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ARTICLES

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POPULAR CONSTITUTIONALISM AND FORMS OF DEMOCRACY

Jaime Cárdenas Gracia*

Astract: *This article describes the crisis of representative democracy, and the need to bolster modalities of direct, participatory, deliberative and communitarian democracy in order to overcome the rift between the governed and the government. A brief overview of some current constitutional models underlines the fact that critical and popular modes of constitutionalism are absent in Mexico. The conclusion of the article evaluates and critiques the instruments of direct and communitarian democracy that were inscribed into Mexico City's recently approved local Constitution.*

Keywords: *Popular constitutionalism, critical constitutionalism, new Latin American constitutionalism, crisis of representative democracy, Mexico City Constitution.*

Resumen: *El ensayo expone la crisis de la democracia representativa y, la necesidad de fortalecer las modalidades de democracia directa, participativa, deliberativa y comunitaria para superar el divorcio gobernantes-gobernados. Se realiza un breve repaso de algunos modelos constitucionales vigentes y se pone de manifiesto que las propuestas críticas y populares son inexistentes en el constitucionalismo federal mexicano. Finalmente se hace una crítica a los instrumentos de democracia directa y comunitaria aprobados en la reciente Constitución local de la Ciudad de México.*

Palabras clave: *Constitucionalismo popular, constitucionalismo crítico, nuevo constitucionalismo latinoamericano y crisis de la democracia representativa.*

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I. Introduction

A specter is haunting the world, the specter of a crisis of representative democracy. Citizens do not feel represented by parties, nor do they believe that representative institutions are geared towards guaranteeing human rights or democracy. There is a deep fissure between those who govern and those who are governed, and this gap, by some accounts, is responsible for the rise of populist movements. But it is mistaken to view populism merely as a response to a crisis of representation in politics. A South American theorist explains it thus:

> The crisis of representation in politics is a necessary but not a sufficient condition of populism. A complete picture of the situation needs to include another factor: a crisis in the upper echelons where a new form of leadership is emerging and gaining ground as it convincingly presents itself as an alternative leadership that is distinct from the existing political class. This is the form of leadership which most effectively takes advantage of the palpable crisis of representation and it does so by articulating unsatisfied demands, political resentment, feelings of marginalization, and with a discourse that unifies these elements with a reconfiguration of political space through the introduction of an additional institutional crevice.[1]

Beyond the question of whether the global crisis in representative democracy produces populism, it is certain that there is a problem with representative democracy, and that institutional design, including that of Mexico, is embedded in this issue as it is at the center of these principles and characteristics. For these reasons, I am convinced that the solution must include a far-reaching and thorough review of the mechanisms and institutions of this form of democracy, and that merely proposing adjustments to this framework is insufficient. We must ask, for instance, why the most important decisions of

[1] Juan Carlos Torre, La audacia y el cálculo, 145 (Sudamericana, Buenos Aires) (2011).

a polity —those related to the current economic model— are not voted upon by citizens. Or, for example, why free trade agreements or security agreements between Mexico and the United States are not decided through a referendum or a consultation with citizens.

In many representative democratic regimes, the political system allows for the concentration of mass media, especially electronic media, in very few hands, which leads to a deficit of social and political representation. TV and radio licenses, for example, are generally granted to those who are close to big business interests. Once the licensees begin operations they are not bound to air a diversity of news items, rather they tend to reproduce the point of view of those in power. Such a political system cannot fully guarantee the right to information, and thus cannot be considered democratic.

Another way in which the political system is manipulated is through campaign finance. In countries such as the United States, where private campaign contributions exceed public ones, campaign donors, many of which are large corporations, donate money to some candidates rather than others, once their candidate reaches public office, be it Congress or some other institution, he or she will tend to represent the interests of donors over those of citizens.[2] As Ian Shapiro has stated in reference to US democracy, the competitive Schumpeterian system has been substituted by money, and the competition for votes is substituted by competition for donations and campaign spending, leading to a bipartisan domination of electoral institutions and a political model that is ultimately anti-competitive and anti-pluralist.[3]

Another instrument of manipulation of the political system is lobbying in Congress and in other instances of government: powerful economic interests have the resources to ensure professional lobbyists permanently guide and supervise the design of public policy and legislation. In countries such as Mexico, where there is vast inequality, manipulation in favor of the powerful within the political system is carried out through: vote buying and vote coercion; the clientelist use of public programs (the manipulation of poverty for electoral gain); the staffing of electoral management bodies to favor oligarchic interests; the use of government budgets to influence electoral outcomes, taking advantage of weak oversight; the preservation of unaccountable spaces outside of the legal control of the state, where *de facto* powers are protected; the undercutting of direct, participatory, deliberative and pro-citizen democracy; and the inhibition of the exercise of economic, social,

[2] The US Supreme Court's 2010 decision in the case of Citizens United v. Federal Election Commission is well known. In this case, the effect of the Supreme Court ruling was to approve the constitutionality of unlimited campaign spending by the country's largest corporations —private donations with no limits— couched in the argument that this furthered corporate and union's capacity for "freedom of expression".

[3] Ian Shapiro, El Estado de la teoría democrática 207 (Bellaterra, Barcelona) (2005).

cultural, and environmental rights, thereby not addressing or remedying the causes of poverty.[4]

These shortcomings of representative democracy, along with many others, persist in several countries, which from our point of view demonstrates that representative democracy must go through a comprehensive transformation so that politics can link citizen and rulers. Under the current iteration of representative democracy, far removed from citizens with high levels of corruption and impunity, it is evident that this system no longer serves the purposes its creators had in mind when they designed it and put it to practice.

II. Current Constitutional Models: the Role of Popular Constitutionalism

Every constitution is guided by a theoretical model and influenced by the politics of its time. In Mexico, at present, it is evident that the influences of neoliberal globalization and certain traditional positivist influences are behind structural constitutional reforms. However, important contemporary theoretical influences are absent, save for traces of neo-constitutionalism, which appear as a consequence of the constitutional reform in human rights published in Mexico's Official Federal Gazette on June 10, 2011. There is no strong neo-constitutionalist influence in the Mexican Constitution, nor is there evidence of the influence of critical or popular constitutionalism. Influences of new Latin American constitutionalism are also absent.

The most influential versions of constitutionalism in our time are neo-constitutionalism, critical constitutionalism, popular constitutionalism and new Latin American constitutionalism. It is important to reflect on each of these strands and to define their contours to understand if any of these could become an avenue to stand up to the negative consequences of neoliberal globalization.

Neo-constitutionalism or contemporary constitutionalism, both in its continental European and its Latin American form, has a deep Anglo-Saxon inspiration —drawing on Ronald Dworkin, for example— and has encouraged criticism and examination of the traditional theses of positivism.[5] In this view, the constitution re-materializes the body of laws, that is, it implies a hierarchy of values that condition the validity of the norms in the constitution. The constitution is thus the immediate and direct origin of rights and obligations, and is not limited to being the primal origin of the national legal system. The thesis of separation between law and morality cannot be held

[4] Jaime Cárdenas Gracia, La crisis del sistema electoral mexicano. A propósito del proceso electoral de 2012 (IIJ-UNAM, México) (2014).

[5] Miguel Carbonell, Teoría del neoconstitucionalismo. Ensayos escogidos (Miguel Carbonell ed., Trotta, Madrid) (2007).

to be true in absolute terms because the constitution has incorporated the values of justice into its principles. The legislator is no longer the voice of the sovereign, because he or she must adapt their actions to the constitution. In this view, the principle of legality gives way to a principle of judiciality and constitutionality.[6] Interpretation and application of the law have been modified by the inclusion of constitutional principles, as well as the weight of rhetorical argumentation is couched in the logical-formal argumentation of Rights.[7] Constitutional norms do not have the classical structure of legal rules and, hence, are not tenable to being subsumed, or to the application of logical syllogisms. This, however, should not lead to total and arbitrary reliance on the decisions of judges, but rather points to the need for judges to adequately justify their rulings based on varied argumentation techniques, according to theories such as those espoused by Viehweg, Perelman, Toulmin, MacCormick, Alexy, Aarnio, Peczenik, and so on.

Following Guastini, neo-constitutionalism has the following salient characteristics: 1) constitutional rigidity; 2) control of the constitutionality of laws; 3) the binding strength of the constitution; 4) the over-interpretation of the constitution; 5) the direct application of the constitution by judges; 6) interpretation according to the constitution;[8] and finally, 7) the direct influence of the constitution over political relations.[9] In neo-constitutionalism, the interpretation from and through the constitution and treaties is of such importance that it is at the center of legal and constitutional theory.[10] Constitutional judges in continental Europe and Latin America have therefore acquired a surprisingly salient role that has on many occasions displaced that of elected legislators.

Constitutional principles have transformed traditional legal interpretation by stimulating new forms of legal reasoning. The use of the principle of proportionality and the configuration of cases in open instead of closed modalities has also contributed to this transformation. The test of proportionality forces the interpreter to develop a material or substantive rationality that is far more complex than legal subsumption, a rationality closer to moral argumentation. Argumentation based on principles forces the interpreter to use standards of interpretation whose ends place the judge's discretion in a position similar to that which Kelsen or Hart had envisioned.

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[6] Gustavo Zagrebelzky, El derecho dúctil. Ley, derechos, justicia 144-153 (Trotta, Madrid, 2008) (1993).

[7] Manuel Atienza, Las razones del derecho. Teorías de la argumentación jurídica 32 (Centro de Estudios Constitucionales, Madrid) (1991).

[8] This refers to *interpretación conforme*, which is a method of interpreting the law in constant reference to the constitution. It is sometimes referred to as conforming interpretation in English.

[9] Riccardo Guastini, *La constitucionalización del ordenamiento jurídico: el caso italiano*, in Neoconstitucionalismo(s) 49-57 (Trotta, Madrid, 2003).

[10] Luis Rodolfo Vigo, Interpretación constitucional 81-104 (editorial Abeldeo-Perrot, Buenos Aires) (1993).

The constitutional reform on human rights in Mexico, published on June 10, 2011 in the Official Federal Gazette, is clearly influenced by neo-constitutionalism, as is made clear by the fact that it includes the obligation for all authorities to carry out interpretation in accordance to the Constitution along with *pro homine* interpretation (second paragraph of Article 1 of the Constitution). This influence is also clear in the third paragraph of Article 1 of the Constitution which refers to the methods and criteria of interpretation in fundamental rights: interdependence, universality, indivisibility and progressivity. The same could be said about the ruling of the Supreme Court corresponding to record 912/2010 (the case of Rosendo Radilla), which includes the diffuse control of constitutionality and conventionality for all authorities in the country, as well as the ruling to resolve contradicting theses 293/2011 which established with definitive clarity the concepts of Constitutional Block and the Parameter of Constitutional Regularity.

This shift in judicial culture means that the constitutional transformations I have just mentioned imply that some judicial methods and arguments —such as systematic argument or those derived from the principles of interpretation and argumentation— could acquire a far more important role than that which they have traditionally held in the everyday life of authorities and judges. This could also be the case with the use of methods and arguments that arise from the law of treaties, including the link between domestic tribunals and the rulings of supranational bodies. In this vein, we find the *ex officio* constitutional interpretation, which allows courts and authorities to analyze, independently from what the parties have argued, whether the secondary laws that they are about to apply have constitutional and conventional bases and, therefore, if these laws can be disapplied or expelled from the system, or if authorities should proceed with an interpretation according to the constitution, having explored beforehand whether these laws are constitutional and conventional or not.

This is innovative and important for law because it constitutionalizes and conventionalizes every judicial rule in order to protect and guarantee human rights. There are, however, some shortcomings. Alterio's contributions help us identify these shortcomings: 1) the judge, especially the constitutional judge, is given a surprisingly important role, above other established powers, including the legislature; 2) the constitutional judge lacks genuine democratic legitimacy as the members of high courts in any country are not elected by citizens (with the exception of Bolivia); 3) the constitutional judge is often designated by majority political forces in one of the houses of congress, and thus reproduces *status quo* conceptions which are an extension of the main political forces; 4) the constitutional judge represents the elitist conceptions of society, as they themselves come from an elite group; 5) the neo-constitutionalist model distrusts popular participation and believes, along with Ferrajoli and Dworkin, that human rights are not up for democratic debate, while at the same time human rights are treated as trump cards in decision making, and

are a reserved domain; 6) electoral democracy is substituted for what is called substantial democracy —that of human rights and principles— which subordinates political democracy; 7) constitutional control and conventionality is placed above the will of the majority; 8) politics is subordinated to the constitution, international treaties and interpretation; 9) human rights form part of an objective morality that exists beyond the will of people and therefore cannot be limited by majority decisions; and finally, 10) neo-constitutionalism has an undeniable natural law basis.[11]

The neo-constitutionalist model has attracted many and, to the extent that, as in Ferrajoli's theory, there is a proposal to spread constitutionalism around the world in order to counterbalance the noxious elements of neoliberal globalization. However, this model is primarily based on legal theories that are anchored to the scheme of the nation state, which have not yet expanded to include the complexities of the new rights in a globalized world. Additionally, and this may be what is most pernicious to new planetary conditions, these theories rely on an elitist model of law and of democracy which is often opaque because the majority of citizens are uninformed about the reasons and the processes of the courts' decisions or of the motives that politicians had to accept international agreements and treaties which are not voted on by referenda. In other words, neo-constitutionalist theories that adopt a call to constitutional democracy lack democratic elements founded on participation and citizen deliberation.[12] Neo-constitutionalist theories are conceptual schemes that give certain unelected officials who are beyond citizen control the power to define what is and what is not a human right and what scope these rights will have.

Critical perspectives influenced by or originating in Marxism, such as the school of the alternative use of the law,[13] or critical legal studies,[14] have long posited that: 1) the law is used ideologically by its operators in order to defend dominant classes and interests; and 2) there is a historical and instrumental role of the law which contributes to the maintenance of the status quo, and therefore, there is a need to use critical postulates in order to turn the law into an instrument capable of bringing social transformations.

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[11] Ana Micaela Alterio, *Corrientes del Constitucionalismo contemporáneo a debate*, 8 Revista Problema. Anuario de Filosofía y Teoría del Derecho 227-306, January-December (2014).

[12] Carlos de Cabo Martín, Pensamiento crítico. Constitucionalismo crítico (Trotta, Madrid) (2014).

[13] Nicos Poulantzas, *Marx y el Derecho moderno*, in Hegemonía y dominación en el estado moderno, (Cuadernos de Pasado y Presente, Buenos Aires, Siglo XXI) (1975). Umberto cerroni, Introducción al pensamiento político (Siglo XXI, México) (1994). Nicolás López Calera, et al., Sobre el uso alternativo del derecho (Fernando Torres Editor, Valencia) (1975).

[14] Duncan Kennedy, Libertad y restricción en la decisión judicial (Universidad de los Andes, Pontificia Universidad Javeriana, Ediciones Uniandes, Instituto Pensar, Siglo del Hombre Editores, 1999) (1997).

From these critical perspectives, the judicial superstructure appears not simply as a reflection of a structure or an instrument, it is also a body that allows for the general and contextual conditions for the existence of the structure itself. In this sense, the law is an expression of the contradictions of the worldwide struggles of social class and, even though it generally upholds the interests of the dominant classes, it may also benefit subordinate classes by imposing conditions on the structure and in the mechanisms of the state, including on local apparatuses. There is no unanimity among those who espouse critical perspectives on the law, among them are pessimists who believe that the law can never aid the weak; while there are others who consider that law —both as theory and as judicial practice— can become an essential tool for class emancipation. In this sense, critical theories have much to contribute to the construction of an alternative to neo-constitutional theories, especially weak ones.[15]

Popular constitutionalism has been sustained mainly by currents originating in North America which have had a major impact in Latin America, and in South America in particular.[16] The distinctive features of popular constitutionalism are: 1) it makes the constitution more flexible and can even exceed it; 2) it challenges judicial supremacy and in certain cases can refute any form of judicial control over constitutionality; 3) it suggests an extrajudicial interpretation of the constitution; 4) it calls for the democratization of all economic and political institutions; and 5) it seeks to recover the relationship between the law and politics.[17] Among the most salient ends of this theoretical current lies in challenging the role of constitutional judges as the monopolistic and maximum interpreter of the constitution and of the body of laws,[18] as well as in promoting citizen participation in collective decisions to the fullest, as the democratic legitimacy of these decisions depends on the degree of participation they emanate from.[19]

Critical legal studies and popular constitutionalism are dynamic and thus constantly changing. According to these approaches, citizens should participate in the process of making and defining the law, and judicial control of the

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[15] Angélica M. Bernal, *The Meaning and Perils of Presidential Refounding in Latin America*, Constellations. An International Journal of Critical and Democracy, 21, 4, New York (2014). Federico Finchelstein, *Returning Populism to History*, Constellations. An International Journal of Critical and Democracy, 21, 4, New York (2014). Yannis Stavrakakis, *The Return of the People: Populism in the Shadows of the European Crisis*, Constellations. An International Journal of Critical and Democracy, 21, 4, New York (2014).

[16] Roberto Gargarella, Roberto, *Acerca de Barry Friedman y el "constitucionalismo popular mediado"*, Revista Jurídica de la Universidad de Palermo, 6 -1, Buenos Aires, 2005.

[17] Ana Micaela, Alterio *Corrientes del Constitucionalismo contemporáneo a debate*, 8 Revista problema. anuario de filosofía y teoría del derecho 254-255, January-December (2014).

[18] Larry D. Kramer, Constitucionalismo popular y control de constitucionalidad (Paola Bergallo, Marcial Pons trans., Madrid, 2011) (2004).

[19] Mark Tushnet, Taking the Constitution Away from the Courts (Princeton University Press) (1999).

laws should be done away with and replaced by citizen control. The authors who defend these positions are well aware of the 'risks' of popular participation: fascism, anti-intellectualism, the persecution of unpopular minorities, the exaltation of mediocrity and the romantic exaggeration of the virtues of the masses.[20] Nevertheless, these scholars believe that only the people can provide legitimacy to governments, and that fear of society or of majorities contributes to the maintenance of the status quo.

The purpose of the law is to promote the rules of majorities and other forms of citizen participation and deliberation to guarantee that the institutional structures and the definitions of human rights today depend on society, and not on an enlightened elite of constitutional judges who represent the interests of the status quo.[21] Popular constitutionalists are divided between those who argue that the United States Supreme Court's important decisions should be reviewed by that country's congress, and those who posit that the constitutional review of fundamental issues —such as the unconstitutionality of laws or general norms— should be carried out by the people themselves.[22]

Popular constitutionalists have put forth various proposals for U.S. law in order to promote citizen participation in the definition of human rights. These proposals include: 1) promoting constitutional reform procedures; 2) electing, through the popular vote, supreme court justices; 3) investing citizens and certain popular powers with the capacity to review Supreme Court decisions; 4) allowing for popular revocation of Supreme Court justices; and 5) social disobedience of judicial decisions.[23] These measures are founded on the axiomatic, and not only the technical, principle of majority rule, as well as on the constitutional importance of popular sovereignty as origin and objective of norms and institutions, on the importance of deliberating public issues, and on the idea that the democratic process must define the meaning and scope of the law, including human rights.

Popular constitutionalism does not develop notions, concepts or categories that challenge the pernicious elements of the law in neoliberal globalization. Despite this important gap, it does include elements that are absent in neoconstitutionalism, namely the emphasis on the role of citizens to define the law and to ultimately determine the content of human rights. The insistence in popular constitutionalism on democratizing institutions and the law, although confined by its parameters (the nation state), can easily be expanded

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[20] Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, Paper 268, Faculty Scholarship Series 1950-1951 (1995).

[21] Roberto Gargarella and Roberto Niembro Ortega, Constitucionalismo progresista: retos y perspectivas. Un homenaje a Mark Tushnet (UNAM-Instituto de Estudios Constitucionales del Estado de Querétaro) (2016).

[22] Roberto Post and Reva Siegel, Reva, *Popular Constitutionalism, Departamentalism, and Judicial Supremacy*, 92 California Law Review (2004).

[23] Roberto Post and Reva Siegel, Reva, *Popular Constitutionalism, Departamentalism, and Judicial Supremacy*, 92 California Law Review 1039 (2004).

to a global scale. If we accept that there are possibilities of expanding constitutionalism around the world, then this expansion must include citizen participation and deliberation in national societies as well as in global society. Globalizing, neoliberal law can only be unmasked by the democratic legitimacy that citizens bestow through their participation in public affairs, and it is their power that can limit the interests of large transnational corporations as well as shedding light on these interests.

The new Latin American constitutionalism, which focuses on theorizing around the Constitutions of Venezuela (adopted in 1999), Ecuador (2008), and Bolivia (2009), has some sordid elements, as well as some enlightening ones. Chief among its most deplorable aspects is the promotion of hyperpresidentialism. Among its positive aspects, we find that the new Latin American constitutionalism: 1) seeks to build more equal societies;[24] 2) broadens the mechanisms of participatory democracy; 3) presents democratic means to construe constitutional controls; 4) recovers the state's role in the national economy as a means to lessen economic and social inequalities; and finally 5) argues for an international integration that is more just something that is affirmed in different latitudes.[25] This is a constitutionalism wherein the constituent will of the popular classes finds expression in vast social and political mobilization, creating a bottom-up constitutionalism, whose protagonists are those that have been marginalized together with their allies.[26] These protagonists seek to expand the field of the political beyond the liberal horizon through a new form of conceiving institutions (a plurinational approach), a new form of territoriality (asymmetric autonomies), a new legality (judicial pluralism), a new political regime (intercultural democracy) and new individual and collective subjectivities (individuals, communities, nations, peoples, nationalities), in which constitutional changes aspire to implement anti-capitalist and anti-colonial policies.[27]

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[24] Roberto Gargarella, *El nacimiento del constitucionalismo popular*, in Teoría y crítica del derecho constitucional 249-262 *(*Abeledo Perrot, tome I, Buenos Aires, 2008).

[25] Roberto Viciano Pastor and Rubén Martínez Dalmau, *Aspectos generales del nuevo constitucionalismo latinoamericano*, in El nuevo constitucionalismo en américa latina 9-43 *(*Corte Constitucional, Quito, 2010).

[26] This work distinguishes between formal and material characteristics of the new Latin American constitutionalism. Among its formal characteristics, the authors point out that new texts have the following traits: 1) they incorporate new legal categories that old Latin American constitutionalism did not consider; 2) they put forth a new notion of unconstitutionality based on the emergence of new government offices and institutions; 3) they are lengthier constitutions; 4) they are more complex constitutions; and finally 5) they are constitutions that reestablish the role of the state in the economy, that is, they are anti-neoliberal.

[27] Boaventura de Sousa Santos, Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur 85 (Universidad de los Andes, Siglo del Hombre Editores y Siglo XXI, México, Guatemala and Buenos Aires 2010) (2009).

New Latin American constitutionalism promotes broad means of direct, participatory and deliberative democracy, including the recognition of the right to resist and of intercultural democracy. It frees the constitution from the bounds that international treaties signed before the drafting of the new constitution. It is a theory that is weary of the elitist powers of constitutional courts, and therefore, attempts to mitigate the power of these organs through participatory mechanisms. In the constitution there are specific criteria to guide constitutional interpretation and thus avoid judicial discretion,[28] in some cases, class actions against supposed unconstitutional provisions are established so that citizens, without having to prove a specific form of procedural legitimacy, can argue for the unconstitutionality of certain issues in constitutional courts.[29]

Furthermore, new Latin American constitutionalism reaffirms national sovereignty over the legal interests of neoliberal globalization. In this way, nations can recover control over their natural resources, with an insistence on the re-nationalization of resources which were once privatized, and a demand to ensure that nation states exploit these resources to the benefit of national societies. In this sense, new Latin American constitutionalism re-establishes the possibility of national control of the national economy in order to promote material equality among citizens. It is a constitutionalism that is respectful to, and protective of, the culture of native peoples. For these reasons, some constitutions, such as Bolivia's, enshrine the plurinational nature of the state. There are also fundamental rights included in the Bolivian Constitution that are of Indigenous origin such as the right to *Madre Tierra* (Mother Earth) and the right to *buen vivir* (living well). These are constitutions that promote many forms of cooperation and solidarity among peoples, through the promotion of self-management, cooperative management, cooperatives, popular savings accounts, and community corporations.

The democratic theory of new Latin American constitutionalism acknowledges different forms of democratic deliberation that respect Indigenous peoples and their cultures. It therefore accepts different criteria of democratic representation, recognizing the fundamental collective rights of peoples as a condition for the exercise of individual rights, broadening the catalogue of fundamental rights to include social and identity rights, and maintaining that education should be compatible with the distinct cultures within a country in order to purge neocolonialist elements. In the politics of new Latin American constitutionalism, it is popular sovereignty that determines the scope of the constitution and of human rights.

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[28] Carlos Villabella, Nuevo constitucionalismo latinoamericano. ¿Un nuevo paradigma? (Grupo Editorial Mariel, Instituto de Ciencias Jurídicas de Puebla, A.C., Universidad de Guanajuato, Juan Pablos Editor) (2014).

[29] Ana Micaela Alterio and Roberto Niembro Ortega, ¿Qué es el constitucionalismo popular? Una breve referencia al uso de las fuerzas armadas en México como fuerzas de seguridad, in Constitucionalismo popular en Latinoamérica 178 (Porrúa, México, 2013).

There are, without a doubt, criticisms to be made of the new Latin American constitutionalism, as I have mentioned, it has fostered hyper-presidentialism in Latin America. But it should nonetheless be taken seriously as a means to confront the damaging consequences of neoliberal globalization. The alternative nature of new Latin American constitutionalism, its insistence on material equality, its emphasis on the rights of Indigenous peoples, the promotion of the recovery of different forms of democratic participation, the defense of natural resources so that they may be used to benefit the nation, the economic command of the nation state, the broadening of social and collective rights that is unheard of in western law, and the espousal of a politics of solidarity and cooperation in the face of neoliberalism's possessive individualism, are all qualities that make this form of constitutionalism a powerful instrument to transcend the negative and deeply entrenched elements of neoliberal globalization which are expressed in weak neo-constitutionalism.

III. The Forms of Participatory and Community Democracy Needed to Transcend Representative Democracy

The potential of participatory democracy in Brazil has been studied by Leonardo Avritzer and Boaventura de Sousa Santos, among others.[30] For these authors, participatory democracy implies handing permanent power to citizens in moments between elections —as well as during elections— so that they can participate at these times in deciding fundamental matters of the state. Namely, by permanently supervising or monitoring through referenda, proposing constitutional and legal reforms, carrying out citizen audits, or suggesting public policies through legislative initiatives.

These instruments of direct, participatory democracy challenge social exclusion and seek to combat poverty through mechanisms in which citizens decide the priorities of fundamental government choices and public budgets. Citizen participation has numerous positive consequences: 1) it allows citizens to become involved permanently in public affairs (not only during elections), thus legitimizing the political system and the decisions which are taken by and because of society; 2) it allows for the redistribution of wealth through the prioritization of social issues in the budget; 3) it unites the governed with the government; 4) it aides the fight against corruption through instruments of citizen control; 5) it can be reconciled with representative democracy. There are forms of combining participatory and representative democracy, for example through the coexistence of representative democracy at a national or centralized level with participatory elements at the local level. Another form is through the government's recognition of participatory proceduralism,

[30] Leonardo, Avritzer, *Modelos de deliberación democrática: un análisis del presupuesto participativo en Brasil,* in Democratizar la democracia. Los caminos de la democracia participativa *(*Fondo de Cultura Económica, México, 2004).

whereby public forms of monitoring and public deliberation can substitute part of the process of representation and traditional deliberation.[31]

In addition to the forms of participation already mentioned, there are mechanisms within the tradition of direct democracy such as referenda, popular legislative initiatives, citizen consultations, motions to repeal from office, citizen class actions arguing for unconstitutionality, among others. These mechanisms can mitigate popular anger, limit political corruption and, most importantly, allow the voices of those who are generally excluded to be heard.[32] The purpose of participatory democracy is to avoid the exclusion of citizens, and to emphasize citizen participation through means other than political parties. Its instruments limit the unacceptable consequences of any representative system based exclusively on political parties: elitism, a closed-off group of political elites, and the lack of transparency in deliberation and in public affairs.

If what are referred to in Latin America as delegative democracies are not corrected, there will be no full-fledged democracies, even if these delegative 'democracies' have relatively fair elections and political parties, parliaments and the media that enjoy freedoms and courts which block anti-constitutional policies. When citizens are not treated as people in practice, if their decisions are delegated to others, if they only participate through the vote and afterwards have no opportunity to verify or evaluate the work that elected officials carry out, and if the offices responsible for horizontal accountability do not function properly, there is a huge loss of legitimacy in the political system.[33] For these reasons, participation must be incentivized both through semi-direct mechanisms, as well as through the use of techniques such as those described by de Sousa Santos, Avritzer, and other authors. We must assume that it is the right of citizens to evaluate whether their government has satisfied their needs and requirements, and that only citizens are capable of doing so, as they know more than their governments do about their own necessities. Participation, therefore, is a corrective to the deficiencies of traditional representative democracy.

The deliberation of public issues is a fundamental element of advanced democracies. As Joshua Cohen has argued, deliberative democracy implies a framework of social and institutional conditions that allow for free discussion among equal citizens, providing the necessary conditions for free participation, association and expression.[34] Deliberative democracy requires that the

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[31] Adela Cortina, Ética del discurso y democracia participativa, 112 January, Revista Sistema 25-40 (1993).

[32] Thomas E. Cronin, Direct Democracy: The Politics of Initiative, Referendum and Recall, 126-226, *(*Cambridge University Press) (1989). Martín Krause and Margarita Molteni, Democracia directa (Abeledo-Perrot, Buenos Aires) (1997).

[33] Guillermo O´Donnell, *Delegative Democracy*, 5,1, Journal of Democracy (1994).

[34] Joshua Cohen, *Procedimiento y sustancia en la democracia deliberativa*, 4, 14, April/June, Metapolítica, 29 (2000).

authorization to exercise power comes as the consequence of permanent discussion through an architecture of dispositions that guarantees responsibility and accountability on behalf of those who exercise public power, not only through elections —though elections are important— but rather through procedures whereby public issues are made known through publicity, legislative work is supervised, and the work of other branches of the state is monitored by citizens.

In deliberative democracy, democracy is not reduced merely to a process of political aggregation through the vote and elections, rather it involves a process of public debate that competes with the political systems over the prerogative of political decision.[35] This dispute intends to broaden the practice of democracy. Where does deliberative democracy originate? In its contemporary incarnation, it comes from Habermas's work, which advanced the very important concept of the public sphere.[36] The public sphere is a place for the free interaction of groups, associations and social movements, and it requires the possibility of a critical-argumentative relation with politics. For deliberative democracy to work, several elements must be in place: a) deliberative processes need to be carried out argumentatively, that is, through the regulated exchange of information and reason between equals that present and critically examine various points of view; b) deliberations must be inclusive and public, no one, in principle, must be excluded and all those that could be possibly affected by the decisions should have the same opportunity to join the discussion; c) deliberations must be free from external coercion, participants are sovereign to the degree that they are related to the requirements of communication and to the processual rules of debate; d) deliberations should be free from any internal coercion that may affect the equality of participants, as each as the same opportunity to be heard, introduce issues, make contributions, suggest and criticize proposals; e) deliberations must seek, in general, an agreement that is rationally motivated and that can be, in principle, carried out without restrictions or taken up at any moment; f) political deliberations must conclude by contrasting the majority's decision, while this examination is based on the notion that the fallible opinion of the majority can be considered a reasonable base for a common practice until a minority convinces the majority otherwise; g) political deliberations must encompass every issue susceptible to being regulated, in particular the issues that are relevant, taking into account the interest of all; h) political deliberations should be carried out around the interpretation of the needs and transformations of pre-political

[35] Leonardo Avritzer, *Teoría democrática, esfera pública y deliberación*, 4, 14, April/June, Metapolítica, 86 (2000).

[36] Jürgen Habermas, Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso 363 (Trotta, Madrid, 1998) (1992).

preferences; i) the absence of public deliberations must lead to the nullification of judicial acts and to the imposing of sanctions on public servants.[37]

Deliberative democracy recognizes that the rule of the majority does not guarantee impartiality, rather a decision that is supported by a majority but not by all of those involved in a conflict can indeed be partial. Nor is unanimity an ideal, because it requires making decisions within a specific timeframe: unanimity as an exclusive rule would lead to the defense of the status quo. According to Nino, because the rule of the majority and the rule of unanimity are insufficient, there must be other elements such as: 1) the knowledge of the interests and needs of others, which implies the inclusion of every part of society in the public deliberation so that individuals have the opportunity to make decisions according to ordered preferences and rankings; 2) the need to avoid exclusively presenting naked, egoistic interests to others, and instead to present interests, needs, and preferences in an argumentative framework which continuously justifies each point of view; 3) the discussion with others should contribute to the detection of empirical and logical errors, as it is common for some to commit the same error as others; 4) the necessity for participants to put themselves in the shoes of others, understanding not only their interests but also their emotions, which implies possessing the intellectual faculty of imagination and the attribute of empathy; 5) the attribute of consensus beyond mere negotiation, conducted on the basis of pure interest; and finally, 6) the collective tendency towards impartiality derived from decisions made through a process of inclusive participation and deliberation.[38]

Representative democracy does not correspond to a deliberative scheme,[39] for this reason Habermas argued in favor of a model of deliberation similar to that set forth in the preceding paragraphs. He defined deliberative politics in two ways: the formation of a democratically constituted will in institutional spaces, and the construction of an informal opinion in extra-institutional spaces. According to Habermas, the possibility of legitimate government arises through the interrelation of these two spaces.[40]

In this sense, the crisis is based on a system of representation, which must be corrected. Some suggest that representation should be conceived as a form of delegation which allows for the continued discussion from a point of view that was reached by the electorate during the debates that led up to the election of representatives at every level of political decision making: government, parliament, and judiciary. It is important to avoid delegating

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[37] Jürgen Habermas, Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso 382-383 (Trotta, Madrid, 1998) (1992).

[38] Carlos Santiago Nino, La constitución de la democracia deliberativa, 166-180 (Gedisa Editorial, serie Filosofía del Derecho, Barcelona) (1997).

[39] Antonio Porras Nadales, Representación y democracia avanzada (Cuadernos y Debates 50, Centro de Estudios Constitucionales, Madrid) (1994).

[40] Jürgen Habermas, Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso 407 and ff. (Trotta, Madrid, 1998) (1992).

this mandate to representatives, so that the people themselves can discuss in a direct manner what is to be done. Political parties can help materialize a deliberative vision if they have democratic processes in their structures and if they are organized around ideological positions, value systems and models of society, and not based purely on economic or social group interests. The representative system demands the highest possible inclusion of sectors and people, and for these reasons it is unjustifiable to exclude those who have committed a crime from the political process. Also, the representative system must be modified in its four classical stages of the process —debate, mandate, control, and governmental action— so as to broaden its deliberative and participatory components.[41] If the rules of open government are not complied with, the consequence should be the legal annulment of decisions taken by the authorities and a termination of the duties of said authorities.

I have argued elsewhere[42] for the necessity of a direct, participatory and deliberative democracy that is different from that which exists today in many countries in the world, which is characterized by elitism.[43] The participative-deliberative model underlines the control of the representative by the represented as well as public and open deliberation of affairs, where citizens can take part in many of the decisions made by authorities. Deliberation implies a serious and attentive weighing of reasons in favor and against a given proposal; it is a process in which individuals study the reasons for and against given courses of action.[44] Deliberation and participation foster a set of virtues in citizens as well as in the model itself. Cognitive biases are remedied, as knowing that there is a problem does not automatically lead to an attempt to address it. For example, in the United States, an all-white jury may lack the necessary information to understand the conduct of a Hispanic mother, as practical wisdom is not only a matter of having good information, but also of having the sensitivity to weigh said information. Virtue is instilled and increased, for that which is not known cannot be demanded, such as what happens to women living in oppressive patriarchal regimes who cannot demand a more equitable position, as true equity would require knowledge of part of a society they do not have access to.

The deliberative model fosters citizen participation, it brings politicians closer to citizens, creates accountability, and informs the public about the

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41 Antonio Porras Nadales, Representación y democracia avanzada (Cuadernos y Debates 50, Centro de Estudios Constitucionales, Madrid) (1994).

42 Jaime Cárdenas Gracia, *El modelo participativo y deliberativo*, 11 Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional, IIJ-UNAM (2004). Jaime Cárdenas Gracia, La crisis del sistema electoral mexicano. A propósito del proceso electoral de 2012 (UNAM, México) (2014).

43 Félix Ovejero, *Democracia liberal y democracias republicanas*, 111 April, Claves de Razón Práctica, 18-30 (2001).

44 James D. Fearon, *La deliberación como discusión*, in La democracia deliberativa 88 (Editorial Gedisa, Barcelona, 2001) (1998).

reasons why legislators have taken certain decisions and not others. It also includes citizens in decision-making processes, and so allows them to determine the degree of justification that each point of view requires, and to gauge the normative dimension of each decision at every step in its development. This approach clearly incorporates citizens into the public sphere and provides education in civic virtues. Additionally, the deliberative model allows for the legal nullification of decisions by authorities when they are not a product of deliberation, and creates mechanisms to hold authorities to account for decisions of this nature.

Communitarian democracy implies the recognition of the individual and collective human rights of Indigenous peoples.[45] It centers on acknowledging their autonomy, which is the means to ensure that they may exercise their political, social, economic, legal, cultural, territorial and environmental rights in an independent fashion. Indigenous peoples have the right to self-determination, which is to say, to freely define their political and legal conditions, and to freely set the course for their economic, social and cultural development. They also enjoy the right to free, prior and informed consent on all issues that impact them as established by Article 6 of the International Labour Organization's Convention 169.

Communitarian democracy implies establishing territories with forms of self-government in the locations where indigenous peoples live. The outline of these territories must be made in keeping with the history, culture, society and identity of Indigenous peoples, as well as in their will, as expressed in an assembly or consultation. In Mexico, there has long been a demand for the recognition of Indigenous peoples as subjects and entities of public rights, with a legal character and formally recognized estates, so that they may exercise autonomous forms of political and administrative organization. This recognition has not been fully established, despite the 2001 reform to Article 2 of the Mexican Constitution.

Communitarian democracy thus refers to the self-government of peoples, founded upon the expression of the will of the majority of the population through plebiscites and consultations that are organized according to customs and traditions. Governments, authorities and representatives of Indigenous peoples must be elected according to their own normative systems and procedures.

A comprehensive democracy —representative, direct, participative, deliberatie and communitarian— must be established as a precondition of the constitutional state, it is not enough for representative and electoral democracy to simply make smaller adjustments along the way. Without active participation by citizens and social movements that goes beyond voter turnout, there is no

[45] Héctor Díaz Polanco, Elogio a la diversidad: Globalización, multiculturalismo y etnofagia (Siglo XXI, México) (2007).

possibility of a constitutional state. Why is this so? Because citizens and social movements can permanently supervise, control, propose and demand that rights be guaranteed. The state's institutions and mechanisms of accountability cannot be trusted exclusively as the majority of these have been co-opted by institutionalized powers, as well as the powers that be.[46] Citizens and social movements can prevent a chasm from forming between the government and the governed, and demand the guarantee of human rights. The traditional state and party system is decaying and obsolete, and has found an ally in transnational powers, preventing the full exercise of human rights.

IV. The Unsuccessful Efforts at Direct and Communitarian Democracy in the Recent Mexico City Constitution

Some have praised Mexico City's Constitution, which was ratified by the Constitutional Assembly of Mexico City on the 31st of January, 2017, and published in the National Official Gazette and the Federal District's Official Gazette[47] on February 5th of the same year, for its progressive nature. Others, including myself, have been critical of its shortcomings.

Article 22 of the Mexico City Constitution does not recognize Indigenous peoples, Indigenous residents of the city or Afro-Mexicans as part of the city's population—instead it is guided by an individualistic conception of population. Article 22, which refers to the population, does not acknowledge displaced peoples or migrants who are recognized in international law. These groups of people are mentioned in a separate part of the Constitution which does not focus on the city's population.

The drafters of Article 23, which focuses on the duties of citizens, refused to include the obligation to disobey laws that do not originate from democratic procedures or which do not respect human rights. The duty to disobey unjust laws disappeared from the final version of the Mexico City Constitution. An important proposal included accepting that citizens have a duty to obey just and democratic laws, as unjust regulations do not form part of the law. Civil disobedience, which is a democratic, liberal procedure with a long philosophical pedigree, was thus kept out of the Mexico City Constitution.

The important category of universal citizenship, which implies developing active citizenship from childhood and for every person in the world, was removed from Article 24. The assembly also refused to extend the right to vote to everyone 16 years of age or older, and it denied this same right, as well as

[46] In Spanish, *poderes fácticos* refer to social actors who, despite not holding elected office of participating in one of the State's institutions, wield significant influence over political life through reserved domains of power. These may be companies, media outlets, religious organizations, lobbying groups, etcetera.

[47] Mexico's *Diario Oficial de la Federación* and Mexico City's *Diario Oficial*.

denying the right to run for office to those who have been accused of criminal charges but who are awaiting or standing trial, which goes against the presumption of innocence. In addition, the assembly refused to extend the vote to foreigners who have lived in Mexico City for more than two years. It also refused a provision that stipulated that no citizen can be detained or charged on the day before or the same day of the elections, except for those charged with a flagrant crime and, in such cases, authorities would take measures to allow the citizen to vote—this is a provision that already exists in the Constitution of the State of Chihuahua.

With regards to the citizens' right to propose legislative initiatives, the drafters refused to guarantee the right to any person to promote initiatives, which is a provision that is included in the Constitution of the State of Mexico. In this state, signatures equivalent to 0.13 percent of the 7.5 million names on electoral register are required for citizens to present an initiative, and initiatives are preferential if they include signatures equal to 0.25 percent of the electoral register. This lack of inclusion in the México City Constitution is especially disappointing for those of us who believe that citizen initiatives should always be preferred before those of the authorities.

The assembly also refused to include the right of citizens to reform the Constitution through referendums, and instead opted for a rule that requires the vote of two thirds of the local congress to achieve this objective. In the case of constitutional norms or constitutional laws, the referendum to adopt changes should have been mandatory, while in the case of general and abstract norms, the provision should have demanded that it be initiated with: a) signatures equivalent to 0.2 percent of the voter roll; b) a tenth of the votes in the local congress; or c) a tenth of the mayors. Referenda should have been included as part of reform procedures on every issue, with the exception of proposals that seek to curtail human rights. And yet, Article 25, Section C of the Constitution in fact raises the requirements for referendums and prohibits referendums in fiscal and penal matters.

The plebiscite, which is a form of consultation of public policies implemented by the local executive or mayor's offices, can be requested through the signatures of 0.4 percent of the electoral register. The local executive may also request a plebiscite, as may one third of congress or one third of mayors. These are excessive requirements, and the subject matter is limited because fiscal, tax and penal issues are exempted from this procedure.

The drafters did not wish to incorporate a proposal which stipulated that, with regards to decisions about the environment or historical and cultural heritage, and when dealing with (public or private) mega construction projects, consultations would be mandatory, binding and would not require presenting the signatures of citizens. The drafters also failed to accept consultation and other procedures to ensure consent from Indigenous peoples and Afro-Mexicans on constitutional, legislative and administrative norms, be prior, informed, mandatory, binding and effective. Nor did they accept that

citizens have a right to seek consultations about any action or omission from the authorities. In the current text, according to Article 25, Section E, Clause 2, of the Mexico City Constitution, two percent of signatures from the electoral register in a given electoral demarcation are required in order to seek a citizen consultation, which would then be regulated by the law.

Popular consultations are a form of direct democracy that must be carried out exclusively on regular election days and require that two percent of the voter roll request its inclusion. Consultations exclude fiscal, taxation or penal issues.

According to the new Mexico City Constitution, citizens can revoke the mandate of elected representatives when at least 10 percent of the electoral register in the corresponding electoral circumscription so requests. But this request is only valid once at least half of the official's term has passed, and the results of the election are binding only if a 40 percent voter turnout threshold is met and if at least 60 percent of the votes cast were in favor of revoking the mandate. These are very strict regulations that effectively hinder the capacity to revoke the mandate of public officials.

In a participative democracy, the most important figure is that of participatory budgets. It never entails 100 percent of the budget. In the case of the Mexico City Constitution, this will be regulated by a secondary law passed in accordance with Article 26, Section B, Clause 2.

The Constitution of Mexico City stipulates in Section B of Article 35 that the justices of the Supreme Court of the city be designated by a two-thirds majority of the local congress from a shortlist of three candidates chosen by the judicial council.[48] Some assembly members, including myself, argued that these justices should be elected by citizens without the possibility of reelection. Our proposal included a seven-year term, and it also set out that candidates to the position should satisfy the requisites included in Article 95 of Mexican Constitution, in addition to those of subsequent laws. The proposal established that prior to an election, candidates would undergo an exam that would be organized by the judicial council and held by a public university, under citizen control. The top three scorers on the exam would appear on the ballot. The election would occur without party meddling, and candidates would not carry out campaigns. It also proposed that in the cases where these candidates were aided by political parties, their candidacy would be canceled. They would be allotted time on radio and television to present their *résumés*, and proposals, and they would be elected as part of a larger electoral process held in the city. This proposal also included a call for the process to guarantee gender equality and representation for Indigenous peoples (natives of Mexico City and those who are not native to the city but reside there) and Afro-

[48] The additional requirements were meant to be those derived from the *ley orgánica* which is a law that emanates directly from a constitutional provision.

Mexicans.[49] Nevertheless, our proposal for electing justices was not included in the constitution.

In the text as approved, there can be a challenge the constitutionality of a law or norm at a local judicial authority —an unelected constitutional court— as long as five thousand citizens petition for this. And in some cases, this can even result in the removal of the provision from the legal system.

The heads of constitutionally autonomous powers will be designated by a qualified majority of the local congress from among the nominees put forth by the citizen councils –according to Article 46, Section C, Subsection 3. This method will incentivize the distribution of quotas among the major political parties of the local congress. A better method would have included citizen selection, as per our proposal for a method of selecting supreme court justices so as to avoid the heads of these autonomous powers from acting as mere transmission belts on behalf of the largest parties, but rather acting with democratic legitimacy from the outset.[50]

Indigenous peoples native to Mexico City and who reside there —mentioned in Articles 57, 58 and 59 of the Mexico City Constitution— were not given full territorial autonomy, and their townships will not be constituted into a fourth level of territorial or functional circumscription. Nor will they be able to participate in consultations about reforms to the Constitution, consultations will be nonbinding, and the city's institutions will not be pluri-ethnic in their composition, which is particularly egregious in the case of mayors, congress, the cabinet or the Supreme Court of Justice, as this means that there will not be representatives of Indigenous peoples within these institutions. The consultation carried out among Indigenous peoples and Indigenous residents of the city for the ratification of the city's Constitution did not allow them to vote on the whole text of the Constitution, which was relevant to them in its entirety, rather it only allowed them to vote on the three articles mentioned above.[51]

A very important part of the Constitution deals with urban development. The Institute of Democratic Planning (IPD) is charged with the urban development and territorial management of the metropolis, but does not have constitutional autonomy form the city's government and its heads are not elected by popular vote. Instead, it will be under the control of the administration in

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[49] José María del Castillo Velasco, Apuntamientos para el estudio del derecho constitucional mexicano (copy, Miguel Ángel Porrúa, México 2007) (1879). Daniel Cosío Villegas, La constitución de 1857 y sus críticos (Fondo de Cultura Económica and Clío, México, 2007) (1957). Jeremy Waldron, The Dignity of Legislation (Cambridge University Press, 1999) (1995).

[50] John M. Ackerman, Organismos autónomos y democracia. El caso de México 41 (UNAM-Siglo XXI, México) (2007).

[51] Mario Maldonado Smith, Torres de babel. Estado, multiculturalismo y derechos humanos 127-195 (UNAM, México) (2015).

power, and so particularly influenced by the head of government.[52] According to Article 15, Section D of the Constitution, the Institute of Democratic Planning will be a decentralized office that will plan urban development for the city in 20-year timeframes, as well as preparing territorial management schemes with 15-year horizons. The city's urban development will depend on the Institute of Democratic Planning, which—although it is checked by congress in issues related to high-impact zoning and some other issues,[53] lacks sufficient mechanisms of citizen control and accountability. This is in effect a technocracy, where some citizens will participate along with the private sector, without being subject to sufficient democratic controls, be they representative, direct or communitarian. Nevertheless, it will be charged with urban and territorial planning in Mexico City.

V. Conclusions

This critical review shows the political uses of the law, and the difficulties which critical and popular constitutional models and practices face in countries such as Mexico. The legitimacy deficits in Mexico's constitutional framework are evident given the impossibility to create advanced forms of democracy that are participatory, direct, deliberative and communitarian and that transcend the deficiencies of representative democracy.

The process of drafting Mexico City's recent Constitution, approved on January 31, 2017, demonstrates that a document of this nature needs the ongoing backing and participation of citizens. Unfortunately, during this political and legal process, most of the city's residents were oblivious to the activities of the local constitutional assembly. Mexico City's new Constitution includes some important innovations, such as: regulating urban development and land zoning; recognizing the right to the city; a recognition of the right to a vital minimum; the right to a dignified life and death; the right to use cannabis for medical and scientific purposes; reproductive and sexual rights; the right to care; the right to leisure; and labor rights for non-salaried workers, among others. It also recognizes, albeit in a limited way, some representative, direct and participatory democratic figures. It will have impact in the future because it does recognize, though in a restrictive manner, the rights of Indigenous peoples—those native to Mexico City and those who reside there—and it acknowledges the Afro-Mexican community. This document also grants a degree of independence for the judicial council from the President of the

[52] *Jefe de Gobierno* or the head of government is the executive branch of Mexico City's government.

[53] Enrique Provencio, *Visión y proyecto de ciudad en la Constitución* in Configuraciones. Aportes al debate constituyente de Ciudad de México 41 Revista de la Fundación Pereyra y del Instituto de Estudios para la transición democrática 94-105 (2016).

