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UNDERSTANDING CONSTITUTIONAL AMENDMENTS IN MEXICO: PERPETUUM MOBILE CONSTITUTION

Mauro Arturo Rivera León*

Abstract. *In spite of being formally rigid, the Mexican Constitution is frequently amended. In this article, I analyze the constitutional amendment procedure in order to understand the causes, consequences and potential solutions of the accelerated rhythm of constitutional amendments in Mexico.*

Key words: *Constitutional amendment, rigid constitutions, flexible constitutions.*

Resumen. *A pesar de ser formalmente rígida, la Constitución mexicana ha sido reformada con gran frecuencia. En el presente artículo se analiza el procedimiento de reforma constitucional para entender las causas, consecuencias y potenciales soluciones al acelerado ritmo de reformas constitucionales en México.*

palabras clave: *Reforma constitucional, Constituciones rígidas, Constituciones flexibles.*

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I. Bryce revisited: flexible and rigid constitutions

1. *Academic classification*

James Bryce, a constitutional scholar, is better known for his famous characterizations of constitutions as rigid or flexible. In his prominent essay *Flexible and Rigid Constitutions*, Bryce proposed a new classification of constitutions based on "(…) the relation which each Constitution bears to ordinary laws of the State and to the ordinary authority which enacts those laws."[1]

In his view flexible constitutions:

" (..) are on the level of other laws of the country, or also in the form of recorded decisions defining and confirming a custom. Such Constitutions proceed from the same authorities which make the ordinary laws; and they are promulgated or repealed in the same way as ordinary laws"[2] (…) "Technically, therefore, we cannot draw a distinction between constitutional and other laws."[3]

On the other hand rigid constitutions:

"(…) stand above the other laws of the country which they regulate. The instrument (or instruments) in which such a constitution is embodied proceeds from a source different from that whence spring the other laws, is repealable in a different way, exerts a superior force. It is enacted, not by the ordinary

[1] James Bryce, Constitutions 7 (Oxford University Press 1905).
[2] *Id.* at 7-8.
[3] *Id.* at 12.

legislative authority, but by some higher or specially embodied person. If it is susceptible of change, it can be changed only by that authority or by that special person or body. When any of its provisions conflicts with a provision of the ordinary law, it prevails, and the ordinary law must give away."

In Bryce's conception,[4] a constitution can be deemed rigid when its amendment procedure is more complicated than the one employed for ordinary laws. Consequently, such a constitution has a different nature and stands above the laws of the country. On the other hand, a flexible constitution can be amended by the same procedure as an ordinary law and thus does not have a special formal hierarchy. Bryce did not make a distinction based solely on the amendment procedure, but rather on the nature of such constitutions vis-à-vis the ordinary law.[5]

According to Bryce, each type of constitution has different strengths and weaknesses. In this regard, flexible constitutions are by nature elastic, which may add stability and balance to the fundamental norm. In this sense, "[j]ust because their form is not rigidly fixed, a temporary change is not felt to be a serious change"[6] allowing them to recover from a crisis without injury. They can minimize the risks of open confrontation or revolutionary movements. Adaptation is their keyword. However, this flexible nature may become a weakness in itself because, to a certain extent, it may give way to the abuse of its ability to change. This peculiarity becomes more evident when Parliament has the power to singly amend the constitution like an ordinary law and party discipline leads to an overwhelming concentration of power. Rigid constitutions have the stability of political institutions and the advantage of having their explicit confirmation in a written text. However, the same stability that characterizes them can prove to be a weakness at certain times *for in their rigidity there is an element of danger.*[7] Bryce states that:

"When a party grows up clamoring for some reforms which can be effected only by changing the Constitution, or when a question arises for dealing with which the Constitution provides no means, then, if the Constitution cannot be amended in the legal way, because the legally prescribed majority cannot be obtained, the discontent that was debarred from any legal outlet might find vent in a revolution or a civil war. The Constitution of the United States illustrates this danger on so grand scale that no other illustration is needed."[8]

Bryce's brilliant distinction has been slowly fading away although it remains as a paradigm in classic constitutional theory.[9] The reasons for this "fading" may well be that flexible constitutions are now rather the exception.

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[4] *Id.* at 8.

[5] Alessandro Pace, Starre und flexible Verfassungen, 49 *Jahrbuch des öffentlichen Rechts der Gegenwart* 90 (2001).

[6] *See* Bryce, *supra* note 1 at 22.

[7] *Id.* at 67.

[8] *Id.* at 68.

[9] Further considerations *inter alia* in Edward David, *The Community's constitution- Rigid or Flexible? The Contemporary Relevance of the Constitutional Thinking of James Bruce*, in Institutional

Other than the English Constitution, we cannot really argue that the category is still useful for practical purposes. On the other hand, other distinctions have been debated and employed, such as legal sanctions vs. political sanctions regarding the breach of constitutional provisions[10] (partially on Kelsenian grounds[11] on the element of sanction).

2. *Formally rigid, materially flexible*

Having revisited Bryce's analysis, it is possible to answer the following question: is the Mexican Constitution rigid or flexible? In this regard, Mexico's Constitution would undoubtedly fall under the rigid category.

Its legislative procedure is established in Articles 71 and 72 of the Constitution. The procedure may be initiated by the President, Federal Deputies, Senators or 0.13% of the voters list (a popular initiative). In broad terms, except in the case of certain matters, both congressional chambers might serve as an origin and a revising chamber. Once approved by one chamber, the bill is passed on to the revising chamber. If the second chamber has no objections, the bill is immediately published. In case of observations, the bill would be returned to the origin chamber for renewed discussion. When a bill is finally approved by both chambers, it is sent to the President of the Republic. Within 30 days, the President can either veto or publish the law. A veto may only be overridden by a majority of 2/3 in both chambers.

The fact that the natural majority required for constitutional amendments is already 2/3 makes a strong case regarding the statement that amending a constitution is more complicated than amending an ordinary law. Furthermore, the participation of federal entities (which must also consent to the amendment) is a determining factor. Its rigidity is undisputable. Nonetheless, Bryce's analysis can be considered a normative one. He focuses on the nature of the constitution regarding its hierarchical difference to ordinary laws, reinforced by a different amendment procedure. However, he implicitly excluded from his analysis the behavior of the political system and the actual usage of amendments.

In this sense, even if the Mexican Constitution is apparently a rigid constitution, it has acted in practice as a materially flexible constitution. So far (February 8, 2016), the Constitution has been amended through 227 amendment decrees. Each decree often amends more than one article, which gives us more than 650 individual changes to the constitution. Only 22 articles stand without any amendment. That means 114 articles have been amended,

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Dynamics of European Integration: Essays in Honour of Henry G Schermes 63, 73 (D. Curtin and T. Heukels eds., 1994).

[10] Pasquale Pasquino, *Classifying Constitutions: Preliminary conceptual analysis*, 34:999 *Cardozo L. Rev*. 1016, 1017 (2013).

[11] Hans Kelsen, *La garantie juridictionnelle de la Constitution*, 35 *Revue du Droit Public et de la Science Politique* (1928).

roughly the 84% of the Constitution. Paradoxically, even the amendment procedure set forth in Article 135 has been amended. Is it even a valid question to ask whether or not our current Constitution is actually the one enacted in 1917?[12]

In the period between 2012 and 2015, the rate of amendments has stood at 6.6 amendment decrees per year; that is, a decree amending several articles every two months. These amendments have not only changed the text, but they have also substantially enlarged it. Therefore, the length of the Constitution has almost doubled in size.[13]

The tendency is increasing. From 1917 to 1979 (62 years), the Constitution was amended through 90 amendment decrees. However, from 1980 to February 2016, the Constitution was amended 137 times in only 36 years. The rate of amendments is truly impressive if compared with other countries like the United States (27 amendments in 227 years), Spain (2 amendments in 38 years), Poland (2 amendments in 25 years) and so on.

In conclusion, the Mexican Constitution can only be deemed rigid from a normative perspective in terms of procedure. The practice of decreeing amendments, on the other hand, shows it to be a flexible, easily amendable Constitution, which frequently invades the natural scope of statutes and ordinary provisions through the regulation of constitutional text matters with an unusually deep level of detail while preserving its hierarchical nature vis-à-vis ordinary laws (reinforced by constitutional justice mechanisms).

The following table represents the constitutional amendments made to the 1917 Constitution divided by presidential periods:

Period	*President*	*Number of amendments*	*Average amendments per year*
1917-1920	Venustiano Carranza	0	0
1920-1924	Álvaro Obregón	2	0.5
1924-1928	Plutarco Elías Calles	5	1.25
1928-1930	Emilio Portes Gil	1	0.5
1930-1932	Pascual Ortiz Rubio	2	1
1932-1934	Abelardo L. Rodríguez	9	4.5
1934-1940	Lázaro Cárdenas	10	1.66
1940-1946	Manuel Ávila Camacho	10	1.66
1946-1952	Miguel Alemán Valdés	13	2.16
1952-1958	Adolfo Ruiz Cortines	1	0.16
1958-1964	Adolfo López Mateos	8	1.33

[12] See Diego Valadés, La Constitución reformada 11, (IIJ-UNAM 1987).

[13] José María Soberanes, Análisis formal de las reformas constitucionales 3 (IIJ-UNAM, 2015).

Period	*President*	*Number of amendments*	*Average amendments per year*
1964-1970	Gustavo Díaz Ordaz	8	1.33
1970-1976	Luis Echeverría	15	2.5
1976-1982	José López Portillo	14	2.33
1982-1988	Miguel de la Madrid	19	3.16
1988-1994	Carlos Salinas	15	2.5
1994-2000	Ernesto Zedillo	18	3
2000-2006	Vicente Fox	17	2.83
2006-2012	Felipe Calderón	38	6.33
2012-present	Enrique Peña Nieto	22	5.17[14]

Figure 1. Source: Author

3. *Consequences and problems of hyper-reformism*

A constitution that is amended every two months evidently generates various problems. In the first place, it hinders the consolidation of the constitutional text. Articles and concepts do not gain the strength and prestige that somehow is attributed to other constitutional texts aided by constant interpretation through the years. In second place, the text is visibly deficient. Numerous mistakes, grammatical errors and terminological imprecisions can be detected in a *Grundnorm*, the prestige of which should be beyond question. In third place, as I have pointed out elsewhere,[15] continuous invasive amendments contravene the development of local constitutionalism (constitutional development of Federal Entities). Lastly, constant amendments and changes in fundamental institutions have an impact not only in economic terms, but also in terms of the stability of the institutions themselves. Not only has the State frequently assumed massive costs in changing institutions (IFE to INE, for example) but also those institutions do not consolidate through mature development and practice.

Professor Valadés and Professor Fix Fierro have jointly coordinated an interesting project on the organization and consolidation of the Mexican Constitution.[16] The project argues that even though the constitution has been modernized through amendments that incorporate elements of contemporary constitutionalism. These amendments have produced a long, unsystematic

[14] I use a period of 4.25 years. Counting a full year in December (in which the current President took office) or January and February 2016 would distort the results.

[15] Mauro Arturo Rivera, *Las otras constituciones: el constitucionalismo local en la encrucijada de la reforma constitucional*, in Miradas a la Historia Constitucional de México 221, 242 (Catherine Andrews et al eds., 2015).

[16] The full project is available at http://biblio.juridicas.unam.mx/libros/9/4050/1.pdf

and somewhat chaotic text. This is by no means a new assessment, but it is a precise one. The problems of the constitution are well known to those who have witnessed the relatively recent debate on amending the text versus creating a new Constitution.[17] The virtue of the project lies precisely in its desire to leave the fundamental decisions untouched and to aim only at the methodological and grammatical problems of the text (i.e. a reformulation under legal drafting principles and not a new text in itself).

The authors identify the following problems:[18] 1) Duplicated articles. For example, Article 130 forbids ministers of religion to hold public office. However, the same provision is subsequently repeated in other articles regarding specific offices, as Deputy or President. 2) Inconsistent use of terminology. For example, the constitution employs the terms "human rights" (Art. 1) and "fundamental rights" somewhat indistinctly. Another example would be the use of the word "autonomy" regarding constitutional autonomous bodies which lacks systematic treatment. 3) Disparity in the length of the regulation on different matters. For example, while the regulation of the Federal Electoral Court occupies a full article of more than 1000 words, labor and military justice (Art. 123 and 13) take only few lines. 4) A lack of order and a system of topics regulated by the Constitution. There are several articles in the constitution that do not respect the proper homogeneity of subjects. The contents of several articles could be placed more properly in other articles. 5) The deficient placement of constitutional provisions. For example, human rights institutes are placed in the article regulating the Office of the Public Prosecutor and the Attorney General. Moreover, the dogmatic part of the constitution (which traditionally regulates rights) sets forth the regulation of different organisms, such as the National Institute for Education Assessment, National Institute for Transparency, Access to Public Information and Personal Data Protection, National Institute of Geography, Statistics and Informatics, Federal Antitrust Commission, and so on. 6) Mistakes in the constitutional text. Before the amendment of January 2016, there were mistakes in the terminology used for the names of the institutions of former Federal District (now Mexico City). Finally, we also have 7) Articles with a regulatory nature that actually function as secondary regulations in various areas, as in the case of Article 41, which regulates electoral administration, or Article 20, which regulates various aspects of criminal procedure and human rights. I will deal at length with this topic below.

Professors Valadés and Fix Fierro propose a consolidated version of the text which does not alter the content, but improves its form. The organization of the text is also enhanced as diverse normative portions are relocated to more appropriate articles. Finally, to attend the regulatory nature of some constitutional articles, the professors propose the creation of a "Constitutio-

[17] See Jorge Carpizo, ¿Se necesita una nueva Constitución en México? Algunas reflexiones y seis propuestas, 24 *Cuestiones Constitucionales* 141, 167 (2011).

[18] Here we follow *in toto* the study of Valadés & Fierro, *supra* note 16.

nal Development Law" (*Ley de desarrollo constitucional*). Such law would need to be approved by 2/3 of the Congress and operate under a more flexible procedure than that for constitutional amendment, which requires the additional approval of the majority of the states. The project also proposes that the Supreme Court analyze the constitutionality of such a law. This law aims to shift regulatory provisions from the constitution to the constitutional development law.

This project provides a very good explanation about the subtleties of Mexican political conditions. In my view, even though is arguable whether or not a new Constitution could technically be a better solution to the problems in the text, the current political conditions are not favorable for a new Constitution. Presumably, political actors would not dare to open Pandora's Box and question the fundamental political agreements that uphold the rules of the constitutional system.

Even though the proposed solution is a technically viable solution, it is necessary also to identify and solve the causes of the rate of amendments. Otherwise, political dynamics could start fostering unnecessary amendments by altering the corrected text.

II. The amendment procedure

1. *An historical overview*

Throughout Mexican constitutional history, the various Constitutions have formulated different amendment procedures. The first Constitution in force in Mexico was the 1812 Constitution of Cadiz.[19] The amendment procedure established in this constitution was rather complicated (Articles 377-384). At least 20 deputies are required to propose an amendment. The text must be read three times over a period of six days to consider the merits of the proposal in order to decide whether or not to formally open discussion on the amendment. If the amendment is approved at least by a 2/3 vote, it could be discussed further by the next legislature. The next legislature needs to approve the powers to amend the Constitution by a 2/3 vote. If the next legislature approves the amendment by a 2/3 vote, the electoral board of the provinces would determine if the current legislature or the next one needs to approve the proposed amendment again by a 2/3 vote. This procedure is extremely rigid and complicated.

The Constitution of Apatzingan (The Constitutional Decree for the Liberty of Mexican America) was conceived as a provisional Constitution and therefore did not establish an amendment procedure. It even prohibited any amendment especially one regarding the system of government (Art. 237).

[19] Javier Tajadura, La problemática de los límites del poder de reforma constitucional en la Constitución de Cádiz, 13 *Historia Constitucional* 267 (2012).

In view of this prohibition, did the Constitution of Apatzingan assume that other matters could also be amended? And, if so, under which procedure? Given the preeminence given to the legislative branch in this Constitution, it could very well be that it was assumed that the same procedure used to create and amend ordinary laws would be employed. However, this argument is highly theoretical as Article 237 announces the creation of a new Constitution by the "National Representation", which could presumably establish a different amendment procedure *ex novo*.

The 1824 Federal Constitution (Articles 166-171) adopted an amendment procedure that required the consecutive approval of two legislatures. The right of initiative belonged only to the states. States could propose amendments which would be analyzed by the current legislature, but voted on by the following one. This procedure did not required special majorities. According to Article 171, principles concerning freedom, sovereignty, religion, the system of government and the division of powers among the Federation and the states were unamendable.

The 1836 centralist Constitution (also called the Seven Laws) employed the term "Variation of Constitutional Laws". This procedure (Articles 1-6 of the Seventh Law) was employed for ordinary laws with one exception. A "Variation of Constitutional Laws" required the approval of the Supreme Conservative Power (Article 12.10 of the Second Law). The Supreme Conservative Power was a body that could control the constitutional consistency of the other branches. It is not clear whether this approval was meant as a formal requirement or the body truly had such margin of political decision that it could influence constitutional amendments.

Finally, the current procedure was adopted in 1857. Article 127 of the 1857 Constitution required that amendments had to be approved by 2/3 of the present members of the Congress and by a simple majority of the states. The text of Article 127 was adopted almost in its entirety to become Article 135 of the 1917 Constitution. The changes are minor. Article 135 incorporated some accents, presumably as part of certain spelling changes in the Spanish language. It also changed the word "Constitution" for "*misma*" [the same] in the second phrase, serving as an anaphoric reference or a pronoun. Lastly, it added a comma in the last sentence. As can be observed, these minor changes are only stylistic and in no way modified the substance of the procedure. Therefore, it is possible to argue that Mexican constitutionalism already has 159 years of experience using the same constitutional amendment procedure. It is worth exploring the amendments made to the 1857 text.

In 60 years, the 1857 Constitution was amended 34 times,[20] which gives a rate of 0.56 amendments per year. This is a much lower rate than that made to the current Mexican Constitution and still substantially inferior than the rate of 1.17 amendments per year during the first 20 years of the 1917 Constitution.

[20] Imer B. Flores, *La Constitución de 1857 y sus reformas: a 150 años de su promulgación*, in El proceso constituyente mexicano: a 150 años de la Constitución de 1857 y 90 de la Constitución de 1917 320, 324 (Diego Valadés & Miguel Carbonell eds., 2007).

2. *The "main" amendment procedure*

It is a commonly shared thought that the amendment procedure is solely described in Article 135 of the Constitution. However, as Professor Valadés has argued, there is more than one procedure for amending the constitution.

The main constitutional amendment procedure is described in Article 135 of the Constitution. In this procedure, the Congress of the Union must approve the amendments by a vote of 2/3 of the present members. The amendments must subsequently be approved by the majority of the states.

This procedure has been amended twice in history. The first one took place in 1966 and allowed the Permanent Committee to perform certain functions in state vote counting. Presumably, before the amendment, only the Congress could count votes and thus, the promulgation of constitutional amendments was consequently at a standstill during Congress recesses. The original text of the 1917 Constitution established only one period of ordinary sessions[21] from September 1st to December 31st (even though it could be ended earlier upon agreement). Such short periods could have motivated the amendment in order to speed up the process.

In second place, Article 135 was further amended in 2016 as to expressly include "Mexico City" in the amendment procedure. Originally, Mexico City was considered a Federal District hosting the capital and the federal branches of power. Given the fact that the amendments were voted on by the "majority of the states", Mexico's capital was consequently excluded from the amendment procedure. In 2016, an amendment covering 52 articles in the Constitution changed Mexico's Federal District into the 32nd Federal Entity. Among these changes was the express inclusion of Mexico City in the amendment procedure. However, deficient legal drafting may raise questions as to its interpretation. Currently, Article 135 states:

"The present Constitution may be added to or amended. In order that the additions or amendments shall become a part thereof, it shall be required that the Congress of the Union, by a vote of two thirds of the individuals present, agree to the amendments or additions and that they be approved by a majority of the legislatures of the States and of Mexico City. The Congress of the Union or the Permanent Committee, as the case may be, shall count the votes of the legislatures and shall announce those additions or amendments that have been approved".

Given the wording, does it declare that amendments need to be approved by the majority of the Federal Entities formed of states and Mexico City, or has Mexico City been granted the power to give its approval independently? The original text in Spanish says "...y que éstas sean aprobadas por la mayoría de las legislaturas de los Estados y de la Ciudad de México." Naturally, the original intention was to add Mexico City to the group of Federal Entities whose approval is required for an amendment and not to grant Mexico City

[21] Gonzalo Campos, Ampliación de los periodos de sesiones ordinarias del Congreso Federal, 89 *Quorum* 72 (2007).

separate powers of approval. A better technique would have simply been to state that "…they be approved by a majority of the Federal Entities" thus including Mexico City without the need to mention it expressly.

Article 135 does not specifically mention who has the right to propose constitutional amendments. This has led to a consolidated doctrine which states that the right of initiative for constitutional amendments is the same as the one for ordinary laws.

Historically, Article 71 said that the right to initiate laws belonged to the President of the Republic, Federal Deputies, Federal Senators, and state legislatures. However, in 2012, the constitution was amended as to establish a popular initiative consisting of 0.13% of the voter registry list. If the same people who can propose a bill can also propose a constitutional amendment, can it be said that there is now a popular right of initiative for constitutional amendments? The answer seems to be yes. There are no grounds to exclude popular initiative from constitutional amendments if it is considered that an initiative of this type is the same as that for ordinary laws. Also, besides an express mention in Article 135, Article 71 included Mexico City in January 2016 as a party that is able to propose laws through its legislature.

Presidential veto is not admissible for constitutional amendments. As I have previously stated,[22] there are at least three commonly argued reasons why a veto cannot be used. In the first place, it is not an express right attributed to the President. Therefore, to exercise veto against a constitutional amendment would be a breach of the principle of legality. Secondly, under the Court theory of the "amendment body of the Constitution", constitutional amendment as a constituent power could not be controlled by an elected official like the President (a weaker argument). Finally, there is a practical argument. Legislative veto may be overridden by a 2/3 vote. If constitutional amendments already require a 2/3 vote, it would be illogical for the presidential veto to demand the same vote that was already required. The same majority would be compelled to override the veto.[23]

3. *Territorial constitutional amendment procedures*[24]

We have briefly analyzed Article 135, deemed by many as the only amendment procedure. However, we must also consider other procedures that have

[22] Mauro Arturo Rivera, De la rigidez teórica a la flexibilidad material: un análisis del procedimiento de reforma constitucional en México (1917-2012), *Revista Iberoamericana de Derecho Procesal Constitucional* 171, 195 (2013).

[23] This argument is similar to the one stated in *Hollingsworth vs State of Virginia* (3 US 378).

[24] Several authors have claimed that there are only two constitutional amendment procedures, thus arguing implicitly that the territorial procedures are just variations of a territorial amendment procedure. Miguel Carbonell, Notas sobre la reforma constitucional en México, 245 *Revista de la Facultad de Derecho de México* 229 (2006). Also Miguel Eraña, Las minorías parlamentarias en la reforma constitucional, 33 *Anuario del Departamento de Derecho de la Universidad Iberoamericana* 155, 156 (2004). I firmly believe that Sections II and II are in fact different amendment procedures.

been established to change the composition of national territory. These procedures are established as part of the legislative powers of the Federal Congress, described in Article 73, Sections I and III.

The territory of the Federation is expressly described in Articles 42, 43 and 44. Article 42 of the Constitution describes the territory *in toto*. Article 43 enumerates the states of the Federation. Finally, Article 44 establishes Mexico City as a Federal Entity and the capital of the nation.

The dilemma is clear. If Article 73 sets forth procedures to amend the territory of the Federation and this territory is expressly described in the Constitution, there are only two options to consider: either the Constitution describes two procedures which cannot be used at all because they would still require a subsequent constitutional amendment, or the Constitution is expressly describing two additional procedures to amend the Constitution in the specific area of territorial composition. I presume that the latter is the correct one. I agree with Professor Valadés's[25] assessment: "Therefore, in each of the fractions of article 73 (…) we find other hypotheses of constitutional amendments different to the one contained in Article 73." Other authors have maintained different opinions.

The constitution must be interpreted systematically. Territorial procedures allow at least an amendment of Articles 42, 43 and 44. Further amendments could be discussed. For example, if the intention of an amendment were to divide the territory of the State of Nayarit, could we not assume that, by analogy, this procedure allows the amendment of Article 47 of the Constitution as well, which states that "The State of Nayarit shall have the territorial area and boundaries which at present comprise the Territory of Tepic?" Further debates could be raised on whether or not those procedures might eventually include "Mexico City", even though it is Federal Entity and not a state.

The abovementioned discussions, however, should be deemed as merely theoretical disputes. As I shall argue, the territorial procedures have never been used under the 1917 Constitution. All territorial amendments have been performed following the generic procedure described in Article 135.

A. *The flexible territorial procedure*

Article 73.I states that the Congress has the power "[t]o admit new States into the Federal Union." As I have argued before, accepting a hypothetical new state to the Union would necessarily imply at least one amendment to Article 43, which exhaustively describes the States that form the Federation.

This amendment procedure however is flexible[26] and it is entirely vested in the Federal Congress. Such an amendment procedure requires neither a

[25] Valadés, *supra* note 12 at 17.

[26] Valadés himself clearly pointed out that Article 73.I "authorizes the Congress to amend the Constitution. In this case, we have a flexible amendment procedure." *Id.*

special majority nor further approval from the remaining Federal Entities. Here, there is a case in which a constitutional amendment can be approved in the same way as ordinary legislation is. Questions may arise as to whether or not the President may use the power of veto. In this case, the ability to force a further voting under a 2/3 majority would actually have practical effects as the majority under the veto conditions would be greater than the original majority. National doctrine provides no answer for this question. If we consider that a veto may not be exercised, we would have a clear case in which amending the Constitution would be even easier than amending an ordinary law.

Political conditions, however, are quite clear. These hypotheses apply only to new states, which are by definition not already part of the Federation. For this section to be exercised, it is necessary for neighboring nations or overseas countries to ask to become part of Mexico. Both cases are very unlikely.

This section was amended once in 1974. Originally, the section stated that the Congress had power "[t]o admit new States *and Territories* into the Federal Union". With the end of the "territory" regime, this part of the provision was repealed.

B. *Converting territories into states: The repealed conversion procedure*

Before 1974, Mexico was divided into both states and territories. Territories were portions of land whose political and economic conditions did not meet the conditions to achieve the self-determination of a state and thus had a lesser political autonomy. The territories originally mentioned in the 1917 Constitution were the territories of Baja California and Quintana Roo. A detailed description of the evolution of former Mexican territories goes beyond the scope of this article. It should be said nonetheless that in 1974, the last territories (Quintana Roo and Baja California Sur) were admitted as states and Section II of Article 73 was repealed.

The original text of the 1917 Constitution established that Congress had the power "[t]o convert Territories into States when they have a population of eighty thousand inhabitants and the necessary resources to provide for their political existence." Just as with the abovementioned section, this provision is a flexible amendment procedure which requires only the approval of Congress.

The procedure was never used even in the cases in which the conversion was achieved. For example, in 1952, the territory of Baja California Norte was converted into a State using the procedure established in Article 135, which involved the approval of the other Federal Entities. The same occurred in 1974 when the territories of Baja California Sur and Quintana Roo ascended to the category of state, again under the procedure of Article 135 instead of this specific procedure.

The problems of using the generic procedure contained in Article 135 instead of the flexible one in Sections I and II (repealed) of Article 73 are not important. By using Article 135, the amendment is carried out by a procedure with even more guarantees. Furthermore, Congress actually has mandatory intervention in the abovementioned sections. Therefore, it would not be possible to claim that the 1974 amendments that turned territories into states are void because, in addition to the procedure of Article 73.II, a greater majority was required and subsequently approved by the Federal Entities. The real problem may arise with the next procedure.

C. *The ultra-rigid territorial division procedure*

From all the territorial procedures, the most rigid one is undoubtedly the one described in Article 73.III, which grants power to the Congress "[t]o form new states within the boundaries of existing ones." This procedure contemplates two scenarios depending on whether the state or states to be divided consent to such division.

If the division is endorsed by the interested parties, a 2/3 majority of the Congress is required, plus the approval of the majority of the states. The President is also to be heard to prove before the Congress that there are elements that support the political existence of the new states and that the area(s) seeking to be made a state have a population of at least 120,000 habitants. Given the fact that a 2/3 vote of the Congress and a majority of the states is required, the audience given to the President makes this case arguably more rigid than the procedure contained in Article 135.

However, Article 73.III.7 establishes that in the absence of the abovementioned consent, the approval of the Federal Entities requires a 2/3 majority, far greater than that required by the procedure of Article 135. Procedurally speaking, it is more complicated in Mexico to divide a state without its consent than to amend human rights or change the system of government.

Given the fact that the territorial procedures have been simply ignored, this raises the question: what would happened if the Congress tried to divide a state or states without their consent by using the procedure of Article 135 and not the one in Article 73.III? In this case, contrary to Sections I and II, I believe that a constitutional breach could be claimed since using the "generic procedure" would provide considerably fewer guarantees than the specific provision for territorial division.

It must still be noted that the consolidation of the territorial architecture of the Republic makes this scenario highly unlikely. The territory of the Federation has been consolidated and there has been no discussion about dividing states in the public sphere and it does not seem feasible one will arise in the near future.

It is very interesting to note that before 1917 a similar procedure was established in Article 72.III of the 1857 Constitution. This procedure, however, did not increase the requirements in case of an absence of consent and only required congressional approval and the consent of a simple majority of the states. Therefore, contrary to our current territorial division procedure, the one in the 1857 Constitution was flexible. This procedure was indeed used three times during the period in which the 1857 Constitution was in force.[27] These amendments may be the only case of the use of a constitutional procedure other than the one contained in Articles 135 (1917 Constitution) and 127 (1857 Constitution) in the last 159 years.

D. *Bryce and the capacity of constitutions for territorial expansion*

Before finishing the analysis of territorial amendments in the Mexican Constitution, it should be noted that Bryce briefly analyzed the capacity for territorial expansion as an asset of flexible constitutions. Given the fact that it has already been stated that territorial amendment procedures are flexible in nature, it should also be considered whether territorial expansion considerations played any role at all in the drafting of the relevant 1857 constitutional provisions, which were somewhat inherited by the 1917 Constitution.

Bryce considered the potential expansion of states by conquest or through a treaty a characteristic of the suitability of flexible constitutions in some cases. Even though his analysis never considered the possibility that a constitution may have different amendment procedures for different purposes, the observation is precise and deserves more consideration. In his view, "[s]uch constitutions [flexible constitutions] seem especially well suited for countries which are passing through periods of change whether *internal or external.*"[28] He quotes the examples of Rome and England whose constitutional flexibility allowed for territorial change "(…) in both cases altering the Constitution of the enlarged State no further than by the admission of additional members to the two Houses of Parliament…"[29] As I have already pointed out, this exact procedure (the approval of the two Houses of Parliament) is established under some of the premises of the territorial amendment procedures contained in Article 73.

It is well known that Mexico went through major territorial changes before 1857, most significantly, the loss of half of its territory in a war against the United States through the treaty of Guadalupe-Hidalgo in 1848. After that, as I have already pointed out, other territorial changes occurred regarding the nature of the former "territories" and their conversion into states. Previous constitutions, such as the 1824 Federal Constitution, the 1836 centralist

[27] Flores, *supra* note 20 at 292, 293.

[28] Bryce, *supra* note 1 at 43. Italics are mine.

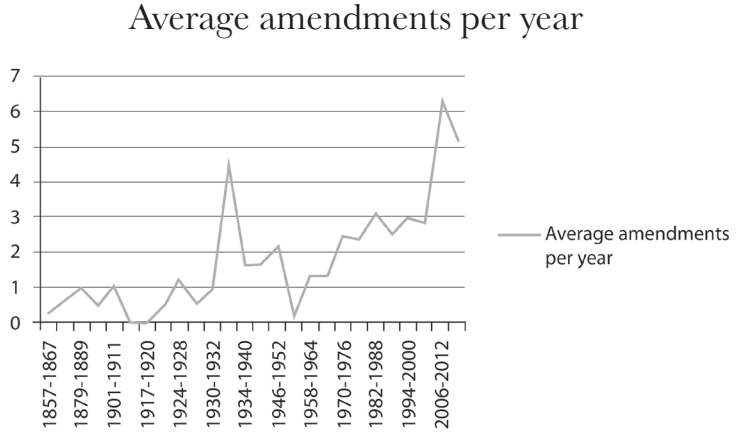
[29] *Id.* at 44.

Constitution (the "Seven Laws") or the Organic Bases of the Mexican Republic in 1843, did not mention anything about territorial amendments, despite containing provisions on territorial distribution.

In this regard, I think territorial adaptation could have played a significant role in the 1857 Constitution in attempting to confer a desired flexibility to procedures pertaining to the territorial organization of the State.

III. Causes of the hyper-amendment

Mexican Constitution will be a hundred years old in 2017, with more than 650 changes through 227 amendment decrees. It was previously stated that, given the fact that Article 135 of the 1917 Constitution was substantially the same as Article 127 of the 1857 Constitution, it could even be argued that Mexican Constitutionalism has already had 159 years with the same constitutional amendment procedure; 159 years through which amendments have always and steadily increased in frequency, size and rate. The following graph may explain this:



Much has been discussed about the effects of such amendments and the political conditions which motivated them, but what are the real causes of this rate? In the following sections, I argue that no single cause may fully account for this. Several causes must be analyzed jointly, namely the former hegemony of a single political party, the political conception of the Constitution, the regulatory nature of some constitutional provisions and a progressive centralization of powers.

Political Composition of the Mexican Chamber of Deputies (1994-2015)*

Year/ Party	*PRI*	*PAN*	*PRD*	*PT*	*PV*	*CV*	*NA*	*MC*	*A*	*M*	*PES*	*President*
1994**	300 (60%)	119 (23.8%)	71 (14.2%)	10 (2%)								Ernesto Zedillo
1997	239 (47.8%)	121 (24.2%)	125 (25%)	7 (1.4%)	8 (1.6%)							Ernesto Zedillo
2000	211 (42.2%)	207 (41.4%)	50 (10%)	7 (1.4%)	17 (3.4%)	3 (0.6%)						Vicente Fox
2003	224 (44.8%)	151 (30.2%)	97 (19.4%)	6 (1.2%)	17 (3.4%)	5 (1%)						Vicente Fox
2006	106 (21.2%)	206 (41.2%)	127 (25.4%)	11 (2.2%)	17 (3.4%)	17 (3.4%)	9 (1.8%)		5 (1%)			Felipe Calderón
2009	237 (47.4%)	143 (28.6%)	70 (14%)	13 (2.6%)	21 (4.2%)	6 (1.2%)	9 (1.8%)					Felipe Calderón
2012	213 (42.6%)	114 (22.8%)	101 (20.2%)	14 (2.8%)	28 (5.6%)		10 (2%)	20 (4%)				Enrique Peña Nieto
2015	202 (40.4%)	108 (21.6%)	60 (12%)		47 (9.4%)		11 (2.2%)	25 (5%)		35 (7%)	8 (1.6%)	Enrique Peña Nieto

Table 2. Source: Author

* This tabla 2 represents the political composition of the chamber of the deputies. Deputies are elected for a 3 years term. Percentages may not sum 100% as I do not include in this table parties with less than 1% of representation in the Congress. The upper number represents the deputies a party obtained in the chamber in the respective year. I also provide a percentage to facilitate the understanding of the relative force of the party regarding the total number of members of the chamber. For example, in 1994, PRI had 300 deputies wich represented the 60% of the chamber's total members (300/500). This table intends to show the impact of pluralism over the constitutional amendment procedure as explained in this section. I take this table from my book *Las puertas de la Corte* 316 (Porrúa, 2016). Abbreviations regarding parties have the following meaning: PRI (Partido Revolucionario Institucional); PAN (Partido Acción Nacional); PRD (Partido de la Revolución Democrática); PT (Partido del Trabajo); PVEM (Partido Verde Ecologista de México); CV (Convergencia); MC (Movimiento Ciudadano); M (Movimiento Regeneración Nacional); PES (Partido Encuentro Social); NA (Nueva Alianza).

