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AMPAROS FILED BY INDIGENOUS COMMUNITIES AGAINST MINING CONCESSIONS IN MEXICO: IMPLICATIONS FOR A SHIFT IN ECOLOGICAL LAW

Carla Sbert Carlsson*

Abstract: *Four indigenous communities in Mexico have initiated* amparos *seeking constitutional protection against mining concessions that have allegedly violated their constitutional rights. In addition to their significant implications for indigenous rights in Mexico, these* amparos *are part of a growing reaction against laws that prioritize mining interests over community land uses and ecological values. This article explores the relationship of these cases with a new legal paradigm that is emerging in response to the inability of environmental law to adequately address the deepening ecological crisis: ecological law. From an ecological law perspective, these* amparos *are of interest because of the possibility for courts to give priority to indigenous values ascribing spiritual, ecological and relational meanings to the land and its resources, over economic interests seeking to exploit the land and resources for commercial gain without regard to ecological limits. The article introduces a "lens of ecological law" conceived to understand the nature of the required shift from the current law to ecological law, and then examines the* amparo *filed by the community of San Miguel del Progreso–Júba Wajítn from this standpoint. The analysis shows that the provisions of the Mining Law challenged by the* amparo *pose serious obstacles for ecological law (prioritizing mining over any other land use), and it points to certain synergies between indigenous rights and ecological law. While the SCJN did not examine the merits of the* amparo *because the concessions had been withdrawn, the* amparo *offers insights into the challenges facing a shift away from the current legal paradigm.*

Key Words: *Ecological law, indigenous rights, environmental protection, mining law, Mexican Constitution (2001 amendment).*

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Resumen: *Cuatro comunidades indígenas en México han iniciado juicios de amparo por presuntas violaciones a sus derechos constitucionales en el otorgamiento de concesiones mineras respecto de sus territorios. Estos amparos tienen implicaciones importantes para los derechos indígenas en México, pero además, reflejan la creciente oposición a leyes que dan prioridad a intereses mineros por encima de usos comunitarios del territorio y valores ecológicos. Este artículo explora la relación entre estos casos y un nuevo paradigma jurídico —el derecho ecológico— que está emergiendo para responder al fracaso del derecho ambiental ante la crisis ecológica. Estos amparos son de interés desde una perspectiva de derecho ecológico en tanto que abren la posibilidad de que la corte dé preeminencia a valores indígenas que otorgan significados espirituales, ecológicos y relacionales al territorio, en vez de dársela a intereses económicos de explotación comercial que son indiferentes a los límites ecológicos. El artículo presenta una "lente de derecho ecológico" diseñada para apreciar la naturaleza del cambio que implicará pasar del derecho actual a un modelo de derecho ecológico, y esta lente se aplica para examinar el amparo promovido por la comunidad de San Miguel del Progreso–Júba Wajíin. Se muestra que las disposiciones de la Ley Minera en cuestión representan obstáculos importantes para la adopción del derecho ecológico (la priorización de la minería sobre otros usos del suelo). Asimismo, se revela cierta sinergia entre los derechos indígenas y el derecho ecológico. Si bien la SCJN no examinó el fondo del amparo, dado que la empresa titular abandonó las concesiones, el amparo permite vislumbrar algunos de los retos que plantea el cambio de paradigma jurídico hacia el derecho ecológico.*

Palabras Clave: *Derecho ecológico, derechos indígenas, protección ambiental, legislación minera, Constitución Mexicana (reforma de 2001).*

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I. Introduction

Ecological law is an emerging approach to law that seeks to constrain economic activities within ecological limits, restore and protect ecological integ-

rity, and promote ecological justice.[1] It has arisen in response to the inability of environmental law to adequately address the deepening ecological crisis,[2] and is part of a move away from the dominant growth-insistent economic model to an economy that operates within the planet's biophysical limits with much reduced material-energy throughputs and ecological footprints.[3] Also, ecological law is part of a shift to a different concept of the relationship of humans among themselves and with the Earth.[4] It is an alternative to environmental law —a paradigm shift— rather than a call for its reform.[5] As one of the key components of the current growth-insistent economy,[6] mining will need to undergo a profound transformation if it is to contribute to a new ecologically-bounded economy and to ecological justice.[7] A critical component of this is the role of indigenous communities in deciding whether and how mining takes place in their territories.

Indigenous peoples are increasingly being affected by mining activities in their territories.[8] At the same time, they are gaining the recognition of their

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[1] See, among others: David R. Boyd, *Sustainability Law: (R) Evolutionary Directions for the Future of Environmental Law. (Future Directions?)*, 14 *J Envtl L & Prac* 357 (2004); Klaus Bosselmann, *Ecological Justice and Law*, in Environmental Law for Sustainability: A Reader, (Benjamin J. Richardson & Stepan Wood, eds., 2006); Cormac Cullinan, Wild Law: A Manifesto for Earth Justice (2nd ed., c2011); Geoffrey Garver, *The Rule of Ecological Law: The Legal Complement to Degrowth Economics,* 5:1 Sustainability 316 (2013).

[2] On the shortcomings of environmental law, see e.g. Boyd, *Sustainability Law; supra* note 1; and Hans Christian Bugge, *Twelve Fundamental Challenges in Environmental Law*, in Rule of Law for Nature: New Dimensions and Ideas in Environmental Law (Christina Voigt, ed., 2013). On the ecological crisis, see e.g., Johan Rockström, *et al*, *The Anthropocene: From Global Change to Planetary Stewardship* 40 AMBIO 739 (2011); Will Steffen, *et al*, *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 15 Science 1 (January 2015); Will Steffen, *et al*, *The Trajectory of the Anthropocene: The Great Acceleration*, The Anthropocene Review 1 (2015).

[3] William E. Rees, Avoiding Collapse: An Agenda for Sustainable Degrowth and Relocalizing the Economy (2014).

[4] Thomas Berry, The Great Work: Our Way into the Future (1999); Cullinan, *supra* note 1; Peter Brown & Geoffrey Garver, Right Relationship: Building a Whole Earth Economy (2009).

[5] The term "environmental law" is consistently used in English to refer to the body of law aimed at mitigating the effects of human activities on the environment. In contrast, there has been debate in Spanish about of the use of the terms "*derecho ecológico*" and "*derecho ambiental*" and these have at times been used interchangeably to refer to this body of law (see e.g., María del Carmen Carmona Lara, Derecho ecológico, (1991)). In this article, "ecological law" and "*derecho ecológico*" refer only to the emerging approach to law that, as briefly explained herein, is fundamentally different to environmental law, and is also referred to in English literature as "wild law", "sustainability law", "Earth jurisprudence", and "Earth law" (see *supra* note 1).

[6] International Council on Mining and Metals (ICMM), The Role of Mining in National Economies (2nd ed., 2014).

[7] Carla Sbert, *Re-imagining Mining: The Earth Charter as a Guide for Ecological Mining Reform*, 6 IUCN AEL E Journal 66 (2015).

[8] C. Doyle & A. Whitmore, Indigenous Peoples and the Extractive Sector: Towards a Rights Respecting Engagement 5 (2014).

rights in international law[9] and in a growing number of national constitutions, like the Mexican one.[10] This generally includes the need for the free and informed consent of indigenous peoples before carrying out activities that affect their territories.

Mexico has a long history of mineral exploitation, but mining activities in the country have increased dramatically over the past fifteen years.[11] This is primarily due to neoliberal policies that enable foreign investment in the sector[12] and to technology that has greatly enhanced extraction capabilities.[13] Conflicts in connection with extraction projects are also on the rise,[14] accompanied by the criminalization of dissent.[15]

According to the official estimate, approximately 12.5% of the country was subject to a mining concession in 2015,[16] while other sources report it at 30%.[17] It is thought that 17% percent of indigenous territory is subject to mining concessions.[18] In the State of Guerrero, new discoveries of mineral deposits have pushed the number of concessions to approximately 600.[19] While these figures may seem high to some, a government publication that promotes business in Mexico writes that "[t]he Mexican territory occupies 1,964,000 km^2, of which 70% has geological suitability for development of mining projects" [20] but that "*only* 27% of the national territory has been

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[9] Convention Concerning Indigenous and Tribal Peoples in Independent Countries (C169), 1989 [ILO C169]; American Convention on Human Rights, 1969 [ACHR]; Miguel Ángel Sámano Rentaría, *Derechos indígenas y la nueva relación de los pueblos indígenas y el Estado en América Latina: en específico en México*, 60 Alegatos (2005).

[10] Constitución Política de los Estados Unidos Mexicanos, art. 1, 2, 4, 18, 115. See, Constitución y derechos indígenas (Jorge Alberto González Galván, coord., 2002).

[11] Marvin D. Bernstein, The Mexican Mining Industry 1890–1950 (1964); Jaime Cárdenas, *The Mining Industry in Mexico: The Dispossession of the Nation*, 28 Cuestiones Constitucionales (2013).

[12] Darcy Tetreault, *Social Environmental Mining Conflicts in Mexico*, 204:42:5 Latin American Perspectives 48-66, 52-4 (2015).

[13] ICMM, Mining's Contribution to Sustainable Development: The Series, Ch. 3, at 9.

[14] Tetreault, *supra* note 12.

[15] Jen Moore, Roch Tassé, Chris Jones & Esperanza Moreno, In the National Interest? Criminalization of Land and Environment Defenders in the Americas 14 (2015).

[16] *Concesiones mineras vigentes por entidad federativa a mayo de 2015*, in Prontuario de la Industria Minero Metalúrgica 24 (Secretaría de Economía, 2015).

[17] Cárdenas, *supra* note 11 [citing López Bárcenas] 53; Moore, *et al*, *supra* note 15, at 14.

[18] Agustín del Castillo, *17% de tierras indígenas concesionadas a minería*, *Milenio.com* (April 24, 2015).

[19] Centro de Derechos Humanos de la Montaña "Tlachinollan" (en adelante, Tlachinollan), La Defensa del Territorio de San Miguel del Progreso–Júba Wajíín, Comunidad Me'phaa de La Montaña de Guerrero, Frente a la Entrega de Concesiones Mineras sin Consulta: Ficha Informativa 1-2 (2014).

[20] Secretaría de Economía, *The Mexican Mining Industry: More than Diamonds in the Rough* Negocios ProMéxico (May 2015), at 18.

explored."[21] Critics instead note that "[t]he unprecedented rapaciousness with which the extractive model in Mexico threatens collectively owned lands and peoples far out measures colonial times."[22]

Since 2013, four indigenous communities in Mexico have initiated *amparo trials*[23] seeking constitutional protection against mining concessions that allegedly violated their constitutional rights. These *amparos* have significant implications for indigenous rights in Mexico. The analysis that follows, however, explores the relationship of these cases to the new legal paradigm that is ecological law.[24]

II. The "Lens of Ecological Law"

To improve the understanding of the implications of a shift from existing law (primarily, but not exclusively, environmental law) to ecological law I have built on existing scholarship[25] and propose a *lens of ecological law* with which to analyze the major affinities and inconsistencies between the laws in place[26] and ecological law. This lens is formed by three interconnected principles that inform the objectives of ecological law and help advance it as an alternative to environmental law. This is based on the general definition of the term *principle* as "a fundamental truth or proposition that serves as the foundation for a system of belief or behavior or for a chain of reasoning."[27] As for the objectives of ecological law, in my view these can be summarized as 1) constraining the economy within ecological limits, 2) restoring ecological integrity, and 3) enabling an ecologically just society. These principles are drawn from a grow-

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[21] *Id* (emphasis added).

[22] Moore, *et al*, *supra* note 15, at 14.

[23] In this article, I use the 2010 Mexican Supreme Court (SCJN) English translation of the Mexican Constitution. Mexican Supreme Court, Political Constitution of the United Mexican States (4th ed., 2010). I also follow the common practice of referring to the brief filed to initiate an *amparo trial* as an "*amparo.*"

[24] Garver, *supra* note 1.

[25] Klaus Bosselmann, The Principle of Sustainability: Transforming Law and Governance (2008); David R. Boyd, *Sustainability Law: (R)Evolutionary Directions for the Future of Environmental Law. (Future Directions?)* 14 J Env L & Prac 357 (2004); Brown and Garver, *supra* note 4; Cullinan *supra* note 1; Garver, *supra* note 1; Nicholas A. Robinson, *The Resilience Principle*, 5 IUCN AEL E-Journal 19 (2014).

[26] Ecological law challenges the narrow specialization of environmental law. As exemplified in this article, the obstacles and opportunities for adopting ecological law may also be found in other kinds of laws (mining, constitutional, etc.). See Michael M'Gonigle & Paula Ramsay, *Greening Environmental Law: From Sectoral Reform to Systemic Re-formation (Future Directions?)*, 14 J Envtl L & Prac 333 (2004).

[27] The New Oxford American Dictionary (Angus Stevenson & Christine A. Lindberg, eds., 3rd ed., 2010) *SV* "principle." The term "principle" is intended herein in the sense of a legal principle as per Humberto Avila, Theory of Legal Principles 8, 40, 45-50 (2007).

ing body of scholarship, in particular the features of the "rule of ecological law" as defined by Geoffrey Garver.[28] Ecological law is an emerging approach to understand and imagine law, so these principles are only proposed as tentative contributions to its evolving theory. They are as follows:

1. *Ecocentrism: To Recognize and Respect the Value of all Beings and their Interconnectedness, Equitably Promoting the Interests of Human and Non-Human Members of the Earth Community*

Ecocentrism primarily illuminates the law's ability to support and promote a worldview in which humans are part of nature and no more important than other life forms and systems. It also guides the law in preventing decisions that disregard ecological consequences and lean towards short-term human interests. The focus of this principle is relational and conceptual: it centers on the view and understanding of the human-Earth relationship underlying the law.[29] *Ecocentrism* sets a strong basis for the other two principles.

As understood here, the principle of *ecocentrism* corresponds to the first feature of Garver's rule of ecological law: "recogniz[ing] humans are part of Earth's life systems."[30] In requiring that law "recognize and respect the value of all beings," the principle also implies Aldo Leopold's land ethic,[31] and Thomas Berry and Cormac Cullinan's Earth rights.[32] The requisite to "equitably promote the interests of human and nonhuman members of the Earth community" is meant to invoke the essence of biocentrism/ecocentrism (further discussed below) and the responsibility towards other beings, as in the Earth Charter's call for "universal responsibility."[33]

The proposed principle includes the acknowledgment of the relationship that humans have with other beings as part of the web of life, through the notion of interconnectedness. As noted, interconnectedness is often present in indigenous worldviews and legal traditions.[34] However, the recognition of interconnectedness does not exclude *per se* anthropocentric approaches that value other life forms and systems based on human interests (in particular

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[28] Garver, *supra* note 1, at 325.

[29] See Cullinan, *supra* note 1, at 29.

[30] *Id*.

[31] Willis Enkins & Whitney Bauman quote Leopold as follows: "In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for her or his fellow-members, and also respect for the community as such. *Source:* Aldo Leopold (1949). *A Sand County Almanac, and Sketches Here and There,* p. 204. New York: Oxford University Press." Willis Jenkins & Whitney Bauman, *Ecocentrism*, in Berkshire Encyclopedia of Sustainability, Vol 1: The Spirit of Sustainability 119-120 (Willis Jenkins & Whitney Bauman, eds., 2010).

[32] Berry, *supra* note 4; Cullinan, *supra* note 1.

[33] Earth Charter Commission, The Earth Charter, Preamble, (2000).

[34] E. Richard Atleo, Tsawalk: A Nuuchah-nulth Worldview (2004).

utilitarianism). Therefore, the principle of *ecocentrism* also includes biocentrism, which "articulat[es] a larger philosophical vision in which all life is interconnected *and which seeks to promote the interests of human and nonhuman life alike*."[35] Combining interconnectedness and biocentrism permits a rich appreciation of the approach to the human-Earth relationship underlying the law. Thus, *ecocentrism* is not understood here narrowly as "an argument that asserts ecological integrity as the most important moral good or that considers ecological systems as the bearer of ultimate value."[36] It is a broader argument for respect for the Earth community. The value of and need to give primacy to ecological integrity is captured instead in the second principle proposed below (*ecological primacy*).

2. *Ecological Primacy: To Ensure that Social and Economic Behavior and Systems are Ecologically Bound, Respecting Planetary Boundaries*

Ecological primacy provides clarity about the need to ensure human development is pursued without irreversibly impairing natural systems or crossing Planetary Boundaries, including precaution about respecting these boundaries. This principle should be understood as targeting the social and economic behavior of individuals, groups, corporations and other legal persons (for example, the acquisition and use of property, family planning, marketing and consumer behavior, etc.), as well as social and economic sectoral and systems behavior (for example, the financial system, the mining sector, etc.).

This principle corresponds to the second and ninth features of Garver's rule of ecological law, respectively: "ecological limits must have primacy over social and economic regimes;"[37] and "requir[ing] precaution about crossing global ecological boundaries."[38] This includes Bosselmann's *principle of sustainability*, which he defines "as the duty to protect and restore the integrity of the Earth's ecological systems"[39] because creating ecologically-bound human systems requires that this duty be observed. At the same time *ecological primacy* also indirectly implies Garver's fourth feature: "focus on radically reducing material and energy throughput."[40] Such a reduction is needed to achieve sustainability (in the sense Bosselmann gives it)[41] and for creating ecologically-bound human systems. The principle captures the recognition that some ecological limits have already been surpassed and cannot continue to be transgressed

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[35] Gavin Van Horn, *Biocentrism*, in Jenkins & Bauman, eds., *supra* note 31, at 36 (emphasis added).

[36] Jenkins & Bauman, *supra* note 31.

[37] Garver, *supra* note 1 at 325.

[38] *Id.*, at 329.

[39] Bosselmann, *supra* note 25, at 53.

[40] Garver, *supra* note 1, at 326.

[41] Bosselmann, *supra* note 25, at 53.

without compromising the planet's life supporting systems.[42] The reference to Planetary Boundaries[43] highlights the need to respect ecological limits not only of the local ecosystem, but also at a planetary level,[44] and implies the need for legal systems to incorporate the growing understanding of complex social-ecological systems.[45]

Ecological primacy also includes the *precautionary principle* (*in dubio pro natura*) with respect to Planetary Boundaries specifically, as in Garver's ninth feature of the rule of ecological law, and more broadly as a means to prevent harm.[46]

The concept of ecological integrity is incorporated as a fundamental component of the proposed principle of *ecological primacy*, while acknowledging its contentious meaning and that the boundaries for its implementation may appear elusive.[47] Given the profound complexity of nature, ecological integrity is difficult to measure and defies rigid standardization.[48] The Panel of Ecological Integrity of Canada's National Parks offers the following definition: "[i]n plain language, ecosystems have integrity when they have their native components (plants, animals and other organisms) and processes (such

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[42] Will Steffen, *et al*, *The Trajectory of the Anthropocene, supra* note 2; see also Geoffrey Garver, *Moving Forward with Planetary Boundaries and Degrowth*, in, Confronting Ecological and Economic Collapse: Ecological Integrity for Law, Policy and Human Rights 203-214, 203 (Westra & Michelot, eds., 2013).

[43] Rockström, *et al*, *supra* note 2; Steffen, *et al*, *Planetary Boundaries*, *supra* note 2.

[44] Geoffrey Garver, *A Complex Adaptive Legal System for the Challenges of the Anthropocene* (forthcoming).

[45] Social-ecological Resilience and Law (Ahjond S Garmestani & Craig R Allen, eds., 2013); J.B. Ruhl, *Panarchy and the Law*, 17:3 Ecology and Society 31 (2012).

[46] As Jamie Benidickson explains: "From its German origins in good household management, the *precautionary principle* has evolved to encompass a cluster of basic principles. It includes, for example, the proposition that early preventive action is appropriate even in the absence of scientifically documented need when delay would impose increased costs and greater risks of environmental harm. Precaution also entails recognition of the importance of leaving wide margins of tolerance or room for manoeuvre to permit natural adaptation to human interference. Pushing the edge of the envelope is not a good idea. In addition, the precautionary principle implies a shift in the onus of proof to those who propose initiatives, innovations, and activities whose environmental impact is not fully understood". Jamie Benidickson, Environmental Law (Essentials of Canadian Law) 22 (2nd ed., 2002), citing T. O'Riordan & J. Cameron, Interpreting the Precautionary Principle 16-8 (1994).

[47] Garver, *supra* note 44, at 203.

[48] Ecological Integrity: Integrating Environment, Conservation, and Health 20-21, 99 (David Pimentel, Laura Westra & Reed F. Noss, eds. 2000). *See also* Garver, *supra* note 44, at 5-6; P.J. Crabbé & J.P. Manno, *Ecological Integrity as an Emergent Public Good*, in Reconciling Human Existence with Ecological Integrity: Science, Ethics, Economics and Law 73-86 (Westra & Bosselmann, eds., 2008); Bosselmann, *supra* note 25, at 53; Klaus Bosselmann, *The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm*, in The Earth Charter, Ecological Integrity and Social Movements 3-11 (Laura Westra & Mirian Vilela, eds. 2014); Joseph H. Guth, *Law for the Ecological Age*, 9 Vt J Envtl L 431(2007-2008) (proposing a tort of "ecological degradation"), at 496.

as growth and reproduction) intact."[49] The notion of ecological integrity is adopted here following this general definition, with the understanding that humans are not separate from nature, but part of the native animal components of ecosystems.

Another concept broadly captured by this proposed principle of *ecological primacy* is the *resilience principle*. Nicholas Robinson articulates it as follows: "Governments and individuals shall take all available measures to enhance and sustain the capacity of social and natural systems to maintain their integrity."[50] Resilience plays an important role in ecological integrity, so the *resilience principle* can contribute to building the ecologically-bound behavior and systems enshrined by the principle of *ecological primacy*.

Ecological primacy is strongly linked with *ecocentrism*. It is by recognizing the place of humans in the web of life, their dependence and impact on other life forms and their equal intrinsic value that it becomes possible to embrace limits and forego non-essential benefits that may be harmful to the Earth community. In contrast to *ecocentrism*, *ecological primacy* has a material focus that aims at bounding material and energy consumption within ecological limits. In turn, this ecologically-bound material basis helps create the conditions for the implementation of the last principle, *ecological justice*.

3. *Ecological Justice: To Ensure Equitable Access to the Earth's Sustaining Capacity for Present and Future Generations of Humans and Other Life Forms and Systems, and Avoid the Inequitable Allocation of Environmental Harms*

Ecological justice provides an ethical grounding for decisions about the equitable use of the planet's sustaining capacity and the fair distribution of and restraint on wealth. Its focus is relational, but unlike *ecocentrism* it is so in a practical and material way, aiming to render respect for all beings into actual equitable access to the Earth's sustaining capacity and the avoidance of the inequitable allocation of harm.

This principle captures the sixth feature of Garver's rule of ecological law: "ensur[ing] the fair sharing of resources and environmental harms among present and future generations of humans and other life"[51] and Bosselmann's

[49] Parks Canada Agency, Unimpaired for Future Generations: Protecting Ecological Integrity within Canada's National Parks: A Call to Action 2 (2000). The question of whether ecological integrity is the most appropriate concept as a reference for developing a new legal framework for the human-Earth relationship remains open as ecological law evolves. Similarly, the question of the baseline to be adopted for judging the ecological conditions that ecological law aims to protect and restore requires further research and discussion. At a global level, perhaps the thresholds identified as Planetary Boundaries (which are meant to evolve through ongoing scientific inquiry and debate) could provide that baseline.

[50] Robinson, *supra* note 25, at 24.

[51] Garver, *supra* note 1, at 326.

concept of ecological justice.[52] As Bosselmann explains, intergenerational and intragenerational equity are "two ethical elements that are widely accepted as being essential to the idea of sustainable development."[53] In contrast, the notion of humans and other species having equal intrinsic value is controversial and is only starting to be recognized in law.[54] Bosselmann argues that interspecies equity or "concern for the non-human natural world" is needed along with the moral duties to the poor (intragenerational equity) and to future generations (intergenerational equity) if we are to exclude the "very possibility of destroying the planet's conditions of life" from humanity's development paths.[55]

The fundamental idea behind this triple principle of *ecological justice* is that the Earth's sustaining capacity should be used so as to enable humans *and other species* to sustain themselves today and in the future.[56] Moreover, this principle goes beyond fair distribution and implies a society that aims to attain sufficient —not maximum— wealth held collectively and individually. Garver argues that "[t]he focus on sufficient as opposed to maximum wealth implies a limit on inequality of wealth, and that it is possible to be too rich —with the limits established so as to allow for the flourishing of non-human species and ecological restoration."[57]

The principle of *ecological justice* also captures the values promoted by Berry and Cullinan in their arguments for recognizing the rights of other beings through Earth jurisprudence and wild laws.[58] At the same time, it allows for other approaches that do not assign rights to nonhumans, like Taylor's proposal emphasizing the ecological responsibilities and constraints attached to human rights (ecological human rights).[59] Finally, the principle includes the concept of environmental justice[60] by requiring that inequitable allocation of environmental harms be avoided.

In summary, *ecocentrism, ecological primacy and ecological justice* are intended together as a tool (a "lens of ecological law") to critique existing laws in order to better understand what changes adopting ecological law might entail. In the sections that follow, I use this lens to discuss the *Júba Wajíin Amparo*. First, I briefly introduce the case and its context; second, I present the analysis of

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[52] Bosselmann, *supra* note 25.

[53] *Id.*, at 97.

[54] *Id.*, at 103-109; Universal Declaration of the Rights of Mother Earth (2010).

[55] *Id.*, at 99.

[56] Peter G. Brown, *Are There Any Natural Resources?* 23 Politics and the Life Sciences 1 (2004).

[57] Garver, *supra* note 1, at 328.

[58] Berry, *supra* note 4; Cullinan, *supra* note 1.

[59] Prue Taylor, *Ecological Integrity and Human Rights*, in Westra & Bosselmann, eds., *supra* note 48, at 89-108, 91.

[60] Jason A. Byrne, Environmental Justice (2013).

the case from the lens of ecological law; and third, I offer a summary of the status of the case and some considerations on its importance. The article then closes with a short conclusion.

III. Indigenous Communities in Mexico Challenge Mining Concessions in Their Territories

Under the Mexican Constitution, the nation owns all minerals, irrespective of surface ownership. The Mining Law further considers mining an activity of public utility and a preferential land use over any other, with the exception of hydrocarbon extraction and electricity transmission.[61] Concessions are granted on a first come, first serve basis to qualified Mexican nationals or Mexican companies (which can be 100% foreign owned).[62] They include both exploration and extraction rights, as well as guaranteed access to mining deposits, including through expropriation.[63] Mining concessions are granted for 50 years and may be renewed for the same time period.[64] Some praise the Mining Law for its simplicity and for imposing very few restrictions on mining enterprises.[65] For others, like Jaime Cárdenas, "the aims of the Mining Law are incompatible with the Constitution and international treaties."[66] Francisco López Bárcenas further argues that mining law and policy in Mexico have life-threatening implications for indigenous communities.[67] The Mexican legal mining regime has also been criticized as "unsustainable legislative nonsense, or blunt corruption and environmental suicide."[68]

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[61] Ley Minera, Diario Oficial de la Federación, June 26, 1992, as amended November 8, 2014, Art. 6.

[62] Ley Minera, Art. 10, 11 13 and 13 BIS. Indigenous and agrarian communities that claim a concession on the land they occupy at the same time others do will have a preference over the concession if they meet the same requirements (which is, in practice, nearly impossible).

[63] Ley Minera, Art. 19.

[64] Ley Minera, Art. 15.

[65] Federico Kunz, *Mexican Mining Law: Healthy Development for the Industry*, in Secretaría de Economía, *supra* note 20, at 38-40.

[66] Cárdenas, *supra* note 11, at 64 (author's translation); also Marisol Anglés Hernández, *Jurisprudencia interamericana. Acicate contra la discriminación y exclusión de pueblos originarios de México en relación con sus recursos naturales (Inter American Case Law. Incentive against Discrimination and Exclusion of Mexican Indigenous Peoples Regarding their Natural Resources)*, XIV Anuario Mexicano de Derecho Internacional, 261 (2014), at 282.

[67] Francisco López Bárcenas & Mayra Montserrat Eslava Galicia, El mineral o la vida: La legislación minera en México (2011).

[68] J. Lara González, *Sobre la Ley Minera de México: ¿dislate legislativo insustentable o llana corrupción ambiental suicida?*, 187 Observatorio de la Economía Latinoamericana (2013) (author's translation).

A growing number of indigenous and agricultural communities in Mexico are taking action to protect their territories from mining projects. San Miguel del Progreso-Júba Wajíin is a Me'phaa (Tlapaneca) community of approximately 3,800 people located in the Municipality of Malinaltepec, Guerrero, which depends principally on cultivating maize, coffee and fruit trees.[69]

In April 2011, aware of the growing number of mining projects in the region, its governing assembly unanimously decided to reject any mining activity in their territory.[70] After confirming the existence of two mining concessions on their lands, in July 2013 the community filed an *amparo* alleging the concessions violate their constitutional rights to territory and consultation, and challenging the constitutionality of the Mining Law (hereinafter the *Júba Wajíin Amparo* or the *Amparo*).

Hundreds of communities in Mexico have declared themselves free from mining and a total of 71 indigenous communities in the States of Puebla and Colima have filed 3 *amparos* similar to the *Júba Wajíin Amparo*.[71] These *amparos* have all been admitted by district courts that have imposed injunctions on the concessions in question, pending the resolution of each case. The decisions on these cases could have momentous implications for achieving indigenous communities' self-determination, as well as other important issues related to indigenous rights in Mexico.[72] The effective observance of the rights of indigenous communities to consultation and to territory could have critical implications for mining in indigenous territories. As scholar Anglés Hernández has shown, effective implementation of free prior and informed consent is fundamental for empowering indigenous peoples regarding the use of their natural resources and the protection of their environment in the context of extractive projects in their territories, and more broadly, to counter the systemic exclusion they endure.[73] Furthermore, these *amparos* are of interest from the perspective of ecological law because of the possibility that courts might give precedence to indigenous values ascribing spiritual, ecological and relational meanings to the land and its resources over economic interests seeking to exploit such land and resources for commercial gain without regard to ecological limits.

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[69] Tlachinollan, *supra* note 19, at 2.

[70] *Id*., at 5; Eloisa A. Mora Cabrera, *The ecosocial struggle against mining in The Montaña de Guerrero: defending the territory in times of dispossession*, 65 Textual 129 (2015).

[71] Red Mexicana de Afectados por la Minería, REMA (Mexican Network of Those Affected by Mining) *www.remamx.org*

[72] SCJN, Reasunción de competencia 23/2014 relativa al amparo en revisión 167/2014 (Ponente: Ministro José Ramón Cossío Díaz) (hereinafter "Reasunción") par. 35-36.

[73] Anglés Hernández, *Jurisprudencia interamericana, supra* note 66, at 278-284; see also Georgina Gaona Pando, *El derecho a la tierra y protección del medio ambiente por los pueblos indígenas*, XXVI: 78 Nueva Antropología, 141 (2013).

IV. The San Miguel del Progreso-Júba Wajíín *Amparo* From the Lens of Ecological Law

1. *Main Claims of the San Miguel del Progreso-Júba Wajíín* Amparo

The *Júba Wajíín Amparo* was filed on July 15, 2013, before the Federal District Court in the State of Guerrero. The *Amparo*[74] makes six claims, five of which relate to the concessions and one to the constitutionality of certain provisions of the Mining Law itself. It argues that the act of granting the two concessions under Articles 6,[75] 10,[76] 15[77] and 19-IV[78] of the Mining Law violates the following rights:

A. The community's collective right to property of their indigenous territory under Article 21 of the American Convention on Human Rights[79] and Articles 13, 15 and 17 of ILO Indigenous and Tribal

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[74] The *Júba Wajíín Amparo* brief was provided to me for this research by the REMA civil society group. This article does not disclose any private or confidential information therein that is not otherwise publicly available.

[75] Article 6 of the Ley Minera states: "The exploration, exploitation and beneficiation of minerals or substances this law makes reference to are of public convenience and necessity, will be preferential over any other use or exploitation of the land, subject to the conditions established herein, and these activities may only be taxed through federal laws… "(Author's translation).

[76] Article 10 of the Ley Minera provides that: "The exploration and exploitation of the minerals or substances referred to in Article 4 …may only be carried out by Mexican nationals, *ejidos* and agrarian communities, indigenous towns and communities, …recognized as such by the Constitutions and Laws of the States, and by corporations created under Mexican law, through a mining concession granted by the Ministry…" (Author's translation).

[77] Article 15 of the Ley Minera provides: "Mining concessions confer rights over all the minerals or substances subject to the present law. Mining concessions will be valid for a period of fifty years as of the date or their registration with the Public Mining Registry and will be renewed for the same time period if their holders did not incur any grounds for cancellation provided by this law and so request it within the five years prior to the end of the term. The concessions for which a renewal request has been made will remain valid during the processing of such requests (Author's translation).

[78] Article 19 of the Ley Minera states: "Mining concessions confer rights to: …IV. Obtain the expropriation, temporary occupancy or establishment of an easement of the lands needed to carry out the works and activities of exploration, exploitation and beneficiation, as well as for the deposit of waste, tailings, and slags, and equally to establish underground rights of way through mining lots; …" (Author's translation).

[79] This article of the ACHR provides that: "Article 21. Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases

Peoples Convention No. 169,[80] in conjunction with Articles 1 and 133 of the Mexican Constitution.[81]

B. The right to integral protection of indigenous lands under Articles 2-A (V), (VI) and 27 (VII) second para., in conjunction with Article 1, all of the Mexican Constitution.[82]

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and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

[80] These provisions of ILO C169 set forth that: "Article 13. 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use…"

"Article 15. 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities…"

"Article 17. 1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. 2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community. 3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them."

[81] Article 1 of the Constitution provides: "Article 1. In the United Mexican States, all persons shall enjoy the fundamental rights recognized by this Constitution, which may not be abridged nor suspended except in those cases and under such conditions as herein provided…

Every form of discrimination motivated by ethnic or national origin, gender, age, incapacities, sexual preferences, status or any other which attempt on human dignity or seeks to annul or diminish the rights and liberties of the people, is prohibited."

[82] See *supra* note 81 for Article 1. Articles 2-A (V), 2-A (VI) and 27 (VII) para. 2 of the Constitution read: "Article 2… A. This Constitution recognizes and protects the right to self-determination of indigenous people and communities and, consequently, their right to autonomy, so that they may… V. Maintain and improve their habitat and preserve the integrity of their lands as provided in this Constitution.

VI. Attain preferential use and enjoyment of any natural resources located in the sites inhabited and occupied by the communities, save for the ones pertaining to strategic areas as provided in this Constitution. The foregoing rights shall be exercised respecting the nature and classes of land ownership and land tenure set forth in this Constitution and the laws on the matter, as well as the rights acquired by third parties or by members of the community.

C. The right to consultation under Articles 6 and 13 of ILO C169,[83] in conjunction with Articles 1 and 133 of the Mexican Constitution.[84]
D. The guarantees of legality and legal certainty under Articles 14 and 16 of the Constitution.[85]
E. The right to the protection of communal lands both for purposes of human settlements and for productive activities provided by Article 27 (VII) of the Constitution.[86]

Finally, the *Amparo* also claims that, in granting the concessions, the authorities applied Articles 6, 10, 15 and 19 (IV) of the Mining Law to the detriment of the community as said articles are deemed unconstitutional and contrary to international conventions because they allegedly violate Articles 1 last para., 2, 25, 27 sixth para., and 28 tenth para. of the Mexican Constitution; Articles 6, 13, 15 and 17 of ILO C169; and Article 21 of the ACHR; all in conjunction with Articles 1 and 133 of the Mexican Constitution.[87]

To achieve these goals, communities may constitute partnerships under the terms established by the Law… Article 27… VII… The Law shall protect the integrity of the lands of native indigenous groups…"

[83] See Article 13 of ILO C169 in *supra* note 80. Article 6 of ILO C169 reads as follows: Article 6. 1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

[84] See Article 1 of the Constitution in *supra* note 81. Article 133 provides:

Article 133. This Constitution, the laws of the Congress of the Union which shall be enacted in pursuance thereof and all treaties in accordance therewith, celebrated or which shall be celebrated by the President of the Republic with the approval of the Senate, shall be the supreme law of the Union. The Judges of the Federal District and of the States shall be bound thereby, notwithstanding any provision to the contrary in the local constitutions or local laws.

[85] Article 14 and 16 of the Constitution state:

Article 14. No law shall be enforced *ex post facto* in the detriment of any person.

No one shall be deprived of their freedom, properties, possessions or rights without a fair trial before previously established courts, according to the essential formalities of the proceedings and laws issued beforehand… Article 16. No one may be disturbed in his person, family, home, papers or possessions, except by written order of a competent authority, duly grounded in law and fact which sets forth the legal cause of the proceeding…

[86] See *supra* note 82 for Article 27 (VII) of the Constitution.

[87] See *supra* notes 81, 82, 84, respectively for Articles 1, 2 and 133 of the Constitution. See text following *infra* note 108 for Article 25. Article 27 para. 6 and 28 para.10 provide:

2. *Analysis From the Lens of Ecological Law*

This section reflects on the issues raised in the *Júba Wajíin Amparo* using the lens of ecological law described above. The objective of this reflection is to test the hypothesis that judicially advancing indigenous rights to territory might also further the interests of ecological law. Thus, it inquires into whether the arguments in the *Amparo* overlap in any way with the principles of ecological law.

I believe there are synergies between ecological law and indigenous rights and legal orders, and that those synergies should be respectfully discovered and fostered. Numerous statements from indigenous peoples around the world highlight the relationship of indigenous peoples with the environment[88] and some indigenous scholars argue that common features of indigenous law include the concept of interconnectedness[89] and strong environmental protection values.[90] However, one should be mindful to avoid essentializing indigenous peoples by assuming their relationship to the environment is consistent across their diversity[91] or by claiming that indigenous peoples are inherently less destructive of the environment than Western industrial societies.[92] A further caution is that this article limits the consideration of the potential interactions between *ecocentrism*, *ecological primacy* and *ecological justice* with the worldview of the Me'phaa only to the arguments put forth in the *Amparo*.

Article 27 …In the cases established in the two paragraphs hereinbefore, the Nation's dominion is inalienable and not subject to the statute of limitation and the exploitation, use or enjoyment of the resources in question by private persons or by companies incorporated in accordance with Mexican laws, may not be undertaken save by means of concessions granted by the President of the Republic and in accordance with the rules and conditions set forth by the Laws…

Article 28 …The State may, in accordance with the law and in case of general interest, grant concessions for the provision of public services or for the exploitation, use and profit of property owned by the Federation, save for the exceptions established by the laws. The laws shall set forth the requisites and conditions required to guarantee the efficiency of the services rendered and the social use given to such property, and shall prevent occurrences of hoarding which contravene public interest.

[88] For example, the Universal Declaration of the Rights of Mother Earth, *supra* note 54. Some international instruments also recognize this relationship, e.g. Chapter 26 of U.N. Agenda XXI (1992).

[89] Peigi Wilson, Interconnections: The Symbiosis of Human Rights and Environmental Protection (LL.M. Thesis University of Ottawa 2009) 29.

[90] John Borrows, Recovering Canada: The Resurgence of Indigenous Law (c2002) at 47.

[91] Val Napoleon, Indigenous Laws: Some Issues, Considerations and Experiences-An Opinion Paper prepared for the Centre for Indigenous Environmental Resources (CIER) (2007).

[92] Benjamin J. Richardson, *The Ties that Bind: Indigenous Peoples and Environmental Governance*, in, Indigenous Peoples and the Law: Comparative and Critical Perspectives (Benjamin J. Richardson & Shin Imai, eds., 2009).

A. *Ecocentrism*

To recall, this principle calls for law to *recognize and respect the value of all beings and their interconnectedness, equitably promoting the interests of human and non-human members of the Earth community*. What elements in the *Amparo* are in line or conflict with *ecocentrism*?

The *Amparo* describes the applicants (the Me'phaa people) as for centuries having owned their territories and collectively used the resources of the land while maintaining a cultural link to the "land and habitat in its integrity," in accordance with their indigenous worldview.[93] The *Amparo* argues that the destructive nature of mining is incompatible with the protection of their territory and their resources.[94]

A sense of interconnectedness is apparent in these statements, but beyond this there are no other obvious signs of *ecocentrism* in the *Amparo*. The claims and arguments put forth are fundamentally anthropocentric. Whether this may be due to the constraints imposed by the types of arguments expected in a legal document such as an *amparo* brief is an intriguing question, which is, however, beyond the scope of this article.

As for the Mining Law provisions in question, it is clear that the pre-eminence of mining over any other land use is profoundly anthropocentric because the land is valued as a source of mineral resources solely for human consumption. Land uses that seek to fulfill human interests in harmony with the ecosystem (for example, permaculture or polyculture orchards) are more likely to be in line with *ecocentrism*. Whether and what forms of mining could be in line with *ecocentrism* remain open questions.[95]

B. *Ecological Primacy*

The principle of *ecological primacy* aims for law to *ensure social and economic behavior and systems are ecologically bound, respecting Planetary Boundaries*. What can be said of the *Amparo* from this perspective?

The *Amparo* states that the open pit silver and gold mining authorized by the concession would "necessarily involve the material destruction of [the community's] territory and of the use of the natural resources that inhabit [their] land, such as the water, forests, grasslands and other vegetation that make up [their] habitat."[96] As noted, the fifth claim of the *Amparo* invokes the constitutionally enshrined right to the protection of communal lands for purposes of human settlements and for productive activities.[97] The community

[93] *Amparo,* at 11 (author's translation).

[94] *Id.*, at 62.

[95] Sbert, *supra* note 7.

[96] *Amparo,* at 62 (author's translation).

[97] *Amparo,* at 80.

argues that because Article 6 of the Mining Law gives preferential use of the land to mining over any other use, the concessions granted to the company are incompatible with this constitutional indigenous right.[98]

Compared to large-scale open pit mining, the Júba Wajíin settlement and the small-scale farming and harvesting activities the community carries out are more likely in line with *ecological primacy*, especially to the extent that these maybe governed by a worldview that seeks to maintain a balance with the environment. In contrast, it would be hard to argue that prioritizing mining over any other land use reflects ecological rather than economic primacy. Mining inherently disturbs the land on which it is carried out.[99] Especially in its increasingly frequent form of large-scale open pit extraction involving large volumes of toxic substances, mining cannot be viewed as an activity that is ecologically bound at the site level.[100] Globally, the sector is driven by the demand for commodities and the pursuit of profit, neither of which are ecologically bound. Mining directly and indirectly impacts Planetary Boundaries:[101] it contributes to biodiversity loss through pollution and direct and induced habitat destruction; to land use change through displacement of agricultural communities and forest clearing; to climate change through coal and bitumen mining; to the production of fertilizers disrupting the nitrogen and phosphorous cycles; and to the depletion and pollution of fresh water.[102] Even under the most ambitious sustainability standards for mining, environmental considerations are an operational concern aimed at minimizing —not preventing— harm to the environment.[103] In contrast, from an ecological law perspective, respecting ecological limits locally, regionally and globally would be fundamental concerns in determining whether a mining project is to be pursued at all.[104]

Protecting land from destruction and maintaining a traditional land use may be supportive of ecological integrity; however, they do not necessarily lead to a system that is ecologically bound. The challenge of incorporating *ecological primacy* into law involves setting benchmarks for ecological integrity and mechanisms to measure whether ecological integrity is being maintained and restored. At the same time, it is clear that norms that grant primacy to extractive land uses are obstacles in a shift toward ecological law.

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[98] *Amparo*, at 81.

[99] See for example, *Mining: Adding Up the Costs of a Hole in the Ground* in Soil Atlas: Facts and Figures about Earth, Land and Fields 32-33 (Heinrich Boll Foundation and Institute for Advanced Sustainability Studies, January 2015).

