who may otherwise be accused (genuinely or falsely) of a crime; or stealing from suspects under investigation. An even more serious problem is that of overt criminal behavior (such as does not arise from the performance of an official function), committed as a result of privileged information or capacity.

Under the heading of predatory corruption, Mexico City police, especially those in criminal investigation agencies, often use threats, intimidation and physical force to solve the problems of private interests. As described in previous studies, this amounts to police who contract out their services to third-parties.[42]

The aim of the second pattern ("*bent for the job* "or "strategic corruption") is not for personal benefits but in compliance with an institutional "mission" or, stated differently, the orders of commanding officers. Although such practices break formal institutional rules, they follow informal ones that often serve to legitimize *them*.[43] The duties of Mexican public prosecutors make them particularly prone to this kind of behavior, although preventive police forces are by no means exempt. Examples include forced confessions; framing suspects to

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violence both as a direct means of extracting these rents and in order to satisfy occasional demands by officials to assist in oppressing opposition groups or to give the appearance of solving criminal cases, thereby preserving their access to opportunities for rent extraction" Theodore P. Gerber & Sarah E. Mendelson, *Public Experiences of Police Violence and Corruption in Contemporary Russia: A Case of Predatory Policing?* Vol. 42 No. 1 *Law & Society Review*1, 44 (2008).

[39] Maurice Punch, Conduct Unbecoming: The Social Construction of Police Deviance and Control (Tavistock, 1985).

[40] Chevigny, *supra* note 6, Belur, *supra* note 36.

[41] Kutnjak, *supra* note 2.

[42] Beatriz Martínez de Murgía, La Policía en México (Planeta 1998). This kind of practice, while it may or may not represent a direct source of income to the police, does offer benefits to those who "request the service." Cases also occur where the problem the police set out to solve is a personal problem (and action is taken by police in their capacity as such).

[43] These sorts of behavior cannot be attributed to a lack of police "training" or "professionalism," since in reality they are not "irregularities" but rather forms of behavior legitimized by the "subculture" of the institution and shared expectations regarding the way in which police work is realized. See Patricio Tudela, *Aportes y desafíos de las ciencias sociales a la organización y la actividad policial*, Fundación Paz Ciudadana (2011).

make them appear guilty of crimes; the excessive or unnecessary use of force; planted evidence; and false declarations or witnesses.[44]

Normally, personal enrichment accompanied by the use of force is typified as one type of "police corruption;" whereas irregularities in the "use of force" is regarded as a separate and distinct issue.[45] For this reason, the motivation behind such irregularities include: (a) a necessity of police work; (b) retribution, either for alleged crimes, resistance or disrespect for authority;[46] and (c) legitimate way to control an individual or subdue an imminent threat (cases of unnecessary use of force).[47]

In summary, four types of motivation explain the excessive use of police force:[48]

— Instrumental motivation for the purpose of obtaining personal and/or group benefits (predatory corruption);
— Instrumental motivation for the purpose of obtaining informally valued objectives (strategic corruption);
— Moral-expressive motivation to "make authority respected" or "punish those who deserve it;"
— Instrumental motivation for obtaining formally valued objectives (unnecessary use of force).

The use of excessive force as described in the section above (individual, situational, organizational and social) has been justified by either: (1) instrumental motivation (to stop criminals and/or maintain order); or (2) retribution. However, the scant attention paid to the relation between corruption and the use of force at an organizational level has moved the first type motivation —using force excessively for personal or group gains— to a secondary position. This typology, of course, is purely analytical, as these categories are not mutually exclusive given that more than one motivation can coexist. I will, however, seek to classify the excessive use of police force as a single predominant type of motivation.

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[44] In the Distrito Federal, such acts of "strategic corruption" involved in presenting detainees and "framing" them are seen as expedients enabling police to perform tasks expected of them by their commanding officers, the search for truth being a much less important goal.

[45] Kutnjak *supra* note 2.

[46] On the basis of research carried out in Venezuela, as well as studies performed in other countries (United States, Argentina), Luis Gerardo Gabaldón distinguishes between two forms of police force: "instrumental" and "expressive." See Luis Gerardo Gabaldón, *Función, fuerza física y rendición de cuentas en la policía latinoamericana. Proposiciones para un nuevo modelo policial*, in Seguridad y Violencia: Desafíos para la Ciudadanía 253, 276 (Lucía Dammert & Liza Zúñiga eds. 2007).

[47] Fyfe, *supra* note 15.

[48] The distinction between motivations is purely theoretical; several may coexist empirically. Nevertheless, an attempt will be made to classify the excessive use of police force on the basis of a predominant type of motivation.

IV. Methodology

Studies of the excessive use of police force have been based mainly on three types of data sources: official registers (criminal investigations, reports of use of force, citizens' complaints); observations of police behavior; and public opinion surveys. Each source has its strengths and weaknesses. Due to time and financial constraints, observation and public opinion surveys are uncommon, especially in Latin America. With regard to official records, there are still no internal reports issued by Mexican law enforcement agencies of the use of police force. Moreover, criminal investigations into police abuse or torture are extremely rare.

To complicate matters further, criminal sentences for the excessive use of police force in Mexico City is practically non-existent. This failure to make law enforcement agencies accountable for police brutality works as a de facto legitimization of such tactics. Between 2007 and 2012, only 11 cases of torture were successfully prosecuted;[49] whereas between 2007 and 2008, there were only 31 cases of abuse of authority (after 2009, there have been no official prosecutions). While both preventive and criminal law enforcement agencies in Mexico City are condemned regularly for serious offenses and exceptionally poor disciplinary oversight, officers are rarely subject to prosecution — much less punishment— for brutality and other types of police misconduct.[50]

Despite this dearth of official records, a considerable number of cases have been registered over the last twenty years by the Mexico City Human Rights Commission.[51] Since its founding in 1993, approximately one fifth of complaints for a wide assortment of human rights violations have been filed against officers of Mexico City's diverse law enforcement agencies.[52] These complaints, however, represent only a small percentage of human rights violations by Mexico City police. This said, the large number of complaints filed each year provide access to one of the few sources of information available to discuss an issue of urgent importance.

This study is based on an analysis of citizens' complaints that involve a Mexico City police officer and at least one violation of the right to physical integrity (a category comprised of several types of excessive force). Since only complete electronic files were made accessible, the study began with records

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[49] *inegi.com.mx.* Visited 9/09/2014.

[50] Azaola & Ruiz, *supra* note 4.

[51] Democratic societies must possess mechanisms for identifying, documenting and containing the problems of police abuse, whatever their dimensions. The development of civil agencies of control has represented one of the most important efforts for finding solutions to such problems.

[52] Citizens' complaints have been one of the most important sources of information regarding police abuse, Paul Chevigny's study being one of the pioneers. See Paul Chevigny, Police Power: Police Abuses in New York City (Pantheon, 1969).

initiated in 2007 and completed in 2011.[53] During this period, there were a total number of 1,485 cases. Since a major weakness of studies based on citizen's complaints is the low percentage of substantiation,[54] we decided to leave out cases considered by the CDHDF to be unsustainable, or when there were insufficient elements to evaluate.[55] In this way, the sum was reduced to 706 files, from which another 18% were eliminated because of inconsistent or missing information. This left a total of 575 complaints for violations of the right to physical integrity, all occurring between 2007 and 2011. In each case, the accused was an officer employed by the Public Security Ministry, or the Criminal Investigation unit of the Mexico City Public Prosecutor's Office.

Each file includes a narrative of the alleged violation, accompanied by the response of law enforcement agencies; and finally the CDHDF's determination whether there was an actual violation. Although these documents were of no interest to me as administrative procedures, they served as a window on the use of excessive use of force by the police.

It should be noted that the nature of these procedures limited, at least in part, the data available for the study. Although the complaints fully describe certain violations (e.g., the right to physical integrity), other alleged transgressions (e.g., extortion) are incomplete. For this reason, cases in which force is linked to corruption may be under-represented. Classification of these complaints is therefore not intended to calculate exact percentages for each type of abuse, but rather to shed light on the varied motivations for police abuse, including the pursuit of monetary gains.

V. Results

Mexico City has a permanent population of 8.8 million inhabitants plus a floating population of about 4 million from neighboring municipalities. It's Preventive Police force, under the SSP, is comprised of 40,000 agents, which include riot control and traffic cops; 15,000 auxiliary police; 15,000 banking and industrial police; and over 3,000 Investigative Agents in the Public Prosecutor's.

In April 2008, Mexico City enacted a law reforming the use of police force, and whose provisions regulate: the detention of individuals; public peace; citizens' security; and police training and professionalization. In November 2010, regulations for this law were issued that required handbooks on the use of force

[53] The collection of information took place during 2013.

[54] Adams, *supra* note 16.

[55] The causes of conclusion not considered were those marked as "No violation of human rights" and "Insufficient information." Those included in the universe correspond to "Solved in the course of the proceedings," "Recommendation," "Lack of interest" and "Withdrawal of complaint." The two latter categories are not so much indicators of the weakness of the complaint, as, rather, of the difficulties the complainants and aggrieved parties faced for continuing with the procedures, as well as fear or the intimidations to which they are subjected in order to make them desist.

to be developed by the Public Security Ministry and Public Prosecutor's Office. Subsequent to the period analyzed in this article, three additional regulations were published: an arrest protocol for Investigative Agents (May 7, 2012); a protocol for crowd control (March 25, 2013); and a protocol for the detention of offenders and alleged perpetrators (April 2, 2013).

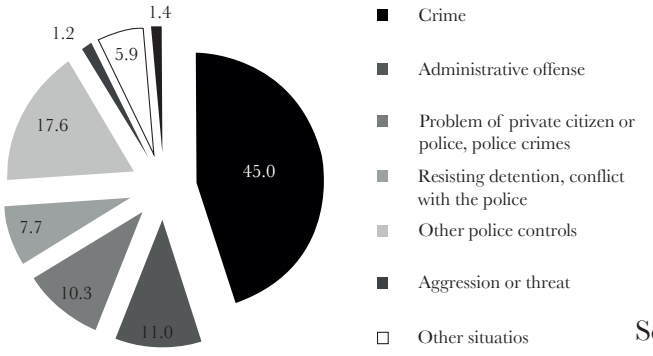
Nearly 7 of 10 types of violations of the right to physical integrity reported in the 575 cases were for "disproportionate or undue use of force" (68%); followed by "threats and intimidation" (16.3%); "simple aggression" (11.1%); and "cruel, inhuman and degrading treatment" (7.3%). A smaller percentage was for torture (2.7%) and extrajudicial executions (1.9%).[56] About 40% of these complaints involved either the Public Security Ministry or Public Prosecutor's Office; 57% involved the SSP; and 3% involved officers from both these agencies.[57]

Although several aspects of the complaints illuminate the motives behind the use of excessive police force, let's first analyze cases in which corruption played a prominent role.

Instrumental motivation to obtain a personal or group benefit ("predatory corruption")

The first element that helps identify the kind of excessive force used by Mexico City's Preventive Police and Investigative Agents involves the "type of situation" (i.e., the nature of the interaction) that gives rise to the complaint (Note: In Fig. 1, both the SSP and PDI of the PGJDF are lumped together).

Type of situation in which the right of humane treatment was violated 2007-2011



Source: CDHDF

[56] Because of the selection criteria used, the distribution of the types of violations in the final sample varies with respect to the total number of complaints received by the CDHDF during this period. In particular, it includes a lower percentage of cases involving torture. The percentages should not be taken as representative of the social distribution of the problems of police violation of the right to humane treatment (since cases reported to the CDHDF represent only a minor percentage of actual cases). This said, the sample includes numerous allegations of the use of excessive of force and, as such, a good indication of both its frequency and nature.

[57] Complaints involving police from the Public Security Ministry are divided as follows: 75% involve preventive police; 10% auxiliary police; 9% grenadiers (NOTE: this term is rarely used in English, "riot police" would be better) and Task Force; 5% Banking and Industrial Police; and 1% Traffic Police. Regarding the Mexico City Attorney General's office, 93% of complaints involve the investigative police; and 7%, members of various specialized groups.

As one might expect, most situations relate to typical police duties, including arrests for alleged crimes (45%), civil offenses and infractions (11%). Likewise, a large percentage (17.6%) involves other police actions that are lumped together in Figure 1: checks on drivers, control of demonstrations, vehicle spot checks, etc. A third category ("Problem of private citizen or police and police crimes" - 10.3%) deserves special attention, as it involves the kind of predatory corruption mentioned in the section above. This includes: (a) offenses committed by the police that are completely unrelated to their daily duties; and (b) abuse by private third parties (or the police themselves) of official resources and/or police authority to resolve personal or private issues. These "issues" include the recovery of debts, evictions, or intimidation of neighbors embroiled in private disputes. Although these situations generally involve Investigative Agents, they also include violations by Preventive Police to stifle charges against them before a court.

Although the behavior typically associated with corruption involves the solicitation of money in exchange for overlooking criminal behavior —or outright theft from detainees— we believe that the cases classified as "Problem of private citizen or police and police crimes" should also be termed "police corruption". Based on our analysis, offenses committed directly by the police are realized with public resources and involve the abuse of police authority. For this reason, these acts —as well as police intervention in private matters— should not be considered independent criminal activities but violations that involve direct or indirect personal benefits. In sum, both these situations have the defining features of corruption.

It is important to emphasize two points: (1) if the number of complaints of excessive police force equals or exceeds those provoked by everyday police procedures such as vehicle spot checks or public searches of pedestrians, then corruption is much more widespread than official data indicates; and (2) this is a problem concerning the Mexico City police that has an impact on the systematic patterns of misuse of force by the police.[58]

In standard interventions such as arrests for crimes or misdemeanors, the police may seek to obtain economic benefits by soliciting money in return for overlooking potential sanctions; or by stealing money or property of the arrested individuals. In some cases, the use of force is a means to apply pressure in order to obtain such benefits; whereas in others, it's a reprisal for an arrestees' refusal to "pay up." In many complaints, officers sought to extort and/or steal money or belongings from their victims. This occurred in about a fifth of the encounters (21.3%) initiated by SSP officials in connection with crimes, infractions or spot checks, in which detainees were either robbed of

[58] The fourth type of situation (7.7%) —classified as "resisting arrest, conflict with the police"— often implies mistrust and fear of police aggression. These are situations where neighbors and/or family members attempt to avoid an arrest or questioning by law enforcement officials (when a patrol car is parked, or a street closed to transit), which subsequently leads to the use of force. When police have a low level of legitimacy, the threshold for conflict is lowered.

money or belongings or subject to extortion. In the case of arrests and other controls by Investigative Agents, theft and/or extortion accounted for 17.4% of the files reviewed.[59]

The concurrence of the use of excessive force and corruption does not imply that the officers' initial motive was to extort money. For this reason, it is rarely easy to establish the temporal sequence of events on the basis of narratives contained in the complaints. Nevertheless, elements exist that seem to corroborate the link between corruption and the use of excessive force. For example, in three of four reported incidents of extortion, the complainant refused to pay what was demanded before force was used against him.

If we combine cases of the use of excessive force reported under "Problems of private citizen or police, police crimes" with violations in which force is connected to or provoked by theft or extortion, the total accounts for 30% of the CDHDF files reviewed. This figure represents a more accurate reflection of police abuse that involves predatory corruption.

Instrumental motivation for obtaining informally valued objectives (strategic corruption)

The illegitimate use of force is also commonly used by Mexico City law enforcement agencies to extract confessions and/or information from detained suspects. These are not corrupt practices per se, as there are no overt motives for personal economic benefit. Instead, they constitute "business as usual," i.e., what law enforcement agencies consider part of their daily duties.[60] Stated differently, these are tactics unrelated to "doing justice" but rather routine, "bureaucratic" mechanisms that "culprits" often face when detained by the authorities.[61] Not including the cases mentioned above that involve monetary gain, 12% of complainants cited the use of excessive force as a means to obtain a confession or extract information. If we consider only those cases involving either the Public Security Ministry or Public Prosecutor's Office, this amounted to 17.5% of reported complaints. The use of excessive force is thus a "tool" commonly used by Mexico City police to substantiate guilt, similar to planting evidence or presenting false witnesses.[62]

Grouping together (a) complaints about the "privatization" of police resources (i.e., the use of force to extract rent from the public); and (b) complaints about the use of force to incriminate detained suspects or obtain information,

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[59] These percentages most likely under-represent cases of rent extraction for crimes, misdemeanors or other instances involving the use of excessive force. The results should not be confused with the frequency with which the police seek to gain monetary benefits when making an arrest or enforcing their authority *without* the use of excessive force.

[60] The existence de incentive payments awarded to Mexico City police for the arrest of individuals suspected of serious crimes blurs the distinction between "predatory" corruption and "strategic" corruption.

[61] Azaola & Ruiz, *supra* note 4.

[62] In 13.5% of cases involving "arrests for crimes" made by Investigative Agents, police allegedly planted evidence or presented false witnesses – in addition to violating the detainees' right to humane treatment.

equals aprox. 40% of all cases handled by Mexico City's Public Prosecutor's Office; and 34% of cases involving the Federal Public Security Ministry.

Moral retribution: "respect for authority"

So far, this article has examined corrupt law enforcement practices in which illegal objectives are pursued in tandem with official duties, and where the use of force acts as a means to obtain personal and/or group benefits. We also looked at the use of excessive force as a means for performing day-to-day police duties, depending on the functions of each particular agency. To these we must add a third category: the use of excessive force as a reaction to challenges made to the real or symbolic power of police officers.

The theoretical and empirical justification for "punishing" those who "deserve it" (the marginalized, poor, disrespectful and those who resist authority) have been examined in a number of UK, US[63] and Latin American[64] studies. In this study, several cases seem to involve retribution —the use of police force for moral and/or disciplinary reasons—. Resisting authority at the moment of arrest (e.g., aggressive behavior or attempting to escape) is repaid with police violence when the suspect is finally detained. In numerous cases, a mere insult or show of "disrespect" provoked a disproportionate use of force. In other cases, in which neither resistance nor challenges to authority took place, the suspect is abused simply for having committed a serious crime.

The excessive use of force occurs either at the time an arrest takes place or after the detainee is moved elsewhere. In the latter cases, it is more likely that the mistreatment and/or beatings take the form of "punishment," as the victim is already under control. In 23.4% of the cases in which Preventive Police were involved, the excessive use of force occurred at a distance from where the initial encounter took place. When Investigative Agents were involved, the percentage was 43.4%. Regarding location, 57.4% of suspects arrested by the Preventive Police were abused in the precinct (a local branch of the Public Prosecutor's Office 42.6% took place inside a patrol car or other vehicle; and 17.4% in some other public location.[65] When Investigative Agents were involved, 71.4% of abuse took place in a Public Prosecutor's Office; 41.6% in a patrol car or other vehicle; and 5.2% in some other public area. Many of these cases, as explained above, involved extortion, theft or attempts to secure a confession.

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[63] Albert Reiss, *Police brutality. Answers to key questions* Vol. 5 No. 8 *Transactions* 10, 19 (1968). Chevigny, *supra* note 6. Donald Black, The Behavior of Law (Academic Press 1976). Friedrich, *supra* note 17. Muir, *supra* note 25. Van Maanen, *supra* note 25. Steve Herbert , *Police culture reconsidered*, Vol. 36 No. 2 *Criminology* 343, 370 (1998). Choongh, *supra* note 29.

[64] Luis Gerardo Gabaldón & Christopher Birkbeck, *Criterios situacionales de funcionarios policiales sobre el uso de la fuerza física*", Vol. 26 No. 2 *Capítulo Criminológico*99, 132 (1998). Teresa Caldeira, Ciudad de Muros (Gedisa 2007). Birkbeck & Gabaldón, supra note 25. Silva, *supra* note 7. José Garriga, "*Se lo merecen.*" *Definiciones morales del uso de la fuerza física entre los miembros de la policía bonaerense*, No. 32 *Cuadernos de Antropología Social* 75, 94 (2010).

[65] The percentages exceed 100 because the categories are not mutually exclusive.

If we leave aside those cases where the main motive was either to extract payment or obtain a confession, the use of excessive force that occurred at a distance from the initial encounter amounted to 15.7% of all cases (13.8% involving Preventive Police, and 19.4% involving Investigative Agents).[66]

Main motive for obtaining formally valued objectives (unnecessary use of force)

The complaints analyzed helped shed light on well-established motives: the extraction of payments, confessions and information, or "punishment" for resisting arrest or showing disrespect for authority. It is likely that the number of cases involving these motives are underrepresented, as not every type of case includes relevant data; e.g., extortion. This said, these cases clearly confirm the presence of diverse patterns linked to the use of excessive force. In the remaining cases (aside from those already mentioned), such force only takes place at the site of arrest and does not seem to involve the extraction of payments or confession. None of these cases are catalogued by the CDHDF as torture, or arbitrary or extrajudicial execution.

It is possible that in these cases the police intended to arrest or subdue an individual but, due to incompetence, lack of training or routine, employed excessive force. Between 2007 and 2011, such cases accounted for 4 out of 10 complaints against Investigative Agents; whereas for the Preventive Police, half the files fell into this category.

In sum, it is fundamental to recognize the diversity of cases involving the use of excessive force and their relation to the dynamics of law enforcement practices, including corruption, deeply-entrenched ways of handling detainees and harsh forms of "punishment" generated in response to the situational demands of police work. As long as the institutional incentives, structures and customs that support such practices are not altered, regulatory changes and improved training cannot be expected to make a significant impact.

VI. Conclusions

Studies on the excessive use of police force have taken into account individual, situational, organizational, and social factors. Organizational factors include institutional control mechanisms such as training programs and accountability structures, as well as a subculture that legitimizes the use of excessive force in carrying out day-to-day police work. This said, research regarding the relation between corruption and police violence is scarce.

This failure to analyze the link between corruption and police brutality is a serious omission when dealing with law enforcement agencies in which widespread corruption has deep historical roots. Such is the case of Mexico City's Preventive Police and Investigative Agents. To give an account of that part of

[66] The 27 cases catalogued by the CDHDF as torture or arbitrary execution that appear in the cases under study involve punishment, extraction of a confession or payment.

the problem of excessive use of force in the Distrito Federal that derives from objectives of obtaining rent implies acknowledging the heterogeneity of the phenomenon of police violations of the right to physical integrity and, along with this, the complexity of the responses that would be necessary in order to contain it. Based on an analysis of nearly 600 citizens' complaints received by the CDHDF between 2007 and 2011, many troubling patterns involving the use of excessive force emerge, including: corruption, a deeply-rooted modus operandi, retribution, incompetence and lack of training, among others.

While the problems generated by the use of excessive force have recently acquired greater political and social importance, the proposals, regulations and institutional changes adopted to reduce it have had, at best, only limited success. Each of these responses have emphasized greater regulation of law enforcement agencies as well as increased training of police officers.[67] The main weaknesses of this approach —and the most costly reforms from the point of view of the quotas of power affected within the corporations— include a lack of both disciplinary structures and accountability. A clear reflection of the latter may be seen in the extremely low sanctions currently in place for those found guilty of violating detainees' right to physical integrity. The inefficacy of these norms act to preserve the widespread practice of corruption and, as a result, the endemic problem of police brutality.

[67] The law regulating the use of force in Mexico City law enforcement agencies ("*Ley que regula el uso de la fuerza de los cuerpos de seguridad pública del Distrito Federal*") was enacted in April, 2008. The protocol for police action for crowd control of the capital's Public Security Ministry ("*Protocolo de actuación policial de la Secretaría de Seguridad Pública del Distrito Federal para el control de multitudes*") was enacted in March, 2013. The protocol for police action for arrested offenders and suspects ("*Protocolo de actuación policial de la Secretaría de Seguridad Pública del Distrito Federal para la detención de infractores y probables responsables*") was enacted in April, 2013.

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WHAT IS "CONSTITUTIONAL EFFICACY"?: CONCEPTUAL OBSTACLES FOR RESEARCH ON THE EFFECTS OF CONSTITUTIONS

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Abstract. *When and why are codified constitutions efficacious? Answering these key and apparently straightforward questions turns out to be extremely challenging. The road to responding to them is paved with conceptual, theoretical, and empirical difficulties. In this article, I make a modest, but nevertheless hopefully useful, claim: that overlooking certain conceptual difficulties is detrimental to the advancement of the theoretical and empirical agenda on constitutional efficacy. In other words, I posit that empirical and theoretical research linked to these questions can benefit from a clear conceptualization of constitutional (or more broadly formal) efficacy that is consistent with their research objectives. It is not uncommon for social and political science research in this area to overlook the question "how should constitutional efficacy be conceptualized?" A close analysis of academic sources makes it clear that even specialized literature on questions related to constitutional (or more broadly formal) efficacy have assumed conceptualizations that are theoretically problematic given their research objectives, potentially leading to theoretical inconsistencies or inaccurate empirical conclusions. To exemplify this point, I analyze the conceptualization of constitutional efficacy used in two influential political science texts: Barry Weingast's "The Political Foundations of Democracy and the Rule of Law" and Gretchen Helmke and Steven Levitsky's Informal Institutions and Democracy. I argue that the conceptualizations of constitutional (or more broadly formal) efficacy used in their theoretical proposals are not adequately suited to their own research objectives, and that this conceptual misfit affects the theoretical consistency and empirical applicability of their conclusions.*

Key Words: *Constitutional Efficacy, Concept Building, Informal Institutions, Self-enforcing Constitutions, Weingast, Helmke and Levitsky.*

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Resumen. ¿Cuándo y por *qué las constituciones codificadas son eficaces? Responder estas preguntas cruciales y aparentemente directas han resultado un reto mayúsculo. El camino a su resolución está plagado de dificultades conceptuales, teóricas y metodológicas. En este artículo defiendo una tesis modesta pero, espero, útil: Ignorar ciertas dificultades conceptuales es perjudicial para el progreso de la agenda teórica y empírica sobre la eficacia constitucional. En otros términos, afirmo que la investigación teórica y empírica vinculada a estas preguntas puede beneficiarse de una conceptualización clara de eficacia constitucional (o de manera más general de eficacia formal) que sea consistente con los objetivos de su investigación. Un análisis a detalle de las fuentes académicas muestran que incluso la literatura especializada sobre cuestiones vinculadas a la eficacia constitucional han presupuesto conceptualizaciones que son teóricamente problemáticas con sus objetivos de investigación, y que ello los puede conducir a problemas de orden teórico y empírico. Para ejemplificar este punto analizo la conceptualización de eficacia constitucional utilizada en dos influyentes estudios de ciencia política: "The Political Foundations of Democracy and the Rule of Law" de Weingast e Informal Institutions and Democracy de Helmke y Levitsky. Argumento que las conceptualizaciones de eficacia constitucional (o de manera más general de eficacia formal) empleadas en sus estudios no son adecuadas para los objetivos de su investigación, lo cual genera problemas para la consistencia y aplicabilidad de sus propuestas.*

Palabras clave: *Eficacia Constitucional, Conceptos, Instituciones Informales, Constituciones como Equilibrio, Weingast, Helmke, Levitsky.*

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I. Introduction

With the emergence of codified national constitutions, modern constitutionalism made a critical bet: "that societies of men are really capable… of establishing good government from reflection and choice [, that they are not] forever destined to depend for their political constitutions on accident and force."[1] Prima-facie this bet has reached a consensus, prolific constitution-making processes all around the globe have marked the last two decades of the 20th Century, and the first years of the 21st.[2] Latin America has been a frontrunner in this global trend with a stunning production of half of the world constitutions counting from independence until 2008.[3] The stakes of this bet are substantive: constitution-making processes imply considerable social and political risks and costs.[4] Moreover, from the late 18th Century to our day there have been important voices willing to bet against the efficacy of codified constitutions as mechanisms of social and political change[5] and the empirical evidence on constitutional efficacy does not support overly optimistic views.[6] Therefore, understanding when and why codified constitutions are efficacious is not only a matter of academic interest, but also of great social and political concern.

Unfortunately, answering these key and apparently straightforward questions turns out to be extremely challenging. The road to responding to them is paved with conceptual, theoretical, and empirical difficulties.[7] In this article, I make a modest, but nevertheless hopefully useful, claim: that overlooking certain conceptual difficulties is detrimental to the advancement of the theoretical and empirical agenda on constitutional efficacy. In other words, I posit that empirical and theoretical research linked to these questions can benefit from a clear conceptualization of constitutional (or more broadly formal or *de jure*) efficacy that is consistent with their research objectives.

It is not uncommon for social and political science research in this area to overlook the question "how should constitutional efficacy be conceptualized?"

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[1] The Federalist No 1 (Hamilton).

[2] Half of the world's constitutions were written or rewritten between 1978 and 2003: Vivien Hart, Democratic Constitution Making, Special Report 107 (2003).

[3] See: Jose Luis Cordeiro, Constitutions Around the World: A View From Latin America", Institute of Developing Economies, Discussion Paper # 164, (2008) *available at http://www.ide.go.jp/English/Publish/Download/Dp/164.html*.

[4] David Landau, *Constitution-Making Gone Wrong*, 62 Alabama L. Rev. 923,938 (2013).

[5] See for instance: Ferdinand, Lassalle. *On the Essence of Constitutions* in 3(1) Fourth International. 25,31 (1942).

[6] See for instance: Cliford Carruba *et al*. *When Parchment Barriers Matter: De jure judicial independence and the concentration of power* (unpublished manuscript available at: *http://polisci.emory.edu/faculty/jkstato/resources/WorkingPapers/Parchment.pdf*).

[7] *See* David Law, *Constitutions,* in The Oxford Handbook Of Empirical Legal Research (Peter Cane & Herbert M. Kritzer eds., 2010).

On the one hand, this question may seem odd. "Constitution" and all its associated terms are recurrent elements of our public speech, and "constitutional efficacy" is not the exception. Even if considered a legitimate question, it may be thought of as an issue relevant only to the philosophical research on Law that has little relevance for social or political science research.[8] Nevertheless, as I argue, a close analysis of academic sources makes it clear that even specialized literature on questions related to constitutional (or more broadly legal) efficacy have assumed conceptualizations that are theoretically problematic given their own research objectives, potentially leading to theoretical inconsistencies or inaccurate empirical conclusions. To exemplify this point, I analyze the conceptualization of constitutional efficacy used in two influential political science texts: Barry Weingast's "The Political Foundations of Democracy and the Rule of Law"[9] and Gretchen Helmke and Steven Levitsky's *Informal Institutions and Democracy*.[10] I argue that the conceptualizations of constitutional (or more broadly formal) efficacy used in their theoretical proposals are not adequately suited to their own research objectives, and that this conceptual misfit affects the theoretical consistency and empirical applicability of their conclusions. Specifically, I argue that the theoretical proposals of both texts imply a conceptualization of efficacy that I label as *norm-behavior congruence*, and that this conceptualization is not adequate for their aims.

The remainder of the article is divided into four sections. The first section discusses the conceptualization of constitutional efficacy as norm-behavior congruence and argues that it is not adequate for research on whether, when, and why constitutions (or more broadly formal institutions) have a causal effect on public official's behavior. In the second section, I analyze Helmke and Levitsky's theoretical proposal to account for the different kinds of relations between formal and informal institutions, and how these relations affect formal efficacy. In the third section, I analyze Weingast's theoretical proposal to account for the mechanism that makes constitutions work. In the fourth section I briefly conclude.

II. Efficacy as Norm-Behavior Congruence

First of all, it is important to make clear that this article is only concerned with the efficacy of constitutional norms that prescribe behavior to public officials.

[8] Paradoxically, as Pablo Navarro argues, many philosophers of Law have not been interested on the conceptual analysis of legal efficacy on the grounds that that the analysis of legal efficacy is an issue that concerns Sociology of Law and not Jurisprudence see: Pablo E. Navarro, La Eficacia del Derecho 20 (Centro de Estudios Constitucionales, 1990).

[9] Barry Weingast, The Political Foundations of Democracy and the Rule of Law, vol. 91, no. 2, The Political Science Review, 245 (1997).

[10] Gretchen Helmke and Steven Levitsky, Introduction in Informal Institutions and Democracy (John Hopkins 2006).

Therefore, we will focus on an important, but limited, subset of the different types of provisions contained in contemporary codified constitutions. The efficacy of these norms is important to political science and political theory research since they are considered fundamental institutions for the realization of constitutionalism (i.e. limited but effective government).[11]

The centrality of norm-behavior congruence for constitutional efficacy is very intuitive and is present in everyday discourse. Consider the following news report published on March 22nd 2007 that the BBC Monitoring Kiev Unit entitled "Ukrainian mayor says top presidential official controls home region:"

The mayor of Uzhhorod, Serhiy Ratushnyak, made a resonant statement at a news conference in Kiev today. According to him, *the laws and constitution do not work* in the Transcarpathian Region. The region is actually controlled by the family of the head of the presidential secretariat, Viktor Baloha.

According to the mayor, the Ukrainian constitution does not work in the Transcarpathian region because the real rules of the game are *different* from those established in the constitution: the legal authority is impotent and the actual rules are those imposed by the powerful Baloha family. If the constitution is ineffective because political reality differs from the constitutional norms then, under the implied notion of constitutional efficacy, for a constitution to work what is legally prescribed by the constitutional text (*de jure*) must correspond with the behavior that actually (*de facto*) occurs.

Norm-behavior congruence can be considered either a *necessary* condition for a constitution to work or a *necessary and sufficient* condition for constitutional efficacy.[12] Only the latter implies that observing correspondence between a polity's constitutional norms and their prescribed behavior is *sufficient* to claim that its constitution works. This is the claim of the conceptualization of constitutional efficacy that I label "norm-behavior congruence."

In this section I defend two theses:

Research concerned with the effects of codified constitutions on political reality must consider agreement between the constitutional norms and the prescribed behavior as a *necessary* condition for constitutional efficacy and

Given this research objective, norm-behavior congruence should not be considered a *sufficient* condition for a codified constitution to work. In particular, I argue that norm-behavior congruence as a necessary and sufficient criterion for efficacy is not satisfactory because it is *too broad* (i.e., under it constitutions that play no role in their polities are considered efficient).

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[11] Stephen Holmes, *Constituionalism* in The Encyclopedia of Democracy, (Congressional Quarterly ed. 1995). In what follows "constitutional efficacy" and related terms will refer only to the efficacy of these norms.

[12] Note that "legal norm" and "behavior" can be conceptualized in very different ways. How to conceptualize them is a mayor concern of jurisprudence and of philosophy of action correspondently, nevertheless for the purposes of this paper is not necessary to take a position of those debates. For a classical analysis see: Joseph Raz, the Concept of the Legal System (Clarendon Press, 1971).