** Elections before 1994 were held with a 300-member Chamber of Deputies. From 1997 onwards, the Chamber increased its number to 500 with the inclusion of 200 deputies elected by proportional representation.

1. *The hegemony of a political party*

For a long time, it was a commonly shared idea that the frequent rate of constitutional amendments was a direct consequence of the dominance of a single political party. Since the PRI [Institutional Revolutionary Party] held close to 90% of the seats in both chambers and controlled all Federal Entities, amending the Constitution was regarded as party discipline. We should remember that it was not until 1989 that the PRI lost a gubernatorial election for the first time.

This hegemony can partially explain some of the amendments made in the period from 1917 to 1989, which witnessed a total of 117 amendments in 72 years, or a rate of 1.62 amendments per year.

Some Mexican academics viewed[30] constitutional rigidity and fewer amendments as a natural consequence of greater pluralism. The transition period, which culminated in the PRI losing the presidency for the first time in 2000, would prove this hypothesis wrong

Political Composition of the Mexican Senate (1991-2012)[31]

Year/Party	*PRI*	*PAN*	*PRD*	*PT*	*PVEM*	*CV*
1991[34]	61 (95.31%)	1 (1.56%)	2* (3.12%)			
1994	96 (75%)	24* (18.75%)	8 (6.25%)			
2000 D	59 (46.09%)	45* (35.15%)	17 (13.28%)	1 (0.007%)	5* (3.9%)	1 (0.007%)
2006 MD/D	35* (27.34%)	52 (40.62%)	31 (24.21%)	3 (2.34%)	4 (3.12%)	2 (1.56%)
2012 D	52 (40.62%)	38* (29.68%)	22 (17.18%)	5 (3.9%)	9 (4.68%)	

[30] Carbonell, *supra* note 24 at 251.

[31] This table 3 represents the political composition of the Senate. Senators are elected for a 6 years term. The upper number represents the number of senitors a party obtained in the Senate in the respective year. I also provide a percentage to facilitate the understanding of the relative force of the party regarding the total number of members of the senate. For example in 1994 PRI had 96 senators which represented the 75% of the Senate's total members (96/128). I take this table from my book *Las puertas de la Corte* 316 (Porrúa, 2016). For the abbreviations of the political parties, see the table regarding the chamnber of Deputies.

[32] This was the last year in which the Senate consisted of 64 members. After this period, the Senate increased to 128 members.

NA	*MC*	*President*
		Carlos Salinas
		Ernesto Zedillo
		Vicente Fox
1 (0.007%)		Felipe Calderón
1 (0.007%)	1 (0.007%)	Enrique Peña Nieto

Table 3. Source: Author.

A comparison of the above data with the post-transitional amendments may yield surprising results. From 2000 to 2016, 80 amendment decrees were enacted, resulting in an average rate of 5 amendments per year. This data shows that during the period of pluralism, the number of amendments increased by more than 300%.

In the case of the Chamber of Deputies, in recent years no single political party may amend the Constitution. And while it is true than in the periods of 2000-2006 and 2009-2012 two political parties (PRI and PAN) could obtain the 2/3 majority required, in the periods of 2006-2009 and 2012-2015 at least a three-political party agreement was required to amend the Constitution. A slightly different scenario can be observed in the Senate. From 2000 to date, a PRI/PAN agreement could always reach the required 2/3 majority.

Let us analyze the periods of greatest dispersal in which at least 3 political parties were required to amend the Constitution (2006-2009 and 2012-2015). In the 2006-2009 period the Constitution was amended 23 times, which results in an even greater rate of 7.66 amendments per year. Meanwhile, in the congressional period from 2012 to 2015, the Constitution was amended 22 times, which results in a rate of 7.33 amendments per year. The numbers clearly show the so-called hegemony hypothesis openly disproven.[33]

[33] This graph reflects the amendments carried out over the last 5 legislatures in the Chamber of Deputies. The data is taken from the Chamber of Deputies database. http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm (12.04.2016).

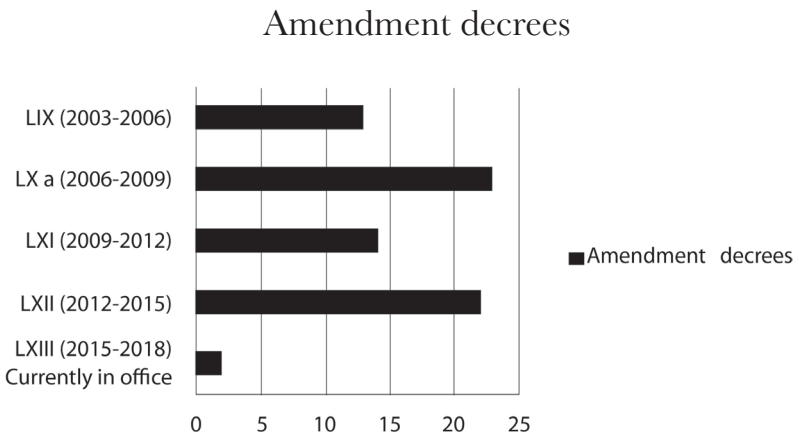


Table 2.

Not only has pluralism not slowed down the rate of constitutional amendments, but it has arguably increased it. Of course, as always, absolute theories lack effectiveness in explaining social reality. While a pluralist theory analysis does show it to be impossible to make hegemony fully accountable for the amendments, it is probably also not possible to discard it as a factor –however minor- at least during the period of PRI dominance.

This analysis has already proven that hegemony can be considered a minor factor, at most, in constitutional amendments and cannot be held solely accountable for the recent accelerated rate. What other factors could explain the amendments?

2. *A political conception of the constitution*

During the almost 100 years of the 1917 Constitution, its text has served as a canvas in which political programs are established with the paintbrush of congressional and presidential power.

Professor Valadés has described this phenomenon very clearly:

"Changes in the substance and form of the Constitution have occurred. However, they respond to the different phases of a country which has tried to leave the testimony of what in each moment constituted the most relevant of its political program in its constitutional amendments (…) There are various periods in our political development. The characteristics of each one of them are captured in the constitutional amendments."[34]

In this sense, Professor Valadés's keen analysis implicitly argues that to a certain extent, reforms neglect the normative force of the constitution as they

[34] Valadés, *supra* note 12 at 12.

make a somewhat improper use of the text to make a declaration of specific political programs.

There are at least two different types of amendments which could be described as made under a political conception of the Constitution. There is what I call "political declaration amendments" and there is the constitutionalization of rights as programmatic principles.

In the first case, the constant declarations of the ideological nature of certain institutions can serve as an example. In 1934, the first amendment to Article 3 was made to establish that "education shall be socialist" as a declaration of Mexico's political stance at the time. Currently (and until the amendment of 2011), education shall:

"(…) tend to harmonically develop all faculties of human being and at the same time will promote love to the motherland, respect for human rights, and awareness of international solidarity in independence and justice."

As seen, the ideological components of the article on education are evident. The above-mentioned provisions would hardly translate into concrete obligations susceptible of constitutional control. They are rather perfectly explained under Valadés's theory as the consolidation of two different political programs under different historical circumstances. Multiple examples can be found in the Constitution.

In second place, we could argue that the continuous inclusion of rights, whose normative effectiveness cannot be guaranteed, is also a type of political declaration. We could call these rights "programmatic rights". One good example is Article 4, which contains the right to culture, the right to physical activity, the right to practice sports, the right to water, right to decent housing, the right to nutritious food, etc. The inclusion of these rights in the constitution would very much be in doubt had the political instances considered that there is an unconditional obligation of satisfying rights guaranteed by judicial bodies. In 2014, the CONEVAL [National Council for the Evaluation of Social Development Policy] reported that there are 11.4 million Mexicans living in extreme poverty, which represents 9.5% of the population. A good question is whether we can actually guarantee their right to decent housing, nutritious food and water? And whether the relevant political authorities view these rights as normative provisions? The answer is simple. The inclusion of such rights was regarded as a political and programmatic declaration, and not destined to become a normative force, at least for the time being.

3. *The regulatory nature of constitutional provisions*

Regulatory articles are both a cause and a consequence of constant amendments. The very specific nature of the rules established in constitutional articles is perplexing. Such level of detail comprises a concrete system that sets a variety of rules which cannot be amended by the corresponding provisions of relevant statutes.

In this way, the Constitution becomes a secondary regulation, an ordinary law that contains the concrete rules governing individual cases instead of functioning as a framework of principles these rules should expound. Detailed dispositions in a constitution create constant problems as the amendment of such provisions necessarily requires an amendment to the Constitution itself.

A good example is the case of Article 41. Originally, Article 41 consisted of a single, 7-line paragraph. Those 7 lines contained 63 words. Currently, Article 41 has more than 70 paragraphs with nearly 5000 words. The level of detail in Article 41 (which currently regulates political parties and electoral administration) is truly surprising. It defines political parties and their creation, mathematical formulas for calculating public financing for political parties, percentages and differentiations of the financing depending on the type of election. It also sets rules for pre-campaigns, specifies the number of minutes (honestly, the number of minutes!) political parties are entitled to on television and in the media during campaigns, describes the complete organization of the National Electoral Institute, sets up a complex network outlining the powers of the National Electoral Institute and local electoral institutes, etc.

In conclusion, Article 41 is clearly set up as an Electoral Code. If, for instance, we wanted to assign propaganda time to political parties starting from 5 o'clock in the morning, we would need to amend the Constitution. The Constitution itself which disposes that such media time is distributed between 6.00 and 24.00. Therefore, simple amendments which in other countries would imply changing a regulation enacted by the executive power or at most a statutory provision imply here a change in the constitutional text.

The same case could be put forward with many provisions. Article 2 recognizes the rights of indigenous populations in Mexico. However, it also determinates the criteria for their recognition, grants them autonomy in the exercise of their right to self-determination and defines all the rights, one by one, which stem from this recognition. It establishes the obligation of the Federation and Federal Entities in these matters and even states that certain budget items related to indigenous rights should be included in the general budget.

Even the legislative faculties of the Federation suffer to a degree from this regulatory nature. Article 73 defines the legislative powers of the Federation, but in many cases it does so somewhat specifically. For example, the Federation has the power to establish taxes on "beer" (Section XXIX), a law on the organization of federal archives, a law on the distribution of powers of the Federation and Federal Entities in matters of electoral administration, legislation on sports, a law creating the Federal Administrative Court, etc.

Such way of defining powers has two main problems. In the first place, it questions the concept of a federalist system in which the Federation refuses to allow the consolidation of powers granted to the states in virtue of the closing clause (this will be discussed in the following section). In second place, it refuses to see the Constitution and federal powers as part of a constitutional system, which should be interpreted as a whole. In this sense, Congress and

political actors feel that the scope of power of each must be expressly stated in the Constitution under specific terms. Otherwise, why does the Federal Congress have the power to enact *a law* that creates the Federal Administrative Court, but not the power to regulate administrative justice at a federal level? Why can the Federal Congress impose taxes on beer and not on alcoholic beverages? Why can the Federal Congress create a National Teacher Service / schools and cannot legislate on education?

It should not be forgotten that the Constitution itself provides a system of implicit powers. Section XXX of Article 73 clearly states that Congress has the power "[t]o enact all laws that may be necessary to enforce the foregoing powers, and all others granted by this Constitution to the branches of the Union." Therefore in my view, it is beyond a doubt that many powers are implicitly contained in constitutional provisions and there is no need to elevate the specific details to competence clauses. A constitution can be interpreted by courts, political actors, branches of government and other relevant agents. Not everything has to be described word for word in the constitutional text.

4. *Centralization and Federalism*

Centralization can be deemed a true underlying cause of constitutional amendments. Of the 227 amendment decrees, 76 (or 33%) have modified Article 73 of the Constitution, usually for the purpose of increasing federal legislative powers. As in the case of the other amendments, amendments to Article 73 have increased with political pluralism. In the first 82 years of the constitutional text, there was a rate of 0.53 amendments to Article 73 a year while after pluralism (2000), the rate goes up to a scandalous 2.12 amendments per year. Given the fact that Article 124 states that "[t]he powers not explicitly vested in federal officers by this Constitution shall be implicitly vested in the states and Mexico City," these continuous amendments are required to centralize power.

However, centralization is not only externalized through legislative powers. For example, an in-depth amendment of Article 41 was required to centralize electoral administration. A similar case can be put forward regarding the organizational of states. The Constitution has been progressively amended to impose specific organizational rules on the states, rules that basically define all their local constitutional elements. Consider the case of Articles 115 and 116, which altogether summed up to 8 paragraphs in the original 1917 Constitution and now have a total of 111 paragraphs. Even though the abovementioned articles should presumably provide a general framework of Federal Entities, the truth is that the free scope of the states is much diminished. Article 115 organizes municipalities and establishes their relationship with states, branches and powers. Article 116 regulates the internal organization of states, the organization of the three branches of local government, some

constitutional autonomous organs to be created, auditing provisions, electoral administration, the regulation of local political parties, the administrative responsibility of the local judiciary, etc. These two articles combined have undergone 28 constitutional amendments. Arguably, most of these amendments reduce state powers regarding the self-determination of their constitutional organization by imposing certain conditions on them.

5. *Is Article 135 an "easy procedure"?*

Evidently and despite the abovementioned causes, an amendment procedure that has allowed more than 650 changes to the text through 227 amendment decrees raises doubts. I do not think the procedure is extremely flexible. However, given that potential amendments to the procedure have been proposed, I have analyzed some of the potential normative changes that could solidify the procedure established in Article 135 elsewhere.[35]

In the first place, the 2/3 majority mentioned above "the attending" deputies or senators greatly diminishes the difficulties in pushing through an amendment. The Chamber of Deputies is composed of 500 representatives while 128 members form the Senate. Article 63 establishes that[36] "[n]either the Chamber of Deputies nor the Chamber of Senators shall be allowed to open their sessions or perform their duties without the presence of at least half plus one of their respective members." This actually means that the Chamber of Deputies can vote on a constitutional amendment with only 251 members while the Senate requires 65. This means that 167.33 Deputies and 43.33 Senators can approve a constitutional amendment under certain conditions. The absence of any deputies and senators at their respective sessions should not alter the required quorum. If there is no interest in attending the respective session, it should be interpreted as a lack of interest in amending the Constitution.

Secondly, same considerations could apply to the required majority for Federal Entities. The current simple majority could be increased to match the one required, for example, in the United States (3/4).

Finally, under certain conditions other possible mechanisms would be to introduce a referendum for the approval of such amendments or to establish a minimum deliberation period from 3 to 6 months (as in Italy) to avoid fast-track amendments.

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[35] See Rivera, *supra* note 22 at 192, 193.

[36] On the debates regarding the calculation of a quorum, see Diego Valadés & José María Serna, El cálculo del quorum en la Cámara de Diputados: una interpretación del artículo 63 constitucional, 108 *Boletín Mexicano de Derecho Comparado* 1038, 1052 (2003).

IV. Conclusions

This article has shown that there is an impressive rate of constitutional amendments in Mexico. Hesse's remark is still valid today. Constant amendments under the pretext of seemingly ineluctable political needs endanger the normative force of the Constitution.[37]

As Bryce suggested:

"(…) the stability of any Constitution depends not so much on its form as on the social and economic forces that stand behind and support it; and if the form of the Constitution corresponds to the balance of those forces, their support maintain unchanged."[38]

In the Mexican case, perhaps this instability can account not only for the present constant constitutional amendments, but also for historical constitutional changes in the Constitution of Cadiz, the Constitution of Apatzingan, the 1824 Federal Constitution, the 1836 Centralist Constitution, the 1857 Constitution and the 1917 Constitution. Mexican constitutional history is riddled with different constitutions with limited force.

Is it not possible that these dynamics has been passed on in the constitutional amendment rate of the 1917 Constitution? Can such rate be explained as part of the elasticity offered by flexible constitutions under the pretext of revolutions, civil war or, in the Mexican case, constant major political changes?

After the Mexican Revolution, the 1917 Constitution offered a social framework that institutionalized political demands. Constant amendments served as proof of a lack of the establishment of a strong system and the attention given to different demands in the form of political declarations in the constitution.

It has been argued in this article that there is no single cause for the constant amendments made to the Mexican Constitution. The amendments obey a complex structural framework, which includes partially the hegemony of a political party, a political conception of the Constitution, the regulatory nature of its provisions, an ongoing centralization process and perhaps too an amendment procedure that is unable to contain particular political dynamics.

The constant amendments have considerably damaged our constitutional system by preventing the consolidation of political institutions and producing an incoherent and overwhelmingly detailed regulatory text. However, in this specific case, normative solutions are unable to give a definitive answer to the problem. Either changing the amendment procedure (a normative padlock) or restructuring the Constitution (addressing the negative effects of the amendments) cannot be done by disregarding the underlying causes for the amendments. Overlooking the causes would result in the continuance of this *Perpetuum Mobile Constitutio*.

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[37] Konrad Hesse, Die normative Kraft der Verfassung, 15 (C.B Mohr 1959).

[38] Bryce, *supra* note 1 at 20.

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APPLE PAY & DIGITAL WALLETS IN MEXICO AND THE UNITED STATES: ILLUSION OR FINANCIAL REVOLUTION?

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Abstract. *Apple Pay and digital wallets have gained popularity since the fall of 2014. Perceiving Apple Pay & digital wallets as a financial revolution at this moment might be a mistake. The following study shows that it is just the evolution of a payment system in Mexico and the United States of America, a system that opened the door to a possible future financial revolution. Current financial regulation in Mexico and the United States of America is not accurately applied; therefore, proper guidelines or amendments in financial regulations should be issued by financial authorities in order to mend the loopholes in the law.*

Key Words: *Apple Pay, digital wallets, Illusion or Financial Revolution, USA and Mexico.*

Resumen. *Apple Pay y las Digital Wallets han ganado gran popularidad desde otoño de 2014. El concebir a Apple Pay & las Digital Wallets como una revolución financiera en este momento puede ser un error. El presente estudio muestra que estos, solamente son una evolución de un sistema de pago en México y Estados Unidos de América. Son un sistema que abrió la puerta a una posible revolución financiera en el futuro. La regulación financiera actual en México y Estados Unidos de América no se aplica de manera literal. De esta manera*

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la publicación de guías o modificaciones en la regulación financiera deben ser expedidas por las autoridades financieras con el fin de subsanar las lagunas en la ley.

Palabras Clave: *Apple Pay, Digital Wallets, Ilusión o Revolución Financiera, EUA y México.*

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I. Introduction

Describing Apple Pay and digital wallets as an illusion and not a financial revolution is a complicated task. It is common to see new products with amazing creativity and innovation on the market every day. In this particular case, Apple Pay has managed to trick the minds of many. In the following analysis, it is possible to define Apple Pay as a moment of evolution of the current payment system, a payment system that has indeed opened the door to a real financial revolution. Marketing has played an important role in Apple Pay, which has used marketing techniques to further a financial evolution.

Regulations are not prepared to meet the many upcoming events. Current financial regulations leave the Dodd Frank Act, Regulation-E and the General Dispositions applied to the Credit Institutions Law exposed for Apple Inc. to freely interpret these provisions. There is uncertainty about how the payment system should be called, either Mobile Wallet or Digital Wallet, and there are even other non-financial statutes in Mexico to be considered. Therefore, it is necessary for financial authorities to issue federal guidelines or amendments to mend the loopholes in financial regulations. These guidelines are needed to properly define the name of this payment system and its rules. Current financial regulations promote interpretation when analyzing the ru-

les due to a lack of precision in concepts. After reviewing the nature of Apple Pay, the policies involved and the current laws in place, this paper indicates the loopholes in current financial regulations in Mexico and the United States of America and how they might be addressed. Due to the lack of scholarly legal research in the field, Apple Pay and digital wallets have to be analyzed from both a market and a management approach.

Understanding the general idea of Apple Pay is the first approach for suggesting proper legal guidelines. Part I discusses Apple Pay's characteristics, expansion and competitors, as well as its perception of marketing to foresee upcoming changes that would impact regulations. Part II provides an overview of the regulatory framework in the United States of America. Part III analyzes the legal framework and its evolution in Mexico. Part IV examines the available literature and the benefits of this research paper. Part V evaluates the impact of biometric user identification. Finally, Part VI explores two elements required to be able to consider Apple Pay a financial revolution.

By studying Apple Pay and the above-mentioned aspects along with monetary history, it is possible to understand Apple Pay as a development in the payment system. It has clearly opened the door for a future financial revolution, but it has not yet reached that point at the moment. In order to prepare for the future, financial authorities like the Federal Reserve and Mexican Financial Authorities need to issue guidelines or amendments to the regulations mentioned in Part II and Part III. These changes aim at not leaving any loophole or uncertainty in this type of payment system.

II. Apple Pay Structure and its Competitors

In keeping with its renowned creativity, Apple Inc. came up with the idea of applying and incorporating the already existing concept of the mobile/digital wallet into their products.[1] "Digital Wallet is an application residing on an electronic device which passes user payment data to a point-of-sale device using Near-Field Communication ("NFC") technology. It does not receive the payment amount information regarding the transaction, and does not modify or edit the amount to be paid."[2] The mobile/digital wallet had already been used similarly by Google Inc., but it failed to gain popular acceptance.[3] Apple is trying to avoid that mistake through its incredible marketing strategies, creativity and business relations while taking advantage of its corporate power. In order to understand all the implications of Apple Pay, it is important to analyze it in parts. First, since digital/mobile wallets can be seen as the evolution of payments, just like what happened when the

[1] Apple, *Apple Pay*, https://www.apple.com/apple-pay/ (last visited Mar. 2, 2015).

[2] 35 R.C.N.Y. § 51-03.

[3] Greg Sterling, *Has Google Wallet Already Failed?* (Jun. 7, 2013, 1:26 PM), http://marketingland.com/has-google-wallet-failed-47441.

Diners Club card first appeared,[4] Apple Pay managed to forge alliances with banks. Secondly, marketing is an important aspect that the authorities should carefully examine to foresee upcoming market trends and targets because its ultimate goal is to turn Apple Pay into a way of life; notwithstanding the lack of legal research done in this field.[5] Biometric identification is just one of the examples in which marketing and law can work together.[6]

1. *The missing piece required for the evolution of payments*

Some companies have attempted to replicate Apple Pay, but have failed by not considering alliances with financial institutions.[7] Google Inc. and Bitcoin both tried to enter the financial world and were unsuccessful[8] because they did not establish business alliances with other big financial companies or even the government. Even though not all of these companies focus on the concept of mobile/digital wallet, they have all tried to create its own version of this business concept.[9] Apple Pay formed alliances and signed agreements with the main banks in the United States like "Bank of America, Wells Fargo, Capital One, Chase, Citi, American Express [and others]."[10] Besides the agreements with financial institutions, the arrangements are the same as those with main credit card issuers like Master Card, Visa and American Express.[11] The important feature in Apple Pay is that it provides the banks certainty by using the money in the client´s bank account and credit cards.[12] This gives the financial institutions the confidence that Apple Pay is not a new competitor or a new product that aims at forcing them out of business.

Apple approaches the concept of the mobile/digital wallet in the same way the credit card was created.[13] This approach could be understood as an evolution of the payment system. Just as Diners Club cards, Apple Pay could be a

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[4] Dinners Club International, *The Story Behind the Card*, https://www.dinersclubus.com/home/about/dinersclub/story (last visited Mar. 2, 2015).

[5] Bertil Hulten, Niklas Broweus and Marcus Van Dijk, Sensory Marketing 28-29 (Palgrave Macmillan, 2009).

[6] *Id.* at 24.

[7] Apple Pay, *supra* note 2.

[8] Apple, Apple Pay, https://www.apple.com/apple-pay/ (last visited Mar. 2, 2015); see also Edward Hadas, A Prediction: Bitcoin Is Doomed to Fail (*Nov. 27, 2013, 12:28 PM), http://dealbook.nytimes.com/2013/11/27/a-prediction-bitcoin-is-doomed-to-fail/?_r=1*. Accord Karen Webster.

[9] Apple, Apple Pay, https://www.apple.com/apple-pay/ (last visited Mar. 2, 2015); see also Edward Hadas, A Prediction: Bitcoin Is Doomed to Fail (*Nov. 27, 2013, 12:28 PM), http://dealbook.nytimes.com/2013/11/27/a-prediction-bitcoin-is-doomed-to-fail/?_r=1*. Accord Karen Webster.

[10] Apple Pay, *supra* note 2.

[11] *Id.*

[12] *Id.*

[13] Diners Club International, *supra* note 4.

good example of such changes.[14] While Apple Pay does not have a history like Diners Club, the way a cardboard Diners Club card first replaced tangible currency in the past is the same case as Apple Pay.[15]

2. *How does it work?*

Apple Pay combines the concepts of a credit/debit card and cash in a smartphone that can perform electronic banking transactions.[16]

The iPhone 6 is the only Apple mobile phone to use this technology.[17] Its near field communication (NFC) technology serves as a connection with a special point of sale device.[18] With the iPhone, pictures must be taken of your participating credit cards, which can be "Visa, Master Card or American Express."[19] Even though it is a product especially developed for the United States of America, Apple most probably intends to spread this new way of payment around the world.[20]

Apple Pay works with a specific point of sale device which Android phones also use.[21] This means that every merchant must change their point of sale devices/readers or acquire new ones in order to make payments using the iPhone possible.[22] "[According to Apple some stores that will have this new point of sale are]: Target, Apple Store, Baby´s R Us, Disney Store, Petco, Sephora, Walgreens, Staples, Whole Foods, Subway, Panera Bread [among others]."[23] Although there might seem to be many points of sale, you will definitely encounter some problems if you want to pay with Apple Pay since people do not usually only buy at their specific stores.[24]

3. *Other competitors*

Apple Pay can be conceived as a payment system of its own even though there are other similar mobile/digital wallets in the market.[25] Mobile/digital

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14 *Id.*

15 *Id.*

16 Apple Pay, *supra* note 1.

17 Apple, *Apple Pay FAQ*, https://support.apple.com/en-us/HT201469 (last visited Mar. 3, 2015).

18 *Id.*

19 *Id.*

20 *Id.*

21 Apple Pay, *supra* note 1.

22 *Id.*

23 *Id.*

24 *Id.*

25 Apple, *Apple Pay*, https://www.apple.com/apple-pay/ (last visited Mar. 2, 2015); *see also* Lisa Gerstner, *Mobile Wallets: A Smart Way to Pay?* (Jan., 2015), http://www.kiplinger.com/article/credit/T057-C000-S002-mobile-wallets-a-smart-way-to-pay.html#V6s8MX2lIFMBYo1S.99.

wallets should be studied because they, just like Apple Pay, are taking the same legal advantage, which consists of a loophole in the law that does not regulate mobile/digital wallets. Considering the expansion of competitors in under a year, federal authorities should consider regulating the legal flaws seen in Part II and Part III of this article. Apple Pay's current competitors are: 1. Google Wallet, 2. Soft Card, 3. PayPal, 4. Starbuck and Subway, and [5. Samsung Galaxy.][26] There are other smartphones offering this service,[27] but the creativity instilling a lifestyle, security using biometrics and the benefits obtained with financial institutions has put Apple Pay in the spotlight.[28] Due to the newness of the product and a lack of legal studies, the analysis should start with the product itself and its marketing to understand the legal implications.

A. *Google Wallet*

Google has its own well-known mobile/digital wallet.[29] Google Wallet offers similar mobility, security and utilitarian advantages as Apple Pay does.[30] The main concern is that it does not make life as easy as Apple Pay.[31] When making a transaction, it is necessary to insert a PIN Code manually.[32] Even though it is easy, it means extra work for the user.[33]

B. *Softcard*

This product was the result of an alliance among several telephone mobile companies,[34] like AT&T, T-Mobile and Verizon Wireless.[35] This payment system only worked with phones from one of these phone companies.[36] The main concern was that it only worked with certain banks, such as American Express, Chase and Wells Fargo.[37] To give an example, if American Express was chosen, user would have been redirected to the American Express homepage to enter the required security information.[38]

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[26] Lisa Gerstner, *Mobile Wallets: A Smart Way to Pay?* (Jan., 2015), http://www.kiplinger.com/article/credit/T057-C000-S002-mobile-wallets-a-smart-way-to-pay.html#V6s8MX2lIFMBYo1S.99.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

C. *Paypal*

PayPal is a famous Internet payment system. If the user has an existing account, it can be linked to the application.[39] As a mobile payment system, the problem lies in the lack of affiliated establishments.[40] The process is not so lengthy if the user's PayPal account is already linked to the user's bank account.[41] The security code or PIN that PayPal uses is the password chosen when the account was created.[42] To make a purchase in a store, the mobile phone must be linked to the account and have the matching PIN at the checkout.[43] The PayPal financial procedure consists of first withdrawing the amount from the PayPal balance and then from the baking account.[44]

D. *Starbucks and Subway*

Other competitors are trying to replicate the idea of a mobile payment system,[45] but their designs consist of developing smartphone applications as rewards programs.[46] These establishments are trying to force customers to redeem their points only in their stores.[47] The disadvantage at the moment is not having the freedom to redeem those points elsewhere, due to deficient affiliations with banks.[48]

E. Samsung Galaxy

The iPhone's main competitor is Samsung Galaxy.[49] Samsung is developing a mobile phone that includes a mobile payment system,[50] which will be based on LoopPay/Samsung Pay.[51] It works by scanning a fingerprint or entering a

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39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 Lisa Eadicicco, *How The iPhone 6 Compares To Its Biggest Android Rival, Samsung's Galaxy S5* (Oct. 4, 2014, 8:13 AM), http://www.businessinsider.com/iphone-6-samsung-galaxy-s5-specs-comparison-2014-10.

50 Jason Del Rey, *Samsung in Talks to Launch Apple Pay Competitor* (Dec. 16, 2014), *http://recode.net/2014/12/16/samsung-in-talks-to-launch-apple-pay-competitor/*; *see also,* Samsung, Samsung Pay, http://www.samsung.com/us/samsung-pay/ *(last visited June. 29, 2016).*

51 *Id.*

PIN and hovering the phone over the point of sale.[52] LoopPays/Samsung Pay uses the tokenization of a credit card as a security system.[53] Unfortunately, at the moment, this product requires a PIN to authorize purchases.[54]

The rules of economics say that when there is demand, supply will grow.[55] This is the perfect scenario for mobile payments, especially for the mobile/digital wallets.[56] It was not until Apple Pay appeared, together with their innovation and creativity, that a boom in similar apps came from other companies.[57] It is true that many other companies could do something similar, just as Google Wallet, PayPal, SoftCard, Starbucks and Subway and Samsung Galaxy did,[58] but they will never match what Apple has put in the minds of their consumers.[59] The idea of authorizing a purchase with a fingerprint instead of a PIN Code makes people feel their phone is an extension of themselves.[60] This type of implementation is called sensory marketing.[61]

The case of PayPal is different.[62] Since this payment system is dedicated to online shopping, two issues arise.[63] The first is that people have adopted the concept of PayPal as an online payment system for shopping on the web,[64] and not as a payment system with retailers on a daily basis.[65] The second reason is that since it was built for Internet shopping, the system configuration to setup an account and perform transactions is lengthier and more complicated.[66] Adding up all the required steps and the possibility for the system to red flag irregular sales might be a good idea,[67] but Apple Pay still holds

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52 *Id*.

53 *Id*.

54 Nicole Lee, *Dabbling in the future of payment: A week of Apple Pay and Google Wallet* (Oct. 29, 2014, 10:00 AM), http://www.engadget.com/2014/10/29/week-apple-pay-google-wallet/.

55 Parkin Michael, et al., Microeconomía 78 (Pearson, 7th ed. 2006) (trans. Ricardo Heredia Salazar).

56 *Id*.

57 Apple Pay, *supra* note 1.

58 Gerstner, *supra* note 26; *see also*, Eadicicco, *supra* note 50.

59 Apple Pay, *supra* note 1.

60 Roberto Mendoza Carapia, Cases of Success in Marketing, 113 (McGraw Hill, 2007) (trans. Ricardo Heredia Salazar).

61 *Id*.

62 PayPal, *About PayPal*, https://www.paypal-media.com/about (last visited Mar. 2, 2015).

63 *Id*.

64 Albert Costill, *The 10 Most Popular Online Payment Solutions* (Dec. 8, 2013), http://www.searchenginejournal.com/10-popular-online-payment-solutions/80025/.

65 *Id*.

66 Gerstner, *supra* note 26, *see also* Albert Costill, *The 10 Most Popular Online Payment Solutions* (Dec. 8, 2013), http://www.searchenginejournal.com/10-popular-online-payment-solutions/80025/.

67 Gerstner, *supra* note 26.

the lead with its fingerprint authentication, securing its position as a leading technology company.[68]

SoftCard and other retailers' phone apps like Starbucks and Subway still lag behind other competitors.[69] The way SoftCard operated made it less attractive for many users since it took more time and redirected them to the credit card company´s web page for authorization and authentication.[70] In the case of retailers, an app exclusively developed for their business does not have the same appeal.[71] People are looking for a universal digital payment method, which helps them make transactions fast, securely and conveniently. Functioning only as a rewards payment system will not make people see it as a competitor of Apple Pay or other mobile payment systems.[72]

The Samsung Galaxy is an appealing phone in many ways.[73] It has a great processor, a long battery life, a good camera, and application possibilities.[74] One good reason to buy a Galaxy instead of an IPhone would be the cost of the device.[75] For many people, there is no reason to spend several hundreds of dollars more for an Iphone, but for others, it is worth it,[76] most probably for the lifestyle it sells.[77]

Establishing the specifications of each competitor for the purpose of this research makes it possible to identify the similarities of the products. These similarities are consistent with security and user identification. Each company seems to have a favorite user identification method: fingerprinting in Apple Pay,[78] linking it to a web account like PayPal,[79] redirecting to the bank´s web page for SoftCard,[80] and finally inserting a PIN for the card like Galaxy.[81] A fitting solution would be to introduce a uniform user identification system. Considering these user identification rules in guidelines or amendment issued by federal authorities would be of great value to unify the mobile/digital

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68 Apple Pay, *supra* note 1.

69 Gerstner, *supra* note 26.

70 *Id.*

71 *Id.*

72 *Id.*

73 David Ludlow, *iPhone 6 vs Samsung Galaxy S5- which phone is best for you?* (Feb. 6, 2015), http://www.expertreviews.co.uk/mobile-phones/1401274/iphone-6-vs-samsung-galaxy-s5-which-phone-is-best-for-you.

74 *Id.*

75 *Id.*

76 David Ludlow, *iPhone 6 vs Samsung Galaxy S5- which phone is best for you?* (Feb. 6, 2015), http://www.expertreviews.co.uk/mobile-phones/1401274/iphone-6-vs-samsung-galaxy-s5-which-phone-is-best-for-you.; *see also* Mendoza, *supra* note 61.

77 Hulten, *supra* note 5.

78 Apple Pay, *supra* note 1.

79 Gerstner, *supra* note 26.

80 *Id.*

81 Lee, *supra* note 54.

wallet payment system. Biometric factors would be the best choice.[82] Other countries like Mexico use it and criminologists find it very safe.[83] The advantages of taking user identification into account are discussed in more depth in Part V.

4. *The marketing responsible for the illusion*

Marketing and management have been two of the most important key factors in the success of Apple Pay. Due to the lack of legal doctrine and scholarly research, it is important to analyze the marketing background to understand how Apple has been working throughout its history and how it can be regulated in the future. Apple Pay's principal marketing elements are sensorial marketing and how it helps create a lifestyle.[84] These two elements are vital to the thesis of research in this field.[85] It will only be possible to understand the policy completely by understanding the minds of consumers. Only then will it be possible to predict the future of mobile/digital wallets under proper guidelines or regulations.