Supreme Court of Mexico City. It designates a mandatory two percent of the city budget to fund science and technology. It forbids the privatization of water management, except for purification procedures. It suppresses legal exemptions for public servants. It creates a constitutional court dependent on the Supreme Court that will rule on issues to protect and restitute rights, as well as determining the constitutionality of general laws that the city and its authorities issue (although these issues can only be brought to this court in a way that favors elites). These and other innovations are certainly important, however, from my point of view, they fall short of the expectations of the residents of Mexico City, which is the most critical and progressive city in Mexico.

Mexico City's recently approved Constitution also includes neoliberal and technocratic provisions. It does not radically expand human rights nor does it impose strong limits and controls over public and economic powers. It does not commit to guaranteeing human, economic, social, cultural or environmental rights. It places obstacles to direct and participatory democratic methods. And although it recognizes the rights of Indigenous peoples, both natives and residents of the city, it does not provide sufficient and binding legal figures that allow them to oppose the decisions which affect them directly or indirectly. Real estate groups, on the other hand, have been given vast powers, and urban and territorial policy are concentrated in a technocratic office that is not under effective citizen control.

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SHOULD MEXICO ADOPT PERMISSIVE GUN POLICIES: LESSONS FROM THE UNITED STATES

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Abstract: *After a recent increase in violence, policy makers and advocates in Mexico have proposed new firearm legislation that would shift Mexican gun policies towards a more permissive approach. Following the argument of 'self-defense', these initiatives would facilitate citizens' access to guns by allowing them to carry firearms in automobiles and businesses. These initiatives have been developed without a deep analysis of the effects of permissive gun laws. In this article, the authors present an assessment of what Mexican policymakers and advocates should be aware of regarding permissive gun laws using the example of the United States, the nation with the highest rate of gun ownership in the world and where these policies are already in effect.*

Keywords: *Permissive Gun Laws, Self-Defense, National Rifle Association, Second Amendment, Gun Violence.*

Resumen: *Ante el reciente incremento de violencia en México, algunos tomadores de decisión y grupos ciudadanos han comenzado a debatir propuestas legislativas que modificarían la política de armas en México hacia un enfoque más permisivo. Bajo el argumento de 'legítima defensa', estas iniciativas, por ejemplo, facilitarían el acceso a armas de fuego a los ciudadanos al permitírseles portar armas en automóviles y negocios. Estas iniciativas se han presentado sin un análisis profundo sobre los efectos de regulaciones permisivas en otros países. En este ensayo, los autores presentan una evaluación sobre lo que los tomadores de decisiones en México deben de considerar sobre regulaciones permisivas en Estados Unidos, un país donde ya se implementan regulaciones similares y la nación con más armas de fuego per cápita en el mundo.*

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Palabras clave: *Regulaciones permisivas, Defensa Propia, Asociación Nacional del Rifle, Segunda Enmienda, Violencia asociada a las armas de fuego.*

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I. Introduction

Regardless of efforts and resources invested by federal and local institutions, crime continues to be one of the biggest challenges in Mexico. 2017 was the year with the highest rate of homicides in the past 20 years.[1] A similar situation is reported with regard to other crimes. From 2007 to 2017, kidnappings and extortions increased dramatically, rising 162 and 81 percent respectively.[2]

Evidence suggests that, aside from other contributing factors, an expansion of the illegal firearms market in Mexico has played a major role in fueling violence. Some studies have linked the increase of illegal firearms in México to the expiration of the Assault Weapons Ban (AWB) in the U.S. in 2004. This ban triggered opportunities for gun traffickers along the U.S.-Mexico border and contributed to an escalation of violence in Mexico.[3]

Gun violence has become a serious issue in Mexico. According to the 2017 National Victimization Survey (ENVIPE), one third of the 17 million crimes that occurred in 2016 in which a victim was present involved the use of a firearm.[4] This phenomenon has a major impact considering that 34 percent of the households in Mexico included at least one victim of crime in 2016.[5]

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[1] José Roberto Cisneros, *2017 Tiene el Arranque de Año más Violento en dos Décadas*, Expansion May 2, (2017), *available at http://expansion.mx/nacional/2017/05/02/2017-tiene-el-arranque-de-ano-mas-violento-en-al-menos-dos-decadas*.

[2] Analysis of Secretario Ejecutivo del Sistema Nacional de Seguridad Pública (SNSP), Delitos del Fuero Común 2017 (2017); Secretario Ejecutivo del Sistema Nacional de Seguridad Pública (SNSP), Delitos del Fuero Común 2007 (2007).

[3] David Pérez Esparza & Eugenio Weigend, *Más armas, más homicidios*, Revista Nexos September 1, (2013), *available at http://www.nexos.com.mx/?p=15496*; Arindrajit Dube, Oeindrila Dube and Omar Garcia Ponce, *Cross-Border Spillover: US Gun Laws and Violence in Mexico*, 107 American Political Science Association 3, 397-417 (2013).

[4] Instituto Nacional de Estadística y Geografía (INEGI), Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública 2017 (2017).

[5] *Id.*

Crimes committed with guns have increased markedly over time. While firearms were used in 58 percent of violent crimes committed with some type of weapon in 2005, this figure increased to 68 percent by 2015.[6] A similar pattern is reported for homicides. Thirty nine percent of all murders were committed with a gun in 2007, compared to 67 percent in 2017, an all-time high.[7]

The increase in gun related violence has triggered discussions of unconventional measures aiming to reduce and tackle violence in Mexico. A small group of Mexican politicians as well as gun-advocates have proposed changing existing gun regulations and adopting a more permissive approach. This approach would allow citizens to carry guns outside of their residence.[8] It would allow citizens to easily acquire firearms for self-defense through the opening of gun shops outside Mexico City.[9] In addition, recent state level initiatives that are not directly associated with firearm policies have contributed to more permissive gun approaches. In 2016, a congressman from the state of Nuevo Leon introduced legislation to extend the definition of self-defense within a household.[10] This initiative was passed in March 2017.

As policy makers and advocates in Mexico advocate for a more permissive approach to gun laws, it is essential to analyze and understand international experiences. In this regard, the United States is a relevant case study for two reasons. The U.S. is the country with the highest rate of gun ownership in the world, and the proposed legislation in Mexico would replicate many of the laws already in force in the United States.

Assessing the impacts of permissive gun laws in the United States involves looking not only at their effects on violence but also their impact on key out-

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[6] Instituto Ciudadano de Estudios sobre la Inseguridad (ICESI), Tercera Encuesta Nacional sobre Inseguridad 2005 (2005); Instituto Nacional de Estadística y Geografía (INEGI), Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública 2016 (2016).

[7] Secretario Ejecutivo del Sistema Nacional de Seguridad Pública (SNSP), Delitos del Fuero Común 2017 (2017); Secretario Ejecutivo del Sistema Nacional de Seguridad Pública (SNSP), Delitos del Fuero Común 2007 (2007).

[8] Mexican Senate (2016), Iniciativa con Proyecto de Decreto con el que se reforma el artículo 10 de la Constitución, Proposal by Senator Jorge Luis Preciado, presented 08/11/2016, in discussion up to November 2017, *available at http://www.senado.gob.mx/sgsp/gaceta/63/2/2016-10-11-1/assets/documentos/Inic_PAN_art-10_Const_Armas.pdf*.

[9] Nuevo León State Congress (2016), Exhorto a la Secretaria de Defensa Nacional SEDENA para que abra una segunda armería en el Estado de Nuevo León. Proposal by State Congressman Ángel Barroso, presented 29/05/2017, in discussion up to November 2017, *available at http://www.hcnl.gob.mx/trabajo_legislativo/pdf/DD%20SO%20-%20202%20MEL%20OK.doc*.

[10] Nuevo León State Congress (2016), Iniciativa con Proyecto de Decreto con el que se modifica el artículo 17 del Código Penal del Estado de Nuevo León. Proposal by State Congressman Marcos Mendoza Vazquez, presented 08/11/2016 and approved 29/05/2017, *available at http://www.hcnl.gob.mx/trabajo_legislativo/iniciativas/pdf/LXXIV-2016-EXP10390DIP.MARCOS%20MEDONZA%20VQZ%20INICIATIVA%20DE%20PROYECTO%20DEC%20ART%2017%20CODIGO%20PENAL.pdf*.

comes such as gun theft and illegal arms trafficking. This article addresses key questions about the U.S.'s permissive approach towards gun laws, in an effort to contribute to an informed debate, and to understanding the differences between the U.S. and México in this regard. What are the outcomes of gun laws in the U.S.? Do these laws reduce violence and crime? What are other impacts of permissive gun laws? How does the U.S. fare in comparison to other developed nations? Within the U.S., are there differences amongst the 50 states?

This article is divided into five sections. After introducing the problem and the key objectives, we discuss Mexico's gun laws and the new proposals in section two. In section three, we address laws and actors involved in crafting and passing gun policies in the U.S., examining the Second Amendment of the U.S. Constitution and the National Rifle Association (NRA), a key player pushing for the implementation of increasingly permissive gun laws. Section four analyzes existing literature addressing gun violence in the U.S. Finally, in section five, we outline our main conclusions and offer a series of policy recommendations.

II. Mexican Gun Laws and New Proposals

Article 10 of the Mexican constitution states that, so long as the objective is of self-defense and protection, citizens have the right to possess a firearm in their residence. This article specifies that the Federal Firearms and Explosives Law (*Ley Federal de Armas de Fuego y Explosivos, LFAFE)* will determine the conditions, cases and requirements authorizing gun possession.[11]

All firearm regulations are enacted and decided at a federal level. Firearm purchases must be registered in the Federal Firearms Registry (*Registro Federal de Armas*), which is administered by the National Defense Ministry (*Secretaría de la Defensa Nacional, SEDENA*).[12] At the time of publication of this article there are 46 modules in the country where citizens can register their firearms.

In Mexico several firearms and calibers of weapons are reserved for exclusive use by the military.[13] These include calibers for the AR-15 and AK-47 semi-automatic rifles, weapons commonly used and illegally acquired by criminal groups in Mexico.[14] Mexico's federal government, through SED-

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

[12] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 2 and 7, Diario Oficial de la Federal [D.O.] 23 de enero, 2004 (Mex).

[13] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 11, Diario Oficial de la Federal [D.O.] 23 de enero, 2004 (Mex).

[14] Colby Goodman & Michel Marizco, U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges, The Wilson Center 187 (2010), *available at*

ENA, has the faculty to authorize the opening of firearm factories and establishments. SEDENA is responsible for administering and supervising industrial operations involving firearms, ammunition as well as restricted chemical substances.[15] SEDENA only operates one gun shop in Mexico.[16]

Mexico's National Defense Ministry also regulates conditions for gun possession by citizens within their place of residence. Article 15 of LFAFE states that citizens can possess firearms within their residence,[17] however, all firearms must be registered with SEDENA and in accordance to Article 16, citizens may only register a single residence.[18]

On the whole, Mexico's gun laws are strict in comparison to other countries.[19] However, given an increase in violence in Mexico, policy makers have proposed legislation that would shift Mexico's gun laws to a more permissive approach. For instance, at the end of 2016, a Senator from the conservative National Action Party (PAN) proposed an initiative that would extend legal, individual firearm possession to business and vehicles.[20] Senator Jorge Luis Preciado Rodriguez proposed a modification to Articles 15 and 16 of LFAFE to legalize the possession of a firearm in businesses and private vehicles[21] and to allow citizens to register a business address as well as vehicle information in addition to a single residence.[22] In other words, citizens would be allowed to register their business as well as their vehicle as places where they could legally carry their firearms.

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https://www.wilsoncenter.org/sites/default/files/Chapter%206-%20U.S.%20Firearms%20Trafficking%20to%20Mexico,%20New%20Data%20and%20Insights%20Illuminate%20Key%20Trends%20and%20Challenges.pdf.

[15] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 37, Diario Oficial de la Federal [D.O.] 23 de enero, 2004 (Mex).

[16] *Esta es la única tienda en México para comprar armas legalmente*, Excélsior, (Aug. 17, 2016), *available at http://www.excelsior.com.mx/nacional/2016/08/17/1111571*.

[17] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 15, Diario Oficial de la Federal [D.O.] 23 de enero, 2004 (Mex).

[18] Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 16, Diario Oficial de la Federal [D.O.] 23 de enero, 2004 (Mex).

[19] United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime Threat Assessment*: firearms (section 6.1), *available at https://www.unodc.org/documents/data-and-analysis/tocta/6.Firearms.pdf*.

[20] Susana Guzmán, *Senador del PAN propone la portación de armas para legítima defensa*, El Financiero, October, 6, 2016, *available at http://www.elfinanciero.com.mx/nacional/senador-del-pan-propone-la-portacion-de-armas-para-legitima-defensa.html*; Mexican Senate (2016), Iniciativa con Proyecto de Decreto con el que se reforma el artículo 10 de la Constitución. Proposal by Senator Jorge Luis Preciado, presented 08/11/2016, in discussion up to November 2017, *available at http://www.senado.gob.mx/sgsp/gaceta/63/2/2016-10-11-1/assets/documentos/Inic_PAN_art-10_Const_Armas.pdf*.

[21] *Id.*

[22] *Id*.

This proposal gained some momentum towards the end of 2016. In fact, during a Senate hearing in November 2016, organizations from the civil society as well as advocates and academics participated in a debate to address this proposal.[23] Pro-gun advocates presented arguments in favor of this proposal, and non-governmental organizations presented arguments against it. More recently, a 2017 survey suggests that the overall population in Mexico believe that violence would increase with these types of policies.[24] In this regard, as of June 2018, efforts to modify Articles 15 and 16 of LFAFE have been unsuccessful and the proposal has not been approved.

In early 2017, a local Congressman from the state of Nuevo León proposed the opening of a second gun shop in the country in the northern city of Monterrey.[25] As stipulated in Article 37 of LFAFE, Mexico's gun laws are decided at a Federal level and hence, authorization from the President is needed to open an additional establishment. The Congressman's proposal was, in effect, to request that federal authorities open a second gun shop in the country. For this to happen, this proposal would require executive action, not legislative discussion. As of November 2017, this proposal has not been approved.

Finally, while some legislative initiatives are not directly related to gun laws, they complement and facilitate the adoption of more permissive gun laws. A congressman from the state of Nuevo Leon introduced legislation that would extend the definition of self-defense within a residence. This amendment would legally shelter citizens who injure or kill someone within their residence, and protects a person who kills an intruder before entering a residence. The state of Nuevo Leon approved this initiative in March 2017.[26]

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[23] Mexican Senate, Version Estenografica del foro de análisis sobre la iniciativa de reforma a la Ley Federal de Armas de Fuego y Explosivos (Primera parte) (2016), *available at http://comunicacion.senado.gob.mx/index.php/informacion/versiones/32538-version-estenografica-del-foro-de-analisis-sobre-la-iniciativa-de-reforma-a-la-ley-federal-de-armas-de-fuego-y-explosivos-primera-parte.html*; Mexican Senate, Version Estenografica del foro de análisis sobre la iniciativa de reforma a la Ley Federal de Armas de Fuego y Explosivos (Segunda parte y final) (2016), *available at http://comunicacion.senado.gob.mx/index.php/informacion/versiones/32564-version-estenografica-del-foro-de-analisis-sobre-la-iniciativa-de-reforma-a-la-ley-federal-de-armas-de-fuego-y-explosivos-segunda-parte-y-final.html*.

[24] David Perez Esparza & David Hemenway, What is the level of household gun ownership in urban Mexico? An estimate from the first Mexican survey on gun ownership 2017, Injury Prevention (2018).

[25] Ricardo Alanís, *Propone Barroso instalar tienda de armas en NL*, Milenio Noticias, (Apr. 30, 2017), *available at http://www.milenio.com/region/tienda_armas-barroso-sedena-milenio-noticias-monterrey_0_965903594.html*; Nuevo León State Congress (2016), Exhorto a la Secretaria de Defensa Nacional SEDENA para que abra una segunda armería en el Estado de Nuevo León, proposal by State Congressman Ángel Barroso, presented 29/05/2017, in discussion up to November 2017. Available at: *http://www.hcnl.gob.mx/trabajo_legislativo/pdf/DD%20SO%20-%20202%20MEL%20OK.doc*.

[26] Nuevo León State Congress, Dictamen 10390 y anexo por el que se amplía la legítima defensa, proposal 10390/LXXIV, presented 08/11/2016 by State Congressman

These legislative proposals at the national and local level are relevant from a historical and a policy perspective. For instance, they would structurally modify the Mexican gun policy which is widely considered to be one of the most restrictive in the world.[27] Perhaps more importantly they would increase the accessibility of firearms among civilians. For instance, the proposal to open a gun shop in Monterrey may create pressure to establish more gun shops elsewhere. In turn, this could lead to further incentives to remove existing restrictions on high caliber firearms as well as eroding the army's capabilities for enforcing the background checks that are carried out before every gun sale. Overall, these proposals would likely shift Mexico's gun policies towards a more permissive approach.

Irrespective of the possible impacts of these proposals, pro-gun advocates have insisted that given the incapacity of Mexican institutions to guarantee security, firearms in the hands of civilians would protect them from criminals. [28] Interest groups and policy makers that push for a more permissive approach in Mexico often cite U.S. gun laws as a model to analyze and replicate. In fact, the Senator proposing changes to Articles 15 and 16 of LFAFE admitted that he based his proposal on the United States' Second Amendment.[29]

U.S. gun policies are considered more permissive than Mexico's. In the U.S., many gun laws are determined at a state level and in contrast to Mexico, every state allows for some form of concealed carrying of guns by citizens outside of their residence. In fact, 12 states allow a person to carry a concealed firearm in public without the need of a permit.[30] In other states, guns are allowed in vehicles, churches, bars, universities and schools.[31]

Marcos Mendoza Vázquez, approved by Congress 29/05/2017, *available at http://www.hcnl.gob.mx/trabajo_legislativo/pdf/DICTAMEN-10390%20y%20anexo.docx*.

[27] United Nations Office on Drugs and Crime (UNODC). *Transnational Organized Crime Threat Assessment*: firearms (section 6.1), *available at https://www.unodc.org/documents/data-and-analysis/tocta/6.Firearms.pdf*.

[28] Senado de la Republica, Versión Estenográfica del foro de análisis sobre la iniciativa de reforma a la Ley Federal de Armas de Fuego y Explosivos, Primera Parte (2016), *available at http://comunicacion.senado.gob.mx/index.php/informacion/versiones/32538-version-estenografica-del-foro-de-analisis-sobre-la-iniciativa-de-reforma-a-la-ley-federal-de-armas-de-fuego-y-explosivos-primera-parte.html*; Senado de la Republica, Versión Estenográfica del foro de análisis sobre la iniciativa de reforma a la Ley Federal de Armas de Fuego y Explosivos, Segunda Parte (2016), *available at http://comunicacion.senado.gob.mx/index.php/informacion/versiones/32564-version-estenografica-del-foro-de-analisis-sobre-la-iniciativa-de-reforma-a-la-ley-federal-de-armas-de-fuego-y-explosivos-segunda-parte-y-final.html*.

[29] *Id;* Héctor Figueroa Alcántara, *Proponen armar a la población; el estado fracaso: Preciado,* Excélsior, (Oct. 7, 2016), *available at http://www.excelsior.com.mx/nacional/2016/10/07/1120970*.

[30] Giffords Law Center, Concealed Carry, *available at http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#federal*.

[31] See for example the different state laws addressing guns in Schools, Giffords Law Center, Guns in Schools, *available at http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/*.

In addition, the United States has thousands of gun shops. According to information from the Bureau of Alcohol, Tobacco, Firearms and Explosives, there were close to 56,000 firearm dealers by the end of 2017.[32] Additionally, individuals can purchase firearms on the Internet or through numerous gun shows that take place each year.[33]

We must ask, however, if US gun laws can be considered a success in reducing violence or deterring crime? If policy makers and gun advocates in Mexico are pushing for a more permissive approach towards gun laws and are using the United States as a model, it is fundamental to conduct an analysis of U.S. gun laws and their effects. The following sections of this article analyze the context of permissive gun laws in the United States as well as their effects on violence and other outcomes.

III. Actors and Gun Policies in the United States

A key element for understanding gun policy in the U.S. is the Second Amendment. Written more than two hundred years ago, this amendment to the U.S. Constitution reads as follows "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This is the backbone upon which all firearm regulations in the U.S. are based.

There have been several interpretations and debates surrounding the Second Amendment. On the one hand, there are those who suggest that the it exclusively provides the right to possess guns to members of the military, and that by contrast, it does not protect individual gun ownership.[34] In fact, following this argument, in Salina v. Blaksley the Kansas Supreme Court agreed that the purpose of the Second Amendment was to guarantee the continuation as well as effectiveness of the state militia.[35]

However, a recent decision by the U.S. Supreme Court (District of Columbia vs. Heller) written by Justice Antonin Scalia held that the Second Amend-

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[32] Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Listing of Federal Firearms Licensees (FFLs) -2017, available at https://www.atf.gov/firearms/listing-federal-firearms-licensees-ffls-2017*. These dealers do not include collectors, Pawnbrokers, manufactures of destructive devices or importers. This information is current as of December 2017.

[33] Garen Wintemute, *Inside Gun Shows,* University of California David School of Medicine, *available at https://www.ucdmc.ucdavis.edu/vprp/pdf/IGS/IGScoverprefweb.pdf*.

[34] John Paul Stevens, *The five extra words that can fix the Second Amendment,* The New York Times, (Apr. 4, 2014), *available at https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html?utm_term=.c434922eab81*.

[35] Giffords Law Center, State Right to Bear Arms in Kansas, *available at http://smartgunlaws.org/state-right-to-bear-arms-in-kansas/*.

ment does refer to an individual right, as decided in a 5-4 ruling.[36] In this case, the Supreme Court held that the law banning handguns in the District of Columbia was unconstitutional, and violated the Second Amendment. This interpretation of the Second Amendment has determined that citizens have the individual right to possess firearms. Despite being considered a personal right: Justice Scalia agreed that the Second Amendment can be limited and regulated.[37]

Notwithstanding the limitation to the Second Amendment as held by Justice Scalia, others have suggested that the Second Amendment fully protects the individual rights of citizens to purchase, own and carry guns. In this regard, any attempt to regulate firearms is perceived as a violation of the constitutional rights of American citizens. Perhaps the most outspoken organization leading this interpretation is the National Rifle Association.[38]

Founded in 1871, the NRA originally focused on hunting, conservation and marksmanship.[39] However, after an NRA convention in 1977, it significantly shifted direction. Led by Harlon Carter, a faction of the NRA members took control of the organization and made the defense of the Second Amendment the key to their strategy. Afterwards, the NRA became significantly more outspoken about the right to carry firearms. Consequently, it was after this period that the NRA's mission began to focus on defending a hardline interpretation of the Second Amendment.[40]

With individual donations and substantial financial backing from the gun industry, the NRA has led the gun lobby movement in the U.S. Forty years after its strategic shift, this organization has consolidated its political power and has evolved into one of the most influential interest groups in the U.S.[41] In fact, the NRA is able to influence crucial political decisions surrounding firearm regulations.

One of the clearest examples of the strength of the NRA occurred in 1996. Following the publication of an academic article that concluded that

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[36] Legal Information Institute, *District Of Columbia V. Heller (No. 07-290),* Cornell University Law School, (Nov. 3, 2015), *available at https://www.law.cornell.edu/supct/cert/07-290*.

[37] Thomas M. Defrank, *Supreme Court Justice Antonin Scalia said that the right to bear arms is not unlimited, and noted that future limitations will have to be decided in future cases,* NY Daily News, (Sep. 3, 2014), *available at http://www.nydailynews.com/news/politics/supreme-court-justice-antoninscalia-bear-arms-unlimited-noted-future-limitations-decided-future-cases-article-1.1124408*.

[38] Michael Waldman, *How the NRA Rewrote the Second Amendment,* Politico Magazine, (May. 19, 2014), *available at http://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856*.

[39] Joel Achenbach, Scott Higham & Sari Horwitz, *How NRA's true believes converted a marksmanship group into a mighty gun lobby,* The Washington Post, (Jan. 12, 2013), *available at https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15_story.html?utm_term=.7b3b9159db52*.

[40] *Id*.

[41] The Violence Policy Center, *Blood Money II, How Gun Industry Dollars Fund the NRA*, Violence Policy Center, *available at http://www.vpc.org/studies/bloodmoney2.pdf*.

guns within a household are a risk factor for homicides in the U.S.,[42] Congressman Jay Dickey (R-AR) managed to advocate for banning all funds to conduct public health research on gun violence.[43] After this regulation passed with the support of the NRA, the U.S. Center for Diseases Control and Prevention (CDC) halted all health research related to gun violence. To date, despite strong support from academics and physicians, who agree that gun violence research is underfunded, and it should be treated as a public health crisis, efforts to remove this restriction have been futile and unsuccessful.[44]

This has not been the only lobbying victory from the NRA. More recently, the gun lobby managed to prohibit medical professionals from speaking freely to their patients about the risks of gun ownership in the state of Florida, even if there were clear signs that patients were suicidal. This regulation was struck down in 2017.[45] The NRA has also been able to limit the ability of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to investigate gun crimes. Backed by the NRA, in 2003, U.S. Representative Todd Tiahrt (R-KS) successfully introduced an amendment which prohibited the ATF from disclosing firearm trace data to researchers and the public. This amendment limited law enforcement agencies ability to access data, restricting them to accessing only the information exclusively connected to a specific criminal investigation or prosecution. As a result of this amendment, agencies were impeded from accessing and sharing aggregated data that would allow them to examine patterns of gun trafficking, or to identify gun dealers linked to large numbers of guns used in criminal acts.[46] This amendment also required the ATF to destroy all records of gun purchases within 24 hours and prohib-

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[42] Arthur Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, NEJM New England Journal of Medicine (1993).

[43] Center for American Progress, *Removing Barried and Reinvesting in Public Health Research on Gun Violence*, Center for American Progress, (Mar. 9, 2016), *available* at *https://www.americanprogress.org/issues/guns-crime/reports/2016/03/09/132894/removing-barriers-and-reinvesting-in-public-health-research-on-gun-violence/; Michael Hiltzik, The NRA has blocked gun violence research for 20 years. Let's end its stranglehold on science, The Los Angeles Times (June 14, 2016), available at http://www.latimes.com/business/hiltzik/la-fi-hiltzik-gun-research-funding-20160614-snap-story.html*.

[44] David E. Stark & Nigam H. Shah, Funding and Publication of Research on Gun Violence and Other Leading Causes of Death, JAMA (2017); Laura Wagner, *Gun Violence Should be Treated as a Public Health Crisis, Study Says.* NPR News (Jan. 3, 2017), *available at http://www.npr.org/sections/thetwo-way/2017/01/03/508037642/study-says-gun-violence-should-be-treated-as-a-public-health-crisis*.

[45] Everytown for Gun Safety, *In Blow to the National Rifle Association, Federal Appeals Court Strikes Down Gun Lobby-Backed Florida Doctor Gag Rule That Barred Doctors From Talking With Patients About Guns*, Everytown for Gun Safety, (Feb. 17, 2017), *available at https://everytown.org/press/in-a-blow-to-the-national-rifle-association-federal-appeals-court-strikes-down-gun-lobby-backed-florida-doctor-gag-rule-that-barred-doctors-from-talking-with-patients-about-guns/*; James Hamblin, *The Question Doctors Can't Ask*, The Atlantic, (Aug. 11, 2014), *available at https://www.theatlantic.com/health/archive/2014/08/doctors-cant-ask-about-guns/375566/*.

[46] Giffords Law Center to Prevent Gun Violence, Tiahrt Amendments, *available at http://lawcenter.giffords.org/gun-laws/federal-law/other-laws/tiahrt-amendments/*.

ited the ATF from requiring gun dealers to submit inventories to law enforcement agencies. However, after organizations such as Mayors Against Illegal Guns campaigned to oppose this amendment, some of these procedures were reversed.[47] For instance, the ATF regained the right to release aggregate data, and law enforcement agencies recovered some access to trace data. Nonetheless, other restrictions imposed by the Tiahrt Amendment remain an obstacle for law enforcement agencies. In addition, access to data concerning guns used in criminal activities is limited for the public as well as researchers.[48]

Another victory for the gun lobby occurred in 2004, ten years after assault weapons were restricted. After numerous high-profile shootings at the end of the 1980s and early 1990s, the Assault Weapons Ban (AWB) was adopted in 1994.[49] This legislation included a sunset provision that indicated that the law would expire ten years later (in 2004), unless it was renewed by Congress. Congress did not renew the legislation, ending the ban on assault weapons in September of 2004.[50] It then became legal for companies to manufacture and for citizens to purchase as well as possess assault weapons in the U.S.

A year after the AWB expired, the NRA had another legal victory. In 2005, the Protection of Lawful Commerce in Arms Act (PLCAA) was signed into law. With some exceptions, this federal law provided immunity from liability to firearm manufacturers and federal gun dealers.[51]

Perhaps the most recent victory of the gun lobby occurred after one of the most horrific incidents in the U.S., when a 20-year-old man used an AR-15 rifle to murder 26 people —including 20 young children— in an elementary school in the state of Connecticut at the end of 2012. Following the massacre, polls showed that public opinion supported gun violence prevention measures. However, the two most important bills introduced after this tragedy did not pass the Senate.[52] These included the reinstatement of the Assault

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[47] City of Boston, Mayor Menino Joins Bloomberg to Urge Repeal of Tiahrt Amendment, *available at https://www.cityofboston.gov/news/Default.aspx?id=3557*.

[48] Winnie Stachelberg, Arkadi Gerney and Chelsea Parsons, *Blindfolded, and with One Hand Tied Behind the Back*, Center for American Progress, (Mar. 19, 2013), *available at https://cdn.americanprogress.org/wpcontent/uploads/2013/03/GunRidersBrief-7.pdf*.

[49] For example, a case involved the shooting at the Cleveland Elementary School in Stockton California during 1989. The perpetrator fatally shot 5 school children and wounded another 32 others before committing suicide.

[50] Giffords Law Center to Prevent Gun Violence, Assault Weapons, *available at http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/assault-weapons/*. Assault Weapons manufactured before 1994 were legal.

[51] Center for American Progress, *Immunizing the Gun Industry*, Center for American Progress, (Jan. 15, 2016), *available at https://cdn.americanprogress.org/wp-content/uploads/2016/01/14133650/PLCAA.pdf*.

[52] Meghan Keneally, *Four Years After Sandy Hook, Obama Leaves a Legacy of Little Progress on Gun Laws*, ABC, (Dec. 14, 2016), *available at http://abcnews.go.com/Politics/years-sandy-hook-obama-leaves-legacy-progress-gun/story?id=44163755*.

Weapons Ban and the implementation of universal background checks for buyers on all gun sales.[53]

Perhaps what is most surprising about the NRA is that it can influence decisions to pass or block policies despite support or opposition from the general population. Numerous polls indicate that universal background checks are supported by 85 to 97 percent of Americans, including gun owners.[54] Other polls suggest that the reinstatement of the assault weapons ban is supported by 67 percent of the U.S. population.[55] A poll from 2017 shows that 67 percent of U.S. voters oppose the federal ban that limits the CDC's ability to conduct research on gun violence.[56] This poll also indicates that 60 percent of the U.S. population opposes the gag rule that limits the ability of doctors to discuss guns with their patients.[57]

How is the NRA able to influence legislation without a support from the majority of the population? Aside from its organizational ability, the NRA provides substantial campaign donations to candidates running for public office, including congressional representatives, governors, and even city mayors.[58] The NRA has also developed a ranking system (from an "A" to "F") in which it evaluates candidates and serving politicians based on their allegiance to the NRA's interpretation of the Second Amendment.[59] The NRA has also threatened to support rival candidates if politicians do not align with its agenda.[60]

The NRA's impact has been substantial. In 2002, the NRA argued that George W. Bush "owed the Presidency" to the Association's donations and

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[53] Currently in the U.S., background checks are only mandatory on gun transactions that occur on Federal Firearm Licensees. However, they are not mandatory on internet sales or at gun shows.

[54] Mike Lillis, *Poll: 92 percent of gun owners support universal background checks*, The Hill (2014), *available at http://thehill.com/blogs/blog-briefing-room/news/211321-poll-most-gun-owners-support-universal-background-checks*; Hannah Fingerhut, *5 facts about guns in the United States,* Pew Research Center, available at *http://www.pewresearch.org/fact-tank/2016/01/05/5-facts-about-guns-in-the-united-states/*; Quinnipiac University, *U.S. Support For Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds,"* Quinnipiac University, available at *https://poll.qu.edu/national/release-detail?ReleaseID=2521*.

[55] Quinnipiac University, *U.S. Support For Gun Control Tops 2-1, Highest Ever, Quinnipiac University National Poll Finds,"* Quinnipiac University, available at *https://poll.qu.edu/national/release-detail?ReleaseID=2521*.

[56] Guns Down, *New Poll: Americans Believe Fewer Guns Will Keep us Safer*, Arms Down, (June 14, 2017), *available at https://gunsdownamerica.org/new-poll-safety-over-gun-rights/*.

[57] *Id*.

[58] Aaron Williams, *Has your U.S. Congressperson received donations from the NRA?* The Washington Post, (June 21, 2016), *available at https://www.washingtonpost.com/graphics/national/nra-donations/*.

[59] National Rifle Association-Political Victory Fund, Grades and Endorsement, *available at https://www.nrapvf.org/grades/*.

[60] Josh Israel, *NRA Threatens Senators Who Support Campaign Finance Disclosure,* Think Progress, (July 13, 2012), *available at https://thinkprogress.org/exclusive-nra-threatens-senators-who-support-campaign-finance-disclosure-6b086e9fef2d.*

support.[61] Recently, the NRA spent close to 30 million dollars backing President Donald Trump's campaign, and later publicly supported his presidency and proposals.[62] In response, Trump became the first sitting president to address the country's largest gun lobby in more than three decades, speaking at the NRA's Annual Meeting in April 2017. During his address, he pledged to support the goals and mission of this organization.[63]

Available evidence suggests that the NRA exerts substantial political influence over gun regulations. With their grip on policy makers, this organization has shown its ability to lobby for laws and policies that follow its interpretation of the Second Amendment.

The NRA, however, has not remained unchallenged. After the mass shootings in Connecticut at the end of 2012, several organizations in the U.S. such as Everytown for Gun Safety, Giffords and the Brady Campaign to Prevent Gun Violence have advocated for stronger gun laws. The major successes of these organizations have occurred at the state level. Since December 2012 and as of October 2017, states have enacted more than 200 laws that are stronger on gun control.[64] 11 states have strengthened their background check systems, and six have implemented local policies that require lost and stolen guns be reported to authorities.[65] Five states have enacted laws banning assault weapons, and 27 more have passed regulations addressing the use of guns by domestic abusers.[66]

The result of this contrasting phenomenon is a polarized country, as evident in the differences in state gun laws.[67] Some states have weakened their gun laws, while others have strengthened their local policies. The Law Center to Prevent Gun Violence has indicated that the states with the strictest gun laws as of 2017 are: California, New Jersey, Connecticut, Massachusetts, New York, Maryland, Hawaii, Illinois, Rhode Island and Washington. By contrast, the states with the

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[61] Associated Press, *Bush Owes Presidency to NRA, NRA Says*, Los Angeles Times, (2002), *available at http://articles.latimes.com/2002/apr/28/news/mn-40519*.

[62] The New York Time's editorial board, *Even as President, Donald Trump Panders to the N.R.A.*, The New York Times, (2017), *available at https://www.nytimes.com/2017/04/29/opinion/even-as-president-donald-trump-panders-to-the-nra.html?_r=0*.

[63] Kira Lernes, *Trump will be the first president to address the radicalized NRA*, Think Progress, (2017), *available at https://thinkprogress.org/trump-nra-speech-c46de8cfc5f0*.

[64] Giffords Law Center to Prevent Gun Violence, State Legislative Trends since Newtown; Newsweek, (2017), *available at http://www.newsweek.com/sandy-hook-anniversary-gun-control-laws-failed-747415*; Giffords Law Center to Prevent Gun Violence, Annual Gun Law Scorecard 2017 , *available at http://lawcenter.giffords.org/scorecard/*.

[65] Giffords Law Center to Prevent Gun Violence, State Legislative Trends since Newtown.

[66] *Id;* Lois Beckett, *10 gun violence prevention victories since Sandy Hook*, The Guardian, (2017), *available at https://www.theguardian.com/us-news/2017/nov/13/10-gun-violence-prevention-victories-since-sandy-hook*.

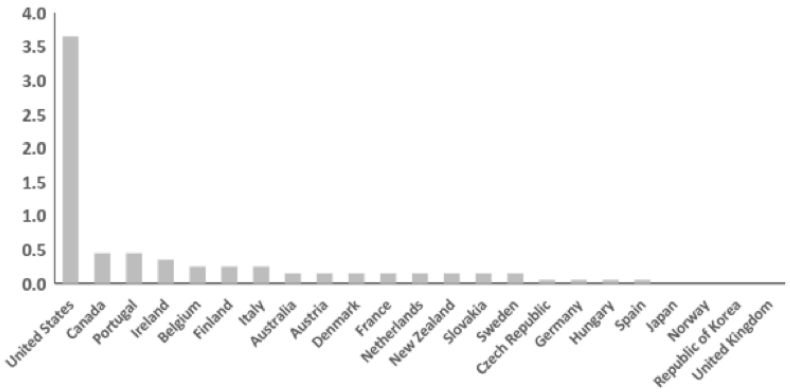
[67] National Black Caucus of State Legislators, State Gun Laws More Polarized Than Ever, *available at http://www.nbcsl.org/index.php/public-policy/state-issues/state-issues-archive/item/1161-state-gun-laws-more-polarized-than-ever*.

most permissive gun laws are Mississippi, Missouri, Kansas, Arizona, Idaho, Wyoming, Alaska, Louisiana, West Virginia and Vermont.[68] As detailed in the following section, there are significant differences in terms of gun violence between these two contrasting groups of states. The following section will discuss the existing evidence (outcomes) concerning permissive gun laws in the U.S.

IV. Impacts of Permissive Gun Laws in the U.S.

To date, the NRA's successful efforts to maintain permissive gun laws have resulted in an increase of firearm production and gun violence in the U.S. The U.S. produced close to 3,650,000 firearms in 2006, by 2016 this figure had increased to close to 11,500,000.[69] Imports have also increased, from around 2,400,000 in 2006 to 5,100,000 in 2016.[70] As a result of this growth there is almost one firearm per citizen, and the U.S. has by far the highest rate of gun ownership in the world.[71]

Graph 1: Rate of gun homicide per 100,000 inhabitants across High-Income Countries, 2010



Source: Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US compared with Other High Income OECD Countries, 2010*, 219 The American Journal of Medicine 3, 266-273 (2016).

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[68] Law Center to Prevent Gun Violence, 2017 Annual Gun law Scorecard, *available at http://lawcenter.giffords.org/scorecard/*.

[69] Bureau of Alcohol, Tobacco, Firearms and explosives (ATF), *Firearms Commerce in the United States 2017* (2017), *available at https://www.atf.gov/resource-center/docs/undefined/firearms-commerce-united-states-annual-statistical-update-2017/download*; Bureau of Alcohol, Tobacco, Firearms and explosives (ATF), *Annual Firearms Manufacturing and Export Report* (2016), *available at https://www.atf.gov/about/docs/undefined/afmer2016webreport508pdf/download*.

[70] *Id.*

[71] Small Arms Survey, *Estimating Civilian Owned Firearms,* Small Arms Survey, *available at http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/full/Small-Arms-Survey-2007-Chapter-02-EN.pdf*.

The U.S. has a gun homicide rate that is 25 times higher than other developed countries.[72] If only young Americans, ages 15 to 24, are counted, the rate is 49 times higher in the U.S. than in other developed nations.[73] However exceptional, these figures only indicate a part of the story. Every day, approximately 91 people are killed with a gun in the U.S., and another 222 are injured.[74] In 21 states, more people are killed with a gun every year than in vehicle related accidents.[75] The accessibility of guns also increases risks of accidental deaths. Every day a person is accidentally shot and killed in the United States, while 46 are accidentally injured.[76] In fact it is more likely one would be shot by a toddler than be killed in a terrorist attack in the US.[77]

The availability of firearms due to permissive gun policies has consequences that are completely unrelated with the notion of self-defense. For instance, the U.S. has an alarming rate of firearm suicides, eight times higher than other developed countries.[78] On average a firearm suicide occurs every 26 minutes in the U.S.[79] Proponents of permissive gun laws often argue that guns are a mere tool (i.e. people would commit suicide anyway), and that other factors should be addressed to mitigate suicide rates. However, evidence indicates that while other factors are important, access to guns plays a significant role. A study conducted in 8 states concluded that firearms were the most fatal method of attempting suicide.[80] While 30 percent of suicide attempts via other methods resulted in a fatality, 83 percent of suicide attempts

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[72] Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US compared with Other High-Income OECD Countries, 2010*, 219 The American Journal of Medicine 3, 266-273 (2016).

[73] *Id.*

[74] Analysis of 2007-2016 data from Center for Disease Control and Prevention, Injury Prevention & Control: Data & Statistics (WISQARS): Fatal Injury Data, *available at https://www.cdc.gov/injury/wisqars/fatal.html*; Center for Disease Control and Prevention, Injury Prevention & Control: Data & Statistics (WISQARS): Nonfatal Injury Data, *available at https://www.cdc.gov/injury/wisqars/nonfatal.html*.

[75] Violence Policy Center, *Gun Deaths Surpass Moto Vehicle Deaths in 21 States and the District of Columbia*, Violence Policy Center, (2016), *available at http://www.vpc.org/press/gun-deaths-surpass-motor-vehicle-deaths-in-21-states-and-the-district-of-columbia/*.

[76] Analysis of 2007-2016 data from Center for Disease Control and Prevention, Injury Prevention & Control: Data & Statistics (WISQARS): Fatal Injury Data, *available* at *https://webappa.cdc.gov/sasweb/ncipc/mortrate.html*; Center for Disease Control and Prevention, Injury Prevention & Control: Data & Statistics (WISQARS): Nonfatal Injury Data, *available at https://www.cdc.gov/injury/wisqars/nonfatal.html*.

[77] Todd Miller, *The Freakonomics of Extreme Extreme Vetting*, The Huffington Post (2016), *available at http://www.huffingtonpost.com/todd-r-miller/the-freakonomics-of-extre_b_11821634.html*.

[78] Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US compared with Other High-Income OECD Countries, 2010*, 219 The American Journal of Medicine 3, 266-273 (2016).

[79] Analysis of 2007-2016 data from Center for Disease Control and Prevention, Injury Prevention & Control: Data & Statistics (WISQARS): Fatal Injury Data, *available at https://webappa.cdc.gov/sasweb/ncipc/mortrate.html*.

[80] Rebecca Spicer and Ted Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 American Journal of Public Health 12, 1885 (2000).

with a firearm had the same result.[81] In other words, firearms, even if they are considered only a tool to commit suicide, play an important role in the overall lethality of suicide attempts. To further support this argument, a 2016 study found that states with higher levels of gun ownership were strongly associated with the highest rates of firearm suicides among both women and men.[82]

Other violent outcomes should also be included in an assessment of the permissive gun laws in the U.S. For instance, evidence suggests mass shootings, defined as incidents where four or more people are fatally shot, are deadlier and more frequent. While these incidents occurred every 200 days prior to 2011, since then they occur every 64 days.[83] In June 2015, a young white male fatally shot eight African Americans in a church in Charleston, South Carolina. A year later, a mass shooting occurred in the city of Orlando when a man entered a night club and opened fire at the crowd. As a result of this attack, 49 people were fatally shot and another 53 were injured.[84] In 2017, the United States had its deadliest mass shooting in modern history. A man used a semiautomatic firearm to shoot at people attending a country music concert in Las Vegas, Nevada. From his hotel window, the perpetrator killed 58 people and injured close to 500 more.[85] These are extreme but not isolated cases. Mass shootings have taken place in colleges, movie theaters, churches, and even in schools. Moreover, if the definition of mass shooting involves four or more people shot, fatally or not, approximately 1,000 mass shootings occurred in a period of 1,260 days.[86]

An argument often cited by the NRA is that armed civilians with guns can rapidly stop mass shootings.[87] The NRA often refers to these armed civilians as "good" guys with guns.[88] According to this rationale, it is important

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[81] *Id.*

[82] Michael Siegel and Emily Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981-2013,* 106 American Journal of Public Health 7, 1316-1322 (2016).

[83] Amy Coheb, Deborah Azrael, & Matthew Miller, *Rate of Mass Shootings Has Tripled Since 2011, Harvard Research Shows*, Mother Jones, (2014), *available at http://www.motherjones.com/politics/2014/10/mass-shootings-increasing-harvard-research/*. Authors of this article are scholars from the Harvard School of Public Health and Northeastern University. The authors wrote this article based on their research.

[84] BBC News, *Orlando nightclub shooting: How the attack unfolded,* BBC News (2016), *available at http://www.bbc.com/news/world-us-canada-36511778*.

[85] BBC News, *Las Vegas Shooting – What we Know so Far*, BBC News (2017), *available at http://www.bbc.com/news/world-us-canada-41471242*.

[86] The Guardian, *1,000 mass shootings in 1,260 days: this is what America's gun crisis looks like,* The Guardian, (2015), *available at https://www.theguardian.com/us-news/ng-interactive/2015/oct/02/mass-shootings-america-gun-violence*.

[87] Rachel Tropp, *The "Good Guy With a Gun" Myth,* Harvard Political Review (2016), *available at http://harvardpolitics.com/united-states/good-guy-gun-myth/*; Matthew Chapman, *The NRA's "Good Guy/Bad Guy" Argument is Fatal Stupidity,* Huffington post, July 12, 2016, *available at http://www.huffingtonpost.com/matthew-chapman/the-fatal-stupidity-of-th_b_10940338.html*.

[88] *Id.*

to allow gun possession in public places such as bars and churches so that an armed civilian can defend potential victims in case of an attack. One of the most recent cases in favor of this argument occurred on November 2017, when a man fatally shot 26 people and injured many more at church in Sutherland Spring, Texas. The case rapidly became popular amongst gun rights activists as the perpetrator was shot by an armed civilian.[89]

While there have been cases where civilians do stop shooters, these are rather the exception and occur after multiple people have been shot. A study of 63 mass shootings concluded that not even one attack was stopped by armed individuals.[90] Expanding this sample further to 160 mass killings between 2000 to 2013, an FBI study showed that only one aggressor was stopped by an armed civilian.[91] In contrast, the Violence Policy Center found that "good" guys with concealed carry licenses have perpetrated 31 mass shootings since 2007.[92] The costs behind this argument appears to exceed the possible benefits. Additionally, armed citizens can worsen the outcomes of mass shootings. In 2011, for example, an armed citizen almost shot the wrong person during the mass shooting that injured Congresswoman Gabrielle Giffords in Tucson, Arizona.[93]

The NRA has also argued that citizens with concealed firearms prevent crimes. In this context, it often cites a study written by John Lott. In his work, Lott argues that the implementation of concealed carry laws allowing citizens to carry firearms were associated with a reduction in violent crime during the 1990s.[94] Nonetheless, when researchers from Stanford and Johns Hopkins University updated this research, they concluded that concealed carry laws were not associated with lower rates of violent crimes, rather, they were linked to a 15 percent increase in violent crimes.[95] Furthermore, a 2005 re-

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[89] Dakin Andone, Kayle Hartung and Darran Simon, *At least 26 people killed in shooting at Texas Church, CNN*, (2017), *available at https://www.cnn.com/2017/11/05/us/texas-church-shooting/index.html*.

[90] Mark Follman, *More Guns, More Mass Shootings-Coincidence,* Mother Jones, (2012), *available at http://www.motherjones.com/politics/2012/09/mass-shootings-investigation/*.

[91] Federal Bureau of Investigation, A Study of Active Shooter Incidents in the United States between 2000 and 2013, *available at https://www.fbi.gov/news/stories/fbi-releases-study-on-active-shooter-incidents*.

[92] Violence Policy Center, *Mass Shootings Committed by Concealed Carry Killers,* Violence Policy Center, *available at http://concealedcarrykillers.org/*.

[93] Elspeth Reeve, *Armed Hero in Giffords Shooting Almost Shot the Wrong Guy.* The Atlantic (2011), *available at https://www.theatlantic.com/politics/archive/2011/01/armed-hero-in-giffords-shooting-almost-shot-the-wrong-guy/339205/*.

[94] John Lott, *More Guns, Less Crime,* University of Chicago Press, Third Edition; John Lott and David Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns,* 26 Journal of Legal Studies 1 (1997).

[95] John Donohue, Abhay Aneja & Kyle Webe, *Right-to-carry gun laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis,* The National Bureau of Economic Research, *available at http://www.nber.org/papers/w23510*.

port from the National Research Council of the National Academies of Sciences, Engineering, and Medicine determined that it is not possible to reach any conclusion about the causal link between the passage of concealed carry laws and crime rates.[96]

Proponents of lax gun regulations often argue that the benefits of armed civilians outweigh the costs. For example, a 1992 study by Kleck and Getz suggested that up to 2,500,000 crimes in the U.S. were prevented by citizens armed with guns, suggesting that firearms are used more often to prevent a crime than to commit one.[97] Nevertheless, existing evidence points to fallacies in this argument. A 1997 report criticized Kleck's and Getz's methodology by suggesting bias issues due to problems with social desirability and telescoping.[98] Furthermore, data from the *National Crime Victimization Survey* suggest the probability of being injured during a robbery was the same when victims did nothing in comparison to victims that used guns.[99] In other words, there are no clear advantages of using a firearm during a robbery. This research also shows that firearms are rarely used for self-defense. In fact, out of all crimes committed between 2007 and 2011 in the U.S., only 0.9 percent involved a victim able to use a gun.[100]

The Violence Policy Center has recently found that for every justified gun homicide that occurs in self-defense in the U.S., more than 34 people are feloniously murdered with a gun.[101] Firearms at home increase the risks of suicide and homicide.[102] Evidence suggests that, when available, guns are more likely to be used against a member of the household than to be used for self-defense against an offender.[103]

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[96] National Academies of Sciences Engineering Medicine, Firearms and Violence: A critical Review Chapter 6 (2005), *available at https://www.nap.edu/read/10881/chapter/8.*

[97] Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-defense with a Gun.* Journal of Criminal Law and Criminology 86 (1995).

