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ARTICLES

NOTE

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STATE POWER AND THE ENFORCEMENT OF PROHIBITION IN MEXICO

Dawn Paley*

Abastract: *This article positions the prohibition of psychoactive substances as a material means of strengthening States and State power. We argue that the militarized enforcement of prohibition has known outcomes beyond the control of substances, including the creation of cash economies that, firstly, support the smooth flowing of modern global capitalism, and secondly, finance US allied (reactionary) armed groups internationally. Various national contexts are considered, with a special focus on how these trends are developing in the ongoing "war on drugs" in Mexico.*

Key words: *Global Capitalism, War on Drugs, State Power, Prohibition.*

Resumen: *En este artículo se postula la prohibición de las sustancias psicoactivas como un medio material para fortalecer a los Estados y al poder estatal. Sugerimos entonces que la aplicación militarizada de la prohibición ha tenido resultados más allá del control de las sustancias, incluyendo la creación de economías en efectivo que, en primer lugar, apoyan la fluidez del capitalismo global moderno y, en segundo lugar, financian a los grupos armados aliados (reaccionarios) de los Estados Unidos a nivel internacional. Se consideran diversos contextos nacionales, con especial énfasis en cómo se desarrollan estas tendencias en la guerra contra el narcotráfico en curso en México.*

Palabras clave: *capitalismo global, guerra contra el narcotráfico, poder estatal, prohibición de sustancias psicoactivas.*

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I. Introduction

On February 4, 2016, Mexican President Enrique Peña Nieto met with US Secretary of Homeland Security Jeh Johnson and Secretary of Commerce Penny Pritzker to inaugurate the new Guadalupe-Tornillo border bridge between Chihuahua and Texas. "We have a privileged location and a historic opportunity we must seize to consolidate ourselves as allies and create prosperity and wealth," said Peña Nieto.[1] What US and Mexican officials ignored was that over the same time period as the bridge was constructed, the Mexican side of the border had been transformed into a war zone. Over 300 people in the town of 10,000 have been killed since 2008, and many thousands displaced. Today, Guadalupe is essentially a ghost town.

In the mainstream media, the violence in the Juárez Valley, of which Guadalupe is part, was portrayed as the result of a war between the Mexican State and drug traffickers. But as time passes, competing narratives are beginning to emerge. Mexican journalist Ignacio Alvarado wrote the following events in town of Guadalupe in late 2015: "In the abandoned and burned-out remains of Guadalupe, former residents see a scorched-earth policy: The State colluded with capitalists and criminals, they say, to empty the area of both residents and industry so that large binational groups could swoop in and develop huge infrastructure projects on valuable borderlands rich in natural resources."[2] Less than a week after the Guadalupe-Tornillo port of entry was inaugurated, a clandestine grave containing four bodies was discovered "very close" to the bridge.[3]

Official narratives of the drug wars in Mexico, Central and South America maintain a strong separation between violence linked to the drug war and global capitalism. This article builds on existing work connecting the violence of the drug war to capital accumulation in Latin America, particularly the enforcement of prohibition in the form of *comprehensive drug wars*, which is how we refer to multi-year, multi-agency funding packages like Plan Colombia

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[1] Enrique Peña Nieto, *El mensaje integro de Peña Nieto,* ANIMAL POLÍTICO (2016), available at *http://www.animalpolitico.com/2014/11/el-mensaje-integro-de-pena-nieto-video/*.

[2] Ignacio Alvarado, *Mexico's ghost towns Al Jazeera America*, AL JAZEERA (2015), available at *http://projects.aljazeera.com/2015/09/mexico-invisible-cartel*.

[3] El Ágora, *Localizan en Praxedis G. Guerrero una fosa clandestina con 4 cuerpos*, El Agora, (February 11, 2016), *http://www.elagora.com.mx/Localizan-en-Praxedis-G-Guerrero,41466.html*.

and the Merida Initiative that propose armed combat against drug trafficking while at the same time shoring up the rule of law in host nations. We argue that the enforcement of prohibition strengthens States and smooths the functioning of capitalism in four ways: through policy changes introduced to support prohibition, through formal militarization, by creating cash economies to ensure the smooth operation of capitalism, and by outsourcing the costs of war, which has long been an essential part of State development within a capitalist world economy. As Giovanni Arrighi has written, "the secret of capitalist success is to have one's wars fought by others, if feasible costlessly, and, if not, at the least possible cost."[4]

Among other things, this article is intended to encourage further exploration of how the management of prohibited substances and the militarized enforcement of prohibition interact with global capitalism and State making in the 21st Century. This area remains undertheorized, even as it becomes increasingly clear that States and capitalism have come to depend on the cash economies generated through the enforcement of prohibition, as well as on narratives of criminality linked to prohibited substances as ways to shape national imaginations and notions of citizenship.

II. The Politics of Prohibition

We begin by setting out that prohibition refers to the action of forbidding something, especially by law, or "as a government decree against the exchange of a good or service."[5] We consider prohibition "an extreme form of government intervention,"[6] a *management* of illicit substances, rather than a hands off policy. As Abraham and van Schendel point out, "Both law and crime emerge from historical and ongoing struggles over legitimacy, in the course of which powerful groups succeed in delegitimizing and criminalizing certain practices […] Students of illicitness must start from the assumptions that states cannot simply be equated with law and order, and that illicit practices are necessarily part of any state."

The prohibition of narcotics and psychoactive substances began as laws that made certain substances illegal were passed internationally in the early twentieth century, through efforts spearheaded by the United States. From the outset, drug control was a mechanism through which racialized populations were criminalized, and also through which the US government and corporations could increase their power around the world. After the World War II, "The influence of the pharmaceutical industry and the drug control

[4] Giovanni Arrighi, The Long Twentieth Century: Money, Power and the Origins of our Times 39, (Verso, 2010).

[5] Mark Thornton, The Economics of Prohibition 3, (University of Utah Press 1991).

[6] *Id.,* at 83.

apparatus that traveled with it persisted as critical components of the projection of US economic and political power on a global scale."[7]

Prohibitionist logics got a boost in the 1960s and 1970s as they were deployed by States across the Cold War political spectrum in order to criminalize youth and social movements worldwide.[8] Hinton calls attention to an entanglement of the US "War on Poverty" in the with Lyndon B. Johnson's "War on Crime," which allowed "law enforcement officials to use methods of surveillance that overlapped with social programs —for instance, antidelinquency measures framed as equal opportunity initiatives— to effectively suffuse crime-control strategies into the everyday lives of Americans in segregated and impoverished communities."[9] Johnson "laid the foundations for the carceral state," which he passed off to his successor Richard Nixon, who proceeded to launch the War on Drugs.[10] In a 1994 interview released last year, John Ehrlichman, who was a policy advisor to Nixon when he was president, said the following:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[11]

The words of Ehrlichman ring true when we think through how the logics of prohibition are taken up via ideological State apparatuses to criminalize and dehumanize communities inside and outside the United States, while also strengthening the repressive State apparatus (police, courts, prisons, army).[12] In the United States, for example, prohibition has been a key contributing factor to the realization of what Angela Davis calls the "prison industrial complex" and what Mumia Abu Jamal has deemed "mass incarceration and [the] racialized prison state".[13] Critical Resistance, a national group that fights

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[7] Suzanna Reiss, We Sell Drugs: The Alchemy of US Empire 52 (University of California 2014).

[8] Dawn Paley, Drug War Capitalism 40 (AK Press 2014).

[9] Hinton, Elizabeth, *"A War within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 The Journal of American History, 101, (2015).

[10] *Id.*, at 102.

[11] Dan Baum, *Legalize It All*, Harper's (2016), available at *https://harpers.org/archive/2016/04/legalize-it-all/*.

[12] Althusser, Louis, On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses 285 (Verso 2015) (1971).

[13] Alexander, Michelle, *The New Jim Crow" Author Michelle Alexander Talks Race and*

for prison abolition, describes the prison industrial complex as "overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems"[14] Prohibition enforcement in the US also creates new revenue streams, through which police can recoup part of the cost of policing through the seizure and sale of property and assets believed to be owned or used by someone active in the drug trade. The prison industrial complex, which has reached epic proportions in the United States, is but one example of how the hard and soft power mobilized through the enforcement of prohibition are jointly manifested.

The enforcement of prohibition has generally been accompanied by a right wing, reactionary agenda in the US and elsewhere. "The War on Drugs has been adopted to serve important political ends while ushering in what deputy drug czar, John Walters (1989–93), characterized as a 'conservative cultural revolution.'"[15] Kuzmarov argues the US war in Vietnam and surrounding nations, as well as the return of veterans to the United States, were key elements in shaping President Richard Nixon's war on drugs. "Its primary aim, besides bolstering the public reputation of the U.S. Armed Forces and easing public anxieties about the return of addicted vets, was to improve the image of the South Vietnamese government so as to allow for its political sustainability."[16]

Over time, institutions created to enforce prohibition have become established parts of the US State, threading a dependence on maintaining prohibition in the fabric of the State. "In order to enforce Prohibition, the American State created new law enforcement agencies that over time have become politically and financially invested in the continuation of prohibitionist drug policies (as well as the continuation of those activities they are ostensibly designed to prohibit), despite their demonstrable failure."[17]

Indeed, these policies must be viewed as a failure if we measure their impact on people and communities in terms of individual and collective rights, or if we evaluate them in terms of their efficacy in controlling or reducing the use of narcotic drugs. But arguments about the failure of these policies obscure the fact that they have been successful means of justifying ongoing criminalization, militarization and social control on behalf of elites and the dominant political class in Washington and elsewhere. The racist and highly political roots and impact of prohibition and the war on drugs within the

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Drug War (2014), aviable at *http://stopthedrugwar.org/chronicle/2014/mar/10/new_jim_crow_michelle_alexander_talk*.

[14] Critical Resistance, *What is the PIC? What is Abolition?*, Critical Resistance (2016), aviable at *http://criticalresistance.org/about/not-so-common-language.*

[15] Kuzmarov, Jeremy, *From Counter-Insurgency to Narco-Insurgency: Vietnam and the International War on Drugs*, 20 Journal of Policy History 344–378 (2008).

[16] *Id.,* at 356.

[17] Helen Redmond, *The political economy of Mexico's drug war International Socialist Review*, 90 International Socialist Review (Apr 6, 2016), *http://isreview.org/issue/90/political-economy-mexicos-drug-war*.

United States is but one system of repression operating within a broader context of capitalism, and while the focus of this article is specifically on the consequences of prohibition, a singular focus prohibition can be short-sighted. Marie Gottschalk points out that "Legislators are making troubling compromises in which they are decreasing penalties in one area —such as drug crimes— in order to *increase* them in another area —such as expanding the use of life sentences."[18] It goes without saying that a war on drugs is not the only fuel for militarization and criminalization in the United States and internationally, and ending prohibition is but one terrain of struggle for those working towards social justice.

Having briefly discussed how the enforcement of narcotics prohibition is an active and politicized means by which States seek to exercise control over people and project State military and economic power at home and abroad, we shall now turn to how narcotics prohibition can facilitate the expansion and maintenance of capitalism, and how the militarized enforcement of prohibition can provide an off-the-books source of funding for reactionary and paramilitary groups involved in strengthening State repression of community networks and popular resistance.

III. Prohibition Enforcement and Cash Returns

For prohibition to be enacted, it has to be enforced, and this enforcement is carried out in large part by State repressive apparatus.[19] Huge sums of money have been spent by the US in order to uphold and enforce prohibition inside the United States and around the world. In 2010, Washington spent $15 billion on the drug war, while state and local governments spent another $25 billion.[20] Total US spending on the war on drugs since Nixon declared the War on Drugs in 1971 is estimated at over a trillion dollars.[21] Today, funding to uphold prohibition is spread across nearly the entire US federal government, with 13 of the 15 Executive Departments that make up the federal cabinet slated to receive a segment of the $31.1 billion in funding to support the National Drug Control Strategy for fiscal year 2017.[22] In fact, the only cabinet level departments that do not receive drug war monies

[18] Marie Gottschalk, *It's Not Just the Drug War*, Jacobin (2015), available at *https://www.jacobinmag.com/2015/03/mass-incarceration-war-on-drugs/*.

[19] Every year since 2003, federal funding for demand reduction (treatment and prevention) spending has been lower than for supply reduction (including domestic, interdiction, and international supply control strategies), with the vast majority of supply reduction going to police forces nationwide (Drug War Facts, 2015). That balance is slated to shift in 2017.

[20] Drug Sense, *Drug War Clock*, (Apr 6, 2016). *http://www.drugsense.org/cms/wodclock*.

[21] Richard Branson, *War on drugs a trillion-dollar failure*, CNN, (Apr 6, 2016). *http://edition.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs*.

[22] Office of National Drug Control Policy, National Drug Control Budget: FY

from Washington are the Department of Commerce and the Department of Energy. Of particular interest for the purposes of this article are the funds for international supply control, which for 2015, 2016, and 2017 (requested) total $1.6 billion annually. International supply control is by far the most expensive form of prohibition enforcement for the US government. A 1994 estimate pegs the cost of reducing cocaine consumption in the US by one percent at $788 million annually if realized via international supply control, $366 million per year via interdiction, $246 million per year via domestic policing, and $34 million per year via treatment.[23] If reducing drug use in the United States were the primary political motivation behind these programs, it would be an obvious choice as to which kinds of policies would be put in place. But as we have seen domestically and internationally, there are political implications to prohibition enforcement which cannot be calculated using the metrics of the availability of narcotics and/or their use. In the words of Alex Wodak, former director of Alcohol and Drug Service, at St. Vincent's Hospital, in Sydney, Australia, and current President of the Australian Drug Law Reform Foundation, "Conventional drug policy has survived for so long despite compelling evidence of abject failure because dysfunctional policy has been good politics."[24] Spending on domestic and global prohibition enforcement has become an essential thread in the fabric of US State-making.

International supply funds are used by US agencies to attempt to "disrupt" and "disband" trafficking organizations, carry out investigations and gather intelligence, carry out monitoring and interdictions, and to enact policy changes and development programs in target nations.[25] In Mexico, the US government has provided $1.5 billion "worth of training, equipment, and technical assistance" between fiscal year 2008 and November 2015.[26] It is estimated that Mexico spent $79 billion over the same time period on security and public safety.[27] The aim of these programs is to increase the personal risk

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2017 Funding Highlights (2016), avialable at *https://www.whitehouse.gov/sites/default/files/ondcp/pressreleases/fy_2017_budget_highlights.pdf.*

[23] C. Peter Rydell & Susan S. Everingham, Controlling Cocaine: Supply Versus Demand Programs XIII (1994), available at *http://www.rand.org/content/dam/rand/pubs/monograph_reports/2006/RAND_MR331.pdf*.

[24] Alex Wodak, *The abject failure of drug prohibition*, 47 (2) Australian & New Zealand Journal of Criminology 198 (2014), *http://anj.sagepub.com.ezproxy.library.ubc.ca/content/47/2/190.full.pdf+html.*

[25] To break this down, in 2017, the funds requested are to be divvied out to: the Department of Defense International Counternarcotics Efforts ($567.1 million), the Drug Enforcement Agency ($467.9 million), the Bureau of International Narcotics and Law Enforcement Affairs ($382.4 million), and the US Agency for International Development ($131.9 million) (Office of National Drug Control Policy 2016: 14-15).

[26] Clare Ribando Seelke & Kristin Finklea, *U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond* (2016), available at *https://www.fas.org/sgp/crs/row/R41349.pdf*.

[27] *Id.*, at 1.

to those involved in the production, transport and distribution of narcotics, driving up the cost of labor, with the aim of raising the price of illicit narcotics to consumers as a means of deterrence.[28] Many involved in the drug trade or narcotics trafficking are not involved by their own free choice, though in regions where salaries (this ranges from salaries for police and soldiers to salaries for agricultural workers) are depressed as a consequence of global capitalism, as in Mexico, Colombia, and Central America, the higher wages of the criminal economy may be considered worth the risk.

We cannot forget that prohibition "produces profit opportunities that previously did not exist."[29] These forms of profit tend to benefit the US government and the functioning of global capitalism: it has been established that the cash economies generated through regimes of prohibition have kept the entire world economy afloat. In 2009, Antonio Maria Costa, then head of the UN Office on Drugs and Crime (UNODC) stated that the proceeds generated by criminal groups involved in drug trafficking was the only source of cash some banks had access to during the financial crisis that began in 2008. "In many instances, the money from drugs was the only liquid investment capital. In the second half of 2008, liquidity was the banking system's main problem and hence liquid capital became an important factor," Costa told *The Guardian* newspaper (Syal 2009). Without a nearly globally enforced regime of narcotics prohibition, this cash-only economy would not exist.

It is difficult to estimate the amount of money generated worldwide because of narcotics prohibition, which serves to increase the price of narcotics and leads the creation of a cash economy around them. In 2003, the United Nations Office on Drugs and Crime (UNODC) published the most recent of the size of the illicit drug market, according to which the world market is worth $320 billion (0.9 per cent of world GDP), $151 billion of which is generated in North, Central, and South America. But lumping North, Central and South America together is misleading because the vast majority of drug proceeds are generated in the United States, as warehouses sell to mid-level warehouses, who sell to street level dealers and finally to consumers. A 2010 estimate by the UNODC found that 85 percent of the proceeds of the cocaine trade in the Americas remained in the United States.[30] (In looking at the cocaine market in the Americas, an estimated 1 percent of proceeds stay in Andean countries, and 9 percent of the proceeds remain in transit countries, like Mexico and Central American nations.[31]

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[28] Dawn Paley, *Punching Holes in the Desert*, The Dominion, (April 23, 2013,) *http://dominion.mediacoop.ca/story/punching-holes-desert/16740*.

[29] Thornton, *supra* note 5, at 82.

[30] Paley, *supra* note 8, at 106.

[31] Organization of American States, The Drug Problem in the Americas 19 (2013), available at *http://www.cicad.oas.org/drogas/elinforme/informeDrogas2013/laEconomicaNarcotrafico_ENG.pdf.*

Estimates for the proceeds from the sale of illegal narcotics from Mexico to the United States range from $9.73 billion to $22.18 billion per year.[32] In either scenario, the cash revenues generated through the sale of narcotics to the United States are significant.[33] This cash economy behaves differently in different jurisdictions. In the United States, Canada, and the European Union it has buoyed the economy as a whole, and in particular the financial and real estate sectors. Keeping in mind that "one of the state's most important functions […] has to do with organizing the monetary system, regulating the money-names and keeping the monetary system effective and stable" requires us to consider the management of the illicit/non-legal cash economies connected to regimes of prohibition as of integral importance to States in the capitalist system.[34] The drug war is foremost a police project, and policing is a key part of what produces and reproduces the capitalist social order. But the injection of government funds into policing prohibition also creates a cash economy that provides an additional stabilizer to the global financial system. In the words of Michael Hudson, as far back as the late 1960s, "the U.S. Government went to Chase and other banks and asked them to be good American citizens and make America safe for the criminals of the world, to safeguard their money to support the dollar in the process."[35]

IV. Reactionary Armed Groups and Drug Money

Outside the United States, in addition to providing a (much smaller) cash infusion to the economy, the money generated through prohibition has been used at least in part to fund the arming of paramilitary groups. If we consider the enforcement of prohibition part of a broader political project not limited to narcotics, we can understand the far-reaching state intervention necessary for the enforcement of prohibition not only as a means to grow the state repressive apparatus, but also as an effective way of generating significant cash economies. These cash economies have, as we have seen, smooth the functioning of the capitalist system in the age of financialization (as in the US, Canada, the EU). But in other jurisdictions, these cash economies can find paramilitary groups which support the State repressive apparatus, including in countries that are apparently democratic (such as Mexico and Colombia).

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[32] Sergio Ferragut, Organized Crime, Illicit Drugs and Money Laundering: the United States and Mexico 7 (2012), available at *https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Security/1112pp_ferragut.pdf.*

[33] The estimates quoted do not include domestic sales, which are much less significant (Ferragut 2012: 6).

[34] David Harvey, A Companion to Marx's Capital 58 (Verso 2010).

[35] Michael Hudson, *Panama and the Criminalization of the Global Finance System,* Counter Punch (May 6, 2016), *http://www.counterpunch.org/2016/04/18/panama-and-the-criminalization-of-the-global-finance-system.*

In what follows we trace a brief history of how cash economies created by prohibition function to fund right wing paramilitary groups, whose activities are generally aligned with the hegemonic fraction of capital and with the interests of Washington and leaders of client States in Latin America and elsewhere.

In his classic book *The Politics of Heroin,* Alfred McCoy documented in detail how the US Central Intelligence Agency collaborated with the Corsican and Sicilian mafia, flush with drug money, to undermine communist organizing in Europe after WWII, and how heroin was used strategically to fund client States and destroy resistance. In the Americas, it is known that the CIA collaborated with Cuban drug runners as part of the US fight against the Cuban Revolution in the late 1950s and into the 1960s.

But perhaps the most well-known case of a right wing group arming itself with the proceeds from cocaine is that of the *Contras* in Nicaragua. The Contras (short for counter-revolutionaries) were a CIA-supported group active in Nicaragua in the 1980s that President Ronald Reagan referred to as the "moral equals of the Founding Fathers."[36] The Contras were tasked with overthrowing the Sandinista government through sabotage and terror. Official documents reveal that US officials were aware that the Contras were using the proceeds of cocaine sales in Miami to fund their operations. The war in Nicaragua was effectively outsourced, paid for with the proceeds accrued through prohibition, under the supervision of the United States. A congressional investigation looking at the links between foreign policy, narcotics and policing in the United States and Latin America prepared by then Senator John Kerry found "substantial evidence of drug smuggling through the war zones on the part of individual Contras, Contra suppliers, Contra pilots, mercenaries who worked with the Contras, and Contra supporters throughout the region."[37] Also referred to as the Kerry Committee Report, it remains by far the most extensive official investigation of US participation of knowledge of drug trafficking and money laundering. Quoted in the report is US General Paul Gorman, who stated "If you want to move arms or munitions in Latin America, the established networks are owned by the cartels. It has lent itself to the purposes of terrorists, of saboteurs, of spies, or insurgents and subversions."[38] Interestingly, the report produces specious evidence linking communist, Cuban or anti-US groups to the drug trade, but documents links between US agencies, client States and right-wing armed groups in depth. The Kerry Committee Report found the US State Department had "selected four companies owned and operated by narcotics traffickers to supply hu-

[36] Robert Parry, *How John Kerry exposed the Contra-cocaine scandal-Salon.com*, Salon, (Apr 7, 2016). *http://www.salon.com/2004/10/25/contra.*

[37] Subcommittee on Terrorism, Narcotics and International Operations, Drugs, Law Enforcement and Foreign Policy (1989).

[38] *Id*. at 39.

manitarian assistance to the Contras."[39] The report also found Cuban-Americans in Miami had provided direct support for the Contras. "Their help, which included supplies and training, was funded in part with drug money."[40] The report documented how "Papa Doc" Duvalier and his family profited from narcotics trafficking, and how the Tontons Macoute death squads operated in Haiti under the direction of Colonel Jean-Claude Paul, who was then in the pay of Colombian drug traffickers.[41] In the case of Panamanian General Manuel Antonio Noriega, who was indicted in 1988 on federal narcotics charges, the report revealed that US officials from various agencies had known that Noriega had been participating in narcotics smuggling and various other criminal activities for nearly 20 years. The report noted that US agencies turned a blind eye to Noriega's involvement in drug trafficking and money laundering for nearly two decades because US intelligence had close links with his government because of the negotiation of the Panama Canal Treaties and because of Panama's help in backing the Sandinistas.[42]

Testimony linking Cuba's Fidel Castro to the drug trade was rebuked by Castro himself, who invited the members of the US government to verify the claims themselves, which they did not do. Other than passing mentions of arms trades with the FMLN in El Salvador and the ties between Colombia's M-19 guerrillas (or what remained of the M-19) and Colombian drug money, there is little in the report that indicates that, at that time, left wing or "communist" forces were profiting in any significant way from the cash economy created by prohibition. Nor was there mention of US collaboration with Death to Kidnappers (MAS) an anti-communist paramilitary group created by drug traffickers founded in Medellín in 1981. By the mid-1990s, guerrilla movements in Guatemala, El Salvador, and Nicaragua had been brought to heel through campaigns of state and paramilitary terror, in which hundreds of thousands of people were killed, many tens of thousands disappeared, and millions of people displaced. The end of the Cold War meant tapering down anti-communism as a means of justifying war, and narco-trafficking and organized crime came to occupy the specters that would justify increased US intervention in the hemisphere. In Colombia, however, guerrilla groups remained active and paramilitaries were initially far more conflictive, and so the United States promoted war on drugs there was fused with an anti-guerrilla counterinsurgency-style war.

Since the 1960s Colombian society has undergone processes of paramlitarization. The first paramilitary groups were set up with funding from the US government, and their role was to support the Colombian army in combating the guerrillas. A second wave of paramilitarization occurred in the 1980s

[39] *Id.* at 42.

[40] *Id.* at 59.

[41] *Id.* at 69-70.

[42] *Id.* at 79.

when "the capitalist class of Colombia played a more direct role in the setting up of paramilitary bodies" in order to protect their families and their fortunes.[43] Many of these groups also had anti-communist ideals and worked closely with state forces. In the early 1990s, Medellín cartel leader Pablo Escobar hired "a veritable army from the northeastern and northwestern Medellín comunas to wage war against the state."[44] Los Pepes, a group of former associates of Escobar who had turned against him, worked together with US and Colombian forces to target Escobar's armed apparatus, as well as to kill communists. After Escobar was killed in a joint US-Colombia mission in December of 1993, Álvaro Uribe, then governor of Antioquia state "moved to bring together the paramilitary forces of the cocaine industry into Colombia's state security system. The mechanism for this was the Defense Ministry's new Convivir structure —designed to give government backing to local 'security and vigilance' units grouped alongside Colombian military and pólice."[45] Uribe, of course, went on to become President of Colombia for two terms, during which paramilitary groups, armed forces, drug traffickers and elite groups worked together to secure investment and control social movements and the poor.

Drug proceeds in Colombia tend to fund right wing, government aligned paramilitary groups, much more so than they do guerrilla organizations. Though the US and Colombian media focused extensively on the funding of the Revolutionary Armed Forces of Colombia (FARC) guerrilla group through drug trafficking, it was estimated in 2001 that only 2.5 per cent of FARC funds came from drug trafficking.[46] Meanwhile, in a TV interview in the early 1990s, Carlos Castaño, leader of the United Self-Defense Forces of Colombia (AUC) paramilitary group said that 70 per cent of AUC funds came from drug trafficking.[47] "Today the fusion of paramilitarism and drug trafficking has reached an advanced stage, where these right-wing armed groups (including those who have claimed to be demobilized) control at least half the country's narco-trade, producing a revenue of $1 to $2 billion annually."[48] To this day, large swaths of territory remain under paramilitary control in Colombia although the government of Juan Manuel Santos insists that these groups are not paramilitaries but rather criminal bands (*bacrim*) or mafias. On April 1, 2016, the Gaitanista Self-Defense Group of Colombia (AGC) oversaw a paramilitary curfew in the state of Urabá: for twenty-four

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[43] Jasmin Hristov, Blood and Capital: The Paramilitarization of Colombia 63 (Ohio University Press 2009).

[44] Forrest Hylton, *The Cold War that Didn't End: Paramilitary Modernization in Medellín, Colombia*, *in* A Century of Revolution: Insurgent and Counterinsurgent Violence During Latin America's Long Cold War 354 (Joseph Grandin, Greg Gilbert M. ed., 2010).

[45] *Id.,* at 356.

[46] Paley, *supra* note 8, at 55.

[47] *Id.,* at 55.

[48] Hristov, *supra* note 43, at 80.

hours shops and schools remained closed and people were warned to stay off the streets.[49]

Though paramilitary formations and the drug trade have different characteristics from one country to another, Colombia is considered a model state in Latin America. Paramilitary groups remain actively in control of much of the country's resource rich areas, effectively serving as an extension of state military power. These paramilitary groups continue to be funded by narcotics trafficking, but today there is not the media attention there was a decade ago when Plan Colombia was in full swing. Rather, the buzzword in Colombia is peace, and the official discourse insists paramilitary groups have been demobilized, though it is clear they have not. The myth of peace in Colombia is, after Neocleous, a kind of pacification that represents continuation of the "permanent war of capital" and falls within the "manifold permanent or semi-permanent wars against the various 'enemies within': war on crime, war on drugs, war on poverty […]."[50] The US government has announced a new aid package for Colombia, called Peace Colombia, which builds on Plan Colombia and continues to privilege the enforcement of prohibition.[51]

V. The War on Drugs in Mexico in Context

In *Drug War Capitalism* (2014), I explore how the United States backed war on drugs in Colombia, Central America and Mexico are forms of war that tend to facilitate the expansion of capitalism. Plan Colombia, the Merida Initiative, the Central American Regional Security Initiative and other similar comprehensive drug war packages funded by Washington through the George W. Bush and Barack Obama administrations have been the primary vehicles through which the drug war is promoted and spread in Latin America. Official discourse, promoted by states and reproduced and spread through society through what Althusser calls ideological state apparatuses,[52] tells us these wars are about reducing the supply of narcotic drugs in the United States, and reducing crime in host nations. By way of example, in

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[49] Natalio Cosoy, *Fuerzas que se autodefinen como paramilitares paralizan en Colombia una región más grande que Jamaica*, BBC Mundo (2016) available at *http://www.bbc.com/mundo/noticias/2016/04/160331_colombia_uraba_paro_armado_gaitanistas_usuga_nc.*

[50] Mark Neocleous, *War as Peace*, Peace as Pacification (2010), available at *https://www.academia.edu/7593571/War_as_Peace_Peace_as_Pacification.*

[51] The White House Office of the Press Secretary, FACT SHEET: Peace Colombia-A New Era of Partnership between the United States and Colombia (2016), available at *https://www.whitehouse.gov/the-press-office/2016/02/04/fact-sheet-peace-colombia-new-era-partnership-between-united-states-and.*

[52] Althusser, Louis, On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses 287 (Goshgarian, G. M. trans., Verso 2014) (1971).

2010, then-Secretary of State Hillary Rodham Clinton said the following during a speech at the Council for Foreign Relations:

> And we are working very hard to assist the Mexicans in improving their law enforcement and their intelligence, their capacity to detain and prosecute those whom they arrest. I give President Calderon very high marks for his courage and his commitment. This is a really tough challenge. And these drug cartels are now showing more and more indices of insurgency; all of a sudden, car bombs show up which weren't there before.[53]

The focus of Clinton's description of violence in Mexico is on drug cartel activity, even as an increase in state violence (funded and supported by the US) was (and remains) a key element in increasing overall levels of violence. A closer look at what is taking place in Mexico and elsewhere shows us that comprehensive drug wars are a useful system for the promotion of the expansion of capitalism through three primary mechanisms: policy, policing and paramilitarism. These mechanisms all reshape and, we argue, increment the power of the repressive state apparatus in host nations, and are all tied to the militarized enforcement of prohibition.

The policy component comprises the direct US funding of legal system reform and direct and indirect federal policy and regulatory changes which deepen neoliberalism by encouraging privatization and extend additional guarantees to private investors. So, for example, the privatization of Colombia's oil sector took place during Plan Colombia, and the privatization of Mexico's oil sector took place during the Merida Initiative. Though seemingly unrelated to the war on drugs, major infrastructure builds and privatization programs were initiated during a period of intense violence, and were justified in part by as a way increase prosperity in order to create economic alternatives that would force fewer people into the drug trade. In his first major address after the disappearance of 43 students from the Ayotzinapa Normal School in Guerrero in the fall of 2014, Mexican President Enrique Peña Nieto said: "Peace is also built with development, and it is up to all of us to prioritize the region that is being left behind. Most of the worst political and social conflicts in the country have their origin, precisely, in the lack of development in the states of Chiapas, Guerrero and Oaxaca."[54] The president then mentioned new highways, a new dry corridor across the Isthmus of Tehuantepec, and a new natural gas distribution system, as well as new economic zones to encourage foreign investment, as part of the pathway to reducing violence in Mexico.

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[53] Hillary R. Clinton, Remarks on United States Foreign Policy (2010), available at *http://www.state.gov/secretary/20092013clinton/rm/2010/09/146917.htm 2.*

[54] Enrique Peña Nieto, *El mensaje íntegro de Peña Nieto,* Animal Político (2014), available at *http://www.animalpolitico.com/2014/11/el-mensaje-integro-de-pena-nieto-video.*

The policing component introduces (or increases) the presence of soldiers and marines in patrolling streets and neighborhoods, and militarizes the training, weaponry and composition of police forces throughout host nations. The work of Mark Neocleous, particularly his concept of pacification is useful here in thinking through the way police and soldiers are mobilized together as part of war. "Indeed, as a *critical* concept 'pacification' insists on conjoining war and police in a way which is fundamentally opposed to the mainstream tendency that thinks of war and police as two separate activities institutionalized in two separate institutions (*the* military and *the* police)."[55] (Militarized policing strategies are funded by the US Department of Defense, the State Department (through USAID) and the Department of Justice, with supplemental funds from host nations, and in Central America and Colombia include the active participation of on-duty US police and soldiers. These forces are created (in the case of Federal Police in Mexico, for example), deployed, and maintained on the premise of disrupting the production and flow of narcotic drugs, but in fact these same forces serve to pacify urban and rural populations, defend transnational corporate interests against community organization and strengthen the repressive apparatus of the state.

The third component of comprehensive drug wars, paramilitarism, is strengthened through the promotion of a military strategy against drug production and trafficking, which is to say through the militarization of the enforcement of prohibition. The response generated by the militarized disruption of the activities of narcotics production and trafficking, particularly to the State strategy of killing or capturing leaders of trafficking organizations is twofold: first, it leads to a fracturing of organized trafficking groups and thus increases the number of armed groups, and second, these groups move to arm themselves with increasingly powerful weapons (from late model automatic weapons to grenades, bazookas and the like). From a military perspective, the decapitation strategy, according to which drug cartel bosses are captured and killed, has not led to a dismantling of criminal organizations. "Twenty-two out of the top 37 trafficking figures that the Mexican government has gone after have been taken off the board. But it has not had an appreciable effect —an appreciable, positive effect," said Gen. Charles Jacoby, commander of U.S. Northern Command, during testimony to the Senate Armed Services Committee in 2012.[56] Instead, this strategy leads to segments of trafficking organizations splintering off, after which smaller splinter groups often lose access to the drug transportation market (and to the direct spoils of prohibition), leading to a diversification that rests on increased activity in

[55] Mark Neocleous, *The Dream of Pacification: Accumulation, Class War and the Hunt*, 9 Socialist Studies (2013), available at *https://www.academia.edu/7593502/The_Dream_of_Pacification_Accumulation_Class_War_and_the_Hunt*.

[56] Robert Beckhusen, *Killing Drug Cartel Bosses Isn't Working, Says Top U.S. General*, Wired (2013), available at *https://www.wired.com/2012/03/cartel-general.*

other spheres including kidnapping and extortion. Official narratives on the drug war do not take paramilitarism into account; instead, increased violence and the splintering of criminal organizations are presented as an unforeseen consequence of enforcing prohibition.

Drug War Capitalism is a preliminary examination of how increased paramilitarism caused by official policies of militarizing the drug trade can benefit the interests of transnational capital at large, looking at how mining companies, oil and gas companies, maquiladoras, big box retailers and others might benefit from or in fact enable increased military and paramilitary activities in their areas of operation. There are clear cut cases of paramilitary intimidation and execution of unionized workers and communities considered to be standing in the way of corporate development, which have been well documented in Colombia.[57] In Mexico, where the comprehensive drug war has just entered its tenth year, these groups are referred to as "drug cartels" or "drug gangs," and though we have less evidence of direct collusion with corporate interests, it is possible to document how drug cartels/paramilitary groups in Mexico have been involved in concert with police in repressing social organizations. A handful of cases stand out: the massacred and disappeared students of the Ayotzinapa Teacher's College in Guerrero, Mexico,[58] the displacements which have taken place at the hands of state and paramilitary forces along the US-Mexico border,[59] and the so called "narco-violence" deployed against community activists organizing against a Canadian owned mining project in the state of Chihuahua.[60]

We propose calling organized crime/drug trafficking groups paramilitary groups (instead of drug cartels) in order to recognize the activities of these groups as functional to global capitalism and also to put them in a historical context. This acknowledges that where we have information available about those who fill their ranks, we see that these groups are made up in large part of people who at one time worked within the state repressive apparatus (municipal, state or federal police, elite army and police special forces, and soldiers). And it casts off the notion of a criminal "insurgency" promoted by Hillary Clinton and her ilk, allowing us to structurally acknowledge how these groups often interact cooperatively with the State repressive apparatus.

Experiences in Mexico and Colombia have demonstrated that as investment in militarization is increased, and particularly as US spending on militarization rises, processes of paramilitarization deepen. Though some of this

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[57] Paley, *supra* note 8, at 62-71.

[58] Dawn Paley, *Tlatlaya, Ayotzinapa, Apatzingán: State Terror in Mexico,* Warscape (2015), available at *http://www.warscapes.com/opinion/tlatlaya-ayotzinapa-apatzing-n-state-terror-mexico.*

[59] Alvarado, *supra* note 2.

[60] Dawn Paley, *Punching Holes in the Desert*, The Dominion, (2013), *available at* http://dominion.mediacoop.ca/story/punching-holes-desert/16740.

new paramilitary firepower can be used to fight state forces, state military power remains far greater than drug cartel/paramilitary might. In addition, as discussed, the strategy of taking down the leaders of drug cartels, as practiced in Mexico, means that as processes of paramilitarization deepen, the structures and allegiances of these organizations change. So although at times State forces and paramilitary groups/drug cartels are in conflict, we see that the activities of the latter tend to reinforce the hard power of the State, and function in ways that decrease the mobility and the voice of communities. The key argument here is that the more there is a militarized State enforcement of prohibition, the more processes of paramilitarization and the dispersion of paramilitary groups increase. In the examples of both Colombia and Mexico, the deployment of militarized State forces and attendant paramilitary activity together form the backbone of a war against the people.

