Mexican Law Review

New Series

VOLUME VIII

Number 2

January- June 2016

UNIVERSIDAD NACIONAL
AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES
JURÍDICAS

Mexican Law Review

New Series

January - June 2016 Volume VIII, Number 2

Mexican Law Review, nueva serie, vol. VIII, núm. 2, enero-junio de 2016, es una publicación semestral editada por la Universidad Nacional Autónoma de México, Ciudad Universitaria, Coyoacán, 04510 Ciudad de México, a través del Instituto de Investigaciones Jurídicas, Circuito Maestro Mario de la Cueva s/n, Ciudad Universitaria, Coyoacán, 04510 Ciudad de México, teléfono 5622 7474, correo electrónico: mlr.iij@unam.mx. Editor responsable: John Mill Ackerman Rose. Certificado de Reserva de Derechos al Uso Exclusivo núm. 04-2010-102014301100-102. ISSN: 1870-0578.

Primera edición: 10 de enero de 2016

Hecho en México

Mexican Law Review se encuentra registrada en los siguientes índices y bases de datos: Sistema de clasificación de Revistas Mexicanas de Ciencia y Tecnología-Conacyt (competencia internacional); SCOPUS; Latindex; Clase; Periodica; scielo (Scientific Electronic Library Online); Biblat (Indicadores Bibliométricos); Dialnet; Matriu d'Informació per a l'Avaluació de Revistes (MIAR).

ARTICLES

NOTE

ASSESSING ATTITUDES TOWARD MUNICIPAL POLICE IN MEXICO DURING DEMOCRATIC TIMES: A CASE STUDYING

Saúl SANDOVAL PEREA[1]

ABSTRACT. *One of the key roles of States is to act as primary authorities over their territories and societies to establish order and provide security. Nevertheless, the processes of establishing and maintaining order and social control are complex. As such, different groups and institutions are required to interact effectively to encourage collective behavior. Among the different State agents, the police are directly in charge of fighting crime as well as maintaining social control. Their role in the development of democratic political systems is indeed significant. Police officers' varying degrees of respect for civil, political, and human rights affect the tone of the relationship between the public and the government. Furthermore, the performance of the police in combating crime and violence can serve as an indicator of government competence. Today, the acceptance of democratic governance around the world has achieved an appeal seldom seen in modern history, yet the spread of democracy has not necessarily allowed all States to establish or maintain order and provide social control. This situation has been especially true for emerging and transitional democracies, as manifested through increasing problems of insecurity. Mexico is one such case of a nascent democracy facing significant insecurity challenges. In an attempt to learn more about the phenomenon of insecurity, this study examines citizens' perceptions of the Mexican police at a municipal level. By using different approaches of criminal justice as well as a cross-sectional survey design, the study finds that police integrity, political legitimacy, and the perception of escalating neighborhood crime significantly affect varying attitudes toward the police. According to the results, Mexican police administrators and policymakers in general ought to place special attention on issues of integrity and political legitimacy to improve security and other areas of public policy in a country that is currently entering the democratic stage.*

KEY WORDS: *Police, citizen insecurity, integrity, political legitimacy, democracy.*

---

[1] Ph.D. Political Science, Claremont Graduate University (CGU); M.A. Public Policy, CGU; M.A. International Affairs, Carleton University (NPSIA); B.A. International Trade, ITESM. He has taught both in Mexico and the United States on U.S.-Mexico relations and Latin American politics and economics. The author thanks the editors and anonymous reviewers for their helpful suggestions for this article. Contact: *saul.sandovalperea@alumni.cgu.edu*.

RESUMEN. *Una de las funciones clave de los estados es actuar como autoridades principales sobre sus sociedades y territorios para establecer el orden y proveer seguridad. Sin embargo, los procesos para el establecimiento y mantenimiento del orden y control social son complejos. Así, diferentes grupos e instituciones necesitan interactuar de forma efectiva para promover el comportamiento colectivo. Dentro de las diferentes instituciones del estado, las policías se encargan directamente de combatir el crimen y también de mantener el control social. El papel de la policía en el accionar de los sistemas políticos democráticos es vital. Los diferentes grados de respeto que los policías ejercen sobre los derechos civiles, políticos, y humanos afectan la relación entre la ciudadanía y el gobierno. Además, el desempeño de la policía en el combate al crimen y la violencia puede servir como indicador de la eficiencia del estado. En la actualidad, la aceptación de los sistemas de gobierno democráticos ha generado un interés raramente visto en la historia reciente, pero la propagación de la democracia no ha necesariamente permitido a todos los estados establecer o mantener el orden y proveer el control social. Esta situación se ha manifestado primordialmente en las democracias emergentes o en transición a través de problemas crecientes de inseguridad ciudadana. México es uno de esos casos de una democracia naciente que enfrenta retos importantes de inseguridad. En un intento para conocer más sobre el fenómeno de la inseguridad, este estudio examina percepciones ciudadanas sobre la policía a nivel municipal en México. A través del uso de diversos enfoques de justicia criminal y encuestas, el presente trabajo reporta que la integridad policial, la legitimidad política, y la percepción colectiva de que el crimen en la colonia está en aumento afectan de manera importante las percepciones del público con relación al desempeño de la policía. De acuerdo con estos resultados, los mandos policiales así como los servidores públicos en general deberían poner especial atención en los asuntos de integridad y legitimidad política para mejorar la seguridad y otras áreas del quehacer gubernamental en un país actualmente adentrado en su etapa democrática.*

PALABRAS CLAVE: *Policías, inseguridad ciudadana, integridad, legitimidad política, democracia.*

TABLE OF CONTENTS

I. INTRODUCTION

Among the different State agents, the police are directly in charge of combating crime and maintaining social control.[2] Police actions "arguably are the most visible embodiment of the government's exercise of control and authority."[3] Police officers exercise wide-ranging discretionary powers in their operations and become gatekeepers in the sense of deciding who will undergo further legal intervention by other social control agencies.[4]

The role of the police in the development of democratic political systems is indeed significant.[5] Varying degrees of police officers' respect for civil, political, and human rights affect the mood of the relationship between the public and the government. Furthermore, the performance of the police in combating crime and violence can serve as an indicator of government competence. Limited police achievements in these public policy areas lead

---

[2] MERCEDES S. HINTON, THE STATE ON THE STREETS: POLICE AND POLITICS IN ARGENTINA AND BRAZIL 5 (2006).

[3] Blaine Bridenball & Paul Jesilow, *What Matters: The Formation of Attitudes toward the Police*, 11 POLICE QUARTERLY 151 (2008).

[4] Douglas A. Smith & Christy A. Visher, *Street-Level Justice: Situational Determinants of Police Arrests Decisions*, 29 SOCIAL PROBLEMS 167 (1981).

[5] John Bailey & Lucía Dammert, *Public Security and Police Reform in the Americas*, *in* PUBLIC SECURITY AND POLICE REFORM IN THE AMERICAS 2 (John Bailey & Lucía Dammert eds., 2006).

citizens to withdraw their support from the current democratic regime, thus affecting its legitimacy and viability.[6] Moreover, the effective police agency performance in combating crime and maintaining social control hinges on citizen cooperation.[7] Citizens can help the police fight crime and violence by voluntarily reporting crimes or identifying criminals.[8] Most importantly, citizens can significantly contribute to maintaining public order by complying with the current societal laws and rules since "the police cannot be everywhere at every moment to prevent crime or intervene."[9]

Studies also show that the way in which citizens evaluate the police may impact police enforcement efforts to fight crime and maintain order.[10] Public dissatisfaction with the police tends to dissuade citizens from cooperating with the legal authority on crime-related activities. In more general terms, perceptions about the police may determine whether the public supports or opposes the current political and legal order.[11] Those who view the police in positive terms tend to be more engaged in the political system or to manifest overall approval of the government. In contrast, negative views about the police may lead citizens to express dwindling confidence in the State's legitimacy.[12]

Politically speaking, the current acceptance of democratic governance around the world has acquired an appeal seldom seen in modern history.[13] For some authors, "democratization has

---

[6] *Id*.

[7] James Hawdon, *Legitimacy, Trust, Social Capital, and Policing Styles: A Theoretical Statement*, 11 POLICE QUARTERLY 182 (2008).

[8] Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 85 (2004).

[9] Heath Grant et al., *The Role of the Police in Promoting the Rule of Law*, *in* DEMOCRATIC POLICING IN TRANSITIONAL AND DEVELOPING COUNTRIES 201 (Nathan Pino & Michael D. Wiatrowski eds., 2006).

[10] Bridenball & Jesilow, *supra* note 2, at 152.

[11] *Id*. at 151.

[12] *Id*.

[13] RONALD A. FRANCISCO, THE POLITICS OF REGIME TRANSITIONS 61 (2002).

become one of the dominant international issues of this new century."[14] Yet, the spread and intensification of democracy have not necessarily allowed all States to establish or maintain order and provide social control. This situation has been especially true for emerging and transitional democracies. For instance, Latin American democracies generally lack effective social control systems as reflected in the growing problems of common crimes and organized crime.[15] Indeed, the fact that citizen insecurity is on the rise makes Latin America the "most violent region" in the world.[16]

Among all Latin American countries, Mexico has been one of the most adversely affected by crime and violence in recent years.[17] Indeed, some authors state that Mexico "finds itself in the midst of the most troubling period of criminality in its modern history."[18] The Mexican criminal justice system not only faces rising problems of violent common crimes —mainly robbery, property crime, and assault— but also high-profile violence linked to organized crime, such as drug trafficking, arms smuggling, money laundering, and kidnapping.[19]

These increasing problems of insecurity have generated tremendous challenges for Mexico's criminal justice system.[20] Most importantly, though, they have unveiled the system's significant weaknesses and the troubling dysfunctions of some law enforcement agencies like the police.[21] Generally speaking, Mexican police agencies suffer from funding limitations and

---

[14] Nathan W. Pino & Michael D. Wiatrowski, *Introduction*, *in* DEMOCRATIC POLICING IN TRANSITIONAL AND DEVELOPING COUNTRIES 3 (Nathan Pino & Michael D. Wiatrowski eds., 2006).

[15] Richard L. Millett, *Crime and Citizen Security: Democracy's Achilles Heel*, *in* LATIN AMERICAN DEMOCRACY: EMERGING REALITY OR ENDANGERED SPECIES? 252 (Richard L. Millett et al. eds., 2009).

[16] William C. Prillaman, *Crime, Democracy, and Development in Latin America*, XIV POLICY PAPERS ON THE AMERICAS 3 (2003).

[17] Millet, *supra* note 14, at 257.

[18] Robert O. Varenik, *Exploring Roads to Police Reform: Six Recommendations*, *in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 393 (Wayne A. Cornelius & David Shirk eds., 2007).

[19] David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEXICAN LAW REVIEW 191-2 (2011).

[20] Robert A. Donnelly & David A. Shirk, *Introduction*, *in* POLICE AND PUBLIC SECURITY IN MEXICO 1 (Robert A. Donnelly & David A. Shirk eds., 2010).

[21] *Id.*

problems of coordination that hinder effective efforts to combat crime and violence.[22] Furthermore, the majority of citizens display limited trust in the police.[23] To illustrate this, surveys in Mexico City indicate that 70 percent of the respondents do not trust the police.[24] They also show that approximately 88 percent of all of the crimes committed in Mexico City are not reported to legal authorities. In addition, 57 percent of those citizens who decided to report crimes were afraid to do so.[25] This disconnection between the public and the police has evidently hampered police actions to adequately face the increasing insecurity.[26] It has also undermined citizens' confidence in the country's justice sector.[27]

Why does this gap exist between the public and the police in addressing problems of insecurity in Mexico? This article addresses the question by focusing on how individuals form opinions about police in Mexico, and specifically about the performance of municipal police agencies. A study of public views of local or municipal law enforcement agencies in Mexico is warranted for a number of reasons. Municipal institutions play a significant role in fighting crime and violence.[28] Although serious crimes like drug trafficking fall under federal jurisdiction, local authorities can effectively contribute to federal efforts to maintain social control by focusing on other types of crimes.[29] Scholars note that approximately 95 percent of all the crimes committed in Mexico fall under the realm of state criminal law.[30] Furthermore, local or municipal police departments tend to rely on better information about a

---

[22] David A. Shirk & Alejandra Ríos Cázares, *Introduction: Reforming the Administration of Justice in Mexico*, *in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 19 (Wayne A. Cornelius & David Shirk eds., 2007).

[23] *Id*. at 8.

[24] GRANT ET AL., *supra* note 8, at 201.

[25] *Id*.

[26] *Id*.

[27] DONNELLY & SHIRK, *supra* note 19, at 1.

[28] Allison Rowland, *Assessing Decentralization: What Role for Municipal Government in the Administration of Justice? in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 458 (Wayne A. Cornelius & David Shirk eds., 2007).

[29] *Id*.

[30] Guillermo Zepeda Lecuona, *Inefficiency at the Service of Impunity: Criminal Justice Organizations in Mexico*, *in* TRANSNATIONAL CRIME AND PUBLIC SECURITY: CHALLENGES TO MEXICO AND THE UNITED STATES 72 (John Bailey & Jorge Chabat eds., 2002).

neighborhood's crime level and have the potential to improve their relation with the community through their performance.[31] Thus, it appears that most of the efforts to reduce Mexico's problems of crime and violence should concentrate on the subnational level instead of the national one.[32]

Using quantitative approaches of criminal justice, a cross-sectional survey design, and multivariate analyses, this article finds that variables like police integrity, political legitimacy, and the perception that neighborhood crime is escalating significantly affect the various attitudes toward the police. According to the results, Mexican police administrators and policymakers in general ought to place special attention on issues of integrity and political legitimacy to improve security and other public policy areas in a country currently transitioning to a democratic stage.

This article seeks to positively contribute to the emerging literature on public perceptions of police at a municipal level in Mexico. It is especially important to emphasize that correct generalizations are difficult to achieve due to marked regional differences among Mexican municipalities. Thus, what follows should be considered an exploratory and provisional interpretation of the topic at hand.

II. REVIEW OF THE LITERATURE

1. *Attitudes toward the Police*

Arguably, the police are the most visible and obtrusive governmental control agency that interact with the general public.[33] Citizens come into more frequent and direct contact with the police than they do with other state institutions dealing with control and authority. Walker and Richardson capture this relationship well in explaining that:

> Whatever the citizen thinks of the police, they can hardly be ignored. Whereas other public bureaucrats are often lost from the public's view, locked in rooms filled with typewriters and anonymity, policemen are out in the world. They are on the sidewalks, and in the streets, in the

---

[31] ROWLAND, *supra* note 27, at 444.

[32] John J. Bailey & Wayne A. Cornelius, *Reforming the Administration of Justice in Mexico*, *in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 500 (Wayne A. Cornelius & David Shirk eds., 2007).

[33] Paul R. Benson, *Political Alienation and Public Satisfaction with Police Services*, 24 PACIFIC SOCIOLOGICAL REVIEW 45 (1981).

schoolyard, and in the shopping mall, cruising, strolling, watching, as both state protectors and state repressors.[34]

Some observers may claim that the above-mentioned routine police activities are relatively ordinary or trivial.[35] Nevertheless, some researchers argue that these police functions may indeed represent valid opportunities for continually assessing the way in which the police transfer the core values of the current political regime to the public.[36] In this sense, most citizens tend to grant legitimacy to the State and display willingness to respect the Rule of Law contingent on their relative perceptions of police personnel behavior. Owing to the close relationship between the public and the police, it is therefore important for administrators to identify citizens' feelings toward the police in the hope of achieving collective goals such as that of social control. By identifying these public attitudes, administrators may also be in a position to more accurately gauge levels of citizen approval of the existing legal and political order.[37]

Policy analysts rely on different instruments to assess police performance.[38] Examples of these instruments are police station records, crime statistics, and surveys. Yet, the use of surveys is more common owing to some reliability problems regarding the production of police and crime statistics.[39] In some cases, police departments may disseminate inaccurate statistics in order to protect or advance their own particular bureaucratic agendas. Policy analysts also prefer conducting citizen surveys because the information is obtained directly from those who receive police services. The results of citizen surveys can provide useful information to attempt to improve relations between the public and the police. They can also serve to increase the level of police accountability.[40]

---

[34] Walker & Richardson are quoted in Benson, *supra* note 32, at 46.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] *Id*. at 47.

[39] *Id*.

[40] Ben Brown & William Reed Benedict, *Perceptions of the Police: Past Findings, Methodological Issues, Conceptual Issues and Policy Implications*, 25 POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES AND MANAGEMENT 546 (2002).

However, scholars argue that studying public attitudes toward the police may represent a complex enterprise.[41] To begin with, a multitude of variables affect how citizens view the police. The complexity increases because many societal groups differ in the way they conceptualize certain aspects of policing. Also, analysts often use different measures to assess attitudes toward the police. Furthermore, citizens tend to discriminate between diffuse and specific support when evaluating the police.[42] They offer diffuse support when judging police performance in general terms and specific support when focusing on specific police practices, policies, or personnel. In some situations, the public may grant low levels of specific support to the police owing to aggressive police action, such as an arrest, but still evince favorable opinions toward the agency as a whole. Moreover, even though the impact of some variables relating to public perception of the police is consistent across studies, other variables still offer inconclusive results.[43] Researchers are still unable to clearly understand the interactive effects among these variables.[44] This relative inconsistency in results precludes scholars from sharing a common methodological framework and calls for caution when attempting to draw theoretical generalizations on the study of attitudes toward the police. Nevertheless, the relatively scant empirical evidence available on perceptions of the police may still prove useful for administrators in terms of policy development.[45]

Researchers generally study attitudes toward the police by considering variables at the individual, police-related, and contextual levels of analyses.[46] For instance, studies at an individual level reveal that variables such as age, gender, ethnicity, education, income, and social class all have an impact on perceptions of the police.[47] Younger people and those with higher levels of education, along with minorities, are more likely to display negative attitudes

---

[41] *Id*. at 563.

[42] *Id*. at 564.

[43] *Id*. at 567.

[44] *Id*. at 568.

[45] *Id*.

[46] *Id*. at 547, 555.

[47] Bridenball & Jesilow, *supra* note 2, at 157.

toward the police.[48] The gender variable shows that women tend to have more favorable attitudes toward the police than men.[49] In regards to variables like income and social class, some analyses yield inconclusive results, yet it is generally accepted that more affluent citizens or those belonging to a higher social class hold more favorable views toward the police compared to those from lower classes.[50] Some of the police-related variables include individuals' prior contact with the police.[51] Additionally, citizens expect the police to be honest and provide equal treatment to all regardless of gender, ethnicity, or social class.[52] Those who have experienced positive interaction with the police generally express approval towards this institution compared to those who have had negative encounters.[53] Moreover, citizens evince more negative views toward the police when police officers initiate contact with the public (involuntary contact), but not when the public requests police services.[54] Citizens also disapprove of the police when these are perceived as dishonest and/or inconsistent in their treatment of citizens.[55]

At a contextual level of analysis, social scientists include variables dealing with how safe residents feel in their neighborhoods, as well as those relating to personal experiences of victimization when living in these locations.[56] Other variables focus on the existence of neighborhood conditions, such as unrest or incivilities (bad manners), and varying levels of informal mechanisms of collective security.[57] On a more general level, scholars argue that citizens' evaluations of how the broader political and legal systems operate also influence their

---

[48] *Id*.

[49] *Id*.

[50] Brown & Benedict, *supra* note 39, at 550-1.

[51] *Id*.

[52] Benson, *supra* note 32, at 49.

[53] Brown & Benedict, *supra* note 39, at 551.

[54] Bridenball & Jesilow, *supra* note 2, at 159.

[55] Benson, *supra* note 32, at 59.

[56] Brown & Benedict, *supra* note 39, at 555.

[57] *Id*. at 556.

views of the police.[58] Residents who perceive themselves as living in dangerous neighborhoods, or who have been victims of crime are more likely to evince negative opinions toward the police. Studies also indicate that citizens are more prone to disapprove of police practices if they live in neighborhoods where visible social and physical unrest prevails.[59] In contrast, research shows that significant levels of informal collective security correlate with residents' approval of the police.[60] Finally, analysts posit direct or positive relationships between the attitudes toward the political and legal system and those toward the police.[61]

Most analyses of these variables show that at an individual level only age and race yield consistent and significant impact on attitudes toward the police.[62] Similarly, contact with the police, police integrity, neighborhood conditions, local crime perceptions, and trust in the legal and political system stand as the most important predictors when studying how citizens perceive the police.[63] Regarding the rest of the variables, researchers still have not reached consensus on the effects such variables exert on the public's view of the police.[64]

When conducting surveys via telephone or face to face, researchers generally try to identify attitudes toward the police by asking participants the extent to which they agree or disagree with statements like "the police do a good job," and then linking the answers with some of the explanatory variables reviewed above.[65] However, this method precludes more in-depth information relating to the basics of how and why people form their attitudes toward the police. These types of responses have relatively little value in terms of informing police administrators about the specific areas on which to focus in order to improve the public image

---

[58] Stan L. Albrecht & Miles Green, *Attitudes toward the Police and the Larger Attitude Complex: Implications for Police-Community Relationships*, 15 CRIMINOLOGY 80 (1977).

[59] Bridenball & Jesilow, *supra* note 2, at 161.

[60] Liqun Cao et al., *Race, Community Context and Confidence in the Police*, 15 AMERICAN JOURNAL OF POLICE 13 (1996).

[61] Albrecht & Green, *supra* note 56, at 80.

[62] Brown & Benedict, *supra* note 39, at 567.

[63] Liqun Cao & Jihong Solomon Zhao, *Confidence in the Police in Latin America*, 33 JOURNAL OF CRIMINAL JUSTICE 410 (2005).

[64] Brown & Benedict, *supra* note 39, at 567.

[65] Paul Jesilow et al., *Public Attitudes toward the Police*, 14 AMERICAN JOURNAL OF POLICE 68 (1995).

of the police.[66] Even the empirical findings on associations found in public perceptions of the police are only partially helpful in providing administrators with clear and specific improvement strategies. For instance, the police may be unable to alter the neighborhood's demographic or economic conditions.[67]

Aware of these potential research limitations, some scholars propose additional strategies to try to obtain more specific information on attitudes toward the police. For example, they suggest using open-ended questions instead of closed ones when asking respondents about their views on the police.[68] Open-ended questions generate both advantages and drawbacks for researchers.[69] On the one hand, open-ended questions allow participants to use their own words to express what they believe is important when judging the police instead of choosing from a predetermined pool of answers selected by the researcher. On the other hand, these relatively unstructured questions allow subjects to give a wide variety of responses. This situation may pose challenges to researchers in terms of how to standardize, code, and make use of quantitative techniques arising from a broader range of responses provided by the subjects.[70]

The disadvantages of using open-ended questions in surveys may limit the possibility of drawing generalizations that can be applied to other settings due to problems of the reliability of both the different responses given by the participants and the different ways in which the interviewers interpret and code the information.[71] In spite of these potential methodological limitations, some scholars argue that the overall advantages of open-ended questions overcome their drawbacks.[72] As Bridenball and Jesilow explain:

For example, if in fact the public does have negative attitudes toward the police, the police need to know why there are negative attitudes, how they are being formed, and what factors

---

[66] *Id*.

[67] Bridenball & Jesilow, *supra* note 2, 152.

[68] Jesilow, *supra* note 63, at 68.

[69] *Id*. at 72.

[70] *Id*.

[71] *Id*.

[72] Bridenball & Jesilow, *supra* note 2, at 156.

are influencing their formation in order for the police to change the circumstances. The responses to the open-ended questions help to more accurately ascertain the participants' thought with respect to these matters.[73]

2. *The Police in Mexico*

Few observers or researchers would disagree on the dark history of police forces in Mexico as being characterized by pervasive corruption, abuse, and an inability to effectively maintain social control.[74] Scholars note that the origins of the corrupt nature of the police in Mexico can be partially explained as the result of the country's conflicting history of the creation of the State that began in the early 19th century.[75] To achieve or consolidate State power, the rival groups participating in civil wars, independence movements, or revolutions needed to monopolize the means of violence. Irrespective of advancing class, regional, or cultural interests under the banners of either democracy or authoritarianism, the winners sought to control State power by significantly arming the forces capable of securing and maintaining the political elite's supremacy in State leadership.[76]

The ensuing relationship between the State and the police became one of political convenience for the ruling class.[77] The State would grant the police significant levels of impunity and relative autonomy in exchange for political loyalty.[78] Impunity and autonomy meant the State condoned or forgave police forces for any wrongdoings against the public. It also meant the State allowed police administrators to manage the police according to their own particular agendas and ignore any internal problems of rampant corruption. In terms of the historical development of the police, López Portillo Vargas notes that police forces "were

---

[73] *Id*.

[74] Daniel M. Sabet, *Police Reform in Mexico: Advances and Persistent Obstacles*, *in* SHARED RESPONSIBILITY: U.S.-MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 248 (Eric L. Olson et al. eds., 2010).

[75] Diane E. Davis, *Law Enforcement in Mexico City: Not Yet Under Control*, 37 NACLA REPORT ON THE AMERICAS 23 (2003).

[76] *Id*.

[77] Ernesto López Portillo, *The Police in Mexico: Political Functions and Needed Reforms*, *in* TRANSNATIONAL CRIME AND PUBLIC SECURITY: CHALLENGES TO MEXICO AND THE UNITED STATES 112 (John Bailey & Jorge Chabat eds., 2002).

[78] *Id*.

excluded from the modernization policies of the State and were consolidated as a privileged resource of repression and corruption."[79]

For some observers, the gradual transition of Mexico's political regime from an authoritarian State to a democracy would alleviate the problem of the corruption entrenched in the country's law enforcement institutions.[80] Nevertheless, scholars argue that democratization processes may have created more problems than solutions.[81] After the end of Mexico's one-party system and the beginning of multi-party competition at all levels of government, some police departments lost the benefits they used to receive from the regime in exchange for political allegiance. The disruption of the previous dysfunctional relationship between the State and the police has compelled some police agents to attempt to recoup lost privileges by increasing police discretion and resorting to even more corrupt practices.[82] As Shirk notes, "police reform has not kept pace with Mexico's democratic regime change."[83]

In this sense, problems of corruption and ineffectiveness in achieving adequate levels of social control have stigmatized the police in Mexico.[84] Citizens typically view the police as part of the problem instead of the solution.[85]Newspapers from almost every part of the country continually report incidents of collusion between some police agents and criminal groups, human rights violations, and the police's overall inability to fight crime.[86]

For these reasons, the public evinces very low levels of confidence in the police. When citizens distrust the police, they are significantly less likely to cooperate with the police to solve

---

[79] *Id*. at 116.

[80] Davis, *supra* note 73, at 17.

[81] *Id*.

[82] *Id*. at 18.

[83] Shirk, *supra* note 18, at 193.

[84] Guillermo Zepeda Lecuona, *Mexican Police and the Criminal Justice System*, *in* POLICE AND PUBLIC SECURITY IN MEXICO 50 (Robert A. Donnelly & David A. Shirk eds., 2010).

[85] Sabet, *supra* note 72, at 247.

[86] *Id*.

crimes, thus perpetuating problems of insecurity, corruption, and abuse.[87] For example, surveys show that 90 percent of Mexicans distrust the police.[88] As an institution, the police are one of the least respected in Mexico —just slightly above unions, legislators, and political parties.[89] Yet, as Zepeda Lecuona notes, "the heroism and sacrifice demonstrated by many honest uniformed officers requires that we make an effort to retain all that is beneficial among the police and reform what is not."[90]

3. *Attitudes toward Mexican Police at a Municipal Level*

Empirical studies on criminal justice affairs and the police in Mexico are generally limited in number, yet they are increasing. In Mexico, there is still a pattern of insufficient and unreliable data on crime and the police. Scholars indicate that in Mexico "accurate data gathering lags perhaps farthest behind in the law enforcement field."[91] The unavailability of data can be explained by a number of factors. Before the 1990s, Mexico did not have a national official crime reporting system.[92] Moreover, police administrators tended to discourage or simply prevent social scientists from studying the intricacies of police agency activities. In terms of academic research, educational programs and academic journals on criminal justice affairs only emerged in the 1990s both in Mexico and in other Latin American countries. Indeed, some Mexican scholars studying the problem of insecurity have had to write their articles in English to disseminate them.[93] Finally, the reliability of official crime data is still questionable. For instance, law enforcement agencies generally fail to gather information about the victims and the circumstances surrounding the crime.[94]

---

[87] *Id*.

[88] Shirk, *supra* note 18, at 192.

[89] *Id*.

[90] Zepeda Lecuona, *supra* note 82, 50.

[91] John Bailey & Jorge Chabat, *Transnational Crime and Public Security: Trends and Issues*, *in* TRANSNATIONAL CRIME AND PUBLIC SECURITY: CHALLENGES TO MEXICO AND THE UNITED STATES 9 (John Bailey & Jorge Chabat eds., 2002).

[92] Ben Brown et al., *Public Perceptions of the Police in Mexico: A Case Study*, 29 POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES AND MANAGEMENT 159 (2006).

[93] *Id*.

[94] Shirk & Cázares, *supra* note 21, at 12-3.

In general, most of the available studies focus on the overall performance of the police system in Mexico and/or on suggesting reforms needed to improve it. These studies also pay almost exclusive attention to the problems of insecurity, police corruption, and citizen perceptions of the police in Mexico City. Works on these issues at state or municipal levels, especially those concerning attitudes toward the police, are still scarce.[95]

Nevertheless, there are some exceptions to the scant literature on public perceptions of the police at state and local levels in Mexico. For example, Olivero and Murataya conducted a survey to a non-random sample of 185 citizens from Guadalajara in the summer of 1997 to determine their satisfaction with police services.[96] Of the 185 participants, 49 (26 percent) had come in contact with the police within the previous 12 months.[97] Of those 49 citizens, only 1 person called the police to request a service or report a crime. For Oilvero and Murataya, this low number of participants willing to contact the police shows how effectively all citizens in the sample tend to avoid interactions with local law enforcement institutions. In general, the participants see community involvement with the police as a futile enterprise because the police side with the party offering the highest bribe regardless of the crime.[98]

An additional research goal of the Olivero and Murataya project consisted of assessing whether respondents would consider it appropriate to increase the number of police officers on the street to fight crime more adequately.[99] Instead of the majority of participants responding in the affirmative, less than half of the subjects supported the idea of having more agents patrolling the streets. Olivero and Murataya argue that this negative attitude toward the police can be explained by the inefficiency of the services the police offer the public, which

---

[95] Relevant contributions to the study of police agencies and prospects of police reform in Mexican cities other than Mexico City are those of Suárez de Garay, Donnelly and Shirk, and Sabet. *See* María Eugenia Suárez de Garay, *Justiciabarómetro: estudio de la policía municipal preventiva de la zona metropolitana de Guadalajara* (2010); Robert A. Donnelly David A. Shirk, *Police and Public Security in Mexico (2010*); and Daniel M. Sabet, *Police Reform in Mexico: Informal politics and the Challengue of Institucional Change (2012).*

[96] J. Michael Olivero & Rodrigo Murataya, *Citizen Satisfaction with Police Services in Guadalajara, Mexico*, 22 INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE 306-7 (1998).

[97] *Id*. at 307.

[98] *Id*.