A. *Sensory marketing*

"Marketing as a social process is constantly buffeted by different cultural, economic, political and technological change forces."[86] In order to understand the changes and forces in sensory marketing, it is important to know them.[87] In the 20th century society could be studied based on economic, social, and technological changes.[88]

Marketing is linked to lifestyle and the conditions of a society in a specific country or period of time.[89] Marketing uses the Elliot Wave Theory to explain how a company can position their products in such a way so as to obtain astounding sales and popularity.[90] Apple Pay is situated in the third wave.[91]

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82 Bir Bhanu & Xuejun Tan, Computational Algorithms for Fingerprint Recognition 1 (Kluwer Academic Publishers, 2004).

83 Interview with Dr. Rafael Moreno González, Prof. of Criminalistics and Researcher, Nat´l Inst. of Criminal Sci. INACIPE, in Distrito Federal, Mex. (Dec. 22, 2014).

84 *See* Hulten, *supra* note 5 at 28-29; *see* Mendoza, *supra* note 60.

85 *See* Hulten, *supra* note 5 at 28-29; *see* Mendoza, *supra* note 60.

86 Hulten, *supra* note 5, 74 *alteration*.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

The influence of the iPhone on communication, gaming, browsing and now financial transactions has made huge changes in society.[92]

Apple´s success in sensory marketing is that by including touch screens or fingerprinting in its products, Apple creates a connection with human senses,[93] giving the customer a complete experience through their mobile phone, apps and biology.[94] For many people the idea of doing financial transactions and validating them with biometry is a way for them to feel they truly own their device.[95] This ownership is not simply legally possessing an iPhone,[96] but the possibility for someone to sense the instructions given to it.[97] When Apple Pay is used to make an in-store purchase, the user is the only one who can validate it with his or her fingerprint.[98] This establishes a link between the person, the iPhone and DNA.[99] Federal authorities need to realize that marketing and law are not always unrelated. In this situation, the link is clearer than ever. If the authorities take advantage of elements like sensory marketing and fingerprints as user identification,[100] they will be able to develop the proper guidelines for user identification. The aim would be to implement these rules to all mobile/digital wallets and perhaps to future types of electronic banking. The idea and concept of user identification is seen in more depth in Part V.

B. *Individualization as a lifestyle*

People adopt a lifestyle based on a consuming tendency.[101] Brands are instilling a way of life and individualization in each member of the community.[102] Deciding how to pay can set you apart from others. People who use American Express Cards are supposedly set apart from those using a regular Bank of America card.[103] There is now a legal or financial reason for this. Many times products like American Express have a higher annual fee, commission

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92 *Id.*

93 *Id.* at 24.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 28-29.

102 *Id.*

103 American Express, *Compare Most Popular Cards*, https://www.americanexpress.com/us/small-business/credit-cards/top-credit-cards/?inav=menu_cards_sbc_comparecards (last visited Mar. 4, 2015); Bank of America, *Credit Cards*, https://www.bankofamerica.com/credit-cards/overview.go (last visited Mar. 4, 2015).

or fewer benefits than a regular credit card.[104] Apple Pay is an ideal example of how to fashion a lifestyle.[105]

People who use Mac products claim to be different from those that use PCs.[106] The reason is that lifestyle and marketing has instilled the need to create a person's self-image.[107] Apple Pay can do exactly the same thing as a regular Bank of America card. The difference is that using a digital payment device sets you apart from the rest and gives a different status.[108] Just like American Express, you have to buy a very expensive device to use Apple Pay.[109] This device needs to be the latest version of the iPhone 6 since Apple Pay does not work with other models.[110] There are risks: new points of sale may not be available in every establishment, technology can always fail, there may be problems of double charging and fights in court due to loopholes in the law. With globalization, people nowadays feel the pressure to belong to a culture that makes them part of society.[111] Marketing has influenced culture, economy and technology, to a point that it has become the reason of happiness.[112] Government should recognize that people show a strong desire to use mobile/digital wallets. This tendency will grow in the future, leaving the financial system unprepared. Therefore, federal financial authorities need to issue proper rules or guidelines.

III. Legal Background in the United States of America

Due to the novelty of Apple Pay, there is no case law dealing with it yet. Apple Pay is not a well-known regular banking product that could be easily made compatible with a regular Bank Agreement.

At this stage, a proper analysis for this type of product should focus is on public policy and less on strict regulatory analysis because there is no applicable law or regulation for Apple Pay as yet. This analysis is done by reviewing regulations from a federal perspective. Financial institutions can be incorporated as national or state institutions.[113] Focusing on financial institutions chartered under state law, would be going backwards for what Apple

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104 *Id.*

105 Hulten, *supra* note 5 at 28-29.

106 *Id.*

107 *Id.*

108 *Id.*

109 Apple, *iPhone*, http://www.apple.com/iphone/ (last visited Apr. 13, 2015).

110 Apple Pay FAQ, *supra* note 17.

111 Hulten, *supra* note 5 at 32.

112 *Id.*

113 Office of the Comptroller of the Currency, *Comptroller's Licensing Manual: Charters (2009)*, http://www.occ.gov/publications/publications-by-type/licensing-manuals/charters.pdf; *see also* 12 C.F.R. § 5.20(f) (2) (2012).

Pay needs to accomplish are federal rules.[114] The authorization to charter a state financial institution is given by the state banking commissioner while authorization for federal financial institution is given by the OCC.[115] This also means that the state commissioner and OCC respectively will supervise their respective institutions.[116] Having to focus on the laws of each state would involve a huge struggle in regulating Apple Pay.[117] In this sense, the fact that Apple Pay and mobile/digital wallets have been taking advantage of the lack of regulation and represent a risk in the future, these payment systems should be properly regulated.[118] The perfect means to do this would be through the federal authority and regulations.[119] Similar competitors are taking advantage of this lack of regulation and operate in the market. The main financial regulations to be analyzed should be Regulation E and Dodd Frank Act. Here, the concepts of Access Device, electronic fund transfer, coverage and service provider are ambiguous when applied to mobile/digital wallets. Secondary sources blur the concept of Apple Pay by interspersing the names mobile wallet and digital wallet. This generates legal uncertainty and a clear definition of the concept is required to prevent this. Finally, the lack of proper regulation in the United States to identify the users in electronic transactions in Mexico for example poses a future risk for mobile/digital wallets.

1. *Electronic Fund Transfer Act (Regulation E)*[120]

Regulation E is contained in one of the 50 titles published by federal government departments.[121] "Regulation E was published in the Federal Registry in December 27, 2011 in volume 76, number 248."[122] The objective of this regulation is to set the rules of and limits on the electronic transactions that take place in everyday commerce.[123] Regulation E aims at protecting consumers.[124] Some of the transactions broadly mentioned are remote ban-

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 Regulation-E implements the Act and is not the Act itself.

121 Morris L. Cohen & Kent C. Olson, Legal Research in a nutshell 170 (West Academic Publishing, 11th ed. 2013).

122 Electronic Fund Transfers (Regulation E); Interim Final Rule, 76 Fed. Reg. 81020-81058 (Dec. 27, 2011) (to be codified at 12 CFR Part 1005) *alteration*.

123 The Federal Reserve Board, *Consumer Compliance Handbook Regulation E: Electronic Fund Transfers* http://www.federalreserve.gov/boarddocs/supmanual/supervision_cch.htm (last visited Mar. 2, 2015).

124 *Id.*

king programs and point of sale terminals, among others.[125] The authority responsible for overseeing this regulation depends on the jurisdiction and type of charter of the financial institution.[126]

If Regulation E is analyzed from a purely conceptual and narrow perspective, it is difficult to find an analogy between Apple Pay and Regulation E. This regulation is structured in two parts.[127] The first part is Subpart A, which establishes the basic framework, scope, disclosures and liabilities,[128] and the second part is specifically for money transfers.[129]

The main analysis for Apple Pay should be based on Subpart A.[130] 12 CFR 1005.2 gives the definition of Access Device.[131] "Access device means a card, code, or other means of access to a consumer's account, or any combination thereof, that may be used by the consumer to initiate electronic fund transfers."[132] Even Legislative History defines Access Device the same way it does today.[133]

The first step to determine if Apple Pay is subject to Regulation E is by understanding if it actually is an Access Device.[134] From a practical point of view, Access Devices can be strictly understood as those that financial institutions provide for withdrawing money or performing other transactions.[135] These Access Devices are established in the contract consumers initially sign with the financial institution.[136] Apple Pay is not considered an Access Device in this Contract.[137] It is a different negotiation involving an intermediary, which must be specifically defined in regulations as a mobile wallet or digital wallet.[138] Regulation E also establishes a list of the Access Devices that are not included in this category.[139] Neither of these corresponds to Apple Pay.[140] The

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125 12 C.F.R. § 1005.2 (2015).

126 Consumer Compliance Handbook Regulation E: Electronic Fund Transfers, *supra* note 124.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 12 C.F.R. § 1005.2 (2015).

132 *Id.*

133 Electronic Fund Transfers (Regulation E); Interim Final Rule, 76 Fed. Reg. 81023 (Dec. 27, 2011) (to be codified at 12 CFR Part 1005).

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

only way it might be linked is by adding the concept to the financial institution agreement as an Access Device.[141]

However, according to 12 CFR 1005.3 (b) Apple Pay could be interpreted as an Electronic Fund Transfer.[142]

> "Electronic fund transfer. (1) Definition. The term 'electronic fund transfer' means any transfer of funds that is initiated through an electronic terminal, telephone, computer, or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer's account. The term includes, but is not limited to: (i) Point-of-sale transfers; (ii) Automated teller machine transfers; (iii) Direct deposits or withdrawals of funds; (iv) Transfers initiated by telephone; and (v) Transfers resulting from debit card transactions, whether or not initiated through an electronic terminal."[143]

The part in the previous regulation establishing "The term includes, but is not limited to . . ."[144] opens up the possibility of interpreting an electronic fund transfer as something else.[145] This interpretation could apply to Apple Pay.[146] Determining that these transfers originate from an electronic terminal, which could be an iPhone, is just one possibility.[147] But it is still not clear enough since it should state digital wallet or mobile wallet.[148]

Another interpretation could be that Apple Pay is not covered by this regulation.[149] But its scope is indistinct because it can be considered a Telephone Limited Transfer under 12 CFR 1005.3 Part 3 I (6).[150] Here, a transfer done over the phone is covered by Regulation E, but only if an agreement has been signed previously.[151] The authority must determine whether a signed banking agreement and the acceptance of the terms and conditions of Apple Pay is enough to establish such a link.[152] Despite the previous statement, according to 12 CFR 1005.3 Part 2. Article 4A, Apple Pay could also be considered not covered by Regulation E.[153] "Financial institutions offering telephone-initiated Fedwire payments, which encourage verification of Fedwire payment orders pursuant to a security procedure established by agreement between

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141 *Id.*

142 12 C.F.R. § 1005.3 (2015).

143 *Id.*

144 *Id. alteration.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

the consumer and the receiving bank. These transfers are not subject to Regulation E."[154] This uncertainty could be cleared up if the Federal Authority issues guidelines or rules determining whether mobile/digital wallets are covered under Regulation E or not.[155]

If Apple Pay is considered regulated under Regulation E, it might be forced to answer for liabilities under 12 CFR 1005.6.[156] The problem is that Regulation E establishes the consumer as liable for the loss of the Access Device or unauthorized transfers.[157] Regulation E does not contemplate the implications and differences between regular Access Devices like a card and a smartphone.[158] As discussed further in Part V concerning user identification, one of the implications would be for Regulation E to exclude customer liability.[159] This exclusion would be for unauthorized transfers with Access Devices.[160] Since mobile/digital wallets are not defined as Access Devices, Apple Pay users could be liable in the case unauthorized purchases,[161] under 12 CFR 1005.6.[162] This regulation only places certain limitations on the fines.[163] The range of these fines depends on whether the consumer notified the financial institution.[164]

Besides the possibilities of falling under the categories of Access Device or Electronic Fund Transfer, Apple Pay could also be considered a service provider.[165] "Apple Pay could be considered as a service given by a provider that does not hold a consumer account."[166] Even though Regulation E does not give the exact concept of a digital wallet or mobile wallet, a description of the system could be comparable.[167] 12 CFR 1005.14 (b) (I) and (2) establishes the rules Apple Pay would have to follow to be considered one of these services.[168]

Apple Pay could be considered an Access Device, an electronic fund transfer or simply an external provider as established in 12 CFR 1005.14.[169] The

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154 *Id. alteration.*

155 *Id.*

156 12 C.F.R. § 1005.6 (2015).

157 *Id.*

158 12 C.F.R. § 1005.2 (2015).

159 12 C.F.R Part 1005 Supplement I (2015), *see also* Part V.

160 12 C.F.R Part 1005 Supplement I (2015).

161 *Id.*

162 12 C.F.R. § 1005.6 (2015).

163 *Id.*

164 *Id.*

165 12 C.F.R. § 1005.14 (2015); s*ee also* Adam Levitin, *Apple Pay and the CFPB* (Sept. 10, 2014, 10:56 PM), http://www.creditslips.org/creditslips/2014/09/apple-pay-and-the-cfpb.html.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

company should pay close attention to avoid being categorized as an Access Device; otherwise it will be bound to comply with Regulation E.[170]

2. *Dodd-Frank Wall Street Regulation Act Chapter X (special consideration for CFPB)*

Chapter X of the Dodd-Frank Wall Street Regulation Act contains the Consumer Federal Protection Bureau (CFPB) law.[171] "The most significant structural response so far to the ongoing financial crisis precipitated by the failure of the subprime mortgage market."[172] The main functions of the CFPB are to supervise, analyze financial laws and products, enforce laws and protect consumers.[173] The Financial Stability Oversight Council (FSOC) is the only authority not bound to comply with the CFPB Opinion.[174] The FSOC is in charge of the safety and soundness of the financial system.[175] FSOC will look into possible future financial risks and implement ways to prevent them.[176]

In order for a product to be subject to analysis under this regulation, it should be mentioned in one of the categories under paragraph 15.[177] If all categories are examined, the reader can realize that they are all meant for financial institutions, and not for a system like Apple Pay.[178] The only category where it could fit would be category 7.[179]

> "(vii) providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network, except that a person shall not be deemed to be a covered person with respect to financial data processing solely because the person--

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170 *Id.*

171 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, 124 Stat. 1376, 1383.

172 1 Michael P. Malloy, *Banking Law and Regulation* §1C.10 (Wolters Kluwer, 2th ed.) *see* page 1C-113- 1C-114.

173 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, 124 Stat. 1376, 1733.

174 12 U.S.C. § 5513 (2015)

175 *Id.*

176 Big Bank Regulation Lecture from Prof. Lawrence Baxter, Ph.D., Fall 2014, Duke University School of Law.

177 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, 124 Stat. 1376, 1957-1960.

178 *Id.*

179 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, 124 Stat. 1376, 1958-1959.

> [1959] (I) is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer; or (II) provides access to a host server to a person for purposes of enabling that person to establish and maintain a website."[180]

If Apple Pay is described as a financial product subject to this law, it enters the complicated and highly regulated field of the financial world.[181] One of the main duties of Apple Pay would be to act towards their customers according to the terms in Category 7 since they would have to solve customer´s complaints.[182] The CFPB director and the corresponding agencies or federal trade commission will have to solve public enquiries regarding any malfunction of Apple Pay Software.[183] Apple should consider if this would exclude the banks from any responsibility[184] because banks are obligated to abide by this regulation.[185]

For Adam Levitine, even though Apple Pay could not be considered a product, as discussed in the above paragraphs, it could fit in the category of service provider.[186] If classified as a service provider and making Apple Pay subject to these regulations, this is another reason for the government to properly define Apple Pay[187] because at the moment there is a broad interpretation of the rule that can work in favor of Apple Pay or against it.[188]

3. *Secondary Sources for the Apple Pay app*

Due to the newness of Apple Pay there is no main legal framework that applies. Mobile/digital wallets have not been explored by scholars and authorities. The issuance of guidelines similar to the Handbook of the Office of the Comptroller of Currency (OCC) or a more extensive publication of scholarly articles on this topic could be beneficial.

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180 *Id.*

181 *Id.*

182 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111- 203, 124 Stat. 1376, 2008-2009.

183 *Id.*

184 *Id.*

185 *Id.*

186 Adam Levitin, *Apple Pay and the CFPB* (Sept. 10, 2014, 10:56 PM), http://www.creditslips.org/creditslips/2014/09/apple-pay-and-the-cfpb.html.

187 *Id.*

188 *Id.*

A. *The Office of the Comptroller of Currency (OCC) and Handbook*

The Office of the Comptroller of Currency (OCC) is an independent government bureau devoted to regulating national banks and analyzing future risks in the financial market for those banks.[189] For the specific purpose of Apple Pay, it is fitting to mention the Comptroller's Handbook on the "Electronic Fund Transfer Act".[190]

There are times when a regulation is so broad that secondary regulation is needed to narrow down the issue. In the case of Apple Pay, the last resource would be such a Handbook.[191] It serves as a guide and offers additional analysis material on Electronic Fund Transfers.[192] Even though the booklet gives similar information as that in Regulation E, the regulation does not provide additional help to determine whether Apple Pay is subject to Regulation E.[193]

Therefore, using the rules that Regulation E establish or using the OCC Handbook will render the same results[194] because the OCC handbook is uniformly applied to national banks and the analysis is made on a federal basis.[195] Even though the Federal Reserve is the custodian of Regulation E, the content per se in the statute will be the same federal bases as the analysis.[196] Therefore, as the guardians of the main Electronic Payment regulation, the Federal Reserve should issue its view on Apple Pay.[197]

B. The quest for a proper terminology and money laundering considerations

Due to the evolving nature of Apple Pay as the new product it is, there is no Case Law recorded and only a few limited law reviews. There are three types of articles related to Apple Pay that should be mentioned, but neither of them applies directly to: a. Bitcoin, b. Mobile/Digital Wallets or c. Money Laundering.

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189 Office of the Comptroller of the Currency, *About the OCC* http://www.occ.gov/about/what-we-do/mission/index-about.html (last visited Mar. 2, 2015).

190 Office of the Comptroller of the Currency, *Comptroller's Handbook Booklet Revision and Rescission*__http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-43.html (last visited Mar. 2, 2015).

191 *Id.*

192 *Id.*

193 Office of the Comptroller of the Currency, *Comptroller's Handbook* www.occ.gov/publications/publications-by-type/comptrollers-handbook/file-pub-ch-efta.pdf - 759k - 2014-12-17 (last visited Mar. 2, 2015).

194 Class Lecture, *supra* note 176.

195 *Id.*

196 *Id.*

197 *Id.*

a. Bitcoin

A pioneer in the digital currency, Bitcoin was very popular, but did not have the required element to make it successful among people. The important thing is to keep in mind the concept of mobile/digital wallet and the responsibilities in its use.[198] Apple may have taken certain basic elements from this product to develop Apple Pay. Bitcoin began to analyze how and what information was going to be disclosed.[199] It could range from consumers or transactions.[200] What is certain is that Regulation E does not apply to it[201] because it is not a legal entity and has no Access Devices; it is just conceived as a digital wallet.[202]

b. Mobile/Digital Wallet

The best way to refer to Apple Pay and future electronic payment systems would be as a mobile or digital wallet.[203] Although there is no case law setting rules for digital wallets, some sources use the term to refer Apple Pay[204] while others use the term mobile wallet.[205] Both terms can be seen as synonyms, although a single term should be determined for it to be used in regulations. It is interesting to examine what people thought about digital wallets a few years ago since it is not something new.[206] "A survey in the year of 2000 showed that 38% of 14,000 consumers knew what a digital wallet was."[207] In 2012, Google Wallet started operating and used NFC, which attracted the attention of scholars publishing articles discussing this payment method.[208] Even though

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198 Catherine Martin Christopher, *Whack-A-Mole: Why Prosecuting Digital Currency Exchanges Won't Stop Online Money Laundering*, 18 Lewis & Clark L. Rev. 1, 13-14 (2014).

199 R. Joseph Cook, *Comment: Bitcoins: Technological Innovation Or Emerging Threat?*, 30 J. Marshall J. Computer & Info. L. 535, 538-540 (2014).

200 *Id*.

201 Nikolei M. Kaplanov, *Student article: nerdy money: bitcoin, the private digital currency, and the case against its regulation*, 25 Loy. Consumer L. Rev. 111, 157-158 (2012).

202 *Id*.

203 Wells Fargo Bank, *Mobile Wallet Basics* https://www.wellsfargo.com/mobile-payments/mobile-wallet-basics/ (last visited Mar. 3, 2015).

204 Forrest Stroud, *Apple Pay* http://www.webopedia.com/TERM/A/apple-pay.html (last visited Mar. 3, 2015).

205 Mobile Wallet Basics, *supra* note 204.

206 David Goldman, *Mobile pay war: Wal-Mart and others vs. Google* (Aug. 15, 2012), http://money.cnn.com/2012/08/15/technology/mcx-mobile-wallet/.

207 Carl Felsenfeld & Genci Bilali, *The Check Clearing for the 21st Century Act--A Wrong Turn in the Road to Improvement of the U.S. Payments System*, 85 Neb. L. Rev. 52, 73 (2012) *alteration.*

208 Yochai Benkler, *Open wireless vs. licensed spectrum: evidence from market adoption*, 26 Harv. J. Law & Tec 69, 120-122 (2012).

they did not foresee a future in mobile phone payments, they attributed some reasons to the wired point of sales and complicated agreements with phone companies.[209] It is clear that at that time an iPad could not be conceived as a point of sale.[210]

On the other hand, Google Wallet was something that offered many possibilities to perform daily activities[211] many people would adopt it instead of a regular cash transaction.[212] The problem was in the limited availability of phone models, limited usage of credit cards and limited number of merchants accepting it.[213]

Another issue that the mobile/digital wallet has faced for a long time is anonymity.[214] There should be ways to identify a user to give security to consumers and better ways to store information about the transactions made[215] to prevent future disputes among users.[216]

One law review does begin to mention rumors about Apple´s mobile/digital wallet.[217] This law review pays particular attention to partnerships with credit cards.[218] It particularly refers to Discover and PayPal.[219] Here it is important to note that the law review detects an area of expansion in mobile banking,[220] based on which company manages to offer banking services to unbanked people.[221] The lack of user identification requirements has allowed the industry to start signing partnership agreements.[222] To this respect, the partnership between Discover Network and PayPal to expand their services is especially important.[223] Therefore, it is most likely that Apple Pay took the idea of bank alliances from partnerships like Discover and Pay Pal.[224]

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209 *Id.*

210 ShoeKeep, *How it works* http://www.shopkeep.com/ipad-pos (last visited Mar. 3, 2015).

211 Meena Aharam Rajan, *The Future Of Wallets: A Look At The Privacy Implications Of Mobile Payments*, 20 CommLaw Conspectus 445, 465-466 (2012).

212 *Id.*

213 *Id.*

214 A. Michael Froomkin, *Regulation and Computing and Information Technology: Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & Com. 395, 506 (1996).

215 *Id.*

216 *Id.*

217 Erin F. Fonté, *Mobile Money In Developing Countries: Financial Inclusion and Financial Integrity: Mobile Payments In the United States: How Disintermediation May Affect Delivery of Payment Functions, Financial Inclusion and Anti-Money Laundering Issues*, 8 Wash. J.L. Tech. & Arts 419, 430-431 (2013).

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

c. Money Laundering

One of the most important aspects Apple Pay and future competitors should pay heed to is anticorruption and money laundering. Due to the uncertainty in regulations for mobile banking, it was determine that[225] financial services and regulations apply to mobile banking[226] and that they should be treated like any other type of payment.[227] Mobile payment systems are regulated by existing laws; if not, any liability is linked to the corresponding financial institutions.[228] The problem is that Apple Pay is not a mobile payment system *per se*, but a mobile/digital wallet.[229]

Banking has unlimited creativity in developing new products.[230] Authorities and companies like Apple Pay should consider defense mechanisms in case of a possible attack on or hacking of iPhones.[231] These new products represent a new channel of access for criminals dealing in terrorism or other types of attacks.[232] Criminals could just steal an iPhone, create fake bank apps or do smishing attacks.[233] A "Smishing attack consists of a message sent to a mobile phone stating Notice: Issues Found On Your Shazam MasterCard. Please Call 13035780902. When the smishing victim calls the number, they reach an automated recording demanding the entry of the Personal Account Number (PAN) and additional confidential information."[234] Criminal creativity can go beyond this, even to the point of using a mobile/digital wallet for casinos.[235] Imagine going to Las Vegas and gambling with the help of an iPhone.[236]

IV. Legal Background in Mexico

Like many other countries, Mexico adapts to technological developments that come from the United States. Sometimes these inventions are simple products without any significant legal impact on society, such as iPods, computers, iPod accessories, iPads, and so on. Concern arises when software or a product has

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225 *Id*. at 419, 431-437.

226 *Id*.

227 *Id*.

228 *Id*.

229 *Id*.

230 *Id*. at 419, 437-438.

231 *Id*.

232 *Id*.

233 *Id*.

234 *Id*.

235 Gerd Alexander, *Article: The U.S. on tilt: Why the unlawful internet gambling enforcement act is a bad bet*, Duke L. & Tech. Rev. 6 (2008).

236 *Id*.

an impact that goes beyond society's simple use of the product as in the case of Apple Pay in Mexico. Apple Pay in the United States is very recent and the financial laws regarding it are uncertain; therefore, Mexican legislation has no specific provision on it at the moment, but possible legal allowances for Apple Pay, user identification mechanisms and suggested changes for similar technologies might be made along with other legal statutes applicable involving areas like data privacy, commercial transactions, consumer and financial user protection in the future.

1. *Legal allowances for Apple Pay*

Based on general banking principles in Mexico, banks are only allowed to do that permitted by law and regulations.[237] The general statutory framework to consider the possibility of Apple Pay in Mexico is found in the General Dispositions of the Credit Institutions Law. A complete analysis should be made of two particular aspects: definitions and Chapter X on the request of banking products and services from financial users.[238]

The first part of the General Dispositions of the Credit Institutions Law establishes a definition section for certain terminology.[239] Similar related terms are defined such as: Point of Sale Devices (devices to access electronic bank services, phones, computers etc.; to perform the payment of goods and services), Mobile Banking (electronic banking system in which an account is linked to a phone), Online Banking (electronic banking system based in the internet), Telephone Banking (electronic banking system in which the user gives instructions by phone), Access Devices (device that allows a user to access the electronic banking system), Mobile Payment (access device linked to a mobile phone) and authentication factor (tangible or intangible means to identify a user in electronic banking).[240]

Some of these terms could be easily interpreted applying to Apple Pay, having as a result the same legal uncertainty as in United States. Mexican legal system most of the times is very clear and every law tries to define every possible term used in practice to avoid misconceptions. Therefore, if every described term is analyzed textually and carefully directly from the statute, the reader will distinguish that technically, a specific term for digital wallet would be required.

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237 Legal Framework of Banks Lecture from Prof. Eduardo Preciado Briseño, Ph.D., 2013, Universidad Panamericana.

238 Ley de Instituciones de Crédito LIC (Credit Institutions Laws); The Law authorizes the Minister of Finance to regulate the use of electronic banking transaction; *see* Disposiciones de Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law); see Article 1, (trans. Ricardo Heredia Salazar).

239 *Id.*

240 *Id.*

It is possible having a misconception through an interpretation of the following terms: Access Device, Mobile Banking System, Telephone Banking and Mobile Payment.[241] Nevertheless, first an access device faces the same problem as in United States. It is not defined in the services bank agreement to use a phone as a digital wallet. Secondly a mobile banking system, in practice relates only to a deposit account linked to a phone, not credit cards as Apple Pay. Thirdly telephone banking works only to call the bank and instruct several banking transactions with your voice by phone. Finally Mobile Payment, even if it is an account linked to a phone; it is limited to the accounts from one bank linked to the phone. Another consideration is that mobile payment is limited in checking an account balance and transferring only a limited amount of money to another account. All of the above would require a proper definition for digital wallet.

2. *Requesting Electronic Banking Products and Services*

As any other banking product and service, there is a list of requirements to fulfill which are required by law. Most of them are established in the General Dispositions applied to the Credit Institutions Law, while others represent newness and are not considered by the law.[242] Even though, in order to avoid a fine by the Mexican Financial Authorities and complying with the purpose of this Law, an implementation of the term digital wallet should be considered.[243] The main sources for the legal possibility are mentioned in articles 306 and 307.[244]

A. *Article 306 of the General Dispositions applied to the Credit Institutions Law*

This article describes the rules of banks to allow customers use electronic banking.[245] These requirements are the following: describe the services intended, type and monetary limit of operations that could be provided by these electronic services, means to identify users, how a transaction is registered, cancellation procedures, restrictions, let the users know the risks of the services and provide covenants to customers.[246]

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241 *Id.*

242 Ley de Instituciones de Crédito LIC (Credit Institutions Laws); The Law authorizes the Minister of Finance to regulate the use of electronic banking transaction; *see* Disposiciones de Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law); see Chapter X, Article 306, (trans. Ricardo Heredia Salazar).

243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.*

B. *Article 307 of the General Dispositions applied to the Credit Institutions Law*

This article establishes additional requirements from the previous article 306 in order to request banking products and services.[247] There is a mandatory requirement to obtain the signed consent of the customer for every banking service except: mobile payment and ATM related products such as prepaid cards and point of sale devices.[248] Finally the article allows the users to subscribe new non listed banking products and services, if they give their consent through a third or fourth user identification means as described in Part V.[249]

Both articles 306 and 307 could be applicable in a parallel way to banks in Mexico that want to be part of Apple Pay. Even though there could be a challenge from the banks trying to implement Apple Pay as a banking product or service due to a legal uncertainty from a loophole; it could be a good alternative. Notwithstanding, in case the Banks wanted to enforce this provision in an electronic way, it could be possible, since Apple Pay accepts fingerprinting as a fourth factor identification.

Therefore, there is a loophole in Mexico for the regulation of digital wallets, just as in United States. A possible application in Mexico could be done, interpreting the previous legal framework. Even though due to a legal banking principle and a reality that law is always changing and adapting to new ways of living, an amendment in the law should be done. Understanding Apple Pay in Mexico as an evolution of other ways of payment and not a financial revolution is a must. Mexican Financial Authorities should define in the mentioned regulation or issue a secondary statute specifically for digital wallets.

3. *Digital wallet race in Mexico*

Influenced by other countries using digital wallets, Mexico is beginning to modernize its systems to implement this type of payment method. Since March 27, 2015, Mexican banks, like BBVA Bancomer, Citi Banamex and Banco Santander México, have begun to operate digital wallets.[250].

A. *BBVA Bancomer*

BBVA Bancomer Bank developed a smartphone app that offers several online banking functions and the possibility of digital payment through a

[247] Ley de Instituciones de Crédito LIC (Credit Institutions Laws); *supra* note 242; see Chapter X, Article 307, (trans. Ricardo Heredia Salazar).

[248] *Id.*

[249] *Id.*

[250] Sánchez Onofre Julio, *Arranca la carrera de e-wallets en México* (Mar. 27, 2015, 7:37 AM), http://eleconomista.com.mx/tecnociencia/2015/03/27/arranca-carrera-e-wallets-mexico.

contactless point of sale device.[251] In order to use BBVA Wallet, the client must be subscribed to the banking product[252] by logging into the smartphone app with the client's digital signature.[253] It should be noted that only BBVA Bancomer clients can use this particular digital wallet.[254]

B. *Citi Banamex and Banco Santander México*

Both of these banks, Mexico's other "Big Banks", also started evaluating the possibility of developing digital wallet software for its clients.[255] Even though The Economist states that this method of payment is actually only expected from Banamex since Banco Santander México will most likely implement the same platform the company uses in Spain.[256] Currently, both institutions are running trials to evaluate its effective legal and commercial application in the Mexican market.[257]

Preliminary negotiations have probably taken place between Apple Inc. and Mexican domestic banks to implement a digital wallet and Apple Pay in the country. Due to statutory loopholes and the legal complications described in this legal research, Mexican banks will start creating a legal framework for digital wallets. The Mexican Bank Association will play an important role in trying to make the implementation of digital wallets possible in Mexico.[258] The Mexican Bank Association represents the main banks in Mexico before government authorities[259] regarding issues like banking/credit services and products, as well as the modernization of payment systems in the country.[260]

Since digital wallets are simply an updated version of a payment system and not a financial revolution, creating a legal roadmap in other countries with the help of domestic banks and associations is a good strategy for private companies like Apple. Once Mexican regulations have been adapted for digital wallets and Apple Pay, the next issue will be to upgrade point of sale devices for Apple Pay and other companies with near-field communication ("NFC") technology. This might be an issue, but one that was overcome in the

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251 BBVA Bancomer, *BBVA Wallet*, https://www.bbva.es/estaticos/micros/wallet/index.html (last visited Dec. 31, 2015).

252 *Id.*

253 *Id.*

254 *Id.*

255 Sánchez, *supra* note 250 alteration.

256 Banco Santander, *Santander Wallet* https://www.bancosantander.es/es/particulares/banca-online/banca-online/santander-wallet (last visited Dec. 31, 2015).

257 *Id.*

258 Asociación de Bancos de México, *¿Qué es la ABM?* http://www.abm.org.mx/quienes-somos/ (last visited Jan. 4, 2016).

259 *Id.*

260 *Id.*

United States. Therefore, the last step could take time, but would not bring out any legal issues.

4. *Other Statutory Considerations in Mexico*

Apart from the US and Mexican regulations applied specifically to digital wallets and Apple Pay, as stated above, Mexico has other related statutes. The Credit Institutions Law permits financial institutions the use of electronic technology. The General Commercial Code allows commercial transactions to be performed electronically. The Federal Consumer Protection Agency and the National Commission for the Protection and Defense of the Users of Financial Services oversee the rights of users of the products against errors or fraud. It is not yet clear which of the mentioned agencies would oversee Apple Pay and digital wallets. The Personal Data Protection Act must also be considered since digital wallet and Apple Pay software stores personal data and sensitive personal data, which imply special considerations.

A. *Credit Institutions Law Article 52*

From a broad analysis from the Credit Institutions Law, financial institutions may perform operations using electronic or optical equipment or that of any other technology, automated data processing systems and network telecommunications.[261] This type of operations might be established in financial institution contracts if such agreements cover: i) operations and services which are agreed upon, ii) the means of user identification and liabilities, and iii) the means for the creation, transmission, modification or termination of rights and obligations inherent to the corresponding operations and services.[262] It is possible to use other means of identification other than a handwritten signature for electronic transactions.[263] In order to make this electronic identification procedure possible, financial institutions must comply with the rules established by the Central Bank of Mexico and the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores)*.[264]

From a legal point of view, Apple Pay and digital wallets can be used in Mexico. The fact that the main banking law in the country allows financial institutions to perform services like digital wallets is good for the advancement of payment systems in Mexico even though as seen in Part III, proper guidelines or laws are needed. The main concern Apple Pay would face at

[261] Ley de Instituciones de Crédito LIC (Credit Institutions Laws); *see* Article 52, (trans. Ricardo Heredia Salazar).

[262] *Id.*

[263] *Id.*

[264] *Id.*

this moment is that the Credit Institutions Law only allows financial institutions to offer this service, and not any other legal entity. Apple should have a legal strategy if it wants to implement this service by forging alliances with banks, incorporating a non-bank financial institution or waiting for a reform to be made to financial regulations. Otherwise, the considerations of Section III.D.2 could apply. In this sense, Mexico is using a brilliant strategy for this payment method. Mexican banks BBVA's, Banamex's and Santander's implementation of digital wallets as one of their products, as described in section C, are drawing the roadmap for foreign companies and technologies. Therefore, it is possible foreign companies that are non-financial entities like Apple Pay will participate in this payment system in the future. Its commercial and marketing strategy, along with a biometric identification system, will create a revolutionary payment system in the country.