VI. Cash Economies for Capital and Reactionaries: Known Consequences of Prohibition

Given the patterns of the drug war identified above, it is clear that the maintenance and enforcement of narcotics prohibition that has led to the creation of revenue streams which otherwise would not exist. Regardless of the evidence to the contrary, there has been an effort to maintain that the creation of a "black market" is an unintended (rather than a known) consequence of prohibition enforcement. Take for example this awkward explanation of the effects of prohibition, which dovetails with official discourse: "The unintended, even if predictable, consequences of the war on drugs are widely acknowledged." [61] How can a known (predictable) outcome of a policy be considered unintended? The argument here is that it cannot, and that as part of building our understanding of the realities we face today, students of the State, of capitalism and of war would do well to attend to the well-known consequences of US led militarization on the pretext of upholding prohibition.

We have seen how revenue streams that would not exist without a regime of prohibition are used to smooth the functioning of global capitalism in times of crisis, but also how they are used to fund armed groups, which form or are strengthened in order to protect the trade in prohibited goods, in which traffickers have little recourse to non-violent mechanisms of protection. As explored earlier, paramilitary groups and drug cartels are forged out of close links between certain segments of State bureaucracies and State security forces, a necessary collaboration which ensures them access to flows of prohibited substances, or to the resources generated by those flows. The activities of paramilitary groups and/or drug cartels tend to favor the expansion of

[61] *Id.*

capital, though is a constant effort by governments to depoliticize the activities of these groups. Colombia's attempt to re-brand paramilitary groups as "criminal bands" without ideology is a prominent example of this trend. After a recent paramilitary curfew imposed in Urabá, Colombia's Defense Minister Luis Carlos Villega said the AGC are not a political organization, rather a "criminal and mafia cell" whose "motivations are profit, profit at any Price." [62]

The Kerry Committee Report reiterated multiple times that there are no political motives behind the actions of drug cartels. "As witness after witness stressed to the Subcommittee, the cartels are driven by financial rather than ideological motives. They are willing to do business with anyone as long as it helps further their narcotics interests."[63] In addition to evidence that so called drug cartels have collaborated with or acted as reactionary, State-aligned groups, the notion that capital accumulation is an ideologically neutral pursuit does not hold water. Capital accumulation by armed groups is a pursuit that tends to strengthen the status quo, and thus is presented from spaces of domination as an activity that has no ideology or is somehow ideologically neutral.

This article set out to argue that the generation of cash-only "illegal" economies through the enforcement of prohibition is a known consequence of prohibition, a strategy pursued by States (despite its seeming 'failure' to control the availability and use of narcotics) in order to create additional means of financing repressive social control, as well as propping up global capitalism. Coming back to the Arrighi quote that this article opened with, the hope is that we can begin to consider the increased firepower available to groups through cash generated via economies of prohibition as a known consequence of the militarized enforcement of prohibition, and as a way of outsourcing the (financial and political) costs of war.

[62] Cosoy, *supra* note at 49.

[63] Subcommittee on terrorism, narcotics and international operations, *supra* note 37, at 8.

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THE NEED TO REMOVE THE CIVIL CODE FROM MEXICAN COMMERCIAL LAWS: THE CASE OF "OFFERS" AND "FIRM PROMISES"

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Abstract: *In 1889, then Mexican President Porfirio Díaz enacted the Mexican Commercial Code that is still in force today. This code was inspired on the Napoleonic code of 1807. Unfortunately, the Mexican code eliminated the use of commercial customs and practices as an accepted method for breaching gaps in commercial law. Since then, Mexican commercial law has held the civil code as the basis for dealing with gaps and loopholes in the application of commercial law. This has prevented the further development of Mexican commercial law as it is forced to use institutions and doctrines that were not designed to deal with rapidly changing commercial issues. Mexican commercial law would benefit from the reincorporation of commercial customs and practices as a basis to fill in the gaps in the law.*

Key Words: *Commercial law, commercial code, civil code, comparative law, customs and practices, business practices.*

Resumen: *En 1889, el entonces presidente Porfirio Díaz promulgó el código de comercio que actualmente rige en México. Este código estaba inspirado en el código promulgado por Napoleón en 1807. Desafortunadamente, el código mexicano eliminó los usos y costumbres mercantiles como fuentes supletorias para el derecho mercantil. A partir de entonces, el derecho mercantil mexicano ha estado sujeto al código civil como guía para llenar las lagunas y vacíos en la aplicación del derecho mercantil. Esta medida ha evitado el desarrollo del derecho mercantil mexicano al utilizar instituciones y doctrinas que no fueron diseñadas para lidiar con la rápida evolución de los negocios mercantiles. El derecho mexicano*

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se beneficiaría de la eliminación del código civil como fuente supletoria y la reincorporación de los usos y costumbres mercantiles.

Palabras clave: *Derecho mercantil, código de comercio, código civil, derecho comparado, usos y costumbres, prácticas comerciales.*

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I. Introduction

In the autumn of 1806, while campaigning in Germany, Napoleon received notice of a scandalous bankruptcy in Paris.[1] The bankruptcy of M. Récamier's bank prompted the Emperor to order the creation of a new, more severe bankruptcy law.[2] The response from Paris was to include the new law in the Commercial Code.[3] It was this event that prompted the Emperor to resume the formulation of a Commercial Code, a task that had been suspended for about five years.[4]

The truth is that the Emperor was not particularly interested in the creation of a Commercial Code. Two were the issues that actually preoccupied him: to "save" non-merchants from the application of commercial law and to enact a law of bankruptcy.[5] This lack of interest may explain why some consider the *Code de Commerce* the most carelessly drafted of all Napoleonic codes.[6]

The French Commercial Code was one of the main sources of inspiration for the Mexican Commercial Code.[7] Napoleon's disregard was based on his

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[1] IX The Cambridge Modern History 177 (A.W. Ward, G.W. Prothero & Stanley Leathes eds., 1907).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 177-178.

[6] This opinion was expressed by Pardessus, according to the Cambridge Modern History, *supra* note 1 at 178.

[7] *See* Jorge Barrera Graf, *Codificación en Mexico, Antecedentes, Código de Comercio de 1889, Perspectivas* [*Codification in Mexico, Background, Commercial Code 1889, Perspectives*], *in* Centenario del Código de Comercio 69, (UNAM ed., 1991). *See also* Jorge Barrera Graf, *Evolución del Derecho*

distrust of the merchant class.[8] This distrust was, unfortunately, incorporated into the Mexican Commercial Code [CÓD.COM.].

Article 1 of the CÓD.COM. orders that "[c]ommercial acts shall solely be regulated by this code and other applicable commercial legislation."[9] Meanwhile, Article 2 removes the possibility of employing commercial practices or commercial customs in the interpretation of the CÓD.COM.: "[l]acking regulations in this code and other commercial legislation, commercial acts will be governed by the Federal Civil Code."[10]

This was a departure from the way of ruling on commercial law matters in Mexico. Until the enactment of the 1884 Mexican Commercial Code, the *de facto* commercial legislation in Mexico included instruments like the *Ordenanzas de Bilbao*.[11] The *Ordenanzas* were enacted by the guild of merchants of Bilbao, Spain,[12] and relied on the use of commercial customs and practices on their application.

Mercantil en México en el Siglo XIX, Hasta el Código de Comercio Vigente de 1890 [*Evolution of Commercial Law in Mexico during the 19th Century, Up to the Current Commercial Code of 1890*], *in* I MEMORIA DEL IV CONGRESO DE HISTORIA DEL DERECHO MEXICANO, 111, 111 (Instituto de Investigaciones Juridicas eds., 1986).

[8] "Napoleon Bonaparte's goal was to protect non-merchants, particularly from the misfortunes of credit transactions that so frequently led to "mobilization" and loss of fortunes and to the dissipation of family assets […] [H]e strongly wanted to discourage the use of bills of exchange or other negotiable instruments by those who were not in business, and especially by bourgeois fathers of family […] From a legislative standpoint, it was necessary to ensure that those whom the emperor wanted to protect from the perils of commerce would be governed by the *Code Civil* rather than by the *Code de Commerce.* (Emphasis in original). BORIS KOZOLCHYK, COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT 332-333 (2014).

[9] Código de Comercio [CÓD.COM.] [Commercial Code], as amended, Art. 1, Diario Oficial de la Federación [D.O.], 7 de octubre al 13 de diciembre de 1889, (Mex.) (translation by author), available at *http://ordenjuridico.gob.mx/Documentos/Federal/html/wo38904.html.*

[10] CÓD.COM. Article 2.

[11] *See* The political struggle over deciding the course and characteristics of the fledgling country, with the ensuing change of governments with divergent ideologies and policies, made the survival of Spanish commercial laws possible. In this way, the *Partidas*, the *Ordenanzas of Bilbao* and even the 1829 Spanish Commercial Code continued in force instead of applying national laws, each of which were only in force for a few years. [La contienda política por decidir el rumbo y las características que había de tener el joven país, con la consecuente alternancia de gobiernos de signo y políticas contrarios, hizo posible la supervivencia de los ordenamientos españoles en la aplicación del derecho mercantil. Así, frente a los ordenamientos nacionales, los cuales sólo estaban vigentes por pocos años, se siguieron aplicando las Partidas, las Ordenanzas de Bilbao e incluso el Código de Comercio español de 1829.] (Internal citations omitted) (translation by author) María del Refugio González, *Comerico y Comerciantes en la Legislación y la Doctrina Mexicanas del Siglo XIX* [*Commerce and Merchants in 19th Centrury Mexican Legislation and Doctrine*], II ANUARIO MEXICANO DE HISTORIA DEL DERECHO 115, 133 (1990) available at *http://www.juridicas.unam.mx/publica/rev/indice.htm?r=hisder&n=2*.

[12] *See* Manuel Torres y López, *El Proceso de Formación de las Ordenanzas de Bilbao de 1737 in*

To give an example of the use of commercial customs and practices, these *Ordenanzas* ordered commercial issues to be solved briefly and summarily using commercial practices and avoiding the use of "lawyers' writs."[13] The text of the section stated that: "[l]awsuits and differences should be solved briefly and summarily at the mentioned Consulate with the known truth and in good faith according to merchant practices, without incurring in delays, libels, or lawyers' writs […]."[14]

The lack of stability that Mexico suffered in the 19th century meant a lack of unified commercial codification.[15] This lack of commercial codification combined with the use of codifications that relied on customs and practices like the *Ordenanzas de Bilbao* meant that commercial issues were solved applying commercial customs and practices instead of strict doctrinal rules.

An example of this can be seen in the case of *Garcia Torres v. Bocker & Co,*[16] which was a cassation[17] case relating to the wrongful payment of a bill of exchange. The *Garcia Torres* case was solved in 1888, a mere four years after the enactment of the 1884 commercial code and just one year before the enactment of the current 1889 code. This means that the interpretation of commercial law could still be influenced by the judicial practices used before the official codes were enacted.

In the transcript of its request, the public ministry expressed the following:

Las Ordenanzas del Consulado de Bilbao: Tres Conferencias con Motivo del Centenario de su Derogación 45, 51 (1931) available at *http://catalogo.fsancho-sabio.es/Record/km-10690-793* (quoting Lorenzo Benito). *See also* Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M.N. y M.L. Villa de Bilbao [*Ordenanzas de Bilbao*] (1737 and 1814), as amended in 1818 (Spain), Confirmación Real.

[13] *Ordenanzas de Bilbao* Ch. 1 s. 6.

[14] "Por cuanto en dicho Consulado deben determinarse los pleitos y diferencias de entre las partes breve y sumariamente, la verdad sabida y la buena fe guardada por estilo de mercaderes, sin dar lugar á dilaciones, libelos ni escritos de abogados…" *Ordenanzas de Bilbao* Ch. 1 s. 6.

[15] *See supra* note 11 *See also* Barrera Graf, *Codificación,* and *Evolución supra* note 7.

[16] García Torres v. Bocker & Co., *in* Anuario de legislación y Jurisprudencia, año V, Sección de Casación, Colección Completa de las Ejecutorias Pronunciadas por la Primera Sala del Tribunal Superior de Justicia del Distrito Federal 98 (Pablo Macedo & Miguel S. Macedo eds., 1888). For more on this and other cases *see* Raul Iturralde Gonzalez, The Archetypal Merchant in the Mexican Commercial Code of 1889 at 18-21 (2015) (unpublished LL.M. thesis, University of Arizona) (on file with the author) (soon to be available at *http://www.natlaw.com*).

[17] Cassation refers to an appeal of a final decision given by a local court in the event of irregularities in the application of the law. Julio Bustillos, *Surgimiento y Decadencia de la Casación en México* [*Apearance and Decline of Cassation in Mexico*], 3 Reforma Judicial, Revista Mexicana de Justicia, January-June 2004, at 141, 147 available at *http://biblio.juridicas.unam.mx/revista/ReformaJudicial/indice.htm?n=3*. Cassation disappeared from Mexican law when the process of *Amparo* absorbed these types of appeals. *See id.* at 144.

> It is the belief of the undersigned that it cannot be said that the judicial decision being appealed is contrary to the letter or spirit of [Article 830 of the CÓD.COM. of 1884] since the sentencing judge presents *it solely as an example of commerce law accepting the commercial custom [practice] of using good faith as a basis for commercial transactions, as good faith is indispensable for the speed of transactions, and not to rescind the advantages this principle generates.* The sentence upholds the general rule that in commerce it is not indispensable to demand from the presenter of a document (for its payment) the identity of the person. The first part of this article, which in this part does not indicate that only acceptance and protest are the only powers that the drawee is obligated to recognize simply due to the possession of the bill, establishes that endorsement in favor of the agent who presents the draft (for payment) is not necessary. The article seems to indicate that the only necessary requirement, as a general rule, is the possession of the bill.[18]

The fact that it was the public ministry that requested the use of commercial customs and good faith in the resolution of a commercial dispute instead of applying strict legal doctrines shows the use of these sources before the enactment of the 1884 and 1889 codes.

Similarly, the public ministry also advocated the use of good faith instead of strict formalisms. In the same volume that contains the *Garcia Torres* decision, it is possible to find the decision of the case of *in re Successors of Agustin Meeser*,[19] which mentions a cassation procedure initiated after the bankruptcy of Agustin Meeser's successors.[20]

On the *in re Successors of Agustin Meeser* case, the public ministry argued that the clash arose when the commercial code uses the civil code system.[21] The

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[18] [A juicio del suscrito no puede decirse que la decisión judicial materia de este recurso, haya sido contraria á [sic] la letra ó [sic] espíritu de [el art. 830 del Código de Comercio de 1884], pues el juez en su sentencia lo presenta solamente como un ejemplo de que *la ley ha sancionado la costumbre mercantil de prestar como base á [sic] las operaciones de comercio la buena fe, indispensable para la rapidez de las transacciones, y de no destruir las ventajas que trae este principio*. La sentencia ocupándose de fundar que por regla general en el comercio se considera que no es indispensable exigir al que presenta un documento para su cobro, la identidad de su persona, estudia este artículo, el que por esta parte no dice que sólo la aceptación y el protesto sean las únicas facultades que esté obligado el girado á [sic] reconocer como consecuencia de la mera tenencia de la letra sino que antes bien al establecer en su primera parte que el endoso á [sic] favor del mandatario que la presenta á [sic] la aceptación no es necesario, parece que ha querido sancionar que no se exija más requisito por regla general que la posesión de la letra.] (Emphasis added) (translation by author). *García Torres v. Bocker & Co.,* V ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA 98, 100 (1888).

[19] In re Successors of Agustín Meeser, *in* ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA, AÑO V, SECCIÓN DE CASACIÓN, COLECCIÓN COMPLETA DE LAS EJECUTORIAS PRONUNCIADAS POR LA PRIMERA SALA DEL TRIBUNAL SUPERIOR DE JUSTICIA DEL DISTRITO FEDERAL 476 (Pablo Macedo & Miguel S. Macedo eds., 1888). *Also see* Iturralde Gonzalez *supra* note 16 at 20-21.

[20] *In re Successors of Agustín Meeser,* V ANUARIO DE LEGISLACIÓN Y JURISPRUDENCIA 476-477 (1888).

[21] *Id., at* 476, 484 (1888).

issue revolved around the order of priority given to creditors.[22] At some point, the public ministry said:

> Much has been said during the debates about the unprecedented suppression of the privilege given to simple notarized credits; nonetheless, it is true that, *due to the nature of commercial business, which is based on good faith and the purest equity instead of formal requirements*, this suppression is not surprising as it had existed in ancient laws.[23]

Again, we see the public ministry arguing that commercial law is not based on the application of strict rules, but, in this case, the application of good faith and equity. Nevertheless, since the enactment of the 1889 code, the resolution of commercial disputes has been based on the application of legal formulas based on Aristotelian logic and legal doctrine.

One possible reason for the departure from the use of commercial customs and practices in favor of the Civil Code's strict rules may be a search for uniformity, which was absent in commercial law at the time. In 1911, the then *Academia Central Mexicana de Jurisprudencia y Legislación* ran a contest to select a writer for the elaboration of a study on the evolution of commercial law in Mexico. The winner was an attorney named Enrique Orozco. His study appeared on several issues of the *Diario de Jurisprudencia* and can be found in Volumes XXII and XXIII of the *Diario de Jurisprudencia del Distrito y Territorios Federales.*[24]

In his study, Enrique Orozco refers to a proposal made by a commission created in 1870 for the preparation of a Commercial Code.[25] The commission expressed concern about the lack of uniformity regarding commercial laws, citing as examples the state of Guanajuato, which had enacted a law on the regulation of priority among creditors that went contrary to the *Ordenanzas de Bilbao*, and Veracruz, which followed the 1854 Code that ran contrary

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[22] *Id.*

[23] [Mucho se ha dicho durante los debates acerca de lo inaudito de la supresión del privilegio en favor de los créditos escriturados simples; pero lo cierto es, que *dada la naturaleza de los negocios mercantiles, fundados más que en requisitos de forma, en la buena fe y la más pura equidad,* nada tiene de sorprendente esa supresión, la cual, por otra parte existió en las leyes antiguas.] (Emphasis added) (citing another source) (translation by author). *In re Successors of Agustín Meeser,* V Anuario de Legislación y Jurisprudencia 476, 487 (1888).

[24] Diario de Jurisprudencia del Distrito y Territorios Federales, Tomos XXII, XXIII [Diary of Jurisprudence of the Federal District and Federal Territories, Volumes XXII, XXIII] (Victoriano Pimentel ed., January-Apr., May-Aug. 1911). *See also* Iturralde Gonzalez, *supra* note 16 at 11-13.

[25] Diario de Jurisprudencia del Distrito y Territorios Federales, Tomo XXIII [Diary of Jurisprudence of the Federal District and Federal Territories, Volume XXIII] 96 (Victoriano Pimentel ed., May-August 1911).

to the then Constitution that ordered the use of Article 45 of the Act of November 23, 1855.[26]

The commission expressed their support for the creation of a sole commercial law by saying:

> However, this diversity of commercial laws would disappear from the moment that Congress, by itself or authorized by the Executive, gives the nation a Commercial Code. In the neighboring republic, it has been the case that while awaiting the enactment of a general bankruptcy law, states were to give whatever they deemed convenient without this meaning an attack on the faculties of the federal powers […] It is easy to understand that for its development, commerce needs a uniform law for the entire republic.[27]

It seems that the legislators of the 1884 and 1889 codes not only conveyed the distrust against merchants that was contained in the Napoleonic Code, but they were also wary of granting the power to enact commercial laws to anyone, but Congress. This attitude is understandable from legislators coming from almost a century of uncertainty in terms of applicable commercial laws. Nevertheless, combining commercial law with the strict doctrines created for civil law has had detrimental effects on the advancement of commercial law in Mexico.

It is also apparent that Mexican legislators saw the need to use commercial customs and practices when enacting specialized legislation by deferring to them in cases of uncovered issues, as seen in laws like the General Law of Credit Instruments and Operations[28] or the Credit Institutions Law.[29] Nevertheless, several factors limited the application of commercial customs and practices. These included the limited operation of these laws and the fact that these laws first deferred to commercial legislation (that is, the Commercial Code), as well as the Civil Code.

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[26] Letter [Exposició de Motivos] from the Drafting Commission to the Minister of Justice (Jan. 4, 1870) *in id.* at 103.

[27] [Sin embargo, esa diversidad de leyes en materias mercantiles, desaparacería desde el momento en que el Congreso por sí ó por autorización al Ejecutivo, diese á la Nación un Código de Comercio; por que en la República vecina se ha dado el caso de que debiéndose dar una ley general de bancarrotas, mientras ella no fué expedida, los Estados dieron lo que cada cual creyó conveniente, sin que esto importase un ataque á las facultades propias de los poderes federales […] Fácil es comprender que el comercio necesita, para su desarrollo, una ley que sea uniforme en toda la República.] Letter [Exposició de Motivos] from the Drafting Commission to the Minister of Justice (Jan. 4, 1870) *in* Diario de Jurisprudencia del Distrito y Territorios Federales, Tomo XXIII [Diary of Jurisprudence of the Federal District and Federal Territories, Volume XXIII] 104 (Victoriano Pimentel ed., May-August 1911).

[28] Ley General de Títulos y Operaciones de Crédito [LGTOC], as amended, article 2, Diario Oficial de la Federación [D.O.], 27 de agosto de1932 (Mex.).

[29] Ley de Instituciones de Crédito [LIC], as amended, article 6, D.O. 18 de julio de 1990 (Mex.).

Moreover, the wide-ranging application of the Civil Code makes access to other sources difficult as many institutions are already regulated by that legislation. In an "isolated" decision,[30] Judge Leonel Castillo Gonzalez (of the Fourth Collegiate Civil Court) stated that:

> The Commercial Code does not have a set of bases for the interpretation of commercial contracts or any regulation regarding other commercial acts, at least not for the general interpretation of all commercial contracts. However, there is a set of rules for the interpretation of contracts, and all juridical acts, in the Federal Civil Code. In this code, Article 1856 expressly provides that national practices and customs will be taken into account when interpreting ambiguities within contracts. Therefore, it is possible to invoke commercial customs and practices since Article 2 [CÓD.COM.] expressly and directly indicates that the precepts of the Federal Civil Code shall apply in the absence of previsions in the [CÓD.COM.].[31]

The biggest issue with this decision is that it relies on customs and practices based on the Federal Civil Code [C.C.F.], which means that it is not commercial customs and practices, but customs and practices of the country as a whole. All these issues make the suppletory application of customs and practices difficult.

The suppletory use of the Civil Code in commercial matters has detrimentally affected the development of commercial law in Mexico. In this paper, I will present a recommendation for the development of commercial law in Mexico. I will start by making a brief study of the Mexican legal system (the civil law system). I will continue by presenting an example of the lack of

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[30] "Isolated" decisions do not have precedential value. Their force is limited to persuasive value. *See* Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [LARACPEUM] [Constitutional Law, Regulating Articles 103 and 107 of the Political Constitution of the Mexican United States], as amended, articles 215-224, Diario Oficial de la Federación [D.O.], 2 de abril de 2013 (Mex.).

[31] [En el Código de Comercio no existe un conjunto de bases para proceder a la interpretación de los contratos mercantiles, ni tampoco alguna normativa al respecto en alguna otra ley mercantil, por lo menos de aplicación general para todos los contratos mercantiles. En cambio, en el Código Civil Federal sí existe un conjunto de reglas para la interpretación de los contratos, y por extensión a todos los actos jurídicos. Dentro de este conjunto, el artículo 1856 de dicho ordenamiento general, dispone expresamente que el uso o la costumbre del país se tendrán en cuenta para interpretar las ambigüedades de los contratos, por lo cual cabe la posibilidad de invocar la costumbre y las prácticas mercantiles, porque por disposición expresa y directa del artículo 2o. del Código de Comercio, a falta de previsiones en la legislación mercantil es aplicable la preceptiva del Código Civil Federal.] (Translation by author). USOS Y COSTUMBRES MERCANTILES. VALIDEZ DE SU EMPLEO EN LA INTERPRETACIÓN DE CONTRATOS MERCANTILES, Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito [T.C.C.] [Fourth Civil Court of the First District], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXXI, Enero de 2010, Tesis I.4o.C.254 C, Página 2267 (Mex.) This is a criterion expressed in an Amparo proceeding.

adapting commercial law in Mexico in the cases of the doctrines of "offer and acceptance" and firm promises. Then, I will compare the "offer and acceptance" doctrine with the creation of contracts in US law. I will later present an alternative that has been successfully used in international trade law for decades: the use of compilations of customs and practices employed by the merchants themselves.

II. The Civil Law System

What common law practitioners know as *civil law* is not a single system. Civil law practitioners find the origins of their system in the laws of Ancient Rome.[32] Civil law lawyers aspire to be seen as the successors of Ancient Roman laws. Nonetheless, modern day civil law is not a continuation of the laws of neither the Roman Republic nor the Roman Empire.[33]

Modern day civil law is the result of centuries of experimentation in which hundreds of scholars have integrated Roman law with Aristotelian philosophy.[34] Professors Berman and Reid, Jr. described this amalgamation as follows:

> What is most amazing about the Westernization of these three ancient traditions [the Bible, Plato and Aristotle's philosophy, and Justinian's Roman Law works] is that in their original forms they were entirely incompatible with each other. The ancient Hebrew culture would not tolerate Greek philosophy or Roman law; the ancient Greek culture would not tolerate Roman law or Hebrew theology; the ancient Roman culture would not tolerate Hebrew theology, and it resisted large parts of Greek philosophy. Yet in the Christian West, over the centuries, they were somehow brought together in new and changing syntheses. All three underwent parallel transformations at each of the principal stages of their historical evolution.[35]

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[32] *See* "Because of its ancient Romano-Germanic Origins, and the influence of the Code of Napoleon of 1804, appellate decisions have no legal binding in Mexico." 1 Jorge A. Vargas, Mexican Law: A Treatise for Legal Practitioners and International Investors 6 (Jorge A. Vargas, ed., 1998) (original citations omitted). For information on the influence of Roman law on Mexican law, *see Derecho Romano*, Enciclopedia Jurídica Mexicana (2nd ed. 2004).

[33] "It is […] quite misleading to speak of 'the' Roman law, as though it constituted only, or primarily, a particular legal system existing at a particular time. On the contrary, Roman law must be seen primarily as an evolving element of an evolving legal tradition." Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the JUS COMMUNE: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century*, 20 Syracuse J. Int. Law Commer. 1, 1–2 (1994).

[34] *See Id. See also* James Gordley, The Philosophical Origins of Modern Contract Doctrine 1-4 (1991).

[35] Berman and Reid, Jr., *supra* note 33 at 2 (internal citations omitted).

Different schools of thought influenced the development of civil law. However, they often relied on the Justinian compilation works of Roman Law and Aristotelian philosophy,[36] which is based on the idea that all things are composed of "essences" (which are necessary) and "accidental properties."[37]

It was the influence of Aristotle (and the interpretation given by Thomas Aquinas) that inspired Western scholars to seek the "essence" of legal concepts as these ideas were not part of the original Roman law.[38] Through the amalgamation of Roman law and Aristotelian philosophy, civil law scholars developed a legal system structured in such a way that it is considered a science at the same level as other social sciences.[39]

This science is based on the search for the "essence" of legal concepts. Once the essence is found, legal concepts can be classified according to their own particular characteristics. One example would be the form in which "contracts" are classified in the Civil Code.[40] The definition found in the Civil Code reads: "[those] *agreements* that produce or transfer *obligations* and *rights* are called contracts."[41]

This definition in itself does not seem to indicate very much. Nevertheless, a careful review shows that contracts are defined as the genus of a family, the family of "agreements." Agreements are defined in the previous article as

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[36] *See, e.g.*, Gordley, *supra* note 34 at 1-4.

[37] Aristotle taught that all things – not just living things – have two kinds of properties: essential properties, without which they fail to be the particular kind of thing they are, and accidental properties, which are free to vary within the kind. And along with each kind of thing came an essence. Essences for Aristotle were definitive: timeless, unchanging, all or nothing. A thing could not be *rather* silver or *quasi*-gold or a *semi*-mammal. Daniel C. Dennett, *Darwin's Dangerous Idea*, 35 Sciences 34, 36 (1995) (emphasis in original). *See also, e.g.*, Gordley, *supra* note 34 at 34.

[38] The difference [between Gaius and Aristotle/Thomas Aquinas] is not that Aristotle and Thomas used concepts that were wholly alien to the Romans. It is rather that these philosophers paid attention to concepts that where helpful in building theories. The Romans were interested not in building such theories but in analysing particular legal problems. Often, principles so universal as to draw the attention of an Aristotle or a Thomas are not stated by the Romans in any general form just because they are obvious. On the occasions when the Roman texts state these principles, they offer them as interesting observations, not as starting points for analysis. Gordley, *supra* note 34 at 32.

[39] *See* José María Martínez Doral, *Sociologos, Juristas, Filosofos. Apuntes para una Metodología de la Ciencia del Derecho* [*Sociologists, Jurists, Philosophers. Notes for a Methodology of Law Science*], 17 R. Ch. D. 509 (1990). *Contra* Juan Carlos Fitta Quirino, *La jurisprudencia no es ciencia: A 125 años de la muerte de Julius Hermann von Kirchmann* [*Jurisprudence is not Science: 125 years after the Death of Julius Herman von Kirchmann*], 23 Argumentos 64, diciembre 2010, at 313-324.

[40] *See* Código Civil Federal [C.C.F.] [Federal Civil Code], as amended, arts. 1792-93, Diario Oficial de la Federación [D.O.] 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928, (Mex.), available at *http://www.ordenjuridico.gob.mx/Documentos/Federal/html/wo17186.html*.

[41] "Los convenios que producen o transfieren las obligaciones y derechos, toman el nombre de contratos." (Emphasis added) (translation by author). C.C.F., article 1793.

"the arrangement between two or more people to create, transfer, modify or terminate *obligations.*"[42]

Reviewing the C.C.F., it is possible to see that both "agreements" and "contracts" belong to a higher class, which is the class of obligations.[43] In this way, the theory of contracts resides within the theory of agreements, which is also contained in the theory of obligations. This structure is repeated in the C.C.F. under different legal concepts, such as wills[44] or property.[45]

This order allows legal problems to be resolved through the application of legal theories and code interpretation based on specific facts.[46] Thus, it is possible to give consistent answers to legal problems and to predict the resolution of a legal issue. In knowing the many legal theories and doctrines that compose the civil law system, civil law practitioners are capable of confidently predicting the resolution of a legal problem.

Similarly, strict formulas were created for the formation of contracts based on offers and their acceptance.[47] The Federal Civil Code indicates that a contract "is formed at the moment that the offeror receives an acceptance, which binds him to the offer made […]"[48] These strict formulas do not always represent the realities of commercial transactions. As will be seen later in the examples from US cases,[49] it is not always easy to identify when an offer was made or accepted. Moreover, sometimes commercial transactions require the enforcement of offers even when these offers have not been accepted yet.[50]

The real problems arise when a branch of the legal system is forced to follow the doctrines and theories created for another branch. Articles 1 and

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[42] "Convenio es el acuerdo de dos o más personas para crear, transferir, modificar o extinguir obligaciones." C.C.F., article 1792 (emphasis added) (translation by author).

[43] "Obligations" C.C.F., Book 4th (articles 1792-2998).

[44] "Sucesiones" C.C.F., Book 3rd.

[45] "De los bienes" C.C.F., Book 2nd.

[46] While explaining the evolution of contract doctrine, Professor Gordley stated that: "Nineteenth-century jurists no longer claimed that their conclusions followed from larger philosophical principles [Aristotelian philosophy]. They said they were merely describing the law in force in their own countries […] [I]n France [they claimed to be interpreting] the French Civil Code […] [Anglo-American, French, and German jurists] purged the doctrines of the natural lawyers of Aristotelian concepts and principles that seemed wrong or unintelligible to them. They bent and stretched the ideas they retained to make them do the work of those they have abandoned. Then, as authority for their conclusions, they cited […] the French Civil Code […] Gordley, *supra* note 34 at 161.

[47] The development of the theory of offer-acceptance will be seen later. *See infra* section III.

[48] "El contrato se forma en el momento en que el proponente reciba la aceptación, estando ligado por su oferta […]" (translation by author). Código Civil [C.C.F.], as amended, article 1807, D.O., 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.)

[49] *See* Teachers Ins. & Annuity Ass'n v. Tribune Co. 670 F. Supp. 491 (S.D.N.Y. 1987) *infra* section IV.

[50] *See* the discussion regarding Letters of Credit *infra* sections IV and V.

2 of the Commercial Code restrict the interpretation of Commercial Law disputes to the Commercial Code and the Civil Code.[51] Article 2 indicates that "[i]n the absence of regulations in this code or in other commercial laws, commercial acts will be regulated by the regulations applicable to civil law according to the Federal Civil Code."[52]

This and similar articles have forced Mexican commercial law doctrine to follow the stricter doctrine created for civil law (*i. e.* family law, probate law, property law, etc.). This not only discards the history of commercial law, which evolved separately from civil law,[53] but it also impedes the development of exclusive commercial theories. As will be seen later, forcing civil theories on commercial disputes has prevented commercial law in Mexico from adapting to the realities of the market.

III. "Offer" as Applied to Commercial Law in Mexico

The definition of "offer" has suffered a noticeable transformation from its Roman roots. The modern Civil law theory of "offer" was developed in 18th century France.[54] French scholars found their inspiration in the terminology the Romans used for promises and *pollicitations*.[55] According to Prof. Simpson, the origin of the theory is born from the interpretation made of the following passage by Ulpian:[56] "A pact is an agreement and convention of two people, but an undertaking [*pollicitation*] is the promise only of the person who makes

[51] Código de Comercio [Cód.Com.], as amended, articles 1, 2, D.O. 7 de octubre al 13 de diciembre de 1889 (Mex.).

[52] "A falta de disposiciones de este ordenamiento y las demás leyes mercantiles, serán aplicables a los actos de comercio las del derecho común contenidas en el Código Civil aplicable en materia federal." (translation by author). Cód.Com, article 2.

[53] There did remain, however, even after the Protestant Reformation, two other bodies of law that continued not only to contribute to the family resemblances among the various national legal systems but also to develop as bodies of transnational customary law applicable as such in all the European countries —each of them a genuine common law, though not called that. These were the customary lex mercatoria, applicable everywhere in both domestic and international commerce, and the much weaker law of intergovernmental (inter-royal, inter-urban) relations, including what today would be called conflict-of-laws. Concepts, principles, and rules drawn from both Roman law and canon law formed an important component of those two branches of what was called at the time the law of nations (jus gentium). Berman and Reid, Jr., *supra* note 33 at 10–11.

[54] Parviz Owsia, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 Tul. L. Rev. 871, 873 (1992).

[55] *See e.g.*, *Id.* at 873–75.

[56] A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 L. Q. Rev. 247, 259 (1975).

it […] (*Pactum est duorum consensus atque conventio, pollicitatio ver offerentis solius promissium* […])."[57]

Prof. Simpson explains that a *pollicitation* is "a promise made, but not accepted" or, "a [*pollicitation*] is a promise not accepted by the promisee."[58] Therefore, there was a difference in Roman law between agreements and undertakings (*pollicitations*), which is that *pollicitations* did not bind the person who made them until they were accepted by the promisee ("a promise *accepted* immediately became a contract; for, then, there was the assent of two persons to the thing promised)."[59]

French authors, who adopted the Roman doctrine of *pollicitation*, developed the concept of a chronological order between an "offer" and an "acceptance".[60] "The contract is the succession of an *offer* (to contract, or *pollicitation*), which is seized by an *acceptance.*"[61] Therefore, under French law, an agreement is considered an "accord of the wills" between a person that makes an offer and a person who accepts it.[62]

This theory was adopted in Mexico[63] as seen in the Federal Civil Code.[64] As an example, Article 1794 of the C.C.F. indicates that: "[f]or a contract to exist, it is necessary to have (I) consent […]"[65] Article 1796 says that "[C]ontracts are perfected by mere consent […] From the moment they are perfected, contracts bind the parties."[66] As such, Mexican authors have accepted the "accord of the wills" theory.[67]

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[57] DIG. 50.12.3 (Ulpian, Disputationum 4) (Watson trans., 1985).

[58] Simpson, *supra* note 56 at 259 (quoting John Austin, Lectures on Jurisprudence, 906, 980 (1885)).

[59] Simpson, *supra* note 56 at 259 (quoting Joseph Powell, Vol. 1, p. 334) (emphasis in original).

[60] *See* Owsia, *supra* note 54 at 879. *See also* Julie M. Philippe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 Tulsa J. Comp. & Int'l. L. 357, 365 (2005).

[61] Owsia, *supra* note 54 at 879 (emphasis in original) (quoting 4 Jean Carbonnier, Droit Civil no. 35 [14th ed. 1990]).

[62] *See* Owsia, *supra* note 54 at 878.

[63] *See* Rodolfo Batiza, Las Fuentes del Código Civil de 1928 [Sources of the 1928 Civil Code] 141, 846-49 (Porrúa, 1979) (one of the sources for articles 1794 and 1796 of the current Mexican Federal Civil Code is the French Civil Code).

[64] "El contrato se forma en el momento en que el proponente reciba la aceptación, estando ligado por su oferta, según los artículos precedentes." [A contract is created at the moment that acceptance is received by the offeror. The acceptance binds the offeror according to the previous articles.], (translation by author). Código Civil [C.C.F.], as amended, article 1807, D.O. 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

[65] "Para la existencia del contrato se requiere: I. Consentimiento." (translation by author) C.C.F., article 1794.

[66] "Los contratos se perfeccionan por el mero consentimiento […] Desde que se perfeccionan obligan a los contratantes […]" (translation by author). C.C.F., article1796.

[67] "[Consentimiento] [e]s el acuerdo de voluntades para crear o transmitir, modificar o

While this theory of offer has developed over centuries, it has centered on the world of civil contracts. When applied to commercial transactions, the application of French *pollicitation* and the strict order of "offer" and then "acceptance" has hindered the development of "firm promises," which are essential in today's business world.