1. *Norm-behavior Congruence: a Necessary Condition*

The first thesis, that *norm-behavior congruence* is a necessary element of a plausible conceptualization of constitutional efficacy, is hardly a controversial statement. The constitutional articles that are the center of this enquiry are those concerned with the behavior of public officials. Thus, if norm-behavior congruence is *not* a necessary condition of constitutional efficacy then it is possible for those articles to be fully ignored and yet to work. In other words, the negation of the first thesis implies that it is possible for norms regulating behavior to do so effectively and for such behavior to be inconsistent with them. This is a contradiction since the very meaning of "regulation" implies agreement between the prescribed behavior and the norm(s) that regulate it. Hence, by *reductio ad absurdum*, norm-behavior congruence is a necessary condition of any plausible conceptualization of constitutional efficacy.

Of course this does not imply that the only effects (intended or not) of codified constitutions are prescribed behaviors. For instance, it can be the case that a codified constitution is causally linked to political riots or economic growth, but the relation between constitutional norms and those effects would not constitute constitutional efficacy. In other words, constitutional efficacy must minimally involve correspondence between the norm and the prescribed behavior.

2. *Norm-behavior Congruence not Sufficient for Constitutional Efficacy*

Now, let me focus on the idea that agreement between the constitutional norms and the political behavior is not only necessary but also not *sufficient* for constitutional efficacy. In what follows, I argue that political science research should not consider that norm-behavior congruence is sufficient to assert constitutional efficacy because under it codified constitutions that have no motivational role on the behavior of public officials are considered effective. In other words, my aim is to show that for this research it makes sense to open the possibility of constitutional *inefficacy* even if we observe that the relevant public officials behave in accordance with what the provision in question requires.

My first argument has the same form as the classic argument presented by Schumpeter against the claim that "government approved by the people" is a satisfactory definition of "democracy."[13] The norm-behavior congruence criterion is too broad in exactly the same way "government approved by the people" is too broad to define democracy. Schumpeter claims that "government approved by the people" is not a satisfactory definition of democracy because "by accepting this solution we should lose the phenomenon we wish to identify: democracies would be merged in a much wider class of political arrangement which contains individuals of clearly non-democratic

[13] Joseph A. Schumpeter, Capitalism, Socialism and Democracy (Rontledge, 1976).

complexion."[14] In the same way, I argue that *norm-behavior congruence* is not a satisfactory criterion for constitutional efficacy since if we accept it, constitutions that work would be merged in a wider political class: that of written constitutions whose content is consistent with the political equilibrium of its polities that contains constitutions that do not matter. In other words, a satisfactory conceptualization of constitutional efficacy for empirical legal studies should not have as part of its extension constitutions that have no effect on their regulatory target.

This last argument bears the question, how can we have norm-behavior congruence without constitutional efficacy? Congruence is a state of agreement. The norm-behavior criterion of constitutional efficacy is satisfied when constitutional norms and the prescribed behavior of public officials agree *independently* of what is behind such an agreement. Such an agreement can be attained 1) because constitutional norms has some effect on the behavior of public officials, 2) because the behavior (or intended behavior) of public officials has some effect on the constitutional text or 3) because of another non-related cause. Notice that while in these three cases there is congruence between constitutional norms and behavior prescribed by them, only in the first case it makes sense to claim that the constitution is efficacious. In other words, only in the first case the constitutional norms motivate individuals to behave in a certain way. In what follows I discuss in detail scenarios where the criterion text-law is satisfied but the constitution has no effect on the behavior of constitutional role-holders.

3. *Ex-post ad-hoc Enactment, Ex-ante ad-hoc Enactment and Parallel Norms*

Ex post ad hoc Enactment

An *ex post ad hoc* enactment occurs when the constitutional text is made to fit an already occurring behavior. The 1980 Chilean constitution is a particularly illuminating case in this respect. This constitution has two parts: the permanent articles that provided the basic framework for a transition to civil rule that did not come into effect until 1989, and the transitory part that dealt with the institutional framework that ruled Chile until the transition. What is important for our current purposes is that, to an important extent, these articles enacted an already established institutional framework, an institutional framework that had ruled Chile from the early years of the dictatorship that had associated behaviors well established by then (the military coup took place in 1973).

By 1980 "the Junta already had agreed to its own rules… The transitory articles enacted did not significantly depart from this prior organization."[15]

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[14] Id. at 247.

[15] Robert Barros, Constitutionalism and Dictatorship (Cambridge University Press, 2002).

Thus, the fact that the constitution entered into effect in March 11, 1981 was not very noticeable: "the organization of power during the transitory period remained largely identical to the period which the regime allegedly was stepping away from."[16] Take for instance Pinochet's executive role and the legislative faculties of the Junta. These roles and faculties emerged in 1973-4 to respond to specific political challenges and from power struggles within the military Junta. As Barros' account clearly shows the constitution did not *constitute* the particular equilibrium linked to these institutional roles; actually the equilibrium *preceded* the constitution.

In sum, the transitory articles of the Chilean constitution of 1980 are a good case of *ad hoc ex post* enactment, and thus a case where norm-behavior congruence does not provide a sensible foundation to conceptualize constitutional efficacy. Even if there was a high degree of norm-behavior congruence relative to the Junta's legislative powers, it would be misleading to say that the constitutional provisions dealing with that power were efficacious since, arguably the behaviors associated to prescribed by those norms were originated and maintained by means independent of the constitution, that is the *de facto* power of the Junta members.

4. *Ex-ante ad-hoc Enactment*

Someone could argue, following Thomas Paine's famous dictum,[17] that given that the constitutional norms in question *precede* the relevant behavior, it would be sufficient to observe norm-behavior congruence to infer that those norms are efficacious. Thus, *prima facie*, we could say that the norm-behavior congruence criterion could still survive by additionally requiring that the enactment of constitutional provisions *precede* the prescribed behavior. Let me call this addition the *precedence condition*, and the criterion that incorporates it the *modified* norm-behavior criterion.

I believe the precedence condition misses the mark. Even incorporating the precedence requirement, the modified text-reality criterion is not sufficient to ascertain constitutional efficacy. In particular, I argue that such a criterion is still *too broad* since it leads us to consider efficacious cases that are not such. As I have shown, correspondence between norm and behavior can be reached through different routes. In the previous section I showed that text can be made to fit behavior. In what follows, I show that the text can also be made to fit *intended* behavior and that this type of fit undermines the modified norm-behavior congruence criterion for constitutional efficacy.

The constitutional norm can be made to fit an individual intended behavior when the intention to behave in a certain way shapes the enactment of the constitutional provision that is supposed to regulate the intended behavior. I

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[16] *Id*. at 179.

[17] *See* Thomas Paine, Common Sense 59 (1751).

call this *an ex ante ad hoc enactment*, since the enactment of the provision in question *precedes* the behavior but the content of the provision is expressly made to fit the intention to behave in that way.

Consider the following example:

Imagine a President of a country who is about to finish his term with overwhelming public support, and who heads a party with the political capacity to amend the current codified constitution (e.g. a party with a supermajority in congress). Suppose that the constitution of that country has a provision (CP_1) that mandates a term limit that is about to expire and prohibits presidential reelection. Now, suppose that the president intends to seek re-election, and that he knows that given his public support he could ignore the constitutional term limit without any real opposition. Suppose further that nevertheless, the President has a legalistic preference that leads him to instruct the members of his party to amend CP_1 in an *ad hoc* fashion. CP_1 is amended and a new constitutional provision, CP_2, enabling indefinite reelection is enacted. If the president stays in office until he finishes his term and then seeks reelection, there would be congruence between the relevant constitutional text (CP_2) and the president's behavior. However, it would be misleading to say that CP_2 was in any way causally linked to such behavior. The amendment was done only because of the President's legalistic preference, but if it had not been enacted the President's (and other relevant actors') behavior would have been the same. Therefore, in this case too claiming that norm-behavior congruence is *sufficient* for a constitution to be effective implies that it is possible for a constitutional norm to work even if the behavior it prescribes has no causal relation to it.

The previous is a counterexample to the modified text-reality criterion showing that even if the precedence condition is met, norm-behavior congruence is too weak to ascertain constitutional efficacy. However, it may be argued that this counterexample does not pose a real problem to the modified criterion since in the real world *ex ante ad hoc* enactment does not occur. To refute this point consider the following example:

When the administration has the control of the organs required to amend the constitution it has the capacity to surpass the rigidity of codified constitutions without opposition. In such a context, *ex ante ad hoc* enactment is facilitated. This was the case during what Dominicans call "The Era of Trujillo," the time during which Rafael L. Trujillo ruled the Dominican Republic (1930-1961). During those times, *ex ante ad hoc* enactment was not an uncommon practice.[18] Trujillo was president from 1930 to 1938 and from 1942 to 1952, but he remained "the Supreme Leader of the Dominican Party" and in fact he and his family controlled Dominican politics until his assassination in 1961. Trujillo's rule was a bloody and authoritarian period in Dominican history; it was also a time marked by personality cult. However, he had a

[18] Jacobo Espinal, Constitutionalism and Democracy in the Dominican Republic (University of Virginia Press, 1997).

notable respect for the legal forms and constitutional technicalities that lead him on several occasions to amend the constitution for it to fit his intended actions.[19] Thus, under this legalistic dictator the modified norm-behavior congruence criterion was satisfied, but one could hardly claim that the constitution governed Trujillo's behavior. In this case norm-behavior congruence was achieved through the adjustment of law to intended behavior.

5. *Parallel Norms*

I have argued that the central problem with the norm-behavior congruence criterion is that it is satisfied whenever the constitutional text and the political reality agree independently on what is behind such an agreement. As already discussed, this agreement can be reached without any guarantee of constitutional efficacy when the constitution is made to fit behavior or intended behavior. There is a last logical possibility where the norm-behavior congruence is satisfied but constitutional efficacy is not assured: when there are what I call *parallel norms*.

A codified constitution is a system of norms. It is a system because its constitutional provisions are interrelated, creating a more or less consistent whole. And that system is of norms because its provisions establish constitutional roles (e.g. that of Supreme Court Justice or President) and regulate the behavior of individuals occupying those roles.

But, codified constitutions are not the only normative systems of political life. Historically, in fact, they are latecomers: they have been present in the political scene only since the late eighteenth century. Moreover, even in countries with codified constitutions, the Constitution is only one among many political normative systems that can potentially regulate interactions of individuals in constitutional roles. Constitutional conventions (non-written norms regulating relations between political parties or governmental branches)[20] and intra-political parties' formal and informal norms are only two of the many normative systems in place in the political scene. Each of these normative systems establishes institutional roles and regulations linked to them. Furthermore, politics is not an isolated sphere, and normative systems are present in all areas of social life. In this way, a complex net of normative systems constitutes social and political life.[21]

Now, any given individual has a number of different roles. For instance, an individual with a constitutional role like that of "the President," can also be member of a party, a corporation's stoke holder, a friend of many, and a par-

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[19] *Idem*.

[20] J. Jaconelli, The nature of constitutional convention, vol. 19, no. 1, Legal Studies (1999); J. Jaconelli, Do constitutional convetions bind?, vol. 64, no. 1, The Cambridge Law Journal (2005).

[21] John R. Searle Making The Social World (Oxford University Press, 2010).

ent of two. And therefore, a given interaction between two individuals holding constitutional roles can be regulated by a number of different, potentially conflicting, normative systems.[22]For instance, an interaction between two individuals holding the constitutional roles of "Vice-president" and "member of Congress" correspondingly could be regulated by a constitutional provision linked to those roles, by an informal corporative norm if they both are board members of a corporation, by an interpersonal norm if they happen to be friends, among many others.

Here I am interested in what I call parallel norms. This is its definition: Two norms are parallel if an individual holds two roles linked to two independent normative systems, each role belongs to one of these systems and can be satisfied by the same behavior. Note that in this case there is no behavioral conflict derived from the norms associated to two different roles. In what follows, I present an example in which parallel norms present a systematic problem to the empirical assessment of constitutional efficacy.

The PRI (*Partido Revolucionario Institucional*) was the hegemonic party in Mexico from 1929 to 1989. During the PRI Era, this political party had control over the administration, the federal Congress, the states' governments and the judiciary. The President was the head of a very well disciplined political system: he was the head of the government and the head of the PRI. He had the political capacity to violate some provisions of the 1917 Constitution without political opposition. For instance, the Constitution mandated life tenure for Supreme Court judges. However, every six years the incoming President used to appoint as much as 72% of the Court (Ruiz Cortinez, 1952-58) and no less than 36% (Lopez Mateos, 1958-64). "The president could thus somehow create vacancies to be filled by justices he appointed or, put in other terms, he could either dismiss justices or induce early retirements."[23] Furthermore, the PRI's supermajoritarian control also gave him the legal capacity to alter the Constitution. Every incoming President amended the Constitution to make it fit his political agenda: as much as 66 constitutional provisions were altered in the presidential term of Miguel de la Madrid Hurtado, 1982-1988.[24]

Nevertheless, surprisingly during this president-centered era (1929-1989), Article 83 of the constitution that establishes a six-year presidential term without re-election was neither altered nor violated. In 1927, Article 83 had been amended to enable non-consecutive re-election allowing former president Álvaro Obregón to run for a second term, but in 1928 (after the assassination of president elect Obregón) the article was again amended back to its original form, and it was never again touched.

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[22] Robert Merton, Social Theory and Social Structure (Simon and Schuter, 1968).

[23] Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of law in Mexico*, in Democratic Accountability in Latin America 228-289 (Scott Mainwaring & Christopher Welna eds., 2003)

[24] Francisco Valdés Ugalde, La Regla Ausente. Democracia y Conflicto Constitucional [Gedisa-IIS-UNAM] (2010).

Why did presidents with extraordinary power accept to hand over political power and to retire from public life once their term was over? Arguably, the means by which Article 83 was enforced, at least during the first terms of the PRI era, were *independent* of constitutional prescriptions.[25] During this period, Article 83 was enforced through the norms of the PRI that also enabled, and in some instances promoted, the violation of some other constitutional provisions and the *ad hoc* amendment of others. In other words, there was a highly efficient normative system alternative and parallel to the constitution: that of the hegemonic political party, the PRI. If this normative system could totally account for the behavior of presidents facing the end of their term, then Article 83 was ineffective.

The prescriptions of the hegemonic party system sometimes contradicted the constitutional norms, as happened with the party norm that enabled the President to dismiss Supreme Court justices or induce their early retirement. At other times, the norms of the PRI were parallel to the constitutional ones, as was the case with the prohibition of re-election. In this case, norm-behavior congruence would not be sufficient to affirm constitutional efficacy since the President's behavior could be fully motivated by the party's norm, the constitutional norm could then have no motivational effect, and it could not work while the norm-behavior congruence would still hold.

In conclusion, if we are interested on the *effects* of codified constitutions (or more broadly formal institutions) on public officials' behavior as is most, if not all, political science research in this thematic area, then we need a conceptualization of constitutional efficacy considers norm-behavior congruence as a necessary but not sufficient condition. We need a conceptualization of constitutional efficacy where the norm not only corresponds to the behavior it prescribes, but were it has a causal relation to such a behavior. However, as I will now show, influential works on the effects of constitutions do not take into consideration such conceptual discussions and in fact adopt a criterion of norm-behavior congruence as sufficient for constitutional efficacy.

III. On the Relations between Formal and Informal Institutions

As we discussed in the previous section, constitutions, and more generally formal institutions, are not isolated, they interact in various ways with informal institutions of all sorts, from the reciprocity rules that characterize clientelistic networks, to social norms such as foot binding. Since these informal institutions systematically motivate individual behavior as formal institutions aim to do, if we want to understand what can affect the motivational capacity of formal institutions, we need to understand the different types of relations among formal and informal institutions. In other words, informal institutions can

[25] Magaloni, *supra* note 23.

have different kinds of relations with formal institutions, and those relations have important implications for formal efficacy in general, and therefore for constitutional efficacy in particular since codified constitutions are paradigmatic examples of formal institutions. In this section I analyze the influential typology of formal-informal institutions relations by Helmke and Levitsky,[26] and I argue that it implies the norm-behavior congruence conceptualization of constitutional efficacy that is not adequate for their research aim that involves understanding institutions as causes of behavior.

Helmke and Levitsky are not the only authors that have dealt with the different relations formal and informal institutions can have, but they are, without doubt, as clear and systematic as any other author. Their commitment to analytic clarity enables the discussion and the criticisms, hopefully constructive, I present here.

To begin let me provide the basic definitions of formal and informal institutions that Helmke and Levitsky give. "We define informal institutions as *socially shared rules, usually unwritten that are created, communicated and enforced outside officially sanctioned channels*…[and]…formal institutions are rules and procedures that are created, communicated, and enforced though channels that are widely accepted as official." [27] Here I take these definitions as given. As Helmke and Levitsky note it is important to be clear that:

- Not all informal institutions are linked with cultural or traditional practices.
- It is not the case that the formal-informal distinction coincides with the state-societal distinction (i.e. there are informal state institutions).
- It is not the case that informal rules are not externally enforced while formal rules are.
- Ineffective formal institutions do not always imply the presence of informal institutions.
- And
- Informal institutions should not be mistaken for other informal behavior not rooted on shared expectations or rule bound.[28]

The typology Helmke and Levitsky present, is based on two dimensions:

First, the degree of convergence between the outcomes of formal and informal institutions:

"The distinction here is whether following the informal rules produces a result substantively similar to or different from that expected form a strict and exclusive adherence to the formal rule…Where following the informal rule leads to a substantively different outcome, formal and informal institutions

[26] Helmke & Levitsky, *supra* note 10.

[27] *Id.* at 5.

[28] *Id.* at 5-8.

may be said to diverge. Where the two outcomes are not substantively different, formal and informal institutions converge".[29]

What do the authors mean by "outcomes" or "result substantively similar or different" is not very clear. Based on the examples they provide we can conclude that they mean very broad outcomes such as political competiveness, cohesion or stability. As I argue later the lack of specificity of this dimension is problematic.

The second dimension of Helmke and Levitsky's typology is the effectiveness of the relevant formal institution. They tell us: "[b]y effectiveness we mean the extent to which rules and procedures that exist on paper are enforced or complied with in practice"[30] It is important to note that this explicit definition of formal efficacy is *not* that of norm-behavior congruence since enforcement and compliance imply more than mere correspondence. That this is the explicit definition of formal efficacy makes sense given their research interests but as will become clear later, their typology does imply a conceptualization of efficacy as norm-behavior congruence, and this conceptual misfit creates theoretical problems for their proposal reducing its empirical usefulness.

Table 1: Helmke and Levitsky typology

Outcomes/Effectiveness	*Effective Formal Institutions*	*Ineffective Formal Institutions*
Convergent	Complementary	Substitutive
Divergent	Accomodating	Competing

As already mentioned the first dimension of the typology, ("whether following the informal rules produces a result substantively similar" to the produced by the formal one), appears to refer to the effects those institutions have vis-à-vis a substantive broad political outcome. For instance, whether it enhances political stability I believe this criterion is problematic for practical and theoretical reasons.

First, I want make two points of a practical nature. Given the first dimension of this typology, establishing what type of relation a formal and an informal institution have could be very taxing in practical terms because determining the effects of institutions is often not an easy task. In fact, an important section of the most sophisticated political science research aims to specify the effects of particular institutional arrangements, and doing so is not trivial most of the times. Furthermore, the outcomes of institutions often vary considerably depending on political or social conditions. The same institution may enhance political stability under some conditions while contribute

[29] *Id.* at 13.

[30] *Id.* at 13.

to instability under others. The prohibition of executive re-election, is a good example of this, it arguably contributed to the political instability of Mexico in the period that immediately followed the Revolution (1917-1934), while it was arguably helpful to that effect under era of hegemonic party (1934-1997). Therefore, pining down this dimension with respect to specific formal and informal institutions in order to establish their relation will often be practically difficult. Second, institutional arrangements often have multiple effects and these are often not unidirectional vis-à-vis a substantive broad outcome as rule of law, or political stability. In these cases, it would be impossible to establish the type of relation institutions has.

Now, my main concern is with the second dimension of the taxonomy, since it is based on a definition of formal efficacy that, when applied to constitutional articles, implies the norm behavior correspondence conceptualization of efficacy which is misleading. To see why this is the case, let us give account in greater detail of the different types of relations informal and formal institutions can have according to this typology.

Complementary informal institutions "shape behavior in ways that neither violate the overarching formal rules nor produce substantively different outcomes."[31] According to Helmke and Levitsky the following is one type of complementary informal institutions:

"[A type of complementary informal institution] …serves as the underlying foundations for formal institutions. These informal norms create incentives to comply with formal rules that might otherwise exist merely as pieces of parchment. Thus compliance with formal rules is rooted not in the formal rules *per se* but rather in shred expectations created by underlying (and often preexisting) informal norms".[32]

Two parallel norms, as described and discussed in this paper, could perfectly fit this description of an informal complementary institution of this sort vis-à-vis a formal one. As stated before, two norms are parallel if an individual holds two roles linked to two independent normative systems, each of these norms belongs to one of these systems, and both norms can be satisfied by the same behavior. So, in the case of the complementary rule above described, the informal and the formal rules would be part of different normative systems (e.g. the Constitution and the informal hegemonic party political norms), and both could be satisfied by the same behavior, actually the informal complementary one would fully motivate the behavior prescribed by the formal one. The theoretical critique to this typology is now clear: under this circumstances it would be mistaken to claim the formal institution is efficacious if we assume a notion of efficacy that is not reduced to norm-behavior congruence, instead we need to incorporate a causal... incorporate a causal link between norm and behavior.

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[31] *Id.* at 13.

[32] Helmke and Levitsky, 2006, 14.

In this connection, if an informal norm creates "incentives to comply with formal rules that might otherwise exist merely as pieces of parchment presence" it is a misattribution to claim that the formal institution is efficacious (in the stronger sense implied in terms such as "enforced" or "complied") since the informal norm is *fully* responsible of producing the prescribed behavior. Helmke and Levisky's theoretical framework is problematic since under it these would be complementary norms and, as the Table 1 shows, the formal parallel norm is claimed to be efficacious in these cases. The function of norms is to motivate specific behaviors. Hence, if they totally fail to do so, it is problematic to claim that they are efficacious in the strong sense, even if the behavior in question happens to be produced by another norm. In sum, claiming that in these cases the formal rule works even if it has no role what so ever in the producing the behavior, makes explicit a implicit assumption of this typology: under it observing the behavior is sufficient for to consider efficacious a formal rule that prescribes such behavior. In other words, it assumes norm-behavior congruence conceptualization of efficacy.

Now, notice the implication of the previous argument: if what I have argued is correct in these cases the formal institution should be considered inefficacious and hence it is problematic to claim that the informal parallel norm is *complementary* to the formal one, what it actually does is to *substitute* the formal rule, since it plays the role the formal one ought to play (i.e. leading to the behavior it prescribes).

What if both the formal and the informal parallel norms are efficacious? Would they then be complementary? According to the *Oxford Dictionary* "complementary" means: "[c]ombining in such a way as to enhance or emphasize the qualities of each other or another"[33] Hence, saying that two things complement each other implies that, they have *an effect on their qualities*: it implies certain type of interaction. If a formal and an informal rule prescribe the same behavior and both work, the behavior is over-determined: any of the two norms would be sufficient to motivate it. But in these circumstances the efficacy of one has no impact on the efficacy of the other. They are totally independent with respect to their efficacy. For this reason, I believe it would not be advisable to claim that these norms *complementary*. I think that the best way to characterize their relation is by saying that they are parallel vis-à-vis their efficacy.

Now to complete the discussion on the Helmke and Levitsky's typology let me briefly characterize the other types of informal institutions vis-à-vis their relations with formal institutions. An informal institution is *accommodating* vis-à-vis a formal institution, if the later is effective and they have di-

[33] Oxford Dictionary available at *http://www.oxforddictionaries.com/definition/english/complementary?q=complementary* (last visited april, 8th, 2016).

vergent outcomes. These informal institutions do not directly violate their formal counterparts: "they contradict the spirit, but not the letter of the formal rules."[34] The substantive outcomes of these rules are incompatible. Competing informal institutions combine ineffective formal institutions and divergent outcomes. These informal institutions "trump their formal counterparts, generating outcomes that diverge markedly form what is expected form the formal rules."[35]

The category of competing informal institutions creates another theoretical problem. It assumes that what makes inefficacious the formal norm is the informal norm. But it is possible for a formal institution to be inefficacious and to have divergent outcomes with an informal institution, and for the informal institution to have nothing to do with the formal inefficacy in question. These cases have no place under Helmke and Levisky's typology. Finally, substitutive informal institutions "…combine ineffective formal institutions and compatible outcomes."[36]

I have so far presented an account of Helmke and Levisky's typology, I have argued that it implies the conceptualization of formal efficacy (and for implication of constitutional efficacy) as norm-behavior convergence, that this conceptualization is not adequate for their research objectives, and that it differs with the conceptualization they explicitly offer. I have further pointed to some theoretical problems their typology has as a result of their conceptualization of constitutional efficacy.

Finally, it is important to note that using this typology to account for the relations between formal and informal institutions and their implications for formal efficacy would lead us, in certain cases, to problematic empirical conclusions. For instance, take the example of Article 83 of the Mexican Constitution in the PRI era discussed in the previous section. Under Helmke and Levitsky's typology during the presidential succession processes that followed the consolidation of the hegemonic party (at least until the election of Ruiz Cortines in 1952) Article 83 and the PRI non-reelection informal norms would be considered "complementary." They would be complementary because arguably, the PRI norms "…server[ed] as the underlying foundations for formal institutions. These informal norms create[d] incentives to comply with formal rules that might otherwise exist merely as pieces of parchment… compliance with formal rules [was not] rooted not in the formal rules *perse* but rather in shred expectations created by underlying informal norms."[37] But, if this was in fact the case, in spite of its complete lack of motivational effect on presidential no-reelection, this taxonomy would lead us to conclude that Article 83 was efficacious at that time. If what I have argued is correct the misfit

[34] Helmke & Levitsky, *supra* note 10 at 15.

[35] *Id.* at 15.

[36] *Id.* at 16.

[37] *Id.* at 16.

of the conceptualization of efficacy and Helmke and Levitsky's research objectives is problematic both for theoretical and for empirical reasons.

IV. Exogenous Foundations of Constitutional Efficacy?

Constitutional efficacy as an equilibrium is arguably the most common criterion in the literature of political science. While several authors describe constitutions as equilibria, it is clear that the claim is not that all codified constitutions constitute equilibria, but that all codified constitutions *that work* are equilibria. Thus, for instance, I believe that Russell Hardin's account of constitutions as coordination devices is not that all codified constitutions can be considered as such, but that all constitutions that work do coordinate.[38]

A constitution depicts an equilibrium if and only if actors behave in accordance with the constitutional text and they individually have nothing to gain by changing his or her own strategy unilaterally. A constitution that depicts an equilibrium is often characterized as a self-enforcing constitution. In other words, by using the game theoretic notion of equilibrium political scientists have aimed to give an account of the mechanism through with constitutions become efficacious. Now, an account of how codified constitutions become efficacious necessarily implies a conceptualization of constitutional efficacy (in a more general way, you can not account how *x* becomes an *xa* without implying an idea of what it means to become *a*). The conceptualization constitutional efficacy implied in the account of constitutional efficacy as equilibrium is that of norm-behavior congruence.

As the reader most probably can see by now, the problem with constitutional efficacy as equilibrium is that it tells us nothing of what maintains such an equilibrium. In particular, it can perfectly well be the case that what maintains the correspondence between the constitutional norm and the actor's behavior bears no relation to the constitution itself. If this were the case, a constitutional norm that has no effect on the relevant behavior would be considered effec-

[38] In this connection, some criticisms to this theory would be somewhat off the mark. For instance, showing that for most Latin American constitutions the probability of replacement increases as time goes by would not falsify Hardin's theory for the Latin-American region (see Gabriel Negretto, Shifting Constitutional designs in Latin America: A Two-Level Explanation, 89 Texas Law Review 1777-1805 (2010)), since we would expect re-coordination costs to decrease the probability of replacement only for constitutions that in fact coordinate. In other words, assuming the interpretation I propose, if it is the case that most Latin American constitutions have a very low degree of efficacy, the empirical implications of the theory would not be in conflict with such empirical findings. Hardin acknowledges that: "Many actual constitutions do have the character of contracts at their core. They cover the agreed resolution of a bargaining process in which interests are compromised. Unfortunately, constitutions that include contracts at their core are typically unstable… If a constitution is to be stable, it must be self-enforcing:" Russell Hardin, Liberalism, Constitutionalism, and Democracy 98 (Oxford University Press, 1998).

tive. Hence, given that political science research in this area has as one of its objectives to understand the effects of institutions on behavior, the account of constitutional efficacy as equilibrium is too broad: for constitutional efficacy to make sense endogenous motivations must play a role in the maintenance of the equilibrium. Therefore, if the aim is to account for how codified constitutions can motivate behavior the equilibrium account of constitutional efficacy should make limit themselves to a subset of equilibria, those where the equilibrium is not exclusively maintained by exogenous controls.

To clarify this point consider an account of constitutional efficacy as equilibrium that only incorporates exogenous controls: the one presented in Barry Weingast's very influential article "The Political Foundations of Democracy and the Rule of Law". Weingast's central question is: "How are democracy's limits enforced?" His aim is to give "a unified approach to the political foundations of limited government, democracy and the rule of law- phenomena requiring that political officials respect limits on their own behavior".[39] Political officials respect the limits of their behavior if and only if those limits are self-enforcing. His approach is modeled by a game of the stability of limited government that focuses on the relation between a single political official, called the sovereign, and the citizenry.

To stay in power the sovereign requires sufficient support from the citizens, and each individual supports the sovereign as long as he does not transgress what the citizen believes are her rights.[40] Different citizens have different "preferences and values" and therefore, different conceptions of what her rights are.[41] So accordingly constitutions are devices that *coordinate* the citizens on what constitutes a violation of rights so that they can collectively react to transgressions by withdrawing their support from the sovereign. If the constitution is effective, that is if citizens are coordinated on its content, the sovereign will avoid any behavior that violates the constitution because by doing so he risks losing power. Notice that in this model the converse relation also holds: if the sovereign acts in accordance with the constitution, the constitution is efficacious. Therefore, clearly this particular model falls under the conceptualization of constitutional efficacy as norm-behavior congruence: norm-behavior congruence is necessary and sufficient for constitutional efficacy.

Furthermore, in the model the controls are exogenous to the constitution. Weingast claims that whether or not a constitution coordinates individuals on its content is a function of the social consensus of the rights of citizens and the limits of the state.

"In terms of the model, limits become self-enforcing when citizens hold these limits in high enough esteem that they are willing to defend them by withdrawing support from the sovereign when he attempts to violate these

[39] Weingast, *supra* note 9.

[40] *Id.* at 246.

[41] *Id.* at 246 y 247.

limits. To survive a constitution must have more than philosophical or logical appeal; citizens must be willing to defend it".[42]

"Because citizens have different views about ideal limits, a unique set of ideal limits is unlikely. Coordination requires that citizens compromise their ideal limit…When the difference between each citizen's ideal and the compromise is small relative to the cost of transgression, the compromise makes the citizens better off".[43]

Thus according to this account whether or not a constitution works depends on the presence of a common set of citizen attitudes that are totally exogenous to the constitution and its incentives. What maintains the equilibrium of efficacy has therefore nothing to do with the codified constitution and its design. To clarify this point further Weingast's account of why Latin American constitutions "have not worked" while the American has is particularly helpful:

"[Latin American constitutions "have not worked" because] Latin American states are not characterized by a common set of citizen attitudes about the appropriate role of government… [While] citizen reaction implies that US constitutional restrictions on officials are self-enforcing …Latin America states exhibit a complementary set of phenomena: citizens unwilling to defend the constitution, unstable democracy and episodic support for coups".[44]

In sum, there is a theoretical and conceptual tension between the research's aim, accounting for how constitutional norms can systematically cause the behavior that characterizes limited governments and the rule of law (how they become efficacious), and the account of constitutional efficacy as an equilibrium maintained only by exogenous controls (citizens' attitudes) that it offers.

To close let me point out that this lack of adequacy may be the result of conflating two different understandings of what it means to say "constitutions are coordination devices." As Hardin argues:

"In claiming that a particular constitution is a device for coordination we could be making two quite different claims: that the choice of the content of the constitution was itself a matter of coordination or that the constitution works by successfully coordinating actions under it".[45]

Claiming that the content of a particular constitution coordinated the most important sectors of a society may be given as an account of a successful constitution-making process and as an explanation of why the content of a particular constitution is such. So following Hardin's account, we can claim that the American-constitution making processes coordinated the most important economic interests and, we may add, following Weingast, also the most

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[42] *Id.* at 251.

[43] *Id.* at 252.

[44] *Id.* at 54.

[45] Hardin, *supra* note 37, at 103.

important attitudes about the appropriate role of government (i.e. that those interests and attitudes were coordinated *on* the content of the constitution).

Now when we claim that a constitution that *works* is a coordination device, we are claiming that actions are successfully coordinated *under* it; i.e. that the behavior that is its regulative target is attained thanks to the incentives the constitution gives to the relevant individuals. That public actors act according to the constitution as a result of their pursuit of individual benefits *under* constitutional laws.

The need of separating these two senses in which a constitution is a coordination device follows from the recognition that an account of modern constitutional government requires a two-stage theory.[46] Success in coordinating on a particular constitutional content does not guarantee that the individuals who populate the institutions created by the constitution will coordinate under it. In other words, a successful constitution-making process is not sufficient for constitutional efficacy. This is the case because constitutions create and distribute power in ways that are not predictable *ex ante*. Moreover, constitutions are complex systems that often have unintended effects. Therefore, what enables coordination *on* a particular constitutional content and what enables coordination *under* that constitution require separate accounts. In particular, while the former necessarily deals only with interests and other motivations *exogenous* to the constitution, the latter requires the incorporation of motivations *endogenous* to it.