[100] Philippe Sibaud, Opening Pandora's Box: The New Wave of Land Grabbing by the Extractive Industries and the Devastating Impact on Earth (2012); The Gaia Foundation, Undermining Agriculture: How the Extractive Industries Threaten Our Food System (2014).

[101] Rockström *et al*., *supra* note 2.

[102] Sbert, *supra* note 7, at footnote 28.

[103] For example, Natural Resources Charter (2014), Precept 5, at 20; Mining Association of Canada (MAC), Toward Sustainable Mining: Guiding Principles.

[104] Sbert, *supra* note 7.

C. *Ecological Justice*

Law under this principle would *ensure equitable access to the Earth's sustaining capacity for present and future generations of humans and other life forms and systems, and avoid the inequitable allocation of environmental harms.* What can be said of the case from this perspective?

The *Amparo* raises issues of intra and intergenerational equity regarding the mining concessions, but no obvious links are made to inter-species equity. The threat of loss of access to and destruction of the land on which the community depends for their livelihood is at the heart of the Júba Wajíin opposition to mining in their territory. As noted, the *Amparo* argues that the preferential use of the land given to mining violates the constitutionally enshrined right to the protection of communal lands both for purposes of human settlements and for productive activities.[105]

The *Amparo* further claims that the fifty-year term of the concessions —renewable for another fifty years— compromises the future of the community and threatens future generations of its members.[106] The *Amparo* also deems this term unconstitutional because it obstructs the implementation of several indigenous rights. According to the *Amparo,* the fifty-year term:

— hinders the authorities from fulfilling their constitutional duty to protect the territory for human settlement and productive activities;
— impedes the State's constitutionally-mandated direction of the economy from being implemented to benefit indigenous communities and in a non-discriminatory fashion; and
— prevents the Mexican authorities from complying with their duty to promote, respect, protect and guarantee indigenous peoples and communities the rights to consultation and to territory under ILO C169 and the ACHR.[107]

The *Amparo* alludes to Article 25 of the Constitution,[108] which says in its first paragraph that:

> *The State is in charge of directing national development and must guarantee that such development is comprehensive and sustainable*, that it strengthens national sovereignty and its democratic regime, and that it enables full exercise of the liberties and dignity of the individuals, groups and social classes, whose safety is protected by this Constitution, *by promoting economic growth and employment, and a more just distribution of income and wealth*.

105 *Amparo*, at 80.
106 *Id.*, at 22.
107 *Id.*, at 91.
108 *Id.*, at 93 [italics in *amparo*].

The *Amparo* argues that based on this constitutional mandate, mining concessions are bound by ulterior and higher ends such as the general interest and the social use of the goods covered by the concessions.[109] This argument furthers *intra*generational equity. From an *inter*generational perspective, the renewable fifty-year term of mining concessions is deemed inconsistent with the social use of the land.[110]

In sum, what light does the *Júba Wajíin Amparo* shed on some of the challenges and opportunities for adopting an ecological law model in Mexico, in particular regarding mining? The current approach to the human-Earth relationship as gleaned from the *Amparo* is anthropocentric with only incipient acknowledgement of interconnectedness on the part of the applicants, which indicates an important challenge for an *ecocentric* approach. From the perspective of *ecological primacy*, the *Amparo* reveals some opportunities for ecological law by highlighting the deeply conflicting rules over the use of the land. On the one hand, constitutional provisions proclaim the protection of traditional indigenous and agrarian uses (arguably consistent with respecting ecological limits); and on the other, the Mining Law prioritizes large-scale mineral extraction (generally not conducive to respect for ecological limits). There are conflicting rules determining who decides what use should be given to the land: indigenous rights to consultation and territory require the free, prior and informed consent of indigenous communities for mining in their territories and the protection of those territories; contrasted with a framework designed to facilitate access to the land for mining investors. These provisions also have implications for *ecological justice*, as the latter appears to support profit-driven short-term uses while hampering the continuation of multi-generational relationships with the land.

A fundamental question underlying this case is whether any specific use should be preferred to others, and whether and in which ways the ultimate ends of any such use (subsistence, ceremonial, commercial, recreational, developmental, etc.) should affect that determination. The Mexican Constitution explicitly enshrines economic growth in Article 25, cited above, but at the same time this growth is bound to the fulfillment of broader societal goals. This is at the heart of a fundamental question underlying ecological law: what is the economy for and what is its proper place in society?[111]

V. Status and Significance of the *Júba Wajíin Amparo*

For now, the Júba Wajíin community is free from mining concessions on their territory although their case was not ruled on by the SCJN. In summary, the procedural history of this *amparo* is as follows. First, the district judge ruled

[109] *Amparo*, at 94.

[110] *Id.*

[111] Brown and Garver, *supra* note 4.

in favor of Júba Wajíin declaring that the two mining concessions violated the community's constitutional rights; however, the judge did not rule on the constitutionality of the contested articles of the Mining Law.[112] In response, the community and the Mexican authorities concerned both appealed the decision. Among other things, the former argued that the court failed to resolve all the matters set forth in the *Amparo* while the latter argued that there is no right to prior consultation regarding mining concessions.[113] Following a request from the applicants, on February 11, 2015, the SCJN assumed jurisdiction over the appeal of the *Amparo* on the grounds that it raised issues of "importance and transcendence," such as the interpretation of indigenous rights to territory and consultation, and deliberation as to whether the Mining Law is in accordance with the Constitution and international law.[114]

In November 2015, the company holding two of the challenged concessions abandoned those concessions.[115] On May 25, 2016, the SCJN ordered a stay on its review of the *Amparo* and revoked the district judge's ruling on grounds that the contested act no longer existed given the withdrawal of the concessions.[116] Some argue this withdrawal was a strategy to prevent a momentous SCJN decision that would uphold indigenous rights against concessions and partially strike down the Mining Law.[117]

The *amparos* brought by indigenous communities against mining concessions on their territories can be interpreted as a (cautious) willingness on behalf of these communities to engage with the State (to a certain extent) and use the legal system to address some of their grievances. This is no trivial matter: other communities in Mexico have decided that engaging with the system is not worthwhile and are instead creating alternative ways to live.[118] Many of the indigenous rights currently enshrined in the Constitution were introduced in 2001 as the result of a long struggle triggered by the Zapatista uprising in December 1994 and in recognition of ILO C169.[119] The San Andrés Accords between the Zapatistas and the Mexican government called for

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[112] Tlachinollan, Indigenous Me'phaa Community of the Montaña of Guerrero Obtains an Unprecedented Amparo Against Mining Concession (June 27, 2014).

[113] *Id.*

[114] SCJN, Reasunción, *supra* note 72, at par. 29.

[115] Hercilia Castro, *Se retira la minera Hochschild y cierra El Corazón de las Tinieblas*, LaPlazaDiaro.com (February 2, 2016).

[116] *Suspende la SCJN amparo promovido por indígenas de La Montaña contra minera*, LaJornadadeGuerrero.com (May 26, 2016).

[117] *Id.*

[118] Jessica Davies & Helen Jaccard, *Gustavo Esteva: Recovering Hope - The Zapatista Example*, UpsideDownWorld.com (January 10, 2013).

[119] Pablo González Casanova, *Los zapatistas del siglo XXI*, 4 OSAL (June 2001), at 5-8; Francisco López Bárcenas, Legislación y Derechos Indígenas en México 49-50 (3rd ed., 2010); César Nava Escudero, *Indigenous Environmental Rights in Mexico: Was the 2001 Constitutional Reform Facilitated by International Law?*, IV (2) Mexican Law Review (2012).

constitutional reforms that would have gone beyond those actually adopted in 2001.[120] For some, the reforms were a mockery[121] and further reason for disengagement.[122]

These *amparos* reflect some indigenous groups' decision to test the legal system by seeking judicial recognition of their rights. The *amparos* also test the 2011 Constitutional reforms that broadened the scope of the *amparo trial* to include the constitutionality of general norms and the observance of human rights recognized in international treaties to which Mexico is party.[123]

The district court's initial favorable decision in the *Júba Wajíin Amparo* was hailed as evidence that the *amparo trial* could be used as a tool to protect indigenous rights.[124] Arguably, a favorable decision from the SCJN might have even signaled a departure from what legal scholar Francisco López Bárcenas describes as the Mexican State's historical treatment of indigenous peoples: a refusal to recognize their rights or recognizing them only in ways that cannot be enforced.[125] The fact that the SCJN instead stayed its review of the case and revoked the district court ruling is viewed as yet another failure to protect the community's rights, as well as a lost opportunity to examine indigenous rights and the constitutionality of the Mining Law.[126] Speculating on whether the SCJN could have decided otherwise is beyond the scope of this analysis, but based on its February 2015 decision to review the *Amparo*, it seems clear that the court recognizes the importance of indigenous rights and the need to further their development.[127] Communities affected by mining will continue to fight to have their rights respected, and other opportunities for the SCJN to rule on the constitutionality of the Mining Law may arise.[128]

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[120] Francisco López Bárcenas, Autonomías y Derechos Indígenas en México 94-95 (Universidad de Deusto, 2008); Francisco López Bárcenas, *La Reforma constitucional en materia de derechos indígenas: los discursos y los hechos*, 36 Alegatos 225-234 (1997); see also Ana Esther Ceceña, *La marcha de la dignidad indígena'*, 4 OSAL 13 (June 2001).

[121] López Bárcenas, *supra* note 120, at 95.

[122] Juan José Carrillo Nieto, *El rechazo zapatista a las reformas constitucionales y la construcción de la Autonomía*, Rebelión.org (March 22, 2009).

[123] See SCJN, Reformas Constitucionales en materia de Amparo y Derechos Humanos publicadas en junio de 2011 (*scjn.gob.mx*).

[124] Tlachinollan, *supra* note 19, at 10.

[125] López Bárcenas, *supra* note 120, at 76 ("…la tónica del trato histórico del Estado mexicano hacia los pueblos indígenas: se les reconoce su existencia pero no sus derechos o en el mejor de los casos, estos se reconocen siempre que no se puedan ejercer.")

[126] Tlachinollan, SCJN deja pasar oportunidad histórica para proteger los derechos colectivos de los pueblos indígenas (May 25, 2016).

[127] SCJN, Reasunción, *supra* note 72, at par. 29 [listing a substantial number of issues the court might examine].

[128] REMA, Posicionamiento de la Red Mexicana de Afectados por la Minería, ante el *fallo* de la Primera Sala de la SCJN en el caso del amparo en revisión de la comunidad San Miguel Progreso, Guerrero (May 27, 2016).

For the mining company to have abandoned the concessions is, of course, a victory for the community of Júba Wajíin.[129] However, it is a fragile, partial and short-term victory because, under the Mining Law, the land with a cancelled concession becomes available for another concession within 45 days of such cancellation.[130] In fact, the Júba Wajíin community filed another *amparo* arguing that the authorities once again violated their constitutional rights to consultation by officially declaring the lots in question available for a new concession on November 24, 2015, without consulting the community. This *amparo* is under review by the district judge, who on December 11, 2015, granted the suspension of the declaration.[131]

A favorable SCJN decision would have delivered a victory with longer-term implications for Júba Wajíin and other indigenous communities threatened by extractive projects in their territories. Other *amparos* may have followed with similar results, changing the way mining companies relate to indigenous communities when there is an interest in mining on community territory.[132]

What does the fate of the *Amparo* mean from the perspective of ecological law? Admittedly, had the SCJN examined the merits of the case, it is unlikely that it would have even mentioned the environment, let alone explicitly engaged with ecological law. No reference is made to the environment in the initial SCJN decision to review the case.[133] However, the fact the *Amparo* challenged Mining Law provisions that conflict with ecological law (in particular those prioritizing mining over other land uses) reveals that issues of great interest to ecological law are at least reaching the courts. Had the SCJN found the contested provisions of the Mining Law unconstitutional, it would have indirectly removed certain rules that are clear obstacles to ecological law.

VI. Conclusion

Ecological law is an emerging approach to law aimed at constraining the economy within ecological limits, restoring ecological integrity and enabling an ecologically just society. Based on a wealth of existing scholarship, this article proposed a lens of ecological law, comprised of the principles of *ecocentrism, ecological primacy* and *ecological justice,* as a tool to better understand what adopting ecological law might entail. It then offered an analysis of the *Juba Wajíin Amparo* against mining concessions using this lens, testing the hypothesis that upholding indigenous rights may also imply opportunities for

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[129] Tlachinollan, Comunidad indígena Me'phaa logra cancelación de concesiones mineras en la Montaña de Guerrero (May 18, 2016).

[130] Ley Minera, Art. 14.

[131] *Júba Wajíin, la comunidad indígena que marcó un alto a las mineras*, laplazadiario.com (16 May 2016).

[132] Tlachinollan, *supra* note 19, at 12.

[133] SCJN, Reasunción, *supra* note 72, at par. 35-6.

ecological law. The analysis shows that the Mining Law provisions challenged by the *Juba Wajíin Amparo* pose important obstacles to ecological law; and even if tenuously, it shows synergies between indigenous rights and ecological law. From the perspective of ecological law, it is not justifiable for mining to be a priority land use over any other use: giving mining such pre-eminence is profoundly anthropocentric since by definition it gives primacy to economic interests, treating ecological considerations like operational concerns aimed at minimizing —not preventing— ecological harm. Finally, it is incompatible with ecological justice because it interferes with indigenous communities' and other life forms' and systems' access to the Earth's sustaining capacity, potentially over several generations. That the merits of this *amparo* were not examined by the SCJN because the concessions it was based on were cancelled makes it no less important as an example of the struggle for indigenous rights to territory and self-determination. Moreover, it illustrates the challenges facing a shift away from the current legal paradigm.

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UNVEILING THE MEANING OF SOCIAL JUSTICE IN COLOMBIA

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Abstract: *Through the presentation of the history of social justice in global constitutional discourse, this article aims to demonstrate that, although in Colombia there is not a constitutionalized purpose or principle of social justice, as in other countries, the modern notion of distributive justice, also called social justice today, is implicit in the Constitution of 1991 because it enshrined as mandatory rules the three main elements of its meaning at the time of its promulgation: the principle of social rule of law, the principle of human dignity and the right to a material equality. Thus, in Colombia social justice must not be understood in the Aristotelian sense of distributive justice but in accordance with these three elements, and can only be achieved if they are fulfilled.*

Key Words: *Distributive justice, social justice, human dignity, merit, material equality, affirmative actions*

Resumen: *Mediante la presentación de la historia de la justicia social en el discurso constitucional global, este artículo pretende demostrar que, a pesar de no existir en Colombia, como en otros países, un valor o principio constitucional de justicia social, la noción moderna de justicia distributiva, también llamada hoy justicia social, se encuentra implícita en la Constitución de 1991 porque esta consagró como normas obligatorias los tres elementos principales de su significado en el tiempo en el que fue promulgada: el principio de Estado Social de Derecho, el principio de dignidad humana y el derecho a una igualdad material. Así pues, la justicia social debe entenderse en Colombia a partir de esos tres elementos, no según el sentido aristotélico de justicia distributiva, y sólo puede ser alcanzada si ellos se cumplen.*

Palabras Clave: *Justicia distributiva, justicia social, dignidad humana, merecimiento, igualdad material, acciones afirmativas*

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I. Introduction

Defining distributive justice is not an easy issue. In fact, if someone wants to write about it, it is very important to establish first what will be understood by it, which author or school of thought will be followed, etc., in order to make clear to the reader what the writer means by this concept. According to Samuel Fleischacker[1] distributive justice has been understood in two senses throughout the history of the tradition of political philosophy based on ancient Greek thought: the Aristotelian and the modern sense. In general terms, the first one refers to giving everyone what they deserve according to their merits and the *telos* or purpose of the thing to be allocated,[2] while the second one, the object of this research article and also called "social justice" today,[3] refers to a duty of the State to guarantee everyone in society a certain level of means to satisfy their needs.[4]

On November 26, 2007, the United Nations (UN) established World Social Justice Day, to be celebrated on February 20 each year.[5] By doing so, the UN

[1] Samuel Fleischacker, *A Short History of Distributive Justice* (Cambridge: Harvard University Press, 2012) [Fleischacker, "A Short"].

[2] *Id.* at 5.

[3] However, it is worth noting that there is no consensus about how social justice should be understood, what its origin is, and how it came to be synonymous to distributive justice; those issues will be conducted in this paper.

[4] Fleischacker, *A Short*, *supra* note 2 at 4.

[5] G.A. Res. 62/10, U.N. Doc. A/RES/62/10 (Nov. 26, 2007).

placed social justice as one of the most important issues that it has to promote in order to achieve its original purpose of preserving peace and security in the world. Certainly, social justice is an omnipresent and controversial issue both in politics and the law today. In politics, for example, the highest chief of FARC-EP guerrilla, Rodrigo Londoño, alias Timochenko, after hearing of President Juan Manuel Santos' nomination to the Peace Nobel Prize, said that the only prize his guerrilla wanted was peace with social justice.[6] Now, in the legal arena, there are nearly seventy constitutions around the world that enshrine the expression "social justice" —despite the different cultures and backgrounds— as a purpose or principle of the State itself.[7]

In Colombia, even though the Political Constitution of 1991 doesn't explicitly enshrine the expressions "social justice" or "distributive Justice" as a purpose or principle of the State, it should be stressed that the Constitutional Court, its main and ultimate interpreter and a world-renowned institution because of its active protection of social rights in the last two decades, has applied those expressions in its judgments since its foundation in 1992. Actually, in a very famous judgment in 1992, the Court mentions social or distributive justice as a matter of allocation of means with the aim of guaranteeing social rights in the new Social Rule of Law.[8] Nevertheless, the judgment also in-

[6] El Espectador, *El único premio al que aspiramos es el de la paz con justicia social: Timochenko*, (Oct. 7, 2016), https://goo.gl/G2zqiM. Despite the historical evolution of the expression, it is still paradoxical that, following the example above, a Marxist guerrilla uses that expression to describe the goal of its "revolutionary plan", although the term has strong roots in the social discourse of the Catholic Church.

[7] Countries whose current constitutions enshrine the expression "distributive justice": Philippines, 1987. Countries whose current constitutions enshrine the expression "social justice": Afghanistan, 2004; Albania, 1998; Algeria, 1989; Angola, 2010; Antigua and Bermuda, 1981; Argentina, 1853; Armenia, 1995; Bahrain, 2002; Bangladesh, 1972; Belize, 1981; Bhutan, 2008; Bolivia, 2009; Brazil, 1998; Burundi, 2005; Costa Rica, 1949; Croatia, 1991; Cuba 1976; Dominica, 1978; Dominican Republic, 2015; Ecuador, 2008; Egypt, 2014; El Salvador, 1983; Equatorial Guinea, 1991; Eritrea, 1997; Gabon, 1991; Guatemala, 1985; Guinea-Bissau, 1984; Guyana, 1980; Honduras, 1982; India, 1949; Indonesia, 1945; Iraq, 2005; Ireland, 1937; Jordan, 1952; Kenya, 2010; Kosovo, 2008; Kuwait, 1962; Kyrgyzstan, 2010; Lebanon, 1926; Liberia, 1986; Macedonia, 1991; Montenegro, 2007; Morocco, 2011; Mozambique, 2004; Nepal, 2015; Niger, 2010; Nigeria, 1999; Pakistan, 1973; Panama, 1972; Paraguay, 1992; Philippines, 1987; Poland, 1997; Portugal, 1976; Qatar, 2003; Rwanda, 2003; Saint Lucia, 1978; Saint Vincent and the Grenadines, 1979; Sao Tome and Principe, 1975; Serbia, 2006; Sierra Leone, 1991; Solomon Islands, 1978; Somalia, 2012; South Africa, 1996; South Sudan, 2011; Sudan, 2005; Suriname, 1987; Syrian Arab Republic, 2012; Timor-Leste, 2002; Trinidad and Tobago, 1976; Tunisia, 2014; Turkey, 1982; Uganda, 1995; United Arab Emirates, 1971; United Republic of Tanzania, 1977; Uzbekistan, 1992; Venezuela, 1999; and Zimbabwe, 2013. Notice that the enactment date does not always correspond to the year in which the expression was added into the Constitution, for example, by an amendment. See Constitute, https://goo.gl/9YFqxR

[8] Corte Constitucional [C.C.] [Constitutional Court], Judgment T-406 of 1992. As Fleischacker would have said, the Court applied the modern sense of distributive justice.

cludes a corrective function in the sense that distributive justice also allocates punishments, which, as will be explained later below, is against the principles of Social Rule of Law and human dignity, and the right to material equality, enshrined by the Constitution.[9]

It is important to point out not so much why the Court has applied an old-fashioned and unconstitutional notion of distributive justice,[10] but that, even though there is no mandatory rule in the Constitution that enshrines social or distributive justice as a purpose or principle of the state, the Court has continuously described it as a purpose of the state itself in its judgments since 1992.[11] At least three questions arise from this fact: Is it permissible for a Court, the Congress or the executive to appeal to an extra-systemic purpose or principle when drafting, for example, a judgment, an act, a decree, etc.? Is social justice just an expression that Colombian legal practitioners, judges, and legal scholars should not take into account? And, can it be freely interpreted and applied both in the Aristotelian and a modern sense without contradicting the Constitution?

In this article, i will try to support the argument that, even though it is not a purpose or principle enshrined by the Constitution, the modern notion of distributive justice or "social justice,"[12] and not the ancient one, is an implicit idea in the Constitution, because the latter enshrined the three main elements of such a modern notion, i.e., the principles of Social Rule of Law and human dignity, and the right to material equality, which were available in the global constitutional discourse of the years in which the Constitution was promulgated.[13] So, the expressions "social justice" or "distributive justice" can be used in the national constitutional discourse,[14] but by following the

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[9] Corte Constitucional [C.C.] [Constitutional Court], Judgment C-171 of 1993.

[10] Changes in the definition of a very ambiguous expression through the years are justifiable because of the nature of a collegiate body.

[11] Although hundreds of them can be found, see, e.g., some current uses of the expression "distributive justice" in this sense: Corte Constitucional [C.C.] [Constitutional Court], Judgment T-014 of 2016; Corte Constitucional [C.C.] [Constitutional Court], Judgment C-027 of 2016; and some uses of the expression "social justice" throughout two decades in this sense too: Corte Constitucional [C.C.] [Constitutional Court], Judgment T-476 of 1998; Corte Constitucional [C.C.] [Constitutional Court], Judgment T-177 of 1999; Corte Constitucional [C.C.] [Constitutional Court], Judgment C-063 of 2008; Corte Constitucional [C.C.] [Constitutional Court], Judgment T-891 of 2013; Corte Constitucional [C.C.] [Constitutional Court], Judgment T-395 of 2016.

[12] The author follows the current tendency of equating the meaning of these expressions.

[13] Now, by constitutional discourse, the author means a system of thoughts, beliefs, and knowledge about the constitutional law that are shared by the agents of the constitutional field, i.e., judges, practitioners, and legal scholars, a system that also includes the rules that make up the constitutional law itself, e.g., the constitution, the *ratio decidendi* of certain judgments on the constitutionality of a rule, etc. Comp. Michael Foucault, The Archeology of Knowledge (New York: Pantheon, 1972).

[14] For example, in a judgment or even in an amendment to the Constitution, but also in an act, decree, a scholarly paper or a book, and so on.

principles and the right above, i.e., it ought to be understood, at least, as a duty of the state to guarantee a certain minimum means, based on human dignity and a different treatment in benefit of the poorest, discriminated, vulnerable, and marginalized people in society. Finally, the proposed meaning can be proved by the fact that, if the ancient or Aristotelian interpretation of distributive or social justice is followed in the constitutional discourse, e.g., in a judgment, it would disregard, even violate, the two principles and the right mentioned above.

So, the general objective of this article is to demonstrate that, even though there is no purpose or principle of social justice in the Colombian Constitution of 1991, social justice is implicit in it and can be achieved by guaranteeing the principles of Social Rule of Law and human dignity, and the right to material equality. The first specific purpose —although without exhaustive pretensions— is to contribute to clarify the meaning of the expression "social justice" today in the global constitutional discourse, by presenting new evidence about its origin, historical evolution, and relation with the principles of Social Rule of Law and human dignity, and the right to material equality, which are, in fact, the three legal tools of the State to materialize social justice. The second purpose is to show that, by enshrining the two principles and the right mentioned above, social justice has become implicit in the Constitution of 1991 and can be used in the Colombian constitutional discourse if it is only understood according to those rules and not to the Aristotelian sense of distributive justice. Finally, the third specific objective is to prove that the achievement of social justice in the Colombian State is possible and requires, essentially, the fulfillment of the principles of Social Rule of Law and human dignity, and the right to material equality, which are mandatory rules to the branches of power and the civil society. So, the justification for this research article is evident, because the clarification of that expression can guide the agents of the legal field, mainly in Colombia, but also in the world, on how to understand social justice in order to have the tools to materialize it through Law.[15]

Now, in the first part, by following the methodology proposed by the Socio-cultural and Transnational School of Legal History, which states that a legal institution (e.g., the Social Rule of Law, human dignity, material equality, distributive justice or social justice, etc.) should be contextualized according to "its preconditions and effects on a concrete society and culture, under a

[15] Although arguably, for the author social justice cannot be achieved if nobody knows what it is or, at least, what its essential elements are. Now, for the author, the very knowledge that social justice can be attained by the application of the principles of Social Rule of Law and human dignity and the right to material equality, is a legal tool by itself (e.g., for a judge, the legislator, or a policy maker), but also the especial lawsuits that protect those principles and right and prevent their violation, for example: lawsuits demanding to declare unconstitutional an act or the immediate protection of the fundamental right.

transnational and comparative view,"[16] an attempt will be made to construct a historical overview of the evolution of the modern notion of distributive or social justice in the comparative constitutional discourse. In the second part it will be shown: *i)* that the main elements of the modern notion of distributive or social justice presented above were enshrined by the current Colombian Constitution in 1991, *ii)* how a Colombian constitutional meaning of social justice would be like, *iii)* how the application of an Aristotelian meaning of distributive or social justice in the constitutional discourse would disregard and even violate mandatory principles and rights, and *iv)* some examples on how distributive or social justice can be achieved by applying such a meaning in the national constitutional discourse. Finally, as a summary of the two parts and a reflection, a brief conclusion will be drawn.

II. A Short History of Social Justice in Global Constitutional Discourse

1. *Aristotelian Distributive Justice*

In his book Nicomachean Ethics, Aristotle distinguished between two notions of justice: the first one called "universal justice," which includes all the virtues, and a second one called "particular justice," which belongs to the world of politics and judicial decisions. Within the latter notion, Aristotle presents two subtypes: corrective justice and distributive justice.[17] The first one refers to the elimination of the benefits and losses produced by a situation of inequality in voluntary or involuntary interactions, in order to restore equality between the parties of these interactions. This type of justice was more commonly known as commutative justice, a name that derived from the Latin expression used by Thomas Aquinas *justitia commutativa* in which *commutare* means "to exchange",[18] and whose use can be noticed in the judgment that is discussed here. The second type of particular justice says that political offices and property must be awarded according to merit; here, Aristotle points out: "all men agree that what is fair in distribution must be according to merit in some sense."[19] However, the understanding of this distinction has not been peaceful throughout the centuries and has been permeated by the context from which Aristotle has been read.[20]

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[16] Bernd Marquardt, *Historia Constitucional Comparada de Iberoamérica* 22 (Bogotá: Grupo Editorial Ibáñez, 2016).

[17] Aristotle, *The nichomachean ethics* 1129a1-1132b20 (Oxford: Oxford University Press, 2009) [Aristotle, N.E.].

[18] Izhak Englard, Corrective and distributive justice: from Aristotle to modern times 7, 17 (Oxford: Oxford University Press, 2009).

[19] Aristotle, N.E., *supra* note 18 at 1131a25.

[20] Allan Beever, Forgotten justice: forms of justice in the history of legal and political theory 68-70 (Oxford: Oxford University Press, 2013) [Beever, Forgotten]; Fred

Thus, equality in corrective justice imposes a rectification of the inequality caused within a voluntary or involuntary interaction, regardless of merit, for example: when a judge sentences someone to pay a prison sentence for homicide, he does not consider whether the condemned man deserves the punishment because he was a bad man, or if he does not deserve it because, in spite of everything, he was a good man. Therefore, Aristotle clarifies that "it makes no difference whether a good man has defrauded a bad man or a bad man a good man ...the law looks only to the distinctive character of the injury."[21]

In distributive justice, equality is achieved through the sharing of common assets (e.g, property or political positions) available in a society ruled by the same constitution, according to the merit of the person to whom such assets will be awarded. Justice requires that those assets be proportional to the merit of the individual to whom they are to be awarded. For this reason, it is unfair to treat the "unequal in merit" as "equal in merit," giving them equal assets.[22]

If merit is the basis for doing such a distribution, then: what is merit? Aristotle does not give a definition of merit. In fact, he notes that people may disagree on the meaning of merit in distributive justice and does not take sides in the debate expressly.[23] Nevertheless, it can be said that, in general, merit constitutes a measure of the accomplishment of certain requirements that make a person be a part in distributive justice.[24]

Aristotle argues that the concept of merit depends on the type of political regime that a community has. Thus, in an oligarchy, wealthy or noble birth are the basis to make the distribution of the benefits: whoever had more wealth and a better rank deserved to receive a better public office than the one that did not have them at all; in an aristocracy, aristocrats would insist on a distribution according to excellence; finally, in a democracy, they would say that distribution should be based on freedom, that is, a free citizen would have certain benefits that a slave would not have.[25]

According to Aristotle, once the meaning of merit has been given, it will be possible to allocate the benefits in a political community, a distribution that will take into account the relevant merit to the thing to be allocated.[26] For Aristotle, if there is a flute to be allocated, it should not be given to those

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Miller, *Nature, justice, and rights in Aristotle's politics* 71-74 (Oxford: Oxford University Press, 1995).

[21] Aristotle, N.E., *supra* note 18 at 1132a.

[22] Aristotle, N.E., *supra* note 18 at 1131a20.

[23] Aristotle, N.E., *supra* note 18 at 1131a25.

[24] John Hill, *A Theory of Merit*, 1 Geo. J.L. & Pub. Pol'y 19 (2002).

[25] Aristotle, N.E., *supra* note 18 at 1131a25; Rosen, 1975, pp. 234-236.

[26] Michael Sandel, Justice: what's the right thing to do? 186-188 (New York: Farrar, Strauss and Giroux, 2010).

who were born in a wealthy or noble family, but to the person who can better play the flute, because that is the person who can better fulfill the purpose for which the flute was designed, i.e., being well played to produce the best music.[27]

In this way, a reasonable answer to the question about the meaning of merit for Aristotle is that it is the virtue or excellence relevant to the thing to be allocated (virtue or excellence understood as the ability to fulfill the *telos* or purpose of the thing). Despite that, this answer is arguable if it is taking into account that there is no consensus about the meaning of merit for Aristotle because he never defined it. At least in the distribution of the flutes, the conclusion would seem to work, but if hypothetically a slave or a stranger had more virtues with respect to a political office, would they deserve the flute? The answer in this case would be negative because, although excellence is the most important part of the meaning of merit in distributive justice, Aristotle says that political virtue (the exercised virtue in political life) cannot be exercised if it is not supported by external means. Thus, without freedom and wealth, a slave or stranger would not be able to hold a public office. Merit, in the ideal political regime for Aristotle (the aristocracy), would take into account the virtue complemented with freedom and wealth.[28]

Finally, if equality in Aristotelian distributive justice is based on the proportionality between the merit of a person and the purpose or *telos* of the thing to be adjudicated to her, then, how would the Aristotelian distributive justice deal with the socio-economic inequalities that are discussed by modern theories of justice? Of course, a logical consequence of the Aristotelian distributive justice is that it could only remain immobile before the claims of material equality: socio-economic inequalities would be justified because the only thing that matters to Aristotelian distributive justice is that the rule of distribution according to merit is not affected.[29] Thus, neither the rich are called to share their wealth with the poor nor the State is called upon to make distributive policies on wealth: the rich have wealth because they have worked hard to obtain or preserve it (if it has been inherited), and have been prudent in their investments; in addition, such inequalities would be naturally justified because of, e.g., the race, the education level, or wrong decisions.[30] In short, social inequities are the product of the difference in excellence to deserve the means that the wealthy possess; the purpose of distributive justice is not to satisfy the needs of the poorest, vulnerable, and marginalized people of society, but to give each one what she deserves according to her excellence with respect to the thing to be allocated.

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[27] Aristotle, Politics 1282b14 (Oxford: Oxford University Press, 2009) [Aristotle, P.].

[28] David Keyt, *Aristotle's theory of distributive justice*, in A Companion to Aristotle's Politics 259 (David Keyt, & Fred Miller eds., Oxford: Blackwell, 1991).

[29] Eric Engle, *Aristotle, law and justice: the tragic hero*, 35 N. Ky. L. Rev. 1, 2, 10-12 (2008).

[30] *Id*.

2. *The Evolution of Distributive Justice as Social Justice: Three Stages*

A. *First Stage of Social Justice*

In the first stage, which extends to the beginning of the 20th century, the expression "social justice" was born in Europe at some point in the Old Regime, and was used to refer to "the justice of society," that is, the justice that had to regulate the relations between the individuals that compose society, and did not denote any relation with the idea of obligatory minimum means, human dignity, or material equality, because, in that aristocratic and hierarchical society, although the concern that the poor also needed some means to survive was not ignored, Christian morality argued that the division between the rich and the poor was a natural distinction created by God, and any donation to the poor to alleviate their suffering was an issue of Christian charity (form *caritas*, Latin word for "love") rather than justice, which was either corrective or distributive in an Aristotelian sense.[31] Some references to the use of the expression according to the context of this period can be found in articles of journals published with the mission of spreading the spirit of the Enlightenment, in which, for example, they refer to social justice as an obligation of the monarch,[32] and in works by Catholic theologians.[33]

According to Fleischacker,[34] at least in Philosophy, it was not until Adam Smith and his book "The Wealth of Nations" of 1776,[35] that this conception of the poor, as those condemned to be poor in the earth and to be hierarchically inferior and disdained by their behavior, began to change because Smith suggested a change of attitude towards the poor by saying that they also possessed the same intellectual capacities, virtues, and ambitions like any human being. By the early 1790's, claims of equality in aspects such as the right to work and education, came to constitutionalism, particularly in the Constitution of France of 1793,[36] and, although, like many others, François Babeuf was already talking about a natural right to an equal enjoyment of wealth,[37] there is no evidence that the term "distributive justice" or "social justice" has been used in this sense.

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[31] Fleischacker, A Short, *supra* note 2 at 17-52.

[32] Pierre Rousseau, VIII Journal encyclopédique ou universel 311 (1774), *available at* https://goo.gl/azD0O3; Jean-Jacques Tutot, L'Esprit des journaux françois et étrangers par une société de Gens-de-Lettres. Decembre. 131-133 (1784), *available at* https://goo.gl/QgwBr4

[33] Gianvincenzo Bolgeni, L'Episcopato ossia della potestà di governar la Chiesa 349 (1789), *available* https://goo.gl/TZR3jz

[34] Fleischacker, A Short, *supra* note 2 at 62-68.

[35] Adam Smith, 1 An inquiry into the nature and causes of the wealth of nations 96 (Oxford: Oxford University Press, 1979).

[36] Constitution de l'an I [French Constitution of Year I], 1793.

[37] Fleischacker, A Short, *supra* note 2 at 75-79.

Traditionally, it has been pointed out that the expression "social justice" was coined in the mid-nineteenth century by the Jesuit priest Luigi Taparelli D'Azeglio;[38] however, as seen, the use of the expression is older. For Taparelli, social justice is justice "between a man and another man", which demands, as they are both equal in specie by God (both are equal in humanity), they must be equal in rights even though, concerning their individuality, they are different by nature (e.g., some are more intelligent, others are stronger, etc.).[39] Taparelli says that social justice is divided between commutative and distributive justice: the first one balances the quantity of assets to which someone has a right in a private relation (e.g., if someone acquires an asset, she has to pay for it; the right must be satisfied with something equivalent), while the second one balances the proportion in the distribution of the common good (e.g., an office in government must be assigned to the most skilled person, not to anyone).[40] So, it is not true that Taparelli did coined the modern sense of the term "social justice" because his definition of social justice followed the typical features of this stage: social justice is the "justice of society", which is understood in an Aristotelian sense and, by consequence, divided between corrective (or commutative, according to Tomas Aquinas) and distributive justice.[41] In the same way, in the Anglo-Saxon world, John Stuart Mill used the expression "social and distributive justice" in his essay "Utilitarianism"; however, as Taparelli did, that expression was understood in an Aristotelian sense.[42]

However, as United Station professor Thomas Burke clarifies,[43] Taparelli's conception about morality in the economy equivocally transcended as Taparelli's concept of social justice and influenced the way that expression was to be understood later. Taparelli's economic doctrine suggested a confrontation between the economic liberalism and the ideal or catholic economy, which is the one he prefers. In the first place, he considered that the individualism of the former condemned society to a permanent war (e.g., producers against producers and buyers), leading to demands for redistribution and commu-

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[38] Thomas Burke, *The origins of social justice: Taparelli D'Azeglio*, 52 Modern Age. A *Quaterly Review, 2*, 97-106 (2010) [Burke, The origins].

[39] Luigi Taparelli, Saggio teoretico di dritto naturale appoggiato sul fatto 144, 145 (Livorno: Vincenzo Mansi, 2a. ed., 1979) [Taparelli, Saggio]; comp. Burke, The Origins, *supra* note 39 at 101-103.

[40] Taparelli, Saggio, *supra* note 40 at 145, 146; comp. Burke, The Origins, *id*.

[41] Previously, in a foot page note at page 143 of his book, when he tries to define "Law", Taparelly says that he prefers to use the expression "Social Law" rather than "Law" because the expression "social" shows the essential distinction of Law: it is something which is between a man and another man or between "associated intelligences". So, it is possible to imagine that the reason why Taparelli used the expression "social justice" is the same as the one for which he used the expression "social justice", i.e., because justice is also a relation between a man and another or "between associated intelligences".

[42] John Stuart Mill, On liberty and other essays 198 (Oxford: Oxford University Press, 2008).

[43] Burke, The origins, *supra* note at 105.

nism; second, the ideal economy was preferable because it was based on the presumption of society as a community, founded on respect for the person and charity, and where, as an accomplishment of the latter, the rich (not the State) were responsible for providing the poor with the goods they needed to survive. Therefore, the role of the State was to protect the social order both from the cruelty of the powerful (e.g., big industrialists) against the poor, and also from the communism promoted by the poor, which rose up against the powerful.[44] Thus, in general terms, it can be said that the roots of the meaning of social justice that eventually became globalized can be found mainly in the doctrines of a conservative Catholic political sector that was against the individualist *laissez-faire* of the capitalist Industrial Revolution and against the radical communist demands for a greater economic equality, especially for the benefit of the poorest sectors of society.

B. *Second Stage of Social Justice*

This "Taparelli's meaning" of social justice evolved in such a way that it became a third way to liberalism and communism, according to which a qualified type of poor, workers, should have the right to some minimum means to be able to exercise their work without the abuse of their ambitious employers and to minimum conditions of life to develop themselves as persons. Now, this is the second stage of social justice, which extends from the first decade of the twentieth century to the middle of the same century approximately.[45] There are some fundamental documents to understand this

[44] *Id*. at 103-106.

[45] According to Leo W. Shields, social justice was a new word for an old type of justice, legal justice, which was defined by Thomas Aquinas as the justice that regulates the actions of the parts of a community towards the achievement of the common good. So, there were at least two main meanings of the words "social justice" in this interregnum between the first two stages: the one that assimilated social justice with legal justice, i.e., named an old idea with new words (for example, American legal scholar Roscoe Pound used them in this sense); and the other one who mixed it with distributive justice and was the most widespread meaning eventually. Leo W. Shields, The history and meaning of the term social justice (1941) (doctoral dissertation, University of Notre Dame). Following Shields, the author of the present article argues that, with the ascent of the "social question" in political, economic, and legal discourses, the expression "legal justice" was slowly replaced by a "social justice" because the inclusion of the adjective "social" would seem to reflect the same issues that had been proposed to address the "social question". In this sense, social justice and not the old-fashioned "legal justice" would denote to the readers most precisely that justice required that all parts of the society, because of their interdependence, guided their actions with the aim of achieving the common good, not only the good of the industrialists, for example. So, it was logical to move into the field of distributive justice, because the achievement of that common good could only be possible if the sick part of society in that moment, the oppressed workers, shared the industrialists' profits through their distribution by the State, so that the whole society recovered its health and achieved the common good.

transit towards the transnational consolidation of social justice as "an obligation of the State and also of the employers, to provide some minimum means so that the workers can live with dignity" are:[46] political scientist Westel Woodbury Willoughby's book, *Social Justice: A Critical Essay*, which says states that the problem of social justice is both "the proper distribution of economic goods… and the harmonizing of the principles of liberty and law, of freedom and coercion," and that is the first verifiable definition of social justice which expressly relates it with the distribution of assets; [47] the preamble of the Constitution of the International Labor Organization in 1919 (the first establishment of that expression in a legal document in world history);[48] the encyclical "*Quadragesimo anno*" by Pius XI (named after the forty years of "*Rerum novarum*"),[49] written by a pupil of a Taparelli's pupil,[50] in which the Catholic Church officially incorporates social justice into its "social doctrine", by saying that it is an institution that orders, for example, that workers' wages must satisfy the needs of their families, including education, and that they cannot be diminished in order to increase the wealth of the employers, because social justice condemns the excessive accumulation of individualist capitalism; and finally, the encyclical "*Divini redemptoris*" also by Pius XI,[51] according to which social justice, from whose rules no one can escape, demands that, for society to function, all members of society, endowed with the dignity of the human person, must have all the means to be able to fulfill their particular social function, just as the parts of an organism are interdependent and they need their means so that they can give life to it. In this way, the notion of social justice starts to be linked to human dignity explicitly and continues its path to become a constitutional and international rule as explained by Samuel Moyn above. Also, this was the context in which the principle of Social Rule of Law was born as explained above too.

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[46] It is curious that the encyclical *Rerum novarum* by Pope Leo XIII, which has been traditionally mentioned as the starting point of the "Catholic Church social doctrine", doesn't have the expression "social justice", even though it was drafted by a Taparelli's pupil, according to Burke (*supra* note 85 at 106): Leo XIII, Rerum novarum, 1891.

[47] W. W. Willoughby, Social justice. A critical essay 11 (New York: Macmillan, 1900). According to Leo Shields, Willoughby is an example of the use of "social justice" with a similar meaning as distributive justice. Now, for the author, a research is needed on how the expression "social justice" spread out throughout the world in the first stage, for example, from Europe to the United States of America and Latin America, and its influence, for example, in the beginning of social movements, the creation of public policy, researches in Economy, Political Science, etc., inspired by this expression.

[48] International Labor Organization, Constitution of the International Labor Organization, 1919. It is not clear on what sense of social justice is this document based (legal or distributive justice); nevertheless, whatever it may be, both have in common the commitment to improve the health of the sick part of society in the time, the workers, in order to achieve the health of the whole society, as explained above.

[49] Pius XI, Quadragesimo Anno, 1931.

[50] Burke, The origins, *supra* note 39 at 106.

[51] Pius XI, Quadragesimo Anno, 1931.