These firm promises, as its name implies, are promises that cannot be revoked by the promisor once expressed. A clear example of firm promises appears in Article 5 of the Uniform Commercial Code [U.C.C.], which regulates letters of credit.[68] The specific provision indicates that "[a] letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides."[69]

In other words, once the issuer has transmitted the letter of credit, it becomes enforceable by the beneficiary even if the beneficiary has not expressed his acceptance of the offer. Moreover, the mentioned article orders that a letter of credit is considered irrevocable unless the parties have expressed the opposite. The reading of the two parts of Article 5-106 prohibits an issuer of a letter of credit from withdrawing his offer even if that withdrawal reaches the beneficiary before the letter of credit (in this case, the offer).

These types of promises become extremely difficult to apply in a system based on the French doctrine of "offer and acceptance." Even though the Civil Code currently has some examples of firm promises in the form of promises of rewards, contest prizes, offers to the public, and executive documents to be paid to the bearer,[70] the truth is that these forms of legally binding oneself could not develop under the French doctrine.[71]

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extinguir derechos y obligaciones y se forma por la policitación u oferta y la aceptación." ["Consent is the meeting of wills geared toward the creation, transmission or extinction of rights and liabilities. It is created through a *pollicitation* or offer and an acceptance."] (translation by author). Víctor M. Castrillón Y Luna, Contratos Civiles [Civil Contracts] 16 (Porrúa, 2007).

[68] U.C.C. § 5 (Am. Law Inst. & Unif. Law Comm'n 1995).

[69] U.C.C. § 5-106(a) (Am. Law Inst. & Unif. Law Comm'n 1995).

[70] *See* Fausto Rico Álvarez & Patricio Garza Bandala, *Sobre la Declaración Unilateral de Voluntad como Fuente de las Obligaciones*, *in* Derecho Civil y Romano, Culturas y Sistemas Jurídicos Comparados 263, 268-269 (Instituto de Investigaciones Jurídicas UNAM, 2006) (original citations omitted).

[71] In laws based on the French-Roman model, such as the Napoleonic [Civil] Code or our [Mexican] Civil Codes of 1870 and 1884, this form of binding oneself abstractly (that is, binding oneself before an unspecified number of people without those people having assented their will, but only with the manifestation of the will of the offeror) was rejected. [En las legislaciones de corte franco-romano, como el Código Napoleón o nuestros códigos civiles de 1870 y 1884 esta posibilidad de obligarse abstractamente, es decir, ante un número indeterminado de personas sin que consintieran en ello a partir de la manifestación de la voluntad únicamente de su autor, fue desechada.] (Original citations omitted) (translation by author). *Id.* at 264-265.

These types of abstract promises were imported into Mexican legislation from German law.[72] Nevertheless, as explained by authors Rico Álvarez and Garza Bandala, the inclusion of Germanic doctrines in Mexican law was carelessly done. These authors explain:

> The legislative problem that we want to emphasize is that the legislator of [the Civil Code of] 1928, based on the 1884 Civil Code, which was basically Franco-Roman and therefore considered contracts the most important source of obligations, singly and thoughtlessly incorporated the unilateral declaration of will, the origins of which are found in Germanic legislations.
>
> We consider ourselves at this doctrinal crossroads. Unlike the 1942 Italian Civil Code, in which the differences between French and Germanic doctrines were closely examined to incorporate the most adequate legal text or to reject both and create a new one, the 1928 legislators adopted a more convenient stance by incorporating the various parts of the legal text without correlating them.[73]

This lack of attention can be seen in the Civil Code as this act contains contradictory and confusing rules regarding firm promises. As explained above, the Civil Code contains the obligation of respecting offers to the public, or more exactly sale prices advertised to the public.[74] Nonetheless, this is the only article regulating public prices. The following articles regulate the public offer of rewards,[75] contest prizes,[76] stipulations in favor of third parties,[77] and executive documents to be paid to the bearer.[78]

The Civil Code indicates that a public offer of rewards can be revoked unless the offeror has established a term for the fulfillment of the condi-

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[72] *Id.* at 267-269.

[73] [La problemática legislativa que queremos hacer patente consiste en que el legislador de 1928, sobre la base del Código Civil de 1884, que era esencialmente franco-romano y por consiguiente consideraba al contrato como la fuente más importante de las obligaciones, incluyó de manera aislada e irreflexiva a la declaración unilateral de la voluntad, cuyos orígenes se encuentran en legislaciones de corte gérmanico […] Consideramos que nos encontramos en esta encrucijada doctrinal. A diferencia del Código Civil Italiano de 1942 en donde se estudiaron a fondo las diferencias entre las corrientes francesas y alemanas para incorporar al texto legal la más adecuada o desechar las dos y crear una nueva, los legisladores de 1928 tomaron una postura más cómoda sin correlacionar las diversas partes integrantes del texto legal.] (Translation by author). *Id.* at 271.

[74] "The fact of offering goods to the public at a certain price, compels the owner to maintain his offer." [El hecho de ofrecer al público objetos en determinado precio, obliga al dueño a sostener su ofrecimiento]. (translation by author). Código Civil Federal [C.C.F.], as amended, article 1860, D.O. 26 de mayo, 14 de julio, 3 y 31 de agosto de 2918 (Mex.)

[75] C.C.F. articles 1861-1865.

[76] *Id.* Articles 1866-1867.

[77] *Id.* Articles 1868-1872.

[78] *Id*. Articles 1873-1881.

tions.[79] In the case of stipulations in favor of third parties, the benefit can be revoked if the beneficiary has not expressed a desire to accept it.[80] These provisions do not seem to fit with article 1860 C.C.F., which forces those who offer goods to the public at a certain price to fulfill that offer without the need of previous acceptance or an established term.[81]

Moreover, Mexican legislators have also had difficulties in adapting the concept of firm promises even in commercial matters. To give an example of this, the regulation of letters of credit in Mexico does not assume their irrevocability.[82]

Comparing Mexican regulations on letters of credit with those stipulated in the US U.C.C. shows the aversion that Mexican legislators still have towards offers that do not require an acceptance in order to be enforceable. Issues regarding firm promises go beyond mere enforcement. The application of civil law doctrines also affects the result of this enforcement.

A clear example of these difficulties is the enforcement of promises to sell. In Mexico, these types of firm promises are not considered to create obligations to give, but obligations to do.[83] This distinction is borne from the mentioned application of Aristotelian classifications[84] as doctrine and the code has divided contract obligations into "obligations to give,"[85] and "obligations to do."[86] If a contract is considered to create an obligation "to do," such as entering into a future contract, it cannot have effects "to give," such as transferring the property of an object or land[87] even when that was the effect of the future contract.

An example of these effects is the *Amparo* decision given in the case of *María Trinidad Gómez Jiménez*.[88] This case dealt with a person attempting to enforce a

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[79] Código Civil Federal [C.C.F.], as amended, articles 1863-64, D.O. 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

[80] C.C.F. article 1871.

[81] *Compare* C.C.F. articles18061-18072, *with* C.C.F. article 1860.

[82] Ley de Instituciones de Crédito [L.I.C.], as amended, article 71, D.O. 18 de julio de 1990 (Mex.).

[83] *See* C.C.F. Articles 2011-2028.

[84] *See supra* section II.

[85] *See* C.C.F. Article 1824(I).

[86] *See* C.C.F. Article1824(II).

[87] *See* Contrato de Promesa de Compraventa. Opera su Recisión Después de Vencido el Plazo que se Estipuló en Éste (Legislación del Esatdo de Puebla), Primer Tribunal Colegiado en Material Civil del Sexto Circuito [T.C.C.] [First Civil Court of the Sixth Circuit], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XXII, Julio 2013, Tomo 2, Tesis VI.1o.C.31 C (10a.), P. 1362.

[88] María Trinidad Gómez Jiménez, Semanario Judicial de la Federación, Quinta Época, Tomo CXXV, Página 355 (Mex.) (Tesis Aislada) (Amparo civil directo 1205/54, 11-07-1955) *in* Kozolchyk, Contracts *supra* note 8 at 938-940.

promise to sell real estate.[89] The court decided that a promise to sell could not be enforced to transmit the ownership of land as promises to sell only create obligations "to do."[90] The claimant had to sue the defendant not for the transmission of the property over land, but for granting a sales contract.[91]

The application of the French theory of "offer and acceptance" and a strict adherence to Aristotelian classifications make it extremely difficult to apply promises to sell real estate in Mexico. Some proposed solutions include the use of escrow accounts similar to those used in the United States and Germany.[92]

IV. "Offer" as Developed in US Law

To give an example of the different results the independent development of commercial law could bring, I will present examples from US courts dealing with offers in commercial matters.

Instead of the mechanical approach taken by French doctrine (an offer followed by acceptance creates a contract), the US approach asks whether the parties intended to create a legal relation.[93] This "means that even if a valid offer has been accepted, the parties must have intended to create legally binding relations."[94]

The focus of the US doctrine is not whether there was a valid acceptance of an offer; instead, the focus is on the intention of the parties. While in the French (and Mexican) approach, a contract can be created if there is an acceptance to an offer, in US law, it is necessary to demonstrate that the parties have bargained something in order for the contract to materialize.

Unlike the mechanical approach of French doctrine, the concept of bargaining is better suited for commercial relations. One example is the case of *Teachers Ins. & Annuity Ass'n v. Tribune Co.*[95] In that case, the U.S. District Court for the Southern District of New York had to decide at what moment a binding agreement was created when the parties exchanged several communications.

In *Teachers Ins.*, the Tribune Company was seeking to attract creditors. Tribune created an approximately 50-page brochure describing a proposed

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89 Maria Trinidad Gómez Jiménez, *in* Kozolchyk, Contracts *supra* note 8 at 938-39.

90 *Id. supra* note 8 at 939.

91 *Id. supra* note 8 at 939, 940.

92 *See* Boris Kozolchyk, *Symposium: Enhancement of Mexican Commercial Adjudication by Improved Transactional Fact-Finding, Application of Equitable Principles, and Drafting of Standard Contracts and Best Contractual Practices: English Material: Working Group Reference Materials,* 27 Ariz. J. Int'l & Comp. L. 441 (2010).

93 Philippe, *supra* note 60 at 372.

94 *Id.*

95 Teachers Ins. & Annuity Ass'n v. Tribune Co. 670 F. Supp. 491 (S.D.N.Y. 1987).

mortgage and loan.[96] The only interested creditor was Teachers Insurance and Annuity Association of America, who received a letter from Tribune to begin negotiations on the terms of a purchase-money mortgage.[97]

The facts indicate that Teachers Ins. accepted to enter into negotiations with Tribune and agreed to extend the loan.[98] Teachers Ins. sent a commitment letter to Tribune, but the letter did not mention offset accounting.[99] The letter also stated that the agreement was contingent in the preparation of certain documents and the execution by Tribune.[100] Tribune responded with a letter that purported to be part of the negotiation but not a "binding agreement."[101] This letter also mentioned nothing about offset accounting.[102]

Due to internal issues, which included the sale of a building and the problem of offset accounting, Tribune backed away from the deal.[103] The main legal question in the case was the "nature of the obligations that arose out of the commitment letter agreement."[104] The court decided that the letter represented a "binding preliminary commitment" that "obligated both sides to conclude a final loan agreement upon the agreed terms by negotiating in good faith to resolve such additional terms as are customary in such agreements."[105]

This decision brings up the issue of forcing parties to enter into agreements. However, in order to avoid "trapping parties in surprise contractual obligations […],"[106] the court established the concept of "binding preliminary commitments," which are agreements that bind the parties without being complete contracts.[107] This court's analysis shows the importance of adapting legal theories to real commercial interactions.

Another case that shows a flexible approach to contract creation and the definition of offer used by US courts is *Leonard v. Pepsico, Inc.*[108] This is an interesting case as it relates to an intentionally misleading advertisement, albeit for comedic purposes.

In the facts of *Leonard*, the Pepsi Company conducted a promotional campaign in the mid-1990s,[109] which consisted of an opportunity to collect "Pepsi

96 *Teachers Ins.* 670 F. Supp. at 493.

97 *Id.*

98 *Id.*

99 *Id.* at 494.

100 *Id.*

101 Teachers Ins. & Annuity Ass'n v. Tribune Co. 670 F. Supp. 491, 494 (S.D.N.Y. 1987).

102 *Teachers Ins.* 670 F. Supp. at 494.

103 *Id.* at 495-496.

104 *Id.* at 496.

105 *Id.* at 499.

106 *Id.* at 497.

107 Teachers Ins. & Annuity Ass'n v. Tribune Co. 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

108 Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116 (S.D.N.Y., 1999).

109 *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d at 118.

Points" and exchange these points for products from a catalog.[110] Before releasing the campaign nationally, the Pepsi Company tested the promotion by releasing a TV commercial in the Seattle, Washington, area.[111]

The mentioned commercial featured several products that could be exchanged for "Pepsi Points."[112] At the end of the commercial, a Harrier Fighter Jet was presented with the following words: "HARRIER FIGHTER 7,000,000 PEPSI POINTS."[113] Even though the fighter jet has a prominent appearance in the TV commercial, it is not mentioned in the catalog.[114]

The plaintiff in *Leonard* submitted the order form included with the catalog, fifteen Pepsi Points (the minimum number of points needed to claim a prize), and a check for $700,008.50 since it was possible to send cash instead of Pepsi Points.[115] Pepsi returned the check with a letter explaining that the fighter jet was not part of the promotion.[116]

After reviewing the facts of the case, the United States District Court of New York reached the conclusion that the TV commercial could not be considered an offer.[117] The reason is that in US jurisprudence (and common law jurisprudence in general) mere advertisements are not considered offers.[118]

Advertisements in common law countries are considered mere invitations to bargain.[119] In order for an advertisement to be considered an "offer" (in the same sense as in the French doctrine), it needs to be "clear, definitive and explicit, and [leave] nothing open for negotiation."[120]

Although these decisions were not strictly based on commercial customs and practices, they demonstrate that US courts are concerned with the realities of the market, such as the problems related with the negotiation of commercial agreements as seen in the *Teachers Insurance* case. This case shows that a strict application of a theory, such as the offer-acceptance theory, is not always in accordance with the form in which commercial contracts take place. Similarly, the *Leonard v. Pepsico* case shows issues with a strict application of said theory.

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110 *Id.*

111 *Id.*

112 The court makes a detailed description of the commercial. *Leonard v. Pepsico, Inc.,* 88 F. Supp. 2d at 118-19.

113 *Leonard v. Pepsico, Inc.,* 88 F. Supp. 2d at 119.

114 Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 119 (S.D.N.Y., 1999).

115 *Leonard v. Pepsico, Inc.,* 88 F. Supp. 2d at 119.

116 *Id.* at 120.

117 *Id.* at 132.

118 *Leonard v. Pepsico, Inc.,* 88 F. Supp. 2d at 123-24. *See also* Restatement (Second) of Contracts § 26 cmt. b (1981).

119 *See e.g.*, Restatement, *supra* note 118 at § 26 cmt. b . *See also* Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 123-24 (S.D.N.Y., 1999).

120 *Leonard v. Pepsico, Inc.,* 88 F. Supp. 2d at 124 (quoting *Lefkowitz v. Great Minneapolis Surplus Store,* 251 Minn. 188 (1957)).

In Mexico, both the Civil Code and commercial legislation compel merchants to respect the prices advertised to the public without any latitude in cases that could be interpreted as non-offers or mistakes.[121] The disposition in the Federal Consumer Protection Law only allows changes to the offer when the consumer gives his consent.[122] It is not difficult to see the problems created by a strict, mechanical application of these dispositions as there are numerous cases in which merchants have been forced to accept extremely low prices advertised by mistake.[123]

Other clear example of US courts acknowledging the realities of the market is the case of letters of credit. Although the U.C.C. did not specify whether the letters of credit were considered as revocable or irrevocable prior to the modification of Article 5 in 1995,[124] by the 1970s courts in the United States had already established that revocable letters of credit are "illusory contracts."[125] As explained by another court:

> The bank's role in a letter of credit is to facilitate commercial transactions between its customer and the beneficiary by creating an arrangement whereby the beneficiary seller can deal freely with the buyer without fear that payment will be withheld. A revocable letter of credit provides the beneficiary seller with little protection. Therefore, unless otherwise provided in the letter of credit itself, there should be a presumption in favor of irrevocability.[126]

US courts realized that in the specific case of letters of credit, offers that require acceptance in order to be enforceable leave beneficiaries with little protection. Nevertheless, this trend to favor irrevocable letters of credit was not always the norm.

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[121] Ley Federal de Protección al Consumidor [L.F.P.C.] [Federal Consumer Protection Law], as amended, article 42, 24 de diciembre 1992 (Mex.). *See also* Codigo Civil Federal [C.C.F.] [Federal Civil Code], as amended, art. 1860, 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

[122] L.F.P.C. article 42.

[123] *See Venden 99 paquetes de cerveza por 396 pesos en Veracruz* [*99 packs of beer sold for 396 pesos in Veracruz*], Publimetro, May, 8, 2015, available at, *http://www.publimetro.com.mx/noticias/venden-99-paquetes-de-cerveza-por-396-pesos-en-veracruz/moeh!JnKbRVS89sJTI/* (last visited Oct. 31, 2016). *See also,* Antonio Rebolledo, *Compran estufa en 13.99 pesos por error en etiqueta* [*Oven bought at 13.99 pesos due to mistake in the price tag*], El Diario MX, (June 30, 2014 2:23 PM), *http://diario.mx/Local/2014-06-30_a56b5dc5/compran-estufa-en-1399-pesos-por-error-en-etiqueta/* (last visited Oct. 31, 2016). *See also, Compra pantalla de 39 pulgadas por 70 centavos gracias a Profeco* [*39-inch screen purchased at 70 cents thanks to Profeco*], Excélsior (June 18, 2014 7:37 PM), *http://www.excelsior.com.mx/nacional/2014/06/18/966049* (last visited Oct. 31, 2016).

[124] *See* James E. Byrne, Revised Article 5: Letters of Credit, 6B Hawkland UCC Series (West) §5-101:2 [Rev], §5-105:3 & n2 [Rev] and §5-106 n2 [Rev] Dec. 2008.

[125] West Virginia Hous. Dev. Fund v. Sroka, 415 F. Supp. 1107, 1111-12 (W.D. Pa., 1976).

[126] Data Gen. Corp. v. Citizens Nat'l Bank, 502 F. Supp. 776, 783 (D. Conn., 1980).

In a work published in 1933, an attorney named Vald Hvidt who was working in Copenhagen, Denmark, explained that back in the 1930s the norm was to use revocable letters of credit.[127] Vald Hvidt explained that the trade world back then was dominated by merchants who knew and trusted each other.[128] Nevertheless, when dealing with strangers, as in the case after the "Great War," the use of irrevocable letters of credit increased.[129]

Merchants adapt and change their ways of doing businesses according to changes in the market. An adequate commercial law must be able to adapt to those changes promptly and adequately. Binding commercial law to the strict logic created for the civil code impedes this adaption. The use of commercial customs and practices as the basis for the commercial code and commercial laws is an adequate way of allowing adaptations to be made. An example of how to reach this goal is found in the creation of "soft" law in international law.

V. Uniform Customs and Practices

In the theory of international law, scholars have classified international norms as "hard"[130] and "soft" laws.[131] The aspect that differentiates hard law from soft law is whether the instruments are deemed binding.[132] Instruments that have been created by practitioners, but that have not been enacted as national laws or treaties, fall into this category of "soft" law.[133] Although not

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[127] Vald Hvidt, Bankers' Credits 9 (Copenhagen-London, 1933).

[128] *Id.* at 9-10.

[129] In particularly troublous periods —such as during and immediately after the Great War— when the reliability of connections was shaken, an increase of irrevocable credits as against the revocable ones is recorded. The war period caused a number of new business houses to crop up, and houses of old standing started trading on new lines. As a consequence the seller's knowledge of the buyer was not, as a rule, sufficient to afford a sound opinion of the latter's solidity and respectability. *Id.* at 9.

[130] On a domestic level, law includes constitutions, statutes, codes, regulations, and court decisions. International law includes those rules and norms that the international community deems technically binding or hard law, namely treaties or customary international law. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Finance Instruments*, 30 Yale J. Int'l L. 125, 127 (2005).

[131] "Other international rules and norms reside in the catch-all category of soft international law." *Id.*

[132] *See Id.*

[133] *See* Bottom-up lawmaking tales do not feature state policymakers but rather the very practitioners —both public and private— who must roll up their sleeves and grapple with the day-to-day technicalities of their trade. On the basis of their experiences on the ground, these practitioners create, interpret, and enforce their rules. Over time, these initially informal rules blossom into law that is just as real and just as effective, if not more effective, as the treaties that initiate the top-down processes. *Id.* at 126.

strictly enforceable, these instruments have become extremely important in the regulation of international trade and have even forced changes in domestic laws.[134]

One of these instruments is the Uniform Customs and Practices for Documentary Credits [U.C.P.]. U.C.P. started as national trade rules and statements of views or positions adopted by national banking groups.[135] The International Chamber of Commerce took upon itself the task of grouping these local rules and statements into a single instrument that could be used to regulate the use of letters of credit on an international level.[136] The I.C.C. enacted the *Règlement Uniforme Relatif aux Créits Documentaires* in 1929.[137] These regulations would be reformed on several occasions, the last one being U.C.P. 600 in 2007.[138]

The compilation of customs and practices that is the U.C.P. has been successfully used by bankers for decades for managing documentary credits.[139] This success has compelled legislators to accept its use in lieu of commercial law, as in the above-mentioned case of the U.S. U.C.C. or even in the Credit Institutions Law of Mexico.[140]

These international instruments show a way in which commercial customs and practices can be employed as suppletory of commercial legislation. Moreover, if trade groups are allowed to enact compilations of their customs and practices, it would also eliminate issues regarding the application of customs in resolving legal controversies, as in the case of establishing when a custom has been created or is valid.[141]

Moreover, allowing trade groups to compile their customs would also reduce issues like choosing between different customs.[142] Furthermore, con-

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[134] *See supra* notes 68, 69, and *infra* 140.

[135] Boris Kozolchyk, Commercial Letters of Credit in the Americas 83 (1966).

[136] *Id.* at 83-84.

[137] *Id.* at 84.

[138] *See* The Complete UCP, Texts, Rules and History 1920-2007, at 208 (Dan Taylor ed., 2008).

[139] *See Id.*

[140] Ley de Instituciones de Crédito [L.I.C.], as amended, art. 71, D.O. 18 de julio de 1990 (Mex.).

[141] *See* The term custom, despite its seeming transparency of context, blurs, rather than covers, a wide field of concepts not only in different legal systems but even within the boundaries of a given jurisdiction. As used in relation to commercial law, it has meant in the common-law world both an entire body of law as in the case of the "law merchant." And also a "course of dealing" or "usage of trade," persuasive in nature and applicable to "give particular meaning to and supplement or qualify the terms of an agreement." Civil lawyers, on the other hand, have since the days of Bartolus struggled with the problem of properly defining and delimiting the scope of customs. Kozolchyk, Americas *supra* note 135 at 75.

[142] The mere fact that there are different parties to a letter of credit transaction and that they usually belong to different spheres of the mercantile community gives rise to different practices, depending upon the capacities in which the parties interact. Buyers and sellers, im-

cerns with protection of parties not belonging to the trade sector or group are lowered as these sectors or groups know that compiling unequal customs would affect their businesses.[143]

The enactment of compilations of customs and practices by trade sectors or groups would also allow Mexican commercial law to develop in parallel with commerce without having to wait for slow legislative processes. This would also be a return to the commercial law that existed in Mexico before the enactment of the 1884 Commercial Code (with merchants playing a more important role in the creation of the laws that regulate them).

However, these changes would also require a deeper change in Mexican commercial legislation. It is necessary not only to accept the use of commercial customs as the grounds for commercial law instead of the civil code, but also to change the anti-merchant attitude inherited from the French Commercial Code. Moreover, misgivings about allowing parties other than Congress to enact commercial legislation need to be eliminated.

VI. Conclusion

The reliance on the Civil Code to fill the gaps in commercial law has prevented Mexican commercial law from evolving. The Civil Code did not develop as a tool to regulate the rapidly changing environment of commerce. The doctrines created to regulate the lives of citizens, with their Aristotelian logic of unchanging "essences," are not adequate for a world where certainty may not be as important as expeditiousness.

Legislators in Mexico should allow commercial legislation to develop independently from the Civil Code. It should be left to merchants, judges, and scholars to develop commercial doctrine. Removing the Civil Code as an

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porters or exporters bring about different usages when dealing among themselves than when acting as parties in a transaction in which the presence of one or several banks alters the nature of preexisting practices by introducing greater certainty, redistributing duties, and shifting burdens of proof. *Id.* at 76-77.

[143] It could be argued that the UCP, without clearly violating public policy, could still effect an unfair result especially for parties such as customers, beneficiaries, shipping and insurance companies not directly represented in their formulation, and that their application should be precluded in such cases. However, while the earlier versions of the UCP were essentially the product of the views of the international banking community, the later versions, particularly the 1962 and 1974 Revisions, have sought to incorporate the views of importers, exporters and the shipping and insurance industries as well as judicial decisions and doctrinal writing. Although there are still one-sided provisions, experienced bankers and banking lawyers are aware that unfairness toward customers when arbitrarily invoking these provisions, can only result in an eventual loss of business. Consequently, the problem of unfair results in the application of the UCP is more a function of the circumstance of a given case —reflecting an unconscionable or sharp practice by an individual bank or banker— than an endemic unfairness of the text. 5 Int'l Encyclopedia of Comp. L. §5-30 (Boris Kozolchyk, n.d.).

auxiliary of commercial legislation and allowing the use of commercial practices, usages of trade, and customs would allow commercial law to develop in a way that reflects the reality of the Mexican commercial market.

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THE RECOGNITION OF FOREIGN LAW: FOREIGN MARITIME LIENS UNDER MEXICAN LAW

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Abstract: *Maritime liens, without a doubt, are a unique and hugely important feature of maritime law. Broadly speaking, they represent a claim on or special right to a vessel. However, there is no uniformity when it comes to studying this unique feature. It is from the Anglo-Saxon jurisdictions that we get the majority of our information about its nature and associated problems. In this article, the law on maritime liens is examined through a comparative study of several Anglo-Saxon jurisdictions and Mexican law. Also under investigation are the problems that arise when a national court is faced with a maritime lien created under foreign law, and when that maritime lien differs from those liens established under the law that governs the domestic court.*

Key Words: *Maritime liens, Foreign Law, Substantive Law, Procedural Law, Arrest of ships*.

Resumen: *Sin lugar a duda los privilegios marítimos representan una figura única y de suma importancia del derecho marítimo. A grandes rasgos se puede decir que un privilegio marítimo es un crédito o privilegio sobre un buque, sin embargo, es en sus particularidades que no hay uniformidad a la hora de estudiar esta figura tan única. De tal modo que son las jurisdicciones anglosajonas aquellas que nos dan mayor detalle sobre la naturaleza y problemas que surgen de su estudio. En este trabajo se estudia el derecho de los privilegios marítimos a través de un estudio comparativo de varias jurisdicciones anglosajonas y el derecho Mexicano. Luego, se estudian los problemas que surgen cuando un juez nacional se enfrenta con un privilegio marítimo nacido bajo el derecho extranjero, y aun ms importante cuando ese privilegio marítimo difiere de aquellos establecidos en su legislación*.

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Palabras clave: *Privilegios marítimos, derecho extranjero, derecho sustantivo, derecho procedimental, embargo precautorio de buques*.

Table of contents:

I. Introduction

Maritime law is a unique branch of the law. Among its areas of specialization is admiralty law. Because of its nature, admiralty law requires deep knowledge of other areas of the law such as insurance, environmental, international and contract laws.

Maritime transactions are based on good faith. The dynamism and nature of the maritime business sometimes require creditors to wait for payment. Vessels must navigate in order to earn money and pay dues, therefore, the creation of maritime credits or the right to a maritime claim has been of paramount importance to the development of international trade. For instance, a company that repairs a vessel needs security that its services will be paid. Without collateral, the company cannot allow the ship to sail away. A maritime lien can be said to provide greater security for a claimant than a regular maritime claim. The enforcement of a maritime lien through the arrest of the ship gives certainty to the claimant that negotiations for the provision of security by the P&I Club or the bank will be held.

Despite the fact that the expression maritime lien is recognized in the national law of all countries, and that these nations are aware of the importance of this feature of maritime law, there is no global agreement on the precise character of maritime liens.

In fact, the law of maritime liens has developed differently across the globe, and substantial disparities remain in the way it is administered. Therefore, it is natural that conflicts of laws should arise in regard to claims of this nature.

Specifically, when the discussion is about the recognition of foreign maritime liens, courts around the globe have used different approaches depending on their own conflict of laws rules, public policy and expertise in certain juridical areas. For instance, the approach used by common law countries is substantially different from that used by civil law countries.

This article analyzes the law on "maritime liens" and the problems that arise when a domestic court is faced with a maritime lien recognized under foreign law. The first part of this article analyzes and attempts to define the concept of maritime liens. This section also makes a comparative study of English, American and Mexican maritime laws. Part two offers an analysis of the position regarding the recognition of foreign maritime liens. In this chapter a study of the leading cases, mainly English, American, Canadian and Australian is done in order to predict what the Mexican court could do faced with a similar situation.

II. What is a Maritime Lien?

As stated by Sheen J. a maritime lien is more easily recognized than defined.[1] For this reason it is necessary to analyze the features of maritime liens across different jurisdictions. In this article English common law, American law and Mexican law will be studied.

1. *Maritime Liens Under English Common Law*

The concept was first defined by Sir John Jervis in the *Bold Buccleugh.*[2]

A maritime lien, he said, is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law.[3] A maritime lien is defined as a claim or privilege upon a thing to be carried into effect by legal process.[4] This claim or privilege travels with the thing, into whosesoever possession it may come.[5] It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*,[6] relates back to the period when it first attached.[7]

The maritime lien is the foundation of the admiralty proceeding *in rem*. An action *in rem* is restricted to the process of enforcing a maritime lien directly

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1 The Father Thames 1979)2 Lloyd´s Rep 364, 368.

2 The "Bold Buccleugh" [1851] 7 Moo PC 267.

3 *Id.* at 284.

4 *Id.*

5 *Id*. at 284, 285.

6 *Id*. at 284.

7 *Id*. at 285.

against the ship as the defendant, in accordance with the provisions of the Senior Courts Act of 1981. This is called the personification theory, which through time, evolved into the procedural theory. Historically, if the owner of the ship appears or acknowledges service of the proceedings, the action also becomes an action *in personam.*[8] This may be seen as a device to bring the shipowner into court and extend his liability, previously limited to the value of the ship.[9]

The Ripon City,[10] established that a maritime lien may exist and be enforced against the property of persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage.[11] Furthermore, the person who has acquired the right cannot be deprived of it by alienation of the thing by the owner.[12] In other words a maritime lien travels with the vessel into whosesoever hands it may pass.

Furthermore, Mellish LJ. noted in The *Two Ellens*[13] that:

> A maritime lien must be something which adheres to the ship from the time that the fact happened which gave the maritime lien, and then continues binding the ship until it is discharged, either by being satisfied from the assets of the owner, or in any other way by which, by law, it may be discharged. It commences, and there it continues binding on the ship until it comes to an end.[14]

A maritime lien can arise in a variety of contexts. In *the Tolten,*[15] Scott L.J. states that the lien needs to be admitted or established by evidence.[16] While a maritime lien for collision requires personal liability and may be tortuous in nature, a maritime lien for seafarer wages only requires that service was rendered to the ship[17] arising independently of the shipowner's personal liability.

Additionally, in *the Tolten* it was stated that:

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[8] Further discussion on the real nature of maritime liens can be seen in the controversial decision in the Republic of India v India Steamship Co Ltd (no 2) [1994] 3 WLR 818 (HL). For a critique of this decision see Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (the "*comandate*") 1 Lloyd's Rep. 119; also, Aleka Mandaraka-Shepard, Modern Maritime Law Volume 1, Jurisdiction and Risk 3-3.7(informa Law 2013).

[9] Case note, *Personification of Vessels,* 77 Harv. L. Rev. 1123 (1963-1964).

[10] The Ripon City [1897] P. 226.

[11] *Id.* at 242.

[12] *Id.*

[13] The Two Ellens (1872) LR 4 PC 161.

[14] *Id.* at 169.

[15] The tolten [1946] P. 135.

[16] *Id.* at 146.

[17] Common law provides many precedents about maritime liens, but an in deep study may require the separate study all types of maritime liens, from salvage to master's disbursements.

> The lien consists in the substantive right of putting into operation the Admiralty Court's executive function of arresting and selling the ship, so as to give clear title to the purchaser, and thereby, enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities […].[18]

Finally, under English law, a very restricted list of claims may give rise to a maritime lien

I. Salvage.
II. Collision damage.
III. Seaman's wages.
IV. Bottomry (although bottomry is now obsolete).
V. Master's wages.
VI. Master's disbursements.[19]

2. *Maritime Liens Under United States Law*

United States Maritime liens share some features with common law maritime liens. In fact, the *The Bold Buccleugh*[20] is considered to be a very important case both in England and the United States. In *The John G Stevens*[21] the Supreme Court describes a maritime lien for collision in a similar fashion to a maritime lien under English law:

> *The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, jus in re, a proprietary interest in the offending ship, and which, when enforced by admiralty process in rem, relates back to the time of the collision*. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done […].[22] (Emphasis added).

Therefore, in this section some unique features will be highlighted in order to understand maritime liens under other jurisdictions.

In *The Brig Nestor,*[23] Story J. defined the character of a maritime lien according to US law and analyzed the nature of a maritime lien as a mixture of

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[18] The Tolten [1946] P. 135. at 145, 146.

[19] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325 AT 332,333.

[20] The "Bold Buccleugh" [1851] 7 Moo PC 267.

[21] The "John G. Stevens" 170 U.S. 113 (1898).

[22] *Id*. at 122, 123.

[23] The Brig Nestor (1831)18 Fed Cas 9.

a tacit hypothecation, being a lien that is created by operation of law creating security without title or possession, and a privilege.[24]

Story J. also established that a maritime lien is enforced by an action *in rem*, which can only be executed by the US Admiralty Court.[25] A lien arises from the vessel's wrong and creates an interest in the vessel that will be enforced by an action *in rem* which is allowed by the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C.

The American action in rem is against the property that relates to the claim. This is possible due to a legal fiction called "personification of the vessel."[26] Moreover, the ship is invested with legal personality and is liable for its actions. For instance, in *United States v. the Brig Malek Adhel*[27] Story J noted that the vessel will be liable for its torts and misconducts regardless of the innocence of the shipowner, stating that:

> […] the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. *The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.* The vessel or boat (says the act of Congress) from which such piratical aggression, shall have been first attempted or made shall be condemned […].[28]

Also, unlike an English maritime lien, a US maritime lien would not be barred by a previous action *in personam* against the owner of the offending vessel as in *S.E.L. Maduro (Florida), INC v M/V Antonio De Gastaneta.*[29]

Under American law then, there are a large number of claims that may give rise to a maritime lien, either because of "statutory law" or because of "case law". Robert Force provides a list of the claims that can give rise to a maritime lien:

I. Seamen's wages.
II. Salvage.
III. Torts that arise under the general maritime law.
IV. General average.
V. Preferred ship mortgages

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[24] *Id*. at 82-85.

[25] *Id*. at 78.

[26] For further discussion on this see Alex T. Howard JR, *Personification of the Vessel: Fact or Fiction?,* 21 J. Mar. L. & Com. 319-329 (1990).

[27] United States v. Cargo of *the Brig Malek Adhel*, *43 U.S. 210 (1844)*.

[28] *Id.* at 229.

[29] S.E.L. Maduro (Florida), INC v M/V Antonio De Gastaneta 833 f.2d 1477, 1988 AMC 1217 (11th Cir. 1985).

VI. Supplies.
VII. Repairs.
VIII. Necessaries furnished to vessel.
IX. Towage.
X. Wharfage.
XI. Pilotage.
XII. Stevedoring.
XIII. Damage or loss to cargo while aboard a vessel.
XIV. Claims by carriers for unpaid freight.[30]

3. *Maritime Liens Under Mexican Law*

Maritime liens are codified in articles 91 to 100 of the Navigation and Maritime Commerce Law (L.N.C.M in Spanish).[31] Maritime liens or maritime privileges as they are called under Mexican law are defined in the first paragraph of Article 91: "Maritime liens give the preferential creditor the right to be privileged over other creditors regarding payment, in accordance with the provisions of this Act […]."[32]

According to the L.N.C.M a maritime lien is a cause of preference attached to a real or personal right[33] for the satisfaction of the claimant's right. Further explanation about the nature of a maritime lien is provided in Article 93:

> Maritime liens on a vessel will be extinguished after a period of one year from the time the maritime lien arises, unless an action has been issued to seize the ship or to make the ship subject to preventive embargo.
>
> The extinction of the maritime lien does not involve the extinction of the credit or compensation; they will become extinct in the form and terms indicated in the applicable legislation.[34]

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[30] Robert Force, Admiralty and Maritime Law 176 (Federal Juridical Center, 2d ed.2013).

[31] Ley de Navegación y Comercio Marítimos[LNCM][Navigation and Maritime Trade Law] as amended, Articles 91-100, Diario Oficial de la Federación [Official Federal Gazette -- D.O.], 1o. de junio de 2006 (Mex).

[32] *Id.*, Article 91.

[33] Robert Force et al, Aadmiralty and Maritime Law Practitioner's Edition Volume 2 266 (2008).

[34] Ley de Navegación y Comercio Marítimos[LNCM][Navigation and Maritime Trade Law] as amended, Articles 93, Diario Oficial de la Federación [D.O.], 1o. de junio de 2006 (Mex).