If I am right, the source of Weingast's problematic account of constitutional efficacy lies in his conflation of the two stages required by a satisfactory theory of modern constitutional government. He conflates the determinants of coordination *on* constitutional content with the determinants of coordination *under* a modern constitutional order. Weingast's account is then an instance in which I claim we can have norm-behavior congruence without efficacy in the strong sense linked to research on how codified constitutions can motivate politicians to behave in ways consistent with the ideals of constitutionalism and the rule of law. It also exemplifies why I claim constitutional efficacy as equilibrium implies a conceptualization of constitutional efficacy that is too broad for this research agenda, and thus why we would need to make sure to incorporate controls endogenous to the constitution if we what to purse this research aims.

V. Conclusion

It is not uncommon for social science research to overlook the importance of the conceptualizations they use in their proposals and how adequate they are given their research objectives. In this paper, I have defended a modest,

[46] *See* id. at 83.

but nevertheless hopefully useful, claim: that overlooking certain conceptual difficulties is detrimental to the advancement of the theoretical and empirical agenda on constitutional efficacy. I have argued that It is not uncommon for social and political science research in this area to overlook the question "how should constitutional efficacy be conceptualized?" A close analysis of academic sources makes it clear that even specialized literature on questions related to constitutional (or more broadly formal) efficacy have assumed conceptualizations that are theoretically problematic given their research objectives, potentially leading to theoretical inconsistencies or inaccurate empirical conclusions. To exemplify this point, I analyzed the conceptualization of constitutional efficacy used by Barry Weingast's "The Political Foundations of Democracy and the Rule of Law" and Gretchen Helmke and Steven Levitsky's *Informal Institutions and Democracy*. I showed that conceptualizations of constitutional (or more broadly formal) efficacy used in their theoretical proposals are not adequately suited to their own research objectives, and that this conceptual misfit affects the theoretical consistency and empirical applicability of their conclusions.

I believe that the lack of adequacy between the conceptualization of constitutional efficacy used these texts and their research objectives has the following cause: on the one hand we what to understand how and when institutions in general, and codified constitutions in particular, motivate public officials to behave in ways that embody the political ideals of constitutionalism and the rule of law. These research objectives do require a conceptualization of constitutional (or formal) efficacy that is demanding, where norm-behavior congruence is a necessary but not sufficient condition. This adequate conceptualization requires theoretical accounts and empirical methodologies that are less simple and elegant than those in which norm-behavior congruence is both necessary and sufficient. Unfortunately, as I have shown in this paper, though simpler and more elegant this conceptualization is not well suited for such research puropses. In this area, it seems to be true the dictum that says that simplicity is inversely proportional to relevance.[47]

[47] Navarro, *supra* note 8. Chap. 1.

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CHALLENGING THE CENTRALIST DOCTRINE IN MEXICAN FAMILY LAW: AN ANALYSIS OF THE EVOLUTION OF STATE AUTHORITY OVER CIVIL LAW MATTERS AND ITS IMPACT ON THE REGULATION OF COHABITATION AND DIVORCE

Graciela Jasa Silveira*

Abstract. *This article addresses the need for debate about the concepts of federalism, centralization, decentralization and sovereignty within the context of Mexican comparative and family law. Until recently, private law and family law scholars have generally dismissed the issue of federalism within Mexico, largely because of the belief that Mexico is not "really" federalist given its strong tendency toward political and legal centralism. Despite this preconception —and the fact that Mexico does have a highly centralized federal system— a deeper analysis shows that states and sub-national jurisdictions have played a critical role in shaping the contours of family law and influencing the state-federal relationship. This article argues that the centralist doctrine that so permeates scholarly works on private law in Mexico —if not addressed and revised both for the past and present— risks undermining attempts at understanding legal change and improving Mexican family law.*

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Key Words: *Federalism, decentralization, private law sovereignty, comparative law, family law.*

Resumen. *Este artículo es evidencia de la necesidad de situar debates de federalismo, descentralización, centralización y soberanía en el contexto de derecho comparado y derecho familiar. Hasta hace poco, académicos de derecho privado y familiar han desestimado la cuestión del federalismo. Esta desestimación se ha basado en la creencia generalizada de que en México no existe un verdadero federalismo dado el alto grado de centralismo político y jurídico que ha primado en el país. Sin embargo, un análisis más a fondo muestra que, a pesar del sistema federal centralizado, los estados y jurisdicciones sub-nacionales han jugado un papel igualmente importante a la hora de definir la política sobre derecho familiar y las relaciones entre federación y estados. Este trabajo argumenta, que la doctrina de centralismo que tanto permea la forma en que pensamos sobre derecho privado en México es una narrativa peligrosa que —de no ser abordada o revisada de alguna manera, en términos del pasado o del presente— puede socavar esfuerzos para entender el cambio jurídico y mejorar el derecho familiar en México.*

Palabras clave: *Federalismo, descentralización, soberanía en derecho privado, derecho comparado, derecho familiar.*

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I. Introduction

In 2000, Mexico's family law took an unprecedented turn: the Civil Code for the Federal District was amended to grant nearly full marriage rights to concubinage unions.[1] This was followed by similar amendments between 2006 and 2009 that legalized civil unions, same-sex marriage and adoption by same-sex partners, unilateral divorce and abortion.[2] With these reforms, Mexico broke new ground in the realm of equal rights.

Often neglected by commentators in this area are the complex layers of political, jurisdictional and legal change which gave rise to this new wave of family law rights in Mexico. Unsurprisingly, most of these reforms were influenced by political events.[3] As capital of the nation, the area called the

[1] Código Civil para el Distrito Federal [C.C.F.D.] [Mexico City Civil Code], *as amended*, Diario Oficial de la Federación [D.O.], 25 de mayo del 200 (Mex.)

[2] Decreto de Ley de Sociedad de Convivencia para el Distrito Federal [.L.L.T.F.D.] [Decree of the Law of Living Together for the Federal District], *as amended*, Gaceta Oficial del Distrito Federal [G.O.D.F.], November of 2006. *See* Decreto por el que se reforma el Código Penal para el Distrito Federal y se adiciona la Ley de Salud para el Distrito Federal [Decree by which the Penal Code of the Federal District is ammended and additions are made to the Health Law of the Federal District], México, *Gaceta Oficial del Distrito Federal*, April 26 of 2007; See also Decreto por el que se reforma y deroga el Código Civil para el Distrito Federal y se reforma, deroga y adiciona el Código de Procedimientos Civiles para el Distrito Federal [Decree by which provisions of the Civil Code and the Proceedural Civil Code of the Federal District are ammended and abolished], México, *Gaceta Oficial del Distrito Federal*, October 03 of 2008 ; See also Decreto por el que se reforman diversas disposiciones del Código Civil para el Distrito Federal y del Código de Procedimientos Civiles para el Distrito Federal [Decree by which diverse provisions of the Civil Code and the Proceedural Civil Code of the Federal District are ammended], México, *Gaceta Oficial del Distrito Federal*, December 29 of 2009.

[3] Up until the 1986 reforms, the Federal District had been governed indirectly by the President of the Republic, who delegated his authority to a federally-appointed Head of the Federal District Department, referred to as the *Regente* (Regent). The imposition of a representative selected by the federal government and not by the city's inhabitants was a source of constant and often bitter resentment among Mexico City residents. The 1996 Constitutional Reforms, introduced by presidents Carlos Salinas and Ernesto Zedillo, altered the federal government's power structure by substituting the Regent with the newly-created "Jefe de Gobierno del Distrito Federal" (Government Head of the Federal District), which was to be chosen through popular election. The first popular election of this new political figure took place in 1997, when the position was won by Cuauhtémoc Cardenas, head of the leftist *Partido Revolucionario Democrático* (Democratic Revolutionary Party, referred to as "PRD"). Cuauhtémoc Cardenas became a candidate in the 2000 presidential election, won by Vicente Fox of the *Partido de Acción Nacional* (National Action Party, known as "PAN"). These changes gave a powerful platform to the PRD, which used it to make key political and legislative gains on a national level.

Federal District (*Distrito Federal*) —at the heart of the Mexico City metropolitan area— was under the authority of the federal government until 1997. This jurisdicion included private law matters.[4] The National Congress was authorized to legislate for the Mexico City; appoint its judiciary; and divide and distribute the City's internal divisions, including civil and criminal legislation. In effect, the nation's President was authorized to unilaterally appoint (and remove) the Federal District's two main executives, the local governor and attorney general.[5]

This situation changed abuptly in 1997 when the federal Constitution was amended to give residents of Mexico City a "mixed system of distribution of competence".[6] In essence, it granted independence to the DF, transferring authority from the federal government to the City's executive, judicial, and legislative branches.[7] This transition included the granting of legislative authority in both civil and criminal matters.

In 2000, Mexico City enacted a new civil code[8] that changed in subtle yet significant ways the regulation of family law. In a sense, these changes illustrate the main idea of this article, i.e., that the interaction of federalism, centralization and other forms of hybrid jurisdictional authority have had a major impact on family law. As Daniel Elazar noted, "after many years being neglected as a proper political study, federalism has become a major issue in

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[4] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* México, Diario Oficial de la Federación [D.O.], art. 122, section C, first requisite, subsection V, 5 de febrero de 1917 (Mex.); *See* Estatuto General del Distrito Federal [G.S.F.D.] [General Statute of the Federal District] *as amended*, art. 52-66, 26, Diario Oficial de la Federación [D.O.], Julio de 1994.

[5] *Id.*

[6] José María Serna de la Garza, El sistema federal mexicano. Un análisis jurídico 50 (Instituto de Investigaciones Jurídicas UNAM 2008).

[7] Graciela S. Jasa, *Family Law Reform in Mexico City: The Contemporary Legal and Political Intersections*, The International Survey of Family Law, 267, 270-271 (2013).

[8] *Id.*, at 71. *See* Reforms to Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* México, Diario Oficial de la Federación [D.O.], art. 122, 22 de agosto de 1996 (Mex.) At the inception of the legal independence of Mexico City, both the federal government and Mexico City had the exact same civil codes (the Código Civil Federal [Federal Civil Code] [CCF]) that remained applicable for the Federal District. However, the 1996 constitutional reforms gave the Federal District executive, judicial, and legislative independence from the federal government, which included the power to legislate in civil and criminal matters. In the year 2000, the Legislative Assembly for Mexico City, published a number of reforms to the Código Civil para el Distrito Federal 2000 that were mainly directed at reorganizing and redefining the family. See Decreto por el cual se derogan, reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal en materia común y para toda la república en materia federal y el Código de Procedimientos Civiles para el Distrito Federal [Decree abolishing, ammendeding and adding diverse provisions of the Civil Code for the Federal Disrict applicable in local matter and throughout the Republic in federal matters and the Procedural Civil Code fo rthe Federal District] [DCCFDRPCCFD], as amended Gaceta Oficial del Distrito Federal [G.O.D.F.], 25 de mayo de 2000 (Mex.).

world affairs and political science..."[9] Given the strong disposition of federal laws and governance, it is more important than ever for scholars to study the underlying basis of these interactions in order to better understand how jurisdiction shapes family law.[10]

To better appreciate these issues, this article has taken a comparative approach. At this point it should be noted that Mexican legal scholars and practitioners have until recently given short shrift to the issue of federalism,[11] as they were convinced that Mexico has never "really" been federalist given its strong centralist tendencies.[12] This interpretation is not without merit,[13] as centralism is firmly-rooted in Mexico's early social, political, and legal history and, as a consequence, is deeply ingrained in the thinking of legal scholars.[14] For this reason, academics have tended to strongly emphasize the similar-

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[9] Daniel Elazar, *Federalism: Aftermath of the 1980s and Prospects for the 1990s. International and comparative federalism*, 26 Political Science & Politics, 190 (1993).

[10] *See* Joel A. Nichols, Marriage and Divorce in a Multicultural Context: Multi-tiered Marriage and The Boundaries of Civil Law and Religion, (Cambridge University Press 2011). Nichols undertakes a similar approach to the examination of change in marriage and divorce laws but with a focus on the "conflicts between civil law and religious norms in the arena of family law".

[11] Federalism as viewed by the States may be split into two distinct approaches: revisionism of Mexico's early political history and the more recent "new federalism" literature. The first group includes the works of Nettie Lee Benson, Timothy Anna, and Jesus Reyes Heroles who have shown that before Mexico's first federalist phase in 1824, the country was not as unified as the centralists/conservatives have claimed, as the provinces considered themselves both "independent" and "sovereign" in all matters within their borders. Since the late 1990's, the State's view of federalism has been strongly influenced by Peter Ward and Alicia Hernandez Chavez. These works have drawn attention to governance changes among the levels and branches of government in the 1990's to reforms to reduce the centralization of legal and political power in key areas. While these inquiries have helped academics to better understand how federalism/regionalism has impacted political and social processes, none have directly connected the issue of states' residual rights, the federal pact and family law. *See*: Alicia Hernández Chávez, ¿Hacia un nuevo federalismo? (Fondo de Cultura Económica 1996); José Natividad González Paras & Armando Labra, la gobernabilidad democrática en México 97-128 (Instituto Nacional de la Administración Pública 2000).

[12] *See* Jorge Carpizo, *Sistema Federal Mexicano*, *in* Los sistemas federales del continenete americano, (FCE-UNAM ed., 1972). Jorge Carpizo describes Mexican federalism as the struggle between two extremes, the "idea" versus the "reality" of federalism in Mexico. *See also* Mecham Lloyd, *Mexican Federalism: Fact or Fiction?*, 208 The Annals of the American Academy of Political and Social Science, (1940); *See also* Stephen Zamora, Mexican Law 120 (Oxford University Press 2004).

[13] Felipe Tena Ramírez, Derecho Constitucional Mexicano 110-111 (Porrúa 1998); *See also* Ignacio Burgoa, Derecho Constitucional Mexicano 421 (Porrúa, 1989); *See also* Jorge Carpizo, *Sistema Federal Mexicano*, in Los sistemas federales del continenete americano, (FCE-UNAM ed., 1972); *See also* Luis Aguilar Villanueva, *El federalismo mexicano: funcionamiento y tareas pendientes*, 58 Revista Mexicana de Sociología, (1996).

[14] Jorge Carpizo, *Sistema Federal Mexicano*, 81 Gaceta Mexicana de Administración Publica Estatal y Municipal, 128-131 (1981).

ity and centralization of the nation's civil laws rather than their diversity. In truth, the states' authority to regulate private legal matters has been largely symbolic, superceded by three key factors: (a) the centralized power exercised by the Federal District over state jurisdiction;[15] (b) the national and state-level political monopoly held by the *Partido Revolucionario Institucional* ("PRI") for over 70 years;[16] and (c) the "uniformizing effect" that federal civil legislation has had on Mexico's 31 state codes.[17]

Despite this dismissal, this federalist debate has been around since the early 19th century, a perennial struggle between national civil law and state law.[18] As a result, the interpretation of civil law switched often during the 19th century,[19] at which time the debate was revived by comparative legal scholars in order to unify the civil laws in Mexico by centralizing private law codification.[20] Comparitivist supporters of centralism (i.e., substantive, procedural, civil and criminal law) argued that legal unity would enhance political unity.[21] Labelling the Mexican federalist system as "artificially diverse," many scholars argued that the unity of private law would not affect federalism given

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[15] Jorge Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 28 The International Lawyer, 659-658 (1994).

[16] *Id.*

[17] *Id.*

[18] In 1842, the authority of the federal legislature was amplified to authorize the making of civil, criminal, commercial, and mineral codes applicable to the whole republic. This power was extended in 1856, the basis of which Benito Juarez, then governor of Veracruz, requisitioned the drafting of a civil code: *Bases Orgánicas de la República Mexicana de 1843*, 14-06-1843. Chávez Ascencio notes that "[t]he struggle by the state to assume authority over marriage, required the elaboration of a theory of marriage as a contract…and as means to justify the intervention of the state implicating that its essence is constituted by the liberty of marriage consorts." Thus, the success of civil marriage in Mexico consisted in its symbolic "affirmation and respect to the liberty of creed", Manuel Chávez Asencio, La familia en el derecho: Derecho de familia y relaciones jurídicas familiares (Porrúa 2007).

[19] *See* Ma. del Refugio González, *Notas para el estudio del proceso de la codificación civil en México (1821-1928), in* Libro del Cincuentenario del Código Civil, (Instituto de Investigaciones Jurídicas ed., 1978).

[20] *See* Fernando Serrano Migallón, Los maestros del exilio español en la Facultad de Derecho 145 (Porrúa, 2003); *See also* Jorge Carpizo, Estudios Constitucionales, 143-144 (Porrúa-UNAM, 1999).

[21] During the twentieth century, debate for a centralized civil code was fomented by comparative scholars, who were convinced of the benefits of one federal civil code that applied to all states. Supporters of a centralized code argued that Mexico's private law diversity was incoherent from historical, social, and cultural perspectives. They cited the example of the United States where adoption of the U.S. federal system had, in effect, "disintegrated" the nation's former political, religious, linguistic, economic, legal, and social unity. Moreover, the diversity of private law that existed was deemed more "formal" than real, given the continued influence of Spanish law within civil codes and the widespread adoption of federal codes in 1870, 1884 and 1928 by state legislatures. Scholars believed that the centalization of private law would not affect federalism.

that unification would only consolidate the already existing unity that underpinned most state codes.[22] As stated in the Proposal for a Uniform Civil Code by the Institute of Comparative Law: "*La unificación legislativa en nada afecta el sistema federal, porque no se toca su esencia: la descentralización política, ni tampoco se disminuye la descentralización administrativa.*"[23] [Legislative unification does not at all affect the federal system, because it does not touch its essence: the political decentralization nor does it diminish administrative decentralization.] Critics were quick to claim otherwise.[24]

This article makes three assumptions: (a) "real federalism" has never existed in Mexico, as most state civil laws are alike; (b) states often copy verbatim the federal civil code; and (c) states have been happy to share residual civil law powers with the federal government as a baseline to further the conversation on Mexican family law federalism. In doing so, it examines how family law governance in Mexico changed during the 19th and 20th centuries (with emphasis on the period following independence) and analyzes how cohabitation and divorce laws were impacted by changes in the application of family law. Despite Mexico's highly centralized system, the states have played a greater role than centralist assumptions suggest, both in terms of their influence over family law and state-federal relations. This article argues that the centralist doctrine that permeates private law thinking in Mexico —if not revised both for the past and present— seriously undermines attempts to understand legal change and improve Mexican family law.

This article is divided into five sections. Part one analyzes how centralist assumptions regarding civil law have obscured the complex history of family governance in Mexico. Part two examines how these assumptions have understated the diverse roles played by states in shaping concubinage and divorce laws for women during the early 19th century. Part three and four separately examine how these assumptions have diminished numerous family laws and policies enacted in the early 20th century in matters of concubinage and divorce. Part five concludes by explaining why a reassessment of family law governance is vital to current efforts at reform. It also considers ways in which a comparative law perspective helps this reassessment.

II. Local Codes as Symbols of Federalism: 1820-1830

Until federalism and the separation of powers were formally adopted in the Constitution of 1917, Mexico's system of governance formally shifted six different times. During the early period of the nation's struggle for independence, it was assumed that centralist traditions, both republican and monar-

[22] Javier Elola, *El Estudio de Derecho Comparado, Instrumento de la Unificación Jurídica Internacional*, 32 Boletín del Instituto de Derecho Comparado, 4-9 (1958).

[23] *Id.*

[24] *Id.*

chical, would continue in force.[25] After the nation broke relations with Spain, Mexican courts continued to apply Spanish colonial law in private legal matters, a situation which continued throughout the 19th century.[26] The Constitution of Apatzingan of 1814 confirmed this doctrine by deeming old laws valid until the enactment of new ones. The Constitution of Cadiz of 1821 reaffirmed this same principle. The result was that in private legal matters, Spanish law held sway. This situation did not change until the enactment of Mexican civil codes.

It should be noted that legal uniformity —even at this time— was a vital concern. Article 258 of the Constitution of Cadiz of 1821 stated that its provisions were to be applied "one and the same throughout the monarchy, without prejudice of the variations" that could result from their application by local courts. The Constitution of Apatzingan of 1814, influenced by the Constitution of Cadiz of 1812, preserved the centre's political control. In 1821, Mexican states including Oaxaca, Zacatecas, Guadalajara (state of Jalisco) and Guanajuato sought self-governance. Some areas formed regional councils with the intent of separating and, as independent states, joining a federation with other Mexican provinces. Many entered into inter-provincial treaties as a stepping-stone towards the establishment of a federation.

The move to create a federal republic sparked political ambitions of autonomy by the states. As Nettie Lee Benson noted in 1823, rather than being a "united country", Mexico was a made up of "virtually autonomous provinces."[27] The first organic law in Mexico, drafted by Ignacio Rayon, helped provinces retain their administrative autonomy within a centralist state.

Given the need for political reconstruction and recovery from economic hardships caused by internal wars, the power held by the Mexican provinces at this time resembled more a confederacy than a federalist union. The autonomy enjoyed by local polities during this period led regions and provinces to first reject all proposals that entailed centralization of political powers, but most subsequently accepted radical federalist claims. For example, the enactment of both Santa Anna's Veracruz Plan of 1822 and the Casa Mata Plan helped facilitate the establishment of the Federal Republic. The Casa Mata

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[25] Mecham Lloyd, *The origins of federalism in Mexico*, 18 The Hispanic American. Historical Review, 164 (1938).

[26] In addition, doctrinaires continued to use Spanish laws and institution to interpret private law. The idea of granting federal authority over traditionally local matters —for the sake of uniformity— were also included in the first constitutional documents. However, none of the initial constitutional documents (The Constitution of 1824, the Seven Constitution of 1836, and the Constitution of 1857) had provisions that gave the federal government jurisdiction over private law; or indicated which laws prevailed in these matters; or the order in which they applied. In 1856, the Provisional Organic Statute of the Mexican Republic was enacted as a result of emergency conditions it included a residual clause in favour of the federal government that gave to the President all rights that were not expressly reserved to the states.

[27] Nettie Lee Benson, *The Plan of Casa Mata*, 25 The Hispanic American. Historical Review, 45-55 (1945).

Plan also called for the establishment of a new federal Congress; and granted administrative control of the provinces to provincial deputations. Provinces quickly adhered to the Plan, declaring their authority over political and economic affairs until a new central government was formed. By 1822, Nueva Vizcaya, San Luis Potosi, Zacatecas, Guadalajara, Guanajuato, Michoacan, Mexico, Puebla, Vera Cruz, Oaxaca, Yucatan, Sonora and Sinaloa and the Eastern Interior Provinces had created their own provincial deputations.

In May 1823, attempts by the first restored Congress to structure a highly centralized federal government were vehemently rejected by the provinces. While this occurred, the federal government weakened and transferred many governmental functions to state agencies. As a result, municipalities became the basis of Mexico's political infrastructure. The central government, ruled by General Agustín de Iturbide, was confined to Mexico City, while each province declared its independence by establishing its own provincial government.

Yucatan became the first entity to establish an independent government and declare itself a federation. In 1823, Yucatan's delegation called for the election of a local official to govern the state until the National Congress had formed the federal government. Other provinces followed suit, including the delegation of Guadalajara, which in May 1823 suspended enforcement of all national law until the demand for a federation was enforced. The Act vested chief authority in the provincial delegation and called other states to follow their lead. In July 1823, Zacatecas declared independence from the Mexican Republic, and in the following years, several other states sought complete political autonomy. For obvious reasons, these ambitions were not welcomed by the central government.

During the Constitutional Congress of 1823-1824, the issue of whether Mexico City or the provinces had legislative authority in matters of civil law generated considerable tension. Given the nation's colonial past, it was expected that Congress would follow the model based on codes in the Cadiz Constitution. The opposing sides held their respective views: the liberals advocated federalism and argued that the central authorities needed to respect state sovereignty. Conservatives, on the other hand, contended that only a strong central government could establish uniformity and impose nation-wide order in civil law matters.

After the congressional session of October 1824, Juan Cayetano, a representative from Jalisco, sent a letter to the Aguila Mexicana newspaper to report a discussion he had held with a certain representative regarding a proposal to grant the states authority to enact their own civil codes. During this discussion, Cayetano said that states were sovereign independent entities with the power to enact legislation in civil and criminal matters. According to Cayetano, the Congress had no role in creating civil or criminal codes, which was "manifestly counter to the liberty and sovereignty" of the states.

The tensions between nationalists, federalists, and centralists culminated with the Constitution of 1824 which[28] established —for the first time— a federal system divided into national and state governments, each with their own legislative, judicial and executive branches.[29] The Constitution empowered states by recognizing them as free and sovereign, with the right to elect their own president and vice president.[30] In addition, each state was considered free, independent, and sovereign regarding their internal affairs[31] and federal congresses held more authority than the executive branches.[32]

Federalists had the upper hand with regard to legislative authority in matters of civil law. Although more than one proposal contained clauses that prescribed a national civil code,[33] the final text of the 1824 Constitution failed to include any such provision.

Although the Constitution of 1824 gave Congress the power to harmonize laws in states and territories with regard to certificates, registries and court procedures, states were authorized to enact civil codes on the basis of their own constitutions.[34] During this period, the state of Oaxaca (1827) passed its own code; Zacatecas (1829) published a draft for consideration; and Jalisco published part one of its own civil code. The Constitution of 1824, however, failed to include any viable formula to divide powers between Mexico City and provincial governments.[35] While liberals and conservatives debated whether the nation was better off with a centralized and/or single national civil law system, the *de facto* reality was federalism and state sovereignty, which meant that each state had to enact its own codes.

After Congress proclaimed federalism, nineteen states were included (i.e., Chiapas, Chihuahua, Coahuila and Texas, Durango, Guanajuato, Mexico, Michoacán, Nuevo Leon, Oaxaca, Puebla Queretaro, San Luis Potosi, Sonora and Sinaloa, Tabasco, Tamaulipas, Veracruz, Jalisco, Yucatan, and Zacatecas) and four areas were designated "territories" (Alta California, Baja California, Colima, and Santa Fe de Nuevo Mexico). Seventeen of the nineteen states enacted constitutions by the end of 1826; and except for Jalisco and San Luis Potosi, every state had abandoned its radical federalist claims.[36]

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[28] *Id. at* 113.

[29] Tena *supra* note 13 at 110.

[30] Anna Timothy, Forging Mexico: 1821-1835 167 (University of Nebraska Press, 2001).

[31] *Id.* at 128-131.

[32] *Id.* at 34.

[33] González *supra* note 19 at 113-114.

[34] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* México, Diario Oficial de la Federación [D.O.], art. 145, 4 de noviembre de 1884 (Mex.)

[35] *Id.* art. 157-162. Contained a set residual powers in favour of departments (states), a formula that was readopted in the Constitution of 1917. Consideration of a federal formula began only in 1842 and was included since then in several constitutional drafts. One major disagreement was whether states were sovereign and free in all matters not covered by the constitution.

[36] Lloyd *supra* note 25 at 172.

During this first phase of federalism, state governments gained significant political power.

1. *States' Regulation of Family Law on the Basis of Revolutionary Principles*

Inspired by the separatist movement, new state legislatures moved quickly to take advantage of their administrative autonomy by enacting their own civil codes. Committees were created by state governments to enact civil statutes to help resolve pressing political and legal issues. At this point, there was wide diversity regarding Church-State relations. Although four states (Oaxaca, Zacatecas, Jalisco and Guanajuato) formally enacted their own codes, only Oaxaca completed and published its Code. While ultimately two states finished their projects during this period, they remained valid for only a short duration.

Given the political climate, the states' regulation of family law coincided with key revolutionary aims.[37] Every state except for Zacatecas maintained the Church's primacy in family law matters.[38] The Civil Code of Oaxaca and draft codes proposed in Zacatecas, Jalisco and Guanajuato were the first to incorporate revolutionary principles at a family law level, including the separation of Church and State and the abolition of patriarchical colonial laws.[39] Given anti-centralist and anti-clerical sentiments, the states also pressed for more egalitarian and secular family institutions, which helped pave the way for the formal recognition of concubinage unions and the children born of such unions, as well as the legalization of civil divorce.[40]

2. *Zacatecas: Weakening of the Church's Power and Authority over Marriage*

The most radical legislative proposal was that of Zacatecas, which aimed at reducing the Church's authority over marriage.[41] Discussion regarding this

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[37] It was through one of the Laws of Reform, the Ley de Matrimonio Civil del 23 de julio de 1859 [Law of Civil Matrimony of 1859] that marriage was removed from the church's jurisdiction. Article 1 of the law defines marriage as a civil contract and establishes the state as the single legitimizing institution. This law also recognized divorce as a "temporary separation" of spouses that did *not* leave either party free to remarry (art. 4, 20, 21 26).

[38] González *supra* note 19 at 118.

[39] *Id.*

[40] Despite the anticlerical sentiments of the era, the Church remained inextricably involved in regulating and administering family law. The State of Mexico was considering a draft Criminal Code that persecuted non-Catholic behaviour and punished crimes "against the Church". *See* Cecilia Adriana Bautista García, Las disyuntivas del Estado y de la Iglesia en la consolidación del orden liberal, México 1856-1910, (El Colegio de México A.C., 2012).

[41] González *supra* note 19 at 118.

civil code began as early as 1824, but it wasn't until 1828 that a special commission developed and published a draft for discussion. The legislation was then amended and resubmitted for review in 1829 but never approved.[42] The two proposals were notable given the local inclination towards a radical interpretation of federalism; in effect, it became one of the first states to declare political autonomy.[43] From 1827 to 1829, a movement arose in Zacatecas to give state law precedence over religious law. The change of marriage from religious sacrament to civil ceremony, and the removal of the Church's jurisdiction over family matters, amounted to a rejection of centuries of Church doctrine.[44] The first proposal of 1827 stripped religious authorities of any authority over marriage, and described matrimony in purely contractual terms.[45] It recognized local municipalities' power to formalize marriage[46] and invalidated unions that were not established in accordance with civil statutes. In effect, religious marriages would not be legally acknowledged by the state.[47] The state was thereby empowered to revoke church-ordained marriages that failed to satisfy civil law requisites, as well as punish religious figures that authorized such unions.[48]

In the end, this draft law was never approved, and a later proposal in 1828 reversed the legislature's goals of secularization. In the 1828 version, the Church regained rights over marriage; and unless they explicitly contravened civil law, parishes retained authority to formalize marriage.[49] Although this statute established a civil marriage registry, it also issued warnings about subsequent attempts to secularize civil laws. Additional laws were passed to complement religious laws over family and marriage.[50]

3. *Oaxaca: Shift toward Gender Equality and Parent-child Relations*

The state of Oaxaca, the first Latin American jurisdiction to enact a civil code, was also an important crucible of the liberal family law movement born during this period. In 1825, Oaxaca's government published a state constitution that authorized its legislature to enact both civil and criminal statutes. This

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[42] Aguedam Venegas de la Torre, *Los avatares de una justicia legalista: el proceso de codificación en Zacatecas de 1824 a 1835*, 13 Signos históricos 55 (2011).

[43] *Id.* at 46.

[44] *Id.* at 68.

[45] José Enciso Contreras, *El Proyecto de Código Civil Presentado al Segundo Congreso Constitucional del Estado Libre de Zacatecas,* 1829, Revista Mexicana de Historia del Derecho, 236 (2011).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] González *supra* note 19 at 118.

[50] *Id.*

first code was published in three parts: volume 1 in 1827, volume 2 in 1828, and volume 3 in 1829. The Civil Code of Oaxaca recognized the role played by religious law regarding matrimony, non-vincular divorce (otherwise known as the separation of bed and board) and the legitimacy of Catholic marriages.[51] Although its secularizing provisions were not as extreme as proposals in other states (e.g., Zacatecas),[52] Oaxaca's Civil Code represented an important shift in favour of gender equality and parent-child relations. The principles embodied in this document, in fact, went far beyond any provision proposed over the course of the next three decades for the federal civil code, including the lowering of the age of emancipation to 21 for both men and women.[53] Oaxaca's civil code also prohibited parents from receiving usufruct rights over minor children's independently-earned income;[54] this was important because Mexican elites were using restrictive colonial laws to control the marriage of heirs. While the code still required parental consent for marriage, it applied only to men under the age of twenty-five and women under twenty-three.[55]

In regard to gender equality, the state's Civil Code integrated both orthodox and progressive principles. While preserving males' dominant rights (e.g., when parents disagreed, the father's decision took precedence),[56] it also extended women's rights (e.g., women were allowed to enter into legal business contracts without their husband's permission).[57] While paternal rights were previously reserved to men, the state's code permitted women over the age of fifty to legally adopt minors and act as their guardian. It also protected widows' paternal and guardianship rights upon remarriage.[58]

The civil codes of both Zacatecas and Oaxaca granted parents with only one child testamentary freedom over half the estate, which could be lowered to one-fourth if there were three or more children. This right allowed fathers to bequeath, if they so wished, part of their estate to their illegitimate offspring or concubines.[59] The code also granted rights over parental property to both "natural" and "illegitimate" offspring through the guise of support.[60]

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[51] Fernando Alejandro Vázquez Pando, *Notas para el Estudio de la historia de la codificación del Derecho Civil en Mexico, de 1810 a 1834*, 4 Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana, 395 (1972).

[52] *Id.*

[53] González *supra* note 19 at 115.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] For a broader explanation of the incorporation of testamentary freedom and how it impacts women's family law rights, *see* Silvia Marina Arrom, *Changes in Mexican Family Law in the Nineteenth Century: the Civil Codes of 1870 and 1884,* 10 Journal of Family History, 313-314 (1985).

[60] Francisco García González, *Liberalismo y Familia en Zacatecas Durante el Siglo XIX*, 8 Vínculo Jurídico, (1991).

Notably, the code granted the administration of inheritances received by illegitimate children to the beneficiaries.[61]

The innovative civil laws introduced by both Zacatecas and Oaxaca were controversial from several standpoints. First, the mere mention of concubines in civil codes was, in the opinion of many conservatives, "morally wrong and contrary to the legal institution of marriage."[62] According to these commentators, increasing testamentary freedom and granting inheritance rights to illegitimate children threatened the very foundation of family. Most liberals, however, held that concubines were an integral "part of the fabric of Mexican culture, customs and social mores".[63] They also argued that by refusing to recognize concubinage, far too many women and children were left without any legal protection.[64] Debate over the extent of the reform aggravated ideological differences and eventually led to small but notable disparities between state civil codes and the "customs and uses" of local communities regarding concubinage.

III. Dual Federal-State Family Law System: 1835 to 1916

The autonomy of Mexican states in family law matters lasted only a short time. Until the publication of the Civil Code of 1870, no statute remained in effect long enough to fully abrogate colonial era law. This situation was exacerbated by the Court's elusiveness with regard to its jurisdiction over state civil law and its continued reliance on Spanish statutes long after Mexico had enacted its own codes. No charter authorized during this period —the Constitutions of 1824, 1836 or 1846— stipulated which government had jurisdiction over civil law, what laws took precedence and the order in which they were to be applied. Commentators continued to rely upon Spanish laws and institutions to adjudicate matters of civil law.