In the constitutional domain, the Constitution of Ireland became the first one to enshrine the expression "social justice" by stating that the exercise of the natural right to private property "ought, in civil society, to be regulated by the principles of social justice".[52] The next one was the Constitution of Costa Rica in 1949, which, by following the typical Christian sense of the term in the second stage, enshrined social justice as a principle of social rights such as to have a job and a family.[53] Finally, the preamble of the Constitution of India in 1949 enshrined social justice, together with economic and political justice, as a purpose of the State itself. Now, this is an example of the diffusion of the expression "social justice" beyond the explicit influence of the tradition of Catholic thinking in constitutional law; so, further research is encouraged to unveil the origin of "social justice" in the Indian Constitution.[54]

Thus, as suggested before, it is necessary to make some precisions about two transcendental concepts in contemporary constitutional law, which, as seen, are linked with the arise of social justice in the world and which, eventually, would become the legal tools through which the State will try to materialize social justice itself: the principle of Social Rule of Law, and the principle of human dignity.

a. The Principle of Social Rule of Law

The Social Rule of Law is a legal institution that arose as a result of several reactions against the classical legal thought of the late eighteenth century, which spread to Europe, America, and other parts of the world during the nineteenth century and conceived the Law (and the State) as an individualistic system, a consequence of a "socio-Newtonian" conception of society.[55] Because of the deepening of the effects of the Industrial Revolution, there was a need to respond to phenomena such as the exploitation of workers, the growth of misery, and health problems in the cities, etc. Thus, at the end of the nineteenth century, the social question arises as a concern to solve the problems attributed to that individualist perspective of society, which also ignored the interdependence among all of the components of society.[56] Then, a labor and social security legislation emerged with ideas such as social function of property, among other aspects, which marked the beginning of a State engaged with two purposes: the preservation of the Rule of Law and its liberal and capitalist values, as opposed to the communists' pretensions, and,

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[52] Bunreacht na hÉireann [Constitution of Ireland], 1937, art. 43.

[53] Constitución de Costa Rica, 1949, as originally published, art. 74.

[54] Constitution of India, 1949, preamble.

[55] Bernd Marquardt, 4 Historia mundial del Estado 25 (Bogotá: ECOE Ediciones, 2014) [Marquardt, Historia].

[56] Duncan Kennedy, Tres globalizaciones del Derecho y del pensamiento jurídico 55-68 (Bogotá: Universidad Externado de Colombia, 2015).

second, the establishment of certain minimum means for people to exercise their rights of the first generation (i.e. civil and political rights), in order to prevent communist popular uprisings.

In spite of these advances, which can be first verified in the Constitution of Mexico and, later, in the Constitution of Weimar,[57] the principle of Social Rule of Law was not expressly enshrined at the constitutional level but after the promulgation of the Constitution of France in 1946,[58] the Constitution of the State of Bavaria of 1946,[59] and the German Basic Law,[60] and, in Colombia, in article 1 of the Constitution that includes the progress made in social rights by the constitutional amendment of 1936 to the former Constitution.[61] It is worth pointing out that the use of the expression "Social Rule of Law" (*Sozialstaat* in German), although not used at the beginning to denote all the characteristics that today are attributed to the Social Rule of Law, was popularized in Germany after World War I by the social democrat legal scholar Hermann Heller.[62] However, its theoretical background may be found in previous works by Lorenz von Stein almost a century earlier.[63] By contrast, in the Anglo-Saxon world, there is no such a principle of Social Rule of Law in the constitutional discourse, and that cannot be assimilated with the Welfare State, a set of economic measures undertaken by the federal government of the United States to overcome the Great Depression of 1929 through the State intervention in the national economy. Summarizing, it can be said that a Social Rule of Law is a Rule of Law in which social rights are enshrined as a complement to civil and political rights, and whose purposes are to preserve the liberal values of the Enlightenment revolutions and to ensure some minimum material means for the exercise of civil and political rights.

b. The Principle of Human Dignity

The expression "dignity", in Latin "*dignitas*", was used by the Romans to imply the social status of someone in life and the honor due by that status. At least two traditions with a different sense of human dignity can be mentioned

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[57] Constitución Política de los Estados Unidos Mexicanos [Const. Mex.], as originally published, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.), arts. 27, 123; Die Verfassung des Deutschen Reichs [Constitution of the German Empire], 1919 (Germ. Emp.).

[58] Constitution du 27 octobre 1946, IV République [Constitution of French 4th Republic], 1946 (Fr.), art. 1.

[59] Verfassung des Freistaates Bayern [Constitution of Bayern], 1946 (Bay.), art. 3.

[60] Grundgesetz für die Bundesrepublik Deutschland [Constitution of Federal Germany], 1949 [Ger.], art. 20.

[61] Congreso de la República de Colombia [Congress of Colombia], Acto legislativo número 1 de 1936 [Amendment Act no. 1 of 1936].

[62] Hermann Heller, Escritos políticos 283-301 (Madrid: Alianza Editorial, 1985).

[63] Kenneth Dyson, The State tradition in Western Europe 21 (Colchester: ECPR Press, 2009).

in European philosophy: the Catholic and the Kantian. According to the former, starting from Thomas Aquinas, this expression was used as the intrinsic value of something (not only the human person, at least until 1937 because of the encyclical *Divini Redeptoris* by Pius XI)[64] with respect to its place in the hierarchy of God's creation. For example, women and animals would have a lesser intrinsic value than a Catholic man, and even the Catholic sacraments would have a greater dignity.[65] In the second one, starting from Immanuel Kant, in philosophy, dignity (*Würde* in German) began to be understood as the intrinsic value of every human being, because they have autonomy (a moral law given by their own), which prevents their instrumentalization by no one.[66] Now, two theories on the first constitutionalization of the expression "human dignity" can be mentioned: those of German scholar Bernd Marquardt and American scholar Samuel Moyn.

According to Marquardt,[67] the first modern constitutionalization of human dignity is found in the Bavarian Constitution of 1946,[68] where it was mentioned as one of the elements that did not take into account the former Nazi State and as an inviolable obligation of the State. In addition, Marquardt says that this constitution took up the expression "dignity", which was enshrined for the first time in the Weimar Constitution of 1919,[69] where it was prescribed that economics should be governed by "the principles of justice" (an expression that, by its time, context, and environment, does not seem to refer to the Aristotelian notion of distributive justice) to guarantee human conditions in accordance with dignity.[70] Finally, Marquardt seems to suggest that the Fundamental Law of Federal Germany was more influential, in the later transnational constitutionalization of human dignity,[71] and he says that, with respect to the female population, the emphasis on human dignity in the subsequent decades was the key to gender equality, for example, in societies with patriarchal traditions such as the Catholic ones and those with a Napoleonic Civil Law tradition.[72]

On the other hand, scholar Samuel Moyn has attempted to demonstrate that the Irish Constitution,[73] by its fervently Catholic framers that wanted to

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[64] Pius XI, *Divini redemptoris*, 1937.

[65] Michael Rosen, Dignity: its history and meaning 47-54 (Cambridge: Harvard University Press, 2012).

[66] *Id.* at 19-31, 80.

[67] Bernd Marquardt, Derechos humanos y fundamentales. Una historia del Derecho 137 (Bogotá: Grupo Editorial Ibáñez, 2015) [Marquardt, Derechos].

[68] Verfassung des Freistaates Bayern [Constitution of Bayern], 1946 (Bay.) preamble, art. 100.

[69] Die Verfassung des Deutschen Reichs [Constitution of the German Empire], 1919 (Germ. Emp.), art. 151.

[70] Marquardt, Derechos, *supra* note 68 at 137.

[71] Marquardt, Derechos, *supra* note 68 at 137, 138; Grundgesetz für die Bundesrepublik Deutschland [Constitution of Federal Germany], 1949 [Ger.], art. 1.

[72] Marquardt, Derechos, *supra* note 68 at 141-143.

[73] Bunreacht na hÉireann [Constitution of Ireland], 1937, preamble.

follow the indications given by the papal encyclical *Divini redemptoris* —which denounced the atheistic communism—,[74] was the first constitution in world history to proclaim the individual dignity of the human person as a founding principle of the State. Of course, dignity was still interpreted according to the context of the Catholic doctrine of the time, opposed, for example, to recognizing the total equality of women *vis-à-vis* men, especially in the traditional Catholic patriarchal home.[75] Moyn's central idea is that this constitution is important because it reflects a historical fact that no current scholar has noticed, namely that the inclusion of the expression "human dignity" in the contemporary global constitutional discourse was spread from the tradition of Catholic thought about dignity and not from the Kantian tradition, as it is currently broadly believed. According to Moyn, in addition to the Irish one, it was enshrined later in the constitution of the largely Catholic State of Bavaria,[76] as in Ireland, by the influence of the Catholic thought of this period, and globalized, totally secularized, thanks to the Universal Declaration of Human Rights,[77] in which the inclusion of the expression "human dignity" was due, to a large extent, to the influence, on its writers, of the frequent use of the expression "dignity of the human person" by the Pope during World War II, and, again, not to the Kantian tradition of dignity.[78]

Nevertheless, today, the Kantian tradition is preferred when interpreting the expression "human dignity". Therefore, all the current debates on justice deal with the best distribution scheme and it is not disputed if all people have equal worth when they are taken into account to be subjects of distributive justice; that is to say, it is taken for granted that all people have a dignity that cannot be ignored and must be respected when they are to be allocated rights or means, an aspect that was in discussion in Aristotle's times.[79] Thus, egalitarians, like John Rawls,[80] argue that the best distribution scheme is one where benefits are guaranteed to the most disadvantaged, contrary to libertarians, like Robert Nozick,[81] for whom there should be no distribution by the State because it would be against individual freedom.

C. *Third Stage of Social Justice*

In the third stage, which extends from the mid-twentieth century to the present, the notion of social justice has been expanded from the context of la-

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[74] Pius XI, Divini redemptoris, 1937.

[75] Samuel Moyn, *The secret history of constitutional dignity*, 17 *Yale H.R. & Dev. L.J.*, 53-60 (2014) [Moyn, The secret].

[76] Verfassung des Freistaates Bayern [Constitution of Bayern], 1946 (Bay.), preamble.

[77] U.N. Universal Declaration of Human Rights, 1948.

[78] Moyn, The secret, *supra* note 76 at 59.

[79] Beever, Forgotten, *supra* note 21 at 66.

[80] John Rawls, A theory of justice. Revised edition (Cambridge: Harvard University Press, 1999) [Rawls, A theory].

[81] Robert Nozick, Anarchy, State, and utopia (New York: Basic Books, 1974).

bor relations thanks to the evolution of affirmative actions, the international establishment of a catalog of economic, social, and cultural rights (as a duty of the State to guarantee a certain level of minimum means to allow people to exercise their civil and political rights signed but not ratified by the United States),[82] and the discussion on the adoption of differential treatment to the benefit of the poor in income and wealth as part of social justice.

The term "affirmative action," in its modern sense, stems from the Executive Order 10925 by USA President J. F. Kennedy,[83] in which all contracting agencies of the government were ordered to apply affirmative action to ensure that both applicants and employees were treated equally regardless of race, creed, color, or origin (note the link between the expression "affirmative action" and labor). However, this expression was already somewhat common in the American language in the same labor relations slang (see its previous use in Figure 12 below). This understanding of affirmative action as an instrument to fight discrimination and achieve equality of opportunities allowed the expression to be applied to measures with the same purpose taken, in addition to the government, by the Supreme Court of the United States, for example, in the case "Regents of the University of California v. Bakke,"[84] that allowed universities to include race as an admission criterion in order to achieve greater diversity, and, indirectly, to provide more opportunities to groups traditionally discriminated, in line with the precedent of the case "Brown v. Board of Education of Topeka."[85]

In this period of increasing affirmative action in government and the judiciary in the United States and then in the rest of the world, John Rawls' very influential book in philosophy, Law, politics, and economics, "A Theory of Justice", was published in 1971 and revised throughout his life. In this work the expression "social justice" is used to refer to the very notion of distributive justice that he uses there,[86] and whose core is the principle of difference, according to which socio-economic inequalities in an ideal well-ordered society are justified if they work for the benefit of the least advantaged in society, which are not women, the elderly, nor the traditionally marginalized people, among others, but those who, although sharing with other people equal liberties and opportunities (the first principle of justice and the first part of the second principle), have less income and wealth, i.e., the poor.[87] So, it is important to clarify that Rawls' social justice did not include as one of its main aims to overcome the discrimination and marginality present in the non-ideal sphere of the theory, that is, in the real context of the American society and

[82] G.A. Res.2200A (XXI), U.N. Doc. A/RES/21/2200 (Dec. 19, 1966).

[83] J. F. Kennedy, *Executive Order 10925*, (1961), *available at*, https://goo.gl/p38Hqc.

[84] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[85] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[86] Rawls, A theory, *supra* note 81 at 177.

[87] John Rawls, Justice as fairness: A restatement 65 (Cambridge: Harvard University Press, 2001) [Rawls, Justice]; Samuel Freeman, Rawls 106-108 (New York: Routledge, 2007).

other liberal societies of the time, as the promoters of affirmative action had actually in mind.[88]

Most contemporary constitutions that enshrined the expression "social justice" as a purpose or principle of the State did it in this stage, i.e., from the seventies to the second decade of this century.[89] So, even though social justice, as a third path between communism and laissez faire capitalism, arrived into the contemporary global constitutional discourse from the Catholic thought just like human dignity, the Christian heritage is not evident at all in the third stage, which has also favored the expansion of the expression in contemporary constitutional discourse throughout the world. Today, social justice is not only used in the labor discourse, but also in the field of affirmative actions for the discriminated, the vulnerable, and the marginalized. In the discourses that promote the achievement of social, economic, and cultural rights, and in those discourses that encourage a differential treatment by the State to benefit those with lower income and wealth. These last features make up the contemporary notion of material equality (as opposed to formal equality).

Summarizing, these are the three basic elements which constitute the current meaning of social or distributive justice in contemporary comparative constitutional discourse: *i*) the Social Rule of Law as a duty of a new kind of State, which must guarantee or allocate some minimum means so that people can subsist, *ii*) the acknowledgment of the human dignity of people, and *iii*) the duty to promote affirmative actions in order to guarantee the poor, the marginalized, the discriminated, and the vulnerable, an equal opportunity to develop their life plan, i.e., the warranty of the right to material equality.

Just like the principles of social rule of law and human dignity, it is necessary to clarify the meaning of "material equality" as a right, which is also a transcendent element both in the configuration of the current understanding of social justice and in contemporary constitutional discourse.

a. The Right to Material Equality

In contemporary constitutional discourse, the expression "material equality" has been generally understood as a duty of the State to promote affirmative actions, so that equality remains not merely formal as it was before the enshrinement of the socio-economic-cultural rights, in order to overcome socio-economic inequalities to benefit the poorest in income and wealth, but also the traditionally discriminated and marginalized sectors of society.[90]

Although there is no certainty about the first use of the expression "material equality" in the global constitutional discourse, some early sources and similar

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[88] Thomas Nagel, *John Rawls and affirmative action*, 39, *The Journal of Black in Higher Education* 82 (2003).

[89] *Supra* note 8.

[90] Eduardo Cifuentes, *La igualdad en la jurisprudencia de la Corte Constitucional*, 7 Pensamiento Jurídico 65, 66 (1996).

in meaning like the described in the previous paragraph can be found both in France and in Germany at the end of the nineteenth century.[91] The modern use of this expression in English can be verified in the Austrian economist Friedrich A. Hayek's book "Road to Serfdom" in 1944;[92] of course, he uses it in a context of criticism towards centralized or collectivistic economic planning.[93]

Nevertheless, just like the principle of Social Rule of Law, the expression "right to material equality" is not present in the Anglo-Saxon constitutional discourse and, actually, its conceptualization and use are part of the European and Latin American civil law tradition. Of course, this doesn't mean that, in the Anglo-Saxon constitutional discourse, there are no ways to realize the purposes that the right to material equality has in other parts of the world.[94] That is why, in Latin America, the constant use of the expression can be verified, for example by the Colombian Constitutional Court since 1992.[95] In fact, it is also used interchangeably with others just like "real and effective equality" (as it appears in Article 13 of the Colombian Constitution) or "substantial equality".[96] Also in Latin America, the first constitution worldwide that enshrined the right to material equality as opposed to formal equality was the Constitution of Ecuador in 2008.[97]

However, no conclusive proof can be given about the original source of inspiration for the modern use of this expression. So, it would be interesting to continue looking for the primary sources of its inspiration to determine when they began to be used to mean a different right to that of formal equality before the law; nevertheless, this is beyond the scope of this research.

D. *Social Justice in Google Ngram Viewer*

Some graphs can be shown to illustrate the tendency of the use of the expression "social justice" thanks to Google Ngram Viewer, a novel technological tool for research in social sciences, which displays an approximate evolution of the frequency in the use of a word over time in several books in different languages.[98] It can be seen that the use of the term "social justice" is

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[91] Germer Bailliére, Revue scientifique 364 (1885), *available at*, https://goo.gl/0m9aPS; Arthur Mülberger, P. J. Proudhon: leben und werke 77 (1899).

[92] Friedrich Hayek, Camino de servidumbre 113 (Madrid: Alianza Editorial, 2007).

[93] See, e.g., Corte Constitucional [C.C.] [Constitutional Court], Judgment T-406 of 1992.

[94] See, e.g., Encarna Carmona, *El principio de igualdad material en la Constitución Europea*, Revista del Foro Constitucional Iberoamericano, 8, 1 (2004).

[95] See, e.g., Corte Constitucional [C.C.] [Constitutional Court], Judgment T-406 of 1992.

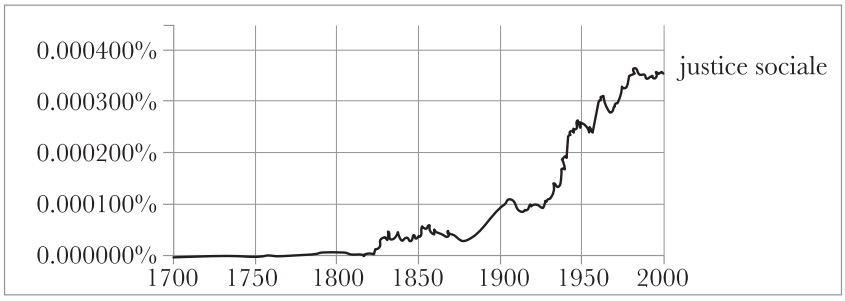
[96] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July 20, 1991 (Col.), art. 13.

[97] Constitución de Ecuador, as amended, 2008, art. 66 No. 4.

[98] Google Ngram Viewer will be used in this article to complement the historical narrative presented here, by inquiring into the tendency of the usage of some expressions (material equality, social justice, distributive justice, and affirmative actions) in a comparative spectrum. It is not, of course, the main nor ultimate source on which such a narrative is based.

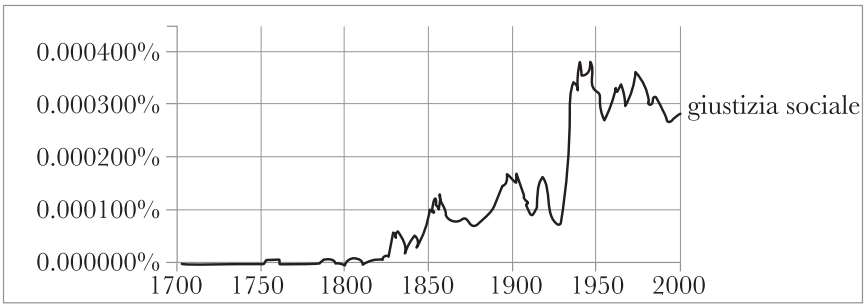
older in French (Figure 1) and Italian (Figure 2) than, for example, in Spanish (Figure 3), English (Figure 4), and German (Figure 5).

FIGURE 1



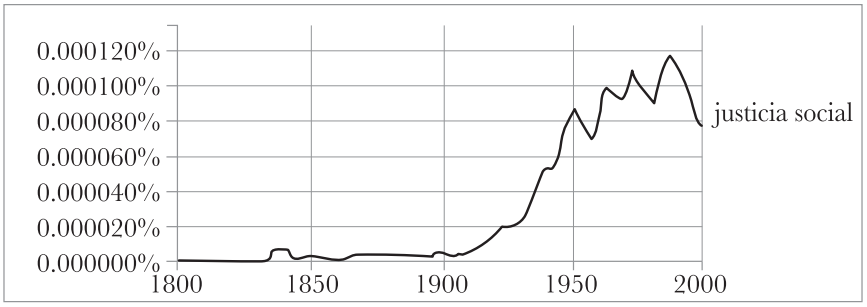
SOURCE: https://books.google.com/ngrams

FIGURE 2



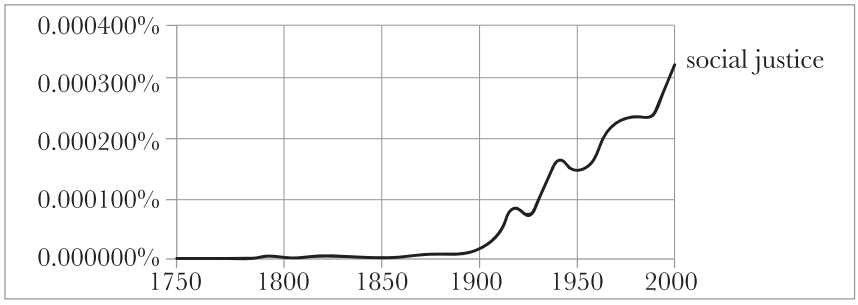
SOURCE: https://books.google.com/ngrams

FIGURE 3



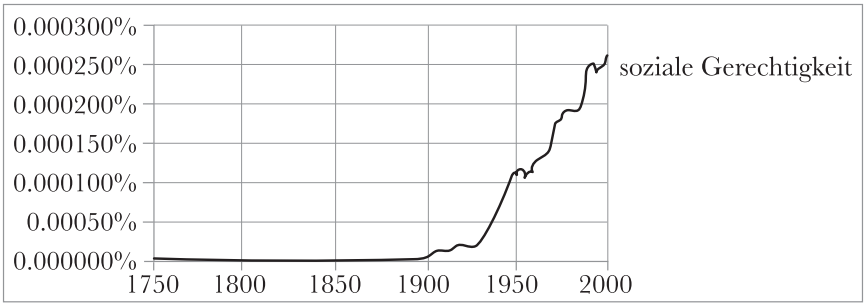
SOURCE: https://books.google.com/ngrams

FIGURE 4



SOURCE: https://books.google.com/ngrams

FIGURE 5



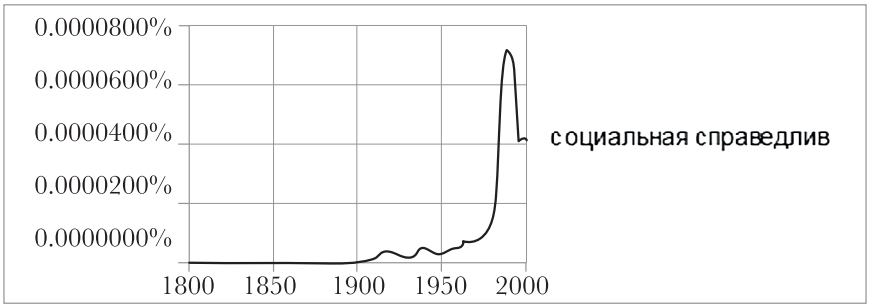
SOURCE: https://books.google.com/ngrams

In all these languages, the use of this term increased in the late nineteenth and early twentieth centuries, i.e. at the beginning of the second stage of its evolution, and, despite valleys that could be due to reasons of different nature, which are not pertinent to discuss here, it is important to note that it shows that its use grows after World War II, when the notion of social justice of the second stage is consolidated, arriving at its highest peak in the 1980's, when social justice was strengthened by the ascent, first in the United States, and since the 1970's in the rest of the world, of the discourses of affirmative actions (with its ideals of non-discrimination), equal opportunities, and distribution of wealth and income for the poor or disadvantaged. However, it still remains to be known why its use has a moderate downward trend in Spanish and Italian, and not in English or French, its use has a moderate downward trend.

On the other hand, it can be seen how the notion of social justice did not echo so much in Russian, the majority language in the main communist country in the twentieth century, the Union of Soviet Socialist Republics, and that is because the notion was typically used in those legal-political discourses that stood against Communism (Figure 8). However, as a way to set up here

a debate that can be developed later, there is a timid rise of the expression during the 20's and 40's, which coincides with the emergence of important documents in other parts of Europe, which contain the expression "social justice" as described above. Moreover, it is noteworthy to mention that only after the collapse of the USSR and its opening to the capitalist and liberal bloc, the expression has a vertiginously upward trend that has been declining for some time.

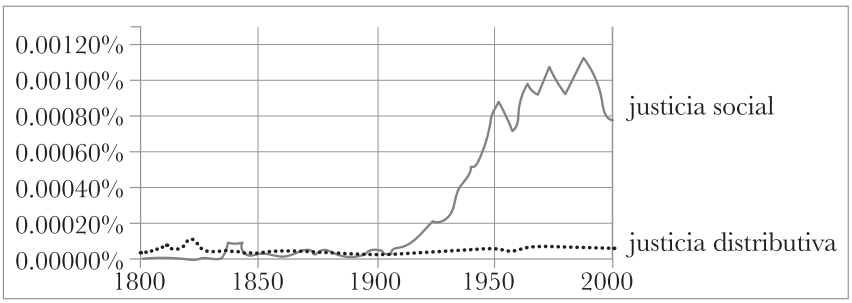
FIGURE 6



SOURCE: https://books.google.com/ngrams

Finally, if the frequency of the use of the expression "social justice" in Spanish, English, and French is compared with that of "distributive justice" in the same languages (figures 7, 8, and 9), it can be concluded that the first expression has been more popular than the second one starting from the second stage, a phenomenon that may be explained by the fact that the expression "social justice" began to include distributive justice by this time, as explained above.[99]

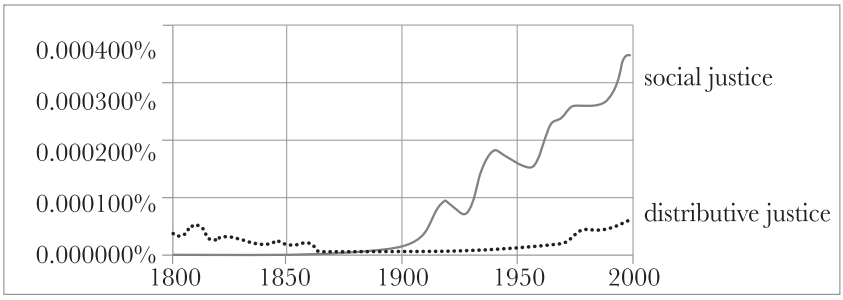
FIGURE 7



SOURCE: https://books.google.com/ngrams

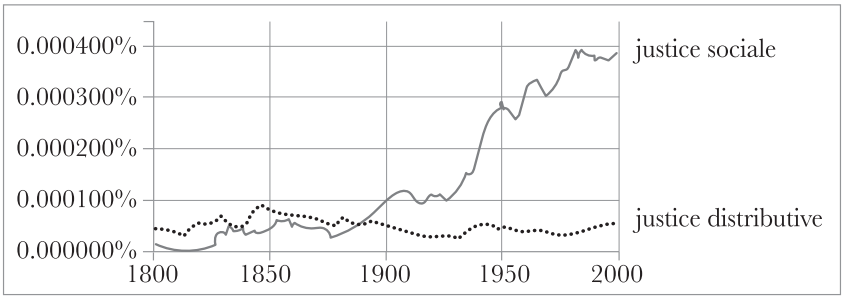
[99] *Supra* note 46.

FIGURE 8



SOURCE: https://books.google.com/ngrams

FIGURE 9



SOURCE: https://books.google.com/ngrams

E. *Social Justice in Latin American Constitutions*

The first Latin American constitution that used the expression "social justice" was the Constitution of Costa Rica in 1949, which followed the typical Christian sense of the term in the second stage.[100] Nevertheless, the expression was popularized in the Latin American constitutionalism in the current third stage of its evolution, in which the theological component is not evident yet.[101]

So, the Constitution of Panama enshrined social justice as an element that the right to education must foster, and as a purpose to be effective by the State when intervening in enterprises.[102] The Constitution of Cuba decreed

[100] Constitución de Costa Rica, 1949, as originally published, art. 74.

[101] Although some researches in the future could go deeper into the influence of the social doctrine of the Catholic Church (even the so-called Liberation Theology) in the development of some constitutions in the region in the seventies and eighties.

[102] Constitución Política de la República de Panamá, 1972, as originally published, art. 87, art. 243. In 1992, the expression was included in the preamble as a purpose of the State.

the right to social justice as the purpose of the republic.[103] The Constitution of Honduras stated that the "principles" of social justice are the foundation of the economic system and the objective to be guaranteed by the process of agrarian reform in rural areas.[104] The Constitution of El Salvador included social justice as a duty of the State and a founding principle for labor rights, social security, and the economy.[105] The Constitution of Guatemala decreed that the labor law and the social and economic orders are organized based on the "principles" of social justice.[106] The Constitution of Brazil established that the economic order has to guarantee a dignified existence, according to the principles of social justice, and that the social order (social security and health) must achieve social justice.[107] The Constitution of Paraguay enshrined social justice as a purpose that the right to education must promote.[108] The Constitution of Argentina ordered the Congress to legislate in order to achieve economic development with social justice.[109] The Constitution of Venezuela decreed social justice as a purpose of the State and one of the principles in which the economic regime is founded.[110] The Constitution of Ecuador asserted that social justice is the principle in which the right to the enjoyment of city and its public spaces is founded.[111] The Constitution of Bolivia enshrined social justice as founding purpose of the State and as one of the purposes both of the State when carrying out its functions and the higher education.[112] And, recently, the Constitution of the Dominican Republic declared that social justice is a founding element both of the functions of the State and of the economic regime.[113]

The most important exceptions of this tendency are Mexico, Chile, Peru, and Colombia, which could be studied by future researchers that analyze the political, ideological, and legal causes which determined that, in some countries and not in others, there had been a consensus to expressly constitutionalize the term "social justice".

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[103] Constitución de la República de Cuba, 1976, as originally published, art. 1.

[104] Constitución de la República de Honduras, 1982, as originally published, art. 328, art. 344.

[105] Constitución de la República de El Salvador, 1983, as originally published, art. 1, art. 52, art. 101.

[106] Constitución Política de la República de Guatemala, 1985, as originally published, art. 101, art. 118.

[107] Constituição da República Federativa do Brasil, 1988, as originally published, art. 170, 193.

[108] Constitución de la República de Paraguay, 1992, as originally published, art. 73.

[109] Constitución de la Nación Argentina, 1853, as amended in 1994, art. 75.

[110] Constitución de la República Bolivariana de Venezuela, 1999, as originally published, preamble, art. 299.

[111] Constitución de la República del Ecuador, 2008, as originally published, art. 31.

[112] Constitución del Estado Plurinacional de Bolivia, 2009, as originally published, art. 8-II, art.9, art. 91, II.

[113] Constitución Política de la República Dominicana, 2015, as originally published, art. 8, art. 217.

III. Social Justice in Colombian Constitutional Discourse

The reception of the notion of distributive or social justice in an extended sense in Colombia can be verified in the debates that led to the enactment of the new Constitution in 1991.[114] In the Gaceta Constitucional (Constitutional Gazette), the official newspaper that published the projects and proposals discussed in the National Constituent Assembly, it can be seen how the notions of human dignity, affirmative actions, and social justice were expressly used according to the discourse of the social stage in an extended sense. Thus, some constituents understood social justice as one of the main purposes of the Social Rule of Law,[115] by comparing it with the full warranty of labor rights (both individual and collective), according to its use in the Catholic social discourse of the second stage,[116] and by understanding it as an essential purpose of the intervention of the Social Rule of Law in the economy.[117] One year later, the Constitutional Court decided the Judgement T-406 of 1992, in which it mentions both social and distributive justice as a matter of allocation of means with the aim of guaranteeing social rights in the new Social Rule of Law.[118] So, it is possible that social justice or distributive justice can be considered, at least implicitly, as an aspiration of the Colombia Social Rule of Law, and which, according to the Court's jurisprudence, has been understood as a "constitutional purpose,"[119] although it has not been expressly established in the Constitution. However, its express establishment as a purpose, a principle, or even a constitutional right corresponds to the competence of the constituent power, whether original (the people through a National Constituent Assembly by drafting a new Constitution) or derivative (the congress through an amendment to the Constitution). Nevertheless, the 1991 Constitution enshrined the three elements of social justice described above as will be shown in the next three items.

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[114] Even though the word "reception" may imply a passive process of assimilation of foreign legal-political ideas about distributive justice in the country, before adopting another expression a profound research is necessary to show that there was, at the time, an original local or regional understanding of social justice or modern distributive justice, which is not relevant to carry out in this text.

[115] Asamblea Nacional Constituyente [National Constituent Assembly], 6 Gaceta Constitucional 1, 2 (1991).

[116] Asamblea Nacional Constituyente [National Constituent Assembly], 11 Gaceta Constitucional 11 (1991).

[117] Asamblea Nacional Constituyente [National Constituent Assembly], 8 Gaceta Constitucional 2 (1991); Asamblea Nacional Constituyente [National Constituent Assembly], 22 Gaceta Constitucional 41, 51 (1991).

[118] Corte Constitucional [C.C.] [Constitutional Court], Judgment T-406 of 1992.

[119] See *supra* note 3.

1. *Social Justice in the Constitution of 1991*

A. *The Principle of Social Rule of Law*

Article 1 of the Constitution describes Colombia as a Social Rule of Law,[120] whose main purpose is to guarantee some minimum means for the exercise of civil and political rights, as discussed earlier. Many books, articles, and judgments have defined this principle enshrined by the Constitution,[121] but what is important to note here is that, since the beginning, the main interpreter the Constitution, the Constitutional Court has pronounced on the essential purpose of this kind of state mentioned above, and it has identified it as the sense of social or distributive justice that derives from a Social Rule of Law such as the Colombian one:

> if it were necessary to give an abstract judgment on distributive justice... one could resort to the principle of equality, …from which all distribution of means, in order to be just, should, at least, improve the social position of the most disadvantaged. In other words, distributive justice must be considered as a problem of distribution —of allocation by the State— of new means available, whose final result, whatever the beneficiaries or those affected by such distribution may be, does not spoil the situation of those who have fewer means.[122]

In the legal system, evidence of this principle of Social Rule of Law as a duty to guarantee some minimum means to allow people exercise their rights can be found in the Constitution itself, which has an entire chapter devoted to social, economic, and cultural rights,[123] and an article on the State intervention in the economy in order to guarantee the fair distribution of oppor-

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[120] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July 20, 1991 (Col.), art. 1.

[121] See, e.g., Jheison Torres Ávila, El mandato del estado social de derecho en la constitución colombiana (Bogotá: Universidad Santo Tomás, 2012); Luis Villar Borda, *Estado de derecho y Estado social de derecho*, 20 Revista Derecho del Estado 73 (2005).

[122] Corte Constitucional [C.C.] [Constitutional Court], Judgment T-406 of 1992. In Spanish: "Si fuese necesario dar elementos de juicio en abstracto sobre la justicia distributiva… se podría recurrir al principio de igualdad, …a partir del cual toda distribución de recursos, para ser justa, deba mejorar al menos la condición de los más desfavorecidos. Dicho en otra perspectiva, la justicia distributiva debe ser planteada como un problema de repartición —de asignación por parte del Estado— de recursos nuevos disponibles, cuyo resultado final, cualesquiera que sean los beneficiarios o los afectados por tal repartición, no desmejore la situación de aquellos que poseen menos recursos."

[123] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July, 20 1991 (Col.), title 2, chap. 2.

tunities and other objectives,[124] and in other norms such as the acts on social security,[125] higher education,[126] etc.

B. *The Principle of Human Dignity*

Article 1 of the Colombian Constitution enshrines the principle of human dignity as a founder principle of the Social Rule of Law. This precept is not a mere aspiration of the constituent or a symbolic text, but a binding legal rule.[127] In several judgments, the Court has emphasized human dignity as a fundamental principle and right of the Constitution and the Social Rule of Law; human dignity is an inherent attribute of the human beings, which makes them the creditors of minimum rights in order to guarantee their development in the best conditions.[128]

Furthermore, this principle is *i)* a mandatory hermeneutical directive for all public authorities, *ii)* an absolute *a priori* principle, that is, it cannot be limited or downplayed, like other principles and rights;[129] and *iii)* a direct normative source of fundamental rights both enshrined in the Constitution and non-enshrined expressly.[130] It is important to clarify here that fundamental rights are also understood as the economic, social, and cultural rights recognized by the constitutional jurisprudence, such as the right to health and to a vital minimum, because of their deep and indissoluble connection with the human dignity itself.[131]

An example of the scope of human dignity is the Judgment C-177 of 2001,[132] in which the Court established a public lawsuit of unconstitutionality against a part of article 322A of the Criminal Code, which enshrined that the

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[124] *Id.* at art. 334.

[125] Ley 100 de 1993 por la cual se crea el sistema de seguridad social integral y se dictan otras disposiciones [Act 100 of 1993 by which it is created the integral social security system and other issues are enacted], as amended, Diario Oficial [D.O.], December 23, 1993 (Col.).

[126] Ley 30 de 1992 por la cual se organiza el servicio público de la educación superior [Act 30 of 1992 by which it is organized the public service of higher education], as amended, Diario Oficial [D.O.], December 29,1992 (Col.).

[127] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July 20, 1991 (Col.), art. 4.

[128] Rodolfo Arango, El concepto de derechos sociales fundamentales 289, 290 (Bogotá: Legis, 2012).

[129] Corte Constitucional [C.C.] [Constitutional Court], Judgment T-401 of 1992.

[130] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July, 20, 1991 (Col.), arts. 1, 5, 94.

[131] Bernardo Carvajal-Sánchez, El principio de dignidad humana en la jurisprudencia constitucional colombiana y francesa 27-35, 40-47 (Bogotá: Universidad Externado de Colombia, 2005).

[132] Corte Constitucional [C.C.] [Constitutional Court], Judgment C-177 of 2001.

crime of genocide did not protect illegal groups, e.g., guerrillas. The Court declared the unconstitutionality of that part of the rule, motivated by the fact that it was against human dignity because it set up a limitation to the inalienable rights that every person has by virtue of being human,[133] which cannot be restricted even if the acts of the persons involved are outside the Law; i.e., everybody has some inalienable rights based on their human dignity, which must be guaranteed regardless of their degree of contribution to the common good or, "emulating" the Court, "regardless of whether they deserve those rights or privileges".

C. *The Right to Material Equality*

As a development of the principles of human dignity and solidarity,[134] article 13 enshrines the right to "material equality".[135] This expression has been frequently used by the Constitutional Court in its judgments since 1992 when it refers to the right that every Colombian has to demand from the State affirmative actions to overcome socio-economic inequalities of the poorest, vulnerable, and traditionally discriminated or marginalized sectors of society.[136]

In fact, most of the Court's judgments on social rights in the last two decades grant the protection of the right to health when the Health Care Service Providers (*Entidades Promotoras de Salud*) do not guarantee the right to health service access to the plaintiffs, especially when they have low economic means, poor means of subsistence, or are subjects with a special status in the Constitution (children, pregnant women, old men or women, etc.). This is a clear accomplishment of the fundamental right to material equality in Article 13: the State must guarantee the right to real and effective equality of opportunities in the protection of rights and access to offices, especially if they are subjects in conditions of vulnerability.

2. *Unveiling Constitutional Meaning of Social Justice*

So, the modern notion of distributive justice or social justice and not the ancient or Aristotelian one is an implicit idea in the Constitution, because the latter enshrined the three main elements of such a modern notion, i.e.,

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[133] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July 20, 1991 (Col.), arts. 1, 5.

[134] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July, 20,1991 (Col.), art. 1.

[135] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July 20, 1991 (Col.), art. 13.

[136] See, e.g., Corte Constitucional [C.C.] [Constitutional Court], Judgment C-177 of 2016.

the principles of Social Rule of Law and human dignity, and the right to material equality, which were available in the global and national constitutional discourse of the years in which the Constitution was enacted. This exercise allows to construct a notion of distributive justice that, contrary to the Aristotelian one, is in accordance with the Constitution and can be applied by all public authorities, not only the Court, and citizens when they are asked how social justice should be understood in the Colombian constitutional discourse. It is not intended to give an incontrovertible definition, but rather to present a concept that can be used to *i)* clarify a diffuse notion in the Colombian legal system, *ii)* interpret and apply it more consistently with the Constitution, and *iii)* generate an intense debate about the notion itself (both in scholarly circles and in those sectors that have the power to make the Law). Recently, for example, the same Constitutional Court has brought to the Colombian constitutional debate the concern for an "environmental justice," thus complementing the anthropocentric approach to distributive justice by ruling that the use of natural resources must be made in a sustainable way, ensuring that their exploitation generates the least negative environmental impact so that both present and future generations can enjoy the environment on equal opportunities.[137] However, the fulfillment of environmental justice requires the concomitant materialization of distributive justice, which is one more reason why all the legal agents in the Colombian legal system are sure about the essential meaning that the expression social or distributive justice must have if it is going to be used in the Colombian constitutional discourse.

Thus, all public authorities and citizens are called to understand, interpret, and apply the constitutional distributive justice in the Colombian constitutional discourse, at least, as follows: the social justice of the Colombian Social Rule of Law is a duty of the State to guarantee or allocate everyone, by virtue of their human dignity, some minimum means so that they can exercise all their rights and fulfill their life plan, and a material equality through the application of affirmative actions, which consist of a distribution of rights in equal opportunity and always for the benefit of the most disadvantaged in the society, that is, the poor, the vulnerable, the discriminated, and the marginalized.

The above definition shows that, in the current constitutional order, it is not congruent to turn to Aristotle, for example, to define the meaning of social justice in the constitutional discourse, and that the demonstration of the implicit presence of a modern notion of distributive justice in the Constitution is a more complex exercise than the simple textual comparison between John Rawls' principles of justice (from which modern debates on distributive justice start)[138] and the constitutional text, as some scholars have already stat-

[137] Corte Constitucional [C.C.] [Constitutional Court], Judgment T-294 of 2014.

[138] Rawls, A theory, *supra* note 81.

ed.[139] Also, it is important to emphasize that any approximation to the meaning of distributive justice in the Colombian constitutional discourse cannot be understood only from a single discipline (e.g., political philosophy) or from a single group of "fashion authors" —which, ultimately, are the product of their own historical context— (John Rawls, Jürgen Habermas, etc.),[140] because such exercise needs *i)* the comparative historical contextualization of the received discourses about social or distributive justice in Colombia, and, of course, *ii)* the analysis on the presence of their essential elements in the Constitution, as this paper has attempted to make.

Now, the question about the minimum means of social justice is an issue that contemporary political philosophy is currently debating, for example, from the Rawls' approach on primary goods,[141] the alternative approach centered on capacities formulated by Amartya Sen,[142] and the ideas about material contents of distributive justice demanded at the international level.[143] However, the answer to the Colombian constitutional case should not only be based on these theoretical references, since, above all, a "list" of vital minimum means guaranteed by the Social Rule of Law must be the result of the political struggle for its recognition by the Colombian society, in arenas such as the legislative and the executive branches of power, according to the need to resolve the problems that the society itself has and without depending on a decontextualized theory that ordains the explicit content of such a "list", allowing, in turn, a strengthening of participatory democracy that counterbalances the Court's marked judicialization of politics in deciding the content, scope, and enforceability of social rights, without depriving it from this function.

Furthermore, it is important to clarify that, although many of the components of this notion of social justice have some antecedents in the Catholic Church's tradition of thought, this does not imply that the interpretation of these components must be done based on this religion. Nor does it mean that the components should be rejected because of their origin, despite their potential to materialize the Social Rule of Law, which is achieved if they are interpreted and contextualized within the framework of the Constitution.

So, it can be said that, as social justice or modern distributive justice is implicitly contained in the Colombian constitutional law, it is not an extrasystemic element neither an absolute idea, because, although it is not estab-

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139 Ricardo Sotaquirá-Gutierrez, *Justicia distributiva y problematización de la desigualdad en el discurso constitucional colombiano*, 7 Reflexión Política, 13, 154 (2005).