As with an English or a US maritime lien, a Mexican maritime lien is secret; it does not need to be registered.[35] It also attaches to the vessel until the lien is carried into effect by a preventive embargo or seizure.[36] Hence, a maritime lien is not enforceable against all the assets of the person at fault but against the ship or naval artifact.[37]

Arguably, a maritime lien is an independent legal feature as it will be extinguished independently of the underlying claim. The Mexican legislation is unsatisfactory and rather inconsistent about the information it provides about maritime liens, however, and some Mexican authors suggest that a maritime lien is not a "derecho real" by itself but a "derecho real de garantia"[38] or a real security right.

A "real security right" is a preferential right that allows the creditor to be paid ahead of other creditors on the sale price of the asset subject to the privilege, and sometimes also allows the creditor to seize the property regardless of the ownership of the asset.[39] This right to seize the asset regardless of property depends on the nature of the privilege[40] or in this case, the maritime lien. Moreover, in the current Latin American systems "real security rights" only indicate priority and not the right of prosecution regardless of the ownership.[41]

Arguably, a Mexican maritime lien should not include the right of prosecution. Also, the holder of a maritime lien cannot start proceedings against the ship unless his claim is based on a real right or "derecho real".[42] Nevertheless, the above mentioned seems to be an unsettled area for Mexican law as it is strictly linked to the ship arrest law, a measure that was incorporated into

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[35] *Id.*, Article 97.

[36] Hereafter embargo is the synonym for the arrest of a ship for purposes of Mexican legislation.

[37] Abraham A. Servín, Should Mexico Adopt the 1952 International Convention for the Unification of Certain Rules in Relation to the Arrest of Sea-Going Ships or The 1999 International Convention on Arrest of Ships? (Sep, 09, 2015) (unpublished LLM dissertation, University of Southampton).

[38] Jose Eusebio Salgado y Salgado, Manual de Derecho Marítimo Tomo I 545 (Editorial Academica Española 2012); Raúl Cervantes Ahumada, Derecho Marítimo 877 (Editorial Herrero, S. A. 1984); David Enríquez Rosas, El Buque: una Introducción al Estudio del Estatus Jurídico de las Embarcaciones 412 (Universidad Nacional Autónoma de México, 1998).

[39] CarlosA de Cores et al., El Nuevo Derecho de las Garantías Reales 38 (2008).

[40] *Id.*

[41] *Id.*, at 40.

[42] See Abraham A. Servín, Should Mexico Adopt the 1952 International Convention for the Unification of Certain Rules in Relation to the Arrest of Sea-Going Ships or The 1999 International Convention on Arrest of Ships? (Sep, 09, 2015) (unpublished LL.M. dissertation, University of Southampton).

the Mexican maritime legislation in 2006, being the ship arrest an obscure feature for Mexican law.

Finally, the list of maritime liens that are recognized by Mexican law are stated in Article 91 as follows:

> I. Claims for wages and other dues to the crew members under their employment on the vessel including repatriation costs and social security charges;
>
> II. Claims arising from compensation due to death or injury occurring whether ashore or at sea, in direct relation to the use of the vessel;
>
> III. Claims for salvage reward for the salvage of the vessel;
>
> IV. Credits to the vessel, derived from the use of port infrastructure, maritime signals, waterways and pilotage;
>
> V. Claims arising from the compensation by a non contractual fault, due to loss or material damage caused by the operation of the vessel, other than loss or damage caused to the cargo, containers, and effects of passengers carried on board the same […].[43]

It is safe to say that the list of recognized maritime liens within one juridical system depends on public policy, history, and economic development especially in the area of trade. A country that has a lot of shipowners may protect ships from arrest based on a maritime lien, while a country with much stronger port developments may advantage suppliers with a maritime lien on supplies. It is natural, therefore, that very different positions about how to apply and recognize such a right exist around the world. Nevertheless, a natural sense of justice and developments in international litigation require countries to recognize this right, provided that it was validly conferred.

III. The Recognition of Foreign Maritime Liens

As noted before, there is no uniformity around the world with regard to the development and application of the law of maritime liens. It is natural, therefore, that conflict of laws may arise and the way courts around the world solve these problems differ depending on their conflict of laws rules. English law, for instance, restricts what claims can be considered maritime liens. The US and other civil law jurisdictions, on the other hand, have a much longer list of claims that are considered maritime liens. Therefore, having a maritime lien recognized by a foreign court could mean the difference between having

[43] Ley de Navegación y Comercio Marítimos [L.N.C.M] Navigation and Maritime Trade Law] as amended, Articles 91, Diario Oficial de la Federación [D.O.], 1o. de junio de 2006 (Mex).

a right in security over the ship that travels with the property[44] and being secured by a regular maritime claim or statutory right in rem.[45]

This conflict of laws problem gives rise to a very complicated set of questions. A claim may arise by means of a contract or a tort or any other cause of action, and the court needs to decide which law governs the claimant's cause of action. The court may need to take into consideration that a maritime lien forming security for this obligation arises not only by this cause of action but also by operation of law.[46]

The questions may not stop there: Should the courts of the *forum arresti* recognize the foreign law regarding maritime liens when that law is dissimilar to the domestic law that regulates maritime liens? and; should the courts of the *forum arresti* apply its national law or the foreign law to the ranking of the foreign maritime lien?[47] These questions are linked to the characterization of maritime liens, and the courts will look at their conflict of laws rules to find a solution.[48]

1. *Other Jurisdictilons and the Recognition of Foreign Maritime Liens*

The infamous decision on the *The Halcyon Isle*,[49] represents the leading authority on maritime liens in English law. This majority decision of the Privy Council establishes that the *lex fori* governs the recognition and ranking of foreign maritime liens.

The majority's position, as explained by Lord Diplock, is that a maritime lien in English law involves rights that are procedural or remedial only.[50] The minority, represented by Lord Salmon, would have preferred that a maritime lien validly conferred by the *lex loci* be entitled to recognition.[51] In other

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[44] Veronica Ruíz Abou-Nigm, The Arrest of Ships in Private International Law 118,119 (Oxford International Press) (2011).

[45] In case of English law.

[46] Griffith Price, The Law of Maritime Liens 206 (Sweet and Maxwell Limited 1940),*and* Veronica Ruíz Abou-Nigm *supra* note 34 at 127.

[47] William Tetley, *International Conflict of Laws, Common, Civil, and Maritime* 542-543 (International Shipping Publications BLAIS 1995);

William Tetley, Maritime Lien in the Conflict of Laws in Law and Justice in a Multistate World: Essays in Honour of Arhtur T Von Mehren 439-457 (Nafzinfer & Symeonides ed.,2002); and Ruíz Abou-Nigm *supra* note 34 at 125.

[48] Ruíz Abou-Nigm *supra* note 34 at 124.

[49] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325.

[50] *Id.* at 331.

[51] *Id.* at 339.

words, the minority recognized that a maritime lien should be classified as substantive and not procedural.[52]

There is a policy reason for this decision. Apparently, Lord Diplock was concerned about the extensive list of actions that can lead to the award of maritime liens in some jurisdictions. Whereas English law authorizes maritime liens from a restricted set of circumstances, the US and France, for instance, have a wider range of claims that can give rise to maritime liens, including one for necessaries men, which is a very broad claim.[53] From that perspective, the recognition of foreign maritime liens may constitute an injustice to a purchaser or a mortgagee.[54]

The main objective of the *lex fori* approach then, is to work as an "escape device",[55] rendering less inconvenient the application of foreign elements, which may be unfamiliar to the court.[56] Lord Diplock identified two possible answers: to use the *lex fori* approach or to apply a complicated kind of partial *renvoi.* The first option, he noted, had the merit of simplicity and was preferable in principle.[57]

This approach favors "forum shopping" as it benefits those claimants who are in a position to take advantage of this opportunity, like mortgagees,[58] or even further as in *OceanConnect UK Ltd v Angara Maritime Ltd*[59] a court of appeal case involving US law maritime lien for supplies. In 2009, OCEANCONNECT arrested the vessel in Amsterdam in respect of its claim, and the parties agreed on the release of the vessel upon security. The agreement stated that the monies due would be paid following judgment in a competent court of law and provide an English exclusive jurisdiction clause and an English applicable law clause. Following the re-arrest of the vessel in the US in 2009, the appellant, sought to set aside an anti-suit injunction.

In this case the judge identified the problems that would arise if the order were upheld, given that under English law the recognition of a foreign maritime lien is *lex fori* and that English law does not grant a maritime lien for

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[52] For a summary of the position of the academics refer to: Steve Rares, Maritime Liens, Renvoi and Conflicts of Law: The Far from Halcyon Isle, LMCLQ 183, 183-202 especially 191-193 (2014).

[53] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325 at 331,332.

[54] C.A. Ying, Priorities and the Foreign Maritime Lien 8 Adel.L.Rev 95, 98 (1982-1983).

[55] RUÍZ ABOU-NIGM *supra* note 34 at 130, 133.

[56] T.A.G. Beazley, Maritime Lien in the Conflict of Law 22 Malaya L Rev 115 (1978).

[57] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325 at 327.

[58] William Tetley, Maritime Lien in the Conflict of Laws in LLaw and Justice in a Multistate World: Essays in Honour of Arhtur T Von Mehren 439-457 (Nafzinfer &Symeonides ed.,2002) and Ruíz Abou-Nigm *supra* note 34 at 131.

[59] OceanConnect UK Ltd v Angara Maritime Ltd (Civil Division) [2010] EWCA Civ 1050.

necessaries. OCEANCONNECT would not be entitled to a maritime lien and therefore they would not be able to proceed *in rem*.[60]

According to William Tetley, the Rome Convention 1980[61] may have changed the law regarding the recognition of foreign maritime liens. The author bases his theory on articles 1(2)(h) and 14. These articles lessen the importance of procedure[62] and state that the governing law would apply to the extent that "applicable law" should raise presumptions of law, in this case the lien. Now, this provision has been reproduced in a similar fashion in the Rome I Regulation on the law applicable to contractual obligations[63] in its articles 1(3) and 18, and in the Rome II Regulation on the law applicable to non-contractual obligations[64] in its articles 1(3), 21 and 22. Although, by the decision in *OceanConnect UK Ltd v Angara Maritime Ltd* it appears that *The Halcyon Isle*[65] is still the authority regarding recognition of foreign maritime liens, it can be argued that by virtue of the Rome I and Rome II regulations, a maritime lien would be recognized even when the maritime lien would rank according to English law.[66]

The United States regards the right to arrest a vessel through an action in rem as synonymous with maritime liens;[67] therefore, under US Law, a maritime lien constitutes a substantive right.[68] A US court would use a choice-of-law criterion in order to determine the governing law that should confer a maritime lien on a claimant.[69]If the court does not decide to dismiss the case under the doctrine of *forum non convenience,* it will allow the claimant to proceed in rem, but the ranking will always be governed by US Law.[70]

Given the above outline, Martin Davis notes that under US Law, it is of paramount importance to address three choice-of-law topics: the law governing the underlying claim; the law that gives access to a maritime lien in the specific case and; the law governing the ranking of the lien.[71]

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[60] *Id.* at 39.

[61] Rome Convention on the law applicable to contractual obligations 1980; the consolidated text at [1972] OJ C028/34.

[62] TETLEY *supra* 48.

[63] Regulation (EC) 593/2008 [2008] OJ L177/6.

[64] Regulation (EC) 864/2007 [2007] OJ L199/40.

[65] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325.

[66] TETLEY *supra* 48.

[67] Charles A. Donovan, Picking the Shipowner's Poison–Choice-of-Law Classes and Maritime Liens 14 U S F Mar L J 185, 195 (2001-2002).

[68] *Id.*, at 195.

[69] FORCE *supra* 23 at 185.

[70] TETLEY *supra* 48.

[71] Martin Davis, Choice of Law and U.S. Maritime Liens 83 Tul L Rev 1435, 1436 (2008-2009).

The US conflict of laws rules would find the proper law because it is expressly declared in the relevant contract or contracts or because the connecting factors indicate that the "proper law" is the law of other jurisdiction.[72] To illustrate this, in *Exxon Corp. v Central Gulf Lines,*[73] a case that relates to a bunkering performed in Saudi Arabia, the court found that US law was the proper law:

> Plaintiff Exxon contends that American law should govern whether maritime liens exist in this case. Defendant does not oppose this contention. I agree that this case should be decided according to American law. The United States has a significant interest in this case. The shipowner, the charterer, the ship, and the plaintiff were all American. On the other hand, Saudi Arabia has no interest in having its law apply in this case. The only foreign participant in this transaction, Arabian Marine, was not injured. See Lauritzen v. Larsen, *345 U.S. 571*, 582-90, 73 S. Ct. 921, 928-32, 97 L. Ed. 1254 (1953); Rainbow Line, Inc. v. M/V Tequila, 480 F.2d 1024, 1026-27 (2d Cir. 1973).

Also, the proper law approach is exemplified in *Ocean Ship Supply Ltd. v. M/V Leah*[74] a Fourth Circuit decision in which a Greek ship obtained necessaries in Quebec, Canada. The ship was subsequently sold and registered in Honduras. Afterward, the ship was arrested in Charleston, United States. The court decided that the applicable law was Canadian law. Therefore, the purchase of the vessel defeated the statutory right in rem that was conferred by Canadian law for claims of necessaries.[75] In the case of *Oil Shipping (bunkering) B.V. v Sonmez Denizcilik ve Ticaret A.S.*[76] it was not disputed that the plaintiff was entitled to a maritime lien for necessaries simply because Turkish law provides for such a lien.

To summarize the US position as expressed by Martin Davis, under US law there is an axiomatic connection between conferral of a maritime lien under the *lex causae* and the recognition of a maritime lien in the US.[77]

The position at Canadian law is the one established in the *Ioannis Daskalelis*.[78] in this Supreme Court case Mr Justice Ritchie stated that if a maritime lien exists, it cannot be shaken off by changing location of the res.[79] In other

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[72] Tetley *supra 48*; William Tetley, *supra* 37 at 552-565; Charles A. Donovan Picking the Shipowner's Poison – Choice-of-Law Classes and Maritime Liens 14 U S F Mar L J 185, 185-201 (2001-2002).

[73] Exxon Corp v Central Gulf Lines, Inc. 707 F. Supp. 155 (S.D.N.Y. 1989).

[74] *Ocean Ship Supply Ltd. V M/V Leah*729 F.2d 971, 194 AMC 2089 (4 Cir. 1984).

[75] Tetley *supra* 37 at 552.

[76] Oil Shipping (Bunkering) B.V. v Sonmez Denzcilik ve Ticaret A.S. 10 F.3d 1015 (3d Cir. 1993).

[77] Davis *supra* 61 at 1438.

[78] *Todd Shipyards Corporation v The Ship Ioannis Daskalelis*[1974]1 Lloyd's Rep 174.

[79] *Id.* at 176.

words, if a maritime lien is validly created by a foreign law, this lien can be equally enforced in Canada by an action *in rem*.[80] Consequently, according to Canadian law, a maritime lien is characterized as a substantive right and the validity and nature of this right or lien depends upon the proper law of the situation that gives rise to the claim.[81] The ranking is also procedural or remedial, therefore determined by the *lex fori.*[82]

In *the Lanner*[83] it was held that whenever a Canadian court is asked to apply a substantive law of a foreign jurisdiction, the Canadian conflict of laws rules must be applied in order to determine what choice of law to employ.[84] In addition, the judges acknowledged that a maritime lien arises by operation of law, and consequently, they are extra-contractual rights, so there might be cases in which it is necessary to look for the connecting factors rather than the choice of law clause in the contract.[85]

In *Reiter Petroleum Inc v The Ship "Sam Hawk",*[86] the Federal Court of Australia faced a complex situation in relation to the existence and recognition of a US maritime lien. The main question was whether the *Halcyon Isle* decision still governed the law of Australia. The court considered, in particular, the nature of maritime liens and the test of what should be regarded as procedural or substantive matters, as proposed in *John Pfeiffer Pty Ltd v Rogerson.*[87]

While measuring the pivotal issue of the case Judge McKerracher said:

> […] *matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in McKain (1991) 174 CLR 1 at 26-27, rules which are directed to governing or regulating the mode or conduct of court proceedings* «are procedural and all other provisions or rules are to be classified as substantive.»[88] (Emphasis added).

The court recognized that in light of this new test, a maritime lien should be regarded as a matter of substance rather than procedure. After re-evaluating the authorities, McKerracher stated that even viewing the topic his-

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[80] *Id.*

[81] *Id.,* at 177.

[82] *Id.*

[83] Kent Trade and Finance Inc and others v JPMorgan Chase bank and another (the "Lanner")[2009]1 Lloyd´s Rep. 566.

[84] *Id.,* at 24-26.

[85] *Id.*

[86] Reiter Petroleum Inc v The Ship "Sam Hawk" [2015] FCA 1005.

[87] John Pfeiffer Pty v Rogerson(2000)203 CLR 503.

[88] Reiter Petroleum Inc v The Ship "Sam Hawk" [2015] FCA 1005 at 106.

torically, it seemed clear that a maritime lien is more than a procedural or remedial right.[89]

Furthermore, the court supported the minority *ratio decidendi* in the *Halcyon Isle* in the *John Pfeiffer* case.[90] Finally, the court recognized that an Australian court should recognize and enforce a maritime lien arising under foreign law.

2. *An Approach to the Recognition of Foreign Maritime Liens Under Mexican Law*

Mexican courts have not yet had to wrestle with a maritime lien created by a foreign law at odds with local legislation.

The Federal Civil Code,[91]however, has conflict of laws rules for civil matters that may provide Mexican courts with some direction.

Article 12 reads as follows:

> *Mexican law governs all persons who are within the republic, as well as the acts and events occurring within its territory or jurisdiction and those who submit to Mexican law*, except when these provide for the application of a foreign law and also, those provisions set forth in treaties and conventions to which Mexico is a party.[92] (Emphasis added).

Although seemingly territorialist, Article 12 appears open to the application of foreign law when Mexican legislation provides that option.

On the one hand, under the situation that is analyzed in this paper, it would be inconsistent to hold that Mexican law is applied because the main cause of action occurred within the Mexican jurisdiction. To illustrate this point, a maritime lien arises under a different law from Mexican law and then attaches to a vessel and travels with the vessel until the plaintiff seeks to enforce his right by arresting the ship. On the other hand, it may be harsh to say that Mexican law applies just because the plaintiff is within the jurisdiction. Therefore, it is necessary to look at articles 13, 14 and 15 where the conflict of laws rules that provide for the application of foreign law are codified.

Article 13 sets out the connecting factors that may determine the applicable law:

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89 *Id.,* at 115.

90 *Id.,* at 119.

91 Código Civil Federal [Federal Civil Code-C.C.F.] [Navigation and Maritime Trade Law] as amended, Articles 12-15, Diario Oficial de la Federación [D.O.], 1o. de junio de 2006 (Mex).

92 *Id.*, Article 12.

> Determination of applicable law shall be done according to the following rules:
>
> i. *legal situations validly created,* in the entities of the Republic or in a foreign state under its law, shall be recognized.
>
> ii. the status and capacity of natural persons is governed by the law of the place of residence.
>
> iii. the constitution, regime and extinction of *real rights* over non movable assets, *and movable assets, and leases and temporary use of such property shall be governed by the law of the place of its location*, although its owners are foreign.
>
> iv. *the form of legal acts is governed by the law of the place where it is held*. However, they may be subject to the forms prescribed in this code when the act is to take effect in the Republic or in the Distrito Federal or in the case of a federal matter; and
>
> v. except as provided in the previous sections, the legal effects of acts and contracts are governed by the law of the place where they are to be executed, *unless the parties have validly designated the applicability of another law.*[93] (Emphasis added).

Furthermore, three possible connecting factors can be identified in the case of the recognition of foreign maritime liens. Article 13 (i) states that in order to recognize any right, it must be validly conferred under the foreign law. It follows, then, that it is necessary to look at the rules on conflict of laws in order to determine which statute confers the disputed right.

First, Article 13 (iii) states that in case of movable assets, the connecting factor is the *lex rei sitae* or the place where the asset is located. Therefore, two assumptions may be inferred.

The fact that the vessel is arrested within Mexican jurisdiction fixes the law of the forum as the applicable law. Interestingly, the *lex rei sitae as a* connecting factor has been used as a device to use the *lex fori* approach in other jurisdictions.[94]

Conversely, it can be argued that the connecting factor could be the domicile of the owner.[95] However, a more suitable factor to this specific case could be the nationality of the vessel or the law of the ship´s flag. But this approach can cause some problems. First, as acknowledged by Professor William Tetley, nowadays "there is no value to the law of the flag in a world of flags of convenience."[96] Furthermore, by taking this approach, the vessel would be subjected only to its own law, rendering injustice to the claimant, such as in the case of, a US tanker supplier trying to enforce his lien without knowing that the nationality of the vessel is Nigerian and that Nigerian law does not provide for a maritime lien on supplies.

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[93] *Id.,* Article 13.

[94] Ruíz Abou-Nigm *supra* note 34 at 130.

[95] Leonel Pereznieto Castro, Derecho Internacional Privado parte general 348 (Oxford University Press 2015).

[96] Tetley *supra* 37 at 582.

Second, article 13 (iv) states that the connecting factor would be the *locus regis actum.* This approach seems the most suitable as it would require an analysis of the underlying claim in order to determine the place where it was held. For instance, first, the court would characterize the matter, for example as a tortuous matter, and then the court would determine the place where the tort was committed. Additionally, when the place of performance of the obligation is Mexico, Mexican law would be the applicable law.

Third, article 13 (v) works as a residual category as it states that without prejudice to the other subsections of this article, the legal effects of the acts and contracts will be governed by the law of the place of execution.[97] Moreover, this article identifies in some way the principle of freedom of contract by giving recognition to a valid governing law clause, clauses that are very common in the maritime business.

Consequently, the "applicable law" issue does not have a clear-cut answer as the Mexican courts can take either a very protective approach or, to be fairer to the parties, a more complicated one.

Furthermore, Mexican jurisprudence provides another approach for a Mexican judge to characterize[98] this kind of situation. Characterization under Mexican law would help the judge to find the applicable law and guide him in its application.[99] This characterization would occur because of the need to define the assumptions of the case and to find the previously mentioned connecting factors.[100]

The importance and use of this characterization is explained by Maria Soledad Hernandez Ruiz de Mosqueda in the following excerpt:

> […] In its legal sense it (the characterization) is used to determine the legal nature of a relationship in order to classify it in a category regulated by law; or, the reasoning by which it is decided that a number of facts are referred to a certain rule of law. […] *the study of characterization is particularly relevant in private international law* because this area of the law is of particular relevance: *when several legal systems, which provide different characteristics and definitions relate to a certain matter, it is necessary to know which of these systems should prevail,* for instance, which of them will determine the characterization. *This choice will determine the applicable law to*

[97] Abraham A. Servín, Should Mexico Adopt the 1952 International Convention for the Unification of Certain Rules in Relation to the Arrest of Sea-Going Ships or The 1999 International Convention on Arrest of Ships? (Sep, 09, 2015) (unpublished LL.M. dissertation, University of Southampton).

[98] This characterization process usually happens after the Mexican judge looks at his conflict of laws rules.

[99] Quinto Tribunal Colegiado en materia civil del primer circuito. Amparo directo 740/2010. I.5o.C.28 C (10a.). (María Soledad Hernandez Ruiz de Mosqueda).

[100] *Id.*

> *this conflict of laws, because this choice implies the conflict of laws rules that will regulate this matter* […].[101] (Emphasis added).

There are three ways to effect this characterization under Mexican law: the *lex fori* method, the *lege causae* method, and the comparative method.[102] It, however, limits itself to describing the three methods and does not detail the complications that can arise by the use of any of these options, thereby leaving the final choice up to the presiding judge.

> [...] 1. Qualification by the lex fori. This method involves the application of the domestic legal system categories by the judge to determine the characterization, and is based on several arguments: *a) The rules of private international law are part of a legal system that, in order to maintain consistency, also has a number of concepts and definitions that the legislator uses in order to create its rules. If the problem of characterization refers to the interpretation of the law (referring to the established legal categories) it is indisputable that it must correspond to its own system.*
>
> *b) The characterization has a previous character in the conflict of laws. Its function is to put into operation a conflictual norm to help to determine the law that is* applicable to the substance of the matter. The only rules that the judge may consider are the ones of his own system. The judge cannot use a foreign system when he does not know whether this law is applicable. Such an assumption would lead to a vicious circle.
>
> *c) The judge, as the authority on his own system, is required to use the concepts of this system that are the result of a particular legislative policy and respond to sociological, political and international factors that the legislators have taken into account and processed in a particular way.*[103] (Emphasis added).

As mentioned before, using this approach could be considered to be excessively protective. This approach uses the law of the state in a conflict in which a foreign element is clearly the issue, and if the nature and concept of the local law is different, as in the case of maritime liens in Mexican and US laws, then a judge using the domestic definition may interpret the norm in a restrictive way, and this may be dangerous to the right to justice that a plaintiff has.

> [...] 2. Characterization lege causae. Consists in the definition of legal concepts in compliance with the foreign law that may be applicable to the matter. It is based on the argument that foreign law is a unit that cannot be arbitrarily broken, if its application is subject to foreign standards. If it is based on categories that are not their own, the unit breaks down and the result will be the implementation of a reformed law. *This method reveals the complexity of the charac-*

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101 *Id.*

102 *Id.*

103 *Id.*

> *terization, emphasizing the real presence of foreign law in the relationship and pointing to the dangers of absolute application of the lex fori.*[104]

The absolute application of this approach may, as inferred by Lord Diplock in the *Halcyon Isle*,[105] extend and reform the nature of features that also may exist in the judge's legal system. In other words, a judge using this approach may end up recognizing the foreign law in its full extent, but at the same time he will be modifying and affecting the established institutions of his own legal system.

> […] 3. Comparative Method. This comes from the need to create truly appropriate conflict of laws rules to deal with international problems, whose concepts give answer to the possibility of applying different rules to the ones provided in the judge's system without changing the nature of that rule, *respecting the unknown institutions* […].[106]
>
> This appears to agree with the principle that the characterization shall be done independently of the problems that may arise from the application of the judge's legal system. In other words through a comparative study of the institution, this approach provides solutions of and amendments to how to characterize the matter. However, it seems that the application of this method requires the judge to research the matter thoroughly or possess expert level knowledge of it.

After identifying the applicable law, it is then necessary to assess the issue of the application of that foreign law. These rules are set out in Article 14:

> In the application of foreign law, the following shall be followed:
>
> i. It will be applied as the corresponding foreign judge would have *applied it, for which the judge may gather the necessary information about the text, validity and scope of that law;*
>
> ii. *Foreign substantive law shall apply*, except when due to the special circumstances of the case, it is necessary, in an exceptional case, to look at their conflict of laws rules that make a substantive right, either from Mexican law or from the law of a third State, applicable;
>
> iii. *It will not be an impediment to the application of foreign law that Mexican law does not provide institutions or procedures essential to the applicable foreign institution, if there are institutions or similar procedures;*
>
> iv. Previous, preliminary or incidental issues that may arise during the trial of the main issue, should not necessarily be resolved in accordance with the law governing the latter; and

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[104] *Id.*

[105] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325.

[106] Quinto Tribunal Colegiado en materia civil del primer circuito. Amparo directo 740/2010. I.5o.C.28 C (10a.). (María Soledad Hernandez Ruiz de Mosqueda).

> v. When different aspects of the same legal relationship are governed by various laws, they will be applied harmoniously in order to attain the purposes pursued by each of such rights. The difficulties caused by the simultaneous application of such rights shall be resolved taking into account the requirements of equity in the case. The provisions of this Article shall be observed when the right of another entity of the federation becomes applicable.[107] (Emphasis added).

Article 14 provides us with a bit of a conundrum. On the one hand the first part of subsection ii declares that the local courts must apply the foreign law in cases of substantive rights, which shows that the characterization of a maritime lien will be the main issue for their recognition as discussed before. However, it appears that the international maritime reality is that the majority of the most important maritime nations that have dealt with this problem recognize a maritime lien as a substantive right. Furthermore, a Mexican maritime lien seems to share most of the features of a maritime lien that arises under other jurisdictions.

On the other hand, the second part of subsection (ii) allows for the possibility of applying a *renvoi* if this points toward Mexican substantive law or another law that may be determinative, whenever the extraordinary features of the case require it. Moreover, there is no guidance on what the words "*special circumstances*" *or "exceptional"* could possibly mean. From this perspective, it seems that this second part is an escape clause to use substantive Mexican law or avoid a complicated *renvoi.*

Article 14 (i) says the Mexican judge has a right to gather the necessary information about the foreign law in order to apply that foreign law as the judge of that jurisdiction would have done it. Therefore, it is convincing to say that the judge may accomplish this by his own means or by asking the parties, such as experts, to provide evidence of this law.[108] Moreover, the jurisprudence makes it clear that there is a burden of proof on the claimant on the existence, text and scope of the foreign law.[109] This may be explained by the fact that the judges are masters of the law of their own legal system, and even though they have the obligation to gather information, the pace, and volume of work of the Mexican courts make this task very difficult.[110]

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[107] Código Civil Federal [C.C.F.] [Navigation and Maritime Trade Law] as amended, Article 14 Diario Oficial de la Federación [D.O.], 1o. de junio de 2006 (Mex).

[108] Loenel Pereznieto Castro, Derecho Internacional Privado parte general 351 (Oxford University Press 2015).

[109] Tercer Tribunal Colegiado en materia civil del primer circuito. Amparo directo 10623/2001. I.3o.C.302 C. (Armando Cortez Galvan).

Quinto Tribunal Colegiado en materia civil del primer circuito. Amparo directo 740/2010. 1.5o.C.33 C (10a.).(María Soledad Hernández Ruiz de Mosqueda).

[110] It would be valid to say that this burden of proof and obligation to gather information

Before this analysis of the Mexican legislation on recognition of foreign law, we examined the nature, the definition and the differences between maritime liens in English law, American law and Mexican law and between civil law and common law in general. If the *lex fori* is used to characterize the situation it is highly probable that only the maritime liens provided for by Mexican legislation will be recognized.

Article 14 (iii) does not see it as an impediment to the application of foreign law if Mexican law does not cater precisely for those procedures set out in the foreign law, if there are Mexican institutions and procedures with similar proceedings. The question arises, therefore, to what extent will Mexican courts recognize a foreign maritime lien? Is the Mexican judge to recognize the foreign maritime lien simply as a privilege or are they going to accept the right to proceed in rem and therefore the right to prosecute the vessel regardless of ownership?

If the first assumption is right, what is the value of the recognition of the foreign maritime lien? If it may be held that the applicable procedures or institutions are the Mexican ones, then it may be held that the ranking is up to the *lex fori.*[111] Conversely, if the second assumption is right, is the Mexican judge to grant the right to proceed as a real right in order to satisfy the Mexican institutions of arrest of ships and maritime liens?

Finally, Article 15 provides an exception to the application of foreign law.

> I. When principles of Mexican law have fraudulently been evaded, the judge must determine the fraudulent intention of such evasion
>
> II. Where the provisions of foreign law or the outcome of its application are contrary to fundamental principles or institutions of Mexican public order.[112]

It is left up to the judge to determine what constitutes "fraudulent intention", "fraud to the law" and "public order".

IV. Conclusions

Despite there being no uniformity in the laws of maritime liens, it is a common feature in many legal systems that a maritime lien creates an interest in the vessel, one that shall be enforced through the arrest of the res. The

exist in the very early stages of the claim, for example, in order to characterize the lien according to the applicable law.

[111] There is no other indicator of the nature of the ranking. Abraham A. Servín, Should Mexico Adopt The 1952 International Convention For The Unification Of Certain Rules In Relation To The Arrest Of Sea-Going Ships or The 1999 International Convention On Arrest Of Ships? (Sep, 09, 2015) (unpublished LLM dissertation, University of Southampton).

[112] Código Civil Federal [C.C.F.] [Navigation and Maritime Trade Law] as amended, Article 15 Diario Oficial de la Federación [D.O.], 1 de junio de 2006 (Mex).

dynamism and complexity of the maritime business pushes all the involved parties to seek advantages. The availability of this feature plays a very important role in current maritime business. Consequently, this situation creates forum shopping. On the one hand, companies that provide supplies to vessels look for the protection of a more favorable jurisdiction, as in the example of the "*Sam Hawk*", which, though Reiter Petroleum had little or no connection at all to the United States, they established in a contract that the creation of maritime liens should be governed by US law. On the other hand, the nature of maritime business makes it necessary for its workforce to seek out jurisdictions that recognizes the right to arrest a ship by reason of maritime liens.

Interestingly, the position in Mexican law is unclear. Despite the fact that the list of maritime liens under Mexican law is fairly extensive, national legislation leaves many obscure areas. The domestic law provides both tools to recognize such an important maritime feature to its full extent, and the means to adopt a more territorial approach and not treat the feature to its full extent. If a Mexican court were to face this situation, the commercial and maritime experience of the presiding judge would play an important role in the decision, as this topic requires a deep knowledge of maritime law, contract law, insurance law etc.; a good understanding of foreign law and; an awareness of all new developments in international litigation. Moreover, as stated by Lord Salmon,[113] the judge must take into account "the balance of authorities, the comity of nations, private international law and natural justice."[114]

There is an intrinsic relationship between maritime liens and the arrest of ships. Hence, there is a need for the Mexican legislator to re-analyze the nature of these two institutions. In this regard, the law of the arrest of ships has been recently added to our legal system, when in other maritime nations this has been a pivotal part of the discussion about the nature of maritime liens. The legislator should analyze the positions of other jurisdictions upon the nature of these two maritime features and the problems that may arise in their treatment in order to harmonize our legislation with the international reality and bring justice to a plaintiff seeking to enforce his right to a maritime lien that was conferred elsewhere.

The legislator and the academics should pay special attention to the true nature of maritime liens in the sense that a clear position must be established on the issue of whether maritime liens should be treated as a "derecho real" by itself or as a "derecho real de garantía", and what the scope and implications are of treating this juridical feature as either. If it is to be treated as a "derecho real," the legislator and the academics should define the spectrum of such a feature.[115] If it is to be treated as a "derecho

[113] Who represents the minority on The Halcyon Isle.

[114] *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)*[1980] 2 Lloyd's Rep. 325 at 337.

[115] Because as a matter of history it is understood that a maritime lien includes the right to

real de garantía" a study on the handling of maritime liens around the world should be done, paying special attention to the right of prosecution regardless of possession, as in theory a "*derecho real de garantía*" may include this right[116] To be studied as well is whether a maritime lien is to be treated as a matter of substance or a matter of procedure.

Mexican jurisprudence and law are wide open to the interpretation and criteria of the judge regarding situations in which the judge is asked to recognize and apply foreign law. Mexican conflict of laws rules have a mixed approach: they provide for both a territorial and a more international approach, and the law offers the same options without setting out comprehensively when to apply either approach. There is a powerful need for comprehensive conflict of laws rules and other legal guidelines on how and when to apply foreign law in situations such as those examined in this paper.

In other words, lawmakers need to understand that the developments of the trade and the swift pace of international transactions require forums in which those who interpret the law are capable of applying an international feature such as a maritime lien and of enforcing it through the arrest of the ship.

be a preferential creditor, this debate should involve the law on real rights and the implications of defining a maritime lien as such.

[116] As mentioned before it seems that in most of the cases in Latin America a "derecho real de garantía" is treated as a mere cause of preference.

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THE REJECTION OF EXECUTORY CONTRACTS: A COMPARATIVE ECONOMIC ANALYSIS

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ABSTRACT: *This article describes three models used around the world for the treatment of executory contracts in bankruptcy. An economic analysis is made of the ex post incentives of the bankruptcy trustee to reject the contract under each model, based on Jesse Fried's article* Executory Contracts and Performance Decisions. *This article states that the approach used by Spain is likely to create the most efficient ex post incentives. The contribution of this article is to further the discussion on the treatment of executory contracts in bankruptcy, as it continues to be one of the main day-to-day issues at bankruptcy courts.*

KEY WORDS: *Insolvency proceedings, bankruptcy, liquidation, conciliation, insolvency, bilateral contracts, executory contracts, efficiency, economic analysis, United States, Germany, Spain.*

RESUMEN: *Este artículo propone tres modelos de tratamiento de los contratos bilaterales pendientes de cumplimiento en el procedimiento de insolvencia*[1] *de diferentes sistemas jurídicos, con la finalidad de realizar un análisis de los incentivos que crean las reglas de rescisión o continuación para el síndico en cada uno de los modelos propuestos. El análisis costo-beneficio de los modelos tiene como base el texto de Jesse Fried, titulado* Executory Contracts and Performance Decisions. *El artículo concluye que el modelo de España es el más eficiente. El objetivo de este texto es continuar con el debate sobre el tratamiento de los contratos pendientes de ejecución en los procedimientos de*

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[1] Meaning "concurso mercantil."

insolvencia desde el punto de vista del análisis económico del Derecho, pues es un problema vigente.

Palabras clave: *Procedimiento de insolvencia, concurso mercantil, quiebra, liquidación, conciliación, insolvencia, contratos bilaterales, contratos pendientes de cumplimiento, eficacia, análisis económico, Estados Unidos, Alemania, España.*

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I. Introduction

Executory contracts in bankruptcy are an issue of concern among legal scholars due to their economic importance and the complexity of their treatment. For the purposes of this article, executory contracts, as defined by Jesse Fried, are those contracts in which performance other than payment is owed by at least one party at the time of the filing of the bankruptcy petition.[2] These contracts are particularly relevant in any bankruptcy proceeding because they are not entirely assets, nor exclusively liabilitie;[3] instead, they imply an interrelationship between the debtor and the non-debtor party in which each of them enjoys some benefits and bears some costs. However, depending on the value of the contract, it can indeed represent an asset or a liability to the bankruptcy estate.

Because one of the main goals of bankruptcy worldwide is the maximization of the bankruptcy estate value, it is thought that bankruptcy law should ease the powers of the bankruptcy trustee to dispose of executory contracts.