B. *General Commercial Code*

In matters of electronic commerce in Mexico, all the applicable rules shall be interpreted based on technological possibility, neutrality and international compatibility, in matters regarding its application to electronic signatures.[265]

> "An electronic signature will be deemed Advanced or Secure if it at least meets the following requirements: i) the information on the creation of the signature, in the context in which [the signature] is used, corresponds exclusively to the Signer, ii) the information on the creation of the signature were, at the time of signing, under the exclusive control of the Signer; iii) it is possible to detect any alteration made to the electronic signature after moment of signing, and iv) regarding the reliability of the information in a Data Message, it is possible to detect any alteration after the moment of signing."[266]

These considerations under Mexican law establish the fact that an electronic signature is reliable and is allowed in commerce. Even then, it may be proven otherwise by presenting the corresponding evidence.[267]

The General Commercial Code is the main statute that applies to every commercial transaction in the Mexico. Even when financial and banking aspects are involved, the General Commercial Code will be considered a secondary legal source,[268] due to the applicability of the Credit Institutions Law

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[265] Código de Comercio (CCo.) (Commercial Code), as amended, Diario Oficial de la Federación (DO), 13 de junio de 2014 (Mex.); *see* Articles 89 and 97 (trans. Ricardo Heredia Salazar).

[266] *Id.*

[267] *Id.*

[268] Ley de Instituciones de Crédito LIC (Credit Institutions Laws); *see* Article 6 (trans. Ricardo Heredia Salazar).

for this type of transactions. Under this code, digital wallets and Apple Pay can be considered operational in Mexico. The technological capabilities of the system, the day-to-day use given to it from an international standpoint, and the elements used for biometric identification meet the requirements for electronic commerce. Therefore, from an interpretation of the previous law together with the General Dispositions applied to the Credit Institutions Law, Apple Pay should be a viable option to be used in Mexican commerce, but Apple needs to take into account the following aspects of biometric identification: It being possible to identify: i) how the transaction was used and have a database to identify biometric information of the users; ii) that the user owner of the biometrics in fact performed the transaction; iii) possibility of detecting alterations to the biometrics; and iv) been able to prove the used biometrics in the case of trial.[269] Even though Apple might technologically meet these four requirements, it could be hard to prove them materially since all the information is stored on the user´s iPhone.[270] Apple uses this type of information storage globally under a very strict policy regarding the disclosure of the information stored on said device.[271] This might be the only deterrence of implementing the use of Apple Pay in Mexico.

C. *National Commission for the Protection and Defense of the Users of Financial Services (Condusef)*

Condusef is a financial agency in charge of protecting users of financial services.[272] Its functions include regulating and authorizing banking products, as well as registering banking contracts.[273] In view of the legal uncertainty present in the law, a careful examination of Condusef statutes reveal elements that would affect the spread of the use of digital wallets and Apple Pay in Mexico: the main statute of the agency, the Single Provision of the Condusef (repealed) and the Financial Services Transparency and Regulation Law.[274]

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269 Código de Comercio (CCo.) (Commercial Code), as amended, Diario Oficial de la Federación (DO), 13 de junio de 2014 (Mex.); *see* Article 89 and Article 97 (trans. Ricardo Heredia Salazar); *see also* Disposiciones de Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law).

270 David W Opderbeck & Justin Hurwitz, *Apple v. FBI: Brief in Support of Neither Party in San Bernardino Iphone Case* (March 10, 2016), *http://ssrn.com/abstract=2746100.*

271 *Id.*

272 Ley de Protección y Defensa al Usuario de Servicios Financieros (Law for the Protection and Defense of Users of Financial Services); *see* Articles 1 and 11 (trans. Ricardo Heredia Salazar).

273 *Id.*

274 Condusef, *Marco Jurídico,* (Mar. 29, 2016) http://www.condusef.gob.mx/index.php/conoces-la-condusef/marco-juridico (trans. Ricardo Heredia Salazar).

Since the Condusef only regulates financial entities[275] there is no legal impediment at this point that might restrict the implementation of such a system. Because Apple Inc. is a regular corporation, these provisions do not apply *per se*. Even then, the strategy of financial institutions is to introduce mobile wallets as a banking product. In doing this, a precedent will be set with the Condusef, reasserting the possibility for Apple Pay to one day operate in Mexico and urging authorities to start evaluating new financial technology products and their effects on the Mexican people.

D. *Personal Data Protection Act*

Apple Pay and other potential digital wallets store personal data and sensitive personal data. Therefore, Apple Inc. and other companies must comply with the Mexican Personal Data Protection Act.

Every company that processes personal data and sensitive personal data must have a Privacy Notice that complies with certain requirements, such as:[276] i) the identity and address of the person responsible for collecting personal data; ii) purposes for which the data will be handled; iii) the options and means the person responsible offers to the owners of said information to limit the use and disclosure of the data; iv) the means to exercise the rights of access, correction, cancelation or opposition; v) if necessary, the any transfer of information; and vi) the procedure and means by which the person responsible will inform the owners of the information of changes to the privacy notice, as stipulated by law.[277] Sensitive personal data is defined as any personal information affecting the most intimate sphere of the owner of such information, or that which the misuse of can lead to discrimination or pose a serious risk to said owner – *namely anything involving racial or ethnic origin, present or future health conditions, genetic information, religious, philosophical or moral beliefs, union membership, political views and sexual preference*. The Mexican Data Protection Act also protects personal data, defined as any piece of information regarding and identified or identifiable individual.[278] When handling an individual's sensitive personal data, the individual's express consent for the handling of

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[275] Ley de Protección y Defensa al Usuario de Servicios Financieros (Law for the Protection and Defense of Users of Financial Services); *see* Articles 2 and 5 (trans. Ricardo Heredia Salazar).

[276] Ley Federal De Protección De Datos Personales En Posesión De Los Particulares (LFPDPPP) (Personal Data Protection Act); *see* Article 16, Diario Oficial de la Federación (DO), 5 de julio de 2010 (Mex.) (trans. Ricardo Heredia Salazar).

[277] *Id.* at Article 16.

[278] *Id.* at Article 3; *see also* Reglamento de la Ley Federal De Protección De Datos Personales En Posesión De Los Particulares (RLFPDPPP) (Personal Data Protection Regulations); *see* Article 15, Diario Oficial de la Federación (DO), 21 de diciembre de 2011 (Mex.)(trans. Ricardo Heredia Salazar).

said information is required.[279] In the case of an individual's personal data, only tacit consent is required from the individual.[280] Any transfer of information can only be done to the parties and for the purposes stated in the Privacy Notice.[281]

Personal data protection must be taken into account when introducing a digital wallet or Apple Pay in Mexico. The main personal data protection authority, the National Institute for Transparency and Access to Information and Protection of Personal Data (INAI), is in charge of overseeing the compliance of Apple Pay and digital wallets with the Personal Data Protection Act. Digital wallet software requires the user's personal information, such as the user's name, as well as sensitive personal data, such as the user's biometrics for identification and a picture of the user's credit or debit card, which is also considered part of the user's financial information. The best practice for these companies is to add the Privacy Notice as part of the terms and conditions of software use. This notice should clearly establish all the personal data and sensitive personal data to be obtained, as well as to whom the information may be transferred –*such as financial institutions*. Since the Personal Data Protection Act requires the user's express consent to obtain sensitive personal data, this consent may be granted electronically on a smartphone under special legal consideration, requiring the user to accept the terms and conditions of use and give express consent for the data to be processed. Therefore, in addition to revising the apparent workability of several financial laws for the product to operate in Mexico, there are other important fields as Personal Data Protection that apply and must be considered.

E. Federal Consumer Protection Agency (Profeco)

The Federal Consumer Protection Law establishes the protection of the rights of both consumers and suppliers,[282] authorizing transactions in a business environment using electronic devices or any other technology.[283] There are several elements the provider and consumer must comply with: i) the information

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[279] Ley Federal De Protección De Datos Personales En Posesión De Los Particulares (LFPDPPP) (Personal Data Protection Act); *see* Articles 8-10, Diario Oficial de la Federación (DO), 5 de julio de 2010 (Mex.); *see also* Reglamento de la Ley Federal De Protección De Datos Personales En Posesión De Los Particulares (RLFPDPPP) (Personal Data Protection Regulations); *see* Article 15, Diario Oficial de la Federación (DO), 21 de diciembre de 2011 (Mex.) (trans. Ricardo Heredia Salazar).

[280] Ley Federal De Protección De Datos Personales En Posesión De Los Particulares (LFPDPPP) (Personal Data Protection Act); *see* Articles 8-10, Diario Oficial de la Federación (DO), 5 de julio de 2010 (Mex.) (trans. Ricardo Heredia Salazar).

[281] *Id.* at Article 36.

[282] Ley Federal de Protección al Consumidor (Federal Consumer Protection Law) LFPC; *see* Article 76 bis, (trans. Ricardo Heredia Salazar).

[283] *Id.*

is used on a confidential basis; ii) the supplier must offer safety and confidentiality; iii) the supplier must provide its personal information to the user; iv) the supplier must avoid deceptive trade practices; v) the user is entitled to know all the terms and conditions; vi) the supplier must abide by the consumer's decision on the quantity and quality of the products the consumer wishes to receive and vii) the supplier must abstain from misleading advertising practices.[284]

Mexican legislation has a loophole that Apple Pay and digital wallets can make use of. While the Condusef is the protection agency in charge of financial institutions, the Profeco is the agency in charge of supervising regular corporations. There is legal uncertainty regarding which authority Apple Pay should follow. On one hand, it is unknown whether it will be incorporated as a financial entity or will continue to work as a regular corporation. This is important in the event of a program malfunction or a fraud while using the payment system. With whom should consumers file a claim, Profeco or Condusef? The truth is that Apple Inc. should be cautious when complying with Profeco since it involves transactions using electronic devices. From what can be inferred, as a provider, Apple Inc. will comply with the following elements contained in the Federal Consumer Protection Law: i) with the use of biometrics and the Apple data protection, information is held confidential; ii) the specific security criterion would be the use of biometrics to verify and authenticate the user; iii) due to the nature of Apple Inc., it is assumed that no deceptive or misleading decision practices will be employed and the personal data provided will comply with the Personal Data Protection Act; and iv) the consumer will read and approve the terms and conditions of the software electronically before using it.[285] Therefore, a preliminary analysis of the Federal Consumer Protection of Digital Wallets and Apple Pay, the project is viable.

V. Literature Review

Financial products can have a wide range of options, innovations and creativity. However, any product, as revolutionary as it may be, must always comply with the laws of the country. In the case of Apple Pay and digital wallets, the topic can sometimes be misunderstood and confused with Bitcoin or digital currency. In this section, the difference between digital wallets and digital currency (Bitcoin) are established, as well as the importance of this research paper for the future development of financial products.

Due to the lack of research in this field, there is little information since this topic might be confused with digital currency or Bitcoin. Therefore, it

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284 *Id.*

285 *Id, see also* Disposiciones de Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law)

is important to explain the differences between digital currency and a digital wallet (Bitcoin and Apple Pay).

In view of the rapidly changing technology, the government should enforce consumer protection regulation, as well as its banking regulation.[286] Prof. Mark Edwin Burge has properly defined Apple Pay as mobile payment, and Bitcoin as cryptocurrency.[287] In the United States, it can be seen a trend in the evolution of methods of payment.[288] First, personal checks have almost been eliminated and secondly, plastic payments with debit or credit cards are in decline.[289] At this point, new developers are trying to introduce a new culture of payment in society.[290] Some tried by creating a new payment system like Apple Pay, while others tried to substitute cash for digital tokens.[291] The difficulty lies in analyzing the legality of one product with the uncertainty that the other represents. There are even some authors that claim it is possible to make a universal currency[292] based on electronic money called as quantum money.[293] Electronic money can be conceived as storing a monetary value on a device that serves as a payment system.[294]

Apple Pay and digital wallets should be considered an element of its own, different from digital currency. The applicability and nature of digital wallets as a mobile payment method eventually involve government and financial institutions. In fact, there has been an evolution in the payment system and monetary law; the problem is when technology tries to avoid legality or government protection, as in the case of Bitcoin. It is important to use technology in a way that benefits society and complies with regulation. Bitcoin blockchain technology has been used by companies and financial institutions because of its underlying technology.[295] The benefit of a ledger, which helps one party keeps track of the events, makes it valuable.[296] With this system, smart contracts are possible to make it possible for one party to make a payment by only meeting their requirements.[297]

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286 Mark Edwin Burge, *Apple Pay, Bitcoin, And Consumers: The ABCs of Future Public Payments Law*, 67 Hastings L. J. 1 (2016).

287 *Id.*

288 *Id.* at 2-3.

289 *Id.* at 3-5.

290 *Id.* at 3-5.

291 *Id.* at 3-5.

292 Dimitri O. Ledenyov & Viktor O. Ledenyov, *Quantum Money*, James Cook University, (Nov. 19, 2015) at 5, http://ssrn.com/abstract=2693128.

293 *Id.* at 1-3.

294 *Id.*

295 Victor Li, *Bitcoin's Useful Backbone*, 102 *A.B.A.J.* 31, 31 (2016) (discussing the benefits of blockchain).

296 *Id.*

297 *Id.*

Bitcoin is used to purchase goods and to speculate on the market.[298] Instead of having a central bank or an authority regulating the use of Bitcoin, it is based on and operates according to a protocol of its own.[299] One of the risks of Bitcoin is its inability to provide the people with the legal certainty that the currency is backed by the government or a commodity.[300] It intends to function entirely on the trust of its users and among a network of people, which eventually opens up the possibility of being hacked.[301] This network can be described as a blockchain, which is not operated by a financial institution.[302] Profits are made through commissions acquired through every transaction.[303] Due to these particularities, Bitcoin can be the best mechanism for tax evasion[304] because electronic transfers can be made without meeting in person.[305] Cryptocurrencies have certain advantages for some people,[306] which range from not operating under a particular jurisdiction or being subject to sources of taxation.[307] Finally, the possibility of users to have several accounts without the need for any formal identification increases the possibility of tax evasion.[308] "This virtual or digital money has been defined by the U.S. Financial Crimes Network as those currencies that operate like a currency in some environments, but do not have a legal tender status in any jurisdiction".[309] Therefore, governments should strictly regulate digital currencies and even ban them in some countries. One of the goals of cryptocurrencies is to decentralize financial intermediaries.[310] It is inevitable that technology and financial expansion will reach a point where international financial authorities will need to take into account every update in the financial arena.[311] It began with the age of mortar banking, later internet banking and finally mobile banking.[312] Maybe the next step will be electronic wallets,

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298 Misha Tsukerman, *The Block Is Hot: A Survey Of The State Of Bitcoin Regulation And Suggestions For The Future*, 30 Berkeley Tech. L.J. 1127 (2015).

299 *Id.*

300 *Id.*

301 *Id.* at 1127-1128, 1147.

302 *Id.* at 1128.

303 *Id.*

304 *Id.* at 1147.

305 *Id.*

306 *Id.* at 1151.

307 *Id.*

308 *Id.*

309 Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?* (Feb. 10, 2016), http://ssrn.com/abstract=2730983.

310 Massimo Morini, *Inv/Sav Wallets And The Role Of Financial Intermediaries In A Digital Currency*, (July. 21, 2014) at 1, http://ssrn.com/abstract=2458890.

311 *Id.*

312 Dimpy Handa & Gaurav Sehraat, *Banking System In India: From Bricks to Clicks to What Next?*, (Mar. 2014) at 334, http://ssrn.com/abstract=2703525.

virtual cards, plastic money or the use of biometrics.[313] This could be the case of Bitcoin or Apple Pay and digital wallets.

Even though Bitcoin and digital currencies are not central to this research paper, this concept and that of digital wallets must be clarified. Although digital wallets work with its software and protocols, they differ from digital currency by complying with state and international laws. In this way, digital wallets provide people and users legal certainty that the credit cards used in the digital wallet software will not be used to commit fraud, thus making it a payment system authorized by the government. Digital wallets do not use blockchains because a financial institution is involved at some point. The main advantage of a digital wallet will evolve into a regular payment system and create a lifestyle for marketing purposes. This evolution is made possible by developing digital wallets in every country based on each country's laws and tax regulations. Just as digital currency aims at preparing society for the future in terms of monetary law, but due to its legal uncertainty, it has completely failed. Digital wallets are preparing the society an evolution in the payment system. This evolution should go hand-in-hand with user biometrical identification because of its potential security. The greatest differences between digital currency and digital wallets are that digital wallets must comply with state laws, have legal certainty and involve a financial institution while digital currency does not.

Due to the novelty of digital wallets, Apple Pay and the use of biometrics as a way to identify users in electronic banking transactions, there is a lack of doctrine and information published in law journals.[314] This scarcity was witnessed in the research carried out for this paper, which might help guide proper applicable regulations in the future.

Nowadays, with a need to interpret the law and a concept that legal doctrine and legal scholars have not analyzed, there is a need for a pioneer on the subject. This pioneer should make a comprehensive analysis, covering not only legal aspects but also the essence of the invention, which usually derive from business or marketing strategies.

In publishing this research paper, Mexico will be one of the few countries in which legal scholars provide doctrine regarding digital wallets, Apple Pay and the use of biometrics as a way to identify users in electronic banking transactions. It will be a cornerstone for future analysis for financial product developments, together with an analysis of their legal viability.

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313 *Id.* at 339.

314 This can be proved by the small number of law journals and legal doctrine books published and referred to in this research paper.

VI. Statutory authorities for implications on user identification in Mexico and the United States of America

Property has been one of the most important elements of people from centuries ago, such as in Roman history and law. [315] Fingerprinting has been used since ancient cultures as a way of identifying property and therefore protects it from thieves.[316] Even then, as Mexican criminologist Dr. Luis Rafael Moreno González states, criminal creativity and inventions will always be one step ahead of the law.[317] For some countries, protection could develop a statute that regulates and enforces user identification.[318] Meanwhile, other countries prefer not to limit commercial expansion by enforcing user identification contained in a statute.[319]

Nowadays biometry has so many applications that it has spread to the financial world.[320] Financial institutions all over the world have been using fingerprinting as a safer way to prevent frauds in financial transactions. One example of this is Apple Pay, which stands out as an advanced payment method.[321] Since Apple Pay works through a screen and it is possible to share the device or have it stolen, Apple Inc. incorporated fingerprinting as a way to validate a financial transaction.[322] Unfortunately nothing is 100% safe. There might be some possibilities for frauds to take place, such as loopholes in the law, especially in civil law nations. In such countries, criminals can kidnap a person in order to use his or her biometry or in a worst scenario cut off his or her finger. To analyze the relevance of user identification, a comparison between statutes in Mexico and the United States should be made, since US federal authorities are contemplating the benefits of implementing a similar security system.

1. *Overview of Apple Pay User Identification in Mexico*

In Mexico, a fingerprint system works differently than in United States in a legal manner. As a civil law country, Mexico is based in statutes and has a very important one, the General Dispositions Applied to the Credit Institutions Law. This law technically regulates banking transactions and Chapter X establishes what banks should use to identify customers in electronic banking transactions.[323] Their classification ranges from a set of personal questions

315 Bhanu, *supra* note 83.

316 *Id.*

317 Interview Dr. Moreno, *supra* note 84.

318 *Id.*

319 *Id.*

320 Bhanu, *supra* note 83.

321 Apple Pay, *supra* note 2.

322 *Id.*

323 Ley de Instituciones de Crédito LIC (Credit Institutions Laws); The Law authorizes the

to biometric factors.[324] These regulations state that for a customer to have a complete freedom to perform any electronic banking transaction a biometric factor will be requested.[325] What banks have implemented in smartphones is voice identification software.[326]

When Apple Pay was launched in the fall of 2014, it said that entering the Mexican market was very hard at that moment.[327] Mexico´s complicated banking law is so overregulated that for Apple Pay to work, the principal banking regulations would have to be amended.[328] The General Dispositions Applied to the Credit Institutions Law has a very strict procedure on how clients should be identified for each type of financial transaction.[329] To check a balance, make a purchase, withdraw or a money transfer,[330] the client should always check whether answering simple questions from the bank is enough, or if a password or a signature is required.[331] The only way to avoid complications is by using biometrical identification.[332] Banks are starting to use it, but have not obtained much acceptance because of the high costs. The problem in Mexico with Apple Pay is that the General Dispositions Applied to the Credit Institutions Law strictly applies to banks.[333] Mexico´s financial authorities need to examine Apple Pay in order to give the authorization to use such a system, change the law and avoid fining the company.

2. *Overview of Apple Pay User Identification in the United States*

The United States does not have compelling regulations that enforce identification methods in banking transactions the way Mexico does.[334] Regulation E only establishes that financial institutions can choose whatever method

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Minister of Finance to regulate the use of electronic banking transaction; *see* Disposiciones de Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law); at Chapter Chapter X, (trans. Ricardo Heredia Salazar).

324 *Id.*

325 *Id.*

326 *Id.*

327 CNN Expansión, *México queda excluido del sistema de pagos Apple Pay* (Feb. 27, 2015), http://www.cnnexpansion.com/tecnologia/2014/09/16/mexico-queda-excluido-de-apple-pay, (Mex.), (trans. Ricardo Heredia Salazar).

328 Ley de Instituciones de Crédito LIC (Credit Institutions Laws); The Law authorizes the Minister of Finance to regulate the use of electronic banking transaction; *see* Disposiciones de Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law); at Chapter Chapter X, (trans. Ricardo Heredia Salazar).

329 *Id.*

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.*

334 Class lecture, *supra* note 176.

they prefer to identify clients using access devices.[335] These methods could be a PIN, a signature, fingerprints or a photograph.[336] By choosing one of these identification methods, the user is not liable for unauthorized transfers in the access device.[337] The main problem is the uncertainty of whether mobile/digital wallets qualify as access devices.[338] Therefore, the federal authority needs to clarify this issue through guidelines or amendments to regulations.[339]

Due to the capitalist nature of the United States, each bank is willing to absorb the losses in the event of fraud.[340] Apple Inc. has considered disclosing information requested from a user's device to the government.[341] The company is only willing to do so, however, if they have a search warrant and are compelled by law.[342] Apple Inc. will inform iPhone users of this legal requirement of providing certain personal information.[343] In the new iOS software, messages, photographs and mail are impossible to provide because they are encrypted by the user´s password.[344] It would be interesting to know the limit of this encrypted data since Apple Pay also works with the user's password and fingerprint.[345]

Even if US law does not enforce minimum criteria to identify users in financial transactions, Apple does it brilliantly.[346] It is not known whether this is due to identification problems or a desire to standardize the system, but the government has admitted to this flaw and is contemplating the possibility of collaborating with the stakeholders to fix it.[347] The Federal Financial Institutions Examination Council published guidelines in 2001 on user identification for online banking.[348] The guidelines classify the types of identification in a similar way as Mexico does: passwords, a token and biometrics.[349] The problem flaw is that is not enforceable on the level of statutes as it is in Mexico.[350]

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335 12 C.F.R Part 1005 (2015) Supplement I.

336 *Id.*

337 *Id.*

338 *See.* Part II. A.

339 *Id.*

340 Class lecture, *supra* note 176.

341 Apple, *Privacy* https://www.apple.com/privacy/government-information-requests (last visited Mar. 3, 2015).

342 *Id.*

343 *Id.*

344 *Id.*

345 *Id.*

346 Class lecture, *supra* note 176.

347 Federal Reserve System, *Strategies for Improving the U.S. Payment System* (Jan. 26, 2015), https://fedpaymentsimprovement.org/wp-content/uploads/strategies-improving-us-payment-system.pdf

348 Federal Financial Institutions Examination Council, *Authentication in an Internet Banking Environment* http://www.ffiec.gov/pdf/authentication_guidelines.pdf (last visited Mar. 3, 2015).

349 *Id.*

350 Ley de Instituciones de Crédito LIC (Credit Institutions Laws); The Law authorizes the Minister of Finance to regulate the use of electronic banking transaction; *see* Disposiciones de

The idea of using biological data that is very hard to replicate is not only a big legal improvement, but also a great marketing tool.[351] Even with the significance of this product, the company should not lose track of the fact that the government is very powerful. Under Rule 26 of the Federal Rules of Civil Procedure "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense… including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."[352] This ties in with international law because Apple Inc. could be requested the same in other jurisdictions.

"As it is demonstrated biometric factors are very safe since will not naturally change after one year of his birth and are entirely unique, not even twin biometric factors are the same."[353] When fingerprinting was first used many years ago in Egypt as a form of identification, it was very primitive and since then it has been improved and used in criminalistics; formerly it was used by Tang dynasty in China to identify mummies.[354]

The fact that forensic teams use fingerprinting in murder scenes has made it necessary to improve technology.[355] When it comes to a product development like Apple Pay and other software, engineers try to improve image processing.[356] Another advantage of improved quality of algorithms is its acceptance for use in trials; better images could help in bringing about better and fair rulings.[357] In Apple Pay, the technical process used to retrieve fingerprints is through a sensor like an iPhone screen,[358] which explains just how much fingerprinting as a means of identification has evolved and is applied on a digital device.

VII. The missing piece of the puzzle for a real financial revolution

Since the launching of Apple Pay there has been a media debate about Apple´s attempts to enter the financial market. In a business panel Paul Percival revealed a key element,[359] which could trigger the digital revolution in a

Carácter General Aplicables a las Instituciones de Crédito (General Dispositions applied to the Credit Institutions Law); at Chapter Chapter X, (trans. Ricardo Heredia Salazar).

351 Apple Pay, *supra* note 1.

352 Fed. R. Civ. P. R 26.

353 Bhanu, s*upra* note 82, at 8 *alteration*.

354 *Id*. at 1

355 Nikolaos V. Boulgouris, Konstantinos N. Plataniotis, Evangelia Micheli-Tzanakou, *Biometrics, Theory, Methods and Applications* 339 (IEEE Press, 2010).

356 *Id*.

357 *Id*.

358 *Id*. at 340

359 Biz Carson, *Why Apple Pay may be the gateway drug bitcoin needs* (Dec. 2, 2014, 2:31 PM), https://gigaom.com/2014/12/02/why-apple-pay-may-be-the-gateway-drug-bitcoin-needs/.

way that Bitcoin did not:[360] the confidence Apple Inc. transmitted to consumers.[361] This confidence made people more comfortable in doing electronic transactions.[362] "But what Apple managed to obtain was a moment which is what Bitcoin needs."[363] Even though Apple probably will never make an alliance with Bitcoin, introducing the digital payment system idea to new generations is key.[364] If Apple Pay or other similar companies continue shaping the minds of these generations, instilling in them the idea that currency can be digital, it will be open the door for a real financial revolution.[365]

There is still room for more creativity. People and companies will continue to find new ways to enter the financial world.[366] Even though Apple Inc. has clearly not created an astonishing breakthrough for a financial revolution, it has indeed contributed its start[367] by offering the possibility of presenting Apple Pay as square cash.[368] Upgrading software to transfer money between accounts is an area for Apple Inc. to expand.[369] Due to the legal uncertainty discussed in Parts II and Part III and the possibilities of expansion by upgrading the software,[370] Apple Inc. might find new Banking functions that apply in the future and upgrade Apple Pay software.[371] These possible upgrades could be potential threats if the authorities do not start regulating its basic element, mobile/digital wallets.

VIII. Conclusion

Apple Pay and digital wallets have had huge effects on daily life in the United States. The repercussions can be summarized in three parts. The first would be to consider Apple Pay and digital wallets illusions and not a financial revolution; the second covers the public policies involved for its success and the last touches on the loopholes in the law.

Many things and products already exist in daily life. People and companies are always searching for new business opportunities. Sometimes, these opportunities are novel and represent a big change, sparking a revolution.

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360 *Id.*

361 *Id.*

362 *Id.*

363 *Id.*

364 *Id.*

365 *Id.*

366 *Id.*

367 *Id.*

368 Dan Moren, *Wish List: Apple Pay your friends* (Dec. 4, 2014, 12:34 PM), http://sixcolors.com/post/2014/12/wish-list-apple-pay-your-friends/.

369 *Id.*

370 *Id.*

371 *Id.*

Apple Pay, however, simply adapts methods of payment to the digital era. Money has evolved throughout history; it all started as barter. Later people gave a value to gold coins and later transferred this value to paper (bills) with a number representing its worth and the power to settle debts. After bills, other methods of payment like credit cards have emerged. The digital era now requires another phase in the evolution of money. Apple Pay might lead the way in this as it has just introduced the next level of payments, opening the door to future competitors and inventions. If Apple Pay manages to gain people's trust and the government establishes a way to regulate it, a real financial revolution could take place in the upcoming years.

Due to the lack of legal research in the field, marketing is key to understanding the policy and evolution of Apple Pay. Other predecessors tried to introduce the concept of mobile/digital wallets, but failed. The corporate image of the brand, management techniques to create alliances with banks, uniqueness of their products and the way Apple Inc. has left an imprint on people are creating a new lifestyle in terms of payment systems.

In the regulatory aspect, amendments, guidelines or an official document is needed to define the rights and obligations of mobile/digital wallets. Regulation E, the Dodd-Frank Wall Street Reform and the Consumer Protection Act, case law, law reviews, General Dispositions applied to the Credit Institutions Law, Credit Institutions Law, related legal statutes on data privacy, commercial transactions, consumer and financial user protection, as well as any other regulation, do not provide a proper framework or guidelines for mobile/digital wallets. While the law cannot define mobile/digital wallets for the sole purpose of allowing future competitors, the simple act of defining the concept as either a mobile wallet, a digital wallet or any other name would show some progress. If a definition is not given, the authorities should issue an opinion to determine whether it is an access device, a mobile banking system, telephone banking, mobile payment, a service provider or an electronic fund transfer or if it is covered by regulations.

Just as crime will always be one step ahead of the law, technology is starting to expand at such a speed that unfortunately the law cannot keep up with it. Understating that law and business go hand in hand is a must. A capitalist system that is not willing to be overregulated has its benefits as well as its flaws. In this case the FSOC, the Federal Reserve, Mexican financial authorities and other members of government should keep in mind how much they are willing to sacrifice. Would it be better to have a limit in some cases? And could the lack of security and regulations for electronic transactions make this problem too big to manage?

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MEXICAN STRUCTURAL REFORMS AND THE UNITED STATES CONGRESS*

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Abstract. *Diverse structural reforms were enacted in Mexico during 2013 and 2014. Since these reforms were made on the constitutional level, they must be translated into specific laws and regulations; and more importantly, they must be implemented in an efficient manner. As Mexico is experiencing this transformation, its relations with United States are also evolving. This transition will probably imply new challenges with regard to different aspects of the bilateral relationship. Considering that the U.S. Congress plays a significant role in shaping those relations, the purpose of this article is to analyze some significant issues that have received or are likely to receive special attention in the U.S. Congress. This article is divided into seven sections. The first one presents an analysis of the complexity of U.S.-Mexico relations. The second part includes an explanation regarding Mexican reforms of 2013 and 2014, as well as the resulted transition in the bilateral relationship. The next four sections address significant pillars of this relationship: security, economy, migration, and energy. Each of these parts comprises a general overview of the U.S.-Mexico relations in that specific matter; a description of the views of the Mexican government and reforms of its constitutional and legal framework; and an analysis of the most relevant legislative actions that have recently taken place or are likely to receive attention in the U.S. Congress. The seventh section addresses other relevant aspects that should be taken into account in the policy- and law-making processes.*

Key words: *Constitutional reforms; U.S. Congress; U.S.-Mexico relations; legislative processes.*

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Resumen. *Diversas reformas estructurales fueron promulgadas en México durante 2013 y 2014. Dado que se realizaron a nivel constitucional, estas reformas deben traducirse en leyes secundarias y reglamentos y, aún más importante, deben implementarse de una manera eficiente. Mientras México está experimentando esta transformación, su relación con Estados Unidos de América (EE. UU.) también está evolucionando. Esta transición probablemente implicará nuevos retos en los diferentes aspectos de la relación bilateral. Considerando que el Congreso de EE.UU. desempeña un papel significativo en la configuración de dicha relación, el propósito de este artículo es analizar algunos asuntos que han recibido o probablemente recibirán atención en el Congreso de los Estados Unidos. El artículo se divide en siete secciones. En la primera se presenta un análisis de la complejidad en las relaciones entre México y EE.UU. En la segunda se incluye una explicación de las reformas promulgadas en México durante 2013 y 2014, así como un análisis de los efectos que dichas reformas han ocasionado en la relación bilateral. En los siguientes cuatro apartados se estudian pilares fundamentales de la relación: seguridad, economía, migración y energía. Cada una de estas secciones comprende una descripción de ese aspecto concreto; un análisis de la perspectiva mexicana y de las reformas a su marco jurídico; y un estudio de acciones legislativas relevantes que se han realizado, o que probablemente reciban atención, en el Congreso de EE.UU. En la séptima sección se abordan aspectos relevantes que deben considerarse en los procesos tanto legislativos como de política pública.*

Palabras clave: *Reformas constitucionales; Congreso de EE.UU.; relaciones EE.UU.-México; procesos legislativos.*

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I. Introduction

The United States (U.S.) and Mexico have shaped "one of the strongest and most productive relationships in the world. No two countries anywhere engage so intensely on a daily basis, cooperate across such a wide and varied spectrum of issues, and affect the economy and society of the other so profoundly."[1]

The complexity of the relationship between these two countries lies not only in the inherent characteristics of both societies but also in the policy and political objectives that both governments have. For instance, while immigration and border issues have been an important part of the agenda for a long time, economic matters were the most relevant aspect of the bilateral relationship during the nineties and security became the prominent topic during the last years. Today, the two countries are betting on the future by focusing on a relatively new issue that captures the essence of their long-term objectives: energy. Undoubtedly, the way these issues are addressed is a process of constant change that is marked by internal political debates and decision-making processes.

Taking into consideration that U.S.-Mexico relations are experiencing a time of transition due to diverse structural reforms that were approved in Mexico during 2013 and 2014, and that the U.S. Congress plays a significant role in shaping those relations, the purpose of this paper is to study the current status of the bilateral relationship. Particularly, its main objective is to address some significant issues that have received or are likely to receive special attention in the U.S. Congress.

This article is divided into seven sections. The first one presents an analysis of the complexity of U.S.-Mexico relations. The second part includes an ex-

[1] Commission on Mexico-U.S. Relations, Inter-American Dialogue, A More Ambitious Agenda 1 (2013).

planation regarding Mexican structural reforms of 2013 and 2014, as well as the resulted transition in the relationship with the U.S. The next four sections address significant pillars of the bilateral relationship: security cooperation, economic integration, migration, and energy. Each of these parts comprises a general overview of the U.S.-Mexico relations in that specific matter; a description of the views of the Mexican government and reforms of its constitutional and legal framework; and an analysis of the most relevant legislative actions that have taken place or are likely to receive attention in the U.S. Congress. The seventh section addresses other relevant aspects that should be taken into account in the policy- and law-making processes. Finally, some concluding remarks are included.

II. The Complex Scope of U.S.-Mexico Relations

Sharing a 2,000-mile border, with over 1.25 billion dollars of two-way trade, and approximately one million legal border crossings each day, the scope of bilateral relations between the U.S. and Mexico is broad and complex.[2] It comprises far-reaching social, commercial, and cultural bonds. As the famous Mexican writer Octavio Paz once stated, the border between Mexico and the U.S. "is political and historical, not geographical."[3]

About 33 million U.S. residents are of Mexican origin and a million American citizens live in Mexico.[4] Consequently, the relations between the two countries have a direct impact on the lives of millions of persons. Being aware of this reality, both nations have made a commitment to "enhance this cooperation to fully leverage their inevitable and accelerating economic and demographic integration."[5]

Luis Rubio points out that the neighborhood calls for new ideas and new ways of looking at problems.[6] Moreover, the success of Mexico in resolving its difficulties has a major impact upon the U.S.[7] For instance, if Mexico resolves the current wave of violence and insecurity that has affected investment and impacted economic performance, it could become a formidable partner for economic growth.[8] Similarly, if Mexico successfully promotes a more competitive economy in the energy sector, both migration and investment flows could change dramatically.

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[2] U.S. Department of State, Bureau of Western Hemisphere Affairs, *U.S. Relations with Mexico* (2013), *available at* http://www.state.gov/r/pa/ei/bgn/35749.htm

[3] Octavio Paz, *Mexico and the U.S.: Ideology and Reality*, *in* Mexico Matters: Change in Mexico and its Impact Upon the United States 6 (Luis Rubio, Wilson Center, 2013).