140 Cf. Oscar Mejía Quintana, Teoría Consensual del Derecho. El Derecho como Deliberación Pública (Bogotá: Universidad Nacional de Colombia, 2016).

141 Rawls, Justice, *supra* note 88 at 168-176.

142 Amartya Sen, The idea of justice (Cambridge: Harvard University Press, 2009).

143 Allen Buchanan, Justice, legitimacy, and self-determination: moral foundations for the international law 191-230 (Oxford, 2004).

lished by a specific rule, its components are Constitutional rules of mandatory compliance.[144] Actually, the same exercise can be done in other countries which have no purpose or principle of social justice in their constitutions such as Mexico or Chile, in order to identify both *i)* its implicit presence through the enshrinement in their constitutions of the three main elements of social justice in the transnational constitutional discourse, and *ii)* the legal mechanisms to materialize social justice.

3. *The Exceptional Presence of the Aristotelian Distributive Justice*

The jurisprudence of the Constitutional Court has understood distributive justice, in most of its trials in which it has tried to define it, according to its modern sense. Nevertheless, there are some judgments where the Court has used a very unusual mixture of the corrective justice in an Aristotelian sense and the distributive justice based on merit (i.e. the amount of contributions to the common good, the Court's definition of merit).

In Colombia, there are no scholarly works about the presence of the Aristotelian notion of distributive justice in the jurisprudence of the Constitutional Court. For instance, Alejandro Matta, in his paper on the influence of Aristotle in the Court's judgments, only briefly analyzes the value of justice for Aristotle, by saying that his ideas have been followed by the Court in some judgments as a tool aimed to overcome a norm-centered hermeneutic, but he doesn't identify how the main features of the Aristotelian notion of distributive justice has been applied in its jurisprudence.[145]

The methodology used to select the "Aristotelian" judgments was as follows: first, on the Court's web page, all judgments which contain the expression "distributive justice" were searched; then, those judgments which define the distributive justice were selected; after that, each one was studied with the aim to determine the sense of distributive justice contained in them, i.e., an Aristotelian or modern sense. Finally, these cases were classified by year and their category of distributive justice, and were organized in the following table. The "Aristotelian" judgments are marked with an asterisk.

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[144] Whatever the meaning of social justice may be in a determined legal system of a society, it is not an absolute one because it depends on its background and its evolution conducted by the legal agents; comp. Hans Kelsen, What is justice? 1-24 (Berkeley: University of California Press, 1971). Even though Kelsen talks about a personal notion of justice, the essential message is clear: it has no absolute meaning, but a relative one.

[145] Alejandro Matta, *Aproximación a la metaética de la Corte Constitucional Colombiana: influencia de la filosofía práctica de corte aristotélico en su jurisprudencia constitucional*, 38 pensamiento jurídico 31 (2013).

Table 1

Colombian Constitutional Court's judgments since 1992 to 2016 containing and defining the expression "distributive justice"

Year	*Judgments*
1992	T-588, T-406, C-472, T-532, T-432, T-505, T-422, C-479
1993	T-483, C-228, T-484, T-140, C-094, C-171*, T-253, T-122*, T-236, C-002, T-292, C-260, C-006, T-574, C-197
1994	T-290, C-372, T-563, T-411, C-266, T-467, T-525, T-463, C-547, C-069*
1995	C-028, C-136, T-113, T-165, C-419, C-430
1996	C-251, C-59, C-036, C-080, T-715, T-566
1997	SU-519, T-674, C-384, C-536, T-002, T-455, T- 516, T-526, C-588, SU-519
1998	T-288, C-159, T-748, T-208, T-208, C-002, T-311, T-707, C-317, C-094
1999	C-925, T-865, T-528, C-741, T-798, C-082, C-152, C-741, C-474, T-209, C-866
2000	T-1571, T-1134, T-1104, T-1293, C-386, T-1294, T-1730, T-1752, T-1576, T-1596, C-922, T-1451, C-392
2001	T-1133, T-075, T-209, C-651, T-752, T-022, C-1060A, C-555, T-1154, C-1218, C-648, T-1040, C-1168
2002	T-610, T-770, C-762 *, C-184, C-261, C-109, C-615
2003	C-482, C-1005, C-875, C-271, C-870, C-776, T-1089
2004	C-1029, C-1054
2005	T-640
2006	C-741, C-666
2007	T-065, C-308
2008	T-250, T- 1040
2009	C-324, T-543
2010	C-073*, C-639
2011	T-551, T-176
2012	T-999, T-1094, C-715
2013	T-235, T-583, T-370, T-095, T-427, C-912, T-646, T-799, C-753, C-839, SU-130, C-099, C-359, C-579
2014	T-695, T-271*, T-600, T-565, T-682, C-616, C-180, C-286, T-294
2015	C-044, T-606, T-539, T-080, T-191, T-648
2016	T-112, C-209

Source: http://www.corteconstitucional.gov.co

According to the results of this research, two issues can be concluded: the first one is that there are five judgments in which the Aristotelian notion of distributive justice is used to base the decision: C-171 of 1993, C-069 of 1994, C-762 of 2002, C-073 of 2010, and T-271 of 2014; Judgment C-171 of 1993 is the founder of the "Aristotelian precedent" because it was quoted

by the other ones. The second one is that, as there have been no changes in the Aristotelian definition of distributive justice in Judgment C-171 of 1993 throughout the years, this judgment will be studied alone in order to extract the Court's Aristotelian notion of distributive justice. This hermeneutic methodology is known in Colombian legal academy as the static jurisprudential analysis (*análisis jurisprudencial estático*), as opposed to the dynamic jurisprudential analysis (*análisis jurisprudencial dinámico*), which consists of the interpretation of an individual judgment, not several ones over the years.[146]

Thus, Judgment C-171 of 1993 by Justice Vladimiro Naranjo Mesa decided the constitutionality of Decree 264 of 1993,[147] which was enacted in the frame of an State of exception by internal shock (*Estado de excepción por conmoción interior*), declared on November 3th, 1993, with the aim of fighting criminality through the implementation of some mechanisms that allowed the Attorney General to get from the defendants and convicts a greater collaboration with the State in the prosecution and punishment of the crimes related to drug growth, funding, traffic, elaboration, and promotion, the obstruction of justice by public authorities, terrorism, and those crimes against the security and existence of the State itself (e.g., espionage) and against the valid constitutional regime (e.g., rebellion and sedition). The mechanisms that this Decree gave to the Attorney General were benefits to the collaborator such as house arrest, partial or general pardon, among others.

At least two legal problems were considered by the Court: the first was whether this Decree had violated the constitutional prohibition to modify the judicial accusation and judgment functions through a State of exception.[148] The second one was whether the Decree had broken the right to equality by giving certain benefits only to some criminals and not to all of them. The Court's decision to the first problem was that the executive modified the accusation and judgment functions because it was giving judicial functions to the Attorney General and also congressional functions such as general pardons, which are only granted in cases of political crimes. On the second problem, the Court said that the Decree made an unjustified distinction between the beneficiaries and the rest of criminals, even though the formers had committed the worst crimes according to the Criminal Code.

According to the Court, the constitutional right to equality was violated by the Decree because "it gave a more favorable treatment to certain type of criminals, paradoxically …to those who [had] committed the worst crimes against society, including crimes against humanity, such as indiscriminate acts of terrorism. There is, in this case, an evident breaking of the principle of

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[146] Diego López-Medina, El derecho de los jueces 193-264 (Bogotá: Legis, 2006).

[147] Decreto 264 de 1993 por el cual se expiden normas sobre concesión de beneficios por colaboración con la justicia [Decree 264 of 1993 by which some rules on the granting of benefits for collaboration with justice are enacted], Diario Oficial [D.O.], February 5, 1993 (Col.).

[148] Constitución Política de Colombia [Const.], as amended, Diario Oficial [D.O.], July 20, 1991 (Col.), art. 252.

distributive justice and commutative justice."[149] Then, the Court defined the sense of distributive justice to adjudicate this case: "in the distributive justice, it is observed the mean according to the merit of the people. But that merit is also observed in the commutative justice, for example in the allocation of punishments, because the punishment will be higher to that person who affects seriously the common good. As said before, the distributive justice allocates something among people, according to the personal merit of each one. So, a benefit cannot be granted only according to the thing exclusively, but according to the proportion of the thing with respect to the person."[150] Now, on the meaning of merit, the Court said: "the more a person contributes through his daily actions to the common good, the greater the prerogatives must be. That is to say, the objective contribution to the common good and the consistent action with the general interest must be taken into account in order to apply the principle of equality, which corresponds not to quantity but to proportion."[151] Then the Court explained that distributive justice could tolerate difference or inequality, except in cases where it is contrary to the proportional distribution of merit; the Court said that "granting some citizens a series of benefits..., excluding the other individuals from those exceptional privileges, means establishing the principle known as the "people differentiation" opposed to the equality proper to justice. In fact, the above-mentioned anti-juridical saying contradicts distributive justice since it consists of allocating the goods and the penalties to different people in proportion to their merit. Consequently, when one considers this property of the human being, by which he is given what is due to him, his individuality is not observed as much as his merit or dignity. Therefore, it is clear that the differentiation of people is opposed to justice, since adjudicating without proportion is not equal. And nothing is as much opposed to justice as inequality."[152] In this way, the Court emphasizes that,

[149] Corte Constitucional [C.C.] [Constitutional Court], Judgment C-171 of 1993. In Spanish: "al darle un trato más favorable a cierto tipo de delincuentes, paradójicamente …a quienes [habían] incurrido en los peores crímenes que puedan cometerse contra la sociedad, incluyendo delitos de lesa humanidad, como son los atentados terroristas indiscriminados. Existe en ello un evidente quebrantamiento del principio de justicia distributiva y de justicia conmutativa."

[150] *Id.* In Spanish: "En la justicia distributiva se observa el medio de acuerdo con el merecimiento de las personas. Pero ese merecimiento también se observa en la justicia conmutativa, como por ejemplo en la imposición de penas, pues será mayor el castigo a quien afecte gravemente el bien común. Como se ha venido sosteniendo, la justicia distributiva adjudica algo entre los particulares, según el merecimiento personal de cada uno de éstos. Por tanto, no se puede conceder un beneficio según la cosa en sí —exclusivamente—, sino según la proporción que guardan dichas cosas con las personas."

[151] *Id.* In Spanish: "Entre más participa la persona por medio de sus actos cotidianos al bien común, mayores deben ser las prerrogativas. Es decir, debe tenerse en cuenta el aporte objetivo al bien común y una actuación coherente con el interés general, para así aplicar el principio de igualdad donde éste corresponde no a la cantidad sino a la proporción."

[152] *Id.* In Spanish: "concederles a algunos ciudadanos una serie de beneficios…, excluyendo de esos privilegios excepcionales a los demás individuos, significa establecer el principio cono-

when it comes to adjudicating on distributive justice in a case, that is, allocating both property and penalties, merit is a substantial element and cannot be negotiated.[153] The Court declared that the Decree contradicted the right to equality because it enshrined punitive privileges to a group of criminals —especially those who deserved it less— and denied them to the rest criminals.[154]

The question that arises now is: where did the Court get the concept of distributive justice from? This is not an innocuous issue because the decision on the unconstitutionality of the Decree depends on the adopted concept of distributive justice. In fact, in the other three judgments of constitutionality, the Court decided a similar issue, i.e., the unconstitutionality of a criminal act in which special benefits were given to criminals because their lesser contribution to the common good made them less deserving to those punitive benefits. And, in the most recent judgment, the Court denied a request for house arrest made by a prisoner with HIV due to his illness, and it founded its arguments also in the lack of merit of the prisoner to such a punitive benefit, even though, because of his vulnerable condition, it could be argued that his stay in prison was against his human dignity.[155] Anyway, what is clear at first glance is that, in these five judgments, the Court follows the well-known "meaning" of justice: "justice is to give each one what they deserve", i.e., the Aristotelian or ancient sense of distributive justice.

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cido como la "acepción de personas", opuesto a la igualdad propia de la justicia. En efecto, la máxima antijurídica a que se ha hecho mención contradice a la justicia distributiva; pues ésta consiste en distribuir los bienes y las penas a las distintas personas en proporción a su merecimiento. En consecuencia, cuando se considera dicha propiedad del ser humano, por la cual se le da lo que le es debido, no se observa tanto su individualidad como su merecimiento o dignidad. Por tanto, es evidente que la acepción de personas se opone a la justicia, puesto que al obrar sin proporción desconoce la igualdad. Y nada se opone tanto a la justicia como la desigualdad."

[153] Therefore, the distribution of the benefit of a total punitive pardon to defendants and convicts of the crimes mentioned above clashes with equality because —through their actions— they have not contributed to a large extent to the common good and, therefore, have no personal merit proportional to the purpose of such forgiveness, which is to reward people who —in spite of their transgressive acts— have contributed the most to the common good; so, as these crimes affect the most the public order, according to the Court's opinion, the damage to the common good is greater than the benefits that an effective collaboration of these criminals can bring to justice.

[154] In his way, the Court, as part of the notion of distributive justice, justified inequalities among persons according to their merit, without taking into account the justification of inequalities according to the disadvantaged position in society, a fundamental element in the modern debate on distributive justice. In fact, the Court explained that differences with respect to merit could be justified on the grounds that persons who are convicted of less heinous crimes than those convicted by the most atrocious crimes are "more deserving"; otherwise, it would be like treating equally persons who have different merits.

[155] In fact, in a dissenting opinion, Justice Jorge Iván Palacios said that the act prohibiting house arrest for anyone convicted because of the crimes such as those of the plaintiff, ought not to be applied in this case because it could not fully guarantee his right to life.

However, the Court has mixed the two types of particular Aristotelian justice, in what has been called here an "Aristotelian and corrective distributive justice". Indeed, to the Court, distributive justice consists of the distribution of goods and penalties and is based on merit, thus falling into a substantial theoretical imprecision because the penalties, according to Aristotle, cannot be allocated depending on merit, because it is intended to correct the inequality caused by an anti-legal damage. Thus, the Court has based the unconstitutionality of the Decree in this judgment, and in the others that followed it as a precedent, on a wrong interpretation of the Aristotelian theory of justice, although it does not mean that the applied notion of distributive justice lacks Aristotelian roots. Then, by applying such an Aristotelian and corrective notion of distributive justice, the Court violates the principle of Social Rule of Law because that notion does not take into account the concern of ensuring everyone a minimum quantity of means to fulfill their life plan, which is the base of one of the essential objectives of the State itself.

Also, as it can be seen, there is also no coherence between the Court's notion of distributive justice based on merit, according to which a person will be entitled rights and benefits from the society depending on the quantity of his contribution to the common good, and the principle of human dignity, which, applied to the idea of distributive justice, means that everyone can be a subject of distributive justice just for the fact of being human and, therefore, everyone has an equal dignity to participate in the distribution of rights available in society without relying on the merit as the quantity of their contribution to the common good. Thus, by interpreting distributive justice based on the Aristotelian merit, the Court violates the principle of human dignity and questions its absolute character because it says that it does not matter if all human beings have the same dignity to participate in the distribution of social goods, because there are always some people more dignified than others, that is, there are people who deserve more than others to be treated in a privileged way by the Law and the State.

Additionally, there is no coherence between adopting the Aristotelian notion of distributive justice —which allows socio-economic inequalities as long as equality in merit is not affected, because the most important is that there be no inequalities in merit— and the obligation imposed by the Constitution to guarantee a different treatment in benefit of the least favored in society in order to realize an effective and real equality with the same opportunities for everyone, which is the conceptualization of the fundamental right to material equality.

Thus, according to the methodology of jurisprudential analysis proposed by the Critical Legal Studies,[156] such notion of distributive justice applied in this judgment allows to identify that the ideology on which Justice Vladimiro Naranjo decided this case is framed into the Natural Law, specifically in the

[156] Duncan Kennedy, Libertad y restricción en la decisión judicial (Bogotá: Universidad de los Andes, 1999).

Aristotelian-Thomist tradition. In the Middle Ages, Thomas Aquinas, by introducing Aristotle into the European political philosophy, conditioned the interpretation of the former in the centuries to come, which can be seen in Judgment C-171 of 1993 both in the permanence of the use of the adjective "commutative" when describing Aristotelian corrective justice, and in the addition of "the achievement of the common good" as a goal of distributive justice and corrective justice,[157] something that is not originally expressed in Aristotle's theory of justice, since he only referred to that goal as a characteristic of a good constitution or form of government.[158] Justice Naranjo's Aristotelian-Thomist ideology has also been noticed by professor Cristina Motta who has shown, in his judgments, the recurring use of the "common good" as an axiological category by which Law and justice in the Colombian Social Rule of Law should be guided.[159] Also, it is important to note that, recently, the Court has revived the debate on the validity of Natural Law in the Colombian Social Rule of Law by declaring constitutional the use of "the principles of Natural Law" to interpret the Constitution in penumbra cases, against what was requested in an unconstitutionality action that sought to repeal this possibility enshrined in an article of the centennial Civil Code. However, currently, it is difficult to predict the use and effects that this judgment can have in the long term.[160]

Finally, it must be said that, although the Court would not have modified the declaration of unenforceability of Decree 264 in Judgment C-171 of 1993, even if a modern notion of distributive justice had been applied, since there was another reason to declare it unconstitutional as explained in the first chapter, it is important to mention that a correct interpretation in that judgment regarding distributive justice would have allowed a better protection of rights, since: *i)* the type of justice applicable to the case was corrective, not distributive; *ii)* corrective justice is not based on merit, but on the restoration of broken equality, therefore, the Court violated human dignity by considering a group of people less deserving to receive the benefits of the Decree; *iii)* the majority of the justices did not understand that, in this case, there was no discrimination between the defendants/condemned who profited from the Decree and those who did not, since, precisely, the State of exception was an exceptional situation in which the measures to be taken to stop violence had to be different to those envisaged in ordinary situations; and *iv)* a rule with a constitutional legitimate purpose was drawn from the legal system, even

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[157] Jorge Martínez, *Santo Tomás de Aquino y la teoría de la justicia*, 12, Derecho y Humanidades, 109 (2006).

[158] Aristotle, P., *supra* note 28 at 1279a8-1283b27.

[159] Cristina Motta, Ética y Conflicto 226-229 (Bogotá: Universidad de los Andes 1995).

[160] Corte Constitucional [C.C.] [Constitutional Court], Judgment C-284 of 2015. In opinion of the author (who also was the plaintiff in this judgment), it is curious to see how the drafter Justice studied his LL.B. at the same university where Justice Vladimiro Narajo Mesa studied (Universidad del Rosario).

though it aimed to achieve peace and, through it, to guarantee the validity of all those purposes, principles, and rights of the Social Rule of Law limited by a war.[161] Thus, an analysis such as that of the Court in this Judgment C-171 of 1993 and the other five, would mean now, for example, that it is legitimate to deny members of the FARC-EP and ELN guerrillas exceptional benefits for making peace, with the argument that they are persons who do not deserve them because of their low level of contribution to the common good and that the same treatment should be given to the other offenders, just as proposed by the Court in the judgments discussed here.

4. *Achieving Social Justice Through Law*

The application of this modern notion of distributive justice or social justice, based on the principles and the right mentioned above, can serve to empower the Constitutional Court, other authorities of the public power, and the rest of Colombians, to materialize the aspirations of the Social Rule of Law itself. In fact, the Court has already implicitly applied this notion of distributive justice to defense and has extended the social rights initially enshrined by the Constitution, thus guaranteeing its validity as full rights.[162] Thus, both the Court and other public authorities can continue or, if they have not done it yet, begin to materialize the Social Rule of Law, by applying the notion of social justice proposed here, either *i)* in cases among individuals, in which the persons or groups may be in a condition of vulnerability or marginality (the displaced before the measures of eviction without alternatives of relocation by the public administration, the child or elder before the adult, the woman before the man, the afro-descendants or indigenous people before the whites or mestizos, the homosexual before the heterosexual, etc.), *ii)* in cases where the other branches and agencies of the public power try to restrict the progression of social rights, for example, by implementing a specific economic model that is not in accordance with the distributive justice of the Social Rule of Law, or *iii)* when making an act, e.g., by enacting a tax reform on income with a progressive tax that allows a redistribution of wealth to social programs that promote the general welfare, especially of the poorest, one of the verifiable achievements of the Social Rule of Law in the last century to overcome inequality, and from which very relevant lessons for today can be drawn.[163] Finally, by knowing the meaning of social justice and what

[161] These arguments would be shared by the two justices who presented dissenting opinions in Judgment C-171 of 1993.

[162] See, e.g., the judgments of the Table 1. See also, Corte Constitucional [C.C.] [Constitutional Court], Judgment C-209 of 2016; VÍCTOR ABRAMOVICH & CHRISTIAN COURTIS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES 37-47 (Madrid: Trotta, 2002).

[163] MARQUARDT, HISTORIA, *supra* note 56 at 291-296; THOMAS PIKETTY, EL CAPITAL EN EL SIGLO XXI 525-528 (México: Fondo de Cultura Económica, 2014).

is necessary in order to achieve it through Law, individuals and civil society in general can use legal arguments to demand the State a broader guaranty of their constitutional rights, without forgetting that they are also responsible for the materialization of the same justice, e.g., through the respect for the human dignity of their peers, the elimination of behaviors that encourage discrimination and marginality, the execution of practices to increase the efficient expense of the limited resources that the State assigns to the fulfillment of social rights without corruption, among other aspects.

So, it is clear that also in the family, the school, the university, the political arena, the policy making, etc., it is necessary to promote the constitutional meaning of social justice and to avoid using the common idea that social or distributive justice is "to give each one what they deserve", an idea of a slave and a non-egalitarian society in which Aristotle lived, that does not materialize the purposes, principles, and rights that govern the Colombian Social Rule of Law.

Finally, it is important to point out that, currently in Colombia, many people in academia, in politics, and also in the media are talking about the need to materialize social justice as the requirement for a stable and lasting peace in the country. For example, as mentioned before, the former guerrilla FARC-EP is very committed with social justice as its slogan in the coming years as a Marxist or communist party. Nevertheless, social justice must not be demonized by the FARC-EP's opponents and ultra-right parties as an expression that summarizes a supposed "Castro-chavista political program" for Colombia by the possible FARC-EP political party in the post-conflict. In any case, the materialization of social justice requires a balance among the principles of Social Rule of Law and human dignity, and the right to material equality, and there is no excuse to favor, for example, the realization of material equality if the principle of human dignity is violated. So, social justice is not an expression neither of the domain of Marxists or communists,[164] left-wing supporters, nor of the conservative religious sectors, but of all the persons who believe that material equality can be achieved without sacrificing the Rule of Law and human dignity in all its forms.[165]

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[164] Actually, Karl Marx himself never based his ideas on the purpose of achieving justice or "social justice" in its current popular meaning of the third stage.

[165] As seen, according to its constitution, the Cuban communist regime aims to achieve social justice as its main purpose. Nevertheless, this paper argues that this is not possible if it violates human dignity with the excuse of providing a full material equality; the same observation can be applied currently in the case of Venezuela. It is necessary to remember that social justice is, in fact, a third way to communism and savage capitalism, so civil society must avoid misunderstanding that social justice is the ultimate political purpose of communism, because communism violates the principle of human dignity by the strong limitation of rights such as freedom of speech, freedom of enterprise, freedom of association, freedom of expression, private property, among many others, i.e., by making the human being an instrument of the State.

IV. Conclusion

Summarizing, even though social justice is not a purpose or principle enshrined by the Constitution, it is an implicit idea in the Constitution because it enshrined its three main elements which were available in the global constitutional discourse of the years in which the Constitution was promulgated, i.e., the principles of Social Rule of Law and human dignity, and the right to material equality. Thus, social justice is a duty of the State to guarantee a certain minimum means, based on human dignity and a different treatment in benefit of the poorest, discriminated, vulnerable, and marginalized people in society. In contrast, an Aristotelian interpretation of distributive or social would disregard, even violate, the two principles and the right mentioned above. That is why the achievement of social justice in the Colombian State requires, essentially, the fulfilment of the principles of Social Rule of Law and human dignity, and the right to material equality, which are mandatory rules to the branches of power and the civil society. However, this does not mean that the meaning of social justice is static; on the contrary, it is necessary that progress be made to complement it with new characteristics and spheres of protection (e.g., the sphere of environmental justice).

A final reflection that can be mentioned is that this article, even though it was not among its objectives, demonstrated the lack of academic research that shows the ways in which social or distributive justice has been interpreted in both Colombia and Latin America throughout their history, and the effects it has had on the construction of constitutionalism in the region, among other phenomena. The history of the influence of classical or socio legal thinking on the configuration of Law in Latin America has been told *in extenso*, for instance, but not the history of how elites' conceptions on the meaning of social or distributive justice have influenced the way in which institutions, relations between the people and the State, economic and public policy, etc., have been constructed, which would allow us to discover, from another angle, the causes of some current problems in the region in order to generate some contextualized proposals and, perhaps, use others to solve them without resorting to the application of "fashion theories" on social or distributive justice, which, by the way, may be loaded with a political content that favors, consciously or unconsciously for their own benefit, the worldview and the interests of the countries in which they are produced. Thus, narrating the history of social or distributive justice in Colombia and Latin America with such a purpose is a pending task.

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THE APPLICATION OF *BLANK CRIMINAL LAW* AND THE PRINCIPLE OF LEGALITY: THE GUATEMALAN EXAMPLE

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Abstract: *The following article aims to assess the applicability of "blank criminal laws" under positive legal systems, as well as the threat it represents for the nullum crimen sine lege principle. It discusses the approaches to this concept taken by different legal systems in Latin America, particularly in Guatemala, where this technique was recently used to include in a flagship sentence several Conventions in which the State is involved but which are not fully transcribed into the corresponding codes. "Blank criminal laws" are understood as incomplete laws that only establish a penalty, leaving it to another judicial rule the broader definition, and analysis. The article compares the application of such laws in different Latin American countries, and how each country addresses the possible collision with the principle of legality.*

Key Words: *Blank criminal law, principle of legality or criminality, Constitutional Court, war crimes, crimes against humanity, criminal conduct.*

Resumen: *El presente ensayo pretende evaluar la aplicabilidad del derecho penal en blanco en el marco de los sistemas jurídicos de naturaleza positiva, particularmente el conflicto que tal aplicación representaría frente al principio de legalidad. El artículo expone las distintas aproximaciones realizadas por destacadas legislaciones en América Latina, acentuando el caso de Guatemala, donde esta técnica legislativa fue recientemente usada para incluir, en una decisión emblemática, el contenido de distintos tratados de los que el Estado forma parte, pero que no aparecen completamente descritos en su legislación penal. De esta manera, el artículo compara la aplicación del derecho penal en blanco en distintos sistemas legales en América Latina y la manera en que estos se enfrentan a la posible contradicción con el principio de legalidad. En los términos del presente ensayo, una ley penal en blanco consiste en aquellas leyes incompletas, que se limitan a fijar una determinada sanción, dejando a otra norma jurídica la misión de completarla con la determinación del precepto.*

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Palabras Clave: *Derecho penal en blanco, principio de legalidad, Corte Constitucional, crímenes de guerra, crímenes de la humanidad, conducta penal.*

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I. Introduction

On Friday, February 26, 2016, The High Risk Court (A) in Guatemala found two former senior military officers guilty of crimes against humanity in a case involving, rape, sexual violence, sexual slavery, inhumane treatment and forced labor under article 378 of the Guatemalan Penal Code.[1] The mentioned article refers to "Crimes against the Duties of Humanity" and is used to characterize conducts which amount to War Crimes or Crimes Against Humanity. This provision succeeds in grouping all the previously mentioned conducts into one single article applying the technique of blank criminal law (*Derecho Penal en Blanco*).

The term "blank criminal law" comes from the German word *Blankett-strafgesetz*. It was first used by Karl Binding in its 1872 work: *Die Normen und ihre Ubertretung*. Binding defines "blank penal law" as: "those incomplete laws which simply set a certain penalty, leaving the mission to another norm to complete its determination, that is, the specific description of the criminal offense".[2] In other words, blank criminal laws are those criminal laws that do not fully describe the prohibited conduct. Therefore, they are completed by other laws to fulfill that description.

However, the application of this technique might pose a threat to the principle of *nullum crimen sine lege*, especially under positive law systems such as Guatemala's. Different systems throughout Latin America have provided diverse approaches regarding the use of blank criminal laws; some of these systems have strongly limited this legislative technique, while others have almost unconditionally accepted its application. The following investigation will

[1] The case is commonly known as the *Sepur Zarco.* See Prensa Libre, *Sepur Zarco Reyes Girón 120 y Valdez Asij 240 años de prisión,* PRENSA LIBRE (Feb. 26, 2016, 08:41 AM). http://www.prensalibre.com/guatemala/justicia/sepur-zarco---tribunal-dictara-sentencia-esta-tarde.

[2] Unofficial translation of: *"aquellas leyes incompletas, que se limitan a fijar una determin*ada sanción, dejando a otra norma jurídica la misión de completarla con la determinación del precepto, o sea, la descripción específica de la conducta punible, In: Álvaro Roberto Delgado Lara, *Las leyes penales en blanco en la jurisprudencia del Tribunal Constitucional (2005-2011),* 8 No. 2 *Ars Boni et Aequi,* 277 (2012).

compare these different approaches and the interpretation given by them to the principle of legality under the existence of blank criminal laws. In other words, it will try to establish the line where what is strictly written as law blurs to allow for the existence of blank criminal laws. Given the unprecedented decision in Guatemala in which two former military officers where convicted for crimes against humanity and war crimes under local courts, the application of blank criminal law may become pivotal as a reference for future trials throughout the region.

II. Analysis of the *Nullum Crimen* Principle

The first challenge blank criminal law faces is the possible contradiction with the principle of legality. The latin formula "nullum crimen sine lege" is attributed to Paul Johann Anselm Feuerbach who came to highlight and specify one of the central achievements of the French Revolution (article 8 of the Declaration of Rights of Man of August 26, 1789, and the Constitution of September 3, 1791).[3] However, Feuerbach did not literally refer to the *nullum crime sine lege*, as much as it's interpreted from his reasoning.[4] Thus, the principle *nullum crime sine lege* is an approach of Cesare Becaria in his work "On crimes and punishments"[5] in which he explains "laws alone can decree punishments for crimes …that this authority can rest only with the legislator, who represents all of society united by a social contract."[6]

It is thus important to highlight how the legal system approaches this mentioned principle: It has developed as a rule under international law prohibiting retroactive application of criminal laws.[7] For instance, it is included in Article 15 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[8] Specifically, Article 15 provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence, under national or international law, at the time when it was committed.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission that, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[9]

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[3] S. Mir Puig, Derecho Penal Parte General 26 (Barcelona, 1984).

[4] *Id.*

[5] Cesare Beccaria, On crimes and punishments and other writings 12 (Aaron Thomas and Jeremy Parzen trans., University of Toronto 2008).

[6] *Id.*

[7] M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in International Criminal LAW, 2d rev. ed. vol. 1, ed. M. Cherif Bassiouni (New York: Transnational Publishers, 1999).

[8] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171. Ratified by the Guatemalan congress through decree 9-92 on 1 May 1992

[9] *Id.* Art. 15.

The principle is also codified in key human rights treaties, including the African Charter on Human and People's Rights,[10] the European Convention on Human Rights,[11] and the American Convention on Human Rights (ACHR).[12] The relevant provision of the ACHR, Article 9, states: "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed..."[13]

Importantly, although the ACHR, unlike the ICCPR, does not refer expressly to international law, the Inter-American Court of Human Rights has stated that the purpose of the *nullum crimen* provision is to safeguard the fundamental rights of life and liberty against *arbitrary abuses of power*.[14] Because the international community has long recognized that individuals may be prosecuted for acts committed in violation of international law,[15] such prosecutions would not constitute an arbitrary abuse of power and thus would be consistent with the principle enshrined in Article 9 of the ACHR.

Notably, international criminal tribunals and the European Court of Human Rights have expressly adopted a flexible approach to the prosecution of crimes that were only codified under customary international law at the time the relevant conduct was committed, recognizing the nature of international law and the severity of crimes that rise to the level of international crimes. For instance, while international criminal tribunals have made clear that the *nullum crimen* principle requires not only that the conduct was prohibited, but also that it gave rise to individual criminal responsibility under domestic or international law at the time it occurred,[16] they have also held that the principle

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[10] See, African Charter on Human Rights and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 58

[11] Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* 4 November 1950, 213 U.N.T.S. 221.

[12] Organization of American States, American Convention on Human Rights, *adopted* 22 November 1969, 1144 U.N.T.S. 123.

[13] *Id*. Ratified by Guatemalan on November 22, 1969. Guatemala also recognized the jurisdiction of the Inter-American Court of Human Rights through Government Agreement No. 123-87, dated February 20, 1987

[14] See, Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, 174 (Aug. 31, 2004).

[15] See, *e.g., infra*, Section IV. *But see also* Corte Constitucional de Colombia. Sentencia C-004 de 2003 34 (M.P. Dr. Eduardo Montealegre Lynett: January 2003). (holding that cases involving human rights violations and serious infringements of international humanitarian law may be re-opened based on evidence that an accused was acquitted due to a failure by the State to adequately and impartially investigate, even though there is no express language in the Colombian Procedural Criminal Code allowing for such a procedure).

[16] See, *e.g.*, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3, Judgment and Sentence, 86 ICTR-96-3 (6 December 1999) (supporting the proposition that, in order for the *nullum crimen* principle to be satisfied, the conduct in question must not only be violative of international law, but also it shoud have given rise to individual criminal responsibility); *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for

does not require that a crime was proscribed in the *exact and precise terms* in which it is later prosecuted. [17] Rather, according to the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR), as long as individuals could have reasonably foreseen from the law what acts or omissions would entail criminal liability, the *nullum crimen* principle is satisfied.[18] Thus, as the ICTY explained in the *Hadžihasanović* case: "In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the *underlying conduct* at the time of its commission was punishable. The emphasis on conduct, *rather than on the specific description of the offense in substantive criminal law*, is of primary relevance."[19]

In other words, "the principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, *regardless of how the concrete charges in a specific law would have been formulated*."[20] Notably, the European Court of Human Rights has taken a similar approach in interpreting the *nullum crimen* provision of the European Convention on Human Rights,[21] which is virtually identical to that found in the ICCPR.[22]

Interlocutory Appeal on Jurisdiction, 128-136 (2 October 1995). At least one human rights body, the European Court of Human Rights, had adopted the same approach: *Streletz, Kessler and Krentz v. Germany*, (Applications nos. 34044/96, 35532/97 and 44801/98), Judgment (22 March 2001).

[17] *Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 62, 165 (12 November 2002); *Prosecutor v. Edouard Karemera, et al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction In Relation To Joint Criminal Enterprise, 37 (11 May 2004).

[18] *Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 62, 165 (12 November 2002); *Prosecutor v. Edouard Karemera, et al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 37 (11 May 2004).

[19] *Hadžihasanović*, Decision on Joint Challenge to Jurisdiction, *supra* n. 18, 62 (emphasis added). See *also Karemera, et al.*, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction In Relation To Joint Criminal Enterprise, *supra* n. 18, 37 ("Where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle.").

[20] *Hadžihasanović*, Decision on Joint Challenge to Jurisdiction, *supra* n. 13, 165 (emphasis added).

[21] *Case of Streletz, Kessler and Krentz v. Germany*, *supra* n. 12, 105 (finding no violation of the European Convention on Human Right's bar against retroactive application of laws, even though the defendants had been prosecuted under a law that did not exist at the time they committed the acts, because "at the time when they were committed, the applicants' acts… constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection on human rights.")

[22] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 7 Nov. 4, 1950, 213 U.N.T.S. 222, (1953).

This approach towards the interpretation of the *nullum crimen* is logical in light of the nature of international law, as explained by one of the Nuremburg Military Tribunals established to prosecute the atrocities of World War II:

> Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law has passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. [...] International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs, which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence that follows the events. Having attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.[23]

Similarly, the ICTY has observed:

> Whereas the criminalization process in a national criminal justice system depends upon legislation that dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards.[24]

It is therefore relevant to emphasize the strong relationship between the principle of non-retroactivity and the principle that there is no crime or punishment except in accordance with law. However, some authors argue in favor of the making of retroactive laws in exceptional circumstances: in situations where the wrongdoer's acts or omissions were morally wrong, though legal at

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[23] *United States v. Josef Altstötter, et al.,* Case No. 3 IMT Trial [Trial of the major war criminals before the International Military Tribunal, Nuremberg], 974-75 (14 November 1945-1 October 1946). It must be noted that the mentioned Military Tribunal was severely criticized for providing for punishment of all crimes against humanity (whether or not in violation of the domestic law of the country where the acts were committed), and for declaring the waging of a war of aggression to be a crime. Both examples were considered to go beyond existing international law. Nevertheless, as mentioned by G. Williams "No injustice was done at Nuremberg, because all the defendants there found guilty were clearly guilty of war crimes in the traditional sense." See, G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART, 577 (1961).

[24] *Prosecutor v. Zdravko Mucić*, Case No. IT-96-21-T, Trial Judgement, 404-05 (16 November 1998).

the time when they were committed, that is, when the wrongdoer has transgressed the "natural law".[25] Such is the case of the previously mentioned Nuremberg Trials for which most jurists have agreed the actions of the Nazis were so immoral as to be an exception to the principle of non-retroactivity.[26] Yet, even when few would argue that the Nazis found guilty at Nuremberg were treated unfairly or unjustly, they were in fact tried under an ex post facto law, thus ignoring the principle of non-retroactivity.

The scenario brought up in by the Nuremberg trials is that, even when the principle of non-retroactivity is considered a fundamental human right, "retroactive law has been made, and continues to be made, in societies which ostensibly accept that principle as being a [fundamental] right".[27] This then leads to the interpretation that retro-active law-making is eventually and tacitly accepted.

III. Blank Criminal Law as a Legislative Tool

The application of blank criminal law as a legislative technique has been described by the Guatemalan Courts in a very recent decision regarding the initiation of trial against former president Efraín Ríos Montt.[28] In its decision the Court explained the application of article 378 regarding war crimes and crimes against humanity. This was extended by defining it as a "blank penal law".[29] Thus, the nature of article 378 as a "blank penal law" serves as a legislative tool, which refers to international covenants or customary laws (*jus cogens*), where the norm is fully described.[30] Therefore a legislative tool should be understood as *a technique that by the application of a set of rules leads to correct formulation and design of a pre-set norm content, resulting in a juridical-technical harmonization of the norm in itself and with regard to other norms*.[31] Thus, the use of this

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[25] See, James Popple, *The Right to Protection from Retroactive Criminal Law*, 4 *Criminal Law journal* 256 (1989).

[26] *Id.*

[27] *Id.*

[28] Audiencia de Resolución de Procedimiento Intermedio, Juzgado Primero de Primera Instancia Penal, Narcoactividad y Delitos Contra el Ambiente por Procesos de Mayor Riesgo (B) Municipio y Departamento De Guatemala. [C.H.R.C] [Courts for High Risk Crimes] (Juez Miguel Angel Galvez Aguilar; 28 January, 2013).

[29] *Id.* Unofficial translation of: El artículo 378 es una norma penal en blanco… Que por razones de técnica legislativa remite a normas internacionales convencionales o de carácter inderogable, o sea el *ius cogens*, de donde se hayan sus propuestos de hecho. Transcript of Oral Argument at 19.

[30] *Id.*

[31] Stijn Debaene, Raf van Kuyck and Bea Van Buggenhout, *Legislative Technique as Basis of a Legislative Drafting System*, in Legal Knowledge Based Systems 23-34 (H. Jaap van den Herik *et al.* Eds 1999).

legislative tool does not collide with the principle of legality: as mentioned by Muñoz Conde and García Aran "once completed, a blank criminal law is as much of a criminal law as any other. From a structural point of view, a blank criminal law does not raise special difficulties, the hypothesis contained in the non-penal norm belongs to the criminal law, integrating or completing it."[32]

In the case of criminal law Mir Puig explains: "neither the factual situation, nor the legal consequences in criminal law are completely described on any provision stated in the Penal Code. In this sense, all provisions in the Penal Code are individually considered as incomplete propositions".[33] Therefore, blank criminal laws should not be interpreted as threatening to the principle of legality, except in those cases in which the complementary non-penal law fails to provide a clear description. In that case, both the non-penal and the criminal law would become ineffective.[34]

The application of blank criminal law becomes useful when the subject matter proofs extremely changeable, flexible or complex to be described by a single provision, and therefore demands an immediate reference to another law.[35] This means that the economy and society are subject to constant evolution. In this sense, the use of such legislative tools becomes necessary. Otherwise, a frequent revision of every prohibited conduct would be necessary to adapt to this constant evolution.[36]

The definition of blank criminal law proposed has been modified through time and inserted into different legal systems. It has been mostly influenced by their particular characteristics and legal standards. Edmund Mezger[37] would broaden this concept by including two new applications:

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[32] Unofficial translation of: "la norma penal en blanco, una vez completada, es tan norma penal como cualquier otra. Desde un punto de vista estructural la norma penal en blanco no plantea, por consiguiente, especiales dificultades, el supuesto de hecho consignado en la norma extrapenal pertenece a la norma penal, integrándola o completándola." Francisco Muñoz Conde & Mercedes García Arán, Derecho Penal Parte General 36-37 (Tirant lo Blanch, 1996).

[33] See, *supra* n. 3 S. Mir Puig, Derecho Penal Parte General 26 (Barcelona, 1984).

[34] See, Luis Miguel Reyna Alfaro, *Derecho penal y la ley en blanco. Algunos apuntes sobre la problemática de la técnica del reenvío en las legislaciones penales europeas a propósito de la normativa comunitaria,* 41 *Themis 327* (2000)

[35] Juan Bustos Ramírez, Obras Completas, Derecho Penal, Parte General 387 (Jurídica de Santiago) (2007); Enrique Cury Urzúa, Derecho Penal, Parte General 175 (Universidad Católica de Chile) (2005); Gustavo Cassola Perenzutti, Medio Ambiente y Derecho Penal 29 (B de F) (2005).

[36] *Id.*

[37] Mezger, E., Tratado de Derecho Penal; Tomo I 381 (J. A. Rodríguez Muñoz trans., Madrid 2d ed.) (1946) and Edmund Mezger, Derecho Penal. Libro de Estudio. Parte General 154 (Bibliográfica Argentina) (1958), in Ramón Yordanis Alarcón Borges, *Normas penales en blanco: Por el camino de la doxa al de la alétheia*, Revista Pensamiento Penal, (Jul. 03 2016, 10:12 AM), http://www.pensamientopenal.com.ar/doctrina/29717-normas-penales-blanco-camino-doxa-al-aletheia

—The supplement to the criminal conduct is described *within the same law*.
—The supplement to the criminal conduct is described *in another law but it emanated from the same body of law*.[38]

This addition would then divide the concept of blank criminal law into two: Binding's definition in which the supplement to the described conduct is found in another body of law as a blank criminal law in a *strict sense*, and Mezger's addition as blank criminal laws in a *broad sense*. The addition of the two previously mentioned applications should then be interpreted as *an external legislative tool*.[39] It is important to note that in all three applications the necessary supplement is considered as an accessory part of the prohibited conduct. Nevertheless, the whole supplemented prohibited conduct has the same legal effects as any other, specially regarding its significance as a legal base for illegality.[40]

IV. The Application of Blank Criminal Law in Latin America

The development process and socio-economic transformations that have taken place in Latin America are placing new demands on the exercise of the law. This development not only comes from the field of economics and business but it is also emerging as a reflection from other social needs of particular importance such as the prevention and repression of crime, the protection of the family, and the environment and the protection of certain disadvantaged groups. Moreover, the recent trend towards globalization of national economies and societies is creating new challenges to international law and its application, therefore imposing the internationalization of legal relations and law.[41]

In this context the approach towards the exercise of criminal law in Latin America should rely on appropriate resources to strengthen and also to complement its range of protection, but respecting the limits imposed by the principle of legality or *Nullum crimen, nulla poena sine lege*. This means that even under the premise of illegality for the application of criminal figures through international law at the domestic level, the use of blank criminal laws serves as an exception to the principle of legality, and therefore opens a channel to include international standards described through covenants and customary international law into domestic systems in the region.