[99] *Id*. at 308.

perhaps derives from the rampant problems of corruption in the country's law enforcement institutions.[100]

Brown, Benedict, and Wilkinson led another study that attempts to empirically capture public perceptions of the police in Mexico.[101] In the summer of 2003, these scholars conducted a survey to 303 students from a law school in the city of Tampico, Tamaulipas.[102] Using a stratified cluster sampling technique, Brown and his associates gathered data on perceptions toward the police. The researchers asked participants to give their opinions on whether they believed the municipal, state, and federal police were doing a good job in addressing different criminal offenses. They divided the types of criminal offenses according to the functions and jurisdictions of each police agency in question. Even though Brown and his colleagues attempted to use multilevel techniques to analyze the data, they did not find significant results, perhaps owing to the homogeneity of the sample and a significant amount of missing data.[103]

In spite of these research limitations, descriptive statistics show that almost 80 percent of participants evinced negative attitudes toward the overall structure of police agencies in Mexico.[104] Municipal police forces received the worst evaluations in comparison to state and federal agencies. Brown and colleagues claim that their research is "the most detailed study of public perceptions of the Mexican police conducted to date in that this study gauged diffuse and specific evaluations of municipal, state, and federal police agencies in Mexico."[105] Aware of the limitations of the quality of the sample, they nonetheless argue that the results of the study can help to empirically confirm the low levels of confidence Mexican citizens have in the police. Results also indicate that national efforts to reform police institutions have been insufficient in improving public views of the police.[106]

---

[100] *Id.*

[101] Brown et al., *supra* note 90, at 158-175.

[102] *Id.* at 165.

[103] *Id.* at 171.

[104] *Id.* at 166.

[105] *Id.* at 170.

[106] *Id.*

Kwak, San Miguel, and Carreon also studied attitudes toward the police in Mexico.[107] Their research used data from the 1996 and 2005 surveys conducted by World Values Surveys, an organization dedicated to gathering information from different countries on health issues, politics, economics, social issues, and people's beliefs and values.[108] The total sample used by Kwak and his associates consisted of 3,924 adult respondents from different Mexican states (2,364 from the 1996 sample and 1,560 from 2005). By using multilevel analyses, they tested how factors such as age, education, marital status, levels of political legitimacy to the current political order, degrees of happiness and life satisfaction, religious activity, and size of town affected public confidence in the Mexican police. Statistically significant results show that positive attitudes toward the police are linked to political legitimacy, happiness, life satisfaction, frequency of religious activities, and being married. Negative views are associated with younger respondents, highly-educated people, and those living in bigger cities.[109]

According to Kwak and colleagues, the study suffered from certain limitations.[110] Chief among these were the absence of relevant police-related variables associated with public views of the police, such as corruption, police brutality, or citizen-police encounters. Moreover, Kwak and the researchers claim it is difficult to generalize these findings to other settings as the research only included one country in its analysis. Nevertheless, the analysts point out that one can still generate certain policy implications from the study's findings.[111] The significant statistical associations among higher degrees of happiness, life satisfaction, and political legitimacy relative to public confidence in the police indicate that governments need to focus on enhancing these variables. The relative success of crime prevention programs like Community-Oriented Policing or Neighborhood Watch depends on public trust toward the police and political order in general.[112]

III. RESEARCH RATIONALE AND CONTEXT

---

[107] Dae-Hoon Kwak et al., *Political Legitimacy and Public Confidence in Police: An Analysis of Attitudes Toward Mexican Police*, 35 POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES & MANAGEMENT 124-46 (2012).

[108] *Id.* at 132.

[109] *Id.* at 136-8.

[110] *Id.* at 139.

[111] *Id.* at 140.

[112] *Id.*

Following the argument that the local level is key to understanding problems of citizen insecurity, this article focuses on municipalities in Mexico. Specifically, the focus centers on a relatively recent case of police misconduct that took place in the municipality of Ensenada, Baja California. Official investigators publicly announced that since 1999 a group of approximately twelve Ensenada policemen began protecting members of a regional powerful drug organization with headquarters in Tijuana.[113] These policemen offered the criminal group protection from both authorities and rival gangs. They also orchestrated kidnappings and assisted criminals in drug trafficking operations. Arrests linked to the incident began to take place in 2005. The leader of the corrupt police group would later be captured in 2008. As expected, the reputation and public perception of the police in Ensenada was severely damaged.[114]

In order to improve matters regarding crime and violence as well as public perception toward the police, municipal authorities made security issues the cornerstone of its administration policies.[115] The main goals were to have an efficient police and to change citizens' attitudes toward them. Policymakers' chief expectation was to eventually recoup citizens' trust by providing an honest, transparent, modern, and efficient police force.[116] The municipal authorities made an unprecedented investment in the area of security from 2007 to 2009. This investment helped to fully equip the police force.[117] Policymakers claimed that their security program had already started to produce positive results because by the end of 2008 violent and nonviolent crimes in Ensenada had decreased by approximately 16 percent. This decreasing trend in the incidence of crime continued in 2009. Local officials then highlighted that these achievements were indeed significant and unique for the municipality of Ensenada. They also stated that the positive outcomes originating from the local security plan were

---

[113] *Capturan líder de comando negro: policías protegían a narcos,* PERIÓDICO EL SIGLO DE DURANGO (DURANGO) June 15, 2008, available at *http://www.elsiglodedurango.com.mx/noticia/171267.capturan-lider-de-comando-negro.html* (last visited: June 10, 2015).

[114] Kidnapping Charges for Seven Mexican Cops, FOX NEWS (New York), November 11, 2005, available at *http://www.foxnews.com/story/2005/11/11/kidnapping-charges-for-seven-mexican-cops/* (last visited: June 10, 2015).

[115] Gobierno Municipal de Ensenada, *Primer Informe de Gobierno* 11 (November, 2008).

[116] *Id.* at 20.

[117] Gobierno Municipal de Ensenada, *Segundo Informe de Gobierno* 13 (November, 2009).

exemplary for the other four municipalities of Baja California and even for all municipalities in Mexico.[118]

With this scenario in mind, the goal of this study is to carry out an in-depth analysis on whether government efforts have indeed affected public perceptions toward the local police, and specifically to identify the main driving forces that affect people's attitudes toward police performance after police misconduct scandals.

IV. DATA, METHOD AND ANALYTIC STRATEGY

1. *Data*

At this point, it is important to highlight that in order to test hypotheses about public attitudes toward the police, this study borrowed variables from models used by some of the authors mentioned in the Literature Review section. Most of these studies drew on U.S. communities as research sites. Variables on race, ethnicity, and immigration were all significant in affecting public views on the police. Nonetheless, based on the research purposes of the particular work, such variables were excluded for two reasons. In terms of race and ethnicity, Mexico's population is not as heterogeneous as that of the United States.[119] As to immigration, Mexico is generally considered a country that sends migrants abroad instead of receiving them. This situation marks a clear contrast with the U.S. case.

To gauge citizens' attitudes toward a variety of public policies, especially those linked to criminal justice affairs, social scientists tend to rely more on survey research instead of official statistics to avoid biased reporting. As a result, this project followed the lead of other scholars working on similar topics and used survey research as the primary data collection method. The data reported in this article were collected from a survey administered to locals living in different neighborhoods in Ensenada during the fourth quarter of 2009.

When performing the exploratory data analysis, one issue was identified to have compromised the data. Specifically, the gender variable exhibited discrepancies in the population of Ensenada. While census parameters indicated 49.63% of females in Ensenada, the sample showed 57%. The discrepancies between sample and population parameters were ascribed to a higher likelihood of finding more women at home than men during the

---

[118] Gobierno Municipal de Ensenada, *supra* note 113, at 31-2.

[119] Brown et al., *supra* note 90, at 164. Also, Dae-Hoon Kwak et al., *supra* note 105, at 132.

schedules selected to conduct the survey. As a result, the data were adjusted by means of a statistical software package in order to obtain similar proportions to those reported by official statistics for Ensenada.

2. *Sample*

For purposes of convenience, the local police department of Ensenada divided the neighborhoods into different police districts. To select the sample, members of the city police were contacted to obtain authorization to gather information about which neighborhoods correspond to each police district. Police department staff provided a list of the neighborhoods. The neighborhoods to be surveyed were randomly selected from this list. Once the neighborhoods of interest were selected, the police department also provided a list of the grids covering neighborhood streets that officers tended to patrol regularly. The streets on the grids were also randomly selected. Finally, households were systematically chosen to participate in the surveys. Following Jesilow, Meyer, and Namazzi, one to three dwellings from each street were selected.[120]

The author of this research and five other paid collaborators conducted the surveys. Only one person living at the dwelling in question was interviewed and all of the participants were at least 18 years old. Most of the interviews took place on weekday afternoons and some took place on weekends. The approval rate was about 70 percent and the final sample consisted of 221 participants.

3. *Dependent Variable*

Drawing from Benson, attitudes toward the police were measured using public perceptions of police performance as the dependent variable.[121] Participants were asked: "How would you rate the overall police service in the two or three blocks around your home?" The response options were: 1 (very poor), 2 (inadequate), 3 (adequate), 4 (good), or 5 (excellent). For purposes of analysis, options 1 and 2 were considered negative evaluations and options 3, 4, and 5, positive evaluations.[122] To code this variable, a dichotomous or dummy variable was created in which 1 represented a "negative evaluation" and 0, a "positive evaluation." In this

---

[120] Jesilow et al., *supra* note 63, at 69.

[121] Benson, *supra* note 32, at 52.

[122] *Id.*

sense, the outcome variable became "negative attitudes toward the police." The independent variables then measured the likelihood of participants showing negative attitudes toward the police.[123]

4. *Independent Variables*

The independent variables impacting negative attitudes toward the police were divided into three groups: individual, police-related, and contextual. The first group included demographic variables such as age, gender, education, and household income. Age was entered as a continuous variable. Gender was a categorical variable, coded 1 (male) and 0 (female). Education and income were ordinal variables. Education ranged from 0 (no high school diploma) to 3 (college graduate or higher). Household income ranged from 1 (less than $3,500 a year) to 7 (more than $20,500 a year).[124] Following Benson, education and income were combined to create a composite measure called social class. The categories for social class were "lower class" and "middle and upper class."[125] Lower class consisted of *only* those participants with no more than "high school diploma" *and* a "household income" of less than $3,500. The rest of the participants who did not fulfill the above conditions were considered "middle and upper class." The coding for social class was 1 for "lower class" and 0 for "middle and upper class."

The next block of items dealt with police-related variables. The "contact with the police" variable was measured with the question: "Have you had any contact with the police in the last 12 months?"[126] It became a categorical variable coded as 1 (yes) and 0 (no contact). Police integrity was measured through two survey items.[127] The first item asked participants to express their level of agreement or disagreement with the following statement: "Policemen in your neighborhood are basically honest." The second item asked: "The police in your neighborhood treat all citizens equally according to the law." Response categories ranged from

---

[123] Although not used for statistical analyses, participants were also asked to say what they liked and disliked about the local police. Respondents also had the option of sharing suggestions on how the municipal government could improve public security-related services.

[124] Based on Banxico, the exchange rate used for October 2009 was 13.75 Mexican pesos per 1 US dollar.

[125] Benson, *supra* note 32, at 54.

[126] Jesilow et al., *supra* note 63, at 71.

[127] Benson, *supra* note 32, 53.

1 (strongly disagree) to 5 (strongly agree). Police integrity was measured by using the combination of these two items to show acceptable reliability or internal consistency (Cronbach's alpha = .758). Based on Benson, the composite measure of police integrity was calculated as the sum of these two items.[128] Higher scores indicate higher police integrity.

The third group of variables included measurements at a contextual level of analysis. The variables were "broken windows," "neighborhood crime," "personal violent victimization," "collective efficacy," and "political legitimacy." To test the broken windows variable, open-ended questions were used. The questions were: "What do you best like about where you live?" and "What do you least like about where you live?"[129] Following Bridenball and Jesilow, the focus was just on the aspects participants disliked about their neighborhoods.[130] Participants' responses were then divided into categories based on whether or not complaints were police-related.[131] Police-related complaints about neighborhoods were coded as 1 and non-police related complaints as 0.

Drawing again from Benson, the following item was used to elaborate on levels of neighborhood crimes: "Do you think crime in your neighborhood has increased, decreased, or stayed the same in the last year?"[132] Responses indicating that crime "had decreased" or "stayed the same" corresponded to the "not increasing" category and the "had increased" option to the "increasing" category.[133] This crime-related variable was coded as 1 (increasing) and 0 (not increasing). In keeping with Sampson, Raudenbush, and Earls, personal violent victimization was gauged by asking: "While you have lived in this neighborhood, has anyone ever used violence, for instance in a mugging, fight, or sexual assault, against you or any

---

[128] *Id.*

[129] Jesilow et al., *supra* note 63, at 71.

[130] Bridenball & Jesilow, *supra* note 2, at 161.

[131] *Id.*

[132] Benson, *supra* note 32, at 53.

[133] *Id.*

member of your household anywhere in your neighborhood?"[134] Respondents had to respond yes or no, which was coded as 1(yes) and 0 (no).

The existence of informal security measures in neighborhoods was also an important factor affecting attitudes toward the police. Developed by Sampson and associates, collective efficacy was used to denote informal collective security.[135] Collective efficacy results from the combination of two composite measures: informal social control, and social cohesion and trust. To measure informal social control, the following questions were asked: (a) "How likely is it that your neighbors could be counted on to do something if children were skipping school and 'hanging out' on a street corner?" (b) "How likely is it that your neighbors could be counted on to do something if children were spray-painting graffiti on a local building?" (c) "How likely is it that your neighbors would do something if children were showing disrespect to an adult?" (d) "How likely is it that your neighbors could be counted on to do something if a fight broke out in front of their house?" and (e) "How likely is it that your neighbors could be counted on to do something if the fire station closest to your home was threatened with budget cuts?"[136] Social cohesion and trust were measured with five statements: (a) "People around here are willing to help their neighbors," (b) "This is a 'close knit' community," (c) "People in this neighborhood can be trusted," (d) "People in this neighborhood generally do not get along with each other," and (e) "People in this neighborhood do not share the same values."[137]

For social cohesion and trust, the possible answers ranged from 1 (strongly disagree) to 5 (strongly agree). In regards to informal social control, options fluctuated between 1 (very unlikely) to 5 (very likely) with the exception of items (d) and (e) which were reverse coded.[138] Reliability scores for social cohesion and trust, and informal social control were acceptable (Cronbach's alpha = .684, and Cronbach's alpha = .802). The combination of the informal social control measure and levels of social cohesion and trust generated the total collective efficacy measure. Internal consistency for collective efficacy was likewise acceptable (Cronbach's alpha

---

[134] Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 920 (1997).

[135] *Id.* at 919.

[136] *Id.* at 919-20.

[137] *Id.* at 920.

[138] *Id.*

= .807). Collective efficacy was calculated as the sum of the two items in question. Higher scores indicate higher collective efficacy.

Based on Kwak, San Miguel, and Carreon, the probable relationship between attitudes toward the police and political legitimacy was also tested.[139] Political legitimacy was measured by using two items. Both items sought to capture respondents' trust toward government institutions other than the police. The questions were: "How much do you trust the municipal government?" and "How much do you trust the courts and the judicial system?" Responses ranged from 1 (no trust at all) to 5 (a lot of trust). For statistical purposes, the two items were combined to obtain a composite measure of political legitimacy. Internal consistency between the two items was acceptable (Cronbach's alpha = .743). Political legitimacy was computed as the sum of these items. Higher values mean greater political legitimacy.

5. *Analytic Strategy*

In order to evaluate how the independent variables affected negative attitudes toward the police, logistic regression was used as the principal analytical technique. This technique was selected because the operational definition given to negative attitudes toward the police resulted in a variable that was binary or dichotomous in nature.[140] Moreover, logistic regression allows for both continuous and dichotomous independent variables in the model.[141] Instead of directly estimating the expected value of the dependent variable (Y) based on selected independent variables, logistic regression also relies on the combination of predictors, but models the dependent variable on the probability that $Y = 1$. The assumption is that Y has been coded 1 = yes and 0 = no.[142] For the purpose of this research, the focus was to determine the probability of a participant showing a negative attitude toward the police based on a set of independent variables. Adopting a pragmatic approach, a statistical software package was used to perform the relevant descriptive and multivariate analyses to help answer the key research question.

V. FINDINGS

---

[139] Kwak et al., *supra* note 105, at 144.

[140] DEAN JOHN CHAMPION & RICHARD D. HARTLEY, STATISTICS FOR CRIMINAL JUSTICE AND CRIMINOLOGY 407 (2010).

[141] *Id.*

[142] JOHN P. HOFFMAN, GENERALIZED LINEAR MODELS: AN APPLIED APPROACH 47 (2004).

1. *Descriptive Statistics*

As indicated in Section IV-1, the gender variable had to be adjusted, but the remaining sample demographic variables were consistent with the census population parameters for Ensenada. All descriptive data of the variables included in this study are presented in Table 1.

TABLE 1. DESCRIPTIVE STATISTICS (*N* = 221)

Variables	*Mean*	*SD*	*Min*	*Max*
Attitudes toward the police	.35	.478	0	1
Negative (1)	(34.8%)	13.487	18	
Positive (0)	(65.2%)	.501	0	76
Age	36.18	.453	0	1
Gender	.50	.500	0	1
Male (1)	(50.4%)	1.935	2	1
Female (0)	(49.6%)	.493	0	10
Social class	.29	.445	0	1
Lower (1)	(28.6%)	.430	0	1
Middle/upper (0)	(71.4%)	6.915	10	1
Contact with police	.47	2.138	2	50
Yes (1)	(46.6%)			10
No (0)	(53.4%)			
Police integrity	5.75			
Broken windows	.41			
Police-related complaint (1)	(40.9%)			

Non-police related complaint (0)	(59.1%)
Neighborhood crime	.27
Increasing	(27.1%)
Not increasing	(72.9%)
Victimization	.24
Yes (1)	(24.3%)
No (0)	(75.7%)
Collective efficacy	32.92
Political legitimacy	5.87

NOTE: The percentages for categorical variables are listed in parentheses.

Regarding the respondents' evaluations of the police, a little bit more than one-third of respondents (*n* = 77) indicated that the services the police provided were "very poor" or "inadequate." Almost two-fifths (*n* = 85) perceived the police provided "adequate" services, and just over one-quarter (*n* = 59) rated their services as "good" or "excellent." Overall, about two-thirds of participants (*n* = 144) had positive perceptions about police performance and the remaining third (*n* = 77) held negative views.

Although not used for statistical analyses and underscoring the relevance of using open-ended questions in conducting surveys, participants had the opportunity not only to evaluate police performance, but also to openly mention the specific things they liked or disliked about the municipal police. On the one hand, 51% (*n* = 112) had positive comments about the local police and 49% (*n* =109) refrained from mentioning positive items. Some participants provided more than one positive comment and 137 responses were counted. Most of the praise for the police referred to the newly acquired equipment and the promptness with which they responded to citizens' calls. On the other hand, 73% of the interviewees (*n* = 161) complained about the police and 27% (*n* = 60) did not share their opinions on the subject. Again, some individuals offered more than one negative comment. A pool of 237 complaints was created. Corrupt practices and arrogance stood as the main complaints from the public. Tables 2 and 3 specifically list the positive and negative comments that participants had about the police, along with their frequency and corresponding percentages.

Continuing with open-ended questions, participants were asked to give possible suggestions on how the municipal government could specifically improve security issues in the city. Nine-tenths of them (n = 197) agreed to do so. They were also free to offer more than one suggestion. After reviewing the answers, a set of 291 responses was obtained. Among the many suggestions, the public emphasized tackling corruption and promoting police honesty and accountability, having more police presence in their communities, and professionally training police officers. A detailed categorization of the suggestions is provided in Table 4.

TABLE 2. PRAISE ABOUT THE ENSENADA MUNICIPAL POLICE

	Frequency	*Percentage*
Praise to the police	36	26.3
Good equipment	31	22.6
Good response time	21	15.3
Officers are efficient/reliable/professional	13	9.5
More police presence/good visibility	9	6.6
Officers are kind/respectful	8	5.9
I feel protected	8	5.9
Officers are cooperative	4	2.9
The police engage in community-oriented policing	4	2.9
Good appearance	1	.7
New facilities	1	.7
Discounts on fines	1	.7
Honesty		

TABLE 3. COMPLAINTS ABOUT THE ENSENADA MUNICIPAL POLICE

	Frequency	*Percentage*
Complaints about the police	53	22.4
Corruption	46	19.4
Arrogance	25	10.6
Slow response time	23	9.7
Abuse of authority	19	8
Poor police tactics	12	5
Police officers do not respect the law they enforce	8	3.4
	8	3.4
Police collude with criminals	7	3
Service is not community-oriented	6	2.5
Lack of security	5	2.1
Lack of judgment	5	2.1
Police brutality	4	1.7
Poor appearance	4	1.7
Lack of professionalism	3	1.3
"I dislike everything"	2	.8
Weak enforcement of laws	2	.8

Police officers are ignorant	1	.4
Police officers are not trustworthy	1	.4
Lack of moral values	1	.4
Expensive equipment	1	.4
Lack of equipment	1	.4
Not enough officers		
Apathy		

TABLE 4. SECURITY-RELATED SUGGESTIONS MADE TO THE MUNICIPAL GOVERNMENT

	Frequency	*Percentage*
Tackling corruption and promoting honesty and accountability of police officers	43	14.8
More police presence and patrolling	41	14.1
Professionally training police officers	32	11
Better salaries	18	6.2
Better police recruitment processes	14	4.8
Better police equipment	13	4.5
Police operational efficiency	13	4.5
Better police response time	12	4.1
Police need to get involved with the community	12	4.1
Police intelligence/strategic planning	11	3.8
	10	3.4

Better infrastructure services (traffic signs, speed bumps, street lighting, recreational facilities)	9	3.1
“Just do the job!”	9	3.1
Being more respectful and fairer treatment by the police	6	2.1
Police officers need to show serious commitment to the police profession	5	1.7
Police rotation	5	1.7
More cooperation from the public	4	1.4
Crime prevention programs	4	1.4
Efficient enforcement of laws	4	1.4
Better city budget management	3	1
Focusing on strengthening society’s values	3	1
The police need to trust citizens	2	.7
Use of surveys	2	.7
Better municipal government services (less bureaucracy)	2	.7
More military presence in the area	2	.7
No arrogance and no abuse of power	1	.3
Harsher penalties for criminals	1	.3
More financial resources for security	1	.3
Better police facilities	1	.3
Lower traffic fines	1	.3
Independent agencies auditing the police		
Providing support to crime victims		

Improved intergovernmental coordination

Reduction of police personnel

Public servants need to set the example of appropriate behavior

Taking into consideration variables at the contextual level of analysis, ninety-one percent of the participants (*n* = 202) agreed to share the things they liked best about the neighborhood. Some respondents gave more than one answer and a pool of 272 responses was obtained. Of the 272 responses, a quiet neighborhood ranked first (32%) followed by location (18%), aesthetics/amenities (16%), good neighbors (9%), city infrastructure (8%), and good security (5%), to name a few.

For items indicating the things respondents least liked about where they live, the responses were separated into complaints that were related or unrelated to the police. This categorization allowed for the creation of the "broken windows" variable that was subsequently used in the statistical analyses. 95% of respondents (*n* = 211) complained about the neighborhood and the other 5% (*n* = 10) did not have any complaints. The complaints of 57% (*n* = 121) were considered unrelated to the police. Some of them gave more than one complaint and a set of 191 complaints was obtained. Among the complaints, they mentioned lack of neighborhood infrastructure[143] (34%), a lack of neighborhood aesthetics or amenities[144] (20%), traffic (8%), stray dogs (7%), noise (7%), strained relations between neighbors (6%), inconvenient locations (5%), and abandoned houses/lots (3%), among others. The other 43% of the participants (*n* = 90) complained about issues that they thought the police could

[143] Neighborhood infrastructure mostly referred to: street cleaning, trash collection, the availability of potable water, street lighting, paved roads, pothole repair, an adequate number of traffic signals, speed bumps, sewage systems, and postal services.

[144] As to neighborhood aesthetics or amenities, participants generally mentioned: green areas, parks, schools, sport facilities, public parking, convenience stores, trees, and preventive maintenance programs.

intervene to fix them. Participants also were allowed to express more than one complaint and a total of 119 responses were counted. The most frequent police-related complaint was the perception that they were living in neighborhoods that "lacked security." Table 5 lists all of the police-related complaints, their frequency, and the corresponding percentages.

TABLE 5. POLICE-RELATED COMPLAINTS ABOUT NEIGHBORHOODS

	Frequency	*Percentage*
Lack of security	25	21
Gangs	14	11.8
Loitering	13	10.9
Vandalism	12	10.1
Drugs (use, addicts, dealing)	11	9.2
Graffiti	10	8.4
The police (inadequate police protection, police harassment, and lack of patrolling)	9	7.6
Transients or homeless	7	5.9
Traffic violations	6	5
Crime/delinquency/violence	6	5
Groups of teenagers or others hanging out and harassing	2	1.7
People	2	1.7
Bad neighbors (fighting, arguing, violence, being hassled by neighbors)	1	.8
Street fights	1	.8

Disorder/unrest

2. *Multivariate Analyses*

Logistic regressions were used to assess the likelihood of citizens to express negative attitudes toward the police. At an individual level, it was expected that age would lower the likelihood of respondents with negative attitudes toward the police. In contrast, being male and belonging to a lower class would increase it. Contact with the police and police integrity correspond to the police-related factors. Whereas previous contact with the police was thought to increase the probability of holding negative views, police integrity was expected to reduce it. As to contextual variables, the expectation was that broken windows, neighborhood crime, and personal violent victimization would increase the likelihood of negative attitudes toward the police. Collective efficacy and political legitimacy were thought to produce the opposite effect.[145]

Before conducting the logistic regressions, tests were conducted to identify whether multicollinearity or outliers were present in the model. Neither multicollinearity (Variance Inflation < 1.29; Tolerance > .77) nor outliers were present.

Three logistic regression models were run. The first model included individual variables: age, gender, and social class. The second model added police-related variables: contact with the police and police integrity. The third model added contextual variables: broken windows, neighborhood crime, personal violent victimization, collective efficacy, and political legitimacy. Table 6 displays the results of the logistic regressions of negative attitudes toward the police using independent variables. In Table 6, *b* stands for unstandardized logistic regression coefficients (standard errors are presented in parentheses), *OR* for the odds ratio of coefficients, and *βR* for semi-standardized logistic regression coefficients. Based on Roncek, semi-standardized coefficients were obtained by multiplying each unstandardized coefficient

[145] Bi-variate correlations between negative attitudes toward the police and the model's independent variables were also obtained. The results were as follows: age (-.059); male (.065); lower class (-.071); contact with police (.083); police integrity (-.423; $P < .01$); broken windows (.231; $P < .01$); neighborhood crime (.416; $P < .01$); victimization (.181; $P < .01$); collective efficacy (-.211; $P < .01$); political legitimacy (-.294; $P < .01$).

by its corresponding standard deviation.[146] Variables showing larger coefficients (in absolute values) were considered stronger predictors in the equation.[147]

TABLE 6. PREDICTING NEGATIVE ATTITUDES TOWARD THE POLICE

Variable	*Model I*			*Model II*			*Model III*		
	b (*SE*)	*OR*	*βR*	*b* (*SE*)	*OR*	*βR*	*b* (*SE*)	*OR*	*βR*
Age	-.007	.993	-.094	.012	1.012	.162	.018	1.019	.243
Male	(.011)	1.295	.123	(.013)	1.320	.139	(.014)	1.096	.046
Lower class	.259	.761	-.124	.278	.957	-.019	.091	1.109	.047
Contact with police	(.284)	.649		(.315)	1.018	.008	(.357)	.709	-.173
Police Integrity	-.273			-.044	.564	-1.111	.104	.585	-
Broken Windows	(.333)			(.374)	6.946		(.417)	1.603	1.037
Neighborhood crime	-.432			.017			-.345	6.697	.233
Victimization	(.436)			(.323)			(.384)	1.372	.846
Collective efficacy	.015			-.574***			-.536***	.987	.136
Political legitimacy				(.101)			(.114)	.838	-.089
				1.938***			.472	10.22	-.378
				(.683)			(.361)		
				.254			1.902***		
							(.408)		

[146] Champion & Hartley, *supra* note 138, at 414.

[147] *Id.* 415.

Constant	.316
Nagelkerke R^2	(.462)
N = 221	-.013
* P < .10	(.028)
** P < .05	-.177*
*** P < .01	(.091)
	2.325*
	(1.206)
	.440

For Model I, none of the individual-level variables were statistically significant on negative attitudes toward the police. Model II revealed improved explanatory power when police-related variables were included in the equation. The overall model was significant (-2 Log Likelihood = 240.772, model X^2 = 44.953, with 5 degrees of freedom, and P = .000) and the independent variables were able to account for 25% of the variance in negative attitudes toward the police. In Model II, police integrity was the only statistically significant variable (P = .000).

Model III, the final and most complete model, added the contextual variables. The overall regression model was statistically significant (-2 Log Likelihood = 200.833, model X^2 = 84.893, with 10 degrees of freedom, and P = .000). Predictors in the model were able to explain 44% of the variation regarding the participants with negative attitudes toward the police. Police integrity remained statistically significant (P = .000). Neighborhood crime and political legitimacy were also statistically significant (P = .000 and P = .051). In this model, controlling for the rest of the independent variables, each unit-increase in police integrity decreased the

odds of negative attitudes by 42%. Similarly, political legitimacy reduced the odds of negative attitudes toward the police. On average, each one-unit increase in political legitimacy was associated with a .177 decrease in the log odds of negative attitudes. As to the odds ratio, each one-unit increase in political legitimacy increased the odds of negative attitudes by .838 or lowered them by 16%. The perception of increasing levels of crime in the neighborhood while keeping the rest of the predictors constant increased the odds of negative attitudes by a factor of 6.697 (a 597% increase in the odds of negative attitudes). Overall, police integrity remained the strongest predictor of negative attitudes toward the police indicated by the magnitude of its βR.

VI. DISCUSSION AND CONCLUSION

In the multivariate analysis, the most important explanatory variables were police integrity followed by perceptions of neighborhood crime and political legitimacy. The rest of the independent variables lacked statistical significance. Despite showing the expected signs and even significant correlations with negative attitudes (.231, $P < .01$; -.211, $P < .01$), broken windows and collective efficacy did not become significant determinants when incorporated into the complete logistic regression model. The results contrast with those of Cao and associates who find both variables statistically significant predictors of attitudes toward the police.[148] Moreover, the results are not in line with those of Jesilow and colleagues who find broken windows the best predictor of negative attitudes.[149] Nonetheless, the previous studies conducted in U.S. cities did not include variables like police integrity, perceptions of neighborhood crime, or political legitimacy. This situation may help explain the differences in causes of negative attitudes toward the police. Based on the results of previous studies like those of Bridenball and Jesilow, it was also expected that contact with the police would exert a significant impact on negative attitudes.[150] Yet, this was not the case. The fact that most participants in the current study voluntarily contacted the police may indicate the limited influence this predictor may have on unfavorable views toward the police.

As to the variables that marked statistical significance, public perceptions of the severity of neighborhood crime exerted a significant impact on negative attitudes toward the police. The

---

[148] Liqun Cao et al., *supra* note 58, at 11.

[149] Jesilow et al., *supra* note 63, at 84.