[4] Inter-American Dialogue, *supra* note 1, at 1; *see also* and U.S. Department of State, *supra* note 2.

[5] *Id.*

[6] Rubio, *supra* note 3, at 5.

[7] *Id.*

[8] *Id.*

III. Mexican Structural Reforms: A Time of Transition for the Bilateral Relationship

Presidential elections in the U.S. and Mexico coincide once every 12 years. While Enrique Peña Nieto was inaugurated President of Mexico on December 1, 2012, Barack Obama began his second term on January 21, 2013. This concurrence poses an opportunity for both governments to explore what needs to be done in order to achieve a more cooperative and productive relationship.[9]

After his inauguration, President Peña Nieto announced that his government would work on five strategic pillars: reducing violence, combating poverty, enhancing education, boosting economic growth, and fostering global responsibility.[10]

At the earliest stage of the administration, President Peña Nieto promoted the signature of the "Pact for Mexico," a political agreement signed by the leaders of the three major political parties: Institutional Revolutionary Party (PRI, the President's party), National Action Party (PAN), and Party of the Democratic Revolution (PRD).[11] This agreement contained commitments on key issues for the nation and functioned as a first step to discuss diverse legislative proposals.[12]

Those multi-party negotiations were certainly essential for the enactment of a variety of structural reforms: political, antitrust, financial, fiscal, on education, on telecommunications, on energy, on transparency, among others. These reforms were made on the constitutional level and thus must be translated into specific laws and regulations that will have a direct impact on the economic and social conditions of the country.

Even at the constitutional level, these reforms contain significant changes for Mexico. For instance, the political reform establishes reelection for federal and local congressmen, senators, and mayors; requires at least 50 percent of congressional candidacies to be reserved for women; and shortens presidential transitions: the President, elected in July, will now take office on October 1, rather than December 1.[13] Another illustrative example is the fiscal reform, which is aimed to tax junk food and sugary drinks; increase taxes on upper income brackets; and formalize 5.2 million small businesses through an electronic tax system.[14]

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[9] Inter-American Dialogue, *supra* note 1, at 2.

[10] "*5 Ejes para Lograr una Democracia de Resultados*," (Apr. 27, 2014), http://www.presidencia.gob.mx/5-ejes-para-lograr-una-democracia-de-resultados/

[11] In November 2013, the PRD withdrew -at least temporarily- from the Pact for Mexico.

[12] *See* "*Pacto por México*," (Apr. 27, 2014), http://pactopormexico.org/acuerdos/

[13] Andrés Sada, *Explainer: Mexico's 2013 Reforms*, Americas Society/Council of the Americas, (Apr. 27, 2014), http://www.as-coa.org/articles/explainer-mexicos-2013-reforms#telecoms

[14] *Id.*

Clare Ribando, from the Congressional Research Service (CRS), observes that as Mexico is experiencing this "major domestic shift" the relations between the U.S. and Mexico are also evolving.[15] This transition may lead to advances in some aspects of the bilateral relationship, while setbacks may take place in others.[16] For instance, analysts hope that security cooperation may continue even if bilateral attention focuses more on trade and energy than in the recent past.[17] Throughout this process, maintaining strong bilateral cooperation while protecting the U.S. interests is likely to be a crucial purpose for the Congress.[18]

IV. Security Cooperation

1. *General Overview*

The Mérida Initiative is an unprecedented partnership between the two countries aimed to "address violence and criminality while strengthening the rule of law and the respect for human rights."[19] For this initiative, Congress appropriated nearly $2.5 billion from 2008 to 2015.[20]

When the Mérida Initiative was signed, in 2007, the U.S. assistance was focused on training and equipping Mexican forces. However, President Obama's administration replaced this heavy emphasis on military equipment with "a more comprehensive bilateral strategy that seeks to reduce the role and influence of organized crime."[21]

Since 2010, the Mérida Initiative focuses on four pillars: disrupting organized criminal groups; enhancing the capacity of Mexican institutions to sustain the rule of law; improving the border management; and building strong and resilient communities.[22]

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[15] Clare Ribando Seelke, Cong. Research Serv., R42917, Mexico: Background and U.S. Relations 11 (Jan. 30, 2014).

[16] *Id.* at 27.

[17] *Id.*

[18] *Id.* at 1.

[19] U.S. Department of State, *supra* note 2.

[20] Clare Ribando Seelke and Kristin Finklea, Cong. Research Serv., R41349, U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond, summary (Jan. 15, 2016).

[21] Shannon K. O'Neil, Senior Fellow for Latin America Studies, Council on Foreign Relations, testimony before the U.S. Senate Committee on Foreign Relations, Subcommittee on Western Hemisphere and Global Narcotics Affairs, Hearing on Security Cooperation in Mexico: Examining the Next Steps in the U.S.-Mexico Security Relationship, at 2 (Jun. 18, 2013).

[22] U.S. Department of State, *supra* note 2; *see also* Ribando, Cong. Research Serv., *supra* note 15, at 18.

As the U.S.-Mexico security cooperation strategy has evolved, there has been a dramatic increase in violence: while in 2007 there were over two thousand drug-related homicides annually, by 2012 the number escalated to more than twelve thousand.[23] This rise in violence is not only a result of drug trafficking; criminal organizations have diversified into numerous illicit businesses (kidnapping, robbery, human trafficking, among others) and thus prey more directly on the local population.[24]

As it will be explained in the following section of this work, President Peña Nieto initially shifted the national security strategy from combating drug trafficking toward reducing violence.[25] With regard to the new security strategy, on May 2, 2013 President Obama stated that "it is obviously up to the Mexican people to determine their security structures and how it engages with other nations, including the United States."[26] He emphasized that his administration supports "the Mexican government's focus on reducing violence [and looks] forward to continuing […] good cooperation in any way that the Mexican government deems appropriate."[27]

Several cases of human rights abuses allegedly involving security officials, such as the disappearance of 43 students in the state of Guerrero (September 2014), have demonstrated the profound problems of corruption and impunity in Mexico. For this reason, Mexican government has received severe criticism, which has generated pressure to hasten the nation's criminal justice system transition.

2. *Mexican Government's Perspective*

Ribando observes that while "bilateral efforts have yielded some positive results, the weakness of Mexico's criminal justice system has hindered the effectiveness of some anti-crime efforts."[28] In this regard, Mexican government has taken some measures to advance in the implementation of the 2008 constitutional reform, which main purpose is the transition from an inquisitorial justice system to an oral, adversarial, and accusatory one in which human rights for victims and the accused should be protected. Although the deadline for this implementation is 2016, "the urgency of a properly functioning court system is clearer than ever."[29]

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[23] O'Neil, *supra* note 21, at 3.

[24] *Id.*

[25] *Id.*

[26] The White House, Office of the Press Secretary, *Remarks by President Obama and President Peña Nieto of Mexico in a Joint Press Conference*" Press Release, (Apr. 27, 2014). , *available at* http://www.whitehouse.gov/the-press-office/2013/05/02/remarks-president-obama-and-president-pena-nieto-mexico-joint-press-conf

[27] *Id.*

[28] Ribando, Cong. Research Serv., *supra* note 15, at 18.

[29] Duncan Wood, Director, Mexico Institute, Woodrow Wilson International Center for Scholars, testimony before the U.S. Senate Committee on Foreign Relations, Subcommittee

President Peña Nieto outlined a security strategy under which human rights are protected by implementing a policy that involves all levels of government and requires civic participation.[30] Although this security strategy does not abandon the fight against organized crime, its primary goal is to reduce violent crime.[31] Along with this emphasis on reducing violent crime, President Peña Nieto has adjusted the process and priorities of U.S.-Mexican efforts.[32]

Duncan Wood identifies two central themes in Mexico's security strategy: coordination and violence reduction.[33] In the first case, President Peña Nieto centralized the decision-making power into the Interior Ministry and brought the Office of Public Security under its purview. In addition to these structural changes, there has been coordination between all government ministries, and between the federal and state governments. In the second case, the Office of Prevention and Citizen Participation will "invest heavily in social programs and citizen engagement strategies at the local level in high risk communities."[34]

As a result of the structural changes of the security strategy, the Interior Ministry is now the principal entity through which the Mérida Initiative intelligence is channeled.[35] The Mexican government has requested increased assistance for judicial reform and prevention efforts, but has limited the U.S. involvement to certain operations related to law enforcement and intelligence.[36] Additionally, the Mexican government has supported efforts to enact gun control and to combat gun trafficking from the U.S. to Mexico, and has identified money laundering as a field in which bilateral efforts could be strengthened.[37]

To conclude, the Mexican government is focused on reinforcing the institutions and the coordination among the various actors in charge of security while using the bilateral mechanisms with the U.S. to exchange intelligence and technology. However, there are still important pending issues to be discussed in Mexico that could affect the broad security policy in the country, such as unified police (*mando único*) at the state level, prison reform, and marihuana legalization, just to mention the most important ones.

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on Western Hemisphere and Global Narcotics Affairs, Hearing on Security Cooperation in Mexico: Examining the Next Steps in the U.S.-Mexico Security Relationship (Jun. 18, 2013).

30 Ribando, Cong. Research Serv., *supra* note 15, at 7.

31 *Id.*

32 *Id*. at 18-19.

33 Wood, *supra* note 29.

34 *Id.*

35 Ribando, Cong. Research Serv., *supra* note 15, at 19.

36 *Id.*

37 *Id.*

3. *Issues in the U.S. Congress*

Many hearings had been held in the Congress in order to determine how the Mexican security strategy aligns with the U.S. interests and thus reevaluate some types of Mérida Initiative funding. According to the CRS, when examining the future of the Mérida Initiative, Congress may seek to ensure that those who implement the Initiative have adequately developed metrics to measure progress.[38] Considering the achieved level of progress, the Initiative may be deemed sufficient or insufficient; in the latter case, Congress might examine how it could be improved.[39] Also, in order to evaluate if the U.S. funding is complementing or duplicating Mexican efforts, Congress may compare how much funding programs in Mexico are receiving from the Peña Nieto government.[40]

In this regard, Shannon K O'Neil proposes that the funds from the U.S. government in the Mérida Initiative should prioritize civilian (versus military) law enforcement institutions, focus on judicial reform, and move beyond the federal level. She suggests focusing resources on local efforts because this is where insecurity and violence are most concentrated and a shift to the state level would enable policymakers to address the varying nature of the violence. Finally, she proposes, the U.S. should prioritize the modernization of the U.S.-Mexico border. These initiatives (many already part of the Mérida framework) would help to reduce violence in Mexico by strengthening police forces, court systems, and local communities.[41]

The 114th Congress has decided to continue funding the Mérida Initiative, as well as related domestic initiatives. In 2015, while the initial request for the Mérida Initiative was for $115 million, Congress ultimately provided $143.6 million. Additionally, some other funds were considered to support Mexican justice system's reform and its southern border program.[42]

The efforts under the Mérida Initiative framework to propel the judicial reform and prevent violence have taken on more urgency as Mexico has been struggling to prosecute those responsible for the serious cases involving allegations of human rights abuses that were previously described.[43]

In 2016, cooperation efforts are focused on securing Mexico's southern border, modernizing the U.S.-Mexico border, and developing a bilateral plan to combat heroin production and trafficking.[44] Analysts comment that the

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[38] Clare Ribando Seelke & Kristin M. Finklea, Cong. Research Serv., R41349, U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond 31 (Jun. 12, 2013).

[39] *Id.* at 32.

[40] *Id.*

[41] O'Neil, *supra* note 21, at 5-6.

[42] Ribando and Finklea, Cong. Research Serv., *supra* note 20, at summary.

[43] Clare Ribando Seelke, Cong. Research Serv., R42917, Mexico: Background and U.S. Relations 11 (Dec. 16, 2014).

[44] Ribando and Finklea, Cong. Research Serv., *supra* note 20, at 26.

U.S. Congress will probably monitor and evaluate how Mérida Initiative funding can best be used to help Mexico root out the corruption of its criminal justice system.[45]

In conclusion, while it is clear that the Mérida Initiative has significant challenges, it is also clear that it has become a unique bilateral instrument through which Mexican and U.S. institutions dialogue on issues of interest to both countries. This instrument has evolved with administration changes in both nations and it has been modified according to each country's objectives. Nonetheless, the dialogue caused by the Mérida Initiative creates communication channels that should be valorized and strengthened in order to face the serious security challenges of the region.

V. Economic Integration

1. *General Overview of U.S.-Mexico Relations*

Why is Mexican economic prosperity relevant for U.S. national interests? Mexico is the second largest export market and the third largest trading partner of the U.S.[46] Moreover, during the past five years Mexican investment in the U.S. has grown by over 35 percent.[47]

On the other hand, the U.S. is by far Mexico's largest trading partner, as well as the largest source of foreign direct investment.[48] Mexico is heavily dependent on the U.S. as an export market and as a source of tourism revenues, remittances, and investment.[49] For all these reasons, economic indicators in Mexico tend to follow economic patterns in the U.S.[50]

The U.S., Mexico, and Canada are partners in the North American Free Trade Agreement (NAFTA), which entered into force in 1994. The NAFTA "achieved broader and deeper market openings than any prior trade agreement anywhere in the world" by eliminating tariffs on all industrial goods; opening a broad range of services; providing a high standard of protection for patents, trademarks, copyrights, and trade secrets; as well as establishing clear rules to protect the rights of investors.[51] Eric Farnsworth points out that

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[45] *Id.*

[46] U.S. Department of State, *supra* note 2.

[47] *Id.*

[48] M. Angeles Villarreal, Cong. Research Serv., RL32934, U.S.-Mexico Economic Relations: Trends, Issues, and Implications summary (Aug. 9, 2012).

[49] Ribando, Cong. Research Serv., *supra* note 15, at 9.

[50] *Id.*

[51] Carla A. Hill, Co-Chair of the Inter-American Dialogue's Board of Directors and Chief Executive Officer of Hills and Company, statement before the House Committee on Foreign Affairs, Subcommittee on the Western Hemisphere: NAFTA at Twenty: Accomplishments, Challenges, and the Way Forward (Jan. 15, 2014).

"a joint production platform" has been developed among the three North American nations.[52]

In 2012, Mexico joined the negotiations of the Trans-Pacific Partnership (TPP), which will establish "new and higher standards for global trade."[53] This multilateral free trade agreement would likely enhance the economic links that Mexico has already developed with the U.S. and Canada under the NAFTA, for example additional reduction of barriers to trade and negotiation of key issues in various areas (such as agriculture, intellectual property rights, government procurement, regulatory cohesion, among others).[54]

The former Mexican Ambassador to the U.S. Arturo Sarukhan notes that the presence of the three North American countries in the TPP is crucial because it will enable them to discuss measures that face the challenges of "twenty-first-century free and fair trade, such as compatibility of regulatory systems, new environmental provisions, strong protection for intellectual property rights, and emerging areas such as digital technologies and e-commerce."[55]

Experts have called presidents Obama and Peña Nieto and their administrations to deepen their economic partnership, increase their productivity and competitiveness, and open opportunities for long-term growth and job creation.[56] In this regard, Luis Rubio suggests that "many of the opportunities for a truly competitive North America lie in combining American technological might and the progressively more productive and competitive Mexican manufacturing base."[57]

As part of their High-Level Economic Dialogue, on September 20, 2013, President Peña Nieto and Vice President Biden announced plans to heighten cooperation in border trade and security, so that the transit of people and trade will become faster, safer, and more efficient.[58]

2. *Mexican Government's Perspective*

Over the past three decades, Mexico has had a low economic growth record, with an average growth rate of 2.6%.[59] Economic volatility and events

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[52] Americas Society/Council of the Americas, Viewpoints: What Should the Top Priority be for U.S.-Mexican Relations? (Apr. 27, 2014)http://www.as-coa.org/articles/viewpoints-what-should-top-priority-be-us-mexican-relations.

[53] U.S. Department of State, *supra* note 2.

[54] Villarreal, Cong. Research Serv., *supra* note 48, at summary.

[55] Americas Society/Council of the Americas, *supra* note 52, Arturo Sarukhan contribution.

[56] Inter-American Dialogue, *supra* note 1, at iii.

[57] Rubio, *supra* note 3, at 5, 7.

[58] Maja Wallengren, "Biden, Mexico's Peña Nieto Inaugurate New Initiative to Enhance Trade, Cooperation," *International Trade Reporter* (Sept. 24, 2013), *cited in* Ribando, Cong. Research Serv., *supra* note 15, at 17.

[59] M. Angeles Villarreal, Cong. Research Serv., RL32934, U.S.-Mexico Economic Relations: Trends, Issues, and Implications 11 (Apr. 20, 2015).

such as the recession of 2001 or the global downturn of 2009 may have affected Mexico's ability to expand at a faster rate. Additionally, violence and security risks may hinder economic growth.[60] On the other hand, there are factors that may help Mexican economy to grow at a faster rate over the next decades, such as abundant natural resources, a young labor force, and proximity to the United States.[61]

Additionally, the impact of NAFTA –and other reforms to promote open markets and competition- in the Mexican economy is mixed. On the one side, large and medium companies have adopted new and more efficient methods of production by adapting their processes to international standards, situation that allows them to participate successfully in the global market and particularly in the American market. On the other side, there are micro and small businesses that are not integrated with foreign trade; in fact they normally exhibit low productivity and under-professionalization. As a consequence, the Mexican economy still has significant challenges in order to achieve a long-term sustainable economic growth. As McKinsey Global Institute points out:

> Special tax breaks for small enterprises, intended to protect traditional businesses, encourage companies to stay small, informal, and unproductive. Mexico can […] streamline regulatory processes to make compliance easier and examine the remaining labor-law inflexibilities that discourage full-time hiring. Most important of all, to discourage informality the country can redouble its efforts to enforce tax laws and other rules; today, informal businesses employ more than half of nonfarm workers. Mexico needs to become a place where formal, compliant companies grow and prosper –and inspire others to emulate their success- and where companies that do not play by the rules suffer the consequences.[62]

In this sense, President Peña Nieto has presented proposals for improving productivity in different levels of the Mexican economy. For example, through the establishment of the North American infrastructure fund, it is intended to increase the efficiency at the U.S.-Mexican border and deep North American integration.[63]

Similarly, on May 27, 2013 the federal government created a National Productivity Committee in an effort to "democratize productivity" that is defined as to "achieve a more efficient use of the resources used in an economic activity."[64] The democratization of productivity is attained when tools that

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[60] *Id.*

[61] *Id.*

[62] Eduardo Bolio et al., *A tale of two Mexicos: Growth and Prosperity in a Two-Speed Economy*, McKinsey & Company (Mar. 2014), (Apr. 27, 2014), http://www.mckinsey.com/insights/americas/a_tale_of_two_mexicos

[63] Ribando, Cong. Research Serv., *supra* note 15, at 16-17.

[64] "Democratizar la Productividad para Lograr un México Próspero," (Apr. 27, 2014)http://www.presidencia.gob.mx/democratizar-la-productividad-para-lograr-un-mexico-prospero/.

facilitate work and new technologies of information and communication are incorporated; when the organization of a company and its production processes are modernized; when there is greater access to credit; and when well trained and educated workers are abundant in the labor force.[65]

Although this set of objectives is very ambitious, the first steps could be given through the reforms promoted by President Peña Nieto's government. Their success certainly depends on their implementation (especially in the subnational level), the political equilibrium of the country, and the external shocks of the global economy.

3. *Issues in the U.S. Congress*

The bilateral trade relationship is of key interest to the U.S. Congress because of the circumstances previously described, such as Mexico's proximity, the strong cultural ties between the two countries, and the high volume of trade with Mexico.[66] According to Ribando, potential questions for congressional consideration include "how U.S.-Mexican trade and economic ties can be deepened, how efficiency on the border can be improved without compromising security, and how weaknesses in NAFTA can be addressed."[67]

The Congress faces numerous issues that could affect the economic relationship with Mexico.[68] For instance, the U.S. government has sought to go beyond current U.S. free trade agreements (FTAs) in its proposed rules for the TPP, which may have implications for NAFTA in numerous areas. If agreement is reached, for example, the three NAFTA countries would need to adhere to stronger labor and environmental provisions and more stringent rules regarding intellectual property rights.[69]

On the other hand, the Congress will probably continue monitoring NAFTA's institutions: the Border Environment Cooperation Commission and the North American Development Bank.[70] Congress has also been observing the implementation of NAFTA, the effects of NAFTA on the economies of both nations, and the resolution of NAFTA-related trade disputes.[71]

With regard to the structural reforms that have been passed in Mexico with the purpose of helping reverse years of slow economic growth, as it was previously stated, the administration of President Peña Nieto will need to focus on the implementation of these reforms, in conjunction with appropriate

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65 *Id.*

66 Ribando, Cong. Research Serv., *supra* note 15, at 16.

67 *Id.* at 18.

68 *Id.* at 17.

69 *Id.*

70 *Id.*

71 *Id.* at 16.

measures to boost economic growth, create more jobs, and fight informality in the labor markets, among other challenges.

In this sense, a crucial interest for the 114th Congress is to monitor the implementation policies for the economic reforms in Mexico by addressing some relevant issues, such as the extent to which the energy reforms will provide opportunities for U.S. oil companies, the improvement that the reforms will cause in the Mexican economic performance, and the complementary measures that Mexican government should take to stimulate economic growth.[72]

VI. Migration

1. *General Overview of U.S.-Mexico Relations*

Immigration is a fundamental aspect of the U.S.-Mexico relationship. History and geography have made the U.S.-Mexico migration flow the largest in the globe.[73] Mexicans are by far the largest group of immigrants in the U.S., accounting for about 12 million people in 2012 (30% of all U.S. immigrants).[74]

Undoubtedly, Mexicans are uniquely affected by U.S. immigration policies: they are "the largest group of aliens subject to U.S. immigration control and border security policies, the largest group of lawful immigrants within permanent and temporary visa categories, and the majority of unauthorized migrants within the United States."[75] Taking these facts into consideration, both governments have acknowledged the significance of appropriately regulated immigration.[76]

According to an analysis of government data from both countries by the Pew Hispanic Center, a project of the Pew Research Center (2012), after four decades that brought about 12 million immigrants, the net migration flow from Mexico to the U.S. has stopped and may even have reversed.[77] The numbers of Mexican people entering the U.S. are now about the same as those leaving.[78] The standstill of Mexican migration appears to be the result of many factors, such as the weakened U.S. job and housing construction markets, the heightened border enforcement, the increased dangers associa-

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[72] Villarreal, Cong. Research Serv., *supra* note 59, at 31-32.

[73] Marc R. Rosenblum et al., Cong. Research Serv., R42560, Mexican Migration to the United States: Policy and Trends summary (Jun. 7, 2012).

[74] Ribando, Cong. Research Serv., *supra* note 15, at footnote 40.

[75] Rosenblum, Cong. Research Serv., *supra* note 73, at summary.

[76] Inter-American Dialogue, *supra* note 1, at 2.

[77] Jeffrey S. Passel et al., *Net Migration from Mexico Falls to Zero—and Perhaps Less*, Pew Research Center, (Apr. 27, 2014) http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/

[78] Inter-American Dialogue, *supra* note 1, at 7-8.

ted with illegal border crossings, a rise in deportations, and the decline in Mexico's birth rates.[79]

At the same time, the number of Mexican-Americans in the U.S. (both immigrants and U.S.-born residents of Mexican ancestry) is continuing to rise. In fact, between 2000 and 2010 births surpassed immigration as the main reason for growth of the Mexican-American population. In 2010, this population numbered 33 million.[80]

Mexicans are currently dispersed throughout all U.S. states. Compared to other migrants, the Mexican born in the U.S. are more likely to be younger, have lower education levels, and work in lower-skilled occupations.[81] Additionally, in 2012 just over half (51%) of all Mexican immigrants in the U.S. were unauthorized.[82] Regarding this last characteristic, the sharp downward trend in net migration from Mexico previously described has led to the first significant decrease in at least two decades in the unauthorized Mexican population.[83]

What is the best approach to manage the complex issues related to immigration? The Inter-American Dialogue suggests that U.S. and Mexican policies should be directed toward increasing the role of immigration in economic expansion and job growth in both countries, ensuring the respect for the individual rights of immigrants, and curtailing violations of immigration law.[84] In a similar way, the former U.S. Ambassador to Mexico James Jones suggests that the U.S. must pass comprehensive immigration reform that recognizes the reality regarding labor needs and legal protections for immigrants.[85]

2. *Mexican Government's Perspective*

Mexican government has worked with U.S. law enforcement to combat alien smuggling and human trafficking, and has pledged to enforce legal emigration, increase security in both its northern and southern borders, and create more working opportunities so that fewer individuals emigrate.[86] Nevertheless, corruption remains endemic within the National Migration Institute (office within the Interior Ministry in charge of enforcing immigration

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79 Passel, *supra* note 77.

80 *Id.*

81 Rosenblum, Cong. Research Serv., *supra* note 73, at summary.

82 Passel, *supra* note 77.

83 *Id.*

84 Inter-American Dialogue, *supra* note 1, at 2.

85 Americas Society/Council of the Americas, *supra* note 52, James Jones contribution.

86 Ribando, Cong. Research Serv., *supra* note 15, at 13.

laws), Mexico's southern border continues to be insecure, and a lack of employment opportunities persists.[87]

On the other hand, Mexican government has protested that the use of force by U.S. agents on the border is excessive, has defended the rights of Mexican migrants in the U.S., and has challenged state laws against illegal immigration.[88] Accordingly, the Mexican government has filed amicus curiae briefs in lawsuits seeking to block the immigration laws in Arizona, Alabama, Georgia, South Carolina, and Utah.[89]

Both governments are concerned about the recent increases in Mexicans seeking asylum in the U.S. due to threats of violence in their communities, as well as the rise in Central American migrants in transit through Mexico.[90] Besides, migrants from Mexico and Central America have become victims of abuses by organized crime, sometimes in collusion with corrupt Mexican officials.[91]

Additionally, Mexican government has been criticized for failing to grant asylum to Central Americans, especially unaccompanied minors. This crisis was particularly serious during 2014. Between January and August of that year, Mexican authorities reportedly apprehended more than 15,795 minors.[92] This situation implies a double challenge for the country because while it demands better treatment for Mexican immigrants going to the U.S., its authorities are not giving adequate treatment to Central American migrants crossing the country.

President Peña Nieto has pledged his support for efforts to enact a comprehensive immigration reform and is likely to continue efforts to improve border security, enforce its migration policy in a humane way, and create jobs.[93] Therefore, it seems that the official focus towards migration has to do with improving economic conditions in Mexico and increasing awareness about human rights.

3. *Issues in the U.S. Congress*

Despite the fact that President Obama has put immigration reform at the top of his second-term legislative agenda,[94] it has been difficult to discuss and

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87 *Id.*

88 *Id.*

89 *Id.* at footnote 47.

90 *Id.* at 13-14.

91 Jenny Johnson, *Perilous Journey: Kidnapping and Violence Against Migrants in Transit through Mexico*, Latin American Working Group (Oct. 2013), http://www.lawg.org/component/content/article/1267/1267, *cited in* Ribando, Cong. Research Serv., *supra* note 15, at 14.

92 Ribando, Cong. Research Serv., *supra* note 43, at 23.

93 Ribando, Cong. Research Serv., *supra* note 15, at 13.

94 Inter-American Dialogue, *supra* note 1, at 8.

pass a comprehensive reform due to the weak political equilibrium in the Congress. Specifically, the executive actions that President Obama announced in November 2014 haven't been enacted because they were challenged in the courts of several states. In February 2015, a federal judge in Texas blocked those actions. In January 2016, the U.S. Supreme Court agreed to take the case through which the federal government is fighting the injunction.[95]

The executive actions of President Obama were targeted to improve the immigration system through the expansion of the eligible population for the Deferred Action for Childhood Arrivals (DACA) program and the launch of a new one: Deferred Action for Parental Accountability (DAPA). This program would have allowed parents of U.S. citizens and lawful permanent residents to request also a deferred action against removal and would have allowed them to apply for work authorization, continue studying, among other rights.

Even if these executive actions were implemented to their full extent, they only constitute a partial solution in an immigration system that needs profound changes simply because today there is a different reality and the legal framework has not been adapted to it.

In this regard, The Inter-American Dialogue proposes that a general reform of U.S. immigration legislation "could multiply the benefits of immigration" and that a new policy in this field would open opportunities for millions of individuals and would benefit both economies.[96] It also observes that the decisive impact of the "Latino vote" on the U.S. presidential election has significantly increased the possibility for a "comprehensive reshaping of immigration policy."[97] Both Republicans and Democrats, it explains, have strong incentives to tackle immigration because they are aware of "the unprecedented turnout of Latino voters and the fact that their numbers will be substantially larger in subsequent elections."[98]

In this sense, the Development, Relief, and Education for Alien Minors Act (DREAM Act) is a proposed federal law that authorizes the Secretary of Homeland Security to cancel the removal of certain undocumented youth by giving them the possibility to obtain permanent legal status and even citizenship.

Several versions of the DREAM Act have been introduced in the U.S. Congress during the last 14 years. The earliest versions were not brought to a vote. In 2006, the DREAM Act was included in a bipartisan comprehensive immigration reform act that also failed to win congressional support. The bill had its best chance of passing during 2010 but it suffered a setback in the Senate.[99]

More recently, during the last legislative period (113th Congress), a new version of the DREAM Act was included in the Senate's immigration reform

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[95] Citizen Path, *DAPA and Expanded DACA Status* (2016), *available at* https://citizenpath.com/dapa-expanded-daca-status/

[96] Inter-American Dialogue, *supra* note 1, at 7.

[97] *Id*. at 8.

[98] *Id*.

[99] *See* Schmid, Carol L., *Undocumented childhood immigrants, the Dream Act and Deferred Action for Childhood Arrivals in the USA,* 693 Int'l J. Soc. & Soc. Pol'y (2013).

bill: Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), approved in June 2013. If the House of Representatives approves it, this bill would –among other things- approximately double recent investments in border security; establish three programs designed to potentially offer lawful residency to most existing unauthorized immigrants; and revise rules for permanent and temporary immigration to the U.S.[100]

In the House, five different immigration bills received committee attention in 2013.[101] In May, the House Homeland Security Committee reported favorably on the Border Security Results Act of 2013 (H.R. 1417), which would require the Department of Homeland Security to develop a strategy to secure the southern border, along with new border security metrics. In June, the House Judiciary Committee marked up four bills.[102] First, the Strengthen and Fortify Enforcement Act (SAFE Act, H.R. 2278) would encourage states and localities to play a larger role in immigration enforcement and heighten penalties for violations of federal immigration law. Second, the Agricultural Guest Worker Act (H.R. 1773) would create a new temporary agricultural worker visa designed to be more flexible than the existing one. Third, the Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act (SKILLS Visa Act, H.R. 2131) would expand permanent and temporary visa programs for high-skilled workers. Finally, the Legal Workforce Act (H.R. 1772) would require employers to use the E-Verify electronic employment eligibility verification system and would create a larger role for states in the enforcement of employment-related immigration law.[103]

With the purpose of modernizing the U.S.-Mexico border, during the last years, the U.S. Congress has authorized pilot programs to enter into public-private partnerships with certain localities, permitted the private sector to fund improvements in border facilities and port services, and provided funding for additional customs inspectors and infrastructure.[104]

As part of the debate about immigration policy and border issues, Ribando notes that one question that may arise is if Mexico should be treated as a "special case" on the immigration field given Mexico's status as the U.S. neighbor.[105] In this regard, the Latin-American Dialogue suggests that a special bilateral arrangement governing the cross-border migration flow merits consideration by both countries because the two of them "have important stakes, both political and economic, in a predictable, regulated migration stream."[106]

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100 Ribando, Cong. Research Serv., *supra* note 15, at 14.

101 *Id.*

102 The four Judiciary Committee bills were referred to other committees with jurisdiction over them. However, House Members appear to be divided regarding which of these bills should be brought to the House floor (*Id.* at 15).

103 *Id.* at 14-15.

104 Ribando, Cong. Research Serv., *supra* note 43, at 22-25.

105 *Id.* at 25.

106 Inter-American Dialogue, *supra* note 1, at 9.

VII. Energy

1. *General Overview of U.S.-Mexico Relations*

Although Mexico has been a consistent and top crude oil supplier to the U.S., Mexico's oil production has declined significantly in recent years.[107] As it will be analyzed in the next section of this work, in December 2013 President Peña Nieto signed into law a constitutional reform related to the energy sector with the purpose of reversing those declines. This historic reform permits Mexico's state oil company, Petróleos Mexicanos (Pemex), to partner with international companies to propel production.[108] Depending upon the provisions and implementation of the secondary legislation, significant investment opportunities for U.S. companies could be created, the U.S.-Mexican energy trade could be increased, and North American competitiveness could be bolstered.[109]

The future of oil and natural gas production in Mexico is crucial for both Mexico's economic growth and U.S. energy security, which is a "a key congressional interest."[110] As a result, the U.S. has a national interest in ensuring that Mexico "is economically vibrant and politically stable" and U.S. policy makers are likely to closely monitor the implementation of the Mexican reforms on the energy sector.[111]

Energy sufficiency has been one of the key long-term issues of interest for the U.S. Therefore, a change in its neighbor regulation towards oil, gas, and other fuels not only represents an opportunity for American companies to sell technology and infrastructure or invest in productive partnerships, but also means securing new fuel sources for the whole continent. This will strengthen both the Mexican and American energy security by lowering their dependence from other markets.

2. *Mexican Government's Perspective*

The Mexican energy reform bill took effect on January 1, 2014 and "formalizes the most liberal energy regime in the country's history."[112] The

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[107] Clare Ribando Seelke et al., Cong. Research Serv., R43313, Mexico's Oil and Gas Sector: Background, Reform Efforts, and Implications for the United States summary (Jan. 6, 2014).

[108] *Id.* at 1.

[109] *Id.* at summary.

[110] *Id.*

[111] *Id.* at 1.

[112] David Enríquez, *Mexico's Energy Reform: A Game Changer in the Nation's History (An Upstream Perspective)*, Mexico Institute of the Woodrow Wilson International Center for Scholars, at 1 (2014), *available at* http://www.wilsoncenter.org/publication/mexico%E2%80%99s-energy-reform-game-changer-the-nation%E2%80%99s-history-upstream-perspective-0.

reform addresses three key aspects: authorizing private investment for exploration and extraction of hydrocarbons under contracts with the federal government; allowing private investment for electricity generation, commercialization, transmission and distribution under contracts with the Electricity Federal Commission; and permitting oil processing and refining by private companies as well as gas processing, oil and oil derivatives transportation, storage and distribution.[113]

Although the constitutional provision that establishes the hydrocarbons' ownership by the country (and thus prohibits concessions) remained intact, the reform unfolded a new oil and gas strategic area and offered new business opportunities.[114]

According to the bill's transitional clauses, Pemex and the Electricity Federal Commission will progressively become "productive state companies" that will be able to compete with other enterprises. For this reason, their workforce and investment priorities must be restructured. Both companies will be provided with greater managerial and technical autonomy and will be subject to financial balance and income taxes as any other private company.[115]

As a consequence of this change, Pemex will pass its oil and gas traditional power to the National Hydrocarbons Commission as the new manager of the resource, and to the Energy Ministry as the policy maker.[116] Similarly, the Electricity Federal Commission will pass its energy generation dispatch function to Center for Energy Control, which is the new autonomous agency that will be the technical operator of the electricity in the country. These situations exemplify the key challenge that Mexico has in strengthening the role that regulators have in the new energy market.

The bill introduces four different types of contracts for exploration and production: service contracts under which companies are paid for activities done on behalf of the state; profit-sharing contracts, with a compensation based on a percentage of profit; production sharing contracts, with a compensation based on a percentage of production; and license contracts that enable a company to obtain ownership of the oil or gas at the wellhead after it has paid taxes.[117] The bill also allows as a fifth alternative any combination of the above-mentioned contracts. Although this provision may allow a great similarity with the concession model, such flexibility depends on the secondary legislation to implement the reform.[118]

As this provision, many important details left for the secondary laws are crucial for attracting oil companies to Mexico. For instance, this legislation

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113 *Id.* at 1-2.