[2] Jesse M. Fried, *Executory Contracts and Performance Decisions* 46 in Duke L. J. 517 (1996).

[3] An alternative way to state it is that executory contracts "are nothing more tan mixed assets and liabilities arising out of the same transaction." *See* Thomas Jackson, *The Logic and Limits of Bankruptcy Law* 106 (1986).

The idea is to enable the bankruptcy trustee to seek performance of profitable contracts as well as to unburden the bankruptcy estate from unfavorable contracts. As a consequence, bankruptcy rules have usually been regarded as necessary to give the bankruptcy trustee broad discretion to assume and reject executory contracts, reducing the costs of rejection to the bankruptcy estate.

In 1996, Jesse Fried, in his seminal article "Executory Contracts and Performance Decisions", challenged these traditionally accepted rules for the treatment of executory contracts by analyzing the incentives that American bankruptcy creates to inefficiently reject executory contracts.[4] To be precise, the author shows that a regime that reduces the costs of rejection to the bankruptcy estate allows the externalization of costs to the non-debtor party which create inefficient incentives for the bankruptcy trustee to reject executory contracts that according to an efficiency perspective should be performed because performance would increase the total value to the bankruptcy estate as well as to the non-debtor party. Then, Jesse Fried proposes that, from an efficiency perspective, bankruptcy rules for rejection of executory contracts should be aligned with the social goal of maximization of total value.

[4] There are previous studies on executory contracts that focus on the unpredictable consequences for the bankruptcy trustee and the non-debtor party as a result of the lack of a definition of the executory contract under Section 365 of the American Bankruptcy Code. The prevailing definition in case law is the one proposed by Vern Countryman during the 1970's. According to this legal scholar, an executory contract is "a contract in which the obligation of both the bankruptcy and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *See* Vern Countryman, *Executory Contracts in Bankruptcy:* Part I 57 in Minn. L. Rev. 439, 460 (1973). But such definitions are so confusing that it is unpredictable whether a contract will be regarded as executory or not in bankruptcy. Thus, legal commentators have advocated for the inclusion of a clearer definition such as the one proposed by Michael T. Andrew or for the elimination of "executoriness" as proposed by Jay L. Westbrook. *See* Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 (U. Colo. L. Rev. 845) (1988); Jay L. Westbrook, *A Functional Analysis of Executory Contracts* 74 (Minn. L. Rev. 227) (1989). Some other studies have demonstrated that the current regime under the Bankruptcy Code is undesirable because it distorts the incentives for the debtor and the non-debtor party to make investment and performance decisions ex ante and ex post. *See* George Triantis, *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment* 43 (U. Toronto L.J. 679) (1993); Fried, *supra* note 2; Alon Chaver & Jesse M. Fried, *Managers Fiduciary Duty upon the Firm's Insolvency: Accounting for Performance Creditors* 55 (Vand. L. Rev. 1813) (2002). Peter Menell focused on the detrimental effects of rejection of intellectual property licenses in bankruptcy. See, Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis* 22 (Berkeley Tech. L.J. 733) (2007). For recent general studies about rejection of executory contracts in bankruptcy, *see* George G. Triantis, *Jumping Ship: Termination Rights in Bankruptcy: The Story of Stephen Perlman v. Catapult Entertainment, Inc.,* in *Bankruptcy Law Stories* 55, 68 (Robert K. Rasmussen ed. 2007). Carl N. Pickerill, *Executory Contracts Re-Revisited* 83 (Am. Bankr. L.J. 63) (2009).

The purpose of this article is to contribute to the study of the rules for the treatment of executory contracts in bankruptcy by proposing a classification of the main approaches around the world, namely the American model, the German model and the Spanish model, and analyzing the incentives that these regimes create for the bankruptcy trustee ex post based on Jesse Fried efficiency analysis of executory contracts treatment in bankruptcy.

Thus, this article concludes that the Spanish model is likely to create the most efficient incentives. Also it analyzes the possible objections to this model, namely that it is contrary to the principle of equal treatment among creditors and that it hampers the rehabilitation of the debtor. This article challenges these arguments; it finds that the argument of equal treatment is misplaced as bankruptcy law indeed allows for some exceptions to this principle on efficiency considerations for some other claimants. It also observes that this model does not hinder the rehabilitation of the debtor because despite enjoying administrative priority, the damage claims for rejection of executory contracts have to wait until the reorganization plan is confirmed to be satisfied. For all these reasons, this article advocates for consideration of the Spanish bankruptcy law by other bankruptcy systems as model to improve the treatment of executory contracts.

The study is organized as follows. Part II suggests a classification of the different approaches to the treatment of executory contracts in bankruptcy and describes the rules that characterize them. Part III examines the ability of the bankruptcy trustee to reject executory contracts under each of these approaches and the ex post incentives that it creates on the bankruptcy trustee. Based on such examination, this article argues that the Spanish model creates the most efficient incentives and, as a result, it is superior to the American and German models. Part IV analyzes the possible objections to the Spanish model. Part V draws a conclusion based on the results of this study.

II. Three Models

Even though most bankruptcy laws all over the world include some rules for the treatment of executory contracts, it was necessary to find the most paradigmatic models that could facilitate a systematized analysis of the different approaches to the treatment of executory contracts. As the treatment of executory contracts becomes relevant only when the firm is expected to survive (usually in liquidation, the business is closed and all contractual relationships are terminated), only those countries where formal reorganization is available as part of a bankruptcy procedure were considered for this analysis. It should be noted that the classification of bankruptcy system presented in this article is only an effort to systematize the study of the treatment of executory contracts across different bankruptcy systems; thus it should only be

considered as an effort to contribute to the discussion of bankruptcy rules in this area.

For the classification of bankruptcy systems that provide with reorganization rules in three models, two elements were taken into account: 1) Whether the bankruptcy trustee[5] has limited or unlimited powers to reject executory contracts, where limited powers mean that it is necessary for the bankruptcy trustee to submit the decision to reject an executory contract to the bankruptcy court, and whether the bankruptcy court is likely to approve the bankruptcy decisions or not; and 2) whether the creditor's damages claim for rejection of an executory contract is treated as an unsecured claim or as an administrative expense.

The American bankruptcy law grants the bankruptcy trustee the power to assume or reject executory contract and submit such a decision to the authorization of the bankruptcy court, which is likely to approve the bankruptcy trustee's decisions; the damages claim for rejection is treated as an unsecured claim. It should be noted that the American bankruptcy system has become the paradigm all over the world in recent years, [6] particularly due to the rules for the reorganization of the debtor. For this reason, the first model proposed in this article is the American model.

Under the German bankruptcy law, the bankruptcy trustee has powers to assume or reject executory contracts without any limit imposed by the bankruptcy court; the damages claim for rejection is treated as an unsecured claim. It should be clear that the German bankruptcy system has also influenced other countries in terms of procedural structure and functioning of bankruptcy laws. [7] For this reason, the second model is the German model.

Last, but nor least, under the Spanish bankruptcy law, the bankruptcy trustee has the power to assume or reject executory contracts but such decision has to be approved by the bankruptcy court; the damages claim for rejection is treated as an administrative expense. This is the only bankruptcy system that treats a damages claim for rejection as an administrative expense.[8] Therefore, Spanish bankruptcy law, at least in terms of executory contracts, is the most innovative one. For this reason, the third model is the Spanish model.

The following table summarizes with the elements that characterize each model in terms of executory contracts treatment in bankruptcy.

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[5] The term "bankruptcy trustee" applies to all the models proposed in this article and refers to the person in charge of administering the "bankruptcy estate."

[6] For example, Brazil, Canada, China, France, Germany, Japan, Korea, and Mexico, to name only a few.

[7] For example, Japan and Mexico.

[8] It should be noted that the Spanish bankruptcy system was modified last decade; it included an improved version of the US Chapter 11 reorganization based on the suggestions provided by American scholars on this topic.

TABLE 1.

			Models		
			American Model	*German Model*	*Spanish Model*
Characteristics	Debtor's ability to terminate	Who decides rejection?	Trustee with the approval of the court	Trustee	Trustee with the approval of the court
		Treatment of the damages claim for rejection	Unsecured claim	Unsecured claim	Administrative expenses

1. *The American Model*

In the United States, the bankruptcy system has been devised on the basis that the firm is more valuable as an ongoing concern tan sold in pieces;[9] as a result, the rules tend to favor the debtor over its creditors. The idea is that, for the maximization of the debtor's assets, it is crucial to protect the debtor from being dismantled by its creditors.[10]

The main source of bankruptcy law in the United States is the Bankruptcy Code;[11] section 365 of the code governs the treatment of executory

[9] Whether the going concern value of the firm is higher than the liquidation value depends on two factors: *a*) the assets in combination should be worth more than if sold in pieces, and *b*) when a prompt liquidation is no more beneficial for the group as a whole rather than a long proceeding in which some creditors will take advantage at the expense of the others. *See* Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy, An Essay on Bankruptcy Sharing and the Creditors' Bargain* 75 (Va. L. Rev. 155, 159) (1989).

[10] It should be noticed that although bankruptcy rules are devised to protect the debtor, the objective is to increase the value of the debtor's assets for the benefit of creditors. For an explanation of the role of bankruptcy law on the grounds of the creditor's collective action problem, *see* Jackson; *supra* note 3, at 7-19.

[11] The title 11 of the United States Code or "Bankruptcy Code" is not the only one statutory source of bankruptcy law such the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms issued by the Supreme Court, as well as provisions related to bankruptcy law found in other statutes such as in titles 28 and 18 of the United States Code.

contracts;[12] those aspects not covered by statutory law are governed by case law.[13]

Trustee's ability to dispose of executory contracts

Executory contracts do not become part of the bankruptcy estate automatically. Section 365 of the Bankruptcy Code expressly provides that the bankruptcy trustee, who administers the bankruptcy estate, [14] can assume or reject executory contracts with the authorization of the bankruptcy court.[15]

a. *Assumption*

In order to bind the bankruptcy estate to an executory contract it is necessary for the bankruptcy trustee to assume it. Assumption makes the contract compulsory in its original terms and in its entirety to both the bankruptcy estate and the non-debtor party.[16]

The main effects of assumption are that all the obligations arising from the contract are treated as administrative expenses (because the contract is bind-

[12] Liquidation is governed by Chapter 7 of the Bankruptcy Code; whereas reorganization is governed by Chapter 11 of the same code. It should be noticed that, under the American bankruptcy law, liquidation and reorganization are two separate proceedings, but section 365 covers the treatment of executory contracts regardless of the type of bankruptcy proceeding. For the purposes of this study, however, only reorganization cases are analyzed. The reason is that the disposition of executory contracts in liquidation cases is somewhat restrained. In Chapter 7 on liquidation proceedings, executory contracts are deemed to be automatically rejected unless the trustee requests the authorization of court to assume a contract within sixty days after the order for relief is issued. *See* 11 U.S.C §365(d)(1).

[13] Case law is an important source of law in the United States. Bankruptcy law is not an exception; indeed, section 105 of the Bankruptcy Code provides that bankruptcy courts "may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title." *Id.*, §105 (a).

[14] The bankruptcy trustee is the person in charge of administering the bankruptcy estate. *Id.*, §§1104 and 1302. Under the American bankruptcy law, the debtor´s managers may remain in the administration of the bankruptcy estate with the same powers of those of a trustee, which is known as the debtor-in-possession (DIP). *Id.*, §1107.

[15] Section 365 states that the trustee may assume or reject executory contracts or unexpired leases. *See* 11 U.S.C §365 (a). Although this study focuses exclusively on assumption and rejection, the bankruptcy trustee can assign an executory contract to a third party once it has been assumed. *Id.*, §365(f)(1).

[16] In this sense, if there has been a prepetition default of the debtor, an executory contract cannot be assumed unless the bankruptcy trustee cures such default, compensates the non-debtor party for any actual pecuniary loss suffered and provides adequate assurance of future performance. *Id.*, §365 (b)(1). For the purposes of this study, it is assumed that there is no prepetition default of the debtor.

ing to the bankruptcy estate).[17] If the bankruptcy estate breaches the contract's post-assumption, the non-debtor party is entitled to sue the bankruptcy estate for the loss suffered; the resulting damages claim for rejection is treated as administrative expenses.[18] Because administrative expenses have a priority position over all other unsecured claims (administrative expenses have to be paid before any other unsecured claim), these claims are usually paid in full.[19]

b. *Rejection*

Alternatively, the bankruptcy trustee can choose to reject an executory contract; rejection is considered to be a prepetition breach by the debtor;[20] thus, the non-debtor party is left with an unsecured damages claim.[21] The main effect is that the damages claim for rejection has to share pro rata in the distribution of the debtor's assets with all other general unsecured creditors (unless the non-debtor party has a security interest in the debtor's assets);[22] given that general unsecured claims are at the bottom of the priority ranking,[23] the payout rate for these claims is frequently a small fraction of the total amount of the claim.[24]

The rationale for treating the damages claim for rejection as an unsecured claim under the American bankruptcy law is based on the bankruptcy policy of equal treatment and the maximization of the bankruptcy estate value.

Equal treatment and the maximization of the bankruptcy estate are explained as the solution to the creditor's collective action problem. To be precise, when the debtor is insolvent, there are not enough assets to pay its creditors in full; then, every creditor has incentives to dismantle the debtor in order to get full payment of the claim before the rest of the creditors (first come, first served rule).[25] The consequence is that only a few creditors are paid in full while the rest of the creditors are paid zero; moreover, dismantling the assets of the debtor, reduces their value. Thus, bankruptcy law works as an implicit agreement, whereby, except for secured creditors, all creditors share

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[17] This includes the payments made to cure and compensate for prepetition default.

[18] *Id*., §365(g)(2).

[19] *Id*., §§507(a)(1), 503(b); Fried, *supra* note 2, at 525.

[20] *See* 11 U.S.C. §365(g)(1). It has to be mentioned that there is a serious controversy about the meaning and effects of rejection. *See* Michael T. Andrew, *supra* note 4; Jay L. Westbrook, *supra* note 4.

[21] *See* 11 U.S.C §502(g).

[22] *See* Fried, *supra* note 2, at 519.

[23] *See* 11 U.S.C §507(a).

[24] *See* Fried, *supra* note 2, at 525.

[25] *See* Jackson; *supra* note 3, at 7-19.

equally in the distribution of the debtor's assets, and are paid a quantity proportionate to the actual amount of their claims.[26]

In this sense, treating damages claim for rejection as an unsecured claim furthers equal treatment among creditors and, in turn, the maximization of the bankruptcy estate value, as it makes it possible for the bankruptcy estate to unburden itself from unfavorable contracts.[27]

c. *Time limit*

Executory contracts can be available for the bankruptcy trustee at any time before the confirmation of the reorganization plan.[28]

The bankruptcy trustee needs time to determine whether an executory contract is valuable or wasteful for the bankruptcy estate. Hence, the bankruptcy trustee usually delays assumption. For the non-debtor party, nonetheless, such delay may have undesirable effects because it prevents the non-debtor party from making future business decisions (it creates uncertainty).

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[26] *Id.*

[27] To illustrate this statement, suppose that Firm and Ad Agency have entered into an advertising agency contract in which Firm has agreed to pay $100 to ad Agency to launch an advertising campaign for a Firm's new product. Suppose further that Firm files for bankruptcy. At the time the bankruptcy petition is filed, Firm has not paid $100, and Ad Agency has not incurred any expenses in producing the advertising campaign for the Firm's new product. Suppose that the contract represents $80 of value to the bankruptcy estate. The bankruptcy trustee is considering whether to assume or reject the contract. Assume that the expected payout rate for unsecured claims is of 30%. If the bankruptcy trustee rejects the contract, the bankruptcy estate has to pay $9 for damages to Ad Agency because the bankruptcy estate only has to pay 30% of $30 (which is the expected gain from performance to Ad Agency, $100 that would be paid in Exchange of the advertising campaign, less $70 that it would cost to Ad Agency to produce it); whereas if the bankruptcy trustee assumes the contract, it will cost $20 to the bankruptcy estate to perform ($100 that has to pay Ad Agency, less $80 of value that the contract creates for the benefit of the bankruptcy estate). The contract represents a burden to the bankruptcy estate because performance of the contract imposes a loss of $20 to the bankruptcy estate; thus, the bankruptcy trustee is likely to reject the contract because the cost of performance is greater tan the cost of rejection. As it can be observed, treating the damages claim for rejection as an unsecured claim reduces the costs of rejection because the bankruptcy estate only has to pay 30% of the loss that Ad Agency suffers from rejection of the contract. Because the damages claim is never paid in full under this rule, rejection is always less costly tan performance of the contract. In this case, the $9 fee for damage compensation that the bankruptcy estate has to pay to Ad Agency, if the contract is rejected, should be compared to the $20 loss imposed on the bankruptcy estate, if the contract is performed. Thus, this rule makes it easy for the bankruptcy estate to unburden itself from unfavorable contracts. This numerical example is based on those used by Jesse Fried. *See* Fried, *supra* note 2.

[28] *See* 11 U.S.C. 365(d)(2).

Recognizing the detrimental effects that such delay may have on the non-debtor, the Bankruptcy Code provides that the non-debtor party is entitled to ask the bankruptcy court to require the bankruptcy trustee to decide assumption or rejection before the confirmation of the reorganization plan.

Despite this provision, bankruptcy courts are reluctant to force the bankruptcy trustee to make a decision due to the effects that assumption or rejection of an executory contract can have on all the debtor's creditors (as it may reduce or maximize the bankruptcy estate value).[29]

d. *Court Approval*

According to the Bankruptcy Code, the bankruptcy trustee's decision to assume or reject a contract is submitted to the bankruptcy court for its approval.[30] It should be noted that bankruptcy courts frequently grant a great deference to the bankruptcy trustee's business judgment.

Under the American bankruptcy system, the bankruptcy trustee is considered to know better how to administer the bankruptcy estate and how to maximize its value for the benefit of the debtor's creditors; for this reason, bankruptcy courts usually do not interfere with the trustee's activities and decisions.[31] Moreover, bankruptcy courts' role in authorizing or prohibiting assumption or rejection of an executory contract is limited because it is considered that, for the maximization of the bankruptcy estate value and rehabilitation of the debtor, it is necessary that the bankruptcy trustee enjoys some flexibility to make decisions, that is to say, this is a pro debtor bankruptcy system.

In the exercise of its discretion to administer the bankruptcy estate, the bankruptcy trustee owes a duty to maximize the value of the bankruptcy

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[29] *Id*. It should be mentioned that there are cases in which the bankruptcy trustee does not make a formal decision about assumption or rejection of an executory contract; however, the Bankruptcy Code is silent about this issue. Bankruptcy courts have generally considered that, if the bankruptcy trustee fails to take formal action on assumption or rejection of an executory contract, the contract "rides through" reorganization and the contract continues to be binding to the debtor. See Charles Jordan Tabb, THE LAW OF BANKRUPTCY §8.3 (1997). Because formal decision to assume or reject an executory contract is necessary under the American bankruptcy law, the condition of an executory contract and its actual assumption or rejection are also uncertain after the bankruptcy petition has been filed. For a discussion on executory contracts in the "gap period", *see* Douglas W. Bordeweick, *The Postpetition, Pre-Rejection, Pre-Assumption Status of an Executory Contract* 59 (Am. Bankr. Dev. J. 421) (1982). *See* Continental Country Club, Inc. v Burr (In re Continental Country Club, Inc.) 114 (B.R. 763) (Bankr. M.D. Fla. 1990); Central Control Alarm Corp. v Black (In re Central Watch, Inc.) 22 (B.R. 561) (Bankr. E.D. Wis. 1982); International Union of United Auto., Aerospace & Agric. Implement Workers v. Miles Mach Co. 34 (B.R. 683) (Bankr. E.D. Mich. 1982).

[30] *See* 11 U.S.C. 365 (a).

[31] *See* Fried, *supra* note 2, at 540.

estate for the benefit of creditors;[32] thus, when the bankruptcy trustee decides on assumption or rejection of an executory contract, indeed, it seeks the maximization of the bankruptcy estate value. In this sense, whether an executory contract is assumed or rejected is determined by whether the trustee sees the contract as beneficial or burdensome to the bankruptcy estate. If performance of a contract maximizes the value of the bankruptcy estate and facilitates the rehabilitation of the bankrupt company, the contract is likely to be assumed; conversely, if performance of a contract is burdensome to the bankruptcy estate or the value of the bankruptcy estate can be maximized by entering into a more favorable contract with a third party, the contract is likely to be rejected.[33]

Despite the great deference that bankruptcy courts usually grant to the bankruptcy trustee's decisions, it has been recognized that the bankruptcy trustee has incentives to reject contracts when rejection is harmful to the non-debtor party; for this reason there have been developed other judicial standards to authorize or deny rejection of an executory contract that are different from the "business judgment test".[34] Still due to the prevailing deference that bankruptcy courts grant to the bankruptcy trustee's business judgment, these standards are rarely used.

2. *The German Model*

The German bankruptcy law grants the bankruptcy trustee total authority to assume and reject executor contracts as the authorization of the bankruptcy court is not required; notwithstanding, the bankruptcy trustee's power to assume or reject executory contracts faces a particular limit: the non-debtor party is allowed to terminate some executory contracts. The effect of this rule has no impact on rejection but on assumption; this rule limits the bankruptcy trustee's power to assume contracts that are favorable to the bankruptcy estate but unfavorable to the non-debtor party.[35]

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[32] *Id.*, at 518

[33] *See* Steven J. Wadyka Jr., *Executory Contracts And Unexpired Leases: Section 365*, 3 (Bank. Dev. J. 217, 217) (1986).

[34] These tests have been labeled by Jesse Fried as "the burdensome test" and "the balancing test." Under this standard, the bankruptcy court prevents the bankruptcy trustee from rejecting an executory contract, only if rejection causes "an absolute reduction in the value of the estate." Thus, the bankruptcy trustee can only reject a contract if the contract imposes a loss on the bankruptcy estate. Under this standard, the bankruptcy court prevents the bankruptcy trustee from rejecting an executory contract only if the loss from rejection to the counterparty is not disproportionately greater than the benefit obtained by the bankruptcy the bankruptcy estate. Thus, the bankruptcy court cannot prevent rejection from imposing minimal losses on the non-debtor party, even though rejection in such a case is equally wasteful. *See* Fried, *supra* note 2, at 540-542.

[35] The analysis of postpetition termination by the debtor's creditors is beyond this article.

The rules for the treatment of executory contracts under the German bankruptcy law are based on the idea that the reorganization of a viable debtor is desirable and that reorganization requires the maximization of the value of the debtor's assets for the benefit of its creditors. However, the bankruptcy trustee's power to have executory contracts available is limited because bankruptcy is regarded under the German bankruptcy law as a procedure that facilitates the enforcement of creditor's rights against the insolvent debtor, that is to say, it is a pro creditor bankruptcy system.[36]

The main source of bankruptcy law in Germany is the Insolvency Code (Insolvenzordnung);[37] Chapter II of Part III of this code governs the treatment of executory contracts.[38]

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[36] The rationale is that there is still a stigma attached to insolvency. This stigma of insolvency is ancient and can be traced back to the Roman law. In Rome, insolvency was severely punished, even with incarceration. *See* Eckart Ehlers, Germany Statutory Corporate Rescue, at CORPORATE RESCUE, 80-81 (Katarzyna Gromeck Broc & Rebecca Parry eds., Kluwer Law International, 2004). Even though this conception of insolvency is changing, the stigma is still alive (for example, section 1 of the German Insolvency Code which states that "honest debtors shall be given the opportunity to achieve discharge of residual debt." InsO §1). *See* Christoph G. Paulus, *The World Bank Principles in Comparison with the New German Insolvency Statute,* 2. Section 1 of the German Insolvency Code provides that: "The insolvency proceedings shall serve the purpose of collective satisfaction of a debtor's creditors by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan, particularly, in order to maintain the enterprise." Insolvenzordnung (InsO) 5.8.1994 (BGB1. I S.2866) [hereinafter InsO] (1999) (Gr.) Whether a firm should be liquidated or reorganized is determined by creditors and depends on how to best maximize creditors' claim value, rather than whether a firm is viable or unviable; this conception is usually called "Creditor control" (*Gläubigerherrschaft*). *See* InsO §157; Lies, Gerald I., *Sale of a Business in Cross-Border Insolvency: The United States and Germany* 10 (Am. Bankr. Inst L. Rev. 363, 377) (2002); Kamlah, Klaus, *The New German Insolvency Act: Inzolvenzordnung,* 70 Am. Bankr. L.J. 417, 422 (1996).

[37] The German Insolvency Code was passed in 1994 but that came into effect in its entirety until 1999. *See* Axel Fressner, *National Report for Germany,* 4 PRINCIPLES OF EUROPEAN INSOLVENCY LAW, 314 (Mc Bryde, W. W. et al, ed., Kluwer Legal Publishers, 2003). It should be mentioned that in Germany there are other statutes that are relevant for bankruptcy cases, namely, the Civil Code (Bürgerliches Gesetzbuch or "BGB"), the Code of Civil Procedure (Zivilprozessordnuung or "ZPO"), The Commercial Code (Handelsgesetzbuch or "HGB"), the Stock Corporation Act (Aktiengesetz or "AKtG"), AND THE Limited Liability Company Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung or "GMbHG"). See Braun, Ebrhard & Tashiro, Annerose, Germany, THE LAW OF INTERNATIONAL INSOLVENCIES AND DEBT RESTRUCTURINGS, 162 (Silkenat, James R. & Schmerler, Charles D., ed., Oxford University Press, 2006).

[38] It should be noticed that, under the German bankruptcy law, liquidation and reorganization are two alternatives of a single bankruptcy procedure, but the rules on the treatment of executory contracts are applicable to both liquidation and reorganization cases.

Trustee's ability to dispose of executory contracts

Under the German bankruptcy law, a bankruptcy case[39] commences when the bankruptcy court[40] orders bankruptcy relief rather than at the moment at which the bankruptcy petition is filed by the debtor or its creditors.[41]

From the moment of the bankruptcy filing to the time when bankruptcy relief is ordered, known as the "opening procedure", an investigation is conducted by the bankruptcy court in order to determine the debtor's financial condition. The bankruptcy court employs experts to prepare a report about the financial condition of the debtor.[42] Based on that report, if the bankruptcy court finds that the debtor is insolvent, it orders the commencement of the bankruptcy case.[43]

During this period, the debtor continues in operation but with several limitations to dispose of its assets, and no automatic stay is imposed on creditors to collect from the debtor.[44] Likewise, contracts continue to be binding to the debtor and the non-debtor party; thus, both of them are obliged to continue performing their obligations under the contract.[45] Because the effects of the bankruptcy procedure are triggered until relief is ordered, it is at this moment rather tan at the time of the bankruptcy filing that "executory contracts" [46] come into existence. According to the Insolvency Code, the bank-

[39] The German Insolvency Code refers to "bankruptcy " as "insolvency procedure" (*Insolvenzverfahren)*.

[40] *Id.*

[41] *See* InsO §27; Klaus Kamlah, The New German Insolvency Act: Insolverzordnung, 70 Am. Bankr. L. J. 417, 426 (1996).

[42] *See* InsO §§5, 10 and 20; Axel Flessner, *supra* note 37, at 322. A receiver (*vorläufiger Insolvenzverwalter*) may be appointed by the bankruptcy court with the purpose of supervising the debtor's operation; in some cases, the receiver replaces the debtor in the administration of the firm. *See* InsO §21. If the receiver is appointed by the bankruptcy court, the receiver has to prepare the report for the bankruptcy court on the financial condition of the debtor. *See* InsO §22.

[43] Under the German bankruptcy law, the grounds for the commencement of a bankruptcy case is the debtor's insolvency as defined by sections 17, 18 and 19 of the German Insolvency Code. *See* 2-23 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE [hereinafter Collier Int'l. Bus. Insol. Guide] ¶23.04[4] (2004).

[44] A stay may be imposed by the bankruptcy court as a prejudgment measure; thus, unlike the American model, the stay is not triggered at the time when the bankruptcy petition is filed but until the bankruptcy relief is ordered. *See* InsO §§21-25, 88, 89; Axel Flessner, *supra* note 37, at 315.

[45] *See* Eberhard Braun, Insolvenzordnung (INSO) Kommentar, 535 (Munchen, 2002).

[46] Section 103 of the German Insolvency Code defines "executory contracts" as those bilateral contracts that are unperformed (completely or partially) by both the debtor and the non-debtor party at the time of the commencement of the bankruptcy case. *See* InsO §89.

ruptcy trustee,[47] who administers the bankruptcy estate, can reject executory contracts.[48]

a. *"Assumption"*

Under the German bankruptcy law, the bankruptcy estate is merely the result of the commencement of the bankruptcy case. The bankruptcy estate is not an entity different from the debtor.[49] The debtor's property is levied for the benefit of all its creditors, but there is not a transfer of property because the debtor does not lose the title of property on its assets but the right to administer them and keep them at his disposal.

The bankruptcy estate encompasses all of the debtor's property (both at the time of the commencement of the bankruptcy case and acquired by the debtor during the procedure).[50] Because the bankruptcy estate is not an entity completely different from the debtor, executory contracts become part of the bankruptcy estate automatically; in other words, executory contracts are valid and binding to the bankruptcy estate once the bankruptcy case commences but its effects are "suspended" until the bankruptcy trustee disposes of them.[51]

Even though all executory contracts are valid and binding to the bankruptcy estate,[52] the German Insolvency Code requires that the bankruptcy trust-

[47] Under the German Insolvency Code, the "bankruptcy trustee" is called "insolvency administrator" (*Insolvenzverwalter),* who is the individual that administers the bankruptcy estate. *Id.,* §56. The court may allow the debtor to manage the bankruptcy estate with similar powers of those of the insolvency administrator under the supervision of a custodian (*Sachwalter)* on the request of the debtor at the time of the opening of the procedure. The court determines whether a trustee should be appointed or whether "self-administration" (*Eigenverwaltung)* should be allowed, but the creditor's assembly has the right to require the court to allow or prohibit the debtor from managing the bankruptcy estate, then it has the same powers of the trustee except for some acts such as the avoiding powers, which are exercised exclusively by the custodian. *Id*., §280.

[48] *Id*., §103.

[49] In plain terms, the bankruptcy estate is another name for the debtor when it is in bankruptcy.

[50] *Id*., §35. The debtor's liabilities become claims against the bankruptcy estate.

[51] Because a stay imposed on creditors and the debtor's ability to dispose of its assets is restrained on the commencement of the bankruptcy case, the effects are suspended until the bankruptcy trustee decides to perform or reject it. In fact, according to the German Insolvency Code, assumption consists in the bankruptcy trustee's action to request performance from the non-debtor party. *Id.,* §103; Braun, *supra* note 45, at 528.

[52] However, there are cases in which the German Insolvency Code expressly limits the bankruptcy trustee's power to reject executory contracts. Specifically, there are two types of contracts that cannot be rejected by the bankruptcy trustee: *a*) those contracts in which value is closely related to the identity of the person who originally contracted with the debtor (non-assignable contracts under ordinary non-bankruptcy laws); and *b*) contracts in which there is a property right that has already been acquired by the non-debtor party (conditional sales,

ee explicitly determines whether the executory contract is to be performed rather than rejected in order to protect the creditor's interests (right to be notified). To be clear, insolvency implies that the bankruptcy estate is limited to perform all executory contracts that if the bankruptcy trustee fails to take formal action to perform a contract ("assumption"), the contract is deemed to have been breached.

The effect of "assumption" is that the obligations related to performance of the contract by the bankruptcy estate become administrative expenses, which are priority claims.[53] When an executory contract is "assumed", it is binding to the bankruptcy estate and the non-debtor party in its original terms.[54] If the bankruptcy estate breaches the contract post-assumption, the damages claim for breach is treated as administrative expenses as well.

It should be mentioned that the German Insolvency Code classifies the creditor's claims against the bankruptcy estate into four different categories in which administrative expense (included "creditors of the estate") are over all other unsecured claims;[55] as a consequence, these claims are usually paid in full.[56] The justification for this rule is that performance of the contract is a claim that results from the administration of the bankruptcy estate; in fact, it is the

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and contracts that consist in transferring the property rights in real estate). In the first case, that is contracts that are not assignable to third parties under ordinary non-bankruptcy, the German Insolvency Code explicitly provides that such contracts are rendered terminated once the bankruptcy case has commenced, for example, agreement trading of financial futures and agency contracts. *See* InsO §§104, 115-117. In the second case, that is, contracts in which the non-debtor part has acquired a property right by virtue of the contract, the German Insolvency Code explicitly prohibits termination of those contracts, for example, conditional sales, only when the debtor is the seller and has delivered goods before the commencement of the bankruptcy case; otherwise, if the debtor is the buyer, the trustee can exercise its power to assume or reject the contract, *Id.* §107; real estate leases, only when the debtor is the lessor; otherwise, if the debtor is the lessee, the trustee can exercise its power to assume or reject the contract, *Id.* §§ 108 and 109; and any contract, regardless of how it is labeled, in which property rights on real estate property have been transferred under non-bankruptcy ordinary laws, *Id.* §106.

[53] The German Insolvency Code refers to "administrative expenses" as "estate liabilities" (*Masseverbindlichkeiten) See* InsO §53.

[54] Unlike the American system, under the German Insolvency Code it is not necessary to cure prepetition defaults in order to "assume" an executory contract. Prepetition default of the debtor remains as a debtor's prepetition liability; thus, any prepetition default of the debtor is treated as a general unsecured claim. This treatment has a procedural explanation. The commencement of the bankruptcy procedure turns prepetition liabilities into claims against the bankruptcy estate; under the German bankruptcy law, curing prepetition defaults would violate equal treatment among creditors. *Id.*, §105.

[55] *Id.*, §§38, 47, 49-51 and 53.

[56] Moreover, obligations related to performance of the contract have to be paid immediately as they come due; however, if the bankruptcy estate breaches the contract post assumption, the non-debtor party is entitled to damages compensation but has to wait until the confirmation of the reorganization plan to be paid. *Id.,* §§53, 54, 55 and 90.

bankruptcy estate the one which benefits from performance of the contract. Moreover, the non-debtor party is encouraged to continue in the contractual relationship by turning it into administrative expenses.

b. *Rejection*

The bankruptcy trustee can choose instead rejection of the executory contract; then, the non-debtor party is entitled to compensation for damages but the claim is treated as a general unsecured claim.[57] The damages claim for rejection has to share pro rata with other general unsecured claims (unless the non-debtor party has a security interest on any of the debtor's assets); general unsecured claims (insolvency claims) are at the bottom of the priority ranking, so they are frequently paid a fraction of the total amount of the claim.

The justification for treating the damages claim as a general unsecured claim is found in the bankruptcy policies of equal treatment and the maximization of the bankruptcy estate for the benefit of the debtor's creditors.

This bankruptcy system fosters the bankruptcy trustee's efforts to maximize the bankruptcy estate value by reducing the costs of rejection to the bankruptcy estate. The purpose is to facilitate rejection of those contracts that are unfavorable or burdensome to the bankruptcy estate. On the other hand, in the German bankruptcy system, the non-debtor party to a rejected contract is regarded as any other general unsecured creditor who has to share pro rata with all other unsecured creditors.[58]

c. *Time Limit*

The German Insolvency Code does not impose a time limit for the "assumption" and termination of executory contracts; thus, it is implicit that the bankruptcy trustee can decide at any time before the confirmation of the reorganization plan.[59]

The decision about "assumption" and rejection of executory contracts usually takes some time, and the delay in making a decision may have a detrimental effect on the non-debtor party. Recognizing this situation, the German bankruptcy law enables the non-debtor party to ask directly the bankruptcy trustee to accelerate the decision on "assumption" or rejection of the contract.[60] The

[57] *Id.*, §103.

[58] This rule can be illustrated with the same numerical example provided in the subsection that explains rejection under the American model.

[59] *Id.*, §103.

[60] The bankruptcy court does not have authority to compel the bankruptcy trustee to accelerate the disposition of executory contracts before the confirmation of the reorganization plan. *Id.*

effect of such request is that the bankruptcy trustee becomes obliged to decide "without negligent delay" about the disposition of the contract. If the bankruptcy trustee omits to take action within a reasonable time, then it is deemed that the bankruptcy trustee has rejected the contract.[61]

d. *Trustee's Business Judgment*

The German Insolvency Code gives complete discretion to the bankruptcy trustee to "assume" or reject executory contracts as no approval is required from the bankruptcy court.[62] The rationale is that the bankruptcy trustee is supposed to know best how to achieve the maximization of the bankruptcy estate value. On the other hand, the German bankruptcy system is characterized by the control exercised by the debtor's creditors. [63] Then bankruptcy court supervises that the bankruptcy goals are effectively fulfilled, and intervenes whenever there is a conflict among the parties affected by bankruptcy case.[64]

3. *The Spanish Model*

Bankruptcy in Spain is ruled by the Insolvency Act (Ley Concursal),[65] whose Chapter III of the Title III contains the rule on the treatment of ex-

[61] The German Insolvency Code states that if the trustee fails to assume or reject within such period, it is deemed that the trustee has given up assumption of the contract and cannot require the counterparty to perform. *Id.*

[62] *Id*., §279. Although the bankruptcy trustee has a duty to inform the bankruptcy court about the administration of the bankruptcy estate, the bankruptcy court does not have authority to interfere with the administration of the bankruptcy estate; the bankruptcy court only monitors the bankruptcy trustee's activities. Only if there is a conflict between the parties taking part in a bankruptcy case, the bankruptcy court may intervene as a mediator. *Id*., §58; Flessner, *supra* note 37, at 328; European Commission webpage is available at *http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_ger_en.htm*. However, if the debtor keeps the management of the bankruptcy estate as debtor in possession, the decision has to be approved by the custodiam. *See* InsO §§1, 58, 66 and 79.

[63] Nonetheless, they may exercise some pressure on the bankruptcy trustee because creditors are empowered to request the removal of the bankruptcy trustee from the bankruptcy court and the bankruptcy trustee is personally liable to them for the losses incurred as a result of the mismanagement of the bankruptcy estate. *Id.*, §60.