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] See, Inter-American Development Bank, Justicia y desarrollo en América Latina y el Caribe (1993).

1. *The Chilean Separation Into Proper, Improper and Open Penal Laws*

The use of blank criminal law in Chile finds its boundaries within its own Constitution, as stated in article 19, section 3, paragraph 8, which reads: "No crime will be punished with a penalty other than that specified by a law promulgated prior to its perpetration, except where a new law favors the affected [person]. No law can establish penalties unless the conduct that [the law] penalizes is expressly described in it."[42]

As described through this constitutional provision, the application of blank criminal law is somewhat accepted under the Chilean system. In this sense, the Chilean law uses a similar distinction for blank criminal laws distinguishing them in accordance with their legal status and the hierarchical level of the supplemented prohibited conduct.[43] Thus, *improper* criminal laws in blank are those that make a reference to a law in strict sense; *proper* criminal laws in blank are those that find their supplement in lower legal instruments such as regulations, or any other form of rules emerging from an administrative authority; and finally a third category defined as *open penal laws*, which are laws with no supplementary law whatsoever, nor lower level regulations to refer to, but its determination or supplement is delivered to the judge.[44]

The Constitutional Tribunal in Chile has tolerated the existence of some blank criminal laws in their *proper* form. Even when these legal instruments lack a clear description of the prohibited conduct, their reference to a lower level regulation protects them from colliding with the principle of legality. Still, the Court demands three characteristics from the referred law to prevent it from being constitutionally inapplicable:

> a. The referred regulation must include the central core of the prohibited conduct;
> b. The referring law must clearly state the referring regulation to which it's referring;
> c. The referred regulation must provide a certain level of clarity.[45]

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[42] Unofficial translation of: "Ningún delito se castigará con otra pena que la que señale una ley promulgada con anterioridad a su perpetración, a menos que una nueva ley favorezca al afectado. Ninguna ley podrá establecer penas sin que la conducta que se sanciona esté expresamente descrita en ella" Art. 19, Const. Chile.

[43] See, *supra* no. 2 Álvaro Roberto Delgado Lara, *Criminal law in blank in the jurisprudence of the Constitutional Court (2005-2011).*

[44] See, Sergio Politoff. *et al*, Lecciones de Derecho Penal Chileno. Parte General 613 (Editorial Jurídica) (2004); and see Ángela Vivanco, II. Curso de Derecho Constitucional, Aspectos Dogmáticos de la Carta Fundamental de 1980 555 (Universidad Católica de Chile) (2006).

[45] *Id.*

The Chilean Tribunal has approached the applicability of blank criminal law by focusing its analysis on the description provided by the original law.[46] If such description or definition proves insufficient then the legal provision shall be declared unconstitutional. Nevertheless, if the mentioned provision at least describes the central core of the prohibited conduct then other rulings or administrative provisions may supplement it.[47] This is the case of a proper blank criminal law, which by nature demands a clear and direct reference to the regulations, or any other form of rules emerging from an administrative authority that complements it.

It has been the Tribunal's reasoning that both improper and proper blank criminal laws will always be constitutional. Only in the event that the legal supplement for improper blank criminal laws or any of the previously mentioned characteristics for the proper blank criminal laws are missing, then these will turn into open penal laws. The latter will in fact be considered unconstitutional given that they miss a direct reference to any body of law, thus colliding with the principle of legality.[48]

2. *Argentina and the Mouwiel Case*

The distinction between *proper* and *improper* blank criminal law has also been studied in Argentina. Criminalist Ricardo C. Núñez distinguishes the first as: those "in which particular infringements are actually designed by the supplementary legal act"[49] therefore evading any description of the sanctioned conduct, and so appointing the power to determine the infringement to another law.[50] *Improper* blank criminal laws, on the contrary, are those that are limited to sanction certain prohibited conducts on which an specific law or regulation has already ruled.[51] In these circumstances, even when the prohibited conduct depends on another legislative body, the main law is the one that specifies such conduct, therefore excluding the description in the supplementary law.[52]

Improper blank criminal laws may also be distinguished as those that perform an internal remission within the same law, a different article for ex-

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[46] See, Requerimiento de Inaplicabilidad por Inconstitucionalidad, Tribunal Constitucional [T.C.] [Constitutional Tribunal] 9 de noviembre de 2006, rol no 468, p. 1 (Chile)

[47] See, *supra* note 34

[48] *Id.*

[49] Unofficial translation of: "Las infracciones particulares son creadas, en realidad, por el acto legislativo complementario" in Ricardo C. Nuñez, Manual de Derecho Penal, Parte General 66 (Marcos Lerner) (1999)

[50] *Id.*

[51] *Id.*

[52] *Id.*

ample; while these same laws may perform an external remission to another formal law.[53] This means that the main law establishes the sanction but then it refers to another article within this same law or to another law at the same hierarchical level to establish the prohibited conduct.[54]

When analyzing the principle of legality in Argentina against the use of blank criminal laws the *Mouviel* case emerges as an inevitable reference[55]. The case dealt with the arrest of Raúl Mouviel and others for the violation of Police Edicts for public disorders. The defendants were detained for 30 days as determined by the Federal District's Police Chief based on Art. 7 inc. a), of the Argentine Federal Police Statute. The mentioned norm authorized the Police Chief to issue edicts within the competence allocated by the Criminal Procedural Code with the purpose to repress acts of violence that were not considered by the legislator.[56]

The decision was then appealed before the Penitentiary Criminal Judge, who sustained the decision. The defendants made an extraordinary review arguing that the current regime simply concentrated in the Police Chief all three legislative, executive and judiciary powers, which would constitute a violation of the principle of separation of powers.[57]

The Supreme Court reversed the already issued police edicts based on Article18 of the Argentinean Constitution, which clearly states: "No inhabitant of the Nation may be punished without previous trial based on a law enacted before the act that gives rise to the process, nor tried by special committees, nor removed from the judges appointed by law before the act for which he is tried."[58] According to this same reasoning Article 19 states that: "The private actions of men that in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit."[59] It is

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[53] *Id.*

[54] *Id.*

[55] The mentioned case refers to the prosecution of Raúl Mouviel and others for the violation of Police Edicts for public disorders. The defendants were detained for 30 days as determined by the Federal District's Police Chief based on Art. 7 inc. a) of the Argentine Federal Police Statute. The mentioned norm authorized the Police Chief to issue edicts within the competence allocated be the Criminal Procedural Code with the purpose of repressing acts of violence that were not considered by the legislator. See, "Mouviel R. *et al.*" CSJN, FA57000000, 1957.

[56] *Id.*

[57] See, Frente Universitario Peronista, *caso Mouviel, Resúmenes de Fallos*, federación universitaria 8 Blog (May 13, 2016 12:25 PM) http://federacionuniversitaria8.blogspot.com/2008/04/mouviel.htm/

[58] Unofficial translation of: "Ningún habitante de la Nación puede ser penado sin juicio previo fundado en ley anterior al hecho del proceso, ni juzgado por comisiones especiales, o sacado de los jueces designados por la ley antes del hecho de la causa." Art. 18, Const. Arg.

[59] Unofficial translation of: "Las acciones privadas de los hombres que de ningún modo ofendan al orden y a la moral pública, ni perjudiquen a un tercero, están sólo reservadas a Di-

thus highlighted that only the legislative power is responsible for establishing, through laws, the description of the prohibited conducts and their corresponding sanctions.

The executive power is, however, entitled to issue "the instructions and rules necessary for the enforcement of the laws of the nation, without altering their spirit with regulatory exceptions".[60] Nevertheless, the Supreme Court has stated in previous sentences that even if the Executive is granted the power to establish certain police regulations, it means only the faculty to implement regulations that are already defined by the legislature.[61]

In its opinion on the Mouviel case, the Attorney General explains that the reference to another law does not create major problems.[62] But when the referral from blank criminal laws involves administrative regulations, two situations must be considered: first, if the prohibited conduct is described by criminal law but the description of such conduct must be incorporated with a factual element provided by the Executive, in which case there would be no violation of the principle of legality; and second, if the prohibited conduct is not specified by criminal law but instead it refers to administrative regulations, in which case they should be considered as an example of Article 99.2 of the Constitution.[63]

The Argentinean Constitutional Tribunal therefore considers blank criminal laws admissible only if they meet the following requirements:

- The remission to another regulation must be unavoidable by the complexity or extension of the issue presented.
- The central core must be regulated by the law that it is referring to, while the referred regulation may only verse on secondary issues.
- The referral must be clear and explicit.[64]

3. *The Constitutional Court in Colombia and the Possibility of Sentence Revision*

The principle of legality in Colombia is described under Article 29 of the Constitution as follows:

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os, y exentas de la autoridad de los magistrados. Ningún habitante de la Nación será obligado a hacer lo que no manda la ley, ni privado de lo que ella no prohíbe". Art. 19, Const. Arg.

[60] Unofficial translation of: "Expide las instrucciones y reglamentos que sean necesarios para la ejecución de las leyes de la Nación, cuidando de no alterar su espíritu con excepciones reglamentarias." Art. 99, Const. Arg.

[61] See, *supra* note 45.

[62] *Id.*

[63] See, *supra* note 47.

[64] *Id.*

> Article 29. Due process will apply to all legal and administrative measures.
>
> No one may be judged except in accordance with the relevant previously written laws before a competent judge or tribunal following all appropriate formalities in each trial.
>
> In penal cases, a permissive or favorable law, even when ex post facto, will be applied with preference over restrictive or unfavorable alternatives.
>
> Every person is presumed innocent until proven guilty according to the law. Everyone criminally charged is entitled to counsel and to chose a defendant or to be appointed one during the investigation and trial; to a fair and public hearing without undue delay; to present evidence and to examine witnesses for the prosecution; to challenge the conviction, and to not be prosecuted twice for the same offence.
>
> Evidence obtained in violation of due process is null and void as of right.[65]

This provision establishes that by Constitutional level, the criminal law must indicate or describe in a complete way the structural elements of the prohibited conduct. In other words, there is no crime if the law has not considered it as such, and this is not accomplished until a clear description and a penalty for it are provided (*nullum crimen sine lege–nulla poena sine lege*).[66]

The Supreme Court has clearly explained the principle of legality in the following terms:

> If the criminal provision appears vague, uncertain, ambiguous or erroneous, those who are called upon to apply it will then be necessarily exercising an arbitrary power, causing an unfair disruption in the sphere of individual liberties, which is inviolable, and Constitutionally guaranteed.
>
> The principle of legality must be aligned with the following essential features of normativity: 1. Every criminal substantial law, whether it constitutes an infraction, a crime, or a disciplinary sanction, must be hierarchically respectful of the Constitution; 2. It must be legally applicable prior to the commission of the crime; 3. It must prove specific, clear, certain, sharp, unequivocal, exhaustive and clearly delimited; 4. Thus it may not be deemed valid when it appears

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[65] Unofficial translation of: "El debido proceso se aplicará a toda clase de actuaciones judiciales y administrativas. Nadie podrá ser juzgado sino conforme a leyes preexistentes al acto que se le imputa, ante juez o tribunal competente y con observancia de la plenitud de las formas propias de cada juicio. En materia penal, la ley permisiva o favorable, aun cuando sea posterior, se aplicará de preferencia a la restrictiva o desfavorable. Toda persona se presume inocente mientras no se la haya declarado judicialmente culpable. Quien sea sindicado tiene derecho a la defensa y a la asistencia de un abogado escogido por él, o de oficio, durante la investigación y el juzgamiento; a un debido proceso público sin dilaciones injustificadas; a presentar pruebas y a controvertir las que se alleguen en su contra; a impugnar la sentencia condenatoria, y a no ser juzgado dos veces por el mismo hecho. Es nula, de pleno derecho, la prueba obtenida con violación del debido proceso." Constitución Política de Colombia [Const]. Art. 29. Julio 7 de 1991 (Colombia).

[66] See, Claudia Patricia Orduz Barreto, *El Principio de Legalidad en la Ley Penal Colombiana*, 2 Revista Criterio Jurídico Garantista, (January-June 2010).

> implicit, ambiguous, equivocal, extensive or analogical, with the exception of the latter when it is used to favor the prosecuted[67].

Under these boundaries, the criminal code in Colombia (Law 599, 2000) provides the following:

> Article 6. Legality. No one may be tried except in conformity with the laws that predate the act of which the person is accused, before a competent court or tribunal and in accordance with the procedure appropriate to each case. The pre-existence of the law is also applicable for the referral of criminal blank laws.[68]

The Constitutional Court in its Sentence C-559/99 has revised the implementation of blank criminal law in Colombia.[69] In the Court's reasoning blank criminal laws are characterized by the scope of their prohibition, which cannot be autonomously defined, instead it depends on different provisions of the Law.[70] The Court finds these legislative tools constitutionally valid if "the remission to another law allows to unequivocally establish the scope of the prohibited conduct and the corresponding sanction".[71]

On a similar matter the Constitutional Court in Colombia used a similar technique as the High Risk Court (A) referring to IHL standards on its

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[67] Unofficial translation of: "Si la norma penal es vaga, incierta, ambigua o equívoca, los funcionarios llamados a aplicarla resultan detentando por ello solo, necesariamente, un poder arbitrario, y las personas sufrirán el consiguiente recorte injusto en la esfera de la libertad individual inviolable, garantizada por la Constitución".

"El principio de estricta y preexistente legalidad corresponde a los siguientes rasgos esenciales de normatividad: 1. Toda norma sustancial de naturaleza punible, tanto delictiva, como contravencional, disciplinaria o correccional, debe ser de carácter y jerarquía constitucional o legal, o autorizada por la ley conforme a la Constitución. 2. Debe ser preexistente a la comisión del hecho prescrito como punible y estar vigente al momento que se haya cometido. 3. Debe ser expresa, clara, cierta, nítida, inequívoca, exhaustiva y de limitativa. 4. No puede por lo tanto adquirirse como válida cuando es implícita, incierta, ambigua, equívoca, extensiva, o analógica, a no ser que respecto de esta última característica, su aplicación sea para favorecer y no para desfavorecer al sindicado o condenado" In: Corte Suprema de Justicia. Sala Plena. (M.P. Fernando Uribe Restrepo; 1o. de septiembre de 1983).

[68] Unofficial translation of: "Legalidad. Nadie podrá ser juzgado sino conforme a las leyes preexistentes al acto que se le imputa, ante el juez o tribunal competente y con la observancia de la plenitud de las formas propias de cada juicio. La preexistencia de la norma también se aplica para el reenvío en materia de tipos penales en blanco". Ley 599, 2000. Por la cual se expide el Código Penal. Julio 24 de 2000. DO. No 44.097

[69] See, Corte Constitucional de Colombia. Sentencia C-559 de 1999 4 (M.P. Dr. A. Martínez Caballero; 4 de agosto de 1999).

[70] *Id.*

[71] Unofficial translation of: "esas descripciones penales son constitucionalmente válidas, siempre y cuando el correspondiente reenvío normativo permita al intérprete determinar inequívocamente el alcance de la conducta penalizada y de la sanción correspondiente." In *supra* no. 59.

Sentence C-004/03. This decision establishes that it is necessary for the Procedural Criminal Code in Colombia to include the possibility of reopening investigations concerning human rights violations and serious IHL infringements in cases in which the acquittal of a defendant results from a protruding dereliction of the State's duty to investigate, these behaviors in a serious and impartial manner.[72] Article 220 concerning revision causes does not include that provision. So the code has a legislative gap. The Court resolves this situation by determining the nature of the crimes added to the State's obligation to prosecute these crimes. Therefore, such gap should and must be filled through a sentence that integrates the possibility to revise those cases involving the rights of human rights victims as grave breaches to IHL.[73]

The Constitutional Court in Colombia determines that Article 220 may be invoked in the revision of cases of preclusion of investigation, cessation of proceedings or dismissal of charges, in which human rights violations or serious IHL infringements are involved, and a domestic court judgment or a decision by an international human rights monitoring and follow-up body, formally recognized by Colombia, has found that there exists a new fact or evidence not known at the time of the hearing.[74] In this sense, it is the duty of the judge in Colombia to abide by such possibility even when it's not literally expressed in the Criminal Code.

4. *Costa Rica and the Immediate Reference to International Law*

The inclusion of international crimes as a particular prohibition within the criminal normativity in Costa Rica provides a more tolerant application of blank criminal laws in the State. Thus in alignment with the principle of legality as defined by its Constitution where it states: "Article 28. No one may be disturbed or persecuted for expressing his opinions or for any act that does not infringe the law."[75] Article 374 of Costa Rican Penal Code states the following:

> Crimes of international level: Article 374. For those who direct or take part in international organizations with the purpose of trafficking slaves, women or children, drugs, or [those who] carry out acts of terrorism, or infringe human rights treaty provisions ratified by Costa Rica, the penalty shall be a term between ten to fifteen years' imprisonment.[76]

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[72] See, Corte Constitucional de Colombia, Sentencia C-004 de 2003 34 (M.P. Dr. Eduardo Montealegre Lynett; 20 de enero de 2003).

[73] *Id.*

[74] *Id.*

[75] Unofficial translation of: "Nadie puede ser inquietado ni perseguido por la manifestación de sus opiniones ni por acto alguno que no infrinja la ley." C. Rica Const. Art. 28 (1949)

[76] Unofficial translation of: "Delitos de carácter internacional: ARTÍCULO 374. Se impondrá prisión de diez a quince años a quienes dirigieren o formaren parte de organizaciones

Under this provision, it becomes clear that Costa Rica easily abides by the principle of legality without the use of an exhaustive description of the criminal conduct. Although, it seems valid to state that the allusion to this type of blank criminal laws directs to figures provided by conventional standards, consideration must be given the fact that criminal law will not be sufficiently covered by the mere reference to crimes described by customary international law. The exercise of customary international law demands a widespread and constant practice by the State and its correspondent *opinio iuris*.[77] Nonetheless, Costa Rica's use of criminal laws in blank provides an interesting reference to international law as a complement to its own description of criminal conducts. As it will be explained below, Guatemala uses a very similar technique for the implementation of international conventional standards and customary international law into its own criminal system.

The Constitutional Court in Costa Rica has found that the application of blank criminal laws is constitutionally acceptable as long as the referral carried out by the law is done towards a provision at the same level. Thus, sentence 6785-05 stated the following:

> ...in the particular case, what the appellant states is that the criminal conduct attributed to him, as detailed in Article 213 of the Criminal Code, is incomplete. Therefore to be deemed understandable and applicable it must be supplemented by Article 209 of the same law. This Court has previously ruled in favor of the constitutionality of such specific legislative technique [blank criminal laws], which is used to complement legal standards in order to configure and complete all the minimum necessary elements of the offense.[78]

Under the Court's analysis the contested law is fully constructed by all the required elements for a criminal conduct: the active subject, the description of the conduct, and the sanction for it, and then it does not prove illegal in the light of the principle of legality.[79]

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de carácter internacional dedicadas a traficar con esclavos, mujeres o niños, drogas estupefacientes o realicen actos de terrorismo o infrinjan disposiciones previstas en los tratados suscritos por Costa Rica para proteger los derechos humanos". Cod. Pen. Art. 374 (C. Rica 1970)

[77] See, X Fernández Pons, "El principio de legalidad penal y la incriminación internacional del individuo" 5 REEI, 8 (2002).

[78] Unofficial translation of: "Ahora bien, en el caso particular, lo que el recurrente señala es que el tipo penal que se le aplicó, contenido en el artículo 213 del Código Penal está incompleto y para ser entendible y aplicable debe completarse con el artículo 209 del mismo cuerpo normativo. Ya este órgano se ha pronunciado a favor de la constitucionalidad de este tipo de técnica legislativa específica consistente en emplear normas de rango legal para que se complementen entre ellas con miras a configurar y completar todos los elementos mínimos necesarios del tipo penal. In: Corte Constitucional de Costa Rica, Sentencia 6785 de 2005.

[79] *Id.*

5. *The Principle of Nullum Crimen Under Guatemalan Domestic Law*

The principle of legality is also firmly rooted in Guatemalan law. For instance, Article 5 the Constitution provides: "All persons have the right to do what the law does not prohibit; [the persons] are not obligated to obey orders that are not based in law or issued in accordance to it. Neither may they be persecuted or harassed for their opinions or for acts that do not imply an infraction of it."[80] Furthermore, Article 17 of the Constitution provides: "The actions or omissions that are not qualified as crimes or faults and that [are] punishable by a law [that is] prior to their perpetration[,] are not punishable.[81]

[80] Unofficial translation of: "Toda persona tiene derecho de hacer lo que la ley no prohíbe; no está obligada a acatar órdenes que no estén basadas en ley y emitidas conforme a ella. Tampoco podrá ser perseguida ni molestada por sus opiniones o por actos que no impliquen infracción a la misma" GUAT. CONST. Art. 5 (1985)

[81] Unofficial translation of: "No son punibles las acciones u omisiones que no estén calificadas como delito o falta y penadas por ley anterior a su perpetración." GUAT. CONST. Art. 17 (1985). See also Corte de Constitucionalidad de Guatemala, Expediente 1122 de 2005 (1 de febrero de 2006). The mentioned sentence also argues "Article 17 of the Guatemalan Constitution states that actions or omissions that are not qualified as crimes or faults and that [are] punishable by a law [that is] prior to their perpetration[,] are not punishable. This principle, which is also a guarantee for a prosecution under the legal principle of due process, is one of the central elements of the criminal prosecution in a democratic society, and imposes an obligation to the common legislator to define, as clear as possible (lex certa)[,] which of those conducts that may be punishable through the determination of the criminal offences that include a clear definition of the criminalized conduct, narrow its elements to allow a clear distinction between conducts of a criminal nature and those which are not.") (Unofficial translation of: "El artículo 17 de la Constitución Política de la República de Guatemala expresa que no son punibles las acciones u omisiones que no estén calificadas como delito o falta y penadas por ley anterior a su perpetración. Este principio, que a su vez constituye una garantía para un juzgamiento conforme al principio jurídico del debido proceso, constituye uno de los elementos centrales de la persecución penal en una sociedad democrática, e impone la obligación al legislador ordinario de definir en la forma más clara y precisa posible (lex certa) cuáles son esas "acciones u omisiones" que son consideradas punibles mediante la determinación de tipos penales que contemplen una clara definición de la conducta incriminada, concretizar sus elementos y permitir así deslindar conductas punibles de aquellas que no lo son."). The principle is also mentioned in Article 1 of Guatemala Penal Code: "No one shall be punished for acts that are not expressly qualified as crimes or offenses by law prior to their perpetration; no penalties different to those previously established by law will be imposed." Unofficial translation of: "Nadie podrá ser penado por hechos que no estén expresamente calificados, como delitos o faltas, por ley anterior a su perpetración; ni se impondrán otras penas que no sean las previamente establecidas en la ley." Likewise, Article 1 of the Guatemalan Penal Procedure Code states: "No punishment shall be imposed if the law has not [been] defined it in advance." Unofficial translation of: "No se impondrá pena alguna si la ley no la hubiere fijado con anterioridad." Finally, Article 2 of the Penal Procedure Code states: "No trial, complaint or grievance process may be initiated but by conducts qualified as crimes or offenses by a previous law. Without this prerequisite, proceedings shall be deemed null and may induce the Court's accountability."

While the Guatemalan Constitutional Court has held that *nullum crimen* "demands that the criminal conduct is fully described in the positive law,"[82] this requirement does not preclude the prosecution of acts that were criminalized only as a matter of customary international law at the time they were committed.[83] Article 149 of the Guatemalan Constitution expressly incorporates customary international law as part of domestic law insofar as it governs its international relations in accordance with international principles, rules and practices.[84] This means that a rule of international law can be enforced without being enacted by Congress. This is only valid if the existence and extent of a certain rule of international law has been duly proven to be binding and accepted by the international community as a whole, and if it has never been rejected by the State under consideration.[85]

However, the Court's reasoning in a case involving allegations of torture as a war crime leads to a contradiction against this provision when it states:

> Resorting to international norms cannot restore the vulnerable condition of such criminal acts regarding torture (or any other crime under IHL), even if they are norms of *ius cogens* that demand universal application. Regarding the principle of legality, as referred in the preceding paragraphs, for a criminal offense to be linked with the commission of criminal acts, it must be fully described within a norm, otherwise it would violate the freedom of will granted to

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Unofficial translation of: "No podrá iniciarse proceso ni tramitarse denuncia o querella, sino por actos u omisiones calificados como delitos o faltas por una ley anterior. Sin ese presupuesto, es nulo lo actuado e induce responsabilidad del tribunal."

[82] See, Corte de Constitucionalidad de Guatemala, Inconstitucionalidad General Parcial por omisión, Expediente 1822-2011, 20 (17 de julio de 2012). In this mentioned sentence the Constitutional Court of Guatemala addressed the issue of the definition of Torture found in Article 201 bis of the Penal Code. According to the sentence, the former definition of Torture was inconsistent by omission with international standards since the mentioned definition failed to include the objective element of the acts committed "based on discrimination of any kind", as stated on article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which the Guatemalan congress ratified through decree 58-95 on 10 August 1995. And the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish, as described on the Inter-American Convention to Prevent and Punish Torture, to which Guatemala is a State Party since December 12 1986. Unofficial translation of: Adviértase que, en cuanto a la razón de la inconstitucionalidad examinada, se hace referencia a un precepto del Código Penal, que no puede ser suplido por vía de interpretación ni por analogía, puesto que el principio de legalidad penal exige que el tipo a sancionar sea debidamente establecido en el derecho positivo.

[83] See, Ana Cristina Rodríguez Pineda, Guide to Legal Research in Guatemala, Section. 4.2.2, (Jul. 23, 2016, 11:15 AM), http://www.nyulawglobal.org/globalex/Guatemala1.html#_4.2_Treaties

[84] *Id.*

[85] *Id.*

> the State's citizens, particularly taking into account the prohibition of analogy and broad interpretation embodied in criminal law.[86]

The Court goes further to state: "for this reason, the prohibited conduct must be concrete. If the qualifying elements for this conduct are not reached, then the constitutional parameters for the creation of offenses will not be met."[87]

Given the forgoing, it is clear that, to be prosecuted in Guatemala, an act must have been criminalized either under the domestic law applicable in the State or under international law at the time it was committed. The charges in the *Sepur Zarco* case have been brought under Article 378 of the Guatemalan Penal Code, which states: Crimes against the Duties of Humanity: Whosoever violates or infringes humanitarian obligations, laws or covenants regarding prisoners or hostages of war or those wounded in battle, or whosoever commits any inhuman act against the civilian population or against hospitals or places designated for the wounded will be sentenced to 20-30 years in prison.[88]

While this provision clearly criminalizes violations of international humanitarian law, it does not "fully describe[s]" the individual violations that fall within its scope, as required by the Guatemalan Constitutional Court in its analysis of the principle of legality cited above.[89] Nevertheless, the accused in the present case were charged with crimes against the duties of humanity in the specific forms of sexual violence, sexual slavery, domestic slavery, and outrages upon personal dignity.[90] Indeed, during the stage of proceedings intended to determine whether there is a basis for committing a person to trial, the First Instance Judge, Miguel Ángel Gálvez, permitted the case to go to trial against the accused on the basis of these specific charges, arguing, in part, that Article 378 is an open or "blank, criminal law,"[91] meaning that although it does not describe in detail the conduct proscribed, it makes reference to

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[86] Unofficial translation of: "La desprotección de tales actos en el tipo penal de la tortura no puede suplirse acudiendo a las normas internacionales, pues aunque son normas de *ius cogens* que son de aplicación universal, con base en el principio de legalidad, tal como se refirió en párrafos precedentes, para que un tipo penal pueda ser aplicado a la comisión de hechos delictivos, debe ser plenamente descrito en una norma, pues de lo contrario, violaría la libertad de acción de la que gozan los ciudadanos del país, tomando en cuenta la prohibición de analogía y de interpretación extensiva que opera en materia penal." in *supra* note 72.

[87] Unofficial translation of: "razón por la que la conducta prohibida debe ser concreta, porque si no se consignan íntegramente los elementos específicos del supuesto de hecho, no se cumplirían con los parámetros constitucionales para la creación de los delitos." *Id*.

[88] Unofficial translation of: "Quien violare o infringiere deberes humanitarios, leyes o convenios con respecto a prisioneros o rehenes de guerra, heridos durante acciones bélicas, o que cometiere cualquier acto inhumano contra población civil, o contra hospitales o lugares destinados a heridos, será sancionado con prisión de veinte a treinta años." Cód. Pen. Art. 378 (Guat. 1973).

[89] See *supra* Note. 70.

[90] See, *supra* Note. 2.

[91] Juzgado Primero de Primera Instancia Penal, Resolución de Fase Intermedia, *supra,* 28.

other sources of law and allows a court to define the proscribed conduct by reference to those other sources.[92] Judge Gálvez explained that the Penal Code, which Guatemala adopted in 1976, created various offenses of international concern, among them Article 378, which "of course refers us to international conventions and especially the [1949] Geneva Conventions" ratified by Guatemala in 1952.[93] Noting that the provision had to be interpreted in light of developments in international law, Judge Gálvez went on to point out that, Article 378 was intended to refer not only to war crimes but also to crimes against humanity.[94] Thus, under Article 378 of the Guatemalan Penal Code, this court has jurisdiction to adjudicate acts constituting crimes under customary or conventional international law binding on Guatemala.

V. Conclusion

Though useful, the legislative tool of blank criminal law finds a certain level of resistance within the legal systems reviewed. It is a common understanding that such a tool can only be exercised as an exception to heavily positivized legal systems. For this reason States like Chile and Argentina opt for strict applications of blank criminal laws in only allowing the reference they provide through rulings of lower hierarchical level. On the other hand, States like Costa Rica and Guatemala use blank criminal laws as a more open reference to notably complex subjects like International Humanitarian Law and customary international law. On either approach, it becomes important to bring to attention the thoughts of Luis Miguel Reyna when he states that blank criminal laws do not particularly interfere with the principle of legality, except only in those cases in which the non-penal law makes an unclear description of the criminal conduct.[95]

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[92] See Impunity Watch, Monitoreo de la Justicia Transicional en Guatemala, Tomo II: Derecho a la justicia para las víctimas del Conflicto Armado Interno 16, (Jul. 23, 2016, 11:43 AM), http://www.impunitywatch.org/docs/Research_report_informe_monitoreo_IW_JUSTICIA_Dec_2014.pdf (internal citations omitted).

[93] Juzgado Primero de Primera Instancia Penal, Resolución de Fase Intermedia, *supra* n. 28.

[94] *Id*. Notably, this position is consistent with that of other experts. *See, e.g.* Impunity Watch, *supra* n. 92 ("En efecto, los crímenes de guerra, los crímenes de lesa humanidad, y el genocidio, que están categorizados como delitos internacionales, se encuentran previstos en el CP guatemalteco (*lex scripta*). Por razones técnicas se afirma que los crímenes de guerra y de lesa humanidad están amparados en el artículo 378, puesto que los elementos y sub-conductas tipo de tales delitos permiten su integración en una sola disposición legal, ya que para identificarlos necesariamente hay que recurrir a los tratados internacionales pertinentes ratificados por Guatemala. Además, tanto los delitos contra los deberes de humanidad como el genocidio forman parte del Capítulo IV (De los delitos de trascendencia internacional) que incluye los tipos penales que ofenden al mundo entero y responde a obligaciones internacionales adquiridas por el Estado.").

[95] See, *supra* note 34 Luis Miguel Reyna Alfaro, *Derecho penal y la ley en blanco. Algunos apuntes sobre la problemática de la técnica del reenvío en las legislaciones penales europeas a propósito de la normativa comunitaria.*

Nevertheless, it is also notable how the use of blank criminal law has become a more frequent trend starting in the nineties to the date. With the exception of Argentina, the use of blank criminal laws has become a more recent approach by the reviewed States. The period coincides with the transition of these legal systems from complex situations of human rights violations towards the inclusion of human rights standards into their legal orders. This period includes the ending of the Military dictatorship in Chile in 1989; the demobilization of the M-19 guerrilla and the new Constitution signed in 1991 in Colombia, and, the peace process in Guatemala in 1996. These transitions where followed by a strong implementation of International Human Rights Law and International Criminal Law into their legal systems.

It appears that the complexity and length of the mentioned bodies of law proved difficult enough for this States to handle. Then, the use of legal tools as criminal laws in blanks serves as a practical way to resolve this. Nevertheless, the requirements *the nulla poena sine lege* demands, proves that regardless of the legislative tool chosen by each State, the existence of an internal law which in some way translates the international standards for international crimes, becomes necessary.

In other words, the use of legislative tools such as blank criminal law may be understood as the fulfillment of the State's obligation to "adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to"[96] the rights and freedoms described by the relevant covenant. In the words of the Permanent Court of International Justice: "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[97]

As mentioned above, the decision regarding the conviction of two former Military men in Guatemala constitutes the first case in which a local Court tries and sentences individuals for crimes against humanity and war crimes. Notably, the decision was taken making an strict reference to blank criminal laws that might not appear as popular within the region. However, its application is positive for convictions like these.

It is not unfair to say that the Guatemala case has become an example for the enactment of IHL provisions throughout the region, not only for undertaking the necessary measures, but most importantly for bringing such measures to the highest level of practice.

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[96] American Convention on Human Rights, art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 Such obligation is also stated by the Convention on the Prevention and Punishment of the Crime of Genocide. Which states in Article 5: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts mentioned in Article 3."

[97] *Exchange of Greek and Turkish Populations* (Greece v Turkey), Advisory Opinion, PCIJ Series B no 10, at 20 ICGJ 277 (1925).

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UNDERSTANDING NAFTA'S ISDS: A CHALLENGE FOR MEXICAN ATTORNEYS

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Abstract: *In the context of the 20th anniversary of the North America Free Trade Agreement (NAFTA), this article will analyze its Chapter XI: Investor-State Dispute Settlement. Chapter XI embodies the investor's real and practical experience under NAFTA rules. An examination of the historical record demonstrates that Mexican lawyers have been passive participants in defending investors' rights. On the other side of the coin, Mexican investors have not been active participants in NAFTA's Chapter XI, in contrast to Canadian and US investors. Finally, Mexico's experience in international arbitration has not always been negative, but Mexico has been criticized for a lack of transparency and due process for foreign investors.*

Key Words: *NAFTA (North America Free Trade Agreement), ISDS (Investor-State Dispute Settlement), NAFTA-Chapter XI, 20th Anniversary of NAFTA.*

Resumen: *Tras la celebración del aniversario número 20 del Tratado de Libre Comercio de América del Norte (TLCAN), el siguiente artículo pretende hacer un análisis a su Capítulo XI: Controversias Inversionista-Estado. El Capítulo XI representa, desde una perspectiva práctica y real, la experiencia del Inversionista bajo las reglas del TLCAN. Al realizar un análisis sobre esta experiencia, se logra concluir, que el abogado mexicano ha sido un participante pasivo en defender los derechos de los inversionistas tanto extranjeros, como nacionales. Asimismo y discutiblemente, los inversionistas mexicanos no han sido participantes activos del Capítulo XI del TLCAN, en comparación de los inversionistas extranjeros (Canadá y Estados Unidos de América). Por último, la experiencia que México ha tenido en el campo del Arbitraje Internacional, no siempre ha sido del todo negativa, sin embargo, México se ha visto expuesto por falta transparencia y certeza jurídica hacia el inversionista extranjero.*

Palabras Claves: *TLCAN (Tratado de Libre Comercio de América del Norte), Inversionista-Estado Controversias, TLCAN-Capítulo XI, Aniversario 20 del TLCAN.*

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I. Preface

For Mexican attorneys, the North America Free Trade Agreement (hereinafter NAFTA or the Treaty) has a great deal of connotations. Nonetheless, twenty-two years after the adoption of the Treaty, Mexican attorneys have not developed a well-defined practice area in law, regarding NAFTA's Chapter XI: Investor-State Dispute Settlement (henceforth ISDS), which is one of the most controversial issues in NAFTA.

As NAFTA's procedural history indicates, Chapter XI was a watershed in so far as it implied increase protection for investors (especially against the Mexican authorities)[1]. When NAFTA came into force in 1994, the lack of for-

[1] Alejandro Faya Rodríguez, A quince años del capítulo XI del tlcan, (Universidad Iberoamericana, bepress, 2008), http:// https://works.bepress.com/alejandro_faya_rodriguez/1/

eign investment legislation, the mandatory joint venture requirements with a majority Mexican ownership, and the uncertainty that foreign investors faced in Mexico, all led to the creation of NAFTA's Chapter XI.

But the main reason why ISDS was enforced in NAFTA was to protect investors from expropriations or nationality-based discrimination. Currently, ISDS is often used for disputes claiming unfairness in the behavior of the government,[2] which has made the United States (hereinafter U.S.) the most sued party (which was actually not considered a threat to foreign investments back in the 1990's).

In the twenty-second anniversary of NAFTA, regarding Investor-State disputes, Mexico has received 22 claims from the U.S. government, and five from the Canadian government.[3] In contrast, the U.S. has put forward 35 complaints against Canada.[4] Mexico has only brought two complaints under NAFTA's Chapter XI, one against Canada and one against the U.S.[5] Why have Mexican Foreign Investors not taken advantage of their NAFTA rights?

The International community has a two-sided opinion concerning ISDS. First, ISDS can be seen as a threat for State's sovereignty, especially on environmental or health matters[6] (Tobacco companies suing against tobacco health regulations, for instance). Indeed, there is a vast amount of discussions about the need for a change of ISDS's pact terms. Second, ISDS is also viewed as a way to push underdeveloped countries to have a fairer legal system by encouraging alternative means of disputes solutions, for example, under NAFTA's Ch. XI, ISDS is solved through arbitration by international panels.[7]

Investor-State disputes play an important role for the international community. NAFTA was the first international trade treaty to protect foreign investors when they participate abroad. It enacted a law enforcement mechanism that gives investors the capacity to ask the foreign government to view its investment as if it was national. Nowadays, Mexico has over 49 trade treaties

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[2] Simon Lester, The world has changed. Why haven't our trade deals?, Washington Post: In Theory, Sept. 14, 2016, *available at* https://www.washingtonpost.com/news/in-theory/wp/2016/09/14/the-world-has-changed-why-havent-our-trade-deals/?utm_term=.8a7e375930fb

[3] It is important to highlight that not all of the claims have reached Arbitrational Panels.

[4] PUBLICCITIZEN, *Table of Foreign Investor-State Cases and Claims Under Nafta And Other U.S. "Trade" Deals*, (2017), *available at* http://www.citizen.org/documents/investor-state-chart.pdf

[5] NAFTACLAIMS.COM, *Todd Weiler*, (Aug. 20, 2017), *available at* http://www.naftaclaims.com/disputes-with-mexico.html

[6] Bilaterals.org., *Key cases*, from *available at* http://isds.bilaterals.org/?-key-cases (Aug. 20, 2017)

[7] See:, Francisco González de Cossío, *Arbitraje de Inversión y América Latina*, 39 Revista Jurídica: ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA (2009). The author points out that arbitration panels are not always the best way to solve international disputes, due to the fact that, through an arbitration panel, society is affected because legal matters become public. Furthermore, international panels may result in diplomatic and political tension.

with different countries[8] where similar rights are granted to foreign investors. In other words, NAFTA's Chapter XI is the model for investor protection in various free trade agreements.[9]

Particularly for Mexico, Investor-State Dispute Settlements are becoming more accessible because of Mexico's new openness to foreign investment in particular sectors which were previously reserved for domestic corporations. The recent reform of Articles 20 and 21 of the Hydrocarbons Law opens the energy sector to foreign participation through different types of contracts, some of which may qualify as investments under NAFTA's Ch. XI. Recently, Bradly J Condon (2016) concluded that foreign investors may have access to pursue Investor-State arbitration covered by NAFTA's Ch. XI, now within the Hydrocarbons sector, as a consequence of the openness to foreign investment in that sector.[10] According to this idea, Mexico's new access to foreign investment may result in more Ch. XI's dispute settlements in the future.

Undoubtedly, free trade agreements now represent a priority issue for countries around the world. Globalization and the accessibility through the internet to worldwide markets have encouraged states to reconsider protectionism. In this sense, a new area of law is being created encouraging attorneys to develop expertise to offer their local investors the opportunity to exploit their rights in a trade partner-foreign jurisdiction.

From a Mexican perspective, the absence of training in alternative dispute settlements has discouraged the growth of law firms with expertise in foreign investment arbitrational panels. Sadly, foreign investors often have to look outside Mexico for well-prepared attorneys.

In developing this article, I contacted Francisco Cortina Velarde,[11] Foreign Affairs Mexican attorney and partner of one of the largest Legal Firms in Mexico-Chevez, Ruiz, Zamarripa y Cía. I also consulted with Hugo

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[8] ProMexico, (May, 2017), *available at* http://www.promexico.gob.mx/en/mx/tratados-comerciales

[9] See: FAYA, *supra* note 1. The author relates the foreign investment success of NAFTA in Mexico, with the measures given to investors by Chapter XI. Faya concludes that countries with free trade agreements providing investment rights with an enforcement mechanism, such as NAFTA's Chapter XI, encourage and stimulate foreign investors to invest in a partner trade country.

[10] BRADLY J. CONDON, *Mexican energy reform and NAFTA Chapter XI: Articles 20 and 21 of the Hydrocarbons Law and access to investment arbitration*, 9(3) Oxford: Journal of World Energy Law and Business, 203-218 (2016), *available at* https://doi.org/10.1093/jwelb/jww008

[11] Partner in the Trade and Customs area since 2000 at Chevez, Ruiz, Zamarripa y Cia. His practice includes: customs law, indirect taxes related with trade & customs operations, international trade law, free trade agreements and procedures under WTO. Mr. Cortina headed the Foreign Trade Commission of the International Chamber of Commerce Mexico (ICC) in 2003; he is in the list of panelists for dispute resolution under Chapter IXI of NAFTA. Mr. Cortina is listed as noted T&C lawyer by: Legal 500, Chambers, Who's who legal and Latin Lawyer currently during the last decade, (May, 2017), *available at* http://www.chevez.com/ingles/index.asp?action=content.detail&pID=175&id=108

Perezcano,[12] former General Counsel for International Trade Negotiations, who worked for Mexico's Secretary of Economy for 20 years and represented Mexico in all the dispute settlement proceedings under trade and investment agreements from 1994 through 2006. Later in the article, I will quote them and share their ideas on the lack of Mexican expertise regarding Ch. XI of NAFTA with regard to why Mexican corporations and foreign investors are going outside Mexico to look for legal advice on investment arbitration disputes.

The scope and aims of this article are to look at NAFTA's ISDS from a Mexican perspective, in order to address the following issues:

1. Positive or negative outcomes for the Mexican government,
2. Is it an undeveloped practice area of law among Mexican attorneys?
3. Is the expertise already there, and if not where could we find it?

In this regard, I will first start with the basic ISDS' concepts, followed by the analysis of an example in order to acknowledge what a foreign investor will face in suing Mexico. This will be followed by a future projection on the matter, and a conclusion will then be reached.