114 *Id.* at 2.

115 *Id.* at 3.

116 *Id.*

117 *Id.* at 2; *see also* Ribando et al., Cong. Research Serv., *supra* note 107, at 4.

118 Enríquez, *supra* note 112, at 2.

needs to define the terms under which private firms may be involved in upstream operations, establish transparency and anti-corruption measures, and determine the duties of the regulatory entities.[119]

In conclusion, the major challenge in the energy sector is to achieve an effective regulation that provides clear rules to all national and international actors and incentivizes investment, while Mexico continues to strengthen internal economic and security conditions to ensure the operability of the legal changes.

3. *Issues in the U.S. Congress*

According to the CRS, the opening of the Mexican oil and natural gas sector to foreign investors poses substantial changes in the U.S.-Mexico relationship that may have advantages and disadvantages for both nations.[120] Reversing Mexico's production decline would add more oil to the global market, heighten U.S. energy security, and contribute to North American energy independence. Besides, depending upon the terms and implementation of the secondary legislation, U.S. companies could be benefited from the opening of Mexican resources to foreign investment. While this could be true for some sectors, U.S. natural gas producers who export natural gas to Mexico might lose their market.[121] For these reasons, the U.S. Congress has "legislative and oversight interests in examining the potential implications" of the Mexican energy reform.[122]

Another crucial congressional interest has been the management of energy resources in the deep-water areas of the Gulf of Mexico.[123] In 2012, the U.S.-Mexico Transboundary Hydrocarbons Agreement[124] was signed to start an energy partnership and facilitate joint development of oil and natural gas in part of the Gulf of Mexico.[125] Under the agreement, the two countries establish a framework for jointly developing 1.5 million acres along a 550-mi-

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[119] David L. Goldwyn, *Mexico Rising: Comprehensive Energy Reform at Last?* Atlantic Council (Dec. 2013), *http://www.atlanticcouncil.org/images/publications/Mexico_Rising.pdf, cited in* Ribando et al., Cong. Research Serv., *supra* note 107, at 5.

[120] Ribando et al., Cong. Research Serv., *supra* note 107, at 15.

[121] *Id.*

[122] *Id.* at summary.

[123] Curry L. Hagerty & James C. Uzel, Cong. Research Serv., R43204, Legislation Proposed to Implement the U.S.-Mexico Transboundary Hydrocarbons Agreement summary (2013).

[124] Officially titled as "Agreement between the United States and Mexico Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico."

[125] It is estimated that this area of international waters contains about 172 million barrels of oil and 304 billion cubic feet of natural gas.

le border and agree to dismantle a treaty-based moratorium on oil and gas development agreed to in 2000.[126]

U.S. legislation to approve and implement the agreement includes H.R. 1613 (passed by the House on June 27, 2013) and S. 812 (passed by the Senate on October 14, 2013).[127] Committee chairs and ranking members in both chambers have pledged expeditious approval of the proposed implementing legislation.[128] Opponents have expressed objections to certain provisions of H.R. 1613 alleging that they involve issues beyond implementing the agreement.[129]

In addition, legislation dealing with U.S. approval processes for North American energy infrastructure has been introduced (H.R. 3301).[130] This is particularly relevant given that the opening of Mexico's oil and natural gas sector could "provide opportunities for U.S. companies and investors involved in the hydrocarbons sector, as well as infrastructure and other oil field services."[131]

Accordingly, Congress oversight may focus on the implementation of the Transboundary Hydrocarbons Agreement; the extent to which Mexico is developing independent and capable regulators for the energy sector; and the fairness of the terms Mexico offers to private companies interested in investing.[132]

VIII. Other Relevant Issues

1. *Human Rights*

While some bilateral issues require immediate congressional attention in order to advance, others "may lend themselves more to long-term oversight."[133] Ribando suggests that congressional concerns about improving human rights conditions and strengthening democracy in Mexico fall into the second category.[134]

Concerns about human rights conditions in Mexico have intensified as U.S. security assistance to Mexico has increased under the Mérida Initiative.[135] With the purpose of ensuring that U.S.-funded anticrime efforts are

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126 Hagerty & Uzel, Cong. Research Serv., *supra* note 123, at summary.

127 *Id.*

128 *Id.* at 3.

129 *Id.*

130 Ribando, Cong. Research Serv., *supra* note 15, at 22.

131 *Id.*

132 *Id.*

133 *Id.* at 12.

134 *Id.*

135 *Id.* at 20.

carried out in a way that respects human rights, Congress has conditioned U.S. assistance to the Mexican military and police on compliance with certain human rights standards and has provided funding to protect vulnerable groups (such as the press and human rights defenders) and to support human rights training for security forces.[136]

As it was previously noted, U.S. assistance to Mexico has increasingly focused on supporting Mexican government's efforts to reform its justice system. Particularly, Congress has targeted money to support the transition from an inquisitorial justice system to an oral, adversarial, and accusatory one. Moreover, the U.S. Agency for International Development (USAID) expanded its program to support judicial reform from seven to twenty states.[137]

In this sense, human rights conditions in Mexico are likely to constitute an important oversight issue in the U.S. Congress. For instance, Congress may choose to increase Mérida Initiative funding for ongoing human rights programs (such as the above-mentioned training programs) or for newer efforts (such as support for human rights organizations).[138]

2. *Border Issues*

The U.S. Congress must consider the U.S.-Mexico border situation in both policy- and law-making processes. As it has been studied here, interdependence is an essential feature of the U.S.-Mexico relationship. This interdependence is particularly pronounced along the border.[139] In fact, the complex mix of local, state, national, and international policy issues of the border has been described as the best counterexample to the traditional notion that domestic politics are distinct from foreign policy.[140]

At the border, the U.S. and Mexico must manage complex problems and shared opportunities regarding a wide variety of issues, such as natural resources, transnational criminal groups, and trade. Therefore, border management has implications that go "far beyond the border region itself."[141] Given the immense trade flows, misguided policies can impose tens of billions of dollars of costs on consumers each year. Poor security coordination along the frontier could prove deadly and, in some cases, disastrous. Mismanagement

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136 *Id.*

137 Ribando, Cong. Research Serv., *supra* note 43, at 17-18.

138 *Id.*

139 Pacific Council on International Policy & Comexi (Consejo mexicano de Asuntos Internacionales), Managing the United States-Mexico Border: Cooperative Solutions to Common Challenges 8 (2009).

140 Woodrow Wilson International Center for Scholars et al., The State of the Border Report: A Comprehensive Analysis of the U.S.-Mexico Border 4(Woodrow Wilson International Center 2013) (2013).

141 *Id.* at 5.

of shared resources can lead to scarcity and environmental degradation.[142] Consequently, the public-policy design for this area needs a comprehensive and careful analysis.[143]

Given these circumstances, "cooperative binational solutions are often the only solutions."[144] While the U.S. State Department and Mexico's Foreign Ministry formally manage federal government-to-government interaction, a number of federal and state agencies are also involved in the border management. Interagency coordination is crucial and can be difficult because local governments must conduct international work with their counterparts in the U.S. or Mexico.[145]

The ten U.S. and Mexican border states actively participate in the border liaison mechanisms, which operate in "sister city" pairs and have proven effectiveness while dealing with a variety of problems.[146] Binational collaboration in this regard not only benefits localities but also makes "vital contributions to international stability and prosperity."[147] This shows that the most important public policy or common problems along the border usually have their solution in regional agreements and not in policies dictated from the center of the federal system.

3. *Water Sharing*

Pursuant to binational agreements, the U.S. and Mexico share the Colorado River and Rio Grande.[148] Compliance with these agreements has become more complicated as water demands nears or exceeds available supplies.[149]

The Colorado River flows through seven U.S. states before reaching Mexico and 97% of the basin is in the U.S. A 1944 Water Treaty requires the U.S. to annually provide Mexico with 1.5 million acre-feet of Colorado River water (about 10% of the river's average flow). Under the treaty, disputes can be resolved through amendments called "minutes." Minute 319 (agreed to in 2012) "provides for a bilateral basin water management, storage, and environmental enhancement effort."[150] On the other hand, Rio Grande is go-

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142 *Id*. at 8.

143 *Id*. at 4.

144 *Id*. at 5.

145 *Id*. at 5-6.

146 U.S. Department of State, *supra* note 2.

147 Michael Dear, *Building Connections (Not More Walls) Along the U.S.-Mexico Border*, The Huffington Post, (2013), *available at* http://www.huffingtonpost.com/michael-dear/building-connections-not-more-walls_b_3275005.html

148 Nicole T. Carter et al., Cong. Research Serv., R43312, U.S.-Mexico Water Sharing: Background and Recent Developments summary (Nov. 19, 2013).

149 *Id*.

150 *Id*.

verned by two different agreements. Deliveries to Mexico in the northwestern portion of the basin are laid out in the 1906 Convention, while deliveries for the southeastern portion occur under the 1944 Water Treaty.[151]

Some Members of Congress are concerned about Mexico's 1944 Water Treaty compliance, the resulting economic impacts, and the adequacy of U.S. government efforts to press Mexico to comply with its treaty obligations.[152] Moreover, various bills[153] include provisions to require further reporting on Mexico's efforts to meet its Rio Grande water deliveries and on the implementation of Minute 319 regarding the Colorado River.[154]

4. *Regional and Global Issues*

U.S.-Mexico cooperation is increasing on regional and global issues. Diverse matters in the international arena deeply concern both countries, such as security threats in Central America, reforming multilateral organizations, building new trade partnerships worldwide, and problems of nuclear nonproliferation and climate change.[155] As the Inter-American Dialogue notes, even if the two nations disagree on some of these issues, "they remain natural partners" and the U.S. and Mexico "can best meet the current challenges of global instability and uncertainty by stepping up efforts toward economic integration."[156]

IX. Concluding remarks

— The relations between the U.S. and Mexico are complex because they involve far-reaching commercial and cultural bonds. This bilateral relationship has a direct impact on the lives of millions of persons. Given the interdependence between the two countries, the success of Mexico in resolving its difficulties has a major impact upon the U.S. For these reasons, U.S.-Mexico relations are a key interest for the U.S. Congress.

— U.S.-Mexico relations have been evolving and issues in the bilateral agenda have been steadily expanded. From an emphasis on immigration issues, economy or security (more recently), now other critical is-

151 *Id.*

152 *Id.* at 16-17.

153 H.R. 1863, H.R. 2307, S. 1125, and H.R. 2642 (2013 Farm Bill, as passed by the House).

154 Carter et al., Cong. Research Serv., *supra* note 148, at summary.

155 Inter-American Dialogue, *supra* note 1, at iii.

156 *Id.*

sues appear, such as natural resources or energy, which will probably dominate the dialogue between the two nations during the next years.

— Under the administration of President Peña Nieto, a variety of significant structural reforms have been enacted. Since these reforms were made on the constitutional level, they must be translated into specific laws and regulations. As Mexico is experiencing this major transformation, its relations with the U.S. are also evolving. This transition will probably imply new challenges with regard to different aspects of the bilateral relationship.

— In the security field, President Peña Nieto's new strategy is focused on reducing violent crime and the process and priorities of U.S.-Mexican efforts had been adjusted in that sense. President Obama has supported these adjustments. If the Congress finds that the Mexican security strategy has no longer the same priorities as the U.S., Congress may consider reevaluating certain types of Mérida Initiative funding.

— Mexican economic prosperity is relevant for the U.S. national interests and, on the other hand, Mexican economy is heavily dependent on the U.S. The Congress faces numerous issues that could affect the economic relationship with Mexico, such as the U.S. government proposal of going beyond current U.S. free trade agreements in its proposed rules for the TPP; the monitoring of NAFTA's institutions and its effects on the economies of both nations; and the resolution of NAFTA-related trade disputes.

— Mexico's role in the U.S. immigration system creates a number of both opportunities and challenges. Mexicans are uniquely affected by U.S. immigration policies. It has been suggested that a comprehensive immigration reform that recognizes labor and legal protection needs of the immigrants must be passed. Nonetheless, if an integral reform is not attainable in the short term, immigration will still be receiving substantial attention in both chambers of the Congress.

— With regard to the energy sector, the future of oil and natural gas production in Mexico is crucial for U.S. energy security and for this reason is a relevant congressional interest. Depending on the provisions and implementation of the secondary legislation of Mexico's constitutional reform, significant investment opportunities for U.S. companies could be created, the U.S.-Mexican energy trade could be increased, and North American competitiveness could be bolstered. Congress is likely to study the fairness of the terms Mexico offers to private companies interested in investing. Additionally, congressional oversight may focus on the implementation of the Transboundary Hydrocarbons Agreement.

— Finally, the complexity of the U.S.-Mexico relationship is reflected in the multiplicity of important topics that should be taken into account in the policy- and law-making processes. These topics will definitively

have a crucial weight and presence in the bilateral dialogue. Firstly, human rights conditions in Mexico will continue to be an important issue in the U.S. Congress. Secondly, Congress must consider the U.S.-Mexico border situation in order to anticipate and solve problems that could arise from the intense economic and cultural exchanges that happen in the border area. Thirdly, Congress may monitor Mexico's compliance of the binational agreements under which the U.S. and Mexico share the Colorado River and Rio Grande. Lastly, U.S.-Mexico cooperation is also increasing on diverse regional and global matters.

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THE CUBAN REGIME AFTER A DECADE OF RAÚL CASTRO IN POWER

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Abstract. *The leadership and ideology of the Cuban regime have changed since Raúl Castro came to power. Fidel Castro's charismatic authority was replaced by a collegial arrangement, and the centrally planned economy has admitted market socialist features. The main argument of this article is that both changes are related as the decline of charisma increased the relative weight of performance-based legitimacy. Drawing on the literature of communist survival, I claim that Cuba has thus changed from a charismatic post-totalitarian regime to a maturing one –thus joining China and Vietnam in the same regime-type, although Cuba has not (yet) restored capitalism.*

Keywords: *Cuba; Raúl Castro; leadership; ideology; charisma; market socialism*.

Resumen. *El liderazgo y la ideología del régimen cubano han cambiado desde que Raúl Castro llegó al poder. La autoridad carismática de Fidel Castro fue reemplazada por un acuerdo colegiado, y la economía de planificación centralizada ha adquirido características de un socialismo de mercado. El argumento principal de este artículo es que ambos cambios están relacionados ya que la*

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disminución del carisma aumentó el peso relativo de la legitimidad basada en la actuación. Partiendo de la literatura de la supervivencia comunista, se sostiene que Cuba ha transitado de un régimen postotalitario carismático a uno maduro –uniéndose así a China y Vietnam en el mismo tipo de régimen, aunque Cuba no restablecido (todavía) el capitalismo.

Palabras Clave: *Raúl Castro, liderazgo, ideología, carisma, socialismo de mercado.*

Table of Contents

I. Introduction

It has been a decade since Raúl Castro succeeded his brother Fidel as President of Cuba and First Secretary of the Cuban Communist Party (PCC, by its acronym in Spanish). On the 31st of July 2006, after falling ill, Fidel Castro wrote a *Proclamation* that "provisionally" delegated power to Raúl.[1] In 2008, however, Raúl's takeover became definitive. Soon after, he launched a reform process that reverberates until today. Two Party Congresses have been held since then (in 2011 and 2016), where the main goal has been to 'update' the Cuban 'economic and social model'. That the post-Fidel transition has tested the Cuban political system is an understatement.

However, most international attention on Cuba has recently focused in the normalisation of its relations with the United States –a diplomatic breakthrough that Raúl Castro and Barack Obama announced in December 2014 in simultaneous speeches in Havana and Washington, respectively. Although this development says more about the United States changing its approach

[1] Fidel Castro, Proclamation by the Commander in Chief to the People of Cuba (2006), http://ow.ly/FeKCs (last visited Aug 8, 2016).

towards Cuba rather than the other way around,[2] this does not mean that Cuba has not changed at all under Raúl Castro. Quite the contrary, Washington has noted that Cuba *has* changed, which is why it has modified its diplomatic stance in the first place –now it pursues its interests by trying to engage the expanding Cuban private sector.[3] The fact that the new US-Cuba relations have only emerged eight years after Fidel Castro stepped down and Raúl Castro took over, must serve as a reminder that the internal factors shaping Cuba deserve equal if not more attention than the external ones in order to understand *how* and *why* the Cuban polity has changed. Such a premise has laid the foundation of this article.

Drawing on the literature of post-totalitarian rule, I argue that between 2006 and 2016 Cuba experienced a change from a charismatic post-totalitarian regime to a maturing post-totalitarian one. The basic argument behind these concepts (that I will later explain) is that the loss of Fidel Castro's charismatic authority –he stepped down in 2006– pushed forward economic performance as a compensatory source of legitimacy, which helps to explain the market reforms adopted by Raúl Castro.

This characterisation is opposed to one proposed by Steven Saxonberg, who draws on the same literature.[4] This author has provided a sophisticated framework to understand the survival of communist rule in Cuba, China, North Korea and Vietnam. His comparative study on a multi-region range of cases (fourteen, as he also discussed many non-survival cases) is an important contribution to the analysis of communist political systems. This said, I contend that Saxonberg has poorly applied his own model to understand the survival of Cuba, which he equates to North Korea on the ground that in both cases the Soviet-style economy prevails and power has been transferred within the same family –from father to son, in Pyongyang; and from brother to brother, in Havana. I refute this take on the Cuban regime –valid for Saxonberg as far as 2013– not least because Raúl has introduced market reforms that have revised the previous economic ideology and because beyond Raúl and Fidel there is no other Castro family member in the line of succession.

In this article I thus re-apply Saxonberg's own theory to the analysis of contemporary Cuba. In doing so, nevertheless, I challenge some assumptions in regards to both his evolutionary theory of communist rule and his conceptualisation of the Cuban case.

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[2] Alessandro Badella, *Obama and US Democracy Promotion in Cuba: New Strategies, Old Goals?*, 3 Caribbean Journal of International Relations and Diplomacy 7–35 (2015); Samuel Farber, *The Alternative in Cuba*, Jacobin, 2014, http://ow.ly/Sd6Bu (last visited Mar 11, 2015).

[3] The same day that the United Sates and Cuba announced the normalisation of relations, Washington explicitly declared that it "will seek to empower the nascent Cuban private sector". See White House, Charting a New Course on Cuba (2014), https://goo.gl/rsF2fz (last visited Aug 8, 2016).

[4] Steven Saxonberg, Transitions and non-transitions from communism : regime survival in China, Cuba, North Korea and Vietnam (Cambridge University Press, 2013).

The Sixth Congress of the PCC held in April 2011 marked the culmination of Raúl Castro's consolidation of power. By then, 1) the leadership had already lost the charismatic character granted by Fidel Castro's decades-long tenure; and, 2) the ruling ideology had started a departure from the centrally planned economy (CPE). The key argument of this article is that both changes are related as the loss of charisma helped to increase the weight of economic performance, thus re-shaping the regime's claims to legitimacy.

As Raúl Castro has confirmed that he will step down in 2018 –when his second five-year presidential tenure comes to an end, the contours of the new regime analysed here are arguably those of what will be the initial conditions of the post-Castro era.

In the next section, I provide the theoretical framework of this study. I will define Cuba as Raúl Castro 'received' it –i.e. a charismatic post-totalitarian regime– and I will theorise why the decline of charisma can boost a performance-based legitimacy. In the third section, I discuss *how* the Cuban regime has changed. I argue that the charismatic leadership turned into a collective arrangement and that the ideology swerved from CPE orthodoxy to a market socialist approach. In the fourth section, I explain *why* these changes are related in the re-equilibration of the regime's legitimacy, which I will situate in (abridged) comparative perspective. Cuba is a new maturing post-totalitarian regime, thus joining contemporary China and Vietnam within the same regime-type… without the restoration of capitalism (for now).

II. Re-focusing communist survival in Cuba

1. *Defining the problem*

In their seminal work, Linz and Stepan argued that 20th-century regimes could be divided into five ideal types: democracy, authoritarianism, totalitarianism, post-totalitarianism, and sultanism.[5] Crucially, the post-totalitarian regime differs from the other four in that "it is not a genetic type but an evolutionary type".[6] Based on this notion, they developed a framework to analyse the transitions from communist rule, which Saxonberg has taken to a new, more sophisticated level. Instead of adding a new study on the *fall* of communist rule, Saxonberg has focused on communist *survival* in contemporary Cuba, China, North Korea and Vietnam. Thus, he took the post-totalitarian approach out of its original focus on European Communism and advanced a general argument –regardless of region.

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[5] Juan J. Linz & Alfred C. Stepan, Problems of democratic transition and consolidation : southern Europe, South America, and post-communist Europe (John Hopkins University Press, 1996).

[6] *Id.* at 293.

Also, Saxonberg has advanced a theory of *why* post-totalitarian rule emerges in the first place. In his account, totalitarian rule is a temporary "messianic phase" –marked by revolutionary fervour– after which "the regime begins to institutionalise itself". [7] The *early post-totalitarian stage* is the outcome of such a relaxation process. His basic argument is that a salient element of the early stage is the endurance of socialist ideology as a key claim to legitimacy –an ideological legitimacy that is eventually undermined by the CPE failures. Once this de-legitimisation process reaches a certain critical point, the regime enters the "late post-totalitarian" stage marked by a shift toward *performance-based legitimacy*:

> The communist regimes lose their grand-future oriented beliefs and instead promise improves living standards. Consequently they try to reach some sort of social contract with the population in order to induce it to "pragmatically accept" that *given certain external and internal constraints, the regime is performing reasonably well.* [8]

As this shift is likely to produce a crisis, the regime either moves into a "freezing" direction (the reformist path is stopped or reversed) or a "maturing" one (the reformist path continues). Applying this model, Saxonberg proposes that China and Vietnam had long been on a maturing post-totalitarian path. While in the European cases the ideological legitimacy was lost because of the erroneous belief that the CPE model was superior to advanced capitalism, China and Vietnam have lost their (socialist) ideological legitimacy because they have, ironically, restored capitalism. [9] Hence, these regimes would have remained in power because they bypassed their ideological predicament by building their pragmatic acceptance on capitalist ground.

In regards to Cuba and North Korea, Saxonberg argues that both cases have long become patrimonial (Fidel Castro became a dynastic ruler like Kim Il Sung), the difference being that Cuba overlaps with freezing post-totalitarian rule, while North Korea does so with totalitarianism (hence, both cases stick to CPE). [10] Under this view, these regimes turned to patrimonial rule in order to avoid collapse.

However, Saxonberg has ignored a previous *post-totalitarian* analysis of the Cuban case. Although Linz and Stepan had limited their typology to the comparative analysis of European Communism, Mujal-León and Busby later applied their toolkit to characterise the Cuban regime after 1990, which they termed a "charismatic early post-totalitarianism" –incidentally, a solution

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[7] Saxonberg, *supra* note 4 at 17.

[8] *Id.* at 18.

[9] *Id.* at 272.

[10] *Id.* at 107–152. Saxonberg uses the term 'patrimonialism' instead of 'sultanism' in order to avoid the cultural stereotype that associates this regime-type with the Middle East –a caveat I agree with.

Linz later agreed with.[11] As Linz and Stepan defined the typical totalitarian leadership as "often charismatic", the peculiarity of Cuba, according to Mujal-León and Busby, was not so much the presence of charisma, but its persistence beyond the phase in which such element was supposed to be endemic.[12] The counter-intuitive argument was that the importance of Fidel Castro's charisma to the Cuban regime had "increased by the scope of the crisis in the 1990s" –i.e. "the crisis spawned by the collapse of the Soviet Union […] made him even more indispensable".[13]

In contrast, Saxonberg holds that Cuba became a patrimonial communism –i.e. a concept applied by Linz and Stepan to Romania, which López later extended to Cuba, and that Saxonberg picked up and applied to North Korea as well.[14] However, Mujal-León and Busby had already objected to the sultanistic (or 'patrimonial') label for the 1990s Cuban regime "not least because of its reliance on ideology and mobilisation."[15] According to Saxonberg, Cuba lost its ideological legitimacy since the early 1990s, and had been on a freezing post-totalitarian path since the late 1980s. As I will argue, socialist ideology is still a key claim to legitimacy in today's Cuba and the economic reform launched by Raúl Castro is a clear case of maturation.

2. *An alternative analytical approach*

Now, what happens to a charismatic early post-totalitarian regime if its charisma fades? My proposition is that the *finale* of charisma can change the

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[11] E. Mujal-León & J. W. Busby, *Much ado about something? Regime change in Cuba*, 48 in Problems of Post-Communism 6–18 (2001); Juan J. Linz, Totalitarian and authoritarian regimes 10 (Lynne Rienner Publishers, 2000).

[12] The *early post-totalitarian* ideal type was originally defined as "very close to the totalitarian ideal type" but differing from it "at least in one key dimension, normally some constraints on the leader" in Linz and Stepan, *supra* note 5 at 42, 45.

[13] Mujal-León and Busby, *supra* note 11 at 11, 15. For another influential account of Cuba from a post-totalitarian perspective, see Jorge I. Domínguez, *¿Comienza una transición hacia el autoritarismo en Cuba?*, 6/7 Encuentro 7–23 (1997). While Domínguez has helped to look at Cuba through the post-totalitarian lenses, his approach draws from an older theory by Linz that regarded post-totalitarianism as a sub-type of authoritarian rule –Linz later defined the former as a regime-type on its own, to be distinguished from authoritarianism in Linz and Stepan, *supra* note 5. This distinction is helpful to not only define Cuba's path as a post-totalitarian one, as Domínguez has done, but to examine such a trajectory vis-à-vis the different varieties of the post-totalitarian mould.

[14] Linz and Stepan, *supra* note 5; Juan J. López, Democracy Delayed: the Case of Castro's Cuba (John Hopking University Press, 2002); Saxonberg, *supra* note 4.

[15] Mujal-León and Busby, *supra* note 11 at 11. To be sure, in the sultanistic ideal type there is "no elaborate or guiding ideology […] outside of despotic personalism" according to Linz and Stepan, *supra* note 5 at 44–45. For another objection to López's conceptualisation of Cuba, see Jorge I. Domínguez, *Democracy Delayed: The Case of Castro's Cuba by Juan J. Lopez*, 119 Political science quarterly : PSQ ; the journal public and international affairs 189 (2004).

style (and power) of the leadership, which in turn can modify the regime's legitimation strategy.

Different Communist systems built its leadership on charismatic legitimacy, to use Weber's classic term [16] –i.e. on the devotion to Stalin (Russia), Mao (China), Tito (Yugoslavia), Enver Hoxha (Albania), Kim Il-Sung (North Korea), or Fidel Castro in Cuba. However, most post-totalitarian transitions were accompanied (or sometimes sparked) by the dissipation of charismatic authority. According to Linz and Stepan, the post-totalitarian regime institutionalises "checks on top leadership." [17] I define this change as a turn to collective leadership or *collegiality*, which refers to "specific social relationships and groups which have the function of limiting authority", to use Weber's words. [18] Weber also stressed, to avoid confusion, that "collegiality is no sense specifically democratic", though it is an arrangement "to prevent the rise of monocratic power." [19]

But what happens if collegiality replaces charisma when the regime (apart from its leadership) has already entered the early post-totalitarian stage? First and foremost, this means that two anachronistic legitimation strategies had co-existed:

Charismatic: as analysed by Mujal-León and Busby in regards to the renewed role of Fidel Castro's leadership in Cuba after 1990

Ideological: as theorised by Saxonberg as a highly distinctive feature of post-totalitarian regimes in their early stage

If the former dissipates, the strategic importance of the latter will increase. At that point, the regime may be said to have experienced a post-totalitarian normalisation –i.e. hybridity ends because the leadership is no longer totalitarian (charismatic), which moves the regime closer to the ideal early post-totalitarian stage. The causal chain may be theorised as follows: if a charismatic early post-totalitarian rule loses its charismatic leadership, its reliance on ideology as a central piece of its claims to legitimacy will confront the regime sooner rather than later with *Saxonberg's dilemma*, namely that the regime will have "to choose between either losing their ideological legitimacy by sticking to their ideology and having it fail, or giving up their ideology in order to meet their economic goals". [20] As explained above, the first alternative is the *freezing* path, and the second, the *maturing* one.

In other words, Saxonberg identifies two solutions to the dilemma:

— Sticking to the centrally planned economy (CPE)
— Introducing market reforms (in the sense of capitalist restoration)

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[16] Max Weber, 1 Economy and society : an outline of interpretive sociology 241 (Claus Wittich ed., 1978).

[17] Linz and Stepan, *supra* note 5 at 45.

[18] Weber, *supra* note 16 at 241.

[19] *Id.* at 277.

[20] Saxonberg, *supra* note 4 at 272.

However, I propose a third, intermediate theoretical solution that destabilises the dilemma posed by Saxonberg and its presupposition that non-capitalist economic formations are incompatible with market mechanisms. The third solution would then be as follows: instead of having to choose between Soviet-style orthodoxy and capitalist restoration, *ideology itself may be modified in a manner that redefines the boundaries of admissible economic action according to socialist ideas*. In the language of *constructivist* or *discursive* institutionalism, the alternative advanced here implies that ideas can change and even shape political processes –as opposed to the fixed nature of communist ideology in Saxonberg's model.[21]

In other words, the rise of performance-based legitimacy in communist polities does not inevitably lead to capitalism. A viable path is thus the emergence of 'market socialism', which has been defined as "an attempt to reconcile the advantages of the market as a system of exchange with social ownership of the means of production".[22] Curiously, although Saxonberg has classified the Yugoslavia of the 1970s as a *maturing post-totalitarian* regime, he has ruled out any market-socialist potential for any other case.[23] Nonetheless, this article argues that, within the decade following Raúl's rise to power in 2006, Cuba adopted a *maturing*, market socialist path. It is still premature, however, to predict the fate of this path as it can get stuck or 'frozen' in Saxonberg's terms. This said, the regime's bid is clear: bringing the market without the formation of a capitalist class –a clear-cut market socialist approach.

In summary, if charismatic early post-totalitarian rule 'runs out' of charisma (ergo, also the legitimacy granted by it), the regime will rapidly enter the late stage –i.e. *Saxonberg's dilemma*. If the regime responds to the new situation by adopting a performance-based legitimation strategy (still) constrained by socialist ideology, a likely outcome is a market-socialist style of post-totalitarian maturation.

III. Addressing change

In this section, I argue that the Cuban regime during the presidency of Raúl Castro has experienced a 'double political shift' at the levels of *leadership* and

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[21] e.g. Colin Hay, Political analysis (2002); Vivien A. Schmidt, *Taking ideas and discourse seriously: explaining change through discursive institutionalism as the fourth "new institutionalism,"* 2 European Political Science Review 1–25 (2010); Andreas Gofas & Colin Hay, The role of ideas in political analysis : a portrait of contemporary debates (Routledge, 2010).

[22] Market socialism, Dictionary of the social sciences 294 (Craig J. Calhoun ed., 2002).

[23] Saxonberg, *supra* note 4 at 105. Yugoslavia's 'workers' self-management' embodied the market-socialist paradigm of that time, distant from both CPE and capitalism, a point well discussed by Sergej Flere & Rudi Klanjšek, *Was Tito's Yugoslavia totalitarian?*, 47 Communist and Post-Communist Studies 237–245 (2014). For a seminal analysis of Yugoslavia's political economy, see Jean Michael Montias, *Types of Communist Economic Systems*, *in* Change in Communist systems 117–134 (Chalmers A. Johnson ed., 1970), https://goo.gl/hxFsjn (last visited May 17, 2016).

ideology. On the one hand, I claim that the charismatic nature of the leadership has been replaced by a collegial arrangement –i.e. Raúl Castro did not become a patrimonial ruler. On the other hand, I hold that the orthodoxy of CPE ideology has softened in favour of market-socialist solutions –i.e. the regime is far from 'freezing'. After discussing the changes in leadership and ideology, in the next section I will address the relationship between them as part of the transformation of the Cuban regime.

1. *Leadership: from charisma to collegiality*

When Fidel fell ill in July 2006, he provisionally delegated his posts of president of the Council of State and first secretary of the PCC to his younger brother Raúl –long-time head of the Revolutionary Armed Forces (FAR, in Spanish) and second secretary of the PCC. This change would bring a new era in the leadership of the Revolution.

Kapcia has cleverly described the Cuban leadership as an "onion", "with real power at the centre (an 'inner circle'), outside which were layers of lesser influence, weakening the further from the 'core' now went".[24] The nucleus was, of course, the veteran mountain guerrilla, known in Cuba as the *historical generation* (*generación histórica*) who fought in the Rebel Army that won the 1959 revolution.

For Mujal-León the inner circle resembled a charismatic community for its "dependence and unswerving loyalty toward the *comandante en jefe*" –i.e. the *Commander-in-Chief*, Fidel Castro, who was the unrivalled leader of the *historical generation* from 1959 to 2006, and thus, of the elite ruling Cuba.[25]

Of course, this does not mean that charisma acted in an institutional vacuum or that it was the sole political force. Fidel's charismatic authority, as Mujal-León and Busby have explained, "also had an institutional aspect of which the PCC and the FAR have not been the only, but certainly the most important tools".[26] In other words, the FAR and the PCC became the "two main pillars" of the Cuban state – of which Fidel Castro remained "the key figure", as Klepak has put it.[27] As charisma "in its pure form" only exists *in statu nascendi* and thus it eventually undergoes a *routinisation* process –i.e. it must

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[24] Antoni Kapcia, Leadership in the Cuban revolution : the unseen story 81 (Zed Books Ltd, 2014).

[25] Eusebio Mujal-León, *Survival, adaptation and uncertainty: the case of Cuba*, 65 Journal of International Affairs 149–168, 154 (2011).

[26] Eusebio Mujal-León & Lorena Buzón, *El excepcionalismo y la trascendencia: el caso de las relaciones civiles-militares en Cuba*, *in* Influencias y resistencias: militares y poder en América Latina 372 p., 35 (Felipe Agüero & Claudio Fuentes eds., 2009), http://library.georgetown.edu/search/i?=9789563240405.

[27] Hal Klepak, Cuba's military 1990-2005 : Revolutionary soldiers during counter-revolutionary times 51 (Palgrave MacMillan, 2005).

be either "traditionalised" or "legalised" according to Weber, the FAR-PCC coalition may be seen as the legal-rational *routinisation* of Fidel's charismatic authority.[28]

Although during his provisional rule (2006-2008) Raúl did not reshape the leadership, he did advance a more consultative decision-making style since his first days in power.[29] Later, after being appointed president in February 2008, he overhauled the top leadership. Between 2008 and 2009 Raúl dismantled the *Support Team of the Commander-in-Chief* –also simply known as the "Grupo de Apoyo– which acted as a "parallel structure of government that answers to only [Fidel] Castro and is an extension of his power".[30] As part of this move, Raúl Castro did not hesitate to fire the top leaders that owed their careers to their service in the *Grupo de Apoyo,* such as vice-president Carlos Lage and Foreign Minister Felipe Pérez Roque, whom had developed charismatic claims to succession.[31]

After re-shaping, between 2008 and 2009, the leadership he inherited from Fidel, Raúl would unveil his own approach to the succession question in April 2011, when he told the delegates of the Sixth Party Congress that it was "advisable to recommend limiting the time of service in high political and State positions to a maximum of two five-year terms".[32] Less than a year later, in order "to prepare the gradual renovation of cadre", term limits became the official Party line.[33] As Weber explained, the "principle of collegiality […] is usually derived from the interest in weakening the power of persons in authority."[34] In this sense, term limits can be understood as a form of *collegial relation* for the introduction of term limits attests to the intention of turning to a more collective style of decision-making –as opposed to the undefined duration of charismatic rule.[35]

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[28] Weber, *supra* note 16 at 246.