[64] *See* for example InsO §56. It is important to mention that the German bankruptcy system has been designed to provide the debtor's creditors with the control of the bankruptcy procedure on the grounds that bankruptcy seeks to maximize creditors' claims; however, creditors do not have control over the day to day administration of the bankruptcy estate; their power is limited to major decisions on the disposition of the bankruptcy estate and the approval of the reorganization plan. *See* InsO §79.

[65] Ley Concursal [hereinafter L.C.] (B.O.E., 2003, 22) (Spain). This statute was adopted in

ecutory contracts.[66] The main purpose of the Spanish bankruptcy is the reorganization of the debtor as a means to maximize the value of the debtor's assets for its distribution among creditors.[67]On these grounds, the Spanish bankruptcy law gives the bankruptcy trustee the power to reject executory contracts.[68]

Trustee´s ability to dispose of executory contracts

Under the Spanish bankruptcy law, a bankruptcy case commences at the time when the bankruptcy court[69] orders bankruptcy relief rather than at the moment when the bankruptcy petition is filed.[70]

After the bankruptcy petition has been filed the bankruptcy court[71] conducts an investigation on the financial condition of the debtor. However, un-

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an effort to deal with an outdated bankruptcy system in which the prevailing conflict of interest between the debtor and its creditors used to lead to the delay of liquidation of liquidation of unviable debtors and the anticipated liquidation of viable debtors. *See* Exposición de Motivos, *supra* note, I; Rocío Albert & Francisco Cabrillo, Un Análisis Económico de la Reforma Concursal Española, 11 Revista Valenciana de Economía y Hacienda, 113-118 (2004). The UNCITRAL Legislative Guide on Insolvency Law was an important influence for the design of the new Spanish bankruptcy laws. For more details about this guide, see an updated version at *http://www.uncitral.org/uncitral_texts/insolvency/2004Guide.html*.

[66] It should be noticed that in this bankruptcy system, reorganization and liquidation are two alternatives of a single procedure; hence, the rules on the treatment of executory contracts are the same for both reorganization and liquidation cases.

[67] *See* Exposición de motivos VI (B.O.E., 2003, 22) (Spain); Lilian Issa, La Nueva Ley Concursal: Principales Novedades, Boletin Jurídico (September, 2004).

[68] For more information about executory contracts under the Spanish bankruptcy law see Javier Martínez Rosado, *Los efectos de la declaración de concurso sobre los contratos con obligaciones recíprocas (arts. 61 a 63 de la Ley 22/2003, de 9 de julio, Concursal), Estudios sobre la Ley concursal: libro homenaje a Manuel Olivencia,* Ed. Macial Pons, España, 2005; Susana Navas Navarro, *Créditos y deudas de los autores: Especial referencia a la Ley 22/2003, de 9 de julio, Concursal*, Ed. Reus, Madrid, 2005. Francisco Vicent Chuliá, TRES AÑOS DE LEY CONCURSAL: TEMAS DE REFORMA, Revista de Derecho Concursal y Paraconcursal, num. 8, Sección Ponencias, Primer semestre de 2008, pág. 113, Editorial LA LEY; Ana Moreno Sánchez-Moraleda, *Los efectos de la declaración de concurso en los contratos bilaterales*, Tirant lo blanch, Valencia, 2010; Inmaculada Herbosa Martínez, "Tratamiento del leasing financiero en el concurso del arrendatario," *Anuario de Derecho Concursal*, ISSN 1698-997X, num. 26, 2012, págs. 51-104; Sonia MARTÍN MARTÍN, *El contrato de leasing. Su regulación en la Ley Concursal y en la Legge Fallimentare*, *Cuadernos de Estudios Empresariales*, 2014, vol. 24, 65-74; Sebastián Bozzo Hauri, "La excepción del contrato no cumplido en materia concursal en España," *Rev. derecho* (Valdivia) vol. 26, num. 1 Valdivia, jul. 2013.

[69] In Spain, a bankruptcy case is brought to a commerce court (juzgado de lo mercantil) but a bankruptcy judge (juez de concurso) presides over the case.

[70] *See* L.C. Article 21.

[71] This phase is known as "first stage" (Sección primera). *Id.*, Article 16.

like the German model, if the bankruptcy filing is voluntary, there is no need for a detailed investigation because for the bankruptcy court it is sufficent to examine the documents submitted by the debtor in order to find the grounds for bankruptcy relief. Conversely, if the bankruptcy is involuntary, the bankruptcy court instructs an expert to prepare a report. If the bankruptcy court finds that the debtor is insolvent, it orders the commencement of the bankruptcy case.[72]

During this first stage (after the bankruptcy petition has been filed but before the commencement of the bankruptcy case), the debtor continues in operation and no automatic stay is imposed on creditors to collect from the debtor.[73] All contracts continue to be binding to the debtor and the non-debtor party, and, as a consequence, both of them are obliged to continue performing their obligations under the contract.

Because the effects of the bankruptcy procedure are triggered when the bankruptcy relief is ordered, it is at this moment rather than at the time of the bankruptcy filing that "executory contracts" come into existence.[74]

a. *Assumption*

The commencement of the bankruptcy case creates the bankruptcy estate but, under the Spanish bankruptcy law, the bankruptcy estate is not an entity with its own legal personality; instead, it is a pool of those assets that have been seized from the debtor for the benefit of its creditors.[75] The bankruptcy estate encompasses all of the debtor's property,[76] but the debtor does not lose the ownership of these assets; instead, a bankruptcy trustee is appointed to administer them.[77]

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[72] *Id.,* Articles 14-20.

[73] The bankruptcy court has authority to order prejudgment measures on the petition of the debtor or its creditors such as imposing restraints on the debtor to dispose of its assets or a stay on creditor's individual efforts to collect from the debtor. *Id.,* Article 17.

[74] *Id.*, Article 21. According to the Insolvency Code, executory contracts are those contracts in which both the debtor and the non-debtor party owe performance of their obligations at the time of the commencement of the bankruptcy case. *See Id.*, Article 21. The Spanish Insolvency Act does not exclude financial contracts from the definition of executory contracts; in fact, if there is prepetition default by the debtor within the three months before the commencement of the bankruptcy case, the bankruptcy estate can repair the default so that the contract continues to be valid and it is binding to both the debtor and the non-debtor party. *Id.*, Article 68.

[75] *Id.*, Article 76.

[76] Includes property owned by the debtor at the time of the commencement of the bankruptcy case and acquired by the debtor during the procedure. *Id.*

[77] Under the Spanish bankruptcy law, the bankruptcy trustee is a collegiate body, known as the bankruptcy administration (administradores concursales), which charged with the administration of the bankruptcy estate. The members of the bankruptcy administration are known as insolvency administrators (administradores concursales) and are appointed by the

Because the commencement of the bankruptcy case does not create an entity different from the debtor, all executory contracts are part of the bankruptcy estate and are deemed to be valid and binding to both the bankruptcy estate and the non-debtor party.[78] However, unlike the German bankruptcy law, as the debtor continues in operation, the effects of contracts are not suspended; instead, both the bankruptcy estate and the non-debtor party are obliged to continue performing their obligations under the contract in its original terms.[79] In this sense, all executory contracts are automatically assumed. The main consequence of automatic assumption is that all the obligations related to performance of a contract are treated as administrative expenses, which have a priority position over all the other unsecured claims. Moreover, according to the Spanish bankruptcy law, administrative expenses have to be paid as they come due.[80]

b. *Rejection*

The Spanish Insolvency Act provides that the bankruptcy trustee can reject a contract with the approval of the bankruptcy court.[81] Considering that not all the contracts are valuable and many of them can be burdensome to the bankruptcy estate, the bankruptcy trustee can reject executory contracts with the approval of the bankruptcy court.[82] Rejection, in this sense, means breach of the contract. The main effect of rejection is that the counterparty is entitled to damages compensation, which is treated as an administrative expense.[83] This rule ensures that the non-debtor party is compensated in full

debtor or its creditors, the debtor can remain in the administration of its assets under the supervision of the insolvency administrators (similar to the American debtor in possession). As a default rule, in voluntary cases the debtor remains in the administration of the estate while in involuntary cases the insolvency administrators replace the debtor. The aim is to create incentives for both the debtor and creditors to file a prompt bankruptcy petition. *Id.*, Article 40.

78 *Id.*, Article 61.

79 If there is a prepetition default of the debtor, the non-debtor party has the right to rescind the contract with the approval of the bankruptcy court. If the court denies authorization to rescind the contract, performance of the debtor is conditioned to fix the prepetition default. It should be noticed that the non-debtor party is no entitled to compensation for damages from prepetition default. *Id.*, Article 62.

80 *Id.*, Articles 84 and 154. According to the Insolvency Act, administrative expenses are paid as they come due; thus, payments related to performance of the contract are paid as they come due. The damages claim for breach, however, has to wait until the confirmation of the reorganization plan. See Juan José Pintó Ruiz, "Incidencia de la Ley Concursal en la resolución de los contratos con obligaciones recíprocas," 252 in *Revista de Derecho Mercantil*, 651, 675 (Madrid, 2004).

81 *See* L.C. Article 41

82 *Id.*, Articles 61 and 62.

83 *Id.*

for the loss of the expected gain from performance of the contract, because administrative expenses are paid before all other unsecured claims.[84]

Because this rule forces the bankruptcy estate to pay in full the damages claim for breach of the contract, it creates incentives for the bankruptcy trustee to choose not to reject (*i. e.* to perform) the contract when it increases the total value to both the promisor and the promisee (*i. e.* it prevents value wasting rejection). Likewise, this rule creates incentives for the bankruptcy trustee to choose breach of the contract when the cost of performance to the bankruptcy estate is greater than the benefit of performance to the non-debtor party (*i. e.* it prevents value wasting performance).

The Spanish bankruptcy law solves the conflict between this rule and the bankruptcy principle of equal treatment among creditors by providing that all executory contracts are automatically assumed. All contracts are deemed to be binding to the bankruptcy estate and as such all the obligations related to performance of contracts as well as the damages claim for rejection of a contract are the bankruptcy estate's liabilities. The non-debtor party to a contract then is not a creditor of the debtor but a creditor of the bankruptcy estate.[85]

c. *Time Limit*

No time limit is imposed on the bankruptcy trustee to decide rejection of an executory contract. However, it is evident that the bankruptcy trustee can reject executory contracts before the confirmation of the reorganization plan, as it has to be approved by the bankruptcy court previous hearing of the non-debtor party, as it is to be explained below.

It is important to notice that time limits are imposed in most bankruptcy systems with the purpose of limiting the bankruptcy trustee's authorityre to assume and reject executory contracts (it reduces the uncertainty in the non-debtor party's rights and obligations with respect to the performance of a contract). In this model, time limits for the trustee to dispose of executory contracts are somewhat irrelevant as all executory contracts are automatically assumed. Specifically, both the bankruptcy estate and the non-debtor party have to continue performing the contract in its original terms as long as the bankruptcy trustee does not reject the contract. Moreover, if the contract is breached by the bankruptcy estate, the claim for damages is granted an administrative priority, which ensures that the non-debtor party is compensated in full.

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[84] *Id*., Articles 84, 89 and 154.

[85] *See* Fernando Martínez Sanz, "Efectos del concurso sobre los contraltos mercantiles pendientes," *Noticias Jurídicas* (February, 2004).

d. *Court Approval*

Under the Spanish bankruptcy law, the bankruptcy court has the control of the bankruptcy procedure; for this reason, the Spanish Insolvency Act mandates that the bankruptcy trustee's decision to reject an executory contract is subject to the authorization of the bankruptcy court.

Unlike other bankruptcy systems, the bankruptcy court's authority to approve or prevent rejection of executory contracts prevails over the bankruptcy trustee's business judgment; thus, the bankruptcy's trustee decision is not sufficient to breach a contract.

According to the Spanish Insolvency Act, once the bankruptcy trustee request rejection of an executory contract, the bankruptcy court summons the bankruptcy trustee, the debtor, and the non-debtor party for a hearing. In such a hearing, the bankruptcy court mediates between the parties. If the bankruptcy trustee and the non-debtor party do not reach agreement on the rejection of the contract, the conflict is solved in a collateral proceeding.[86] The bankruptcy court decides on rejection of the contract depending on whether performance or breach of a contract is favorable to the bankruptcy estate.[87]

III. The Superiority of the Spanish model

This part examines the incentives that each model creates for the bankruptcy trustee and the non-debtor party to perform or terminate executory contracts ex post as well as the debtor's and creditors' incentives to invest and file for bankruptcy ex ante.

The treatment of executory contracts and its effects in efficiency terms has been examined by American scholars in previous studies.[88] Such analyses have demonstrated that the externalization of costs by the bankruptcy estate when an executory contract is rejected leads to inefficient results.[89]

Based on such findings, this part examines and compares the rules on the treatment of executory contracts under American model, the German model, and the Spanish model. The part argues that the regime adopted by the American and German models is undesirable as it facilities the externalization of costs by the bankruptcy estate to reject executory contracts, creating inefficient incentives for the bankruptcy trustee ex post as well as for the debtor and its creditors ex ante. It also argues that the Spanish model, which

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[86] *See* L.C. Articles 61, 62 and 192.

[87] Pinto Ruíz, supra note 84, at 658. In fact, under the Spanish Insolvency Act, one of the main goals of bankruptcy is the maximization of the value of the bankruptcy estate. *See*, for example, LC Articles 21, 134, 154-59.

[88] *See* Triantis *supra* note 4; Fried, *supra* note 2; Chaver & Fried, *supra* note 4.

[89] *See* Fried, *supra* note 2, at 522.

adopts a regime that forces the bankruptcy estate to internalize the costs of rejection, creates the most desirable results both ex post and ex ante.

Finally, this part argues that because the rules on the treatment of executory contracts adopted by the Spanish model create the most desirable incentives for the bankruptcy trustee, this model is superior to the American and German models.

Ex post Efficiency to Reject

Assumption or rejection of executory contracts is part of the ordinary decisions that the bankruptcy trustee has to make in the administration of a bankruptcy estate.

Some bankruptcy systems, as it is the case of the American model and the Spanish model, impose a judicial limit on the bankruptcy trustee's discretion to dispose of executory contracts because the decision to assume or reject executory contracts is subject to the approval of the bankruptcy court. In spite of these judicial limitations, the bankruptcy trustee is the one who has the initiative to assume or reject contracts.

a. *The Possibility of Inefficient Rejection*

This part intends to establish if, from an efficiency perspective, there is a regime for the treatment of the damages claim for rejection likely to create the best incentives for the bankruptcy trustee to make decisions on assumption or rejection of executory contracts that result in an increase in the value available to all the parties affected rather tan exclusively to the bankruptcy estate.

The rules for the treatment of the damages claim for rejection determine the bankruptcy trustee's incentives to assume or reject an executory contract. The bankruptcy trustee chooses assumption or rejection of an executory contract depending on whether the contract is valuable or burdensome to the bankruptcy estate, which in turn is determined by the value of the contract and cost of performance to the bankruptcy estate. However, as explained by Jesse Fried, from an efficiency perspective it is desirable that assumption or rejection of executory contracts is decided on whether a contract increases total value (the value to both the bankruptcy estate and the non-debtor party).[90]

[90] Fried, *supra* note 2, at 523.

a) *Contract Law and Efficient Breach*

— *Damages Claim for Breach*

Besides bankruptcy, the promisor has the option to perform or breach the contract just as it happens in bankruptcy with the bankruptcy trustee's opportunity to assume or reject an executory contract.

When two parties enter into a contract, some value is created so that both the promisor and the promisee are better off. Due to this value it is desirable to make a promise enforceable and to provide the promisor with remedies to ensure the enforcement of the promise. The most common remedy available in contract law to the promisee is damages compensation. Damages compensation consists in forcing the promisor to pay an amount of money to the promisee equal to the loss the promisor suffers as a result of breach of the contract (or equal to the gain the promisee would have realized on performance of the contract).[91] Forcing the promisor to compensate the promise in full creates efficient incentives for the promisor to perform a contract, because it prevents such party from externalizing costs to the promisee and it preserves the value that is created when an exchange takes place.[92]

Had contract law not force the promisor to internalize the cost of breach in full, a promisor would simply breach contracts at the expense of the promisee; that is to say, the promisor would enjoy all the benefits without paying the amount due to the promisee, because reaping all the benefits and externalizing the costs makes the promisor (agent) better off.

— *Efficient Breach*

Forcing the promisor to pay in full the damages claim for breach gives the promisor efficient incentives to breach a contract when the cost of performance to the promisor is greater than the value of the contract to the promisee (to be precise, it creates incentives for the promisor to breach when performance is value-wasting). This doctrine is known as the theory of the efficient breach.[93]

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[91] This rule has been labeled by Jesse Fried as the "Expectation Damages Rule". *See* Fried, *supra* note 2, at 519.

[92] *See* Charles J. Goetz & Robert E. Scott, Enforcing Premises: An Examination of the Basis of Contract, 89 (Yale L.J. 1261, 1265, 1275-1277) (1980).

[93] *See* Richard Craswell, Contract Remedies. Renegotiation, and the Theory of Efficient Breach, 61 in S. Cal. L. Rev. 629, 637 (1988). For example, suppose now that Firm values the contract at $50 and that it costs $90 to Ad Agency to produce the advertising campaign. If Firm performs the contract, it has to pay $100 to Ad Agency, but Firm will lose $50 ($100-$50). On the other hand, if Firm breaches the contract, Firm has to pay damages compensation of $100 to Ad Agency for breach of the contract ($100-90). Performance of the contract is value-wasting because it imposes a loss on Firm greater than the gain to Ad Agency; performance

b) *Bankruptcy Law and the Damages Claim for Rejection*

The logic of the trustee's power to assume or reject an executory contract is no different from the promisor's option to perform or breach a contract outside of bankruptcy.[94] However, in bankruptcy, the assets are not sufficient to pay in full every claim, therefore creditors share pro rata the debtor's creditors. This principle is known as "equal treatment among creditors."[95]

— *Damages Claim for Rejection as an Unsecured claim*

In the American model and the German model, the damages claim for rejection has to be paid as a prepetition unsecured claim, and, as a consequence, the damages claim from rejection shares pro rata with other prepetition unsecured claims. [96]

This rule has usually been justified in these bankruptcy systems on the basis that it is in harmony with the principle of equal treatment among creditors in bankruptcy. As mentioned above, in bankruptcy the lack of sufficient assets to be distributed among the debtor's creditors limits the bankruptcy estate's ability to compensate in full the non-debtor party for the loss suffered when the bankruptcy estate rejects an executory contract; thus, as any other unsecured creditor, the non-debtor party's damages claim for rejection has to share with all other unsecured claims.[97]

This rule is also justified on the basis that it furthers the rehabilitation of the debtor and the maximization of the bankruptcy estate value. This conception considers that it is desirable to treat the damages claim for rejection as a general unsecured claim because it eases the rejection of those contracts that are burdensome to the bankruptcy estate. To be clear, it is necessary to enable the trustee to perform contracts that are beneficial for the estate and

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reduces the total value by $40 (compare $50 of loss from performance to Firm and $10 of gain from performance to Ad Agency). Thus, breach of the contract is efficient because the benefit from breach to Firm is larger than the loss suffered by Ad Agency. If Firm breaches the contract, the expectation damages rule forces Firm to pay damages compensation of $10 to Ad Agency for breach of the contract in full which creates efficient incentives for Firm to breach because it makes Firm internalize in full the costs of breach and allows Firm to breach a contract when performance reduces the total value. This example is based on the one provided by Jesse Fried.

94 *See* Mark J. Roe, CORPORATE REORGANIZATION AND BANKRUPTCY, 358 (2000). The main effect of assumption is that the bankruptcy estate adopts all the debtor's rights and obligations under the contract. The main effect of rejection is that the bankruptcy estate is released from performance of the contract. *See* Fried, *supra* note 2, at 519.

95 *See* Jackson, *supra* note 3.

96 Jesse Fried labels this rule as the "ratable damages rule." *See* Fried, *supra* note 2, at 519.

97 *See id.,* at 522, Triantis, *supra* note 4, at 691; InsO §1. Under the German bankruptcy law this principle is known as the *par condition creditorum*. *See* Braun *et al.*, *supra* note 45.

unburden the bankruptcy estate from unfavorable contracts that pose an obstacle to the maximization of the bankruptcy estate value.[98]

An alternative explanation for this rule is that the damages claim arises from the rejection of a contract in which the parties had entered into before the bankruptcy petition was filed —or the bankruptcy case is commenced. Consequently, as any prepetition claim, the damages claim has to share pro rata with all other unsecured claims in the distribution of the assets; otherwise, the non-debtor party to an executory contract would be treated differently from all the other general unsecured creditors.

— *Rejection of Burdensome Contracts*

From an efficiency perspective, rejection of burdensome contracts is efficient when performance is value-decreasing. Executory contracts are burdensome to the bankruptcy estate when the cost of performance is larger than the value of the contract to the bankruptcy estate; likewise, performance is wasteful when the cost of performance to the bankruptcy estate is greater than the value of the contract to the non-debtor party.

The rejection of a burdensome contract is efficient and consistent with the goal of the maximization of the value of the bankruptcy estate for the benefit of the debtor's creditors when performance is wasteful, because the gain from rejection to the bankruptcy estate is greater than the loss imposed on the non-debtor party. In other words, if the trustee decides to assume the contract, the loss from performance to the bankruptcy estate is greater than the gain that the non-debtor party obtains.[99]

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[98] *See* Fried, *supra* note 2, at 601; *see* InsO §1; Braun, *supra* note 45, at 528.

[99] For example, suppose that Firm and Ad Agency have entered into a contract, in which Firm has agreed to pay $100 to Ad Agency to launch an advertising campaign for a Firm's new product. Producing the advertising campaign costs $60 to Ad Agency. Suppose further that Firm enters bankruptcy. At the time the bankruptcy petition was filed, Firm had not paid $100 to Ad Agency, and Ad Agency had not incurred any expenses in producing the advertising campaign for the Firm's new product. The bankruptcy estate is created and the bankruptcy trustee has to decide assumption or rejection of the contract. Suppose that the bankruptcy estate values the contract in $70 and that the costs of producing the advertising campaign to Ad Agency have increased to $90. In addition, the payout rate is expected to be 30%. If the bankruptcy trustee chooses assumption, performing the contract imposes a loss on the bankruptcy estate of $30, whereas it only creates $10 of value for the benefit of Ad Agency ($100 that Ad Agency would receive from the bankruptcy estate minus $90 it would cost to Ad Agency to produce the advertising campaign). Rejection of the contract in this example is efficient because even though the bankruptcy estate would pay only $3 to Ad Agency for damages compensation (30% of $10), the gain from rejection of the contract to the bankruptcy estate is larger than the benefit Ad Agency would realize from performance of the contract (if the contract were performed, Firm would lose $30 while Ad Agency would only obtain $10). In this sense, the ratable damages rule facilitates rejection of burdensome contracts whose performance is wasteful. This example is based on the one provided by Jesse Fried.

— *Possible Inefficient Rejection*

However, treating the damages claim for rejection as an unsecured claim has proved to produce undesirable effects because it creates incentives for the trustee to excessively reject executory contracts, even though some of these contracts create some value for the benefit of both the bankruptcy estate and the counterparty.[100] To be clear, this rule causes a bias towards rejection regardless of whether a contract is wasteful or value-creating, because under this rule the bankruptcy estate does not fully internalize the costs of rejection.

A contract is value-creating when it increases the total value available to both the bankruptcy estate and the non-debtor party; that is to say, when the cost of performance to the bankruptcy estate is less than the benefits the contract creates for the non-debtor party; to put it differently, the gain from rejection to the bankruptcy estate is less than the loss imposed on the non-debtor party if the contract is rejected; a contract is value-creating because performance increases the total value to both the bankruptcy estate and the non-debtor party.[101]

The rejection of value-creating contracts is inefficient because the loss from rejection to the non-debtor party is greater than the cost of performance to the bankruptcy estate; in other words, the benefit from rejection to the bankruptcy estate is less than the loss that the non-debtor party suffers as a result of rejection of the contract. Rejection of a value-creating contract then is inefficient because the value that performance of the contract would create for the benefit of both the bankruptcy estate and the non-debtor party is lost.[102]

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[100] *Id.*, at 529-533.

[101] *Id.*

[102] For example, suppose that Firm and Ad Agency have entered into a contract, in which Firm has agreed to pay $100 to Ad Agency to launch an advertising campaign for a Firm's new product. Suppose that Firm enters bankruptcy but before the bankruptcy petition is filed, Firm has not paid $100 to Ad Agency, and Ad Agency has not incurred any expenses in producing the advertising campaign for Firm's new product. The bankruptcy estate is created and the bankruptcy trustee has to decide whether to assume or reject the contract. Suppose further that the bankruptcy estate values the contract at $70 and that the payout rate for general unsecured claims is expected to be 30%. Despite the $30 of loss suffered by the bankruptcy estate (the bankruptcy estate has to pay $100 to Ad Agency for the advertising campaign, but the advertising campaign creates only $70 of value to the bankruptcy estate), the contract is value-creating because it creates a total value to both the bankruptcy estate and Ad Agency of $10 ($70 of value of performance to the bankruptcy estate less $60 that would cost to Ad Agency to perform). If the contract is rejected, the bankruptcy estate has to pay $12 to Ad Agency for damages compensation (30% of $40). Rejection, however, is inefficient because the bankruptcy estate' benefit from rejection is only $18 ($30-$12), whereas the loss imposed on the non-debtor party is $28 ($40-12). This is an inefficient result because the loss imposed on the non-debtor party is

This rule is problematic from an efficiency perspective because the cost of rejection is always lower than the cost of assumption. When the damages claim for rejection is treated as an unsecured claim, the damages claim is paid on a pro rata basis, whereas the obligation arising from the assumed contract and any damages claims arising from post-assumption breach of such contract have to be paid in full. The difference in the cost of performance and the costs of breach creates a bias towards rejection, even if the contract is value-creating.[103]

c) *Damages Claim for Rejection as Administrative Expenses*

Unlike the other models, the Spanish model adopts a rule in which the damages claim for rejection of executory contracts is treated as administrative expenses. This rule ensures that the non-debtor party is compensated in full for the expected gains lost as a result of rejection of the contract. The effects of this rule are similar to those of paying in full the damages for breach in contract law. Because the bankruptcy estate is forced to fully internalize the costs of rejection, the bankruptcy trustee has the efficient incentives to choose assumption of the executory contract when performance is value-creating and chose rejection of the executory contract when performance is value-wasting.[104] This rule attacks the origin of the externalization of costs by the bankruptcy estate, as well as the bankruptcy trustee's bias towards the rejection; in this sense, the expectation damages rule creates the same efficient incentives for the bankruptcy estate to make performance decisions as contract law creates efficient incentives for the promisor to make performance decisions outside of bankruptcy.

Treating damages claim for rejection as administrative expenses prevents the bankruptcy trustee from rejecting an executory contract when the loss imposed on the non-debtor party is greater than the benefit obtained be the bankruptcy estate because the bankruptcy estate is forced to internalize the costs of rejection to the non-debtor party. Similarly, this rule creates efficient incentives for the bankruptcy trustee to reject when performance is wasteful, that is when the benefit to the non-debtor party is less than the cost of performance to the bankruptcy estate. Again, the reason is that the bankruptcy estate has to internalize

larger that the benefit from rejection to the bankruptcy estate. This example is based on the one provided by Jesse Fried.

[103] It should be noticed that the lower the payout rate, the stronger the incentives for the trustee to reject an executory contract. For example, compare the amount that the bankruptcy estate would have to pay to Ad Agency for damages compensation in case of rejection of the contract, if the payout rate for general unsecured claims were expected to be 10%, instead of 30%. Firm would have to pay only $4 to Ad Agency for damages compensation from the rejection of the contract, instead of $12.

[104] *Id.*, *supra* note 2, at 545-547.

in full the costs of rejection to the non-debtor party. This rule creates more certainty about the fate of the contract for the non-debtor party, because the bankruptcy estate is obliged to pay the non-debtor party in full in either case: assumption or rejection.

IV. Objections

As explained above, the Spanish model creates the most efficient incentives for the bankruptcy trustee ex post. However, this model may create other sort of problems, namely: a) it violates the principle of equal treatment among creditors, and b) it may hamper the rehabilitation of the debtor.[105]

1. *Fairness*

The main objection against granting the damages claim for rejection as the administrative priority is that it is contrary to the principle of equal treatment among creditors.[106]

Granting the damages claim for rejection of an executory contract has already been analyzed as a solution for the distortions created by the ratable damages rule, which is the approach adopted in most bankruptcy systems.

Legal scholars have acknowledged that forcing the bankruptcy estate to internalize in full the costs of rejection eliminates the distortions created by the ratable damages rule because it creates incentives for the bankruptcy trustee to choose rejection of the contract only when the cost of performance to the bankruptcy estate is greater than the benefit to the non-debtor party (*i. e.* the administrative priority rule prevents wasteful rejection). However, it has been argued that this measure is problematic because it is contrary to one of the main bankruptcy policies: equal treatment among creditors.[107]

In bankruptcy, except for unsecured creditors, all the debtor's creditors have to share pro rata in the distribution of the debtor's assets among them because the debtor's assets are not sufficient to pay all the claims in full. Since the administrative priority rule forces the bankruptcy estate to pay in full the damages claim for rejection (rather than a proportionate amount according to the assets available in bankruptcy), it disregards the principle of equal treatment among creditors.

Such conception has its basis on the idea that bankruptcy is a procedure that facilities an orderly payment to the debtor's creditors when the debtor is insolvent. Because an insolvent debtor has not sufficient assets to pay its credi-

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105 *Id.*

106 *See* Fried, *supra* note 2, at 546.

107 *Id.*

tors in full, bankruptcy ensures equal distribution of the value of the debtor's assets among creditors.

From an economic perspective, the principle of equal treatment is justified on the basis that bankruptcy as a solution to the creditor's collective action problem.[108] According to this theory, when the debtor is insolvent, creditors have incentives to grab the debtor's assets to satisfy their claims in full before no assets are left. However, this behavior makes creditors worse off as a group because only those who individually collect first from the debtor are paid in full, whereas the remaining creditors receive nothing.[109] Creditors would be better off if they could renegotiate the terms of the debt and defer payment of their claims until the firm produced more income to be able to meet its obligations, or if they could agree to divide ratably the value of the firm so that all of them could receive some value to satisfy their claims. Nevertheless, bargaining costs are prohibitively expensive for creditors to enter into such agreement because creditors are dispersed and have an interest to maximize their claims individually. Hence, bankruptcy law provides the rules that creditors would negotiate if they could enter into a contract to distribute equally the value o the debtor among them according to their non-bankruptcy entitlements and, if possible, seek the rehabilitation of the debtor[110].

Granting an administrative priority to the damages claim for rejection then is regarded as unfair because contractual creditors, unless they have a secured interest in the debtor's assets, should share pro rata in the distribution of the value of the debtor's assets as any other unsecured creditor. It is argued that when the damages claim for rejection of an executory contract enjoys an administrative priority some value is transferred to the non-debtor party at the expense of all other unsecured creditors. Unlike all other unsecured claims, a claim that enjoys an administrative priority is paid first all other unsecured creditors and as such is usually paid in full.

Likewise, from a traditional view, granting ad administrative priority to the damages claim for rejection violates the principle of equal treatment because it disregards the implicit agreement among the debtor's creditors to distribute the firm's value ratably among them.

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[108] Even though this theory has been challenged, it still remains as the most widely accepted explanation of bankruptcy even in efficiency terms.

[109] To put it differently, whereas individual collection from an insolvent debtor makes those creditors who grab from the debtor better off because they get paid in full, this result is inefficient: all other creditors are worse off because they receive nothing; the firm is dismantled which eliminates any possibility to rehabilitation (when the firm is viable) and destroys the ongoing concern value of the firm (which in some cases may be higher tan the liquidation value).

[110] *See* Jagdeep S. Bandhari & Lawrence A. Weiss, Bankruptcy as a Reflection of the Creditors' Implicit Bargain, CORPORATE BANKRUPTCY, ECONOMIC LEGAL PERSPECTIVE, 26 (Jagdeep S. Bandhari & Lawrence A. Weiss eds., 1996).

Nevertheless, the principle of equal treatment among creditors should be flexible when both the bankruptcy estate and all the debtor's creditors are benefited; in other words, it is valid to make an exception to this principle of equal treatment among creditors when the strict use of this principle has detrimental effects on both the debtor and its creditors. From an economic perspective, this is explained in these terms: this rule creates inefficient incentives on the bankruptcy trustee to obtain some benefit for the bankruptcy estate at the expense of the non-debtor, not to say that it creates other inefficiencies besides bankruptcy; this is the reason why bankruptcy law grants a priority position to certain types of claims.[111]

For example, under the American Bankruptcy Code, the claims of tort creditors are in a higher priority position than all other general unsecured creditors. The justification is that tort creditors become creditors of the debtor involuntarily. Thus, these creditors cannot make the debtor internalize the risk of loss, which creates incentives for the debtor to engage in excessively risky activities that reduce the expected value of creditors' claims which is aggravated when the debtor is insolvent and bankruptcy is certain. Moreover, even though the debtor can be forced to take insurance against tort damages, the debtor has incentives to undersecure. Thus, bankruptcy law intends to deter such behavior by granting tort claims an administrative priority s that the debtor internalizes the cost of its activities.

Although equal treatment among creditors is one of the pillars of bankruptcy law, an exception to this principle should be valid on the grounds of efficiency, because in the end the purpose is to align the goals pursued by bankruptcy law with the social of maximization of total value.

It is important to notice that fairness concerns could be mitigated with a procedural solution as it is the case of the Spanish model. The Spanish Insolvency Act mandates that all executory contracts are deemed to be automatically assumed by the bankruptcy estate. By mandating automatic assumption of all contracts, all those parties to executory contracts become creditors of the bankruptcy estate (these creditors are no more prepetition unsecured creditors of the debtor); as a consequence, the non-debtor party is not anymore a prepetition unsecured creditor of the debtor but a post-petition creditor of the bankruptcy estate.

2. *Rehabilitation*

The second objection to a regime for the treatment of the damages claim for rejection that adopts the administrative priority rule is that it hampers reorganization.

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[111] This is what actually Triantis argues in favor of this rule. *See* Triantis, *supra* note 4, at 696-698.

The traditional explanation of the rules on the treatment of executory contracts is that the duty of the bankruptcy trustee is the maximization of the bankruptcy estate. When a firm enters bankruptcy, it is common that some of the contracts remain unperformed and some of these contracts impose a burden to the bankruptcy estate. Because one of the underlying goals in bankruptcy is reorganization of the debtor, it is desirable to allow the bankruptcy trustee to reject those contracts that are unfavorable to the bankruptcy state.

It is regarded as necessary to enable the bankruptcy estate to unburden itself from unfavorable contracts in order to maximize the bankruptcy estate value; once the bankruptcy estate is released from those contracts, the bankruptcy trustee can seek to enter into contracts with third parties in more favorable terms for the bankruptcy estate, and even if the bankruptcy estate does not enter in new contracts with third parties, rejecting burdensome contracts benefits the bankruptcy estate as it releases the bankruptcy estate from loosing some value.

In this sense, reducing the costs of rejection is justified on the basis that it facilitates rejection of burdensome contracts, which in turn facilitates the maximization of the bankruptcy estate value. Conversely, a regime that forces the bankruptcy estate to fully internalize the costs of rejection is regarded as undesirable because it makes it more difficult for the bankruptcy estate to unburden itself from unfavorable contracts due to the asset constraints in bankruptcy.

Notwithstanding, the administrative priority granted to the damages claim for rejection is unlikely to affect the rehabilitation of the debtor, because payment damages claims can be deferred until the reorganization plan is confirmed. In this sense, although the amount of the damages claim for rejection of executory contracts are larger under the expectation damages rule, such claims are paid out at the end of proceeding.[112]

V. Conclusions

This article has examined the main approaches to the treatment of executory contracts used around the world for the treatment of executory contracts in bankruptcy focusing on the ability and incentives of the bankruptcy trustee to reject executory contracts.

After classifying such regimes into three models, this article has described the rules on the treatment of executory contracts under each model. Based on previous studies on executory contracts from an economic perspective, this article has analyzed the incentives that these regimes create ex post for the bankruptcy trustee.

[112] *See* Fried, *supra* note 2, at 446.

This article has demonstrated that the American model, which adopts a regime in which the damages claim for rejection of executory contracts is treated as a general unsecured claim, creates inefficient incentives for the bankruptcy trustee to reject value-creating contracts. As for the German model, this article has shown that it adopts a regime in which the damages claim for rejection is treated as a general unsecured claim, produces the same inefficiencies as those generated by the American model. Last but not least, this article has found that the Spanish model is likely to create the most efficient incentives ex ante and ex post for the debtor and the non-debtor party to make decisions on performance, investment and filing for bankruptcy. Unlike the American and German models, the Spanish model adopts a regime in which the damages claim for rejection enjoys administrative priority which forces the bankruptcy estate to internalize the costs of rejection.

This article has also analyzed several objections to the Spanish model, namely that it is contrary to the principle of equal treatment among creditors and that it hampers rehabilitation of the debtor. This study has concluded that these objections are misplaced and that an exception to the principle of equal treatment should be allowed.

Based on the results of this study, this article argues that the Spanish model is superior to the American and German model and advocates for its consideration as a model for other bankruptcy systems to improve the treatment of executory contracts.