[98] David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates,* Journal of Criminal Law and Criminology 87 (1997); Evan DeFilippis, *Debunking the Defensive Gun Use Myth,* Armed with reason, (2015), *available at https://www.armedwithreason.com/debunking-the-defensive-gun-use-myth/*. Social desirability bias refers to tendencies of respondents to answer favorably by others. If you purchased a gun for example, you want to appear favorably by saying that you have used that gun. Telescoping refers to a displacement of an event. For this case, respondents may believe that an event is more recent than what it is.

[99] David Hemenway & Sara Solnick, *The epidemiology of self-defense gun use: Evidence from the National Crime Victimization Survey 2007-2011, 79* Preventive Medicine, 22-27 (2016).

[100] *Id.*

[101] Violence Policy Center, *Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use,* Violence Policy Center (2017), *available at http://www.vpc.org/studies/justifiable17.pdf.*

[102] Andre Anglemyer, Tara Horvath & George Rutherford, *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-Analysis,* 160 Annals of Internal Medicine, 101-110 (2014).

[103] Deborah Azrael & David Hemenway, '*In the Safety of your own home': results from a national survey on gun use at home*, 50 Social Science and Medicine, 285-291 (2000).

Another argument is that criminals choose gun free zones to commit crimes as well as mass shootings, and therefore having more available guns will stop these unfortunate incidents.[104] However, evidence does not support these claims. A study of 111 mass shooting that occurred between 1966 and 2015 in the U.S. revealed that only 18 occurred in places where carrying guns was restricted for civilians.[105] A report from Everytown for Gun Safety found that out of the mass shootings committed between 2009 and 2016, only 10 percent occurred in gun free zones.[106]

Several examples suggest that perpetrators of crime are not always deterred by armed individuals. These examples include cases of ambushes against police officers in the U.S. These attacks debunk the arguments that criminals select unarmed victims, and suggest that given the element of surprise, armed criminals can cause serious harm before being stopped by armed individuals. Recently, for example, five armed police officers were fatally shot during an ambush in Dallas, Texas, where another seven civilians were injured.[107] During this incident, the aggressor was involved in a standoff with armed police forces that lasted four hours. Contrary to the gun activists' discourse, this is not an isolated case, as there have been numerous incidents where police officers are attacked, despite being armed with guns and being explicitly trained to manage violent criminals.[108]

Easier access to guns, facilitated by permissive gun laws can trigger additional costs to law enforcement institutions. A study looked at gun ownership and rates of police officers killed with a firearm across the 50 U.S. states. The analysis concluded that for each 10 percent increase in gun ownership, there were ten more police officers killed with a gun.[109] According to the FBI, attacks against police officers can occur in diverse instances. For example, they can occur

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[104] John Lott, *Gun-free zones easy targets for would-be killers,* USA Today, February 9, 2017, *at https://www.usatoday.com/story/opinion/columnists/2017/02/09/john-lott-gun-free-zones-easy-targets-would--killers/97645622/.*

[105] Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings*. Amherst, NY: Prometheus Books, 2016.

[106] Everytown for Gun Safety, Mass Shootings in the United States: 2009-2016, Everytown for Gun Safety, April 11, 2017, *at https://everytownresearch.org/reports/mass-shootings-analysis/.*

[107] Joel Achenbach, William Wan, Mark Berman & Moriah Balingit, *Five Dallas police officers were killed by a lone attacker, authorities say,* Washington Post, July 8, 2016, *at https://www.washingtonpost.com/news/morning-mix/wp/2016/07/08/like-a-little-war-snipers-shoot-11-police-officers-during-dallas-protest-march-killing-five/?utm_term=.2a3d54081d26.*

[108] See for example Mark Berman & Adam Goldman. *Police: Officers in Baton Rouge were 'targeted and assassinated,'* The Washington Post, July 18, 2016, *at https://www.washingtonpost.com/news/post-nation/wp/2016/07/18/details-emerge-about-suspected-baton-rouge-gunman-who-had-endorsed-violence-in-online-videos/?utm_term=.5a0ac85626bf.*

[109] David Swedler et al, *Firearm Prevalence and Homicides of Law Enforcement Officers in the United States,* 105 American Journal of Public Health 10, 2042-2048 (2015).

when officers attend domestic violence disputes, while they serve an arrest, or even while conducting a simple traffic stop for speeding.[110]

Permissive gun laws trigger a complex phenomenon that increases the risks of fatal encounters between police officers and regular citizens regardless of who end up being shot. A 2017 study found that permissive gun laws are an important factor in people being shot by a police officer. The study concluded that individuals living in states with stronger gun laws were 51 percent less likely to be shot by police than those individuals living in states with weaker gun laws. The rationale is that police officers either encounter more armed individuals or are aware that they are more prone to encounter armed individuals in states with permissive gun laws, and would be more likely to react with fatal force than those police officers in states where guns are scarce.[111]

The existence of permissive gun laws also provokes several negative outcomes associated with social violence. The availability of firearms, for example, plays a major role on fatal cases of domestic violence. A study from the Center for American Progress found that more than 50 percent of intimate partner homicides of women in the U.S. are committed with a gun.[112] In fact, when a gun is available in a domestic violence situation, the risk of homicides against women increases by 500 percent.[113] In a similar manner, the aforementioned study from Everytown for Gun Safety also found that the majority of mass shootings in the U.S. take place in households during a domestic violence dispute.[114] Altogether, this evidence suggests that guns that are originally purchased for self-defense have a high risk of being used against women in their own home.

Permissive gun laws also increase the costs associated with interpersonal conflicts between members of a community that would not be as violent otherwise. One of the most common examples is school shootings, which would not occur if guns were not available to students. High availability of guns has made school shootings a major concern for parents, teachers and students in the U.S. These concerns and fears are altogether reasonable.

Some school shootings have received major public attention. On February 2018, a 19-year-old man fatally shot 17 people and injured 17 more at Mar-

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110 Federal Bureau of Investigations, Law Enforcement Officers Killed and Assaulted. Uniform Crime Reporting, *available at https://ucr.fbi.gov/leoka*.

111 Aaron Kivisto, Bradley Ray & Peter Phalen, *Firearm Legislation and Fatal Police Shootings in the United States,* 107 American Journal of Public Health 7, 1068-1075 (2017).

112 Arkadi Gerney & Chelsea Parsons, *Women Under the Gun,* Center for American Progress, June 1, 2014, *available at https://cdn.americanprogress.org/wp-content/uploads/2014/06/GunsDomesticViolencereport.pdf*.

113 Jane Koziol-Mclain et al, *Risk Factors for Femicide in Abusive Relationships: Results from a multisite case control study,* 21 Violence and Victims, 3-21 (2006).

114 Everytown for Gun Safety, *Mass Shootings in the United States: 2009-2016,* Everytown for Gun Safety, April 11, 2017, *available at https://everytownresearch.org/reports/mass-shootings-analysis/*. Last accessed May 31st, 2018.

jory Stoneman Douglas High School in Florida.[115] This incident has raised awareness on gun violenceand has sparked March for Our Lives, a movement that advocates for stronger gun laws.[116] Nonetheless, there are numerous similar incidents across all the U.S. According to data from Everytown for Gun Safety, there were at least 316 incidents of gun fire from January 2013 to June 2018.[117] In this regard, the *modus operandi* of school shooters deserves particular attention as the majority of these shootings are perpetrated by minors, and in more than half of these shootings, minors brought the gun from home.[118] These incidents have a tremendous impact on student performance and mental health. A recent empirical study found that school shootings resulting in a fatality reduce school enrollment, cause students to become depressed, and reduce standardized test scores by five percent.[119]

Existing evidence also suggests that the availability of guns can expand the severity (mortality and morbidity) of the resulting outcome in cases associated with random and unplanned conflicts linked to social violence. For instance, road rage incidents between citizens carrying guns are a growing concern across the U.S. According to data from The Trace, while there were 247 road rage incidents involving a gun in 2014, this figure rose to 621 by 2016. In 40 percent of these incidents, someone was either injured or killed with a gun.[120]

As previously discussed, permissive gun laws are associated with higher levels of gun ownership. With higher levels of gun ownership, the risk of gun thefts also increases. Privately owned firearms are stolen with high frequency in the United States: a 2017 study revealed that between 300,000 and 600,000 firearms are stolen every year.[121] This phenomenon is a response to

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[115] Eizabeth Chuck, Alex Johnson and Corky Siemaszko, *17 killed in mass shooting at high school in Parkland, Florida,* NBC News, February 15, 2018, *at https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101*.

[116] Ariel Edwards-Levy, *How Views On Guns Have Changed Since the Parkland Shooting,* The Huffington Post, April 30, 2018, *at https://www.huffingtonpost.com/entry/how-views-on-guns-have-changed-since-the-parkland-shooting_us_5ae78a59e4b055fd7fcedb48;* Jennifer Angiesta, *CNN Poll: Seven in 10 favor tighter gun laws in wake of Parkland shooting,* CNN Politics, February 25, 2018, *available at https://www.cnn.com/2018/02/25/politics/cnn-poll-gun-control-support-climbs/index.html;* Dakin Andone, *What you should know about the March for Our Lives,* CNN, *available at https://www.cnn.com/2018/03/21/us/march-for-our-lives-explainer/index.html*.

[117] Everytown for Gun Safety, *Gunfire on school grounds in the United States,* Everytown for Gun Safety, *available at https://everytownresearch.org/school-shootings/* (Last accessed June 5, 2018).

[118] Everytown for Gun Safety, *Analysis of School Shootings*, Everytown for Gun Safety, December 31, 2015, available at *https://everytownresearch.org/reports/analysis-of-school-shootings/*.

[119] L.-P. Beland & D. Kim, *The Effect of High School Shootings on Schools and Student Performance,* 38 Educational Evaluation and Policy Analysis 113-126 (2015).

[120] Aviva Shen, *When the Driver Who Just Cut You Off Also Has a Gun,* The Trace, April 10, 2017, *at https://www.thetrace.org/2017/04/road-rage-shootings-guns/*.

[121] Brian Freskos, *Guns are Stolen in America up to Once Every Minute. Owners who leave their weapons in cars make it Easy for Thieves,* The Trace, December 21, 2016, *at https://www.thetrace.org/2016/09/stolen-guns-cars-trucks-us-atlanta/*.

the opportunity structure of firearm availability, a phenomenon called "target backcloth" by criminologists (e.g. the spatial opportunity structure of crime sites). According to this argument, if guns are available in vehicles, criminals would target vehicles knowing or seeing that a gun is inside. A recent investigation found that after firearms were allowed to be carried in automobiles in the state of Tennessee, the number of stolen firearm increased significantly.[122] In a similar manner, some of the risk factors that facilitate gun theft include owning multiple guns, unsafe storage and carrying guns in public.[123]

Other states have adopted more extreme self-defense measures offering substantial lessons for other states and countries, such as Mexico itself. Florida, for example, adopted a law called "Stand Your Ground" in which individuals who believe they are under threat of death or injury can use deadly force in the street without the need to retreat.[124] As a result of this law, homicides in Florida increased significantly. A 2016 study concluded that, because of this new policy, gun homicide rates in Florida increased 32 percent while overall homicide rates increased 24 percent.[125] Other studies found that states that enacted similar laws presented an increase of eight percent in homicides.[126]

Another issue that deserves attention in this discussion is the fact that states with more permissive gun laws and higher levels of gun ownership tend to illegally export more crime guns to other states. For instance, 74 percent of guns used in crimes in New York, a state with strong gun laws, originated in states with weaker gun laws such as Pennsylvania, Georgia, Florida and North Carolina.[127] A 2016 analysis by the Center for American Progress found a strong correlation between a states' rate of crime gun exports and the strength of the states' gun laws.[128] This suggests that gun diversion to criminal networks is more likely to occur in states with more permissive gun laws,

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[122] Adrian Mojica, *Tennessee gun owners unintentionally helping criminal obtain weapons?,* FOX17 News, November 23, 2016, *at http://fox17.com/news/local/tennessee-gun-owners-unintentionally-helping-criminals-obtain-weapons*.

[123] David Hemenway, Deborah Azrael & Matthew Miller, *Whose guns are stolen? The epidemiology of Gun theft victim,* 4 Injury Epidemiology (2017).

[124] Chelsea Parsons, *Jeb Bush's License to Kill.* Center for American Progress July 28, 2015, *available at https://cdn.americanprogress.org/wp-content/uploads/2015/07/28193014/Bush-StandYourGround-brief-FINAL4.pdf*.

[125] David Humphreys, Antonio Gasparrini & Douglas Wiebe, *Evaluating the Impact of Florida's "Stand Your Ground" Self-Defense Law on Homicide and Suicide by Firearm,* 177 Jama Intern Med 1, 44-50 (2017).

[126] Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 Journal of Human Resource 3, 821-854 (2013).

[127] German Lopez, *Almost 74% of guns used in New York crimes come from states with weaker gun laws* Vox, October 26, 2016, *available at https://www.vox.com/policy-and-politics/2016/10/26/13418208/guns-new-york-iron-pipeline*.

[128] Chelsea Parsons & Eugenio Weigend, *America under fire.* Center for American Progress October 11, 2016, *available at https://cdn.americanprogress.org/wp-content/uploads/2016/10/11100940/AmericaUnderFire-report.pdf*.

generating negative externalities not only in these particular places, but also in surrounding areas.

All of these violent situations also generate economic costs. In this regard, research from the CDC reported that in 2010 the cost of firearm related deaths in the U.S. totaled $41 billion.[129] A more recent and comprehensive study included not only the costs of deaths, but also of hospitalizations and reductions in job productivity, finding that U.S. citizens paid out $229 billion due to gun violence in 2015. [130] To put this figure in perspective, it is more than the economic costs of obesity in the U.S., and $55 billion more than Apple's revenue in 2012.[131]

The evidence reviewed thus far suggests that the implementation of permissive gun laws is associated with an escalation of violence, incurring mental, social and financial costs. But what happens if we evaluate the opposite effect, analyzing the cases where gun laws are being strengthened.

Research conducted by Everytown for Gun Safety found that states that implemented universal background checks had rates of intimate partner gun homicides that were 46 percent lower than those states that did not implement such a measure.[132] This study also found that gun suicides were 48 percent lower in those same states.[133]

Similarly, researchers from Johns Hopkins University analyzed the impact of state permit requirements, including background checks, before purchasing a gun, finding that when Connecticut implemented this requirement, gun homicides decreased by 40 percent.[134] When the state of Missouri removed such requirement and firearms became more accessible, gun homicides increased by 26 percent.[135] In other words, gun homicides increase as firearms become more available, and they decrease when tougher restrictions are implemented.

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[129] Centers for Disease Control and Prevention, Data & Statistics: Cost of Injury Reports, *available at https://wisqars.cdc.gov:8443/costT/cost_Part1_Intro.jsp*.

[130] Mark Follman, Julia Lurie, Jaeah Lee & James West, *The True Cost of Gun Violence in America*, Mother Jones, April 15, 2015, *available at* http://www.motherjones.com/politics/2015/04/true-cost-of-gun-violence-in-america/.

[131] *Id.*

[132] Everytown for Gun Safety, *Latest Gun Violence Research: States With Background Checks Have Fewer Domestic Violence Homicides, Fewer Police Killed by Guns*, Everytown for Gun Safety, January 16, 2015, *available at https://everytown.org/press/latest-gun-violence-research-states-with-background-checks-have-fewer-domestic-violence-homicides-fewer-police-killed-by-guns/*.

[133] *Id.*

[134] Kara Rudolph et al, *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides* 105 American Journal of Public Health 8, 49-54 (2015).

[135] Daniel Webster, Cassandra Kercher & Jon Vernick, *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides* 91 Journal of Urban Health: Bulletin of the New York Academy of Medicine 3, 293-302 (2014).

A general outlook would suggest that an efficient approach for a complete assessment of the possible impact of permissive gun laws would be to compare the states with the most permissive policies *vis-à-vis* those with the strictest ones. A 2016 study found that the 10 states with the weakest gun laws in the U.S. collectively experienced three times more gun violence compared with the average of the ten states with the strongest gun laws.[136] This comparison between states suggests that more permissive gun laws seem to be linked to higher levels of gun violence. Since states in the U.S. have the right to dictate certain gun laws, this ultimately reminds us how different states have taken different approaches to gun laws, and how these policy decisions have led to differing gun violence outcomes.

V. Policy Implications and Conclusions

Would more permissive gun laws have the effect of reducing violence in Mexico? By analyzing experiences with gun laws in the U.S., where guns are more prevalent, this analysis indicates that guns do not have a deterrent effect on violence, and in fact can lead to more gun deaths. Therefore, based on results from the U.S., there is no evidence to support the hypothesis that more firearms would have a deterrent effect in Mexico.

In addition to rejecting the hypothesis that more guns imply less crime, this study also found relevant data and research that raise additional questions and concerns drawn from the U.S. experience. These concerns need to be addressed in Mexico's social context. First, if the U.S., a developed country with relatively strong security institutions, has serious problems related to gun violence, how would similar gun laws affect a country with weaker security institutions, such as Mexico? Ninety percent crimes are not reported to authorities in Mexico, presenting staggering levels of impunity.[137]

For instance, evidence suggests that instead of reducing crime, the implementation of permissive gun laws could potentially keep arming criminal groups. Today, most firearms in Mexico are illegally trafficked from the U.S.[138] As evidence from the U.S. suggests, permissive gun laws and higher levels of gun ownership are associated with more guns being stolen and diverted to criminal networks. Therefore, should more permissive gun laws be

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[136] Chelsea Parsons & Eugenio Weigend, *America under fire,* Center for American Progress, October 11, 2016, *available at https://cdn.americanprogress.org/wp-content/uploads/2016/10/11100940/AmericaUnderFire-report.pdf.*

[137] Instituto Nacional de Estadística y Geografía (INEGI), Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública 2017 (2017).

[138] Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *International Firearms Trace Data Mexico 2010-2015* (2016), *available at https://www.atf.gov/docs/internationalfirearmstracedata-mexicocy2010-2015pdf/download.*

adopted in Mexico, it is likely that these regulations would contribute to arming criminal groups.

Another fundamental question that follows from this assessment is how these permissive gun laws would affect Mexican police forces. Evidence from the U.S. suggests that police officers are more vulnerable to gun violence in states with permissive gun laws, whether conducting an arrest, addressing violent disputes or simply stopping a vehicle for speeding. Were there more guns, would these actions place law enforcement officers at higher risk in Mexico? Available evidence suggests that, at the very least, this issue should be considered as a key element in the debate.

Another factor that deserves further debate is whether more permissive gun laws could also escalate other forms of violence. For instance, how will easy access to guns in Mexico affect violence against women? According to Mexico's National Institute for Statistics and Geography (*Instituto Nacional de Estadística y Geografía*, INEGI), two out of three women in Mexico already suffer from some kind of violence related to gender.[139] Specialists report that 44 percent of women in Mexico are victims of violence caused by their intimate partners.[140] In the U.S., women's risk of being killed at home when there is a gun increase significantly. Would the situation be different (or better) in Mexico? Probably not.

Other risks associated to permissive gun laws also deserve attention. For instance, what would happen with regards to school violence in Mexico? To date, there have been some cases of students bringing knives and other non-firearm weapons to schools, but these could easily be substituted for firearms. In this regard, Mexico experienced a mass school shooting in Monterrey, Nuevo León, in 2017, and additional cases have occurred in which students have brought guns to educational premises.[141] Mexico presents higher rates of bullying in schools when compared to other Organization for Economic Co-operation and Development (OECD) countries.[142] Adding firearms to this already growing concern is likely to result in additional fatal outcomes, such as an increase in suicides.

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[139] Instituto Nacional de Estadística y Geografía, Resultados de la Encuesta Nacional Sobre la Dinámica de las Relaciones en los Hogares, *available at http://www.inegi.org.mx/saladeprensa/boletines/2017/endireh/endireh2017_08.pdf*.

[140] *Id.*

[141] Paulina Villegas, *Mexican Student Fatally Shoots Himself in Classroom After Wounding Four*, The New York Times January 18, 2017, *available at https://www.nytimes.com/2017/01/18/world/americas/mexico-school-shooting-monterrey.html*; Luciano Campos Garza, Suspenden a alumna que llevó pistola a secundaria privada de Monterrey, Proceso, October 24, 2017, *at http://www.proceso.com.mx/508671/suspenden-a-alumna-llevo-pistola-a-secundaria-privada-monterrey*.

[142] Organization for Economic Cooperation and Development, How much of a problem is bullying at school? PISA in Focus #74, *available at http://www.oecd-ilibrary.org/docserver/download/728d6464-en.pdf?expires=1510940200&id=id&accname=guest&checksum=1C4E03315AC63A87BD0318022223B077*.

If a more permissive gun law is adopted in México, it could also potentially experience an increase in gun confrontations derived from vehicle related accidents. This type of violence has escalated in the U.S. in recent years and could potentially become a problem in Mexico. Policy decision makers must consider that Mexico is a country with high levels of vehicle related accidents, and that fatal encounters with guns during road incidents have already occurred.[143] Evidence suggests that problems such as road rage incidents can escalate if guns become more available.

We assume decision makers in Mexico have the best intentions when suggesting permissive gun laws. However, if they consider replicating U.S. gun policies, they must also analyze the potential flaws in their diagnosis, as well as the possible negative effects, costs, and consequences of such laws.

Instead of adopting strategies that increase the availability of guns among the population, the discussion should be centered on how to reduce access to illegal firearms for criminal groups. Even policy makers that support permissive gun laws agree that reducing illegal gun trafficking is crucial. The federal government should incorporate a more balanced security strategy that incorporates firearms trafficking as a priority. This is key, since one of the necessary conditions for drug markets to become more violent is the availability of firearms. At the same time, firearms provide criminal groups with the opportunity to diversify from drug markets into other types of criminal activity such as kidnappings and robberies. In fact, crimes such as illegal mining or violent oil theft have risen in recent years, the latter having a dramatic impact in Mexico.[144] It is debatable as to whether these violent crimes would occur if criminal groups had no access to powerful guns.

It is a fact that Mexico is experiencing a serious challenge in terms of criminal violence, and something must be done to address it. However, instead of adopting permissive gun laws, Mexico should adopt a holistic strategy. Among other strategies, impunity rates must be reduced by devoting substantial political and financial efforts to design a clear strategy to complete the judicial reform in force since 2016. Likewise, security institutions must be strengthened with a specific emphasis on what has worked domestically and internationally, particularly in the fields of social and situational crime prevention. For this to happen, comprehensive police reform that focuses not only on redesigning the institutional framework, but also on increasing sala-

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143 Toluca Noticias, *Conductor de BMW mata a chofer de autobús por un "cerrón" en San Mateo Atenco,* Toluca Noticias, February 7, 2015, *at http://www.tolucanoticias.com/2015/02/conductor-de-bmw-mata-chofer-de-autobus.html*.

144 Alberto Najar, *Minería, el nuevo negocio de los carteles mexicanos*, BBC Mundo, May 1, 2017, *at http://www.bbc.com/mundo/noticias/2014/03/140318_mexico_mineria_nuevo_negocio_carteles_narcotrafico_templarios_zetas_an*; Sergio Rincón, *El millonario negocio del robo de combustible por el crimen organizado en época de escasez en México*, Univision Noticias, December 29, 2016, *at http://www.univision.com/noticias/crimen-organizado/el-millonario-negocio-del-robo-de-combustible-por-crimen-organizado-en-epoca-de-escasez*.

ries and working conditions, seems to be an efficient and sustainable way to tackle crime.[145]

From a general perspective, Mexico can learn much about successful policies from the U.S., but permissive gun laws are not one of those successes. Instead, Mexico would do well to follow the example of other countries like Australia, where stricter gun laws may have contributed to reducing gun related crimes.[146] In the end, the evidence is clear: a safer society is not one where firearms are more available, but one where they are not needed or used at all.

[145] Bernardo González-Aréchiga, et al., ¿Cómo transformar las policías? Análisis de opciones y estrategias para reformar el mando policial en México, Tirant lo Blanch (2017).

[146] Simon Chapman, et al, *Association Between Gun Law Reforms and Intentional Firearm Deaths in Australia, 1979-2013,* 316 JAMA 3, 291-299 (2016).

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UNDERSTANDING THE RISE OF MEXICAN MIGRATION TO CANADA

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Abstract: *This article shows that the number of people seeking asylum in Canada from Mexico continues and has increased at an exponential rate. Canada has become a favorite destination for Mexican asylum seekers while Canada accepts their claims at an alarmingly low rate compared to those from other nations. We argue that the reason Mexicans choose Canada to claim refugee status is due to Canada's long history of open immigration policies and especially its economic and temporary labor agreements. These policies give the impression to Mexicans that they are welcome in Canada. This proved to be untrue when Canada changed its immigration and refugee policies in response, specifically, to the overwhelming number of Mexican refugee claims.*

Keywords: *Human Rights, Refugee Claimants, Mexico, Canadian Government, Temporary Foreign Worker Program, NAFTA, Immigration and Refugee Board of Canada*

Resumen: *Este documento muestra que la cantidad de personas buscando asilo en Canadá desde México continúa y ha aumentado a un ritmo exponencial. Se encuentra que Canadá se ha convertido en el destino favorito de los refugiados mexicanos, mientras dicho país acepta sus solicitudes a una tasa alarmantemente baja en comparación con las solicitudes de otras naciones. Argumento que la razón por la cual los mexicanos eligieron Canadá para pedir el estatus de refugiado, es derivado de una larga historia de política de inmigración abierta y especialmente por sus acuerdos laborales y económicos. Estas políticas dan la impresión a los mexicanos que son bienvenidos en Canadá. Sin embargo se demuestra que esto no es cierto toda vez que Canadá cambió sus políticas de inmigración y de refugiados en respuesta, específicamente, a la abrumadora cantidad de solicitudes de refugiados mexicanos.*

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Palabras clave: *Derechos Humanos, Refugiados, Solicitante, México, Gobierno de Canadá, Programa de Trabajadores Extranjeros Temporales, TLCAN, Consejo de Inmigración y Refugiados de Canadá*

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I. Introduction

In recent years, migration from Mexico to Canada has increased at an exponential rate. The most significant and notable surge has been in the number of refugee claims from Mexicans seeking asylum in Canada. Currently, there has been little research on the subject of Mexican refugees in Canada, despite thousands of claimants each year. The mere fact that 83.2 percent of all Mexican refugee claimants were denied in 2011 alone demonstrates a disparity between the standards and requirements for obtaining refugee status in Canada and the claims by Mexicans. This causes concern and questions about the reasoning behind the lack of approval of claims from Mexicans specifically. The stories behind how Canada proceeded to change its visa policy in 2009 in response to the overwhelming number of refugee claims from

Mexico are essential to understanding how and why Canada further revised its immigration policy in 2012, making it a quicker process from the moment a refugee claim is made to the moment the government can deport those who failed to meet the requirements of their claims.[1]

The Temporary Foreign Worker Program[2] (TFWP) in Canada allows Mexicans to work temporarily (mostly during agricultural seasons), but due to a large Mexican refugee claimant numbers,[3] the Canadian Government changed its policies. In response to the backlogged system and continuous applications from Mexicans, Canada changed its immigration policies in 2009, 2010, and then again in 2012, in an attempt to reduce the number of refugee applications, mainly from Mexico, and to expedite the process to get those denied refugee status out of the country quicker.

The TFWP, North American Free Trade Agreement[4] (NAFTA), and the general relaxed immigration laws made Canada seem like a natural location for Mexicans fleeing from violence and drug wars in Mexico. Using statistical data from the Government of Canada, we will demonstrate how the changes in Canadian immigration policy have drastically and negatively affected Mexican refugees seeking asylum.

This article argues that the number of people seeking asylum in Canada from Mexico has increased at an exponential rate despite the changes made to Canadian Immigration Policies. Our work will take an interdisciplinary approach to study Mexican refugees in Canada, drawing upon the work of the media, data, and scholars to present a comprehensive look at the evolution of this phenomenon.

II. The History of Mexican Immigration in Canada

Mexicans did not begin arriving in Canada in significant numbers until the mid-1970s when the Canadian government expanded their TFWP to specifically recruit Mexicans to fill the unskilled labor shortage in its agriculture industry.[5] As Mexicans started arriving to work seasonally for typically

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[1] Government of Canada, *Canada Imposes a Visa on Mexico*, July 13, 2009, *available at https://www.canada.ca/en/news/archive/2009/07/canada-imposes-visa-mexico.html* (last visited July 28, 2018).

[2] A program of the Government of Canada to allow employers in Canada to hire foreign nationals. Created in 1966, it originally recruited workers from Commonwealth Caribbean countries until it was expanded to include Mexicans in 1974.

[3] *Id.*

[4] The North American Free Trade Agreement (NAFTA), *Tratado de Libre Comercio de América del Norte,* (*TLCAN)* in Spanish or *Accord de libre-échange nord-américain*, (*ALÉNA*) in French is an agreement signed by Canada, Mexico, and the United States. The agreement created a trilateral trade bloc in North America and came into force on January 1, 1994.

[5] Tanya Basok, *Mexican Seasonal Migration to Canada and Development: A Community-based Comparison*, 41 Int'l. Migr. 2 (2003).

six months at a time, this migration continued because knowledge spread about how to enter Canada and adjust to life there. The expansion of the guest worker program is why Mexicans have continued to choose Canada as a preferred destination of choice when they fear for their lives.

The importance of the history of Mexicans in Canada and their immigration patterns points to a trend which will most likely continue in the foreseeable future. Although immigration from Mexico to Canada is a recent phenomenon and occurs in much smaller numbers than it does to the United States, it still represents an important trend in migration in North America. While the TFWP has been fairly well documented and researched by scholars, general immigration information and especially the emergence of large numbers of Mexican refugee claims in Canada and its meaning has yet to be analyzed by scholars.[6] This history of Mexican immigration in Canada has shaped and influenced current immigration patterns of Mexicans in Canada.

According to authors like Irene Bloemraad, the United States is more important in numbers when it comes to Latin American immigration than Canada, specifically from Mexico. The United States seems more willing and able to accept persons from Mexico into their society based on the total number of Mexican immigrants, but the percentage of persons who actually obtain citizenship and claim refugee status is much higher for Mexicans in Canada. Using census data from 1991 to 2001, Bloemraad illustrates how the United States consistently receives the most Mexican immigrants, while Canada has mostly relied on European immigration.[7] However, this trend has been changing. When historically considering the policies toward immigrants and refugees in each nation, it becomes obvious why a higher percentage of Mexican immigrants in Canada become citizens and choose to claim asylum there as well.

Canada categorizes its population into permanent and temporary residents. It defines permanent residents as those individuals who have been granted permanent resident status and have not subsequently lost it; permanent residents are given all the rights of Canadian citizens with the exception of the right to vote in elections. The Department of Immigration, Refugees and Citizenship Canada defines temporary residents as persons who are legally authorized to be in Canada on a temporary basis and have the corresponding permit (i.e., a work permit, study permit, temporary resident permit, or a visitor visa). Temporary residents include foreign students, foreign workers, and visitors.

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[6] Richard E. Mueller, *Mexican Immigrants and Temporary Residents in Canada: Current Knowledge and Future Research*, 3 Migr. Int'l (Migraciones internacionales) 1 (2005).

[7] Irene Bloemraad, *Becoming a Citizen: Incorporating Immigrants and Refugees in the United States and Canada*, (eds), (Berkeley: University of California Press, 2006).

1. *Canadian Worker Programs*

Mexicans began migrating to Canada in exponentially larger numbers when the Canadian guest worker program was expanded to fill the need for more migrant labor in the country. Canada launched a Seasonal Agricultural Worker Program (SAWP) in 1966. This was a means to address the labor shortages growers were facing in all provinces. Commonly known throughout the region as the "offshore program," it initially only applied to workers from Caribbean countries. The use of only Caribbean workers did not completely fill the labor market shortage, so it was expanded to recruit workers from Mexico in 1974.[8]

Tanya Basok and other authors argue that the reason temporary immigrant labor was needed at that time and continues is because Canada needed persons willing to participate in "unfree" or captive labor. This type of labor means persons are by contract unable to change jobs once hired for their contract and must also be able to fill the request for labor whenever the need arises.[9] Canadian agricultural employers prefer this type of unfree labor in order to maintain control over and stability in their working environment.[10] In addition, contract workers cannot unionize or organize to improve their working conditions, except in British Colombia.[11] Temporary workers are willing to comply with these conditions because they need the work and fear losing future opportunities with the program. Canadian citizen and permanent residents are unwilling to accept this type of labor because they must remain under contract, accept lower wages, and at times work under extremely strenuous working conditions. These people choose to take higher skill-level jobs that allow them freedom of movement throughout Canada, instead of being tied to the growing season or a contract.

On the other hand, the economic situation in Mexico makes Mexicans the perfect population to fill the labor void in Canada. As many rural Mexican residents lost their farmland after 1994 when Mexico opened their economy to large, foreign companies, and that land was redistributed to large land owners for mass production, these small farmers were left unemployed and had to find work to provide for their families. Canadian agricultural work was the best solution to their problems. Mexicans were willing to accept the work and conditions that went along with it. According to Basok:

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[8] Tanya Basok, *Human Rights and Citizenship: The Case of Mexican Migrants in Canada,* 72 The Center for Comparative Immigration Studies (2003).

[9] Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada,* McGill-Queen's University Press 14 (2002).

[10] *Id.* at 16.

[11] *Id.* at 60-61.

> Unlike local workers, Mexicans are willing to accept minimum wages for work that is back-breaking, monotonous, and detrimental to their health. Even though Mexican labour is relatively costly because of the high transportation and accommodation costs, for many growers it is extremely valuable because it is unfree. Most Mexican workers stay with the same employer as long as there is work for them to do; they are available to work long hours every day; and they do not take time off work, even when they are sick or injured.[12]

Growers who use seasonal laborers through the SAWP can request workers who have worked for them in the past for the next season to ensure receiving reliable and trusted laborers. Many workers establish a relationship with a specific farmer and return year after year to the same farm. Employers are required to provide adequate housing on or near the farm for free and the laborers are required to stay there.[13] Free housing is both an advantage and disadvantage for the migrant workers. They work late hours and live far from non-Mexican communities, giving them limited time in the community to interact and establish any kind of connection. However, this living arrangement gives the laborers a better opportunity to save money for their families than immigrant workers in the United States.

Mexican contract laborers are given benefits they would not receive in the United States for the same work. On average, they are paid five cents above Canada's minimum hourly wage, receive money for their transportation costs and are provided housing for the duration of their employment. Employers must arrange and pay for transportation to Canada and back to the worker's country of origin, but some of the costs can be taken out of their payroll during the season.[14] This is a huge added benefit to working in Canada and helps ensure the loyalty of highly productive Mexican workers who are willing to accept their working environment and stay for the entire season. In addition, since they work long hours and are isolated from the cities, they are even available for work on weekends.[15] While the migrants are entitled to a day of rest for every six consecutive days of work, they usually prefer to work as many days and hours as their employer will allow.[16] Mexicans' willingness to work and accept all the terms makes them the ideal population to fill labor shortages of Canadian farmers.

More people from Mexico involved in temporary work in Canada means more people returning to Mexico after their work permits expire who will

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[12] *Id.*at 107.

[13] Employment and Social Development Canada, *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico* – 2017, *available at https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/sawpmc2017.pdf* (last visited July 26, 2018).

[14] *Id.*

[15] Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*, *supra* note 9 at 127.

[16] *Id.* at 119-120.

tell their friends and relatives about the programs Canada offers. Mexicans learn about the benefits of choosing Canada over other destinations like the United States via word of mouth. Mexicans seeking a better life come to believe that Canada would be the best choice in situations where asylum is needed. Canada is seen as an immigrant-friendly country that offers assistance to temporary workers, as well as to asylum seekers. As success stories in Canada make their way back to Mexico, it increases the likelihood that more Mexicans wanting to find work or needing asylum will opt for Canada.

2. *International Human Rights*

Canada also has a relatively good record of upholding international human rights when it comes to immigrants. Universal human rights principles, such as those established by the United Nations after World War II, cannot be implemented and enforced without the consent of nations. Migrants are protected internationally by the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[17] While this convention provides protection measure to migrant workers, it carries no weight if Canada chooses not to implement and enforce international human rights standards for migrant workers. In other words, if Canada were a signatory of the Convention which it is not, it would be held accountable by the international community to uphold its provisions. All migrant workers in Canada are protected under the same laws that protect all Canadian citizens.[18] Even though Canada has a legal framework that protects migrant workers, they may still suffer from human rights violations, but to a much lesser degree than in other nations.[19]

Guest workers lack inclusion in social communities in Canada because they are usually isolated, which prevents laborers from having access to their full rights. Hence, they experience human rights violations, such as poor housing conditions, unsafe working conditions, and fear of losing their job due to health concerns. Living away from a community and in a rural area, they are physically separated from places the provide services such as medical facilities or offices where they can claim their benefits. Another reason

[17] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is a United Nations multilateral treaty governing the protection of migrant workers and families. Signed on 18 December 1990, it entered into force on 1 July 2003, after the threshold of 20 ratifying States was reached in March 2003. The Committee on Migrant Workers (CMW) monitors the implementation of this convention, and is one of the seven UN-linked human rights treaty bodies.

[18] Tanya Basok & Emily Carasco, *Advancing the Rights of Non-Citizens in Canada: A Human Rights Approach to Migrant Rights* 32 HUM.RTS. Q. 2 (2010).

[19] Tanya Basok, *Human Rights and Citizenship: The Case of Mexican Migrants in Canada* 8 Citizenship Studies 1 (2004).

they tend to be victims of human rights violations is their acceptance to work under any and all conditions even when ill or injured because many fear they will lose their job in the future if they take off time to tend to their needs. If they speak up for their rights, they fear the consequence of being deported or not hired again the next season.[20] Migrants thus suffer human rights violations when they are cut off from access to economic and social services when those services are needed.

Canada is not a signatory of the United Nations' International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Even though it has not signed the Convention, which would show its commitment before the international community to protect migrant workers in Canada, the country has implemented laws that do protect migrant workers including:

- Right to minimum wage (called prevailing wages in Canada);
- Worker compensation;
- Access to Medicare;
- Provisions of the Employment Standards Act such as vacation pay and public holiday pay if employed for at least 13 weeks (these are only granted to "harvest" and not "farm" workers).

Workers are granted one day of rest for every six consecutive days of work via the "Agreement for Employment in Canada of Seasonal Workers from Mexico."[21] In addition to the aforementioned rights, migrant workers in Canada also qualify for the Ontario Health Insurance Plan (OHIP). However, their fear of losing their job prevents migrant workers from taking full advantage of their healthcare benefits when needed, showing that while Canada provides added benefits for temporary workers, they are not used to their fullest. As with all laborers who choose to migrate to a country with a language other than their primary language, this makes it difficult to communicate or understand what rights they have in that nation. This results in Mexicans' social exclusion if they cannot speak English to communicate with others in the community. In addition to not being able to understand what rights they have, the language barrier makes it more difficult for them to fully understand the procedures they need to carry out in order to take advantage of those rights granted to them.[22] Employers have access to posters informing workers of their rights, but they are only required to post them in English.[23]

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[20] Basok & Carasco, *Advancing the Rights of Non-Citizens in Canada: A Human Rights Approach to Migrant Rights*, *supra* note 18.

[21] *Id.* at 11.

[22] *Id.* at 13.

[23] Delphine Nakache & Paula J. Kinoshita, *The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns*? IRPP Study 5 (2010).

Despite the disadvantages they face, according to statistics, Mexicans are still choosing Canada as a location for temporary work and this trend does not show signs of slowing anytime soon. As long as they cannot find suitable work in Mexico and the demand for temporary labor in Canada remains constant, Mexicans will continue to migrate there. So far, Canada's policies have changed in many ways since Mexico's inclusion in the Seasonal Agricultural Workers Program[24] (SAWP) in 1974. Among the significant changes in policy is the signing and implementation of NAFTA in 1994. Since 1867, for the most part, Canada has been liberal and supportive of those wishing to immigrate to their country. As opposed to the bureaucratic nature of the United States immigration system, Canada's system tends to cater to the needs of immigrants, including refugees, and is in favor of supporting their move toward citizenship. According to Bloemraad:

> First, Canadian bureaucracy overseeing immigration and citizenship supports integration and has a normative bias in favor of citizenship. Second, federal, provincial, and municipal governments in Canada tend to offer more public assistance with the practical business of settlement and integration, subsidizing, for example, classes to learn English or programs to find a job.

To conclude this section, I argue that while immigration from Mexico to Canada is a relatively recent phenomenon, it grew to much larger numbers in the mid-1990s in areas other than temporary labor. The trend towards an increase in all types of Mexican immigration is important to study so as to understand why Mexicans, and especially refugees, are choosing Canada as a key destination. By examining the migration patterns of Mexicans to Canada, this paper can promote an understanding of the reasons for Canada's change in immigration and refugee policies in 2009, 2010, and again in 2012. In the next section I will discuss how NAFTA influenced Mexican immigration to Canada and demonstrate that NAFTA provisions caused an increase in immigration to Canada from Mexico, which contributed to Canada's implementation of a closed immigration policy in recent years.

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[24] The Seasonal Agricultural Worker Program is a Government of Canada program that was introduced by the Pearson government in 1966 between Canada and Jamaica but has since expanded to include Mexico and numerous other Caribbean countries. It is intended to allow Canadian farm employers to hire workers from Mexico and the Caribbean on temporary visas during the planting and harvesting seasons when employers are unable to hire local workers to fill their labor demands. The program, administered jointly by Employment and Social Development Canada with Immigration, Refugees and Citizenship Canada, is available to those who are at least 18 years of age, from one of the participating countries, qualify under the immigration laws and the country of applicant and agree to the employment contract. Those workers are eligible for the Canada Pension Plan and certain Employment Insurance benefits (excluding «special benefits» such as maternal, parental and compassionate care benefits). Workers are also subject to income tax laws.

3. *The Impact of NAFTA on Mexican Immigration and Asylum*

The history of Mexicans in Canada has been influenced and shaped by numerous policies and practices over the years. Canada does not seem like a natural location of choice for Mexicans wishing to migrate because of its distance compared of that of the United States. This is why there was no notable increase in the number of Mexicans in Canada until the adoption of a specific policy and legislation targeted at Mexicans that offered incentives to make the trip. As explained above, significant numbers of Mexicans began arriving in Canada after the expansion of the SAWP in 1974. The SAWP became an alternative to the United States and it offered legal, social, and economic benefits that rivaled and even exceeded opportunities in the U.S. This program started the flow of Mexicans by the thousands to and from Canada each year, which aided in the relationship between the two countries. More and more Mexicans learned of the benefits of working and living in Canada from returning migrants to Mexico.

Signed in 1992, NAFTA entered into force on January 1, 1994, for the purpose of increasing economic relations between the three North American countries. The main provision of *NAFTA* centered on eliminating or reducing tariffs on most goods exported and imported among the three nations. The events leading up to the decision to create such an agreement were dire as thousands of people in Mexico had lost their jobs by 1993, as a result of a severe economic downturn and foreign competition.[25] On other hand, Canada entered NAFTA believing it to be the best option for its economic situation. Canada used its signature as a defensive strategy to avoid losing out on the opportunity to have preferential access to Mexican markets. According to Roberto J. Mejias and José G. Vargas-Hernández:

> …to have stayed out of the agreement would have allowed the United States privileged access to Mexico's tremendous market potential. From the Canadian perspective, Canada would be affected via trade diversion whether or not it joined a free trade agreement.[26]

Canada did not fear it would lose potential economic gains in Mexico, but rather it would lose in U.S. markets as the United States increased trade with Mexico at the expense of Canada. Canada and the United States had already entered into the U.S.-Canada Free Trade Agreement in 1989. This agreement reduced trade barriers, similar to NAFTA's provisions, which is another reason Canada was not too vested signing NAFTA. Because it essentially had already made the same deal with the United States just a few years before,

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[25] Jorge G. Castañeda, *Can NAFTA Change Mexico*? 72 Foreign Affairs 4 (1993).

[26] Roberto J. Mejias & José G. Vargas-Hernández, *Emerging Mexican and Canadian Strategic Trade Alliance Under NAFTA*, 14 J. of Global Marketing 4 (2001).

Canada entered NAFTA with many reservations, as they did not have nearly as many geopolitical interests in Mexico as the United States did. In the end, Canada agreed to the tri party agreement with the mindset to welcome the opportunities Mexico's markets offered.[27]

Many in Mexico hoped NAFTA would aid Mexico's dying economy with foreign capital investments aimed at providing the country with sustainable growth for the future. President Carlos Salinas de Gortari used NAFTA's economic and political promise to gain support for his 1994 campaign. Salinas saw the country's falling per capita growth as a chance to attract foreign capital to finance economic growth. Author Jorge G. Castañeda argues that at the same time, Salinas hoped that by further linking Mexico's economy with the United States, the foundations would be laid for more democratic processes in Mexico and boost Salinas' political power at the same time.[28] Large agricultural corporations especially took advantage of the open-door policy and shut out small-scale farmers, leaving them unemployed and in extreme poverty.

The implementation of NAFTA contributed to drastic declines in several producer prices, as well as reductions in government assistance to small-scale farmers throughout the country in order to appease corporate farms.[29] Increased unemployment was the effect of the NAFTA policy in Mexico that relied on foreign investors in farming. While the average farm size in Mexico increased, the total number of farms decreased. As foreign manufacturing and farming increased in Mexico, so did the use of new technologies, with which small industry and farming owners could not realistically compete. The privatization of farms in Mexico had lasting effects including "deregulation, reduced government spending and support, privatization of state industries that service the farm sector, emphasis on attracting foreign investment, and the trade and corporatization of agriculture."[30] NAFTA policies also affected individuals' health, the infrastructure, and social relationships in rural communities, which led to even more adverse effects on Mexico's social and economic infrastructures.[31] Increased unemployment and the despair of those who lost their farms caused unrest in rural areas among those competing for any kind of job available, whether legal or illegal. As more Mexicans found themselves unemployed, the opportunity for legal employment outside of Mexico became more and more appealing.

In 1995, the peso devaluation process caused by a stagnant economy increased the economic deficit, and the lack of credibility in the exchange rate

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[27] *Id.*

[28] Castañeda, *Can NAFTA Change Mexico*?, *supra* note 25.

[29] Leigh Binford, *Tomorrow We're All Going to the Harvest: Temporary Foreign Worker Programs and Neoliberal Political Economy* (University of Texas Press, 2013).

[30] *Id.* at 48.

[31] *Id.*at 200.

mechanism.[32] The Mexican government was running out of options other than devaluation of its currency to turn the economy around. This was detrimental to Mexico's economy and contributed to the seemingly negative effects of opening its doors through NAFTA. The devaluation, however, did not stop the growing relationship between Canada and Mexico at the time. As Mexican businesses went bankrupt and unemployment soared, economic relations between Canada and Mexico improved. Mexico's heavy reliance on foreign investment and trade after the implementation of NAFTA increased its foreign economic capital as workers in Mexico suffered from unemployment. The economic turmoil in Mexico at this time coupled with increasing trade relations between Mexico and Canada contributed to the increased migration flow from Mexico to Canada.[33] The two-way trade between Canada and Mexico more than doubled after NAFTA was implemented, going from $6.5 billion to $15.1 billion in a ten-year period. Canada is Mexico's second-most important export market while Mexico is Canada's fourth-most important export market. [34] As these economic relations have grown between the two nations, so has the movement of people between Canada and Mexico. Canada has always been a nation to actively petition for immigration because of the belief that immigrants, overall, have a positive economic, social and political impact on their country.[35]

Mexican immigration to Canada grew exponentially after the implementation of NAFTA in 1994. While NAFTA opened economic doors among the three nations, it also opened the doors to people wishing to migrate. The Treaty NAFTA visa[36] (TN visa) was created to give professionals the possibility to pursue employment opportunities in another signatory nation. While this might appear to be a very viable opportunity provided by NAFTA, only 101 Mexicans were in Canada on a *TN visa* in 2001.[37] Rather, as Mexico's

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[32] Maxwell A. Cameron, *Mexican Meltdown: States, Markets and Post-NAFTA Financial Turmoil*, 17 Third World. Q. 5 (1996).

[33] Mejias & Vargas-Hernández, *Emerging Mexican and Canadian Strategic Trade Alliance Under NAFTA*, *supra* note 26.

[34] Rebecca Jannol, Deborah Meyers, & Maia Jachimowicz, *U.S.-Canada-Mexico Fact Sheet on Trade and Migration*, Migration Policy Institute 3 (2003).

[35] E.G., *The United States v. Canada*, *Why the differing views on immigration*? The Economist (Austin Texas, 2011).

[36] TN status or TN visa is a special non-immigrant status in the United States, Canada, and Mexico that offers expedited work authorization to a citizen of these countries. It bears a similarity, in some ways, to the US H-1B visa, but it has many unique features. Within the TN set of occupations, a United States, Canadian, or Mexican citizen can work in the one of the other two countries for up to three years, but does not grant the right to apply for permanent residence. The permit may be renewed indefinitely.