[29] Marc Frank, Cuban revelations : behind the scenes in Havana (University Press of Florida, 2013); William LeoGrande, *Cuba's Perilous Political Transition to the Post-Castro Era*, 47 Journal of Latin American Studies 377–405 (2015).

[30] Armando F. Mastrapa, *Equipo de Coordinacion y Apoyo al Comandante en Jefe: Cuba's Parallel Government?*, 11 *in* Cuba in Transition 476–480, 476 (2001), http://goo.gl/OKc14l.

[31] The contrast between the model of succession developed by the *Grupo* leaders, on the one hand, and Raúl Castro and the *históricos*, on the other, has been extensively discussed in Bert Hoffmann, *Charismatic Authority and Leadership Change: Lessons from Cuba's Post-Fidel Succession*, 30 International Political Science Review 229–248 (2009).

[32] Raúl Castro, *Central report to the 6th Congress of the Communist Party of Cuba*, Portal Cuba, April 16, 2011, http://ow.ly/TE0cs (last visited Oct 20, 2015).

[33] PCC, Objetivos de trabajo del Partido Comunista de Cuba aprobados por la Primera Conferencia Nacional 7 (PCC ed., 2012), http://ow.ly/MX8Jx (last visited Jul 19, 2016).

[34] Weber, *supra* note 16 at 277.

[35] The *collegiality* of term limits lies in the fact that the Cuban head of state will need a degree of peers' endorsement to secure a second period in office –i.e. he or she cannot be a monocratic ruler, let alone a patrimonial one.

Advanced since 2011 by Raúl himself as a means of succession for him and his generation of leaders, the new collegial arrangement is far from Saxonberg's review of the Cuban case, according to which "a successful [patrimonial] succession took place within the ruling dynasty, as Fidel Castro's brother, Raúl, replaced him when he stepped down for health reasons." [36] But a different picture emerges at a closer look. Crucially, although the brotherly bond between Fidel and Raúl was indeed "a vital resource […] in resolving the issue of succession", it was not a case of "a transfer of charisma by heredity", as Hoffmann has explained. [37] Addressing the issue of succession, Raúl discarded any transfer of Fidel's charisma to the future as early as July 2006:

> The special trust granted by the people to the founding leader of the Revolution cannot be transmitted, as if it was an inheritance, to those who hold the main leadership posts of the country in the future. The Commander-in-Chief of the Cuban Revolution is one and only one, and only the Communist Party […] can be the worthy heir of the trust deposited by the people in its leader. [38]

This solution defined Cuba's succession problem, not in terms of who would succeed this or any other leader, but which institutional order would constrain any future leadership (principle of collegiality). Far from trying to establish a Castro dynasty akin to the Kim's in North Korea, Raúl said goodbye to charismatic rule, advancing "a much more institutions-based model" instead; in other words, "Raúl Castro's thesis that the answer to succession is institutionalization has carried the day". [39]

To catch a glimpse of the conditions in which collegiality is expected to operate after the *historic generation* is gone, it is worth it looking at the *core team* since Raúl took over –those Politburo members with a seat on the Council of State. If one looks at Table 1 and visualises the 'core team' without the revolutionary veterans, what is left is a FAR-PCC collegial partnership that will be led by someone different every five or ten years.

Table 1. Members of PCC Politburo with Joint Appointments to the Council of State

	Status in the Council of State				
Politburo member	*2008*[a]	*2011*[b]	*2016*[c]	*Background*	*Entrance/ Exit Politburo*
Raúl Castro Ruz	President	President	President	REV	

[36] Saxonberg, *supra* note 4 at 109.

[37] Hoffmann, *supra* note 31 at 243.

[38] Raúl Castro, *Discurso pronunciado el 14 de junio de 2006*, Granma, June 14, 2006, http://ow.ly/GOCzu (last visited Oct 20, 2015).

[39] Hoffmann, *supra* note 31 at 239, 242.

José Ramón Machado Ventura	1st VP	1st VP	VP	REV	

Table 1. Members of PCC Politburo with Joint Appointments to the Council of State

	Status in the Council of State				
Politburo member	*2008*[a]	*2011*[b]	*2016*[c]	*Background*	*Entrance/ Exit Politburo*
Ramiro Valdés Menéndez		VP (Dec 2009)	VP	REV	
Miguel Díaz-Canel Bermúdez			1st VP (Feb 2013)	PCC	
Leopoldo Cintra Frías	Member	Member	Member	FAR	
Salvador Mesa Valdés		Member	VP (Feb 2013)	PCC	
Alvaro López Miera		Member	Member	FAR	
Juan Almeida Bosque	VP			REV	Died in 2009
Julio Casas Regueiro	VP	VP		REV	Died after 2011 election
José Ramón Balaguer Cabrera	Member			PCC	Not reelected in 2011
Esteban Lazo Hernández	VP	VP		PCC	Not reelected in 2016
Carlos Lage Dávila	VP			GA-PCC	Removed in 2009
Abelardo Colomé Ibarra	VP	VP		FAR	Resigned in 2015
Lázara Mercedes López Acea			VP (Feb 2013)	PCC	Added in 2011
Jorge Marino Murillo		Member	Member	FAR-TECH	Added in 2011
Bruno Eduardo Rodríguez Parrilla			Member	PCC-TECH	Added in 2012
Ulises Guilarte de Nacimiento			Member	PCC	Added in 2016

Miriam Nicado García			Member	TECH	Added in 2016

Table 1. Members of PCC Politburo with Joint Appointments to the Council of State

	Status in the Council of State				
Politburo member	*2008*[a]	*2011*[b]	*2016*[c]	*Background*	*Entrance/ Exit Politburo*
Teresa Amarelle Boué			Member	PCC	Added in 2016

Key: VP = Vice President; REV = Revolutionary Generation; FAR = Military; PCC = Cuban Communist Party; GA= Support Group of the *Commander-in-Chief*; TECH = Technocrat.
Sources: *Granma* and *Juventud Rebelde*; data for 2011 taken from Mujal-León.[1]
[a] Membership at the moment Raúl Castro took over as President in February 2008.
[b] Membership as of September 2011.
[c] Membership as of August 2016.

After 2011, the *core team* experienced some changes that underpinned the collegiality of the Cuban leadership. In February 2013, during the National Assembly that confirmed his second and last presidential term, Raúl Castro ratified: "this will be my last term".[41] In that same event, the promotion of Miguel Díaz-Canel to First Vice President of the Council of State signalled the first time ever that a revolutionary veteran did not hold that position.[42] The end of Raúl Castro's presidency in 2018, *ceteris paribus*, will then bring to the fore the FAR-PCC coalition: the true successor (not a dynasty) of the Castro era. Paradoxically, the Seventh Party Congress (April 2016) still elected Raúl Castro and José Ramón Machado, First Secretary and Second Secretary of the PCC, respectively. While this means that the revolutionary veterans will still control key posts after 2018, it will also be the first time that the head of the Party and the head of the State is not the same person. All things considered, between the Sixth and the Seventh Party Congress –i.e. between 2011 and 2016– the nascent collegiality of the Cuban leadership was rein-

[40] Mujal-León, *supra* note 25 at 161.

[41] Raúl Castro, *Discurso pronunciado el 24 de febrero de 2013*, Cubadebate, February 24, 2013, http://goo.gl/ADKMOj (last visited Oct 20, 2015).

[42] According to the Cuban constitution, if the President dies, the First Vice-President takes over. Explaining the promotion of Díaz-Canel to First Vice President, Raúl Castro acknowledged that this decision represented "a defining step in the configuration of the future leadership of the country" –see *Id.*

forced through measures that seek or serve "to prevent the rise of monocratic power", to repeat Weber's words.[43] The Cuban case has thus moved closer to the institutional pluralism typical of the post-totalitarian ideal regime-type. [44]

Another new outcome of the Seventh Party Congress has been the rise of non-revolutionary veterans and non-FAR individuals to the *core team* –between 2008 and 2016 they grew from three to seven. Of them, six have careers in the PCC –of which four have been provincial Party leaders (Díaz-Canel, Mesa, López, and Boué). Thus, provincial party leadership has emerged as a desired promotion's criterion to the top. [45] Whether the PCC or the FAR will fill the future vacancies left by the revolutionary veterans will define the precise terms of the FAR-PCC partnership in the post-Castro era.

2. *Ideology: from CPE to market socialism*

Kong has classified the economic strategies of the surviving Communist systems into three different types: 1) 'mono-transition' (China and Vietnam), 2) 'cautious reform' (Cuba), and 3) 'ultra-cautious reform' (North Korea). [46] For him, 'mono-transition' refers to a capitalist restoration under the same political regime –as opposed to East European countries that experienced the 'dual transition' of capitalist restoration and regime change. In contrast, the "cautious reform strategy seeks to alleviate the problems of the centrally planned economy (CPE) while resisting transformation towards a market economy". [47] Finally, the 'ultra-cautious' approach seeks "to *restore* the CPE by limited market measures"–hence the term refers to the stubbornness of an orthodox CPE. [48]

To build the definition of *cautious reform* in Cuba, Kong mainly refers to the economic reforms of the 1990s, though things have changed since then. According to Mesa Lago, 1991-1996 was indeed a period of 'pragmatic' policies, followed by a period of stagnation (1997-2003) and then by an 'idealistic' reversal of the reform (2003-2006). [49] As for the presidency of Raúl Castro, the reformist path has not only resumed but also taken to a higher level. If the challenge for Cuban policymakers in the early 1990s was defined in terms of resisting the collapse of the Soviet Union (and its subsidies), since 2006 the self-imposed task has been to fix the economic model itself.

Raúl Castro has thus unleashed a new 'pragmatic' cycle of economic policy, the "strongest under the revolution." [50] Updating Kong's words, it

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[43] Weber, *supra* note 16 at 277.

[44] Linz and Stepan, *supra* note 5 at 44–45.

[45] This pattern had already been proposed in Mujal-León, *supra* note 25.

[46] Tat Yan Kong, *The political obstacles to economic reform in North Korea: The ultra cautious strategy in comparative perspective*, 27 The Pacific Review 73–96 (2014).

[47] *Id.* at 73.

[48] *Id.* at 74.

[49] Carmelo Mesa Lago, Cuba en la era de Raúl Castro (Colibrí, 2012).

[50] *Id.* at 25.

would be more precise to say that the Cuban regime has resumed the *cautious reform* by turning to *market socialism* ideas –an approach that, as I argue in this article, seeks to reconcile the CPE model with the market under the social ownership of the means of production.

In hindsight, Cuba's ideological overhaul started with Raúl Castro's first major speech as provisional head of state. On that occasion, he criticised how the country was run economically and sad that "structural and conceptual changes" were necessary.[51] However, it was not until late 2009 that Raúl summarised his enterprise with a catchphrase: "the update of the Cuban economic model."[52] A few months later, he explained what he meant by "update" or "upgrade" (*actualización*, in Spanish):

> We are convinced that we need to break away from dogma and assume firmly and confidently the ongoing upgrading of our economic model in order to set the foundations of the irreversibility of Cuban socialism and its development.[53]

This quote shows the compromise between change and orthodoxy articulated by the *upgrade-of-the-economic-model* formulation –a compromise between reform ("we need to break away from dogma") and the respect of principles ("the irreversibility of Cuban socialism"). Although this tension has marked the presidency of Raúl Castro, it has functioned as a middle way solution between the two main economic visions within the elite: the Soviet-style one and the pro-market approach.[54]

To be sure, the largest expansion of non-state activity in socialist Cuba has occurred under Raúl Castro. For example, 71% of the workers employed in 2015 were state employees, in contrast to 80% in 2007.[55] Since 2008, more than 1.58 million hectares of idle land have been transferred to non-state actors by January 2014, and the number of (mostly urban) self-employed workers has grown from 141 600 to half million in 2015.[56] In a country with

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[51] Raúl Castro, *Discurso pronunciado el 26 de julio del 2007*, Granma, July 26, 2007, http://ow.ly/L27xz (last visited Oct 20, 2015).

[52] Raúl Castro, *Discurso pronunciado el 20 de diciembre de 2009*, Portal Cuba, December 20, 2009, http://ow.ly/TE1YH (last visited Oct 20, 2015).

[53] Raúl Castro, *Speech delivered on April 4, 2010*, Portal Cuba, April 4, 2010, http://ow.ly/TE1ld (last visited Oct 20, 2015).

[54] For an analysis of these visions, see Camila Piñeiro Piñeiro Harnecker, *Cuba's New Socialism: Different Visions Shaping Current Changes*, 40 Latin American Perspectives 107–125 (2013).

[55] ONEI, Anuario estadístico de Cuba 2015 (2016), http://www.one.cu/aec2015.htm (last visited Jul 21, 2016), Table 7.2; ONE, Anuario estadístico de Cuba 2010 (2011), http://www.one.cu/aec2010/esp/07_tabla_cuadro.htm (last visited Oct 25, 2015), Table 7.2.

[56] Yaima Puig Meneses, *Entrega de tierras en usufructo: al compás de la actualización*, Granma, January 17, 2014, http://ow.ly/TPr1r (last visited Oct 26, 2015); ONE, *supra* note 55; ONEI, *supra* note 55. By January 2016, the land transferred downsized to 1.4 million hectares enjoyed

6.2 million hectares of agricultural land and a total workforce of five million people, these changes are far from trivial.[57]

A major step in 'updating' the economy came in August 2010 when Raúl Castro announced the restructuring of the Cuban labour –self-employment being hailed as an alternative to soon-to-be-fired state employees.[58] As a result, the self-employed were no longer portrayed as a necessary evil –top PCC leaders called them piranhas in the 1990s– and *Granma* even condemned such stigmatisation.[59] At this point, "Raúl Castro and his associates obviously felt that they had arrived at a critical juncture and needed the endorsement of the highest party institution to strengthen their hand."[60] As a result, the call for the Sixth Party Congress was issued, with the *Guidelines of Social and Economic Policy* as the only document of the meeting agenda, which was first discussed in the grassroots inside and outside the Party.

The document had 291 paragraphs sketching future reforms in all sectors of the economy. Although "the document sometimes read like a laundry list that lacked strategic vision",[61] the rudiments of CPE-market *love* can still be perceived. The guideline that most explicitly elaborated the departure from CPE orthodoxy was the first one, which stated that in the new socialism of Cuba, "planning would take the market into account, influencing upon it and considering its characteristics."[62] Although this is rather a clumsy engagement with the market –treating it as an alien from outer space whose features are yet to be discovered– it epitomises the ideological hardships of the Party in coming to terms with the 'update' of Cuban socialism. In spite

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by 279 021 tenants; see Granma, *Inician en Cuba análisis del uso y tenencia de tierras en usufructo*, Opciones, January 25, 2016, http://goo.gl/i4RxcN (last visited Jul 21, 2016).

57 ONEI, *supra* note 55, Tables 7.1 and 9.1. There have been other changes, such as greater autonomy of state enterprises, the growth of urban co-ops, and a friendlier law for foreign investment. However, I do not intend to analyse the economic reforms undertaken since 2006 as this theme that has been much analysed by others. Instead, this article aims to capture and define the ideological change informing the reform –i.e. the revision of the previous economic strategy and the contours of the new one. Some relevant works that have assessed the Cuban economic reform are: Mesa Lago, *supra* note 49; Miradas a la economía cubana: entre la eficiencia y la equidad social, (Omar E. Pérez Villanueva & Ricardo Torres Pérez eds., 2013); Archibald R. M. Ritter & Ted A. Henken, Entrepreneurial Cuba : the changing policy landscape (Lynne Rienner Publishers, 2014).

58 Raúl Castro, *Discurso a la Asamblea Nacional del Poder Popular*, Granma, August 2, 2010, at 4–5.

59 John Rice, *Cuban Official Attacks Capitalism*, Associated Press, November 27, 1997, http://ow.ly/KE3Fg (last visited Mar 22, 2015); Leticia Martínez Hernández, *Mucho más que una alternativa*, Granma, September 24, 2010, at 3.

60 Samuel Farber, Cuba since the Revolution of 1959: a critical assessment 279 (Haymarket Books, 2011).

61 Mujal-León, *supra* note 25 at 157.

62 PCC, Lineamientos de la Política Económica y Social del Partido y la Revolución (2011), guideline 1.

of these tensions, the second guideline was more confident in championing foreign investment, co-ops, private farmers, and self-employment as partners of "the socialist state enterprise" –defined as the "main form of the national economy"– in the quest for "efficiency".[63]

The year after the Sixth Party Congress, and as a product of it, the then three-year-old *upgrade-of-the-economic-model* notion was entwined with a newborn concept: *prosperous-and-sustainable-socialism*, which was born in December 2012.[64] The new notion was not fully shaped, however, until July 2013, when it was ingrained in the ideological framework advanced by Raúl Castro up to that point. The journey away from CPE orthodoxy had finally turned into a passage towards market socialism:

> [T]he implementation of the *Lineamientos* […] approved by the Sixth Congress […] [is] the main task of all of us, because the preservation and development of socialism in Cuba depends on its success. A prosperous and sustainable socialism that ratifies the social property of the fundamental means of production and acknowledges the role of other, non-state, forms of management at the same time […] [A socialism that] reaffirms planning as an indispensable tool in directing the economy, without denying the existence of the market. [65]

The market had been pardoned, but not capitalism yet. The rise of self-employment was not the return of the bourgeoisie –i.e. a class of large proprietors of means of production, as opposed to small businesses. However, it is clear that times had changed. Non-state economic activity has never been this size under the Revolution.

Figure 1 summarises the ideological vicissitudes of Cuba in Raúl Castro's time in office. In hindsight, the period between 2006 and 2008 was in preparation for what would come next. Once Raúl was firmly in power, he championed the need to 'update' the economy with increasing confidence from 2009 to 2011, when his revolt reached its climax at the Sixth Party Congress. After this turning point, market socialism started to emerge and be acted upon according to the idea that *prosperity* was essential for the *sustainability* of Cuban socialism. *In toto*, the market was no longer the enemy, but a junior partner of central planning.

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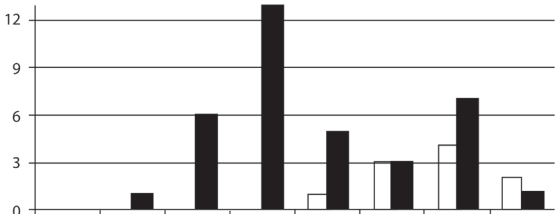
63 *Id.*, guideline 2.

64 Raúl Castro, *Discurso pronunciado el 13 de diciembre de 2012*, Cubadebate, December 13, 2012, http://ow.ly/Sd79Q (last visited Oct 20, 2015).

65 Raúl Castro, *Discurso pronunciado el 7 de julio*, Portal Cuba, July 7, 2013, http://ow.ly/TYlMk (last visited Jul 19, 2016).

Figure 1. Keywords of market socialism in Cuba, 2008-2015



	2008	2009	2010	2011	2012	2013	2014	2015
□ 'prosperous socialism'	0	0	0	0	1	3	4	2
■ 'upgrade of the model'	0	1	6	13	5	3	7	1

Sources: Own elaboration based on the analysis of all Raúl Castro's speeches in Cuba (N=45) with NVivo software. It was counted the total number of appereances, by year, of two notions: 'actualización del modelo económico cubano' and 'socialismo próspero y sostenible'.

The Seventh Party Congress kept on the market socialist path of ideological change but also acknowledged the slow pace of economic reform. Raúl Castro informed that only 21% of the *Guidelines* approved in 2011 had been fully implemented, 77% were in process, and 2% had not yet started.[66] However, the 2016 Congress also approved a *Conceptualisation Project of the Cuban Economic and Social Model of Socialist Development*, which attempted to provide a long-term strategic direction to the reform process approved five years earlier.[67] This document turned into Party doctrine the notion that "the strategic goal of the Model [that will emerge from the updating process] is to drive and consolidate the construction of a prosperous and sustainable socialist society."[68] In market socialist terms, the *Conceptualisation Project* also insisted: "the State recognises and integrates the market into the functioning of the system of planned direction of the economy." [69]

IV. Explaining change

In the preceding section, I discussed how the *leadership* and *ideology* of the Cuban regime have changed during the presidency of Raúl Castro.

As I have been at pains to demonstrate, such changes can be defined as follows:

66 Raúl Castro, *Informe Central al VII Congreso del Partido Comunista de Cuba*, Cubadebate, April 16, 2016, http://goo.gl/Qh4FIi (last visited Aug 7, 2016).

67 In terms of long-term planning, it is revealing that the *Conceptualisation Project* was accompanied by a *National Plan of Economic and Social Development until 2030*.

68 PCC, Proyecto de conceptualización del modelo económico y social cubano de desarrollo socialista 6 (2016), http://goo.gl/hpOj3h (last visited Aug 8, 2016).

69 *Id.* at 7.

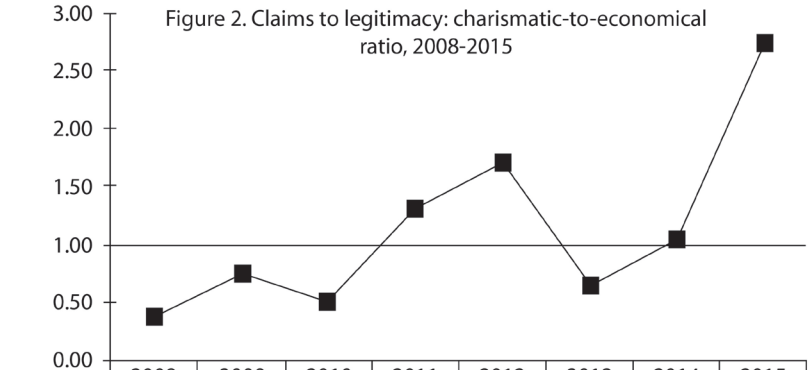
— from charismatic to collegial leadership; and
— from CPE to market-socialist ideology.

In this section I will discuss the relationship between both variations and their combined effect in the development of the Cuban regime within the same timeframe. A key claim of this article is that the rise of market-socialist ideology is, to a substantial extent, an effect of the decline of charismatic authority.

1. *Regime-type development*

All Raúl´s speeches in Cuba are both transmitted on national TV and reproduced next day in *Granma* and/or *Juventud Rebelde*. Such speeches do not only intend to help Cubans make sense of political developments in the country, they are also the public face of the regime's political moves. As "the mode of exercising authority" is conditioned by "the kind of legitimacy which is claimed", it is not an insignificant political development when such claims vary in any regime. [70] In the case of Cuba under Raúl Castro, I argue that there has occurred a variation in the legitimation strategy of the regime –a process indicated, albeit indirectly, by Figure 2.

Figure 2. Claims to legitimacy: charismatic-to-economical ratio, 2008-2015



	2008	2009	2010	2011	2012	2013	2014	2015
Ratio	0.38	0.76	0.51	1.32	1.71	0.65	1.05	2.75
'Economía'	17	19	19	29	12	15	21	11
'Fidel'	45	25	37	22	7	23	20	4

Sources: Own elaboration based on the analysis of all Raúl Castro's speeches in Cuba (N=45) with NVivo software. It was compared the quantity of total appeareances by year of two terms: 'Fidel' and 'economía'.

[70] Weber, *supra* note 16 at 213.

Although Figure 2 only deals with only one person's speeches, such a person is the head of the Cuban party-state –hence his political weight shall not be underestimated. I took all Raúl Castro's speeches delivered in Cuba since 2008 and coded them according to key terms that stand for one or another legitimation strategy –"Fidel" for charismatic, and "economía" (economy, in English) for performance-based.[71] Then I disaggregated this data by year and compared their relative incidence.

When the ratio shown in Figure 2 is < 1, it means that Raúl Castro mentioned 'Fidel' more times than the 'economy' in that single year in his speeches in Cuba. Using this index, it can be argued that before the 2011 Party Congress, charismatic claims prevailed over economic-based ones, while the opposite was true afterwards.[72] In 2008, "Fidel" was mentioned 45 times and the "economy" 17 times. Meanwhile, in 2015 the numbers changed to 4 and 11, respectively. The exception to this trend was 2013, when Raúl's presidency was renewed for five more (and final) years and the commemoration of the 60th anniversary of the attack to the Moncada barracks on the 26th of July took place. In this latter event, which marks the beginning of the Cuban revolution, Raúl praised his brother's Fidel legacy to the socialist system, mentioning him on twelve occasions (from a total of twenty-three that year).[73]

As I have already discussed, Raúl Castro reformed the leadership before reforming the economy. It is significant, nonetheless, that this shift in political concerns was accompanied by a decline of the Fidel Castro's persona in public discourse as a token of the state policies' legitimacy. Thus, if Raúl asked the National Assembly permission to 'consult' everything with Fidel when the former was elected president in 2008, in his re-election –five years later– he reminded the National Assembly that state authority emanated from the 'people' according to the constitution.[74]

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[71] This approach is based on the premise that the political salience of the succession question vis-à-vis the economic reform across time can be grasped through Raúl Castro's political choices as he explains them to both the elite and the lay public. In other words, I have assumed that a change in the claims to legitimacy of any regime leaves discursive footprints in the speeches of key actors, such as the head of state.

[72] An equivalent pattern to the one shown in Figure 2 appears if, instead of the term 'economía', one aggregates into one indicator the appearances of the keywords of Cuban economic reform ('Lineamientos', 'actualización del modelo', and 'socialismo próspero y sostenible'). A more concise approach was then to focus on the term 'economía', even if it is not an obvious invocation of a legitimacy based on performance –as 'Fidel' clearly is in regards to charisma.

[73] Although Figure 2 is not a conclusive 'test', the pattern displayed in it suggests –rather than 'proves'– that Raúl Castro changed how he accounts for his *right* to rule, initially stressing Fidel's endorsement, and then promising economic results. I have defined this change as a shift from charismatic to performance-based legitimacy.

[74] Raúl Castro, *Discurso pronunciado en las conclusiones de la sesión constitutiva de la VII Legislatura de la ANPP*, Granma, February 24, 2008, http://ow.ly/GOI7J (last visited Aug 1, 2016); Castro, *supra* note 41. In order to legitimise his rule, Raúl felt the need to rely on Fidel's charismatic

When compared to concerns on the succession question, the intensification of political concern on the economy suggests a political re-equilibration of the regime –i.e. the rise of market socialism took the toil of the decline of charismatic legitimacy. From a regime-type perspective, from 2006 to 2015 Cuba may be said to have changed from a charismatic *early post-totalitarian* regime to a *maturing post-totalitarian* one. This change can be analytically divided into two distinct stages:

1. from a 'charismatic' to a 'typical' *early post-totalitarian* regime; and
2. from the latter equilibrium to a *maturing post-totalitarian* regime.

Although both processes were empirically intertwined and coetaneous to some extent, each represents a different link in the political causal chain.

The first process is mostly related to the change in the type of *leadership*. As discussed, Raúl Castro's answer to the succession problem after Fidel stepped down was the introduction of collegiality, as the approval of term-limits attest. Such a change marked the post-totalitarian normalisation of the Cuban leadership, as opposed to the typically totalitarian charisma. Therefore, the charismatic early post-totalitarian regime moved closer to the early post-totalitarian ideal type. As a result, the dissipation of charisma confronted the regime with the need to restore the deficit of legitimacy caused by the end of this old source. As early as 2009, Hoffmann had sensed that sooner or later the regime would have to sort out this predicament:

In the short run, the successor government can claim legitimacy based on the formal succession; in the medium term, however, it will have to seek new sources of support and legitimacy of its own. Economic performance will be crucial, and Raúl's calls for economic reforms –however limited their implementation has been so far– seem to signal that the new leadership is very much aware of this. [75]

This argument can be taken a bit further. As the next generation of leaders –expected to take over in 2018– will not have the same legitimacy as the *founding fathers* of communist Cuba, let alone Fidel Castro, the upcoming biological end of the revolutionary veterans still in power has added an extra dose of difficulty to the problem of revamping the legitimacy of the regime. Hence Raúl Castro's challenge has not only been to make his presidency stand on solid ground, but also to do so in such a manner that the new equilibrium of the political system will endure after he leaves. In other words, the revolutionary veterans –still the 'inner circle' of the leadership– have showed a strong

authority in the 2008 speech, while he sought the same effect in the 2013 speech through different means, namely the emphasis on the legality of his rule. In fact, Raúl mentioned Fidel seventeen times in 2008, far more than the five times he was mentioned in 2013, when performance –i.e. the 'updating' of the economic model– was already the kernel of Raúl's legitimacy.

[75] Hoffmann, *supra* note 31 at 243.

interest in the survival of the system they devoted their life to. This biographical feature of the elite is perhaps what ultimately explains the rejection of capitalist restoration in Raúl's economic reform. Of course, it is still to be seen how long this anti-capitalist limit will survive the "históricos" if it does.

The second process (maturation) is related to the change in the type of *ideology*. The new post-totalitarian equilibrium rapidly evolved from the early to the late stage, in which the regime was fully confronted with its economic failures –Fidel was no longer a safety belt. Raúl responded this problem with another switch: he gave up the freezing path he inherited from Fidel (the last 'idealist' cycle) and adopted a maturing direction. Raúl explicitly admitted that the economic focus of the Sixth Party Congress expressed the inner circle's answer to the question of communist survival in Cuba:

> The Sixth Party Congress should be, as a fact of life, the last to be attended by most of us who belong to the Revolution's historical generation. The time we have left is short, the task that lies ahead of us is gigantic, and […] I think we have the obligation of taking advantage of the power of our moral authority among the people to trace out the route to be followed and resolve some other important problems. […] [W]e strongly believe that we have the elemental duty to rectify the mistakes that we have made all along these five decades during which we have been building socialism in Cuba. [76]

This quote, which confirms the extent to which the generational succession was linked to the problem of political survival, also reveals that the "moral authority" of the revolutionary veterans was being used to make Cuba stand on more solid ground after Fidel's charisma was lost. It was perceived as necessary "to trace out the route to be followed", which the Congress did by approving the economic *Lineamientos* that turned the initial relaxation of CPE orthodoxy into nascent market socialism.

Later, at the end of a 2012 Party Conference –with the new leadership and ideology already flourishing, Raúl assessed the new political situation: "the route has been traced." [77] Indeed, it had. Here the perspective of legitimacy helps to understand why the economic reform was necessary in the first place. It was needed, in Saxonberg's terms, in order "to reach some sort of social contract with the population in order to induce it to 'pragmatically accept' that *given certain external and internal constraints, the regime is performing reasonably well*". [78] In other words, the turn to a performance-based legitimacy had been completed. The Sixth Party Congress thus resulted in Cuba definitely adopting a *maturing* path, as opposed to a *freezing* one of CPE obstinacy.

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[76] Raúl Castro, *Speech delivered on December 18th, 2010*, Portal Cuba, December 18, 2010, http://ow.ly/TDZM9 (last visited Oct 20, 2015).

[77] Raúl Castro, *Discurso pronunciado en la clausura de la Primera Conferencia Nacional del PCC*, Cubadebate, January 21, 2012, http://ow.ly/ReBQd (last visited Oct 21, 2015).

[78] Saxonberg, *supra* note 4 at 18.

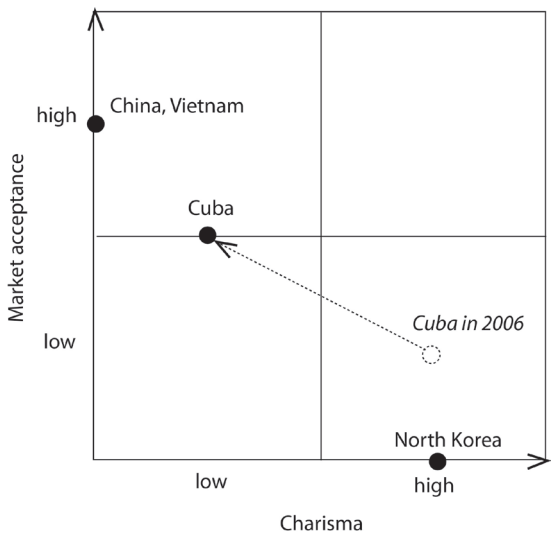
Cuba's *maturing* path, nonetheless, differed from Saxonberg's scheme in that there was no abandonment of socialist ideology, let alone a capitalist restoration (e.g. proper large-scale privatisations of means of production). Conversely, Cuba underwent an ideological renewal (an 'update' in Raúl's words) in order to reconcile the socialist claims of the regime with economic performance (via the market), now turned into a naked test –i.e. the 'Fidel card' could no longer be played– to the regime's legitimacy.

2. *Cuba in (brief) comparative perspective*

In order to appreciate the peculiarity (if any) of Cuba's evolution, it makes sense to look at this case from a comparative perspective. To be sure, I do not intend to present an exhaustive comparison, which may well worth a specific endeavour. My aim is more modest: to place the characterisation advanced in this paper within the literature on the survival of contemporary communist systems in order to grasp the Cuban transition.

Figure 3 presents a comparison of the communist survivors at present, presupposing that only Cuba has changed its type of leadership and ideology since 2006. From this scheme, it follows that Cuba was more similar to North Korea than to China and Vietnam when Fidel Castro stepped down, but after eight years the opposite is true.

Figure 3. Leadership and Ideology in surviving communist systems, 2016



Source: own elaboration.

I do not mean that Kim Jong-Il (the North Korean leader at the time) was as 'charismatic' as Fidel Castro in the sense that both leaders had the same *personal charm*. All I assume is that both were treated *as if* their policies were infallible –i.e. as charismatic leaders. When Kim Jong-Il took over after his father died in 1997, his key claim to legitimacy was based on the premise that "the cause of the great leader" had been passed to him –in this case, the cause of the founding leader of North Korea's regime, Kim Il-Sung.[79] In other words, the North Korean solution to the "problem of succession" adopted "the conception that charisma is a quality transmitted by heredity".[80] As if to mimic Weber's theory, the ruling Workers' Party of Korea also explained that (when the time comes) the great leader (whoever she or he may be) is in charge of "designating the people's leader who possesses extraordinarily personality and qualities as the successor".[81]

In regards to ideology, although Cuba under Fidel oscillated between 'idealist cycles' and 'pragmatic cycles', the latter were tactical retreats as a rule. Hence the market was tolerated rather than accepted. In that sense, Cuba was closer to North Korea, although their actual economic approaches differed. By 2006, both countries had lived a period of economic reforms (North Korea in 1999-2005, and Cuba in 1991-1996), which were later curbed. In comparison, though, North Korea's reforms had been more restrictive.[82]

As for China and Vietnam, I assume that upon the death of their founding leaders (respectively, Mao Zedong in 1976, and Ho Chi Minh in 1969) both regimes adopted sooner rather than later a collegial type of leadership. By 2016, Raúl Castro had established the same type of leadership, although it can be argued that as one of the founders of the regime, his presence still entails a dose of charismatic legitimacy as part of the *históricos*. If Kim Il-Sung had opted for a hereditary succession to avoid the messy post-Stalin and post-Mao successions,[83] Raúl has tried to pre-empt any disorder by instituting collegiality within the *históricos*' lifetime –an original route.

China and Vietnam eventually reformed the Soviet-style CPE through market reforms that later restored (a state-led) capitalism: China since 1979 led by Mao's successor Deng Xiaoping; and Vietnam since 1987-88 when the war with the United States was over (in 1975) and the confluence of Gorbachev's *perestroika* and Deng's reforms in China convinced the Vietnamese leadership of a change.[84]

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[79] Kyo Duk Lee, The successor theory of North Korea 27–29 (Yŏn'guwŏn Minjok T'ongil ed., 2004).

[80] Weber, *supra* note 16 at 248.

[81] Lee, *supra* note 79 at 26.

[82] Kong, *supra* note 46.

[83] *Id.*; Ji You, *China's Reaction to the North Korean Succession Crisis*, 8 China Brief, 2008, http://ow.ly/Redxf (last visited Jul 19, 2016).

[84] Pierre Brocheux, *Reflections On Vietnam*, New Left Review 73–91 (2012).

While capitalism has been restored in China and Vietnam and the CPE is still firmly entrenched in North Korea, Cuba is located somewhere in between. Although Cuba's current economic ideology is classified in Figure 3 as being closer to China and Vietnam than to North Korea, the difference between 'medium' and 'high' market acceptance is a substantial one for the latter presupposes a *comeback* of the bourgeoisie –an ideological limit that has not yet been lifted in the Caribbean case.