In May 1835, the first republic was replaced by a central republic under the leadership of Santa Anna.[65] By 1836, a new constitution —the Seven Laws (*Siete Leyes*) Constitution— established a unitary government which stripped states of their economic and political autonomy and reduced them to mere departments.[66] This move toward centralist government was the first of many before Mexico consolidated as a federal republic in 1917. In fact, the nation wavered between centralism and federalism until 1867; only after

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[61] *Id.*

[62] Jorge Vargas, *Concubines under Mexican Law; with a Comparative Overview of Canada, France, Germany, England and Spain*, 12 Southwestern Journal of Law and Trade in the Americas, 53-54 (2005).

[63] *Id.*

[64] Ley de Relaciones Familiares [L.R.F.] [Family Relations Act] *as amended*, Diario Oficial de la Federación [D.O.], 12 de Abril 12 de 1917.

[65] Timothy *supra* note 30 at 260.

[66] Contreras *supra* note 46 at 229.

the French Intervention was the federalist Constitution of 1857 readopted. During these centralist periods, many powers formerly assumed by the states were abrogated, and the federal government began to codify and harmonize civil law.

During the first period of centralism, from 1835 to 1846, the federal government intended to make all codes —civil, criminal, and commercial— uniform for the whole nation. This intent failed, as a national code was never enacted.[67] Two private compilations of the civil law were enacted,[68] both drawing on Spanish law and differing with respect to treatment of the Church, jurisdiction in family law matters and non-vincular divorce.[69]

The federal system was recovered between 1846 and 1853, at which point the only state to resume codification of civil law was Oaxaca. The governor of Oaxaca, Benito Juarez, later proposed reforms to the code that were published in 1837 and concluded in 1852. Although this was supposed to take effect in April 1853, the coup by Santa Anna resulted in revocation of the federal decree that authorized the state's Civil Code .[70]

Santa Anna's regime, which lasted between 1853 and 1855, ushered in a new phase of centralism. Constitutional documents enacted at this time suspended the state and territorial legislatures and authorities, and reestablished the territorial divisions that existed prior to federalism. These documents declared the federal authorities' intent to establish a unified civil, criminal, and commercial code that was to be applied throughout the nation. As a result, Oaxaca's approval of its Civil Code was declared null and void.

After Santa Anna was removed from power in 1855, federalism returned for a third time; in 1857, the Federal Constitution of the United Mexican States was enacted.[71] It should be noted that the type of federalism in effect at this time was more centralist than that of the first and second federalist phases. Despite the reinstatement of states' legislative rights in civil law matters, the federal government took full responsibibility for reinvigorating codification efforts. During this period, President Juarez commissioned the drafting of the civil code to Justo Sierra, a renowned Mexican legal scholar. This code was finally concluded in 1860 and, one year later, decreed by Federal Congress to take effect in the Federal District and federal territories. All states were invited to adopt it.

The Civil Code commissioned by President Juarez during this third federalist period never went into effect in either the Federal District or territories during his tenure. This same code, however, served as the foundation for the

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[67] María del Refugio González, El Derecho Civil en México 1821-1871 Apuntes para su Estudio (Instituto de Investigaciones Jurídicas, UNAM, 1988).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 100.

[71] Carpizo *supra* note 12 at 85.

nation's first national civil code (called the Imperial Civil Code, 1865-1866) that later took effect during the French Intervention between 1863 and 1866.[72]

In response to President Juarez's default on debts to European governments, France, Britain and Spain sent naval forces to demand repayment. While both Britain and Spain negotiated, France sent naval forces to Veracruz in 1861, driving President Juarez and his government into retreat.[73] In late 1862, Napoleon III —with the support of Mexican conservatives— sent the Archduke Maximilian of Austria as "Emperor of Mexico."[74]

Contrary to many conservatives' expectations, Maximilian did not "overturn" the liberal policies introduced by the Juarez regime.[75] The emperor refused to suspend the Reform Laws that returned church lands and even levied forced loans against it.[76] Maximilian also improved the country's legal framework[77] by drafting a new constitution (which provided for a hereditary monarchy, religious toleration, equality under the law, and the elimination of debt peonage) and enacted the first two volumes of the Imperial Civil Code based on Justo Sierra's draft.[78] Based on French statues, this was the nation's first truly centralist civil code, including commercial and notarial provisions.[79]

Despite these liberal reforms, however, Mexican liberals were not impressed. In the end, Maximilian —a foreigner sent by a European ruler to serve as "emperor"— alienated both liberals and conservatives.[80] To make matters worse, French support began to wane in 1865.[81] Despite efforts to retain his authority —aided by conservative factions and European volunteers— Maximilian lost his final battle in Queretaro, where he was taken prisoner and sentenced to death by Benito Juarez.[82]

IV. Similarities: 1868-1885

In 1867, after Maximilian was removed from power, a federalist structure was reinstated, but this time in a more centralized manner. The codes, tribunals

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[72] González *supra* note 68 at 106.

[73] Juliette Levy, The Making of a Market: Credit, Henequen, and Notaries in Yucatan, 1850-1900 36 (Pennsylvania State University Press, 2012).

[74] Burton Kirkwood, The History of Mexico, 104-107 (Palgrave Macmillan, 2005).

[75] Levy *supra* note 74 at 37.

[76] Kirkwood *supra* note 75.

[77] Beatriz Bernal Gómez, *México y las leyes liberales de Maximiliano de Habsburgo*, 11 Hechos y Derechos (2012).

[78] González *supra* note 68 at 107.

[79] Francisco Valdés Ugalde, Autonomía y Legitimidad: los empresarios, la política y el estado en México 81 (Siglo XXI, 1997).

[80] Bonnie G. Smith, The Oxford Encyclopedia of Women in World History 331 (Oxford University Press, 2008).

[81] *Id.*

[82] *Id.*

and judicial structures established by the states to handle civil law matters after 1870 differed in many respects to those enacted during the first federalist phase.

In contrast to prior attempts, the federal government finally succeeded in enacting a civil code in the Federal District and the territories.[83] In 1867, the National Congress appointed a committee to draft an organic code for Mexico City and Baja California. A major aim of the Civil Code of 1870 was to codify the Laws of Reform of 1859, 1861 and 1862, thereby ending the confusion caused by continued application of colonial law in regard to civil registries and matrimony.[84] This code, however, ended up encroaching on states' civil law sovereignty.

The timing of this statute was pivotal in shaping the harmonization of civil laws during this period. Few states had enacted civil codes prior to enactment of the Civil Code of 1870; only Veracruz and the State of Mexico succeeded in publishing their own statutes prior to the federal government.[85] The states' delay in enacting their own civil codes, combined with federal pressure to move quickly, resulted in the adoption by most states of the Civil Code of 1870 with few if any modifications.[86] Zacatecas, for example, was already in the prcoess of drafting a new code, and the State of Mexico published its code several months earlier than expected.[87] States that adopted the code with few modifications included Chiapas, Hidalgo, Michoacan, Morelos, Queretaro, Sinaloa, Tamaulipas and Sonora.[88] Campeche and Tlaxcala adopted the code but incorporated more substantial changes. States that adopted the 1870 Code without any modifications whatsoever included Guanajuato, Puebla, Durango, Guerrero, San Luis Potosi and Zacatecas.[89]

Worth mentioning is that while the Civil Code of 1870 went a long way in harmonizing Mexican civil laws —including legislation enacted by states which had pioneered civil law during the revolutionary era— there remained small but important differences between the federal and state codes. This was particularly true in matters regarding legal parentage, inheritance by children born out of wedlock and non-vincular divorce.[90]

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[83] The increased involvement of the federal government in the regulation of the family since the late 1800's had important implications for families, and particularly women, in areas such as regulation of concubinage and divorce. The federal government's exercise of its powers with respect to the home of the power of the union (the Federal District), foreigners and the Civil Code of 1932 have all weakened the principle of family law federalism and have transformed family law.

[84] Eduardo Baqueiro Rojas, *El derecho de familia en el Código Civil de 1870, 83 Revista de la Facultad de Derecho de México 379-380* (1971).

[85] González *supra* note 68 at 109.

[86] González *supra* note 68 at 111.

[87] González *supra* note 68 at 109.

[88] *Id.*

[89] García, *supra* note 61 at 111.

[90] Pablo Macedo, *El Código Civil de 1870, Su importancia en el derecho mexicano, 3 Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana* 244-245 (1971).

In matters of legal parentage, the Code of 1870 and the codes of Veracruz, Tlaxcala, Mexico and Oaxaca all distinguished between legitimate children (those born within marriage), illegitimate children and those born from adulterous relationships.[91] These codes also categorized children based on whether their parents were married or unmarried; kids that were born to unmarried parents who later married and recognized legal parentage were considered legitimate but categorized as "legitimized."[92] Illegitimate children were classified based on the barriers to marriage between the parents. "Natural" children were those whose parents: (a) married and "legitimized" their offspring;[93] (b) were involved in an "incestuous" relation; or (c) involved one partner who was already married.[94] These codes also contained the same registration rules for legitimate children (those born within marriage) and natural, illegitimate and adulterous children. (and provided for forced heirship).[95]

Despite these similarities, the codes differed regarding ways in which illegitimate children could be legitimized. For example, in both the Civil Code of 1870 and the 1885 code for Tlaxcala, parents could legitimize a child by means of an explicit declaration of parentage in either the marriage ceremony and at any time during the marriage.[96] The Code of Veracruz of 1868, however, gave newlywed parents only three months to declare parentage; while the Code for the State of Mexico gave newlyweds up to three years.[97] Another difference involved the retroactivity of parentage declarations: in both the Civil Code of 1870 and code for Tlaxcala of 1885, the declaration of legal parentage took effect on the date on which the parents married, whereas in the Civil Code for the State of Mexico of 1870, recognition is applied retroactively starting from the time of the child's birth.[98] These differences were significant because children's inheritance rights were based on whether their parents had satisfied the requisites of legitimization and/or registration, which varied depending on where a child was born or her parents domiciled.

Differences also existed with respect to the inheritance rights of natural, illegitimate and adulterous children. The Code of 1870 and the codes for the states of Veracruz, Tlaxcala, and Oaxaca all impose the figure of forced inheritance in favour of the family.[99] Differences also existed with regard to how inheritances were apportioned, as this depended upon the classification of the illegitimate children. Under the Civil Code of 1870, legitimate offspring

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[91] See Código Civil para el Distrito Federal 1870 [C.C.F.D.] [Mexico City Civil Code], as amended, art. 79, 80, 82, 83, 85, 314, 354-356, 359, 381.

[92] *Id.*, art. 354-256 & 359, 381.

[93] *Id.*, art. 224, 255-257, 286.

[94] *Id.*, art. 354-356.

[95] *Id.*, art. 117-119 & 150-156.

[96] *Id.*, art. 232 & 236.

[97] *Id.*, art. 354-356.

[98] *Id.*, art. 359.

[99] *Id.*, art. 3373.

had a right to four-fifths of the estate, whereas illegitimate children were only entitled to two-thirds and adulterous children one-half. When both illegitimate and legitimate children were involved, the entitlement of the former was reduced and adulterous children received solely alimentary support.[100] Inheritance rights in the Civil Code of Veracruz of 1868 did not distinguish between legitimate and illegitimate, recognizing the right of illegitimate children to alimentary support in the absence of legitimate or legitimized children.[101] By so doing, illegitimate children of all categories were stripped of their inheritance rights. While the Code of the State of Mexico was largely similar to that of Veracruz, its inheritance rules for natural children differed.[102] Although the Civil Code of the State of Mexico gave illegitimate children the same inheritance allowance as the Code of 1870, this right was diminished when other legitimate heirs were involved, such as a surviving spouse, parent, grandparent, brother or sister. The Civil Code of Tlaxcala was more generous with illegitimate children, as it granted them four-fifths of the estate without additional legitimate heirs,[103] and inheritance rights even when legitimate heirs were involved.[104] These different approaches to the inheritance rights of illegitimate heirs gave major importance to where the parent(s) were domiciled.

Despite widespread diffusion of the Civil Code of 1870, states differed in their policies towards adultery and the rights of heirs born of these unions. The Civil Code of Veracruz of 1868 and the Civil Code of 1870 were highly typical, as both were based on the liberal principles of the Laws of Reform. Each code recognized the secular basis of matrimony and established protocols for the registry and formalization of birth, death and marriage. In this way, marriages were treated as contracts rather than religious sacrament.[105] Important differences remained, however, with respect to concubinage and heirs born of such illicit unions. In the Civil Code of Veracruz of 1868, adultery and "public concubinage" committed by husbands (a) gave their wives the right to solicit non-vincular divorce;[106] (b) prohibited recognition of any children born outside of marriage; and (c) permitted paternity challenges when evidence existed that the children were born to a woman

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[100] *Id.*, art. 3373 & 3465.

[101] *Id.*, art. 955-956, 1118-1124.

[102] *Id.*, art. 1031 & 1034-1037.

[103] *Id.*, art. 2762.

[104] *Id.*, art. 2759.

[105] María del Refugio González, ¿Cien años de Derecho Civil?, Un siglo de derecho civil mexicano. Memoria del ii Coloquio Nacional de Derecho Civil 26 (Instituto de Investigaciones Jurídicas-UNAM, 1985); *See also* Jorge Fernández Ruiz, Juárez y sus contemporáneos 198 (Instituto de Investigaciones Jurídicas-UNAM, 2006).

[106] Código Civil del Estado de Veracruz [C.C.E.V.] [Veracruz Civil Code], art. 228, 1868 *(Mex.)*.

held as a concubine in public.[107] In contrast, the Civil Code of 1870 did not include such draconian restrictions on the inheritance rights of children born of illicit unions. Concubines were only mentioned in this code with regard to a wife's claims of adultery as grounds for non-vincular divorce[108] in the following situations: (a) adultery committed in the marital home; (b) adultery committed outside the home with a concubine; or (c) "scandalous" adultery. Similar to the Civil Code of Veracruz, the Civil Code of 1870 restricted estate claims made by illegitimate heirs, but did not ban them categorically as in the Code of Veracruz.[109]

Major differences between these codes also existed with respect to non-vincular divorce. Liberals and conservatives had always differed with regard to divorce which, under the Law of Civil Matrimony of 1859, was understood as either (a) "temporal" separation that did *not* dissolve the marital bond; or (b) "a separation of bed and board."[110] Liberals contended that reforms to facilitate non-vincular divorce would improve the quality of marriage unions and provide greater family stability;[111] whereas conservatives argued that any changes to facilitate divorce would harm and degrade women by taking away the protection and security of marriage. From a conservative perspective, vincular divorce represented a move in favour of the "divorcist" movement endemic to the United States and represented a sharp departure from the views of the Catholic Church and Benito Juarez, both of whom considered marriage to be an indissoluble union.[112]

To discourage hasty divorces, the Civil Code of 1870 circumscribed mutually-agreed to separations of bed and board, and introduced measures to protect older wives and long-term marriages. Separation by mutual consent was thus restricted to spouses who had been married between two and twenty years. The Civil Code of 1870 also prevented the separation of husbands from wives over the age of forty-five. In fact, divorces by mutual consent were only permitted if the spouses agreed to attend mediation sessions for three months as prescribed by the courts. Many feminists argued that the gender-based differences with regard to paternity, maternity and adultery promoted polygamy over monogamy. For example, the Code of 1870 discriminated against women by restricting divorce for adultery committed by the husband *under certain conditions;* whereas adultery of any kind remained a valid justification if committed by the wife. This double standard put women at

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[107] *Id.*, art. 318 & 323.

[108] Código Civil para el Distrito Federal 1870 [C.C.F.D.] [Mexico City Civil Code], *as amended*, art. 240, section 1, 241-242, 245, *(Mex.).*

[109] González, *supra* note 106 at 25.

[110] Silvia Marina Arrom, *Cambios en la Condición Jurídica de la Mujer Mexicana en el Siglo XIX*, in Memoria del ii Congreso de Historia del Derecho Mexicano 493-518 (UNAM, 1981).

[111] *See* Lionel Summers, *The Divorce Laws of Mexico*, 2 Law and Contemporary Problems, 301 (1935).

[112] Chávez, *supra* note 18 at 417.

a disadvantage by shielding men from accusations and making women easy targets of adultery claims. Conservative critics condemned feminist groups for demanding "sexual license" and permissivity.

This gender-based approach to adultery subjected wives to unscrupulous husbands' abuse, while shielding men for similar actions. Fortunately, not all states followed this reasoning: Veracruz's civil code, for example, did not contain any explicit gender-based restrictions. It did, however, include the same provision as the Civil Code of 1870 that allowed judges to refuse a divorce when a spouse had "incited" adultery. Tlaxcala's civil code did not allow gender to restrict divorce for adultery; and the State of Mexico prohibited either spouse from soliciting divorce for adultery when both partners were involved in extramarital affairs.

Not all states followed the federal model. Under the Civil Code of 1870, any of the following were considered valid causes for divorce: (a) adultery by one of the spouses; (b) intent to prostitute the wife; (c) corruption of minor children; (d) abandonment of the conjugal domicile for over two years; (e) cruel treatment; (f) incitement of violence; or (g) commitment of a crime. The codes of both Veracruz and Oaxaca included provisions that castigated extramarital affairs in much broader terms. In Veracruz, for example, either an extramarital affair that is made public or even an *accusation* of adultery could give rise to divorce. In Oaxaca, any violation of the marriage oath was considered to be valid grounds for divorce. Both states added additional causes for divorce, including incurable and hereditary contagious chronic diseases.

One factor behind these widely divergent family law statutes was the constitutional "ambiguity" of the federal government's civil code. Under the Constitution, the federal government lacked explicit power to pass civil legislation, as there was an implicit understanding that states had exclusive jurisdiction in civil law matters. Only in the Federal District and territories did the federal government retain full and exclusive legislative powers. In addition, the nation's move toward independence empowered the executive branch to limit the Church's influence, thereby broadening its influence over family law. In light of these changes, family institutions became secularized, marriage became a civil act.[113] As a result of these developments, the scope of federal jurisdiction in family law matters re-surfaced as a contentious issue.

Another major factor was the ideological battle between both liberals and conservatives, and federalists and centralists regarding Church-State relations, women's rights, divorce, and concubinage. The Laws of Reform had laid the groundwork for liberal reform by first removing the Church from matrimony. By granting the federal government power over religious worship, Juarez secularized all civil acts, including marriage. Although the Civil Matrimony Act of 1859 declared marriage to be indissoluble, it permitted non-

[113] Jorge Adame Goddard, El Matrimonio Civil en México 13-14 (UNAM-Instituto de Investigaciones Jurídicas, UNAM, 2004).

vincular divorce.[114] Although the reform shifted jurisdition for marriage from the Church to the State, it ended up perpetuating both Church authority and conservative values. Despite its intent of "rehabilitating" the legal status of women, some felt that the 1870 Civil Code reintroduced —in a more organized and modern way— the laws, attitudes and values of colonial times.[115]

1. *The Civil Code of 1884*

During this period, the Code of 1870 was reformed to become the Civil Code of 1884, which remained in force until enactment of the Civil Code of 1928. Many scholars contend that, given only minor changes, the Civil Code of 1884 was nearly identical to the Civil Code of 1870.[116] Despite this critique, however, the Civil Code of 1884 instituted such changes as recognition of testamentary freedom and separation of property for legally married spouses.[117] These changes were significant, as testamentary freedom had the effect of diluting wives' negotiating power and permiting asset transfer to non-conjugal consorts and children of unions deemed untenable under the 1870 Code. In effect, the Civil Code of 1884 tried to harmonize civil laws by resolving many disparities between the Civil Code of 1870 and codes enacted by the states. One example is the inclusion of additional causes of divorce for adultery, conjugal violence and terminal illness, all included in the civil codes of Veracruz, Mexico, Tlaxacala and Oaxaca.

Despite these changes, liberals and conservatives continued their long-running dispute regarding divorce. At this time, there were many public debates regarding the negative consequences of divorce on women. As one author (of the *New Mexican February)* stated:

We know how fleeting the beauty of a woman can be, just because she is of the same age [as a husband is enough for decline, other causes are pregnancy, birthing and the work of child rearing which takes a terrible toll on women. As a result women experience substantial inequality with respect to husbands,

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[114] Article 20 (Ley de Matrimonio Civil de 1859) stated that divorce (non-vincular) was to be temporal and that it cannot in any way be construed as allowing the parties to enter into a new marriage while one of the divorced parties was alive. Art. 21 stated the legitimate causes for divorce would be "adultery of wife if not connived at by husband, adultery of husband if public and continuous, false accusation of adultery by husband against wife, perversion of wife by husband, thus defeating end of matrimony; incitement to commit a crime, excessive cruelty, grave and contagious disease, and insanity to the extent that the other feared for his or her life".

[115] Anna Macías, Against all odds: the feminist movement in Mexico to 1940 13 (Greenwood Press Group, 1982).

[116] Rodolfo Batiza, Las fuentes del código civil de 1928. Introducción, Notas y Textos de sus Fuentes Originales no Reveladas 13 (Porrúa, 1979).

[117] José Arce y Cervantes, *La Libre Testamenificacion en el Código Civil y sus Antecedentes Históricos* in Libro del cincuentenario del Código Civil 20 (Instituto de Investigaciones Jurídicas-UNAM, 1978).

who as a result of their physical strength and freedom from the burdens of [pregnancy and child rearing, could consider separating from their wives and obtaining a wife's consent to do so only in appearance... As useful as the right to divorce is to husbands, it is of questionable value to *women.*

In the Civil Code of 1884, reformers excluded gender-based restrictions in cases of mutually-agreed to divorce. They also eliminated the prohibition of divorce by mutual consent if the marriage exceeded 20 years or the wife was over 45 years old. Drawing on notions of equal rights, legislators failed to see how divorce was different for women in marriages that lasted less than 20 years or for women under 45 years old.[118]

Important similarities existed between the 1884 Code and the state codes that were modeled after it. In every code, most of the events that triggered legitimate divorce were similar: (a) the husband's proposition that a wife prostitute herself; (b) attempts by consorts to corrupt the children; (c) a plot involving corruption or prostitution; (d) abandonment of the conjugal home without cause; and (e) false accusation against a spouse. Despite these similarities, however, variations existed that reflected a real divergence in values. In Tlaxcala and the State of Mexico, for example, punishment for a crime or a husband's violence against his wife were considered adequate cause for divorce. These causes were not recognized, however, in other states. There was also division regarding whether gambling, drunkenness, incurable disease or the infraction of marital bonds should be considered legitimate causes for divorce. At the time of the 1884 Code, these were all deemed valid causes in Oaxaca and Veracruz, but not in the civil codes of Tlaxcala and the State of Mexico. More importantly, states differed with regard to mutual consent: while the Civil Code of 1884 and the codes of Oaxaca and Veracruz deemed mutual consent a legitimate cause, this was not the case in Tlaxcala or the State of Mexico.

V. Attempt at Nationalizing and Centralizing Civil Divorce

When Venenustiano Carranza became president in 1914, several policies inspired by the Mexican revolution and enacted by Benito Juarez were revoked. In addition to the Plan of Guadalupe, Carranza expressed impatience regarding the lack of implementation of much-needed political and social reforms.[119] Carranza, as the First Chief of the Constitutional Revolution, adopted a policy to "crystallize the political and economic reforms required by the country, including 'revision of laws regulating marriage and the civil status of individuals'".[120] Changes introduced by Carranza included (a)

[118] Arrom, *supra* note 60 at 508-509.

[119] Goddard *supra* note 114 at 35.

[120] *Id.*

rejection of the revolutionary idea of civil marriage (but only as a lifetime union); (b) acceptance of federal intervention in state civil law matters; and (c) an openness to foreign family law reform. The autonomy granted to states in civil law matters under the "*Additions and Constitutional Law Reforms 1874*" had provided state legislatures exclusive authority to legislate without having to follow constitutional mandates.[121] Classifying marriage as a civil contract under the federal Constitution, however, placed state laws and legislatures under the authority of the federal government.[122] Between 1914 and 1915, President Carranza published two federal decrees launching vincular divorce.[123] The 1914 decree amended the Constitutional law passed in December 1874 that established marriage as an insoluble union.[124] The amendment now decreed that civil marriages could be dissolved with the mutual and free consent of the parties under the following circumstances: (a) after three years of marriage; (b) when procreation was impossible; or (c) when irreconcilable differences arose because of grave omissions by a spouse. Once the marriage was dissolved, the former spouses could officially remarry.

One of Carranza's most innovative reforms was no-fault divorce. By adopting the Civil Code of 1870's model of mutually-agreed separation of bed and board, this reform permitted husband and wife to divorce on the basis of mutual consent. In effect, spouses were required to submit a divorce request accompanied by an agreement for support, custody and the division and administration of communal property. After submission of this request, both husband and wife had to attend two reconciliation sessions scheduled two weeks apart. If reconciliation was not possible, a divorce agreement was submitted for review by a third party to ensure that the interests of spouses and children had been properly safeguarded. At that point, the marriage could be officially dissolved.

The introduction of vincular divorce became a signature reform of Carranza's presidency. As it amounted to outright rejection of key tenets of Mexico's revolution, many believed it would "result in the ruin" of many of those principles.[125] For this reason, conservatives advocated "indissoluble

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[121] *Id.*, at 39.

[122] *Id.*

[123] Carranza's *Vincular Divorce Laws* (1914) are a set of constitutional decrees that eliminated marriage as a lifetime union from the *Ley Orgánica de las Adiciones y Reformas Constitucionales, 14 de diciembre de 1874*. The second decree (1915) amended the Civil Code for the Federal District to include non-vincular divorce.

[124] The decree of 1915 had the effect of modifying the text of the Civil Code for the Federal District and Federal Territories of 1884 by modifying the text of article 226 to: "… divorce was the legal dissolution of the bond of marriage and provides spouses" the legal right to enter into new marriages.

[125] Speech pronounced by jurisconsult Agustin Verdigo in the National School of Jurisprudence in response to the proposal presented by Deputy Juan A. Mateo before the Congress of

marriage" and opposed vincular divorce because it discriminated against vulnerable spouses, in most cases the wife.[126]

One scholar has argued that Carranza's embrace of liberal divorce laws was more of an appeasement of political allies who sought divorce from their own spouses than a true desire to emancipate women.[127] Despite the importance of the "female question" throughout the debate regarding the enactment of these laws, the real issue had little to do with women and everything to do with authority over family law matters.

Underlying the debate between liberals and conservatives lay genuine tensions regarding continued federal intervention in state civil law matters. By the time Carranza decreed the Law of Family Relations, which eliminated family law matters from the Civil Code of 1884 and introduced vincular divorce, questions about the law's constitutionality had already been raised. Güitrón Fuentenvilla writes about a member of the bar that challenged the constitutionality of the law because it had been released by the executive branch rather than the national Congress. To make matters worse, it had been promulgated without any prior discussion or public consultation.[128] These decrees only confirmed that the states' sole jurisdiction in family law matters was more illusory than real. Many also felt that these changes were based on "foreign values" that resulted from a strengthening of Mexico-U.S. relations when Carranza took office.[129]

1. *Yucatan and the Foreign Divorce Trade Market*

Inspired by the foreign divorce trade market that had developed in the U.S., Mexican state legislatures moved quickly to take advantage of Carranza's reforms.[130] Suddenly it was unnecessary to allege cruelty, incompatibility or irreconcilable differences as justification for divorce; mutual consent was deemed to be valid grounds by Mexican courts.[131] All Mexican states lacked to attract foreigners seeking divorce was to figure out how to reduce residency requirements.

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the Union in 1981, cited in Ramón Sánchez Medal, *Los grandes cambios en el derecho familiar en Mexico* (Porrúa, 1979), at 14.

[126] *Id.*

[127] Goddard *supra* note 114 at 38.

[128] Güitrón was highly critical of the derogation of the Family Relations Act which, according to him, led to the disappearance of federal family law from the legal landscape.

[129] In his justification of vincular divorce in the Laws of Divorce, Adame notes that Carranza cited three French but no Mexican authors.

[130] Jesús de Galindez, *El divorcio en el derecho comparado de América*, 6 Boletín del Instituto de Derecho Comparado 36 (1949).

[131] Summers *supra* note 112 at 312.

In 1915, pioneered by Plutarco Elias Calles, the state of Sonora (bordering the U.S. state of Arizona) became the first Mexican state to implement Carranza's federal decree as part of its civil code.[132] The Sonoran reforms went beyond the federal model by reducing the foreign residency period to six months. In addition, spouses were only required to attend the first hearing, allowing the case to continue by means of a power of attorney.

These reforms were followed by those of Yucatan, home of the First Mexican Feminist Congress. In 1916, the state reformed its civil code by classifying mutually-agreed to divorce as an administrative procedure. That same year, the state of Campeche enacted a law that gave the governor authority to grant divorces to out-of-state petitioners after only a twenty-four hour residency period. In 1932, Chihuahua and other states enacted reforms to amplify the courts' jurisdiction to resolve local divorce petitions.[133] The code granted jurisdiction to Chihuahua courts by means of the parties' "express or tacit submission" in writing to a local judge;[134] proof of residency was established through the divorcee's listing in the municipal registry.[135] Soon thereafter, Chiapas, Coahuila, Morelos, Sinaloa and Tamaulipas enacted similar reforms.[136]

In 1923, Yucatan enacted a reform that went beyond those of any other state.[137] By reducing the courts' role and deemphasizing marital misconduct, Salvador Alvarado —the state's liberal governor— helped transform divorce into a summary administrative procedure.[138] Civil registry officials were authorized to grant same-day marriage dissolutions[139] to spouses who had already agreed on custody, child support and the division of property.[140] Under the state's law, even spouses who failed to reach mutual agreement could seek divorce, as marriages could be effectively terminated by unilateral intent.[141] (Note: although the courts were authorized to grant separation, substantive issues were still re-

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[132] *See* Stacy Lee, Mexico and the United States 124 (Marshall Cavendish Corporation, 2002).

[133] Galindez *supra* note 131.

[134] *See* Michelle Benavides, Smokeless Factories: The Decentering of U.S. Legal and Moral Boundaries by Mexico's Transnational Divorce Industry, 1923—1970 177-203 (Biblio Bazaar, 2011).

[135] Jasa *supra* note 7 at 283.

[136] Galindez *supra* note 131.

[137] Decreto de la Ley de divorcio y reformas al Código del Registro Civil y al Código Civil del Estado / Gobierno Socialista del Estado de Yucatán [D.L.D.R.C.R.C.C.E] [Decree of Laws of Divorce and reforms to the Code of the Civil Registry and the Civil Code of the State/ Socialist Goverment of the State of Yucatan], *as amended*, Diario Oficial de la Federación [D.O.], 3 de abril de 1323 (Mex.)

[138] *Id.*, art. 2.

[139] *Id.*, art. 4.

[140] *Id.*, art. 6.

[141] *Id.*, art. 7.

solved through a civil process).[142] Issues regarding the division of property and financial support for spouse and child were decided on the basis of whether the divorce was unilateral and if malicious conduct was involved.[143]

Reforms aimed at expediting the divorce process for foreigners made Yucatan a no-fault divorce pioneer and global contender for the foreign divorce trade market.[144] Under Felipe Carrillo Puerto's government, Yucatan abolished the one-year minimum period imposed on newly-married couples, which meant that spouses could be officially divorced after only thirty days.[145] After this 30-day period, only one more appearance was required before a civil registry officer to confirm the spouses' intent,[146] at which point a divorce decree was issued that same day.[147] This requirement was later modified to permit long-distance divorce, which was handled by civil registry officers appointed by the spouses to act on their behalf.

Several Mexican and American newspapers were later enlisted to promote Yucatan's new divorce laws. In February 1923, the Yucatan governor circulated a memo to all Mexican consulates in the U.S. to inform Americans of the types of divorce recognized by the Yucatan government, their cost, and information regarding the new thirty-day residency period.[148] Costs ranged between 60 and 125 pesos, depending on whether a judge was needed or if there was an estate.

2. *The Undoing of Mexico's early 20th Century Unilateral Divorce Laws*

A major factor behind the downfall of Mexico's early 20th century unilateral divorce laws was their reported link to corruption. In 1934, when the

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142 *Id.*, art. 8 & 9.

143 *Id.*, art. 9. The Code provided that each spouse was to recover their property. The marital partnership was divided between the shares of each spouse and each spouse recovered their legal capacity to then remarry, but a woman could not marry until 300 days after the temporary separation. If the defendant was the wife, she was entitled to support and lodging from the date of temporary separation, but it ended with her remarriage, or if she lived dishonestly or acquired sufficient property of her own. If the defendant was the husband, he was entitled to support if he could not work and had no money. Girls and children younger than six were to live with mothers, except when mothers lived dishonestly or remarried. Both spouses were required to contribute, in proportion to their means, in the support and education of their children until they ceased to be minors.

144 Lindell Bates, *The Divorce of Americans*, 15 American Bar Association Journal, 709 (1929).

145 Robert Cartwright, *Yucatan Divorces*, 18 American Bar Association Journal 307 (1932).

146 *Id.*

147 *Id.*

148 Aurora Quijano, *Los congresos feministas de Yucatán en 1916 y su influencia en la legislación local y federal*, 10 Anuario Mexicano de Historia del Derecho 184 (1998).