[150] Bridenball and Jesilow, *supra* note 2, at 173.

results are consistent with Benson, who finds that citizens are more critical towards the police when they perceive neighborhood crime on the rise.[151] These results also coincide with those of Chermak, McGarrell, and Gruenewald, in whose model the perception of crime in one's neighborhood is found to be a consistent predictor of attitudes toward the police.[152] As concerns about neighborhood crime increase, citizens tend to display more unfavorable views of the police.[153]

Political legitimacy was another variable exerting a relatively strong impact on negative attitudes toward the police. The more citizens trust political institutions, the less likely they will have unfavorable views toward the police. These results are similar to those of Kwak and associates who find a statistically significant relationship between political legitimacy and public confidence in Mexico's police.[154] Using a sample of Latin American countries, Cao and Zhao also find trust in the political system a strong predictor of confidence in the police.[155] Overall, the results of this article support Albrecht's and Green's argument who claim that "public attitudes toward the police do not exist in isolation, but are a part of broader complex of attitudes toward the system of legal justice and its various representatives."[156]

Nonetheless, the results show that in the Mexican context and within the boundaries of this study, police integrity tends to markedly overshadow the influence of the rest of the predictors. For this project, police integrity measured police honesty and whether the police treated everyone according to the law. In keeping with the model, positive perceptions of police integrity significantly dampen the likelihood of individuals holding negative attitudes toward the police. The results are relatively consistent with the comments on the things citizens like least about the police and the suggestions for improving public security in the city. As Tables 3 and 4 show, reducing corruption and encouraging police accountability are the

---

[151] Benson, *supra* note 32, at 59.

[152] Steven Chermak et al., *Media Coverage of Police Misconduct and Attitudes toward the Police*, 29 POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES AND MANAGEMENT 272 (2006).

[153] *Id.* at 270.

[154] Kwak et al., *supra* note 105, at 128.

[155] Liqun & Zhao, *supra* note 61, at 403.

[156] Albrecht & Green, *supra* note 56, at 67.

aspects most citizens deem key in improving citizen security in general and police services in particular.

Analysts generally explain public corruption as "the misuse of public office for private gain."[157] In Mexico, official promises and efforts to eradicate police corruption and other types of corruption have come and gone for decades. Since the early 20th century, incoming federal administrations have promised to seriously tackle corruption.[158] Yet reality consistently shows a radically different story. Not even two democratic federal administrations that did not belong to the Partido Revolucionario Institucional [Institutional Revolutionary Party] were able to curb corruption when they held power from 2000 to 2012.[159] Corruption in Mexico may have even increased in these two presidential terms.[160] Moreover, the return of the Partido Revolucionario Institucional (PRI) in December of 2012 has not brought any better news on the corruption front.[161] In the early 1980s, Riding made a reflection about Mexico's corruption that is no less applicable for today's circumstances: "even good intentions are crushed by reality: the pledges of incoming administrations to clean up corruption look naïve or cynical six years later."[162]

Admittedly, there have been some positive changes to Mexican police institutions recently.[163] Chief among these are larger budgets for police departments.[164] More financial resources have allotted for more and relatively better police personnel, equipment, and

---

[157] Jakob Svensson, *Eight Questions About Corruption*, 19 THE JOURNAL OF ECONOMIC PERSPECTIVES 20 (2005).

[158] ALAN RIDING, DISTANT NEIGHBORS: A PORTRAIT OF MEXICANS 115 (1985).

[159] The Partido Revolucionario Institucional was the incumbent party from the 1920s through 2000.

[160] RODERIC AI CAMP, POLITICS IN MEXICO: DEMOCRATIC CONSOLIDATION OR DECLINE? 314 (2014). Also, Martha Martínez, *Doce años más de corrupción: sacaron al PRI de los Pinos con la promesa de acabar con las 'tepocatas' y 'víboras prietas, pero los panistas no redujeron la corrupción*, PERIÓDICO REFORMA (Mexico City) August 05, 2012.

[161] Proceso, *México sí avanza, pero en corrupción*, REVISTA PROCESO (Mexico City) December 03, 2013, available at *http://www.proceso.com.mx/?p=359535* (last visited January 10, 2015).

[162] Riding, *supra* note 156, at 113. In this sentence, "incoming administrations" refer to federal administrations linked to presidential terms that in Mexico last 6 years. In comparative perspective, U.S. presidential terms last 4 years with the possibility of consecutive reelection for an additional 4-year term.

[163] Sabet, *supra* note 72, at 264.

[164] *Id*.

technology to combat crime and maintain social control more efficiently. Along these lines, Table 2 on praise about the Ensenada police shows that the respondents most frequently extolled the acquisition of "good" equipment. Continuing with changes that have been made to Mexican policing, there is now a renewed official discourse and consensus on the need to professionalize the police and develop institutional mechanisms to facilitate coordination among the different law enforcement agencies belonging to the municipal, state, and federal levels.[165]

Yet, official promises, good intentions, and even actions undertaken to change police agencies in Mexico have continuously been overshadowed by undisputed evidence of police corruption, abuse, and operational inefficiency.[166] Under this scenario, it is difficult for the average Mexican citizen to understand police behavior. On the one hand, citizens know about official efforts to improve police services, but on the other, they are constantly bombarded by news of growing insecurity and persistent official corruption.[167]

Researchers have identified some underlying causes of police corruption actually provided by the police officers themselves. At a basic level, a low salary "promotes and even justifies corruption."[168] Aside from this, others argue that most join the force unconcerned about the limited income because they anticipate getting rich by simply wearing the uniform.[169] Institutional limitations also play a role in fostering corruption. In some cases, unscrupulous police academy instructors sell exams or ranks, or condone arrests in lieu of a bribe. In other cases, instructors charge for bullets if students want to participate in shooting training sessions.[170] Furthermore, police officers oftentimes need to obtain some basic benefits and working tools such as life insurance, uniforms, or bulletproof vests on their own.[171] From a

---

[165] *Id.*

[166] *Id.*

[167] *Id.* at 264-5.

[168] Elena Azaola, *The Weaknesses of Public Security Forces in Mexico City*, *in* POLICE AND PUBLIC SECURITY IN MEXICO 125 (Robert A. Donnelly & David A. Shirk eds., 2010).

[169] *Id.* at 134.

[170] *Id.*

[171] Rowland, *supra* note 27, at 456.

cop's perspective, it is better to incur these costs than to lose the opportunity to patrol the streets. Being out to the field generally allows patrolmen to achieve the sought-after "extra income." The additional money most likely offsets incurred costs and permits the officer to make a profit.[172]

Yet, police officers do not pocket this additional income in its entirety. Any money from extortion needs to be enough to "buy" the job and to satisfy the quotas demanded by their immediate superiors.[173] Some police chiefs may charge for posting an officer in a specific geographical sector or riding a patrol car or motorcycle.[174] Viewed under this light, some police officers have to resort to extortion to compensate for inadequate working conditions, low salaries, and significant pressure from superiors to meet the required financial quotas.[175]

In their defense, policemen argue that one key factor often omitted when assessing police corruption is the deliberate participation of citizens.[176] On the corrupt police-citizen relationship, some policemen say:

> People think that all police officers are corrupt, but corruption starts with citizens because it's easier for them to speed up their business and save time by "greasing the wheels" with cash. The government allows many things. Corruption is rampant, and since we don't get good social benefits because of the economy, a policeman allows himself to be corrupted.
>
> I would like to ask citizens and the media: why are they so keen on putting the blame on us if there is corruption everywhere in this country? Even several government authorities and leaders have stolen money from the Mexican people.
>
> There are others who steal millions and get immunity. But when a policeman steals four pesos, he is persecuted.[177]

Although not all Mexicans are corrupt, it is indeed widely acknowledged that corruption permeates Mexican society.[178] From the policemen's statements, it is possible to identify the

---

[172] Azaola, *supra* note 165, at 128.

[173] Riding, *supra* note 156, at 117.

[174] *Id.*

[175] Azaola, *supra* note 165, at 137.

[176] *Id.* at 138.

[177] *Id.* at 138-9.

explicit assumption that corruption is justified because everyone participates, particularly those holding important governmental posts. If those running the State, supposedly chosen to lead efficiently, honestly and based on the Rule of Law, are blatantly corrupt, then society in general may lack incentives to behave differently.[179] Indeed, analysts agree that the great fortunes associated with "grand-scale" corruption are made at the highest governmental levels.[180] The repertoire of such tricks may include "kickbacks, theft, embezzlement, [and] insider deals," among others.[181]

For example, recent news media accounts detail the inner workings of how federal monies earmarked for public security are handled. A group of Mexican mayors publicly denounced some federal congressmen for assigning resources contingent upon the fulfillment of certain requirements by using federal officials as intermediaries.[182] Some mayors reported that from 2006 to 2012 they were approached by federal bureaucrats from the security area who "suggested" forms of handling these resources. The assigned resources were specifically aimed at the improvement of municipal police departments, which would in general terms consist of higher salaries, police training courses, and better operating facilities. The resources also help to buy modern communication and surveillance devices and other implements for the job such as weapons, patrol cars, bulletproof vests, and uniforms.[183] Some federal bureaucrats provide mayors with a specific list of suggested suppliers to fill the needs of municipal police departments. The distribution of resources would then be blocked, delayed, expedited, or even increased in subsequent years, contingent upon whether mayors do business with the recommended providers.[184]

---

[178] Riding, *supra* note 156, at 123.

[179] Azaola, *supra* note 165, at 139.

[180] Riding, *supra* note 156, at 120.

[181] John Bailey, *Corruption and Democratic Governability*, *in* CORRUPTION AND DEMOCRACY IN LATIN AMERICA 70 (Charles H. Blake & Stephen D. Morris eds., 2009).

[182] Claudia Guerrero, *Exigen a ASF indagar extorsión a ediles*, PERIÓDICO REFORMA (Mexico City) November 20, 2013.

[183] Rolando Herrera & Guadalupe Irízar, *Llegó moche a seguridad*, PERIÓDICO REFORMA (Mexico City) November 21, 2013. Also from these journalists, published on the same day as this newspaper, *Acusan Presión* for SUBSEMUN.

[184] *Id.*

Nevertheless, federal bureaucrats are not the only actors who are involved in corrupt schemes in the distribution of federal monies. High-level local policymakers and police officers themselves also play a role in corruption. Local bureaucrats can participate in corrupt activities by hiring private companies whose owners are relatives or close allies. To illustrate this, municipal authorities can hire one of these suppliers and overpay him or her artificially inflated prices when buying police gear such as bulletproof vests, among others.[185] The mechanics of this form of corruption is not new. Writing in the early 1980s, Riding noted similar corrupt schemes between top bureaucrats and contractors.[186] As to the police, some police chiefs can also dishonestly and arbitrarily manipulate resources to benefit close aides or punish adversaries or the rank and file.[187]

In a democratic setting, the pernicious effects of corruption are strongly associated with lower confidence in the legitimacy of the regime. Declining trust in political institutions tends to inhibit collective actions between the public and the government (through law enforcement agencies) to jointly address issues like citizen insecurity, among others.[188] As noted above, citizens interact more frequently and directly with policemen than with public servants from other government offices. As such, citizens generally view police performance as a reflection of the performance of government as a whole. Whereas an incompetent police force tends to alienate the public from political institutions, an effective and honest police enhances the scope of mutual cooperation and strengthens the regime's legitimacy.

Some Mexican scholars ascribe Mexico's persistent problems of disorder and corruption to a fundamental lack of legitimacy in the political regime.[189] For example, history shows that Mexicans have long lived in conditions of a weak Rule of Law, which presupposes

---

[185] Luigi Rivera, *Vende a sobreprecio familiar de funcionaria de Aguascalientes*, PERIÓDICO EL UNIVERSAL (Mexico City) November 01, 2013, available at *http://www.eluniversal.com.mx/estados/2013/impreso/vende-a-sobreprecio-familiar-de-funcionaria-de-aguascalientes-92695.html* (last visited: June 10, 2015).

[186] Riding, *supra* note 156, at 120-1.

[187] Azaola, *supra* note 165, at 138.

[188] Mitchell A. Seligson, *The Impact of Corruption on State Legitimacy: A Comparative Study of Four Latin American Countries*, 64 THE JOURNAL OF POLITICS 408 (2002).

[189] Stephen D. Morris, Mexico's Political Culture: The Unrule of Law and Corruption as a Form of Resistance, 3 MEXICAN LAW REVIEW 327-42 (2011).

accountability both for State and non-State actors, as well as equal access to justice under the law.[190] Rule of Law also allows citizens to interact with each other in coherent and predictable environments that protect property rights and the enforcement of contracts.[191] Adherence to laws and rules largely hinges on the degrees of people's trust toward the regime.[192] In Mexico, most people perceive the law as subservient to the wealthy and powerful. Citizens usually obey the law to avoid punishment instead of willingly working with the authorities. Low credibility of the regime, Rule of Law, and political institutions reduces the State's capacity to effectively enforce laws and maintain social control.[193]

In a scenario of widespread disrespect for the law, citizens adopt a rather cynical view of government leaders and their actions.[194] Even governmental actions targeting corruption or other illicit acts are viewed with suspicion. Owing to significant inconsistencies in law enforcement, citizens wonder whether the arrests of some corrupt politicians, union leaders, or criminal bosses are legitimate or politically motivated.[195] Citizens get even more confused on learning that these individuals are indeed arrested but receive special privileges while in prison.[196]

Given the omnipresence of the State in the lives of its citizens, the conduct of policymakers strongly influences how citizens behave.[197] If citizens are aware that State officials are corrupt, it is very likely that most citizens will behave in a similar fashion. Citizens might even adopt an

---

[190] EMILY EDMONDS-POLI & DAVID A. SHIRK, CONTEMPORARY MEXICAN POLITICS 255 (2012).

[191] *Id.*

[192] Morris, *supra* note 186, at 329.

[193] *Id.* at 329-30

[194] *Id.* at 332.

[195] *Id.* at 334.

[196] Fabiola Xicoténcatl, *Granier vivirá como rey en una suite VIP cuando sea trasladado a Tabasco*, PERIÓDICO EXCÉLSIOR (Mexico City) February 02, 2014, available at *http://www.excelsior.com.mx/nacional/2014/02/20/944811* (last visited: June 10, 2015). Also, Sonia del Valle and Abel Barajas, *Disfruta Gordillo de una 'cárcel VIP'*, PERIÓDICO REFORMA (Mexico City) February 23, 2014.

[197] Morris, *supra* note 186, at 333.

"anti-State/pro-society bias";[198] that is, they may promptly dismiss any official discourse to improve matters and embrace all the proposals from civil society that demand accountability. Most citizens will comply with the law, but hesitantly and out of fear. At the same time, they will protest against the state of current affairs by misbehaving and attempting to get away with illicit acts like most policymakers and other political actors do. An environment like this produces feelings of disillusionment and pessimism in the public when considering how to reverse the situation.[199] It may also lead citizens to finally tolerate, and even excuse, official corruption in exchange for relatively effective public policy.[200]

When ordinary residents become aware of the mismanagement of public policy programs like those targeting insecurity, enlisting citizen assistance and cooperation may be extremely problematic. Without the participation of citizens, the original goals of joint actions between the public and the police regarding crime prevention disappear. Kratcoski, Das, and Verma note:

> If the community is to have a major impact on crime prevention, citizens must have a value system grounded in the beliefs that it is wrong to violate laws, that the rights of others must be respected, and that those who do not accept these premises and do violate the laws should be punished.[201]

If we strictly apply the above criteria to the Mexican case of securing citizen involvement in crime prevention, it can be argued that the prospects of joint efforts with the police, at least in the short-term, are discouraging. For instance, the value system based on the beliefs that violating laws is wrong is not necessarily in place. Some surveys show that most Mexicans have a relatively high tolerance of illegality. Indeed, there is a widespread view that violating the law is not serious.[202] Littering, not using a seatbelt, or buying bootleg goods is generally not seen as illegal.[203] Moreover, some would categorize fellow citizens as "stupid" if they obey

---

[198] *Id.*

[199] *Id.* at 336.

[200] *Id.*

[201] Peter C. Kratcoski, et al., *World Perspective on Crime Prevention: A Community Policing Approach*, *in* INTERNATIONAL PERSPECTIVES ON COMMUNITY POLICING AND CRIME PREVENTION 226 (Steven P. Lab & Dilip K. Das eds., 2003).

[202] Morris, *supra* note 186, at 330.

[203] Camp, *supra* note 157, at 205.

the law in cases where adverse consequences of non-compliance are minimal or nil.[204] The signals some citizens send is that it is fine to disobey the law and that one only needs to be crafty to avoid "getting caught."[205] Environments featuring these characteristics are unsuitable for obtaining citizens' cooperation in crime prevention or in any other area of public interest that requires collective actions.

The question that follows is why it is that most Mexicans display strong attitudes toward disobeying the law. Citizens tend to disobey the law because they perceive Mexico's legal system and enforcement institutions as inefficient and influenced by the rich and powerful. Citizens distrust policymakers in charge of administering justice and confer low legitimacy to the government and its institutions. The principal cause of mistrust and illegitimacy is the actual and perceived corruption of government officials.

Issues of police integrity and political legitimacy are two of the most important findings in this study of negative attitudes toward the police. Both variables are likely to lower citizens' propensity to display negative attitudes. To improve public views of the police and citizen security, police administrators and politicians in general need to design, implement, and evaluate strategies that reduce corruption and gain citizens' trust.

To mitigate police corruption in Mexico, some analysts recommend reviewing and altering police department compensation and personnel management policies.[206] They consider the U.S. military a successful guiding model of effective workforce management that relies on economic incentives that may be applied to the Mexican case.[207] Mexican policymakers and police administrators ought to focus on restructuring promotion schemes, pay officers more, and use a seniority-based pay system. Productivity bonuses are also needed and recruitment standards must be stricter.[208] Merit ought to be the main guideline for promotions, salary increases, bonuses, and recruitment procedures rather than favoritism or any other form of

---

[204] *Id.*

[205] Morris, *supra* note 186, at 330.

[206] BETH J. ASCH ET AL., MITIGATING CORRUPTION IN GOVERNMENT SECURITY FORCES: THE ROLE OF INSTITUTIONS, INCENTIVES, AND PERSONNEL MANAGEMENT IN MEXICO III (2011).

[207] *Id.* at XII.

[208] *Id.* at 52.

corrupting influence. The proper implementation of these mechanisms is thought to increase police productivity and foster honesty in Mexico's police departments.[209]

Naturally, political and law enforcement leaders must be honest themselves and work in the public interest to increase the likelihood of the successful implementation of the above mentioned police-related changes in human resources polices.[210] It can be said that honest leadership in any type of official agency is key in reducing corruption. As Tanzi puts it:

> When the top political leaders do not provide the right example, either because they engage in acts of corruption or, as is more often the case, because they condone such acts on the part of relatives, friends, or political associates, it cannot be expected that the employees in the public administration will behave differently.[211]

Even though the causes of and solutions to corruption are indeed multifaceted, researchers tend to agree that the critical ingredient to successfully curb official corruption is the political will of an honest and visibly committed leadership that shows no tolerance for corruption.[212] More police in the streets, up-to-date security programs, more enforcement tools, or more security-related laws will be insufficient to improve Mexico's security crisis unless political leaders seriously commit themselves to strengthening the legitimacy of the regime through effective public policies and a reduction of acts of corruption. Indeed, it will be difficult, if not impossible, to attain a functioning and efficient Mexican police (and thus lower levels of insecurity) if they perform within a corrupt and even authoritarian political regime.

Having said this, has democracy made a difference in ending problems of police officer and politician corruption, crime and violence, as well as the culture of unaccountability in Mexico? Not really. Therefore, it appears that corruption, insecurity, and a lack of accountability are only symptoms of a more profound structural problem in Mexico's political system that is now in the democratic stage.

---

[209] *Id.*

[210] *Id.*

[211] VITO TANZI, CORRUPTION AROUND THE WORLD: CAUSES, CONSEQUENCES, SCOPE, AND CURES, IMF WORKING PAPER (98/63) 20 (1997).

[212] *Id.* at 34. Also, Jon S.T. Quah, *Combating Corruption Singapore-Style: Lessons for Other Asian Countries*, 189 MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES 4 (2007).

For Rose and Shin, the problem is that most third-wave democracies, including Mexico, tend to democratize backwards.[213] Democratization backwards means that, unlike first-wave democracies, policymakers from the latest wave of democratization opted for introducing competitive elections before securing the basic institutions of a modern State: Rule of Law, a free and participative civil society, government accountability, and the effective separation of powers.[214] Whereas policymakers in advanced democracies made sure to first consolidate a strong and modern State before allowing universal suffrage and other political benefits, those from third-wave democracies mostly chose an inverse democratization sequence.[215]

Adopting this logic, policymakers and politicians running democracies that democratized backwards now face a number of significant challenges. They need not only to organize, compete for, and monitor relatively clean elections, but also to simultaneously deliver effective public policies, build up Rule of Law and accountability mechanisms, while ensuring citizens' meaningful participation in political processes.[216] The challenges are daunting. Even for policymakers genuinely committed to efficient and honest governments, the magnitude of the challenges may resemble instances like "trying to build an airplane while you're flying it"[217] or "attempting to repair or replace a faulty parachute while free falling."[218]

The case of increasing insecurity in Mexico attests to the lack of a relatively modern State capable of ameliorating this particular and pressing problem. First, citizen complaints about police extortion, arrogance, repression, impunity, and corruption all point to weak Rule of Law. Second, citizens tend to grant the police and other governmental institutions low levels of legitimacy. As a result, citizens gradually develop feelings of alienation from the broader scope of political and legal systems. Strong feelings of alienation make citizens' meaningful participation in Mexico's political life less likely and may also adversely affect the creation of a

---

[213] Richard Rose & Doh Chull Shin, *Democratization Backwards: The Problem of Third-Wave Democracies*, 31 BRITISH JOURNAL OF POLITICAL SCIENCE 331 (2001).

[214] *Id.* at 332.

[215] *Id.*

[216] *Id.* at 336.

[217] Quoted in Varenik, *supra* note 17, at 393.

[218] Quoted in Mercedes S. Hinton & Tim Newburn, *Introduction: Policing Democracies*, *in* POLICING DEVELOPING DEMOCRACIES 1 (Mercedes S. Hinton & Tim Newburn eds., 2009).

strong civil society. Third, the collusion among the members of different branches of government to tolerate corruption denotes deliberate actions to avoid accountability. One case in point is the corrupt schemes between some members of the legislature and the executive branch when distributing security-related monies to states and municipalities. For these reasons, it can be argued that the construction of a modern State in Mexico is still a work in progress.

According to Rose and Shin, policymakers operating democracies lacking the basic institutions of the modern State are likely to face one of three scenarios.[219] One is the completion of the democratization process by building up a modern State. The next scenario is the total abandonment of democratic practices for alternative political models. The last one is a democratic regime where relatively free elections may persistently and indefinitely coexist with weak institutions of a modern State. Rose and Shin call the last political model an incomplete or "broken back" democracy.[220]

Broken back democracies entail certain economic and political costs though. Economically speaking, domestic and foreign entrepreneurs tend to limit investments in market-oriented economies (like Mexico) featuring a weak Rule of Law.[221] Without a relatively strong Rule of Law, the full protection of property rights and the enforcement of contracts are unpredictable. On the political front, it is important to highlight that even though free elections are necessary for democratization, they are not enough to complete or consolidate a democracy.[222] Broken back democracies generally consist of two interacting actors: on the one hand, a set of corrupt, untrustworthy, and unresponsive policymakers; and on the other, a resigned or complacent public accepting their rulers' limited performance. Citizens may claim that an incomplete democracy "is a lesser evil" in comparison with the totalitarian or authoritarian regimes of the past.[223] When a broken back democracy is institutionalized, citizens enter a

---

[219] Rose & Shin, *supra* note 210, at 348.

[220] *Id.* at 350.

[221] *Id.* at 352.

[222] *Id.* at 332.

[223] *Id.* at 350.

stage of "idiotization."[224] According to Rose and Shin, idiotization refers to "the conscious rejection of the obligations of a citizen... at the individual level, this is a rational reaction to a government that is unaccountable and unresponsive to demands."[225]

The price citizens pay for a broken back democracy is rather high. A broken back democracy tends to preclude citizens from truly reaping the benefits of a consolidated democracy and even those of a market economy. Focusing on the pernicious effects of a weak Rule of Law, particularly manifested in high levels of corruption, Tanzi states:

> The widespread disillusion among the population of some economies in transition and some developing countries with both market economies and democratic processes is very much provided by the widespread corruption that prevails in these countries and that is wrongly attributed to the market economy and the democratic processes.[226]

Based on the information provided in this study, and using Rose and Shin's categorizations of democracy, it can be argued that Mexico is on the path of completing democratization, yet it hangs by a very thin thread. Mexico seriously risks falling into the broken back democracy category, or even into that of the total repudiation of democracy, especially if problems of low levels of political legitimacy and ubiquitous corruption remain largely unaddressed in the immediate future.

The causes of and solutions to problems of crime and violence are complex. Many variables enter into the equation such as extreme poverty, misdistribution of wealth, a lack of education and employment opportunities, poor health, and even inadequate housing.[227] Nonetheless, and based on this study of the Mexican case, it seems that the root causes and possible solutions to the problem are of a more political nature. Yes, Mexico has made progress on many fronts, yet more is needed to unleash the country's significant potential. The construction of modern State institutions, an honest and committed political leadership working in the public interest, and citizens' genuine engagement in the country's political life are key in improving not only the security situation and thus the reputation of the police, but also other public policies and institutions of Mexico's nascent democracy.

---

[224] *Id.* at 353.

[225] *Id.*

[226] Tanzi, *supra* note 208, at 33.

[227] Kratcoski Et al; *supra* note 198, at 239.

CRIMINALS AND ENEMIES? THE DRUG TRAFFICKER IN MEXICO'S POLITICAL IMAGINARY

Alejandro MADRAZO LAJOUS[1]

ABSTRACT. *This article compares the official and the widely held discourses about drug traffickers in Mexico's current War against Drugs. The federal government has obliquely distorted the distinction between a criminal and an enemy, dehumanizing drug traffickers and, thus, opening up a spectrum of tolerance for the repressive actions carried out by the authorities against drug traffickers. Inadvertently, however, official discourse has also politicized and empowered drug traffickers, casting them as an enemy. In contrast, popular discourse surrounding drugs and drug trafficking seems to have resisted these disintegrating categories. Using narcocorridos —a popular musical subgenre—, I conclude that criminal and enemy categories when referring to drug traffickers do not merge in the popular imaginary. Nevertheless, younger musicians seem to pick up on the politization of the drug trafficker as the enemy, the risks and implications of which are indicated in this article.*

KEY WORDS: *War on drugs, sovereignty, law, criminal, enemy, narcocorrido, imaginary.*

RESUMEN. *Este artículo compara los discursos que sobre el narcotraficante se han desplegado desde dos distintos foros —uno oficial y otro popular— durante al actual "Guerra contra las drogas" en México. El gobierno federal ha colapsado la distinción entre criminal y enemigo, deshumanizando a los traficantes de drogas y, así, abriendo un espacio de tolerancia para los actos represivos ejecutados por las autoridades en contra de ellos. En contraste, el discurso popular en torno a las drogas y sus traficantes parece haberse resistido a la conflación de estas dos categorías. A partir de un análisis de narcocorridos, concluyo que, en general, las categorías de "criminal" y "enemigo" no se confunden en la figura del traficante de drogas en el imaginario popular. Sin embargo, músicos más jóvenes sí parecen retomar esta conflación y la consecuente politización del narcotraficante como enemigo, con los riesgos e implicaciones que se señalan en este artículo.*

PALABRAS CLAVE: *Guerra contra las drogas, soberanía, derecho, enemigo, criminal, narcocorrido, imaginario.*

[1] Alejandro Madrazo is a researcher at CIDE, email: *alejandro.madrazo@cide.edu*.

TABLE OF CONTENTS

I. INTRODUCTION

This paper studies two contrasting discourses on drug trafficking that were deployed in Mexico. The study aims to explore the impact of the Felipe Calderón Administration's "war on drugs" on the Mexican legal and political imaginary. I address these discourses borrowing from Paul Kahn's exploration of the contrast between the places and roles that the criminal and the enemy have in the political imagination. The first discourse is the official one through which former President Felipe Calderón (2006-2012) addressed drug trafficking. It frames the government's drug policy explicitly (and emphatically) as a *war* on drug trafficking (although late in his administration he replaced the word "war" for "fight"). In contrast, I take up popular discourse regarding drug trafficking and drug policy as embodied in the *"narcocorridos,"*[2] a popular musical subgenre in Mexico. Through *narcocorridos*, I hope to tease out an alternative, popular, counter-discourse to the official one that dominates this phenomenon.[3]

---

[2] The closest translation to a *corrido* is a ballad. A *narcocorrido* is a drug ballad. It is a type of Mexican music and song tradition that evolved out of folk music in the northern part of the country. The first *narcocorridos* focus on the drug and alcohol smugglers of the 1930s, while the non-narco ones go back to the Mexican Revolution and before, telling stories of revolutionary fighters. Sometimes compared to gangster rap, lyrics often refer to specific events and include real dates and places of illegal criminal activities, in this case related to drug trafficking and everything that surrounds it.

[3] I use *narcocorridos* as a point of entry into the popular imaginary on the *war on drugs*. I would not like to reinforce here the view that these *corridos* encourage or stimulate "narco culture" (whatever that is) as some censurers contend. I use *narcocorridos* because other discourses are unavailable to me, like those of speaking with the traffickers themselves, for

I hold that the official discourse politicizes the criminal; that is, it renders him as a fundamentally political actor. If this is so, the important question is whether the popular political imaginary accepts and assumes this politization. If so, then Mexico's current bout of violence needs to be understood as a political conflict as much as a conflict over the control or contention of (illegal) commodity markets.

This paper is divided into three sections. First, I will explore the political and legal imaginary, starting from the fundamental distinction between *criminal* and *enemy* (Section II). These analytical coordinates are borrowed from Paul Kahn.[4] In the following sections, I apply this framework to Mexico's drug war as presented in the official discourse expressed by former President Calderón's speeches (Section III).[5] Then, in Section IV, I glean out how the concepts of criminal and enemy play out in popular political imaginary through an analysis of *narcocorrido* lyrics. Finally, in the conclusions, I speculate on possible paths on which the metaphor and the reality of the *war on drugs* could be taking us.

II. THE CRIMINAL AND THE ENEMY IN THE POLITICAL IMAGINARY

The distinction between criminal and enemy in the political imaginary is crucial: it reflects and supports the distinction between law and sovereignty, between legal action and political action —in its strictest sense.

> Criminals and enemies may do the same violent acts, destroying property and persons. Nevertheless, the modern political imaginary carefully maintained the distinction as a matter of both formal law and informal representation.[6]

In the modern political imaginary, the criminal faces the law; the enemy faces sovereignty. The criminal is a citizen, a part of the political community, and therefore enjoys the protection of the very laws he infringes. The enemy is situated outside the political community and represents a threat to it. Consequently, he does not enjoy the protection of the law, nor is he under obligation to abide by it. Moreover, the enemy has a

---

example, or the discourse portrayed in film because there is too little or non-disseminated literature. The *narcocorrido* is hugely popular and highly publicized, as well as easily accessible.