[37] Jannol, Meyers, & Jachimowicz. There are four categories of *NAFTA* workers. Business visitors are involved in international trade activities and need to go to Canada to fulfill their duties. Intra-company transferees are Mexican or American citizens who, under certain conditions, can enter Canada with a work permit issued at the point of entry. Investors and traders are those individuals who intend to invest substantially in Canadian businesses, or who are involved in

unemployment rate increased, the need for temporary workers in Canada increased, from which most of the upsurge in Mexican migration post-NAFTA stemmed. As trade between Canada and Mexico increased after the implementation of NAFTA, new migration flows flourished. The movement of people between the nations grew as economic connections did. Unlike the United States, Canada sought to accommodate the influx of immigrants through legal channels, including adding to the number of foreign workers. Conversely, the United States forced a majority of Mexicans to migrate illegally. This difference gave Mexicans a choice between legal or illegal migration and the costs associated with each. As migration flow levels from Mexico to Canada went up, Canada showed a greater interest in taking advantage of the legal opportunities offered. The temporary worker program was designed to minimize settlement, maximize return migration and provide better wages and working conditions and it succeeded. Douglas S. Massey and Amelia E. Brown explain:

> Temporary labor migration from Mexico rose by 153 percent from 1998 to 2007, going from an annual flow of around 7,000 workers to a little under 18,000 workers in ten years. Mexico is now the second largest source of temporary workers for Canada, accounting for 11 percent of all entries of foreign workers.[38]

The largest increase in temporary workers was under the SAWP category,[39] compared to the number of high-skilled laborers or those coming for live-in caregiving, for example. Of the Mexicans coming during this time period for temporary work, 94 percent were SAWP laborers.[40] The plan was for NAFTA to place Mexico in a position to "modernize" at a very fast pace, but the result was the opposite. The reorganization of the Mexican economy after NAFTA displaced thousands of workers, leaving many unemployed and in poverty. Income gap and disparity grew in the 1990s in Mexico. While Mexico was experiencing high levels of unemployment and poverty, Canada was experiencing significant demographic changes. With its baby boomer population reaching retirement age, there was a shortage in the low skilled employment sector. This put pressure on the government to expand its temporary worker programs to fill labor shortages with programs like the SAWP. [41]

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significant trade with Canada. These individuals are required to have work permits, which are usually issued outside of Canada. Professionals are those with advanced education, who work in certain occupations and have pre-arranged employment in Canada.

[38] Douglas S. Massey & Amelia E. Brown, *New Migration Stream between Mexico and Canada*, 6 Int'l, Migr (*Migraciones internacionales*) 1 (2011).

[39] Mueller, *Mexican Immigrants and Temporary Residents in Canada: Current Knowledge and Future Research*, *supra* note 6.

[40] Massey & Brown, *New Migration Stream between Mexico and Canada*, *supra* note 38.

[41] Mueller, *Mexican Immigrants and Temporary Residents in Canada: Current Knowledge and Future Research*, *supra* note 6.

For Mexicans lacking economic opportunities in Mexico, Canada became a legal alternative labor destination to the United States. Despite Mexico's post-NAFTA difficulties, it was able to form a lasting relationship with Canada, especially economically. Each country took advantage of what the other had to offer. Canada seized the opportunity to increase its trade relations while Mexicans used Canada as an alternative destination to the United States for employment opportunities. Their relationship was used to improve their situations both individually and collectively. Canada and Mexico even used the strength of their newfound relationship to confront the U.S. together. Using both their voices, they protested the Helms-Burton bill from passing and becoming law in the U.S. in 1996. This bill would fine or restrict any business entity that chose to or was currently exchanging goods or services with Cuba. Mexico and Canada saw this as a violation of international laws because neither country has instituted economic sanctions against Cuba. Both Canadian and Mexican officials believe that this legislation was in violation of the intent and purpose of NAFTA.

Overall, NAFTA had mixed results, but in the end each country gained something from the agreement. Although Mexico's economy essentially collapsed for Mexicans as they lost their lands, became unemployed, and lost the value of their currency, their closer relationship with Canada proved extremely beneficial. Mexico and Canada were able to successfully collaborate to protect their economic interests in Cuba against the United States.[42] Also, as Mexico's economy worsened and unemployment rose, Canada expanded its temporary worker programs to accommodate more Mexicans as a legal alternative to the U.S. While the reason for increased migration from Mexico to Canada cannot be directly equated to NAFTA policies, the increased economic relationship between Canada and Mexico can somewhat be attributed to their willingness to sign the agreement and increase trade relations to the highest level they had ever stood. The next section will discuss Mexican Refugee Claims in Canada.

III. Mexican Refugee Claims in Canada

Since the implementation of NAFTA in 1994, increased illegal market activity has triggered a violent and dangerous environment forcing Mexican citizens to seek refuge. Familiar with Canada through the TFWP, Mexicans overwhelmingly choose Canada as their preferred destination to claim refugee

[42] The collaboration of Mexico and Canada in order to protect their interests in Cuba against the United States was successful. Together they were able to get the Helms-Burton bill suspended so they could continue their economic trade relations with Cuba without and not have any backlash from the United States for it. This shows the progression and tangible benefits NAFTA was able to provide for Canada and Mexico, who used the Agreement to the benefit of their economic interests.

status. While it would appear that Canada is open and welcoming of Mexicans, it has accepted only a small percentage of refugee claims from Mexico out of thousands of applicants. The refusal to accept Mexicans as refugees has left thousands of Mexicans with nowhere to turn, leaving them even more vulnerable to violence and persecution by drug-traffickers, gangs, and corrupt government officials. Refugee claims are denied for three main reasons. First, corruption in Mexico does not provide Mexican refugees with government protection or the conditions to flee within the country. Yet, Canada believes Mexico is a democratic nation that can protect its citizens. Second, Canada does not want to accept refugee claims from Mexicans for fear of hurting its trade relations with Mexico in light of NAFTA. Finally, the new Canadian refugee claim system leaves Mexicans vulnerable and unable to fully explain their situation and need for asylum.

1. *Context*

Canada signed the 1951 Convention on the Status of Refugees[43] in 1969, and in 1970 the Department of Manpower and Immigration incorporated the UN convention definition of a refugee into its new guidelines for refugee admissions. The 1976 Immigration Act made those guidelines law, making it binding for Canada to adhere to the international human rights standards set by the United Nations, at least in theory. Placing international human rights law into its own country's legal system gave more legitimacy to Canada and its refugee program in the eyes of the international community. Canadian refugee policy was originally based on the 1976 Immigration Act, [44] which

[43] 1951 Convention Relating to the Status of Refugees, article 42: 1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive. 2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

[44] *The Immigration Act.* 1976, in Canada was enacted in 1978 by the Parliament of Canada. It focused on who should be allowed into Canada, not on who should be kept out. The Act came into force in 1978, along with new immigration regulations. This Act gave more power to the provinces to set up their own immigration laws and define «prohibited classes» in much broader terms. Individuals who could become a burden on social welfare or health services would now be refused entry, rather than specific categories of people, *e.g.*, those who identified themselves as homosexual, the disabled, and so on. Further, it created four new classes of immigrants who could come to Canada: refugees, families, assisted relatives, and independent immigrants. While independent immigrants had to take part in a points system, other classes did not have to take this test as long as they passed basic criminal, security, and health checks. The Act also created alternatives to deportation for less serious criminal or medical offenses, since deportation meant the immigrant was barred from entering Canada for life. After 1978, the government could issue 12-month exclusion orders and a departure notice, if the cause for a person´s removal was not serious, but in some cases it could be severe. The 1976 *Immigration*

formalized refugee policy in the country. This act gave recognition to convention refugees, as defined by the United Nations Convention Relating to the Status of Refugees, as well as to humanitarian refugees, a term used in Canada for the groups of displaced or persecuted persons who do not necessarily meet the convention definition which tends to be stricter.

The 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention) is the key international legal document that defines who is a refugee, their rights and the legal obligations of signatory countries to the 1951 Refugee Convention.[45] The term "refugee" shall apply to any person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[46]

A Convention 'refugee' is different from an 'asylum seeker' because the former has had his or her asylum claims assessed and has been found to satisfy the above definition. This assessment can be done by a country that has acceded to the 1951 Refugee Convention or by the United Nations High Commissioner for Refugees (UNHCR). There is no such thing as a 'genuine refugee'. A refugee by technical definition is simply someone who has been recognized as meeting the above Convention definition. Further, a person is a refugee within the meaning of the 1951 Convention as soon as they satisfy the above definition. This might actually occur before their refugee status is formally determined by a country or the UNHCR. Refugee status is therefore declaratory in nature—in that, a refugee does not become a refugee because they have been recognized as one but rather, recognized because they are refugees.[47]However, Canada defines a Convention refugee as:

Act was replaced by the *Immigration and Refugee Protection Act* (IRPA) in 2002. The enforcement team with the Immigration, Refugees and Citizenship Canada was responsible for enforcing the act at border crossings with the United States as well as at checkpoints at international airports in Canada.

[45] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 as amended by the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[46] Article 1A(2) of the 1951 Refugee Convention.

[47] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, *available at: http://www.refworld.org/docid/4f33c8d92.html* (last visited July 26, 2018).

> People who are outside their home country or the country where they normally live, and who are unwilling to return because of a well-founded fear of persecution based on race, religion, political opinion, nationality, or membership in a particular social group, such as women or people of a particular sexual orientation.[48]

The Immigration and Refugee Board of Canada [49](IRB) plays a fundamental role in this matter. IRB is an independent court that makes all the decisions regarding immigration and refugee matters. When asylum claims are made in Canada, the IRB determines whether the claimant is a Convention refugee or a person in need of protection. IRB defines a person in need of protection as a person who would be subject to potential torture, a risk to their life, or a risk of cruel and unusual treatment or punishment if they were to return to their home country or the country where they normally live. As a part of the process of making an initial claim at either their port of entry into Canada or at a Citizen and Immigration Canada (CIC) office in Canada, one must bring documents including a passport, a driver's license, and any other documents proving one's identity. This makes it more difficult for individuals from Mexico who do not have this type of identity documents.

Since 1976, Canada has based its program on the Immigration and Refugee Protection Act[50] (IRPA), which was passed in 2002. This Act created three separate categories for permanent residents in the country including family class, economic immigrants, and refugees. The family class consists of foreign nationals who come to Canada through the sponsorship of close relatives or direct family members. People included in this category are spouses or partners, child dependents, parents, and grandparents. Economic immigrants refer to people granted permission to work and contribute to the Ca-

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[48] Immigration and Refugee Board of Canada, *Refugee Claims* (Version 2-2013), *available at https://irb-cisr.gc.ca/en/refugee-claims/Pages/ClaDemGuide.aspx* (last visited July 27, 2018).

[49] Established in 1989, the Immigration and Refugee Board of Canada (commonly referred to as Immigration and Refugee Board or simply the IRB, is an independent administrative tribunal that is responsible for making well-rounded and fair decisions on immigration and refugee matters, efficiently and fairly, and in accordance with the law. Established by an Act of Parliament, the IRB decides on refugee applications made by individuals who land in Canada and make an asylum claim to be in need of protection.

[50] The "*Immigration and Refugee Protection Act*", S.C. 2001, c. 27, ("IRPA") is an Act of the Parliament of Canada, passed in 2001, which replaced the "*Immigration Act*, 1976" as the primary federal legislation regulating immigration to Canada. The IRPA came into force on June 28, 2002. Controversially, the government failed to implement a component of the legislation that would have implemented a Refugee Appeal Division as part of Canada's immigration system. IRPA creates a high-level framework detailing the goals and guidelines the Canadian government has set with regards to immigration into Canada by foreign residents. The Immigration and Refugee Protection Regulations (IRPR) contain the laws created to fit within the IRPA in order to specify how the IRPA is to be applied. Portions of IRPA are administered by the Canada Border Services Agency.

nadian economy. The final category is refugees, which is divided into three sub-categories: government-assisted refugees, privately sponsored refugees, and refugees landed in Canada.[51] Each refugee claimant is required to fill out a Basis of Claim Form (BOC Form),[52] which asks the claimant to detail who they are and specifically why they are filing their claim. Each claimant is also required to include a descriptive narrative of the events that led them to claim refugee status. This is the part where specific events are key to being accepted or rejected as a refugee. If a refugee cites a general fear without giving any specifics, their applications will most likely be rejected.

The claimant must include any actions taken to seek protection from the authorities or if they attempted to seek refuge in another part of their country. If neither action was taken, the claimant must explain why.[53] Each claimant is required to provide documented proof to back their claims including any medical, travel, or police documents that verify their story. If a claimant is accepted into the program, the refugee is given assistance by the Canadian government. During a refugee's first year in Canada, the Resettlement Assistance Program (RAP*)* provides financial support, language training, and the Interim Federal Health Program, which gives the refugee health insurance until eligible for a provincial health care plan in the area he or she ultimately settles. However, refugees who attempt to claim protection from inside Canada are not entitled to any RAP benefits. There are several reasons that Mexicans give for claiming refugee status, including domestic violence, drug war-related fear, and persecution based on sexual orientation. Drug-traffickers in Mexico threaten the lives of those who are not willing to cooperate with them. For example, the Méndez family owned a small grocery store in Morelia, Mexico, when traffickers realized their store would be a perfect front for their drug operations. The Méndezes refused to allow the drug-traffickers to use their store, so the traffickers retaliated by threatening their lives and physically assaulting them, leaving psychological scars and forcing the family to flee to Canada.

In 2008, Mexico became the number one source country of asylum seekers in Canada with 9,527 applicants that year alone. However, only 11 percent of cases were accepted by the Immigration and Refugee Board of Canada compared to 78 percent of 3,132 Colombian claims and 42 percent of 4,936 Haitian claims accepted that same year. This data reveals the percentage of Mexicans who are turned away and sent back to Mexico or try to claim asylum in another country. Those sent to Mexico are vulnerable to further persecution and the possibility of physical, mental, and emotional trauma

[51] Immigration Overview, Permanent and Temporary Residents, Government of Canada (2011). Dependents of landed refugees living abroad are also included in this category of permanent residents according to IRPA.

[52] This form was previously called the Personal Information Form (PIF) before Canada reformed their system in 2012.

[53] Immigration and Refugee Board of Canada, *refugee claims*, *supra* note 48.

from drug-trafficking-related violence. Before Canada changed their visa policies, it was easy for Mexicans to get to Canada to claim asylum, whether or not their claim would be accepted. Drug-traffickers control entire regions in Mexico by paying off the police and government officials. This leaves citizens caught in the middle of cartel wars over territory with nobody to turn to for protection. One of the main reasons Canada refuses refugee claims is because they are not deemed legitimate and the Mexican government is considered "democratic" and therefore able to protect its citizens. This is clearly not the case as many officials are corrupt and bought off by bribes from cartel and gang members, making it difficult for Mexican citizens to feel protected or safe in their own country. Officially, Mexico is not in the middle of a war or under territorial occupation, making it difficult for citizens to prove their fear of persecution at home and their government's inability protect them. Refugee claimants are required to demonstrate this at a determination hearing before the IRB, and this is what makes their situation far different from the Salvadorans in the 1980s. The government of Canada officially recognized human rights violations in El Salvador,[54] but they do not recognize the drug trafficking conflict that has been going on in Mexico.

NAFTA has increased illegal market activity as millions of farms went bankrupt and jobs became scarce. Many Mexicans chose to either migrate north or enter the illegal economy. The process for obtaining refugee status in Canada includes an inquisitorial hearing, which requires the IRB to do an extensive background check into the conditions of the claimants' home country. The Canadian government pays for this research. By not needing a lawyer, this makes it financially easier on the claimant as the government does not use a lawyer to represent its position either. By leaving it mostly in the hands of the IRB, it can leave claimants from Mexico vulnerable to being denied refugee status because they are often not able to fully explain their situation. When the IRB investigates and fails to find any certified danger, such as war or an armed conflict in their country of origin, claimants have a harder time proving their need for asylum.[55] Language barriers and the inability to fully understand legal processes and terms associated with claiming refugee status in Canada can lead to the claimants' failure to understand what is needed and to adequately explain their situation and need for asylum. I believe this is the case with Mexican claimants in Canada who are unable to effectively convey their fear of the violence they have experienced without having anywhere else to turn to for help due to corruption in Mexico.

In Canada, there are three types of hearings: expedited, regular, and extended. Most claimants go to a regular hearing to have their claims determined. If the claimant is from a high-acceptance-rate country or their case

[54] María Cristina García, *Seeking Refuge: Central American Migration to Mexico, The United States, and Canada* (Berkeley and Los Angelos: University of California Press, 2006.

[55] Rebecca Hamlin, *International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia* 37 Law & Soc. Inquiry 4 (2012).

fits the "basic profile", they go through an expedited process to free up the system for those with a less clear-cut case. Expedited processing does not involve the board members directly; an officer meets with the claimants instead to either verify their stories and grant them refugee status or recommend them for a regular hearing. Extended hearings are for more complex cases and are presided over by a board member.[56] Another method the IRB uses to make consistent judgment calls on refugee cases is identified cases that use "leads" or precedents to guide their decisions and make the process more independent from the court system.

The goal is to designate a specific case as a "lead" and use it as a precedent for all future cases from a given country. This is mostly used when claims from a specific country rapidly increase and it streamlines the process and makes judgments across board members in all areas of the country more consistent. In recent years, this approach has been somewhat applied to Mexican refugee claims in Canada. The IRB modified the process by selecting three cases as "Persuasive Decisions." These decisions occurred after the fact and do not have the broad general application language that "lead" decisions have, but they are still used as guidelines for future decisions. All three of the cases chosen as examples for Mexican refugee claims were rejections, stating that the claimants had the option of state protection in Mexico. This 2006 ruling set the precedent in many ways for future Mexican claims, by stating that they are not truly refugees. Claim rates dropped 35 percent in 2006 to stand at only 15 percent the following year and 11 percent in 2009.[57] The use of the Persuasive Decisions can be seen as controversial since the cases used for the Persuasive Decisions are not generalizable for all the cases from Mexico. These Decisions discount corruption, which eliminates the inflight option of many people fleeing from violence and death threats. This eliminates the need for interaction with the court system leaving more room for flexibility in accepting refugee claims. However, the Persuasive Decisions strategy can also lump together all the claims from the same country despite the different concerns and needs. Claims plummeted and continued to drop. The cost of eliminating visas has been pegged at $261.9 million over 10 years, after factoring in the prospect of increased tourism and travel dollars from Mexicans. The number of flights between the two countries has increased, though some immigration service providers point out that these increases have led to the corresponding increase in asylum claims—it is easier to get to Canada from Mexico. Statistics from British Columbia show that in December 2016 and January and February 2017, there were 29 refugee claimants from Mexico compared to 30 who arrived between December 2015 and November 2016. The majority of the newcomers claimed asylum at the Vancouver airport.[58]

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[56] *Id.* at 948.

[57] *Id.* at 948-949.

[58] Stephanie Levitz, *Asylum claims lodged in Canada from Mexico rise again in March*, CBC News,

Since NAFTA entered into force, Mexican refugees in Canada have gone through a journey with which many people are unfamiliar. As NAFTA increased levels of unemployment leading to increased activity in illegal markets, the corruption and violence stemming from large-scale drug-trafficking forced thousands of Mexicans to flee and attempt to find asylum in Canada. Within only a few years, the rapid increase in claims became too overwhelming for the Canadian IRB system, so it responded with a series of immigration and refugee policy reforms that ultimately targeted Mexican refugee claimants. These policies aimed at deterring claims while streamlining the process in order to assist those with "legitimate" claims from countries whose government cannot protect them. Unfortunately, Mexico is not one of these countries.

2. *The Growing Category of Mexican Refugee Claimants: Resignation?*

The number of people seeking asylum in Canada from Mexico continues to rise. New figures from the IRB show that March reached a record high of new claims in 2017 —110, up from 85 in February and 71 in January, making a total of 266 so far that year. Statistics from the IRB show that there were just 241 claims in 2016. Canada experienced a 700% rise in asylum claims from Mexico compared to the number of claims made in January 2016.[59] February 2017 saw a 2, 500% increase from February of the previous year, according to a new report by the True North Initiative [60] based on *IRB* data. In December 2016, the Canadian government lifted the visa requirement for Mexicans to travel to Canada and an increase in claims was projected. The volume of asylum seekers from Mexico had been the reason the previous government begin to require visas in 2009, but the move caused diplomatic bad blood between the two countries.[61]

As with those arriving at our border on foot, any foreign national in Canada can ask for asylum and apply to be a refugee. The person must demonstrate to a Canadian judge that they meet the legal definition of a refugee —that they face a well-founded fear of persecution and that their home country has failed to provide safety and protection. In the meantime, applicants are given full access to Canada's generous social safety net, including the controversial Interim Federal Health Program —which offers services above and beyond

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The Canadian Press, April 16, 2017, *at http://www.cbc.ca/news/canada/british-columbia/asylum-claims-lodged-in-canada-from-mexico-rise-again-in-march-1.4072425* (last visited July 28, 2018).

[59] Charlie Gillis, *Why rich Mexicans are fleeing to Canada as refugees* ? MACLEAN's, Dec.11, 2012, *available at http://www.macleans.ca/news/canada/wealth-asylum/* (last visited July 28, 2018).

[60] *Asylum Claims from Mexico Spike,* True North Initiative, *available at http://www.truenorthinitiative.com/mexicospike* (last visited July 28, 2018).

[61] Stephanie Levitz, *Mexican Asylum Seekers Apply To Canada In Record Numbers*, The Canadian Press, April 16, 2017, *at http://www.huffingtonpost.ca/2017/04/16/mexico-refugees-canada_n_16052976.html* (last visited July 28, 2018).

what Canadian taxpayers receive. But Mexican asylum seekers typically fail to meet Canada's standard of a refugee. Prior to the 2009 decision to impose a visa on Mexican travellers, Canada received nearly 10,000 Mexican asylum seekers in 2008. Only about 10% of those applications were eventually accepted and granted refugee status in Canada. The remaining 90% of cases were either abandoned by the claimant or rejected by a Canadian immigration judge. These claimants cost Canadian taxpayers hundreds of millions of dollars annually through social welfare programs, legal aid, court costs and deportation services. The low acceptance rate for Mexican asylum seekers is due to the fact that, although Mexico is a dangerous country, simply coming from a dangerous place is not enough to qualify for asylum in Canada. A person must face direct persecution, and most Mexicans are not persecuted in the way set forth by legal definitions.

In *Daniel Balcorta,*[62] a rich, former professional Mexican soccer player, who lived in Canada as a claimant had it good. Three cars, a house with a pool, lavish meals at Cancun's top restaurants —such were the perks of a successful realtor selling beachfront property on the Yucatan coastline. Balcorta had paired minor celebrity with a strong grasp of Internet commerce, and developed a thriving business catering to well-heeled snowbirds from the U.S. and Canada. "I even had a private jet to fly my clients around to view properties," he says "We lived a very comfortable life." One call would change that. The man with the raspy voice on the other end introduced himself as a representative of "the Company" —gangster-speak for Los Zetas, a notorious criminal cartel known throughout Mexico for drug trafficking and extortion. The time had come for Balcorta to pay up, the man said, and the price was 500,000 pesos (about $50,000). "You must have the wrong person," Balcorta responded and promptly hung up, but the man called back, and thus began a month-long nightmare during which the gangsters called Balcorta and his wife, Maria, no less than 10 times demanding they pay up or else. When the Balcortas stopped answering, the gangsters left voice mails threatening their lives and those of their children, aged 5 and 2. Maria took a call at the house in which a man told her Zetas would kill Balcorta "or a member of your family" unless she persuaded her husband to co-operate. They reported this to the police —twice— but the calls kept coming. The tipping point came few days later, when the family returned from the luxury mall at Plaza la Isla to find their gate ajar and their front door pried open. The contents of the house were untouched: "they'd left $200 on the table to pay some bills." "They didn't take it." But by then they had noticed strangers watching their house from vehicles parked on the street. When their call to police about the break-in went unanswered yet again, the Balcortas planned their escape. That day, they moved to a friend's house, and few days later, they boarded a plane for Calgary (Canada) where they claimed asylum under Canada's refugee pro-

[62] Gillis, *Why rich Mexicans are fleeing to Canada as refugees*?, *supra* note 59.

tection laws. In the last six years, there have been some 286,000 complaints of extortion in the country while an estimated two million shakedowns go unreported each year, most of them done over throwaway cellphones.[63]

Another example is Javier Castillo Mendoza. Castillo, a former distributor of Hewlett-Packard office equipment, testified that he received a series of demands for cash over the phone before he was kidnapped by corrupt police officers in August 2005. He was released, he said, after his wife delivered an $8,000 ransom to a local police station. After receiving another extortion demand in April 2007 —this time for $25,000— he closed his business and fled to Toronto (Canada) with his wife and four children.[64] Mendoza's plight, in turn, closely resembled that of Alejandro Blando, a distributor of wireless network plans, who in 2008 came under threats from men claiming ties with Mexico's Federal Investigation Agency. In Blando's case, the callers did not want money but undocumented phone lines through which —presumably— they could conduct illegal business.[65]

IV. Canadian Policy Reforms, the Implementation of the IRPA and its Consequences for Mexican Refugee Claimants

Since 2002 and the implementation of the IRPA, Canada has made three significant changes to their immigration and refugee system. As refugee claims from Mexico have increased at a high rate despite the low acceptance rate, the Canadian government reacted with policy reforms that specifically affected Mexicans, starting with visa requirements in 2009, then passing the Balanced Refugee Reform Act, and finally overhauling their asylum system in 2012. With the first change in 2009, refugee claims from Mexico dropped significantly. Canada's reforms to immigration and refugee policy achieved its ultimate aim of deterring Mexicans from claiming asylum in Canada.

1. *Reform Deterring Mexican Refugee Claimants*

Starting in 2009, Canada began a series of reforms that substantially affected Mexican immigration to Canada and especially immigrants seeking refugee status. Due to the large influx of refugee claims, most of which were rejected by the IRB, the government of Canada decided it needed to take action to protect those with legitimate asylum needs by streamlining the process and requiring that all Mexican nationals apply for a Temporary Resident Visa prior to travelling to Canada. In a press release, the Government

63 *Id.*
64 *Id.*
65 *Id.*

of Canada explicitly stated the number of Mexican refugee claims was the pushing factor behind the implementation of the visa requirement. The government hoped this would be a step toward reducing the abuse of the refugee system by persons wishing to immigrate quicker to Canada.[66]

The second reform took place the following year, in 2010, and specifically targeted refugees. The Balanced Refugee Reform Act was introduced by the Refugee Appeals Division (RAD) in an attempt to have the bill passed in 2002. On Parliament's first try, the IRB thought it redundant to add an appeals process as the process was already quite thorough and strong. Courts take a very hands-off approach and ultimately only take less than 15 percent of cases requesting to be heard. This demonstrates the level of trust and cooperation between the courts and the IRB, making for more streamlined refugee claim processes. This is what originally fueled their belief that a RAD was not needed to successfully process all the claims. As claims became exponentially more numerous, the need for reform became apparent. The Balanced Refuge Reform Act was passed in 2010 by Parliament, adding an Appeals Division that was established in 2002. In addition to adding an appeals processing division, the Act reformed the process for low acceptance rates to make the process more expedient. The other aspects of the system remained intact as the main aim was to reduce the number of claims going to the court system. This reform also sought to reduce applications from high claim countries like Mexico. Since Mexico had low acceptance rates, Canada can more easily expedite those claims to streamline the process. This is yet another way that Canada can easily deter or quickly process and then deport Mexicans making refugee claims.

The most recent and ultimately the most extensive reform to the refugee claims system in Canada came in 2012 when Parliament passed the Protecting Canada's Immigration System Act (known as Bill C-31). Effective on December 15, 2012, this piece of legislation further reformed the system for seeking asylum, adding measures to address human trafficking, as well as requiring data collection as a part of the temporary resident visa, work permit, and study permit applications.[67] While still allowing all claimants to get a fair oral hearing before the Immigration and Refugee Board of Canada, Bill C-31 streamlines the process to accelerate judgments on the cases. Those whose claims are accepted are promptly given refugee status, while those whose claims are denied will be deported more quickly as well. This Act identifies "Designated Countries of Origin"[68] (DCO), which labels a country as capable of democratically protecting its citizens. Mexico is included in the

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[66] Citizenship and Immigration Canada, *Canada Imposes a Visa on Mexico*, *supra* note 1.

[67] Canadian Council for Refugees, *Overview of C-31 Refugee Determination Process*, Feb. 21, 2013, *available at http://ccrweb.ca/en/overview-c-31-refugee-process* (last visited July 28, 2018).

[68] Government of Canada, *Designated countries of origin policy*. On July 23, 2015, the Federal Court made a decision that affects the right to appeal to the Refugee Appeal Division of the Immigration and Refugee Board (IRB) of Canada, *available at https://www.canada.ca/en/im-*

list of DCOs, meaning that individuals making refugee claims from Mexico have fewer rights during the refugee process to have their claims heard in detail. Claimants from DCOs do not have appeal privileges. This Act potentially leaves thousands of Mexican refugee claimants in a vulnerable situation. These claimants will inevitably be rapidly deported back to Mexico where the very people they are seeking protection from, most likely, still reside.

2. *Designated Countries of Origin and its Real Impact*

Canada's previous federal government circumvented its legal obligations to refugees. In December 2012, Bill C-31: Protecting Canada's Immigration System Act substantially changed Canada's refugee determination system.[69]Bill C-31 gave the Minister of Citizenship and Immigration the power to identify certain countries considered presumptively safe as "Designated Countries of Origin" (DCOs) for the purpose of deciding asylum claims.[70] Canada added Mexico to the DCO "safe" list in February 2013.[71] As of April 2016, there were 42 countries on the DCO list.[72] Until July 2015, refugee claimants from DCO countries were barred from access to appeal a negative refugee determination to the newly created Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB). It was also possible to deport failed DCO claimants from Canada immediately after a negative ruling on their refugee claim; they did not have a right to an automatic suspension of deportation while pursuing a review of a negative decision at the Federal Court level. The lack of access to the RAD had far-reaching consequences: an August 2015 Osgoode Legal Studies Research Paper reported that over 25% of failed refugees succeeded on appeal at the RAD, indicating a high number of flawed decisions at the IRB level.[73]

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migration-refugees-citizenship/services/refugees/claim-protection-inside-canada/apply/designated-countries-policy.html (last visited Feb. 8, 2017).

[69] House Government Bill (Bill C-31), *Protecting Canada's Immigration System Act*, SC 2012, c 17, 41st Parliament, 1st Session June 2, 2011 - September 13, 2013, *available at http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5383493* (last visited July 28, 2018).

[70] The category of DCOs was originally introduced by the Canadian government by the Balanced Refugee Reform Act [BRRA] of 2010 as amendments to the Immigration and Refugee Protection Act [IRPA]. The original amendments, however, never came into force. Bill C-31 modified the BRRA (s. 109.1). *Id.*

[71] Government of Canada, *Designated countries of origin policy, supra* note 68.

[72] *Id.* (The countries are: Andorra; Australia; Austria; Belgium; Chile; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Israel (excluding Gaza and the West Bank); Italy; Japan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Mexico; Monaco; Netherlands; New Zealand; Norway; Poland; Portugal; Romania; San Marino; Slovak Republic; Slovenia; South Korea; Spain; Switzerland; the United Kingdom; the United States of America).

[73] Sean Rehaag & Angus Gavin Grant, *Unappealing: An Assessment of the Limits on Appeal*

In *Y.Z.*, the Honorable Justice Boswell found that the RAD bar for claimants from DCO countries contravenes Section 15 of the Canadian Charter of Rights and Freedoms (the right to equality and non-discrimination).[74] The decision results in claimants from DCO countries not being able to file an appeal with the RAD, which includes a suspension of deportation from Canada while seeking this appeal.[75] While the government launched an appeal of Justice Boswell's judgment to the Federal Court of Appeal after the 2015 fall election, the new Liberal government withdrew the appeal, leaving Justice Boswell's decision, as well as its positive implications for DCO claimants, intact. DCO refugee claimants were also denied access to publicly funded healthcare under the Interim Federal Health Program (IFHP), with the exception of care required to treat a medical condition deemed a risk to public health. This "public health and public safety" coverage included antiretroviral medications and other HIV-related care.[76]

As of April 1, 2016, the Liberal government has reinstated full IFHP coverage for all refugees. This means that claimants from DCO countries have the same level of healthcare as all other refugee claimants.[77] Finally, the Liberal government has promised to institute an "expert human rights panel" to determine DCO designations.[78] As of April 2016, the specifics of the composition of this panel and the process for DCO designation (and de-designation) have not been announced. Even so, with or without input from such a panel, the government of Canada has the authority to remove Mexico from the DCO list.

In a 2012 report, the United Nations High Commissioner for Refugees (UNHCR) stated that designating a country as "safe" for the purposes of expediting asylum applications is not *prima facie* problem.[79] However, such a designation would need to be used only in "carefully circumscribed situa-

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Rights in Canada's New Refugee Determination System, Osgoode Legal Studies Research Paper Series 42 (2015).

[74] *YZ v Canada (Minister of Citizenship and Immigration)*, 2015 FC 892, [2015] FCJ No 880 [*YZ v Canada*].

[75] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 at ss 49(1)(c), (2)(c).

[76] Justice Law, *Order Respecting the Interim Federal Health* (SI-2012-26), *available at* http://laws-lois.justice.gc.ca/PDF/SI-2012-26.pdf; *See also*; Canadian Doctors for Refugee Care, *The Issue*, *available at* http://www.doctorsforrefugeecare.ca/the-issue.html (last visited July 28, 2018).

[77] Government of Canada, *Restoring Fairness to the Interim Federal Health Program*, Feb. 18, 2016, *available at https://www.canada.ca/en/immigration-refugees-citizenship/news/2016/02/restoring-fairness-to-the-interim-federal-health-program.html* (last visited July 28, 2018).

[78] Justin Trudeau, *Archived* - Minister of Immigration, *Refugees and Citizenship Mandate Letter*, Nov.12, 2015, Prime Minister of Canada, *available at https://pm.gc.ca/eng/archived-minister-immigration-refugees-and-citizenship-mandate-letter* (last visited July 29, 2018).

[79] UNHCR, *UNHCR Submission on Bill C-31: Protecting Canada's Immigration System Act* (May 2012) at para 31, *available at http://www.unhcr.ca/wp-content/uploads/2014/10/RPT-2012-05-08-billc31-submission-e.pdf*; *Prima facie* is a Latin expression that literally reads as "at first face" and is used in legal terms to refer to its first appearance, subject to further informa-

tions" and be based on "reliable, objective and up-to-date information from a range of sources," including compliance with human rights instruments and openness to human rights monitoring.[80] Importantly, UNHCR highlighted that the designation of a country as a safe country of origin cannot establish an absolute guarantee of safety for the residents of that country.[81] While the appointment of an expert human rights panel may reduce concerns about DCO designations being made arbitrary or without proper consideration, the DCO system remains problematic, particularly because of its impact on claimants who are living with or vulnerable to HIV infection. Although DCO claimants now have access to the RAD and healthcare through the IFHP, other obstacles to full access to justice and procedural fairness exist for claimants from designated "safe" countries.

A country that may be safe for the majority of the population may be unsafe for certain minority groups.[82] The success rate of sexual orientation claims for countries that do not otherwise produce a great number of Convention Refugees is illustrative of this fact. A country that appears politically progressive —i.e., has legislated human rights protection and has ratified international instruments— may not have the protocols or resources to ensure the exercise and protection of these rights. This is particularly true for populations that have traditionally been marginalized, such as populations living with HIV and those from groups with a high risk of infection. This includes populations that, for reasons of their gender, sexuality, citizenship status, or social class, are made all the more vulnerable by their HIV status and are not adequately protected by the government. Such populations tend to be stigmatized, criminalized and discriminated against, and are often rendered invisible in statistics purportedly representative of a larger population.[83]

Refugee claimants with fears based on their sexual orientation or gender identity face legal obstacles that can be compounded by coming from a

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tion. *See* Cornell University Law School, "*Prima Facie*", Legal Information Institute, *available at https://www.law.cornell.edu/wex/prima_facie* (last visited July 29, 2018).

[80] *Id.*at paras 31, 32.

[81] *Id.*at para 31.

[82] *Id.*, Canadian Association of Refugee Lawyers (CARL) Presse Release: *Designated Country of Origin Scheme is Arbitrary, Unfair, And Unconstitutional*, December 14, 2012, *available at http://www.carl-acaadr.ca/our-work/issues/DCO* (last visited July 27, 2018).

[83] The quantitative criteria neglect entire subsets of claimants. A country that is safe for most claimants will have a low acceptance rate, but it may have a high recognition for subsets of the population. This is most often the case with gender and sexual orientation-based claims. Statistics have shown that these claimants tend to come from countries with overall low recognition rates, like Jamaica for example, yet when their claims are isolated it is clear that they have generally higher recognition rates than other claimants. The result is that claims from subsets of the population are subject to DCO rules, even though their claims are likely well-founded. *YZ v Canada*, Affidavit of Sean Rehaag, *supra* note 73 at paras 31-42.

DCO country and living with or being vulnerable to HIV.[84] A claimant from a DCO country has half the time to prepare for a refugee hearing after filing a Basis of Claim form —that is, 30 days as opposed to 60 days for all other claimants.[85] Because of the sensitive nature of claims based on sexual orientation, sexual minority status or gender-based violence, there are many factors that contribute to challenges in presenting these claims within the shortened timeframe set out in the DCO regime. After what may be years of hiding their identity or being silent about gender-based or sexual abuse, many do not feel safe enough to share such information or acquire documentary evidence from their countries immediately upon arrival while seeking legal representation and navigating a new country.[86] Many experts note that claimants may not make important disclosures to their lawyers in a first meeting; it often takes months to establish trust.[87] This is particularly true for claimants who have experienced trauma or who are not comfortable disclosing sexual violence, sexual orientation or HIV status.

An additional factor is that some claimants may only discover their HIV status on taking the required Immigration Medical Exam (IME).[88] Claimants must then cope with their diagnosis and disclose this status to their counsel in an extremely short timeframe, which in turn might result in their health status not being included as grounds of risk at their refugee hearing. Another impact of this designation is that failed claimants from DCOs cannot apply for a Pre-Removal Risk Assessment (PRRA) for 36 months after their refugee claim has been denied, compared with the 12-month bar on PRRAs for other claimants.[89] The PRRA presents an opportunity for failed refugee claimants to show that they face a risk in their country based on new evidence arising after their refugee claim was refused. Risk assessment is of particular importance

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[84] For a compilation of appellate decisions reviewing rejected refugee claims based on sexual orientation and gender identity, many of the appeals profiled involved claims made by Mexican nationals, *see* Nicole Laviolette, *Canadian Appellate Level Decisions Dealing with Refugee Claims Based on Sexual Orientation and Gender Identity - Listed According to the Definition of a Convention Refugee* (2015), *available at* http://papers. ssrn.com/sol3/papers.cfm?abstract_id=2594937 (last visited July 27, 2018).

[85] *Immigration and Refugee Protection Act*, at s 111.1(2); *See* also Immigration and Refugee Board of Canada, *refugee claims* (Version 2 – 2013), *supra* note 48.

[86] International Human Rights Program Interview of Adrienne Smith (by email), (15 October 2015); *YZ v Canada* at para 60; Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, McGill L.J. 53-59 (2008); Envisioning Global LGBT Human Rights, Envisioning LGBT Refugee Rights in Canada: Is Canada a Safe Haven?, (September 2015), *available at http://yfile.news.yorku.ca/files/2015/09/Is-Canada-A-Safe-Haven-Report-2015.pdf*; Nicholas Hersh, *Challenges to Assessing Same-Sex Relationships Under Refugee Law in Canada*, McGill L.J. 60. (2015).

[87] *YZ v Canada* at paras 59, 63, 65.

[88] Immigration and Citizenship Canada, *Who must submit to an immigration medical examination*?, *http://www.cic.gc.ca/english/resources/tools/medic/exam/who.asp* (last visited Feb.10, 2018).

[89] *Immigration and Refugee Protection Act*, at ss113(a), 112(2)(b.1).

for claimants who may not have been able to disclose their HIV status, past sexual or gender-based violence, or sexual orientation in their initial refugee claim, and fear persecution if returned to their country.

V. Human Rights Consequences of Canada's Refugee Policy on Mexican Refugee Claimants and Canada's International Obligations toward Refugee Protection

Canada has preserved its humanitarian tradition through the ratification of international conventions, human rights laws, and even a revision of its constitution in 1982. Due to the apparent generous nature of Canada's immigration policy towards Mexicans, many have used the opportunity during crises caused by violence and discrimination throughout Mexico. As a result of numerous claims of asylum from Mexico, Canada responded with a strict immigration reform on three different occasions, effectively eliminating any viable asylum claims from Mexico.

1. *Consequences of Canada's Asylum Policy On the Human Rights of Mexican Refugee Claimants*

For a member of the IRB, the designation of "safe" indicates the Minister's opinion about refugee claims from Mexico, which could affect a claimant's chance of success at having their claim accepted in Canada.[90] As Justice Boswell stated in the case of Y.Z., the distinction between DCO and non-DCO claimants is "discriminatory on its face," serves to "marginalize, prejudice, and stereotype" DCO claimants and perpetuates a stereotype that they are "somehow queue-jumpers" or "bogus," in that they only came to Canada to take advantage of its refugee system and its generosity.[91] Canada's designation of Mexico as a "safe" country was part of a massive overhaul of the refugee determination system. The rationale for the designation was that Mexico, an important trade partner, respects human rights and protects its citizens. Thus, by extension, any refugee claim against Mexico must be "bogus" and unfounded. However, this paper concludes that Mexico remains un-

[90] Audrey Macklin, "A safe country to emulate? Canada and the European refugee" in *The Global Reach of European Refugee Law* (Cambridge: Cambridge University Press, 2013) 99 at 103.

[91] *YZ v Canada* at para 124. Refugee claims that fail the refugee determination process, moreover, should not be understood to be fraudulent. With a highly technical and restrictive refugee definition, many individuals who genuinely fear persecution are unable to meet the Refugee Convention criteria. Labeling these individuals with derogatory terms is harmful to the entire refugee system. Canadian Council for Refugees, *Concerns about changes to the refugee determination system* (December 2012), *http://ccrweb.ca/en/concerns-changes-refugee-determination-system* (last visited July 28, 2018).

safe for many Mexicans. The country should be removed from Canada's Designated Country of Origin (DCO) list. The impact of designation is potentially harmful to refugee claimants because they are afforded fewer procedural rights, and coming from a country labeled "safe" can foster prejudgment among decision-makers in the Immigration and Refugee Board (IRB). This designation further reduced the time it takes to process a Mexican refugee claim to 45 days for those who file a refugee claim at a port of entry, and 30 days after referral for those who make a claim at an inland immigration office. Furthermore, Mexican refugee claimants became ineligible to apply for work permits.

Recent developments in Canada's legal system have limited access to such rights for many people in Mexico who face a very real threat of persecution, harassment, and violence. For reasons explained below, the expedited procedures created by Bill C-31 for example, allow for LGBT people with a well-founded fear of persecution to be sent back to their country of origin where they may face persecution, violence, or possibly death. Additionally, Canada's Immigration and Refugee legislation recently recognized guardianship and spousal bonds based on documentation in the claimants' country of origin. The effect of this is that Canada does not recognize the family bonds of LGBT claimants from countries, like Mexico, that discriminate against LGBT families. LGBT refugees from Mexico will face an expeditious process, with a 45-day processing time (rather than the previous 171 days) for those who make a refugee claim at a port of entry, and 30 days for those who file a claim at an inland office for Citizenship and Immigration. This is especially problematic for LGBT claimants. As noted by researchers at the Simon Fraser University, because of the requirement of documentary evidence for claims based on sexual orientation and gender identity, LGBT claimants often need more time to gather the relevant documents.[92] Even LGBT asylum seekers with a very valid claim of persecution may not be able to compile documentary evidence of their sexual orientation or gender identity, or the persecution they face, in time for these procedures. After having their application expeditiously declined, LGBT refugees from countries labelled "safe" will no longer have the right to appeal the decision, or to make a claim under humanitarian and compassionate grounds. These requirements violate UN High Commissioner for Refugees guidelines on the treatment of SOGI refugees, which recognize that many LGBT people will not have lived openly as LGBT in their countries of origin.[93] It notes that many claimants facing

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[92] Simon Fraser University, *Gender-persecuted refugees need support*, Media Release (November 22, 2012), *available at http://www.sfu.ca/pamr/media-releases/2012/gender-persecuted-refugees-need-support.html* (last visited July 28, 2018).

[93] United Nations High Commissioner for Refugees, *Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2012), *available at http://www.unhcr.org/publications/legal/50ae466f9/guidelines-international-protection-9-claims-refugee-status-based-sexual.html* (last visited July 27, 2018).

real persecution struggle to produce the requested documents and it fosters procedures that are sensitive to their circumstances.

Additionally, LGBT claimants may have difficulty disclosing aspects of their sexual orientation or gender identity, or may express them in ways inconsistent with Canadian terminology for SOGI. For instance, a 2007 Federal Court ruling noted that the claimant was hesitant to acknowledge her gender identity to immigration officials for fear of persecution.[94] Expedited procedures are inadequate for providing a fair hearing where a person must disclose information to immigration officials, because of the discrimination and potential violence they have experienced from public officials in their country of origin. Accommodations are currently available for vulnerable people seeking asylum,[95] but the reduced trial period may also limit a person's ability to seek and obtain accommodations in time.

Canada's refugee and immigration programs allow refugee claimants and immigrants to list family members who were unable to accompany them when they entered Canada, but will join them at a later date. However, Canada's refugee and immigration system creates very specific barriers for LGBT families as it relies on the recognition of family bonds given by the family's country of origin. Canada allows refugees and immigrants to list their spouses as non-accompanying family members, but does not allow common-law partners to do so. As a result, Canada does not recognize partnerships where couples from countries that do not recognize same-sex marriage. A couple fleeing a country due to persecution based on sexual orientation usually does not have access to marriage equality in their country of origin, and is unlikely to have travelled to another country to get a marriage license. The result is that same-sex partners who travel to Canada separately are most often unable to take advantage of the one-year window that Canada offers to opposite-sex spouses.

Canada's refugee and immigration programs also allow claimants to list dependent children who were not able to travel with them. This can occur when families are separated due to the persecution that led to their refugee claim. However, Canada's system creates specific barriers for LGBT families who are forced to travel separately. Most governments worldwide do not allow individuals to adopt their same-sex partner's biological child, or allow same sex partners to jointly adopt. As a result, Canada does not recognize that many parents in same-sex relationships are parents to their own children, and are, in turn, not able to access the resources available to parents in opposite-sex relationships. LGBT people face a high risk of persecution, violence, and even death in Mexico. Canada's designated country of origin list

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[94] *Hernandez v. Canada,* [2007] F.C.J. No. 1665.

[95] Immigration and Refugee Board of Canada, *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (Effective Date: Dec. 15, 2006. Amended Dec.15, 2012), *available at https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx* (last visited July 27, 2018).

has the effect of requiring refugee boards to use expedited procedures with this vulnerable group. LGBT claimants are forced to prove intimate aspects of their personal lives, facets that have been denied by their government and community, and face the threat of having no right to an appeal. Additionally, Canada's IRB is not currently prepared to acknowledge family bonds that are denied because of State persecution. After discussing the discrimination and human rights violation in Canada toward Mexican refugee and asylum seekers, the next section will focus on Canada's international obligation to protect claimants through the principle of *non-refoulement*.[96]

2. *Canada's International Obligations toward Refugee Protection*

Canada is obligated under the Convention Relating to the Status of Refugees (the Convention) and the International Covenant on Civil and Political Rights[97] (ICCPR) to provide asylum to those who have a well-founded belief of persecution. The words of Article 9 of the ICCPR,[98] liberty and security of person form the basis for sec. 7 of the Charter of Rights and Freedoms of Canada.[99] Canada is a signatory of the Refugee Convention and its 1967

[96] *Non-refoulement* is a fundamental principle of international law which forbids a country receiving asylum seekers from returning them to a country in which they would be in likely danger of persecution based on «race, religion, nationality, membership of a particular social group or political opinion»; *See also* Seline Trevisault, *The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea,* 27 Leiden J. Int'l. L. 3 (2014).

[97] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

[98] Article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

[99] Section 7 of *the Canadian Charter of Rights and Freedoms* is a constitutional provision that protects an individual›s autonomy and personal legal rights from actions of the government in Canada. There are three types of protection in this section: the right to life, liberty and secu-

Protocol.[100] Under the Refugee Convention, Canada has a duty to recognize any individual residing outside his or her country of nationality, who is unable or unwilling to return because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a political social group, or political opinion" as a refugee.[101] Once recognized, refugees are entitled to legal status and protection in Canada. A cornerstone of international refugee law and one of the most fundamental articles of the Refugee Convention is the principle of *non-refoulement,*[102] which is the practice of not returning refugees to experience persecution or danger based on one of the five Convention reasons, mentioned[103] In addition to an obligation to recognize refugees and the prohibition against *non-refoulement* as signatory to the Refugee Convention, Canada has a duty not to discriminate against refugee claimants for reasons of "race, religion or country of origin."[104] A Harvard Law School's Human Rights Program, Global Rights, International Gay and Lesbian Human Rights Commission, and Colectivo Binni Laanu A.C. report prepared for the UN Human Rights Committee has demonstrated how the persecution faced by many people in Mexico violate the ICCPR.[105] Obligations to protect people facing persecution of this type are enshrined in Canada's refugee laws, which promise to provide asylum to those who fit the definition of a refugee under the Convention.

That sense of conflicting obligations has played out in Canada in cases where the IRB has been reluctant to extend asylum to wealthy Mexicans, and the federal court has ordered it to reconsider. In several cases, including Balcorta's, the IRB has concluded that moneyed Mexicans do not qualify for asylum because all Mexicans face gang-related crime, and the Immigration and Refugee Protection Act offers no protection against "a risk faced generally by other individuals." The court, however, has held that a wealthy

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rity of the person. Denials of these rights are constitutional only if the denials do not breach what is referred to as fundamental justice. This Charter provision provides both substantive and procedural rights. It has broad application beyond merely protecting due process in administrative proceedings and in the adjudicative context, and has in certain circumstances touched upon major national policy issues such as entitlement to social assistance and public health care. As such, it has proven to be a controversial provision in the *Charter*.

100 Convention Relating to the Status of Refugees & Protocol Relating to the Status of Refugees, *supra* note 45.

101 Refugee Convention, *supra* note 45, at art 1.

102 UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement* (November 1997), *available at http://www.refworld.org/docid/438c6d972.html* (last visited July 28, 2018).

103 Refugee Convention, *supra* note 45, at art 33.

104 *Id.*at art 3.