II. What are ISDS's Provisions?

Investor-State Dispute Solutions provisions are, put simply, a set of rights given to investors and their investments, which are enforced by a mechanism recognized by three contracting parties. That is to say, an investor from Canada, the U.S. or Mexico can use this enforcement mechanism to be entitled to receive damages from the foreign jurisdiction, in case of any breach of that set of important rights. Finbow (2016, p. 66) defines ISDS as a mechanism that creates processes whereby states can be directly challenged by actual or potential investors over loss of real or anticipated profits.[13]

[12] CIGI Portal. Hugo Perezcano, is deputy director of international economic law with the International Law Research Program (ILRP) and was previously a CIGI senior fellow with the ILRP. Prior to joining CIGI, he was an attorney and international trade consultant in his private practice. Perezcano worked for the Mexican government for nearly 20 years. He was head of Mexico's Trade Remedy Authority, within the Ministry of Economy, and was lead legal counsel for the country's Ministry of Trade and Industrial Promotion, which included work on free trade, dispute settlements, investment, and international agreements joined by Mexico. He participated actively in the North American Free Trade Agreement (NAFTA) and Uruguay Round negotiations, and was Mexico's lead counsel in disputes brought under trade and investment agreements", (Aug., 2017), *available at* https://www.cigionline.org/person/hugo perezcano-diaz

[13] Robert G. Finbow, Restructuring the State Through Economic and Trade Agreements: The Case of Investment Disputes Resolution, 4 (Cogitatio: Politics and Governance 2016), *available at* http://www.cogitatiopress.com/politicsandgovernance/article/view/639

It is important to consider who is entitled to this set of rights. Investors organized and formed by the laws of the contracting party (Mexico, Canada, U.S.) will be entitled to protection under the ISDS's provisions. Under this idea, corporations, partnerships, trusts, sole proprietorships, joint ventures and business associations for profit or non-profit, are protected under ISDS.

Investor-State provisions are found in Chapter XI of the North America Free Trade Agreement. The Chapter is divided in two sections: investment rules and the settlement of investment disputes' provisions.

First, I will discuss seven important rights that are recognized in NAFTA's Chapter XI within the sections of the investment rules. This will be followed by an examination of specific exceptions to protection.

1. *National Treatment*

Under NAFTA's Article 1102, the right to be treated as "national" and not "foreign" is recognized. In this sense, the contracting parties no longer have foreign investments regarding themselves; this is the core idea of a national treatment's right. It is important to highlight that Mexico has been sued 27 times[14] (under this most used provision) for a violation of the national treatment right.[15]

The governments of the contracting parties are required by Article 1102 to grant foreign investors/investments a treatment no less favorable, which under the same circumstances would be provided to their national investors regarding establishment, acquisition, expansion, management, conduct, operation, sale or any other disposition of investments.

Under this idea, States cannot impose on any foreign investment additional requirements that a national investment is not required to comply with. NAFTA's Article 1102 gives some examples of this situation: impose on an investor a requirement that a minimum level of equity should be held by nationals, and the requirement to sell or dispose an investment by the mere characteristic of being a foreign investment.

Related to the above, Article 1111 provides that the parties may require a foreign investment to provide routine information concerning their investment in their territory. This will not be considered a breach of Article 1102 (wherein the State is obliged to protect the business information and to acknowledge its confidentiality).

2. *Most-Favored Nation Treatment*

Article 1103 on NAFTA's Chapter XI obliges contracting parties to provide to foreign investors no less favorable treatment than that provided to domestic

[14] Juan Pablo Hugues Arthur & Jimena Moreno González, *Mitos y realidades del arbitraje inversionista., Estado en el Tratado de Libre Comercio de América del Norte: La experiencia Mexicana*, 31(1) *ICSID Rev. Foreign INV. L.J.*, 147, 166 (2016).

[15] *Id.* at 4.

investors, in like circumstances, with regard to establishment, acquisition, expansion, management, conduct, operation, and sale or any other disposition of investments. Once again, the issue of the meaning of "under the same circumstances" is raised.

Recently, an issue has come up about a Vancouver Property Tax that may violate NAFTA's Chapter XI provisions.[16] The issue is a new 15% Vancouver property transfer tax that is levied against foreign, nationals or corporations. We can easily question this issue under the national-treatment right: Is Canada not obliged to avoid making distinctions between a foreign corporation and a national corporation? Expert Canadian lawyers suggest that individual or state-to-state action could be taken under NAFTA.

3. *Minimum Standard Treatment*

The minimum standard treatment right of investors set forth in NAFTA's Article 1105 is an important doctrine in international law, which establishes that the contracting parties must give foreign investors fair and equitable treatment in accordance with international law, and also provide them security and protection at all times.

Regarding the provision on assuring security and protection at all times, states also agreed to provide non-discriminatory treatment in case of an armed conflict or civil strife. It can be very easily implied, that this agreement was established based on Mexico's experience with government instability.

This particular right, based on the Mexican experience, has always been related to Article 1110, which relates to expropriation and compensation[17]. Nonetheless, it opens a lot of discussions based on the ambiguity of the requirements. Thus, we are asked to refer to general principles of international law, which can have a different state-to-state approach. Indeed, the nature of international law governing foreign investments has long been a major subject of debate, and the NAFTA parties addressed this matter by including substantial articles regulating expropriation and compensation.[18]

Metaclad Corporation was the first foreign corporation to sue Mexico under a breach in Article 1105 —the minimum standard treatment— due to local government activity. Metaclad stated that Mexico, through its municipal

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[16] J. Hainsworth, *Vancouver Property Tax May Violate NAFTA, Trade Lawyer Says*, Bloomberg Law, (Aug., 2016) *available at* https://www.bloomberglaw.com/search/results/814c5717508dce427041486c2f08ec4a/document/X1OG3CFS000000?search32=7uAlJRZ-FqDh9vg90APaKA==SwO0ZicY1bhFFL-bPQ73obfJ5l39y26PMlCBr6hvU7KKSa6mNksuyi5vglL6esZI

[17] Metaclad Corporation v. Estados Unidos Mexicanos, Case No ARB(AF)/97/1, Certified Award, (ICSID. 2000), *available at* http://naftaclaims.com/disputes/mexico/Metalclad/MetalcladFinalAward.pdf

[18] RALPH H. FOLSOM, NAFTA AND FREE TRADE IN THE AMERICAS: A PROBLEM ORIENTED COURSE BOOK 307 (Thomson West, 2nd ed. 2005).

government of the State of San Luis Potosí, breached Article 1105 in relation to Article 1110, alleging that the local government did not provide a fair and equitable treatment in intervening with its development and operation of a waste landfill in the aforementioned state.[19] The International Centre for Settlement of Investment Disputes ultimately ruled in Metaclad's favor, but although the corporation had the federal government's license to operate with toxic substances, the local government did not grant the local construction license and obstructed the corporation's investment.

Metaclad's experience highlights the Mexican perspective. As we will see later, the lack of communication between the federal and local government can be very harmful for the Mexican authorities, and can indeed, be a threat to NAFTA's Ch. XI provisions.

4. *Performance Requirements*

Under NAFTA's Article 1106, States agree to not impose or enforce on any contracting party any commitment in its foreign investment with regard to: exporting a given level amount or percentage of goods or services; domestic content; purchasing or use of preferentially domestic products; relating imports or exports in accordance with foreign exchange inflows of their investment; restricting sales of goods or services in the party's territory unless required by a court or a tribunal; transferring technology or production process in the investment territory, and acting as an exclusive supplier.

Accordingly, the performance requirements prohibit contracting parties to impose any kind of regulations that would trigger an obligation on foreign investors. They also define a set of illegal activities as an example of how governments can violate the performance requirements. Article 1106 has been very controversial under the "Mexican IEPS experience," which is discussed below.

IEPS stands for "*Impuesto Especial Sobre Producción y Servicios*", a tax amendment made on December 2001, (effective January 2002), as a measure to discourage excessive consumption of high caloric content products. Locally speaking, the constitutionality of this tax has been highly questioned because under the Mexican Constitution Congress is not expressly competent to tax soda beverages. Experts suggest that a Constitutional reform is needed in order to allow for a tax reform in those sectors.[20]

Pursuant to NAFTA's Ch. XI, three companies filed a "notice of intent" alleging a violation in Article 1106 because of the IEPS tax: Archer Daniels, Corn Products International and Cargill. Also, the three foreign corporations alleged damages in relation to their High Fructose Corn Syrup (HFCS)

[19] See: Metaclad Corporation c Estados Unidos Mexicanos *supra* note 17.

[20] Angelina Mejía Guerrero, *Juzgan Inconstitucionalidad del IEPS.* El Universal, Jan. 22, 2002, *available at* http://archivo.eluniversal.com.mx/finanzas/25318.html

production and distribution facilities, due to the IEPS tax (20% on soft drinks and syrups). As foreign investors claimed, the imposition of the aforesaid tax resulted in a direct impact on their investment. The tax also related to Article 1102 (national treatment) and Article 1110 (expropriation).[21] The tribunals concluded that Article 1102 requires a taxation related to an investment, and since IEPS was not targeting only foreign investors, the tax did not violate NAFTA's Article 1106.

5. Senior Management and Boards of Directors

Under Article 1107, the parties agreed that there would be no requirements to appoint senior management positions individuals of any nationality. Nonetheless, subparagraph 2 allows for a majority of the board of directors or committees to have certain nationalities, as long as they do not interfere with management or control of the investment.

Article 1107 is a consequence of the pre-NAFTA Mexican provisions. As stated before, foreigners were ordinarily allowed to invest in less sensitive industries up to 49% of the equity, but were not allowed to participate in the management and administration of the corporation. Nevertheless, the Secretary of Economy reserved the criteria on increasing the ownership percentage when, according to its criteria, the foreign investment would encourage the country's economy.

Presently, Mexico has different criteria regarding foreign investment. Mexico has ten Free Trade Agreements (FTAs) with 45 countries, two Agreements on reciprocal promotion and protection of the investments (APRIs in Spanish) with 33 countries, nine Agreements of Economic Complementation and Partial Agreements with the ALAFI (Latin American Association for Integration).[22]

Mexico is considered one of the countries with one of the highest level of "openness" to foreign investment. NAFTA has played an important role in this regard. With the NAFTA experience, Mexico has been able to take advantage of what has worked and what has not. Finally, as stated before, NAFTA's ISDS have been replicated along the FTAs.

6. Transfers

[21] ARCHER DANIELS *c Estados Unidos Mexicanos*, Case No ARB(AF)/04/5, Certified Award, (ICSID. Sept. 26, 2007), *available at* http://naftaclaims.com/disputes/mexico/ADMTate/ADMTateLyle-Mexico-Award.pdf Corn Products International c Estados Unidos Mexicanos, Case No ARB(AF)/04/01, Partial Award, (ICSID, Jan. 15, 2008), *available at* http://naftaclaims.com/disputes/mexico/cpi/CPI-Mexico-MeritsAward.pdf Cargill c Estados Unidos Mexicanos, Case No ARB(AF)/05/2, Certified Award (ICSID, Sept. 18, 2009), *available at* http://naftaclaims.com/disputes/mexico/Cargill/VF_Cargill_award_redacted_version1.pdf

[22] ProMexico, *available at* http://www.promexico.gob.mx/en/mx/tratados-comerciales (May, 2017).

Under NAFTA Article 1109 each contracting party is obliged to permit free transfers and financial instruments without delay, such as profits, dividends, interests, capital gains, royalties, proceeds form sales, payments, etc. The objective of this set of rights is to make foreign investment easily traded and to discourage any limitations in transferring capital for one state to another.

Recently, big improvements have been made as to transferring data and communication. Perhaps Article 1109 has not played an important role among the contracting parties, but it surely will in the short future. For instance, the Fair and Accurate Credit Transactions Act (FACTA), between Mexico and the U.S., whose purpose is to share financial information about the parties' citizens, because of the increase in foreign investment with the government's purpose to avoid tax fraud. Similarly, the Common Reporting Standard (CRS) will encourage communications regarding foreign investments, where banks will play an important role in providing governments with their investors' information. Notwithstanding, both FACT and CRS have a tax collection incentive, a core idea shared with NAFTA's Article 1109.

7. Expropriation and Compensation[23]

Huge disputes have been raised about expropriation and compensation investment rights under NAFTA's Article 1110. Expressly stated, no party may directly or indirectly nationalize or expropriate an investment in its territory or take a measure tantamount to nationalization or expropriation. Exceptions regarding public purpose, on a non-discriminatory basis and with due process, and on a compensation payment, are recognized within NAFTA.

Direct expropriation refers to a situation where the government directly takes the ownership title of the investment or the property's investment. Indirect expropriation is when the government does not directly take ownership of the investment, but through a series of acts, it has the same effect as an expropriation.

As mentioned before, the Metaclad's case alleged expropriation breach, because the local government did not allow the investment to take place because of a series of prohibitions by the municipal government of San Luis Potosi. Mexico was found guilty of making an indirect illegal expropriation,

[23] See: Francisco González de Cossío, *Medidas Equivalentes a Expropiación en Arbitrajes de Inversión*, Instituto de Investigaciones Jurídicas de la UNAM, *available at* https://archivos.juridicas.unam.mx/www/bjv/libros/6/2815/5.pdf. Where he scrutinizes the expropriation concept through different arbitration panels, reaching a well-approached conclusion of the meaning in various concepts, by analyzing different cases, not only in NAFTA, where the concept has been raised among investors. Also, González de Cossío focuses on the scope of the "measure tantamount" connotation.

and compensation was paid (about $16 million U.S. dollars). This was the first payment by a State to an Investor under Ch. XI.[24]

Other investors such as Archer Daniels, Corn Product International and Cargill, also alleged that an indirect expropriation was made by the Mexican government. The tribunals ruled in Mexico's favor because the investors held at all times the control and ownership of their investments, and therefore Mexico did not illegally take their investment's economic benefits.[25]

It is important to highlight that any authorized expropriation should result in payment of compensation immediately. As Article 1110 states, compensation will be the equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.

Taking a look at the valuation criteria used in Metaclad, the foreign investor suggested using a discounted cash flow analysis or an actual investment in the landfill value. Mexico suggested using a market capitalization approach or a direct investment value approach to damages. The tribunal agreed to take a fair market value approach in respect to the valuation method.[26]

Expropriation and compensation rights are always raised in ISDS, due to the fact that investors alleging a breach of their NAFTA's right consider that the profits from their investment plan is being threatened, or sometimes it can no longer be recovered.

8. Exceptions

Article 1113 sets forth a "denial of benefit" provision. Under this provision, if investors of a non-party (other than Canada or U.S.) own or control the corporation, and the corporation has not substantial business activities in the territory of the party under whose law it is organized, Chapter XI's benefits might be denied. This provision is focused on giving the rights only to investors of the contracting parties.

A. *Environment*

The international community critically portrays the ISDS mechanism as a threat to democracy, with a disturbing effect on social and environmental programs and regulations. There is also a constant discussion regarding economies such as the U.S., where there is a vast protection of foreign investors within the national system, perhaps ISDS is not really needed. Community activists have long been arguing that the contracting parties are often relaxed

[24] See: Folsom, *supra* note 18 at p. 188.

[25] See: Juan Pablo Hugues Arthur and Jimena Moreno González, *supra* note 14, at p. 158.

[26] See: Metaclad Corporation Estados Unidos Mexicanos, *supra* note 17, at p.122.

in allowing foreign investments that might compromise public health or the environment.[27]

Under Article 1114, the parties agree that it is "inappropriate" to encourage investment by relaxing domestic health, safety, or environmental measures. In this sense and because of environmentalist activism, the contracting parties adopted the North America Agreement on Environmental Cooperation (NAAEC). Some of the objectives of the side agreement is to "assess, as appropriate, environmental impacts", "promote education in environmental matters", and to ensure that each country "shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations".[28]

Over the past 22 years, Mexico has made efforts to legislate environmental laws. Mexico now has over sixteen Federal Environmental Laws, a Federal Attorney's Office for Environmental Protection (Procuraduría Federal de Protección Ambiental – Profepa) with a law enforcement mechanism that audits corporations involved in any kind of business that might have an impact on the environment.[29]

In Metaclad, the environmental impact of the investment was highly questioned, and the local municipality denied the operational permit needed, by reference to environmental impact of the waste disposal landfill. Nonetheless, the lack of transparency of the Mexican Government induced the Tribunal to rule in Metaclad's favor.[30]

B. *Annex I and III Exceptions*

Under Annex I and III, Mexico made exceptions for some sectors that do not have beneficial rights under Ch. XI.

In the communications sector, reservations were made for: entertainment services, telecommunications, transport networks, postal services, and railroads. In the energy sector for: petroleum and other hydrocarbons, basic petrochemicals, electricity, nuclear power, and treatment of radioactive minerals. Under the transportation sector, the following: specialized personnel (only Mexican nationals by birth may serve as captains, harbor pilots, customs brokers, etc.).[31]

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[27] Publiccitizen, *Investor-State Dispute Settlement (ISDS) Attacks: Empowering Multinational Corporations to Attack our Domestic Laws, Demand Taxpayer Compensation*, (May, 2017), *available at* http://www.citizen.org/investorcases

[28] Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty making*, 8(2) *Temple Intl. and COMP. L. J.* 257-314 (1994).

[29] Profepa (May, 2017), http://www.profepa.gob.mx

[30] See: Metaclad Corporation c Estados Unidos Mexicanos, *supra* note 17, at p. 86.

[31] North America Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

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The settlement dispute's provisions are found in Subpart B of NAFTA's Ch. XI. The following provisions set forth the "due process" of the law enforcement mechanism given to foreign investors, in accordance with the set of rights explained above.

The core of the system is international reciprocity and due process before an impartial tribunal. A three-year window is given to investors to claim a breach and to recover damages under NAFTA's Ch. XI.[32] Investors acting on behalf of NAFTA enterprises they own or control (directly or indirectly) are also allowed to use ISDS.[33]

All claims are filed against the Federal Government, stating clearly that the breach of NAFTA caused loss or damage to their investment. The first pre-step that parties must follow is set forth in Article 1118, encouraging parties to settle a claim through consultation and negotiations between them.

First, the disputing party must hand in a notice of intent to submit a claim under NAFTA's Ch. XI. This notice should indicate *a)* the name and address of the disputing investor, *b)* the provisions alleged to have been breached, *c)* the issues and factual basis of the claim, and *d)* the relief sought and the approximate amount of damages claimed.

For Mexico, claims are filed with the Secretary of Economy (Secretaría de Economía) in Mexico City. When the notice of intent is received, the proof of proper filing is a stamp by the Secretary's clerk, which indicates the date and hour of filing.

Second, in connection with Article 1121, a disputing investor must submit a consent and waiver to the other party, where the Investor consents to arbitration in accordance with NAFTA, and waives the right to initiate or continue before any administrative tribunal or court. Nonetheless, Investors may file or seek relief for injunctive, declaratory or other extraordinary relief not covered by NAFTA.[34]

After a six-month period from the events that gave rise to a nonconforming Investor, the disputing party may submit the claim to arbitration under:

- —ICSID (International Centre for the Settlement of Investment Disputes) Convention, which only Canada and U.S. have ratified.
- —Additional Facility Rules of ICSID, in case both parties are not members of the ICSID Convention.
- —UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules.

[32] *Id.* Article 1116.

[33] *Id.* Article 1117.

[34] See: Folsom, *supra* note 18, p. 182.

The applicable arbitration rules for each tribunal will govern the dispute. The tribunal will have three arbitrators, one arbitrator appointed by each of the disputing parties, and the presiding arbitrator appointed in agreement between the parties.[35]

The Additional Facility of the ICSID has resolved nine cases in which Mexico has been sued, and UNCITRAL has resolved two. At the time, in total eleven investor-State disputes against Mexico have been resolved.[36] There are three active investor-State cases in conformity with NAFTA's Ch. XI (there are two other investor-State cases in conformity with Trade Agreements of Panama and Spain).[37]

Article 1136 deals with final award provisions. An award made by a tribunal should be binding and fully complied with by the parties without delay. Nonetheless, paragraph 3 specifies that a disputing party may not seek enforcement until, in the case of a final award under the ICSID Additional Facility or the UNCITRAL, three months have elapsed from the date of the rendered award and no disputing party has commenced a proceeding to revise, set aside or annul the award. After the revision mechanism aforementioned, there is no further appeal.

Criticism has been raised questioning the fact that there is no appeal mechanism before another tribunal.[38] However, ISDS is the investor's best option to find a protection for its foreign investment, given that by the enforcement mechanism States are required to fully comply in case of any damage is sentenced. If a State refuses to comply, it can result in a State-State dispute, governed by Chapter 20 of NAFTA.

III. B-Mex Corporations: An Example of ISDS

B-Mex corporations (B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC, Santa Fe Mexico Investments, LLC, Gordon Burr, Erin Burr, and John Conley), together as the U.S. investors, represented by White & Case, LLP, based in Washington, DC, filed a notice of intent to submit a claim to arbitration, under Article 1119 of NAFTA, on May 23rd, 2014.

The corporations invested in gaming facilities in several states of Mexico, and also shared ownership interest in Mexican company "Exciting Games S. de R.L. de C.V." Together as U.S. investors, claimed to be an "investor of a party" under Article 1139 of NAFTA.

In the notice of intent submitted through the Secretary of Economy, the Investors claimed that Mexico, through its federal government and entities,

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[35] NAFTA, *supra* note 31, Article 1123.

[36] See: Juan Pablo Hugues Arthur and Jimena Moreno González, *supra* note 14, tbls. 164-166.

[37] Secretaría de Economía, (May, 2017) http://www.gob.mx/se/acciones-y-programas/comercio-exterior-solucion-de-controversias.

[38] See: Publiccitizen, *supra* note 27.

jeopardized their gaming investment even though they had the corresponding operating permit granted by the Secretary of Government (Segob for its acronym in Spanish). Claimants argued that Mexico had, by its actions and omissions, and by the acts of entities and agencies for which it is responsible under Mexican law, caused substantial damage to claimants in breach of Mexico's obligation under NAFTA, destroying a successful gaming business and depriving claimants of the fruits of eight years of investment. To date, five gaming facilities are closed, apparently without a closure order or any other kind of explanation by the corresponding authority; the Investors alleged lack of due process and transparency by the Mexican government.

Investors claimed that Mexico's actions violated multiple provisions of NAFTA, including:

1. Article 1102: National Treatment,
2. Article 1103: Most-Favored-Nation Treatment,
3. Article 1105: Minimum Standard of Treatment, and
4. Article 1110: Expropriation and Compensation.[39]

The relief requested was in the amount of U.S. $100 million, and the parties intended to seek post award interest, and all costs and fees associated with the arbitration.

In accordance with Article 1123, claimants chose the Additional Facility of the ICSID as the arbitrator of the dispute. Correspondingly, a Request for Arbitration 2016 was filed on June 15th, pursuant to Articles 1116, 1117, 1120(1)(b) and 1137 of NAFTA, and Article 2(a) and 4 of the Additional Facility Rules of ICSID.

The investors claimed that the government's unlawful measures included 1) the gaming authority invalidation of a 25-year Casino permit that had been granted to the investor, alleging that another Mexican corporation obtained its permit under identical circumstances and continues to operate through its license; 2) permanent closure of the investor's casinos by an unauthorized authority; 3) temporary closure of the Mexico City Casino; 4) the implementation of retaliatory tax measures aimed to harass Casino's profits; 5) criminal investigations against E-Games (one of the corporations of the investor); and (6) intervention into claimants' efforts to sell or transfer their Casino assets to third parties.[40]

First, claimants alleged that the PRI administration (Mexican political party in office) had framed a campaign against the investor's casinos. The investors claimed that they had suffered discriminatory treatment from the Mexican authorities, especially from the director of the Mexican Gaming Department, who has questioned the legality of the permit granted.

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[39] *B-Mex, et al. c Estados Unidos Mexicanos*, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven Of the North American Free Trade Agreement, (May 23, 2014), http://naftaclaims.com/disputes/mexico/bmex/bmex-03.pdf

[40] *Id.* at p. 9.

The investor also alleged the lack of due process and lack of transparency of the Mexican government, where corruption often plays an important role. In fact, ISDS's enforcement mechanism represents the only scheme of protection for the foreign investor, due that the investor has already pursued protection under federal law (through the writ of *amparo*).

Investor alleged a breach of Article 1102 of NAFTA, in that other gaming corporations can operate their businesses under the same exact circumstances (precisely, the investor cites the corporation *Producciones Móviles*). Claimants alleged that the new casino permit was denied on arbitrary and erroneous grounds, while at the same time permits were granted to nationals.

Regarding Mexico's breach of NAFTA's Article 1103, the investor alleged that Mexico refused to grant justice and to ensure a treatment no less favorable than the accorded to other foreign investors. Similarly, claimant alleged that a breach of NAFTA's Article 1105 was made by Mexico because of the supposed arbitrary and discriminatory application of Mexico's Gaming Regulations, enforced by the Segob.

Finally, the investor claimed that a breach of NAFTA's Article 1110 was made by Mexico, because of the closure of the casinos through its institution Segob and the Mexican Judiciary system. The closure of the casinos, which the investor claimed resulted in an expropriation, are alleged to be made with lack of transparency and due process.

This dispute is still in process within the Additional Facility of ICSD. The status of the case is pending following appointment by the respondent Raul E. Vinuesa, who accepted his appointment as arbitrator on October 4, 2016.[41]

1. *Comparison of B-Mex Case and Past Investor Disputes Controversies Against Mexico*

B-Mex allegations resemble claims made by investors in past ISDS under NAFTA. Mexico seems to be sued over and over again under the same grounds. As stated before, Article 1102 of NAFTA is the most cited provision allegedly breached by Mexico.

The lack of transparency and due process were raised by the investors in Metaclad's case, where Mexico breached Ch. XI and had to award U.S. $16.6 millions. In Metaclad, although the investor had the corresponding license to operate a waste treatment facility, the lack of communications between the federal government and the local authorities, jeopardized the investment and resulted in damages to the foreign investor.

In Cargill, Mexico breached Article 1102 and Article 1105 of NAFTA. The Additional Facility of ICSID determined that Cargill was in "like circumstances" (under NAFTA's Article 1102) with domestic suppliers of cane sugar

[41] *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Procedural Details (ICSID, May 2017). *avilable at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB(AF)/16/3&tab=PRD

to the soft-drink industry. Furthermore, the Tribunal concluded that Cargill received treatment no less favorable to that given to domestic suppliers. The Tribunal rationale was that the tax imposed on HFCS was to pressure the U.S. Government and therefore was directed at U.S. producers of HFCS, in breach of NAFTA's Article 1102.

2. *Final Thoughts on B-Mex's Case*

As a Mexican attorney, B-Mex's allegations sound very familiar. Practicing attorneys who deal with federal agencies, and local authorities, regarding permit requirements of any field, face a lack of transparency, due process, and the on going discussion on Mexican corruption.

The gaming industry can be a particularly difficult sector, since it has always been linked to money laundering. Nevertheless, domestic corporations and foreign investors plead with the Mexican government for more legal certainty regarding their businesses. It can be hardly concluded, that if ISDS is taken out of the foreign investor's possibilities, Mexico can be harmed in its foreign investment due that investors will face an insecure investment field. That is to say, the enforcement mechanism represents, sometimes, the only option for investors to be protected under an impartial tribunal.

Mexico has been punished by the international community for a lack of transparency and due process over and over again. This was seen in the Metaclad's case, where a lack of communications between the federal government and local authorities forced the foreign investment to seek damages and to find protection under international law.

IV. Future Projection on the Matter

Mexico has engaged in multiple trade treaties with ISDS provisions. Conclusions and future projections must be made in order to improve our relation with foreign investors. Based on Mexico's past experiences under Chapter XI of NAFTA, we can come up with some future thoughts and questions can be raised for further analysis.

1. *What do Past Investor-State Disputes Teach us?*

First, the Mexican experience with IEPS and HFCS demonstrates that the idea to "pressure" foreign States through enforcing regulations and denying permits to foreign investors from that State, can result in an economic detriment to the country. Mexico, in fact, has been ordered to pay U.S. $189.4 millions to Foreign Investors for a breach in NAFTA's Article 1102, 1105, and

1106. As Lic. Hugo Perezcano (former Mexican representative in ISDS) shared with me, the Mexican Congress was informed from the beginning that, if it enacted the IEPS, Mexico would likely be in breach of its international obligations,[42] likewise three suits were brought by Investors against the Mexican government.

Second, the experience in Metaclad helps us to better analyze what investors face in Mexico. In Metaclad, the lack of communication between the federal government (who granted the operation permit to the corporation) and the tribunal concluded that, when dealing with the operation of an investment, NAFTA foresees that there should be no room for doubt or uncertainty on any matters. Moreover, the tribunal highlighted that if the federal government becomes aware of any scope for misunderstanding or confusion (regarding the local authorities), it has a duty to ensure that the correct position is promptly determined.[43]

Similarly, in *Marvin Roy Feldman*'s case, the Tribunal concluded that SAT (through its treasury department, or SHCP in Spanish) followed an inconsistent and non-transparent course of action against the foreign investor. In this dispute, ISDS was the last course of action that the investor had because a writ of *amparo* was already pursued by the Investor. Here, Mexico was ordered to pay $1.9 millions USD for a breach of NAFTA's article 1102.[44]

Regarding the relationship between the Mexican government and investors, Hugo Perezcano believes that using investor-State arbitration was a losing proposition for both parties: In general, investors have been awarded much less than what they have claimed to be adequate compensation for the loss or damage incurred (around 10% of the amount claimed, as he recalled). From a business point of view, an ongoing business will generally be more profitable than collecting damages. For the State, wining may mean that it does not have to pay any damages, but it will have incurred the cost of litigation and, more often than not, it will entail the loss of an investment in its territory.[45]

To conclude, Mexico can learn and improve from past Chapter XI's controversies. The illustrated cases allow us to re-consider what we are missing as a country, and what we can do to improve a healthy investment environment.[46]

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[42] Interview with Hugo Perezcano (November, 2016).

[43] See: Metaclad Corporation c Estdados Unidos Mexicanos, *supra* note 17, at p. 76.

[44] MARVIN FELDMAN *Estados Unidos Mexicanos,* Case No ARB(AF)/99/1, Certified Award (ICSID, August 30th, 2000), http://naftaclaims.com/disputes/mexico/Feldman/FeldmanFinalAward.pdf

[45] See: Perezcano, *supra* note 42.

[46] FRANCISCO GONZÁLEZ DE COSSIO, *Arbitraje de Inversión Á la Mexicaine*, Instituto de Investigaciones Jurídicas de la UNAM, *available at* https://revistas-colaboracion.juridicas.unam.mx/index.php/juridica/article/viewFile/11594/10605. The author concludes that the defense approached by the SE, by 2005, regarding the 15 cases solved at that time, was excellent. He considers that through the cases solved by an impartial tribunal, in which Mexico has been involved, the concepts have been scrutinized, and therefore, they have left a legal precedent among the international community.

2. *Mexican Threats to Foreign Investors*

Having analyzed the resolved cases, the first threat that foreign investors face among Mexican authorities is the non-transparency of their processes, the deficiency of due process, and legal uncertainty. Tribunals, in resolving investor-State disputes, have scrutinized the matter more than once; Mexico has been punished for its internal affairs and communications between the foreign investor and their federal/local agencies. The internal affairs and communications have been non-transparent and the investors claimed to face doubt and legal uncertainty on their investments.

In Metaclad, the Tribunal stated that "Mexico failed to ensure a transparent and predictable framework for Metaclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor acting in the expectation that it would be treated fairly and justly in accordance with NAFTA."[47]

As we can conclude, the doubt and legal uncertainty that foreign investors face in dealing with the Mexican federal government can drive them to seek international protection. They want to ensure that their investment is being remunerated due to the fact that it is been obstructed by the Mexican government.

The second threat that foreign investment faces are local authorities in the rural communities where they invest. Specifically, in Metaclad, the local government interfered with its development and the operation of the waste landfill. The local government took actions such as blocking traffic into and out of the site and, therefore, the corporation was prevented from opening the landfill. Moreover, the local population took actions that forced the town council to deny the local construction permit and consequently amounted to an indirect expropriation of Metaclad's investment.

It is important to highlight that local governments (including municipalities) are subject to NAFTA standards. Mexico is obliged to enforce its communications with local authorities in order to avoid conflicts with foreign investors.

The third threat is the lack of expertise among Mexican attorneys. Foreign investors do not find corresponding knowledge in Mexican legal firms when facing a controversy with the federal government. The kind of expertise that investors look for should be firms with a legal proficiency in arbitration panels and NAFTA's dispute resolutions.

There have been 11 NAFTA's investor-State disputes against Mexico; all of them have been represented by an International Legal Firm. Why have Mexican Legal Firms not played an important role in NAFTA's ISDS? One reason is that the skill is not there. After 22 years of NAFTA, many foreign investors would rather hire a U.S. legal firm. Perhaps foreign investors prefer a non-Mexican legal firm because they believe that Mexican legal firms will "protect" the Mexican side, and as well, there is a fear of non-transparency and corruption.

[47] See: Metaclad Corporation c Estados Unidos Mexicanos, *supra* note 17, at p. 99.

3. *What Can Mexico do to Fully Comply With Ch. XI's Rights?*

When Mexico adopts international treaties, it should not over-think the ISDS provisions, because foreign investment is worth risking expenditures in awarding foreign investors. Nonetheless, a compliance mechanism is missing among Mexican authorities to fully adhere to its foreign investment commitments.

It can be concluded that, from the ISDS cases, Mexico should already understand the economic consequences that the enforcement mechanism represents. Under this idea, Mexico should provide a safer environment to foreign investors with the aim to avoid future conflicts.

With this in mind, it is clear that Mexico is being asked to enforce its internal affairs in order to fully comply with NAFTA's provisions. The Mexican federal government, through its Secretary of Economy, should improve transparency, due process, and expedite communication when dealing with foreign investors in order to avoid future conflicts. After all, Mexico negotiated NAFTA terms and its Chapter XI to provide economic stability in the long run based on open frontiers and free trade. That is to say, Mexico probably knew that the government (Congress and politicians) can engage in acts that compromise Mexico's international obligations, and therefore, ISDS may be viewed as a way to "tie the hands" of government acts and its constant change because of different political ideas.[48]

For instance, what if foreign investors only deal with federal agencies rather than local authorities? This idea could be implemented in order to avoid local governments jeopardizing foreign investments that have been granted the corresponding permits from the federal government. Sometimes, when foreign investment arrives in a local community, a sense of nationalism is awakened among the residents of that community. This can be very harmful to the foreign investor, since the residents engage in activities to obstruct their projects and investment (see Metaclad). However, due to the Mexican federal system, it will be very hard to implement it.

Local agencies and municipal entities likely do not know about trade treaties and foreign investor's rights. One solution can be the approach by the Secretary of Economy, through workshops and trainings, with local agencies and municipalities to inform and teach them about how to approach foreign investors, and essentially who to approach in case of any dispute.[49]

However, ISDS is an international issue. I believe that it is also a matter of local culture. If Mexican authorities struggle with corruption, transparency and due process can never be achieved. Therefore, it can be question why the federal government keeps signing trade treaties with ISDS provisions, if they cannot assure a secure investment environment to foreign investors.

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[48] See: Perezcano, *supra* note 42.

[49] *Id.* This solution was considered by Hugo Perezcano, based on his past experience with the Vietnam government, where he did a training with representatives of local agencies and municipality entities.

For instance, Mexico should reconsider which industries may be harmed by foreign investments. With this in mind, perhaps Mexico can assure a healthy foreign investment environment to the industries that the country can fully commit to (for example, it is well-known that the gaming industry has a sense of nationalism, and the community does not want foreign investment in that field). Possibly, Mexico can consider adding more exceptions, under Annex I and III, where some sectors will not have beneficial rights under NAFTA's Chapter XI.

4. *What Costs / Benefits has NAFTA's ISDS had for Mexico?*

Mexico has not been the most-sued party, as it was estimated when the ISDS's provisions where being negotiated. Canada has been sued 32 times, mostly by U.S. investors, and U.S. has been sued 21 times, mostly by Canadian investors. ISDS's provisions have not substantially damaged Mexico in comparison to the benefits that NAFTA brought to foreign investment.

Mexico has been exposed by the tribunals (especially by the Additional Facility of ICSID) in its failures of NAFTA's commitments because of lack of transparency, lack of orderly process, and not providing investors fair and equitable treatment under NAFTA.

I believe this is a cost but also a benefit for Mexico. The economic costs are straight forward, but the benefits can be achieved by evaluating and considering what Mexico can do in order to assure a better investment environment, possibly, requiring agencies to enforce their monitoring and oversight performance when dealing with foreign investors in order to prevent miscommunications. By taking these actions, Mexico can have a positive impact on its performance in diminishing lack of transparency and enforcing due process.

Looking at ISDS concluded cases, tribunals have ruled in Mexico's favor six times out of 11 cases. Nonetheless, looking at the other five cases, Mexico has breached NAFTA's Article 1102 "national treatment" in almost all of the disputes. Tribunals have scrutinized Mexico's breach of Article 1102, concluding once again that the lack of transparency within Mexican agencies have given investors less favorable treatment than the one received by domestic corporations.

Regarding NAFTA's Article 1110 "expropriation," Mexico has been found to violate that provision in *Metaclad*, through enacting an Ecological Decree (issued by the local authority of the municipality) within the area of the investment and created therein an ecological preserve. The Tribunal held that the Ecological Decree constituted an act tantamount to expropriation,[50] which obstructed the foreign investor to operate in the landfill.

[50] See: Metaclad Corporation c Estados Unidos Mexicanos, *supra* note 17, at p.111. Tantamount expropriation represented an indirectly expropriation of Metaclad's investment without providing the corresponding compensation foreseen in NAFTA.

With this in mind, for certain industries where regulatory legislation is needed in order to enforce safety and healthy environment, ISDS may bear high costs. However, Mexico always has the option and the right to exclude industries from ISDS's rights. Additionally, with Metaclad's experience, Mexico can communicate to possible future investors the areas or reserves it has in order to protect social matters such as the environment.

5. Mexico has Not Taken Advantage of Ch.XI's Enforcement Mechanism

Under NAFTA's Ch. XI, Mexico has been sued 22 times. Nevertheless, Mexican corporations have only sued two times: once against U.S., and once against Canada; both of them ended in the "notice of intent to submit a claim to arbitration" with no further progress on the process.[51] As we may conclude, Mexico's foreign investors do not represent a threat either for Canada or the U.S. Here are the Mexican examples on ISDS:

In March 1996 Signa S.A. de C.V. was the first Mexican corporation to file a notice of intention to submit a claim to arbitration for the breach of Canada's obligation under NAFTA.[52] Signa claimed to have been prevented by the Canadian government to manufacture a powerful antibiotic for the Canadian marketplace. The investor alleged a breach under NAFTA's Article 1105 and Article 1110 through its Patented Medicines Regulations promulgated on March 1993 by Canada. The investor alleged that it had invested in its factories, equipment and technologies for the purpose of being able to produce and sell pharmaceutical chemicals. Overall, Signa, represented by Appleton & Associates, a N.Y. based Firm, claimed damages of $50 million Canadian dollars. No further documents were exchanged between the parties seeking for arbitration under NAFTA's Ch. XI. As we may recall, NAFTA encourages the disputing parties to reach a settlement by private means of communications; that could have been the case here.

CANACAR (Cámara Nacional del Autotransporte de Carga by its acronym in Spanish), in May 2009 filed a notice of arbitration against the U.S. in accordance with NAFTA's Article 1119. CANACAR, in representation of the interests of independent trucking companies of Mexico, claimed a breached of NAFTA's Article 1102, 1103, and 1105. The investor claimed that the U.S. violated NAFTA by refusing entry of the trucking companies into the U.S. for provision of trucking services and by prohibiting them from making investments in U.S. Furthermore, CANACAR claimed that U.S. had violated NAFTA's Article 1105 through its refusal to comply with an arbitration opinion "Cross-

[51] Naftaclaims.com, *Todd Weiler*, (May, 2017) http://www.naftaclaims.com/.

[52] SIGNA *v Government of Canada*. Notice of Intent to Submit a claim to arbitration under section B of Chapter XI of the North America Free Trade Agreement, (March 4, 1996), http://naftaclaims.com/disputes/canada/signa/signa-01.pdf

Border-Trucking, U.S.A-MEX-98-2008-01".[53] The arbitration procedure ended with the aforementioned notice of arbitration.

In the Mexican experience, two cases cannot teach us a lot. The fact that both of them were represented by International Legal Firms helps us conclude that perhaps one of the reasons why corporations do not use NAFTA's enforcement mechanism is because they do not find knowledgeable legal support in Mexico regarding ISDS claims.

Considering that Mexico has only sued two times and has never recovered damages from Canada nor the U.S., probably ISDS have only had costs to Mexico without any positive outcome for Mexican investors. It can hardly be said that Mexican corporations do not face NAFTA's issues in their investments, while Canada and U.S. corporations use ISDS constantly in protecting their investments.

Nonetheless, perhaps it is a matter of information and communication. The Mexican government should increase efforts in schemes to allow Mexican foreign investors to access their rights not only under NAFTA, but in every trade treaty. Encouraging this, Mexican corporations can start pursuing their foreign investment rights and probably commence using ISDS's provisions. If the rights abroad are recognized by Mexican corporations, these Firms will be able to sense more security, and have Legal certainty in foreign countries, which will result in a boost of Mexican corporations investing abroad.

V. Undeveloped Practice Area of Law

As I have stated in this article, investor-State disputes will keep increasing as a consequence of openness to foreign investments and the enactment of trade treaties. The urge to develop expertise among Mexican attorneys is crucial; Mexican legal firms should engage in ISDS in order to provide all investors legal expertise on the subject matter.

Undoubtedly, there is a lack of arbitration expertise among Mexican attorneys, especially in NAFTA's investor-State dispute settlement. The facts are clear: in 22 years of NAFTA, the participation of Mexican Legal Firms is insignificant, almost null, Mexican corporations are not being active claimants in NAFTA's ISDS, and, lastly overall it is an unknown practice area of law between new generations of attorneys.

Some opinions may suggest that when foreign corporations sue the Mexican government, they will hire local legal firms. However, I would like to consider the advantages of hiring a Mexican legal firm in representing the foreign investor in an investor-State dispute.

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[53] Canacar *v Government of U.S.* Notice of Intent to Submit a claim to arbitration under section B of Chapter XI of the North America Free Trade Agreement (April 2, 2009), http://naftaclaims.com/disputes/U.S.a/Trucking-II/CANACAR-U.S.A-02-04-09.pdf

First, Mexican legal firms know how to move around more effectively with Mexican institutions and government agencies. Generally, Mexican legal firms have the expertise in the modus operandi in dealing with Mexican administrative agencies, government institutions, and their processes. As it has been stated, NAFTA's Ch. XI encourages private communications in order to settle disputes before the case is presented before a tribunal. In this sense, Mexican legal firms will be able to provide a better approach, and encourage better communications with Mexican authorities, which can result in a positive outcome for both parties.

Second, and related with the aforementioned, Mexican legal firms can take advantage of their Spanish-speaking partners and eliminate the language barrier in dealing with Mexican governmental agencies. The fact that Mexico is a Spanish speaking country with a civil law can be very difficult for International legal firms, since the due process in handling with governmental agencies can be very different from common law jurisdictions (Canada and the U.S.).

Third, the costs in hiring a Mexican legal firm will be lower. Even though investors can recover legal fees in their claims, there are some costs that cannot be recovered, such as lawyer's travel expenses for going to Mexico to follow up the case. Investors can benefit from Mexican based firms that will not engage in extra expenses in following up the case.

However, if foreign investors do not look at Mexico to find the corresponding legal support, Mexican legal firms will hardly get the expertise. Nonetheless, as ISDS becomes more and more common in resolving foreign investor disputes, the required skills will become a need more than an option. Moreover, if Mexican investors do not use ISDS, Mexican legal firms will not get the opportunity to represent an investor in an arbitrational panel.