4 Paul Kahn, *Criminal and Enemy in the Political Imagination*, 99 YALE REVIEW 148 (2010).

5 Evidently, official discourse on drug trafficking did not originate with the Calderón administration, but was exacerbated during this period. Consequently, Calderón's rhetoric offers a clear sample of the profile of the official discourse. Likewise, *narcocorridos* did not emerge with the Calderón administration, nor will the ones discussed here be only those within that timeframe. The causal relation between both discourses is not of interest here, but rather the compatibility between one and the other, and the risk that both coincide in politicizing the criminal.

6 Kahn, *supra* note 3, at 1. This piece stems from and relates to a previous work. *See* P. KAHN, SACRED VIOLENCE: TORTURE, TERROR AND SOVEREIGNTY (University of Michigan Press, 2008).

right to resist the violence of a political community to which he does not belong while the criminal does not.

> Everything about the criminal is defined by law, from the elements of the crime, to the procedure of adjudication, to the character of punishment. His depoliticalization is accomplished through his complete juridification. The law, however, will not tell us who are our enemies. It will not define the conditions of victory or defeat. It will not tell us how seriously to take a threat or how devastating to make the response. The enemy, despite the efforts of international law, is not a juridical figure at all.[7]

The enemy is located outside the political community and threatens it. The community frames its own identity *by taking a stance of opposition* to him. The criminal does not fulfill that role in the political imaginary. His existence does not identify us: in fact, he participates in the political community.[8] So if we combine the two categories, we muddle our political identity. We no longer know who belongs to the "us" (the political community, which in principle, includes criminals) and who belongs to the "them" (the enemies). When the criminal becomes an enemy, the community's reaction is that of a civil war.[9] When the criminal is politicized, he *becomes* the enemy. The criminal goes from being in an asymmetrical relationship governed by the law to a (symbolically) symmetric relation analogous to a duel, in which the law disappears and all that remains is the juxtaposition of two competing wills in the arena of sovereignty. In other words, this confrontation becomes a space in which a normative system can no longer be enforced and only a civil war will follow.

III. THE CRIMINAL AND THE ENEMY IN OFFICIAL DISCOURSE

On 2006, just three days after taking office, Mexican President Felipe Calderón announced the first deployment of federal forces, including the army, to take up policing functions in a state: his native state, Michoacán. "Be assured that my government is working hard to win the *war against crime.*"[10] With this, the President defined his crime-fighting strategy as a *war*. He justified launching this "war" by pointing out that the number of drug-related

---

7 Kahn, *supra* note 3, at 2.

8 It is in this context that says: "These are not just categories of theory, but the organizing principles of political and personal narrative. When we lose control of the categories, we can lose the sense of who we are". Kahn, *supra* note 3, at 4.

9 Kahn points out: "… under some circumstances criminals do become enemies: the order of law becomes the disorder of civil war." Kahn, *supra* note 3, at 5.

10 Jorge A. Medellín, *Guerra, terror, terroristas: el discurso del rey*, PERIÓDICO MILENIO SEMANAL, September 4, 2011, *http://www.msemanal.com/node/4571*

murders in the region in the previous year exceeded 500.[11] A few weeks later, at the *21st Session of the National Security Council*, President Calderón noted that "To win the *war against crime* it is essential that we work together beyond our differences… beyond any political party's flag and any private interest."[12] Thus, war demanded unquestioned unity.

Throughout the Calderón Administration, war metaphors shaped official narrative regarding crime and security. The war metaphor has both practical and strategic functions. On the one hand, "…it is applied so as to keep justifying the use of the Armed Forces…"[13] as a building-block of the administration's security policy. On the other, it serves as a rhetorical locus from which to rally for national unity. However, there were some unexpected consequences. Metaphor builds up, reifies crime and blurs the boundaries between different categories within the law. The government does not prosecute people, but crime. In this sense, "…drug trafficking was framed within a larger *enemy*, an enemy that is even more scarcer than drug trafficking, encompassing common crime and the organized social structure needed to commit a crime."[14] Thus, the distinction between the criminal and the enemy collapses.

By labeling criminals as enemies, President Calderón was equating the functions they play in the political imaginary. Up until 2010, President Calderón's speeches explicitly used the word "enemy" when referring to criminals.[15] Because of the *function* of the term

---

11 MIGUEL DAVID NORZAGARAY LÓPEZ, EL NARCOTRÁFICO EN MÉXICO DESDE EL DISCURSO OFICIAL. UN ANÁLISIS DE LOS SEXENIOS COMPRENDIDOS EN EL PERIODO 1988- 2009, Master Dissertation 172 (FLACSO, 2010).

12 María de la Luz González & Sergio J. Jiménez, *Unidad en guerra contra el crimen, pide el gobierno*, EL UNIVERSAL, January 23, 2007, *http://www.eluniversal.com.mx/primera/28308.html*

13 NORZAGARAY LÓPEZ, *supra* note 10, at 172.

14 *Id*. at 29.

15 *See Mensaje a medios de comunicación del presidente Felipe Calderón*, PRESIDENCIA DE LA REPÚBLICA (June 29, 2010) *http://calderon.presidencia.gob.mx/2010/06/mensaje-a-medios-de-comunicacion-del-presidente-calderon/* He said: "There is an elemental truth that we cannot lose [sight of]: the true enemy, the threat to society is the criminals..." *See* also *El presidente Calderón en el evento Diálogo por la Seguridad. Evaluación y Fortalecimiento*, PRESIDENCIA DE LA REPÚBLICA (August 5, 2010) *http://calderon.presidencia.gob.mx/2010/08/el-presidente-calderon-en-el-evento-dialogo-por-la-seguridad-evaluacion-y-fortalecimiento/* In keeping with this line, he also stated: "The enemy, clearly I insist, the enemies are the criminals. We are not [enemies] some Mexicans vis-a-vis others, no matter how different our ideologies or our distinct ways of thinking are." *See Lucha contra enemigos de la sociedad no admite demoras ni titubeos: FCH*, PRESIDENCIA DE LA REPÚBLICA (July 2, 2010*) http://calderon.presidencia.gob.mx/2010/07/lucha-contra-enemigos-de-la-sociedad-no-admite-demoras-ni-titubeos-fch/ Finally,* he said: "Organized crime thrives on division. The enemy advances when there is disagreement between those of us who have a duty to confront it." *See El presidente Calderón en la ceremonia de clausura y*

"enemy", the criminal was positioned outside the political community and *threatens it*.[16]

Organized crime threatens not only society or the government –something a criminal might do; it also threatens sovereignty, a role that, under Kahn's analytical framework, befits the enemy:

> In fulfilling this patriotic mission of the defense of national sovereignty and the integrity of the Mexican territory, the Mexican Navy has occupied a place as the motherland's first line of defense before its enemies. Yesterday, it stood before the foreign powers that sought to invade us; today the fight is to defend our country from the clutches of crime so as to bequeath a safe Mexico, free and prosperous for the new generations of Mexicans.[17]

Like the enemy, the criminal must be subdued or it will subdue sovereignty. "There will be no truce for those who wanted to see Mexico fall into chaos and lawlessness. As long as there are cadets, as long as… the national spirit is renewed, sovereignty will be protected…"[18]

In this context, it is not surprising that the criminal —as well as the enemy— is expelled from the political community in official discourse. "The adversaries of society are criminals, it is not some Mexicans against others…"[19] President Calderón (discursively) *expels* them

---

apertura de cursos de los planteles militares (September 14, 2010) *http://calderon.presidencia.gob.mx/2010/09/el-presidente-calderon-en-la-ceremonia-de-clausura-y-apertura-de-cursos-de-los-planteles-militares/*

[16] Calderón said, "Today in 2010, like in 1847, or in 1913, or in 1810, or in 1910, Mexico also faces enemies who wish to impose their perverse rules, terrorize Mexicans, paralyze authority and subdue us all to their will with their violence." *See* also President's press release, in which he emphasized that "They constitute a real threat to our society, and this threat requires that we confront them, decisively, united and without hesitation." *See Primera intervención del presidente en las conclusiones del Diálogo por la Seguridad*, PRESIDENCIA DE LA REPÚBLICA (August 27, 2010) *http://calderon.presidencia.gob.mx/2010/08/primera-intervencion-del-presidente-en-las-conclusiones-del-dialogo-por-la-seguridad/* Calderón also said that "And we have opened this space to critical analysis, to reflection, because we want to make the fight for security a State policy; that is not a president's or a government's policy, but a government policy shared by the entire Nation because it is for its defense." *Id*.

[17] *See El presidente Felipe Calderón Hinojosa en la inauguración de las instalaciones de la V Región Naval Militar,* PRESIDENCIA DE LA REPÚBLICA (June 1, 2008) *http://calderon.presidencia.gob.mx/2008/06/el-presidente-felipe-calderon-hinojosa-en-la-inauguracion-de-las-instalaciones-de-la-v-region-naval-militar/*

[18] *See Mensaje a medios de comunicación del Presidente Calderón*, PRESIDENCIA DE LA REPÚBLICA (June 29, 2010) *http://calderon.presidencia.gob.mx/2010/06/mensaje-a-medios-de-comunicacion-del-presidentecalderon/*

[19] *See El presidente Calderón en la ceremonia de clausura y apertura de cursos de los planteles militares*, PRESIDENCIA DE LA REPÚBLICA (September 14, 2007) *http://calderon.presidencia.gob.mx/2007/09/el-presidente-calderon-en-la-ceremonia-de-clausura-y-apertura-de-cursos-de-los-planteles-militares/*

from the political community: they cease to be Mexican.[20] The President went even further. Once the enemies have been placed outside the community, he did what is usually done to enemies in a war: he dehumanizes them.[21]

The first duty of those who *do* belong to the political community is to defend it. So comes the demand for sacrifice:

> Today Mexico's enemies seek to affect our nation's development. Mexico calls upon us all to defend it, as always. Today we must protect our families from those who threaten their peace and tranquility; from those enemies seeking to harm the life or property that we Mexicans have so painstakingly built, with their criminal actions. Against those who threaten the security and peace of our people, Mexico clearly and concisely demands the unity of its children.

The transformation is now complete. The criminal is branded the enemy, placed outside the political community, identified as a threat to sovereignty, used as a contrast to identify the citizen, and dehumanized. And to complete the process, the people are called upon to participate in the "we" and to sacrifice "time", "resources", and "lives" to fight the criminal. The President built an "Other" that allows him to request loyalty from "us" to defend the Nation. In doing so, the President necessarily politicizes the criminal, by turning him away from the scope of law and into the field of sovereignty. As a politicized subject, the criminal is released from the obligation to obey the law and gains the "right" to participate in a contest of sovereign wills. Thus, he acquires enormous political freedom. He is able to claim a sovereign character for himself.

The explicit use of the war metaphor, which marked the first 4 years of this

---

[20] One speech said that "because together, we Mexicans can overcome, and overcome we will, a common enemy, which now threatens to destroy not only our tranquility, but also our democratic institutions." *See Palabras del presidente Calderón durante el desayuno conmemorativo al Día de la Fuerza Aérea Mexicana*, PRESIDENCIA DE LA REPÚBLICA (February 10, 2007) *http://calderon.presidencia.gob.mx/2007/02/palabras-del-presidente-calderon-durante-el-desayuno-conmemorativo-al-dia-de-la-fuerza-aerea-mexicana/*

[21] Calderón did so by saying: "And because of this, we face with determination those who seek to prevent the arrival of that which is longed for Mexico, those vile and heartless criminals, those whom we know have no qualms about kidnapping or committing extortion, and do not hesitate to murder anyone who does not enslave themselves to their whims." *See El presidente Calderón en el 98 Aniversario de la Defensa del Puerto de Veracruz*, PRESIDENCIA DE LA REPÚBLICA (April 21, 2012) *http://calderon.presidencia.gob.mx/2012/04/el-presidente-calderon-en-el-98-aniversario-de-la-defensa-del-puerto-de-veracruz/*

administration, would be nuanced and minimized in the last third of Calderón's term.[22] Eliminating the word "war", however, did not change using the figure of the criminal as an *enemy* of society instead of as *part* of society. The word "war" disappears, but the function of the criminal as an enemy remains, along with all its political implications.[23]

The next point will analyze whether the official discourse, in which a thorough politicization of the criminal occurs, is reflected in the non-official discourse on drug trafficking and the drug war.

IV. THE CRIMINAL AND THE ENEMY IN THE SAGA OF THE NARCOCORRIDO

There is a popular tradition, deeply rooted in Mexico, which highlights and records the events of the lives of outlaws. Through various means, such as literature, the popular press, oral tradition and music, this tradition runs counter to the official discourse regarding crime and banditry.[24] One of the best-known expressions of this tradition is the *narcocorrido*.

The *narcocorrido* offers an alternative perspective to the official stance on drug trafficking in Mexico. Faced with hegemonic official discourse on drug trafficking, popular culture —and on occasions the drug traffickers themselves—[25] offers its point of view

---

22 This was because the number of murders linked to drug trafficking and the deployment of federal forces exceeded 34,000 deaths according to official data. *See Base de datos de la Presidencia de la República. Fallecimientos relacionados con el narcotráfico 2006- 2012*, available at: *http://www.presidencia.gob.mx/base-de-datos-de-fallecimientos/*

23 Felipe Calderón clearly illustrated this point in August 2010, when the word "war" was suppressed: "It is clear to all of us that Mexico's enemies are the criminals." *See Primera intervención del presidente en las Conclusiones del Diálogo por la Seguridad*, *supra* note 15. Calderón also equated criminals to foreign invaders: "Like Azueta, like Uribe, [Marine defenders of Veracruz in 1914 against invading US troops], we are not willing to surrender the position to any enemy. Mexico does not surrender and will not surrender. Rather, it will advance, directly, to victory. We will not give up protecting the population and in the defense of our institutions. As long as I am the Supreme Commander of the Armed Forces, as long as I am the President of Mexico, we will not falter not in fighting Mexico's enemies. We will give no truce or quarter to criminals." *See El presidente Calderón en el 98 Aniversario de la Defensa del Puerto de Veracruz, supra* note 20.

24 ELISA SPECKMAN, CRIMEN Y CASTIGO. LEGISLACIÓN PENAL, INTERPRETACIONES DE LA CRIMINALIDAD Y ADMINISTRACIÓN DE JUSTICIA (CIUDAD DE MÉXICO, 1872-1910*)* (Colegio de México, 2012).

25 "Some did it as interpreters of an everyday reality in the world in which they lived, in the manner of spontaneous sociology, others directly by assignment, as unofficial spokespersons. In the era of mass markets, the commercial success of these *corridos* went beyond their economic value: without it having been consciously proposed by their creators, this meant the beginning of the end of State monopoly in the symbolic production of the image portrayed of [drug] traffickers." *See* Luis Astorga, *Los corridos de traficantes de drogas en México y Colombia*, 59(4) REVISTA MEXICANA DE SOCIOLOGÍA 245-261, 247 (1997).

247).

through *narcocorridos.* Luis Astorga points out that some *narcocorridos* are spontaneous products of popular culture, while at other times the traffickers themselves deliberately sponsor their own *corridos* to build up their own image.[26] Both variants undermine the monopolization of State-produced drug trafficking discourses. Since the dawn of *narcocorridos*, "the group's identity ceased to be subjected to the will, imagination and interests of those who, until then, had managed to impose their classifications, and turn them into official discourse."[27]

The stories reflected in *narcocorridos* are in fact ambivalent: torn between telling the facts and even criticizing them, or praising and vindicating the protagonists. For some, the *narcocorridos* tend more towards this latter end of this spectrum.[28] Regardless of how the stories told in the *narcocorridos* are understood, the truth is that in recounting the events from the perspective of those living enveloped by drug trafficking and its profits, *narcocorridos* express cultural values running counter to the official discourse and culture. The *narcocorrido* is presented as the popular voice that contrasts with the discourse of political power, or at least that is its intention.[29]

This is not to say that the *narcocorrido* (fully) articulates a political or ethical discourse. Rather it outlines one, providing something epic, but not quite articulating something ethical.[30] It is the epic aspects offered by the *narcocorrido* that allows us a glimpse into the roles of the criminal, the authority, the law and the enemy in the popular imaginary of communities living near or in contact with the drug-related business and its prohibition.

The *narcocorrido* deals with the heroic deeds of cultural heroes or individuals who are considered exceptional or to have done exceptional deeds, usually with great bravery and courage in the face of danger: soldiers and revolutionary leaders in the early twentieth century; drug traffickers and smugglers at the end of it. In the beginning, one of the main functions of the *corrido* —the predecessor of the *narcocorridos*— was that of publicizing

---

[26] *Id.*

[27] *Id*. at 246.

[28] *See* Farid S. Benavides Venegas et al., *La ley y la música popular*, *in* NORMAS DE PAPEL (Mauricio García Villegas ed., Siglo del Hombre Editores, 2009) at 152.

[29] Eric Lara, *"Salieron de San Isidro..." El corrido, el narcocorrido y tres de sus categorías de análisis: el hombre, la mujer y el soplón. Un acercamiento etnográfico*, 15 REVISTA DE HUMANIDADES: TECNOLÓGICO DE MONTERREY 209 (2003).

[30] I owe the idea of the epic aspect as a precedent on which to build a system of ethics to Ricardo Raphael, who identified the epic as the foundation of a system of ethics. *See* RICARDO RAPHAEL, EL OTRO MÉXICO. UN VIAJE AL PAÍS DE LAS HISTORIAS EXTRAORDINARIAS (Planeta, 2011).

events of the 1910 mexican Revolution, which were very difficult to transmit from other media. The *corrido* was closer to community life: the Mexican masses have seen their desires, passions, frustrations and sympathies reflected in these ballads.[31] Today, with the *narcocorrido,* there is an increased propensity to move from a mere chronicle of events or deeds to the elation (and not necessarily vindication) of the deeds carried out by the protagonists:

This new type of *corrido* approves and praises those outside the law. It celebrates the heroism of those who are able to pass into the world of crime. In general, the *narcocorridos* are chronicles of adventure, betrayal, misfortune, love and other acts of individuals involved in the "business," another of the many synonyms of drug trafficking.[32]

What do the *narcocorridos* tell us about the place drug traffickers as criminals play in the popular political imaginary? Do we stand before evidence of the politicization of the drug trafficker at a popular level? I think that if indeed there is a process of a politicization of the criminal, this is only now beginning to be articulated and associated with the current *war against drugs*. The discourse embedded in most *narcocorridos* offers an alternative but non-antagonistic version of the government's portrayal of the *war on drugs*. The counter-discourse of the *narcocorrido* does not buy into the official discourse's portrayal of the criminal as a political actor who threatens the political community; the *narcocorrido* does not see the criminal as the enemy.

> In its verses, drug trafficking is not the main threat to national security, but simply the lifestyle of a few seasoned guys who can play hardball. It is the world of family alliances, the escape from poverty, the traitor's punishment, the exaltation of manhood. This is what is sung, but without judgment: it is told with humor.[33]

There is, however, an aspect of counter-discourse of the *narcocorridos* that is of concern: violence as a source of self-expression and, consequently, of autonomy (or at least a claim to autonomy). A key element of violence as a specifically *political* expression is lacking for most *narcocorridos* do not include that key element of violence used as a specifically *political* expression. Violence as a source of *individual* self-expression and autonomy *is only* present in the more recent (and comparatively marginal) *narcocorrido*

---

31 Lara, *supra* note 29, at 213.

32 Noemie Massard, *El narcocorrido mexicano: expresión de una sociedad en crisis*, 2 REVISTA LA SIEGA. LITERATURA, ARTE Y CULTURA (2005) *http://www.lasiega.org/index.php?title=El_narcocorrido_mexicano:_expresión_de_una_sociedad_en_crisis*

33 *Id.*

interpreters, such as the "*movimiento alternado*" or alternating movement with musicians like Alfredo Ríos "the Komander," or the increasingly popular "progressive" corridos [*corridos progresivos*] of Gerardo Ortiz.

In the following section, I take up some *narcocorridos*, distilling aspects from these songs to be contrasted with central aspects of the official discourse on the drug trafficking criminal, his role as a threat to the political community, his being situated outside the political community, his dehumanization and the need for sacrifices to be made in order to keep him in check as an existential threat to the Nation.

V. DRUG TRAFFICKING AND AUTHORITIES

We can begin to explore the relationship between drug trafficking and the political community through the relationship between drug trafficking and political authority. In the *narcocorrido,* far from representing a threat to the political authority, drug trafficking *is part of the political system*. Drug dealers and authorities are identified (especially in the higher social strata) or given their roles through corruption (further down the social and criminal hierarchy where authorities appear as instruments subordinate to the drug trafficker). Ultimately, the relationship can lead to violence, but it is portrayed as something personal, and not collective or institutional (this aspect changes in more recent *corridos*, to be discussed later). However, the drug trafficker's community borders do not coincide neatly with those of the political community.

The confusion between drug trafficking and high-level political authority is clearly depicted in "The Circus" by Los Tigres del Norte.[34]

Carlos and Raúl owned
A circus between them.
Carlos was the lion-tamer
The younger brother.
Raúl the manager
Hungry to get rich.
They became so influential
That began to destroy
Circuses everywhere
Until they were forced out of business
So as to keep the areas
And be free to work.
The circus in the Gulf

[34] TIGRES DEL NORTE, *El circo*, on UNIDOS PARA SIEMPRE (Fonovisa, 1996).

Was the first to fall?
And the Chihuahua circuses,
Carlos was the one to close them,
Just leaving the one in Sinaloa
With its lion-tamer at its head.
Raúl became a millionaire
They say that since he was the magician
He made the money disappear
Out of his brother's hands.
Now they say it's in banks
In Switzerland and elsewhere.
Carlos disappeared.
The circus came tumbling down.
The Sinaloan was arrested
After that plane crash.
That's how Raúl and Carlos
Were left without a job.
Raúl is in jail He used up all his magic.
Carlos on the tight rope
Now people get a break
Until another circus comes
And it's the same thing all over again.[35]

"The Circus" refers to Carlos and Raúl Salinas.[36] The first was President of Mexico from 1988 to 1994 and then self-exiled for many years; the second was sentenced for murder and money laundering shortly after his brother's leaving office. The interesting thing is that Carlos and Raúl are presented here as entrepreneurs, and not politicians (although both had careers in public administration until their "fall"). They lead a circus, and the "the Gulf", "Chihuahua" and "Sinaloa" circuses refer to drug trafficking organizations, not political

---

35 Entre Carlos y Raúl/ Eran los dueños de un circo. / Carlos era el domador/ el hermano más chico. / Raúl el coordinador/ con hambre de hacerse rico. Se hicieron tan influyentes/ Que empezaron a truncar/ Los circos por todos lados/ Hasta hacerlos fracasar/ Pa' quedarse con las plazas/ Y libres pa' trabajar. El circo que había en el golfo/ fue el primero que cayó. / Los circos de Chihuahua/ Fue Carlos quien los cerró, / Quedando el de Sinaloa/ Y al frente su domador. Raúl se hizo millonario/ Dicen que por ser el mago/ Desapareció el dinero/ De las manos de su hermano. / Hoy dicen que está en los bancos/ De Suiza y por todos lados. /

Carlos desapareció/ Se les vino el circo abajo. / Aprenden al sinaloense/ Después de aquel avionazo/ Fue como a Raúl y a Carlos/ Se les acabo el trabajo. Raúl se encuentra en la cárcel/ Ya se le acabó la magia. / Carlos en la cuerda floja/ Ahora la gente descansa/ Hasta que llegue otro circo/ Y otra vez la misma tranza.

36 Tigres del Norte, *supra* note 34.

parties or communities. Raul, the chief, the "manager", "became a millionaire." Carlos, "the younger brother" who in fact held political power, is only "the lion-tamer". As such, we assume he is in charge of keeping the beasts at bay so the business can operate smoothly.

In the *narcocorrido*, drug trafficking does not threaten political power; it nurtures it. More precisely, political power both feeds the drug trade and serves as its instrument. What is important is the "work", "our business" (that is, drug trafficking). Politics is incidental, instrumental. When the drug dealers pose a threat to politics, it is a personal issue. In such cases, the threat is focalized, affecting certain people, but not the whole system.

At a lower level (police officers, prosecutors and judges), authorities appear as drug traffickers' subordinates. Even in older *corridos*, the authorities have been portrayed as corruptible. Thus, the "The *corrido* of the underworld" *says*:[37]

That is punishment from above,
Today the law no longer punishes.
Because money and influence,
Nobody can deny,
Can save any prisoner
(...)
For if the law did punish
With a long sentence,
And money was rejected
And the sphere of influence closed/shut down,
The jails would be full. [38]

More recently, "The corrido of Juan García,"[39] from the seventies, reads:

In order to get rid of him,
Since it suited them,
He was killed through betrayal
By the Rangers' infantry.[40]

---

37 FLORES Y DURÁN, *Corrido del Hampa*, on THE ROOTS OF THE NARCOCORRIDO (Arhoolie Records, 2004).

38 Eso es castigo de arriba. / Hoy la ley ya no castiga. / Pues la influencia y el dinero, / Nadie lo podrá negar, / Salva todo prisionero... Que si la ley castigara/ con una larga condena, / el dinero rechazara,/ la influencia se acabara/ la cárcel estaría llena.

39 PINGÜINOS DEL NORTE, *El corrido de Juan García*, on THE ROOTS OF THE NARCOCORRIDO (Arhoolie Records, 2004).

40 Para poder liquidarlo, / pues así les convenía,/ A traición le dieron muerte/ los rinches de infantería.

He is killed by treachery and because "it suited them," not because it was their duty. If the police do their "work", as suggested by the *corrido*, there is an underlying personal interest or some other reason unrelated to fulfilling their police-related obligations. Thus, the element of betrayal, perhaps the most recurrent theme in *narcocorridos*, implies a supra-subordinate relationship: if the authorities betray a drug trafficker, it is only because they owed him allegiance to begin with.

Betrayal explains death. It is betrayal that undermines the invulnerability of the protagonist, regardless of whether he was the one to betray or he himself was betrayed. If we are to believe online sources, "Facing Death" by Gerardo Ortiz[41] gives a first person narrative of drug trafficker Arturo Beltrán Leyva's violent death at the hands of the Navy in December 2009. The song portrays his death as a consequence of his duplicity:

It was expected
They'd strike at me.
When there are mistakes
They must be corrected.
And I let the masters down:
I did business
With the other side.
I jumped all over the place.[42]

Once again, when the authority apprehends or eliminates drug traffickers —even with shootouts as violent, notorious and publicized as Beltrán Leyva's, the role of authorities is minimized. It is not police or, in this case, military expertise that explains Beltrán Leyva's fall, but his betrayal to the drug lords. It was not a political betrayal, but a personal one; it was not a political relationship, but an economic one (I did business / with the other side).

Finally, the authorities are portrayed as cowardly and useless. This is very clear when referring to U.S. authorities —the *rinches* (Texas Rangers) — in *smuggler's corridos* like "Los Tequileros."[43]

If the Rangers were men
And they confronted us,
Another song would be sung

---

41 GERARDO ORTIZ, *Cara a la muerte*, on MORIR Y EXISTIR (Sony Music Latin, 2011).

42 Era esperado/ Que me arrimaran un golpe/ Cuando hay errores/ Hay correcciones/ Y le falle a los señores/ Hice negocios/ Con los contrarios/ Fui un chapulín.

43 TIMOTEO CATU AND JESÚS MAYA, *Los tequileros*, on THE ROOTS OF THE NARCOCORRIDO (Arhoolie Records, 2004).

For the tequileros.

VI. DRUG TRAFFICKING AND COMMUNITIES

The events, deeds and characters of *narcocorridos* are not situated outside the political community the way official discourse would place them. The communities spoken of in *narcocorridos* are often different from the political community. At some point, there is a connection with the political community, especially as a contrast to the threats or abuse posed by U.S. citizens:

> A bloody deed, a heroic deed
> The audacity of a patriotic community
> A very manly man, wounded by a female
> Has put his name in our corrido.[44]

As for ties and loyalties, the protagonist is most frequently identified as having a closer relationship with the local community, more than the national one. Localism results in antagonism between localities or regions, and not between local and national communities. This is particularly evident after the emergence of *narcocorrido*s outside the northern, Mexico-U.S. border region where the genre originated.[45]

> ...In recent years the border itself seems to have moved north of the North (Chicago, Detroit, etc.) and south of the South (Michoacán and Oaxaca), where *norteño* groups have emerged, as well as a *norteño* identity that clearly responds to a popular need or taste...[46]

The case of the state of Oaxaca illustrates the phenomenon of regionalism in *narcocorridos*, and their potential to expose the regional rivalry. The "The Oaxaco" *corrido* by Álvaro Monterrubio y su Santa Cecilia is one such example.[47]

> In the north, many people
> Nickname us oaxaquitos.
> Must be because of the state
> Or because we are small.
> But many have already died

---

[44] TIGRES DEL NORTE, *El corrido*, on CORRIDOS PROHIBIDOS (Fonovisa, 1989). Un hecho sangriento, una gesta heroica/ El atrevimiento de un pueblo patriota/ Un hombre muy hombre, por una hembra herido/ Ha puesto su nombre en nuestro corrido.

[45] The *corrido* has spread all the way to Colombia.

[46] JUAN C. RAMÍREZ-PIMIENTA, CANTAR A LOS NARCOS. VOCES Y VERSOS DEL NARCOCORRIDO (Planeta, 2011), 22.

[47] ÁLVARO MONTERRUBIO Y SU SANTA CECILIA, *El Oaxaco*, on EL OAXACO (AVA Records Corp, Titanio Records and Mundo Musical Prod, 2007).

Because they did not watch their mouths.[48]

Thus, a *narcocorrido* unites a regional community, but not a political one. In contrast to what happens in official discourse, drug dealers e portrayed as forming part of the community, and not as antagonizing it. At a national level, there is also an important streak/ element/feature that upholds a sense of belonging and vindication by denouncing the United States. The *war on drugs* is depicted as an illegitimate intrusion of the United States, which hypocritically tolerates trafficking and consumption within its borders, but demands that a war be waged without its borders. Or else, US authorities use Mexicans to obtain information or other type of assistance and then betray them. For example, in extolling a commander who tried to stop a drug shipment, "Underwater" by the Tigres del Norte,[49] denounces the cover-up of the event and the subsequent distribution of those same drugs:

And in the hospital, the commander
Well under the water
I have brought this issue to light
Out of a journalist's file
Because it was not reported.
And the shipment is now for sale
On the American side.[50]

Narcocorridos openly defend the interests of the political community against the real enemy, the real threat: the United States. The *narcocorrido* points out that:

Different countries are
Certified by gringos
They do not want drugs there
Because they say it is a danger
Tell me who certifies
The United States
To catch the narcos?
Mexico has been straightforward.
The Americans buy coke

---

[48] En el norte mucha raza/ nos apoda oaxaquitos./ Ha de ser por el estado/ o porque nos ven chiquitos./ Pero muchos ya se han muerto/ Por no cuidarse el pico.

[49] TIGRES DEL NORTE, *Por debajo del agua*, on 20 CORRIDOS PROHIBIDOS (Fonovisa, 2007).

[50] Y en el hospital moría/ Asfixiado el comandante. / Muy por debajo del agua/ Este asunto ya he sacado/ Del archivo periodista/ Porque no lo denunciaron. / Ya la carga está a la venta/ En el lado americano.