New York Times reported the Mexican Supreme Court's decision to overturn state statutes, it mentioned a local ring that sold false divorce documents.[149] At that time, Roberto Cossio, a well-known Mexican civil law commentator, published scathing remarks about these early laws:

The way in which some Mexican states exploit the issue of divorce is immoral, as they put economic interests over such a socially sensitive matter. Recently the states of Chihuahua, Morelos, Yucatan and others have jumped into the fray, all competing to expedite divorce procedures.[150]

Mr. Cossio claimed that Mexico's unilateral divorce laws promoted economic development on the basis of immoral behavior and corruption, alleging that states sought profits not only from excessive taxes but also from the use of fraudulent documents, including phony residence certificates, (and from publications or the dispersion of publications that resulted in an important part of state expenditures covered by income derived from impiety and corruption).[151]

Another factor behind the undoing of Mexico's early 20th century divorce laws was U.S. influence on Mexican divorce law. Mexico's abrupt shift from separation of bed and board to unilateral divorce was influenced not only by the Revolution but also by U.S. reforms in family law matters. Geographic proximity to the U.S., the relatively low cost of legal services and a similar system of civil law federalism had the effect of absorbing Mexico's unilateral divorce laws in the niche market created within the U.S. Problems with American unilateral divorce laws, however, motivated courts to later invalidate these statutes.[152]

In sum, two federal statutes that undergirded the Supreme Court's rejection of unilateral divorce on due process grounds were also key factors in the demise of liberal state divorce laws: (1) jurisdictional expansion of the federal statute *Civil Code for the Federal District in local matters and for the entire Republic in federal matters, 1928*, and (2) the civil law status of foreigners as a result of the enactment of this new law.[153] Article 1 of the CCDF-MCRMF 1928 included text stating that the code was to apply "in the Federal District and territories in local matters, and 'throughout the Republic in federal matters.'" Thus, the code created a federal-civil sphere, a new federal-civil law sphere and introduced an interpretative supremacy clause.[154] The CCDF-MCRMF 1928 immediately became a gauge by which to measure the constitutionality of state laws, both for locals and foreigners. In effect, the creation of a federal-civil law sphere gave the federal government its own civil code by which to

149 *Id.*, at 313.

150 *See* Galindez *supra* note 131.

151 *Id.*, at 36 & 38-39.

152 Jasa *supra* note 7 at 284.

153 An element that has changed with the private law autonomy granted to Mexico City.

154 Jasa *supra* note 7 at 284-285.

influence state divorce laws and regulate the civil law status of foreigners. The CCDF-MCRMF 1928 also became an important legal tool wielded by foreigners to overturn state divorce decrees. This disparity between state and federal civil law resulted in the abrogation of many liberal state divorce statutes on constitutional grounds.

3. *Violations of Due Process*

When unilateral divorce was first enacted in the 1920's and 30's, widespread criticism of "cross-border" divorce made-easy motivated a major overhaul in unilateral divorce laws.[155] For their part, U.S. courts began to invalidate Mexican divorce decrees because of due process violations or lack of jurisdiction. The Mexican Supreme Court also began to holding the substantive crux of Carrillo's unilateral divorce laws, and its transplants, as unconstitutional.[156] In 1929, the Supreme Court finally declared in a non-binding judgment that Yucatan's divorce laws were unconstitutional because they violated due process rights by denying the respondent party an opportunity to contest the claim by means of submitted evidence or oral testimony. In 1931, the court overturned divorce laws that were enacted in the state of Morelos without legislative approval. In 1933, the Court also held Campeche's divorce statute to be unconstitutional, as the powers granted to civil registry officials went against the constitutional division of power.

[The courts also began to scrutinize questions of domicile when courts disagreed on the matter. In one case involving abandonment, the codes of civil procedure of both Nuevo Leon and Coahuila granted jurisdiction on the basis of the abandoned spouse's domicile. The presiding court designated the previous husband's domicile as the defendant's residence, even when a husband argued that the matrimonial domicile had changed as a result of his move to another town. The court, however, found that the wife had not acquired a new domicile and that the husband's prior domicile was legally valid. The resolving court also found that a conjugal domicile could not be

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155 *Id.*, at 283-284.

156 *Id.*, at 284. For example, in one case, the Mexican Supreme Court held that Yucatan divorces granted in the absence of mutual consent and without valid cause infringed due process requirements set forth in the Mexican constitution.

In another case, the Mexican Supreme Court invalidated divorce when notification was not properly given to a non-resident in accordance with the laws of the latter's domicile. See, for example: Informe 1938, *Semanario Judicial de la Federación*, Quinta Época, p. 106, [Divorcio por causa de abandono del hogar, 1938]. This forces the plaintiff to serve the defendant according to the laws of the matrimonial domicile and not according to the easy requirements of the lex fori. Notification of divorce by publication was barred in Morelos if the plaintiff did not know the whereabouts of the defendant but had the means to find out.

The Court struck down as unconstitutional statutes that allowed Civil Registry officials to determine residence, such as those set forth in the laws of Yucatan, Campeche and Chihuahua.

confirmed by the certificates released by civil servants who did not document actual proof of domicile. Moreover, marital domicile was not modified by mere accidental and temporary hospitalization. However, when the cause for divorce was ill-treatment, the marital domicile was considered valid if it was the domicile of the defendant.

Despite attempts by states to align divorce law with the federal Constitution, the Supreme Court continued to find unilateral divorce unconstitutional. In response to rulings by the Court in 1929, Yucatan amended its laws by withdrawing the most important elements of Carrillo's earlier statutes. While unilateral divorce was still permitted under the new reforms, it could no longer be granted without notification of the other partner. Foreigners were also required to reside in Yucatan for six months (as opposed to thirty days) before they could solicit divorce. In 1933, the Court declared null and void any decree obtained through Yucatan's "sui generis process" (which had incorporated due process principles) because of its unilateral determination of rights and obligations. The Court reiterated and expanded on this opinion in 1934, 1936 and 1944, declaring that the statutes of both Yucatan and Morelos were unconstitutional (and their divorce laws null and void) because the process did not properly consider notification or counter-arguments made by the opposing spouse.

4. *Trends opposed to Marriage Equality: 1932-1940's*

Among the notable changes to the CCDF-MCRMF 1928 was the influence of equal rights on the civil code and modifications that favored unmarried cohabitants. Although the new code did not formally legitimize concubinage unions, it established criteria by which women involved in these relationships could be granted inheritance rights.[157] For instance, cohabitation required that a woman show that she had lived in a marriage-like relationship and/or bore a child from the relationship. Any claim of another concubinage relationship, however, would automatically nullify her cause of action. The new code also included criteria to help determine the concubine's inheritance rights with respect to the rights of blood relatives. These reforms were important because they legitimized informal conjugal unions once considered illicit under colonial law. They also eliminated the requirement that a woman "prove herself" as morally or sexually competent to be considered a "wife"; and punishment in case the relationship had not been publicly known. By granting cohabitant unions semi-civil law status, these reforms: (a) opened the doors for concubine wives and their offspring to claim inheritance rights; and (b) paved the way for future judiciary and legislative reforms.

[157] As article 1602 stated "Tienen derecho a heredar por sucesión legitima: I.-Los descendientes, conyugue, ascendientes, parientes colaterales dentro del cuarto grado, y en ciertos casos la concubina."

Many states refused to recognize concubines' inheritance rights in the same way as the CCDF-MCRMF 1928. This opposition led to disparities in state codes regarding the proper limits of "marriage;" it also led to delays by Guanajuato, Puebla, Zacatecas, Campeche, Jalisco, Morelos, Sonora and Tamaulipas in recognizing the inheritance and support rights of concubines.[158] While some states like Jalisco flatly refused to acknowledge the existence of concubines or continued to grant them second-class legal status, other states such as Tamaulipas, Veracruz, Hidalgo and Sonora passed codes that were even more progressive than the CCDF-MCRMF 1928.

VI. Divergence between Federal and State Codes

Unlike the CCDF-MCRMF 1928, the Civil Code of Veracruz required only three years of cohabitation to qualify as concubinage and recognized both female and male partners' inheritance rights. There were also other significant disparities: whereas the CCDF-MCRMF 1928 granted concubines two-thirds of their offsprings' inheritance shares, in Veracruz they were granted full rights. In Yucatan, concubines were granted the same inheritance rights as those of wives. Although the Civil Code of Hidalgo, similar to the CCDF-MCRMF 1928, denied inheritance rights to partners when more than one concubine was involved, this restriction was relaxed when concubines had given birth to a child of the direct inheritor. In the state of Hidalgo, inheritance rights were granted to all concubines who had borne children.

1. *Equality between Married and Cohabitating Partners*

Disparities also existed with regard to concubines' support rights. Unlike the CCDF-MCRMF 1928, the civil codes of Tamaulipas and Sonora granted these rights. The civil codes for Tamaulipas and Sonora went beyond the CCDF-MCRMF 1928's provisions by extending equal rights to both female and male concubines. In Tamaulipas, married and unmarried partners were treated as equals. Likewise, the civil codes of both Oaxaca and Tamaulipas placed the burden on the state to provide economic support to minors and invalids in case of parental death resulting from a public sector work accident, even if this involved offspring of concubinage.

Although the CCDF-MCRMF 1928 served as a *general* model for support payments and obligations, the 1940 code for Tamaulipas also stipulated how support payments were to be calculated and paid. Support could not exceed 30% of the supporter's normal income; and payments were required on a monthly basis. In 1940, Tamaulipas redefined marriage as a "continuous

[158] Antonio Aguilar Gutiérrez, Panorama de la Legislación Civil en México 40-42 (UNAM, 1960).

union, cohabitation and sexual relation of a single man and a single woman", in effect eliminating the need for a civil ceremony. These changes made it the only state to equate marriage and cohabitation.

2. *Constitutional Limits on Marriage Equality*

Despite changes in state codes that favored concubinage unions, in 1944 the Supreme Court issued an important ruling regarding Tamaulipas' efforts to equate concubinage and marriage. Although this case was non-binding, it influenced the types of legal venues available to concubines to enforce their marriage rights. In essence, the Court declared Tamaulipas' elimination of civil proceedings as a prerequisite to marriage was unconstitutional. It held that while the Constitution provided states with the power to legislate over the civil status of individuals and regulate how marriages are celebrated and registered, these rights were limited by Juarez's 1874 decree, whose provisions were binding on every state. The principles established by Juarez included: (1) civil marriage was a monogamous union, and that bigamy and polygamy were considered punishable crimes (secc. VII); (2) the partners' voluntary will to marry was legally binding and an "essential requirement of civil marriage" (secc. VIII); (3) civil marriage could only be dissolved by the death of one of the parties, but temporary separation (non-vincular divorce) was permissible under exceptional circumstances (secc. IX); (4) civil marriage could not take effect for individuals who were considered incapable of realizing the aims of marriage (secc. X); and (5) religious rites were unnecessary, and "blessings" from religious authorities had no legal effect. According to the Court, legally-sanctioned marriage required that spouses declare their free intent before civil authorities. Any state law that granted marriage rights without this requisite was considered unconstitutional.

This 1944 case did more than just reaffirm civil formalities. By framing the concubinage versus marriage debate within the context of the *Reform Laws*, the Court denied marriage rights for concubines in a way that both reinforced the separation of Church and State and asserted the federal government's jurisdiction over family law. With this case, the Court offered a glimpse of how it would address any state statute that equated concubinage with marriage; or any attempt to contravene the basic principles of federal law. By curtailing the states' jurisdiction in marriage-related matters, the court also preempted the use of marriage and concubinage to further individual states' political agendas, quashing conservative expectations that religious marriage could again be considered equal to civil marriage. By placing a limit on concubinage rights in Mexican state civil codes, this case helped assure the second-rate status of concubines. It also sent a strong message to legislatures that while states had the power to regulate certain elements of matrimony, full validation required that they be celebrated pursuant to the Constitution. It also

implied that any state code that tried to equate marriage with concubinage would be considered unconstitutional.

VII. Conclusion

Limitations on the federal government's regulatory authority in family law matters in Mexico still remains in flux. Recent Supreme Court decisions regarding the decriminalization of abortion,[159] state protection over the unborn's right to life,[160] and same-sex marriage[161] indicate a trend towards greater respect of state jurisdiction and civil law pluralism (including certain limits on federal power).[162] The Supreme Court's recent ruling on Mexico City's decriminalization of abortion during the first twelve weeks of pregnancy, for example, upheld the reforms not on constitutional grounds but on the legal merits of the city's criminal code.[163] With regard to federalism, the Court found that Mexico City, like any other state, had ample authority to regulate criminal matters. In effect, it held that the federal and state governments' shared competency over health-related matters, thereby giving states wide discretion to regulate both local and general health issues.[164]

This issue arose again in October 2008 when the state of Sonora passed a constitutional amendment that protected "life from fecundity to death".[165] Seventeen states followed suit by enacting nearly identical provisions in their state constitutions.[166] The Supreme Court upheld similar constitutional challenges in Baja California and San Luis Potosí on the grounds that the division of powers contained in Articles 73 and 124 of the federal Constitution did "not grant the federal government exclusivity" regarding protection of the

[159] Suprema Corte de Justicia de la Nación, Engrose Acción de Inconstitucionalidad 146/2007 (Summary of the documents of the Action of Inconstitutionality 146/2007, resolved by the Plenary of the Supreme Court of Justice of the Nation, in public session on 24 and 25 of August of 2008) , at 128-152.

[160] *Id.*

[161] Acción de Inconstitucionalidad 2/2010 (Action of Inconstitutionality of 2/2010), Pleno de la Suprema Corte de Justicia de la Nación, *Semanario Judicial de la Federación y su Gaceta*, tomo XXXII, diciembre de 2010, at 911.

[162] *Id.*

[163] Acción de Inconstitucionalidad *supra* note 160.

[164] *Id.*

[165] Francisca Pou, *El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal*, Anuario de Derecho Humanos, 137 (2009).

[166] Informe Gire, *Aborto Legal y Seguro*, México, Gire, 2013, *available at http://informe.gire.org.mx/caps/cap1.pdf.*

unborn.[167][168] This deference to state authority in private and family law matters has been affirmed with regard to same-sex marriage, when the Court has repeatedly underscored the need to challenge the centralist doctrine.

In 2010, the Supreme Court upheld the constitutionality of Mexico City's same-sex marriage reforms, granting marriage, adoption, inheritance and other economic and social rights to same-sex partners.[169] By doing so, the Court held that state laws need not be constitutionally "uniform."[170] According to the Court, the Mexican equivalent of the Full Faith and Credit Clause in Article 121 section I of the Constitution that empowered Federal Congress to prescribe how legal acts, registries, and judicial orders are to be proven, did not imply that Federal Congress had "freedom to establish the validity and the effects of the acts "that article 121 section one refers to."[171] Contrasting Mexico's federalism to that of the United States, the Court stated that this rule in fact "impedes... Congress… in the name of the Federation, to establish what it thinks is adequate."[172] As the Court explained, in the Mexican federal system "states are free and sovereign in all matters relating to their internal administration, but have a limited independence that is subject to the Federal Pact (articles 40 and 41)."[173] The Court's main point was that "the article in question [permitting same-sex marriage] was not unconstituional… [just because] it may have repercussions in other states, as occurs with any other acts of the Civil Registry." The Court explains this new approach to federalism in family law matters by claiming that "it is because of our federal system that we have substantial normative production, that will not be, nor are required to be constitutionally uniform… just because one [state] regulates a civil institution in one way does not mean that the rest have to do it in the identical or similar manner, just like another [state] cannot be limited or restricted from legislating differently than the others."[174]

The comparative approach articulated by the Court in this ruling illustrates how —despite Mexico's highly centralized federal system— the states play a significant role in defining the contours of family law and the state-

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[167] See Supreme Corte de Justicia de la Nación, Voto particular que presenta el ministro José Fernando Franco González Salas en relación a la acción de inconstitucionalidad 11/2009, resuelta por el Pleno de la Suprema Corte de Justicia de la Nación, en sesión pública del miércoles 28 de septiembre de 2011, 15-17, (Individual opinion of Justice José Fernando Franco González Salas in regard to a ruling of unconstitutionality 11/2009, resolved by the Plenary of the Supreme Court of the Nation, in public session on Wednesday, 28th of September of 2011).

[168] *Id.* at 16-17.

[169] Acción de Inconstitucionalidad *supra* note 160.

[170] *Id.*, at 295.

[171] *Id.*, at 293.

[172] *Id.*

[173] *Id.*, at 294.

[174] *Id.*, at 295.

federal relationship. Despite their limited powers, states have exerted influence over family law policy and federal-state relations through issues like concubinage and divorce, which involve the exercise of residual constitutional powers. Unfortunately, the pervasiveness of the centralist doctrine in Mexico has helped obscure its complex history, including the diverse roles played by states in shaping family law, and the diverse laws and policies that arose at the federal level during the 19th and early 20th centuries regarding concubinage and divorce. It also highlights the somewhat ambiguous role played by the federal government in family law matters.

In sum, it is important to challenge centralist assumptions that have, at times, overwhelmed proper consideration of Mexican civil law. Why? Because consensus, unity and uniformity do not fully account for how Mexican civil law actually evolved. Uniformity, for example, has played an oversized role in many studies that purport to explain changes in family law. This is true, I think, because comparative legal scholars have historically underplayed differences and glazed over important legal and jurisdictional issues that may explain such differences.[175] This article underscores how the use of federalism to examine the evolution of Mexican family law —and the complex levels of governance that this implies— can influence both its implementation and debates regarding much-needed reform.[176] Given the prevalence of federal notions of law and governance, it is critical for comparative scholars to understand how these political structures actually work and how interactions between them have shaped critical legal reform. By taking into account the overlap of federal and state jurisdiction in matters of family law, comparative scholars are advised not to disregard on-the-ground facts by placing too much emphasis on "model federations." Instead, they should be aware of the complexities of multi-jurisdictional governance and the cumulative effects of small (yet not insignificant) legal and political changes that have historically impacted family law and policy.[177]

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[175] *See* Patrick Glenn, *Aims of Comparative Law* in Elgar Encyclopedia of Comparative Law, (Edward Elgar eds., 2006).

[176] Reimann, Mathias, The progress and failure of comparative law in the second half of the twentieth century, 50 American Journal of Comparative Law 671-700 (2002).

[177] Smith, Graham, Federalism: The Multiethnic Challenge 1-15, 294-296 (Longman, 1995).

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A SNAPSHOT OF THE MEXICAN CLEAN ENERGY OBLIGATIONS SYSTEM

Carlos del Razo*

Abstract. *This article explains the main features of the Clean Energy Obligations Market ('CEOM') and the relevance of the brand new Energy Transition Act (the 'Act'), both enacted as part of the Mexican Energy Reform of 2013. The CEOM is designed to incentivize the sustainable growth of renewalable energy capacity by requiring qualified consumers and suppliers to obtain clean energy certificates that represent electricity produced from renewable sources (wind, solar, tidal, geothermal, biofuels, etc.). Although similar mechanisms have been successfully implemented worldwide, they did not achieve success overnight. This article briefly analyzes these mechanisms to highlight certain key aspects that policymakers, in Mexico and elsewhere, should bear in mind when implementing systems like the CEOM.*

Key Words: *Mexican Energy Reform, Clean Energy, Emissions Trading Systems.*

Resumen. *El presente documento aborda las principales características del Mercado de Obligaciones de Energías Limpias (el 'Mercado'), así como la injerencia de la nueva Ley de Transición Energética, como una política central de la Reforma Energética de 2013, en México. El Mercado pretende incentivar el incremento en la capacidad de energías limpias exigiendo a los consumidores calificaos y suministradores obtener certificados de energías limpias, los cuales corresponden a electricidad producida a través de fuentes renovables (tales como fuentes eólicas, solares, mareomotrices, geotérmicas y bioenergéticas). Mecanismos similares han sido implementados de forma exitosa en diversos países, sin*

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embargo, su éxito ha sido el resultado de un esfuerzo constante. El presente provee un breve análisis acerca de los aspectos clave que tanto reguladores como legisladores, ya sea en México o en otras jurisdicciones, deben procurar para implementar de forma exitosa sistemas como el Mercado.

Palabras clave: *Reforma Energética, Energías Limpias, Sistemas de Comercio de Emisiones.*

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The Mexican Energy Reform, enacted in August 2013, is expected to significantly expand the nation's electricity sector, resulting in a greater diversity of energy sources and more clean electricity. The Electricity Industry Law ('EIL') and Regulations; the Energy Transition Act (the 'Act'); and the Guidelines for the issuance of Clean Energy Certificates ('Guidelines') include provisions developed to regulate the formation of a new Clean Energy Obligations Market ('CEOM').This initiative, at least in theory, represents another step in a gradual but steady switch away from the typical Mexican 'command and control' approach to policymaking.

The CEOM has two main objectives: first, to incentivize the use of clean energy as a means to diversify Mexico's energy portfolio.[1] Although it is *not* the intent of this article to explain the benefits of energy diversification, it is worth noting that greater quanitity and diversity of energy sources enable countries to better withstand adverse events, environmental restrictions and price volatility.[2] Second, this new mechanism helps promote sustainability and slow climate change by increasing the rates paid by major electricity users in accordance with the Polluter Pays Principle ('PPP').[3]

[1] As of 2012, renewable energy generation capacity amounted to less than 10% of total electricity generation. About 60% of this amount was from a single renewable energy: wind. See *Balance Nacional de Energía 2014*, *http://www.gob.mx/sener/documentos/balance-nacional-de-energia* (last visited Feb. 28, 2015).

[2] Ken Costello, Diversity of Generation Technologies: Implications for Decision-Making and Public Policy, vol. 20, no. 5, *The Electricity Journal*, (2007), at 11-21.

[3] Both international agreements ratified by Mexico and national law embrace the Polluter Pays Principle. Remarkably, the Principle 16 of the United Nations Rio Declaration Relative to Environment and Development, and Article 15, section IV of the General Law of Ecological Balance and Environmental Protection, interpret this principle in two ways: (i) polluters should bear the cost of their polluting activities; and (ii) environmental protection should be incentivized.

According to the EIL,[4] the only clean energy sources eligible for Clean Energy Certificates ('CECs') are wind, solar, tidal, geothermic, biofuels (including alga and compost), methane and waste combustions, carbon capture storage, hydrogen exploitation (under certain parameters), hydropower, nuclear[5] and combined heat-and-power. Users of low carbon technologies in certain industrial processes or facilities that involve eco-friendly technology (i.e., waste, water and atmospheric emissions management and control) are also entitled to earn CECs.

I. CEOM Features

What types of entities should acquire CECs?

The new law and regulations require the acquisition of clean energy certificates by: (a) suppliers; (b) qualified users who are active in the electric market; (c) end users who generate their own power; and (d) users who receive electricity through an interconnection agreement under the laws in place prior to the reform.[6] As with the international standard, one CEC will be awarded for each "clean" megawatt-hour (MWh) produced.

Who is eligible under the new provisions?

- Clean energy power generation plants (i.e., wind farms, solar plants, hydroelectric or geothermal projects) that begin operations after August 11, 2014.
- Clean energy power generation plants owned by CFE that began operations before August 11, 2014 and that have implemented an expansion project to increase production.
- Clean energy power generation plants whose capacity was not included in an interconnection agreement under the rules in effect prior to the reform.

In accordance with the new law, Purchasers will be required to obtain CECs in proportion to their annual energy consumption; i.e., the number of CECs needed depends on how much electricity they use. This proportion

[4] Article 2, § XXII.

[5] Although the development of nuclear energy is debatable, it should be noted that Mexico currently lacks any legislation that promotes this energy source. At this point, there is only one nuclear plant in the whole country, in *Laguna Verde*, Veracruz. Major renovation is currently planned to increase capacity. CNN Expansión, *México analiza sumar dos reactores nucleares en Veracruz, http://www.cnnexpansion.com/economia/2015/09/24/mexico-estudia-anadir-dos-nuevos-reactores-a-central-nuclear (last visited Sep. 25, 2015).* Note that the emissions trading systems in jurisdictions analyzed in this article do not consider nuclear power to be clean energy.

[6] According to the Act, power stations are facilities and equipment that allow Final Users to access the electric grid in a particular place.

(and other parameters) shall be determined on a yearly basis three years prior to the compliance period. The first compliance period will be 2018; as of April 2015, the Clean Energy Quota was pegged at 5% of total electricity use.

Although it is unclear how much the CEOM, along with other initiatives, will increase the nation's production of renewable energy, the Mexican government is determined to reach 35 percent of total electricity generated from clean sources by 2025.[7]

Pursuant to the Market Rules and Guidelines, CECs will be subject to registration, purchase and exchange;[8] and their price will not be fixed by government decree but treated as negotiable instruments subject to the laws of supply and demand. Under the proposed Rules, CEC title holders will be entitled to sell CECs from different energy sources at different rates; and any person or entity shall be able to transfer the certificates, either independently or at yearly public auctions. Since their purchase is considered a commercial transaction, they will be subject to the principles of commercial law and principles.

In order to prevent market fluctuations and duplication, CECs will be immediately liquidated once purchasers have fulfilled their obligation, in effect nullifying the instrument's transferability. For this purpose, a Registration System will be operated and updated by the Energy Regulatory Commission ('CRE'). Note that if an electricity market participant fails to meet its quota —fixed at the beginning of each year by the CRE— it will be forced to pay an administrative fine in accordance with provisions set forth in the EIL.[9] These sanctions will be revised and assessed periodically to ensure that purchasers have adequate incentive to buy CECs instead of simply paying fines.

Based on the above, purchasers may choose to defer liquidation of up to 25% of their obligations for a period of up to 2 years.[10] The only exceptions to this rule are set forth in the Act's transitory articles, in which deferment may increase to 4 years and up to 50% of obligations,[11] with the deferred obligations increasing at 5% annually until final liquidation. Once a CEC is issued, it will remain valid for a period not exceeding 5 years.[12]

Clean energy markets already exist in several parts of the world. The following section highlights some similarities and differences between these markets, and how they relate to Mexico's electricity sector. It is the author's hope that Mexican policymakers, in preparation for their own clean energy trade system, take note of the challenges faced by these nations. Worth mentioning is that the CEOM allows the use of CECs in foreign systems, subject

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[7] Ciro Di Constanzo, *México es líder en energías renovables*, Excélsior, Jan. 22, 2015, at *http://www.excelsior.com.mx/global/2015/01/22/1004035*.

[8] Bases del Mercado, § 12.

[9] Fines up to $743.00 USD per every CEC not submitted can be claim from the Purchaser.

[10] The Purchaser shall notify the CRE about the deference; otherwise, the former will be likely to be sanctioned for breaching its EIL obligations.

[11] Article 22.

[12] Guidelines, article 16.

to approval by the Ministry of Energy[13] and the establishment of CEC registration criteria to allow their use internationally and prevent their duplication or any other abuses.

Despite its promise, the CEOM faces serious challenges. Firstly, the Act establishes that the CRE is responsible for managing and updating CEC Registration. This task is essential to the proper functioning of the CEOM, since it verifies registration and helps avoid duplication or ownership mistakes.

Secondly, the Mexican authorities will have to properly balance CEC registration targets and grants. The targets, set by the Ministry of Energy, should increase steadily to motivate both consumers and suppliers to purchase CECs at prices that incentivize the growth of clean energy. In addition, the CRE shall issue CECs without improper restrictions, to provide financing for legitimately qualified clean energy generators.

Despite these challenges, the author believes that the CEOM mechanism is far more effective than a command-and-control system that requires the installation of clean energy capacity or the imposition of a flat tax. In sum, the CEOM regime facilitates the flexible exchange of CECs and provides a cost effective system for generators, qualified users and suppliers. In practical terms, the clean generation of 1 MW of electricity can be cheaper for a given generator (e.g., CFE), whereas for an unexperienced qualified consumer (e.g., factory) that generation can imply a disproportionate effort.

Voluntary schemes like the CEOM are also preferred by regulators,[14] as they facilitate verification of CEC purchases and eliminate the need to monitor facilities to ensure compliance. (with capacity requirements, expenses and bureaucracy efforts related to tax collecting to fund such growing of capacity)

The CEOM is key to achieving Mexico's stated goal of installing 35% renewable energy capacity by 2024, as set forth in the Act´s Third Transitory Article. As of June 30, 2015, the nation's total installed renewable energy capacity was 16,953.2 MW, representing about 25.3% of total capacity.[15]

II. United States

The two most notable emissions trading systems in North America have been implemented in the states of California and Texas. California in particular has been developing clean energy initiatives since the 1970's; among their milestones are the 2006 California Global Warming Solutions Act, which requires that 33% of energy supplied by public and private entities, including power plants and individual suppliers, be from clean energy sources by

[13] EIL, article 121.

[14] Stuart Bell *et al*, Environmental Law, 249-263 (2013).

[15] Secretaría de Energía, *Prospectiva del Sector Eléctrico 2015-2029*, *https://www.gob.mx/cms/uploads/attachment/file/44328/Prospectiva_del_Sector_Electrico.pdf*, p. 18 y 19 (last visited Jan. 16, 2016).

2020. This policy includes the grant of Renewable Energy Credits ('RECs'),[16] marketable certificates that are similar in many ways to CECs. The rules for acquiring and exchanging RECs are set forth in the Renewable Portfolio Standard ('RPS') framework.

Under this regime, RECs can be marketed through a bundled scheme that includes the sale of electrical energy. A similar instrument used in Mexico is the "Electricity Coverage Contract", which requires that consumers buy a minimum amount of electricity or associated products (including CECs) in a given period to ensure baseline energy demand.

A key difference between Mexico's CEOM and California's RPS is that the latter requires *all* players in the energy sector to accredit clean or renewable energies, including power generators. Although power generators in Mexico must reduce emissions pursuant to standards issued by the Ministry of Environment ('SEMARNAT'), they are not required to obtain CECs.[17] In both cases, however, certificates shall be used to verify clean energy use.

According to a recent study, partially sponsored by the California Air Resources Board, California is on course to achieve its carbon reduction goals by 2020 and 2030; and also expected to meet its 2050 standards.[18] Although the latter assumes the implementation of additional policies and technologies, the RPS framework is among the policy initiatives with the highest potential impact on carbon reduction.[19]

Texas has also shown been relatively successful in promoting clean or renewable energies. The state leads all other U.S. states in wind power generation, which comprises 76% of its entire renewable energy portfolio;[20] and is number two for the combined use of clean or renewable energy, right after Oregon (which mostly relies on hydropower).[21]

In 2002, Texas enacted renewable energy legislation[22] that requires 10,000 MW to come from clean energy sources by 2025. This goal, already attained

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[16] Center for Energy Economics, Bureau of Economic Geology, The University of Texas at Austin, *Lessons Learned from Renewable Energy Credit (REC) Trading in Texas*, (July, 2009), *http://www.beg.utexas.edu/energyecon/transmission_forum/CEE_Texas_RPS_Study.pdf.*

[17] Secretaría de Medio Ambiente y Recursos Naturales, *http://www.semarnat.gob.mx/*, (last visited Feb. 16, 2015).

[18] Jeffery Greenblatt, Modeling California policy impacts on greenhouse gas emissions, vol. 78, *Energy Policy*, (2015), at 158-172.

[19] Other significant policies aimed to reduce carbon impact include building and transportation standards, as well as the phasing out of coal and hydrofluorocarbons programs.

[20] Texas Wide Open For Business, *The Texas Renewable Energy Industry*, *https://texaswideopenforbusiness.com/sites/default/files/11/13/14/renewable_energy.pdf*, (last visited Feb. 13, 2015).

[21] Department of Energy, *Renewable Energy Production by State*, *http://energy.gov/maps/renewable-energy-production-state*, (last visit Feb. 12, 2015).

[22] See Center for Energy Economics, Bureau of Economic Geology, The University of Texas at Austin, *supra* note 16.

in 2010, laid the groundwork for an integral policy that encompasses a carbon market and mechanisms to support clean energy generation.

In all three entities —Texas, California and Mexico— producers are issued a certificate for every megawatt/hour produced through clean energy. In Texas, energy producers must purchase certificates to verify that pre-determined amounts of energy derive from clean sources. Aside from the carbon market, the state's success has been attributed to the Production Tax Credit, which grants credits to energy producers for every clean energy megawatt/hour generated.[23]

III. Australia

Since half of all carbon emissions in Australia derive from electricity generation, clean energy technologies are of paramount importance.[24] The Climate Change Law defines the mission of the Clean Energy Regulator, the agency charged with managing and regulating carbon emissions and clean energy, as follows:

- Reduce carbon gas emissions to help decrease greenhouse gases.
- Provide incentives to clean energy investors to install new facilities and clean energy sources.
- Manage schemes under its field of competence, including mechanisms to regulate clean energies and carbon emissions.[25]

With regard to the latter, the Renewable Energy Target ('RET') has been key, as it requires that 20% minimum of the nation's electricity supply come from renewable sources by 2020. This goal shall be achieved through investment in both large scale power plants and smaller renewable energy sources, esp. solar photovoltaic and household water heating systems.[26] Under the RET, suppliers must acquire certificates to verify that a certain percentage of their electricity comes from clean energy sources.

Just as in the other jurisdictions mentioned here, these certificates are granted for each megawatt/hour produced through clean or renewable sources. Depending on the type of power generation, the Australian regulator issues two types of certificates:

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[23] Guidelines, § III-4.

[24] Scott Valentine, *Braking wind in Australia: A critical evaluation of the renewable energy target*, vol. 38, *Energy Policy* (2010), at 3668-3675.

[25] *Clean Energy Regulator*, About Us, *http://www.cleanenergyregulator.gov.au/About-us/our-work/Pages/default.aspx*, (last visited Feb. 16, 2015).

[26] See Texas Wide Open For Business, *supra* note 20.

1. Large-scale generation certificates, granted to "accredited participants;"[27] and
2. Small-scale technology certificates, issued to independent producers with low-capacity generators.[28]

Low-capacity generators are those employed by individuals to produce their own energy and deliver the surplus to the grid.

These certificates, once issued and validated, are treated as a form of currency, transferable to third parties at negotiable prices. Large-scale generation certificates are usually sold to liable entities (electricity retailers) who must relinquish a given number of yearly certificates to the Clean Energy Regulator through auction.[29]

In spite of its major promise, the RET has certain downsides. A Carbon Pollution Renewable Scheme was supposed to cover gaps left by the RET through additional rules and procedures that were never enacted by Australia's Congress. As a result, the RET alone cannot level the playing field between clean and traditional energy producers. The shortcomings of the RET and its regulations include: (a) side and pervasive incentives in the power generation that favor polluting sources such as coal; (b) lack of a compliance period that extends beyond 2020 to pay back investments; (c) lack of an ambitious target cap that exceeds the nation's current goal of 45,000 GWh; and (d) excessive support for small-scale generation, hampering larger investments in more efficient clean technologies such as wind power.[30]

IV. European Union Emissions Trading System (ETS)

The ETS system, implemented by the 28 members of the European Union and three European jurisdictions outside the union,[31] is the oldest and most progressive cap-and-trade mechanism, as it includes both the power generation sector and other high carbon emitting industries. In contrast with the Mexican, U.S. and Australian mechanisms, the ETS encompasses not only energy generation but also a wide array of industrial and commercial activities, including agriculture, waste management, manufacturing and transportation. As such, the ETS is the world's most comprehensive emission trading system.