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MINORITY RIGHTS FOR IMMIGRANTS: FROM MULTICULTURALISM TO CIVIC PARTICIPATION

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Abstract: *This article asserts that according to international law, immigrants do have rights as a minority, and in abiding by their international obligations, States are obligated to implement policies that safeguard these rights and, in this way, facilitate the integration of immigrants into the host society. However, there are a number of elements that make the practical enforcement of these rights and the implementation of such policies rather complex. Thus, a series of international law provisions are first reviewed so as to be able to establish the foundations of our views. Secondly, we summarize and analyze the main trends of integration policies in three of the main Western immigration countries: Canada, the United States and the Netherlands, in order to broadly present the actions and results. Lastly, we conclude that immigrant integration projects fail to respect immigrants' rights as a minority and that more effort should be made to comply with the international obligations States have assumed*

Key Words*: Immigrants, multiculturalism, civic participation, human rights, minorities.*

Resumen: *Este artículo sostiene que, de acuerdo con el derecho internacional, los inmigrantes tienen derechos como minoría, y que los Estados, de conformidad con sus obligaciones internacionales, están obligados a implementar políticas que aseguren estos derechos y, en este sentido, faciliten su integración en las sociedades de acogida. Sin embargo, hay un número de elementos que hacen que el cumplimiento práctico de estos derechos y la aplicación de dichas políticas sea compleja. Entonces, primero, se revisa una serie de disposiciones de derecho internacional con el fin de establecer las bases para apoyar nuestras posturas. Segundo, resumimos y analizamos las principales tendencias en las políticas de integración de tres de los países occidentales más importantes de inmigración: Canadá, Estados Unidos y Países Bajos, con el fin de presentar* grosso modo

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las acciones y los resultados. Finalmente, concluimos que los proyectos de integración de los inmigrantes fallan en respetar los derechos de los inmigrantes como minoría y que se deben realizar mayores esfuerzos con el fin de cumplir con las obligaciones internacionales que los Estados han adquirido.

Palabras clave: *Inmigrantes, multiculturalismo, participación cívica, derechos humanos, minorías.*

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I. Introduction

A frequent question is whether immigrants have rights as a minority. However, it should be noted that under the provisions of human rights instruments, States have the obligation to protect the rights of *all* persons subject to or under their jurisdictions. These instruments are drafted in an inclusive language (all, everyone, etc.) and —generally— protect *all* persons without discrimination, regardless of their citizenship or immigration status. Explicit exceptions to this principle relate, *inter alia*, to political rights[1] and freedom of movement,[2] but not to minority rights. Therefore, regardless of their culture,

[1] *See* International Covenant on Civil and Political Rights Article 25, Dec. 16, 1966, GA Res. 2200A (XXI).

[2] *Id.*, Article 12.1.

religion, national original, race, religion, language, ethnic group, or even immigration status, immigrants are all equally entitled as citizens to —most— human rights (with the generally accepted exceptions mentioned above). Thus, in the first section of this article, we will examine certain human rights law provisions regarding minority rights and their application to immigrants.

In the second section, we show that, despite the fact that international law affords minority rights to immigrants, there are a number of elements that make the practical application and enforcement of these rights to immigrants rather complex. For this purpose, we study the experience of three migration receiving countries (Canada, the United States and the Netherlands) and their integration policies. Our aim is to track some of the elements that have influenced and reshaped their immigration integration programs. The cases selected encompass the most representative trends in the world, and the immigration models that several other receiving countries are now trying to implement in an attempt to control, and ultimately establish a selective program so as to attain their objectives of making immigration a cornerstone for population and economic advancement.

II. International Law Standards for Minorities and their Application to Immigrants

1. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*

This Declaration[3] is the main reference document for minority rights. As set out in the resolution and the preamble to the Declaration, its purpose is to promote a more effective implementation of the human rights of persons belonging to minorities. The Declaration is inspired by Article 27 of the International Covenant on Civil and Political Rights, which states that: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".

This article protects the rights of persons belonging to minorities, their national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics they wish to maintain and develop. Although it refers to the rights of minorities in the States in which they exist, its applicability is not subject to a State's official recognition of a minority. States that have ratified the Covenant are obliged to ensure that all individuals under

[3] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, GA Res. 47/135, UN Doc. HR/PUB/10/3, 15.

their jurisdiction enjoy their rights; this may require specific actions to correct inequalities to which minorities are subjected.[4]

Human Rights Committee General Comment Num. 23 (1994) on the rights of minorities provides an authoritative interpretation of Article 27. The Committee states that "this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant."[5] The right under Article 27 is an autonomous one within the Covenant. The Human Rights Committee's interpretation of its scope of application has had the effect of ensuring the recognition of the existence of diverse groups within a State and of the fact that decisions on such recognition are not the province of the State alone. Moreover, that positive measures implemented by States may be "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group."[6]

The beneficiaries of the rights under Article 27 of the International Covenant on Civil and Political Rights, which inspired the Declaration, are persons belonging to "ethnic, religious or linguistic minorities." The Declaration reiterates this assertion, but adds the term "national minorities." To this respect, in 2005 the Working Group on Minorities declared that: "there is hardly any national minority […] that is not also an ethnic or linguistic minority."[7]

The Declaration builds on and adds to the rights contained in the International Bill of Human Rights and other human rights instruments by strengthening and clarifying those rights which make it possible for persons belonging to minorities to preserve and develop their group identity. In particular, the Declaration grants to persons belonging to minorities: State protection of their existence and their national or ethnic, cultural, religious and linguistic identity (Article 1); the right to enjoy their own culture, to profess and practice their own religion, and to use their own language in private and in public (Article 2[1]); the right to participate effectively in cultural, religious, social, economic and public life (Article 2 [2]); the right to participate effectively in decisions which affect them on the national and regional levels (Article 2 [3]); the right to establish and maintain their own associations (Article 2 [4]); the

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[4] *See* A. Buchanan & D. Mathieu, *Philosophy and Justice*, in JUSTICE: VIEWS FROM THE SOCIAL SCIENCES (R. L. Cohen ed., 1986); ODDNY MJÖLL ARNARDÓTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Martinus Nijhoff Publishers; Norwell, MA; Kluwer Law International 2003).

[5] UN Human Rights Committee, *General Comment num. 23: The rights of minorities (Article 27),* UN Doc CCPR/C/21/Rev.1/Add. 5, (1994), par. 1.

[6] *Id.,* para. 2.

[7] UN Commission on Human Rights, *Commentary of the Working Group on Minorities to the United Nations Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities*, UN Doc E/CN.4/Sub.2/AC.5/2005/2, (2005), par. 6.

right to establish and maintain peaceful contacts with other members of their group and with persons belonging to other minorities, both within their own country and across State borders (Article 2 [5]); and the freedom to exercise their rights, individually as well as in community with other members of their group, without discrimination (Article 3).

States must ensure the protection and promotion of the rights of persons belonging to minorities by taking measures to ensure that they may fully and effectively exercise all their human rights and fundamental freedoms without any discrimination and in full equality before the law (Article 4 [1]); create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs (Article 4 [2]); allow these persons adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (Article 4 [3]); encourage knowledge of the history, traditions, language and culture of minorities existing within their territory and ensure that members of such minorities have adequate opportunities to gain knowledge of the society as a whole (Article 4 [4]); allow their participation in economic progress and development (Article 4[5]); consider the legitimate interests of minorities in developing and implementing national policies and programs, and international programs of cooperation and assistance (Article 5); cooperate with other States on issues regarding minorities, including exchanging information and experiences, to promote mutual understanding and confidence (Article 6); promote respect for the rights set forth in the Declaration (Article 7); fulfill the obligations and commitments States have assumed under international treaties and agreements to which they are parties (Article 8 [1[). Finally, the specialized agencies and other organizations of the United Nations system shall also contribute to the realization of the rights set forth in the Declaration (Article 9).

2. *Other Instruments*

The *International Covenant on Economic, Social and Cultural Rights*[8] establishes the principle of non-discrimination, stating that: "the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to *race*, color, sex, *language, religion*, political or other opinion, *national* or social origin, property, birth or other status." In this respect, General Comment num. 14 (2000) of the Committee on Economic, Social and Cultural Rights, on the right to the highest attainable standard of health, explains that health facilities, goods and services must be within safe physical reach for all sections of the population,

[8] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, GA Res. 2200A (XXI), article 2.2.

especially vulnerable or marginalized groups, including ethnic minorities.[9] Furthermore, all health facilities, goods and services must be culturally appropriate, for instance respectful of the culture of minorities. In this sense, the Committee says that: "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including […] *minorities*, to preventive, curative and palliative health services."[10]

Similarly, the *International Convention on the Elimination of all Forms of Racial Discrimination*[11] defines "discrimination" as "any distinction, exclusion, restriction or preference based on *race*, color, descent, or *national* or *ethnic* origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." That is, it prohibits any exclusion of human rights based on race, national or ethnic origin (among others), thus protecting minorities in which immigrants are included.

The *Convention on the Rights of the Child*[12] provides that "in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language." In other words, the convention protects children belonging to minorities and their rights to practice and enjoy their group's religion, language and culture.

The *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families*[13] defines the principle of non-discrimination in the following terms: "the present Convention is applicable […] to all migrant workers and members of their families without distinction of any kind such as sex, *race*, color, *language*, *religion* or conviction, political or other opinion, national, *ethnic* or social origin, *nationality*, age, economic position, property, marital status, birth or other status." That is, it prohibits any exclusion of human rights based on the reasons mentioned above. Additionally, Article 31 protects the cultural identity of all migrant workers and their families on stipulating that: "States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin."

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[9] UN Committee on Economic, Social and Cultural Rights, *General comment num. 14 on the right to the highest attainable standard of health*, UN Doc E/C.12/2000/4, (2000), par. 12.

[10] *Id.*, par. 34.

[11] International Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, GA Res. 2106 (XX), article 1.

[12] Convention on the Rights of the Child, Nov. 20, 1989, GA Res. 44/25, article 30.

[13] International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Dec. 18, 1990, GA Res. 45/158, article 1.

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[14] state that restitution to the victim includes, as appropriate: "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." This principle could be broadly interpreted as to include the right to have one's status as indigenous person or person belonging to a minority restored, in particular where this is provided for under national legislation and if such status is lost as a consequence of displacement.

The *Convention on the Prevention and Punishment of the Crime of Genocide*[15] is a legal source referred to in the United Nations Minorities Declaration for protecting the rights of minorities as it protects groups, including minorities, and their right to physical existence. It defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a *national*, *ethnical*, *racial* or *religious* group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

The *Rome Statute of the International Criminal Court*[16] provides for the prosecution of cases that encompass not only the crime of genocide but also crimes against humanity, in which forced population transfers intended to move persons belonging to minorities away from the territory on which they live (or with that effect) is included.

The *ILO Discrimination (Employment and Occupation) Convention (Num. 111)*[17] requires States to adopt and implement national policies to promote and ensure equality of opportunity and treatment in employment and occupation, with a view to eliminating direct and indirect discrimination on grounds of race, color, sex, religion, political opinion, national extraction or social origin. These national policies must address discrimination and promote equality, in law and in practice, regarding access to education and training, employment

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[14] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Dec. 16, 2005, GA Res. 60/147.

[15] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, GA Res. 260 A (III), article 2.

[16] Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9*, article 7.

[17] ILO Discrimination (Employment and Occupation) Convention, 1958 (num. 111), Jun. 25, 1958, articles 1-2.

services, recruitment, access to particular occupations, as well as terms and conditions of employment.

The *ILO Declaration on Fundamental Principles and Rights at Work*[18] provides that all members of the Organization have an obligation to respect, promote and realize the fundamental principles and rights at work ("core labor standards.") These include the principle of non-discrimination in employment and occupation, freedom of association and the right to collective bargaining, and the elimination of forced and compulsory labor, as well as child labor. The enjoyment of equality of opportunity and the treatment of minorities are monitored under this Declaration.

The *Convention for the Safeguarding of the Intangible Cultural Heritage*[19] provides safeguards and promotes the practices, representations, expressions, knowledge, skills —as well as the associated instruments, objects, artefacts and cultural spaces— that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. For this purpose, the Convention establishes a fund and a listing system of the heritage that is representative and in danger.

The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*[20] encourages States to incorporate culture as a strategic element in national and international development policies and to adopt measures aimed at protecting and promoting the diversity of cultural expressions within their territory. It emphasizes the importance of the recognition of equal dignity and respect for all cultures, including that of persons belonging to minorities, and of the freedom to create, produce, disseminate, distribute and have access to traditional cultural expressions, and asks States to endeavor to create environments conducive thereto.

In addition, several regional human rights treaties include provisions that can be invoked to advance minority rights. The Council of Europe's Framework Convention for the Protection of National Minorities contains particularly detailed provisions on minority rights in various fields.

3. *Minority Rights for Immigrants*

By bearing or adhering to a distinct ethnicity, race, or religion, immigrants constitute a minority group in the society into which they move,[21] and they should be afforded the corresponding rights, in community with the other

[18] ILO Declaration on Fundamental Principles and Rights at Work, Jun. 18, 1998.

[19] Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, Articles 25-28.

[20] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005.

[21] *See* Christian Joppke, *Minority Rights for Immigrants? Multiculturalism versus Antidiscrimination*, 43 Isr. Law Rev, (2010).

members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[22] However, the application of minority international standards to this group is not as clear as one would think. Part of this difficulty derives from the absence of a definition of "minority." Actually, the controversy on the definition of this concept over the years prompted some scholars to doubt the relevance of having any such definition.[23] On the contrary, other scholars took a different position on the issue arguing that the proper application of the international standards on minority rights requires a clear conceptualization of the notion of minority.[24] However, the official position of the UN supports the first opinion. The Working Group established to draft the Declaration stated that: "the Declaration could function perfectly well without precisely defining the term as it was clear […] to which groups the term referred to in concrete cases."[25]

Because of the lack of a widely accepted definition, some scholars maintain that the term 'minority' applies only to nationals of a State for the reason that non-nationals are protected by customary international law.[26] However, it is not well defined why their application should be limited to nationals only. The formulation of Article 27 of the ICCPR does actually not make a distinction between nationals and foreigners. What it requires is that State Parties refrain from denying minorities the right to enjoy their culture, to profess their religion or to use their own language.[27] In addition, the grammatical interpretation of the article suggests that the reference to "persons" as opposed to "nationals" or "citizens," as in Article 25 of the ICCPR (political rights), is meant to apply both to nationals and non-nationals.[28] Finally, systematic reading of the text of the ICCPR also leads to the same conclusion. As a general rule, under Article 2 States Parties to ICCPR are obliged to guaran-

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[22] *See* International Covenant on Civil and Political Rights article 25, Dec. 16, 1966, GA Res. 2200A (XXI), Article 27.

[23] *See* P. Thornberry, International law and the rights of minorities (Clarendon Press, 1991); H. Hannum, *Contemporary developments in the international protection of the rights of minorities*, 66 Notre Dame Law Rev., (1991); G. Alfredsson & A. De Zayas, *Minority rights: Protection by the United Nations*, 14 HRLJ 1-2, (1993); Francesco Capotorti, Study on the rights of persons belonging to ethnic, religious, and linguistic minorities, (UN 1991).

[24] *See* M. N. Shaw, *The definition of minorities in international law*, 20 IYHR, (1991); M. Nowak, UN Covenant on Civil and Political Rights. CCPR Commentary (Engel, 1993); J. Packer, *On the content of minority rights*, in Do we need minority rights?-Conceptual Issues (J. Räikkä ed., 1996).

[25] UN Commission on Human Rights, *Report of the Working Group on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/1991/53 (5 March 1991), par. 9.

[26] Francesco Capotorti, *supra* note 23.

[27] UN Human Rights Committee, *General Comment num. 23: The rights of minorities (Article 27)*, UN Doc CCPR/C/21/Rev.1/Add.5, (1994), par. 5.2.

[28] M. Nowak, UN Covenant on Civil and Political Rights. CCPR Commentary 489 (Engel, 1993).

tee the rights in the ICCPR to all persons under their jurisdiction without distinction as to, inter alia, nationality. Exceptions to this rule must be made expressly as in the case of Article 13 (only for aliens) and Article 25 (only for citizens). In the absence of such express special provision, all rights under the Covenant, including those under Article 27, are available to non-nationals in as much as to nationals. This is also the interpretation of the Human Rights Committee that in its General Comment No. 23 says that: persons who are not citizens of the country in which they reside can form part of or belong to a minority in that country.[29]

Regarding this issue, the Working Group on Minorities affirmed that: "citizenship as such should not be a distinguishing criterion that excludes some persons or groups from enjoying minority rights under the Declaration."[30] However, it also said that other factors can be relevant in distinguishing between the rights that can be demanded by different minorities, *i. e.*, "«old» minorities have stronger entitlements than the «new.»"[31] Along this line, there are some scholars who wish to limit the application of minority rights to groups with established ties with the State. For example, Nowak maintains that immigrants, including migrant workers, can be able to claim the protection of Article 27, but only after a certain (long) period of residency in the State.[32] And Thornberry criticizes the Human Rights Committee position in that even visitors are entitled to the rights under Article 27.[33] Nevertheless, as far as the narrowly defined basic minority rights are concerned, it is not clear why, as the Human Rights Committee observed, migrant workers or even visitors to a State Party constituting minority groups should be denied the rights to enjoy their culture, to profess their religion and to use their own language.[34] It is not therefore appropriate to generally conclude that the concept minority ordinarily exclude non-nationals.

In practice, under international law, certain minority rights have been made applicable to recently arrived migrants who share an ethnic, religious or linguistic identity. Their treatment is to be rooted in the customary international law principle of non-discrimination, which is fundamental in international law and is reflected in all human rights instruments and documents. Indeed, the

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[29] UN Human Rights Committee, *General Comment num. 23: The rights of minorities (Art. 27),* UN Doc CCPR/C/21/Rev.1/Add.5, (1994), par. 5.1, 5.2.

[30] UN Commission on Human Rights, *Commentary of the Working Group on Minorities to the United Nations Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities*, UN Doc E/CN.4/Sub.2/AC.5/2005/2, (2005), par. 10.

[31] *Id.*, par. 11.

[32] M. Nowak, *supra* note 28.

[33] P. Thornberry, *The UN Declaration on the rights of Persons Belonging to National or Ethnic, religious and Linguistic Minorities: Background, analysis, observations and an update*, in Universal minority rights 32 (A. Phillips & A. Rosas eds., 1995).

[34] UN Human Rights Committee, *General Comment num. 23 (50) (article 27),* UN Doc CCPR/C/21/Rev.1/Add.5, (1994).

right not to be discriminated against is guaranteed under several instruments of universal acceptance (as the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights) and others of direct relevance to minorities, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention relating to the Status of Stateless Persons, the Convention relating to the Status of Refugees, and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

In sum, it can be said that minority rights are applicable to immigrants, not only because they are not explicitly excluded from their protection, but also because the Declaration and the Covenant are inspired by the principles of universality and non-discrimination, as well as the rest of the human rights covenants. In international human rights law, the primary concern is the protection and promotion of universal human rights. These rights —which include minority rights— are entitlements that pertain to all human beings at all times irrespective of their particular circumstance, such as the nationality in the case of immigrants. Human rights are inherent in human nature and thus constitute "the birthrights of all human beings."[35] That is the reason why human rights are normally cast in universal terms entitling all human beings to the same rights and protections. The terms used in proclaiming human rights in international instruments such as "all human beings," "everyone," "no one" bespeaks the universal character of human rights.

III. Immigrants' Integration Models: from Multiculturalism to Civic Participation

In this section we will analyze the immigrants' integration models of Canada, the Netherlands and the United States, as they most clearly illustrate the different positions that integration programs have assumed, *i. e.*, multiculturalism, state liberal integrationism, and civic integration (or participation). The approach of this section is in the form of "historical institutionalism,"[36] integrating sociological insights of political aspects present in the societies of the countries mentioned above over time. The analysis takes place within a liberal democratic framework as democratic-egalitarian ideals are strongly held and incorporated in the immigrant integration projects of these nations. The analysis is limited to a timeframe that dates back to the end of the Second World War, as it is considered that immigration programs were more in-

[35] UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, (12 July 1993).

[36] T. Skocpol, *Why I Am an Historical Institutionalist*, 28 Polity 1, (1995).

stitutionalized and enforced at that time when "modern" nation-States began to formally establish themselves.[37]

The policies and orientation of immigration measures in the post-war period are characterized as being "broadly if imperfectly inclusive."[38] The human rights influence on legal national and international regimes and discourses, "extended rights from national citizens to all 'persons' irrespective of citizenship."[39] For some countries these principles still stand as core elements of immigration and integration projects. Nevertheless, the presence of ethnic, cultural, and political elements (namely nationalisms) make immigration a matter of ethnic and cultural identities and citizenship. Additionally, while low-skilled labor still is economically required by a group of countries, so as to supply their services and unskilled labor markets, the irregular influx of immigrants that fill such market gaps has turned immigration into a political, social, and identitarian issue that strongly contends and emphasizes the provision of rights. Finally, due to a status-based conception of rights and recognition provision from the part of the State, citizenship has become the gold standard and ultimate objective for immigrants to achieve as:

> In Most Countries some set of rights and benefits are reserved to people who possess that country's citizenship status. This means that individuals who lack citizenship status (who are designated by law as "aliens") are denied the full enjoyment of social, political, and civil rights in the receiving society, at least for some period. People differ on the question of how accessible citizenship status should be in the first instance, but most agree that, once acquired, possession of citizenship status should be legally consequential for some purposes.[40]

Here, the extensive/inclusive nature of national (and international) post-war legal regimes comes into play so as to provide non-citizens with "important procedural rights that serve to constrain state power over them […]."[41] Such protection is in no way equal, substantial and/or always available to all classes of immigrants, as there are various categorizations that differ in the rights that they convey. The most common instance in which immigrants are

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[37] *See* Irene Bloemraad, Becoming a citizen: Incorporating immigrants and refugees in the United States and Canada (University of California Press 2006); Stephen Castles & Mark J. Miller, The age of migration: international population movements in the modern world (Palgrave Macmillan 2009); J. F. I. Klaver & A. W. M. Odé, Civic Integration and Modern Citizenship: The Netherlands in Perspective (Europa Law Pub, 2009).

[38] Gary Freeman, *Incorporating Immigrants in Liberal Democracies*, 03-09 CMD Working Paper 3, (2003).

[39] Christian Joppke, *Immigrants and Civic Integration in Western Europe*, in Belonging? Diversity, Recognition and Shared Citizenship in Canada 3 (K. Banting *et al.*, eds., 2007).

[40] Linda S. Bosniak, *Being here: Ethical Territoriality and the Rights of Immigrants*, 8 Theoretical Inq L 2, 37 (2007).

[41] *Id.*, 34.

deprived of rights is when they are deemed criminals due to irregular immigration status. The criminalization of immigrants is a phenomenon that has evolved from a civil or administrative matter to a penal one as more and more of immigrants' activities and/or forms of entering and residing in the receiving countries have been defined as (aggravated) felonies.[42]

A variety of issues emerge here since immigrants' rights depend on their status, *i. e*. citizenship (or the different gradients of it) or immigration status. As Bosniak acknowledges, there are ongoing discussions about important aspects of citizenship:

> In addition to issues involving the allocation and distribution of status citizenship, scholars have devoted substantial attention to questions about the legal significance of the status. The inquiry here is what, exactly possession or lack of possession of citizenship status should rightfully entail within a national society. Because citizenship is an exclusive status, and because in most States foreigners enter the territory in status short of citizenship, the question arises as to how those without citizenship status should be treated. To what extent should enjoyment of basic rights depend on being a status citizen, and to what extent should it depend on the fact that personhood and territorial presence alone?[43]

Citizenship, and the many variants it may present, seems to be at the core of the discussion about the incorporation of immigrants. However, as an often indistinguishable feature amongst immigrants and other members of society, it is not the purpose of this section to articulate in depth the constraints and benefits citizenship represents, but rather to focus on the programs and policies implemented by liberal democratic governments in order to integrate immigrants to their societies, and ultimately make them citizens who fully enjoy and practice their social, political and civil rights.

1. *Multiculturalism*

There are different approaches found in academic literature that define what multiculturalism is in contextual terms, namely accommodation/toler-

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[42] *See* Bill Ong Hing, *Immigrant as Criminal: Punishing Dreamers*, 9 Hastings Women's L.J. 1, (1998); Daniel Kanstroom, *Immigration Law as Social Control: How Many People Does it take to Make you Feel Secure?*, in Civil Penalties, Social Consequences (C. Mele & T.A. Miller eds., 2005); T. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 Georget Immgr Law J. 4, (2003); J. Simon, Governing through crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (Oxford University Press, 2007); J. A. Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 1 *Journal of Social and Ecological Boundaries* 2, (2005).

[43] Linda S. Bosniak, *supra* note 40.

ance of differences. However, very few state a definition that can be used as a cohesive one, be it for research purposes or policy making and implementation. Kymlicka states that multiculturalism means "Canada's approach to the accommodation of groups formed by immigration."[44] In a more comprehensive political context, multiculturalism reflects the longer experience settler societies have had "with an intentional strategy of diversity planning and management of nation-building within which immigration is a fundamental cornerstone."[45] Both the United States and Canada share this strategy, as they also share common British roots. Notwithstanding, their trajectories departed along the way, making each country's national project[46] differ due to the categories and principles they are based upon.

A. *Canadian Multiculturalism*

The conformation of the Canadian nation is the result of some "polite revolts against British tutelage"[47] that, through a series of Naturalization Acts and imperial statutes, determined the routes to citizenship in Canada. There was, however, room for discretionary practices in the granting of naturalization, which allowed for a variety of membership classes. In the post-World War II era, some political and legislative measures were taken in order to make membership in Canada more equitable and as a means to assert its sovereignty and national identity.[48] The latter combined with the emergent discussions on cultural relativism and ethnocentric notions and the American Civil Rights movements at the end of 1950s and early 1960s. "As a result of all this, by the mid-1950s the idea of assimilation was replaced in official government thinking by the notion of integration in which some recognition of the cultural identity of immigrants was seen as beneficial in creating national unity."[49] Nonetheless, British culture was dominant in Canada and its immigration practices excluded non-European immigrants. This situation

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[44] William Kymlicka, Finding our way: rethinking ethnocultural relations in Canada 8 (Oxford University Press, 2004).

[45] D. Ley, *Multiculturalism: A Canadian Defense*, 07-04 MBC Working paper, 3 (2007).

[46] We use the concept of "national project" with some reserve, as there is an ongoing discussion where Joppke (2007) asserts that multiculturalism, or any other integration project may not refer to nation-building projects as the global and strategic mobility and malleability of borders do not allow us to talk about nations anymore. Such position is contended by authors such as Jacobs and Rea (2007), who think that the nation-state still remains as a category, and an empirical legal, social, political and economic reality. *See* Christian Joppke, *Beyond national models: Civic integration policies for immigrants in Western Europe*, 30 West Eur Polit 1, (2007); D. Jacobs & A. Rea, *The end of national models? Integration courses and citizenship trajectories in Europe*, 9 IJMS 2, (2007).

[47] Irene Bloemraad, *supra* note 37.

[48] *Id*.

[49] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

allowed the assumption that newcomers' assimilation into "Canada's culture' would not present a challenge as they were «culturally homogeneous.»"[50] Differences, whether formally recognized, were not welcomed.

By early 1970s Canada introduced the concept of multiculturalism. Although it was, to some extent, an unintended consequence of the 1960s clashes between Anglo and Francophone populations, which —in the process of accommodating their demands— made evident that "citizens outside these «charter groups» accounted for 25 per cent of the national population and immigration trends [...]."[51] Thus, policies and new governmental orientation had to further meet the needs of non-British European immigrant groups and their descendants.[52] Policies for the sake of politics were closer to meet.

From then onwards, multiculturalism was set as a public policy in Canada, granting State action to enforce the protection of equal rights for minorities.[53] This can be illustrated by the various pieces of legislation that were passed and *are* at the core of the Canadian immigration system. One of the cornerstones of the more universalistic and liberal policies implemented was the Canadian Bill of Rights in 1960 where "discrimination based on race, color, national origin, religion, or sex was rejected."[54] In 1967, a point system that supported the assumed non-discriminatory policy of the 1960 Bill was introduced.[55]

Currently, Canadian immigration system follows three main objectives: "to reunite families, to fulfil the country's international obligations and humanitarian tradition with respect to refugees, and to foster a strong and viable economy in all regions of Canada."[56] The provision of rights to immigrants is built upon a territorial based standing, as all provisions in the 1982 Canadian Charter of Rights and Freedoms "[w]ith the exception of the right to vote, some mobility rights and minority language education rights [...] apply to any person within Canada, meaning that also non-citizens are guaranteed these fundamental civic and political citizenship rights."[57]

Canada's multiculturalism strives for instituting a Canadian citizenship over diverse national identities in order to keep democratic liberal values at the core of societal and identitarian practices. Specific cultural features

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[50] Irene Bloemraad, *supra* note 37; Stephen Castles & Mark J. Miller, *supra* note 37; J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[51] D. Ley, *Multiculturalism: A Canadian Defense*, 07-04 MBC Working paper, 4 (2007).

[52] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[53] Stephen Castles & Mark J. Miller, *supra* note 37.

[54] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[55] The neutrality of this points system has been contended, as it is a form of selection that has as an underlying principle of exclusion. For further discussion on the topic see: J. F. I. Klaver & A. W. M. Odé, *supra* note 37; A. Simmons, Immigration and Canada: Global and Transnational Perspectives (Canadian Scholars' Press, 2010).

[56] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[57] *Id*, 142.

are preferred as private or diversity and "artistic" (folkloric) practices. In this sense, integration to mainstream society implies a quasi-acculturation, or as Joppke calls it "de-ethnicization."[58] On top of the latter, language has been a major barrier for immigrants' incorporation to the labor market as the point system for selection in place only requires minimum conversational skills that may not be suitable for work environments.[59] Credentialization is another major issue in the participation of immigrants in the workforce as Canada and the countries of origin (emerging economies for the most) have different educational systems —incommensurable according to Canada's standards— which precludes immigrants from taking positions they are certified for back in their countries and profit from it economically or for status improvement.[60] Lastly, family reunification -as the main category of immigration- means a gap in Canada's selection point system, as the qualifications of family members are not as strictly enforced as they are with the main immigrant member.[61] Thus, in spite of Canada's best efforts, *i. e*. involvement, support, sponsorship and implementation and enforcement of policies, the integration of immigrants has not reached the desired levels.

B. *US Multiculturalism*

American citizenship is the result of its revolution of independence. At that point in time, many of the shared characteristics with Canada parted different ways, and membership (and its restrictions) legitimized the "new State."[62] In the case of the United States, restrictions seem more consequential for the analysis, as from the beginning:

> American citizenship contained important limits to its inclusive vision […] [C]itizenship in the United States had a strong tendency to "ascriptive Americanism:" legal statutes, judicial decisions, and legislative debates 'manifested passionate beliefs that America was by rights a white nation, a Protestant nation, a nations in which true Americans were native-born men with Anglo-Saxon ancestors.[63]

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[58] Christian Joppke, *Citizenship between De- and Re-Ethnicization*, 44 Arch Eur Sociol, (2003).

[59] J. F. I. Klaver & A. W. M. Odé, Civic Integration and Modern Citizenship: The Netherlands in Perspective 142 (Europa Law Pub, 2009).

[60] Irene Bloemraad, *supra* note 37; Stephen Castles & Mark J. Miller, *supra* note 37; J. F. I. Klaver & A. W. M. Odé, *supra* note 37; A. Simmons, *supra* note 55.

[61] Stephen Castles & Mark J. Miller, *supra* note 37; J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[62] Irene Bloemraad, *supra* note 37.

[63] *Id.*, 21.

Citizenship in the United States has always been closely linked to migration, and strongly limited by race. Thus, a series of policies and laws have regulated immigrants since its independence. In spite of that, it was not until after the World War II that the country saw the consolidation of "previous immigration laws into a statute which is still the foundation of immigration law today."[64] This piece of legislation is the Immigration and Nationality Act of 1952 (INA). In the Act, as in the pre- and post-immigration Acts, a key characteristic is its reactiveness, *i. e.* "immigration policy in the United States history evolved as a response to a series of crisis, each prompting a redefinition of the qualifications for membership and an elaboration of the instruments to further restrict new immigration."[65] A quota system was first implemented and Western European immigration was privileged over other nationalities. This policy was first passed in 1921, but was abolished in 1965. Such change responded to unfavorable (and unwanted) consequences of the visa quotas allocation numbers that eventually allowed the entrance of a large number of Asians, and increased unauthorized Mexican migration "changing the face of America."[66] The features of the population started to change along the lines of these groups of immigrants and their descendants, prompting a new policy response by the mid-1980s. In 1986, the Immigrant Responsibility and Control Act (IRCA) was passed. It emphasized measures for restricting the entrance of irregular immigrants which included sanctions to employers, the legalization of a large number of irregular immigrants and the implementation of "a far reaching anti-discrimination provision, prohibiting employment discrimination on the basis of citizenship."[67] Hardly any of the enforcement objectives were reached, but up to three million immigrants regularized their status.

Irregular immigration to the United States became a major socio-political concern as economy fluctuated. In 1996, the government tried to tackle the increasing numbers of immigrants by passing the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The United States government took a number of additional measures in order to discourage, control, and punish irregular migrants, but these measures and policies relate to the penal system. Importantly, the immigration system and the penal systems have collided so as to result in what Stumpf[68] has called *crimmigration*.[69] In

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[64] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[65] *Id*.

[66] Bill Ong Hing, Deporting Our Souls: Values, Morality, and Immigration Policy (Cambridge University Press 2006); P. L. Martin, *The United States: The Continuing Immigration Debate*, in Controlling Immigration: A Global Perspective (Wayne A. Cornelius et. al. eds., 2004).

[67] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[68] Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am U L Rev., (2006).

[69] For more on Crimmigration, *see* Bill Ong Hing, *supra* note 42; Daniel Kanstroom,

counter position, the United States government is not focused on implementing policies that improve immigrants' integration. As Klaver and Odé assert:

> Nowadays, the reluctance of federal governments in the US to deal with social and collective problems has become highly apparent in the scanty public support for the development of a welfare state. McCluskey (2003) concludes that this is related to the liberal and neo-liberal ideological dominance in the US, and the belief that social well-being flows from an unimpeded private pursuit of individual preferences and interests, rather than from government enforcement of moral ideals [...] emphasis on individual contract and property rights in the American tradition relegates other relations to a less esteemed status and restricts the emergence of alternative social citizenship rights.[70]

This is US *political multiculturalism*.[71] It is based on racial differentiation and as a result, hyphenated citizenships (namely Mexican-American) as parts of the identity of individuals that only represent a shade of the black-white color continuum, *i. e*. brown, when related to the public political arena. This element facilitates or precludes integration and/or incorporation of immigrants to certain spheres of the public and private sectors. The case of the United States shows that liberal democratic States that limit their participation in the integration of immigrants grant a 'thin citizenship', *i. e*., "citizenship-as-status-«mere status.»"[72]

Nevertheless, United States constitutional rights theoretically apply to all immigrants, citizens and non-citizens, including —to a certain extent— irregular immigrants. The reach of the protection depends upon duration of residence, and legal status, but some basic civil rights are granted to irregular immigrants, as they would be with citizens.[73] It is necessary to bring to the fore the fact that United States government provides some support (*i. e*. material assistance) to refugees, making them less prone to vulnerability. Immigrants who only hold a race-based economic citizenship (or are irregular) in the United States do not have access to this type of assistance.[74]

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supra note 42; T. Miller, supra note 42; J. Simon, Governing through crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (Oxford University Press, 2007); J. A. Warner, *supra* note 42.

70 J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

71 Irene Bloemraad, *supra* note 37.

72 Linda S. Bosniak, *supra* note 40.

73 J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

74 Irene Bloemraad, *supra* note 37.

2. *Civic Integration and Citizenship Trajectories*

As we have seen so far, immigration policies and immigrants' integration to new societies poses a series of challenges for governments, as they try to attain specific objectives that for the most, rely on immigration "as a tool for population and economic expansion."[75] However, integration has become a very unstable ground in Europe as "the meaning and practice of multiculturalism in Western Europe is a unifying sense of unease, and periodic crisis in assessing the failure of immigrant and refugee inclusion."[76] Thus, some countries that used to be oriented and committed to the integration of immigrants into their societies have now steered away from multiculturalism and cultural pluralism policies in order to get closer to their integration objectives. The new formats for integration require immigrants to actively participate in their own immersion into the culture, language and labor market of the receiving country. There is, as a result, a "citizenship trajectory"[77] they must complete in order to be able to fully access the rights and benefits citizenship implies.

The Netherlands is one of these countries and is now implementing a new model for integration that in essence opposes multiculturalism. As it is now, the Dutch system is considered the most coercive immigration system,[78] one that is not only enforced territorially, but has expanded its boundaries (read barriers) extra-territorially.[79]

The Dutch Civic Participation Integration Program

The Dutch immigration system was less complex in the past, as Vink asserts:

> For most of the post-war period, no explicit government policy existed in the Netherlands to deal comprehensively with the legal status and social integration of these newcomers. The main reason for this tacit approach was that repatriates from former colonies, apart from an emergent need for housing upon their arrival, were assumed to have no difficulties with integration in Dutch society, and "guest workers" were

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[75] *Id.*, 18.

[76] D. Ley, *Multiculturalism: A Canadian Defense*, 07-04 MBC Working paper, 3 (2007).

[77] We borrow the term from Jacobs and Rea (2007) in their discussion of integration courses and "other stages", *i. e.* citizenship trajectories, to attain citizenship. *See* D. Jacobs & A. Rea, *The end of national models? Integration courses and citizenship trajectories in Europe*, 9 IJMS 2, (2007).

[78] Irene Bloemraad, *supra* note 37; J. F. I. Klaver & A. W. M. Odé, *supra* note 37; M. P. Vink, *Dutch 'multiculturalism' beyond the pillarisation myth*, 5 Polit. Stud. Rev 3, (2007).

[79] Irene Bloemraad, *supra* note 37; Christian Joppke, *Minority Rights for Immigrants? Multiculturalism versus Antidiscrimination*, 43 Isr. Law Rev, (2010).