They pay it at any price.
They do not want drugs to exist
But give themselves privileges.[51]

VII. THE DRUG DEALER AS A HUMAN BEING

As for the dehumanization of drug traffickers, a significant portion of *narcocorridos* talks about the everyday and human aspects of drug traffickers: their fears, anxieties and reasons for entering the business.

I was poor for a long time
Many people humiliated me
And I started making money
Things have turned around
Now they call me the boss
I have my own private codename.[52]

The character's human side is once again presented when speaking of violent acts. In "The Plane of Death,"[53] the Tigres del Norte tell of a drug dealer's revenge against his captors. At the beginning of the *corrido*, the lyrics speak of suffering ("tortured / without mercy") and the protagonist's friendship ("they locked his friend in"). "Facing Death,"[54] referenced above, insistently emphasizes the protagonist's personal ties when he dies ("the affected").

Murderers had me surrounded
In my thoughts, my family
Within minutes my life flashed before me
(...)
Poor and without tears
And many rosaries
Good friends
Dear children

---

51 TIGRES DEL NORTE, *El General*, on 20 CORRIDOS PROHIBIDOS (Fonovisa, 2007) A diferentes países los/ Certifican los gringos/ No quieren que exista droga/ Pues dicen que es un peligro/ Díganme quien certifica/ A los Estados Unidos. Para agarrar a los narcos/ México ha sido derecho. / Los gringos compran la coca/ La pagan a cualquier precio. / No quieren que exista droga/ Pero se dan privilegios.

52 EL RECODO, *Clave privada*, on PA PUROS COMPAS, Vol.1 (Umbrella Records, 1996). Ya mucho tiempo fui pobre/ Mucha gente me humillaba/ Y empecé a ganar dinero/ Las cosas están volteadas/ Ahora me llaman patrón/ Tengo mi clave privada.

53 TIGRES DEL NORTE, *El avión de la muerte*, on TRIUNFO SÓLIDO (Fonovisa, 1989).

54 Gerardo Ortiz, *supra* note 41.

I failed them along the way.[55]

VIII. THE SACRIFICE

Sacrifice is one of the most interesting aspects of *narcocorridos*. It does not fulfill the function of defending sovereignty as implied by official discourse, but when facing an adversary, self-sacrifice is bound to honor, loyalty and vengeance. For example, in "The Plane of Death,"[56] self-sacrifice makes sense as personal, but not political or communitarian, vindication.

From the ship he remembered
Everything they had done to him
That they had crushed with forceps
The noble parts of his body
And that he would crash the airplane
Even if he died in the process.
In the control tower
Everything was recorded
Shouts of terror could be heard
And three men crying
Atilano laughed and threatened them even more.
The Lieutenant and soldiers
Regretted what they did
They tortured an important man
I think they did not know [that]
On the plane of death
They boarded that day.
The lieutenant was telling him
My wife is waiting for me.
Atilano replied we're going to crash now
I too I have a wife
And she'll be left crying
On arriving at Badiraguato
Helicopters rose
It was going to crash into the barracks.

Violence —whether against oneself, as self-sacrifice, or against others— is perhaps the

---

[55] Los asesinos me tenían rodeado/ En mi mente, mi familia/ En minutos repasé mi vida... Pobre y sin llanto/ Y cantidad de rosarios/ Buenos amigos/ Hijos queridos/ Ya les falle en el camino.

[56] Tigres del Norte, *supra* note 44.

most disturbing element of the counter-discourse. Here, violence is presented as a source of identity, self-expression. As Kahn cautions, this would imply a transition from being the criminal to becoming the enemy. When violence makes sense *per se* and not because of a benefit it may bring, the categories of criminal and enemy begin to crumble. This is the element present in *narcocorridos*: violence as an expression of autonomy and identity.

> Because those who shot
> Tortured without restraint.
> For the weed they stole from me
> They will pay dearly.
> Why did they let me live?
> They should have killed me
> Well, they'll be sorry
> When I have them in the trunk
> I feel hatred and anger toward them
> I swear I'll eat them alive.[57]

If violence is a source of autonomy and self-expression (of identity), what other element is needed to be considered an enemy? I think what is missing is a sense of *community*. In other words, it is necessary for the violence to be a collective and autonomous expression of the *community* itself. If the discourse goes beyond the narration of events or simply a record of deeds, and moves toward a deliberate and comprehensive critique, there are good reasons to think this may be the inception of a communal identity that stems from the criminal's banished status.

It is at this point where the criticism of the current *status quo* found in the *narcocorridos* becomes worrisome. Perhaps the most obvious example of the emergence of critical consciousness is one of the most notoriously censored *corridos* in recent times: "The Farm" by the Tigres del Norte.[58]

> If the bitch is tied up
> Even if she barks all day,
> She must not be set free
> My grandfather used to say,
> They might regret doing it,

---

[57] LARRY HERNÁNDEZ, *El baleado*, on 16 NARCO CORRIDOS (Mendieta Discos, 2009) Porque los que balacearon/ Torturaron sin medirse./ La mota que me robaron/ Me van a pagar muy caro./ Porque me dejaron vivo/ Mejor me hubieran matado/ Pues no se la van a acabar/ Cuando los traiga encajuelados./ Les traigo un odio y rabia/ pues los comeré lo juro.

[58] TIGRES DEL NORTE, *La Granja*, on LA GRANJA (Universal Music, 2009).

Those who did not know her.
It is through the fox that we learned,
That he did break the dishes,
And the bitch's rope
He bit her for a while,
And I think she got away
To make a big mess.
The piglets helped
They feed off the farm,
They want more and more corn every day
And profits are lost,
And the farmer who works
No longer trusts them.
A hawk fell
Chicks wondered
Whether he fell on his own
Or if the winds pushed him down,
All my animals
Were frightened by the noise.
The rabbit is dying
Inside and outside the cage,
And every day there are many dead
All over the farm,
Because there are no crops
Like before with so much alfalfa.
On the edge of the farm
They put up a big fence,
So that they can keep on working
And keep the farmer in,
Because the bitch doesn't bite
Even if he argues against it.
Today we have every day
A lot of insecurity,
Because the bitch got out
And it messed up everything.
Among all the farmers
We need to tie her up. [59]

---

[59] Si la perra está amarrada/ Aunque ladre todo el día, / No la deben de soltar/ Mi abuelito me decía, / Que podrían arrepentirse/ Los que no la conocían. Por el zorro lo supimos/ Que llegó a romper los platos, / Y la cuerda de la perra/ La

Some of the metaphors in this *corrido* are clear: the farm is Mexico, the big fence is the U.S. border, the hawk is Juan Camilo Mouriño (former Minister of the Interior who died in a mysterious plane crash in 2008), the farmer is the working class, the piglets are the political class, and the fox is (President) Vicente Fox. But other metaphors are more obscure: Who is the bitch? Is it the war (on drugs)?[60] Is it organized crime? Is it the army? Speculations abound and it can be interpreted in many ways.

The central issue here is the focus of the *corrido*: it is not so much about specific deeds, events or heroes. Rather it is a general diagnosis of what is wrong in the country, a snapshot of what is happening in a political community that might possibly refer to Mexico. It understands the current crisis as a threat to the community, but there is also a call to collective action: all the farmers need to work together to tie the bitch up; as someone particularly brave or violent is not needed.

IX. RECENT TRENDS IN THE P'OLITIZATION OF THE CRIMINAL

When I finished the first version of this work in 2010, my main conclusion was that the *narcocorrido* did not reflect the politicization of the drug trafficker as characterized by Calderón's discourse. However, since then certain signs are pointing in a different direction, especially among younger *corridistas*.

If we shift our focus from the established *corridistas* like *Los Tigres del Norte* and look at little known young composers, the collective dimension openly acquires a confrontational tone between enemies, blatantly military. For example, "Here-I Affirm" by Gerardo Ortiz:[61]

Here I present a new proposal
Here we have a couple of answers for you
Here I warn that we are not playing
To work
Here we cross borders straight-on

---

mordió por un buen rato, / Y yo creo que se soltó/ Para armar un gran relajo. Los puerquitos le ayudaron/ Se alimentan de la granja, / Diario quieren más maíz/ Y se pierden las ganancias,/ Y el granjero que trabaja/ Ya no les tiene confianza. Se cayó un gavilán/ Los pollitos comentaron, / Que si se cayó solito/ O los vientos lo tumbaron, / Todos mis animalitos/ Por el ruido se espantaron. El conejo está muriendo/ Dentro y fuera de la jaula, / Y a diario hay mucho muerto/ A lo largo de la granja, / Porque ya no hay sembradíos/ Como ayer con tanta alfalfa. En la orilla de la granja/ Un gran cerco les pusieron, / Para que sigan jalando/ Y no se vaya el granjero, / Porque la perra lo muerde/ Aunque él no esté de acuerdo. Hoy tenemos día con día/ Mucha inseguridad, / Porque se soltó la perra/ Todo lo vino a regar, / Entre todos los granjeros/ La tenemos que amarrar.

60 The words "bitch" (perra) and "war" (guerra) rhyme in Spanish.

61 GERARDO ORTIZ, *Aquiles Afirmo*, on ENTRE DIOS Y EL DIABLO (Sony Music Latin, 2011c).

Here I announce that I am the owner
Here I will tell you the new turf rules
And the plan of attack
(…)
Here I show my armed team
Here we have men ready
There are no excuses
Or fear of the blood that must spill
Here we have closed the deal
(…)
The power that rules the cartel de la Juana
Respect is given to
Here I show you
Here I warn
Here I present you with a new Tijuana
Where a couple of battles
Are expected
Here I warn you that I am in command
In each word
I know what I'm talking about
Here I affirm that I have
Support. [62]

Ortiz does in fact present a new proposal that clearly not only speaks of a war environment ("crossing borders," "plan of attack," "armed team", "couple of battles"), but also exalts the collective —and not individual— deeds ("we have a closed deal"). Even more so, collectivity is understood as an organized ("rules in place", "we have men ready", "I am in command") and hierarchical body ("rules in place," "I am in command"). "Pecheras Antrax" by Alfredo Ríos also reflects these features:[63]

Breastplates, grenades and AK-47s

---

62 Aquí les presento una nueva propuesta/ Aquí les tenemos un par de respuestas/ Aquí les advierto que no somos juego/ para trabajar/ Aquí les cruzamos fronteras de lleno/ Aquí les afirmo que yo soy el dueño/ Aquí les menciono las reglas de plaza/ Y el plan de atacar… Aquí les demuestro a mi equipo armado/ Aquí les tenemos hombres preparados/ Aquí no hay pretextos/ ni miedo en la sangre para ejecutar/ Aquí les tenemos un pacto cerrado… El poder que reina el cartel de la Juana/ se da a respetar/ Aquí les demuestro/ Aquí les advierto/ Aquí les presento una nueva Tijuana/ En donde se espera/ Un par de batallas/ Aquí les advierto que yo tengo el mando/ En cada palabra/ yo sé lo que hablo/ Aquí les afirmo que tengo/ el respaldo/

63 GERARDO ORTIZ, *Pecheras Antrax*, Y SEGUIMOS LA BORRACHERA (La Disco Music/Twiins Enterprises, 2011).

Bazookas and armored trucks
Taking care of the chief's domain
Mayo Zambada's turf
Folks call me "El Chino"
I command and lead "The Anthrax" team
Vicente left me a job
And I am not going to disappoint him
I have the experience and the rank
My team is already organized
The field is marked out
Antagonists and parasites
Don't want to overstep
Thinking, planning and acting
Looking for the best way
I like to do everything slowly
I like to use intelligence
But some people do not understand
And it's better to use violence
(...)
Sinaloa, what a beautiful state
Because I was brought up in battle
What a beautiful land, Culiacán
That has given me everything
Women, money and friends
Everything I am, everything I have been. [64]

Once again we find the issues of military-style hostility ("breastplates, grenades and AK-47s, bazookas and armored trucks", "the field is marked out"), organization ("command and lead", "I have the experience and the rank", "my team is already organized"), the identification of enemies ("Taking care of the chief's domain", "antagonists and parasites, don't want to overstep").

Moreover, this *corrido* has two elements found in *narcocorridos* composed by already

[64] Pecheras granadas y cuernos/ Bazucas y trocas blindadas/ Cuidando el terreno del jefe/ la plaza del Mayo Zambada/ el Chino me apodan los plebes/ comando y dirijo al equipo los Ántrax. Vicente ha dejado un encargo/ y yo no pienso defraudarlo/ traigo la experiencia y el rango/ mi equipo ya está organizado/ el terreno está bien marcado/ contrarios y lacras/ no quieran brincarlo/ Pensando planeando y actuando/ buscando la mejor manera/ me gusta hacer todo calmado/ me gusta usar la inteligencia/ pero hay gente que no comprende/ y es más preferible usar la violencia… Sinaloa qué bonito estado/ porque en la batalla fui creado/ Culiacán qué bonita tierra/ que todo me lo ha regalado/ mujeres, dinero y amigos/ todo lo que soy todo lo que he sido.

established performers: a mention of the region and the local area (the praise of Sinaloa and even more specifically, of Culiacán) and violence as a means of expression ("Some people do not understand and it is better to use violence"). This last point seems particularly important because if they foreshadow the direction the *corridos* are taking, then the use of violence as a means of collective expression is already at play.

However, the exact direction this collective war is taking is still up in the air. In short, who is the enemy? In the last two *corridos*, it can be assumed that "they", as opposed to "us", refers to the rival cartel. This is most likely the case in most cases. However, one *corrido,* "I am family; I am from Michoacán" by Gerardo Ortiz,[65] points to a different, more worrisome direction:

...They did not respect
They got mixed up and aren't getting out alive
They are being paid by the news
And Calderon has seized us
It is a way of harming
The family will be respected
They will pay for those affected
We gave truce and they didn't help us
By word of mouth the announcement was made about
The tragedy of Mr. Nazario
If they want war, we'll get them here
I have agents and people under my command
It is a fight that has not ended
The Good and the Bad is mentioned everywhere
I don't check things out, I just keep working I will find a way to get revenge
We already found out that they put it
And with the story they already had their fun
What they were taking it to the pale-faces
That they couldn't stand up to the blows
We changed our approach
Against government forces
The random killings continue
Endless turf wars, [they] don't end
And when it's over they'll do the math
The family is not respected
The conditions are on the table

65 GERARDO ORTIZ, *Soy la familia, soy michoacano*, on MORIR Y EXISTIR (Sony Music Latin, 2011).

They still have time to use their heads. [66]

In short, one may tentatively conclude that the counter-discourse found in the most widespread and popular form of *narcocorridos does not correspond* to the official discourse and even neutralizes the official discourse in many ways. *Narcocorridos* refuse to place the criminal *outside* of the political community; they do not consider the criminal a *threat* to the political community, but humanizes the criminal instead. However, the prolific violence used to express, affirm and identify is present... And there is already an emerging awareness of the need to act in defense of the collectivity. The threat of *"the bitch"* was unleashed by politicians. This tendency is more salient among younger *corridistas*. US-born Gerardo Ortiz, for instance, is 23 and his career grew almost entirely *during* President Calderón's *War against Drugs,* particularly after 2010. This undoubtedly raises concerns, but even more so when it appears to be a response to the previous administration's strategy.

X. CONCLUSION

Felipe Calderón's discourse revolved around the exclusion of drug traffickers from the political community, and called upon "citizens" to rally behind the government. According to Calderón, State violence is deployed in self-defense and what is at stake in this case is the nation itself. In his effort to make the criminal an enemy, the former president turned the criminal into an existential threat to the Nation. In contrast, the discourse embodied in *narcocorridos* places the relationship between criminals and authorities on equal footing/presents the association/liaison between criminals and authorities as common, be it as accomplices or as rivals. Confrontations are generally explained by personal decisions (like betrayal) and as dependent on specific circumstances. In other words, discursively speaking the conflict is individualized and does not extend to the community.

The collective rivalries that appear in the *narcocorrido* discourse do exist, but not as

---

[66] Se hicieron cochi no respetaron/ De esta no salen ya se revolcaron/ por la noticia vienen pagados/ y Calderón nos trae apoderados/ es una forma de perjudicar/ a la familia van a respetar/ van a pagarla por los afectados/ les dimos tregua y no nos ayudaron/ de voz en voz se fueron anunciando/ de la tragedia del señor Nazario/ Si quieren guerra aquí los atoramos/ tengo elementos y gente a mi mando

Es una lucha que no he terminado/ el bien y el mal se dice en todos lados/ yo no averiguo, sigo trabajando/ ya encontraré la forma de vengarlos

Ya descubrimos que lo pusieron/ y con la nota ya se divirtieron/ que lo llevaban para con los güeros/ que a los putazos no se resistieran/ intercambiamos la modalidad/ contra la fuerza gubernamental/ siguen matanzas indiscriminadas/ guerras de plazas sin final, no acaban/ y cuando acabe sacarán las cuentas/ que a la familia cero se respeta/ las condiciones están sobre la mesa/ están a tiempo de usar la cabeza.

portrayed in official discourse. Rivalries emerge between regions. Authority is the object of either reproach —when it betrays or kills traffickers- or ridicule— when it does neither. Drug lords mock authority by considering it an enemy that poses no sort of real threat.

Perhaps in the imaginary deployed and constructed by the "traditional" (as opposed to "altered" or "progressive") *narcocorrido,* the enemy does not belong to a political community, but rather to a particular group that benefits from a context of economic exploitation. Although this aspect merits much deeper reflection, it is flagged at this point given its relationship with two recurring themes in *narcocorridos*: economic necessity as a reason for turning to a life of crime and crime as a way to acquire wealth and, with it, social prestige.

Having said that, we should not lose sight of the troubling aspects of the political imaginary embodied in *narcocorridos*, particularly in those written by younger (*narco*) *corridistas* who have come of age during the current wave of violence. Violence is seen as a manifestation of identity (an old and recurring theme in *narcocorridos*) and the violence unleashed by Calderón's *War on Drugs* is considered a collective problem that requires collective action. This seems to indicate that the popular political imaginary may be politicizing the image of the drug trafficker just as the previous administration did in its discourse. We have not yet reached the same point, but some key elements are present. This notorious and relentless politicization is starting to appear in the more violent *narcocorridos*. It would be prudent for the current government to refrain from identifying the criminal as an enemy; to refrain from politicizing the criminal. Let us hope that criminals do not end up taking the (former) President at his word; or worse still, that society at large comes to interpret the current violence in Mexico as a civil war, in which sides must be chosen.

If we lose sight of the risks represented by the conflation of the criminal and the enemy within the context of the War on Drugs whether in Mexico or elsewhere in Latin America, we run the risk of falling into the trap of either justifying the advent of an authoritarian of making a civil war out of a drug policy that should not be regarded as more than what it actually is: a policy choice.

ANTITRUST IN THE NEW ECONOMY CASE GOOGLE INC. AGAINST ECONOMIC COMPETITION ON WEB

Doris Karina OROPEZA MENDOZA[1]

ABSTRACT. *The American multinational company Google is one of the most important businesses in the new economy, thanks to its innovation has positioned itself as a leader in the Internet environment worldwide. One of its main products is Google Search, which has been in the public eye, because authorities in antitrust considered that search machine infringes the antitrust legal system. The company Google has faced indictments for this reason countries like the US and the EU, but in both cases it is considered that the authorities responsible for research has not given clear and sound criteria to determine the guilt or innocence of the digital enterprise, based on the actual behavior of competition in the markets for electronic commerce, which belong to the new Economy, so this article presents a brief description of both cases and proposals of the key aspects that investigations by the authorities in the field should take.*

KEY WORDS: *Antitrust, Google Inc., electronic commerce, new economy, monopoly.*

RESUMEN. *La multinacional estadounidense Google, es uno de los negocios más importantes de la nueva economía, gracias a su innovación se ha posicionado como un líder en el entorno Web en todo el mundo. Uno de sus principales productos es Google Search, el cual ha estado en el ojo público, debido a que autoridades en defensa de la competencia han considerado que la máquina de búsquedas vulnera el sistema legal de defensa de la competencia. La empresa Google ha enfrentado acusaciones formales por esta razón en Estados Unidos y la Unión Europea, pero en ambos casos se considera que las autoridades encargadas de las investigaciones no han emitido criterios claros y sólidos para determinar la culpabilidad o inocencia de la empresa digital, basado en el comportamiento real de la competencia en los mercados de comercio electrónico, que pertenecen a la Nueva Economía, por lo que este trabajo expone una breve descripción de ambos casos y las propuestas de los aspectos claves que las investigaciones de las autoridades en la materia deben tomar.*

[1] PhD in Public Law graduated with honors from the Legal Research Institute of the Universidad Veracruzana, (email: *doropeza1012@gmail.com*)

PALABRAS CLAVE: *Defensa de la competencia económica, empresa Google, comercio electrónico, nueva economía, monopolio.*

TABLE OF CONTENTS

I. INTRODUCTION

One of the most important digital businesses today and one of the most profitable e-commerce worldwide, is Google, which has faced various indictments for anticompetitive practices, in the United States and in the Europe Union.

Its services and products have changed the way how it looks, uses and exploits the Web, to maintain rapid growth, increasing competition to a level of rapid progressive innovation.

Its main product is the search engine *Google Search*, and is also the reason for the demand. However other products, which the company calls applications: Gmail, Google Play, Google Maps, Google News, Google Calendar, Google Drive, You Tube, Google translator, Google Books, Blogger, the Google Chrome browser, and Android operating system, among others. It is essential to know that most of these services are free, there is a price in money which the consumer must pay to enjoy their services, so we have a clear example that the price is not decisive in the competition in the electronic commerce markets. However Google has become one of the most profitable companies in the world, with a market capitalization on Wall Street of 357.09 billion, far exceeding digital companies such as Microsoft or Facebook.[2]

Google's vertical competitors alleged that Google was using its dominant position in online generic search and advertising to give it an unfair advantage in these other markets,

[2] Yahoo Finance, Google Inc., YAHOO FINANCE, December 2014, available at *http://finance.yahoo.com/q?s=goog* (last visited: January 1, 2015).

specifically by giving its vertical services higher and more prominent places in its generic search results, while lowering the 'Quality Score' of competitors' sponsored links.

The purpose of this study was to determine the results of investigations that antitrust authorities in the United States and the European Union have made against Google and issue an opinion on these results, suggesting some aspects of utmost importance to determine more precisely the points key that can help research and determine the guilt or innocence of Google, recalling that this is a digital company that belongs to the new economy and thus the development of competition has particular characteristics due to its nature technology, that differs from the competition in the physical markets; situation that the authorities in the matter should be taken into account for a result of more relevant research which provide greater security to both the company investigated, and their applicants.

This work is divided five parts, the first is a general description of *Google Search*. The second part analyzes and describes the fundamental aspects of economic competition in the New Economy. The fourth block sets, separately and briefly the research conducted in the United States and the European Union against Google's search engine and its results, and finally, conclusions are offered with relevant proposals.

II. GOOGLE SEARCH

Google Search, formally launched the website in 1998, however, Larry Page and Sergey Brin, both students of computer science at Stanford University in 1996 worked on creating a search engine whose first name was BackRub[3] which was used within the university. Some time later, both consider that the name of its search engine to be modified, and takes the name "Google" arising from "a pun with the mathematical term "googol," the English pronunciation is similar to the "Google" and refers to the number one followed by 100 zeros."[4]

[3] The story of the search engines begins in 1945, formally having a public use thanks to the Web that was created in 1990. One of the first searchers greater overall impact was Altavista, which came to light in 1995, but the innovation of Google earned him the favorite position has until today. For more information please read: *http://www.searchenginehistory.com/*

[4] Google Inc., *Our history in depth—Company—Google*, December 14, 2014, available at *http://www.google.com/about/company/history/*

The original idea of *Google Search*, was an engine that will achieve the organization of all existing information on the Web, without knowing the importance achieved globally and in the time for Internet users.

Like any search engine (software), *Google Search*, had the noble task of making the experience much easier access to the Web, to serve as facilitator specific information required by the user, The information circulates on Internet is very wide, we don't know how many information is produced day to day, considering the existence, according to Netcraft until the month of December 2014 exists 915,780,262 web sites in the world,[5] so for us it would be very difficult to find the information we need, if there were no search engines. Suppose you need to know about the consequences of global warming, but we know of a website that discusses the topic, so it is very difficult to access such information, however, thanks to search engines, is simple just write the keywords in the article you want to read and be shown a varied and extensive list of several websites that talk about it. The search engine makes it easier to use the Internet.

The power of search engines is extremely important, because this software has the information that is displayed to the user, James Grimmelmann thinks about that: "Web search is critical to our ability to use the Internet. Whoever controls search engines has enormous inf luence on us all. They can shape what we read, who we listen to, and who gets heard. Whoever controls the search engines, perhaps, controls the Internet itself. Today, no one comes closer to controlling search than Google does."[6]

If search engines have much influence on the information that is displayed to users, what we might think of a browser that dominates the market? This is one reason why Google has been criticized and has been in the public eye, Google Sites led the US explicit core search market in August With 67.3 percent market share, followed by Microsoft Sites With 19.4 percent (up 0.1 percentage points) and Yahoo Sites With 10 percent. Ask Network Accounted

[5] Netcraft, *December 2014 Web Server Survey*, December 30, 2014, available at *http://news.netcraft.com/archives/category/web-server-survey/*

[6] James Grimmelmann, *The Google Dilema*, 53 NEW YORK LAW SCHOOL LAW REVIEW, 940 (2008).

for 2 percent of explicit core searches, followed by AOL, Inc. With 1.3 percent.[7] In the European Union has seen a 90% market dominance.

As we can see, *Google search* has a high market power in both the US and the European Union, however, the main concern of this power does not lie in the increased use of such mark by the users, for the damage that can cause or causes the competitive process because Google is more than a machine searches, it is actually a global advertising agency, which has generated suspicions about manipulating its search algorithm to show on the first results of search advertising customers and no general results may be more useful to the user (consumer).

About the algorithm, how it works? Google has offered users the possibility to know how works *Google search*, which divides into three different process works: [8]

1. Tracking and Indexing:

a) Tracking: Google uses a software called "web crawler" to discover publicly available websites. The best known tracker is "Googlebot." Trackers consult the website and follow the links on them, just as you would any user to browse the contents of the Web. Move from one link to another, and collect data on these websites providing Google's servers.

b) Indexing: The Web is like a growing public library with billions of books without a file system. In short, Google lists pages during the tracking process and then creates an index, so you know exactly where to look. As the index of the end of a book, Google index includes information about words and where they appear. When you do a search, at the most basic level, our algorithms seek the query terms in the index to find the appropriate pages.

The Google indexing systems consider many different aspects of the pages, as when they were issued, if they contain photos and videos, and so on.[9]

---

[7] *ComScore Releases August 2014 U.S. Search Engine Rankings*, September 2014, available at *http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-August-2014-US-Search-EngineRankings* (last visited: December 12, 2014).

[8] Google Inc., *Cómo funciona la búsqueda,* available at *http://www.google.com.mx/intl/es/insidesearch/howsearchworks/index.html*

[9] Google, *Dentro de Google. Rastro e indexación,* available at http*://www.google.com.mx/intl/es/insidesearch/howsearchworks/crawling-indexing.html* (last visited: December 22, 2014).

2. Algorithms "are computer programs that seek clues to bring you the most relevant results... are based on over 200 unique signals or "cues" that make it possible to guess what really might be looking for. These signals include elements such as the terms of websites, content now, region and PageRank."[10]

3. Spam: The sought against those pages that offer no useful content to the user, or advertising, known as spam, Google notes that "This is detrimental to search for relevant websites are buried, and for owners of legitimate websites because their sites become harder to find. The good news is that Google's algorithms can detect the vast majority of spam and downgrade the position automatically. For the rest, we have equipment to manually review sites."[11]

For the research object of this article, are not discussed the technical operation of the algorithm of *Google Search*, however, for more information on the operation of algorithms could see, Steven S. Skiena, *The Algorithm Design Manual* (2008), Thomas H. Cormen, Charles E. Leiserson, Ronald L. Rivest, *Introduction to Algorithms* (2009).

On the other hand, if users do not pay *Google Search* cost money to enjoy the service, how is that Google has made significant gains in revenue by product? the answer is advertising that sells. Rufus Pollock notes that: "Where then do web search engines find their revenue? In one word: advertising. When search engines provide ordinary users with a `free' service they gain something very valuable in exchange: attention. Thus, while web search engines do not charge users, they can retail the attention generated by their service to those are willing to pay for access to it. In so doing such companies have built multi-billion dollar businesses."[12] Meanwhile Ben Shipper says: "This service is free to Consumers. To earn revenue, Google collects data on the users search-through many repetitions, and sells advertising space using query keywords. Almost all of Google's revenue comes from search advertisement advertisement."[13] Until 2014, the European Union accounts for over 31% of the nearly 112,700

---

[10] Google, Dentro de Google. Algoritmos, available at *http://www.google.com.mx/intl/es/insidesearch/howsearchworks/algorithms.html* (last visited: December 22, 2014).

[11] Google, Dentro de Google. Spam, available at *http://www.google.com.mx/intl/es-419/insidesearch/howsearchworks/fighting-spam.html* (last visited: December 22, 2014).

[12] Rufus Pollock, *Is google the next Microsoft? Competition, Welfare and Regulation in Internet Search*, UNIVERSITY OF CAMBRIDGE, 2 (2009).

[13] Ben Shipper, *The Market Definition of Google Search*, SSRN-INDEPENDENT 3 (2012).

million euros spent on advertising "online" worldwide, well above Facebook (7.79%), Microsoft (2, 54%) and Yahoo (2.52%), according to eMarketer.[14]

This is the key point by which *Google Search* has become a sensitive issue for the EU antitrust authorities and U.S.

Necessary before proceeding, make the process of competition in the markets of the New Economy, with particular and different characteristics of the physical markets due to their technological origin.

III. ANTITRUST IN THE NEW ECONOMY

Google is a company that belongs to the group of digital companies such as Facebook, Twitter or YouTube, among many others, that shape the Internet ecosystem and that has led to the existence of the so-called new economy.

What is the new economy? The economy over the last thirty years has seen major changes in activities worldwide; although since the late sixties with the advent of information and communication technology, the economy had shown significant changes, but it was not until the late eighties and based on the globalization process understood by the World Bank as the "international integration of markets for goods, services and capital,"[15] so emerging new economic activities in which the factors of production and intellectual work becomes transformed into one of the most important resources, known as the new economy.

The new economy is structured so the digital economy, the knowledge economy and information economy, contributing elements to build solidly this form of administration of economic resources, factors of production and activity of economic agents. Consolidated new economy concept emerged in the United States since the nineties, according to Bernard E. Paulré first appears in the magazine Business Week in 1994; consolidated with the emergence of the Web and the introduction of more powerful ICT in storage and processing of

[14] Moncho Veloso, *El poder de Google desata una batalla entre Europa y EE.UU.*, December 9, 2014, available at *http://www.abc.es/economia/20141208/abci-poder-google-batalla-estados-201412052144.html* (last visited: December 15, 2014).