105 Letra S, Sida, Cultura y Vida Cotidiana, A.C., Human Rights Violations Against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People in Mexico: A Shadow Report (July 2014), *available at http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MEX/INT_CCPR_ICS_MEX_17477_E.pdf* (last visited July 27, 2018).

person singled out by the gangsters faces a very specific threat. "The risks of those standing in the same vicinity of the gunman," wrote Justice Michel Shore when sending Balcorta's case back for another IRB hearing, "cannot be considered the same as the risks of those standing directly in front of him." Such cases pose a dilemma for countries like Canada. Giving safe haven to Mexico's skilled and wealthy flies in the face of the spirit of NAFTA. There is no such thing as witness protection in Mexico, only five per cent of crimes are solved, and only two per cent result in a conviction revealing the basic collapse of judicial and law enforcement systems. In Canada, the IRB does not track claimants by income, and its decisions remain private unless an applicant appeals to federal court, but the handful of cases in the public domain point to a disturbing pattern. The stalemate is unlikely to last. Canada has lifted the visa requirement on Mexicans travelling to Canada —a move that could open the gates to another flood of asylum claims. To avoid that scenario, Canada added Mexico to Canada's list of "designated safe" countries, which make it easier to deport refugee claimants after the IRB rejects them. The federal court has "[examined] some of these IRB decisions, found that they got it wrong and sent them back." Under the current designation scheme, "safe" countries are supposed to recognize "basic democratic rights and freedoms" and provide "mechanisms for redress if those rights or freedoms are infringed," in order to be reviewed for possible designation. [106]

VI. Conclusion

Canada-Mexico relations have not been extensively addressed by scholars, beyond Canada's TFWP, which targets Mexican laborers since its expansion in 1974. After the inclusion of Mexicans in the program, mainly in agricultural work, their numbers in Canada began to grow very quickly. The number of Mexicans in Canada has risen over the years due to several reasons, including the creation of the NAFTA in 1994. This agreement had a major role in the increase of Mexicans in Canada mainly due to an upsurge in temporary work to compensate for labor shortages, which aided Mexicans who at the time were suffering from an overwhelmingly high unemployment rate. Also, the high unemployment rate triggered the growth of illegal market activity and violence associated with drug-trafficking, causing Mexicans to fear for their lives due to threats and general violence in Mexico. As a result, in recent years migration from Mexico to Canada has multiplied at an exponential rate.

The most significant and notable increase has been in the number of refugee claims from Mexicans seeking asylum in Canada. It has been found that Canada is the number one destination for Mexican refugee claimants. Can-

[106] Government of Canada, *Designated countries of origin policy*, *supra* note 68.

ada accepts their claims at an alarmingly low rate compared to claims from other nations, even other nations in Latin America. This leaves Mexicans with very few options to turn to for protection from violence. Canada has now seen a drop in the overall number of Mexicans living in Canada due to its new restrictionist immigration attitude towards Mexicans. While Canada is still accepting and using large numbers of Mexicans for temporary work, other methods of immigration have been nearly completely shut off to Mexicans. This has left many Mexicans with nowhere else to turn in their time of need in view of the violence and danger caused by drug-trafficking, gangs, and corruption in Mexico. In the future, this very recent change in policies might hurt Mexico's economic relationship with Canada, especially with regards to the use of Mexicans for temporary labor. Such a potential pitfall will likely occur if the United States chooses to implement a large-scale temporary worker program as part of its upcoming immigration reform. Otherwise, the United States might see a slight increase in undocumented immigration from Mexico, as those who are turned away from Canada might choose to take their chances in the U.S. I contend that the reason Mexicans chose Canada to claim refugee status is Canada's long history of open immigration policy, especially in view of its economic and temporary labor agreements with Canada that have given Mexicans the impression that they are much welcomed in Canada. This proved false when Canada changed its immigration and refugee policies in 2009, 2010, and 2012, in response to the overwhelming number of Mexican refugee claims.

I also argue that most Mexican asylum claimants are not eligible for asylum in Canada because Canada designated Mexico a 'safe' nation" on February 15, 2013, despite the opposition of human rights experts.[107] As a signatory of the 1951 Refugee Convention and its 1967 Protocols, Canada is bound by the principle of *non-refoulement* and has a duty to not discriminate against refugee claimants on the grounds of race, religion or country of origin. Respecting the principle of *non-refoulement*, Canada can in fact respect its international commitment, but this is not often the case. Therefore, I suggest that Canada provide legal protection to all vulnerable Mexican refugee claimants by:

1. Removing Mexico from the list of designated safe countries.
2. Exhorting Mexico to implement genuine human rights reforms. As an important ally and trading partner, Canada could urge Mexico to invest in greater HIV prevention, care, treatment, and support, as well as insist that Mexico put an end to impunity for crimes against LGBTI individuals, women and girls, drug users, sex workers, and people living with HIV.

[107] Government of Canada, *Claim Refugee Protection from Inside Canada*, *https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada.html* (last visited July 27, 2018).

3. Urging Mexico to ensure full, prompt, effective, impartial and diligent investigation and prosecution of the homicides perpetrated against women, migrants, journalists, human rights defenders, children, inmates and detainees, drug users, and LGBTI people, to put an end to impunity.
4. Offering support to Mexico in the implementation of training for all police, prosecutors, border control officers and judicial authorities on HIV, gender identity, sexual orientation, gender-based violence, sex work, drug use and harm reduction. (Canada has significant experience and resources on some of these issues, but should also enhance training for its own police, prosecutors and other authorities on these issues, where absent or inadequate).

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THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT: GMOS IN MEXICO AND THE EUROPEAN UNION

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Abstract: *The main objective of this article is to give an overview of both the right to a clean and healthy environment adopted in international and national agreements, and the effects that the release of genetically modified organisms (GMOs) into the environment (especially genetically modified maize) may cause to human, animal and plant health. This article is divided into three sections: The first section focuses on the right to a clean and healthy environment and its enjoyment as a third generation human right in Mexico and the European Union; the second section briefly examines the global status of commercialized biotech/GM crops worldwide as well as the benefits and risks that the release of GMOs into the environment may cause to human, animal and plant health, and looks at the lack of protection of maize in Mexico as a Centre of Origin and Centre of Genetic Diversity (COD); and the third section analyses and compares the insufficient legal protection in Mexico with the strict legal regime in the European Union regarding the release of GMOs into the environment. I propose that Mexico should only cultivate genetically modified maize using biosafety techniques in arid zones, with the aim of protecting the genetic diversity of maize. This contrasts with the EU regulations because the EU has no genetic diversity of maize to protect. In increasing protections and following specific programs for the cultivation of genetically modified maize, the right to a clean and healthy environment could be guaranteed.*

Keywords: *Climate Change, Environment, GMOs, Maize, Third Generation Human Rights.*

Resumen: *El objetivo de este artículo es dar una visión general del derecho a un medio ambiente sano consagrado en instrumentos nacionales e internacio-*

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nales que toman en consideración los principios ambientales, y los efectos que la liberación de los organismos genéticamente modificados (OGMs) en el medio ambiente (especialmente el GM-Maíz) pueden causar a la salud humana, animal y vegetal. Este artículo se divide en tres partes: la primera parte trata sobre el derecho a disfrutar de un medio ambiente sano como derecho humano de tercera generación en México y en la Unión Europea. La segunda parte muestra brevemente el estatus global de los OGMs a nivel mundial, así como los beneficios y riesgos que la liberación de OGMs en el medio ambiente pueden causar a la salud humana, animal y vegetal. También menciona la falta de protección del maíz en un Centro de Origen y de Diversificación Genética (COD). La tercera parte analiza y compara el insuficiente regimen de protección legal en México con el estricto regimen legal de la Unión Europea (UE) en lo que respecta a la liberación de OGMs en el medio ambiente. También explica que México debe cultivar solamente GM-Maíz en zonas aridas y siempre y cuando se hayan implementado medidas de seguridad. Esto con el objetivo de proteger la diversidad genética del maíz. Esta última contrasta con las regulaciones de la UE porque ahí no hay diversidad genetica del maíz que proteger. Al hacerlo, el derecho a un medio ambiente sano podría ser garantizado.

Palabras clave: *Cambio climático, medio ambiente, OGMs, maíz, tercera generación de derechos humanos.*

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I. The Right to a Clean and Healthy Environment

1. *Third Generation Human Rights*

Academic literature on the *Rights of peoples* generally refers to: (i) the right to food, (ii) the right to a decent environment, (iii) the right to development and, (iv) the right to peace.[1] In addition, César Nava Escudero writes that "The doctrine and the domestic law of many countries have included also the right to self-determination into the solidarity rights or into third generation human rights."[2] First generation human rights are set out in the International Covenant on Civil and Political Rights (ICCPR), and second generation human rights are outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The laws for the protection of the environment have increasingly been influenced by, and been seen in the perspective of, laws relating to development and human rights.[3] Thus, the majority of the international community considers that the right to a clean and healthy environment be included as a collective/solidarity right or integrated into third generation rights. Patricia Birnie, Alan Boyle and Catherine Redgwell explain that today there exists an international human right to a clean environment.[4] Nevertheless, Birnie et al. mention that not all human rights lawyers favour the recognition of third generation rights, arguing that this devalues the concept of human rights, and diverts attention from the need to fully implement existing civil, political, economic and social rights. In addition, the authors claim that environmental rights do not fit neatly into any single category or generation of human rights and therefore can be viewed from three perspectives:

(i) Existing civil and political rights can provide a basis for giving affected individuals access to environmental information, judicial remedies, and political processes.
(ii) The environment should be treated as an economic social or cultural right.
(iii) The environmental quality would be treated as a collective or solidarity right.[5]

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[1] Ian Brownlie, *Principles of Public International Law* 567, (New York, Oxford University Press) (2008).

[2] César Nava Escudero, Derecho al medio ambiente, in Diccionario de derecho procesal constitucional y convencional 399, (Instituto de Investigaciones Jurídicas, UNAM) (2014).

[3] Antonio Cassese, *International Law* 488, (New York , Oxford University Press) (2005).

[4] Patricia Birnie Et Al., *International Law & The Environment*, (New York, Oxford University Press) (2009).

[5] Patricia Birnie et al., *supra* note 4, at 271-272.

David Boyd writes: "The suggestion that there are three generations of rights is controversial, and no global Human Rights treaty recognizes third-generation rights in the same way that the two International Covenants enshrine civil, political, economic, social and cultural rights."[6] It follows that the evolution and development of international environmental principles had an important impact after 1970. There are two international treaties, which have been adopted some environmental principles enshrining environmental law worldwide: (i) the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[7] and (ii) the 1992 Rio Declaration on Environment and Development (Rio Declaration).[8]

On the one hand, the Stockholm Declaration states that:

(i) Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.
(ii) The natural resources of the earth must be safeguarded for the benefit of present and future generations.
(iii) States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction and
(iv) International cooperation is essential to effectively control, prevent, reduce and eliminate adverse environmental effects.

On the other hand, the Rio Declaration establishes that:

(i) Human beings are at the centre of concerns for sustainable development.
(ii) The international cooperation is crucial to conserve, protect, and restore the health and integrity of the Earth´s ecosystem.
(iii) States have common but differentiated responsibilities.

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[6] David Boyd, R., The Environmental Rights Revolution: A Global, Human Rights, and the Environment 22 (UBC Press, Canadá) (2012).

[7] Declaration of the United Nations Conference on the Human Environment, Stockholm Declaration. On June 5-16, 1972, delegations from 114 countries met for the UN Conference on the Human Environment, widely regarded as the first global environmental conference. The Conference produced many documents, including this Declaration which contains 26 principles, several of which have been incorporated into subsequent international environmental agreements. U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972). *http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503*.

[8] The Rio Declaration on Environment and Development is one of five agreements coming out of the United Nations Conference on Environment and Development (also called the "Earth Summit") in Rio de Janeiro in June 1992. Although a non-binding, or "soft law" instrument, the Rio Declaration sets forth important principles of international environmental law, especially sustainable development. UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992). *http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163*.

(iv) The precautionary approach shall be widely applied by States according to their capabilities.
(v) The approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment, and
(vi) States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States.

The most important principles ruling international environmental law arising from these two declarations include:

(i) The polluter pays principle.
(ii) The precautionary principle.
(iii) The principle of sustainable development.
(iv) The principle of common but differentiated responsibilities.
(v) The principle of State sovereignty over their natural resources and the responsibility not to cause transboundary environmental damage.
(vi) The principle of international cooperation and,
(vii) The principle of preventive action as well.

The precautionary principle, the preventive action principle and the principle of international cooperation are the foundation of the environmental principles.[9] It is important to mention that human rights considerations, nor the right to a clean and healthy environment were addressed in the context of development before the 1990´s,[10] rather, this is a trend that began after the end of Cold War. Antonio Cassese explains that "the environment has come to be regarded as a common amenity, as an asset in the safeguarding of which all should be interested, regardless of where the environment is or may be harmed."[11]

Needless to say, the 1997 Kyoto Protocol[12] and the 2015 Paris Agreement[13] are of crucial importance to understand the right to a clean and healthy en-

[9] Reiner Schmidt, *Eimführung in das Umweltrecht 4*, 6. Ed., München, C.H. Beck (2001).

[10] Philip Alston et al., *International Human Rights, the Succesor to International Human Rights in Context 1517*, (UK, Oxford University Press) (2013).

[11] Antonio Cassese, *supra* note 3, at 487.

[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change. In 1997 160 nations met in Kyoto to negotiate reductions in greenhouse gas emissions pursuant to the terms of the 1992 United Nations Framework Convention on Climate Change. The resulting agreement is this document, which sets forth specific limits on emissions. UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998) *http://unfccc.int/essential_background/kyoto_protocol/background/items/1351.php.*

[13] The Paris Agreement's central aim is to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further

vironment, because they regulate international level the emissions of Greenhouse Gases, (GHGs), which make up part of the impacts on human, plant and animal health. The seven main GHGs are:

(i) Carbon Dioxide (CO2)
(ii) Methane (CH4)
(iii) Nitrous Oxide (N20)
(iv) Hydrofluorocarbons (HFCs)
(v) Perfluorocarbons (PFCs)
(vi) Sulphur Hexafluoride (SF6) and
(vii) Nitrogen Triflouride (NF3)

The essence of the Kyoto Protocol seeks to cut back the emissions of industrial and transition economies so that their emissions fall to five per cent below 1990 levels, and to freeze them at that level, while allowing developing countries the right to emit unlimited emissions.[14] This was designed to assist countries in adapting to the adverse effects of climate change and to guarantee the right to a clean and healthy environment. The Kyoto Protocol places a heavier burden on developed countries under the principle of common but differentiated responsibilities because they are mainly responsible for the high levels of GHG emissions in the atmosphere as a result of more than 150 years of industrial activity.[15] Its first commitment period started in 2008 and ended in 2012. During this second period from 2013 to 2020, Parties committed to reduce GHG emissions by at least 18 per cent below 1990 levels over the eight-year period. For instance, the EU´s internal 20 per cent target is also the basis for its international commitments under the Kyoto Protocol´s second comminment period.[16] "The Kyoto Procol is seen as an important first step towards a truly global emission reduction regime that will stabilize GHG emissions."[17]

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to 1.5 degrees Celsius. Additionally, the agreement aims to strengthen the ability of countries to deal with the impacts of climate change. To reach these ambitious goals, appropriate financial flows, a new technology framework and an enhanced capacity building framework will be put in place, thus supporting action by developing countries and the most vulnerable countries, in line with their own national objectives. The Agreement also provides for enhanced transparency of action and support through a more robust transparency framework. *http://unfccc.int/paris_agreement/items/9485.php*.

[14] Bjorn Lomborg, *Global Crises, Global Solutions 28*, (UK, Cambridge University Press) (2004).

[15] The kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The rules for the implementation were adopted at COP 7 in Marrakesch, Morocco, in 2001. For more information see the Conference of the Parties (COP) such as: (i) 2001 COP 7, (ii) 2006 COP 12 and, (iii) 2010 COP 16.

[16] See: *http://ec.europa.eu/eurostat/statistics-explained/index.php/Greenhouse_gas_emission_statistics*.

[17] For more information see: *http://unfccc.int/kyoto_protocol/items/2830.php*.

The Paris Agreement was adopted on 12 December at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 21), and entered into force on 4 November 2016. It states in Preamble 11 that "Climate change is a common concern of humankind, therefore, the international community should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights to indigenous peoples, local communities, the right to development, as well as gender equality, empowerment of women and intergenerational equity."[18] To date, of 197 Parties to the Convention, 168 have ratified.[19]

In this context, the United Nations Framework Convention on Climate Change (UNFCCC)[20] states "the long-term objective is to stabilise atmospheric GHG concentrations at a level that would prevent dangerous anthropogenic interference with the climate system." In order to reduce GHGs, the international community must adopt and implement at national, regional and local levels the approaches adaptation and mitigation. The Intergovernmental Panel on Climate Change (IPPC) defines adaptation as "adjustment in natural or human system in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities."[21] In addition, it defines mitigation as "an anthropogenic intervention to reduce anthropogenic forcing of the climate system. It includes strategies to reduce greenhouse gas sources and emissions and enhancing greenhouse gas sinks."[22] Thus, one of the main goals of the Paris Agreement is the implementation of the approaches explained above in order to reduce GHGs and to protect the environment, human, plant and animal health, as well as the planet earth.

As aforementioned, the right to a clean and healthy environment is considered a third generation human right, and therefore must be seen as other human rights, because human rights are universal, indivisible, interdependent and interrelated. As the environment can be considered as a common

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[18] Paris Agreement, Article 20 states this Agreement shall be open for signature at the United Nation Headquarters in New York from 22 April 2016 to 21 April 2017. Article 21 states that this Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.

[19] Paris Agreement – Status of ratification, United Nations Framework Convention on Climate Change, *http://unfccc.int/paris_agreement/items/9444.php*.

[20] For more information see: The United Nations Framework Convention on Climate Change (UNFCCC) *http://unfccc.int/essential_background/convention/items/6036.php*.

[21] Intergovernmental Panel on Climate change (IPCC) Fourth Assessment Report: Climate Change 2007, Working Group II: Impacts, Adaptation and Vulnerability. Appendix I. Glossary A-D *https://www.ipcc.ch/publications_and_data/ar4/wg2/en/annexessglossary-a-d.html*.

[22] *Ibid*, Appendix I. Glossary E-O.

amenity, it must be protected so that human beings can enjoy a safe, clean, healthy and sustainable environment. Environmental damage has negative implications on human health, directly and indirectly. Thus, for the effective enjoyment of such human rights, including the right to life, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to an adequate standard of living and its components, (such as the right to food, and the rights to safe drinking water and sanitation, and to adequate housing), the right to a clean and healthy environment must be protected at local, regional and international levels.[23]

2. *The Right to a Clean and Healthy Environment and its Enjoyment as a Human Right in Mexico and the European Union*

A. *Mexico*

Mexico is a member state of the Organization of American States (OAS)[24] and the European Union is a permanent observer of this Organization. The right to live in a healthy environment is included into the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador"[25] of which Article 11 states:

> Right to a Healthy Environment
>
> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

This protocol was signed by Mexico and therefore has a regional obligation to protect the environment, as do other member states, including: Antigua Barbuda; Argentina; Bahamas; Barbados; Belize; Bolivia; Brazil; Canada; Chile; Colombia; Costa Rica; Dominica; Dominican Republic; Ecuador; El Salvador; Grenada; Guatemala; Guyana; Haiti; Honduras; Jamaica; Mexico;

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[23] Human Rights Council, twenty-fifth session, agenda item 3, promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, on 24 of march, 2014 of the United Nations A/HRC/25/L.31.

[24] The Organization of American States, *www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-41_carta_OEA_firmas.asp*.

[25] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", (17.11.1988), *http://www.oas.org/juridico/english/treaties/a-52.html*.

Nicaragua; Panama; Paraguay; Peru; St. Kitts & Nevis; St. Lucia; St. Vincent & Grenadines; Suriname; Trinida & Tobago; United States; Uruguay; Venezuela.

Mexico has had environmental provisions in its national constitution since 1971, according to Article 73, XVI, 4, which states that: "The Congress has the power to adopt measures to prevent and combat environmental pollution."[26] The right to live in an environment that is adequate for human development and well-being was adopted in 1999, under Article 4.[27] Since 2012, the right to a clean and healthy environment and its enjoyment as a human right is founded in the Political Constitution of the United Mexican States under Article 4 paragraph 5. This Article was amended with the aim to guarantee the right to a healthy environment and states: "Any person has the right to a healthy environment for his/her own development and wellbeing. The State shall guarantee the respect to such right. Environmental damage and deterioration will generate a liability for whoever provokes them in terms of the provisions by the law."[28]

It is worth mentioning that Article 1 of the Mexican Constitution was amended in 2011 with the aim of enabling the enforcement of the right to healthy environment, among other human rights.[29] Thus, the Mexican state guarantees its citizens the right to a clean and healthy environment and its enjoyment as a third generation human right. This is granted by the Mexican Constitution and by all international instruments to this matter signed by the Mexican state.

B. *The European Union*

On the other hand, the European Union has some of the world´s highest environmental regulations, developed since the 1970s. The EU does not guarantee explicitly the right to a clean and healthy environment and its enjoyment as a third generation human right but 16 of its member states have

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

[27] *Ibid*, Article 4, *http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_141_28jun99_ima.pdf*.

[28] *Ibid*, Article 4 paragraph 5, amended through decree published on February 8th, 2012. *http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_200_08feb12.pdf*.

[29] *Ibid*, Article 1. The first paragraph was reformed by decree published on June 10, 2011. The first paragraph states that: "In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the case and under the conditions established by this Constitution itself".

adopted this right into its national constitutions,[30] these are: Portugal (1976); Spain (1978); Netherlands (1983); Hungary (1989); Croatia (1990); Bulgaria and Slovenia (1991); Czech Republic and Slovakia (1992); Belgium (1994); Finland (1995); Poland (1997); Latvia (1998); Greece (2002); Romania (2003) and France (2005).[31] In addition, 23 member states have environmental provisions in their national constitutions, these are: Italy (1948); Malta (1964); Greece (1975); Portugal (1976); Spain (1978); Netherlands (1983); Austria (1984); Sweden (1987); Hungary (1989); Croatia (1990); Bulgaria and Slovenia (1991); Czech Republic, Estonia, Lithuania, (1992); Belgium and Germany (1994); Finland (1995); Poland (1997); Latvia (1998); Romania (2003); France (2005) and Luxembourg (2007).[32]

The EU ratified the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environment Matters on February 17, 2005.[33] The objective of this Convention is stated in Article 1 as follow: "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this convention". The EU environment policy is founded on Articles 11 and 191-193 of the Treaty on the Functioning of the European Union.[34]

Article 191 states:

> 1. "Union policy on the environment shall contribute to pursuit of the following objectives:
> - Preserving, protecting and improving the quality of the environment,
> - Protecting human health,
> - Prudent and rational utilisation of natural resources,
> - Promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change".
> 2. "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles

[30] The European Union has a share competence with the Member States, according to Article four of the Treaty of Functioning of the European Union. The matters that are relevant include: (i) agriculture; (ii) environment; (iii) consumer protection; and common safety concerns in public health matters.

[31] David Boyd R., *supra* note 6, at 63.

[32] *Ibid*, at. 50.

[33] The Convention on Acces to Information, Public Participation in Decision-Making and Acces to Justice in Environmental Matters, (Aarhus, Denmark, 25 June 1988). It entered into force on 30 October 2001, in accordance with article 20(1). *https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en*.

[34] Consolidated version of the Treaty on the Functioning of the European Union. C 326/132 EN Official Journal of the European Union, 26.10.2012.

> that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."
> In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.
> 3. In preparing its policy on the environment, the Union shall take account of: — available scientific and technical data, — environmental conditions in the various regions of the Union, — the potential benefits and costs of action or lack of action, — the economic and social development of the Union as a whole and the balanced development of its regions.

Combating climate change is an explicit objetive of this Article. Article 3 of the Treaty on European Union invokes the sustainable development for the protection of a high level of protection and the improvement of the quality of the environment. Finally, the EU Charter of Fundamental Rights states in its Article 37 that: "A high level of environment protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". In sum, the environmental policy of the European Union focus on combating climate change and on protecting the environment.

II. GMOs and their Impact on Human, Plant and Animal Health

Known environmental problems include: (i) atmospheric and marine pollution; (ii) global warming and ozone depletion; (iii) the dangers of nuclear and other extra-hazardous substances and; (iv) threatened wildlife species.[35] Air and water are considered transboundary pollution issues because they can be generated in one state and can have a serious impact in other countries. Therefore can be said that the right to a clean and healthy environment is an international concern.

Philippe Sands[36] and Alexander Kiss[37] explain that the planet faces a diverse and growing range of environmental challenges which can only be addressed through international cooperation. These challenges include:

(i) The Greenhouse effect;
(ii) Climate change and;
(iii) Loss of biodiversity.

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[35] Malcolm Shaw N., *International Law 613* (UK, Cambridge University Press) (2014).

[36] Philippe Sands, *Principles of International Law 3* (UK, Cambridge University Press) (2003).

[37] Alexander Kiss et al., *International Environmental Law 637* (New York, Transnational Publishers, Inc. Ardsley) (2004).

In addition, Sands mentions that the growth of international environmental issues is reflected in the large body of principles and rules of international environmental law which apply bilateral, regionally and globally, and reflects international interdependence in a globalising world. Thus, Climate change and global warming affect the whole world, this can produce direct or indirect environmental problems which may damage human, animal and plant health as well as the environment. All these can be resolved with the cooperation of the international community.

1. *Global Status of Commercialized Biotech/GM Crops Worldwide*

Genetically Modified Organisms (GMOs) are organisms whose genomes incorporate and express genes from another species. Genetically modified (or transgenic) individuals are created by genetic engineering, using suitable vectors to insert the desired foreign gene into the fertilized egg or early embryo of the host.[38] Transgenic organisms are the result of biotechnology. Its application in sectors such as in medicine (red biotechnology) and agriculture (green biotechnology) has produced a growing number of GMOs and products derived from them. The environmental safety and risks of GMOs are based on the characteristics of the host organism, the introduced traits, the environment into which the organism is introduced, and the interaction between all of these factors, as well as the intended application of GMOs.[39]

The International Service for the Acquisition of Agri-biotech Applications (ISAAA) notes: "Global hectarage of biotech crops in 2016 increased to 185.1 million hectares compared with 179.7 million hectares in 2015, equivalent to 3% or 5.4 million hectares."[40] The ISAAA continues: "A total of 26 countries, 19 developing and 7 industrial countries, planted biotech crops in 2016". The top ten countries, each of which grew over 1 million hectares (39% of global total, similar to 2015), Brazil with 49.1 million hectares (27%), Argentina with 23.8 million hectares (13%), Canada with 11.6 million hectares (6%), India with 10.8 million hectares (6%), Paraguay with 3.6% million hectares (2%), Pakistan with 2.9% million hectares (2%), China with 2.8 million hectares (2%), South Africa with 2.7 million hectares (1%), and Uruguay with 1.3 million hectares (1%).[41]

For this article, it is important to mention that Biotech DroughtGard™ tolerant maize was first planted in the US in 2013. The cultivation of this GM Maize increased from 50,000 hectares in 2013 to 275,000 hectares in 2014

[38] A Dictionary of Science 350 (Oxford University Press) (2010).

[39] OECD, Safety Assessment of Transgenic Organisms, France, OECD Consensus documents, Volume 1, (2006).

[40] ISAAA, 2016. Global Status of Commercialized Biotech/GM Crops: 2016. ISAAA Brief No. 52. ISAAA: Ithaca, NY, p. 3.

[41] ISAAA, *supra* note 40, at 4.

and to 810,000 hectares in 2015.[42] This reflects the farmer acceptance of this biotech maize crop and the need to use the GM Maize in the arid zones of the USA. This kind of GM-Maize could be introduced in Mexico but only in the arid zones of the country. However, if this were the case, it would be necessary to implement biosafety measures and monitoring before its release takes place, in order to avoid another introgression in Mexico as occurred in Oaxaca in 2001. This introgression will be explained in the third section of this article.

According to some authors Mexico has between 41, 59 and 65 varieties of maize,[43] therefore Mexico does not need to cultivate GM Maize or transgenic maize containing a gene from the bacteria Bacillus thuringiensis (BT Maize). José Antonio Serratos Hernández[44] details 65 varieties of maize in Mexico,[45] which demonstrates the genetic diversity as well as the need to protect these varieties from contamination.

In order to protect the genetic diversity of maize, it is necessary to protect more than two million small scale of marginalized farmers in the country, because they are the guardians of the native germplasm of maize: they retain, maintain, and even modify the genetic diversity present in their territories through exchange, gene flow, and the testing of new seeds.[46]

2. *Benefits and Risks of the Release of GMOs into the Environment and its Effects on Human, Animal and Plant Health*

There are exists benefits and risks of the release of GMOs into the environment. This was and is still being discussed at national and international levels, but the perception of benefits and risks differs from country to coun-

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[42] Clive, James, *Global Status of Commercialized Biotech/GM Crops: 2015. ISAAA Brief, 51. ISAAA*: Ithaca, NY, 2015, 5.

[43] T.A. Kato ET AL, *Origen y diversificación del maíz: Una revisión análitica*, México, UNAM, CONABIO, 18 (2009).

[44] José Antonio Serratos Hernández, *El origen y la diversidad el maíz en el continente americano*, México, Greenpeace, p. 16, (2009).

[45] *Ibid*, the 65 varieties of maize in the country are: Ancho, Apachito, Arrocillo Amarillo, Arrocillo, Azúl, Blandito, Blando Sonora, Bofo, Bolita, Cacahuacintle, Carmen, Celaya, Chalqueño, Chapalote, Clavillo, Comiteco, Conejo, Cónico, Cónico Norteño, Coscomatepec, Cristalino Chihuahua, Complejo Serrano Jalisco, Cubano Amarillo, Dulce de Jalisco, Dulcillo Noroeste, Dzit Bcal, Elotes cónicos, Elotes Occidentales, Elotero de Sinaloa, Fasciado, Gordo, Harinoso de ocho, Jala, Lady Finger, Maíz Dulce, Maizón, Motozinteco, Mushito, Nal Tel, Nal-Tel de Altura, Olotillo, Olotón, Onaveño, Palomero de Chihuahua, Palomero Toluqueño, Pepitilla, Ratón, Reventador, San Juan, Serrano de Jalisco, Tablilla, Tablilla de Ocho, Tabloncillo, Tabloncillo Perla, Tehua, Tepecintle, Tunicata, Tuxpeño Norteño, Tuxpeño, Vandeño, Xmejenal, Zamorano Amarillo, Zapalote Chico, Zapalote Grande.

[46] José Antonio Serratos Hernández, *supra* note 44, p. 12.

try.[47] On the one hand, advocates of biotechnology argues that Biotech crops contribute to food security, sustainable development and mitigating climate change. The ISAAA explains that benefits of planting Biotech Crops include": Increase productivity that contributes to global food, feed and fiber security; Self-sufficiency on a nation´s arable land; Conserving biodiversity, precluding deforestation and protecting biodiversity sanctuaries; Mitigating challenges associated with climate change; and Improving economic, health and social benefits."[48]

Table 1. Global Area of Biotech Crops in 2015 and 2016: by Country (Million Hectares)**

	Country	Area 2015	Area 2016	Biotech Crops
1*	USA*	70.9	72.9	Maize, soybean, cotton, canola, sugar beet, alfalfa, papaya, squash, potato
2*	Brazil*	44.2	49.1	soybean, maize, cotton
3*	Argentina*	24.5	23.8	soybean, maize, cotton
4*	India*	11.6	10.8	Cotton
5*	Canada*	11.0	11.6	Canola, maize, soybean, sugar beet
6*	China*	3.7	2.8	Cotton, papaya, poplar
7*	Paraguay*	3.6	3.6	Soybean, maize, cotton
8*	Pakistan*	2.9	2.9	Cotton
9	South Africa*	2.3	2.7	Maize, soybean, cotton
10*	Uruguay*	1.4	1.3	soybean, maize
11*	Bolivia*	1.1	1.2	Soybean
12*	Philippines*	0.7	0.8	Maize
13*	Australia*	0.7	0.9	Cotton, canola
14*	Burkina Faso*	0.5	-----	Cotton
15	Myanmar*	0.3	0.3	Cotton
16	Mexico*	0.1	0.1	Cotton, soybean
17	Spain*	0.1	0.1	Maize
18	Colombia*	0.1	0.1	Cotton, maize
19	Sudan*	0.1	0.1	Cotton
20	Honduras	<0.1	<0.1	Maize

[47] Alicia Gutiérrez González, *The Protection of Maize Under the Mexican Biosafety Law: Environment and Trade* 18 (Germany, Universitätsverlag Göttingen) (2010).

[48] ISAAA 2016, *supra* note 40, at 1.

21	Chile	<0.1	<0.1	Maize, soybean, canola
22	Portugal	<0.1	<0.1	Maize
23	Vietnam	<0.1	<0.1	Maize
24	Czech Republic	<0.1	<0.1	Maize
25	Slovakia	<0.1	<0.1	Maize
26	Costa Rica	<0.1	<0.1	Cotton Soybean
27	Bangladesh	<0.1	<0.1	Brinjal/Eggplant
28	Romania	<0.1	-----	Maize
	Total	179.7	185.1	

Source: ISAAA, 2015 and 2016[49]
* Biotech mega-countries growing 50,000 hectares or more
** Rounded-off to the nearest hundred thousand or more

On the other hand, the potential of risks associated with GMOs include introduction of allergenic or otherwise harmful proteins into food, transfer of transgenic properties to viruses, bacteria or other plants, as well as potential detrimental effects on non-target species and the environment.[50]

To understand the problem in Mexico with regards to maize, it is important to consider that maize is a totally (100%) open-pollinated (cross-fertilising) crop species, thus a coexistence between GM Maize and native landraces of maize cannot exist. The contamination in Oaxaca in 2001 is evidence of this.[51] The Mexican Secretary of Agriculture (SAGARPA) imposed a *de facto moratorium* on the experimental cultivation of GM Maize in 1998, because there was an uncertainty about potential consequences for maize diversity. However, the *de facto moratorium* did not prevent the planting of transgenic maize, and introgression took place. The 2004 Report of the Commission for Environmental Cooperation (CEC) analysed: (i) gene flow and transgenic maize, (ii) the impact of Living Modified Organisms (LMOs) on biodiversity and on health, (iii) socio cultural impacts of LMOs in Mexico.[52] The group of experts from the CEC concluded that one explanation for the appearance of GM Maize in Mexico was the fact that farmers may have planted imported maize from the United States for the use in Tortillas, unaware that the grain was from GM crops. The CEC recommended the restriction of maize imports and their monitoring, preservation *in-situ* and *ex-situ* of maize, as well as its conservation, due to

[49] ISAAA 2016, *supra* note 40, at 3.

[50] Victor M. Villalobos A., *Oportunidades y amenazas: Los transgenicos* 75 (Mundi Prensa, México) (2008).

[51] Alicia Gutierrez Gonzalez, *supra* note 47, at 59.

[52] Maíz y Biodiversidad, *Efectos del Maíz Transgénico en México*, Informe de Secretariado de la Comisión para la Cooperación Ambiental CCA, (2004), *www.cec.org/files/PDF/Maize-and-Biodiversity_es.pdf*.

the fact that Mexico is a Centre of Origin and Genetic Diversity of Maize. The appearance of contamination demonstrated the complexity of the management of biosafety measures in Mexico, as well as the lack of control at border customs when GM maize is imported from the USA without label or identification.[53]

The release of GM Maize into the environment in Mexico should only be permitted in arid zones and if biosafety measures are implemented. Otherwise, the effects on biological diversity and changes to agricultural and industrial practices, including an increase in environment pollution, would be severe and irreversible. It is expected that the release of GM maize worldwide will increase, and therefore the loss of biodiversity will take place, *i.e.,* native species could be replaced by exotic species. In order to avoid the loss of biodiversity and the loss of maize varieties, Mexico should prohibit the release of GM maize in its territory, except in its arid zones, where there is not genetic diversity to protect, and only if biosafety measure are in place and can be implemented.

Nevertheless, the major concern about the effects on human, animal, and plant health, and about allergies and toxicity. Glyphosate, is the world´s most widely produced herbicide, by volume. It is used extensively in agriculture. This chemical is an ingredient in Monsanto´s weed killer product Roundup, and glyphosate has become more popular with the increasing market share of crops that are genetically engineered to be tolerant to the herbicide.[54] World Health Organization (WHO) cancer authorities and the International Agency for Research on Cancer (IARC) recently determined that glyphosate is "probably carcinogenic to humans" (Group 2A). Glyphosate can cause the following conditions in humans: obesity, cardiovascular disease, colitis, Alzheimer´s disease, Parkinson´s disease, autism and depression among others.[55]

III. The legal Framework for the Release of Genetically Modified Maize into the Environment in Mexico and in the European Union.

1. *In Mexico*

Mexico is considered a megadiverse country, it belongs to a selected group of nations that possess the greatest number and diversity of animals and plants,

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[53] Alicia Gutierrez Gonzalez *supra* note 47, at 61-63.

[54] Cressey Daniel, *Widely used herbicide linked to cancer,* Nature, International Weekly Journal of Science, USA, 24 March 2015.

[55] Samsel Anthony and Seneff Stephanie, *Glyphosate´s Suppression of Cytochrome P450 Enzymes and Amino Acid Biosynthesis by the Gut Microbiome: Pathways to Modern Diseases*. Entropy 2013, 15, 1416-1463, *available at http://www.mdpi.com/1099-4300/15/4/1416/html.*

or nearly 70 per cent of global species diversity. There are 18 megadiverse countries: Australia; Brazil, China; Colombia; Congo; Ecuador; India; Indonesia; Madagascar; Malaysia; Mexico; Papau New Guinea; Peru; the Philippines, South Africa; the USA; Venezuela; and Zaire.[56] In addition, Mexico ranks fifth worldwide with 23,424 Vascular plants, 535 Mammals, 1,096 Birds, 804 Reptiles and 361 Amphibians.[57] Mexico is also a Centre of Origin[58] and a Centre of Genetic Diversity[59] (COD) of crops including: chilli pepper; beans; squash; papaya; cotton; tomato; guayaba; cacao; agave; amaranth, and maize.

Mexico faces a major problem with the cultivation of GM maize due to the fact that Mexico has to comply with international environmental commitments and hence has the obligation to protect, conserve and preserve its biodiversity and its maize. Maize is not only the staple food of Mexicans but it has cultural, nutritional, historical, environmental, symbolic, religious, social, and economic significance.[60] For this reason, Mexico made a declaration against GM maize, which may limit its use for human consumption. The statement establishes that:[61]

> - Being Mexico a center of origin and diversification of maize, and: - paying attention to the reproductive biology of maize as an open-pollinated crop;
> - considering the dynamic character of the traditional farming systems regarding seed exchange and gene flow between local varieties and varieties originated in several geographical regions;
> - reaffirming the importance of conservation and sustainable use of that resource; and - understanding the strategic nature of the crop as a food for the Mexican people; manifests that has decided not to allow the release to the environment of genetically modified maize that has been modified in such way as to be no longer suitable as food. That is, Mexico prohibits both experimentation and release to the environment of maize that has been modified to obtain pharmaceutical products, vaccines, industrial oils, plastics, or any modification that limits or affects its properties as food.

We invite all countries that are Parties, as well as all countries that are not Parties to the Cartagena Protocol to think about the use of edible crops, es-

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[56] For more information see CONABIO, *http://www.biodiversidad.gob.mx/v_ingles/country/whatismegcountry.html*.

[57] *Ibid.*

[58] A centre of origin is the area where a particular organism was first domesticated and brought into use by humans. Centres of origin may still retain a very high diversity of the genetic resources base and wild relatives from which the organism concerned was domesticated.

[59] A centre of genetic diversity is an area where there is a high diversity present amongst a particular group of related species – either within a family, genus, or sub-species, varieties, cultivars, strains, or other sub-categories within a species.

[60] Alicia Gutiérrez González, *supra* note 47, at 42.

[61] For more information see Biosafety Clearing-House, Convention on Biological Diversity in internet *https://bch.cbd.int/database/record.shtml?documentid=8601*.

pecially in centers of origin, as factories for products that limit its properties as food.

Following this, it is crucial for Mexico to prohibit both experimentation and release to the environment of GM maize that has been modified to obtain pharmaceutical products, vaccines, industrial oils, plastics, or any modification that limits or affects its properties as food because maize is, as mentioned before, the staple food in Mexico. In 2005 Mexico enacted a biosafety law[62] and then passed a regulation[63] of this law in 2008. Together, these are considered the most important regulatory developments on biosafety and biotechnology in Mexico.

Table number 2 shows the annual permits for the release of GM maize into the environment in Mexico. The permits for pilot and experimental programs ran from 14 June 2005 to December 2015.

Table 2. Annual Maize Permits

Year	Permits for the release of GM-Maize into the environment
2005	7
2006-2008	0
2009	33
2010	68
2011	61
2012	33
2013-2015	0

Source: CIBIOGEM [64]

It is important to note that under Mexican Biosafety Law 202 permits have been granted for the release of GM maize into the environment.[65] This reflects a lack of protection of maize, even as a COD. Nevertheless, Table 2 shows that between 2013 and 2015, permits for the release of GM maize into the environment were not granted. This happened because of the pres-

[62] Ley de Bioseguridad de Organismos Genéticamente Modificados [LBOGM][Biosecurity law of genetically modified organism], as amended, Diario Oficial de la Federación [D. O.], 18 de marzo de 2005 (Mex.).

[63] Reglamento de la Ley de Bioseguridad de Organismos Genéticamente Modificados [RLBOGM][Regulation of the biosafety law of genetically modified organisms], as amended, Diario Oficial de la Federación[D.O.], 19 de marzo de 2008 (Mex.)

[64] CIBIOGEM, *http://www.conacyt.mx/cibiogem/index.php/permisos-por-cultivo-annual*.

[65] *Ibid*, *http://www.conacyt.mx/cibiogem/index.php/estadisticas-comparativo-pruebas-de-campo-y-permisos*.

sure on behalf of environmental organizations including the organization "Sin Maíz no hay País" and "Greenpeace", as well as researchers, farmers, citizens, and so forth. Contamination of maize took place in Oaxaca in 2001, and these organizations and researchers do not want to have another introgression. They continue to demand the implementation of *a de facto moratorium* and want the government to prohibit the cultivation of GM maize in Mexico, due to the negative effects that this type of maize provoke on human, animal and plant health as well as into the environment.[66]

Researchers and authors recommended the re-installation and maintenance of the release of GM maize in Mexican territory because:

(i) The centres of origin and diversity are not precisely identified,
(ii) Infrastructure for the control of transgenic maize is still not in place,
(iii) The degree of transgenic contamination of maize varieties throughout the country has yet not been determined,
(iv) Programs for the protection, conservation and improvement has been not developed.

Recently, Elena Álvarez-Buylla published in *Gaceta UNAM* that Glyphosate was present in the maize food chain in Mexico, at rates of almost 30%.[67] She and other authors published in *Agroecology and Sustainable Food System*[68] that they have found glyphosate and AMPA residues in 27.7% of samples assayed for herbicide presence. They also stated:

> In Mexico there are no set limits for glyphosate residues in processed food, and the concentration of such herbicide is not assayed by official entities. This study suggests that given yhe high level of maize consumption in Mexico, the latter issue should be further considered.
> Our results imply that transgenic maize varieties, produced abroad under industrial agricultura are finding their way into the food manufacturing industrial networks inMexico. Another possibility is that domestic seed stocks, that are supposed to be free of transgenic materials, contain at least some GM maize, which suggests that currently applied biosafety guideines should be profoundly revised at the COD of Maize: Mexico.[69]

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[66] National campaign Sin maíz no hay país, in defense of food sovereignty and the reactivation of the Mexican countryside. For more information see: *http://sinmaiznohaypais.org/archivos/250*.

[67] Alvarez-Buylla, Elena, Gaceta UNAM, "Invasión de Maíz transgénico", UNAM, 4, 904, 18 de septiembre de 2017, p. 8.

[68] E. González-Ortega, A. et al., , "Pervasive presence of transgenes and glyphosate in maize-derived food in Mexico", Agroecology and Sustainable Food Systems, vol. 41, Iss. 9-10, 2017, *http://dx.doi.org/10.1080/21683565.2017.1372841*.

[69] *Ibid*.

As has been demonstrated, Mexico did not learn from the introgression in Oaxaca in 2001. Sixteen years later (2017), Mexico has not applied biosafety measures properly, as there is a presence of GM maize into the maize chain food in Mexico. This indicates that the regulations in place do not work as they should.

2. *The European Union*

The European Union has established a strict regime regarding the cultivation and consumption of genetically modified organisms. Directive 2001/18/EC of the European Parliament and of the Council and Regulation 1829/2003 of the European Parliament and of the Council establish a comprehensive legal framework for the authorization of GMOs, which is fully applicable to GMOs to be used for cultivation purposes throughout the Union as seeds or other plant-propagating material (GMOs for cultivation).[70] Under that legal framework, GMOs for cultivation are to undergo an individual risk assessment before being authorized to be placed on the Union market in accordance with Annex II to Directive 2001/18/EC taking into account the direct, indirect, immediate and delayed effects, as well as the cumulative long-term effects, on human health and the environment. The aim of this authorization procedure is to ensure a high level of protection of human life and health, animal health and welfare, the environment and consumer interests. In addition, the precautionary principle should always be taken into account.[71]

The Directive (EU) 2015/412 states:

> Member States have the possibility to restrict or prohibit the cultivation in all or part of their territory of a GMO or of a group of GMOs defined by crop or trait, once authorized, on the basis on town and country planning, land use, socioeconomic impacts, coexistence and public policy.[72] But there is a restriction for Member States. Once a GMO is authorized for cultivation purposes in accordance with the Union legal framework on GMOs and complies, as regards to the variety that is to be placed on the market, with the requirements of Union law on the marketing of seed and plant propagating material, Member States are not authorized to prohibit, restrict, or impede its free circulation within their territory, except under the conditions defined by Union laws.[73]

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[70] Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the posibility for the Member States to restricto or prohibit the cultivation of genetically modified organisms (GMOs) in their territory. Official Journal of the European Union, in the whereas clauses p. 1, (1) L68.

[71] *Ibid*, *supra* note 63, in the whereas clauses 1 (2).

[72] *Ibid*, in the whereas clauses 3 (13).

[73] Directive (EU) 2015/412, in the whereas clauses, *supra* note 69, 2 (5).

It is important to mention that the cultivation of GMOs is an issue addressed at the level of Member States, but issues related to importing and placing GMOs on the market should remain regulated at the European Union level, so as to preserve the internal market.[74]

In order to guarantee a high level of consumer protection, Member States and operators should also take effective labelling and information measures pursuant to Regulation (EC) No 1829/2003[75] and Regulation (EC) No 1830/2003 of the European Parliament and of the Council to guarantee transparency with regard to the presence of GMOs in products.[76] Article 26b, 3 of the Directive (EU) 2015/412 states:

> A Member State may adopt measures restricting or prohibiting the cultivation in all or part of its territory of a GMO, or a group of GMOs defined by crop or trait, once authorised in accordance with Part C of the Directive (EU) 2015/412 or with the regulation (EC) No 1829/2003, provided that such measures are in conformity with Union law, reasoned, proportional and non-discriminatory and, in addition, are based on compelling grounds such as those related to:
>
> a) Environmental policy objectives;
> b) Town and country planning;
> c) Land use;
> d) Socio-economics impacts;
> e) Avoidance of GMO presence in other products without prejudice to Article
> f) 26[a] of the Directive (EU) 2015/412;
> g) Agricultural policy objectives;
> h) Public policy.

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[74] In the past, in order to restrict or prohibit the cultivation of GMOs, some Member States had recourse to the safeguard clauses and emergency measures pursuant to Article 23 of Directive 2001/18/EC and Article 34 of Regulation (EC) No. 1829/2003 as a result of, depending onthe cases, new or aditional information made available since the date of the consent and affecting the environmental risk assessment, or of the reassessment of existing information. Other Member States have made use of the notification procedure set out in Article 114 (5) and (6) TFEU which requires putting forward new scientific evidence relating to the protection of the environment or the working environment. In addition, the decision-making process has proved to be particularly difficult as regards the cultivation of GMOs in teh light of the expression of national concerns which do not only relate to issues associated with the safety of GMOs for health or the environment.

[75] Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, L 268.

[76] Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC (O) L268, 18.10.2003, 24.

> Those grounds may be invoked individually or in combination, with the exception of the ground set out in point (g) which cannot be used individually, depending on the particular circumstances of the Member States, region or area in which those measures will apply, but shall, in no case, conflict with the environmental risk assessment carried out pursuant to the Directive (EU) 2015/412 or to Regulation (EC) No 1829/2003.

In the European Union only four countries continued to plant biotech crops in 2016 led by Spain, Portugal, Slovakia and Czech Republic. They experienced a combined increase of 17 per cent in 2016 at 136,363 hectares, compared to 116,870 in 2015. Romania decided not to plant GMOs in 2016 due to onerous government requirement.[77] As mentioned, Mexico has not yet reached its objective to protect maize because it lacks the infrastructure for the control of GM maize. In addition, programs for the protection and conservation of maize have been not developed. In the European Union, Member States of the EU may adopt measures restricting or prohibiting the cultivation in all or part of its territory of a GMOs, as well as ensuring they have been labelled to guarantee a high level of consumer protection.

IV. Concluding Remarks

The right to a clean and healthy environment has been adopted on a regional level through agreements including the Protocol of San Salvador in America and the Aarhus Convention in Europe. The national level, the constitutions of some states have include and adopt this right, in order to protect the environment and human, animal and plant health.

As we have seen, the protection of the environment is a challenge not only for Mexico and the European Union, but for the entire international community. Therefore, international cooperation on this issue is needed. In addition, the implementation of the two approaches adaptation and mitigation, adopted in the Kyoto Protocol and the Paris Agreement, must be implemented at local, regional and international levels in order to guarantee the right to a clean and healthy environment.