> assumed to return to their countries of origin after a few years working in the Netherlands. This resulted in a rather *ad hoc* way of dealing with immigrants.[80]

However, by 1979, several Dutch institutional reports came up to the conclusion that the government had to come to terms with the fact that it had become an immigration country. As a result, in 1983 a new minorities policy was implemented (the 1983 Minorities Memorandum) whose approach "included a number of general provisions that related specifically to the legal status of immigrants, most notably with regard to political participation and citizenship status."[81] The Dutch government held a tolerant position when it referred to dual citizenship so that the number of naturalizations and (assumedly) integrations would rise. This position coupled with the 1994 Equal Treatment Act —that targeted the educational and labor spheres— and the 1998 Act for Stimulation of Labour Market, with the intent of offering immigrants more proportionate access in order to improve their legal and socioeconomic statuses. The social aspect of such policies is an important feature to underline because it focused on "promoting the emancipation of ethnic communities in a broader social and cultural sense."[82]

Notwithstanding, the different policies implemented by the Dutch government to ameliorate the effects of migration for specific ethnic (minority) groups, namely Turks and Moroccans:

> [r]ather [were] pragmatic strateg[ies] aimed at preparing guest workers for return to their countries of origin, which would be facilitated by integrating foreign workers as little as possible into their temporary host society. Later on, when the idea of guest workers returning to their countries of origin became an increasingly unlikely scenario, the government's "ethnic minority" policy consisted indeed of a group-based approach to immigrants, but only for certain groups, and always in a strictly top-down, even condescending manner. Minority organizations needed to be supported in order to provide the government with clearly identifiable and hopefully, representative discussion partners. The process has been aptly coined as the "minorization of minorities."[83]

Nowadays, the Netherlands —followed by several other Western European nations— has implemented the so-called 'civic integration' policies for targeted immigrant groups. Some of the measures taken for the civic integration of such groups include, but are not limited to: *a*) overseas integra-

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[80] M. P. Vink, *Dutch 'multiculturalism' beyond the pillarisation myth*, 5 Polit. Stud. Rev 3, 340 (2007).

[81] *Id.*

[82] *Id.*, 341.

[83] M. P. Vink, *supra* note 80.

tion testing; *b*) civic integration exams for foreign nationals that, if failed, entail fines, differential access to welfare services and the conditioning of a secure residence status.[84] Only those immigrants who are expected to settle are obliged to participate in this program, but as stated, it is not open to voluntary participation.

3. *Lessons learned*

The United States case shows us that the State has transcended the social-welfare State to become a "post-social State," as Inda recognizes, one that is subjecting the individuals and associations in its territory to become their own risk managers. Individuals, companies, institutions, and the like are to manage their well-being and functioning.[85] This entails what Rose[86] calls "ethopolitics," *i. e.*, the transformation of citizens, and inhabitants of the United States into "ethical/moral" individuals that conform to these new requirements. If we assume that this simply represents an adaption to new economic orientations, then we have to consider, as Inda suggests us to do, that "the figure of the prudential subject needs to be understood in relation to the antipode: the oft-racialized anti-citizen unable or reluctant to exercise responsible self-government" since "what the responsibilizing imperatives of contemporary government have done is created a realm of abjection […] in other words have produced a division between active citizens and anti-prudential, unethical subjects […] the truly disadvantaged."[87]

The Netherlands has gone from a multicultural to a civic participation project. This shift from more amicable policies to almost zero tolerance may respond, nonetheless, to the assumption that government promotion of multiculturalism retards immigrants integration: "the more the social and political institutions of the host society accept and recognize ethnic differences, the less likely are immigrants to experience pressure, either formally or informally, to file for citizenship [...]."[88] This may well be the case of Canada, where even a shift to give more leverage to human capital for immigration has not allowed the incorporation of immigrants to the labor markets.[89] In a true

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[84] J. F. I. Klaver & A. W. M. Odé, *supra* note 37.

[85] Jonathan Xavier Inda, Targeting Immigrants: Government, Technology, and Ethics (Wiley-Blackwell 2006).

[86] N. Rose, *Community, Citizenship, and the third Way*, 43 Am. Behav. Sci 9, (2000).

[87] For more on this new orientation of neo-liberal governments, new prudentialism, and ethopolitics. *See* Jonathan Xavier Inda, *supra* note 85; N. Rose, *Community, Citizenship, and the third Way*, 43 Am. Behav. Sci 9, (2000).

[88] Irene Bloemraad, *supra* note 37.

[89] "Recent immigrant groups are much more likely to experience unemployment [...] 11 percent [...] A number of recent studies have found a considerable and sustained income difference between newcomers and the Canadian-born population [...] Equally disturbing,

sense, immigrants in the Netherlands are expected to become independent at the time of arrival, and those who are already there and are not able to do so are subjected to different forms of punishment.[90]

It is at this point that revisiting one of the best-illustrated and empirically proven theories about immigration becomes pertinent. Portes and Rambaut stated that besides individuals' characteristics, namely age, education, occupational skills, wealth, and language proficiency, "the social environment that receives [immigrants], including the policies of the host government, the attitudes of the native population, and the presence and size of a co-ethnic community" are crucial to immigrants.[91] If it is so, the transmutation of the Dutch immigration system raises the question of the underlying motifs.

A simplified justification would be the objective of a full integration of newcomers, as has been mentioned, but more complex explanations have risen so that some of the most recent measures taken by the Netherlands even suggest to some authors that there is a "low intensity ethnic cleansing" behind such programs,[92] or at least an intent for the "de-ethnicization" of immigrants and the "re-ethnicization" of Dutch citizens abroad so as to culturally homogenize the citizenry of the country.[93] The explanatory power of such propositions is out of the reach and aim of this article, but it seems important to at least put them forward as food for thought.

International human rights norms can empower citizens in democracies by creating new vocabularies for claim-making, as well as by opening new channels of mobilization for civil society actors who then become part of transnational networks of rights activism and hegemonic resistance (Keck and Sikkink, 1998). Human rights norms must become elements in the public culture of democratic peoples through their own processes of interpretation, articulation, and iteration.[94]

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however, is the grown incidence of poverty among immigrant in Canada's largest cities." *See* B. Ray, *Canada: Policy Changes and Integration Challenges in an increasingly Diverse Society*, MPI Country profiles, (2005).

[90] We talk about punishment because it is the result of a non-compliance with "laws" and because for immigrants struggling to gain stability, either economic fines or the conditioning of their legal status in the country is more of a punishment than an incentive.

[91] A. Portes & R. G. Rumbaut, Legacies: The Story of the Immigrant Second Generation 771 (University of California Press, 2001).

[92] P. Mutsaers & H.G. Siebers, *Low intensity ethnic cleansing in The Netherlands*, 38 Tilburg Papers in Culture Studies, (2012).

[93] Christian Joppke, *supra* note 58.

[94] S. Benhabib, *Claiming Rights across Borders: International Human Rights and Democratic Sovereignty*, 103 Am. Polit. Sci. Rev. 4, 696 (2009).

IV. Conclusions

As Taylor[95] has pointed out, a human being's identity is partly molded by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back a confining or demeaning or contemptible picture of themselves. Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.

Looking at the rights of minorities in international law, one finds that one of the most important justifications for ascription of rights to minorities is the aim of ensuring substantive justice to all members of society through genuine equality and non-discrimination. The most important effect of these provisions is that States are expected to pursue a policy that embraces the full diversity of their cultural components. Recognition and protection of the rights of minorities is indubitably an effective mode of accommodating the interests of minority groups, such as immigrants, in society.

However, in the immigration arena we have seen how different historical periods have evoked a series of specific immigration and integration policies that have limited or expanded immigrants' access to the political, civil, and social realms of mainstream society. Diverse positions on the accessibility to citizenship or other statuses feed back to the political arena, influencing policies and implementation that ultimately turn the access to and "contents" of citizenship into a controversial source of exclusion/inclusion. Here a differential status —in what Bosniak[96] describes as a linear or concentric circles system of citizenship— may play and important part because the advancement towards a full citizenship status presumes and requires governments recognition and consent, thus establishing stronger bonds and making both individuals and governments responsible for certain minimum obligations.

Culture has become a proxy for race in immigration policy, becoming a source for exclusion. Additionally, the criminalization of immigrants and immigration has turned into a new form of social control and a rationale for exceptionalism when providing/granting basic rights to immigrants. None of the main trends of immigration policy systems has succeeded in fully integrating immigrants to mainstream society. Culture, language proficiency, the "asymmetry of cultural positions,"[97] race and the participation of the government in accommodating immigrants in the receiving society are all important means to an end. Nevertheless, willingness of providing material resources, granting rights, and making citizenship trajectories meaningful and valuable to immigrants vary from country to country and oscillate with

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[95] Charles Taylor, Multiculturalism 25 (Princeton University Press, 1994).

[96] Linda S. Bosniak, *supra* note 40.

[97] M. P. Vink, *supra* note 80.

economic cycles and political positions, making a consistent, coherent and rights based immigration system a target for political and economic governmental agendas.

Since the proclamation of the Universal Declaration of Human Rights, and all the human rights treaties which followed its promulgation, as Benhabib[98] has asserted, we have entered a phase in the evolution of global civil society that is characterized by a transition from international to cosmopolitan norms of justice which consider individuals as moral and legal persons in a worldwide civil society. The peculiarity of international human rights norms is that that they limit the sovereignty of States, in this case regarding determination of their integration policies for immigrants, as well as oblige them to treat their citizens and residents in accordance with the standards these instruments recognize.

[98] S. Benhabib, *supra* note 91.

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THE CONSUMPTION OF MARIJUANA FROM A LEGAL AND PHILOSOPHICAL VIEWPOINT

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Abstract: *In this note I argue that the decriminalization (or authorization) of marijuana use should be considered with an eye to the evil it avoids instead of to the good it seeks. The debate about the decriminalization/permission of the consumption of marijuana in Mexico is set within the context of the individual freedom and the damage to health produced by its consumption. Other related issues result from this approach, such as individual responsibility and the duty of the State to seek the social good. How can one justify the decriminalization of marijuana considering the duty of the state? How can the harmful craving for it be understood given the alleged natural inclination towards personal well-being (axiom of Western culture)? The response has to do with the exercise of power by the State, in the definition of what is healthy and harmful, normal and pathological, because the concepts "healthy" and "harmful" have ideological uses (in the sense of the 18th Brumaire of Louis Napoleon). Secondly, we cannot ignore the discomfort caused by social life, due to the demands on public duty at the expense of private interests. This results in a tension between the individual and society that is only mitigated by tolerance for drug abuse, alcohol or permission of "red zones," because only in this way are social conflicts dissipated.*

Key Words: *Liberty, responsibility, human dignity, health, disease, responsibility of the State, social tensions, Marijuana, decriminalization.*

Resumen: *La discusión sobre la despenalización/venia del consumo de marihuana en México se establece dentro del contexto de la libertad individual y el daño que produce su consumo a la salud. Derivado de este enfoque se encuentran otros temas relacionados, como el de la responsabilidad individual y el deber del Estado de procurar el bien social. ¿Cómo justificar la despenalización de la marihuana frente al deber del Estado? ¿Cómo entender el deseo de su consumo nocivo frente a la supuesta inclinación natural al bienestar personal (axioma de la cultura Occidental)? La respuesta transita a través del ejercicio del poder*

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por parte del Estado, en la definición de lo sano y dañino, normal y patológico, porque los conceptos "sano" y "dañino" tienen usos ideológicos (en el sentido del 18 Brumario de Luis Napoleón).[1] *En segundo término, no puede soslayarse el malestar que provoca la vida social, debido a las exigencias para con el deber público en detrimento de los intereses particulares. Esto tiene como resultado una tensión entre individuo y sociedad que solamente se mitiga con la tolerancia al uso de drogas, alcohol o concurrencia a "zonas rojas," porque sólo así se distienden los conflictos sociales. De esta forma, se concluye que la despenalización (o autorización) del consumo de marihuana debe verse por el lado del mal que evita y no por el bien que procura (para la salud física).*

Palabras clave: *Libertad, responsabilidad, dignidad humana, salud, enfermedad, responsabilidad del Estado, tensiones sociales, marihuana, despenalización*.

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I. Introduction

This note will analyze the problem of marijuana use in Mexico taking into account the following points: first, the freedom of the individual as conceived by the Supreme Court of Justice of the Nation in the resolution of Minister Alfredo Gutierrez Ortiz Mena. In this first point we must consider two issues: the justification of the decriminalization of marijuana together with the responsibility of the State towards the common good, and its consumption by the individual aware of the harm and committed to his own well being. Second, the exercise of power from the concepts of health and disease, normal and pathological, which will aim to determine the ideological elements (in the

[1] Karl Marx, 18 Brumaire des Louis Napoleon Bonaparte. (Digitale Bibliothek. Berlin 2002) (1883).

sense of Karl Marx)[2] that underlie the medical opinion.[3] Third, if the duty of the State is to procure the social good and assume a natural propensity for the good, then how might decriminalization and the choice of its consumption be justified? The answer to this question will be linked to the "unrest in culture" and individual happiness.

Regarding the subject of freedom, I will use both the ideas of John Stuart Mill, because he is the most conspicuous philosopher on that matter as shown in his conceptualization in the Declaration of the Rights of Man and of the Citizen, and those of Mexican Supreme Court Justice Alfredo Gutiérrez Ortiz Mena. With regard to health and marijuana, the ideas of Michel Foucault[4] and Georges Canguilhem,[5] will be used to clarify the ideological elements that underlie the concept of health (and medical practice) and its relevance to establishing a medical opinion. I will base my study of the responsibility of both the State and the individual with respect to the collective well-being, the natural inclination to good and discontent in culture, on authors such as John Locke, Jean Jacques Rousseau, Agustine of Hippo and Sigmund Freud. All of these are *classic* authors, and therefore relevant up to our time. It is necessary for the sharp reader to distinguish between *valid* and *new* thinking: the first is represented by Mill, Locke, Rousseau, Freud, etc.; the second, by Joseph Raz, John Rawls, John Finnis, etc. So, *new* means "was published yesterday," while *valid* means "has validity today and always." The author of this text considers valid thinking only.

II. On Freedom

The National Supreme Court of Justice resolved on November 2015 the unconstitutionality of the normative set integrated by articles 235 (last paragraph), 237, 245 (section I), 247 (last paragraph), and 248, of the General Act of Health,[6] which constituted a system of administrative prohibitions against the consumption of marijuana (*i. e.* sowing, cultivation, harvesting, preparation, conditioning, possession, transport, etc.).

The Supreme Court´s main concern was not to decide whether or not marijuana is harmful to health, whether it has proven therapeutic uses, or whether it constitutes an acceptable recreational form, but whether the State

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[2] *Id*.

[3] Norbet W. Paul, Geschichte, Theorie und Ethik der Medizin. (Suhrkam Verlag. Frankfurt am Main 2006).

[4] Michel Foucault, Die Anormalen. (Suhrkamp Verlag. Frankfurt am Main 2002).

[5] Georges Canguilhem, Das Normalen und das Pathologischen. (Suhrkamp Verlag. Frankfurt am Main 2005)

[6] Ordinary Public Session, National Supreme Court of Justice's First Chamber, November 4th 2015. *See http://www2.juridicas.unam.mx/marihuana-caso-mexico/wp-content/uploads/2016/02/Sesion-publica-04-11-2015.pdf.*

has the right to interfere in the private life of every Mexican. This issue is relevant from the very moment freedom is a human right, recognized in the first article of our constitution,[7] and, understood, as defined in the 1789 Declaration of the Rights of Man and of the Citizen, as the right to do anything that does not affect third parties.[8]

This resolution does not simply include the four persons covered by the specific clause which protects drug addicts detained by the authority for the possession of narcotics (as long as the amount does not exceed the provisions in the table provided by the federal legislature). With this resolution, in addition to declaring unconstitutional the contested articles, the responsible authority is ordered to issue authorizations to consume marijuana for recreational purposes and for all related activities: sowing, cultivating, harvesting, preparing, conditioning, transporting, etc. This is justified by the very concept of effective justice, in other words that the effect of a sentence must be guaranteed in the most effective manner possible by the authority in order for people to enjoy their rights.

Neither the constitution nor the Supreme Court of Justice of the Nation, nor any other institution of the State recommend the consumption of marijuana through this resolution. The constitutional mandate is to comply with human rights, and the Supreme Court cannot tolerate the suspension any of them (such as the right to individual freedom).[9] However, considering that no human right is absolute (with the exception of prohibitions, such as torture, slavery or discrimination), and that it is appropriate to place limits on their exercise, it is necessary to analyze the feasibility of the exercise of individual freedom in the case of marijuana use.

1. *Mill and the Problem of Freedom*

The most conspicuous essay to date on freedom, in terms of the 1789 declaration, is the one written by the English philosopher John Stuart Mill (1806-1873).[10] There the English philosopher analyzes two important aspects: the

[7] Article 1. In the United Mexican States, all persons shall enjoy the human rights recognized in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, the exercise of which shall not be restricted nor suspended, except in the cases and under the conditions established by this constitution. *(Reformed by the decree published in* THE OFFICIAL JOURNAL OF THE FEDERATION *on June 10, 2011). See http://info4.juridicas.unam.mx/ijure/fed/9/2.htm?s=.*

[8] Article 4. Freedom consists in being able to do everything that does not harm others. Thus, the exercise of the natural rights of each man has no more limits than those that assure the other members of society the enjoyment of these same rights. These limits can only be determined by law. *See http://www.juridicas.unam.mx/publica/librev/rev/derhum/cont/22/pr/pr19.pdf.*

[9] The rights cannot be suspended practically under any circumstance, as indicated in Article 29 of the MEXICAN CONSTITUTION.

[10] JOHN STUART MILL, ON LIBERTY. (Clarendon Press, Oxford, 1980) (1859). Modern

individual-state relationship, and private life as the place where freedom is exercised. For Mill, the exercise of freedom is closely linked to the existence of a private life and to a null or minimal intervention of the State. In modern Western culture, "private life" means mainly the right to private property, and our constitution protects "personal privacy"[11] in articles 14 and 16 (as enjoyment of goods and possessions, and the inviolability of the home, respectively).

Mill, of course, analyzes the problem of freedom in the context of English liberal thought, that is, as his fellow countryman John Locke[12] put it, the relation between the interests of the individual and those of the State. Hence the following question: how to protect the individual against the power of the State? Mill's answer lies in the definition of freedom of 1789: allowing the individual to do everything he pleases, as long as it does not affect third parties, because that way the intervention of the State is not necessary.

First, to illustrate the relevance of this definition of freedom, Mill stresses the importance of freedom through his idea of man. For him, man is a compound of reason and passion: reason helps man to make use of the capacity for judgment and rational development, and passions allow to experience the immediate environment and distinguish each (principle of social individuality). To cultivate them means to increase individuality and creativity. Mill's corollary is that all obstacles to freedom hinder the development of man, his capacity for judgment and his ability to experience the world and to develop individually (the more rational and passionate the development, the better the men will be). Among the many social obstacles (church, education, state), State power is the greatest and most formidable for the exercise of freedom and human development.

Mill then goes on to analyze the use (and abuse) of freedom to clarify when and how it affects third parties. There are three types of freedom for Mill: opinion, action and association.[13] The first is the maximum freedom possible, because there is practically no danger of harming anyone. In the exercise of the second (and third) third parties are always affected. Hence, it is necessary to distinguish between the different types of actions in order to know the type of affectation it will provoke. Mill draws a distinction between two types of action: positive action (intentional action) and negative action (intentional omission). In the second type of action —according to Mill— third parties are less affected than in the first type. Therefore, the State has the right to intervene in the life of the individual regulating their positive actions. But the

scholarship on the subject, such as the studies carried out by Ronald Dworkin, do not add an iota to those spoken by the English philosopher more than a century ago. *See* Ronald Dworking, Justice for hedgehogs. (Harvard University Press 2013).

[11] John Locke, Two Treatises of Government. (The Online Library of Liberty *http://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed*) (1689).

[12] *Id*.

[13] *See* John Stuart Mill, On Liberty. (Clarendon Press, Oxford, 1980) (1859).

only appropriate way to intervene is to punish, that is through corrective and non-preventive measures, in order to affect as little as possible the freedom of the individual (another he will say in his *Principles of Political Economy*).[14]

In freedom of association, the individual always leaves his private sphere and enters the common space, public or social, affecting third parties. On the other hand, in the private space, action affects only the individual. This is why Mill enjoys greater (positive) freedom of action. The resulting paradox does not escape the reading of Mill's book: where the individual exercises his freedom more fully, because it affects third parties less (life and private space), is where he can best develop to become a better citizen. Faced with this paradox, it is necessary to ask how the freedom to use drugs allows for individual development and for a better social entity.

2. *Paradoxes of Liberty*

With some clarity, Minister Alfredo Gutierrez Ortiz Mena saw this problem and pointed out that in the "decriminalization of marijuana" (based on the exercise of freedom), one should consider the "dignified development" of the person and not simply the development of the individual. Adding this concept of "dignified development," the following questions arise: Is the harmful consumption of drugs admissible as a right to freedom and individual development? Does the individual have the right to harm himself? Is suicide and self-mutilation a legitimate form of the exercise of freedom? Can anyone in the legitimate exercise of his freedom become evil?

Surely evil is the price of freedom.[15] And while some think that man can orient himself in freedom and achieve good, based on his reason (like ancient Greeks), others affirm the opposite (St. Augustine), because they consider reason insufficient and they require the assistance of an external aid, such as divine grace or social institutions (or both). Although evil thrives in many ways, it causes the most bewilderment when it is directed against the perpetrator itself. Therefore, the most suggestive reflections have been proposed on how to protect man from disloyalty to himself.

This question was formulated by St. Augustine in another way: how can man remain faithful to his demand for transcendence?[16] The father of the

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[14] John Stuart Mill, Principles of Political Economy. (Library Economics Liberty *http://www.econlib.org/library/Mill/mlP.html*) (1848).

[15] The theologian Hans Urs von Balthasar puts it this way: "At least in his own historical realm man can perceive the connection between freedom, power and evil. Evil in the world proceeds, as you know from your own experience, to freedom, which for evil uses power, of one's own or of another's, a power that is always there, and which in itself is not bad, but which possesses in its interior a tendency to evil in the sense that it represents a means of domination". *See* Hans Urs von Balthasar, theodramatic. (Johannes, Einsiedeln) (1971).

[16] Augustine refers to sins against the Holy Spirit, that is those committed by pure malice

church replied that before trusting the individual reason of man, trust in divine grace must be placed in ecclesiastical institutions. Consequently, in addition to imploring the grace of God, the function of the Church must be that of a vigilant of the good behavior of his flock.[17]

From this, a new solution to the problem of evil and human freedom is developed: if the natural goodness of the rational man (due to original sin) or even the direct guidance of God is not accepted, one can trust social or religious institutions). It is evident that this idea of St. Augustine, especially exposed in his maturity work *The City of God*, reflects the crisis that the father of the church lived by the fall of Rome in the hands of Alarico I in 410. The church represented for Augustine a kind of ark of Noah that preserves the pure ones from perdition, almost in the way in the Republic of Plato the individual destiny depended on the strength of the social whole. In our days, the issue is about the responsibility of the State to authorize or decriminalize the consumption of a harmful substance.

In modern times, Jean Jacques Rousseau's[18] enlightened thought warned that the problem lies precisely in institutions and not in the nature of man. The reason why men are inclined to evil is not their own human nature, but the way they gather together in society, fostered by the social structure and its institutions, in such a way that the institutional organization is more important for the welfare than the individual exercise of freedom.

Obviously within this trend, there are differences: some insist on the social structure of the market and the forms of production as the main factor; others stress the excessive concentration of power by a few and the null or incipient division of powers (control of power by power). Some more point at impunity that does not punish the overlapping of individual benefit and the common good. Be it economic, political or judicial reasons, the fact is that in the exercise of individual freedom, the environment plays a decisive role. For this reason, the problem of freedom appears in our day as the disagreement between "I" and "we," between individual freedom and public obligations. What is the relevance of these for the consumption of marijuana? What is the responsibility of the State for the exercise of individual freedom?

(without the attenuation of ignorance or the subjugation of a passion). Of the 6 mentioned by the father of the church, the fifth (obstinacy in sin) is now the most relevant. *See* Aurelius Augustinus, Predigt 71, §13. (*Http://www.augustinus.it/spagnolo/discorsi/discorso_092_testo.htm*).

[17] The modern version of St. Augustine's ideas can be read in Catechism of the Catholic Church. *See* Katechismus Der Katholischen Kirche (chap. III, "The knowledge of God according to the Church", § 36, 37 and 38) (1992) (*http://www.apologeticacatolica.org/Catecis/P1S1.htm*).

[18] Jean Jacques Rousseau, Der Ursprung der Ungleichheit unter den Menschen. (*http://philosophie.hfg-karlsruhe.de/sites/default/files/rousseau_ungleichheit_i.pdf*) (1755).

III. Meta-Constitutional Dilemmas

In Mexico the intervention of the State to impose age limits on the consumption of tobacco, alcohol, even the consumption of sugary drinks and foods with high caloric content, is considered justified, but to affect the right to freedom and to prevent the individual from doing something with his life (and private space) is not considered justified, to the extreme of not prohibiting the use of marijuana.

Given that no one questions the harm of marijuana to the health, then the paradox between private and public interests (consuming marijuana as a right to exercise freedom, and being healthy as an obligation to perform tasks of social interest) is insoluble by Supreme Court of Justice of the Nation. Obviously this is because the problem goes beyond the legal sphere and is internalized in the philosophical, and the judges of the Supreme Court of Justice are not philosophers and don't have any philosophical training. However, most of the issues dealt with by the Supreme Court of Justice go beyond the legal sphere and are internalized in the meta-legal or meta-constitutional levels.[19]

At the meta-constitutional level it is necessary to seek justification for the recreational use of marijuana. To do this, I will first analyze the concept of "healthy life" to show the dependence of this concept on political or sociological criteria. And second, I will analyze the current life circumstances that induce a person to "recreate" with marijuana, to choose (despite the evil that it causes) the consumption of marijuana. I will thus try to justify the recreational use of marijuana.

IV. Marijuana: Health and Illness

For the French thinker Michel Foucault (1926-1984)[20] the key problem worthy of consideration is to investigate the bowels of power. What is power? If power is authentic and complete, then it has power over life and death.

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[19] Jorge Carpizo used this term to refer to presidential powers that exceeded what was allowed by the constitution, such as the appointment and dismissal of governors. Carpizo cited the testimony of the former governor of Baja California, Braulio Maldonado, who boasted that he had come to governorship because of his friendship with President Adolfo Ruiz Cortines and not because of the popular vote. This is not the best meaning of the term, because "meta-constitutional" refers rather to a higher theoretical level (in the sense of the philosophy of language), from which dilemmas and constitutional conflicts are analyzed, such as the logical or philosophical levels. Carpizo should have called these faculties "anti-constitutional"or "para-constitutional" rather than "meta-constitutional." *See* Carpizo, Jorge, El presidencialismo mexicano. (Editorial Siglo XXI. México, 190-199) (2006).

[20] Michel Foucault, Die Anormalen. (Suhrkamp Verlag. Frankfurt am Main 2002).

To unravel the essence of power, Foucault proposes to analyze three typical institutions of modernity: the clinic, the jail and the madhouse. The reason is that this is where power is best manifested, because that is where life and death are decided. It is striking that neither the scaffold nor the torture chamber are so relevant. The life and death in the hands of the powerful represent the power of inclusion or exclusion of society. And the clinic, the jail and the asylum are the zones of exclusion par excellence, bordering on the space where, according to the dispositions of the power, a human "dignified life" is possible.

In the case of the clinic and the asylum, but also of the prison, the power plays with the concepts healthy and pathological to decide who is inside and who outside, who deserves death and who still lives, because death is also understood in sociology as social exclusion, and the sick (corporal or mental) lives excluded from society.[21]

In our case regarding the consumption of marijuana, we discuss its harmful or beneficial effects as an argument for or against its decriminalization. What is striking in this case of ours (and despite the constant presence of power organizing debates) is the absence of analysis on the terms health and disease, subsidiaries of the normal and the pathological.

Obviously, the problem about the structure and behavior of the healthy and diseased (normal or pathological) is very vast. Each case of disease raises problems of anatomy, embryology, physiology, psychology, etc. However, it does not seem to pose any problem of sociology or philosophy of power, when concepts such as "healthy" or "sick" (normal and pathological) have a social relevance.[22]

It has been pointed out that distinguishing between the normal and the pathological involves including a "normativity" within biology, thus projecting the idea of human progress in nature.[23] This is known as the evolutionist seduction (product of social Darwinism) that has sought (and intends) to dictate how to overcome the natural-savage through his domestication or civilization. No one can deny that talking about health and illness means talking about successful and failed ways of life. And to distinguish between the two it is necessary to know the obligations imposed on man in the modern world. These are not the same as in the past. On the one hand, modern man lives stressed under the multiple obligations of the present life. On the other hand, throughout history there have been different notions of normal and pathological, such as those imposed by the dynamic school or the ontological school.

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[21] Peter Berger, The Sacred Canopy: Elements of a Sociological Theory of Religion. (*http://www.medina502.com/classes/faithandculture_la/lecturas/Berger_Religion_World.pdf*) (1967).

[22] Georges Canguilhem, Das Normalen und das Pathologischen. (Suhrkamp Verlag. Frankfurt am Main 2005).

[23] *Id.*

The ontological conception of disease conceived it as something that happens to man and is localized or manifested in his symptoms.[24] The dynamic conception of the disease did not locate the "evil" in any part of the body, but considered its integral, totalizing failure as a kind of dis-harmony of the diseased body with respect to its social environment.[25] According to this, the normal nature of man is in equilibrium or harmony with his environment, and disease represents precisely the decomposition of that balance or harmony. In the first school, the patient had to be cured "in family," while for the second, he had to be excluded from society and confined to the clinic or asylum.[26]

In the case of users who are addicted to marijuana, the dilemma between healthy and sick is analyzed from a functional concept of disease (which corresponds to that of the dynamic school). Because the addict (if all consumption is addictive, for many "every consumer is an addict)" is in dis-harmony with his environment, he breaks with imposed obligations and with the social program to become a better citizen. Incarceration is necessary and inevitable, because the addict's illness operates as an internal struggle between him and something that is foreign and keeps him out of control. Only the medical technique can save him and restore his health, since nothing good can be expected of the one who abandons his social obligations and becomes an uncontrolled. This, by the way, undoubtedly refers to an old confrontation between technique and nature (between civilization and barbarism) and also to an old discussion between those who admit and/or reject the possibility of submitting the human condition to "normative intentions" (healing) of society.

If pernicious alcohol (or intoxicating drinks) is viewed differently, and does not re-enter into the discussion about its authorization or prohibition, it is because it is analyzed from a different point of view. Let me explain: healthy and ill is understood in the context of the discussion on marijuana with the prefix "ab" (from ab-normal) or with "dis" (dis-function), and in the case of alcohol with hypo (less) or hyper (more). These last two prefixes (less/more) indicate a qualitative variation of the normal and not to an absence of the normal, as in the case of the first prefixes (ab/dis). That is why alcohol is tolerated and marijuana is not. Alcohol only "exacerbates" normal states in certain circumstances, while marijuana destroys them.

How to solve the problem regarding marijuana use? First, it must be admitted that medicine is a technique rather than a science,[27] located at the crossroads of many sciences. Second, it can not be denied that the study of

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[24] *Id.*

[25] *Id.*

[26] Michel Foucault, Die Geburt der Klinik: Eine Archäologie des ärztlichen Blicks. (Fischer Verlag, 1999) (1963).

[27] Norbet W. Paul, Geschichte, Theorie und Ethik der Medizin. (Suhrkam Verlag. Frankfurt am Main 2006).

disease is a strategy to control the body within the limits of power. Therefore, a decisive point in the discussion must be the criterion chosen (by the power) on the normal and the pathological: how good or bad is marijuana? How abnormal does marijuana turn its consumers?

V. The Duty of the State in the Face of Personal Interest and the Discomfort of Modern Life

In 1932 Aldous Huxley wrote his dystopia *Brave New World*, where he proposed the use of the drug Soma as a solution for the social problem in order to achieve happiness in the world. Huxley, as a good Englishman, was a lucid heir of the philosophical thought of Hobbes, Locke, Mandville, Hume, Malthus, etc., that is, the contractualist tradition that saw society as the achievement of a voluntary contract in order to settle the individual conflicts, typical of the natural state.

In spite of the express intention of each signer to submit to the sovereign and strive for the collective good, a certain residue of irritation was inevitable, since it always had to yield to the majority. That irritation or discomfort was diluted with the use of the Soma drug. Huxley recommended, in the voice of his character Mustafa Mond, its use in the following doses: "If, unfortunately, some slit of time were opened in the solid substance of his distractions, there is always the soma: half a gram for a holiday, a gram for the weekend, two grams for a trip to the beautiful East, three for a dark eternity on the moon."

Social unrest, as a result of feeling obliged to give up private interests every day, is also described in psychology. During the same year of the publication of *Brave New World*, in 1930, the Austrian doctor Sigmund Freud published *Civilization and Its Discontents*, where he examines the origin of the discomfort that man feels to inhabit the modern world. Its starting point was the question about the end of life, more typical of theology than of medicine or psychology. However, as some Western authors considered the meaning of life by the end of it (teleology), Freud nevertheless approached the problem, although only indirectly.

With reference to animal species no one asks for their end, unless they have utility for man. But to seek an end of animal life in itself seems trivial. Only man's life has an end in itself, and this is precisely why the statement is so disturbing: why only the life of man has or pursues an end? Human life, like any biological life, has no end. The question: why did evolution converge in man and led to the extinction of other species? has no answer. For this reason, the approach to the end of life should come, at best, from a supposition transcendent to human life, namely: God. Men of all ages have endeavored to please their gods in order to reach the "end" and to give meaning to their lives. And this explains why God and the end of life represent happiness for man: man desires not only to live (like any other species), but to live happy.

Freud then goes on to analyze happiness and discovers, like so many others,[28] that it consists in procuring pleasure and avoiding pain.[29]

The principle of pleasure is that which prescribes the end of human life, a principle that governs the complete psychic apparatus and ultimately explains the behavior of man. Granting this first point, it is necessary to analyze the following paradox: why does it cost man so much effort to be happy if that is the meaning of his life? It seems that the vital principle of pleasure always conflicts with the world (with the macro- and microcosm), to the extent that the pleasure principle is absolutely unfeasible. Freud sarcastically claims that man's purpose of being blissful is not in the "plan of creation."

If this constitution of man limits his possibility of happiness, it does not prevent him from experiencing misery. According to Freud, suffering or pain threatens man from three fronts: the external world (with its natural cataclysms), the body (doomed to ruin and dissolution), and the bond with other human beings (*i. e.* socialization; more intense pain). From the catastrophes of the outside world only an "escape" can protect man, and to a lesser extent the technological development applied to the transformation of the environment. From the deformities and diseases of the body, medical science, sports and cosmetology protect him. From social violence, maybe just loneliness.

Is this all that the man has left in his life? If the pleasure principle longs for a permanent situation, and this longing gives meaning to life, the paradox of wanting the unattainable can not be ignored. Freud, again in accordance with JS Mill,[30] says that what is called happiness is the sudden and fleeting satisfaction of retained needs (sic), with a high degree of stasis (*i. e.* stagnation),[31] and which, by its very nature, is only possible as an episodic phenomenon.[32]

Under the influence of the outside world, the pleasure principle is confronted with the reality principle. And under the influence of the latter, the well-versed man accepts to avoid pain and to give up looking for pleasure.[33] From this perspective, the end of life is better defined as the desire to avoid

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[28] This would be the hedonistic tradition initiated by Epicurus of Samos (341-270 BC). In modern times, John Locke, Immanuel Kant, John Stuart Mill, etc., all proposed pleasure as synonymous of happiness.

[29] Nothing very different from the one proposed by John Stuart Mill (but not equivalent). The principle of action, within utilitarian ethics, is to seek the greatest amount of pleasure and avoid the greatest amount of pain (for the greatest number of people). *See* John Stuart Mill The Utilitarianism. (*https://www.utilitarianism.com/mill1.htm*) (1863).

[30] John Stuart Mill The Utilitarianism. (*https://www.utilitarianism.com/mill1.htm*) (1863).

[31] In addition to reasons such as adverse world, vulnerable body and stumbling sociability, the problem is —according to Freud— that we are conceived to enjoy the contrast and not the permanent state of a sensation.

[32] Sigmund Freud, Das Unbehagen in der Kultur. (Fischer Vrlag. Frankfurt am Main 2003) (1930).

[33] *Id.*, p. 97.

the greatest amount of pain or displeasure, and the culture (or cultures of humanity) must be understood as strategies to achieve this end. Culture has also been developed to alleviate the discomfort caused by the obligation to watch over the common good and to postpone one's own good. Among the strategies of survival to society are drugs.[34]

The consumption of marijuana, like that of the mythical Soma, has the function of diluting the malaise of culture. Therefore, permissibility of marihuana should not be decided for the good it does, but for the evil it avoids. This seems to be a point that escapes the analysis of doctors and legislators.

VI. Conclusions

The paradox of freedom consists in being able to do everything that pleases the individual, including what hurts him, but without affecting third parties. However, it is worth asking how this exercise of freedom is possible taking into account that this should contribute to the development of the person who exercises it. In addition, the individuals only conquer their welfare in society with the help of State institutions. For this reason, the State establishes the parameters that define the healthy man fit for the culture, in function of the responsibilities useful for the common good. However, personal happiness never matches social needs and interests, hence the discrepancy between personal obligations and desires. Consequently, there will always be tension between the individual and society, and the resulting malaise will be mitigated by the announcement or decriminalization of the use of drugs, alcohol or other substances, as well as activities that do not contribute to the individual's "health," but to mitigate pain or social unrest. The consumption of marijuana, although it does not seek medical welfare, reduces social tensions and conflicts, and this justifies its decriminalization by the State.

[34] In the constructivist sociology of Peter Berger and Thomas Luckmann the problem of socialization is approached in much the same way as Freud's. *See* Peter Berger, The Sacred Canopy: Elements of a Sociological Theory of Religion. (*http://www.medina502.com/classes/faithandculture_la/lecturas/Berger_Religion_World.pdf*) (1967).

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