[15] Banco Mundial, *¿Qué es la globalización?*, April, 2000, available at *http://www.bancomundial.org/temas/globalizacion/cuestiones1.htm* (last visited: December 20, 2014).

information, which contributes mainly to the business to find an opportunity to generate higher profits, increase productivity and reduce much production costs.[16]

Manuel Castells is concerned about the new economy:

> We are witnessing the gradual development of a global and interdependent financial market, operated by computer networks, a new set of rules for capital investment and the valuation of the shares, and financial assets generally. As information technologies are becoming more powerful and flexible time, financial markets are integrated and tend to function as a unit in real time worldwide.[17]

Economic activities carried out in the vicinity of the new economy have very specific driving forces; Karl Marx in the nineteenth century spoke of the traditional factors of production and classified as: land, capital and labor; in the traditional economy these factors remain in place: the land is literally the property or extent of natural resources that are available for the production of goods, capital is only recourse to exchange money in commercial transactions and work is human effort for obtaining good. Today these factors of production have been amended to take another meaning for the new economy: the earth are the networks and technology platforms on which goods or services are produced; on capital although money can still be considered as an important production factor in the new economy, information is the most valuable resource; on labor, as we saw in the section on the knowledge economy, physical exertion longer the factor of production, to make way for the mental abilities and skills for the production of translated into knowledge and information content, as drivers of the new economy and MCE also technology is another factor of production.

The New economy, is the set of theories and principles to analyze, evaluate and establish the criteria under which the economy works through the use and development of ICT, which following the foundations of classical economics, creates new paradigms and is a new area of knowledge through technology.

---

[16] Bernard E., Paulré, *Is the New Economy a Useful Concept?* Université Paris 1 Panthéon Sorbonne 3, (2000).

[17] Manuel Castells. La era de la Información 22 (2002).

The different categories that make up the new economy operating in different sectos. In the review of the expert Richard Posner, the new economy has-been divided into three different industries and also linked:[18]

1. Manufacture of computer software.

2. Businesses based on Internet.

3. Computer communication services designed to support the above two markets.

The second category mentioned by Richard Posner: Businesses based on Internet, are e-commerce activities, according to David VanHoose in his book e-commerce economics, the electronic commerce is "any process involving the exchange of property usage rights or for goods and services electronically and communicating interactively linking devices within the network."[19]

In the Internet environment in the context of the new economy, there are principles of the classical economic theory such as: applicants, bidders, goods exchange and a determined price on money, these elements enable the existence of the process of economic competition on Internet markets.

Economic Competition in the New Economy

Economic competition is the market process in which the various economic agents use their skills and abilities seek to maximize profits through the sale of goods and services, under equilibrium conditions.

Marcelo Resico notes that: "the economic competition is one of the factors, like private property, currency and regulation; that give sustenance to commercial markets."[20] The market as an institution depends largely on the behavior of firms competing in the daily battle of supply and demand.

Companies have the common goal of maximizing profits. This impels companies making decisions that directly affect the price, costs, and other tools on the market, directly

---

[18] Richard A. Posner, *Antitrust in the New Economy*, UNIVERSITY OF CHICAGO LAW & ECONOMICS, 2 (2000). MANUEL CASTELLS. LA ERA DE LA INFORMACIÓN 22.

[19] DAVID, VANHOOSE, E.COMMERCE ECONOMICS, 3 (2003).

[20] MARCELO F, RESICO, INTRODUCCIÓN A LA ECONOMÍA SOCIAL DE MERCADO, 57 (2010).

influencing overall economic stability with an impact at the micro level, in the long run tend to affect a scale macroeconomic influence the welfare of the society and the country as a whole.

The properly understood and implemented economic competition, according to economic theory, can guarantee stability for buyers and sellers, and in turn create favorable economic conditions for the consumer and the economy in general, promoting economic development, in a legal sense equivalent in conditions of freedom, economic democracy and economic justice.

The elements that shaped the competition in the physical markets, moving into e-commerce markets, these are operators by the side of supply and demand, a price and a good that is offered or demanded; however, the nature of this parallel trade, there are specific factors of the technology platform, which have been analyzed in the light of the theory of the new economy, which determine the competition in these markets and the authorities in defense of economic competition should be particularly cautious when making an investigation into allegations of monopolistic or anti-competitive practices, these are:

1. Plaintiffs and Bidders: As in the physical markets, e-commerce markets are economic agent by the supply side and the demand side, according to Donald R. Davis, economic agents involved in economic competition are individuals, businesses and governments:[21]

a) Individuals are part of the private sector of the economy and these according to economic theory are assumed profit maximizers, from two perspectives: as consumers of final goods and factors of production as through their work.

b) Companies are part of the private sector of the economy. They are seen as maximizing profits.

c) Government: Considered a national welfare maximizer, so that their decisions are broad in the sense of quality in public finances and the equitable distribution of wealth.[22]

The global market of electronic commerce makes the number of potential consumers increases, in contrast to the limited number of customers a business of physical markets may have to be reduced to a certain territorial space, this benefits companies, especially to

[21] Donald R., Davis, *Notes on Competitive Trade Theory*, COLUMBIA UNIVERSITY, 4 (2001).

[22] Wealth: defined by Alvin and Heidi Toffler as "any possession, shared or not, which is what economists call *utility*, to provide some form of welfare itself or by exchanging with some other form of wealth that satisfies that welfare," ALVIN TOFFLER & HEIDI TOFFLER, REVOLUTIONARY WEALTH, (2006).

SMEs, which have greater opportunities to increase their chances of success, to get their products or services to a greater number of customers.

2. Information: The FTC notes that from the view of the consumer the most important aspect of e-commerce is the increased choice and especially the information about the products and services you want.[23] The information on goods or services is essential to determine the efficiency of the result of the digital market as prices and the balancing process. Through the Internet there is a massive data flow, which helps dealers to make the best decisions to improve market outcomes. In economic theory it is assumed that consumers have an unlimited capacity to process information so that more information improves decision making and market efficiency. In traditional markets, information collection and processing of data is a costly task.

3. Search engines: Is related to the previous point, this software reduces the costs of searching for information. Compared to the physical markets, the number of sellers is larger and leads to more varied choices of consumption, reducing costs of research, has provided the consumer experience. Search engines help consumers to understand the operation, characteristics and experiences of other various products or services. Consumers avoid transportation costs, phone calls, etc., so that the consumer can cleave all sufficient elements of information and compare the prices offered in physical markets for prices shown online, and also between the various competitors online, so you can make a balance between the various options to make a decision to purchase.

4. The effects or network externalities are conditions in the physical markets, however in e-commerce markets take a much more delicate sense in the case of research in defense of economic competition. The determination of network effects in e-commerce markets allows us to understand the actions of both competition as anticompetitive actions. David Evans, Richard Schmalensee, Franklin M. Fisher, Daniel L. Rubinfeld, Michael L. Katz and Carl Shapiro agree that a market with network effects occurs "when consumers value the more a product is used by other consumers."[24] Enrico Coiera network externalities defined as:

---

[23] David A., Balto, *Emerging Antitrust Issues in Electronic Commerce, Bureau of Competition*, November 1999, available at *http://www.ftc.gov/public-statements/1999/11/emerging-antitrust-issues-electronic-commerce* (last visited: December 20, 2014).

[24] Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 THE AMERICAN ECONOMIC REVIEW, 1 (1985). David, S. Evans & Richard Schmalensee, *A guide to the Antitrust Economics of Networks, Antitrust*, 2

A cost or benefit that falls on people who are not directly involved in an activity. A positive externality on the Internet, or also known as network effect, defines it as one in which the value of a good depends on the number of other people who use it; on the other hand a negative externality explains how the cost imposed on individual users because of congestion on the Internet or delays in information exchange.[25]

Network externalities, found a strong theoretical foundation in the Coase theorem, which states: "For the negotiation produce viable solutions, property rights must be well defined, negotiation costs should be low and there can be uncertainty or asymmetric information (ie, no participant in the transaction may have more information than the other)."[26]

Evans and Schmalensee posit direct and indirect network effects: the first refers to a consumer appreciates a well because another have purchased it. The latter refers to a product valued more because their purchase means that demand for complementary products is higher and the supply of complementary products will be beneficial. [27]

5. Price. In the New Economy, economic competition in markets for goods or services can be based on the price, or take other aspects differents; Carl Shapiro and Hal Varian explain about this that: "the production of information goods, then costs based on the price is inappropriate; because the marginal cost per unit approaches zero, the price can not be based on a margin percentage since the marginal cost as prescribed methods for traditional prices."[28]

Many of the products that are offered in the markets for electronic commerce, have a zero price, ie, that can be obtained without making a payment in currency, however this does not mean that a zero price is the same as getting something for free. In e-commerce markets, as already noted, money is not the only good that can be valuable for the exchange of goods or services, David Evans exemplifies: "When we enter a web page can access the contents of the

---

(1996). Franklin M. Fisher & Daniel L, Rubinfeld, *United States vs. Microsoft: An Economic Analysis*, 30 UC BERKELEY SCHOOL OF LAW PUBLIC AND LEGAL THEORY, 3 (2000).

[25] Enrico Coiera, *Information Economics and the Internet*, 7 JOURNAL OF THE AMERICAN MEDICAL INFORMATICS ASSOCIATION, 216 (2000) available at *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC61423/*

[26] *Id.* at 1.

[27] EVANS & SCHMALENSEE, *supra* note 24, at 1.

[28] Carl Shapiro & Hal R. Varian, *Information Rules, A Strategic Guide to the Network Economy*, CAMBRIDGE, HARVARD BUSINESS SCHOOL PRESS, 3 (1999).

site and not pay a weight advantage of it, however, the site may place cookies in the browser so that consumers can raise the price of your advertising, or where appropriate, information then sell it,"[29] so the markets of electronic commerce, information has value. This is the performance of companies like Google Inc.[30]

The competitive process of the New Economy is dynamic and versatile, unlike physical markets, that mainly base their price, the competition in industries of the new economy does not rotate, principally price, also on information and innovation, which emerges through the creation of products or services that come from the human mind, defined like the knowledge economy.

In this approach not only based on price, the competition goes beyond wanting to preserve perfect competition, it searches provide, establish and maintain conditions that challenge the power of competitors in the market, such as the rivalry between competitors fixed on the market, and for new rivals.

The key over the competition in the New Economy, has a fundamental difference in relation to the analysis of economic competition protection compared to the physical markets. The United Nations Economic Commission for Latin America and the Caribbean says, it is "of the dynamics of growth and innovation activity,"[31] in markets where innovation is a pillar for support, which is why competition is an struggle "for" the market itself and not a race "in" the market.[32]

In the new economy, competition is essential to their development; Carl Shapiro sets out six principles of growth for companies in the electronic commerce markets:

1. Innovation is the key. The success of companies that get into the electronic commerce markets, depends on the seriousness and speed with which consider innovation. The yields of the companies are managed by innovation, not for money. Shapiro explains that the competition is typically Schumpeterian in character, with a fierce fight for to be the following temporary monopoly.

---

[29] David Evans, *The Antitrust Economics of Free*, UNIVERSITY OF CHICAGO, 2 (2011).

[30] Like a Facebook, Youtube or Twitter, and others.

[31] Marcelo Celani, & Leonardo E Stanley, *Una introducción a la política de competencia en la nueva economía*, ORGANIZACIÓN DE LAS NACIONES UNIDAS-CEPAL, 10 (2005).

[32] *Id.* at 8.

Innovation is a key issue for companies competing in the new economy, if the fight is for the market, as tough for companies to achieve success and remain scenario, it is necessary to have better opportunities in competition, is the main motivation adoption of technology companies, claiming to innovation as an essential prerequisite for success.

ICTs are closely linked to the ability of firms to innovate, introduce new products, services, business processes and applications. The innovation lies in managing information, allowing work with a larger number of data more accessible and constantly updated, so ICTs have become a basic tool for the proper development of corporate activity, influencing in the various existing production systems.[33]

The adoption of ICT, particularly the Internet, provides the opportunity to maximize profits through improved two essential processes for business:

A. Improved customer relations through: *a)* advertising and marketing; *b)* operational Data exchange with customers; c) service and customer support, and *d)* Sales Online.

B. Reduced costs through the integration of the supply chain, through *a)* online Shopping; *b)* operational Data exchange with suppliers, and *c*) Business Process Integration.[34]

2. Intellectual property: The intellectual property rights play a deeper role than in any other competitive strategy, both copyright and patents are critical shields in the ecosystem of the Web, given the greater propensity to theft of intellectual creations that are shared on the network.

3. Free access to contents. Information products exhibit very strong economies of scale, many of the costs are "first copy costs" increase the cost of additional copies being much lower. This pattern is reinforced thanks to the Internet, physical replication is no longer necessary and distribution costs are minimal.

4. Partners complementary and not substitutes: Many products in the new economy, are marketed through the electronic commerce markets, are closely linked through interfaces. Computers are a good example of this, as they are armed with various accessories made by

---

[33] Blanca Hernández, *Aceptación empresarial de las tecnologías de la información y de la comunicación: un análisis del sector servicios*, 4 (1) JOURNAL OF INFORMATION SYSTEMS AND TECHNOLOGY MANAGMENT, (2007) available at *http://www.scielo.br/scielo.php?pid=S1807-17752007000100002&script=sci_arttext*

[34] Jonathan, Whitaker, *Internet Business Practices Across the Globe: Lessons from Emerging Economies*, 1113 UNIVERSITY OF MICHIGAN ROSS SCHOOL OF BUSINESS WORKING PAPER, (2008).

different companies. In these cases, companies invest time in negotiations to form alliances, establishing standards, and work competitors to ensure that their products work together effectively to compromise a whole system. Carl Shapiro notes that "the antitrust thinking on substitutes (competitors) is much more advanced than thinking about supplements (partners). Which must change. Cooperation between completer is generally pro-competitive."[35]

5. Standards red. In the new economy, the networks have grown in importance, supported standards and control over interfaces has been central to the rivalry. Some of the most insistent on competition policy issues revolve around the control of bottlenecks[36] and interfaces.[37]

6. Monopoly power prevails: Clearly, there are strong forces in the information economy favoring network effects. On the supply side, the creation of information involves strong network effects, and design new products that involves substantial fixed costs. Clearly, there are strong economic forces favoring information network effects. On the supply side, the creation of information involves strong network effects, and design new products that involves substantial fixed costs. On the demand side, network effects favor the popular products and establish networks. Carl Shapiro states his opposition that the monopoly power can not persist in the new economy, as many of the leading companies today must continue to improve the quality and reduce the price to protect their present positions.

For some authors as Nicholas Economides, competition in the electronic commerce markets, does not mean a greater number of competitors, because in these markets, "network effects" play a fundamental role, explains that the imposition of a market structure "competitive" is likely to be counterproductive. One consequence of network effects is that interventions of competition may be useless. Because "the winner takes most,"[38] economides says this is the natural balance in these markets, trying to superimpose a different market

---

[35] Carl Shapiro, *Competition Policy Analysis, Competition Policy in the Information Economy, Routledge*, 1-13 (2000).

[36] Bottlenecks in an organization consisting of different activities that slow processes, increase waiting times and reduce productivity, bringing as final consequence the increase in costs.

[37] Device capable of transforming the signals generated by an apparatus other signals understandable.

[38] Nicholas, Economides, *Competition Policy in Network Industries: An introduction*, STERN SCHOOL OF BUSINESS, NEW YORK UNIVERSITY, 15 (2004).

structure (eg, one in which all companies have roughly equal market shares) can be both futile and counterproductive time.

The issue of network effects is, undoubtedly, one of the most sensitive in antitrust in the new economy, as resizes the known parameters for investigations, since, although a network externality leads to create a monopoly power, the companies should not be considered guilty because, market dominance stems from the popularity that plaintiffs give thanks to innovation, however, to determine whether or not guilty of monopoly power, despite the network externality, it would be necessary know if the companies make use of intellectual property about the product innovated, and this is used to restrict competition and maintain monopoly power

After analyzing some key aspects of economic competition in the new economy, in subsequent lines, is exposed the analysis of the specific case of the prosecution against the digital company Google.

IV. ANTITRUST LEGAL SYSTEM AGAINST GOOGLE INC

Google is a company that has made a special place on the Internet, thanks to its focus on innovation, offering more and better products to users (customers) facilitating much experience in the network, including improving the quality of life of people in many respects, however, the network effects of *Google Search*, have made her the dominant position in the market for machines searches, with the consequence that in countries like the United States or the European Union, is designated as a company that has violated antitrust laws and is therefore subject to investigation by the antitrust enforcement legal system.

Parenthetically, it is significant to note that the antitrust legal system is critical to the maintenance and development of markets, considering its functionality that promotes wealth, with significant benefits at all levels of the population economy. The purposes of the law of economic competition are defined in the application of economic principles that underpin the success of the market, one of those principles is maximizing market efficiency, as stated Nicholas Economides: "maximizing efficiency (allocative, productive, and dynamic), is the desired result of competition laws competition."[39]

The issues of competition in electronic commerce markets, have their own characteristics, and different from the principles and rules that have governed competition issues in the

[39] ECONOMIDES, *supra* note 38, at 5.

traditional market, Robert Pitofsky said the "more subtle problems of antitrust must adapt to the special circumstances of high-tech industries,"[40] these differences are primarily in technology, which determines the way in anti-competitive practices are performed, on the other hand, authors like Daniel L. Rubinfeld, note that: regulation in the area high technology should be guaranteed, because the market dominance arises more naturally and more necessary for regulators to protect against abuse of power by dominant undertakings.[41] While the antitrust rules must conform to the trends set by the new economy, it is also a fact that the existing legal systems antitrust, are applicable to defend the process of competition in the markets for electronic commerce, this is due to a reason, such systems are based on the principles and theories of classical economics, principles which also govern the process of competition on the Internet, however, it is essential that the antitrust authorities take into account as particular aspects of these markets due to their technological nature, due to ICT as its backbone.

The case Google is undoubtedly one of the companies in the new economy in recent years[42] has faced severe accusations about violations of antitrust legal system, which critics say has damaged the process of competition and consumers. In this article the analysis of the processes that this digital company has faced in the United States and the European Union, the indictment are very similar in both cases, however the results are different, the criteria issued in research in these countries have been different, leaving little clarity about the real existence of anti competitive practices by Google, we analyzed.

---

[40] Robert, Pitofsky, *Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems,* AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW'S ANTITRUST ISSUES IN HIGH-TECH INDUSTRIES WORKSHOP, 1999, available at *http://www.ftc.gov/public-statements/1999/02/antitrust-analysis-high-tech-industries-19th-century-discipline addresses*

[41] Daniel L. Rubinfeld, *Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries*, ADDRESS BEFORE THE SOFTWARE PUBLISHERS ASSOCIATION, 2 (1998).

[42] The Google case is the most relevant in 1998 the company Microsoft, starred in one of the most important antitrust cases in the United States, its transcendence lies in two main aspects, first reactivated the antitrust legal system in this country. Second, was the first company that belongs to the new global economy, faced a process for anticompetitive allegations, the United States Department of Justice, found the company guilty of anticompetitive practices and was sanctioned repairing the damage caused to the competitive process and consumers. *See* The United States Deparment of Justice, United States v. Microsoft Corporation, *http://www.justice.gov/atr/cases/ms_index.htm*, and Nicholas Economides, *The Microsoft Antitrust Case,* (2001).

a) *Case: United States against Google Inc*

In 2010, the Federal Trade Commission of the United States, launched an investigation against Google, on charges of abuse of its monopoly power with the machine searches, *Google Search*. The research was based on the Sherman Act (legislated in 1890) in their following sections:[43]

> 15 US Code § 1 - Trusts, etc., in restraint of trade illegal; penalty: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Any person who does any contract or engage in any combination or conspiracy is declared illegal and shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by fine not exceeding $ 100 million in case of a corporation, or if any another person, $ 1,000,000, or by imprisonment not exceeding 10 years, or both penalties, he said, at the discretion of the court.
>
> 15 U.S. Code § 2 - monopolizing trade a felony; penalty Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by fine not exceeding $ 100 million in case of a corporation, or, if any other person, $ 1,000,000, or with imprisonment of up to 10 years, or by both said punishments, in discretion of the court.

The research was conducted in response to various allegations made by competitors, primarily, Microsoft, Yelp and TripAdvisor, who accused Google of anticompetitive practices; such as the abuse of its dominant position in the Internet search market to favor its own products and services or those of their advertisers advertising service, at the expense of their rivals. The commission investigated further accusations that Google wrongfully appropriated without the consent or compensation of the content of Web pages rivals to improve their own products and then move this content to consumers as his own.[44]

The indictment alleges that Google did a "search bias" in your engine *Google Search*, the FTC said that the core of the research was the vertical integration of its own content (eg maps, comparison shopping, search results flight, etc.), so the user access for competitors is

---

[43] Google was not investigated only for its search engine, also for alleged breach of the fair, reasonable and non-discriminatory terms of licensing patents in its Android operating system.

[44] John Leibowitz, *Google Press Conference*, Federal Trade Comission, January 2013, available at *http://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks-federal-trade-commission chairman-jon-leibowitz-prepared-delivery/130103googleleibowitzremarks.pdf*

excluded, which is harmful to competition. The focus of the FTC investigation focused on the effect on consumers and the market as a whole, leaving aside the impact on individual competitors. [45]

Google Search results generate two types of results: 1) organic or natural results, and 2) sponsored or paid links.[46] In the first case, the search engine throws a list of links to the most relevant results requested by the user. In the second case the bonds are produced by companies interested and willing to pay Google when users click through your ads.[47]

The FTC investigation could be carried out, should be divided in two senses: first, in relation to the effectiveness of search machine has to offer better customer service and secondly biases that favor, according to his accusers, to their own products and services and their advertisers. Google has generated significant revenue by selling advertising, most of Google's revenue comes from the sale of sponsored links and other similar searches generated by advertising.[48]

The amount that Google indictment for sponsored links is calculated according to a keyword auction conducted through the *Google AdWords* platform.[49]

In the first case, the efficiency of the search machine does not cause harm to consumers, Sterk Bork and indicate that:

> The display of *Google search* results pages specializing in General search is on your machine improved general search product, Google does not have the ability to reduce competition from machine market... The specialized vertical search results ranking search in the same way that general search results are placed, destroy the value associated with specialized searches.[50]

---

[45] Geoffrey A. Manne & William Rinehart, *The Market Realities that Undermined the FTC´s Antitrust Case Against Google*, HARVARD JOURNAL OF LAW AND TECHNOLOGY OCCASIONAL PAPER SERIES-JULY 3 (2013).

[46] Google Inc., *Google Search*, GOOGLE GUIDE, available at *http://www.googleguide.com/results_page.html* (last visited: May 2014).

[47] *Id.* at *http://www.googleguide.com/results_page.html*

[48] VIRGINIA SCOTT, COMPANIES THAT CHANGED THE WORLD: GOOGLE, (2008).

[49] JACOBSON HOWIE, GOOGLE ADWORDS FOR DUMMIES, (2 ed., 2009).

[50] Robert H. Bork, & Gregory J. Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google*, 8(4) JOURNAL OF COMPETITION LAW & ECONOMICS, 663–700, (2012).

So the accusation that the specialized search results harms competition has insufficient basis for antitrust theory, so that did not prosper, besides Google that this improved service benefits the consumer. It is important to mention that Google, as part of a bilateral market, the advertising industry competes with many companies such as Microsoft, Facebook or Twitter.[51] The University of Chicago insists that if Google does not comply with the requests of its users traffic is reduced and hence advertising revenue decrease, plus it is laudable that Google displays search results of specialized only to foreclose its competitors vertical and increase their advertising because the costs of this strategy outweigh its benefits.[52]

In the second case, it has been claimed that Google is the gateway to the Web, argument Bork and Sidak refuse and offer two reasons: the first is that the user can switch to another search engine of equal zero price and navigate Web sites that desired, on the other hand the nature of the market both sides constrains the ability of Google to act anticompetitive.[53]

Also this is false for two reasons, the first is that Internet users can directly navigate to websites thanks to the open architecture of the Internet, using the skills and frequency of use of Web browsers using the uniform resource locators (Uniform Resource Locators) URLs, search methods that can vary depending on the technique with which the URL page is written to the positioning rod browser and selecting a web site or search engine.[54] Second, because there are many search engines on the Internet, for example, YahooSearch:*http://mx.search.yahoo.com/*;DuckDuckGo:*https://duckduckgo.com/*;Bing,*http://www.bing.com/*; among many others.

Dynamic competition generates innovation and therefore an important point in favor of Google is that the placing on the market of specialized search algorithms that benefit consumers, has encouraged other competitors such as Bing, to create similar algorithms for their machines search.

---

[51] Proceeds from Twitter in 2011 were $ 139.5 million dollars, in the case of Facebook for 85% percent of their profits with one equivalent of $ 3.2 billion in both cases derived from the sale of advertising on their websites.

[52] BORK & SIDAK, *supra* note 50, at 10.

[53] *Id.* at 10.

[54] Alexander J.A.M van Deursen, *Rethinking Internet Skills: The Contribution of Gender, Age, Education, Internet Experience, and Hours Online to Medium- and Content-Related Internet Skills,* ELSEVIER-POETICS, 3 (2011).

Bork and Sidak explained on bilateral markets for Internet searches, that the free search creates immense benefits for consumers and advertisers, the consumers value the free information available and the advertisers, value access to consumers of the searches. So we are facing a bilateral market as Internet search engines are considered an intermediary platform that connects two parts, search users and advertisers, for an exchange that occurs over the Internet.[55] Google sells highly targeted advertising that serves the interests disclosed by requests for searches of Internet users. These revenues subsidize the cost of providing free searches to consumers.[56]

Furthermore the University of Chicago also argues that if Google will only show the results according to pay its advertisers, run several risks losing users who do not find the desired results and secondly Google's competitors could offer better results and win easily more advertisers, causing in Google lost in their income. So that both sides of the market could decline.[57]

Google ranks search results unpaid using algorithms that put the most accurate and relevant at the top of the page results.[58]

To tell Mark R. Patterson, to define the market power of Google is necessary not only to inquire into the conduct of distortion search results.[59]

The accusation of excluding competitors by manipulating the *Google Search* engine, requires a comprehensive analysis to identify the relevant market, the correct definition can issue a resolution favoring the process of competition.

To determine the relevant market first service search engine is determined, and it is important to identify potential competitors like Bing, Yahoo Search, Hakia, Blekko, Yandex, Accona, among many others.

---

[55] *Id.* at 3.

[56] Google Inc., *Facts About Google and Competition, About Ads*, available at *http://www.google.com/competition/howgoogleadswork.html* (last visited: May, 2014).

[57] BORK & SIDAK, *supra* note 49, at. 5.

[58] Google Inc., *Webmaster Tools, Ranking*, September 2012, available at *http://support.google.com/webmasters/bin/answer.py?hl=en&answer=34432* (last visited: May, 2014).

[59] Mark R. Patterson, *Google and Search-Engine Market Power*, FORDHAM UNIVERSITY SCHOOL OF LAW, 7 (2012).

The search engine Google is not the only way to find the information sought, for example, the purchase of music, many consumers are addressed directly to iTunes, or for the purchase of books search directly off Amazon.com, among other clear examples, however we should not ignore the power that Google has to issue its first search results to specific companies.

Although competitors might prefer Google products work differently, these desires are not a sound basis for antitrust liability, as the FTC was warned. The recent literature supports this argument and emphasizes the importance for antitrust jurisprudence to avoid the costly mistake discourage excess product innovations that improve welfare.[60]

After 19 months of work, interviews with industry participants and declarations of the key executives of Google, in a press conference the President of the Commission, John Leibowitz, was the spokesman of the agreed resolution the five commissioners investigating the case Google, which in short, it was decided not to file with the Department of Justice demands whatsoever against the company, instead signed an agreement in which Google voluntarily decided change some practices identified as anticompetitive.[61]

The conference Leibowitz said that no evidence showing that a bias in the machine searches Google also states that the investigation was inclined to the potential harm to consumers and the market as a whole is found, he quoted the statement, Earl Warren of the Supreme Court 50 years ago, which is the maximum of the FTC: "The aim of the law is to protect competition not competitors." Finally Leibowitz said that probably many think they should have done more for the case, but argued that it was sufficient and that "it is good for consumers, good for competition, is good for innovation and is what do."[62]

The FTC acknowledged that the regulation of antitrust issues in e-commerce markets can be a difficult task, however clarifies that monopolies analysis provides a framework for prudent application of competition, no matter the market that is in question.

Some experts argue that vertical integration of Google tends to be competitive and pro-competitive, since the law does not require the forced vertically integrated resource access.[63]

---

[60] MANNE & RINEHART, *supra* note 45, at 12.

[61] LEIBOWITZ, *supra* note 43, at 1.

[62] *Id.* at 6.

[63] MANNE & RINEHART, *supra* note 44, at 3.

Given the seriousness of the indictment against Google, the previous voluntary agreement and the refusal by the FTC to apply a sanction on Google for "not find any evidence to prove his guilt" leaves many questions, the main if the Commission really he's protecting competition and even more if it really is looking out for consumers, leaving the FTC in an unfavorable role in the conclusion to which arrived on research but more because it accepted that Google would make voluntary changes.

These changes are to changes in the search engine. First, rival companies now have the ability to remove content pieces known as "fragments" of *Google Search* results, pages that refer to areas such as travel and shopping. Second, Google is giving advertisers more flexibility to manage their data for use in rival search engines like Bing of Microsoft.[64]

On the other hand, Google allow Web sites the ability to opt out of appearing in their searches, not being penalized or degraded in the general search results of *Google Search*, which seeks a competitive Internet.[65]

A key point in the decision of the FTC is "supporting argument" of benefit to the consumer, Timber Craig qualifies to establish the benefit or harm to the consumer has been the quicksand in the middle of antitrust cases in the United States and in fact been the subject in the system of competition that has had to face since 1890; William Kovacic, former chairman of the FTC, "The speed of change has challenged Washington's ability to act forcefully against technology companies increasingly fighting each other in overlapping markets."[66] One of the maxims governing decisions on competition matters is that the law protects consumers not competitors, therefore, explain Robert H. Bork and J. Gregory Sidak of the University of Chicago that "practices penalize Google anticompetitive violate this principle, restricting

---

[64] Grant Gross, *Google, FTC Settle Antitrust Case*, PC WORLD LEGAL ISSUES, January 2013, available at *http://www.pcworld.com/article/2023662/google-ftc-settle-antitrust-case.html* (last visited, May, 2014).

[65] Sam Gustin, *Google's Federal Antitrust Deal Cheered by Some, Jeered by Others,* TIME BUSINESS AND MONEY, January 2013, available at *http://business.time.com/2013/01/04/googles-federal-antitrust-deal-cheered-by-some-jeered-by-others/* (last visited: May 2014).

[66] Timberg Craig, *FTC: Google Did not Break Antitrust Law with Search Practices*, THE WASHINGTON POST, 2013, May 2014, available at *http://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlementday/2013/01/03/ecb599f0-55c6-11e2-bf3e-76c0a789346f_story.html* (last visited: May 2014).

dynamic competition and thereby harm consumers, being the subject of the federal competition Act."[67]

According to the Wall Street Journal, commissioners of the FTC if they mentioned that "did not like who was doing Google, but concluded that the tactics not necessarily violated antitrust law,"[68] also the Wall Street Journal, reveals various actions against the intent of the FTC to punish Google for anticompetitive practices "earlier-chairman of the FTC received a letter from US Senator Mark Udall inviting the agency to proceed with" caution in their investigation of Internet companies mainly to those "who have the highest rates of satisfaction consumers in the country and have also created millions of jobs,"[69] however, was not the only political pressure, reveals the US newspaper.