It is expected that the release of GMOs and GM maize into the environment will increase according to the ISAAA and this may produce negative effects on the environment because of the loss of biodiversity and the replacement of native species. In addition, WHO cancer authorities and the IARC, determined that glyphosate is "probably carcinogenic to humans" glyphosate is an ingredient present into GM maize. For this reason, the consumption of Biotech-crops could damage not only human health but plant and animal health as well. Although it is practically impossible to stop the release of GM

[77] ISAAA 2016, *supra* note 40, 7.

maize and GMOs into the environment worldwide, and its effects on human, animal and plant health, it should be possible to restrict or impede, as in the European Union, the release of GM maize in Mexico, in order to conserve and protect maize, the staple food of Mexicans.

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FREEZING FINANCIAL ASSETS IN THE UNITED STATES AND IN MEXICO: CONTRASTS IN CONSTITUTIONALITY AND LEGAL PARALLELS

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Abstract: *The purpose of this article is to understand how asset freezing works in the United States of America and in Mexico, as well as the contrasts and similarities in both systems. The threats posed to civil rights that can arise from asset freezing led us to compare the judicial criteria held by the US Courts and the corresponding reasoning in the Mexican legal system. Alternative rulings from European courts are also considered. Finally, some recommendations are made to improve due process in the Mexican legal system after preventing money laundering and funding terrorism when freezing financial assets.*

Keywords: *Asset freezing, seizure, Anti-Money Laundering, Combating the Financing of Terrorism.*

Resumen: *El propósito de este artículo es entender cómo funciona la congelación de activos en los Estados Unidos de América y México, sus contrastes y similitudes en ambos sistemas. Las amenazas a los derechos civiles que pueden surgir de la congelación de activos nos llevaron a comparar criterios judiciales sostenidos por los Tribunales de los Estados Unidos y el correspondiente razonamiento en el sistema legal mexicano. También se consideran las decisiones alternativas de los tribunales europeos. Finalmente, se hacen algunas recomendaciones para mejorar el debido proceso en los casos de prevención del lavado de dinero y financiamiento al terrorismo en el sistema legal mexicano al congelar activos financieros.*

Palabras clave: *Congelación de activos, embargo incautación, prevención de Lavado de Dinero y Financiamiento al Terrorismo.*

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I. Introduction

The Mexican legal system has experienced recent legal modifications to introduce financial asset freezing in order to prevent money laundering and to combat the financing of terrorism.[1] The US government has been freezing

[1] Decreto por el que se reforman, adicionan y derogan diversas disposiciones en materia financiera y se expide la Ley para Regular las Agrupaciones Financieras [Decree through which certain provisions on financial matters are amended, supplemented or repealed and the Law

assets since the 18th century.[2] While responding to very different reasons, such measures have always aimed at protecting national security, the economy and international policy.[3] Consequently, the asset-freezing measure has a rich background in US judicial review, and has extended its influence among UN Member States.

Even though the US legal system does not belong to the same legal tradition as the Mexican one, it has been used as a benchmark because the US government has applied this measure for a long time and has strongly endorsed this measure before the United Nations[4] as one of the key mechanisms to counter terrorism financing.

Before 9/11, UN Member States had been working on international instruments to globally coordinate efforts to fight terrorism. The New York terrorist attacks simply accelerated the adoption of such measures.[5]

Other international organizations, such as Financial Action Task Force (FATF), have urged their members to adopt financial and non-financial asset freezing as a key measure to combat money laundering and suppress terrorism financing. Asset freezing is still enforced despite international human rights concerns, mostly related to due process protection.[6]

Several members of the European Union have also experienced terrorist attacks, as well as the legal consequences of restricting civil liberties. Furthermore, European courts have conducted a thorough analysis to balance the need for measures coherent with current international efforts to combat terrorism that deprive terrorists of financial resources while still adopting a protective approach concerning civil liberties.

However, it might be suitable for the Mexican legal system to follow some of the latest judicial criteria given by US courts, or rather follow the European trend regarding the balance between national security and the protection of civil liberties. In this context, we will analyze whether Mexican legal reforms could be improved by taking into consideration the international experiences of both the United States and Europe.

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for the Regulation of Financial Groups is enacted], Diario Oficial de la Federación [D.O.], 10 de Enero de 2014 (Mex.).

[2] Bethany Kohl Hipp, Comment, *Defending expanded presidential authority to regulate foreign assets and transactions*, 17 Emory Int'l L. Rev. 1311, 1311 (2013).

[3] *Id.* at 1365.

[4] Lutz Oette, *A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council*, 13 Eur. J.Int'l L., 93, 96 (2002) (discussing the legitimacy of Security Council sanctions).

[5] Laura K. Donohue, Article, *Anti-terrorist finance in the United Kingdom and United States*, 27 Mich. J. Int'l L. 303, 306 (2006).

[6] Adele J. Kirschner, *Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?*, 70 Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht [ZaöRV] 585, 591 (2010) (Ger.).

II. The Concept of Asset Freezing

According to the financial statutory laws, freezing financial assets is a preventative administrative procedure[7] ordered by the Secretariat of Finance and Public Credit, on behalf of the Mexican federal government, and executed by Mexican financial institutions, which are obligated to cease all dealings involving the accounts or are banned from celebrating operations with blocked persons. This precautionary measure is only applicable to counter two federal crimes, namely financing terrorism and money laundering. Additionally, reconsiderations or administrative reviews are carried out by the same authority that ordered the financial asset freezing.[8]

Even though the term "freezing of assets" is broadly understood, statutory rules refer instead to the "list of blocked persons" [*Lista de personas bloqueadas*].[9] The inclusion of a natural or legal person's data on the list has the effect of a general order to freeze assets in the possession of financial institutions and whose owner's data match those on the list.

There are other preliminary measures such as the temporary seizure or freezing of interest-bearing accounts held by financial institutions as a result of a breach of contract or failure to fulfill tax obligations; but these shall not be considered in this article. These actions are commonly known in the Mexi-

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[7] Competencia para conocer del juicio de amparo indirecto promovido contra la orden de aseguramiento y bloqueo de una cuenta bancaria dictada por el titular de la unidad de inteligencia financiera de la Secretaría de Hacienda y Crédito Público, sin que previamente exista una investigación del ministerio público. Corresponde a un juez de distrito en materia administrativa, Tribunales Colegiados de Circuito [T.C.C.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo IV, Octubre de 2016, Tesis I.10o.P.2 P (10a.), Página 2847 (Mex.).

[8] Ley de Instituciones de Crédito [L.I.C.] [Credit Institutions Law], as amended, Art. 115, paras. nine to eleven, Diario Oficial de la Federación [D.O.], 18 de Julio de 1990 (Mex.); Ley del Mercado de Valores [L.M.V.] [Stock Market Law], as amended, Art. 212, paras. four to six, Diario Oficial de la Federación [D.O.], 30 de diciembre de 2005 (Mex.); Ley de Fondos de Inversión [L.S.I.] [Investment Corporations Law], as amended, Art. 91, paras. seven to nine, Diario Oficial de la Federación [D.O.], 4 de junio de 2001 (Mex.); Ley General de Organizaciones y Actividades Auxiliares del Crédito [L.G.O.C.] [General Law of Organizations and Activities Related to Credit], as amended, Arts. 95, paras. nine to eleven, 95 Bis, paras. six to eight, Diario Oficial de la Federación [D.O.], 14 de enero de 1985 (Mex.); Ley de Uniones de Crédito [L.U.C.] [Credit Unions Law], as amended, Art. 129, paras. eight to ten, Diario Oficial de la Federación [D.O.], 20 de agosto de 2008 (Mex.); Ley de Ahorro y Crédito Popular [L.A.C.P.] [Popular Saving and Credit Law], as amended, Art.124, paras. six to eight, Diario Oficial de la Federación [D.O.], 4 de junio de 2001 (Mex.); Ley para Regular las Actividades de las Sociedades Cooperativas de Ahorro y Préstamo [L.R.A.S.C.A.P.] [Law to Regulate the Activities of Saving and Loan Cooperative Companies], as amended, Art. 72 paras. four to six, Diario Oficial de la Federación [D.O.], 13 de agosto de 2009 (Mex.).

[9] *Id.*

can legal system as a seizure ["*embargo*"][10] and can be brought before a court or an administrative judge.

Similarly, this article does not focus on "civil forfeiture." On Mexican legal grounds, the forfeiture of property is a civil action concerning a permanent deprivation of goods if so ruled by a court. Pursuant to Article 22 of the Mexican Constitution, such a measure is only applicable in cases related to six federal crimes, namely organized crime, drug trafficking, kidnapping, car theft, human trafficking and illicit enrichment.[11] This civil action runs parallel to, but does not depend on criminal procedure.[12]

However, it is worth mentioning that the Federal Law for Civil Forfeiture also set forth precautionary measures similar to asset freezing.[13] It is described as a provisional immediate order prohibiting any transaction of funds or assets, whether financial or non-financial.

From the perspective of the US legal system, "seizure," "blocking of assets," or "asset freezing" in general, refer to a temporary deprivation of property that does not vest the assets in the government.[14] Consequently, an eventual settlement or return of assets can take place. On the other hand, confiscation or forfeiture refers to a permanent deprivation of property.[15]

In the United States, economic sanctions are governed by the 1977 International Emergency Economic Powers Act (IEEPA), which grants the President far-reaching authority to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[16] This grants the President the power to nullify, transfer, prohibit or otherwise

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[10] Procedimiento de inmovilización derivado de créditos fiscales firmes. Se rige exclusivamente por las reglas previstas en los artículos 156-bis y 156-ter del Código Fiscal de la Federación (Legislación vigente en 2010), Segunda Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo IV, Diciembre de 2011, Tesis 2a./J. 20/2011, Página 3064 (Mex.).

[11] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Art. 22, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[12] Extinción de dominio. La autonomía a que se refiere el artículo 22 de la constitución política de los estados unidos mexicanos, entre el procedimiento relativo y el penal no es absoluta, sino relativa, Primera Sala, [S.C.J.N] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 17, tomo I, Abril de 2015, Tesis 1a./J. 21/2015 (10a.), 340 (Mex.).

[13] Ley Federal de Extinción de Dominio, Reglamentaria del Artículo 22 de la Constitución Política de los Estados Unidos Mexicanos [L.F.E.D.] [Federal Law for Civil Forfeiture, Regulatory of the Article 22 of the Political Constitution of the United Mexican States] as amended, Art. 12 Bis, D.O., 29 de Mayo de 2009 (Mex.). (The confiscation measure is governed by the LFED).

[14] Montgomery E. Engel, Note, *Donating "Blood Money": fundraising for international terrorism by United States charities and the government's efforts to constrict the flow*, 12 Cardozo J. Int'l & Comp. L. 251, 260 (2004).

[15] Hipp, *supra* note 2, at 1365-66.

[16] 50 U.S. Code § 1701.

regulate any acquisition, holding or use by any person of any property that is subject to the jurisdiction of the United States and in which any foreign country has any interest. However, this power is limited to national emergencies declared by executive order.[17]

Historically, the IEEPA had been used almost exclusively against foreign nations or in nation-to-nation diplomacy. This changed in 1995 when President Clinton declared a national emergency in response to terrorist threats to disrupt the Middle East peace process by issuing Executive Order 12947. Then such power was applied to individuals, such as terrorist, narcotics traffickers in Colombia and those contributing to the proliferation of chemical or biological weapons. [18]

Afterward, President George W. Bush expanded the application of the IEEPA by issuing several orders targeting the terrorist financial livelihood of States, non-State groups, and individuals.[19]

After 9/11, President Bush exercised IEEPA authority to declare a national emergency by Executive Order 13244, on September 24, 2001. This executive order addressed the issue of persons who commit, threaten to commit or support terrorism. It authorizes the freezing of assets belonging to designated persons and banning transactions involving any assets of interest to these persons, organizations or whoever assists in, sponsors, or provides financial, material or technological support to terrorism.[20] This order created the "Specially Designated Global Terrorist" (SDGT) list.[21]

Currently, the Office of Foreign Assets Control (OFAC) —the agency in charge of executing asset freezing orders— has about twenty-eight sanctions programs.[22]

The next section gives a description of the international context of freezing assets as a measure to prevent money laundering and counter financing terrorism.

III. International Asset Freezing in Context

In the international arena, the following circumstances drove the Mexican government to modify its legal framework in order to fulfill its international commitments.

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[17] J. David Pollock, Note, *Administrative Justice: Using Agency Declaratory Orders in the Fight to Staunch the Financing of Terrorism*, 33 Cardozo L. Rev. 2171, 2174 (2012).

[18] *Id.* at 2175.

[19] *Id.* at 2175.

[20] Hipp, *supra* note 2, at 1367.

[21] Nicole Nice-Petersen, Note, *Justice for the "Designated": The process that is due to alleged U.S. financiers of terrorism*, 93 Geo. L.J. 1387, 1406 (2005).

[22] *See* Department of the Treasury-Office of Foreign Assets Control, Sanctions Programs and Country Information, available at *https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx* (last visited on Jan. 11, 2018).

1. The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, subscribed in the capital of Austria on December 20, 1988 (hereafter the Vienna Convention)[23] required Member States to criminalize money laundering and to establish asset freezing as a provisional measure for the eventual confiscation of proceeds, property or any other things referring to the offences specified in the convention.
2. Regarding the terrorist activities in Afghanistan, Resolution 1267 (1999), issued by the UN Security Council on October 15, 1999,[24] under Chapter VII of the Charter of the United Nations,[25] required Member States to freeze funds and other financial resources, owned or controlled directly or indirectly by the Taliban. Under this resolution, no resources should be made available to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban. However, the Committee may authorize some exceptions on a case-by-case basis on the grounds of humanitarian need.[26]
3. Article 8 of the International Convention for the Suppression of the Financing of Terrorism, adopted by the UN General Assembly in 1999[27] (hereafter the Terrorism Financing Convention) encourages State Parties to take measures "for the identification, detection and freezing or seizure of any funds used or allocated" for the purpose of financing terrorism, for purposes of possible forfeiture.
4. Article 12 of the UN Convention against Transnational Organized Crime, signed in Palermo, Italy, in December 2000[28] (hereafter the Palermo Convention), requires State Parties to adopt measures to enable the identification, tracing, freezing or seizure and confiscation of proceeds, property, equipment or other instrumentalities of crime derived from offences covered by the Convention.

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[23] Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances U.N. Doc. E/CONF.82/15; 28 ILM 493 (1989).

[24] *See* S.C. Res. 1267, 4, U.N. Doc. S/RES/1267 (Oct. 15 1999), *see* S.C. Res. 2253, pmbl. 15, U.N. Doc. S/RES/2253 (Dec. 17, 2015), The UN Security Council Resolution 2253 (2015) changed the name of the "Al-Qaida Sanctions List" to "ISIL (Da'esh) & Al-Qaida Sanctions List".

[25] Oette, *supra* note 4, at 96. Under Chapter VII of the Charter of the United Nations, the Security Council has broad powers. Once it has determined a threat to the peace, a breach of the peace, or an act of aggression-pursuant to Article 39 of the Charter of the United Nations, the Council can impose sanctions in accordance with Article 41 of the Charter of the United Nations, which contains a non-exhaustive list of non-military measures. The scope of the measures and their duration fall entirely within the powers granted to the Security Council.

[26] *See* S.C. Res. 1452, 1-2, U.N. Doc. S/RES/1452 (Dec. 20, 2002), *amended by* S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

[27] International Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/RES/54/109; 39 ILM 270 (2000); TIAS No. 13075.

[28] United Nations Convention against Transnational Organized Crime, 40 ILM 335 (2001); UN Doc. A/55/383 at 25 (2000); UN Doc. A/RES/55/25 at 4 (2001).

5. As a consequence of the 9/11 attacks, the UN Security Council issued Resolution 1373, on September 28, 2001, which demanded that Member States freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.[29]
6. The Financial Action Task Force (FATF),[30] of which the USA and Mexico are members,[31] issued standards of universal application for the suppression of terrorist financing and money laundering.

Recommendation 4 urges country members to adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorism Financing Convention.[32] Subsequently, country members are required to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of *bona fide* third parties: property laundered, proceeds from, or instrumentalities used in or planned for use in money laundering or predicate offences.[33]

Additionally, FATF Recommendation 6 stresses that country members should comply with UN Security Council resolutions which require countries to freeze the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either designated by, or under the authority of, the UN Security Council or designated by a country pursuant to resolution 1373 (2001).[34]

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[29] *See* S.C. Res. 1373, 1 c), U.N. Doc. S/RES/1373 (Sep. 28, 2001).

[30] The FATF is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions (which currently stand at 36 members and 8 FATF-Style Regional Bodies). The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. *See http://www.fatf-gafi.org/home/*.

[31] *See http://www.fatf-gafi.org/about/membersandobservers/*.

[32] FATF (2012-2017), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, FATF, Paris, France, p. 10, available at *http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf* (last visited on Jan. 11, 2018).

[33] A "predicate offense" is an earlier offense that can be used to enhance a sentence levied for a later conviction. Predicate offenses are defined by statute and are not uniform from state to state. Black's Law Dictionary, 3429 (8th ed. 2004). *See supra* note 32. Under the FATF Interpretive Note to Recommendation 3 (criminalization of money laundering), para. 2, Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches.

[34] *See supra* note 32. Recommendation 6.

It is important to note that the three UN conventions mentioned require Member States to freeze assets as a provisional measure for the purpose of eventual confiscation in cases involving the crimes covered by the conventions. Yet, UN resolutions 1267 (1999), 1373 (2001) and FATF Recommendations 4 and 6 urge country members to freeze assets as a provisional measure to counter terrorist financing and money laundering, even when there is no criminal prosecution or regardless of this.

In Mexico, these instruments were the main reason for the introduction of asset freezing as a precautionary administrative measure. Consequently, in seeking to comply with the aforementioned international instruments, the "Decree amending, supplementing or repealing certain provisions in financial matters and issuing the law to Regulate Financial Groups," commonly known as the "Financial Reform," was published in the Federal Official Gazette on January 10, 2014. This reform introduced the "List of Blocked Persons."

IV. How Asset Freezing Works

1. *Authorities in Charge*

In general, in the United States each sanction program has its own rules. So, President Clinton's Executive Order 12947 delegated authority to the Secretary of State to designate persons or entities that have committed, were likely to commit, or provided support for acts of terrorism in the Middle East. It also empowered the Secretary of the Treasury to determine the persons or entities owned or controlled by said designees.[35]

Similarly, President Bush's Executive Order 13224 (2001) delegated authority to the Secretary of State to ascertain the persons or entities that have committed, or posed a significant risk of committing, acts of terrorism. Additionally, it gave authority to the Secretary of the Treasury to determine persons or entities "owned or controlled by, or act for or on behalf of" the persons or entities that "assist in, sponsor, or provide financial, material, or technological support for ... or other services to or in support of" specified persons or entities; or that were "otherwise associated with" said entities.[36]

In Mexico, financial statutory laws grant the Mexican Secretariat of Finance and Public Credit the authority to issue a List of Blocked Persons and dictate the procedure to introduce, modify or remove the entry of any name on the list.[37]

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[35] Pollock, *supra* note 17, at 2175.

[36] *Id*. at 2176.

[37] *See supra* note 8.

So, it is clear that in the United States, the power to freeze assets basically lies in two main bodies: the Department of State identifying threats to national security and the Department of the Treasury determining the direct and indirect participation of entities owned or controlled by those named as threats. On the other hand, in Mexico, asset freezing is an exclusive power of the Secretariat of Finance. The national authority in charge of national security is not involved at all.

2. *The Listing Process*

In the United States, the designation process is carried out by the Office of Foreign Assets Control (OFAC), an office in the Department of the Treasury that collaborates with several other federal agencies. This office identifies possible targets to be added to the list of designated terrorists. All classified and non-classified information is gathered in a record compiled by the OFAC and forms the basis for this list. The record is then analyzed by the legal office of the Department of Justice in order to establish legal designations. The final decision is taken by the National Security Council Policy Coordinating Committee on Terrorist Financing, composed of representatives from the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and the Departments of Treasury, State, Defense, Justice, and Homeland Security.[38]

After 9/11, the IEEPA was amended by the Act for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, best known as the Patriot Act.[39] Consequently, Section 1702 (a) (1) (B) of the IEEPA allows freezing assets during an investigation.[40] Thus, even though the designation and the record have not been formally completed, an entity can find its assets frozen.

In Mexico, the rules to introduce, modify or remove entries on the List of Blocked Persons[41] empower the Mexican Secretariat of Finance to introduce

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[38] Pollock, *supra* note 17, at 2179.

[39] Hipp, *supra* note 2, at 1353.

[40] 50 U.S. Code § 1702. The relevant text points out the following: "Presidential authorities" "(a) In general" "(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise:" […] "B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and." [Emphasis added].

[41] *See* Disposiciones de carácter general a que se refiere el artículo 115 de la Ley de Instituciones de Crédito[L.I.C.] [General Provisions Referred to in Article 115 of the Credit Institutions Law] as amended, ch. XV, Diario Oficial de la Federación [D.O.], 20 de abril de 2009; Disposiciones de carácter general a que se refieren los artículos 115 de la Ley de Instituciones

or modify entries by taking into consideration the lists issued by the UN Security Council pursuant to its own Resolutions 1267 (1999) and 1373 (2001), and lists released by international organizations or inter-governmental groups. However, no guidelines or principle has been provided to do so.

As for national sources, the Mexican Secretariat can add people when national authorities have enough proof to prosecute them for performing terrorist activities, financing terrorism and money laundering; as well as those

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de Crédito en relación con el 87-D de la Ley General de Organizaciones y Actividades Auxiliares del Crédito y 95-Bis de este último ordenamiento, aplicables a las sociedades financieras de objeto múltiple [General Provisions Referred to in Article 115 of the Credit Institutions Law in relation with Article 87-D and 95 Bis of the General Law of Organizations and Activities Related to Credit, applicable to Non-Bank Banks] as amended, ch. XIII, Diario Oficial de la Federación [D.O.], 17 de marzo de 2011 (Mex.); Disposiciones de carácter general a que se refiere el artículo 95 de la Ley General de Organizaciones y Actividades Auxiliares del Crédito, aplicables a las Casas de Cambio [General Provisions Referred to in Article 95 of the General Law of Organizations and Activities Related to Credit applicable to Money Exchange Firms] as amended, ch. XIV, Diario Oficial de la Federación [D.O.], 25 de septiembre de 2009 (Mex.); Disposiciones de carácter general a que se refiere el artículo 95 Bis de la Ley General de Organizaciones y Actividades Auxiliares del Crédito, aplicables a los transmisores de dinero a que se refiere el artículo 81-A Bis del mismo ordenamiento [General Provisions Referred to in Article 95 Bis of the General Law of Organizations and Activities Related to Credit, applicable to Money Remitters] as amended, ch. XIV, Diario Oficial de la Federación [D.O.], 10 de abril de 2012 (Mex.); Disposiciones de carácter general a que se refiere el artículo 95 Bis de la Ley General de Organizaciones y Actividades Auxiliares del Crédito, aplicables a los centros cambiarios a que se refiere el artículo 81-A del mismo ordenamiento [General Provisions Referred to in Article 95 Bis of the General Law of Organizations and Activities Related to Credit, applicable to Low-Amount Foreign Exchange Entities] as amended, ch. XIV, Diario Oficial de la Federación [D.O.], 10 de abril de 2012 (Mex.); Disposiciones de carácter general a que se refiere el artículo 95 de la Ley General de Organizaciones y Actividades Auxiliares del Crédito aplicables a los Almacenes Generales de Depósito [General Provisions Referred to in Article 95 of the General Law of Organizations and Activities Related to Credit, applicable to Bonded Warehouses] as amended, ch. XIII, Diario Oficial de la Federación [D.O.], 31 de diciembre de 2014 (Mex.); Disposiciones de carácter general a que se refiere el artículo 212 de la Ley del Mercado de Valores [General Provisions Referred to in Article 212 of the Stock Market Law] as amended, ch. XVI, Diario Oficial de la Federación [D.O.], 9 de septiembre de 2010 (Mex.); Disposiciones de carácter general a que se refiere el artículo 91 de la Ley de Fondos de Inversión [General Provisions Referred to in Article 91 of the Investment Corporations Law] as amended, ch. XIII, Diario Oficial de la Federación [D.O.], 31 de diciembre de 2014 (Mex.); Disposiciones de carácter general a que se refiere el artículo 129 de la Ley de Uniones de Crédito [General Provisions Referred to in Article 129 of the Credit Unions Law] as amended, ch. XIV, Diario Oficial de la Federación [D.O.] 26 de octubre de 2012 (Mex.); Disposiciones de carácter general a que se refiere el artículo 124 de la Ley de Ahorro y Crédito Popular [General Provisions Referred to in Article 124 of the Popular Saving and Credit Law] as amended, ch. XVI, Diario Oficial de la Federación [D.O.], 31 de diciembre de 2014 (Mex.); Disposiciones de carácter general a que se refieren los artículos 71 y 72 de la Ley para Regular las Actividades de las Sociedades Cooperativas de Ahorro y Préstamo [General Provisions Referred to in Articles 71 and 72 of the Law to Regulate the Activities of Saving and Loan Cooperative Companies] as amended, ch. XVI, Diario Oficial de la Federación [D.O.], 31 de diciembre de 2014 (Mex.).

who have been condemned for such crimes, and those who refuse to give information about the mentioned crimes, or conceal the origin, objectives, location or property of funds derived from said crimes.

In short, in the United States, the final decision to blacklist someone is taken by a high level group in which departments involved in national security play an important role while in Mexico, the designation process is carried out solely by the Secretariat of Finance.

In Mexico, the bases for creating the List of Blocked Persons can be classified into two groups: international causes and national ones. As international sources are more active, the determination of blocked persons might be largely deemed as an administrative procedure to assist in the execution of blocking orders issued by countries that have suffered terrorist attacks or have designated certain individuals or entities as terrorist supporters. Nonetheless, other domestic criminal causes are also considered for the List of Blocked Persons.

3. *The Execution of Asset Freezing*

In the United States, once an individual or an entity has been blacklisted, the OFAC orders to block all "property or interests in property" held by the designated entity or individual in the United States or within the control or possession of US nationals. As a result of the blocking order, the rights to exercise any powers and privileges of ownership are transferred indefinitely and exclusively to the OFAC although the legal title of these frozen assets remains with the designated individual or entity.[42]

The OFAC prohibits US persons from dealing in assets that have been blocked or from providing any kind of services for the benefit of designated persons or entities, including legal services, charitable contributions or donations intended to "relieve human suffering."[43] Nonetheless, under limited circumstances, a license to engage in otherwise prohibited transactions may be granted by OFAC to designees or third parties.[44]

The term "US person" means any US citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or person in the United States.[45] Consequently, this obligation is applicable not only to financial entities, but also to any kind of natural or legal person in the United States.

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[42] Pollock, *supra* note 17, at 2177.

[43] 31 C.F.R. § 94.204, 595.204. 594.406(b), 595.406(b). Exec. Order No. 12,947, 60 Fed. Reg. 5079, 5080 (Jan. 23, 1995); Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,080 (Sept. 23, 2011). Pollock, *supra* note 17, at 2177.

[44] 31 C.F.R. § 594 Subpart E, § 595 Subpart E (2012). Pollock, *supra* note 17, at 2179.

[45] 31 C.F.R. § 594.315, § 595.315.

All US persons who have in their possession or control any property or interests in blocked property, including financial institutions that receive and block payments or transfers, are required to report to the OFAC, within 10 business days from the date said property becomes blocked.[46]

In Mexico, the Mexican Secretary of the treasury notifies financial institutions when an entity or an individual has been so designated. The financial institutions that are obliged to freeze accounts or banned from celebrating operations with blocked persons are banks, brokerage firms (*casas de bolsa*); investment fund operators and distributor companies of investment fund shares (*sociedades operadoras y sociedades distribuidoras de acciones de fondos de inversión*), money exchange firms (*casas de cambio*); entities engaged in low-amount foreign exchange known as *centros cambiarios*; money remitters (*transmisores de dinero*); multiple purpose financial institutions (*sociedades financieras de objeto múltiple*);[47] savings and loan associations (*sociedades financieras populares*), financial cooperative associations (*sociedades cooperativas de ahorro y préstamo*); community financial associations (*sociedades financieras comunitarias*), credit unions and general deposit warehouses (*almacenes generales de depósito*); according to the provisions of their respective statutory laws.[48]

Once an obliged financial institution has realized that one of their clients' or users' data match the List of Blocked Persons, it must basically do three things. First, it must cease all dealings involving the designee's accounts or the delivery of any kind of services that benefit the designated persons or entities. Secondly, an Unusual Transaction Report (UTR)[49] must be filed with the Mexican Secretariat of Finance within twenty-four hours after finding a match.

A UTR is a form by which a financial institution informs the Mexican Secretariat of Finance and its Financial Intelligence Unit (FIU),[50] of its suspicions or reasonable grounds to suspect that the relevant funds might proceed from criminal activity, or be a match on the list.[51]

Thirdly, the financial institution must inform the blocked individual or entity in writing and must include the following information:[52] 1) the accounts and transactions that have been frozen since the identification data match, 2)

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46 31 C.F.R. § 501.603.

47 Generally known as non-bank Banks.

48 *See supra* note 8.

49 *See supra* note 32, Unusual Transaction Report (UTR) under the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation; 12 CFR § 390.355, Suspicious Activity Reports (SARs), under the Bank Secrecy Act.

50 *See* supra note 32, Recommendation 29. *See* also *https://egmontgroup.org/en/content/financial-intelligence-units-fius*. Reglamento Interior de la Secretaría de Hacienda y Crédito Público [Internal Regulations of the Secretariat of Finance and Public Credit] as amended, Art. 15, Diario Oficial de la Federación [D.O.], 11 de septiembre de 1996 (Mex.).

51 *See supra* note 32, Recommendation 20.

52 *See supra* note 41.

the applicable law and procedure, and 3) the clarification that any existing claims may be filed before the FIU within the following ten business days.

Additionally, the Mexican legal system allows some humanitarian exceptions in accordance with Resolution 1452 (2002) of the UN Security Council. Consequently, a blocked person might request a license to access blocked funds to pay for basic expenses, including the provision of legal services.

Up to this point, we can say that one big difference in assets freezing is its scope. In the United States, the measure covers financial and non-financial assets, and is mandatory for any person in the United States. However, in Mexico, this measure only applies to financial assets and is mandatory for the above-mentioned financial institutions.

The consequences of being blacklisted appear to be similar in both legal systems. Basically, the obliged subjects must stop dealing in the assets of or providing any service to individuals or entities who have been designated as a blocked person, in addition to filing a report with the competent financial authority.

Both the US and the Mexican regimes permit designees to access certain blocked funds to pay for basic living expenses, including limited legal services, in compliance with UN Security Council resolutions.

4. *The Delisting Process*

In the United States, removal from the list is possible on grounds of mistaken identity or an error if the blocked individual or entity challenges the designation. The interested party must submit a request in writing to OFAC to demonstrate that the State should not have seized their property or that they were innocent owners. However, at no point does the petitioner have the opportunity to review any classified evidence that the various agencies may have compiled against him.[53]

OFAC designations could be subject to judicial review by district courts, pursuant to the Administrative Procedure Act (APA). Consequently, the review is governed by the "arbitrary and capricious" standard, which means that courts will review whether, given the relevant factors, the agency acted reasonably and within the scope of its authority. Over time, a highly deferential standard of review has been given to the President in the exercise of his powers under the IEEPA.[54]

Moreover, as a result of the enhanced power granted to the US President after 9/11, the Patriot Act gave the President the power to submit classified evi-

[53] Sumeet H. Chugani, Comment, *Benevolent blood money: Terrorist exploitation of zakat and its complications in the war on terror*, 34 N.C.J. INT'L L. & COM. REG. 601, 620 (2009).

[54] *Id*. at 635-636.

dence *in camera* and *ex parte*.[55] This means that the Attorney General can present classified evidence against a blocked entity to the court without the presence of the blocked entity's attorney and without ever disclosing this evidence to the party whose assets are frozen, depriving the designated entity of the usual right to confront the evidence against it.[56] In other words, courts are allowed to consider evidence that would otherwise be inadmissible under the Federal Rules of Evidence.[57]

In Mexico, the relevant rules[58] establish a procedure before an administrative authority, the Financial Intelligence Unit (FIU), which is a Mexican Secretariat of Finance unit that functions as an administrative judge.[59]

Based on the information provided by the financial institution that has blocked the accounts or denied rendering any service, the blocked person or entity can bring their claims before the FIU in writing and offer evidence. The FIU will then issue its decision explaining whether the removal is granted or not.

The blocked persons can be removed from the list when the abovementioned administrative procedure ends in an acquittal, when international organizations or intergovernmental groups remove the blocked person from their lists, when national authorities deem that the reasons for inclusion are no longer applicable, or when a criminal judge acquits the defendant of carrying out terrorist activities, financing terrorism and money laundering.

The Mexican review process afforded by the rules is focused on correcting false positives instead of challenging the causes of the asset freezing order or the inclusion of a person's data on the List of Blocked Persons. This is especially worrying when the reason for that insertion is due to UN Security Council sanctions because the review process would not help the designee revoke the Security Council designation. So, an affected person would have her assets frozen for as long as she is on the UN list.

In summary, both systems have established an administrative procedure to permit designees to be removed from the corresponding list. Nevertheless,

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55 50 U.S. Code § 1702. The pertinent text reads as follow: "(c) Classified information. In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review." [Emphasis added].

56 Nice-Petersen, *supra* note 21, at 1390.

57 Donohue, *supra* note 5, at 375.

58 *See supra* note 41.

59 Alternatively, blocked persons can directly bring a claim before federal courts, through an Amparo. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Art. 107, section IV, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.). Ley de Amparo, reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [Amparo Law that regulates the implementation of Articles 103 and 107 of the Mexican Constitution], as amended, Art. 1, section I, Diario Oficial de la Federación [D.O.], 2 de abril de 2013 (Mex.).

neither can be considered to provide sufficient due process protection because they are more concerned with correcting false positives than reviewing the causes that motivated the listing.

The following section discusses the main constitutional and legal concerns arising from the deployment of the asset freezing measure in an effort to suppress fundraising of terrorism and money laundering.

V. Domestic Legal Concerns

Despite the widespread understanding and commitment of UN Member States on the compliance and enforcement of UN Security Council resolutions and inter-governmental bodies' recommendations to combat terrorist activities and money laundering, the asset freezing measure has raised much criticism and many concerns about its lawfulness in the light of fundamental rights,[60] mainly due process standards.

Although the constitutionality of blocking assets has been questioned several times, US courts have seldom held up those claims. This has been understood as a preference to not interfere with the Executive's foreign policy and national security functions. [61]

On the other hand, the Mexican judiciary has not yet ruled on the legal and constitutional concerns involving the freezing of assets, considering the relatively new[62] introduction of the asset freezing measure.

Similarly, regional courts in Latin America have not reviewed the issue.[63] This lack of legal criteria leads one to understand how US constitutional provisions have extended their influence into international arena.

The main concerns in the legal order involving the freezing of assets are described below.

1. *Due Process Concerns: Lack of Notification*

In the United States, any citizen or person within the United States deprived of his or her property must be given timely, adequate notice of the

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[60] Michael Bothe, *Security Council's Targeted Sanctions against Presumed Terrorists,* 6 J. Int'l Crim. Just. 541, 544-545 (2008) (Discussing the remedies against Security Council decisions).

[61] Hipp, *supra* note 2, at 1365.

[62] Recently the Mexican Supreme Court has discussed and adopted different criterion. However, the legal reasoning was not publicly available when this work was finished. *See http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=4603*.

[63] There is no evidence of any relevant decision from the Latin-American national or regional courts before September 1, 2017.

charges against him or her and a meaningful opportunity to be heard, pursuant to the Fifth Amendment Due Process Clause.[64]

Nevertheless, after 9/11, noting terrorists' ability to "transfer funds or assets instantaneously," Executive Order 13244 explicitly withheld prior notice to the affected entities of the measures taken under its authority on the grounds that notice would render such measures "ineffectual."[65]

The courts have found that despite the failure of notice and hearing, these do not amount to due process violations.[66] The courts have deemed that a presidential declaration of a national emergency under the IEEPA constitutes an extraordinary situation whereby notice and hearing after seizure did not amount to a denial of due process. The courts have also found that the US government satisfied the requirements for a postponement of notice and hearing until after seizure, since:[67] (1) the deprivation served an important government interest, in this case, combating terrorism; (2) prompt action was necessary to prevent the transfer of assets prior to the blocking order; and (3) government officials blocked the assets in accordance with the IEEPA.[68]

Likewise, the courts have determined that due process rights were not violated because notification would have had an impact on security or other US foreign policy goals, and that an SDGT obtained a written opportunity to be heard post-deprivation when it submitted materials to the OFAC for consideration.[69]

In Mexico, every government action interfering with any person's exercise of property rights must be made by means of a warrant submitted by an authorized official.[70]

The requirement of a warrant ensures the existence of a government action, its content and scope. It also allows the affected person access to adequate defense.[71] The warrant must give sufficient information of the facts that

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[64] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), cited on Nice-Petersen, *supra* note 21, at 1404.

[65] Exec. Order No. 13,224 ß 10, 66 Fed. Reg. at 49,081. Pollock, *supra* note 17, at 2176.

[66] Kathryn A. Ruff, Note, *Scared to donate: An examination of the effects of designating Muslim charities as terrorist organizations on the First Amendment Rights of Muslim donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 460 (2005/2006).

[67] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) (the Supreme Court defined the circumstances that "present an `extraordinary' situation in which postponement of notice and hearing until after seizure d[oes] not deny due process").

[68] *Holy Land Found*. 219 F. Supp. 2d at 57. Chugani, *supra* note 53, at 625.

[69] *Id.* Chugani, *supra* note 53, at 626.

[70] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, art. 16 pfo. 1, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.). "No one shall be molested in his person, family, domicile, papers, or possessions, except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken."

[71] COMPETENCIA DE LAS AUTORIDADES ADMINISTRATIVAS. EL MANDAMIENTO ESCRITO QUE CONTIENE EL ACTO DE MOLESTIA A PARTICULARES DEBE FUNDARSE EN EL PRECEPTO LEGAL QUE LES OTORGUE LA ATRIBUCIÓN EJERCIDA, CITANDO EL APARTADO, FRACCIÓN, INCISO O SUBINCISO, Y EN

led the corresponding authorities to issue a given government action or the legal grounds that motivated the interference,[72] and show that the adopted measure is proportional in the light of the goals of the law.[73] Consequently, this lack or error leads to the assumption that a violation of constitutional protection has been committed.[74]

In view of the above arguments, the Political Constitution of the United Mexican States does not provide any exception to or restriction on this protection. Under these circumstances, the asset freezing order or the inclusion of any person's name on the List of Blocked Persons could be understood as an interfering government act, according to the first paragraph of Article 16 of the Mexican Constitution. Asset freezing obstructs the exercise of property rights when the owner cannot use or dispose of his or her own resources.[75]

Following the given procedure, the legal grounds on which the designation was based, and the facts that led to this designation are only provided when the FIU rules on the claims brought before it by the designee, but not before. Subsequently, when the relevant rules order financial institutions to cease dealings with accounts held by designees or prohibit the rendering of any service, and these rules do not instruct the Mexican Secretariat of Finance to serve a warrant or notice, even after the assets have been frozen, there is a clear violation of Article 14 of the Mexican Political Constitution. Thus, the rules are highly questionable regarding their compliance with this guarantee

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CASO DE QUE NO LOS CONTENGA, SI SE TRATA DE UNA NORMA COMPLEJA, HABRÁ DE TRANSCRIBIRSE LA PARTE CORRESPONDIENTE, Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXII, Septiembre de 2005, Tesis 2a./J. 115/2005, Página 310 (Mex.).

[72] FUNDAMENTACION Y MOTIVACION, Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Séptima Época, tomo VI, Tesis 260, Apéndice de 1995, Página 175 (Mex.).

[73] PRINCIPIO DE PROPORCIONALIDAD. SE VULNERA CUANDO SE PERMITA LA REVISIÓN DE DOCUMENTOS DE UNA PERSONA, CON VOCABLOS GENÉRICOS, Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVIII, Septiembre de 2008, Tesis I.4o.C.157 C, Pag. 1390 (Mex.). REANUDACIÓN DEL PROCEDIMIENTO TRAS LARGA INACTIVIDAD, DEBE NOTIFICARSE PERSONALMENTE, Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVI, Septiembre de 2007, Tesis I.4o.C.124, Página 2625 (Mex.).

[74] FUNDAMENTACIÓN Y MOTIVACIÓN. LA DIFERENCIA ENTRE LA FALTA Y LA INDEBIDA SATISFACCIÓN DE AMBOS REQUISITOS CONSTITUCIONALES TRASCIENDE AL ORDEN EN QUE DEBEN ESTUDIARSE LOS CONCEPTOS DE VIOLACIÓN Y A LOS EFECTOS DEL FA LLO PROTECTOR, Tribunales Colegiados de Circuito [T.C.C.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXVII, Febrero de 2008, Tesis I.3o.C. J/47, Página 1964 (Mex.).

[75] INMOVILIZACIÓN DE CUENTAS BANCARIAS. LA ORDEN RELATIVA EMITIDA POR LA AUTORIDAD FISCAL DEBE ESTAR FUNDADA Y MOTIVADA, AUNQUE SE DIRIJA A UNA INSTITUCIÓN FINANCIERA Y NO AL CONTRIBUYENTE, Segunda Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo 2, Libro XXIII, Agosto de 2013, Tesis 2a./J. 79/2013 (10a.), Página 901 (Mex.).

since the Mexican Constitution does not establish any exception to serve warrants or notices in cases of interfering government actions.

Moreover, UN Security Council Resolution 2253 (2015) has recently required Member States[76] to take all possible measures to notify or inform the listed individual or entity of the listing in a timely manner and to include in the notification a narrative summary of the reasons being listed for, a description of the effects of the listing, the committee's procedures for considering delisting requests including the possibility of submitting such a request to the Ombudsperson,[77] and available exemptions,[78] as well as the possibility of submitting such requests through the Focal Point mechanism.[79]

Regarding the above, the Mexican mechanism is far from complying with the UN standard as the relevant rules do not require any notification from the Mexican government. Surprisingly, a federal court ruled that even when the blocked person does not know of the government actions or its motives to freeze assets, such action is not deemed unconstitutional or arbitrary as its legality is presumed.[80] Consequently, the power to freeze assets must be weighed against the protection of the financial system and the national economy.

So far, it is clear that in the United States, the courts have shown a strong deferential approach to the actions taken by the President under IEEPA authority. The courts have developed an objective standard to justify the postponement of notification. There is overwhelming pressure to protect national security at the expense of the human rights of a few.

In the Mexican scenario, the civil liberties have been put aside despite the international recommendation to serve notice to designees even when no emergency has been declared or experienced, and even when financial asset freezing is only applicable to two conducts: money laundering and financing terrorism.

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[76] S.C. Res. 1735, 11, U.N. Doc. S/RES/1735 (Dec. 22, 2006). Initially, Resolution 1735 (2006), paragraph 11, had required serving notice or informing the listed individual or entity of the designation, in the country or countries where the individual or entity was believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information be known).

[77] S.C. Res. 1735, annex II, U.N. Doc. S/RES/1735 (Dec. 23, 2006). S.C. Res. 2083, 43, U.N. Doc. S/RES/2083 (Dec. 17, 2012).

[78] S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002). S.C. Res. 1735, 15, 17 and 18, U.N. Doc. S/RES/1735 (Dec. 23, 2006).

[79] S.C. Res. 2253, 53, U.N. Doc. S/RES/2253 (Dec. 17, 2015).

[80] CONGELAMIENTO DE CUENTAS BANCARIAS ATRIBUIDO A LA UNIDAD DE INTELIGENCIA FINANCIERA DE LA SECRETARÍA DE HACIENDA Y CRÉDITO PÚBLICO. AUN CUANDO EL QUEJOSO DESCONOZCA ESE ACTO O SUS MOTIVOS, ES IMPROCEDENTE CONCEDER LA SUSPENSIÓN CON EFECTOS RESTITUTORIOS EN SU CONTRA. Tribunales Colegiados de Circuito [T.C.C.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo IV, Junio de 2016, Tesis IV.2o.A.123 A (10a.), Página 2879 (Mex). *See* also *supra* note 8.

2. *Due Process Concerns: Secret Evidence*

According to the Fifth Amendment of the US Constitution, the Due Process Clause prohibits the government from depriving any person of life, liberty, or property without due process of law. As a general rule, the due process system requires that each party have the same opportunity to refute the adversary's evidence by providing evidence to the contrary. Surprisingly, under the new anti-terrorism regulation, defendants are not given any opportunity to confront the classified evidence used against them. Besides, the Patriot Act permits assets to be blocked pending investigation and to submit classified evidence *in camera* and *ex parte*, which could lead to freezing assets based on scarce or irrelevant evidence[81] and without any time limit.

US courts have generally upheld the ability to confront witnesses and respond to evidence as a central part of due process. Nevertheless, where national security is concerned, the courts have historically been reluctant to interfere in due process claims. In this regard, the courts have upheld the use of *in camera*, *ex parte* evidence against an entity pending investigation when Congress and the President have determined the need to keep government information secret. The courts have also denied due process challenges, asserting that (1) the notification received at the time of the blocking assets was appropriate in view of pressing circumstances related to national security; and (2) the OFAC written review process provides an adequate opportunity to be heard.[82]

On the other hand, in Mexico and following the arguments presented in the previous section, every single governmental act must be warranted in writing, pointing out the applicable law and the circumstances that made that law applicable. Consequently, it would not be legally possible to freeze financial assets based on classified information.

Once a financial institution finds a match on the list, it would only inform the designee that her data matches the List of Blocked Persons. However, the financial institution lacks sufficient information to explain the facts and reasons why the person or entity has been included on the List of Blocked Persons.

Being included on the List of Blocked Persons might involve a grievance against an individual, as far as he had not received a written warrant from the authority explaining the causes of the inclusion on the List. In such a case, the individual would be deprived of appropriate information to mount a fair defense. Precisely, these are the kinds of situations Article 16 of the Mexican Constitution aims to prevent.

In sum, even though freezing financial assets based on secret evidence would not be possible under Mexican law, the lack of serving notice to designees amounts to a similar situation, as designees are unaware of specific

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81 Chugani, *supra* note 53, at 634-635.

82 *Global Relief Found*. 207 F. Supp. 2d 779, 808. Nice-Petersen, *supra* note 21, at 1401.

facts and reasons for being blacklisted and are thus incapable of preparing an adequate defense. In this respect, both the US and the Mexican systems have a considerable area of opportunity to grant better protection of basic human rights.

3. *Infringement of Property Rights*

In the United States, it has also been argued that blocking assets constitutes an uncompensated taking,[83] in terms of property rights and in violation of the Taking Clause contained in the Fifth Amendment. Thereupon, the US government has stated that a blocking order does not constitute a taking since freezing does not entail a title transfer.

Over the years, courts have consistently rejected claims based on similar considerations. In the context of the IEEPA, courts have ruled that blocking under executive orders is a temporary deprivation and does not vest the assets with the government.[84] Nevertheless, some courts have cautiously suggested at the possibility that a long-term blocking order may have evolved into vesting property in the United States[85] or, at least at the lower tier, some courts have found it an infringement of property rights.[86]

On the other hand, in Mexico, while the Supreme Court of Justice has not ruled on the infringement of property rights in cases of financial institutions' freezing assets within the context of preventing money laundering and terrorist financing, its recent intervention has been limited to stating that similar preventive measures in forfeiture proceedings entail an interference action but do not entail the deprivation of property rights. During the imposition of this precautionary measure, the affected person or entity still holds property right, but an encumbrance is placed on it so as to temporarily prevent this right from being fully exercised.[87]

As the Mexican Supreme Court has recognized that these kinds of preventative measures involve acts of government interference on an individual's

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[83] "There is a taking of property when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property. — Also termed constitutional taking." Black's Law Dictionary, 4553 (8th ed. 2004).

[84] *Holy Land Found.* 219 F. Supp. 2d 57, 77.

[85] Hipp, *supra* note 2, at 1364.

[86] Kindhearts for Charitable Humanitarian Dev. v. Geithner, 647 F. Supp 2d at 871. Pollock, *supra* note 17, at 2185.

[87] EXTINCIÓN DE DOMINIO. LOS ARTÍCULOS 11 A 14 Y 16 A 18 DE LA LEY RELATIVA PARA EL DISTRITO FEDERAL, SOBRE LA IMPOSICIÓN DE MEDIDAS CAUTELARES, NO VIOLAN EL ARTÍCULO 22 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo 1, Abril de 2015, Tesis 1a. CXXXVII/2015 (10a.), Página 514 (Mex.).

property right, serving a warrant would undoubtedly be needed to carry out the freezing of assets, pursuant to Article 16 of the Political Constitution of the United Mexican States. However, the opinion of the Mexican Supreme Court does not consider that this temporary measure could be extended indefinitely. In these circumstances, a long-term asset freezing would be equated to an infringement of property rights.

In short, despite the historically reluctant position of US courts to sustain the deprivation of property rights, they now seem to be more aware of the possible infringement of this right. In Mexico, this debate has not yet begun, as an indefinite extension of asset freezing has not been brought before Mexican Courts. However, in analogue cases, without considering PML/FT objectives, the Mexican Supreme Court has ruled that freezing assets is a preventative restriction on property rights.

4. *Conflict of Interest*

In the United States, conflicts of interest might arise when a designee, who has had his or her assets frozen, applies to the OFAC for a license to release certain funds to pay legal expenses, among other reasons. Basically, Executive branch officials are in control of who can sue and how actively the lawsuit can be pursued if they allow the release of the funds.[88]

In the Mexican legal system, the situation is similar. According to UN resolutions, a blocked person or entity can request a license to access blocked funds in order to cover basic life expenses, the fulfillment of contract obligations previously incurred with a financial institution or legal services. However, this request may entail a conflict of interest since the officials authorized to give this license –the FIU– are the same ones who carry out the corresponding administrative proceedings, and against whom judicial proceedings could be potentially brought.