The benchmarks established for the third phase of the ETS are especially ambitious. In 2013, the cap on power plant emissions was reduced by 1.74%,

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[27] Clean Energy Regulator, *Large Scale Generation Certificates*, *http://ret.cleanenergyregulator.gov.au/Certificates/Large-scale-Generation-Certificates/about-lgcs*, (last visited Feb. 16, 2015).

[28] Clean Energy Regulator, *What is an STC?*, *http://ret.cleanenergyregulator.gov.au/Certificates/stcs*, (last visited Feb. 23, 2015).

[29] Clean Energy Regulator, *Creating and Registering Large-Scale Generation Certificates, http://ret.cleanenergyregulator.gov.au/For-industry/Power-stations/Large-scale-generation*, (last visited Feb. 23, 2015).

[30] See Scott Valentine, *supra* note 24.

[31] Iceland, Liechtenstein and Norway.

and will be adjusted yearly in the same proportion. According to the European Council, "in 2020, greenhouse gas emissions from these sectors will be 21% lower than in 2005."[32] Since the ETS amounts to almost 45% of the EU's total greenhouse emissions, it is perhaps the most effective cap-and-trade system ever implemented.

Despite these notable achievements, however, the ETS had significant growing pains. In the first phase, so many allowances were granted for industrial and regulated generators that, by the end of 2007, certificate value was driven close to zero, without any incentive to cut emissions or invest in green technology. The second phase modestly increased benchmarks established in the first phase but, thanks to the economic crisis and international community's failure to meet Kyoto's goals, drove down carbon fuel prices which made also the outcome of the second phase fruitless.

The system's third phase is far more ambitious, as industrial facilities must now make a major effort to cut emissions and/or purchase certificates to maintain operations. The results of this phase will be properly assessed at the end of 2020. Some milestones include:

1. The elimination of national grant allowances, now replaced by a single European-wide cap system;
2. Elimination of free-allowances allocation, as auctioning is now the general rule;
3. Inclusion of non-regulated sectors and gases; and
4. An innovative funding mechanism that supports new renewable energy projects through the NER 300 Program.[33]

The NET 300 Program shall be "funded from the sale of 300 million emission allowances from the New Entrants' Reserve,"[34] with the goal of financing select renewable projects deemed likely to cut carbon emissions and generate green jobs in Europe. In sum, the NER 300 Program appears to be an efficient and effective way to incentivize the growth of clean energy production, the main goal of any emissions trading system.

V. Conclusions

As we can see, clean energy and emissions trading systems have evolved over the last several years, mostly through trial and error. Mexican authorities would be wise to learn from these attempts in order to better develop their

[32] European Council, *The EU Emissions Trading System (EU ETS)*, *http://ec.europa.eu/clima/publications/docs/factsheet_ets_en.pdf* (last visit Feb. 10, 2015).

[33] European Commission, *NER 300 Programme*, *http://ec.europa.eu/clima/policies/lowcarbon/ner300/index_en.htm*, (last visited March 4, 2015).

[34] *Id.*

own rules and guidelines, especially at this latter stage. They should also revise provisions in order to (a) minimize inconsistent and negative incentives for 'dirty' fuels; and (b) create funding mechanisms for clean energies.

If the rules for suppliers and large consumers set by CEOM are too permissive, they will result in failure, i.e., no change in energy consumption practices or increased renewable energy production. This will also hamper investments that could facilitate a switch from traditional sources of electricity to more efficient and cleaner technologies. Conversely, an overly restricted market for Purchasers may make the Mexican market less attractive for industrial facilities and investors, indirectly threatening the CEOM's effectiveness.

Another factor that may hinder success is poor regulatory performance of the Ministry of Energy and the CRE. For this reason, flexible and cost effective regulation of electricity market participants and large consumers requires a careful study of other jurisdictions and emissions trading systems. Ideally, the CEOM would emulate the third phase of the ETS, with (a) ambitious targets to incentivize clean energy production; and (b) a trading system that encompasses more carbon consuming industries.

NOTES

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THE DIGITAL DIVIDE IN MEXICO: A MIRROR OF POVERTY

Juan Manuel Mecinas Montiel*

Abstract. *The Mexican digital divide is a problem of inequality that also reflects the poverty of certain cities/areas/groups in Mexico. This note analyzes the digital divide in Mexico, as well as the legal and constitutional efforts the Mexican government has made to breach it. In 2013 and 2014, the government approved an important constitutional amendment and other legal reforms in an attempt to solve this problem with a new fiber optic network and new institutional actors. By setting up a new infrastructure, private actors will be able to offer better broadband Internet services. Nevertheless, these efforts will not benefit those who are not Internet users: the have-nots.*

Key Words: *Internet, digital divide, poverty, inequality, constitutional reforms, fiber optics, broadband connection.*

Resumen. *La brecha digital es un problema de desigualdad y que también refleja la pobreza de diversos(as) grupos/áreas/ciudades en el país. Este texto intenta analizar la brecha digital en México y los esfuerzos constitucionales y legales del gobierno mexicano para cerrarla. Durante 2013 y 2014, el gobierno aprobó distintas reformas constitucionales y legales que intentan resolver este problema con una nueva red fibra óptica y con nuevas instituciones. Se trata de una nueva infraestructura que permitirá a actores privados ofrecer mejores servicios de internet de banda ancha. Sin embargo, estos esfuerzos no beneficiarán a quienes no son usuarios de la red, los have-nots.*

Palabras clave: *Internet, brecha digital, pobreza, desigualdad, reformas constitucionales, fibra óptica, conexión de banda ancha.*

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I. Poverty and Inequality

Maria and Francisca do not use a computer or a cell phone. Internet is a vague concept for them. With a kindhearted smile they claim that the Internet and computers are things for educated and wealthy people. They belong to a large number of Mexicans who do not use the Internet. Maria is a single mother of a two-year-old boy. She barely speaks Spanish and finds difficulties in selling handcrafted dresses in a small town in Chiapas —a state in southern Mexico in which one third of its inhabitants live in extreme poverty.—[1] Francisca, her assistant, is younger (14) and only speaks Tzotzil.[2]

Different reasons explain the digital divide in Mexico, but it is essentially a consequence of poverty and inequality. Internet penetration in Mexico is similar to that of other countries in Latin America, with a low average of users in comparison with some European countries.[3] 51.2 million Mexicans have Internet access,[4] which represents less than half of its population.

Internet access has a deeper penetration among wealthier Mexicans than the poorer sector of the population. 7 out of 10 members of the highest income bracket are Internet users, while this is the case of only 2 out of 10 members of the lowest income bracket, despite the fact that this last group represents about the same percentage of the Mexican population.[5]

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[1] CONEVAL, *Indicadores de Pobreza*, (2012), available at *http://www.coneval.gob.mx/coordinacion/entidades/Paginas/Chiapas/pobreza.aspx*.

[2] A language spoken by 291,550 citizens in Chiapas, most of them in the region called *Altos de Chiapas*. Comisión Nacional para el Desarrollo de los Pueblos Indígenas, *Atlas de los Pueblos Indígenas de México,* available at *http://www.cdi.gob.mx/index.php?option=com_wrapper&view=wrapper&Itemid=200027*

[3] For instance, in Belgium, Denmark and Norway, Internet access stands at around 85%, 96% and 96.3%, in that order, compared to Colombia, Mexico and Paraguay where these averages are 52.6%, 44.4% and 43%, respectively. World Bank, *World Development Indicators 2014*, available at *http://data.worldbank.org/indicator/IT.NET.USER.P2*.

[4] AMIPCI, *Estudio sobre los hábitos de los usuarios de internet en México 2014*, (2014), available at *https://www.amipci.org.mx/estudios/habitos_de_internet/Estudio_Habitos_del_Internauta_Mexicano_2014_V_MD.pdf*.

[5] This figure stands at 23% and 26%, respectively. *Vid.* AMIPCI, *Estudio sobre hábitos de los usuarios de internet en México 2009*. Available at *https://www.amipci.org.mx/estudios/habitos_de_internet/2010_Habitos_Usuarios_Internet_Mx.pdf.*

A lack of academic education brings low income and fewer opportunities for Internet access. People who only received elementary education represent 21% of Internet users and they have four times fewer probabilities of using the Internet in Mexico.[6]

There is also a generational gap. People over 45 represent 12.3% of all Internet users[7] even though they are 32.82% of the economically active population.[8]

Evidently, a lack of infrastructure is a key issue to understanding the situation. In 2012, just 26% of Mexican households had Internet access and it varied among the States. For instance, in Sonora, Baja California, Nuevo León (border states with the U.S.) and in Mexico City (the capital), Internet accessibility was 4 out of every 10 households, while in poorer states like Oaxaca, Chiapas and Guerrero, the average was 1 out of every 10.[9]

This condition puts Mexico in the worst OECD rankings of Internet penetration and specifically in wireless broadband penetration. It also explains why Maria and Francisca, living in a poor state, having no formal schooling and with low incomes are far from living in a digital world.

II. From Marcos's Myth to Peña Nieto´s Reforms

In 2012 a movement called "#YoSoy132" ("#Iam132") appeared in Mexican politics using the Internet. It was not the first case. In 1994 the EZLN had risen[10] by using the Internet and changing the way of doing politics and igniting a revolution. The country and the world knew of the political claims of the EZLN through the web.[11] The transmission of EZLN`s ideological platform was different due to the Internet[12] and an indigenous agenda was put on the table.

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[6] INEGI, *Módulo sobre Disponibilidad y Uso de las Tecnologías de la Información en los Hogares 2014*, (2015), available at *http://www3.inegi.org.mx/sistemas/microdatos/encuestas.aspx?c=34519&s=est.*

[7] *Idem.*

[8] INEGI, *Encuesta Nacional de Ocupación y Empleo, Tercer Trimestre de 2014,*(2015), available at *http://www.inegi.org.mx/lib/olap/consulta/general_ver4/MDXQueryDatos_Colores.asp?proy=enoe_pe_pmay*

[9] INEGI, Estadísticas Sobre Disponibilidad y Uso de Tecnología de Información y Comunicaciones en Hogares 2013, 15 (2014).

[10] The EZLN is an army with indigenous members denouncing political actions which emerged in Chiapas on January 1, 1994. See Carlos Tello. La Rebelión de las Cañadas (Cal y Arena, 1995).

[11] Nevertheless, Marcos stated that it was a student in Texas who designed and controlled the web page and that he has never met this student. Vid, CNN México, *El Subcomandante Marcos explica el uso de la tecnología del EZLN*, available at *http://mexico.cnn.com/nacional/2013/02/11/el-subcomandante-marcos-explica-el-uso-de-la-tecnologia-del-ezln.*

[12] For instance, "Primera Declaración de la Selva Lacandona", available at *http://palabra.ezln.org.mx/comunicados/1994/1993.htm*

But in 2012 the context had changed. "#Yosoy132" members were university students and the movement emerged during the presidential electoral campaigns. They asserted that Peña Nieto —the PRI candidate— was a liar[13] and that he had built his position as the leader of the presidential race on a blurred relationship with the most important broadcaster in the country Televisa.[14] If the EZLN showed the lack of an indigenous agenda, "#YoSoy132" showed the gap between old politics and new digital generations.

Nevertheless, Peña Nieto won the election. "#YoSoy132" was a key factor in a very competitive election, but it faced structural limitations for such a movement: half of the Mexican population did not have Internet, which was its core means of communication.[15]

Although #"YoSoy132" was about to make him lose the election, President Peña Nieto proposed an inclusive digital agenda. His decision is based on political and economic grounds. The ICT market means potential revenue of 60 billion USD a year in Mexico; however, it required a new framework. Mexican politics was full of continuous and useless political efforts trying to breach the digital divide and offering incentives for a competitive market. In 2013, Mexico began to amend its constitutional and legal frameworks on ICT. It was a turning point in political and legal terms. The *leitmotiv* of the amendments was not essentially breaching the digital divide, but opening the telecommunications market (controlled by America Movil —a Carlos Slim company— in the phone and mobile phone sector and Televisa in television and broadcasting).

The dispute between Televisa and America Movil also explains the reforms and the fight for control over the telecommunications market. The Mexican ICT sector was living under a *laissez-faire* policy with a lack of governmental infrastructure and two dominant actors leading the business. Obviously, the reform is in part the State's late reaction to this challenge that stresses the need for a national agenda for digital inclusion.

Competitiveness was the goal because two dominant players were not enough for such a broad market. Having more public TV channels and a better ICT infrastructure are fundamental tools for governments in modern democracies. The Mexican government aims to have real control with a reform that underlines three legal features:

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[13] During his visit to the Ibero-American University campus, Peña Nieto dismissed a protest claiming that there were only 131 demonstrators. The movement started on social networks on the premise that they were students and the name #Yosoy132 meant everybody who joined the dismissed group.

[14] Other media had already denounced this connection. See Jenaro Villamil, *Televisa y la imposición de Peña Nieto*, Proceso, July 2, 2012, available at *http://www.proceso.com.mx/?p=312908*.

[15] University students were 5% of the electorate. A majority of people with less formal education voted for Peña Nieto. See Consulta Mitofksky, *México 1o. de Julio de 2012. Perfil del Votante*, available at *http://consulta.mx/web/images/elecciones/2013/20120701_Perfil_Votante.pdf.*

a. ICT access as a fundamental right. The constitution recognizes Internet access as a fundamental right.
b. The creation of an independent institute that will focus on ICT licenses and concessions.
c. Discussion of two scenarios: ICT infrastructure —the creation of a "shared network"— and television broadcast.

The transitional articles of the amendment expressed the government´s target to attain universal digital access. By the end of 2018, the Mexican government aims to extend Internet access to reach 70% of Mexican households and for 85% of micro, small and medium-sized companies to have Internet access with "real speed to download information".

III. Dominant Players and Infrastructure

Besides poverty and inequality, a two-head monster challenges the efforts to breach the Mexican digital divide. One head is the Dominant Players —actually a sort of group of monopolies— and the other is a lack of infrastructure to provide more and better services in the telecommunications sector.

Regarding the players, in recent months the IFT[16] declared America Movil and Televisa as the Dominant Players in the telecommunications sector in Mexico. America Movil —through Telcel and Telmex— accounts for 70% of the mobile market and around 70% of the fixed market. On the other hand, with a market share of 67%, Televisa dominates television and broadcasting service.[17] This declaration is a result of the new constitutional and legal framework in order to compel them to share their infrastructure with other competitors.[18]

Concerning the infrastructure, Mexico has the worst OECD ranking in wireless broadband penetration. While in most OECD countries there are almost 3 wireless broadband subscriptions for every 4 inhabitants, in Mexico the percentage is about 14% —almost 1 subscription for every 7 inhabitants.—[19] There is a lack of fiber optic infrastructure to transmit data and offer cheaper services with better quality.

Under this scenario, the constitutional amendments and a law reform on telecommunications —approved between June 2013 and July 2014— stressed the Mexican government's interest in having a better fiber optic infrastructure

[16] This is the top official Mexican regulator on ICT since 2013.

[17] PriceWaterhouse Coopers, *Nordic Investment in Mexico. Telecommunication services*, available at *http://www.pwc.com/es_MX/mx/international-business-center/archivo/2014-11-telecommunications.pdf.*

[18] Nevertheless, in a much criticized ruling last October, the IFT found that Televisa is not dominant in cable and satellite television markets, which will let the company continue increasing its market share.

[19] OECD, *Broadband statistics,* available at oecd.org/sti/ict/broadband

and more competitors, and articulated its concerns as to who can use the Dominant Players' infrastructure. The aim of these reforms was to kill the monster: building up the digital infrastructure[20] and creating incentives for real competition in the telecommunications sector.

Currently the Mexican government holds a "core network" of fiber optic of about 25,500 kilometers. By the end of 2018, it aims to own 82,500 kilometers.[21] Unfortunately this is not the largest fiber optic network in the country. America Movil owns more than 167,000 kilometers of fiber optics (twice the amount the government aims to have by the end of 2018).[22]

The infrastructure exists even though it belongs to a private company. The government decided to build a new one to control the market and guarantee net neutrality. In this sense the decision seems quite rational because new actors will not depend on America Movil so as to enter into the market. They will need to invest in the "last mile" and not in the "middle mile". However, new actors cannot be obliged to invest in non-profitable markets. In this sense, the relationship between poverty, exclusion and services becomes significant: new actors will not be attracted to markets with high rates of poverty.

Having a larger fiber optic network does not immediately result in a deeper penetration of Internet. Even though America Movil owns a large fiber optic network, it cannot offer a broadband connection to everyone. In other words, an automatic consequence of the efforts to build a larger fiber optic network is not necessarily a decrease in the digital divide. The government knew it and decided to create a network that can reach 70% of the Mexicans households and can connect 80% of the small and medium companies.

Having more service providers with better and cheaper products offered through a government network will be very attractive for customers who can pay for those services, but not for those who cannot. The good news is that it will benefit most of the Mexicans who are already connected. Government efforts will bring new competitors,[23] but that bad news is that it will not necessarily bring more cybercitizens.

For instance, new companies/alliances created to offer services —with the benefits of the shared network built by the government— concentrate their business in cities with large concentrations of Internet users.[24]

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[20] According to the government, this new "shared network" will cover 98% of the Mexican population.

[21] In this sense there is a double risk: time and technology. As long the government does not reach its goal, it will be inadequate to provide coverage for forthcoming technological developments.

[22] An obvious question arises: Why did the government decide not to use America Movil's larger fiber optic network while building its own "shared network"?

[23] For instance, in recent months AT&T bought Iusacell —an important company in the mobile sector— and Nextel de México and will challenge the dominance of America Movil and Televisa.

[24] This is the case of "Izzi" —a new Internet service provider—. *Vid.* Luis González and Nicolás Lucas, *Izzi propone más que una Guerra de tarifas: Televisa*, El economista, Nov. 4,

Therefore, in order to breach the digital divide, it is not sure whether the creation of the network was a reasonable solution in the short and long run. In the meantime it is not clear whether the government will invest in the "last mile" and under what conditions. Furthermore, it is not only a matter of fiber optics, but of towns/cities where the new "shared network" will run.

Experiences show that markets do not close gaps. Fiber optics and broadband connections depend on the attractiveness of the market based on the size of the population, the terrain, the economic situation and the amount of the investment.[25]

The State should undoubtedly have some sort of control over the telecommunications sector.[26] However, it is just part of the solution. Closing the digital divide depends on whether the government wants to invest in places where the market does not.

This is a huge risk because a deeper gap can arise between those who are already connected and those who are not. Digital divide is not only a matter of access but of the quality of access and skills. So, by the end of 2018, 70% of Mexican households will have Internet. The problem will remain for the remaining 30%. If they are the same households that do not have Internet today, we face a problem, the solution to which is not found in the reforms or current policies. The Mexican reforms were a good idea for the existing customers, but it is a risky gamble for citizens with no Internet access. In 2018, the gap may become even deeper.

IV. Reforms and Poverty

Some facts cast doubt on the success of the government's ambitions for different reasons:

1. In households with a computer, the lack of Internet access is due to economic reasons.[27] Therefore, the problem is not only one of infrastructure. In the end, it lies in the possibility of paying for the services offered on the market.
2. In Mexico, people with lower income spend less money on transportation and communications. A service provider will not invest in neigh-

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2014, available at *http://eleconomista.com.mx/industrias/2014/11/04/izzi-telecom-propone-mas-que-guerra-tarifas-televisa*

[25] This also happens in other countries. *Vid.* Susan P. Crawford and Robyn Mohr, *Bringing Municipal High-Speed Internet Access to Leverett, Massachusetts*, December 17, Berkman Center Research Publication 26, 12, (2013), available at SSRN: *http://ssrn.com/abstract=2366044.*

[26] Julia Neumann, Bridging the Digital Divide, 49-50, 102 (Carl Heymanns Verlag 2012)

[27] This was the main reason in 62% of the cases. See INEGI, Estadísticas Sobre Disponibilidad y Uso de Tecnología de Información y Comunicaciones en Hogares, 2013 16 (INEGI 2014).

borhoods/towns where people cannot afford Internet services due to their economic situation.[28]

3. The latest official data showed that one third of Mexican households do not have a cell phone[29] and 38% of the population does not use a cell phone at all.[30] This is a big contradiction because there are more than 100 million cell phone subscriptions.[31] In states like Oaxaca, 60% of the households have no cell phone in contrast with Baja California Sur where the figure stands at 87%. Data shows that even when there is infrastructure to use a cell phone, (with or without a data plan to access the Internet) one third of the households do not have it, especially in the poorest states.[32]
4. The lack of Internet access in households is severe and the government's aim to reach 70% of them seems far away (today it is around 26%). Most states in Mexico did have statistics showing 80% of their households without Internet access, with cases like Chiapas where the average is 92%.[33]
5. Reality does not show a real possibility of bridging the digital gap in the next decade under the policies implemented by the Mexican government. 11.3% of Mexican households have no potable water. Almost half of the households in towns with fewer than 2,500 inhabitants use firewood and coal to cook. These indicators make difficult to believe that the Mexican situation in terms of the digital divide can change in view of such disparities and contradictions in basic services.
6. Data show a country that needs to fill in other gaps in order to fill the digital one. Internet access is very important for Mexican economy, but water, electricity and other basic services are more important. There is a lack of such infrastructure in a large number of Mexican households.

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[28] In the poorest decile, households spend more than 50% to buy food and just 9.8% on Transportation and Communication. On the other side, one-fifth decile of the population spends 16.7% of their income on Transportation and Communication and the richest one, 19.7%.

[29] INEGI. *Módulo sobre disponibilidad y uso de las tecnologías de la información*, 2014, available at *http://www3.inegi.org.mx/sistemas/microdatos/encuestas.aspx?c=34519&s=est.*

[30] INEGI, Estadísticas Sobre Disponibilidad y Uso de Tecnología de Información y Comunicaciones en Hogares, 2013, *supra* note 9, at 20.

[31] IFETEL, *Sistema de información estadística de mercados de telecomunicaciones*, available at http://siemt.cft.gob.mx/SIEM/

[32] These include the states of Chiapas, Guerrero (56%) and Puebla (50%). INEGI, *Censo de Población y Vivienda 2010, available at http://www.inegi.org.mx/sistemas/olap/Proyectos/bd/censos/cpv2010/Viviendas.asp?s=est&c=27875&proy=cpv10_viviendas.*

[33] *Ibídem.*

In other words, the infrastructure that the government will control in the short run is necessary, but it is not really a solution at all. The highest concentration of this lack of Internet access in households occurs in the poorest states, which is indicative of a much more serious problem: poverty.

V. The missing divide

Maria and Francisca were partially right. In their town (and in other places in Mexico), Internet access and digital skills are not for everyone, regardless of whether the constitution declares it as fundamental right. The law is far from being a certainty in this country.

Even if the government is able to connect today´s *have-nots*, it will not close the digital divide because its programs are not accompanied with an ambitious digital skills policy. The first definitions of digital divide considered it an infrastructure and physical problem.[34] Nevertheless, experience shows that infrastructure and gadgets are not enough to breach the digital gap.[35] In other words, the gap is not only about *hardware* and *software*.[36] Approaching the digital divide as a hardware and software problem widens the gap between Internet users and those who do not access to the web. It would be like having cars and highways and still be unable to drive because the potential driver does not know how to.

The divide may be economic and physical, but it is also a gap in terms of skills.[37] The simplification of the issue from an infrastructure or an economical perspective faces only deals with one part of the problem. Reality shows it to be a problem with several ramifications. Having infrastructure and gadgets is essential to close the gap, but digital skills are a pending task for the Mexican government, which normally does not pay attention to this aspect. The digital divide is a *moving target* due to the continuous changes in technologies and gadgets. Infrastructure is useless if it is not accompanied by programs focused on skills. If we want the Internet to become a real and powerful tool in economic and political terms, hardware, software and skills are a necessary trilogy. The government is not running a national digital skills program.[38]

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[34] Appu Kuttan and Laurence Peters, From Digital Divide to Digital Opportunity 4 (Scarecrow Press, 2003).

[35] Pippa Norris, Digital Divide**:** Civic Engagement, Information Poverty, and the Internet Worldwide 16 (Cambridge University Press, 2001).

[36] Mark Warschauer, Technology and Social Inclusion. Rethinking the Digital Divide 1-5*(*MIT Press, 2004); Jan Van Dijk, *The digital divide as a complex and dynamic phenomenon*, Spring, *The Information Society* (2002), at 1-2.

[37] Lisa Servon, Bridging the Digital Divide. Technology, Community, and Public Policy 6 (Blackwell Publishers 2002).

[38] There is a "Pilot Program for Digital Inclusion" in place. It does not focus exclusively on digital skills, but mainly on providing gadgets to Mexican students. See *http://www.presidencia.gob.mx/edn/desarrollo-de-habilidades-digitales-en-el-programa-piloto-de-inclusion-digital.*

There are efforts to provide gadgets; however they are like giving an aspirin to cure a serious disease.

In some sense, people like Maria and Francisca will continue to struggle to pay their bills because they live away from the digital world. Mexico is far from breaching the digital divide. The government has done part of its job, but it will not be enough to narrow the gap.

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THE NULL-VOTE: A DESPERATE CRY FOR DEMOCRACY IN MEXICO

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Abstract. *Derived from the analysis of several election processes carried out within the last two decades, we have to ask ourselves whether there actually exists a democracy in Mexico, and if so, if it's society is really being listened to by its government. The reality is that the number of null-votes in election processes has increased over the years, without it having any impact whatsoever in the country's politics. In fact, the null-vote seems to have a sole and simple purpose: to express the discontent that reigns over the candidates of the political parties and the federal government in general. However, no action has been taken to legitimate this petition, which makes us wonder if a real democracy can exist in a system where the goverment do not hear their people.The purpose of this comment is to analyze the effects of an null-vote within the country and determine if there is a way to force the authorities to listen to this evident desire of the people to obtain better politicians and, therefore, better governors.*

Key Words: *null-vote, electoral process, voting.*

Resumen. *Tras la observación de varios de los procesos electorales que se llevaron a cabo en las últimas dos décadas, debemos preguntarnos si en realidad existe una democracia de facto en México y, si la hay, si la sociedad es realmente escuchada por su gobierno. La realidad es que la cantidad de votos nulos en los procesos electorales ha incrementado con el paso de los años sin que parezca tener ningún impacto en la política del país. De hecho, los votos nulos parecen tener un único y simple propósito: Expresar a los Partidos Políticos y al gobierno el descontento general que existe hacia los candidatos. Sin embargo, ninguna ac-*

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ción se ha tomado para legitimar esta petición, lo que nos hace preguntarnos si puede existir una verdadera democracia en un sistema donde los gobernantes no escuchan a su gente. El propósito de este ensayo es, precisamente, el de analizar los efectos que tienen los votos nulos dentro del país y determinar si existe alguna manera de obligar a las autoridades a escuchar este evidente deseo de la gente por obtener mejores políticos y, por lo tanto, mejores gobernantes.

Palabras clave: *voto nulo*, *proceso electoral*, *voto.*

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I. Introduction

The principle upon which a democratic political system relies on is the fact that government functionaries are representatives of the people and are, therefore, chosen by the majority of the society by means of an electoral process. It is safe to assume then, that for democracies to be successful, they must be based on citizenship participation.

As society evolved, political parties were created to insure political human rights and to offer, to both interested citizens and society members, candidates that would follow the same line of ethics, ideals and regulations of their party. Those ideals would, theoretically, set a standard to improve the politicians on the running for a public function post. However, Mexican political parties seemed to have failed to improve their political standards and have been invaded, instead, by populism to a point which appears to be undermining democracy itself.

This comment will analyze, on a general scheme, the Mexican electoral procedures trying to separate the "ought to be" from the practical reality of what actually happens within them; in addition we will analyze the knowledge and awareness that society has both on the importance of citizenship participation and of voting, as well as the citizen's state of mind regarding the candidates that are nowadays nominated for government functions. Lastly, we will explore the polemic "null-vote" that has become the means for the members of society to object the candidates presented to them as a whole. On this last point, we shall determine the effects that the undervote has upon an

electoral process and, in its case, the possibilities of modifying such effects to transform the undervote into a real and legitimate opportunity for the voting community to be heard, both by the political parties and their government.

II. Historical Framework

"Any society can be said to function, but to understand why people live within one social system rather than another, we have to look to historical factors",[1] writes Ian Morris and there is no clearer antecedent to democracy than that of Athens and the Ancient Greeks.

Democracy's origin comes from the greek words *demos*, which means 'people,' and *kratos*, that can be translated into 'power;' hence, democracy can be conceptualized as the political system by which the entire society holds the power of making decisions for the collectiveness.

According to Morris's point of view, what allowed democracy to be born in the first place, was the Principle of Equality, which implied that all the members of a society believe themselves equal to one and other and that they are all equally capable of taking decisions that would benefit the entire group. Then again, the only way that an entire society can successfully have voice and vote in group decisions, especially nowadays where population density has increased as much as it has, is by electing a representative from a certain group of people, to make their political decisions and protect their interests so that their entire represented group can be benefitted without falling into a plutocracy.[2] A theory from which the *Ekklesia*,[3] and later on the Senates of the Roman Empire, built the foundation of what would later evolve into the theories that now reign our own democratic institutions.

Thomas Hobbes was the first to propose that democracy was to be implemented by the election of a representative by a secret ballot with universal suffrage, which we now call a 'vote,' to be entrusted with the sovereign power of a State while allowing the members of that State to conserve their individual political powers and establish a working democratic system, much like his theory of the Leviathan[4]. In the Hobbesian democracy, the representati-

[1] Ian Morris, The Strong Principle of Equality and Archaic Origins of Greek Democracy in Demokratia: A Conversation on Democracies Ancient and Modern 19, Josiah Ober and Charles Hedrick ed. (Princeton University Press, 1996).

[2] It is important to remember that Aristotle believed that there was a virtuous way of governing and a wrong way to do so, being one the exact opposite of the other. In the case of democracy, its contrary is plutocracy, in which an elite or specific group of people take control over the decision and governance of the rest of society, monopolizing the power and politics of a State.

[3] One of the governing institutions of Ancient Greece in which any one of the Greece citizens could attend and contribute in the political decisions of their *polis*.

[4] The theory clearly estates that human nature determines that every individual has the right to do whatever he seems fit for his own preservation, however, to allow a life in society, each of the individuals that make it up must renounce to part of those rights so that a single

ves of the people eventually "*are elected by a substantial part of the subject population and legally empowered to impose any rules and policies they decide to make,*"[5] under the condition that such rules and policies are made by elected individuals that act in the best interest of their voters; a justification that still supports the modern democratic system, in theory if not in practice.

A democracy, however, cannot rest solely on the free and secret election of society's representatives but needs other mechanisms that allows the power, acquired by those representatives, to be equally distributed among them and, therefore, avoid the possibility of turning itself into a plutocracy. Hence, the importance of Montesquieu's Theory of Weights and Counterweights.[6]

It was thanks to the greek's democracy and Hobbes and Montesquieu's theories that, in the nineteenth century, the political systems, institutions and electoral processes that currently govern our society were created; this way, the members of society secretly vote for their representatives, forming the govermental institutions that administrate the State itself.

III. Mexican Electoral Procedures

Because Mexico is a Federal Republic, it requires two kinds of elections: State or Local Elections (in which 'municipales'[7] are included) and Federal Elections, which determine the presidential charge and the members of the federal legislative power, also known as the Congress of Union.

A number of states, Mexico among them, have determined that, in order to comply with the ideal of democracy, the best process for the election of the public functionaries is through the vote; which should apply the following principles: (i) Freedom of vote, which relies on the assurance that all citizens, who are legally able to vote, are doing so under their own will and without any external influence (such as threats, violence, fraud or even economical gain). As in many Latin-American States, populism has found its way into the mexican electoral process and has managed to taint the freedom of vote by

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individual (or in case of democracy, a groups of individuals) determine the rules and policies that the rest should follow. It is by giving that group of individuals that power that the renouncing individuals themselves remain the authors of the elected group's acts, so that whatever they do is done under the authority of the renouncing individuals.

[5] Frank van Dun, *Hobbesian Democracy,* Hobbesian Democracy (Nov. 28, 2005), *http://users.ugent.be/~frvandun/Texts/Articles/Hobbesian%20democracy.pdf*

[6] Montesquieu divided the power of the State in three branches: administrative, legislative and judicial; it was his belief that those three powers had to be separated from one another but still work together to fully and armonically govern the State. This means that the powers were complementary of one another but still had to act within certain limitations to avoid despotism and tiranism; and those limitations, according to Montesquieu, had to be established by each of the existing powers in turn, so that one of them would stop the others from wrongdoing.

[7] "County" being the closest translation available.

offering temporary satisfaction of basic needs (that ought to be provided by the State, though it has failed to do so) to members of the lower social classes in exchange for their vote in elections; just as gravely, the insecurity and violence resulting from the narcotics war, that has now taken Mexico hostage, has facilitated the use of cohesion and force to illegally obtain votes for one candidate or the other and even to steal the already filled ballots before they can be submitted and counted by the National Electoral Institute (also known as the INE);[8] directly affecting the outcome of the elections.

(ii) Authenticity of the elections, meaning that the INE must legitimate the results of the vote count and verify that the objective and basic function of the elections were met; this means that the INE must ensure that those results are the certain and clear representation of the citizens' will; and (iii) Periodicity of the elections, allowing a constant change in the government personnel, as well as the review of their work by the members of society; in the case of Mexico's federal elections, the timetables that determine the governing periods of popular representatives are of six years for the presidency and senate, and of three years for the deputies.[9]

The ordinary electoral procedure consists of several phases that repeat themselves every three or six years, accordingly; these phases, which we will explain in the following paragraphs, consist of (i) Preparation of the elections, (ii) The elections themselves, and (iii) Counting, legitimation of the elections and its results.

(i) The Preparation of the elections ranges from the registry of the political parties and the creation of the electoral census, to the politic campaigns and their funding. The electoral census is a database composed of the Mexican citizens who have presented themselves to the INE to obtain their Voter's Credential and who represent the members of society who could issue a vote; however, not all of these people will be able to do so. Being registered in the database is not enough to issue a vote in an election, you must also have the possession of the voter's credential; hence the Nominal List was created, in which appear only those citizens that were part of the electoral census and that retrieved their voter's credential from the INE's offices, and it is only those who appear in the Nominal List that can vote during the Elections period.