Even J. Thomas Rosch, FTC Commissioner in the research, told the Wall Street Journal that the decision the commission had set a bad precedent for future negotiations with other companies, because "might demand similar treatment, and not favor them imply that Google has received preferential treatment in the investigation."[70]

Meanwhile, other arguments against the decision of the FTC, state that: "Google clearly skews search results to favor its own products and services, while portraying the results impartially," said John M. Simpson, director of the Project Privacy consumer Watchdog said in a statement: "That undermines competition and harm consumers, the FTC favored Google."[71]

They say that doing so is acting as Microsoft did in the 1990s when PC makers were forced to preinstall software Internet Explorer with Windows operating system at the expense of rivals like Netscape, as described above.

---

[67] BORK & SIDAK, supra note 50, at 1.

[68] Kendall Brent, *Behind Google's Antitrust Escape*, WALL STREET JOURNAL, June 2013, available at *http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html#* (last visited, May 2014).

[69] *Id. http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html*

[70] BRENT, *supra* note 68, available at *http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html*

[71] *Id. http://online.wsj.com/article/SB10001424127887323689604578221971197494496.html*

To Gal and Weber, actually accusing Google only companies sought to use the law of competition to protect their own market positions, at the expense of punishing Google to be a successful competitor and stifle innovation and dynamic competition.[72]

So that Robert H. J. Gregory Sidak Bork and indicate that:

> ... Punish Google for being a more effective search engine could harm consumers and thus contradict the avowed purpose of the antitrust laws... the antitrust intervention that would prohibit or circumscribe the practices of Google punished and then deter the same innovations that improve welfare, he has done an effective competitor of Google. So use the antitrust laws may damage the dynamics of competition, such that only successful companies need to worry about being penalized for being winners.[73]

As we can see the views are much divided, however, the opinion decisive is issued by the FTC, which has been erroneously or not, he finally felt that there was no evidence to accuse Google to exercise monopoly power over your machine searches. What remains in the pipeline are the tools used by the Commission to reach such a conclusion, it actually reinforces the idea that the problem is not in the legislation, but the analysis methods and tools used by the authorities for the investigation of these cases, whose research lies mainly in obtaining evidence in an environment of ICTs involved the need for technical and professional knowledge of the subject.

b) *Case: European Union against Google Inc*

In the European Union, the issue of Google as an economic agent that damages the competitive process, arises because of allegations reported by the British site Foundem, which in November 2009 filed a complaint with the European Commission arguing that Google exploited its dominance in the market for machines search in Europe, in detriment of competitors and consumers.[74] It is argued that to date *Google Search* accounts for roughly

---

[72] Michael S. Gal, & Spencer Weber Waller, *Antitrust in High Technology industries: A Symposium Introduction*, 8(3) OXFORD JOURNALS, JOURNAL OF COMPETITION LAW & ECONOMICS, 449-457, (2012).

[73] BORK & SIDAK, *supra* note 50, at 3.

[74] The Economist, *Google, the EU and antitrust Search over*, February 2014, available at http://www.economist.com/news/business/21595966-third-attempt-settlement-likely-be-last-search-over (last visited: December 20, 2014).

95% of the search market.[75] In 2010 the European Commission launched a formal investigation against the company, although in February 2010 joined the French protests eJustice.fr web and portal Ciao, owned by Microsoft.[76]

The legal basis for the Commission for the investigation is as follows:

1. Article 11(6) of Council Regulation No 1/2003 and article 2(1) of Commission Regulation No 773/2004.
2. Article 11(6) of Regulation No 1/2003 provides that the initiation of proceedings relieves the competition authorities of the Member States of their authority to apply the competition rules laid down in Articles 101 and 102 of the Treaty.
3. Article 2 of Regulation No 773/2004 provides that the Commission can initiate proceedings with a view to adopting at a later stage a decision on substance according to Articles 7-10 of Regulation No 1/2003.

The accusations are similar to those identified in the United States, however, the main concern of the EU is to say Ramon Tremosa (MEP): "The problem with *Google Search* is to divert traffic from rivals links. European companies are losing revenue and redundancies. European consumers are not receiving the most appropriate option, due to the preferential treatment of its own services Google."[77]

Joaquin Almunia, European Commissioner for Competition, until November 2014, was one of the main speakers in the case, made several agreements with the company. In 2012, as part of the research conducted, Almunia pointed to four points on which could be considered to Google as a company with dominant position in the market for search engines:[78]

---

[75] Arthur Charles, *European Commission Reopens Google Antitrust Investigation*, THE GUARDIAN, September 2014, available at *http://www.theguardian.com/technology/2014/sep/08/european-commission-reopens-google-antitrust-investigationafterpolitical-storm-over-proposed-settlement* (last visited: December 20, 2014).

[76] Pablo G. Bejerano & Marilín Gonzalo, *La batalla interminable de Google y Bruselas*, ELDIARIO.ES, December 2014, available at *http://www.eldiario.es/turing/propiedad_intelectual/Google-UE-presion-antitrust_0_331417659.html* (last visited: December 20, 2014).

[77] MONCHO, *supra* note 14, at *http://www.abc.es/economia/20141208/abci-poder-google-batalla-estados-201412052144.html*

[78] Joaquin Almunia, *Statement of VP Almunia on the Google Antitrust Investigation*, SPECH EUROPEAN COMMISION, (2012) available at *http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm*

I. In its general search results on the web, Google displays links to its own vertical search services. Vertical search services are specialised search engines which focus on specific topics, such as for example restaurants, news or products. Alongside its general search service, Google also operates several vertical search services of this kind in competition with other players.

II. The second point relates to the way Google copies content from competing vertical search services and uses it in its own offerings.

III. The third point, relates to agreements between Google and partners on the websites of which Google delivers search advertisements.

IV. The fouth point, relates to restrictions that Google puts to the portability of online search advertising campaigns from its platform *AdWords* to the platforms of competitors.

The Commission considers that these practices can harm consumers by reducing choice and stifling innovation in the fields of specialised search services and online search advertising.[79]

In 2013, Google agreed to adopt a series of measures to contrarrestas allegations against the company, these are:[80]

a) Google will give content providers an extensive opt-out from the use of their content in Google's specialised search services if they so wish, without being penalised by Google.

b) Google will remove exclusivity requirements in its agreements with publishers for the provision of search advertisements; and

c) Google will remove restrictions on the ability for search advertising campaigns to be run on competing search advertising platforms.

d) An important aspect of the proposal is that Google's compliance with these commitments would be supervised by an independent monitoring trustee. The commitments would cover the European Economic Area (EEA) for 5 years.

---

[79] European Commission, *Antitrust: Commission Obtains from Google Comparable Display of Specialised Search Rivals,* (2014) available at *http://europa.eu/rapid/press-release_IP-14-116_en.htm*

[80] *Id. http://europa.eu/rapid/press-release_IP-14-116_en.htm*

However, this concession from Google fu not sufficient for the Commission, so that the investigation against Google continued.

Later in February 2014, Google decided to negotiate again before being sanctioned by the European authorities, and agreed to: "Google agreed to tweak the way it presents search results in Europe to address concerns that it is abusing its dominance in online search to favor its own services at the expense of rivals... futhermore, Google agreed to reserve space near the top of its European search pages for competitors to serve specialized search results for things like hotel rooms alongside Google services that do the same thing."[81] The New York Times defined that "Google agreed to the harshest penalties it has yet received in an antitrust inquiry anywhere. But it escaped a fine and a finding of wrongdoing. And it protected its crown jewel —its secret algorithm— from oversight by regulators, and avoided a court battle or potential consequences like a $5 billion fine or a ruling to make major changes to its company structure or its products.[82]

There have been many speculations about the hardness that the European Union has had against Google, even been accused of xenophobia against the American search engine, which in the Wall Street Journal opinion, "That Could chase away foreign investment."[83] A Tremosa say, is not "of being against Google or any other US company. We are against monopolies, we want equal in the European digital market. We want fair and neutral searched interests of consumers."[84] Arnaud Monteburg, French Economy Minister said "It is Necessary, indeed urgent, to put in place a framework That Guarantees a level playing field."[85]

---

[81] Vanessa Mock, Sam Schechner and Rolfe Winkler, *Google Reaches Settlement in EU Antitrust Probe*, THE WALL STREET JOURNAL, February 2014, available at *http://www.wsj.com/articles/SB10001424052702304450904579364330663366784* (last visited: December 15, 2014).

[82] Claire Cain Miller & Mark Scott, *Google Settles Its European Antitrust Case; Critics Remain*, February 2014, THE NEW YORK TIMES, available at *http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-with-european-union.html?_r=0* (last visited: December 15, 2014).

[83] *Id.http://www.nytimes.com/2014/02/06/technology/google-reaches-tentative-antitrust-settlement-witheuropeanunion.html?_r=0*

[84] MONCHO, *supra* note 14, at http://www.abc.es/economia/20141208/abci-poder-google-batalla-estados-201412052144.html

[85] SCHECHNER & MOCK, *supra* note 81, at *http://www.wsj.com/articles/SB10001424052702303480304579579791562483218*

Tim Worstall says, "However, we've a serious problem here: no one has yet managed to show as Google whos That deserves a fine of anything. Not only That no one has as yet managed to show That Google has done anything wrong at all. Our collective problem here Is That the EU itself does not seem to be sure about what monopolies are and why they're Generally undesirable things."[86] But in reality the European Union can not take any steps until such time as there are no real evidence "that consumer welfare is being damaged by the exercise of that dominance before we get to that stage. That's something we don't have as yet, may never have, and so there's not any justification for the EU's current threats."[87]

Facing accusations Eric Schmidt (Google chairman until 2011) sent a letter to the Financial Times, to defend the position of the company, in Which Said: "Google is not The gataway to the Internet... Nor is it true that we promote our own products at the expense of competitors. We aim to show results that answer the user's queries directly (after all we built Google for users, not websites)... That's more relevant than a link to a specialised search engine, where you have to repeat your query. And if you need directions to a pharmacy, you get a Google Map with the closest stores. We think that is a great result for users."[88]

After four years of research, and now being spokeswoman case, Margrethe Vestager, expressed his intention to meet with those companies more critical of the dominance of the browser. The European Commissioner noted that to complete the case requires further information, so decided a meeting with the detractors of Google in the European Union.[89]

The rules in the European Union, will be much tougher for digital businesses, for the protection of consumer rights, as the European Parliament has called as a digital single market,

---

[86] Tim Worstall, *The Problem with Google's Potential $6 Billion European Union Fine*, FORBES, September 2014, available at *http://www.forbes.com/sites/timworstall/2014/09/24/the-problem-with-googles-potential-6-billion-european-union-fine/* (last visited: December 15, 2014).

[87] WORSTALL, *supra* note 86, at *http://www.forbes.com/sites/timworstall/2014/09/24/the-problem-with-googles-potential-6-billion-european-union-fine/* (last visited: December 15, 2014).

[88] Mr Eric Schmidt, *Regulators Have not Objected to Google's Answers*, FINANCIAL TIMES, September 2014, available at *http://www.ft.com/intl/cms/s/0/ee8da9ea-334e-11e4-85f1-00144feabdc0.html?siteedition=uk#axzz3LtEFT4fd* (last visited: December 15, 2014).

[89] Foo Yun Chee, *EU's Vestager to Meet Google Complainants in Coming Weeks,* REUTERS, December 2014, available at *http://www.reuters.com/article/2014/12/11/us-eu-google-antitrust-idUSKBN0JP1CE20141211* (last visited: December 20, 2014).

this due to the adoption on 24 November 2014 different rules, among which directly affect the functioning of Google. This document, called "on supporting consumer rights in the digital single market (2014/2973 (RSP)"[90] reveals the view that Parliament has on digital markets and electronic commerce, considering it as a source of economic benefits, says:

> whereas the digital single market is one of the area of progress which, though entailing challenges, offers potential for high-efficiency gains that could amount to EUR 260 billion per year, thereby contributing to Europe's recovery from the crisis; además considera que "whereas the digital single market is one of the most innovative sectors of the economy and is therefore playing a major role in the competitiveness of the European economy and contributing to economic growth through the development of e-commerce, while also facilitating the administrative and financial compliance of businesses and presenting consumers with a wider choice of goods and services.[91]

The resolution calls on Member States and the Commission, implement and enforce existing rules to address "barriers to the development of the digital single market."[92] The parliament, consensus application of existing rules or create new rules to protect consumers in e-commerce markets, including recommendations to be observed, have highlighted the performance of search engines,[93] a situation that points directly to regulate the operation of

---

[90] *See:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN*

[91] European Parliament, *Resolution on Supporting Consumer Rights in the Digital Single Market (2014/2973(RSP),* available at *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN*

[92] EUROPEAN PARLIAMENT, *supra* note 90, at *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN*

[93] Resolution points that focus on the search engines are:

"10. Notes that the online search market is of particular importance in ensuring competitive conditions within the digital single market, given the potential development of search engines into gatekeepers and the possibility they have of commercialising secondary exploitation of information obtained; calls, therefore, on the Commission to enforce EU competition rules decisively, based on input from all relevant stakeholders and taking into account the entire structure of the digital single market in order to ensure remedies that truly benefit consumers, internet users and online businesses; calls, furthermore, on the Commission to consider proposals aimed at unbundling search engines from other commercial services as one potential long-term means of achieving the aforementioned aims;

11. Stresses that, when using search engines, the search process and results should be unbiased in order to keep internet searches non-discriminatory, to ensure more competition and choice for users and consumers and to

Google Search, a blow is the resolution to harmonize legislation so that search engines separate their search business from the rest of their business,[94] This arrangement becoming binding force Google to unlink your business advertise your services web searches.

This document undoubtedly put a stop to practices which Google has been accused as harmful to the process of competition in the markets for electronic commerce in Europe; the authorities have greater legal resources to fight the American company and say the same European authorities, to generate more equal for operators of digital markets in Europe.

So far, it is not possible to assess the results of the resolution, this will take time, but it is real that this document is unprecedented in the world, and puts the EU at the forefront of the legislation on e-commerce markets as it seeks to adjust their existing laws to the physical market e-commerce markets, which every day becomes more economic agents who rely on this type of digital markets and despite criticism from those who advocate freedom of Internet regulation, responsibility and limited intervention of the state is necessary to create conditions of legal certainty of the online world.

V. CONCLUSION

In the analysis of the research that both the US and the European Union have made against the company Google about your product *Google Search*, due to accusations that the company uses its dominant position to benefit its customers advertising, detriment of competitors and consumers on the Web, we can see the following:

In both cases is possible see weakness of the antitrust authorities in investigations, it is suggested to be due to two reasons, the first is the lack of rules clarifying precisely how how to carry out investigations in the environment the web, which differs greatly from what is known in the physical world, and the second reason ignorance of the technical aspects of Google Search and behavior of competition in the electronic commerce markets, which inhibits the

---

maintain the diversity of sources of information; notes, therefore, that indexation, evaluation, presentation and ranking by search engines must be unbiased and transparent, and that, for interlinked services, search engines must guarantee full transparency when showing search results; calls on the Commission to prevent any abuse in the marketing of interlinked services by search engine operators;

12. Welcomes the announcement of further investigations by the Commission into search engine practices and the digital market in general..."

[94] *Id. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2014-0286+0+DOC+XML+V0//EN*

possibility of research clearer that emit strong results on the violation of companies like Google to antitrust laws, which inhibits the possibility of much clearer research that emit strong results on the violation of companies like Google to antitrust laws.

Proof of this was the decision of the FTC in 2013, which offered no convincing, specific and transparent statements to explain the reasons why Google was not identified guilty of violating antitrust laws, and let the good will of the business changes that deemed necessary to soften their practices against competitors, Google knows it is a monopoly and its employees have openly recognized as Vicent Cerf said "if we are a monopoly, what is the problem with it."[95]

Another reason is the procedure shown so far in the European Union in the investigation of the European Competition Commission for more than four years to determine that Google has violated the competition in the european electronic markets. The investigations have been so deficient that Joaquín Almunia accepted various agreements that Google provided, to change their practices in the European Union and pretend to leave satisfied the European authorities, with the objective to finish the investigations against him, however, the European authorities do not have been satisfied and have worsened their position on search engines and e-commerce companies in the European Union with the rules that are stated in the resolution on supporting consumer rights in the digital single market (2014/2973 (RSP), argued, of course, encourage the interests of consumers.

However, as in investigations of physical markets, both the European Union and the United States, have explored what is called "market share," nevertheless, in the specific case of *Google Search*, and many companies digital with relevant market of digital products, this can not be the measure to determine market power,[96] as this is applicable to markets with a certain price in money for the service or product is offered, in the case of products like *Google Search* their price is zero, so that innovation plays a fundamental role in market power that acquires, here is the key point of the investigation.

It is important to clarify that this consideration does not put innovation as the enemy of competition in the markets for electronic commerce, on the contrary, as in the physical markets, is essential for surviving the competitive process, and benefit consumers; as in most

---

[95] Moises Naim, *El evangelio según Vint Cerf*, Entrevista, November 2014, available at *http://efectonaim.net/el-evangelio-segun vint-cerf/* (last visited: December 28, 2014).

[96] If Google charge a certain price for access to its service, the business of *Google Search* just end.

of the companies in the new economy, the innovation of its products, such as *Google Search*, has generated positive network externalities that have given a market dominance of search engines and this could be the reason for rejecting the guilty of such companies as violating antitrust laws.

Considering that innovations are protected by copyright, then it would be necessary to review the laws on the subject in order to determine whether those provisions should be reassessed in the market environment of electronic commerce, in the case that they may hinder the competitive process.

But beyond all this, we must remember that the economy is governed by decisions of economic agents, therefore, will play an important role; if profit maximization is the main goal of every business, this objective should never be achieved at the expense of other economic agents involved in the market in question, so that the ethics of competition is vital for the existence fair competition, all companies have the right and obligation to offer innovative products and services to consumers, and it's not their fault if this affects their competitors, the problem is that the controls of the companies, make decisions to use their innovations in order to eliminate, under pressure, to competitors abusing market power they have acquired, even causing collateral damage to third parties.

In particular, it should occupy in the investigations in the case of companies in the New Economy is not the way in which they acquired their market power, but their use that power to follow preserving, creating unnatural barriers competition.

In the case of *Google Search*, is shown to be a company with monopolistic power, so that research should not focus on as acquired that power to then find guilt or otherwise of Google, as we saw network externalities play a key role in that market dominance, but this does not make you guilty.

Actually to determine that truly Google are violating the laws antitrust, with its product, Google Search, the analysis should be in two ways, a) damage to competition, and b) The existence of harm to consumers.

In the first case, it is essential that the authorities thoroughly understand how works the technology used by *Google Search*, including the algorithm and traces of spam, which may be discriminating divers Websites that truly provide valuable information and do not belong to the category of spam. In addition, rigorous analysis of the behavior of the searches machine, taking a particular sample of different markets is required, and analyze the possible exclusions

searching various websites perform competitors, checking the extent in that the links benefit to advertisers and create no natural barriers to competition.

It is important to note that the analysis should not only focus on competition in the market for search engines, also on the possible involvement of many other markets that exist in the environment of the Web, because if we consider that Google decides which links show consumers, and whether they benefit their advertisers, then perhaps many companies could simply be out of the competition in the environment of the web, they are not shown in the top search results, but this is really relative, because that do not appear in the top search results do not mean that Google does not allow them to appear on your ranking, depends on the willingness of the user to search all the pages of the search results shed.

However, we must note that Google is a private company that has the right to make decisions that benefit your company and give preferential treatment to their customers, the problem here is that Google Search has information that is not private, information is a human right, which makes it a matter of public character, so the commercial implications are uncomfortable and even dangerous for the right to information, so that the decision that the European Union has issued for search engines dissociate their activities in trade issues is quite relevant to eliminate the problem decision, however, it is estimated that this will harm the economic interests of Google, so it will be very interesting to know the decision the company will take to prevent impacts. We have the hypothesis that not being a way to generate income for Google, then, is uncertain the position that the digital enterprise will continue to support the service for consumers in Europe, the picture is viewed from three angles, 1) remove the service of Europe, 2) perform charges for using the service search machine, and 3) consider Google Search as a public interest resource and continue to benefit consumers, either option must be careful because it could generate global consequences.

Moreover, in relation to the possible existence of harm to the consumer, we must not lose sight of the antitrust laws safeguarding the process of competition, not competitors and not directly to consumers, for that there are specialized consumer protection laws; therefore, the damage should be investigated as affected consumers, ranging from an indirect appearance in the sense of showing that Google, through the use of Google Search, harm the competitive process and this reduces the economic benefits that are produced by competition in the market, these are: the growth of the overall economy depending, for example, the contribution of e-commerce activities to GDP and income rates microeconomic caused by digital business.

If one tries to analyze the damage to consumers directly can be in both directions in relation to the protection of personal data and direct consumer services, stipulated in the respetivas laws, but this is beyond the antitrust limits.

The end result of research in Europe, will be a precedent in antitrust investigations in the New Economy; America lost a valuable opportunity in the subject, so it will be important the final decision of the European Commission, which will be a future reference for other countries and will determine a starting point for commanding operation of competition in various markets e-commerce, and leading the way for other companies of the digital environment.

ONE NORM, TWO MODELS. LEGAL ENFORCEMENT OF HUMAN RIGHTS IN MEXICO AND THE UNITED STATES

Karina ANSOLABEHERE[1]

ABSTRACT. *In the 21st century, the international community has assumed the responsibility of protecting individuals and groups from unlawful human rights abuse. This article analyzes the political tensions faced by domestic courts when they attempt to enforce international human rights norms. After presenting divergent models, it analyzes how multilateral norms relate to both the nation's domestic law and its foreign policy. It then examines two models of human rights enforcement, followed by a comparison of the Mexican and U.S. models. This comparison shows that although both countries presented different approaches (one from within, USA; and one from the outside, Mexico) both of them enforce the norm of international responsibility to protect.*

KEY WORDS: *Legal enforcement of human rights, human rights politics, domestic judiciaries, Mexico, U.S.A.*

RESUMEN. *Hoy los derechos humanos son una política global sustentada en la responsabilidad de la comunidad internacional de proteger a personas y grupos de abusos. Una de las políticas para hacerla efectiva ha sido el legal enforcement. Este artículo analiza las tensiones políticas que enfrentan los poderes judiciales domésticos cuando asumen la responsabilidad de proteger derechos humanos en la medida en que los ubica como actores no sólo de la política doméstica sino también de la internacional. Poniendo el énfasis en diferentes líneas de política judicial que pueden tener lugar, en primer término se analizan los vínculos entre las diferentes jurisdicciones legales de derechos humanos mostrando la importancia estratégica de los poderes judiciales domésticos y en segundo lugar se analizan dos modelos de legal enforcement de derechos humanos el de México y el de Estados Unido de los que se sostiene que si bien son diferentes constituyen formas de hacer efectiva la*

[1] Researcher and Professor of FLACSO-Mexico, email: *kansola@flacso.edu.mx*

regla de la responsabilidad internacional de protección una desde adentro y otra desde afuera respectivamente, evidenciando las tensiones políticas que deben enfrentar en estos escenarios.

PALABRAS CLAVE. *Aplicación de normas legales de derechos humanos, política de derechos humanos, poderes judiciales, México, Estados Unidos de Norteamérica.*

TABLE OF CONTENTS

I. INTRODUCTION

It is common to hear people discuss a "human rights revolution." In practical terms, this refers to the adoption by domestic institutions of human rights standards that have already been developed by foreign governments, international agencies and organizations.[2] This article will focus on diverse human rights enforcement models, with special emphasis on two cases: Mexico and the United States. Its main goal is to analyze the underlying tensions between international norms and domestic judicial institutions and legal doctrines, and the scope of each branch of the government.

The relation between international and domestic jurisdictions in regard to human rights legal enforcement has received special attention in the literature

[2] *See* CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS (Oxford University Press, 2011).

about diffusion of human rights norms.[3] Both domestic and international courts have became key actors in this scenario.[4] This article argues that even when there is an accepted social norm [5] behind human rights regimes today: that the international community cannot accept human rights abuses at the domestic level (even when this situation can fluctuate from one moment to another); this norm is known as the international responsibility to protect (United Nations, A/63/677); there has been no international consensus with regard the models of human rights legal enforcement at the domestic level.

The norm of the international responsibility to protect is as the same time the one that expresses the maximal aspiration of the contemporary human rights global community as well as the one that became especially problematic in the arena of domestic judicial politics.[6] In other words, the adoption of human rights by domestic judicial decision-making is not merely the result of domestic politics but also a consequence of each State's foreign policy that judges need take into account in their rulings concerning these topics and their legal doctrines regarding international law.[7] As such, it presents a host of unprecedented problems and opportunities.

---

[3] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (W.W. Norton, 2011); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (Cambridge University Press, 2009); Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 ANNUAL REVIEW OF POLITICAL SCIENCE 265,286 (2012) *doi:10.1146/annurev-polisci-031710-114414.*

[4] Cesare P.R. Romano, *Proliferation of International Judicial Bodies: The pieces of the Puzzle*, 31 INT'L L.& POL., 709,751 (1999).

[5] Social norm is defined as an "appropriate behavior" *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 11 (W.W. Norton, 2011)

[6] Judicial politics are defined as "...the analysis of the political process through which the courts are constituted, and (judicial) decisions are taken and implemented", Keith Whittington et al., *The study of law and politics*, *in* Keith Whittington, Daniel Kelemen & Gregory Caldeira (Eds.), THE OXFORD HANDBOOK OF LAW AND POLITICS 4-14, Oxford: OUP Oxford.

[7] Courtney Hillebrecht, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-american Human Rights System,* 34-4 HUMAN RIGHTS QUARTERLY 959,985 (2012).

One of the sources of the human rights as transnational policy[8] is the impulse of different models of legal enforcement.[9] This article proposes that each model faces unique challenges regarding both national sovereignty and international influence in domestic affairs. Judges on both multinational and domestic tribunals confront this inherent tension between national and international interests on a daily basis.[10] However the main focuses of this article are the domestic judiciaries, specifically the path they assume about the international responsibility to protect.[11]

This article intends to: a) systematize different ways of human rights legal enforcement[12] from the point of view of judicial institutions, and b) show the dilemmas faced by domestic courts regarding human rights legal enforcement.

To better understand these enforcement models, the article first analyzes diverse jurisdictions and their corresponding legal institutions, all of which are based upon domestic courts that apply human rights norms that have either been enacted and/or adjudicated by multinational bodies. Second, focusing at the domestic level, the article evaluates two contrasting human rights legal enforcement models used by Mexican and U.S. federal courts. The Mexican one will be called human rights from the outside, and the USA one will be called human rights from within. Although both nations are active in the international human

---

[8] *See* Heinz Klug, *Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights*, 11 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE, 85,103 (2005) *doi:10.1146/annurev.lawsocsci.1.041604.115903.*

[9] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 11 (W.W. Norton, 2011); Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries1*, 54-4 INTERNATIONAL STUDIES QUARTERLY, 939,963 (2010).

[10] *See* Alexandra Valeria Huneeus, *Courts Resisting Courts: Lessons from the Inter-american Court's Struggle to Enforce Human Rights,* 44-3 CORNELL INT.L.J 101,142 (2011); Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights,* 102-4 AMERICAN POLITICAL SCIENCE REVIEW 417,432 (2008).

[11] United Nations General Assembly. Implementing the Responsability to Protect. Report of the Secretary General. A/63/677U.S.C. (2009).

[12] MAHMOUD CHERIF BASSIOUNI, *The Future of Human Rights in the Age of Globalization*, 40-1-3, Denver Journal of International Law & Policy 22,43 (2011).

rights community[13] (e.g., the Inter-American System of Human Rights) the United States applies a "dual approach to International Human Rights Law"[14] by using a domestic model in U.S. territory and applying different standards for other nations, meanwhile Mexico has been increasingly under international scrutiny with regard to human rights abuses. These models are closely linked to (a) the host country's foreign policy regarding human rights; (b) domestic legal doctrine about human rights adjudication and international law, and (c) the decision-making authority of each nation's federal courts. Third part of the article presents some final remarks.

II. HUMAN RIGHTS ENFORCEMENT. JURISDICTIONS AND LEGAL INSTITUTIONS

After World War II, the international community established standards for both human rights abuse and crimes against humanity, and these norms included diverse enforcement mechanisms implemented at national, regional and international levels. But it was until the end of the Cold War that the effectiveness of these enforcement mechanisms became an issue for the international community.[15] In other words, human rights took the form of standards adopted by the international community[16] and gradually evolved to the point of becoming enforceable. Enforcement became feasible in many cases through judicial decision making by regional courts, international *ad hoc* tribunals, international courts or domestic judiciaries.

---

[13] Although it is still premature to say that Mexico decided to change this role in the international community regarding human rights in 2015 the Foreign Ministry of Mexico seems to change this disposition assuming an open critical approach to the recommendations of the international mechanisms like the Forced Disappearances or the Special rapporteur on Torture rejecting this reports.

[14] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 4-110, HARVARD LAW REVIEW 815,876 (1997).

[15] *See* Neil J. Kritz, Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights, 59-4 (autumn) *Law and Contemporary Problems*, 127,152 (1996); Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 ANNUAL REVIEW OF POLITICAL SCIENCE 265,286 (2012), *doi:10.1146/annurev-polisci-031710-114414.*

[16] *See* Gideon Sjoberg, et al., *A Sociology of Human Rights*, 48-1 SOCIAL PROBLEMS 11-47 (2001).

As standards for human rights enforcement became more widespread, disputes arose at both domestic[17] and international and regional levels regarding the scope of protection available in sovereign nation-states.[18] Unsurprisingly, many observers regard legal enforcement as a key to human rights protection.[19]

Enforcement mechanisms were developed in a wide range of jurisdictions and entities ranging from multilateral tribunals to domestic courts. As a result, national debates often involved questions concerning the legitimacy of international legal norms in domestic courts;[20] as well as the legal and political issues faced by local courts in enforcing laws or rulings enacted or adjudicated elsewhere.[21] This article

---

[17] *See* RACHEL SIEDER, ET AL., THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Palgrave Macmillan, 2005); Jeong-Woo Koo & Francisco O. Ramirez, F. O., *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004*, 87-3 SOCIAL FORCES, 1321,1353 (2009).

[18] Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 263,292 (Rachel Sieder, et al., eds., 2005); NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (University of Pennsylvania Press, 2005).

[19] *See* JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS (Cambridge University Press, 2008).

[20] *See* ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (University of Chicago Press, 2009); Roberto Gargarella, *Human Rights, International Courts and Deliberative Democracy*, *in* CRITICAL PERSPECTIVES IN TRANSITIONAL JUSTICE (Nicola Palmer et al., eds., 2012); John Hagan & Ron Levi, *Justiciability as Field Effect: When Sociology Meets Human Rights,* 22-3 SOCIOLOGICAL FORUM, 372,380 (2007).