The applicable rules in both systems do not establish any provision to prevent conflicts of interest nor do they provide any principle or guideline for granting this request. Consequently, blocked persons are subjected to the discretion of the relevant authority. In short, both systems struggle with the same problem. One possible solution would be for an independent judge to rule on the petition for a license and thus avoid a conflict of interest.

5. *Privacy*

In the United States, any federal agency can now obtain sensitive and private data without a subpoena or judicial intervention when investigating one

[88] Donohue, *supra* note 5, at 416.

of the approximately two hundred possible offenses under the Patriot Act.[89] In January 2002, Assistant Attorney General Michael Chertoff notified the Senate Banking Committee that with the new information-gathering powers, "the principal provisions of the Right to Financial Privacy Act no longer apply to letter requests by a government authority authorized to conduct investigations or intelligence analysis for purposes related to international terrorism".[90]

In Mexico, financial service user's private data is protected against unlawful transmission by the statutory law that governs financial institution transactions. For example, in the banking sector, Article 142 of the Credit Institutions Law (LIC) prohibits credit institutions from providing information about accounts or services to any person other than the one with the legal right to receive such information. However, the exceptions and conditions under which financial institutions are allowed to transmit or share information with some authorities are specified in the same provision.[91]

The Mexican Secretariat of Finance and Public Credit is among those allowed to request personal data in order to prevent money laundering and terrorist fundraising.[92] Therefore, the Mexican legal system has no major concern in this field.

6. *The Right to Free Exercise of Religion*

In the United States, it has been widely believed that terrorists are funding their objectives through charitable organizations, particularly those focused on fulfilling Muslim obligations, like the *zakat* —the obligation to pay two and a half percent of their wealth when it exceeds a minimum level.[93] It is commonly believed that charity organizations are attractive targets for terrorist entities due to the reluctance to scrutinize the use of money collected in countries where the *zakat* and *Sadaqah* (supporting charitable works through voluntary contributions) are religious obligations. Moreover, the US Government does not easily discern whether the charity that collects funds for humanitarian causes is actually being utilized for that purpose or used as a monetary source to support terrorism.[94]

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89 *Id.* at 407.

90 *Id.* at 408.

91 SECRETO BANCARIO. EL ARTÍCULO 117 DE LA LEY DE INSTITUCIONES DE CRÉDITO NO VIOLA LA GARANTÍA DE PRIVACIDAD, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, Julio de 2011, Tesis 1a. CXLI/2011, Página 310 (Mex.).

92 *See supra* note 8.

93 Chugani, *supra* note 53, at 606-607.

94 *Id.* at 608.

As a result, after 9/11, twenty-seven Islamic charities were designated terrorist organizations or terrorist supporters by the US Treasury Department. Since the charity organizations were all Islamic, it was also argued that OFAC designations violated the Religious Freedom Restoration Act (RFRA) as the asset freezing measure substantially encumbers the free exercise of religious belief.[95]

In Holy Land Foundation for Relief & Dev. v. Ashcroft (2002), the court considered[96] that First Amendment freedom of religion claims were debatable since the charitable organization that filed the claim had failed to prove that it was a religious organization per se[97] nor did it prove that the exercise of religion had been substantially impeded. During the appeal, on the grounds that even if the charity could in fact exercise religion as protected by the First Amendment, the circuit court sustained that "there is no free exercise right to fund terrorists" and "preventing such a corporation from aiding terrorists [did] not violate any right contemplated in the Constitution or the RFRA."[98]

The Mexican legal system has not experienced a bias on targeted listed persons due to their religious belief, race, political opinions or any other opinions since the sources for creating the List of Blocked Persons are other international lists and some national criminal causes. A deviation from this would not be directly attributable to the Mexican government.

7. *The Right to Free Association*

In the Holy Land Foundation for Relief & Dev. v. Ashcroft (2002) case, it was argued that the government's actions were unconstitutional because the government's imposition of guilt due to Holy Land's association with Hamas failed to establish that the Holy Land Foundation actually had a specific intent[99] to further terrorists' illegal aims, specifically those of Hamas.[100] The court rejected the contention that the First Amendment required specific intent to further terrorists' unlawful aims, reasoning that the requirement of a specific intent was only involved when the government sought to impose guilt by association alone; whereas in this case, it was not mere association that created guilt, but rather the possible funding of terrorism.[101] Similarly, the court also held that freedom of association had not been violated because the des-

95 Ruff, *supra* note 66, at 548-549.

96 *Holy Land Found,* 219 F. Supp. 2d 57, 83.

97 Chugani, *supra* note 53, at 638.

98 Holy Land Found, 333 F.3d 156, 167. Chugani, *supra* note 53, at 640. Ruff, *supra* note 66, at 480.

99 The intent to accomplish the precise criminal act that one is later charged with. Black's Law Dictionary, 2367 (8th ed. 2004).

100 Ruff, *supra* note 66, at 480.

101 *Holy Land Found*. 219 F. Supp. 2d at 81.

ignation and blocking of funds promote governmental interests in combating terrorism by undermining its financial base, and "there is no other, narrower means of ensuring that charitable contributions to a terrorist organization are for a legitimate purpose."[102]

Under the Mexican legal system, it would be difficult for the freezing of financial assets to be tantamount to a claim of free of association since the causes for including somebody on the List of Blocked People is not related to the right to participate in any association,[103] but for having been included on a certain list or being involved in specific local criminal causes.

8. *The Right to Free Speech*

In the United States, designated persons argued that the First Amendment of the Constitution includes the solicitation of funds under free speech clause. According to them, this is a necessary component for the effective flow of information and citizens' ability to advocate different positions.[104]

Nonetheless in this respect, US courts have found an important government interest in regulating the non-speech element to justify incidental limitation to the First Amendment. According to United States v. O'Brien (1968), the elements are the following: 1) the President had the power to issue executive orders under the IEEPA; 2) an Executive order advanced an important government interest —to combat terrorism by undermining its financial bases; 3) this government interest was unrelated to the suppression of free expression, and 4) this incidental restriction was no greater than necessary to further government's interest.[105]

Under the Mexican legal system, holding that the freezing of financial assets could be viewed as an infringement of free of speech could hardly be sustained since freedom of speech can only be restricted when it "offends good morals, infringes the rights of others, incites to crime, or disturbs the public order,"[106] pursuant to Articles 6 and 7 of the Mexican Constitution.

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[102] *Id.* at 64. Chugani, *supra* note 53, at 625.

[103] CÁMARAS DE COMERCIO E INDUSTRIA, AFILIACIÓN OBLIGATORIA. EL ARTÍCULO 5O. DE LA LEY DE LA MATERIA VIOLA LA LIBERTAD DE ASOCIACIÓN ESTABLECIDA POR EL ARTÍCULO 9O. CONSTITUCIONAL, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo II, Octubre de 1995, Tesis P./J. 28/95, Página 5 (Mex.) (explaining the scope of the right to free association).

[104] Donohue, *supra* note 5, at 406.

[105] *Holy Land Found*, 219 F. Supp. 2d at 81 (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). Ruff, *supra* note 66, at 481-482.

[106] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, arts. 6-7, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

The interpretation of this right has not been extended to cover the collection of money to support ideas.[107]

In brief, US Courts have set forth the requirements under which freedom of speech can be restrained in terms of asset freezing. In the Mexican regime, the freezing of financial assets could hardly amount to a violation of freedom of speech.

9. *Burden of Proof*

Globally, the strategy to combat money laundering and financing terrorism has changed in recent years. Initially, it required criminalizing both money laundering and terrorism financing, pursuant to the Vienna Convention and the Palermo Convention. Then, country members were urged to adopt legislative measures that empowered their competent authorities to freeze or seize and confiscate laundered property, proceeds from, or instrumentalities used in or intended for use in money laundering or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations, without requiring a criminal conviction.[108]

As a way to address financing terrorist activities, criminal law has been practically replaced by administrative preventative measures, weakening the burden of proof from beyond a reasonable doubt, as required in criminal cases, to the preponderance of proof used in non-criminal cases.[109] Consequently, both countries have administrative procedures for freezing assets, in addition to criminal procedures to pursue the crimes of money laundering and financing terrorism.

In the United States, the standard of proof for an SDGT designation is lower than the "beyond a reasonable doubt" for criminal procedure. Additionally, the OFAC now has the power to base SDGT designations on classified information, which is not available to the prosecution during criminal proceedings for material support of terrorism.

As a result, the difference in standards of proof applicable to a criminal trial (proof beyond a reasonable doubt) and a regulatory review (preponderance of proof) makes it highly unlikely that an acquittal in the criminal pro-

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[107] LIBERTAD DE EXPRESIÓN. LOS ARTÍCULOS 6O. Y 7O. DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS ESTABLECEN DERECHOS FUNDAMENTALES DEL ESTADO DE DERECHO, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXV, Mayo de 2007, Tesis P./J. 24/2007, Página 1522 (Mex.).

[108] *See supra* note 32. Recommendations 3 and 4.

[109] Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 505 (2004) (given the effects of asset freezing, it closely resembles criminal sanctions).

cedure could challenge or affect the administrative designation.[110] Furthermore, the courts have held that because terrorist financial freezing does not fall under criminal law, the defendant's claim to the Sixth Amendment right to confront accusers does not apply,[111] nor does any other protection under criminal law.[112]

Following international standards, the Mexican administrative procedure for freezing assets is independent of criminal prosecution, and is carried out before an administrative official. As such, it is not a legal action brought before a judge.

The asset freezing measure is supplemental to a criminal process against a designated person or entity, but it is not conditional to the existence of such proceedings, according to FATF Recommendation 6.[113] Consequently, the inclusion of any person or entity on the List of Blocked Persons and the resolution of the corresponding administrative procedure do not depend on the existence of criminal proceedings.

Under the relevant rules, the affected person or entity can file a claim before the FIU, where they explain the reasons their financial assets should be freed and submit the relevant evidence. Subsequently, the administrative authority has the discretionary power to decide on the case. An important difference with the US legal system is that in the Mexican regime, an acquittal of the corresponding criminal proceedings would be sufficient to remove a designee from the List of Blocked Persons.

All in all, even though both systems have administrative procedures to review the execution of asset freezing, the consequences of an acquittal in a criminal process are different. In the U.S., the administrative procedure is continued, while in Mexico the procedure is ended. Broadly, these are the main domestic legal concerns involving the freezing of assets in the context of the United States and Mexican legal systems. However, overseas, Europe-

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110 Grant Nichols, Note, *Repercussions and Recourse for Specially Designated Terrorist Organizations Acquitted of Materially Supporting Terrorism*, 28 REV. LITIG. 263, 272-74, (2008).

111 Donohue, *supra* note 5, at 413.

112 Cf. Organization of American States (OAS), American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), art. 8 para 2, 22 January 1969. (Conversely the Inter-American Court of Human Rights has held that "regarding the determination of [the] rights and obligations of civil, labor, fiscal or any other nature by Article 8 does not specify any minimum guarantees as it does in paragraph 2 to refer criminal proceedings." However, the concept of fair trial also applies to these orders.) *See* also Exceptions to exhaustion of domestic remedies (art. 46.1, 46.2 and 46.2.b American Convention on Human Rights), Advisory Opinion OC-11/90, Inter-Am. CT. H.R. (ser. A) No. 11, 28 (Aug. 10, 1990); Paniagua Morales v. Guatemala, Merits, Judgment, Inter-Am. CT. H.R. (ser. C) No. 37, 149 (Mar. 8, 1998); Constitutional Court v. Peru. Merits, Reparations and Costs, Judgment, Inter-Am. CT. H.R. (ser. C) No. 31, 70 (Jan. 31, 2001); Ivcher Bronstein v. Peru. Merits, Reparations and Costs, Judgment, Inter-Am. CT. H.R. (ser. C) No. 74, 136-37 (Feb. 6, 2001).

113 *See supra* note 32. Interpretative note to Recommendation 6, para. 2.

an courts have reached different determinations for similar concerns. These are discussed in the following section.

VI. Beyond the US and Mexican Scope: The European Approach

Given that neither the United States nor Mexico offers a clear and predictable solution to freezing assets procedure for the years to come, it should be noted that Mexican and US legal interpretations may be contrasted with other interpretative legal criteria, such as those from Western Europe. In fact, several European courts have recognized the highly harmful potential of asset freezing. The main resolutions of the European courts on the issues at hand are presented below.

1. *The Use of Classified Information*

Concerning national security policy, the European Court of Human Rights has recognized that even when national security is at stake and the use of confidential information may be necessary, it does not mean that national authorities can declare that the case concerns national security and terrorism and be free from any review by national courts.[114] Likewise, on the topic of secret evidence, the Court of First Instance of the European Communities (Seventh Chamber) in People's Mojahedin Organization of Iran v Council [2008] stated that the Council of the European Union is not entitled to base its decision to freeze funds on information or material in a file communicated by a Member State if said Member State is not willing to authorize its communication to the Community judicature whose task it is to review the legality of that decision.[115] This refusal put the Court in a position of being unable to review the lawfulness of the contested decision. Consequently, the Court concluded that, under such circumstances, the applicant's right to effective judicial protection had been infringed.[116]

2. *The Right to Be Heard*

Regarding rights of defense, in particular the right to be heard, in the joined cases of Kadi and Al Barakaat International Foundation v Council and Commission [2008], the European Court of Justice asserted that this right had

[114] Chahal v. The United Kingdom, App. No. 22414/93, Eur. Ct. H.R., 131 (Nov. 15, 1996).

[115] Case T-284/08, People's Mojahedin Organization of Iran v. Council, 2008 E.C.R. II-3487, para. 73.

[116] *Id.* at para. 78.

been infringed because the Council of the European Union neither communicated to the applicants the evidence used against them to justify the restrictive measures which had been imposed on them, nor afforded them the right to be informed of the evidence within a reasonable period after they were enacted. Consequently, the applicants had not been in a position to make their point of view heard in that respect. [117]

3. *Effective Judicial Review*

Similarly, with reference to the right to effective judicial review, in the Kadi case, the European Court of Justice asserted that its review of the validity of any Community measure concerning fundamental rights must be considered an expression of a constitutional guarantee stemming from the European Community Treaty, which was not to be prejudiced by an international agreement —namely the Charter of the United Nations.[118]

Likewise, the European Court of Justice held that the Community judicature must ensure a review of the lawfulness of all Community acts in the light of fundamental rights, including a review of Community measures designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[119] Accordingly, the European Court of Justice has stated that while the re-examination procedure carried out by the Sanctions Committee clearly failed to offer guarantees of effective judicial protection that must remain the case.

In particular, the European Court of Justice has asserted that the creation of a focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for the review of decisions made by the Sanctions Committee[120] given that: (1) the request is a matter of inter-governmental consultation; (2) the Sanctions Committee is not obligated to consider the views of the blocked person; and (3) there was no provision other than minimal access to the information on which the decision was based to include the petitioner on the list.[121]

In other words, the de-listing procedure is not independent and impartial since the accuser is also the judge. It is common that the nation requesting the listing is one of the members of the body deciding whether to list or de-

[117] Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission, ECJ, ECLI:EU:C:2008:461, para. 348. Aff'd T-85/09 (2010), Kadi v. European Commission, ECLI:EU:T:2010:418, paras. 180-88

[118] Joined Cases C-402/05 P and C-415/05 P, para. 316.

[119] *Id.* para. 326.

[120] *Id.* paras 322-325.

[121] Opinion of Advocate General Poiares Maduro, delivered on 16 January 2008, Case C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, para. 46.

list a person.[122] Therefore, the Court of Justice concluded that the applicants suffered an infringement of their right to effective judicial review because of the failure to inform the applicant of the evidence given against him and the inability to defend his rights regarding the evidence in question in satisfactory conditions before the Community judicature.[123] In short, while no other instance affords real access to judicial protection,[124] domestic European courts are rather concerned about providing minimal procedural safeguards in European Union courts.

4. *Infringement of Property Rights*

In this regard, in the Kadi case, the European Court of Justice concluded that the applicants suffered from an infringement of their right to property, resulting from the freezing measures imposed under Regulation No 881/2002. This measure was adopted without providing any guarantee that would enable a designated person or entity to bring his case before the competent authorities. Such a general application and actual open-ended continuation of the restrictive measures constituted an unjustified far-reaching restriction of his peaceful enjoyment of property with potentially devastating consequences, even when arrangements are made for basic needs and expenses.[125]

5. *The Right to Freedom of Movement*

In Ahmed and Others, the Supreme Court of the United Kingdom was of the opinion that designated persons were effectively 'prisoners' of the State as their freedom of movement was severely restricted without access to their funds and the effect of asset freezing on them and their families can be devastating.[126]

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[122] Abdelrazik v. Canada (Minister of Foreign Affairs), [2010] 1 FCR 267, 2009 FC 580 (CanLII), para 51; cited in *Her Majesty's Treasury v. Mohammed*, para. 69.

[123] Joined Cases C-402/05 P and C-415/05 P, para 349, aff'd, T-85/09 (2010), paras. 180-88.

[124] Gutherie, *supra* note 109, at 514 (the current review of listing decisions seems more political than legal).

[125] Joined Cases C-402/05 P and C-415/05 P, para. 366, aff'd, T-85/09 (2010), paras. 192-95.

[126] Her Majesty's Treasury v. Mohammed Jabar Ahmed and others; Her Majesty's Treasury v. Mohammed al-Ghabra; R (on the application of Hani El Sayed Sabaei Youssef) v. Her Majesty's Treasury, [2010] UKSC 2, United Kingdom: Supreme Court, para. 104, 27 January 2010.

VII. Final Remarks. Preventing Money Laundering and Financing Terrorism in Mexico: Lessons from US and European Domestic Frameworks

The Mexican regime on financial asset freezing in the context of preventing money laundering and countering terrorist funding suffers from a lack or a reduction of civil liberties, which leaves the affected persons with a weak possibility to conduct a proper defense. In Mexico, financial statutory laws and regulations do not afford sufficient due process protection when the corresponding administrative procedure fails to order a notice to be served even after the assets have been frozen. Furthermore, the administrative procedure is not focused on challenging the designation itself, but on correcting false positives. However, it is possible to grant more effective human rights protection without endangering measures to suppress terrorism and money laundering.

To better protect human rights in the Mexican legal system, some suggestions are:

1. The designated person or entity should be notified without delay after asset freezing has been executed so as to grant those affected a real opportunity to defend existing rights.
2. Mexican Secretariat of Finance should endeavor to serve notice of the reasons for listing the person, entity or group concerned. When this notification is not possible or in any other case, a notice should be published in the Federal Official Gazette to inform those concerned of the applicable procedures. These measures would not hinder the deployment of UN resolutions or FATF recommendations or reduce their efficacy, considering their resolutions and list are publicly available. Yet, people would concurrently enjoy due process protection.
3. Since long-term freezing of assets might amount to a governmental act of deprivation under the Mexican legal system, specific time limits on the blocking of assets would lessen the hardship on civil rights. It also would provide the government with an incentive to present criminal charges quickly, start a civil procedure on the property deprivation, or to release the funds. Alternatively, to the extent that asset freezing could last indefinitely, a hearing before judicial courts should be granted.
4. Some rules or principles to guide the assessment of the requests to access frozen funds to pay the blocked person's defense expenses should be provided. It would avoid conflict of interest claims and mitigate the risk of the resulting decision being challenged as arbitrary, without any basis or against the law.
5. The List of Blocked Persons should be made public or, at least the section concerning UN sanctions. This would not only allow better compliance of the Mexican government's international commitments, but also grant better protection of human rights to designees. Currently,

the reasons to be added to the List of Blocked Persons include not only those blacklisted by the UN sanction committees and other international organizations' lists, but also local criminal causes. Consequently, in order to not contaminate UN sanction regimes and its requirements, the relevant procedures should be unambiguously separated from the cases containing local criminal causes.

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CRIMINAL JUSTICE, DUE PROCESS AND THE RULE OF LAW IN MEXICO

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Abstract: *The criminal justice process should not involve obtaining the truth at any price. This article discusses how Mexico has adopted exceptional regulations which violate due process considerations and create a problematic breach of the rule of law. We argue that, at a time when Mexican society suffers the consequences of organized crime, the Constitution provides for two types of regulations: one protecting human rights, which are the foundation of the rule of law; and another which infringes on the individual rights of those suspected of having participated in organized criminal activity.*

We examine mechanisms such as preventive detention and preventive imprisonment and analyze their treatment under Mexican law as well as in international agreements. We explore whether or not the fight against criminality and the prosecution of criminals "by any means necessary" is more important that the protection of the human rights of those suspected of illegal activity. We conclude by suggesting that the response to criminality should not require limitations on the constitutional freedoms of citizens.

Keywords: *Organized crime, prosecution of crime, human rights, preventive detentions, rule of law.*

Resumen: *En un proceso penal no se debe obtener la verdad a cualquier precio. Este artículo establece que México ha adoptado un procedimiento en el que se permite el quebrantamiento del estado de derecho. En una época en la que México sufre las consecuencias del crimen organizado la Constitución permite dos tipos de reglas de procedimiento penal, una que protege los derechos humanos y otra que los restringe. Con este propósito se examinan figuras tales como el arraigo y la prisión preventiva así como su regulación en la norma mexicana y en los tratados internacionales. El artículo analiza si el uso de métodos represivos en la investigación y combate al crimen organizado es más importante que la protección de los derechos humanos de los presuntos responsables de haber*

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cometido ese tipo de conducta. En este sentido, se sugiere que la respuesta a la criminalidad no debe limitar las libertades individuales de los ciudadanos.

Palabras clave: *Crimen organizado, investigación del delito, derechos humanos, prisión preventiva, estado de derecho.*

Table of contents

I. Introduction

The rule of law and due process should be paramount in democratic regimes where state power is supposed to be checked by the defense of freedom, in societies in where the law is supreme and, therefore, prevails above all, including government institutions. In such settings, legislative bodies have the obligation to create rules that guarantee and respect the human rights of all people. It is the responsibility of judicial officials to interpret such rules to ensure that those rights prevail even over the expectations of the parties involved in a conflict, including the state itself. Therefore, it is essential that both the rules of the state as well as the actions of the authorities applying said rules recognize, promote, and enhance basic rights.

The difficulty in following these principles in countries like Mexico lies in the fact that the constitutional reform of 2008, implementing the accusatorial legal system, was adopted at a time when criminal activity had increased significantly. Casas reported, following a study conducted by The Center of Investigation for Development (CIDAC), that Mexico ranked number 16 among 115 countries with the highest rates of violence in the world.[1]

According to Buscaglia, the change of political party in 2000 strengthened both ordinary and organized criminality.[2] In this scenario, the emphasis of

[1] Maria Casas Perez, *Cobertura informativa de la violencia en México,* 8 Global Media Journal México, 6 (2011).

[2] Doris Gómora, *Crimen se fortaleció a partir del gobierno de Fox: Buscaglia*, El Universal, November 22, 2014, (May 18, 2018), *http://archivo.eluniversal.com.mx/nacion-mexico/2014/impreso/crimen-se-fortalecio-a-partir-del-gobierno-de-fox-buscaglia-220572.html*.

the government security institutions was focused on second one.[3] As a consequence, the lawmakers' discussions before the adoption of constitutional reforms in 2004 and in 2007, emphasized this problem.[4]

One of the reasons that helps explain the current situation in Mexico lies in the fact that most of the criminal and security sector reforms carried out in Mexico, beginning in the late eighties and continuing into the nineties, did not envisage a transformation of the public security, justice or defense systems.[5] Along with non-compliance with due process, there has also been an absence of adequate laws, among other factors.[6] With this in mind, in this article, we develop an analysis of two legal figures that exist to combat criminal organizations: preventive detention and preventive imprisonment. We then question if these measures comply with the most recent constitutional reforms regarding human rights. The purpose of this article is to discuss whether the state gives more importance to human rights or to the adoption of repressive mechanisms aimed at combating organized crime.

The reason why this research is focused on preventive detention and preventive imprisonment is due to the fact that criminal investigation activities have been the object of complaints before different national and international human rights institutions. Additionally, Mexico has received numerous recommendations aimed at restricting the use of this type of force over individuals.

With this in mind, we analyze the Mexican constitutional reforms of 2008 and 2011. In order to support the facts presented in this article, we make reference to statistical data on Mexican organized crime rates, and examine the use of repressive measures and the number of complaints received by human rights organizations. We also analyze the existing social and legal background in which the aforementioned legal figures were adopted in Mexico, and compare these prosecution methods to the content of international treaties and the recommendations of regional and global human rights agencies.

II. How Constitutional Reforms Impact Human Rights

The accusatorial system was put into effect in most countries in Latin America in the last two decades of the 20th century, introducing a protective regime for individuals under the criminal justice system. According to Binder,

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[3] The Mexican Constitution included and defined the figure of organized crime in 1993; the concept and scope of organized crime became so important that three years later, in 1996, congress created the Federal Act Against Organized Crime.

[4] Sergio García Ramírez, *Reseña legislativa sobre la reforma constitucional de 2007-2008 en materia de seguridad pública y justicia penal,* 123 Boletín Mexicano de Derecho Comparado, 1557-1581 (2008).

[5] Raúl Benitez Manaut, *La crisis de seguridad en México*, 220 Nueva sociedad, 174 (2009).

[6] Phil Williams, *El crimen organizado y la violencia en México: una perspectiva comparativa*, 11 Istor: revista de historia international, 37 (2010).

it was a regional legal reform process inspired by principles of democracy, and one that pushed towards social reorganization. The adversarial system is a salient feature of modern states, as it recognizes the accused has substantive, procedural human rights.[7] Specifically, the accusatorial and adversarial system intends to balance two conflicting interests: on one side, legal prosecution and on the other, respect of the rights of the accused.[8]

In tandem with the demands of the Mexican society to move towards fairer judicial procedures,[9] a reform on public security and criminal justice was enacted in 2008.[10] Some of the less informed supporters of the reform considered that the reduction of criminality was the main purpose of the accusatorial and adversarial system. After several discussions, Congress passed legal provisions that attempted to respect the human rights of the accused and to reduce organized crime, within the same set of legal changes.[11] More precisely, whereas the creators of the Mexican Constitutional reforms were in favor of the progressive development of human rights[12] and encouraged guaranteeing the fundamental rights of individuals, they also attempted, within the same set of amendments, to enhance public security and combat organized crime[13] Evidencing this purpose, new legal dispositions were published June 18, 2008 titled: "Constitutional Reform on Criminal Justice and Public Security."

The new reform on public security and criminal justice provisions served as a trigger for the establishment of a new guarantee based criminal justice system designed to aid in the fight on crime.[14] These legal provisions contemplate new rights for the accused, including presumption of innocence, the right to be heard in a trial, a prohibition regarding the use of illegally obtained evidence, and the right to have one's sentence explained in a public audience, among others. It is a reform that incorporates into Mexican law the rights and principles recognized by the Universal Declaration of Hu-

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[7] Alberto M. Binder, *La justicia penal en la transición a la democracia en América Latina*, (1994). *at http://biblioteca.org.ar/libros/133155.pdf* visited 10 December, 2017.

[8] Miguel Angel Oviedo Oviedo, *Tipos de procesos penales o sistemas penales*, in Juicios Orales en México coord. Alfredo Islas Colin, Freddy Dominguez Narez & Mijael Altamirano Santiago 75 (Flores editor y distribuidor 2014).

[9] The main causes of the movement behind the constitutional reform towards an accusatorial and adversarial system were: frequent infringement of the accused individual rights', lack of confidence in the government institutions investigating criminality and the fact that most crimes stayed unpunished.

[10] Guillermo Zepeda-Lecuona, *La reforma constitucional en materia penal de junio de 2008. Claroscuros de una oportunidad histórica para transformar el sistema penal mexicano,* Rev.A.Plu., ITESO, 113 (2008).

[11] García, *supra* note 3.

[12] Rafael Aguilera Portales & Rogelio López Sánchez, *Los derechos fundamentales en la Teoría Jurídica garantista de Luigi Ferrajoli,* 56 IUSTITI, 157-206 (2008).

[13] Hermes Prieto Mora, *Marketing pro-guerra en México,* 16 Fórum de recerca, 363 (2011).

[14] Eduardo Martínez Bastida, *El derecho penal del enemigo en las reformas constitucionales*. 4 Archivos de criminología, criminalística y seguridad privada, 62 (2010).

man Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

Clearly, this was a historic constitutional reform for Mexico. History can move forward or backwards, and these legal changes moved both ways: they moved forward by implementing an accusatorial and modern criminal system, and backwards in terms of individual rights and liberties.[15] The drawback of these movements is that the Mexican criminal justice system can now be categorized under two types of procedures. In other words, after having had just one criminal justice regime, we now have an ordinary system where the rights of the accused are respected, as well as a special procedure designed to fight against organized crime under which individuals can actually be deprived of their rights. The strict application of some of the protective provisions has resulted in the acquittal of serious criminals,[16] consequently, the fight against organized crime has prevented full compliance with the standards protecting human rights that Mexico had adopted in recent constitutional reforms. We thus disagree with the statement that "the protection of human rights is totally consistent with public security."[17]

In this context, we argue that while the debate about the protection of the fundamental rights of the accused in the context of the search for the truth continues, we are faced with the issue of determining whether the state must guarantee the protection of basic rights in a society in which organized crime is strongly rooted. Ledesma has noted that states have the commitment to protect human rights,[18] however, the actual debate involves analyzing if the legislature is giving more importance to the fight against organized crime or to the respect of the fundamental rights of those suspected of carrying out illegal acts.

In considering the amendments to the law, even though human rights regulations within the Mexican Constitution were ample, it was necessary to modernize the 20th century text according to evolving historical, social, institutional and international contexts; at the same time there was a need to ensure the incorporation of international treaties into domestic law.[19] With

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[15] Oviedo, *supra* note 7, at p 75.

[16] Just to mention one example, on April 29, 2010 a Court in Chihuahua acquitted Sergio Barraza Bocanegra after confessing before a police officer he had murdered his girlfriend Rubí Frayre Escobedo and placed her 39 body parts in a dumpster. That declaration was considered invalid in Chihuaha Criminal Procedures Code.

[17] Alfredo islas colin, Declaraciones en el foro reforma penal y democracia el dia 5 sep 2007 Juicios Orales en México tomo I (Flores editor y distribuidor 2014).

[18] Héctor Faúndez Ledesma, Sistema Interamericano de Protección de los Derechos Humanos. Aspectos Institucionales y Procesales (Instituto Interamericano de Derechos Humanos 2004).

[19] Víctor M. Martínez Bullé-Goyri, *Reforma constitucional en materia de derechos humanos, 44 Boletín Mexicano de Derecho Comparado*, 405-425 (2011), (Aug. 12, 2017), *http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0041-86332011000100012&lng=es&tlng=es.*

what appeared to be a growing concern to promote individual rights, the Congress of the Union enacted a human rights reform in 2011.

In the new Article 1 of the Constitution, the government seems to have adopted an ample approach driven by the protection of human rights. It establishes that all authorities must promote, respect, protect and ensure human rights and carry out the state's commitment to prevent, investigate, punish and repair any human rights violation.[20] According to *pro persona* principle, every authority, including state and public institutions, must apply norms providing individuals the widest protections. The amendment established that the international treaties signed by the Mexican government in the matter of human rights will be incorporated into the block of constitutionality limits, which no power can restrict or suspend, *except in cases and conditions established in the Constitution*.[21] It also establishes that every legal provision regarding human rights shall be interpreted according to the Constitution and international treaties.[22]

The 2011 reform evidenced the human rights weaknesses of the constitutional text and it demonstrated a supposed conviction to make individual rights prevail over any other legal provision, nevertheless, in 2013 the Supreme Court of Justice examined Case 293/2011 and determined that even though the block of constitutionality exists and is integrated by the human rights included both in the Constitution and in international treaties, if the international norm is not consistent with the constitutional norm, it is the constitutional norm that will prevail. This interpretation was considered by members of academia and attorneys as a historic step backwards, leading to restrictions to the *pro persona* principle.

To analyze the existing environment of these changes, it is worth mentioning that along with the adoption of these constitutional reforms, many of the criminal acts taking place in Mexico are organized violent acts. According to the report titled *Situación de los derechos humanos en México*, it is corruption and impunity in Mexico, as well as in several countries in Latin America, that have strengthened organized crime networks.[23] The magnitude of the problem is such that organized criminal groups engage not only in drug trafficking, but also in other illegal activities such as human and migrant trafficking, trafficking of protected natural resources, the illegal arms trade and extortion.[24] The growing amount of illegal activities carried out by criminal groups has

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[20] Sergio García Ramírez & Julieta Morales Sánchez, La reforma constitucional sobre derechos humanos (2009-2011), 3ª ed., Porrúa, UNAM, (2013).

[21] José de Jesús Orozco Henríquez, *Los derechos humanos y el nuevo artículo 1 constitucional, 5* Rev. Ius. 28, 85-98 (2011).

[22] Martinez Bullé-Goyri, *supra* note 18, at 410.

[23] CIDH & OEA, *Situación de los derechos humanos en México*, Colección Comisión Interamericana de Derechos Humanos OEA/Ser.L./V/II.Doc.44/15, (Nov. 2, 2017), at *https://archivos.juridicas.unam.mx/www/bjv/libros/10/4618/4.pdf.*

[24] *Id*. at p. 6.

empowered them, while the government is held responsible for the lack of effective strategies in response to rising organized criminality.[25]

Since the early 2000s, the term "organized crime" has been consistently included in documents and strategies on national and public security,[26] as well as in the reports of international organizations.[27] The Federal Act Against Organized Crime established a special regime for the investigation, prosecution, sanction, and enforcement of crimes within this category. This Act increased the number of penalties against criminal associations and allowed for measures such as surveillance and phone tapping.[28] Other new elements include the use of undercover agents and the confiscation of property. Since the adoption of this Act, Mexico has created new criminal policy aimed at strengthening the intensive battle against organized crime, which is often characterized by the absence of responsibility and accountability on the part of local authorities.[29]

Additionally, in 2016 the Federal Act Against Organized Crime resulted in changes to more than thirty three or its own articles, with the stated purpose of confronting criminal associations. For instance, the number of illegal activities punished as organized crime increased, as did the terms of imprisonment. The new dispositions place a particular emphasis on the restriction of communications for individuals who are prosecuted and convicted, as well on special surveillance measures for this type of criminality.

Evidently today's reality in Mexico presents a dilemma, since strictly complying with the protection of human rights provisions could overshadow efforts to deal with growing criminal activity and the wave of insecurity that is being experienced in Mexican society. In its attempts to curtail criminal activity, the state is adopting policies that restrict freedoms and foster the arbitrary use of force; the clearest example is that of the war against drug trafficking carried out during the administration of former president Felipe Calderón (2006-2012).[30] It must be said, however, that in a state governed by the rule of law, and based on the recognition and guarantee of individual rights and freedoms, the use of force must be regulated by rules that distinguish between legal and illegal use of force. In addition, in a nation with the rule of law, the

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[25] *Id*.

[26] Its inclusion in the Political Constitution, complemented the existing regulation in the Federal Penal Code and in the Criminal Procedure Federal Code.

[27] Xavier Servitja Roca, *El crimen organizado en México y el 'Triángulo norte' durante el mandato de Felipe Calderón,* 3 Instituto Español de Estudios Estratégicos 5 (2012).

[28] Jorge Chabat, La respuesta del gobierno de Calderón al desafío del narcotráfico: entre lo malo y lo peor, CIDE (2010).

[29] Javier Carreón Guillén & Pedro de la Cruz, *La lucha actual contra la delincuencia organizada en México* 14 Barataria Revista Castellano-Manchega de Ciencias Sociales 70 (2012).

[30] Guillermo Pereyra, *México: violencia criminal y guerra contra el narcotráfico* 74 Revista Mexicana de Sociología. 430 (2012).

use of force by government authorities, as well as abusive practices, must be gradually restricted or limited.

Rules can be found in the Constitution that allow for arbitrary actions such as preventive detentions and preventive imprisonment, which are inconsistent with respect for human rights. More specifically, the country is adopting a policy consisting of reducing fundamental rights by means of severe control and surveillance;[31] the legalization of said rules will lead to the increase of such practices.

III. Preventive Detention

Preventive detention is a type of arrest carried out when a criminal investigation takes place, long before a formal declaration that someone is guilty of a criminal offense is pronounced by a judge in a court of law. It provides public prosecutors with mechanisms to combat illegal activity.

According to a study titled *Arraigo judicial: datos generales, contexto y temas de debate*,[32] this type of arrest was established for the first time in the Mexican criminal justice system in 1983, after the reform of the Federal Penal Procedures Code. Since its inception, it was enacted as a preventive measure to guarantee the attendance of accused individuals during preliminary investigations in the criminal justice process.[33] Preventive detentions were incorporated in the Code of Criminal Procedures for the Federal District and Federal Territories as a tool to allow detentions with the goal of having the detained testify as witnesses to a crime, and in those cases in which a well-founded basis exists to presume that the accused could evade justice.

During the presidential administrations of Ernesto Zedillo and Felipe Calderón, however, this type of custody began to go in a different direction, as it was included in the Federal Act Against Organized Crime as well as in the Constitution, with the purpose of combating criminal organizations.[34] In fact, organized crime was recognized during those administrations as a national security issue that included the infiltration of government institutions

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[31] Eduardo Martínez, *El derecho penal del enemigo en las reformas constitucionales* 4 Archivos de criminología, criminalística y seguridad privada 68 (2010).

[32] Centro de estudios Sociales y de Opinión Pública, Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C., Arraigo judicial: datos generales, contexto y temas de debate, (México: LXI Legislatura Cámara de Diputados, 2011).

[33] Marco Antonio Díaz de León, *El arraigo y la prohibición de abandonar una demarcación geográfica en el Código Federal de Procedimientos Penales,* in Primera conferencia internacional sobre aplicación y cumplimiento de la normativa ambiental en América Latina (*Jurídicas UNAM*, 2002).

[34] Cecilia Toledo, El uso e impactos del arraigo en México. Otros referentes para pensar el país Fundar, (2014). *http://fundar.org.mx/otrosreferentes/documentos/DocArraigoOK.pdf* visited 10 march 2016.

in which corruption, money laundering and drug trafficking were involved.[35] Due to this criminal environment, the Mexican government put forward a set of initiatives, the outcome of which would be the promulgation of the aforementioned Federal Act, which regulated preventive detentions, in order to prosecute these illegal structures.[36]

In 2005 the National Supreme Court of Justice pronounced preventive detentions unconstitutional.[37] However, one of Felipe Calderón's first actions when he took power was to adopt a strategy to prevent criminality and combat organized crime.[38] In fact, the legislative initiative established that the Mexican government was committed to combat organized crime with its resources and strengths, permanently and effectively.[39] Calderón enacted constitutional reforms of criminal justice procedures and public security, whereby the preventive detention provision was introduced in Article 16 of the Constitution.[40]

> When dealing with organized crime, the judicial authority, at the request of the prosecutor, may order that a person be held in preventive detention in a facility and for a period of time as provided for by law, up to a maximum of 40 days, if such detention is necessary for the success of the investigation or for the protection of persons or property, or if there is a well-founded risk that the suspect will abscond from justice. This time period may be extended if the Public Prosecution Service demonstrates that the original grounds for preventive detention are still valid. The total period of a preventive detention may not, however, exceed 80 days.[41]

It is sometimes difficult to prove all the elements of conduct that are required so as to consider a criminal act as organized crime. When there exists only the suspicion that three or more people are engaging in illegal activity, preventive detention can be used to prosecute serious crimes. Such legal

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[35] In the frameowrk of the UN General Assembly Special Session on the World Drug Problem (UNGASS) *http://cmdpdh.org/2016/04/declaracion-de-organizaciones-de-la-sociedad-civil-de-derechos-humanos-en-mexico-con-relacion-a-los-efectos-nocivos-a-los-derechos-humanos-por-la-inadecuada-politica-de-seguridad-en-el-combate-a-las-d/*.

[36] Toledo, *supra* note 33, at 25.

[37] Martiarena Leonar, Incidencia de la Recomendación 2/2012. Arraigo de la CDHDF en la modificación de prácticas violatorias a los derechos procesales por los jueces del TSJDF (TSJDF, 2014).

[38] Toledo, *supra* note 33, at 24.

[39] Claudia Gamboa, Análisis de la iniciativa de reforma a nivel constitucional, en materia penal, presentada por el ejecutivo ante el Senado de la República, (Cámara de Diputados 2007) at *http://www.diputados.gob.mx/sedia/sia/spi/SPI-ISS-21-07.pdf visited 1 october 2016.*

[40] Toledo, *supra* note 33, at 3.

[41] Article 16 of the Federal Mexican Constitution

reforms aim to introduce new criminal policy alternatives, providing more efficient tools to state authorities in charge of prosecution.[42]

Statistical information on preventive detention issued by state authorities shows that it has been used regularly to prosecute kidnapping, money laundering, human trafficking and terrorism,[43] in other words, it is used to prosecute organized criminal activity. Between 2008 and 2011 General Attorney's Office reported that preventive detention was used in 1,232 kidnapping investigations, 847 terrorism investigations, 288 money laundering investigations and 205 investigations into human trafficking, all criminal activities considered to involve organized criminality.[44]

The National Supreme Court of Justice (SCJN) determined that local legislatures lack the authority to enact such a law, since it is the exclusive power of the Congress of the Union. Meanwhile, to expand the use of preventive detention, the transitional Article 11 of the decree for which the Constitution was reformed in 2008, enabling a higher degree of power to issue preventive detention orders. Congress also lengthened the list of serious crimes, in response to social pressure linked to the lack of citizen security, thus again increasing the use of preventive detention.[45] One of the arguments in favor of the adoption of preventive detentions was to provide state authorities (public prosecutors) with mechanisms to allow them to be more efficient when investigating organized crime. However, the outcome of these arguments and legal changes was to restrict human rights, including freedom and personal security.

IV. The Impact of Preventive Detention on Human Rights

Those who believe in the merits of preventive detention argue that it is necessary to guarantee efficient criminal investigations. This assumption has been criticized by opponents, who assert that the imposition of preventive detention implies the suppression of the freedom of an individual in order to investigate whether he or she participated in an illegal act, and that that free-

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[42] Reform initiative to articles 16, 21, 22 y 73, fraccion XXI of the Federal Constitution and Fedral Law against Organized Crime, (Feb. 1, 2016), *http://www.senado.gob.mx/index.php?ver=sp&mn=3&sm=2&lg=LVI_ II&tp=Segundo%20Periodo%20Ordinario&np=MARZO%2019,%20%201996&d=2*.

[43] People held in preventive detention in Federal Investigation Centers by crime, 2008-2011

[44] "El arraigo hecho en México: violación a los derechos humanos Informe ante el Comité Contra la Tortura con motivo de la revisión del 5° y 6° informes periódicos de México" (Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, A.C. 2012), (Jan. 10, 2017), *http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MEX/INT_CAT_NGO_MEX_12965_S.pdf*.

[45] Amalia Cobos, *El arraigo penal en México frente a la presunción de inocencia,* Revista Penal México, 60 (2015).

dom constitutes a fundamental right that cannot be restricted until a judge imposes a sanction, upon determination that the person in question effectively participated in the commission of a crime.[46]

From another perspective, preventive detention eliminates the freedom of an individual without the need to obtain evidence that connects him or her to the commission of a crime, since only reasonable indications that a person participated or committed such crime will suffice to submit him or her to detention.[47] It also ignores the constitutional system of guarantees with regards to personal freedom.

Additionally, this type of arbitrary detention replaces the ordinary rules regarding restriction of personal freedom that requires that a person can only be detained when he or she is caught in the act or with an arrest warrant. It is obvious that the deprivation of freedom cannot be justified unless elements exist to find it probable that the suspect has participated in a wrongful act. This is why preventive detention is arbitrary and unjustifiable.

Another argument against preventive detention is that the presumption of innocence implies the right to receive the consideration or treatment as a non-participant or author of a criminal offense. As Ibañez said, this principle infers a legal status of being identified as an individual not found guilty.[48] The presumption of innocence can be weakened only at trial based upon legal evidence, empirical elements and rational arguments, never on suspicions or silence.[49] According to this, demonstrating the innocence of an individual is absurd and the deprivation of freedom is even more so, when the participation of an individual in a wrongful act has not been proven in a trial.

In this context, preventive detentions violate due process, which is supposed to be a fair process. Due process refers to a set of requirements that must be observed in legal proceedings in such a manner that people can have the opportunity to adequately defend their rights in the face of any adverse action of the state.[50] In this respect, if government restricts the freedom of an individual, this person will not be able to defend himself properly and the restriction of human rights would, without a doubt, preclude having a fair trial.[51]

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[46] *Id*.

[47] Fernando Silva, *El arraigo penal entre dos alternativas posibles: interpretación conforme o inconvencionalidad* 33 Revista del Instituto de la Judicatura Federal 243 (2012), *at http://fundar.org.mx/otrosreferentes/documentos/DocArraigoOK.pdf*.

[48] Perfecto Ibañez, *Presunción de inocencia y prisión sin condena* Revista de la Asociación de Ciencias Penales de Costa Rica 7 (1996).

[49] Rosario de Vicente, *Culpabilidad, presunción de inocencia y delitos de sospecha* 33 Revista del Poder Judicial. 442 (1994).

[50] Sergio García, El debido proceso. Criterios de la jurisprudencia interamericana (Porrúa 2012), (Jul. 6, 2016).

[51] In the international context, the decision in the case of Chaparro Álvarez y Lapo Iñi-

As for its impacts, the inclusion of preventive detention in the Mexican Constitution has resulted in an increase of this type of detentions to the extent that the Attorney General recognized that authorities have abused of it since 2008; he pointed out that of 4,000 preventive detentions only 200 suspects had been convicted.[52] In fact, from 2008 to 2013, of 9,582 suspects held in preventive custody, only 490 were brought before a judge.[53] Moreover, in 2011 preventive detentions were used to fight the ever increasing number of cases of enforced disappearances.[54] According to information obtained from the Attorney General by the Centro de Estudios Sociales y de Opinión Pública, in 2009 the Judicial Power authorized an average of twelve preventive detentions per day. In addition, from September 2010 to June 2011, 1 579 civilians were subject to this measure through 453 judicial orders.

The Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH) oversaw more than 405 human rights complaints connected to preventive detentions between 2008 and 2011. Additionally, between January 2008 and December 2013, preventive detentions were used in 9,582 investigations, half of these detentions lasted longer than 40 days.[55] In 2013, the National Human Rights Commission (CNDH) reported that the Secretary of Defense, the Attorney General and Federal Police were the agencies with the highest number of human rights complaints against them for employing arbitrary use of force, preventive detention, and cruel, inhuman and degrading treatment.[56] These claims are supported by a CNDH brief on preventive detention and human rights titled *Informe sobre el impacto en México de la figura del arraigo penal en los derechos humanos*. According to this brief, which was presented to the Interamerican Human Rights Commission, 36 percent of the of the complaints before the CMDPDH involved arbitrary detentions, 39 percent involved torture and other types of abuse and 25 percent were related to both situations.[57]

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guez vs. Ecuador in the sentence pronounced November 7th, 2007 and in the case of López Álvarez vs. Honduras in the sentence pronounced February 1st, 2006. Aside from that, established by the UN Human Rights Council, the Working Group on Arbitrary Detention (1991) has long recognized that with preventive and arbitrary detentions the suspect has no guarantee of the right to a fair process and the right to effective legal protection is denied.

52 I. Navarro, *Con Calderón consignaron a 200 de 4 mil arraigados,* Milenio newspaper, January 30, 2013, at *http://www.milenio.com/cdb/doc/noticias2011/* visited 20 December 2016.

53 Toledo, *supra* note 33, at 10.

54 Informe del Grupo de Trabajo sobre desapariciones forzadas o involuntarias, Consejo de Derechos Humanos 19 periodo de sesiones, A/HRC/ 19/58/ Add.2, Numeral 89, p. 18.

55 Toledo, *supra* note 33, p. 10.

56 CNDH. Informe de actividades de la Comisión Nacional de Derechos Humanos. Del 1º de enero al 31 de diciembre de 2013. (CNDH, México. 2014) p. 17.

57 Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, A.C. (CMDPDH) *et. al.,* 2011.

Opponents of preventive detentions emphasize that some of the consequences of these arrests and detentions by the police include injuries, bone fractures, beatings and electric shocks. Furthermore, according to the CMDPDH, violations suffered during these detentions also include illegal searches, self-incrimination, lack of communication, arbitrary detentions and torture,[58] severely diminishing the right of the accused to a fair trial.[59]

Echoing the above, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment declared in 2009 that the use of preventive detentions in Mexico left detainees in a vulnerable situation without a clearly defined legal status to exercise their legal right to defense. The Special Rapporteur on the Independence of Judges and Lawyers stated, at the end of her official visit to Mexico in 2010, that imposing detention in order to investigate when the appropriate action is to expedite an effective investigation in order to detain, is proof of the dysfunctionality of the justice system and implies a violation of the presumption of innocence.[60] The Rapporteur considered preventive detention a violation of human rights and stated that it should be eliminated.

Consistent with the assertions in this paper, some of the changes were adopted not only in legislation, in fact, six Specialized Criminal Federal Courts in Searches, Preventive Detention and Communications Tapping (*Juzgados Federales Penales Especializados en Cateos, Arraigos e Intervención de Comunicaciones*) were created in 2008 in order to prevent, reduce, evade and end national security threats.[61] These courts were necessary to comply with the adversarial criminal system requiring special judges to authorize precautionary measures and to act in accordance with the National Agreement on Security, Justice and Legality. One year later, the seventh Specialized Court was established, and eight years later, a new Specialized Criminal Federal Court in Searches, Preventive Detention and Communications Tapping was set up in order to authorize the precautionary measures of criminal cases judges exclusively under the new model of justice.

After all these changes, and in spite of the fact that judges are allowed to impose preventive detentions, since it is regulated in the Mexican Constitution, the efficacy of preventive detention in reducing organized crime is still questioned. In this regard, in 2011 the Inter-American Commission on Human Rights (IACHR) presented the results of a study showing that the percentage of convictions derived from a process in which a preventive deten-

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58 *Id.*

59 Toledo, *supra* note 33, at 405.

60 Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers Addendum Mission to Mexico, p. 14 at: *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/129/33/PDF/G1112933.pdf?OpenElement.* Visited 9 july 2016.