[8] This Institute is a public and independent organ whose functions rely in organizing, supervising and legitimation of the electoral procedures in Mexico, making it the one responsible of ensuring the very existence and respect of democracy in the country. Because the INE could be bias if it were composed of public functionaries, it's direction is made up by representatives of the existing political parties, representatives of the legislate power and of citizens independent to the other two.

[9] It is not our intention to treat in this comment the topic of the different kinds of deputies and the dissatisfaction that has aroused over their existence; however, it is important for the reader to understand the complications derived from this matter because of the impact it's had over the overall idea that the mexican society has of their politicians. This impact is sure to affect the citizenship participation and, of course, the electoral procedures and outcomes.

It is also from that Nominal List that citizens are randomly selected to support the INE during the elections and ensure the impartiality and legality of the process itself. These people are to compose a set of supervising authorities for the length of the elections day, so that the citizens themselves are the ones that supervise that the voters are indeed within the Nominal List, that they vote a single time, secretly and freely, and that the observers from the political parties do not influence or cheat throughout the electoral process; they are also the ones to do the preliminary count of their ballot's box and ensure that its contents are safely delivered to the INE authorities, without interference from third parties.

As to the politic campaigns, it is the only way in which the politic parties can make their candidates[10] known to society. These public campaigns are funded both by private investors and by public economy, the money to be used in a campaign, however, is limited by the law itself and seeks to warrant a financial equity between one political party and another; the same is true for the amount of time the political parties can use in public media such as television, cinema and radio.

The Political parties have ninety days, when talking about presidential elections, or thirty days, in deputies elections, to make their proposals and candidates known to the voters; once that term has passed, they have to abstain themselves from any communication or publicity so that the voters have time[11] to reflect and decide their vote without any undue influence.

(ii) The elections themselves are rendered in a single day, starting at 8:00 and closing the ballots' boxes at approximately 22:00, or until everyone that had arrived before then has issued their vote. The voters are given the ballots and a crayon to select their candidate under a private table (given by the INE) and are then instructed to fold and deposit their ballots in the corresponding ballots' boxes. Once the last voter has deposited his ballots, the selected members of supervision proceed to open the ballots' boxes and count the votes, filling two certificates with the obtained results, one to be posted outside the newly closed ballots' boxes and the other outside the establishment used for voting. Then, an INE representative accompanies the president of the supervising citizens to deliver the closed ballots' boxes to the INE authorities for an official recount.

(iii) Once all of the ballot boxes have been received by the INE authorities, a recount of the votes is made and the preliminary results are published and

[10] The candidates presented to society must be previously selected and registered by the political party that nominates them after an internal contest among other members and possible candidates of the party.

[11] The law refers to the three days previous to the elections' day as campaign-free days; under this train of thought, the electoral process is made up by the ninety or sixty days of campaign, accordingly, a three day recess and the election day, adding to it the time that the INE takes to recount and legitimate the results.

constantly updated. It isn't until they have registered the last ballot that the official results of the election are posted and informed to the society and, hence, the results legitimized.

Ideally, the electoral process is then concluded, but the law allows for further legal resources that allow political parties to appeal the results of the elections; resources that we will not study within this note.

It has been made evident that the electoral procedures require of more than one sphere of society to work; political parties, government functionaries and private citizens are all involved on the development of the procedures, making their participation complementary and essential to one another.

IV. Society's Point of View

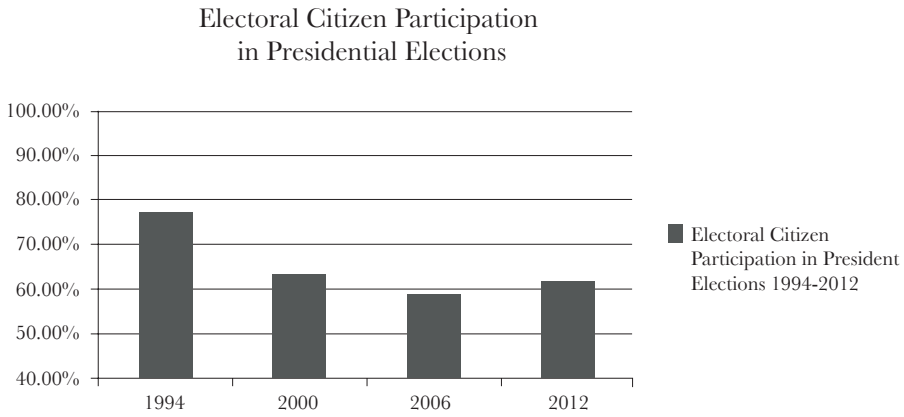
The core of the correct functionality of democracy rests on the participation of the entirety of society; if only a few members of a society participate in the election of their representatives, it is not the majority of society's choice but that of the few that actually had a vote in the elections. Hence, the first problem that any State, who calls itself democratic, has to solve, is to make sure that all of their population, or at least the majority of it, are involved in the election of their public functionaries and representatives. Mexico has had a hard time in this topic.

Because of a lack on awareness and education, Mexicans have come to the belief that the only important power in the country is that of the federal president, arriving to a point in which they have determined that the rest of the powers are not only unimportant, but also dispensable.[12] Adding to it the general apathy and mistrust of Mexican institutions and of the political sphere in its entirety, it is not a surprise to find that citizen participation, not only on the elections but on a daily basis, has proven very difficult to obtain; and following the decline of citizen participation we arrive to the decline of democracy itself.

According to the INE's citizen participation census, which appeared for the first time in 1994 (just in time for the presidential elections) and happened to have the highest participation registered in Mexican history, participation has not been increasing, as it should have with the evolution and stability of democracy in the country. Actually, and as it can be seen from Figure 1, the average percentage of participation for presidential elections has been of only the 65.44%.

[12] An important number of signed petitions have been made in the last decades in an attempt to reduce the number of deputies, and even to try and eliminate the Senate.

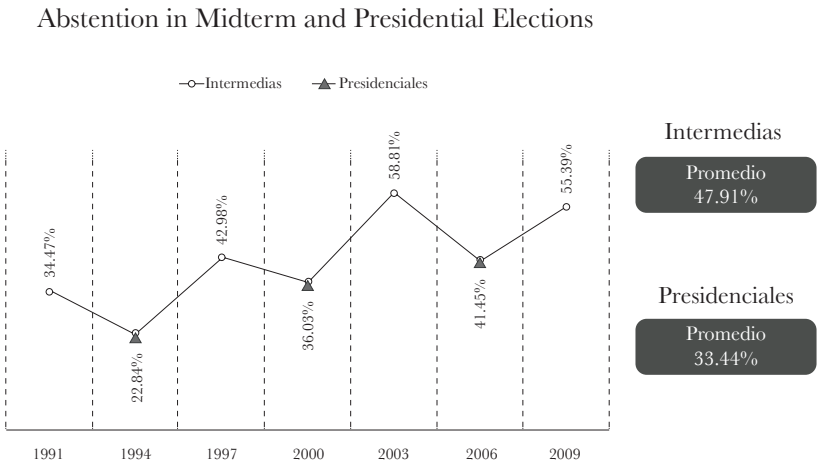
FIGURE 1



SOURCE: Instituto Nacional Electoral. *Estudio Censal de la Participación Ciudadana en las Elecciones Federales de 2012*, INSTITUTO NACIONAL ELECTORAL (2012).

Now, let us compare the participation in presidential elections with that of federal deputies elections:

FIGURE 2



SOURCE: LXI Legislatura Cámara de Diputados.

It is evident, from Figure 2, that citizen participation in the deputies' elections is notably lower than that of presidential elections (notice that Figure 2

makes reference to the percentage of people that did not vote); demonstrating that the awareness of the importance of Congress is not what it should be. As it is, this year's federal deputies election has come and gone with a citizenship participation of only 47%, demonstrating that in the last six years the little participation that there was in these elections has barely improved.

Now, what does all of these mean? When electing their representatives, Mexico's decision truly relies on only a 65% of the population, and that is only true regarding the presidential election, for the average participation in deputies' elections is much lower. That percentage is, indeed, a majority; but is it enough to determine that there is real democracy in the country?

Unfortunately, the answer is probably not. The *Latinobarometer Brief* of 2010 showed that only 27% of the Mexican population had declared satisfaction with the democratic system of government; most of the interviewed determined that it had a lot to do with the amount of corruption that had rotted the system from its core and that government decisions were meant to benefit only a selected few[13]. Actually, those studies have showed that this point of view has not improved with the years but, on the contrary, has declined (as shown in Figure 3).

FIGURE 3

Support for Democracy per Year, 1996-2010										
	1996 media	1997	1998	1999	2000	2001	2002	2003	2004	2005
México	53%	52%	51%	45%	46%	63%	53%	53%	59%	54%

Support for Democracy per Year, 1996-2010					
	2006	2007	2008	2009	2010
México	48%	43%	42%	49%	51%

SOURCE: Latinobarómetro, *Informe 2010*, diciembre de 2010, available at *www.latinobarometro.org*

If there is so little regard to democracy in Mexico, it is reasonable to assume that its citizens hold as much regard to voting; however, research within the country has showed that disregard of democracy is not the only factor to take into account. In fact, 72.3%[14] of the population believes that not voting, or undervoting, is a viable way to punish their politicians; and a 73.3%[15] is

[13] As determined by a 65% of the interviewed for the 2010 *Latinobarometer Brief.*

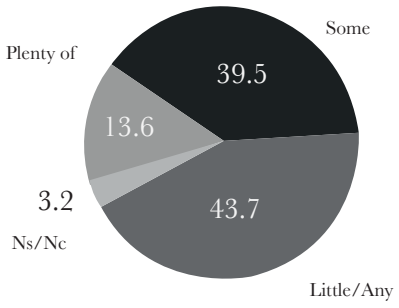
[14] Data obtained from MARTHA GLORIA MORALES GARZA, *et al.*, PARTICIPACIÓN Y ABSTENCIONISMO ELECTORAL EN MÉXICO: REPORTE DE INVESTIGACIÓN (IFE-UAQ,2009).

[15] *Id.*

convinced that the country's situation will not change or improve no matter who wins the elections, making their participation rather useless and time wasting.

The Third Great Poll of Mitofsky Consulting has shown that all of the Politic Parties have managed to increase the apathy and lack of support of the voting citizens within the first month of 2015's federal elections. As it is, they have also uncovered that the citizenship, in general, is no longer interested in politics.

FIGURE 4
Interest in Politics



SOURCE: THIRD GREAT POLL OF MITOFSKY CONSULTING (2015)

Other polls have shown that there is little trust and sense of representation found with the political parties, since only the 22%[16] of the interviewed citizens said that they felt themselves represented by the existing Parties and trusted their general actions.

These results have painted a scene that determines the general scope from which citizenship participation in political matters in Mexico should be approached and studied, clearly marking the factors that seem to be the cause of democratic apathy and indifference to policy change.

V. THE NULL-VOTE

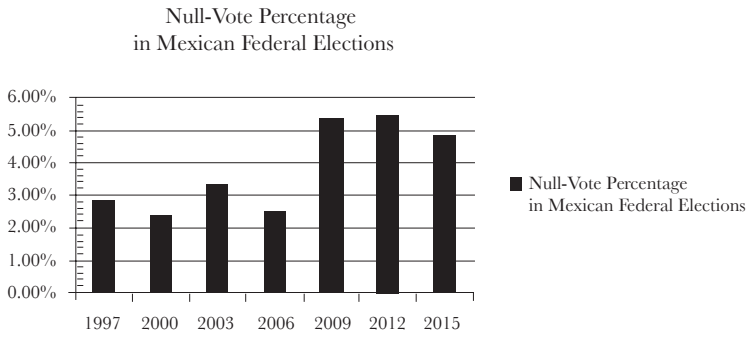
As explained above, the citizenship of Mexico has come to believe that they have little say on their inside politics, and that their politicians are not even close to the terms of quality and preparation required for their posts, not to mention their distrust and the idea of corruption as an indivisible component

[16] Source: LXII Legislatura Cámara de Diputados, *Encuesta Telefónica sobre Confianza en las Instituciones* (2014).

of politics. As a direct result of the citizens' dissatisfaction, it appears there are only two ways to object their current politics and candidates presented to them: no voting on the elections, or exercising a 'null-vote.'

The I.N.E. has determined that a null-vote happens when the ballot that has been submitted to the ballots' box has been left blank, or more than one of the candidates or political parties have been selected within the same ballot. Although many of these null-votes were originally the product of mistakes from the voters,[17] the idea that a null-vote can be used as a way of protest or as a punishment to political parties has become quite popular in the last decades.

FIGURE 5[18]



As seen in the previous figure, an important increase of null-votes happened in the 2009 deputies' elections; this is intrinsically related with the fact that several public figures[19] called to the citizens to express their contempt by simply null voting in the elections. Of those null-votes, the I.N.E. (which up until 2015 used to be called "Electoral Federal Institute" or IFE) determined that 63.5% of them had been intentionally left blank or voided. It was, probably, in the 2009 elections that the null-votes were first used as a tool of political protest in Mexico.

[17] Let us remember that there are a number of coalitions between political parties and that on many occasions the voters are unsure as to what they are supposed to do in such cases, specially when a coalition happens in a federal scope but not in a local one and the elections demand voters for both decisions. When a coalition exists and it has brought forwards the same candidate, it does not matter whether just one of the political parties or all of them have been selected within the same ballot, or even the box reserved for the coalition itself.

[18] Data obtained from José Luis Vázquez Alfaro, *El Voto Nulo (y el Voto en Blanco)*, CUADERNOS PARA EL DEBATE: PROCESO ELECTORAL 2011-2012 (2012)

[19] The strongest influence of undervoting was Alejandro Martí, for the 2009 elections, and, in 2012, the poet Javier Sicilia.

In conclusion, it is apparent that voluntary null voting has managed to gain not only popularity among voters, but also the attention of politicians in the country. What we have to wonder, however, is whether this citizenship protest has any legal effect whatsoever or if it is just that, a protest.

The Mexican Constitution clearly states that the registered political parties must obtain at least a 3% of the valid issued votes to maintain their registry, which allows them, in turn, to access public financing and the opportunity of nominating a certain number of deputies for Congress. Under this regulation, it would appear that null voting could, in fact, take a toll from Political Parties and have legal effects over the country's politics; however, the Federal Code of Electoral Proceedings and Institutions (C.O.F.I.P.E.), where legislation regarding the null-vote is contained, has determined, unlike other systems and countries, that the nullvote is actually void.

The voidity of an juridical act means that said act has no legal effects whatsoever, usually because it is viewed as if it had never existed; this is, sadly, also true for the undervote in Mexico. And why would an null-vote be void in Mexico? Simply because the legislators thought that the null-vote does not clearly express the voter's will, specially when an intentional null-vote can be so easily mistaken for a mistake of the voter.

Up until 2009, when null-vote was first conceived in Mexico as an active campaign to protest Mexican politicians, blank votes and null voting were so few that legislators regarded unnecessary its regulation; after all, void votes and "blank votes" had always existed, it was only that there wasn't enough of them to cause any difference in the election, and most of them were considered mistakes made by the voters. After the campaigns of 2009 the null-vote became a newly found power of protest of the citizenship, one that remains off regulations due to the lack of amendments in the electoral laws; and because the electoral laws remain the same, at least on regards of null voting, the legal effects of the protest are buried under the voidity of unclear ballots and voters' mistakes, turning a protest campaign into benefits for the protested politicians.

As it was mentioned before, the percentages that regulate political parties' registry, and from which most of the results are obtained, depend on the valid issued votes; these are the result of taking all of the ballots deposited in each ballots' box and subtracting from them the void votes, among which are the null-votes, and the votes given to no-registered candidates. This means that null-votes diminish the valid issued votes and effective voting, making it easier for the political parties to maintain their registry and to win their corresponding elections; forcing us to wonder if the protest was even heard.

So, what is the point of null voting when it has no legal effects whatsoever? José Antonio Crespo, a researcher of the Economics Investigation and Teaching Center (also referred to as C.I.D.E.) has determined that null voting has its advantages; it is his professional opinion that it was thanks to the considerable amount of null-votes of the 2009 and 2012 elections that the govern-

ment and the political parties prompted the electoral amendments, both to the C.O.F.I.P.E. and to the introduction of new democratic poll systems, such as the popular consult.

In addition to the already amended legislation, other proposals were submitted after the 2009 elections in which certain deputies attempted to get the law's recognition of the "blank vote," even adding the option to the ballots to avoid having intentional null-votes mistaken for "mistaken votes," so that it may be considered within the valid issued votes count as an expression of the citizenship will and protest; another proposal pretended to recognize those same undervotes with the effect that, if it constituted a percentage larger than the 20% national issued votes, the ordinary elections were to be voided and extraordinary elections called upon. Therefore, the null-vote may have no legal effects but it definitely has political consequences.

In the meanwhile, until real and practical amendments and policy changes are made to the current political system, it is safe to assume that the null voting is a double-edged knife; one that has picked up popularity and is now used by a considerable number of citizens; as proven by Mitfosky Consulting in their already cited poll, where they discovered that 41% of the interviewed individuals considered that undervoting was a way in which they could comply with the responsibility of voting while still being able to protest against the way politics are made in Mexico.

Meanwhile, politicians seem to be undisturbed by the increasing number of null voting, despite the fact that it has reached a point in which the percentage of null-votes has overcome that of the votes obtained by certain existing political parties; up to the point that null voting is now being called "The Third Power."[20]

VI. Conclusion

There are three facts that cannot be denied: First, that Democracy requires the participation of *all* the members of a society to actually function the way it was meant to do, as first thought by Hobbes and the Ancient Greek; a participation that begins with, but by no means concludes in, the electoral process of any democratic country. Mexico has shown a serious deficit, first in their initial participation and then in the overall trust given to the democratic system of the country, mostly because of the corruption existing within the country's politics and the lack of education regarding citizen participation; in fact, it would appear that a considerable number of mexicans no longer

[20] Mexico's two principal Politic Parties, PRI and PAN, have been called by the media: "The Two Powers." Up until very recently, the PRD had been considered like the contesting "Third Power" but because of several internal situations that ended up with the dismemberment of one of their most popular members, their voting percentage has decreased enough to allow the undervote to be considered as the "Third Power."

believe democracy is the adequate political system to reflect their goals and satisfy their general needs.

The reduction of participation in electoral procedures and the indifference of the future generations towards politics represent a serious obstacle for progress and development, not only of democracy but of Mexico as a country, specially if Aristotle's theories of virtuous governing and Hobbes' Leviathan are taken into consideration. After all, democratic apathy might derive into an oligarchy that would directly affect the foundation of society as we know it; for it is generally accepted that leaving the decisions of representation to only a handful of the population implies the failure of democracy and, nowadays, the point of view of the international community a failed democracy resembles a failed country.

Secondly, the way politics are made in Mexico, as well as the politician groups that already exist in the country, seem to have suffered strong image depreciation. Studies have shown, on several occasions, that the average citizen no longer trusts political institutions, such as political parties or the government itself, nor the politicians as individuals; which has induced a problem to the overall governability, seeing how public institutions and functionaries are no longer regarded with the respect and trust upon which they had settled their power on in the first place. The consequences of this mistrust have had an impact in the general mexican population that seems to reflect in their security and economic spheres.

It does not come as a surprise that the opinions of a number of individuals circle the idea that in the oncoming elections, as well as the ones that have recently been carried out, it was not a decision upon who was the better candidate for the job but rather who was the least harmful candidate; citizens have been protesting and asking the government and the political parties for a change in the quality and education standards of their candidates, as well as the issuing of real government proposals, instead of having them fighting each other over what seems like personal matters[21] to no avail.

The idea of a minimum standard of education for certain public offices (such as federal deputies, senators and the president) has been raised and demanded from the government and the parties, just as a firm request from the citizenship in prohibiting the nomination of candidates to publicly known criminals[22] and to those that have criminal records regarding specific crimes (especially those that attempt against the individuals' security and life). It is not, after all, so far fetched that those who represent the citizenship, both within and without the country, should be conditioned to certain require-

[21] Lately debates and political publicity have had little to do with political proposals, instead the candidates have been busy undermining each other's credibility and publicizing personal scandals.

[22] Please note that many criminal suspects have also incurred into the public offices only to gain access to the "*fuero*" or criminal exemptions that privilege the office.

ments; the political parties and the government, however, have yet to listen to their represented population.

It is because of this lack of true representation that we have arrived to the third and last fact: the null-votes are an increasing force within the country's politic. Feeling vulnerable and misunderstood by their politicians, the citizenship has found what they think is a good protesting tool; it is the idea that by null voting the political groups of the country are to finally hear their requests and make a change. However, the null-vote has little to no legal effect in Mexico's legislation and, instead of damaging the political parties, it seems to be helping them maintain their percentages and registry.

Because the null-vote is not taken into account as part of the valid issued votes, leaving a ballot void has no negative impact upon the numbers of the political parties; actually, it is helpful rather than harmful, since the ranges from which their percentages come from are lowered by the diminished valid votes.

Null voting is not, despite it all, completely useless. It has helped raise awareness among the population and has, most definitely, managed to gain the attention of many academics and the media; it has also gained political discussions and an attempt of changing the way our government works by hearing the opinion of the people through other popular mechanisms (such as popular consulting, the popular petitions and the refrendum).

Amendments to the political and electoral procedures are being reviewed and proposed to give validity to the null-vote so that, in the future, it might actually make a difference in the elections' results; and though it is not precisely what was sought from the null voting, it is a start.

COMMENT

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THE *RIGHT TO THE TRUTH* AS AN AUTONOMOUS RIGHT UNDER THE INTER-AMERICAN HUMAN RIGHTS SYSTEM*

Eduardo Ferrer Mac-Gregor **

Abstract. *The evolution of Inter-American Court case law and the advances made by international bodies and instruments, as well as those in domestic legislation, clearly reveal that the right to the truth is now recognized as an autonomous and independent right. Although this right is not expressly included in the American Convention, it does not prevent the Inter-American Court from being able to examine any alleged violation of this right, and declaring that it has been violated, according to Article 29 of the Pact of San José. The author of this opinion considers that although the right to the truth is mainly related to the right of access to justice derived from Articles 8 and 25 of the American Convention, it should not necessarily remain subsumed in the examination of the other violations of the rights to the judicial guarantees and judicial protection that were declared in a case because this understanding encourages the distortion of the essence and intrinsic content of each right. The author considers that the Inter-American Court should reconsider its criteria regarding the fact that the right to the truth is necessarily "subsumed" in the victims' and their families' right to have the competent State bodies elucidate the violations and corresponding responsibilities, in order to proceed, when appropriate, to declare its violation as an autonomous and independent right. This would clarify the content, dimensions and true scope of the right to know the truth.*

Key Words*: Right to the truth, forced disappearance of persons, Inter-American Court of Human Rights, Inter-American Human Rights System.*

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* Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot in the Rodríguez Vera & others Case, 2014 Inter-Am. Ct. H.R. Judges Eduardo Vio Grossi and Manuel E. Ventura Robles concurred with Judge Ferrer Mac-Gregor Poisot's Opinion.

** Inter-American Court of Human Rights Judge, Law Professor and Senior Researcher at the *[Institute for Legal Research]* of the *National Autonomous University of Mexico (UNAM).*
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Resumen. *Del avance jurisprudencial de la Corte Interamericana de Derechos Humanos y del desarrollo de los órganos e instrumentos internacionales y ordenamientos jurídicos internos, se desprende con claridad que el derecho a la verdad actualmente es reconocido como un derecho autónomo e independiente. Si bien el referido derecho no se encuentra contenido de forma expresa en la Convención Americana, ello no impide que la Corte Interamericana pueda examinar una alegada violación al respecto y declarar su violación, de conformidad con los alcances del artículo 20 del Pacto de San José. El autor considera que el derecho a la verdad si bien está relacionado principalmente con el derecho de acceso a la justicia —derivado de los artículos 8 y 25 de la Convención—, no debe necesariamente quedar subsumido en el examen realizado en las demás violaciones a los derechos referentes a las garantías judiciales y de protección judicial ya que este entendimiento propicia la desnaturalización, esencia y contenido propio de cada derecho. Lo anterior clarificaría el contenido, dimensiones y verdaderos alcances del derecho a conocer la verdad.*

Palabras Clave*: Derecho a la verdad, desaparición forzada de personas, Corte Interamericana de Derechos Humanos, Sistema Interamericano de Derechos Humanos.*

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I. Introduction

1. Unfortunately, the forced disappearance of persons is one of the egregious violations of human rights examined in the case law of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"). Its first contentious case, in 1988, dealt with the forced disappearance of Manfredo Velásquez Rodríguez in Honduras. Since then, of the 182 contentious cases that it has decided to date, the Court has heard 42 cases concerning forced disappearances.[1] Following this first case, the Inter-Amer-

[1] Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser.C) No. 4; Godínez Cruz Case, 1989 Inter-Am.Ct.H.R. (ser.C) No. 5; Neira Alegría & Others, 1995 Inter-Am. Ct. H.R. (ser.C) No. 20; Caballero Delgado & Santana, 1995 Inter-Am. Ct. H.R. (ser.C) No. 22; Paniagua Morales & Others Case, 1998 Inter-Am. Ct. H.R. (ser.C) No. 37; Castillo Páez Case, 1997 Inter-Am. Ct. H.R. (ser.C) No. 34; Garrido & Baigorria Case, 1996 Inter-Am. Ct. H.R. (ser.C)

ican Court has emphasized that the practice of forced disappearance violates numerous provisions of the Convention and "constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, moreover, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention."[2]

2. It is within the context of case law on forced disappearances that the Court has affirmed the existence of a "right of the victim's family to know his fate and, if appropriate, where his remains are located, [which] represents a fair expectation that the State must satisfy with the means available to it"[3] since its first contentious case. The Court has also indicated that withholding the truth about the fate of a victim of a forced disappearance entails a form of cruel and inhuman treatment for the nearest relatives,[4] and that this

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No. 26; Blake Case, 1998 Inter-Am. Ct. H.R. (ser.C) No. 36; Benavides Cevallos Case, 1998 Inter-Am. Ct. H.R. (ser.C) No. 38; Durand & Ugarte Case, 2000 Inter-Am. Ct. H.R. (ser.C) No. 68; El Caracazo Case, 1999 Inter-Am. Ct. H.R. (ser.C) No. 58; Trujillo Oroza Case, 2000 Inter-Am. Ct. H.R. (ser.C) No. 64; Bámaca Velásquez Case, 2000 Inter-Am. Ct. H.R. (ser.C) No. 70; 19 Tradesmen Case, 2004 Inter-Am. Ct. H.R. (ser.C) No. 109;Molina Theissen Case, 2004 Inter-Am. Ct. H.R. (ser.C) No. 106; Serrano Cruz Sisters Case, 2005 Inter-Am. Ct. H.R. (ser.C) No. 120; Mapiripán Massacre Case, 2005 Inter-Am. Ct. H.R. (ser.C) No. 134; Gómez Palomino Case, 2005 Inter-Am. Ct. H.R. (ser.C) No. 136; Blanco Romero & Others Case, 2005 Inter-Am. Ct. H.R. (ser.C) No. 138; Pueblo Bello Massacre Case, 2006 Inter-Am. Ct. H.R. (ser.C) No. 140; Goiburú & Others Case 2006 Inter-Am. Ct. H.R. (ser.C) No. 153; La Cantuta Case, 2006 Inter-Am. Ct. H.R. (ser.C) No. 162; Heliodoro Portugal Case, 2008 Inter-Am. Ct. H.R. (ser.C) No. 186; Tiu Tojín Case, 2008 Inter-Am. Ct. H.R. (ser.C) No. 190; Ticona Estrada & Others Case, 2008 Inter-Am. Ct. H.R. (ser.C) No. 191; Anzualdo Castro Case, 2009 Inter-Am. Ct. H.R. (ser.C) No. 202; Radilla Pacheco Case, 2009 Inter-Am. Ct. H.R. (ser.C) No. 209; Chitay Nech & Others Case, 2010 Inter-Am. Ct. H.R. (ser.C) No. 212; Cárdenas & Ibsen Peña Case, 2010 Inter-Am. Ct. H.R. (ser.C) No. 217; Gomes Lund & Others Case, 2010 Inter-Am. Ct. H.R. (ser.C) No. 219; Gelman Case, 2011 Inter-Am. Ct. H.R. (ser.C) No.221; Torres Millacura & Others Case, 2011 Inter-Am. Ct. H.R. (ser.C) No. 229; Contreras & Others Case, 2011 Inter-Am. Ct. H.R. (ser.C) No. 232; González Medina & Family members Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 240; Río Negro Massacres Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 250; Massacres of El Mozote & nearby places Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 252; Gudiel Álvarez & Others Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 253; García & Family members Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 258; Osorio Rivera & Family members Case, 2013 Inter-Am. Ct. H.R. (ser.C) No. 274; Rochac Hernández & Others Case, 2014 Inter-Am. Ct. H.R. (ser.C) No. 285, and Rodriguez Vera & Others Case, 2014 Inter-Am. Ct. H.R. (ser.C) No. 287.

[2] Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser.C) No. 4, para. 158 and Osorio Rivera & Family members Case, 2013 Inter-Am. Ct. H.R. (ser.C) No. 274, para. 114.

[3] Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser.C) No. 4, para. 181 and Rochac Hernández & Others Case, 2014 Inter-Am. Ct. H.R. (ser.C) No. 285, and Rodriguez Vera & Others Case, 2014 Inter-Am. Ct. H.R. (ser.C) No. 287, para. 140.

[4] Trujillo Oroza Case, 2002 Inter-Am. Ct. H.R. (ser.C) No. 92, para. 114 and Rochac Hernández & Others Case, 2014 Inter-Am. Ct. H.R. (ser.C) No. 285, para. 122.

violation of personal integrity may be linked to a violation of their right to know the truth.[5] The members of the disappeared person's family have the right to know the facts being investigated and that those responsible will be prosecuted and punished, as appropriate.[6]

3. This first ruling formed the basis for what is known today as "*the right to the truth" or "the right to know the truth"*. Since then, the Inter-American Court has gradually begun to recognize its existence, as well as its content and its two dimensions of application (individual and collective).

4. Thus, the Inter-American Court has considered that the relatives of victims of gross human rights violations and society as a whole have the right to know the truth, and must therefore be informed of what happened.[7] In Inter-American Court case law, the right to know the truth has been considered both a right that States must respect and ensure, and a measure of reparation that States are obligated to comply with. This right has also been recognized in several United Nations instruments and by the General Assembly of the Organization of American States.[8] In 2006, pursuant to a resolution of the Com-

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[5] Anzualdo Castro Case, 2009 Inter-Am. Ct. H.R. (ser.C) No. 202, para. 113 and Gudiel Álvarez & Others Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 253, paras. 301 and 302.

[6] Blake Case, 1998 Inter-Am. Ct. H.R. (ser.C) No. 36, para. 97 and Rochac Hernández & Others Case, 2014 Inter-Am. Ct. H.R. (ser.C) No. 285, para. 140.

[7] Bámaca Velásquez Case, 2002 Inter-Am. Ct. H.R. (ser.C) No. 91, paras. 76 and 77 and García & Family members Case, 2012 Inter-Am. Ct. H.R. (ser.C) No. 258, para. 176.

[8] United Nations, High Commissioner for Human Rights, Study on the right to the truth, U.N. Doc. E/CN.4/2006/91 (2006); Organization of American States, General Assembly, Resolutions: AG/RES. 2175 (XXXVI-O/06) (2006), GA/RES. 2267 (XXXVII-O/07) (2007); GA/RES. 2406 (XXXVIII-O/08) (2008); GA/RES. 2509 (XXXIX-O/09) (2009), and GA/RES. 2595 (XL-O/10) (2010), AG/RES. 2662 (XLI-O/11) (2011), AG/RES. 2725 (XLII-O/12) (2012), AG/RES. 2800 (XLIII-O/13) (2013), GA/RES. 2822 (XLIV-O/14) (2014) in the Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, (E/CN.4/2005/102) of 18 February 2005. Similarly, the former Commission on Human Rights of the United Nations, in the 2005 Updated Set of principles for the protection and promotion of human rights through action to combat impunity, established, inter alia, that: (i) every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes (principle 2); (ii) the State must preserve archives and other evidence concerning violations of human rights and humanitarian law and facilitate knowledge of those violations in order to preserving the collective memory from extinction and, in particular, to guard against the development of revisionist and negationist arguments (principle 3); (iii) Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate (principle 4), and (iv) States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary In any case, State must ensure the preservation of, and access to archives concerning violations of human rights and humanitarian law (principle 5). In this regard, cf. Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1) of 8 February 2005.

mission on Human Rights, the United Nations High Commissioner for Human Rights prepared a study on the right to the truth. In this study, the High Commissioner concluded that the right to the truth is "an inalienable and autonomous right," "closely linked to the State's duty to protect and guarantee human rights and to the State's obligation to conduct effective investigations into gross human rights violations and serious violations of humanitarian law and to guarantee effective remedies and reparation;" but also, "closely linked with other rights, such as the right to an effective remedy, the right to legal and judicial protection, the right to family life, the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal, the right to obtain reparation, the right to be free from torture and ill-treatment, and the right to seek and impart information."[9]

5. Nevertheless, as indicated in paragraph 510 of the Judgment, in most cases, "the Court has considered that the right to the truth 'is subsumed in the right of the victim or the members of his family to obtain the elucidation of the events that violated the victim's rights and the corresponding responsibilities from the competent State organs through the investigation and prosecution established in Articles 8 and 25(1) of the Convention.'" On only one occasion, that of the case of *Gomes Lund et al. (Guerrilla de Araguaia) v. Brazil*, has the Court expressly declared a violation of the right to the truth as an autonomous right, which meant a violation of Article 13 of the American Convention in relation to Articles 1(1), 8(1) and 25 of this international treaty.[10]

6. I present this concurring opinion because I consider that in light of the present stage of Inter-American Court case law, and the advances made in international human rights law and in the laws and case law of various States Parties to the Convention concerning the right to know the truth, in this case the Court could have declared an autonomous violation of this right (as it did previously in the *case of Gomes Lund et al. v. Brazil*) rather than subsuming it in Articles 8 and 25, as it did in this judgment. Bearing in mind that 29 years have passed since the events took place and the relatives of most of those who disappeared have not received any assurance of the truth as to what happened, in this Judgment, the Inter-American Court stated that "*the State has been unable to provide a definitive and official version of what happened to the presumed victims,"* despite the investigations conducted and the measures undertaken.[11] Hence, I consider that the Court case law can evolve in such a way that

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[9] United Nations, High Commissioner for Human Rights, *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 (2006), paras. 55 to 57.