Raúl Castro has even implied that the difference of Cuba's path from that of China and Vietnam is that the former has kept its communist –i.e. anti-capitalist– commitment:

> The introduction of demand and supply rules is not at odds with the principle of planning. Both concepts can coexist and complement each other […] as has been successfully demonstrated in the processes of *reform* in China and *renovation* in Vietnam, as they call them. We have called it [our process] *updating* because we are not changing the key goal of the Revolution.[85]

I would then distinguish two degrees of maturation: 'minor' and 'major' –each one in turn informing and conditioning correlated economic strategies. Closer to the early post-totalitarian stage, a 'minor' maturation implies an ideological adjustment that has not broken the standard Marxist stance against the private property of means of production. If this principle is compared to a *taboo* then a 'major' maturation occurs when the *taboo* is broken, hence annulling the key Marxist anti-capitalist principle –as in contemporary China and Vietnam. If sparked as a regime's response to the dissipation of charisma, any maturing trend, either *minor* or *major*, is another confirmation that charismatic decline has turned economic performance into the main concern of the regime –i.e. its main challenge to legitimacy.

V. Conclusions

According to Linz, in the work he co-authored with Stepan they limited "to distinguishing post-totalitarian regimes from both authoritarian regimes and the previous totalitarian regime. We did not enter into a detailed analysis of the change from totalitarianism to post-totalitarianism, although we did point to different paths and degrees of change."[86] Meanwhile, Saxonberg added a stringent framework to explain such a change and the rationale behind the different post-totalitarian paths. While I found his analytical contribution a powerful foundation to build on, I reapplied his framework to the Cuban case when doing so, in order to rectify a characterisation that I sensed was contradicted by reality.

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[85] Castro, *supra* note 66. The highlights are mine.

[86] Linz, *supra* note 11 at 6.

I then discarded and endeavoured to replace Saxonberg's explanation of the post-totalitarian evolution of Cuban communism. For him, Cuba (even under Raúl Castro) is a *freezing* post-totalitarian regime mixing patrimonial elements. I thus contended that, focusing on the period between 2006 and 2016, Cuba was neither patrimonial nor a freezing regime. On the one hand, I argued that the leadership of the Cuban regime had been *charismatic*, and then demonstrated that in the transition from Fidel to Raúl, the latter turned to *collegiality*. Then I established that *market-socialist* ideology had been ingrained in the Cuban approach to the *CPE model*, which is what I call a maturing path. Besides, I also demonstrated that the change in the type of leadership and ideology of the Cuban regime was caused by the re-equilibration of its claims to legitimacy.

In conclusion, Cuba under Raúl Castro has experienced a *minor* maturation after the Cuban regime entered the *late post-totalitarian stage* due to the loss of charisma. The ideological redefinition of admissible anti-capitalist economic policies managed to retain socialist claims to legitimacy (typical of the *early stage*) while developing market-based claims (typical of the *late stage*). This political tension is likely to mark the beginning of the post-Castro era, which is expected to start in 2018.

To position the contribution of this article within the existing literature, Table 2 proposes an updated classification of the surviving communist systems.

Table 2. Economic strategy and regime-type of surviving communist systems

	Economic strategy	*Regime type*
China, Vietnam	Capitalist restoration	Maturing post-totalitarian
Cuba	* Market socialism	* Maturing post-totalitarian
North Korea	Centrally planned economy	Totalitarian (mixed with patrimonial rule)

Sources**:** Apart from Cuba, the economic strategies and the regime-types were classified according to the characterisations of Kong and Saxonberg, respectively.[1]
***** This is the argument developed in this article

In order to explain the evolution of China and Vietnam, Saxonberg had asserted that:

87 Kong, *supra* note 46; Saxonberg, *supra* note 4.

> In some cases (China and Vietnam), the very economic success of reforms undermines the ideological legitimacy of the regime, since it has now become obvious that the reforms were based on the introduction of a capitalist market system, rather than on any kind of "socialist" alternative. [88]

As Saxonberg's theory is based on the assumption that "any kind of "socialist" alternative" is impossible, he has only admitted two possible political paths:

> [I]t seems communist countries have had to choose between either losing their ideological legitimacy by sticking to their ideology and having it fail, or giving up their ideology in order to meet their economic goals. [89]

This is what I call *Saxonberg's dilemma* in section 2. The Cuban regime has escaped this dilemma as it neither has stuck to its ideology nor given up on it, which has implications when characterising the type of regime. On the one hand, its ideological departure from anti-market CPE precluded a *freezing* path. On the other, an orientation to performance-based legitimacy faithful to socialist ideology is still far from the current Chinese or Vietnamese capitalist *maturing* path. This is why Cuba's peculiar path may be well defined as a post-totalitarian regime maturing in a market-socialist direction.

The Cuban regime, however, has curtailed the democratic potential of the market socialist path. In a rough comparison Cuba with the Yugoslav case, the 'workers' self-management' effort is absent in the former. If the authoritarian path persists in Cuba, so will the threat of capitalist restoration. [90] For example, the new co-op legislation has suppressed the democratic potential of the co-op's General Assembly because its President is legally treated as if s/he were "a supreme figure" – perhaps "an extrapolation of the leadership's schemes of the state sector." [91] Based on this legal ambiguity, some *de facto* privatisations have been disguised as conversions of small state businesses into urban co-ops, such as the "La Divina Pastora" restaurant in the tourist area of *Morro Castle* in Havana. [92] However, whether this case of Cuban-style

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88 Saxonberg, *supra* note 4 at 31.

89 *Id.* at 272.

90 Camila Piñeiro Piñeiro Harnecker, *Nonstate Enterprises in Cuba Building Socialism?*, 41 Latin American Perspectives 113–128 (2014).

91 Natacha Teresa Mesa Tejeda, *Reflexiones críticas en torno a la regulación de las cooperativas no agropecuarias en Cuba*, Boletín de la Asociación Internacional de Derecho Cooperativo 227–243, 238 (2014). For Cuban co-op's legislation, see Consejo de Estado, Decreto-Ley No. 305. De las cooperativas no agropecuarias 249–253 (2012).

92 Miriam Celaya, *La conjura de "La Divina Pastora,"* Diario de Cuba, September 30, 2013, http://goo.gl/i2XjIE (last visited Apr 11, 2015); Marc Frank & Rosa Tania Valdés, *Cuba looks to cooperatives to slow rise of capitalism*, Reuters, April 14, 2014, http://ow.ly/PdM0L (last visited Nov 4, 2015).

spontaneous privatisation is an isolated case or part of a wider phenomenon is still unknown and thus a (disquieting) matter of speculation.

To summarise, the *market socialist* approach seeks to reconcile the CPE with the market without restoring capitalism. I have also argued that Cuba belongs to the same type of regime as China and Vietnam, although it has a different economic strategy. Indeed, while these two Asian cases have long adopted a maturing path, in Cuba this kind of political development has just started.

Will Cuba catch up with China and Vietnam? This is, of course, a matter for future consideration, which the post-Castro leadership will most certainly undertake.

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NOTES

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MEXICO-U.S. CROSS-BORDER FAMILY MEDIATION: LEGAL ISSUES IN MEXICO*

Nuria Gonzalez-Martín**

Abstract. *The approach taken by society toward dispute resolution in child custody cases has historically been seen as litigation versus mediation. Given the current volume of cross-border family-related disputes, this binary approach no longer makes sense. In this note, I provide a brief introduction to mediation in Mexico, especially Mexico City. I also analyze other ideas regarding International Child Abduction by one of the Parents and International Family Mediation between Mexico and the USA.*

* A presentation containing this brief overview was accepted to be discussed at the American Bar Association in the Section of Dispute Resolution, Spring Conference in New York, April 8th, 2016, Program "ADR Around the World in 75 minutes", coordinated by Sheila R. Purcell, Director and Clinical Professor, Center for Negotiation and Dispute Resolution. UC Hastings. San Francisco, California.

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I wish to acknowledge and thank Maria Cristina Oropeza Zorrilla and Pascual Hernandez Mergold for their feedback and friendship.

Key Words: *Mediation, International Family Mediation, International Child Abduction by One of the Parents, Mexico, United States of America, Alternative Dispute Resolution.*

Resumen. *El enfoque adoptado por la sociedad hacia la resolución de conflictos en los casos de custodia de menores históricamente ha sido visto como un pleito contra la mediación. Dado el volumen actual de los conflictos transfronterizos relacionados con la familia, este enfoque binario ya no tiene sentido. En esta nota, se hará una breve introducción a la mediación en México, especialmente en la Ciudad de México. También se analizan otras ideas sobre sustracción internacional de menores por uno de los padres y acerca de la Mediación Familiar Internacional entre México y los EE.UU.*

Palabras Clave: *Mediación, Mediación Familiar Internacional, Sustracción Internacional de Menores por parte de uno de sus progenitores, México, Estados Unidos de América, Medios Alternos de Solución de Controversias.*

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I. Introduction

The border between Mexico and the United States of America (USA) measures over 3,000 km long, making it the world's longest divide between a developed and developing nation. Unsurprisingly, this shared border has given rise to millions of yearly border crossings - 11,500,000 Mexicans in the U.S.; 738,103 Americans in Mexico - seeking better economic, educational and professional opportunities. This situation also encourages interactions and an increased number of international families, that is, families formed by individuals who are under the jurisdiction of different countries.

Table 1: International Migration.
Mexican Residents abroad by Country

Country	*Population*
United States	11.500.000
Canada	63.395

Country	*Population*
Spain	16,864
Guatemala	14,481
Germany	14.156
Bolivia	8.556
United Kingdom	8.000
Costa Rica	7.500
Netherlands	4.656

Source: Instituto Nacional de Inmigración de México (INAMI), 2015.

Table 2:
Foreign Population in Mexico by Country

Country	*2010*	*2000*	*1990*	*1980*	*1970*	*1960*
United States	738.103	343.591	194.619	157.08	97.248	97.902
Spain	77.069	21.024	24.783	32.240	31.038	49.637
Guatemala	35.322	23.957	45.005	4.115	6.969	8.743
Colombia	14.942	6.215	4.635	2.778	1.133	0

Country	*1950*	*1940*	*1930*	*1920*	*1910*
United States	30.454	9.585	12.396	11.090	15.242
Spain	26.876	21.022	47.239	29.565	29.541
Guatemala	4.613	3.358	17.023	13.974	21.334
Colombia	0	0	273	182	82

Source: Instituto Nacional de Inmigración de México (INAMI), 2010.

These families are formed by citizens of diverse cultural and linguistic backgrounds, which complicates cross-border conflicts and requires solutions that protect minors involved in agonizing family disputes.

In this context, we present a brief and informal overview regarding Mexico and Mediation (Part II); and some ideas regarding international child abduction by a parent and international family mediation between Mexico and the U.S. (Part III).

II. Mexico and mediation

Although mediation in Mexico only started recently, it has already had a notable impact on how family-related disputes are resolved. In Mexico, Alternative (or appropriate) Dispute Resolution (ADR) is grounded in the Constitution. The Mexican United States, established in Article 17 of its 1917 Constitution that "the law will consider controversy resolution mechanisms" (published June 18th 2008) (our own translation). Likewise, Article 18, paragraph six, of the Constitution states that "Alternative forms of justice should be used in the implementation of this system (the juvenile justice system), where appropriate.

In all proceedings in which an adolescent is prosecuted, due process of law and independence among the authorities that issue the referral and those that enforce the measures shall be observed. These measures should be proportional to the transgression carried out and shall aim at the adolescent's social and family reintegration, as well as the full development of his or her person and capacities. Confinement shall only be used as an extreme measure and for the shortest possible time. Confinement can only be applied to adolescents over the age of fourteen who have committed antisocial acts deemed serious".

Note also that:

- Mexico is a Federation organized into 31 States and a Federal District (Mexico City), each having sovereignty for diverse legal matters, including ADR; i.e., family law is local not federal. As a result, 32 Codes would normally have to be amended. This said, a bill is currently pending to amend Article 73 of the Constitution with regard to ADR, April 28th, 2016, so Congress enact a General ADR Law. This Law would be compulsory for all states, as well as the federal government.
- Under ADR statutes, Alternative Justice Centers have been established in 31 different jurisdictions, each located in the State´s Supreme Court facilities.
- In Mexico, mediation in Courts is the most widely used form.

Mexico has 31 Alternative Justice statutes (*Ley de Justicia Alternativa*) (with the exception of Guerrero) and 30 Alternative Justice Centers (except Guerrero and Queretaro). The 2008 Alternative Justice Act and its reforms and amendments, enacted between 2013 and 2015, are also worth noting. Although the reforms of June and August 2013 tried to make the request to mediate mandatory in Mexico City, it was never enacted, as the Alternative Justice Center was unable to deal with massive requests.[1] Although mediators in Mexico City are usually attorneys, this is not a requirement under the 2013

[1] The parties are required to attend an introductory session to learn about the process. In divorce cases already in court, proceedings are suspended for up to two months for the purpose of conducting mediation.

and 2015 reforms. Most states only require that these facilitators are trained to conduct mediation proceedings.

In Mexico City, the Alternative Justice Center (AJC) offers the following types of mediation:

— 2003 Family Mediation
— 2006 Civil and Commerce Mediation
— 2007 Restorative Justice
— 2008 Juvenile Mediation
— 2010 Private Mediation
— 2013 Community Mediation and School Meditation (As part a sinergy project)
— 2013 Mediation sessions are conducted by officers known as *Secretarios Actuario*s.

In Mexico City, under such circumstances, spaces have been established for both public and certified private mediation. Beyond this jurisdictional context, there is uncertified private mediation or private mediation in Mexico.

Alternative Justice Centers in Mexico City employ three types of mediators: (a) public mediators; (b) certified private mediators; and (c) uncertified mediators (or "private mediators").

— Public mediators are public servants employed by the Alternative Justice Center in each jurisdiction;
— Certified private mediators are accredited and supervised by each corresponding Alternative Justice Center, and
— Uncertified private mediators or private mediators work on a freelance basis.

Worth noting is that settlements reached through public mediation or certified private mediation are legally binding in Mexican Courts. Settlements reached through uncertified private mediation (or "private mediation") are not legally enforceable, unless stipulated otherwise under applicable law.

Challenges faced in Mexico in cases of international child abduction by a parent:

— "Amparo" trials can be appealed;[2]
— Use and abuse under the exceptions (international parental child abduction) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention");
— Recognition and enforcement in an international context

[2] Mexican legislation from internal sources regulates the Juicio de Amparo that protects people from general laws, acts or omissions by public powers or by individuals indicated in the Ley de Amparo. (http://www.sitios.scjn.gob.mx/leyamparo/sites/default/files/Ley%20Amparo%20Micrositio%20V.4.pdf), [Visited july, 2016].

Though there are about 22 million inhabitants in the Mexico City metropolitan area, the Alternative Justice Center has only 24 Public Mediators, consisting of:

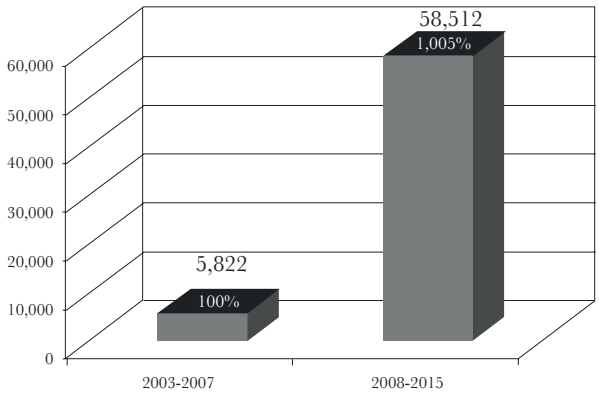
— 7 Civil and Commercial Mediators
— 12 Family Mediators (7 AJC plus 5 CECOFAM)
— 5 Restorative Justice or Criminal and Juvenile or Teenagers Mediators

In total, the Alternative Justice Center employs 347 Certified Private Mediators, among them 114 fully-accredited *Secretarios Actuarios*. Hence we highlight the reduced number of public and certified private mediators.

The Mexico City Alternative Justice Center has a series of agreements with diverse local institutions that helps promote and apply mediation in numerous fields, including INVI, INFONAVIT, LOCATEL, PGJDF, AHM, INE, etc.

Between 2008 and 2015, the Mexico City Alternative Justice Center handled 58,512 public and certified private mediation cases. This figure represents a significant increase in the use of mediation compared with the period 2003-2007.

Table 3:
Cases attended by the Center for Alternative Justice
of the Tribunal Superior de Justicia del Distrito Federal

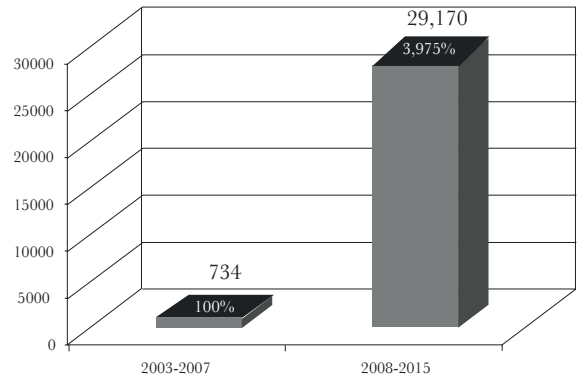


Source: Alternative Justice Center Mexico City.

Note a significant increase in the number of agreements subscribed between 2008 and 2015, when there were 29,170 settlements:

Table 4:

Mediation agreements completed



Source: Alternative Justice Center Mexico City.

Based on its commitment to continuing education, evaluation and high public attention, the Mexico City Alternative Justice Center scores a high Index of Qualification.

Additional information about mediators and requirements in Mexico City:

— As mentioned earlier, Mexico Cit mediators are usually attorneys but it is not a requirement (reform August, 20th 2015).
— Confidentiality. Mediators must treat anything discussed during the mediation as strictly confidential, which is considered key in building trust between the parties. Under law, mediators cannot act as witnesses in any legal proceedings related to mediation cases in which they were involved. These rules derive from both the principle of confidentiality and the duty of professional secrecy.

An exception to confidentiality applies when (a) evidence exists of a danger to the physical or mental integrity of a mediator; or (b) information exists of offences prosecuted ex-officio, which are normally serious crimes, such as homicide, robbery, arson or indecent assault. In these cases, mediators must direct the parties either to specialized institutions or, if necessary, inform the authorities.

III. Mexico – USA and Family Mediation in International Parental Child Abduction

"Love has a universal language that knows no borders…but has legal difficulties because the world has different legal systems". This section is an overview

of international parental child abduction and mediation between Mexico and the U.S., starting with a brief description of the Mexican government's interest through its Foreign Affairs Ministry.

The notable increase in cross-border child abduction by a parent makes this topic both relevant and newsworthy. In general, this increase can be explained by:

— More cross-border family ties.
— Crisis of marriage as an institution (as well as the crisis of couples).
— More cross-border family conflicts.
— More child custody cases arising from marital dissolution.

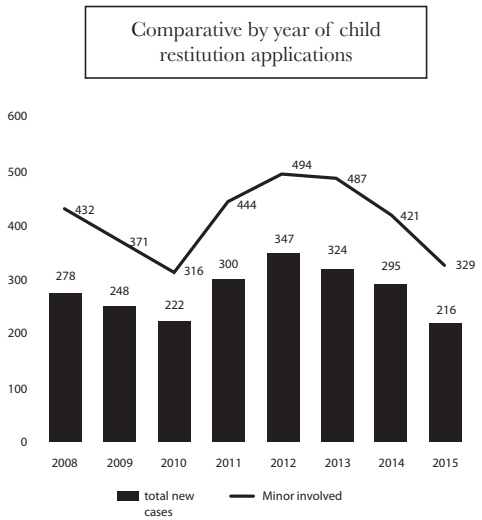
Manipulation of children as weapons during marital breakups have given rise to more abductions and often permanent damage to minors.

This occurs when one of the parents either wrongfully removes a minor child (under 16 y.o.) from his or her normal country of residence; or retains the child in a way that breaches the other parent´s custody rights.

Mexico and the U.S. represent 10% of all international parental child abductions worldwide. In October 2015, Mexico had almost 400 active cases involving 581 minors. Between Mexico-USA were are 300 cases with 460 minors involved.

Worth pointing out is that case reporting requirements differ for each country; while the U.S. Central Authority includes all reported cases, Mexico only considers cases that have actually been filed with the corresponding Central Authority.

TABLE 5:



Year	Total new cases	Minor involved
2008	278	432
2009	248	371
2010	222	316
2011	300	444
2012	347	494
2013	324	487
2014	295	421

As october 9th, 2015 there are:
395 active cases 581 minor children

Mexico -US - Mexico
303 active cases 460 minor children

Incoming cases
(Minor in Mexico)
144 active cases 197 minor children

Outgoing cases
(Minors in other countries)
251 active cases 384 minor children

SOURCE: http://proteccionconsular.sre.gob.mx/index.php/2013-05-23-18-19-55/89-inicio/derecho-de-familia/129-estadisticas [accessed on 12 March 2016].

With regard to children:

— Best Interest of the Child (Article 3 UN Convention on the Rights of the Child).
— "The child´s right to maintain on a regular basis (…) personal relations and direct contacts with both parents" (Article 10 United Nations Convention on the Rights of the Child)
— A human right to be neither separated nor abducted by any of the parents.

The 1980 Hague Convention – signed and enforced in both countries in 1988 and 1991 - seeks to ensure the child´s prompt return to his/her habitual State of residence, that is:

— Rule: Immediate restitution of the child to his/her habitual state of residence and to restore the status quo *before* the abduction as quickly as possible to lessen the harmful effects of the wrongful removal or retention.
— Exception: No restitution (Articles 12, 13 and 20 the 1980 Hague Convention).

Art. 12 (2): exceptions to returning the child include the child becoming settled due to the passing of time – one year since the wrongful removal or retention;

Art. 13. (1)(a) consent or acquiescence by the applicant;

Art. 13. (1)(b) a grave risk that return will expose the child to harm; or place him/her in an intolerable situation;

Art 13. (2) objections by a mature child; and

Art. 20. Any violation of basic human rights.

Although the general principles are fairly clear, there's a problem for exceptions to summary return, at which point the Court of the child's current place of residence (i.e., *after* the abduction) decides whether to send the child back to where he or she lived prior to abduction (i.e., their *habitual residence*).

Right now, it often seems like the exception is the rule and the rule is the exception. This constitutes a lack of respect for the Convention's articles, a lack of respect for the spirit of the Convention and worse, an indescribable danger for the children involved in this kind of parental conflict, with an emotional and (sometimes even) physical damage for the rest of their lives.

Some challenges among Mexico and USA due its special circumstances:

— Implement a binational mediation program for cross-border child abduction cases, especially between Mexico and the U.S for their particular characteristics.

— Analyze need for specialized mediation training in cases of cross-border child abduction (e.g., bilingual, bicultural, use of online dispute resolution "ODR")
— Assess the need for a list of specialized government-certified mediators, as well as continuing education and evaluation
— Monitor implementation of a Central Contact Point located within the site of the Central Authorities (see The Hague Guides to Good Practice Mediation).
— Required Principles and Daily Practice with a Guide or Code of Practice
— Recognition and enforcement of voluntary cross-border child custody agreements, the ¨Achilles heal¨.[3]

Based on the above, we propose the implementation of a Binational Program involving Mexico and the U.S. consisting of:

— Prevention. Mediating cases to prevent future child abduction – education and persuasion; and
— International Family Mediation. International parental child abduction cases.

Binational Program
STEP ONE

— Cooperation between stakeholders
— Promotion
— Education

STEP TWO
Budget aimed at providing access to alternative justice (human and material resources) for the sake of:

— Promotion (prevention)
— Training
— Enforcement

[3] Experts' Group on Recognition and Enforcement of Voluntary Cross-Border Agreements in International Child Disputes, mandate of the Council on General Affairs and Policy of the Hague Conference, meetings in December, 12-14th, 2013 and November 2-4th 2015. See Guide of Good Practice, parr. 303 "The courts should, to the extent feasible, support the sustainability of the agreement legally binding and enforceable in the different legal systems concerned. This may include the use of "mirror orders" or "safe-harbour orders". Mirror Order is "an order made by the Courts in the requesting State that is identical or similar to an order made in the requested State". Safe-Harbour order "is one made by a Court in the requesting State often on the application of the left-behind parent with the aim of ensuring the terms of the return".

25. Process (Child's Best Interest):
Mediation Team:

1. At the child's current place of residence (i.e., after the abduction)

— Face to face;
— Co-mediation:
  a. Male/female;
  b. Multidisciplinary
  c. Bilingual;
  d. Bicultural;
  e. Experience and expertise in international parental child abduction cases;
  f. Knowledgeable in different legal systems;
  g. Links and connections - administrative and legal bodies - in order to cooperate;
  h. Cross-border recognition and enforcement

2. In parallel or simultaneously:

— caucus or private sessions at the child´s habitual place of residence (prior to abduction);
— Online Dispute Resolution "ODR" (e-mail, platform4, videoconference…)

IV. Conclusions

We recognize that mediation is not a panacea and has limitations, including: nature of the conflict; specific needs of the parties; specific circumstances of the case; inability or unwillingness to meet or listen; or particular legal requirements that may impair the mediation.

We also know that mediation has several advantages which, in cases of cross-border parental child abduction, can expedite resolution; bring balance of power; reduce economic and emotional costs; bring many positive deals related to visit, travels, support, education, etc.

Definitely, we are not talking about a confrontational position between mediation and litigation. On the contrary, mediation and litigation are complementary, especially in family conflicts because it is clear to us that solutions or agreements obtained through a process as mediation are more prone to being fulfilled and longer lasting.

Settlements reached by the parties themselves tend to be more durable, flexible and longer-lasting. The stakeholders who engage in mediation often gain responsibility in implementing the best practices available, especially when a child is involved; in this way, it benefits one of the most vulnerable sectors of society.

[4] *E.g.* http://www.modria.com

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MEXICO: A FAILED STATE OR A CRIMINAL STATE? THE NESTORA SALGADO CASE

Ricardo Arturo Lagunes Gasca*

Abstract. *For decades, the people in the Mexican state of Guerrero have been immersed in poverty, insecurity, and militarization. Accordingly in 1995, almost a year after the Zapatista National Liberation Army (EZLN) uprising, a community police corporation was formed with members of indigenous communities, in order not only to protect the population against organized and regular crime but also to administer justice with the legal grounds provided by the International Labour Organization Convention 169. Since then, many members of the Guerrero community police have been incarcerated for political reasons. One of them is Nestora Salgado, who was illegally detained by the Mexican army and incarcerated in a high security prison in Nayarit for almost 20 months. In December 2015, the United Nations Working Group on Arbitrary Detention deemed the detention of Nestora Salgado as illegal and arbitrary, and requested her immediate release.*

Key words: *United Nations, human rights, Guerrero, Mexico, human rights defenders, communitary police.*

Resumen. *Por décadas, el pueblo del Estado Mexicano de Guerrero ha estado sumergido en la pobreza, inseguridad y militarización. Por esa razón en 1995, casi un año después del alzamiento del Ejército Zapatista de Liberación Nacional, se fundó la policía comunitaria compuesta por las comunidades indígenas,*

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con el objetivo no solo de proteger a la población frente al crimen organizado y el crimen en general sino, también, para administrar justicia con la base legal que otorga el Convenio 169 de la Organización Internacional del Trabajo. Desde esa época hasta la fecha, muchos integrantes de la policía comunitaria de Guerrero han sido encarcelados por motivos políticos, una de ellos es Nestora Salgado García, quien fue detenida ilegalmente por el ejército mexicano y llevada a un penal de máxima seguridad en Nayarit por aproximadamente 20 meses. En diciembre de 2015 el Grupo de Trabajo de Naciones Unidas sobre Detención Arbitraria determinó que México detuvo de manera ilegal y arbitraria a Nestora Salgado y solicitó su liberación inmediata.

Palabras Clave: *Naciones Unidas, Derechos Humanos, Guerrero, México, Defensores de Derechos Humanos, policía comunitaria.*

Table of Contents

I. Introduction

Even though Mexico has ratified almost 210 human rights treaties,[1] and has recently enacted a constitutional reform (2011), violations of human rights are getting worse. This social and political crisis was documented and reported by the Inter-American Commission on Human Rights in the special report on Mexico[2] as a result of an *in locu* visit that took place in September-October 2015,[3] and by the United Nations High Commissioner for Human Rights.[4]

At the end of his on-site visit to Mexico, the High Commissioner for Human Rights reported alarming rates of violence occurring since 2006,[5]

[1] National Supreme Court of Mexico. http://www2.scjn.gob.mx/red/constitucion/TI.html

[2] Special Report of the Inter-American Comission of Human Rights http://www.oas.org/es/cidh/informes/pdfs/Mexico2016-es.pdf. [Fecha de consulta: 31 de marzo de 2016].

[3] *Visita in locu* of the Inter-American Comission of Human Rights http://www.oas.org/es/cidh/actividades/visitas/mexico2015.asp. [Fecha de consulta: 31 de marzo de 2016].

[4] Statement of the United Nations High Comissioner for Human Rights on his visit to Mexico, October, 2015, http://www.hchr.org.mx/index.php?option=com_k2&view=item&id=767:declaracion-del-alto-comisionado-de-la-onu-para-los-derechos-humanos-zeid-ra-ad-al-hussein-con-motivo-de-su-visita-a-mexico&Itemid=265. [Fecha de consulta: 31 de marzo de 2016].

[5] *Id.*

although Mexico is not yet considered a country technically involved in an armed conflict. For instance 151,233 people were killed between December 2006 and August 2015 including migrants in transit through Mexican territory; since 2007 there have been at least 26,000 cases of missing people, most of them probably related to enforced disappearances.

From April 21 to May 2, 2014, the United Nations Special Rapporteur on Torture made an on-site visit to Mexico. As a result, he addressed a final report[6] to the Human Rights Council stating that torture and inhuman treatments are widespread from the detention of a person until the moment he or she is brought before a prosecutor or a judge. Special Rapporteur on Torture stressed the weakness of the safeguards to detect or prevent the torture of the detainees while in custody, and above all, a lack of an effective investigation.[7]

In the last two years, Mexico has captured international attention, unfortunately due to several high impact cases of human rights violations: the forced disappearance of 43 students from the Raúl Isidro Burgos School (Ayotzinapa), as well as the Tlatlaya, Tanhuato, and Apatzingan cases, among others.

II. Brief background of community police of Guerrero

Guerrero has undergone several periods of high violence, repression, and military occupation. Since the 1960s,leftist guerrilla groups led by peasants and rural teachers have demanded that their basic human rights be respected and guaranteed.

In 1995, driven by the political and economic crisis, indigenous communities of Tlapanecos, Mixtecos, Nahuas, and Amuzgos, among others, from the Costa Chica and the mountain region in Guerrero, formed a community police force aimed at stopping insecurity, corruption and impunity.[8]

Best known as the Comunitaria, this police force was able to reduce local violence and insecurity in a short time. Afterwards it initiated a process to implement a regional justice system based on indigenous law.[9] Due to the inefficiency of the judicial system the communities decided to create their own and autonomous justice system. Therefore, in 1998 the *Coordinadora Regional*

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[6] Final Report, United Nations Special Rapporteur on Torture, on-site visit to Mexico, http://sintortura.mx/wp-content/uploads/2015/03/A_HRC_28_68_Add_3_SPA.pdf. [Fecha de consulta: 1 de abril de 2016].

[7] *Id.*, paragraph 77.

[8] Raúl Romero Gallardo, *La Policía Comunitaria de Guerrero: un sistema alternativo de seguridad y justicia, Revista Digital Universitaria*, UNAM, [fecha de consulta: 1 de abril de 2016], http://www.revista.unam.mx/vol.15/num9/art68/.

[9] María Teresa Sierra, CIESAS, [fecha de consulta: 1 de abril de 2016], https://nacla.org/article/indigenous-justice-faces-state-community-police-force-guerrero-mexico.

de Autoridades Comunitarias was established with the role to administer justice and enforce the law.[10]

The government responded with repression against the communities. In 2002, all the community authorities were incarcerated and in August 2007 many orders were issued to arrest community police members.[11]

In April 2011, the government of Guerrero issued the State Law 701 acknowledging the rights and culture of indigenous peoples,[12] and referring to the *Comunitaria* and *Coordinadora* as part of the justice system of the state.

Notwithstanding the legal recognition made in the Guerrero State Law 701, in August 2013 Nestora Salgado and other members of the community police of Olinalá, Guerrero, were illegaly and arbitrarily arrested. Many of them are still in prison.

III. Opinion 56/2015 of United Nations Working Group on Arbitrary Detention about Nestora Salgado's case

Nestora Salgado was arrested in August 2013 for her courageous community work in the small indigenous village of Olinalá, Guerrero. Salgado was a leader of a community-policing group that legally forms part of state law enforcement, and had the express approval of Guerrero's governor.

Authorities abruptly changed their position, however, when the group arrested a local official for committing a crime. Salgado was immediately seized by military forces and flown nearly 1,000 kilometers away to the prison of El Rincon, in Nayarit. She was denied visits from her chosen attorney for nearly a year.

Salgado was refused bail, and has lived in solitary confinement 24 hours a day. She has also been denied necessary medical treatment and clean water.

In November 2013, the Human Rights Clinic at Seattle University School of Law requested the United Nations Working Group on Arbitrary Detention (UNWGAD or Working Group) to issue a legal opinion confirming Nestora Salgado's arbitrary and illegal deprivation of liberty.

In December 2015, having analysed the information provided by the Human Rights Clinic and the Mexican government, the UNWGAD issued a legal opinion.[13]

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[10] Giovanna Gasparello, *Policía Comunitaria de Guerrero, investigación y autonomía, Política y Cultura* 32 (Fall, 2009), [Fecha de consulta: 1 de abril de 2016]. http://www.scielo.org.mx/pdf/polcul/n32/n32a4.pdf.

[11] *Id.*

[12] See http://guerrero.gob.mx/leyesyreglamentos/ley-numero-701-de-reconocimiento-derechos-y-cultura-de-los-pueblos-y-comunidades-indigenas-del-estado-de-guerrero/ (Article 35-42). [Fecha de consulta: 2 de abril de 2016].

[13] See http://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opini on%202015%2056_Mexico_SalgadoGarcia_AUV%20.pdf. [Fecha de consulta: 2 de abril de 2016].

The Working Group stated that the source is reliable and has a high standard of credibility, on the basis that the allegations are thoroughly corroborated with the response of the Mexican government.

Additionally, it acknowledged Nestora Salgado as a defender of community human rights and added that she was arrested despite the fact that there were no criminal charges against her. It highlighted the circumstance that a federal court acquitted Nestora Salgado on the same facts she was accused of at the local level, an absolute contravention of the *non bis in idem* principle.

There is no doubt, says the UNWGAD, that the arrest and detention without formal imputation of criminal charges is illegal and arbitrary. Also, it points out as a motive of concern the role of the Mexican army in the detention of civilian people.

Furthermore, the UNWGAD emphasized that Nestora Salgado during her detention did not have access to legal representation and she was not presented before a judge or a court in order to decide about the legality of the detention. In this case the Mexican government did not observe the basic right to a fair trial.

As well, it remarks the fact that Nestora Salgado has been persecuted in retaliation for her human rights work in favor of indigenous peoples.

Finally, the UNWGAD concludes requesting that the Mexican government solve this case releasing Nestora Salgado and providing her an appropriate compensation.

The UNWGAD legal opinion was the first resolution not only at international level but also at the local one, to recognize the severe human rights violations in Nestora Salgado's case since she was arrested, excluding her of any judicial and legal protection as a punishment for her work in favor of indigenous communities.

Doubtlessly, this international legal opinion played a key role in putting Mexican government under pressure to release Nestora Salgado. She was thus freed in March 18, 2016, after almost two years and seven months of unjust imprisonment.

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