61 Acuerdo General 75/2008, de seis Juzgados Federales Penales Especializados en Cateos, Arraigos e Intervención de Comunicaciones.

tion was used amounted only 3.2 percent.[62] We must then ask: are policemen detaining innocent people? Does preventive detention contribute to the fight against crime? Is preventive detention helpful for criminal investigation? Regardless the answers to these questions, the Mexican government has rejected removing this measure from the Constitution. Despite the fact that it is contrary to the protection of human rights, preventive detention is embraced in fundamental law in Mexico and it is therefore legally valid.[63]

More recently and consistently to a human rights protection approach, on April 6, 2018, the lower chamber of the Mexican Congress of the Union passed a bill that eliminates preventive detentions. It was a unanimous decision that gives response to the more than 10 years old international organizations demands to suppress the figure.[64] Nevertheless, because the reform needs to be approved by the Senate and the local Congresses in the country, the United Nations is urging them to continue the process.[65]

We believe that it is the right of individuals to be part of a judicial process that offers them essential guarantees and an adequate implementation. The protections to which individuals are assured include: access to justice, the right to a process with all the essential guarantees, the right to adequate defense, the right to appeal the verdict and the right to request and ensure compliance with the final sentence.[66] Effective legal protection gives all people the right to gain access to the judicial branch of government in order to be able to properly exercise and defend their rights and interests. As a consequence, preventive detention in Mexico violates the right of an individual to have a legal process with full guarantees during the preliminary stage of the proceedings. We also argue that in spite of the existence of arbitrary detention in fundamental law, in the case of infringements committed by organized crime and other severe transgressions, preventive detention compromises the rule of law in Mexico, even though an "emergency measure" may be established to deal with a type of criminality in society. The State simply cannot adopt unfair proceedings which are contrary to the law, in order to investigate and reduce criminality.[67]

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[62] Leticia Pliego, Violencia-Estado en el mundo globalizado. Arraigo penal mexicano, un ejemplo significativo (Flacso, 2014).

[63] Fernando Silva, *El arraigo penal entre dos alternativas posibles: interpretación conforme o inconvencionalidad* 33 Magazine of Instituto de la Judicatura Federal. 240 (2012). *At http://fundar.org.mx/otrosreferentes/documentos/DocArraigoOK.pdf.*

[64] Andrea Meraz y Erika de la Luz, "Diputados eliminan arraigo y modifican ley de extinción de dominio", April 26TH, 2018, *http://www.excelsior.com.mx/nacional/diputados-eliminan-arraigo-y-modifican-ley-de-extincion-de-dominio/1235154.*

[65] La ONU-DH pide celeridad al Senado para eliminar el arraigo, April 27, 2018 *https://www.proceso.com.mx/531825/la-onu-dh-pide-celeridad-al-senado-para-eliminar-el-arraigo.*

[66] García, *supra* note 48, at 11.

[67] Elías Carranza, *Política criminal y humanismo en la reforma de la justicia penal.* 116 Nueva sociedad 21 (1991).

V. Preventive Imprisonment

Preventive imprisonment is the placing in prison of a person who is suspected of having committed a crime when the prosecutor believes the suspect may flee from justice, harm victims or destroy evidence. As Cámara has stated, preventive imprisonment consists of the deprivation of liberty of an accused individual with the purpose of guaranteeing the process or enforcement of a sentence.[68] This kind of imprisonment entails the incarceration of an individual who has not received a guilty verdict. Unfortunately, in Mexico preventive imprisonment is a growing phenomenon and it remains mandatory for wrongful activities conducted by criminal groups in a structured and systematic manner.

At first glance, preventive imprisonment has an investigatory goal, even when applied to organized crime, since in its quest for ensuring the effectiveness of criminal law, it encourages the confession of the accused or collaboration with the government investigation. On the other hand, a thorough study of preventive imprisonment suggests that the measure encourages harmful and abusive police practices that are ineffective when the suspected individual did not in fact commit the crime.[69]

Although in Mexican law preventive imprisonment is a precautionary measure used to initiate and perform legal proceedings, it remains a coercive legal instrument that causes financial damages, pain and suffering.[70] An individual subject to this measure experiences loss of freedom, job and income loss, at the same time he or she bears the stigma of being labelled a criminal in society. Furthermore, it leaves the accused in a detached relationship with their family, whose members will likely incur new debts as a result.[71]

From this point of view, preventive imprisonment is equivalent to a sanction before a sentence and incarceration without judgment. Opponents of this kind of detention claim that an accused individual must be presented before the judge in a manner that ensures the dignity of the citizen, who is presumed innocent. Additionally, they emphasize it does not guarantee principles such as equality of the parties.

It has been contended that preventive imprisonment is used to make sure that certain needs of the trial are satisfied such as avoiding the danger of the accused escaping and evading justice or hindering the criminal

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[68] L. Cámara, Medidas cautelares personales 122 (Curitiba Juruá 2011).

[69] *Id.* at 20.

[70] Javier Rodríguez, Prisión preventiva, populismo punitivo y protección de los Derechos Humanos en el sistema interamericano. in J. *Llobet Rodríguez and D.Durán: Política criminal en el Estado Social de Derecho* (Editorial Jurídica Continental, 2010).

[71] Guillermo Zepeda-Lecuona, Los mitos de la prisión preventiva (Open Society Justice initiative, 2005).

investigation,[72] nonetheless, these requirements are met with the individual's compulsory presentation before the judge in order to lay criminal charges. Besides, the preventive purpose of this measure has vanished since this type of imprisonment is pronounced on the bases of the list of offences considered as serious crimes and is the result of the lack of logical alternatives to prevent a person from evading justice.[73]

Flores has emphasized that preventive imprisonment implies that a person is incarcerated while being subject to a legal process,[74] and that in Mexico, authorities have made an irrational use of it.[75] According to a study by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), by the end of the 20th century, 61 percent of incarcerated people had not received a sentence.[76] A special brief by the IACHR concluded that by 1996 more than 50 percent of inmates in Mexico had not received a sentence.[77] More recently, in 2009, it was found that 41.5 percent of 210,000 inmates in Mexico were individuals who, despite having not received a sentence, are kept behind the bars and thus suffer the consequence of imprisonment.[78] These prisoners are not always separated from sentenced inmates and can make connections with real, experienced and dangerous criminals, learning and being encouraged to commit crimes when they are released.[79]

The use of preventive imprisonment is inconsistent with Article 7 of the American Convention of Human Rights, which protects personal freedoms and prohibits arbitrary detention.[80] It is also contrary to Article 9 of the International Covenant on Civil and Political Rights and by General Assembly Resolution 2200A (XXI) of 16 December 1966, which establishes that everyone has the right to liberty and security and that no one shall be subject to arbitrary arrest or detention. These international instruments recognize the

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[72] *Id.*

[73] Marco Lara Klahr, Prision sin condena. Ocho historias sobre los costos sociales del encierro preventivo en México (Editorial debate, 2008).

[74] Verónica V. Flores, La presunción de inocencia como garantía básica en el derecho constitucional (Doctoral dissertation, 2013).

[75] Jorge Garza, Marco jurídico conceptual de la prisión preventiva y la farmacodependencia en México, así como de la libertad personal en el ámbito internacional de los derechos humanos. Tesis maestría en derechos humanos y democracia (FLACSO, 2014).

[76] Javier Llobet Rodríguez, *Prisión preventiva, populismo punitivo y protección de los Derechos Humanos en el sistema interamericano.* Política criminal, 183-219 (2010).

[77] Informe sobre el uso de la prisión preventiva en las Américas, Comisión Interamericana de Derechos Humanos, 2013.

[78] Zepeda-Lecuona, *supra* note 67, at 8.

[79] Lara Klahr, *supra* note 69, at 154.

[80] Douglass Cassel, *El Derecho Internacional de los Derechos Humanos y la detención preventiva 21* Revista del Instituto Interamericano de Derechos Humanos 34 (1995).

prevalence of the presumption of innocence over preventive imprisonment.[81] The application of these norms is relevant since they are consistent with the principle of *pro persona* recognized by Mexico and in accordance with the norm that offers a more extensive protection of fundamental rights.

We share Beccaria's notion that imprisonment is a penalty that must be necessarily preceded by a declaration of having committed a crime, as outlined by Foucault.[82] Taking into consideration that pre-trial detention is a coercive measure requiring the deprivation of freedom itself, it must be prohibited in states that recognize the presumption of innocence, when evidence is not yet presented or evaluated. Otherwise, a detainee is treated as if already found guilty at a preliminary stage of a trial.[83] Additionally, it represents an abusive measure in an initial stage of a process that obstructs the exercise of an individual's defense and may result in the manipulation of evidence.

In order to understand the evolution of preventive imprisonment, it is worth reviewing several regulatory changes preventive imprisonment has gone through in Mexico. On September 3, 1993, a new law stated that authorities could determine if cautionary provisional freedom might be declared.[84] During this stage, the suspect's right to cautionary provisional freedom was illusory, since it required a fee of a certain amount of money to guarantee payment of damages, such an amount was seldom at the disposal of the detainees.[85] In 1996 the seriousness of the offense was calibrated to the imposition of preventive imprisonment.

After the June 18, 2008 reform it was established that this cautionary measure, imposed only in cases of serious crimes, would not be the rule, but the exception.[86] The crimes that are punishable with preventive imprisonment are decided by the legislature, on behalf of the judge.[87] As for organized crime, Article 19 (fourth paragraph) of the Mexican Constitution lists the type of crimes for which cautionary measures cannot be anything other than prison.[88] More recently, in 2014, Article 167 of the Code of Penal Procedures applicable to the Nation (CNPP) established mandatory preventive imprisonment.[89] In June 2016, changes to the Federal Act Against Organized Crime

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81 Javier Llobet Rodríguez, *supra* note 72.

82 Michel Focault, Vigilar y castigar (18ª edición, siglo XXI, 1990).

83 Mario Corigliano, *Plazo razonable y prisión preventiva a la luz de la Corte Interamericana de Derechos Humanos*, 5 Derecho y cambio social 5 (2008).

84 Guillén & De la Cruz, *supra* note 28, at 322.c fvg.

85 *Id*. at 326.

86 Israel Flores Rodríguez, *El régimen constitucional de la prisión preventiva en México: Una mirada desde lo internacional*, 35 Revista del Instituto de la Judicatura Federal, 15 (2013).

87 Article 7 of the General Law for prevention, sanction, and eradication of crime dealing with human trafficking; and with protection and assistance to victims of these crimes, imposes preventive imprisonment for individuals accused of the commission of these unlawful acts.

88 Zepeda-Lecuona, *supra* note 67, at 10.

89 Intentional murder, rape, kidnapping, human trafficking and violent crimes committed

stated that preventive imprisonment will be applied to people who have committed organized crime, who will remain in jail while being processed.[90] Article 42 establishes "special facilities" for individuals incarcerated as a result of either preventive imprisonment or a conviction for organized crime.

In April of 2017, members of a political party presented a legislative initiative suggesting that preventive imprisonment be used for individuals found to be in possession of weapons reserved for the exclusive use of the Army. The objective of this proposal, according to those presenting the initiative, is to provide government institutions in charge of justice with appropriate mechanisms to combat organized criminal activity.[91] One of the reasons for this proposed change is that according to information from the 2016 National Survey of Victimization and Perception of Public Security, 45.2 percent of the 17.1 million crimes committed in 2015 involved weapons. In such dangerous environment, Mexican citizens expect severe punishment for those who commit serious crimes. For that reason, congress submitted an initiative to amend Mexico's Constitution, allowing judges to order preventive imprisonment for those found improperly carrying weapons reserved for the exclusive use of the Army.

The last thirty years in Mexico have seen criminal laws changed, sentences for certain crimes have been increased, as have the types of crimes that can trigger the application of preventive imprisonment.[92] Evidently, most of these are serious crimes committed by groups of people engaged in planning and sustaining criminal operations. Consistent with this assertion, we observe that as Congress passed new laws regulating illegal acts carried out by organized criminal groups, preventive imprisonment became compulsory upon the apprehension of suspects believed to have participated in the commission of sophisticated wrongful acts.

Notwithstanding the previous framework, the state is the institution which must pay the risk of evidence spoliation by the accused after his or her appearance in court.[93] Ferrajoli notes that this is a cost that the criminal justice

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through violent means such as weapons and explosives, as well as serious crimes determined by law concerning national security, law against the free development of personality and health. Mara Gómez Perez, La prisión preventiva en el código nacional de procedimientos penales, (Juridicas UNAM, 2015) available at *https://archivos.juridicas.unam.mx/www/bjv/libros/9/4032/22.pdf* visited 11 october 2017.

90 Ley Federal contra la Delincuencia Organizada of 2016. *http://gaceta.diputados.gob.mx/PDF/63/2016/jun/20160614-III.pdf* visited 1 march 2017.

91 *See http://www.milenio.com/leon/ley-armas-delito-diputados-guanajuato-milenio-noticias-leon_0-_946105774.html.*

92 Guillermo Zepeda Lecuona, Informe general seguimiento del proceso de implementación de la reforma procesal penal en México. Estados de Chihuahua, Estado de México, Morelos, Oaxaca y Zacatecas, 2007–2011 (USAID-Ceja Américas, 2012).

93 Luigi Ferrajoli, Derecho y razón teoría del garantismo penal, (6ª. Edición Editorial Trotta, 2004).

system must pay, if it wants to safeguard basic rights, fairness and its *raison d'etre*. Based on the analysis above, it can be concluded that in a country that respects the fundamental rights of those that reside within its borders, the punitive powers of the state can be exercised only once a competent judicial authority has found a defendant guilty (and not before), regardless of the acts of an individual subject to a criminal investigation. Preventive measures must serve a last resort, imposed only if no less restrictive means exist, and they must be always subject to judicial oversight. An indicted person must face trial in freedom and not deprived of it.[94] In this sense, the imposition of preventive imprisonment must not be the result of irrational use of criminal justice institutions; otherwise, the fact that an individual spends time in jail implies the application of an anticipated and unjustifiable penalty.

As we can observe, the worrisome and rapid growth of organized crime in Mexico has given birth to a regime of exemptions, conceived as a response to criminal activity. Such a regime consists of the application of arbitrary detentions and restrictions of freedom, resulting in sanctions being meted out to people who have not been sentenced by a judicial authority. Contradictorily, at the same time as these freedoms are restricted, Mexico is oriented towards democratization, which is understood as a process in which the state, through the recognition of rights for its citizens, enhances freedom.

Criminal justice policy that violates human rights has been created in México. Supporting this paper's hypothesis, we perceive two types of regulations in the Constitution: one protecting individual rights and the other advancing norms allowing severe infringements on these rights, as contained in the Federal Act Against Organized Crime. The inclusion of these norms and methods signifies that the rule of law is toothless when it comes to facing criminal groups. Does this mean that the country is adopting an exceptional regulation, specifically a "combat norm" in which the breach of the rule of law is acceptable? Clearly, measures that restrict freedom and make cruel treatment legal are distant from those of a country where human rights are respected.[95] In Mexico, we have introduced in the law an incomprehensible justification to rights violations, which gives the state and its authorities the authority to strongly infringe the right to personal freedom.[96] It translates into a policy that defeats the guarantees of the criminal justice laws which it intended to migrate.

Ironically, the Constitution protects human rights and sets out a fair criminal justice process at the same time as it allows for arbitrary actions in or-

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[94] *Id.*

[95] Ricardo Morales, *El derecho a la intimidad: grabaciones con videocámaras y microfonía oculta* 4 La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía 1718-1725 (2004).

[96] Raúl Plascencia, *Las Comunicaciones Privadas y la Reforma Penal* in Reforma constitucional y penal de 1996 (Instituto de Investigaciones Jurídicas de la UNAM, 1997).

der to fight organized crime.[97] Authorities are then justified in investigating a harmful, and growing phenomenon using arbitrary methods. This puts the rule of law in crisis, since no one should be prosecuted in an atmosphere in which there are no rights, i.e., criminals should not be investigated through restrictive measures that permit the state to lower itself to the level of transgressors of the law. Therefore, we must consider whether or not there has been a dilution of the principles that protect human rights in the law itself. Is the promotion and acceptance of a norm allowing arbitrary acts the result of the government's inability to guarantee collective security? In any event, the above should not occur in a country where the rule of law is functioning.

Hassemer and Muñoz Conde have stated the purpose of criminal justice is not only to protect legal interests and social coexistence but also to limit the powers of the state to impose severe sanctions that diminish minimum guarantees.[98] In line with this, we sustain that democracies fail in states when authorities are permitted to carry out investigations that compromise freedom, dignity, privacy, and property. Consequently, a country cannot resort to illegal procedures in order to maintain order and peace; a country must not resort to the methods that are used by criminals in order to defeat them.

Even in societies affected by violence and high crime rates, the response to criminality should not consist of limitations on the constitutional freedom of citizens. Laws must guarantee limitations in criminal investigations, as well as the punitive function of the state, in order to prevent arbitrary actions and abuses affecting human rights. Following this analysis, we do not object to the fact that in a criminal investigation authorities need to put in place effective procedures in order to obtain the elements necessary to attain a conviction and demonstrate an illegal act. [99] Such mechanisms, however, need to respect the legal sphere of the citizen and safeguard inherent human rights, such as freedom; otherwise the system would upset the presumption of innocence.

Paradoxically, the Mexican Constitution has created norms that are inconsistent with the rule of law in such a way that different legal practices sanctioned by Mexican laws run contrary to due process and the rights to freedom and privacy. With the inclusion of the norms that allow for preventive detention and preventive imprisonment, what happens to the guarantees of the new criminal procedure that among other aims, is intended to help avoid arbitrariness and abuse on the part of the authorities, so that justice becomes more humane?

It was already mentioned that the decision of the Supreme Court in Case 293/2011 established that the Constitution must prevail when a legal provi-

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[97] Emiliano Borja, Curso de política criminal (Tirant lo Blanch 2003).

[98] Winfried Hassemer & Francisco Muñoz, Introducción a la criminología y al derecho penal, (Tirant lo Blanch 1989).

[99] Blanca M. Buergo, *Exigencias de la moderna política criminal y principios limitadores del Derecho penal* 52 Anuario de derecho penal y ciencias penales, 289 (1999).

sion in an international treaty and the *Carta Magna* are not consistent. The next step in this analysis is to determine the consequence of having two types of constitutional norms: one protecting and the other one infringing on human rights. Is it possible that one constitutional legal provision is superior to another? We must then analyze how both types of legal provisions, that is, the ones protecting human rights and the ones regulating preventive detention as well as preventive imprisonment, have followed the same legislative process established by Article 135 of the Mexican Constitution. According to this Article, one constitutional norm cannot be superior to another.

One of the solutions to this problem in the application of the law is provided by the "constitutional contradictions interpretation doctrines."[100] With these doctrines in mind, the judicial officer must identify the constitutional inconsistency. For "ideological contradictions", a *succeeding law derogates a previous law*. In the Mexican context, for example, the 2011 human rights reform should prevail in any interpretation, since it supports the most recent social ideology and enlightens the rest of the constitutional text.[101] According to the "unconstitutional constitutional law doctrine," the judge must not apply legal provisions infringing basic human rights since they are considered "inappropriate law." Conforming to the "preferred liberties doctrine" means that while some values are in conflict in the text, the superior constitutional rights of freedom and due process should prevail.[102] Pursuant to the "balancing test" doctrine, the coexistence of different values in the constitutional text suggest the judiciary evaluate and infer the commitment or vocation of the Constitution.[103] Finally, in consonance with the "democratic interpretation doctrine" a conflict between rights and values established in a constitutional text should be interpreted in a republican and democratic sense, that is, in the most favorable way possible for human beings. These are constitutional interpretation guidelines that should guide the Supreme Court of Justice or the Constitutional Courts, who are the ones applying the norm.

Another solution is expressed in the criteria of The Mexican Supreme Court of Justice, stating that judges have to compare between constitutional legal provisions before deciding to apply one of them in a specific case. In consonance with the method of judicial interpretation called: "conventionality control *ex oficio*" (in Spanish: "*control de convencionalidad ex oficio")* judicial officials should prefer to interpret a legal provision in a sense which is consistent with the human rights established by the Constitution and international treaties.[104] Besides, Article 1 of the *Carta Magna* and Article 29 of American

[100] Nestor Pedro Sagus, La interpretacion judicial de la Constitución. De la Constitución nacional a la Constitucion convencionalizada (Porrúa, 2016).

[101] *Id.* p. 142.

[102] *Id.* p. 145.

[103] *Id.* p. 146.

[104] Pasos a seguir en el control de constitucionalidad y convencionalidad ex officio

Convention of Human Rights establish a system to interpret human rights according to which the legal provisions that offer the best protection to human beings must prevail.[105]

VI. IACHR Recommendations

Following up on justice procurement and transgressions of human rights in Latin America, the Inter-American Commission on Human Rights (IACHR) emphasizes that Article 2 of the American Convention calls for the suppression of legal provisions and practices violating the guarantees established in the Convention as well as the promulgation of legal provisions advocating full observance of legal guarantees.[106] The IACHR has recognized that states must conduct research on the violation of rights protected by this instrument, including due process and judicial protection.[107] It also reaffirms that whenever state authorities are aware of activities that infringe on human rights protected by the Convention, they must follow up on such practices in an effective way so that perpetrators may be prosecuted and punished, *regardless of the agent violating such individual rights.* In this respect, when state authorities are involved in the misconduct, states must clarify the facts and render judgment.[108] In addition, in the case of more severe human rights transgressions, such as torture, arbitrary detentions and the enforced disappearance of persons, eliminating responsibility is inadmissible and amnesty is not possible.[109]

Contrary to these observations, between 2010 and 2015 Mexico received more than 2,000 torture complaints.[110] In 2015 Mexico reported to the Attorney General that out of the 2,420 cases of torture opened, only 15 cases had achieved convictions.[111] Consequently, the CNDH issued 256 recommendations regarding torture and 442 regarding cruel, inhuman or degrading treat-

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en materia de derechos humanos. Pleno, Semanario Judicial de la Federación y su Gaceta, Décima Epoca, libro III, Diciembre de 2011, No. 160525, p. 552. Mexico.

105 Fernando Silva García, Principio pro homine vs restricciones constitucionales. ¿Es posible constitucionalizar el autoritarismo? 269 (Porrúa 2016).

106 OEA/Ser.L/V/II. Doc. 57 31 diciembre 2009, p. 18.

107 According to article 1.1 of the American Convention on Human Rights.

108 OEA/Ser.L/V/II. Doc. 57 31 diciembre 2009, p. 19. Corte I.D.H., Caso de la Masacre de Pueblo Bello vs. Colombia. Sentencia de 31 de enero de 2006,Serie C No. 140, párrafo 143; Caso Heliodoro Portugal vs. Panamá. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 12 de agosto de 2008, Serie C No. 186, párrafo 144; y Caso Valle Jaramillo y otros vs. Colombia. Fondo, Reparaciones y Costas, Sentencia de 27 de noviembre de 2008, Serie C No. 192, párrafo 101.

109 OEA/Ser.L/V/II. Doc. 57 31 diciembre 2009, p. 19.

110 Información del Estado mexicano, visita de la CIDH, 25 de septiembre de 2015, p. 13.

111 According to informe sobre la situación de derechos humanos en México 2016. at *http://www.oas.org/es/cidh/prensa/comunicados/2016/023.asp* visited 3 December 2017.

ment. Surprisingly, those complaints remain unpunished. The unwillingness to prosecute and sanction the government authorities who engage in those acts is clear.

According to the IACHR, in order to combat criminality, public security policies must limit state interventions by including human rights standards, even in violent societies with high levels of criminality that affects the rule of law.[112] Therefore, public security policies must include human rights protections not only in legal provisions but also in practice, so that states can assume the obligations of the Inter-American System.[113] The IACHR has also affirmed that states must obtain information on their criminal investigations methods in such a way that they can be evaluated permanently. Additionally, there must be proper admission, selection and training mechanisms for state authorities. The IACHR affirms that the departments in charge of public security must work with officials trained in related areas so that they can make proper decisions,[114] and work not only by responding to growing levels of crime and insecurity but also by preventing organized criminality. Likewise, there must be a system to modernize police as part of the construction of a democratic society; consequently police must be encouraged to act according to human rights protection standards and the rule of law. This will help to eliminate impunity and increase the trust of society in governmental institutions.

Having studied the human rights transgressions contained within the justice procurement system, *Table 1* pinpoints the legal provisions and tactics used to fight organized crime that infringe on international treaties.

Table 1. Internationally Protected Human Rights

WHAT RIGHTS DO THESE INTERNATIONAL INSTRUMENTS PROTECT?	UNIVERSAL DECLARATION ON HUMAN RIGHTS	COVENANT ON CIVIL AND POLITICAL RIGHTS	AMERICAN CONVENTION ON HUMAN RIGHTS
RIGHT TO FREEDOM	Article 3	Article 9.1	Article 7.1
PROTECTION FROM ARBITRARY DETENTION OR IMPRISONMENT	Article 9	Article 9.1	Article 7.3

[112] CIDH, Informe Anual 2003, Capítulo IV, paragraph 33 at OEA/Ser.L/V/II. Doc. 57 December 31, 2009, p. 21.

[113] *Id.* 32.

[114] *Id.* 34.

VII. Conclusions

The phenomenon of criminality in Mexico has created a risk to the security of citizens to such a degree that the country has found itself making legal exceptions to the general application of fundamental rights. The practices mentioned in this paper clearly violate human rights, including right to personal freedom, the right to free movement, due process, the right to be protected from arbitrary interference and the restriction of guarantees, as well as the principles of *pro persona*, the principle of legality, and the principle of legal certainty. As has been demonstrated, Mexico gives more importance to the fight against organized crime through the adoption of repressive mechanisms than to the strict protection of human rights of those suspected of participating in criminal activities.

Mexico has justified the adoption of exceptional measures within the national Constitution as necessary in order to fight criminal organizations. These measures have strengthened punitive resources, which have been eroded or reduced. Given high levels of public insecurity, Mexico needs to recognize that reducing violence and corruption are priority issues on which the country should take a stand, however, strategies to achieve this purpose need to adopt procedures to monitor the respect of human rights in the fight against organized crime.

Keeping in mind that Mexican public security policies frequently restrict human rights, legal regulations must balance authorities' powers and the protection of individual rights, and there must be a clear role for authorities in charge of public security. For instance, a stronger emphasis should be placed on prevention, rather than on repression. The law must also emphasize the absolute prohibition of torture and cruel, inhuman or degrading treatment, arbitrary detentions and the arbitrary use of force. Accordingly, authorities in charge of criminal investigations must be trained so that they act with respect for human rights, especially regarding personal freedoms. The Mexican government must also study and follow up on the effectiveness of police measures used to obtain information regarding criminal groups and to reduce the high rates of felonies.

In the international context, Mexico should reaffirm its commitments to international treaties and respect the participation of United Nations (UN) agencies. In this regard, Mexico needs to take into consideration the UN briefs recommending it avoid repressive governmental actions and strengthen democratic institutions to combat crime, as well as respecting UN reports analyzing the consequences of security policies that could lead to a decrease in violence while promoting public security without affecting human rights.

On a regional level, Mexico needs to be aware that the rights protected in the Inter-American system should not be suspended. According to the IACHR, respect for the rule of law, legality, dignity, equality and non-discrimination against individuals are principles that establish limits for state authori-

ties intending to confront criminality and violence. It would be fruitful for the Mexican state to work together with civil society, academia and specialized independent organizations to research cases of human rights violations and to suggest how state authorities can combat criminality.

Last but not least, in sharp contrast to the Internal Security Law (*Ley de Seguridad Interior*), Mexico must encourage the non-participation of the armed forces in matters that correspond to the domain of policing. It is a noticeable challenge that security and organized crime policies need to be consistent with the respect to human rights and the due process, in order to ensure an effective functioning of the justice system. Public security problems in Mexico cannot be addressed by restricting the fundamental rights of the population, subsequently; state authorities should not allow for the coexistence of a legal regime consisting of the application of interventions and sanctions contrary to the protection of human rights when its democratic system is still under construction.

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NOTES

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TOWARDS A GLOBAL INTERNATIONAL FAMILY MEDIATION PROGRAM: THE PROFILE OF A MEDIATOR IN MEXICO

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Abstract: *This note is a brief analysis on one of the most recent developments of the work initiated by the International Social Service, ISS, in order to create a global international family mediation program that will transition from a collaborative process into an international network of specialized mediators, where a mediator profile is fundamental. The author of this article was part of the ISS group that convened in Geneva in May, 2017.*

Keywords: *Alternative Dispute Resolution; Mediation; Collaborative Process; International Network; Profile of International Mediators.*

Resumen: *Esta contribución es una breve presentación en torno al desarrollo más reciente iniciado por los Servicios Sociales Internacionales, ISS, con el objeto de crear un programa global de mediación familiar internacional que transita desde un proceso colaborativo hasta la creación de una red internacional de mediadores especializados donde el perfil del mediador es fundamental. La autora de la presente nota formó parte de este grupo reunido en Ginebra en mayo de 2017.*

Palabras clave: *Medios Alternos de Solución de Conflictos; mediación; proceso colaborativo; red internacional; perfil del mediador internacional.*

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I. Introduction

In 2010, the International Social Service (ISS), an international organization that assists children and families confronted with complex social problems as a result of migration,[1] created a global International Family Mediation (IFM) program[2] made up of diverse senior experts in cross-border family disputes.[3] This program is aimed at better protecting children involved in parental conflicts across national borders by facilitating access to mediation for families, uniting mediators from around the world, and working towards global recognition of their capabilities.[4]

The ISS has been a consistent leader in the discussion around how mediation can be used to assist families, its goal is to establish and promote IFM worldwide[5] and for this reason, from the outset, one focus has been on pro-

[1] ISS is an international NGO composed of 120 national entities assisting children and families confronted with complex social problems across borders. ISS is a global actor in promoting child protection and welfare, helping approximately 75,000 families around the world each year. ISS members carry out training projects, awareness raising and advocacy work in an effort to better respect children's rights.

[2] The International Family Mediation program aims to better protect children involved in parental conflicts across national borders, and is involved in cases of international child abduction, which are steadily increasing.

[3] The program's key objectives are to: 1. Provide reliable information to the three target audiences of cross-border conflicts (families, psycho-social and legal professionals supporting families, and policy makers and government authorities); 2. Raise awareness of the benefits and limits of mediation among these actors, towards the prevention of child abduction; and 3. Support the formalization of cross-border family mediation by bringing together professional networks to discuss qualifications, disseminate information and facilitate access to specialized family mediators.

[4] The ISS General Secretariat undertook an evaluation of its International Family Mediation program with the objective of better informing decisions regarding the future of the program, specifically regarding the program's general direction, scope and the resources required.

[5] The IFM's initial program is composed of five pilot projects between 2011 and 2018. These pilot projects are: 1. Drafting, publication and dissemination of a multilingual guide for families and supporting professionals, translated into 9 languages (completed in 2014); 2. Adaptation of the *Guide* to an online format, multilingual (5 languages) and complemented by a directory by country with human resources in support of parents and professionals involved in cross-border family conflicts (completed in 2016); 3. Drafting and publication of the "Charter for International Family Mediation Processes," and a "How to Use" booklet intended for authori-

ducing comprehensive IFM materials and tools in multiple languages. A good example of this is "Resolving Family Conflicts: A Guide to International Family Mediation."[6]

In Geneva, Switzerland, on October 21, 22 and 23, of 2015, two related academic events were held under the auspices of the Hague Conference on Private International Law, International Social Services (ISS) and the University of Geneva, among others, called "Cross Border Child Protection. Conference and Workshop."

The first event was called "Cross Border Child Protection: Legal and Social Perspectives —Towards Better Protection of Children Worldwide—The 1996 Hague Child Protection Convention in Practice," which gathered more than 190 experts from various regions of the world. The second event was a workshop called "Consultation on the Charter for International Family Mediation Processes," which convened 52 mediators specializing in international family mediation.[7] In 2016, continuing with its global IFM program, the ISS published the "Charter for International Family Mediation Processes," also known as the First Meeting: The Charter.[8] In 2017 this collaboration continued with the aim of creating a Global Network International Family Mediators (The Network), this is also referred to as the Second Meeting: Towards a Global Network of Specialized Mediators. Its conclusions will be presented in 2018 and its action plan spans two to three years.[9]

The Network, which involves both individual mediators and recognized regional and transregional organizations, paves the way to promote and strengthen IFM practice across regions and countries, and to facilitate access

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ties, put together through a collaborative process on the part of mediation practitioners from all continents in three languages (completed in 2017); 4. Creation of an interactive platform for professionals, to share best practices and advance advocacy efforts for International Family Mediation (Scheduled to be completed in June 2018); 5. Creation of a global network of International Family Mediators (Scheduled to be completed in October 2018). See also the "Terms of Reference" of the evaluation of the ISS Global Program on International Family Mediation.

[6] A guide aimed at families and professionals in the field, published in 2014 and translated into 9 languages. This guide has several strengths, particularly that it is faithful to the legislation on the matter and attends to the emotional effects that the abduction of children causes for all the members of the family. The Guide was published in 2014. See: *www.iss-usa.org*.

[7] The author of this paper was invited to participate as an international family mediator.

[8] For ISS, *The Charter* is at the core of cross-border family mediation. In the words of Cilgia Caratsch, Coordinator of the ISS Mediation Unit, The Charter, the key ideas over the middle and long term were to: 1. Implement the 10 principles, including in regions/countries where mediation is currently developing; 2. Be an incentive for training initiatives, or training modules, to propose methods and curricula to train family mediators towards the respect of the 10 principles; and 3. Reinforce cooperation between mediation practitioners and authorities in each region and country. See: *www.ifm-fmi.org*.

[9] ISS-ISI, Vers la Création d'un Réseau Global de Médiateurs Familiaux Internationaux, (2017), *available at www.iss-ssi.org/images/MFI/fr/RAPPORT_FINAL_FR.pdf*.

to mediation for families and for the judiciary.[10] The Network intends to help promote existing expertise and regional and transregional networks, as well as existing training offers, in order to expand professionalization and access to information for practitioners in different regions;[11] it is not intended to duplicate already existing networks.[12] A global group cannot promote a specific model of cross-border family mediation, rather the idea is to uphold the diversity of family mediation practice around the world. However, a global group can define strong and rigorous principles for cross-border mediation, which can be respected worldwide.

This note was prepared in order to explain the important steps forward in global mediation, in advance of second ISS meeting on the creation of an international network of specialized mediators that took place May 7 to May 9, 2017 in Geneva. This is part of a collaborative process/follow-up project that is part of the global international family mediation program initiated by ISS in 2010.[13]

In what follows we present a description of mediation in Mexico[14] in a manner that is consistent with the notes structure, emphasizing the general aspects of mediation in Mexico as well as the particular aspects of the profile of mediators in Mexico City, before concluding with an Annex containing a completed preparation sheet delivered at an ISS meeting.

II. A Description of Mediation in Mexico

Article 17 of the Constitution of Mexico establishes that "the law will consider alternative dispute resolution mechanisms."[15] Mexico is a federation or-

[10] ISS-ISI. "Terms of Reference Interim Steering Committee." *www.ifm-mfi.org*.

[11] *Idem.*

[12] We are thinking, specifically, about MIKK, *www.mikk-ev.de*; Reunite, *www.reunite.org* or crossborderfamilymediator.eu, which promote the same model of cross-border family mediation, that is, at the core of all their endeavors (bilingual, bi-professional, male/female, co-mediation model). Certification is granted through participation in their own training initiative. Many mediators, other professionals and authorities dealing with cross-border family disputes around the world feel that this particular model is too costly and complicated to set up and for this reason, among others, the idea has arisen to create a Global Network that is more comprehensive in learning about knowledge and practice.

[13] As we have mentioned elsewhere (missing citation) a good collaboration between different stakeholders is always necessary for international family mediation. Indeed, The Hague Conference on Private International Law (HCCH) has always collaborated with organizations that have an important degree of specialization in the practical field. This is also the case with the ISS, and is part of the feedback that both organizations have been sharing during the last few years.

[14] See also: Nuria González Martin, Mexico-US Cross-Border Family Mediation: Legal Issues in Mexico, 9 Mex.L.Rev. 129-139 (2017).

[15] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended June 18th

ganized into 32 States, almost every one of which has legislative sovereignty over a significant number of matters, including the use of Alternative Dispute Resolution (ADR). In regards to legislation on ADR, all 32 states have laws in which the possibility of creating Alternative Justice Centers (AJC) is considered. Such AJCs would be located within the Supreme Court of each state. Family Law is a local matter, not federal. Thus, the 32 State Legal Codes would have to be amended, nonetheless, at present, there is a proposal for a Decree to add a fraction to Article 73 of the Mexican Constitution concerning ADR, so Congress could enact a General ADR Law. This law would then become compulsory for all states, as well as for the federation. The bill for a General Law on Alternative Dispute Resolution Mechanisms, issued on February 15th, 2017, does not deal with the issues that need to be addressed in order to accomplish the goals set by the constitutional reform, as no legal basis would be established to enable the plans contained in the Presidential Initiative.[16]

Mexico has no general rules guiding people who act as mediators; and while 31 states have specialized entities capable of providing ADR services (one of which is not fully operational, in Guerrero state); 27 states have formalized ADR policies in their local Congress.[17] Most states only require that these facilitators be trained to steer mediation proceedings. However in other states like Mexico City,[18] there are more specific requirements.[19]

In Mexico City there are three different types of mediators: Public Mediators, who are public servants that depend upon the Alternative Justice Cen-

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2008, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[16] On December 12th, 2017 the Parliamentary Gazette of the House of Representatives published the "Decreto por el que se expide la Ley General de Mecanismos Alternativos de Solución de Controversias y se reforman, derogan y adicionan diversas disposiciones del Código de Comercio, en materia de conciliación comercial."

[17] Aguascalientes, Baja California, Campeche, Chiapas, Chihuahua, Mexico City, Coahuila, Colima, Durango, Mexico State, Michoacán, Guanajuato, Hidalgo, Jalisco, Nayarit, Nuevo León, Oaxaca, Puebla, Quintana Roo, San Luís Potosí, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán and Zacatecas.

[18] In Mexico, nine states consider the mediator as the sole operator; 13 states regard operators as mediators as well as conciliators and in some cases even as arbiters; six states name the operator as a "specialist" or some other denomination; and nine states recognize private mediation.

[19] For example, Aguascalientes requires that its mediators-conciliators have degrees in Law, Sociology, Education or any related social science. This also applies to private mediators. In Baja California Norte, specialists (mediators) must be college graduates, but does not specify any particular field. Baja California Sur has public and private mediators. In Campeche, mediators can be public or private, and must have a professional certificate (*cédula profesional)* in social sciences or humanities. In Chiapas mediators are public and independent specialists. They must have a professional certificate in social sciences (arbitrators must have a degree in law). In Jalisco, there are public and private mediators with only a professional certificate in an unspecified field. Tamaulipas does not require a college degree, but requires accreditation in mediation training, there is both public and private mediation. In Yucatán, mediators must have a professional certificate, but no mention is made of a particular degree, and there is also public and private mediation.

ter of their corresponding jurisdictional authority; Certified Private Mediators, who are issued credentials and are supervised by the Alternative Justice Center of their jurisdictional authority; and Private Mediators, who act on a freelance basis. Public Mediation and Certified Private Mediation have the capacity to issue binding force regarding agreements and in the case of non-compliance mediation settlements are enforceable in Mexican federal court.

Article 18 of the Alternative Justice Law of the Mexico City High Court (MCHC) establishes the requirements to act as a public mediator:

> To be a public mediator assigned to the Centre [it is necessary to]:
>
> I. be a Mexican citizen in full exercise of his or her civil and political rights and be at least twenty-five years of age on the day of his or her appointment;
> II. have a degree in law and a professional certificate, as well as a minimum of two years of provable professional experience in any of the matters under the jurisdiction of the Centre;[20]
> III. apply and pass the corresponding selection process, taking exams and training courses (…)

It should be noted that public mediators are non-union employees. Thus, mediators do not belong to the Courts' labor union. Mediators hold their position for three years. To be renewed for another three-year term, he or she must pass a work skills examination. The Mexico City Judicial Council is the body that ultimately decides whether a mediator can remain in his or her position.

Alternative Justice Center directors, as well as Court Officers who meet the legal requirements and receive the appropriate training, can be registered as mediators. Their status as public mediators must be ratified every three years and is lost upon leaving the Centre or not being a Court Officer, accordingly. In order to act as a mediator in criminal matters, Federal Law must be followed. Then there is the figure of private mediator, who is an individual trained to act as mediator who has received official certification to carry out mediation settlements. In order to practice, a mediator must be duly certified and registered by the Alternative Justice Centre in his or her state. Basically, a private mediator must fulfill the same requirements as those for a public mediator, he or she must hold a college degree (but not necessarily a law degree). However, private mediators must also comply with the conditions set forth in Article 18 of the Alternative Justice Law of the MCHC:

[20] This is an issue we have repeatedly questioned in our papers (missing a reference) we feel that in a globalized world with the overwhelming mobility in which we are immersed, the requirement for a a professional certificate is unseemly. At the moment professional certificates are issued only for degrees obtained in Mexico. In this particular case, it applies to specifically to degrees in law and entails a drawn-out, tedious process that is incomprehensible and unattainable unless it is done through a writ of amparo.

(…)
III. Have a good professional reputation and acknowledged integrity;
IV. Not have been convicted by a final judgment of an intentional crime that merits corporal punishment;
V. Take and pass an examination of work skills;
VI. Pass the training courses for certification and registration,
VII. Complete the practicum hours at the Centre as established in the Rules/ Regulations.

The certification and registration granted by the Centre will be valid for three years. To renew certification and registration, the work skills examination must be taken and passed. The provisions on the matter stipulated by the Rules and Regulations must also be met.

There is a creditable innovation in the legal reform of June 19, 2013, which states that public mediators who cease to be civil servants of the Court can be certified and registered as private mediators. Private mediators cannot handle criminal cases. In Mexico City, public mediators compete for their positions. They must take a course, and are tested by both the MCHC Institute of Legal Studies and the MCHC Alternative Justice Centre. The final decision on who will form part of the Centre as a mediator lies with the Mexico City Judicial Council, at the discretion of the General Director of the Centre. The public mediator attends those who use this service in turn; that is, the parties do not choose their mediator, but can refuse him/her if he or she has a conflict of interest in the case.

Private mediators take a 147-hour long diploma course jointly organized by the MCHC Alternative Justice Centre and the MCHC Institute of Legal Studies. All the applicants pass a diploma course and examinations before they can be certified and registered by the MCHC Alternative Justice Centre. They are evaluated and must complete 40 hours of practicum under the supervision of public mediators.[21] According to Provisional Article 5 of the Decree of June 19, 2013, by which various provisions of the Alternative Justice Law of the MCHC were reformed, amended and repealed, private mediators with current certification and registration before the MCHC must take a training and refresher course in order to maintain their registration.[22]

By contrast, the choice of private mediator is open. Parties can choose the mediator who most appeals to them from an official list published in the MCHC Court Bulletin. Related to the 2011, 2013 and 2015 legal amendments, there are some new features regulating mediation that must be under-

[21] Between 2009 and 2012, a 120-hour course was given at the MCHC Alternative Justice Centre with a 10-hour practicum instead of the above-mentioned diploma course.

[22] See: Curso de capacitación y actualización para mediadores privados certificados [Training and updating course for certified private mediators] Boletín Judicial, Órgano Oficial del Tribunal Superior de Justicia del Distrito Federal, tomo CXCII, No. 152, September 10 2013, pp. 9-10 (Mex.).

scored. Legally, mediation agreements are deemed as *res judicata*, forming part of an official record that can be annotated at the property registration office. The Law acknowledges that these agreements are comparable to judicial resolutions. Private mediation is well defined. Private mediators are considered assistants to the court and can certify the agreements settled by the parties (in public faith). They are no longer required to be lawyers as was previously required. In addition, some judicial clerks who execute judges' orders outside of the court can act as mediators. In Mexico City's High Court, the Alternative Justice Center is enabled to develop projects and programs in other social areas, not only regarding judicial matters. The Center may pursue this goal in collaboration with public and private institutions, which can be local or foreign. In addition, mediation may be used to prevent legal controversies. Finally, the law establishes that mediators may associate through colleges.

The supervision of Certified Private Mediation carried out by Alternate Justice Centers includes:

— Managing the records and files of the mediators;
— Randomly monitoring and verifying mediation services either by default or due to a complaint filed against a private mediator;
— Revising and, if appropriate, recording mediation agreements;
— Determining whether mediators require psychological support as a result of their constant exposure to human conflict;
— Conducting quality of service surveys among mediated parties upon process completion.

Annex: ISS Preparation Sheet: The Profile of a Mediator in Mexico

Please briefly describe for, and inform the audience about the most common context for your practice (where, with whom, under which circumstances):

The most common practice in Mexico is to run mediation processes in court-annexed programs. State courts have developed departments or Alternative Justice Centers which are in charge of these programs. Paradoxically, Judges do not usually encourage the parties to try mediation. Most people who use mediation do so because other people have recommended that they try this method as an effective way of solving problems. Mediation is not mandatory in Mexico.

Do you work in huge cities or more remote places; with different kinds of families or those that live under similar social circumstances with similar problems and conflicts; in contexts or situations such as migration or armed conflict?

In Mexico, we mediate in large and small cities as well as in rural communities. Many types of families have undergone mediation processes: single parents, gay or lesbian couples, married or unmarried, etc. We understand family as a complex organization composed by several individuals recognized as such by law.

What are the main type of issues that you mediate?

Child custody, child maintenance support, alimony, and family disputes in general. Mediation is used primarily to solve the same sort of disputes that are litigated in state courts, so long as the *ordre publique* is not affected.

Are agreements coming out of mediation mostly rendered legally binding?

We have not yet established mediation processes in Federal Law. In most states, mediation agreements do not only have binding force, they are considered *res judicata.*

Do you include children in mediation, or stress the child's perspective during mediation?

We have to analyse this on a case by case basis. Sometimes, exposing a child to a mediation process may be counterproductive and contrary to that child's best interest. Children's interests are always considered, even if they do not participate in the process.

Do you include extended family, community or religious leaders, or any other third parties (e.g. representatives of welfare services) in mediation?

As above, we have to analyse this on a case by case basis. In restorative practices it is more common to call stakeholders into the process.

Please, give an example of how you conduct mediation.

- Introduction;
- Listen to the parties;
- Screen the case for suitability;
- Ask parties for their consent.
- Explain the ground rules that must be followed in a mediation process.
- Move parties from positions to their interests;
- Explore possible solutions (Brainstorming);
- Reality check the feasibility of their proposals;
- Reach an agreement.

Where do you mediate (premises)?

Basically inside of courts, but not in the same space where trial hearings take place. As mentioned, we have built specialized infrastructure for mediation sessions called Alternative Justice Centers (AJC).

Do you have access to a good internet connection or other communication technologies (to potentially conduct mediation at distance)?

Only in wealthier states, but even in these states some mediation centers located in rural communities or in impoverished urban places do not have access to the internet, much less internet that is reliable and high speed.

Do you need to travel to conduct mediations, and who would pay for it?

Travel expenses, if any, are usually covered by the parties. There is also a desire to implement or encourage online dispute resolution.

Do you use co-mediation; and caucuses?

Yes.

Do you proceed to screenings for suitability, and if yes, how you do them?

Yes. The screening process includes, but is not limited to the following: the mediator has to be sure that the dispute is not contrary to the *ordre publique*; that the parties are willing to participate in the process voluntarily, and to show the parties their BATNA (Best Alternative to a Negotiated Agreement).

What is your relationship with authorities?

As a Certified Private Mediator and External Counselor at the Mexican Ministry of Foreign Affairs, I have an excellent personal relationship with the Mexican federal authorities. As Certified Private Mediators, our relationship with judges is informal, since they can recommend mediation to the parties, but there is no mandatory mediation in Mexico. A formal relationship is established with courts once the mediation agreement, which is deemed to be res judicata, is achieved and presented for execution.

Please briefly discuss which principles in *The Charter* are the most challenging to maintain?

First, decision making by the participants. Recently in Mexico, there has been an increasing trend of simulating mediation processes. People can easily become certified as mediators, but they generally lack supervision. At the end of the day these "mediators" (who are basically lawyers) essentially sell judicial resolutions (mediation agreements are *res judicata*) to the parties. They give advice to the parties regarding what they deem to be best for themselves. This simulation is dangerous.

Second, the qualification of International Family Mediators. Very little has been done in Mexico on this point. Currently just one state has had training (carried out by myself) in International Family Mediation. There is a lot of work to be done in this area.

Third, developing the cultural awareness and sensitivity of mediators. Only some mediators in states with a strong presence of Indigenous people have developed certain degree of cultural awareness and sensibility. There is a lot of work to be done on this issue, especially in International Family Mediation, as we sometimes must do bi-cultural mediations.

What makes you competent and qualified in your practice and/or in your country?

Is it training?

Yes.

Is it an accreditation or certification?

Yes.

Is it your personal experience and skills?

No, but these should be taken into consideration.

Is it an appointment from a Ministry or another authority or public service?

No.

Are you utilising *The Charter* in your practice in any way, including sharing it with authorities or persons coming to mediation; could *The Charter* add to your qualification (if you undersigned it)?

I trained Public Mediators to be certified in International Family Mediation and *The Charter* was a key tool. First it was introduced to the mediators to become acquainted with it, later I required that it be used in their practice. Mediators thus trained will in turn certify others using *The Charter.* In parallel, *The Charter* is being distributed to Mexican federal authorities and designated judges who work on International Parental Child Abduction.

Please describe one aspect of your practice which you find particularly effective.

Decision making by the parties. The mediator is best viewed as a facilitator who helps the parties to improve their communication skills and their negotiating approach. If the agreement is the result of the most intimate conviction of the parties, the likelihood of compliance is very high. If a third party intervenes excessively, the likelihood of compliance diminishes drastically.

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