[10] *G*omes Lund & Others Case, 2010 Inter-Am. Ct. H.R. (ser.C) No. 219, para. 201 and sixth operative paragraph, which establishes that: "The State is responsible for the violation of the right to freedom of thought and expression recognized in Article 13 of the American Convention on Human Rights, in relation to Articles 1(1), 8(1) and 25 of this instrument, owing to the violation of the right to seek and receive information, and also of the right to know the truth about what happened" (underlining added).

[11] Paras. 299 and 511 of the Judgment.

strengthens the full recognition of the right to know the truth, acknowledges the autonomy of this right, and establishes its content, meaning and scope with increased precision. For greater clarity, this opinion is divided into the following sections: (i) the evolution of the *right to the truth* in the case law of the Inter-American Court (paras. 7-15); (ii) the evolution of this right in other international organs and instruments and domestic legal systems (paras. 16-22), and (iii) a conclusion (paras. 23-29).

II. The Evolution of the *Right to the Truth* in the Case Law of the Inter-American Court of Human Rights

1. The case of *Castillo Páez v. Peru* in 1997 marks the first time the Inter-American Commission brought before the Court the alleged violation of the right to the. The Court indicated that this "refer[red] to the formulation of a right that does not exist in the American Convention, although it may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court's decision to establish Peru's obligation to investigate the events that produced the violations of the American Convention."[12] Subsequently, in the case of *Bámaca Vélasquez v. Guatemala* in 2000, the Court recognized that the State's actions prevented the victims' next of kin from knowing the truth about the fate of the victim. However, it clarified that "the right to the truth [was] subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."[13]

2. The following year, the State acknowledged the violation of the right to the truth in the case of *Barrios Altos v. Peru*.[14] Meanwhile, the Commission correlated the right to the truth not only to Articles 8 and 25 of the American Convention, but also to Article 13, as regards the right to seek and receive information.[15] The Court considered that the surviving victims, their families and the families of the victims who died were prevented from knowing the truth about the events that took place in Barrios Altos, but evoked the fact that this right is subsumed in the right of the victim or his relatives to obtain the elucidation of the illegal acts and the corresponding responsibilities from the State's competent organs, through the right to investigation and prosecution established in Articles 8 and 25 of the Convention.[16]

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[12] Castillo Páez Case, 1997 Inter-Am. Ct. H.R. (ser.C)No. 34, para. 86.

[13] Bámaca Vélasquez Case, 2000 Inter-Am. Ct. H.R. (ser.C) No. 70, paras. 200-201.

[14] Barrios Altos Case, 2001 Inter-Am. Ct. H.R. (ser.C) No. 75, para. 46.

[15] *Id.* para. 45.

[16] *Id.* paras. 47-49.

3. Inter-American case law reveals that the Court began to link the right to know the truth (referring to it as the "*right to know what happened*") to the State's obligation to investigate human rights violations, to punish those responsible, and to fight against impunity.[17] This idea was reinforced in the judgment on reparations and costs in the case of *Bámaca Vélasquez v. Guatemala*, which cited the work done by the United Nations on everyone's right to the truth, and recognized that this is also a right of the members of the victim's family and of society as a whole.[18] In addition, the judgment indicated that this right leads to the victims' expectation for reparation from the State.[19]

4. In 2005 and 2006, in the cases of *Blanco Romero et al. v. Venezuela*, *Servellón García et al. v. Honduras, the Pueblo Bello Massacre v. Colombia* and *Montero Aranguren et al. (Retén de Catia) v. Venezuela*, the Court held that the right to the truth was not "a separate right enshrined in Articles 8, 13, 25 and 1(1) of the [American] Convention," but rather that it "was subsumed in the right of the victim or his relatives to obtain the elucidation of the wrongful acts and the corresponding responsibilities from the State's competent organs, through investigation and prosecution."[20] Nevertheless, the Court reiterated that the

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[17] Paniagua Morales & Others Case, 2001 Inter-Am. Ct. H.R. (ser.C) No. 76, para. 200; Villagrán Morales & Others Case, 2001 Inter-Am. Ct. H.R. (ser.C) No. 77, para. 100; Cantoral Benavides Case, 2001 Inter-Am. Ct. H.R. (ser.C) No. 88, para. 69 and Bámaca Velásquez Case, 2002 Inter-Am. Ct. H.R. (ser.C) No. 91, para. 74.

[18] Bámaca Velásquez Case, 2002 Inter-Am. Ct. H.R. (ser.C) No. 91, para. 76. The Court has ruled similarly in subsequent cases such as: Bulacio Case, 2003 Inter-Am. Ct. H.R. (ser.C) No. 100, paras. 114-115; Molina Theissen Ca, 2004. Series C No. 108; paras. 81 and 82; Case of 19 Tradesmen v. Colombia. Merits, reparations and costs. Judgment of July 5, 2004. Series C No. 109, paras. 188 and 261; Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs. Judgment of November 25, 2006. Series C No. 160, paras. 347 and 440; Case of Escué Zapata v. Colombia. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 165, para. 165; Case of González et al. ("Cotton Field") v. Mexico. Preliminary objections, merits, reparations and costs. Judgment of November 16, 2009. Series C No. 205, para. 388; Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs. Judgment of September 1, 2010. Series C No. 217, para. 225; Case of Gelman v. Uruguay. Merits and reparations. Judgment of February 24, 2011. Series C No.221, para. 192; Case of Luna López v. Honduras. Merits, reparations and costs. Judgment of October 10, 2013. Series C No. 269, para. 156; Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs. Judgment of May 19, 2014. Series C No. 277, para. 250, and Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs. Judgment of October 14, 2014. Series C No. 285, para. 234.

[19] *Cf. Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 76.

[20] *Cf. Case of Blanco Romero et al. v. Venezuela. Merits, reparations and costs.* Judgment of November 28, 2005. Series C No. 138, para. 62; *Case of Servellón García et al. v. Honduras.* Judgment of September 21, 2006. Series C No. 152, para. 76; *Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 220, and *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 55.

next of kin of victims of gross human rights violations have the right to know the truth.[21]

5. In the other cases of possible violations of the right to the truth have been alleged and examined, the Court has not expressly indicated that it does not consider this right to be autonomous. However, it has stated that it considers this right subsumed in the right of the victim or his relatives to obtain the elucidation of the wrongful acts and the corresponding responsibilities from the State's competent organs through investigation and prosecution when analyzing a violation of Articles 8 and 25,[22] or under the obligation to investigate when ordered as a form of reparation.[23]

6. In 2007, in the case of *Zambrano Vélez et al. v. Ecuador*, the Court recognized the principle of complementarity between the extrajudicial truth resulting from a truth commission, and the judicial truth arising from a judicial ruling or judgment. In this decision, the Court established that "a Truth Commission […] can contribute to build and safeguard historical memory, to clarify the events and to determine institutional, social and political responsibilities in certain periods of time of a society," but these "historical truths […] should not be understood as a substitute to the obligation of the

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[21] *Cf. Case of Blanco Romero et al. v. Venezuela. Merits, reparations and costs.* Judgment of November 28, 2005. Series C No. 138, para. 95. *See also, Case of Servellón García et al. v. Honduras.* Judgment of September 21, 2006. Series C No. 152, para. 195; *Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 220.

[22] See, for example, *Case of Baldeón García v. Peru. Merits, reparations and costs.* Judgment of April 6, 2006. Series C No. 147, para. 166; *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 180; *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 25, 2010. Series C No. 212, para. 206, and *Case of Osorio Rivera and family members v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2013. Series C No. 274, para. 220. In another series of cases the Court also indicated that it was not in order to rule on the alleged violation of Article 13 in relation to the right to the truth. *Cf. Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 147; *Case of Anzualdo Castro v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, paras. 119 and 120; *Case of Contreras et al. v. El Salvador. Merits, reparations and costs.* Judgment of August 31, 2011 Series C No. 232, para. 173, and *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012 Series C No. 252, para. 298. Moreover in some case, the Court has established that the right to the truth is subsumed in Articles 8(1), 25 and 1(1) of the Convention, but this consideration has not been included in the specific reasoning set out in the operative paragraph. *Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, para. 291, and *Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012 Series C No. 240, para. 263.

[23] *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 148, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, para. 234

State to ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means, or as a substitute to the determination, by this Court, of any international responsibility." The Inter-American Court explicitly established that these are "determinations of the truth which are complementary between themselves, since they all have their own meaning and scope, as well as particular potentialities and limits, which depend on the context in which they take place and on the cases and particular circumstances objects of their analysis."[24] The Court has applied these criteria in later cases.[25]

7. In the case of *Anzualdo Castro v. Peru* in 2009, the Court had to decide on a specific request to declare an autonomous violation of the right to the truth. According to the representatives and the Commission that presented this request, this right was related to those contained in Articles 1(1), 8, 13 and 25 of the American Convention.[26] In this regard, the Inter-American Court reiterated that in cases of forced disappearance, the relatives of the disappeared person "are entitled to have the facts investigated and the responsible are prosecuted and punished. The Court has recognized that the right to the truth of the relatives of victims of serious human rights violations is framed within the right of access to justice. Furthermore, the Court has based the obligation to investigate into the facts as a means for redress, on the need to repair the violation of the right to know the truth in the specific case." In addition, the Court has established that "the right to know the truth represents a necessary effect for it is important that a society knows the truth about the facts of serious human rights violations[,]" "by means of the obligation to investigate human rights violations and, on the other hand, by public dissemination of the results of the criminal and investigative procedures," as well as by the establishment of "Truth Commissions, which can contribute to build and safeguard historical memory, to clarify the events and to determine institutional, social and political responsibilities in certain periods of time of a society." Based on the above, the Court concluded that, owing to the passage of time "the whole truth about the facts or his whereabouts [of the victim] have not been determined. Since the moment of his disappearance, State agents have adopted measures to hide the truth of what happened […]."

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[24] *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 166, para. 128.

[25] See, *inter alia*, *Case of Gudiel* Álvarez *et al. (Diario Militar) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 298, and *Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012. Series C No. 258, para. 176.

[26] Previously, in the *Case of the La Rochela Massacre,* the representatives had presented the same arguments in relation to Article 13. However, the Court rejected this, indicating that "the right to the truth was subsumed in [the violation of] Articles 8 and 25 of the Convention." *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 147.

"The domestic criminal proceedings had not provided effective recourses to determine the fate or whereabouts of the victim, or to guarantee the right to access justice and know the truth, by means of the investigation and possible punishment of the responsible, and the full reparation of the consequences that resulted from the violations." This constituted a violation of the rights recognized in Articles 8(1) and 25(1) of the American Convention.[27] The Court also considered that the case did not reveal specific facts that could result in a violation of Article 13 of the Convention.[28] Thus, this establishes the criterion to define a violation of this article as requiring specific circumstances and facts that violate the right to seek and receive information, and consequently, the right to the truth, and not only the right to an effective investigation.[29]

8. Along the same lines, in the case of *Gomes Lund et al. (Guerrilla de Araguaia) v. Brazil* in 2010, the Inter-American Court established that "all persons, including the next of kin of victims of serious human rights violations, have the right to know the truth."[30] However, contrary to its case law up until that time, the Court declared it a violation of the right to the truth.[31] The Court considered that the right to the truth was related to access to justice, as well as to the right to seek and receive information recognized in Article 13 of the American Convention. This conclusion was reached due to the impossibility of the relatives of victims of forced disappearance to obtain information on the military operations during which their loved ones disappeared by means of judicial actions regarding access to information.

9. In 2012, in the case of *Gudiel* Álvarez *et al. ("Diario Militar") v. Guatemala*, the Court examined the right to the truth within the context of the right of the next of kin to personal integrity. In this case, the violation of the right to know the truth and the right of access to information was alleged, owing to the discovery of a Guatemalan military intelligence document known as the "*Diario Militar,"* which contained information on the disappearance of the victims,

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[27] *Case of Anzualdo Castro v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, paras. 118, 119, 168 and 169.

[28] *Case of Anzualdo Castro v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 120.

[29] *Case of Anzualdo Castro v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 120.

[30] *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, paras. 200 and 201. See footnote 11 of this opinion *supra*.

[31] The operative paragraphs of the Judgment indicate that the "State is responsible for the violation of the right to freedom of thought and expression recognized in Article 13 of the American Convention on Human Rights, in relation to Articles 1(1), 8(1) and 25 of this instrument, owing to the violation of the right to seek and receive information, and also of the right to know the truth about what happened." *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, sixth operative paragraph.

and of the Historical Archive of the National Police, both of which had been concealed from the Historical Clarification Commission (CEH) despite the Commission's numerous requests to the military and police authorities for information.[32] In that case, the Court stressed the fact that several of the family members were not allowed to know the historical truth about what happened to their loved ones through the CEH owing to the State authorities' refusal to hand over information.[33]

III. The Evolution of this Right in Other International Organs and Instruments and Domestic Legal Systems

1. As mentioned previously, various resolutions of the United Nations and the Organization of American States haves recognized the right to the truth.

2. In particular, the United Nations has recognized the existence of the right to the truth in declarations made by the General Assembly,[34] the Sec-

[32] The Court did not admit that the right of access to information (Article 13 of the Convention) had been violated, because the denials of information were not related to the specific request addressed by the presumed victims to the State authorities to obtain this information, but rather constituted ways to obstruct the investigations (insofar as they related to requests for information made to the Ministry of Defense by the State authorities in charge of the investigation). And the Court analyzed this when ruling on the investigations into the forced disappearances as a violation of Articles 8(1) and 25(1) of the American Convention. *Cf. Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 269.

[33] The Court "stresse[d] that, the appearance of the *Diario Militar* in 1999 and the Historical Archive of the National Police in 2005, both through unofficial channels […], revealed that the State had withheld information from the CEH with regard to the facts of the case. This, together with the impunity that persist[ed] in this case […], allow[ed] the Court to conclude that the next of kin ha[d] been prevented from knowing the truth through either judicial or extrajudicial channels." The Court considered that these facts constituted a violation of Articles 5(1) and 5(2) to the detriment of the members of the victims' families. *Cf. Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, paras. 300 and 302. However, the Court made a distinction between this case and the *Case of García and family members v. Guatemala,* which was based on similar facts. In the latter, the Court considered that the CEH had possessed sufficient evidence to make a specific determination about Mr. García, and also, that total impunity did not exist, because two of the perpetrators had been convicted by the courts and two of the masterminds were being prosecuted. Therefore, the Court did not find it necessary to make an additional ruling on the alleged violation of the right to the truth alleged by the representatives. *Cf. Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012. Series C No. 258, para. 177.

[34] In some of its resolutions, the General Assembly of the United Nations has expressed profound concern for the anguish and sorrow of the families affected by forced disappearances. *Cf.* General Assembly of the United Nations. Resolutions No. 3220 (XXIX) of 6 November 1974, No. 33/173 of 20 December 1978, No. 45/165 of 18 December 1990, and No. 47/132 of 22 February 1993. It has also spoken out with regard to the importance of determining the

retary-General[35] and the Security Council,[36] as well as in numerous resolutions and reports prepared and published by UN agencies dealing in human rights.[37] Thus, the United Nations High Commissioner on Human Rights indicated that the right to the truth was an autonomous, inalienable and independent right, because "the truth is fundamental to the inherent dignity of the human person." He also asserted that:

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truth with regard to cases of genocide, war crimes, crime against humanity, and gross violations of human rights. *Cf.* General Assembly of the United Nations. Resolutions No. 55/118 of 1 March 2001, No. 57/105 of 13 February 2003, No. 57/161 of 28 January 2003 and No. 60/147 of 21 March 2006.

[35] The Secretary-General of the United Nations has recognized the existence of the right to the truth in his bulletin entitled "*Observance by United Nations forces of international humanitarian law*," establishing the rule that the United Nations will respect the right of the families to know about the fate of their sick, wounded and deceased relatives, and emphasizing the importance of the truth in transitional justice. *Cf.* United Nations, Secretary-General's Bulletin. *Observance by United Nations forces of international humanitarian law.* ST/SGB/1999/13. 6 August 1999, Section 9.8, and Report of the Secretary-General of the United Nations. *The rule of law and transitional justice in conflict and post-conflict societies.* S/2011/634. 12 October 2011.

[36] The Security Council of the United Nations has issued resolutions stressing the importance of determining the truth with regard to crimes against humanity, genocide, war crimes and gross violations of human rights. *Cf.* Security Council resolutions No. 1468 (2003) of 20 March 2003, No. 1470 (2003) of 28 March 2003, and No. 1606 (2005) of 20 June 2005.

[37] See, for example, that in 1981, the Working Group on Enforced Disappearances recognized the right of families to know the whereabouts of the victim as an autonomous right. First report of the Working Group on Enforced Disappearances. *Cf.* Report of the Working Group on Enforced Disappearances. E/CN.4/1435. 22 January 1981, para. 187. In 1995, in his eighth annual report to the Commission on Human Rights of the United Nations Economic and Social Council, the Special Rapporteur on States of Emergency concluded that the right to the truth had achieved the status of a customary norm. *Cf.* Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*. E/CN.4/Sub.2/1995/20. 20 June 1995, paras. 39 and 40. In 2005, the United Nations High Commissioner on Human Rights reaffirmed the right to the truth of the victims and their family members. *Cf.* Commission on Human Rights of the United Nations. *Report of the United Nations High Commissioner on Human Rights on the situation of human rights in Colombia.* E/CN.4/2005/10. 28 February 2005, para. 5. The former Commission on Human Rights of the United Nations ruled on the right to the truth, emphasizing the importance of respecting and guaranteeing the right to the truth regarding the enactment of amnesty laws and the right of the next of kin of disappeared persons to know the whereabouts of their loved ones. *Cf.* Commission on Human Rights of the United Nations. Resolutions No. 1989/62 of 8 March 1989, No. 2002/60 of 25 April 2002, No. 2005/35 of 19 April 2005, and No. 2005/66 of 20 April 2005. The Human Rights Council of the United Nations has recognized the importance of respecting and ensuring the right to the truth in order to fight impunity and protect human rights, and has also stressed the importance of the international community's recognizing the right of victims, their families, and society as a whole to know the truth about gross violations of international humanitarian law and human rights. *Cf.* Human Rights Council of the United Nations. Resolutions No. 9/11 of 24 September 2008 and No. 12/12 1 October 2009.

> The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or born during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.[38]

3. The International Committee of the Red Cross (ICRC) has asserted that the right to the truth is a rule of international customary law applicable in both international and internal armed conflicts, so that each party to the conflict must take all feasible measures to account for the persons reported missing as a result of armed conflict and must provide their family members with any information it may have on their fate.[39]

4. Declarations have also been issued on the right to the truth at the regional level. At the 28th Summit of Heads of State held in Asunción on June 20, 2005, the States members and associated States of the Common Market of the South (MERCOSUR) adopted a declaration in which they reaffirmed the right to the truth of the victims of human rights violations and their families.[40] Meanwhile, the European Union has ruled on the right to the truth in its resolutions on missing persons,[41] the disarmament and demobilization of paramilitary groups, and within the context of peace negotiations.[42]

5. Lastly, the General Assembly of the Organization of American States (OAS) has "recognize[d] the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promoting and protecting human rights," in numerous resolutions adopted from 2006 to date, specifically on the right to the truth.[43]

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[38] *Cf.* Report of the Office of the United Nations High Commissioner for Human Rights. *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 of 9 January 2006, paras. 57 and 59.

[39] *Cf.* Resolution II of the XXIV International Conference of the Red Cross and Red Crescent (Manila, 1981). See also: Rule 117 in Henckaerts, Jean Marie and Doswald-Beck, Louise. *Customary International Humanitarian Law, Volume I, Rules*, Cambridge Press University, 2005, p. 421.

[40] *Cf.* Joint communiqué of the Presidents of the States members and associated States of MERCOSUR of June 20, 2005, at the XXVIII Summit of Heads of State held in Asunción, Paraguay.

[41] *Cf.* European Parliament. Resolution on missing persons in Cyprus, of 11 January 1983.

[42] Conclusions of the Council of the European Union on Colombia, 3 October 2005, Luxemburg, para. 4.

[43] *Cf.* General Assembly of the Organization of American States, Resolutions: AG/RES. 2175 (XXXVI-O/06) of June 6, 2006, AG/RES. 2267 (XXXVII-O/07) of June 5, 2007, AG/RES. 2406 (XXXVIII-O/08) of June 3, 2008, AG/RES. 2509 (XXXIX-O/09) of June 4, 2009, AG/RES. 2595 (XL-O/10) of June 8, 2010, AG/RES. 2662 (XLI-O/11) of June 7,

6. In addition, the International Convention for the Protection of All Persons from Enforced Disappearance explicitly recognizes "the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[44] In addition, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity recognizes and develops "the inalienable right to know the truth," as regards both the victims and their families, and society. The principles expressly establish that "[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."[45]

7. Furthermore, the right to the truth has been recognized in the domestic law, constitutional courts and jurisdictional organs of various States Parties to the Convention.[46] Of particular importance for this case is the fact that,

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2011, AG/RES. 2725 (XLII-O/12) of June 4, 2012, AG/RES. 2800 (XLIII-O/13) of June 5, 2013, AG/RES. 2822 (XLIV-O/14) of June 4, 2014.

[44] *Cf.* International Convention for the Protection of All Persons from Enforced Disappearance, article 24. Similarly, article 32 of the Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I) recognizes the right of families to know the fate of their relatives; while the Geneva Conventions of 12 August 1949 include several provisions that impose on the parties in conflict the obligation to resolve the problem of disappeared combatants and establish a central identification mechanism. *Cf.* Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 12 August 1977, and articles 16 and 17 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949; articles 18, 19 and *ff.* of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, and article 15, 16 and *ff.* of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field of 12 August 1949.

[45] Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, of 8 February 2005, Principles 1 to 5.

[46] See, for example, *ARGENTINA*: Decision of the Federal Criminal and Correctional Chamber of the Federal Capital of September 1, 2003, in Case No. 761 "E.S.M.A., Facts reported that allegedly took place in the Naval Engineering School"; Supreme Court of Justice of the Nation. *Case of Suárez Mason, Carlos Guillermo.* Judgments 321:2031 of August 13, 1998, and Supreme Court of Justice of the Nation. *Case of the Naval Engineering School.* Judgment 311:401 of March 29, 1988; *COLOMBIA*: Constitutional Court. Cases T-249/03 of January 20, 2003, and C-228 of April 3, 2002; on the intrinsic relationship between the right to reparation and the right to the truth and justice (Judgment C-715 of 2012); the disregard of the right to the truth in norms that do not establish the loss of benefits due failure to confess all the offenses in the justice and peace proceedings (Judgment C-370 of 2006); the right to the truth and the provision of information to the relatives of a victim, as well as public access to the records in cases of final judgments in the justice and peace proceedings (Judgment C-575 of 2006); the scope, purpose, dimensions and dual connotation of the right to the truth (Judgments C-370 of 2006, C-454 of 2006, C-1033 of 2006, T-299 de 2009, C-753 of 2013, C-872 of 2003, C-579 of 2013, C-180 de 2014 and C-936 of 2010); its subjective and objective

at least as of 2002, the Colombian Constitutional Court has indicated that in cases of forced disappearance "interest exists in knowing the truth and establishing individual responsibilities,"[47] and that the right to the truth sur-

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nature (Judgment C-872 of 2003) and its basic contents (Judgment C-936 of 2010). In addition, its collective dimensions has been referred to (Judgments C-370/06 and C-454 of 2006); its relationship to the clarification of the circumstances of displacement (Judgments T-327 of 2001, T-882 of 2005, T-1076 of 2005, T-367 of 2010). Reference has also been made to guarantees that ensure its exercise (Judgment C-872 of 2003); its relationship to the participation of the victim in criminal proceedings based on enforced displacement (Judgment T-367 of 2010), and the way in which the victims of disciplinary offenses that constitute violations of international human rights law and international humanitarian law have the right to the truth and to the execution of disciplinary justice (Judgment C-666 de 2008); *Mexico*: First Chamber/Jurisprudence 40/2013. Heading: *Direct* amparo *in criminal matters. The victim of the offense is legitimated to apply for this when paragraphs on the reparation of the harm in the final judgment are contested.* 10th session, First Chamber, S.J.F. and its Gazette, Section XII, July 2013, Volume 1, p. 123. Isolated ruling. T.C.C. I.90.P.61, Heading: *Forced disappearance of persons. The fact that the district judge does not admit the application for* amparo *does not prevent the relatives of disappeared persons from exercising their right to know the truth and the progress of the investigations, by obtaining copies of the corresponding preliminary investigation.* 10th session, T.C.C., Gazette S.J.F., Section 10, September 2014, Volume III, p. 2312; and Isolated Judgment, T.C.C. XXVII.1. (VIII Region), Heading: *Reparation of the harm to the victim of the offense. Content of this fundamental right (Legislation of the state of Chiapas),* 10th session, T.C.C., S.J.F. and its Gazette, Section XXIV, September 2013, Volume 3, p. 2660; and *Peru:* Constitutional Court. *Case of Genaro Villegas Namuche.* Judgment of March 18, 2004. Case file No. 2488-2002-HC/TC.

[47] The Constitutional Court of Colombia (judgment T-249/03, paras. 15 to18), indicated that:

"The eradication of impunity for the offense of forced disappearance is in the interests of society as a whole. To satisfy this interest, it is necessary to know the whole truth about the events, and that the corresponding individual and institutional responsibilities be recognized. To this end, both the interest in knowing the truth and the attribution of individual and institutional responsibilities for the facts exceeds the sphere of the individual interest of the victims. To the contrary, they constitute real general and prevailing interests under article 1 of the Constitution.

Indeed, public awareness of the facts, the identification of individual and institutional responsibilities, and the obligation to redress the harm caused are useful mechanisms to create awareness among the public about the magnitude of the harm caused by the offense. […]

The right to the truth and to justice are rights that have a significant individual value (for the victim and his family), but under certain circumstances, they acquire a collective character. This collective character has different dimensions, reaching the level of society as a whole when the foundations of civilized society and the basic elements of the legal order —peace, human rights, and restriction and rational use of military force— are threatened and compliance with the State's basic functions is jeopardized. Peace is built on the basis of respect for human rights, control of the excessive use of force, and achievement of collective security. The fact that peace is a right and a binding obligation supposes a collective interest in knowing and preventing anything that endangers it. The proposed interpretation —the one that excludes the interest of society, because it is represented by the State— signifies an inadmissible restriction of the right to the truth and to justice, which reducing the possibilities of achieving peace in Colombia. Furthermore, it results in a disproportionate restriction of the right of the resi-

rounding the offense of forced disappearance signifies the right to know the final fate of the disappeared person.[48]

IV. Conclusion

1. The evolution of Inter-American Court case law and the advances made by international bodies and instruments, as well as those in domestic legislation, clearly reveal that the right to the truth is now recognized as an autonomous and independent right. Although this right is not expressly included in the American Convention, it does not prevent the Inter-American Court from examining any alleged violation of this right, and declaring that it has been violated. According to Article 29(c) of the Pact of San José, no provision of the Convention can be interpeted as "precluding other rights or guarantees that are inherent in the human personality, or derived from representative democracy as a form of government."[49] In this regard, it should be underscored that, as indicated in the preceding paragraph, the right to the truth has been recognized in Colombian law and is considered part of the *right to reparation, to the truth and to justice,* as a necessary corollary to achieve peace.

2. Nevertheless, the author of this opinion considers that although the right to the truth is mainly related to the right of access to justice derived from Articles 8 and 25 of the Convention, it should not necessarily remain subsumed in the examination of the other violations of the rights to judicial guarantees and judicial protection that were declared in a case[50] because this understanding encourages the distortion of the essence and intrinsic content of each right.[51] Even though the right to the truth is fundamentally contained in the right of access to justice,[52] the right to the truth may affect different

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dents of the country to achieve peace, and know that their constitutional rights are protected and that the obligations established by law are met. Lastly, it entails denying the possibility of effective participation in controlling the exercise of the State's powers."

[48] Constitutional Court of Colombia. Judgment C-370 of 2006.

[49] On the basis of this provision, violations of the right to identity —which are not explicity recognized in the Convention either— have been recognized and declared. *Cf. Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 112; *Case of Contreras et al. v. El Salvador. Merits, reparations and costs.* Judgment of August 31, 2011. Series C No. 232, para. 117, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, para. 117.

[50] Paras. 509 to 511 of the Judgment.

[51] Something similar occurs, for example, by subsuming Article 25 (Right to judicial protection) to the consequences of the violation of Article 8(2)(h) (Right to a Fair Trial): the right to appeal the judgment before a higher court) of the American Convention. In this regard, see the "second part" of my concurring opinion the *Case of Liakat Ali Alibux v. Suriname*. *Cf. Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, second part.

[52] *Cf.* See, *inter alia*, *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988.

rights recognized in the American Convention[53] depending on the particular context and circumstances of the case, as the Court acknowledged in the case of *Gomes Lund et al. (Guerrilla de Araguaia) v. Brazil* concerning the right of access to information (Article 13 of the Convention), and in the case of *Gudiel* Álvarez *et al. ("Diario Militar") v. Guatemala* concerning the right to personal integrity (Article 5 of the Convention).

3. Based on the above and in view of the evolutive nature of Inter-American case law on this issue and the advances made by international bodies and instruments (including the OAS General Assembly[54]) and in domestic legal systems (as in the case of Colombia),[55] I consider that the Court should reconsider its criteria regarding the fact that the right to the truth is necessarily "subsumed" in the victims' and their families' right to have the competent State bodies clarify the violations and the corresponding responsibilities in order to proceed, when appropriate, to declare its violation as an autonomous and independent right. This would clarify the content, dimensions and true scope of the right to know the truth.

4. In the instant case, after 29 years, the victims are still waiting for the events to be clarified. The State still questions the forced disappearance of most of the victims. Despite the creation of a truth commission to investigate the events, and several judicial decisions, as indicated in paragraph 510 of the Judgment,[56] there is still no official version of what happened, and

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Series C No. 4, para. 181; *Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 201; *Case of Barrios Altos v. Peru. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 48; *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 148; *Case of La Cantuta v. Peru. Merits, Reparations and costs.* Judgment of November 29, 2006. Series C No. 162, para. 222; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, paras. 243 and 244, and *Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 117.

[53] In this regard, in his *Study on the right to the truth,* the United Nations High Commissioner for Human Rights pointed out that different international resolutions and instruments have recognized the right to the truth as being linked to the right to seek and receive information, the right to justice, the obligation to combat impunity for human rights violations, the right to an effective judicial remedy, and the right to privacy and family life. In addition, it has been linked to the right to integrity of the members of the victim's family (mental health), the right to obtain reparation in cases of gross human rights violations, the right not to be subjected to torture or ill-treatment and, in some circumstances, the right of children to receive special protection. *Cf.* Report of the Office of the United Nations High Commissioner for Human Rights. *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 of 9 January 2006.

[54] See *supra* para. 20, and footnote 43 of this opinion.

[55] See *supra* para. 22, and footnotes 46 and 47 of this opinion.

[56] Specifically, when analyzing the argument concerning the violation of the right to the truth, the Court indicated: "511. In this case, even though 29 years have passed since the events, the truth about what happened to the victims in this case and their fate is still unknown. The Court also underlines that, since the events occurred a series of actions have been revealed that have facilitated the concealment of what happened and prevented or delayed its clarification

both the families of the disappeared victims, and the victims who survived the events, have been constantly faced with a denial of these events ever taking place. In addition, in the judgment, "the Court also underline[d] that, since the events occurred, a series of actions have been revealed that have facilitated the concealment of what happened and prevented or delayed its clarification by the judicial authorities and the prosecutors."[57]

5. In addition, it should be stressed that in the context of forced disappearances, the right to know the fate of the disappeared victim is an essential component of the right to the truth. The uncertainty about what happened to their loved ones is one of the main causes of mental and moral suffering of the relatives of the disappeared victims (*supra* para. 2). In this case, this uncertainty has been partially resolved for only the families of Ana Rosa Castiblanco Torres and Carlos Horacio Urán Rojas 29 years after the events. Although some investigations have been conducted recently, the Court concluded that, for many years the State had failed to carry out a genuine, coordinated and systematic investigation to discover the whereabouts of those who disappeared and clarify what happened.[58]

6. It should not be forgotten that the Judgment expressly establishes that "the State acknowledges its responsibility by omission for the failure to investigate these facts"[59] and that "despite the different investigations and judicial proceedings that have been opened, the State has been unable to provide a final and official version of what happened to the presumed_victims 29 years ago, and has not provided adequate information to disprove the different indications that have emerged concerning the forced disappearance of most of the victims."[60]

7. Consequently, the author of this opinion considers that, in this judgment, the Court could have declared the autonomous violation of the right to know the truth —as it did previously in the case of *Gomes Lund et al*—.

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by the judicial authorities and the prosecutors. In addition, despite the creation of an extrajudicial commission and the efforts made by the courts to establish the truth of what occurred, the Court stresses that the conclusions of the Truth Commission's report have not been accepted by the different State organs supposedly responsible for the execution of its recommendations. In this regard, the Court recalls that the State argued before the Court that this commission was unofficial and that its report did not represent the truth of what happened (*supra* para. 80). Thus, the State's position has prevented the victims and their families from the realization of their right to the establishment of the truth by this extrajudicial commission. In the Court's opinion, a report such as that of the Truth Commission is important, but complementary, and does not substitute the State's obligation to establish the truth by means of judicial proceedings. The Court stresses that, 29 years after the events occurred, there is no official version of what happened to most of the victims in this case (underlining added).

57 Para. 510 of the Judgment.

58 Paras. 478 to 485 and 513 of the Judgment.

59 Para. 299 of the Judgment.

60 Para. 299 of the Judgment.

(Guerilla de Araguaia) v. Brazil. [61] I believe that this right can be validly violated autonomously and does not need to be subsumed in the violations of the rights contained in Articles 8 and 25 of the American Convention as declared in the judgment. The right to know the truth is now an autonomous right recognized by different international bodies and instruments and in domestic legal systems. In the future, this may lead the Inter-American Court to consider the violation of this right independently, which would in turn contribute to clarifying its content and scope.

[61] As recognized in para. 511 of the judgment in the *Case of Gomes Lund et al.*, "the Court declared an autonomous violation of the right to the truth that, owing to the specific circumstances of that case, also constituted a violation of the right of access to justice and an effective remedy, and a violation of the right to seek and receive information, recognized in Article 13 of the Convention." See also *supra* notes 10 and 31.