Surely, there are many reliable Mexican legal firms trying to move forward to this type of litigation. Francisco Cortina Velarde, foreign trade Mexican attorney from Chevez, Ruiz, Zamarripa y Cia,[54] shared with me his opinion on the subject matter. Cortina (2016) shared my view on the lack of expertise among Mexican attorneys, suggesting that foreign investors will not trust Mexican attorneys because they have the economic capacity to employ an international legal firm and will not risk in losing the controversy.[55]

Likewise, the Mexican government recognizes the absence of experience in investor arbitration in Mexico. Even the Secretary of Economy hires international legal firms to assist him in defending Mexico in ISDS (see Metaclad, Azinian, etc.*)*. Hugo Perezcano shared with me that while he was representing the Mexican government in investor-State disputes (such as Metaclad, Azinian, Feldman, etc.) it was often difficult to find someone appropriate from Mexico with the qualifications to appoint as an arbitrator, especially in

[54] See: *www.chevez.com*, Chevez, Ruiz, Zamarripa y Cia. It's a leading legal firm in Mexico.

[55] Personal Communications with Francisco Cortina Velarde, Cortina, F. (Nov. 2016).

the earlier years. Furthermore, Perezcano pointed out that because Mexican lawyers are trained in the civil law legal system, the Secretary of Economy needed assistance especially in the oral phase of the process, because it lacked in training in advocacy skills, such as cross-examinations.[56]

Understandably, the solution is to promote no more Mexican investors in suing Canada or U.S. to encourage the development of the required skills of investor arbitration. There are better approaches to develop and to incite new attorneys in these matters.

1. *How to Cultivate the Expertise?*

On developing new skills, the best way is to look at exemplars. It is well known that the Secretary of Economy hires external lawyers when representing Mexico in arbitration panels.[57] Perhaps, all of the expertise is being held by the Secretary of Economy, where, indisputably, its representatives are doing a highly recognized job.

In this sense, in Mexico the one with the best expertise in arbitration investment is the Secretary of Economy. It is a great option if the Secretary of Economy can commence internships for lawyers to let them gain the expertise needed in representing ISDS.

An Internship Program with the Secretary of Economy can spread the expertise and, in the future, cultivate expertise among Mexican attorneys. Perezcano (2016) shared with me the opinion that, in fact, legal firms can help promote the internships by allowing some of their seniors attorneys to work with the Secretary of Economy.[58]

Nevertheless, universities and institutional programs should promote legal studies in investment arbitration. As we discussed, there is an unstopping growth of international trade treaties and ISDS; it is important that Mexican legal firms grow along with the international community in developing the new legal skills that are required to compete with international legal firms.

In the last decade, universities have started educating young attorneys in alternative means of dispute resolution, supporting the education of oral trials. It has been a long process, due to the fact that Mexican attorneys are educated under the civil system, where the written law predominates and almost all trials are held by written communications.

Undoubtedly, there is a long road to go in developing Mexican expertise in investment arbitration. Trade treaties (NAFTA in particular) is becoming more

[56] See: Perezcano, *supra* note 42.

[57] See: Francisco González de Cossío, *supra* note 46. The author highlights that the Secretary of Economy hires external lawyers in representing Mexico in arbitration panels. Furthermore, it was shared by Hugo Perezcano (2016), that the Secretary of Economy hires international lawyers especially for the oral phase of the arbitration proceeding.

[58] *Id.*

important every year. Mexican attorneys have already realized the need to start competing in the ISDS market and, hopefully, they will start taking measures to get there some day.

VI. Conclusion

Finally, I would like to point out some of the conclusions reached by this paper:

- —In the twenty years of NAFTA, Mexican attorneys have not been active participants of the treaty, especially in representing foreign investors in NAFTA's Ch. XI enforcement mechanism. The reasons are unclear but shared between two attorneys with enough experience in the field. However, Mexican legal firms have realized the need to develop this knowledge. Measures such as an internship program with the Secretary of Economy can help develop the expertise in the short run, and will likely encourage foreign investors to start looking at Mexican legal firms as a reliable option.
- —Mexico, twenty-two years after of the adoption of NAFTA, has been constantly exposed by the tribunals for lack of transparency, acts of corruption between Mexican authorities, and lack of due process. The threats that foreign investors face in Mexico have not been diminished, taking into consideration the claims alleged in Metaclad and in B-Mex case.
- —Regardless of the fact that Mexico has been able to defend the claims brought by foreign investors eagerly, ISDS have not benefitted Mexican investors. Usually Mexican investors do not understand their rights abroad and do not find within Mexico the legal support to protect their rights. As we have concluded, Mexican investors have had zero participation in NAFTA's ISDS.

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NOTES

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THE SUBALTERNIZATION OF A PROGRESSIVE LEGAL PROJECT:THE RIGHTS OF NATURE IN ECUADOR

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Abstract: *In this note, the author uses the categories of subalternity and hegemony, proposed by Antonio Gramsci, in order to analyze the political process that emerged with the proclamation of the Rights of Nature in the Constitution of Montecristi, the new Constitution of Ecuador that came into existence in 2008. Out of the understanding that every legislative process arises from a political project within a historical bloc with specific interactions between forces, the Alianza País political project has searched for new ways of approaching the human-nature relationship through the "Revolución Ciudadana" in order to avoid the exploitation and commercialization of nature. Nonetheless, the Rights of Nature initiative has received much criticism from many fields: 1) the false distinction between nature and humanity; 2) the change from an obligation to take care of nature to rights of nature as a neoliberal danger; 3) the supposed liberation of nature within liberal market thinking. For that matter, the Rights of Nature can be understood as a political project that has been subalternized by the hegemonic political project within ecological thinking that goes hand-in-hand with neoliberal politics, the so-called Green Economy. This hegemonic project in the ecological field is working towards the continuance of the exploitation and commercialization of nature and has become more powerful than the Rights of Nature initiative by using it to give entrance to green neoliberal projects in Ecuador.*

Key Words: *Subalternity; hegemony; Rights of Nature; Green Economy; Ecuador*

Resumen: *En este artículo se utilizan las categorías de subalternidad y hegemonía propuestas por Antonio Gramsci, para dar cuenta del proceso político que surgió a partir de la promulgación de los Derechos de la Naturaleza en la Constitución de Montecristi, la nueva Constitución ecuatoriana que nació en 2008. Se entiende que todo proceso legislativo concierne a un proyecto político*

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dentro de un bloque histórico con relaciones de fuerzas específicas, en ese sentido, el proyecto político de Alianza País a partir de la Revolución Ciudadana buscó nuevas formas de aproximarse a la relación humano-naturaleza para evitar su explotación y mercantilización. No obstante, las críticas a los Derechos de la Naturaleza pueden encontrarse en varios ámbitos: 1) la falsa distinción humano-naturaleza; 2) el paso de la obligación del cuidado de la naturaleza a sus derechos como un peligro neoliberal; 3) la supuesta liberación de la naturaleza dentro de un pensamiento liberal de mercado. En este sentido es que los Derechos de la Naturaleza pueden ser entendidos como como un proyecto político que se ha subalternizado frente al proyecto político hegemónico dentro del ambientalismo contemporáneo, la llamada Economía Verde, que funciona dentro de los preceptos neoliberales, los cuales buscan dar continuidad a la mercantilización y la explotación de la naturaleza y que sobrepasa la idea de los Derechos de la Naturaleza haciendo uso de ésta para dar entrada a proyectos ambientales neoliberales dentro de Ecuador.

Palabras Clave*: Subalternidad; hegemonía; Derechos de la Naturaleza; Economía Verde; Ecuador.*

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In this note, I use Antonio Gramsci's conception of "subalternity" to analyze the process by which the progressive political project headed by Alianza País in Ecuador, in particular the topic of the Rights of Nature contained in the Montecristi Constitution established in 2008, has been brought into the agenda of the current neoliberal hegemonic project.

I. Analytical Categories: Hegemony and Subalternity

Gramsci's theoretical framework is essential for the analysis of the interaction of forces, as well as for the study of a political project in a specific historical

bloc. Considering the fact that legislative processes are part of specific political projects, their analysis within a Latin-American context is fundamental because the first two decades of the 21st century have seen the emergence of many new progressive projects, such as the cases of Ecuador, Bolivia and Uruguay, among others.

In this note, we will specifically use the concept of subalternity, understood as both a process and a result of the interaction of specific forces in the context of a dependent country as in the case of Ecuador. To talk about subalternity, it is necessary to delve into the concept of hegemony, which refers to the ability one class has to build and reproduce a certain historical bloc, meaning a social, moral, political and economic construction which allows that class to direct or lead the whole society. A particular historical bloc sets or specifies a certain interaction of forces by which the leading class becomes hegemonic based on moral, ethical, political, ideological, and economical arguments.

Hegemony derives from the permanent construction of a force "capable of unifying the society, representing it with a coherent and rational design"[1] and when that representation "makes a distinction between dominant and dominated, it legitimizes the subordination of relationships."[2] This subordination can be analyzed under the category of 'subaltern groups', which, according to Gramsci, are "at the edge of history."[3] Their history is "fragmented and episodic,"[4] even though it tends toward unification:

> …this tendency is continuously broken by the initiative of dominant groups, and therefore it can only be demonstrated when the historical cycle is accomplished, if it concludes with a triumph. The subaltern groups always suffer the initiative of the dominant groups, even when they rebel and revolt: only the permanent victory can break, and not immediately, the subordination.[5]

According to Massimo Modonesi, this concept acquired deeper theoretical meaning only with Gramsci's thought, even though it had been previously used by Marxist authors like Engels, Lenin and Trotsky. This notion "allows avoiding the economic and ideological connotations of the exploited class, and also to broaden the notion of working class, including other forms of popular modalities."[6] The notion of subalternity allows one to "find a con-

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[1] Fabio Frosini, La Religione Dell'uomo Moderno. Politica e Verità Nei Quaderni del Carcere Di Antonio Gramsci 24 (Carocci Ed., 2010).

[2] *Id.* at 24.

[3] Antonio Gramsci, *Tomo 6, Cuaderno 25*, in Cuadernos de la Cárcel 173 (Valentino Gerratana, Instituto Gramsci, Era ed., 1975).

[4] *Id.* at 178.

[5] *Id.*

[6] Massimo Modonesi, Subalternidad, Antagonismo, Autonomía, Marxismo y Subjetivación Política 25 (CLACSO, Prometeo Libros, 2010).

ceptual correlate to alienation in the superstructural field"[7] originated in this subordination. Nonetheless according to Gramsci, the subaltern groups are capable of having autonomous initiatives,[8] which indicates a dialectic relationship "between the subordination and the resistance, avoiding the rigidity of dualist schemes"[9] found in certain types of Marxism. It is important to note the negative aspect Gramsci gives to the notion of subalternity that operates within processes regarding the relation of forces between specific classes and groups. There are processes of subalternization, and even of resubalternization, when there is a "downturn of the antagonistic activation and the autonomic practices, as a return to the subordinate condition."[10] Subalternity can be understood as demobilizing moments of groups and classes that lack autonomy, and the inability to sustain a revolutionary project even though the groups are indeed "capable of outlining a movement that threatens or that appears to put into discussion the hierarchical order."[11] In other words, subalternity, as understood by Gramsci, means a condition of subordination of certain groups to the hegemonic class; a relationship of command-obedience inside the class struggle. Nonetheless, we should point out that subaltern groups can overcome this condition when they generate an autonomous thinking that leads to action, which could be characterized as the antagonistic principle towards political action.[12]

As mentioned above, the subalternity of certain classes and groups is the result of the relation of forces that denote moments and degrees of organization in the society and inside a specific historical bloc. The analysis of the relation of forces only acquires meaning "to justify a practical activity, an initiative of will,"[13] and in this respect, "the decisive element of a whole situation is the permanently organized and predisposed force that can move forward over time when it judges the situation as favorable."[14] Therefore, it is important to generate alternative political projects in search of a hegemony that seeks to overcome subalternity.

Based on this theoretical framework, it should be of great interest to analyze the process of subalternization under which the progressive legal project of the Rights of Nature fell into. To do this, it is important to first review the history and context in which the Constitution was written.

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[7] *Id.* at 26.

[8] Antonio Gramsci *supra* note 4 at 179.

[9] Massimo Modonesi, *supra* note 7 at 38.

[10] Massimo Modonesi, El Principio Antagonista, Marxismo y Acción Política 13 (UNAM/Itaca, 2016).

[11] *Id.* at 115.

[12] *Id.* at 115.

[13] Antonio Gramsci, *supra* note 4 at 40.

[14] *Id.* at 40.

II. The "Revolución Ciudadana" in Ecuador and its New Constitution

In 2005, the so-called "Revolución Ciudadana", or citizen revolution arises, headed by many social movements and organizations like the Confederation of Indigenous Nations of Ecuador (CONAIE) and the Alianza Patria Altiva I Soberana (PAIS) movement. The social movement allowed the removal of the president at that time, Lucio Gutiérrez, who had until then given continuity to many neoliberal politics in the country. Lucio Gutiérrez was preceded by several that pursued the same neoliberal policies, like León Febrés Cordero, Abdalá Bucaram, Jamil Mahuad and Gustavo Noboa. Two of these presidents were likewise ousted by social movements that did not agree with their economic policies because these programs led to increased poverty and multiple social problems. In 2005, protests against Gutiérrez took place in many new, creative and peaceful ways;[15] protesters rejected the president and demanded that the public sphere be reclaimed and the institutions transformed.[16] In 2006, Rafael Correa became the democratically elected president. He represented the Alianza PAIS movement and, apparently, the majority of the mobilized sectors with their many demands.

When Alianza PAIS took power in 2007, one of the first actions was to elect a Constitutional Assembly to enact a new Constitution. This action can be understood as a means to restructure the State that, prior to 2005, seemed like a failed state.[17] It would be a way to re-build the bond between the people and the government by introducing the new concept of a Plurinational State (*Estado plurinacional*) in the new Constitution of Montecristi.

Ecuador has a large indigenous population in comparison with other Latin American countries.[18] The plurinationality project aims at recognizing the cultural, political and civil diversity in the country, and seeks to overcome the poverty of and discrimination against the indigenous population.[19] In the same way, the new Constitution gave birth to the Rights of Nature that can be found throughout the entire document, the same as the idea of *Sumak Kawsay* (*Buen*

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[15] Natalia Catalina León Galarza, Ecuador: La cara oculta de la crisis: ideología, identidades políticas y protesta en el fin de siglo 260 (CLACSO, 2009).

[16] *Id.*

[17] An important fact is that, regardless of society's overwhelming acceptance of Alianza PAIS, many interrelated forces played along so that in 2010 the Ecuadorian Air Force and the National Police carried out a coup d'état. The attempt failed and Rafael Correa remained as President, with his mandate ending in 2017.

[18] Considering that there are about 14 different indigenous cultures in Ecuador, it should be noted that Bolivia, with 32 indigenous nations and cultures, also has even more indigenous groups than Ecuador.

[19] María Isabel González Terreros, Movimiento Indígena y Educación Intercultural en Ecuador 54 (CLACSO, UNAM, 2011).

Vivir or Good Living).[20] The Alianza PAIS government marked its entrance to power with a speech against imperialism and neoliberalism, in favor of redistributive politics based on social investment.[21]

Nonetheless, in the first years of Rafael Correa's government, in 2008, the political process of Ecuador experienced the effects of international crises, in which the government had to respond with determination and strength. First there was the illegal entrance of the Colombian army commanded by then president Alvaro Uribe in hopes of searching out and destroying FARC troops. This was followed by the threat of inflation and increased food prices, which originated as a government response towards an economic development policy under an agrarian mandate that profited industrialists, businessmen and the biggest national farmers, without benefiting poor peasants or promoting sustainability.

Pablo Ospina argues that by then, Ecuador was moving away from the "long neoliberal night,"[22] and was advancing "progressively [advancing] toward a new version of development"[23] reflected in the new Constitution of Montecristi. It is important to note that this new Constitution was preceded by 19 previous Constitutions, written in the midst of great political instability. According to Ávila Santamaría, the 2008 Constitution is the first egalitarian one, after going through many liberal ones, as well as neoliberal neoconstitutionality.[24] In this sense, Alberto Acosta, the chairman of the Constitutional Assembly, stressed that the new government received a poor country and was cursed by the abundance of its natural resources.[25] By 2007-2008, the government's plan revived many claims of movements and left parties. One of the most important claims was the respect of nature. According to Acosta, it had been laid out a long time ago by the indigenous world under their concept of

[20] The concept of *Sumak Kawsay* refers to a good way of living in society. According to Edgar Isch, this idea proposes measurements of equilibrium and complementarity between human beings such as the "minga" (a form of community cultivation), the "cambia-mano" (a form of fair trade) and integration with Pacha Mama, "Mother Nature". This concept refers to a good way of living for all and not just for a small number of people. It can be found in indigenous philosophy and culture because they are more attuned to their territory and natural space than the people who live in Western civilization. See Edgar Isch, El Buen Vivir o Sumak Kawsay, VOLTAIRENET.ORG, (July 24, 2008) *available at* http://www.voltairenet.org/article157761.html

[21] Alfredo Serrano Mancilla, ¡A (re) DISTRIBUIR! Ecuador para Todos (CLACSO, Senplades, 2012).

[22] Pablo Ospina Peralta, *Ecuador al ritmo de la iniciativa política del gobierno de la Revolución Ciudadana*, in Entre el Quiebre y la Realidad, Constitución 2008 126 (Abya Yala Ed. 2008).

[23] *Id.* at 126.

[24] Ramiro Ávila Santamaría, *El derecho de la Naturaleza: fundamentos, in* Alberto Acosta *et al.* La naturaleza con derechos, de la filosofía a la política 83 (Abya Yala, Universidad Politécnica Salesiana ed. 2011).

[25] Alberto Acosta, *Los grandes cambios requieren de esfuerzos audaces, a manera de prólogo*, in Alberto Acosta, *et al.* Derechos de la Naturaleza, el futuro es ahora 16 (abya yala ed. 2009).

Sumak Kawsay: "life of human beings in harmony in the community, with the community, and between communities, between individuals and communities, between individuals and Nature, and in Nature."[26]

According to Ávila Santamaría, the new Constitution contained many contradictions and its work methodology was not the most appropriate because it was divided into thematic working groups that were completely separate from each other and from the final structure of the document. Moreover, many legal regulations were issued against constitutional rules, and the Assembly approved most of the document on the last month of planned for work in order to meet the established deadline.[27]

Additionally, Alberto Acosta and his working group, the main promoters of the Sumak Kawsay, the Rights of Nature, and the Plurinational State, quit the Assembly unexpectedly on June 23, 2008, a month before the final delivery of the new Constitution. With 77 votes of the 120 assemblymen in favor, the irrevocable resignation was approved and the vice-president of the board, Fernando Cordero, took over Acosta's pos. At first, Acosta explained that he did not agree with the government position of requiring final delivery by July 26th of that year because it would "imply sacrificing the quality and amplitude of the political debate."[28] However, historian Pablo Ospina stated that the political bureau of Acuerdo País asked for Acosta's resignation in order to accelerate the discussions.[29] After his resignation, there were many complaints from assemblymen reporting several misapplications in the legal procedures so as to obscure actions on and modifications to many articles in the final version of the document. According to Ospina, this was "a poor ending that left an unnecessary blemish on the legitimacy of an important process of political debate."[30] The root of the problem was, then, a matter of political differences between Correa and Acosta that showed opposite stances on the economic, political, cultural and even ideological issues.

After Acosta's resignation, the split between Correa's government and several social groups that had previously supported him began to attract attention. On July 26th, Correa gave a public speech accusing many assemblymen of being infiltrated agents, and said that the main dangers were not coming from the opposition, but from the contradictions in the Assembly where certain people were endorsing childish leftist, ecological and indigenous positions.[31] In a chronicle dated July 13, 2008, Kintto Lucas, Congressman Paco Veloasco's advisor, reports that the approved documents suffered unexplainable modifications made by the commissions that followed the instructions

[26] Interview with Alberto Acosta, professor at FLACSO, Quito-Ecuador (Nov. 6, 2015).

[27] Ramiro Ávila Santamaría, *supra* note 25 at 103.

[28] Pablo Ospina Peralta, *supra* note 23 at 131.

[29] *Id.* at 131.

[30] *Id.* at 131.

[31] *Id.* at. 133.

of the President's Legal Advisor, right wing Alexis Mera, who had previously been an advisor of ex-president León Febres Cordero, who was also from the right and neoliberal wing.[32]

Despite all the discrepancies and controversies born out of the discussions and the drafting of the new Constitution, it was passed on September 28, 2008, after a referendum with 64% of the votes in favor.

III. The Rights of Nature

Esperanza Martínez was one of the Constitutional Assembly advisors in 2007 for the members that promoted the Rights of Nature. She recounts that there were several debates on the subject with the participation of many different groups, such as non-governmental organizations like Community Environmental Legal Defense Fund (CELDF) and Pachamama Alliance, as well as many well-known international personalities like Ciro Angarita and Eduardo Galeano,[33] wildlife organizations, and even representatives of previous governmental programs like the Environmental Strategy for the Sustainable Development in Ecuador approved by the Ministry of the Environment of Ecuador (MAE for its Spanish initials).[34]

The main argument of the intellectuals promoting the Rights of Nature in the 2008 Constitution of Ecuador mainly resides in the Andean philosophy and world view that breaks with the Western paradigm. The Andean logic is based on four principles: "relationality, correspondence, complementarity and reciprocity,"[35] which led to many discussions inside the Assembly when drafting the Rights of Nature.

However, we can also track the inception of these rights in several international agreements. Silvia Jaquenod de Zsögön argues that the birth of the Rights of Nature can be seen since the beginning of Human Rights. In 1972, the Stockholm Conference recognized the fact that that a human being "has the duty to protect and improve the environment in which he develops his activities, it is a right of the person because it reflects the right of life and of

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[32] Kinto Lucas, *Crónicas desde Ciudad Alfaro* in Entre el quiebre y la realidad, Constitución 2008 *(*Abya Yala ed. 2008).

[33] Ciro Angarita is a Colombian judge who promoted the idea of the Rights of Nature within the legal sphere over a decade ago. Eduardo Galeano, famous novelist and journalist, wrote in favor of the Rights of Nature. "It sounds strange, doesn't it? Nature having rights... Such a crazy thought, as if nature were a person! Instead it sounds quite normal for the largest corporations in the US to enjoy human rights" in Eduardo Galeano, *La naturaleza no es muda*, in Alberto Acosta *et al*. Supra note 26 at 27.

[34] Interview with Esperanza Martínez, active member of Acción Ecológica in Ecuador (Oct. 1, 2015).

[35] Ramiro Ávila Santamaría, *supra* note 25 at 209.

physical integrity."[36] Moreover, the Universal Declaration of Human Rights signed in Paris in 1948; the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly on December 16, 1996; the Pact of San Jose of 1969; the Convention on the Rights of the Child of 1990, and Principle 19 of the Stockholm Convention on Persistent Organic Pollutants that refers to education in environmental matters; the first part of the Resolution adopted by the UN for the United Nations Decade of Education for Sustainable Development (2005-2014); the Indigenous and Tribal Peoples Convention (1989-1991); the Convention on Biological Diversity of 1992; and the Millennium Development Goals of 2000, among many others. All of these treaties have successively been recognized as first, second and third generation rights,[37] clearly showing that the environment and nature has been progressively gaining more importance.[38]

At the same time, Ecuador has made inroads in this idea by signing international treaties concerning environmental matters, as in the case of the Convention on Biological Diversity (CBD)[39] that became effective on December 29, 1993, during the Earth Summit held at Rio de Janeiro.[40]

Based on all these precedents, it was possible to include an environmental viewpoint in the 2008 Ecuadorian Constitution. Many articles refer to environmental matters, including the sections on the Rights of Nature and the environmental rights of citizens, both of which were drafted under the *Buen Vivir* perspective,[41] in a progressive style and pointing toward a battle for alternative hegemony.

Specifically, the Rights of Nature had been much disputed in Assembly discussions;[42] nonetheless, an entire section on the topic was included in the Constitution: Chapter Seven containing Articles 71, 72, 73 and 74. These articles are based on the idea of not commercializing nature, of protecting and restoring it, of stopping its exploitation and of preventing private entities from appropriating its wealth.

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[36] Silvia Jaquenod de Zsögön, *Derechos humanos y recursos naturales*, in Carlos Espinosa Gallegos-Anda *et. al*. Los Derechos de la Naturaleza y la naturaleza de sus derechos 139 (Ministerio de Justicia, Derechos Humanos y Cultos, Subsecretaría de desarrollo normativo, 2011).

[37] For a more detailed explanation on the three generations of rights, see Magdalena Aguilar Cuevas, Las tres generaciones de los derechos humanos *available at* www.juridicas.unam.mx/publica/librev/rev/derhum/cont/30/pr/pr20.pdf

[38] Silvia Jaquenod de Zsögön, *supra* note 37 at 148.

[39] United Nations *available at* http://www.un.org/es/events/biodiversityday/convention.shtml. (March 15, 2017, 23:07)

[40] Id.

[41] Eduardo Gudynas, El mandato ecológico: Derechos de la Naturaleza y políticas ambientales en la nueva Constitución (Abya Yala ed. 2009).

[42] Ramiro Ávila Santamaría *supra* note 25.

TABLE 1. THE RIGHTS OF NATURE[43]

Art. 71	Nature, or *PachaMama*, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution. The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.
Art. 72	Nature has the right to restoration. This integral restoration is independent of the obligation on natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems. In the cases of severe or permanent environmental impact, including the ones caused by the exploitation on non renewable natural resources, the State will establish the most efficient mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.
Art. 73	The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles. The introduction of organisms and organic and inorganic material that can alter in a definitive way the national genetic patrimony is prohibited.
Art. 74	The Persons, people, communities and nationalities will have the right to benefit from the environment and form natural wealth that will allow wellbeing. The Environmental services are cannot be appropriated; its production, provision, use and exploitation, will be regulated by the State.

In the previous table, we can see that the Rights of Nature point at new perceptions of the environment and its relationship with human beings. However, in spite of its originality and the fighting spirit of its defenders, the legal project has been distorted in practice.

It is interesting to point out the cases in which this legislation has been used. According to Memorandum CJ-DNTICS-2015-1483 of the Information Technology and Communications department, complaints of possible violations to the Rights of Nature, or actions to protect these rights were requested by the author at the National Judiciary Board of Ecuador. As of 2015, there have only been five: three in the Manabí province reporting a crime against nature and two in the Bolívar province on "grazing beasts of

[43] ASAMBLEA CONSTITUYENTE, CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR (2008). (August 28, 2017, 16:26) *available at* https://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf

any species at any time of the year in natural fields or artificial plantations, or in fruit tree plantations owned by others."[44] The above quote shows that the alleged crime revolves around the private property (animal or territory) of some people and not around the rights that nature might have. The fact that there are so few references about the use of the Rights of Nature in the current legal sphere can indicate the law's poor reception by civil society, or more likely that the government does not take up emblematic cases like Yasuni ITT to avoid legal and political controversies.[45]

Nevertheless, according to the Global Alliance for the Rights of Nature, the Ecuadorian Coordinating Office of Organizations for the Defense of Nature and the Environment (CEDENMA by its Spanish initials) and the *Pachamama* Foundation won their first case in favor of the Rights of Nature, mostly in reference to Article 71, in 2011. The case was filed and sustained by two residents in the Loja province, Richard Frederick Wheeler and Eleanor Geer Huddle, whose lands were affected by a flood caused by construction work for a highway expansion near the Vilcabamba River. The Loja province government had to present environmental permits for the construction of the highway to the MAE, and the Peoples Defense Department was charged with overseeing the case.[46] Judgement on this case was presented on March 30, 2011, as Protection Action No. 11121-2011-00010, by the Criminal Court of the Loja Province Court. In this case we can see that, in spite of the application of Article 71 in favor of the Rights of Nature, the complaint was filed by two private entities whose private lands were affected by the construction. At the same time, Article 74 has been used extensively by the MAE to establish the Socio Bosque program (PSB). This program seeks to preserve green areas

[44] Lawsuit report, protective actions for the Rights of Nature in Ecuador. Report in response, *Memorandum CJ-SG-PCJ-2015-1712.* Consejo de la Judicatura de Ecuador (Dec. 22, 2015).

[45] The Yasuní-ITT initiative was filed in 2007 as a proposal by the Ecuadorian government, born out of the struggle and resistance of indigenous peoples and other inhabitants against Texaco activities. The proposal consisted of leaving the underground oil in Yasuní, which is the Amazon Basin's most bio-diverse tropical forest in the fields of Ispingo, Tambococha and Tiputini (ITT), located in the Ecuadorian Amazon. Not extracting 846 million oil barrels would prevent the emission of 407 million tons of CO2, and would be an action towards the respect of the Rights of Nature. Nonetheless, in 2013, Correa announced the end of the project in order to start with the extraction of oil. Under the Yasuni ITT initiative, many legal contradictions were debated, such as the case of Article 407 that can open the door to the exploitation of resources in protected areas. This article contradicts the Rights of Nature. Organizations like Yasunidos appealed to hold a popular vote on the case, to stop extraction in Yasuní, but were unsuccessful. In Mario Aguilera Bravo *et al. La iniciativa Yasuní-ITT como materialización de los derechos de la naturaleza,* in Carlos Espinosa Gallegos-Anda *et al. Supra* note 37; and see also Yasunidos at *http://sitio.yasunidos.org/es/* (March 15, 2017, 23:17)

[46] Global Alliance for the Rights of Nature, (March 15, 2017, 23:17) *available at* http://therightsofnature.org/celebran-el-primer-caso-exitoso-de-exigibilidad-de-los-derechos-de-la-naturaleza-en-ecuador/

all around the country, as well as to begin the implementation of the UN Reducing Emissions from Deforestation and Forest Degradation (REDD) and REDD+ programs that contribute to the sustainable management of forests, the conservation and enhancement of forest carbon stocks. The PSB seeks to preserve large forest areas through economic incentives for the inhabitants of these territories, mostly peasants and indigenous populations. In its regulations, this program discusses forest environmental services, one of the most important of which is carbon storage. This program instigates settlers to stop hunting, cutting down trees, fishing, or growing food in the protected areas. It is important to notice that all of the documents related to the PSB ministerial agreements signed by the MAE expressly cited three articles from the Rights of Nature: 71, 72 and 74.[47]

At first glance, conservancy can appear completely related to the Rights of Nature. Nonetheless, if we inspect the introduction of programs like REDD and REDD+ closely, we can see that they imply the commercialization of the natural resources of determined territories in the form of so-called environmental services.

Programs like REDD+ endeavor to introduce themselves in developing countries with an agenda that claims the protection of natural resources and the improvement of their management through the implementation of Payment for Forest Environmental Services, mostly used for carbon storage and based on the sale and purchase of carbon bonds (carbon credits). This program does not reduce carbon emissions from factories or from the countries that buy these credits. On the contrary, it encourages the continued existence of these emissions. Under the idea of forest conservation, they eliminate inhabitants' autonomy over their natural resources. The program encourages a form of eco-imperialism, in the words of John Bellamy Foster[48] that allows central countries and transnational enterprises to gain control over the natural resources of other regions.

At several international meetings, the MAE has brought up the Rights of Nature in a way that legitimizes signing agreements and entering into these types of programs. Examples of this are found in the 2014 COP11 on Biological Diversity where the High Level Ministerial Panel on "Uniting the Rights of Nature and the Green Economy: Finding Solutions to Protecting International Wildlife";[49] the first UN Environment Assembly (UNEA), where the Sumak Kawsay perspective was explained in terms of sustainable development;[48] and in the promotion of the Socio program that aims at becoming the basis for the implementation of REDD in Ecuador.

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[47] Ministerio del Ambiente, PSB, Acuerdo Ministerial (since 2008).

[48] *Id.*

[49] Ministerio del Ambiente de Ecuador (March 15, 2017, 23:17) *available at* http://www.ambiente.gob.ec/ministra-lorena-tapia-presidio-panel-ministerial-de-alto-nivel-sobre-derechos-de-la-naturaleza/

In an interview with Germán Mosquera, the coordinator of the Forest Conservation Program and REDD at the MAE, he mentions that it is through the UN-REDD-Ecuador program that a series of studies have been carried out to allow the implementation of the REDD mechanisms in the PSB over a short period of time. In this sense, the PSB could be an opening for REDD because it too is based on the payment of compensations or for conservation results.[50] Mosquera assures that the commercialization of forest carbon under the REDD does not contradict the Rights of Nature and, besides, it is linked to these rights as seen in the final part of Article 74 where it sets forth that environmental services will be regulated by the State for their production, delivery, use and development: "…then the State, calmly, can make a legal analysis of the terms of provision, delivery, use and development, delimit its range with legal instruments and adjust it to the needs of the REDD program, then the safeguards are there but the State has legal authority over them, that would be the answer."[51]

With these examples, it is possible to see that the use given to the Rights of Nature has benefitted private land owners more than Nature itself, known as a subject of rights. With programs like PSB, REDD, and REDD+, it is clear that the Rights of Nature often work as a discourse that legitimizes new forms of territorial dispossession and new ways for the commercialization of nature even though the real statement of those rights and their search for new legal paradigms may be quite different. The fact that these rights are being used incorrectly suggests that the idea of a truly progressive legal project has not become hegemonic, meaning that on the level of ethics, politics, economics and ideology, the project has not been consolidated as a permanent construct that represents the society in its entirety. This is the result of multiple factors and the relationship of forces that must be analyzed from a critical point of view.

IV. The Rights of Nature in Subalternity Facing Neoliberal Hegemony

As explained at the beginning of this note, in order to understand the subaltern character of a political project, which is completely bound to specific classes and groups, it is essential to analyze it in relation to the ruling classes and the groups that hold the hegemony. In the case of the Rights of Nature,

[50] Interview with Germán Mosquera, Coordinator of the Forest Conservation Program and REDD in the MAE (Oct. 2015).

[51] *Id.* Transalted from: "…entonces el Estado, tranquilamente, puede hacer un análisis jurídico de los términos y prestaciones, uso y aprovechamiento, delimitar su alcance con instrumentos jurídicos y acomodarlo a las necesidades del tema REDD, entonces de pronto el candado está pero el Estado tiene la potestad de, esa sería la respuesta."

it is necessary to set them in the context of their origin through the characterization of geo-politics in the Latin-American region.

Since colonial times, Latin America has functioned as a region that provides raw material to global powers. The international division of labor has suppressed our region into dependency and its population, with its natural resources, has been systematically exploited in many ways. Bellamy Foster's concept of eco-imperialism, as well as Lenin's ideology, can gives us clues to understanding how geo-political and economic relations in the world have influenced global powers' abuse of Latin America. The dominant and ruling classes that control the means of production are the ones that have hegemony and that oppress the other classes and groups. In the case of our region, in the current neoliberal context, the central nations with financial elites and transnational enterprises are the ones that are hegemonic.

Because of that, several groups in the region have challenged the hegemony and demand that it no longer be subaltern. This would be the case, to a certain extent, of the progressive political projects in countries like Ecuador, Bolivia and Uruguay. As seen in the historical walkthrough, Alianza País in Ecuador developed a political project that, among other things, promoted a new vision of the relationship between humans and nature. Nonetheless, the internal contradictions of the project, such as the adverse conditions of the capitalist and neoliberal context, led a project like the Rights of Nature to be transformed into a subaltern project ideal for legitimizing the dispossession of natural resources and territory.

Next, I present three points that seem fundamental to understand the roots of such subalternization processes.

1. *The False Distinction Between Human and Nature*

Regarding this distinction, we first have to address the concept of Nature, which for authors like Erik Swyngedouw, does not exist.[52] This denotes that it is a very relative concept, an ideology that only acquires meaning depending on the use given to it:

> …the uses of Nature simultaneously imply an attempt to determine its unstable sense and, at the same time, to present it as the fetishized 'other' that reflects, or at least, operates as a symptom in which our desires and repressed fears are expressed. The concept of Nature becomes an ideology and works ideologically, meaning that it extinguishes thought, evades the elusive character of the term and ignores its multiplicities, inconsistencies and incoherencies. In other words, this conceptualization eclipses the political moment involved in the pro-

[52] Erik Swyngedouw, *La naturaleza no existe: La sostenibilidad como síntoma de una planificación despolitizada*, 1 *Urban*, (2001).

> cess of giving sense to Nature. Any attempt of suture, of exhaustively fulfilling and colonizing the sense of Nature responds to intrinsically political and hegemonic motivations, which are not recognized for what they are.[53]

From this perspective, the debate towards the concept of Nature it's a piece in the process of hegemony that is used inside the institutional debate in a global sense, facing the current environmental crisis that affects, in part, transnational extractivist enterprises. Swyngedouw proposes that the current concept of nature should be abandoned because if a set of "human and non-human things" exists in the world, this world is drawn from "hybrids of nature and culture", which allows us to understand that there is no such thing as a natural state of things "but on the contrary, a wide variety of different historical natures, relationships and environments subjected to continuous changes and transformations."[54]

Authors like Bruno Latour[55] and Philippe Descola[56]criticize and reject the rift between nature and culture. From these perspectives and as a historical-political result, the concept of nature turns out to be a rejected idea that ends up in a depoliticized action and the non-comprehension of the existing relations between the individuals and their environment.

In this way, the hegemonic discourse about nature as something unconnected to humanity ends up being another way to expose domination-exploitation relations.

Under the same perspective, José Sánchez Parga, an Ecuadorian Marxist who dedicated his last years to making several critiques about the trending discourses of the last decade, called the attention to the opposition between nature and society, saying that a universal concept has not been achieved. In fact, he described the Quichua/Quechua and Aymara indigenous cultures as societies that do not set their culture against nature so the latter can be dominated; instead, they see nature as an extension of their own culture.[57] According to Descola, Sánchez Parga explains that the dualism between culture and nature "establishes when the culture stops being the mediation between cultured nature and human nature,"[58] in a context where technology and

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[53] *Id.* at 42.

[54] *Id.* at 46.

[55] Bruno Latour, Nunca fuimos modernos (Siglo XXI ed. 2007).

[56] Philippe Descola, ESCOLA, Philippe, *Más allá de la naturaleza y de la cultura*, in Leonardo Montenegro, Cultura y Naturaleza, Aproximaciones a propósito del bicentenario de la independencia de Colombia. (Alcaldía Mayor de Bogotá y Jardín Botánico de Bogotá José Celestino Mutis, ed. 2011).

[57] José Sánchez Parga, Alternativas virtuales vs. cambios reales. Derechos de la Naturaleza, Buen Vivir, Economía Solidaria. Estudios y Análisis 51-52 (Centro Andino de Acción Popular-CAAP ed. 2014)

[58] *Id.* at 53.

capital, in what we can call amplified metabolism,[59] suggests new productive forces. This exacerbates the actual neoliberal time because the duality human-nature becomes more polarized when technology and financial capital have a devastating effect on the conditions of the mediation.

It is important to observe the contradictions into which the ideologues of the Rights of Nature themselves fall into when they criticize the distinction between humans and nature. At the same time, they reproduce this duality in conceptual and practical terms in the new Ecuadorian legislation.

Eduardo Gudynas, for example, describes the Montecristi Constitution as a biocentric mandate that seeks to dispossess the anthropocentric vision, for which the Rights of Nature has been a very important step.[60] These rights attempt to overcome anthropocentrism by making use of the Andean indigenous worldview, but it ends up extricating nature from humanity, creating extensive political, economic, social and cultural confusion because of the search for development based on different kinds of extractivism while questioning the Rights of Nature.

The Rights of Nature, Good Living and the Plurinational State are included across the Constitution. In this document, we can also find terms referring to economic growth; that is, in the operations of the market and private companies. Such is the case of Title VI of the Constitution,[61] with the heading "Development Structure". For example, Article 276 says that, in a healthy environment people need access to the benefits of subterrain resources and of the natural patrimony, as well as "to boost strategic insertion into the global context."[62]

As the above mentioned authors say, the Rights of Nature in the Ecuadorian Constitution generates political and economic confusion that does not get to the root of environmental problems. These rights come about as contradictory by promoting the false human-nature dichotomy. Sánchez Parga would say that it "is not the anthropocentrism of the today's human society, but the conditioning of capitalism that devastates much of the human relationship with nature."[63]

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[59] Authors like Fischer-Kowalski and Haberl refer to socio-economic metabolism as a continuous exchange of energy and materials between humanity and the environment, which allows the function, growth and reproduction of social systems. The authors use this concept to make an analysis of society that identifies different types of civilizations according to the relations of exchange with nature to then determine their metabolic profiles. It is interesting to note that we are now faced with an amplified metabolism due to the extraction and utilization of non-renewable resources that are exploited at a faster pace than the natural recovery rate of the environment, resulting in environmental degradation. In Marina Fischer-Kowalski *et al*. *El metabolismo socioeconómico*, in Ecosistemas humanos y biodiversidad (19-2000).

[60] Eduardo Gudynas *supra* note 42.

[61] Raúl Llasag Fernández, *Derechos de la naturaleza: una mirada desde la filosofía indígena y la constitución*, in Carlos Espinosa Gallegos-Anda *supra* note 37 at 88.

[62] Asamblea Constituyente *supra* note 44 at 135-136.

[63] José Sánchez Parga *supra* note 58 at 103.

2. *From Obligations to Rights, the Danger of Neoliberalism*

Several authors that support the creation of the Rights of Nature in Ecuador recognize that the positive right frequently lacks imagination. Throughout history, the struggle for the recognition of the rights of women, children and minorities have had to overcome several prejudices based on new arguments and world visions.[64] From this perspective, the main argument for the Rights of Nature forms part of this same struggle, the recognition of invisible subjects. Nonetheless, we have to speculate about which entity or type of person or community would be in charge of defending these rights, the rights of a subject like the nature that cannot talk or even define itself, as people themselves cannot define nature very accurately.

In talking about the Rights of Nature, Swyngedouw says that there is no such thing as nature that "requires salvation in the name of nature itself or from a generic humanity."[65] To think the contrary would suggest a political incapacity to question and rethink socio-natural configurations and the social metabolism that form part of the capitalist mode of production.

On the other hand, authors like Antonio Elizalde Hevia,[66] or even Eduardo Galeano, argue that holding rights to legal fictions such as companies, is now recognized: "It sounds strange, doesn't it? Nature having rights… Such a crazy thought, as if nature were a person! Instead, it sounds quite normal for the largest corporations in the US to enjoy human rights."[67] In this sense, it would be logical that nature could be equally subject to rights. However, it could lead to the idea that nature is a kind of company that can sell its services, what are now known as environmental services.

Under this logic, Sánchez Parga understands the Rights of Nature as a result of a neoliberal society that seeks to eliminate obligations and public and social responsibilities to favor the market economy because these rights are synonymous to individual necessities and private interests, which contribute in the long term to a new capitalist spirit.[68] Along this line of thought we should recall the first case of the application in favor of Rights of Nature in Ecuador, the case against the expansion of the Vilcabamba-Quinara highway that was allegedly damaging the rights of the Viacabamba River, but it actually referred to the property damages of the complainants, Richard Wheeler and Eleanor Geer Huddle.

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[64] Alberto Acosta *supra* note 26 at 15.

[65] Erik Swyngedouw *supra* note 53 at 49.

[66] Antonio Elizalde Hevia, *Derechos de la Naturaleza ¿Problema jurídico o problema de supervivencia colectiva?*, in Alberto Acosta *et al.* La Naturaleza con Derechos, de la filosofía a la política *71 (*Abya Yala, Universidad Politécnica Salesiana ed. 2011).

[67] Eduardo Galeano *supra* note 34 at 27.

[68] José Sánchez Parga *supra* note 58 at 38.

According to Sánchez Parga, the frenzy over these rights aim at replacing social links and relegating democracy to just rights. It substitutes political issues for legal ones "but with aggression: when the idea of the rights extends that much, rights lose their theoretical substance, political force and quality of citizenship."[69] The Rights of Nature should be human obligations toward the environment for a more efficient relationship. On the contrary, if Nature is recognized as a subject of rights, it only ends up disguising exploitative relations, mostly between men.

Thus, taking the leap towards the recognition of the rights of a figure that is not even well defined and whose very own existence is doubtful leads to the elimination of mankind's obligations towards the environment. It creates a confusion of legal notions and aggravates the political void of several discourses that try to be progressive by not pointing out the essential cause of the environmental crisis: the capitalist production and reproduction system.

Going back to Gramsci, the rift between the State (legality) and civil society (reality)[70] in an organic crisis of the comprehensive State, and in this case, in the environmental crisis, can give us a clue to understanding why the Rights of Nature in Ecuador have not been implemented, or even become functional because the actual causes of the crisis are not being presented in a way for in-depth understanding in the new legislation.

3. *The Emancipation of Nature, Liberalism and Market*

Several authors, like Alberto Acosta, speak about the emancipation of Nature from its condition as a "subject without rights or a simple property".[71] With the new decree in which Nature is now a subject of rights and, therefore, freed, it is no small thing to wonder what the recognition of freedom inside a capitalist society mean.

In the book "Liberty and Capitalism", Milton Friedman, an American economist famous for defending the free market doctrine, says that emphasis was given to the concept of liberty by intellectual liberals in the early 19th century. The idea was that freedom would be the aim of modern society to be taken up by the most important entity: the individual. His arguments disregard State intervention and encourage the so-called laissez faire for the purpose of liberalizing borders to facilitate free markets activities.[72] Therefore, under capitalism, which is now in its neoliberal phase, individuals can ideally be free to choose the products they consume, and companies can be free to compete and take their products worldwide. Nonetheless, something

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[69] *Id.* at 102.

[70] Antonio Gramsci *supra* note 4 at 175.

[71] Alberto Acosta *supra* note 26 at 19.

[72] Milton Friedman, Capitalism and freedom. (The University of Chicago Press ed.1962).

that Friedman does not explain is that there has to be a series of conditions for the trade of merchandise to occur.

Karl Marx argued that products cannot be traded by themselves in the market; commodity owners have to voluntarily reciprocate in order for the trade to be accomplished. For this to happen, both individuals have "to treat each other as private owners"[73] in a legal relationship under the form of a contract. In a capitalist system, there are relations of production where the bourgeois class uses part of its capital to buy labor-power as a commodity. For the capitalist money owner, in order to find labor power as a commodity on the market, it is necessary that "its possessor —the individual whose labor power it is— offers it for sale or sells it as a commodity."[74] For that to occur, the worker must have it at his disposal as the untrammeled owner of his capacity for labor. Both the capitalist and the worker have the same rights, they are equal in the eyes of the law, and "with this difference alone, that one is buyer, the other seller."[75] In this way, the capitalist has to find free workers on the market: "…free in the double sense that as a free man he can dispose of his labor-power as his own commodity, and that on the other hand he has no other commodity for sale, is short of everything necessary for the realization of his labor-power."[76]

Therefore, the concept of freedom in capitalism does not turn out to be as idyllic as the neoliberal intellectuals suggest. The worker, the owner of the labor-power, is only capable of using it as a commodity, as an exchange value and not as use value. This is what liberalism called freedom.

It is in relation to this that the matter of the freedom of nature in capitalism arises. First, under the *Pachamama* discourse, the Rights of Nature appear in an idyllic form to the ecologists who in good faith generally hold the indigenous world vision of respect and equality towards nature and try to defend nature from harm caused by human beings. Yet, what underlies this legal idyll? If we go back to Marx's criticism of legal equality and a worker's freedom to sell his labor-power as a commodity–because it is the only thing he possess after the social nature and the use value of his work was taken from him, nature (or natural and animal resources) with legal equality before capitalists (who own the money to buy labor-power as a commodity) obtains its legal freedom to sell its labor-power. We know that in the Marxist theory this is impossible because labor-power can only be offered by human beings since only they can increase the value of other commodities through their human work. However, nowadays, as explained above, the notion of Payment for Environmental Services emerges as a sort of payment for the work of nature. As regards the Ecuadorian case and the entry of projects like REDD and REDD+, we can see that these aim at the commercialization of nature

[73] Karl Marx, *Capítulo II, El proceso del intercambio*, in El Capital 103 (Siglo XXI ed. 1975).

[74] *Id.* at 203.

[75] *Id.* at 204.

[76] *Id.* at 205.

through environmental services by using the original legislation of the Rights of Nature. From this consideration on the legal freedom of nature we can infer that a political and legal project like the Rights of Nature, despite its good intentions and libertarian convictions, can be associated with capitalist reproduction and accumulation, and this not simply because it was originally intended to be useful for capital, but because of its lack of theoretical precision from a political-economy point of view, which ends up being partially in favor of the imperialist and neoliberal hegemonic model.

V. Conclusions

The analysis of the relationship of forces in the current historical bloc is fundamental in order to understand the risk that a progressive environmental project can have by legitimizing a destructive project that promotes capitalist accumulation in its modern neoliberal form.

We can frame the Rights of Nature, and all the progressive matters included in the Montecristi Constitution, as part of a project that has been subalternized by the fact that it was the result of a disperse struggle that lost the battle at a very early stage. The fact that Alberto Acosta's group and various members of social movements quit the Constitutional Assembly in 2008 is an important event for understanding the contradictions of the Alianza PAIS administration and the lack of organization between the Ecuadorian political and civil societies.

The schizophrenia exhibited in speeches, as well as the conflicts in the Assembly and many government actions, were reflected in the Constitution. The diversity of concepts like nature, natural resources, natural heritage, a healthy environment, and so on, end up causing much confusion and many ambiguities regarding their uses. Even though it is true that the new Constitution differs from the previous one (of 1988) by not explicitly opening the doors to neoliberal privatization policies, there are certain articles, such as Article 316 that allows the State to make exceptions to delegate participation in strategic sectors and public services to private enterprise.[77] As said before, the same articles of the Rights of Nature, mostly Article 74, can lead to the State's permission to decide on the regulation of these rights without refusing entry to the private sector.

Therefore, the subalternity of the projects proposed by social groups in favor of indigenous rights or the Rights of Nature has presented itself in the text itself of the new Constitution. The ruling groups' scheme, in this case those represented by Alexis Mera and those backed by immense amounts of financial capital, is made apparent by the fact that Mera was appointed Legal Secretary in Correa's administration. In the words of Esperanza Martínez,

[77] Pablo Ospina Peralta *supra* note 23 at 136.

Ecuador is part of a "mutant neoliberalism that strengthens the State, but in a partnership with transnational business interests."[78]

So now we have found ourselves faced with political projects that do not stop being subaltern, even though they wish they were, because they are subjected in many ways to the neoliberal hegemonic project. At this point, it is interesting to bring up Gramsci's thoughts on overcoming subalternity by taking power in the form of historical unity as a leading class in the State, as "a result of organic relations between the State or political society and civil society,"[79] known as the comprehensive State. In this sense, the fact that Alianza PAIS, as a left wing and anti-neoliberal grassroots movement, has arrived to power, does not mean that it has political hegemony. As Gramsci points out:

> The political direction turns into a position of dominance, to the extent that the incorporation of the elites of the enemy classes leads to their decapitation and to their powerlessness. There can, and must be, political hegemony even before the arrival to government and one should not only count on power and the material force has to exercise direction or political hegemony.[80]

In such a way, it may be that before its arrival to government, Alianza PAIS had political hegemony. However, the process that followed could not achieve an effective unification between political and civil societies. A visible example of this is the division within the Constitutional Assembly. Moreover, it did not absorb the enemy classes in an alternative hegemonic project and, surely, by trying to do so through alliances and specific treaties, it ended up succumbing to the devastating neoliberal project, although in less violently than other counties like Mexico, Chile and Colombia. One example of the hegemonic neoliberal project's assault on Ecuador is the continuance of subalternity in environmental projects like the Rights of Nature.

As we have seen, under neoliberalism the dispossession and privatization of land and resources can be carried out through new discourses, like the ones referring to conservation. Nonetheless, it must be pointed out that the dispossession of territory and capital hegemony has not only existed now and under these terms. This is why a real solution to environmental problems like deforestation and resources extraction cannot be solved under a welfare capitalist State.

Projects that seek for a real solution to the problems of ecocide, dispossession, and the environmental crisis need to be clear about that in order to achieve it. Good intentions and marvelous legal initiatives are not enough. The underlying political issues are much bigger and much more complex

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[78] Interview with Esperanza Martínez *supra* note 35.

[79] Antonio Gramsci *supra* note 4 at 182.

[80] *Id*. at 107.

than a simple decree or speech. To make a real change in the socio-economic metabolism, it is necessary to set out an alternative hegemonic project that aims at overcoming resistance and suggests new bonds between the political class and civil society. It is necessary to establish a new historical bloc that can overcome the current crisis by creating new ways of social reproduction and always starting with a criticism of the current exploitation system, the exploitation of man-by-man, capitalism.

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THE MODERN POSSIBILITIES OF HUMAN RIGHTS. A CRITIQUE OF THE *NEGATIVE CRITIQUE* OF LAW AND RIGHTS

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> *"I knew that it is not only over different works, in the long course of centuries, but over different parts of the same work that criticism plays, thrusting back into the shadow what for too long has been thought brilliant, and making emerge what has appeared to be doomed to permanent obscurity".* Marcel Proust (1925:1062). The Guermantes way.

Abstract: *This note analyzes the relations between human rights discourse and Critical Legal Theory, focusing on what can be called "the negative critique of law and rights". Although the negative critique is important to any kind of critical approach (especially those which deal with something that seems beyond the possibilities of the critique), the note presents the multiple problems of the total rejection of human rights in contemporary societies.*

Key Words: *Critical Legal Studies, Marxism and law, Critical Legal Thinking, Human Rights, Negative philosophy.*

Resumen: *El presente trabajo analiza las relaciones entre el discurso de los derechos humanos y la Crítica Jurídica, y se enfoca principalmente en lo que puede llamarse la "crítica negativa" al derecho y los derechos. A pesar de la importancia que tiene la crítica negativa para todo discurso crítico (especialmente para aquellos que estudian algo que parece estar más allá de las posibilidades de la crítica), el artículo presenta los múltiples problemas que existen en un rechazo total a los derechos humanos en las sociedades contemporáneas.*

Palabras Clave: *Crítica jurídica, Marxismo y derecho, Pensamiento jurídico crítico, Derechos humanos, Filosofía negativa.*

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I. Introduction

As a member of the group "*Crítica Jurídica Latinoamericana*" (Latin-American Critical Legal Thinking or "CriJur")[1] and as someone who presents himself as a critical legal thinker, I am used to hearing some questions about the Critical Legal Thinking (CLT) as well as objections or responses to certain statements allegedly used by the CLT "in general". In some cases, behind these reactions it is possible to find misunderstandings about the CLT approach to law and rights,[2] but mostly, there are wrong generalizations of certain forms of critique or the presumption that the thought of a particular critical theorist is a perfect and inclusive representation of the general (and homogenous) CLT.[3]

[1] To see the history of the group, see Antonio Carlos Wolkmer, Introducción al Pensamiento Jurídico Crítico (Instituto Latinoamericano de Servicios Legales Alternativos 2003). Nevertheless, it must be recalled that CriJur is not an adaptation of European or North American critical approaches thre are histories of actual hutheWolkmer, 2003. It is not an adaptation of European the law, there are histories of actual huto the law and the rights thre are histories of actual hutheWolkmer, 2003. It is not an adaptation of european the law, there are histories of actual hu, as the global north visions try to present, but one of the most influential perspectives in the construction of the Critical Legal Thinking (CLT), based on the practical struggles for the common people in Latin America made by lawyers, activists, academics and other people. To understand the power of this differentiation, see Oscar Correas (2013), "Conferencia Inaugural" in *VIII Conferencia Latinoamericana de Crítica Jurídica Jornada Argentina*, Universidad Nacional de La Plata, La Plata, *available at* http://www.youtube.com/watch?v=f7WdKU8nkbs (February 15, 2015).

[2] Cf. Motoaki Funakoshi, *Taking Duncan Kennedy Seriously: Ironical Liberal Legalism*, 15 *WIDENER LAW REVIEW* 1, 231-236 (2009): to see good abstract and possible answers.

[3] Cf. Ronald Dworkin, El imperio de la justicia, De la teoría general del derecho, De las decisiones e interpretaciones de los jueces y De la integridad política y legal

The first impulse when someone raises these arguments is to try to explain "*what is the CLT*". Nevertheless, this can be hard: to make a "general explanation" of the CLT or to present a particular approach under the assumption that it can incorporate all the CLT, is to make exactly the same mistake that is being criticized. On the contrary, if the critical perspectives have something in common it is the capacity to see the difficulties that can be generated from a univocal definition,[4] specially to understand something so broad and dynamic as the CLT.

However, this does not mean that definitions are useless or impossible. The problem with definitions is the possibility of a "closed category" that could be understood as a complete (and in this sense, eternal) representation of the reality.[5] In this case, the definition is presented as the reality itself, and creates a strong normative power over others in their relation with both the definition and the reality. It creates a "Procrustean bed,"[6] in which every interpretation/creation of the world must be adapted to be understood as correct.

For the critical theory, these kinds of limits are just a way to create an ideological naturalization of the *status quo,* presenting the "existence" as the only possible reality. So, it is necessary to understand and accept the existence of open categories,[7] definitions that are not perpetual and immutable but adaptable and changeable.[8]

It must be considered that there is a possible paradox in this statement. If the possibility of a closed category is accepted, so should be the existence of some kind of essence or nature that could be used to create those categories. We need to remember that even when they are presented as such, the necessary dynamism of a definition, the multivocal[9] characterization of every concept, the complexity of the social and limited phenomena that we call "reality", make impossible a closed definition of anything at all. Just like the proverbial shield of Achilles,[10] even if definitions are the most detailed and

como clave de la teoría y práctica, 191-197 (Gedisa 1992). All translations from works in another language are my own.

[4] Mauricio Beuchot, Tratado de Hermenéutica Analógica (Universidad Nacional Autónoma de México 2009).

[5] Max Horkheimer & Theodor W. Adorno, Dialéctica de la Ilustración, 29-32 (Akal, 2007).

[6] Ovidio, Las Metamorfosis (Editores Mexicanos Unidos, 2008) talks about Procrustes and the way he used to treat the people who accepted to sleep in his place. When someone was bigger than the bed, he just cut their feet or heads off. If they were shorter, he used it like a torture rack until the person died.

[7] That is, categories that are understand as mutable and unfinished artificial constructions of an epistemological work and not as "objective" representations of the "reality".

[8] Karl Marx, Introducción General a la Crítica de la Economía Política/*1857*, 50-59 (Siglo XXI, 1974) (1857).

[9] Beuchot, *supra* note 4.

[10] The shield of Achilles is described in the book eighteen of the Iliad in the most detailed way possible. Nevertheless, there are multiple interpretations of its meaning, and even physical

explicit descriptions, they will not say the same thing to different people or not even to the same people in different contexts.

The aim of the present paper is to explain a concrete practice of human rights: the construction of theorizations that produce and generate the rationalities and epistemic presumptions which are leading to the other practices involved in this social process. Although problematic,[11] this point of view remembers us that "*all the social life is practice*"[12] and every interpretation of the world (even in a theoretical way) is a way to transform it.[13]

In this sense, this note begins with the settings, the characteristics, and the differences between the traditional and critical theories in a reinterpretation of the Frankfurt School perspective. In a second part, it tries to present how this theoretical framework can help us understand the law, both in a negative and a positive way. Finally, I put forward the idea of the rights and how they are observed by the negative criticism.

II. Critique and Theory

1. *The Concept of Critique*

Besides the multiple *interpretations* that the word "critique" can have, there are different possible *meanings* of it. It is possible to compare the "Critique of pure reason",[14] in which the word critique can be used as a synonym of a "detailed analysis," which presents itself as a *neutral description*, or the "Contribution to the critique of the political economy,"[15] in which there are both an analysis and a political perspective about the subject, with the phrase: "the patient is in critical condition", to see some of the differences between the meanings of the word.[16]

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representations, with an important number of differences between them. Cf. Homero, La Iliada, 478-608 (Universidad Nacional Autónoma de México, 2014).

[11] As the impossibility of the theory to be understood as a practice in Adolfo Sánchez Vázquez, Filosofía de la Praxis (1980).

[12] Karl Marx, *Tesis sobre Feuerbach* in La Cuestión Judía y Otros Escritos (Planeta, Agostini, 1994).

[13] I use in this case the most known phrase of the *Thesis about Feuerbach* to make "another turn of the screw". The interpretation is always a transformation; nevertheless. Only the critical perspectives accept the union of these characteristics and in this sense, only for them it is possible to use the transformative process in an emancipatory way. Ernst Bloch, Principio Esperanza 1, 11 (Trotta, 2008).

[14] Immanuel Kant, Crítica de la Razón Pura (Colihué, 2007)

[15] Karl Marx, Contribución a la Crítica de la Economía Política i (Progreso, 1989).

[16] Oscar Correas, Crítica de la Ideología Jurídica, 135,147 (Universidad Nacional Autónoma de México, 1988) finds at least seven possible meanings of "critique," including these three.

Leaving aside the idea about the "critical condition", we can see a similarity between the others: the critique is a detailed analysis about something. The difference between them is political: In the first case, the analysis starts with the idea that it is possible to separate the "object" under study and the "subject" who is studying. Moreover, the separation is possible even between the process of knowledge itself and the constitutions of the subject and the object. Despite the ideological power of this idea,[17] there are some examples of attempts to prove it wrong: "The critics, on the other hand, share the idea that the science intervenes on the production and construction of its own object, at the same time they explain it by categories and concepts. In this way, it can participate on the realization of its attributed social functions and in the fictions that structure it."[18]

In this sense, we need to remember that the word "critique" shares the same etymological root with the word "crisis".[19] This is not just a coincidence; the long traditions of critical studies recognize themselves as they put *in crisis* (or maybe we can say that they *unveil* the permanent crisis) the domination relations experienced in our societies. In contemporary times, it must be said that they put in crisis the apparently completeness and perfection of capitalism. Even if some theory presents itself as critical, we need to search for this post–capitalist, or even more important "post-domination" horizon, to classify them as traditional or critical approaches.

As we have seen so far, there are two ways, perhaps not mutually exclusive, of theorizing. This division, which assumes the existence of a "traditional" way to make theory and a "critical" one, arises from Max Horkheimer's work.[20]

2. *Traditional Theories and Critical Theories*

According to the vision of this author, there are multiple ways of doing and classifying theories. The central classification, nevertheless, is based on the idea of tradition or critique. Perhaps the most important difference between them is that while traditional theories assume the naturalness, immutability, need, or essentiality of certain elements as historical, critical theories struggle against this vision. A good example of this is the Marxist analysis: "*the purpose of Marx's analysis was to undermine the apparent solidity of bourgeois categories, to show that they were not given by nature but expressed historically transient forms of social relations*".[21]

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[17] Cf. Norberto Bobbio, *La filosofia política y la lección de los clásicos* in Teoría General de la Política, 86-89 (Trotta, 2003).

[18] Alicia E. C. Ruiz, *Derecho, democracia y teorías críticas de fin de siglo* in Idas y Vueltas Por Una Teoría Crítica del Derecho, 5 (Editores del puerto, 2001).

[19] John Holloway, Cambiar el Mundo Sin Tomar el Poder, El Significado de la Revolución Hoy (Sísifo ediciones, 2010).

[20] Max Horkheimer, *Teoría tradicional y teoría critica* in Teoría Crítica (Amorrortu, 2008).

[21] John Holloway *El Estado y la Lucha Cotidiana*, 24, 13 (Cuadernos políticos 1980).

For traditional theories, the "facts" exist for themselves and they have a completely independent nature of social relationships through which they are "manifested".[22] To this kind of approach, if there are variations between two different observers while approaching an "object" must be a mistake from one or even both of them. As the "object" (and with this concept it is possible to talk about a stone, a river, the manual labor in the south of Coimbra, etc.) exists by itself, it has some implicit and natural characteristics that cannot be changed at all by the interpreters, but only misunderstood. This kind of essentialism implies the belief that the world is something immutable, which exists outside of us and therefore we have no choice but to accept it.[23] This is certainly a theory of immobility, which leads to thinking that nothing can be transformed, so the only way to achieve social harmony, is precisely to put away the idea of transformation.[24]

On the other hand, critical theories understand that "*the circumstances are changed by humans*".[25] In capitalistic societies, "the world", "the reality," is just presented as a group of facts, as "something" that has an independent and previous existence. In this sense, we just need to "observe" and to analyze it. Nevertheless:

> By critical theory I understand all kind of theories that do not accept the reduction of the "reality" to what exists. The reality, however you want to conceive it, is considered by the critical theory as a field of possibilities, and the work of the theory is precisely to define and evaluate the nature and the space of the alternatives to what is given empirically. The critical analysis of the existence is based on the presumption that what already exists cannot fulfill the entire existence, so, it is based on the idea that there are alternatives that allow to go beyond what is criticized in what exists.[26]

Villages, houses, clothes, law and rights, all the social process that Durkheim tries to present as "things", are products of the general social praxis. This means that they are socially preformed in two ways; both the process

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[22] Maybe the most important example of this can be found in the work of Émile Durkheim, Las Reglas del Método Sociológico, 7 (Editorial Folio, 2007) for whom "the social facts must be treated like things".

[23] In some cases, this is even presented as the best possible world. Cf. G. W. Leibniz (2005) *Theodicy/Essays on the Goodness of God, the Freedom of Man and the Origin of Evil*, The Project Gutenberg Ebooks (February 28, 2016), http://www.gutenberg.org/ebooks/17147.

[24] This is not a random idea. Durkheim itself used it when he talked about the social division of labor. Cf. Émile Durkheim, La División del Trabajo Social (Colofón, 2002).

[25] Marx, *supra* note 12.

[26] Boaventura de Sousa Santos, Crítica de la Razón Indolente. Contra el Desperdicio de la Experiencia. Para un Nuevo Sentido Común: La Ciencia, el Derecho y la Política en la Transición Paradigmática, 23 (Desclée de Brouwer, 2003).

and the subject that interprets them are part of the history itself,[27] and they perform a historical process when interacting with each other.[28]

There is evidence that ancient Greeks had theoretical and technological knowledge for line production and mechanization. Even so the potential transformation of the production of goods and social relations[29] had to wait for the emergence of a specific set of knowledge, ways of understanding, apprehending and living in the world in order to be considered possible.[30] The Greek's small steam —propelled toys or the ships with steam engines presented to the German— Spanish king Carlos V, were just curiosities without any kind of practical application for them. They could change the history of the world, but the social and economic characteristics of both societies did not adjust to the social transformation required for that.

The importance of these examples is not to present the idea of some kind of "nature" or "essence" of Ancient Greece or Medieval Spain, but to confirm the relevance of the historical, social and economic process in the "creation" of the "products". To present itself as a social necessity, the line production needs the existence of the "commodity," a specific form of social relationship that did not exist before capitalism.[31] It is based on the separation of the worker and the product of his work and the appropriation of the result of this separation by another. Without the necessity of mass production in modern societies and without the specific form of social relation called commodity, with a political system based on the slavery and without the idea of the surplus value, the steam machine was not able to transform the social way of production, although the physical apparatus was already invented.

This attempt to hide the historical and social construction of the "objects" happens in theoretical and scientific work too. In a society where the social division of labor implies more than just a neutral separation of specialized knowledge, which is presented as a non-ideological process of differentiation based on specific requirements generated by external and autonomous entities, all the elements are in a constant process of fetishization, in which *theory* is separated from *science*.[32] In this way, science can be presented as "clean and neutral," different and separate from the process that allows the existence of historically defined theories. However, this kind of artificial division forgets that:

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[27] Horkheimer, *supra* note 20 at 233.

[28] Pierre Bourdieu, El Oficio de Sociólogo (Siglo XXI, 2008).

[29] Karl Marx, *Trabajo asalariado y capital* in La Cuestión Judía y Otros Escritos, 315 (Planeta, Agostini, 1994).

[30] Juan Ramón Capella, Fruta Prohibida. Una Aproximación Histórico Teorética al Derecho y al Estado (Trotta, 2008).

[31] Karl Marx, El Capital, Crítica de la Economía Política, 37 (Fondo de Cultura Económica, 2008).

[32] Max Horkheimer & Theodor W. Adorno, *Filosofía y división del trabajo* in Dialéctica de la Ilustración, 262-263 (Akal, 2007).

> Neither the structure of the production, divided into industrial and agrarian, nor the separation between the so called directive and executive functions, between services and jobs, or manual and intellectual occupations, are eternal or natural situations; however, they come from the specific mode of production of a specific society. The illusion of independence offered by work processes (which run itself, correspond to) the apparent freedom of economic subjects within bourgeois society. They believe they act based on personal choices, when, even in its most complicated speculations, they are exponents of the ungraspable social mechanism.[33]

Within these arguments, there are strong refutations to the ideas of "progress" and "development". While in the political and economic-social sphere these concepts have been widely criticized and its indiscriminate use has decreased, sciences, especially those involved in technical issues, maintain some kind of evolutionary discourse. The history of science and technology is still seen in many cases as a progressive linear story, in which scientific and technological knowledge is always enhanced and never diminished. The traditional discourse about them presents the idea that we know more now than before, in more "efficient" and "accurate" ways, even if these concepts are not properly explained, but just understood as intuitive or obvious. It is a knowledge based on a *proleptic reason*,[34] which does not need to explain or justify itself.

A critical stance, on the other hand, remembers that these processes are not isolated, unique, or unidirectional. A "paradigm shift"[35] in science is not brought about by the logical qualities of the new system; it does not occur because the new approach is more accurate or actually "better" in an abstract and essential way than the previous visions.[36] A change of this type is part of a complete social reconfiguration. The transformation of a system of production and reproduction (both material and social) allows the appearance, the visibility of specific wisdoms and knowledge that maybe already existed in the previous configuration. The difference between them causes that in the new one, some perspectives can be presented as "superior" than others. This does not mean that they are superior in every aspect, but only that that it fits better in the social transformation itself.[37]

When a social reconfiguration arises, the legitimate knowledge creates the idea of its own superiority because it produces, at the same time, the criteria and parameters to be applied in assessing and qualifying all kinds of informa-

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[33] Horkheimer, *supra* note 20 at 231.

[34] Boaventura de Sousa Santos, *La sociología de las ausencias y la sociología de las emergencias: para una ecología de saberes* in Renovar la Teoría Crítica y Reinventar la Emancipación Social (encuentros en buenos aires), 21 (CLACSO, 2006).

[35] Thomas S. Kuhn, La Estructura de las Revoluciones Científicas (Fondo de Cultura Económica, 2002)

[36] Horkheimer & Adorno, *supra* note 32 at 229.

[37] Cf. Michel Foucault, La Arqueología del Saber (Siglo XXI, 2007).

tion. The creation of this monoculture of knowledge and rigor[38] disavows every representation of the reality outside its own parameters. When this happens, it is easy to observe an improvement of the previous conditions, and at the same time, to ignore the negative aspects of the new configuration. Against this idea, the critical perspectives need an ecology of knowledge[39] to embrace the multiple points of view of the society and at the same time, to avoid the problems of univocism.

In this scenario, it is clear that critical theories are only possible with hope; but as Bloch said: "*hope, situated above the fear, is not passive nor closed in self-emptying*";[40] hope is action, just like all kind of critique: *"there is not such thing as knowledge without praxis, so the "critical" knowledge will be the one that is related with certain kind of action that brings the transformation of the reality,"*[41] and even most important, action for a better world.[42]

III. Critical Legal Thinking

1. *Traditional and Critical Theories of Law*

Based on the above, it is possible to talk about two different, but not mutually exclusive groups of theories: traditional theories and critical theories of law. We can understand as a traditional theory every theoretical (and practical)[43] approach that begins with the acceptance of some presumptions about the law, the state or the rights based on the same discourse it tries to explain, and that presents them as natural, external or immutable. For traditional theories, there are certain dogmas that need to be accepted if you want to participate in a legal system, and even if you want to make critiques of that system or to transform it.

According to these approaches, to make a critique about the legality of a concrete action, e.g. the arbitrary detention of an "illegal alien", requires the acceptance of the rules that create the legality itself. This means to accept the required division between the society in which the only role of some people is to accept and obey the rules, while others are legitimate to create, interpret and apply them in exclusive. In the same way it is necessary to accept the legitimacy of the categories that are used in the particular case, and as a consequence, the possibility to use them in other cases. If someone

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[38] Santos, *supra* note 34 at 23.

[39] Boaventura de Sousa Santos, *Más allá del pensamiento abismal: de las líneas globales a una ecología de saberes* in Una Epistemología del Sur, 183-184 (Siglo XXI, 2009).

[40] Bloch, *supra* note 13 at 25.

[41] Luis Alberto Peluso, O Projeto da Modernidade no Brasil,44 (PUCCAMP, 1994)

[42] Correas, *supra* note 16: 135.

[43] About the problem of the theory-practice division, cf. Immanuel Kant, *En torno al tópico: Tal vez eso sea correcto en teoría, pero no sirve para la práctica* in Teoría y Práctica (Tecnos, 2002).

tries to complain about these topics, he or she will be dismissed as "political" (meaning not "neutral" or "objective"), and the critique will be diluted as a "political critique", one that goes beyond the possibilities of the law and does not affect the application of the rules. Along this process, the category "illegal alien" and the social division of power needed for such a category to mean something are presented as external and previous to the law, therefore avoiding the social reproduction that happens inside it.

A good example can be illustrated in the "point of view" of law.[44] The internal point of view is developed by the people who feel constrained by the rules of a legal system, and the external point of view is only possible if you look at the legal system as a non-mandatory set of rules that do not apply to you. The first case is presented by the citizens of a state or by the people of a community about their own law. The second can be found in an anthropologist that observes a different community without participating in it. Hart thinks that only the people who enjoy an internal point of view are able to see the legal system "as it is". For the anthropologists, the rules of a community will be impossible to understand as a legal system, and they will study them like something else. If this is true, the only way to make a critique about the legal system itself is to be "inside" it, and that means to accept the rules of the system as the limit of the critique. In this way, Hart makes it impossible to be inside a legal system without recognizing it as in force. The critiques made by anthropologists will not be "legal" critiques, but some other kind.

For the critical theories, those divisions between internal and external are artificial; methodological preferences that can and in some contexts must be fought against. If you accept the internal point of view as Hart presented it,[45] every kind of struggle (about interpretation, power or application) will be a struggle *inside* the discourse of the "actual law" and not *for* the construction of a different legal reality.[46] In this sense, these theories believe that it is possible to make an internal point of view that does not accept all the rules of a system. At the same time, the point of view that is called "external" by this division is just as important as the internal to understand the law. Unsurprisingly, it is common to find critical perspectives that reject the strong disciplinary division proposed by traditional theories.[47]

2. *A Possible Division of Theories of Law*

At this point it is worth mentioning that not all traditional theories of law should be understood as the same. Multiple categories can be identified, be-

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[44] Herbert Lionel Adolphus Hart, The Concept of Law, 102-103 (Oxford University Press, 1997).

[45] It is important to notice that the methodological approach of an internal and external point of view can be reformulated in a critical way. Cf. Correas, *supra* note 16: 140 & ff.

[46] Cf. Michel Foucault, L'ordre du Discours (1970).

[47] E. g. in Hans Kelsen, Teoría Pura del Derecho (Porrúa, 2008).

cause the order of the concepts is not "natural".[48] To make this point, it is possible to establish one concrete division inside them. The first kind of traditional theories are those that make an apology for the actual existence of the law. For them, the present configuration of the legal system is the best possible. The law and rights work as required, in every space. When these theories talk about the improvement of the law or the rights, they are actually talking about strengthening the legal institutions, rules and legal process *within* the legal system. To the extent that one can identify some problem with the legal *system*, it is due to external factors, such as the "culture" or the "education" of the community, but not because of the nature of the legal system in itself.

Next to the *apologetic visions of the law,*[49] we can find the *renewing approaches.* For them, the *ideals* of rule of law, legality or rights are correct, but the concrete applications of them in the factual world encounter some troubles. The leading idea of this approach is not the transformation of the presumptions of the law and rights, but some adaptation of the practices in which those are materialized. In doing so, it does not problematize the ideas, but just tries to improve the practices inside the law. In some cases, some improvements in the material life of the people can be accomplished, but the major impulse of this kind of theory is not to make such endeavor. Just like the apologists, subscribers to this approach believe the objective of every theory of law is to describe and understand, and if they make it right, then the society can benefit from that. But if this does not happen, the responsibility will not be on the legal dimension.[50]

In some moments, theories and practices start from a renewing approach to the law and eventually they realize that there are internal contradictions in the ideals they are following. In those cases, they start thinking about the possibilities of transforming those ideals, but always to improve what they believe are the most important needs of the system. They recognize the benefits of the actual existence of the legal institutions, concepts, practices and ideals; they use them both theoretically and in other daily practice; they do not want to abandon the general idea of the law or the existence of rights, but they recognize that there are problems on them, some of which cannot be resolved. When we find this kind of approaches, we can thus talk about a *positive critical theory*.[51]

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[48] Michel Foucault, Las Palabras y las Cosas, 7-8 (Siglo XXI, 2009).

[49] Florencia Correas, Alcances Sociológicos del Derecho de Trabajo en México (Coyoacán, 2004).

[50] For instance, we can see the French "sociological positivism" of law. They were followers of Émile Durkheim and believed that the contemporary institutions of the law do not represent the ideal of the rule of law in the modern society. Instead of talking about "legal personality", "obligations" or "rights", the rule of law needs to start with the idea of social function. *E.g.* León Duguit, Las Transformaciones Generales del Derecho Privado desde el Código de Napoleón (Coyoacán, 2008).

[51] Oscar Correas, *Acerca de la crítica jurídica* 5, *EL OTRO DERECHO* 1 (1990).

In some moments, the theoretical approach to certain parts or to what is understood as the totality of this system is problematized in a different way. When E. B. Pashukanis talks about the incompatibility of the idea of law with the communist society, and the historical necessity to disappear this kind of social relationship,[52] he is making a *negative critical theory.* The major difference between the positive and the negative critique is not the "good" or "bad" opinion about the effects or existence of the law and rights, but how they understand the ideas of transformation and reality.

According to a negative perspective, "reality" is just one of the possibilities of existence in a certain moment, an existence in which all the other possible realities that could also exist are denied. Each of these other "denied realities" proves that the existence can be different and in this sense, there is a continuous struggle between the reality that exists and the other possibilities. The mutual opposition between them proves that the struggle is a central part of the existence, and that the reality "as it is" can and even must be changed:

> The starting point of theoretical reflection is opposition, negativity, struggle. It is from rage that thought is born, not from the pose of reason, not from the reasoned-sitting-back-and-reflecting-on-the-mysteries-of-existence that is the conventional image of "the thinker".
>
> We start from negation, from dissonance. The dissonance can take many shapes. An inarticulate mumble of discontent, tears of frustration, a scream of rage, a confident roar. An unease, a confusion, a longing, a critical vibration…
>
> That is our starting point: rejection of a world that we feel to be wrong, negation of a world we feel to be negative. This is what we must cling to.[53]

Within the negative critique of the law and the rights, for any kind of use of legality, the legal system and even the rights would be useless or even counterproductive to improve the conditions in society, because they would reinforce the existing problems,[54] as a process of legitimacy of the actual conditions, or as a simple waste of time.[55]

IV. The Negative Critique of Human Rights

Since World War II, human rights have attracted an increasing and incontestable relevance worldwide.[56] The effects (both helpful and perverse) of the *positivization* process started with the Weimer and the Mexican constitutions,

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[52] E. B. Pashukanis, Teoría General del Derecho y el Marxismo (Grijalbo, 1976).

[53] Holloway, *supra* note 19 at 5-6.

[54] Max Horkheimer, Estado Autoritario, 36 (Ítaca, 2006).

[55] Georg Lukács, *Legalidad e ilegalidad* in Historia y Conciencia de Clase, Estudios de Dialéctica Marxista (Razón y Revolución, 2009).

[56] Norberto Bobbio, El Tiempo de los Derechos (Sistema, 1991).

both in local circumstances and with the Universal Declaration on international law. They started a new era in liberation struggles and their importance increased with the fall of other discourses and imaginaries of emancipation, like "real socialism".[57]

The possibilities that the human rights discourse brings to the legal arena can be considered responsible for the unusual optimism of the theory and the practice of the law. The Neoconstitutionalism put the "fundamental rights" (claims converted to constitutional rights with universal pretention) as the foundation of a new era of the "rule of law".[58] The modern iusnaturalism states that the rights are the last stronghold from which they can fight against the formalism of positive law.[59] Despite the possibility of ideological uses of human rights, they are accepted and used in legal practice and theorization for most of the critical legal thinkers.[60]

However, this optimism is not shared by everyone. There are some voices trying to remind us that in the past we have heard the song of different mermaids, with dreadful results. After all, the capitalism has proved to be an excellent mask maker,[61] and human rights can be easily transformed into nothing more than a domination process. In this sense, we can find two different forms of negative critique of human rights. For the first one, the major problem can be found in their *ideals;* for the second, the most problematic issue about them is their *results.*

1. *The Negative Critique Based on Ideals*

For some authors, the so-called ideals of human rights are just ideological attempts to present liberalism as the only valid source of legitimation on moral issues. In this sense, the critique of "individualism" as a reference to the construction of a moral idea,[62] or the social division of the community

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[57] Boaventura de Sousa Santos, Sociología Jurídica Crítica. para un Nuevo Sentido Común en el Derecho, 506, 508 (Trotta, 2008).

[58] Cf. Luigi Ferrajoli, Los Fundamentos de los Derechos Fundamentales (Trotta, 2001).

[59] E. g. Robert Alexy, Teoría de los Derechos Fundamentales (Centro de Estudios Constitucionales, 1993).

[60] Oscar Correas & Ana María del Gesso, *Naturaleza lingüística y origen de los derechos humanos* in Acerca de los Derechos Humanos, Apuntes para un Ensayo, 11-20 (Coyoacán, 2003).

[61] Marshall Berman, Todo lo Sólido se Desvanece en el Aire, 165 (Siglo XXI, 1998): (o) *ur era has found new forms of putting masks and mystify the conflicts. One of the most important differences between the XIX and the XX century is that our own century has created a grid of new halos to replace those took away by Marx and Baudelaire.* He use of partial and fragmentary discourse of claiming as the human rightscial hardship legal system.

[62] Antoni Domenech, De la Ética a la Política. De la Razón Erótica a la Razón Inerte (Crítica, 1998).

to the formation of new forms of social power[63] can be understood as negative critiques of human rights based on a critique of the ideals behind them.

We can find another way to elaborate this kind of critique based on the idea of hypocrisy of the ideals within human rights. We can see a good example in Zizek's work "Against human rights".[64] At the beginning, the author sets out what he believes are the three main ideas behind rights in order to prove that they are in fact used to veil the true intentions of the ideological project of capitalism and euro-centrism. Nevertheless, the main source of this kind of negative critique is without any doubt developed on the Marxian and classical Marxist work:

> What a terrible mistake it is to have to recognize and sanction in the Rights of Man modern bourgeois society, the society of industry, of universal competition, of private interest freely following its aims, of anarchy of the self-alienated natural and spiritual individuality, and yet, subsequently, to annul the manifestations of the life of that society in separate individuals and at the same time to wish to model the political head of that society after the fashion of the ancients![65]

As we can see, for Engels and Marx the ideals of human rights cannot be fulfilled within the capitalist society; however, this society present itself as the only one in which they can be achieved. This contradiction is maybe one of the most important in the emancipatory process based on the human rights, just as Marx and Engels understood when they put what can be read as human rights claims in the Manifesto.[66]

2. *The Negative Critique Based on Results*

The second group of critiques of human rights in a negative sense is based on the problems that emerge from the application of those rights in daily life. For the negative critiques, the use of something that is based on an unequal power structure can perpetuate the domination of that specific relationship,[67] regardless of the intention or the ideals behind them.

In this sense, the recognition of a right in the legal system can be understood as something useless in the social struggle for emancipation. Even if the "acceptance" of a right or a set of rights can be seen as a success for the

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[63] Sergio Tapia, *Poder como dominación. Una reducción útil para las visiones tradicionales del derecho*, 1, *DERECHO Y CRÍTICA SOCIAL* 2 (2015).

[64] Slavoj Zizek, *Against human rights*, 34 *NEW LEFT REVIEW* (2005) .

[65] Karl Marx & Friederich Engels, The Holy Family or Critique of Critical Critique, 164-165 (Foreign Language Publishing House, 1956).

[66] Karl Marx & Friederich Engels, *Manifiesto del partido comunista* in La Cuestión Judía y Otros Escritos, 270 (Planeta-Agostini).

[67] Horkheimer, *supra* note 54.

realignment of forces in the symbolic power,[68] the negative critique is concerned with the impact of that kind of action. In the first place, the state's recognition of a right means the need for an action about a specific problem of the system.[69] At the same time, the social movements or groups who are fighting for those concrete claims can be demobilized by and through the simple and formal recognition, even without a functional mechanism of enforcement.[70] In most cases, this can lead to a step back in the near future.[71]

For others, the use of legal institutions implies the justification of the legal system as a whole and the abandonment of other ways to achieve the objectives of the specific claims. This is the case of the Critical Legal Studies movement, for which the use of the human rights discourse implies the disappearance of radicalism,[72] and in a certain way, to quit the systemic transformation struggles. In other cases, the use of partial and fragmentary claiming discourse as human rights discourse prevents the configuration of a real and complete political identity, and that means the possibility of articulation with others. The people would use this discourse because of the instantaneous advantage of their own claims, but at the same time it would shut down the possibilities of real emancipation.[73]

V. Conclusion

It is necessary to look at these negative critiques, and take them seriously. They make important observations on the dangers and unintended consequences of using the institutional dimension of human rights. Nevertheless, it is also necessary to remember that their vision is just as incomplete as the others. As Critical Race Studies scholars have shown, for instance, it is easy to disown the formal protection of human rights when you have economic, cultural, and symbolic power to defend yourself without them.[74] In some circumstances, law and rights can be used against others. But it is also possible that the total rejection of the same law or rights could be worse than their strategic use in other contexts.

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[68] Cf. Charles Taylor, El Multiculturalismo y la "Política del Reconocimiento" (Fondo de Cultura Económica, 1993).

[69] Just like the phrase allegedly used by Trostky in an interview, the old idea of that "all the revolutions are impossible, until they become inevitable", can be reformulated to "to have one right is impossible, until the social pressure make it inevitable".

[70] Karl Marx, *La cuestión judía* in La Cuestión Judía y Otros Escritos (Planeta-Agostini).

[71] Marius Pieterse, *Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship*, 29, *HUMAN RIGHTS QUARTERLY* 3, 814-815 (2007).

[72] Duncan Kennedy, *La crítica de los derechos en los Critical Legal Studies* (2006), *REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO* 47, 49-50.

[73] Slavoj Zizek, En Defensa de la Intolerancia (Público, 2010).

[74] Kimberle W. Crenshaw, *Raza, reforma y retroceso: transformación y legitimación en el derecho contra la discriminación* in *CRÍTICA JURÍDICA* (Ediciones UniAndes, 2006).

There is a great danger within the apologetic view of the intrinsic goodness of the rights and the veil that it creates. But at the same time, it is necessary to remember that behind the abstract problems presented on the law, there are histories of actual human beings that can improve their daily life through and with recourse to the law and rights.[75] The fate of a single human must be enough to constrain the critical perspectives to make a generalization[76] about the possibilities of human rights.

The critique must attack the familiar perspective of what exists and at the same time it must try to make a new common sense that can overpower the internal inequalities of the actual reality.[77] In this sense, a critical theory of law and rights should understand the role of the struggle and the contradiction in all of their practices. Both negative and positive critiques are required, at least if we want something more than just a hypocritical discourse or a cynical but harmless practice.

[75] Dworkin, *supra* note 3: 15.

[76] Antonio Gramsci, *Los obreros de la FIAT (Hombres de carne y hueso)* in Odio a los Indiferentes, 27-29 (Arial, 2011).

[77] Santos, *supra* note 26: 15-17.

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