[21] *See* Jeffrey Staton & Alexia Romero, *Clarity and Compliance in the Inter-American Human Rights System*, AMERICAN POLITICAL SCIENCE ASSOCIATION MEETINGS (2011); Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53-1 INTERNATIONAL STUDIES QUARTERLY, 149,174 (2009); Alexandra Valeria Huneeus, Courts Resisting Courts: Lessons from the Inter-american Court's Struggle to Enforce Human Rights, 44-3 CORNELL INT.L.J, 101,142 (2011); KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (Oxford University Press, 2001); RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY (Oxford University Press, 2004); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (Cambridge University Press, 2006); David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential? 36-3* JOURNAL OF LATIN AMERICAN STUDIES, 479,505 (2004); Erik Voeten, *The Politics of International Judicial Appointments: Evidence*

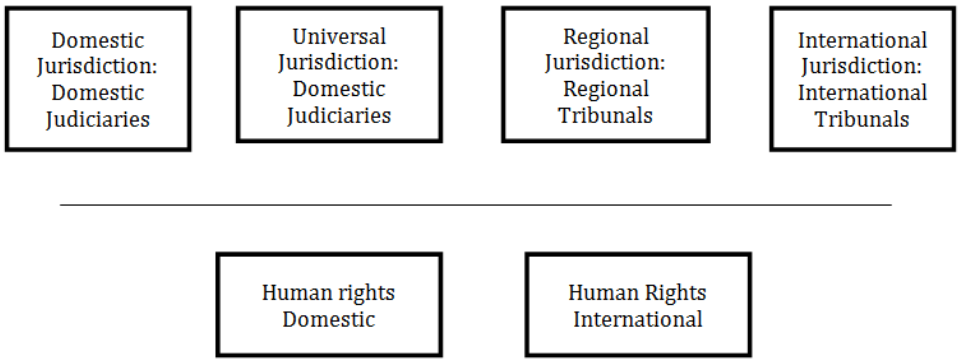
focuses on the tensions and challenges faced by domestic courts regarding human rights enforcement.

For this reason, the "legal enforcement of human rights" refers not only to international tribunals (e.g., Rwanda and ex Yugoslavia) and regional bodies (e.g., European Court of Human Rights or the Inter-American Court of Human Rights) but also to domestic judiciaries.

In effect, human rights accountability and enforcement take into account different jurisdictions and legal institution that use different mechanism to achieve their goals. For example the enforcement can come from International, regional or domestic jurisdictions through international, regional or individual courts that can prosecute individuals or States.

The first step in this article is to present the diverse jurisdictions and legal institutions involved in human rights enforcement. These jurisdictions and legal institutions are schematized as a continuum from foreign to domestic levels regarding their origin and scope of their rulings. Graph 2 places these jurisdictions and judicial institutions related to these on the continuum.

GRAPH 2. JURISDICTIONS FOR HUMAN RIGHTS ENFORCEMENT



Although every jurisdiction can legally enforce human rights issues and humanitarian law, they differ in their relation to the national government. In the

from the European Court of Human Rights, 61(Fall) INTERNATIONAL ORGANIZATION 669,701 (2007); Dancy, Geoff., & Sikkink, Kathryn. (2011), *Ratification and Human Rights Prosecutions: Toward a Transnational Teory of Treaty Compliance*, NYUJ INT'L L.& POL., 44, 751.

human rights domestic side (to the extreme left), "domestic jurisdiction" refers to the standing of local courts to enforce laws imposed on its own citizens. A good example of this are the prosecutions against human rights violations perpetrated by the military dictatorships of Argentina[22] and Chile.[23] The main actors in these procedures are domestic courts enforcing both national and international human rights law.[24] In human rights international side (to the extreme right), "international jurisdiction" refers to the standing of international or multilateral courts to prosecute crimes against humanity or human rights abuses of citizens of different States in accordance with international norms. A good example of the latter are the rulings of the International Criminal Court (ICC).

Between these two extremes are mixed combinations between "the domestic" and "the international" jurisdictions; the two cases analyzed in the next section exemplify this mix.

"Universal jurisdiction" refers to the ability of one domestic judiciary to sue citizens of other States for human rights abuses "of such gravity that affect the interest of the international community as a whole."[25] Regional jurisdiction, on the other hand, describes the ability of multilateral judicial institutions to enforce human rights norms prosecuting member States of the System (not individuals). Three judicial institutions of this kind currently exist: (a) European Court of Human

---

[22] *See* Catalina Smulovitz, The Past is Never Past: Accountability and Justice for Past Human Rights Violations in Argentina (2012) (Unpublished manuscript).

[23] *See* CATH COLLINS, POST-TRANSITIONAL JUSTICE: HUMAN RIGHTS TRIALS IN CHILE AND EL SALVADOR, (Pennsylvania State University Press, 2010).

[24] *See* Karina Ansolabehere Sesti, *Difusores y justicieros: las instituciones judiciales en la política de derechos humanos, 22-44,* PERFILES LATINOAMERICANOS 143,169 (2014).

[25] Program of Law and Public Affairs, Introduction, THE PRINCETON PRINCIPLES ON UNIVERSAL JUSTICE, 23(2001) (August 3, 2015) *https://lapa.princeton.edu/hosteddocs/unive_jur.pdf. The Pinochet case was an excellent example of the use of this jurisdiction*. *See* David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?* 36-3 JOURNAL OF LATIN AMERICAN STUDIES, 479,505 (2004).

Rights; (b) Inter-American Court of Human Rights, and (c) African Court of Human Rights.[26]

It is also important to mention that every jurisdiction is linked with judicial institutions. The domestic one with the judiciaries of each country; the universal jurisdiction with the domestic judiciaries of countries different of the perpetrator of human rights abuses or even of the victim of crimes against humanity; regional jurisdictions with regional tribunals and international jurisdiction with current or special international tribunals.

It is worth noting that even when different domestic and not domestic judicial institutions enforce human rights in the same case, this relationship is ruled by principles of concurrency, complementary and/or subsidiarit[27] between domestic, regional or international courts. At the center of this complex network of jurisdictions and judicial institutions are local courts.

Table 1 bellow illustrates some of the main features of each jurisdiction for the enforcement of human rights norms: their scope; main characteristics; types of processes allowed; adjudicants standing; victims' rights to litigate, etc. For reasons of space, and of the goal of this article, related to regional jurisdiction solely the Inter-American System of Human Rights shall be analyzed as regional jurisdiction as both nations are active members. For international jurisdiction, the focus will be on the ICC.

TABLE 1. HUMAN RIGHTS JURISDICTIONS AND LEGAL INSTITUTIONS

[26] Each of them belongs to the European, the interamerican, and the African systems of human rights respectively.

[27] These principles are established in international law to established the relationship between domestic and international institutions. The can be understood as follow : a) concurrency principle refers to the primacy of an international tribunal over the domestic courts, for example to prosecute crimes against humanity or human rights abuses, the main example of this principle are the Ad Hoc Tribunals for Rwanda and the former Yugoslavia; b)complementarity principle refers to the primacy of domestic courts over the international ones that only can, for example, prosecute human rights abuses and when the nation state be unwilling or unable to prosecute this crimes, the International Criminal Court follows this principle, and c) the subsidiarity principle means that the international tribunal only will have jurisdiction after all domestic procedures are exhausted, the Interamerican System is guide by this principle.

	Jurisdictions			
	Domestic Jurisdiction	Universal Jurisdiction	Regional Jurisdiction	International Jurisdiction
Judicial Institutions	Domestic courts (Judiciary)	Domestic courts in the name of the "Law of the Nations"	Interamercan Court of Human Rights	International Tribunals: International Criminal Court International Tribunal for the Ex Yugoslavia International Tribunal for Rwanda Special tribunals organized for the UN as an answer to a State's request: Special Court for Sierra Leone Special Tribunal for Lebanon.

Who can be put on trial	Individuals	Individuals	State	Individuals
How can be the perpetrators put on trial (Types of enforcement for perpetrators)	Criminal procedure Civil procedure	Criminal procedure Civil procedure	State responsibility for Human rights abuses.	International criminal procedure
How can the victims participate on trials	Private prosecution Civil action	Private prosecution Civil action	Litigation (part of the case)	Private prosecution (ICC)
Type of remedies for victims	Reparations	Reparations	Reparations	Reparations
Other types of enforcement			International Human Rights Legal measures Administrative measures Pedagogic measures	
Juridical legitimacy in the case	Prosecutor Private prosecution	Prosecutor Private prosecution	Inter-American Commission of Human	Prosecutor Private Prosecution

	(victims' participation) Defense (public or private)	(victims' participation) Defense (public or private)	Rights	(victims' participation and legal representation) Defense (public or private)
Relationship between domestic, regional and international courts.		Complementarity with other courts and international institutions	Subsidiarity	Subsidiarity and complementarity, concurrency with other courts
Citizenship of the accused	Citizen	Non citizen	Only State accountability	Individuals (ICC) Citizens of the object states of the Tribunals

SOURCE: AUTHOR ELABORATION BASED IN LEGAL DOCUMENTS.

In the table above, we can see that there are (a) diverse sources for each jurisdiction; (b) several ways for victims of human rights abuses to participate in the procedures, and (c) diverse links between international legal institutions and domestic judiciaries (subsidiarity, complementarity or concurrency). In every case, domestic courts play a fundamental role, either as main actors or as secondary actors (that failed to properly adjudicate the alleged abuse). Although human rights enforcement begins in local courts, they do not necessarily end there, as foreign or multinational judicial institutions, agencies and bodies may also be actively involved.

As we can see, there are many avenues to human rights enforcement that combine domestic and not domestic institutions and jurisdictions. To better understand these relationships here is proposed that it is necessary to study of the politics of the domestic judiciaries into their concrete contexts of human rights politics.[28] This approach will be called: judicial politics of human rights.

Although multiple legal institutions and jurisdictions are often involved in the legal enforcement of human rights, the study of the relationships between them does not adequately explain their decision making process.[29] In other words, to better understand the process we need to take into account the dilemmas that judges and justices face adjudicating inside the context of real human rights politics of legal enforcement characterized (as was already pointed) for the links between of multiple jurisdictions of legal enforcement. We call this approach: judicial politics of human rights.

As the next section explains, judges must face three dilemmas in this process: a) take a "sovereigntist" or "cosmopolitan" legal approach related with their legal ideology; b) maintain the separation of powers between the executive and legislative branches or promote the concept of "multilateral justice"; or c) maintain the territoriality of their rulings or develop an extraterritoriality doctrine.

In the next section, human rights enforcement models incorporated by the federal judiciaries in both Mexico and the U.S. over the last ten years are analyzed with respect to the three issues above. While the Mexican judiciary has

---

[28] Even when there is not an standard definition of Human rights politics, here they will be understood as follow: the various political processes through which human rights' norms, ideas and discourse are disseminated, acquiring particular characteristics in different social, political and legal contexts. One of the basic features of contemporary human rights' politics is its essentially transnational character, which recognizes both governmental and non-governmental agents as key actors of these processes

[29] There are some samples of studies of the judicial politics of human rights judicial institutions. *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights,* 102-4 AMERICAN POLITICAL SCIENCE REVIEW 417,432 (2008); Erik Voeten, *The politics of International Judicial Appointments: Evidence from the European Court of Human Rights,* 61(Fall) INTERNATIONAL ORGANIZATION 669,701 (2007).

transitioned to a model of legal enforcement "from the outside", the U.S. judiciary continues to enforce human rights "from within".

III. TWO HUMAN RIGHTS ENFORCEMENT MODELS: MEXICO AND THE U.S.A.

Mexico and the United States are similar regarding some aspects of human rights politics and political institutional frameworks: both nations are active members of the international community (e.g., members of the UN Human Rights Counsel) and the Inter-American System (with representatives in the Inter-American Commission, and a Mexican citizen as judge of the Inter-American Court).

Both nations are presidential democracies with bicameral congresses and federal judiciaries headed by a Supreme Court. The federal courts in both nations have significant autonomy from the executive and legislative; and both have constitutional review powers.

Despite these similarities, however, domestic judiciaries are organizationally distinct with regard to human rights legal enforcement. While the Mexican federal judiciary is centered on the Supreme Court,[30] the U.S. federal judiciary is more decentralized, with a Supreme Court that has the final word in cases originating in local district courts.

While Mexico has permitted international scrutiny of human rights enforcement since 1998 —including the contentious jurisdiction of the Inter-American Court of Human Rights— the U.S. maintains a dual approach regarding human rights law: active promotion on an international level, but not active to apply these same multilateral norms domestically.

These two path constitute the context of human rights politics of legal enforcement in which the judiciaries of each country are embedded into. While in Mexico we can see a trajectory of gradual acceptation of international human rights norms and multilateral bodies as part of the juridical system; in the United States while the State Department embraced multilateral human rights treaties and bodies, the senate do not ratify them on many cases and as a result some

---

30 *See* KARINA ANSOLABEHERE SESTI, LA POLÍTICA DESDE LA JUSTICIA. MÉXICO, (Flacso-Fontamara, 2007).

federal judges embrace the norm of the responsibility to protect through domestic statutes.

For a good indication of how much the two countries differed with respect to acceptance of international human rights treaties, see Table 2 below.

TABLE 2. ADHERENCE TO INTERNATIONAL HUMAN RIGHTS TREATIES OF MEXICO AND U.S.A.

Treaties	*Mexico*	*U.S.*
Rome Statute of the International Criminal Court (1998)	Ratified	Signatory
Convention on the Rights of Persons with Disabilities (in force 3 May 2008)	Ratified	Signatory
International Convention for the Protection of all Persons from Enforced Disappearance (in force 23 December 2010)	Ratified	Non Signatory
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (in force 1 July 2003)	Ratified	Non Signatory
Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (in force 26	Ratified	Ratified

June 1987)		
Convention on the Rights of the Child (in force 2 September 1990)	Ratified	Signatory
Convention on the Elimination of all forms of Racial Discrimination (in force 4 January 1969)	Ratified	Ratified
International Covenant on Civil and Political Rights (CCPR) (in force 23 March 1976)	Ratified	Ratified
International Covenant on Economic, Social and Cultural Rights	Ratified	Signatory
Convention on the Elimination of all forms of Discrimination Against Women (in force 3 September 1981)	Ratified	Signatory
Ratification rate	100%	30%

SOURCE: HUMAN RIGHTS ATLAS, *http://www.humanrightsatlas.org/atlas/*

In Table 3, it is possible to see a similar, even clearer trend regarding adherence to Inter-American human rights treaties.

TABLE 3. ADHERENCE TO INTER-AMERICAN HUMAN RIGHTS TREATIES OF MEXICO AND U.S.A.

	Mexico	*U.S.*

American Convention on Human Rights (1968)	Ratified	Signatory
San Salvador Protocol	Ratified	Non Signatory
Inter-American Convention About forced disappearences of persons	Ratified	Non Signatory
Interamerican Convention on prevention and sanction torture	Ratified	Non Signatory
Inter-American Convention for the ellimination of all forms of discrimination against persons with disabilities	Ratified	Non Signatory
Inter-American Convention to prevent, sanction and eradicate all forms of violence against woman	Ratified	Non Signatory
Ratification Rate	100%	14%

SOURCE: ELABORATION BASED ON AMERICAN STATES ORGANIZATION RECORDS, *http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_firmas_materia.asp*

The next sections first explore general trends in both countries, and then analyze the main features of the judicial politics of human rights enforcement in each one.

1. *Mexico from legal sovereigntism to legal cosmopolitanism*

The Mexican judiciary's relationship to international human rights law changed from "legal sovereigntism" to contested "legal cosmopolitanism". The turning point came when the Mexican Supreme Court of Justice ratified a ruling by the Inter-American Court of Human Rights against Mexico in the Rosendo Radilla case in 2009.[31]

The importance of this case can be more fully appreciated by placing it in the context of Mexican human rights policies in general.

Most academics agree that in 1994, after the public emergence of the Zapatista Army of National Liberation in the state of Chiapas, Mexican human rights policies abruptly shifted in both foreign and domestic affairs.[32] For the first time, the nation opened itself to international scrutiny on human rights issues; while simultaneously, human rights abuses started to be seen as a domestic problem. Examples of this change include the creation of the National Commission of Human Rights in 1990, and its constitutional recognition as an autonomous body in 1999.[33]

Another major change occured in 2000, when the Revolutionary Institutional Party ("PRI" for its Spanish-language acronym) —which had held power for over seventy years— lost the presidential election. The new president, Vicente Fox Quesada, decided both to open the country's human rights policies to external scrutiny and actively participate in international human rights forums.

At the same time, human rights issues took on greater importance in domestic policy. Notable changes included the creation of a Human Rights office in the Ministry of the Interior (Secretaría de Gobernación); and a National Human Rights

---

31 *Rosendo Radilla Pacheco et al v.* México *Case*, 2009 Inter-Am. Ct. H.R., (November 23, 2009).

32 *Id.*

33 *See* JOHN ACKERMAN, ORGANISMOS AUTÓNOMOS Y DEMOCRACIA: EL CASO DE MÉXICO (Siglo XXI, 2007).

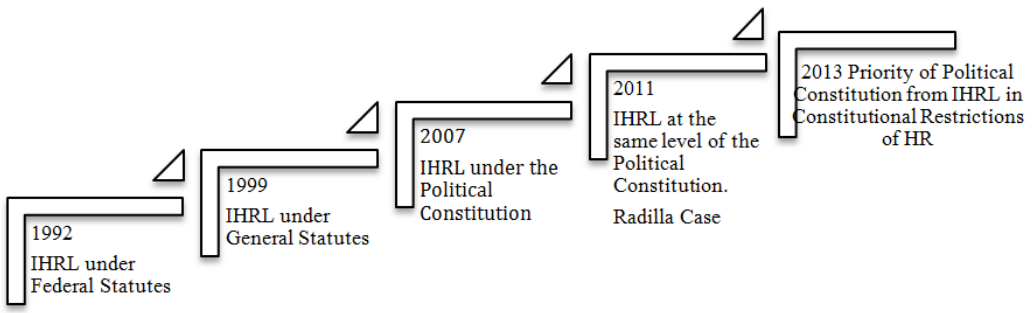
Program approved in 2004 which promoted the inclusion of human rights approach in domestic policies.[34]

Despite these efforts, however, human rights advocacy also suffered notable defeats, including the cancelation of the National Human Rights Program in 2006.[35] A Constitutional Reform on human rights was not approved until 2011 —more than a decade after political change.

In 2006, when Felipe Calderón's administration came to office, the federal government's priority changed from human rights to national security. During this time, human rights violations increased notably.

Given the Mexican government's recognition of human rights as a key component of both domestic and international affairs —at least rhetorically— the federal judiciary began to adapt domestic human rights enforcement through gradual changes in its interpretation of the hierarchy of international law. This evolution can be observed in the time line shown below (Graph 2).

GRAPH 2. PROCESS OF CHANGE IN THE MEXICAN SUPREME COURT'S INTERPRETATION OF THE HIERARCHY OF INTERNATIONAL HUMAN RIGHTS LAW (IHRL)



As we can see, the acceptance process for international human rights law took place incrementally over the course of twenty years. This occurred despite current disputes between judges who espouse either "legal sovereigntist" or "legal cosmopolitanist" views. As noted above, the turning point occured when the

[34] *See* Alejandro Anaya Muñoz, *Transnational and Domestic Processes in the Definition of Human Rights Policies in México*, 31-1, HUMAN RIGHTS QUARTERLY 35,58 (2009).

[35] *Id.*

Supreme Court affirmed the Inter-American Human Rights Court ruling in the Rosendo Radilla case.[36]

The next section analyzes how the Mexican judiciary regards the hierarchy of International Human Rights Law in the turning point in this process the *Rosendo Radilla v. Mexico* case.

2. *The Mexican Federal Judiciary and the Rosendo Radilla Case*

Rosendo Radilla Pacheco was a peasant from the State of Guerrero who was "forcibly disappeared" in 1974. Since that time, he has yet to be found. The disappearance occurred while he was traveling on a bus that was stopped by members of the Mexican Army, who detained him because he had allegedly composed "corridos" (songs) against the Army.[37]

As a result of his disappearance, the victim's family filed several lawsuits in Mexican court. The first, filed in 1992, was dismissed for lack of evidence. In 2001, Tita Radilla, the victim's daughter, joined with the Association of Relatives of Disappeared People [38] and the Mexican Commission for the Defense and Promotion of Human Rights[39] to file a complaint before the Inter-American Human Rights Commission. The Commission's report, issued in 2005 and left unanswered by the Mexican government, elevated the case to the Inter-American Court of Human Rights, which ruled against Mexico on November 23, 2009.[40]

It is worth mentioning that three additional suits followed this ruling: Rosendo Cantú (ICHR, 2010);[41] Fernández Ortega (ICHR, 2010);[42] and Cabrera García and

---

[36] File 912/2011.

[37] A corrido is a traditional Mexican music genere.

[38] Asociación de Familiares de Desaparecidos de México, AFADEM.

[39] Comisión Mexicana de Defensa y Promoción de Derechos Humanos.

[40] *See* Silvia Dutrénit Bielous, *Sentencias de la Corte Interamericana de Derechos Humanos y reacciones estatales: México y Uruguay ante los delitos del pasado*, 61-august, AMÉRICA LATINA HOY, 79,99 (2012).

[41] *Rosendo Cantú et al v. México Case*, 2010 Inter-Am. Ct. H.R. (August 31, 2010).

Montiel Flores (better known as *campesinos ecologistas* "peasant ecologists") (ICHR, 2010).[43] In each case, the Inter-American Court noted the human rights violations suffered by the victims; a lack of due diligence used in the investigations; and the inappropriate application of military justice to civilian abuses.

The following sections examine the Radilla case, which constituted a turning point in the Mexican Supreme Court's transition to a model of "human rights from the outside."

In the Radilla ruling, the Inter-American Court held the Mexican government liable for violating the victim's rights to liberty, personal integrity, legal standing; physical and mental integrity; and judicial guarantees and protection for his family. The tribunal also held that the military court where the case had been tried failed to respect due process standards established under international law; in particular, the American Convention of Human Rights.[44]

The ruling also required that the Inter-American Court monitor the Mexican government's follow up, including submission within one year of a progress report regarding its compliance with the sentence.

Regarding this article main goal is important to mention a request made by the President of the Supreme Court oriented to discuss (as a body) the implications for the judiciary of the Inter-American Court ruling in *Radilla Pacheco v. Mexican United States* (Suprema Corte de Justicia, exp. 489/2010).[45] This request marked a radical change in the way the Supreme Court dealt with Inter-American System of Human Rights decisions; even though the Radilla Pacheco ruling was addressed generically to the Mexican State, the Supreme Court as the head of the federal judiciary began deliberations oriented to define the scope and limits of its duties and responsibilities regarding the Inter-American Court´s rulings at the domestic level.

---

[42] *Fernández Ortega et al. v. México Case*, 2010 Inter-Am. Ct. H.R. (August 30, 2010).

[43] *Cabrera García &Montiel Flores v. México Case*, 2010 Inter-Am. Ct. H.R. (November 26, 2010).

[44] *Rosendo Radilla Pacheco et al v. México Case*, 2009 Inter-Am. Ct. H.R. (November 23, 2009).

[45] Suprema Corte de Justicia, Exp. 489/2010.

Based on this consultation, the Supreme Court decided, by a majority of 8 votes, that despite not having received express notice by the Executive about their duty to comply with the judgment, they would fulfill their obligation without coordination with other branches of the Mexican government (Suprema Corte de Justicia, Exp 489/2010).[46] They also ordered compliance with the entire sentence (not only those that applied to the judiciary). In effect, the Supreme Court ruled in favor of legal cosmopolitanism (at least with respect to rulings by the Inter-American Court).

From this case, the Mexican Supreme Court began to analyze how to articulate their relationship with the Inter-American System of Human Rights given the qualifications made for the Mexican State to the jurisdiction of the Inter-American Court, the reservations against the American Convention on Human Rights and the American Convention on Forced Disappearance of Persons, as well as the interpretative declarations made related to these, and other obligations pursuant to this ruling.[47]

The Mexican Supreme Court deliberated about (a) the relation between domestic legislation and international human rights law, and (b) the relation between domestic lower courts and their international counterparts.

From the point of view of the judicial politics of human rights legal enforcement, regarding the relationship between domestic legislation and international human rights law the Mexican judiciary faced a dilemma between "legal sovereigntism" and "legal cosmopolitan" doctrinal approaches in which it seemed to choose the latter, paving the way for the judiciary to operate as key actor for the diffusion of international human rights standards. This is especially noteworthy considering that this interpretation was, and still remains, bitterly contested in the same Supreme Court.[48] On the other hand, regarding the relation between domestic

---

[46] *Id.*

[47] Crónica del Pleno y las Salas, sesiones 4, 5, 7, 11, 12 y 14 de julio de 2011, Pleno de la Suprema Corte de Justicia, SCJ N, (Supreme Court) (México).

[48] On September 3rd 2013, the Mexican Supreme Court main chamber made a decision that stated that in the case of contradiction between the Constitution and the International Treaties, the constitution must prevail. Looking at this decision it is clear that the change from a sovereigntist legal culture to an internationalist one is a disputed process and this debate has only begun.

lower courts and their international counterparts, the doctrinaire changes thus marked a new approach by the Supreme Court oriented to adapt and define a "legitimate path" to embrace International Human Rights Law at the domestic level. A good example of this trend is the permission allowed to the lower courts to make "diffuse conventionality review"[49] changing the hierarchical organization of the judiciary on constitutional decision-making.

The Mexican judiciary now faces legal challenges regarding its new-found "cosmopolitanist" human rights approach.[50] It is clear that this is a transitionary phase, and that the current Supreme Court has a final word on the process yet.

Before the Radilla ruling, the prevalence of a sovereigntist legal approach that prioritizes domestic law was evident, despite the fact that Mexico had already ratified numerous multinational treaties. One prominent example is that in the early 2000´s in response to human rights violations during the "Dirty War" against leftist opposition in the 1970' the Supreme Court referred the Enforced Disappearance Act enacted as part of the Federal Criminal Code without any reference to the American Convention on Forced Disappearances of Persons that had already been ratified by Mexico.[51]

After Radilla case, rulings by Mexican federal courts were characterized by a delicate balance between enforcement of domestic legislation and Supreme Court precedents and compliance of international law. It is worth noting that this trend was already observed even before the Constitutional Reform on Human Rights issues was enacted on June 2011, as shown in Graph 2.

This reform basically positioned international human rights norms at the same level as the Mexican Constitution. The clearest example of this shift was the already-mentioned consultation requested by the Supreme Court President regarding the Radilla decision. In effect, the change in domestic law was preceded

---

[49] "Control de Convencionalidad Difuso" in spanish.

[50] Roger Cotterrell, Why *Must Legal Ideas be Interpreted Sociologically?* 25-2 JOURNAL OF LAW AND SOCIETY, 171,192 (1998).

[51] Suprema Corte de Justicia, Tesis de Jurisprudencia P/J 87/2004.

by a change in the Supreme Court's entire approach to international human rights standards.

The most telling evidence of this change appeared in Supreme Court ruling 912/2011, in which it proposed a shift both in its external relations with the Inter-American Court of Human Rights and domestic relations with judges and magistrates of lower courts.

It recast its relationship with the Inter-American Court by accepting all rulings against Mexico by the Court of Human Rights as mandatory and viewing the Court´s jurisprudence as optional guidance for the judiciary. (Suprema Corte de Justicia, acuerdo expediente 912/2010).[52]

Domestically, the Supreme Court held that the Radilla ruling produced different types of challenges at administrative and judicial levels. These challenges are: a) the lower level courts' ability to use international human rights law as precedent, and b) the scope of military jurisdiction. In relation to the former, it held (by a vote of 7 to 11 votes) that all federal and local judicial entities could make a "conventionality" review of domestic law using as a benchmark the American Convention of Human Rights (which implies to make inapplicable the statutes inconsistent with the American Convention on Human Rights).

In regard to the latter, the Court excluded the application of military law in human rights cases, stating that all courts in the country should interpret article 13 of the Constitution (which establishes military jurisdiction) as well as article 57 of the Code of Military Justice, in line with the American Convention on Human Rights. This interpretation will become a major legal benchmark.[53]

As a result of the changes in the model of human rights legal enforcement e, the Mexican Supreme Court faced two dilemmas regarding the international responsibility to protect norm: (a) the tension between domestic enforcement (i.e., sovereignty) and supra-national interpretation, and (b) a separation of powers

---

[52] Suprema Corte de Justicia, Acuerdo 912/2010.

[53] *See* Christina Cerna, Unconstitutionality of article 57, section II, paragraph a) of the code of military justice and legitimation of the injured party and his family to present an appeal for the protection of constitutional rights, 107-1 AMERICAN JOURNAL OF INTERNATIONAL LAW 199,206 (2013).

doctrine that favored multilateral norms over national sovereignty that has a lot of domestic resistance.

The following section analyzes the U.S. model.

3. *The United States: Human Rights from the Inside*

The relationship of the Supreme Court of the United States (referred to hereinafter as "SCOTUS") regarding the norm of the international responsibility to protect in human rights issues y can be defined as a model of "human rights from within". Most SCOTS justices —for ideological reasons— view reliance on foreign and international law as a weakening of both democratic sovereignty and judicial accountability. For this reason, it applies domestic law to domestic issues and domestic law to international human rights issues but pursuant to the "Law of the Nations."[54]

The enforcement of human rights as global policy is unfeasible without the active participation of the United States, both for better and for worse. The SCOTUS rulings on this topic are immerse in the context of the nation's policies and politics (both foreign and domestic) on human rights issues.

As noted above, a tension exists between domestic and international application of U.S. human rights policy. While internationalists advocate the incorporation of multilateral norms and treaties into domestic law, sovereigntists place national sovereignty over international cooperation.[55] While the U.S. played a leading role in the enactment of the Universal Declaration of Human Rights in 1948, its role during the Cold War showed little commitment to these norms.[56] The sole exception was the Carter administration, which elevated human rights to a major international cause, especially in Latin America.

After the end of the Cold War, the nation's foreign policy changed but its dual approach to human rights continued, probably as a result of the Senate's

[54] The idea of Law of the Nations originates in the XVIII Century and refers to the customs, norms and treaties accepted as standards of "good" behavior for the international community.

[55] *See* Tom Farer, Democracy, Human Rights and the United States: Tradition and Mutation, *in* HUMAN RIGHTS REGIMEN IN THE AMERICAS 56, 83 (Mónica Serrano & Vesselin Popovski, eds., 2010).

[56] See SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (Harvard University Press 2010).

reluctance to ratify human rights treaties. This situation worsened after 9/11, when national security became the nation's top priority.

Even when the human rights movement in the U.S. worked to "Bring Human Rights Home" (incorporate international human rights standards in domestic law)[57] this initiative has never been strong enough to change the status quo. As noted above, many if not most American jurists (certainly a majority of SCOTUS justices) tend to view the incorporation of international law into American jurisprudence as a weakening of both democratic sovereignty and judicial accountability.[58] As Justice Antonin Scalia commented: "The basic premise that American law should conform to the laws of the rest of the world ought to be rejected out of hand." Seeing this as an all or nothing equation, Justice Scalia drove to a *reductio ad absurdum*: "The Court should either profess its willingness to reconsider all matters in the light of views of foreigners, or else it should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry."(*Roper vs. Simmons*, 112 S.W 3.d 397, affirmed, 2005)

As a result of this judicial doctrine, domestic U.S. human rights enforcement has never been as open to outside scrutiny as in other countries.

Through litigation based on domestic law (mostly the Alien Tort Statute), the federal courts recognized and the Supreme Court confirmed certain international norms to repair alien human rights victims from their abuses in countries different to the US. This "human rights from the inside" approach has been subsequently contested, as analyzed in the next section.

The use of the Alien Tort Statute (referred to hereinafter as the "ATS") to establish civil liability for human rights abuses committed abroad USA was a turning point in the recognition of the international responsibility to protect. ATS

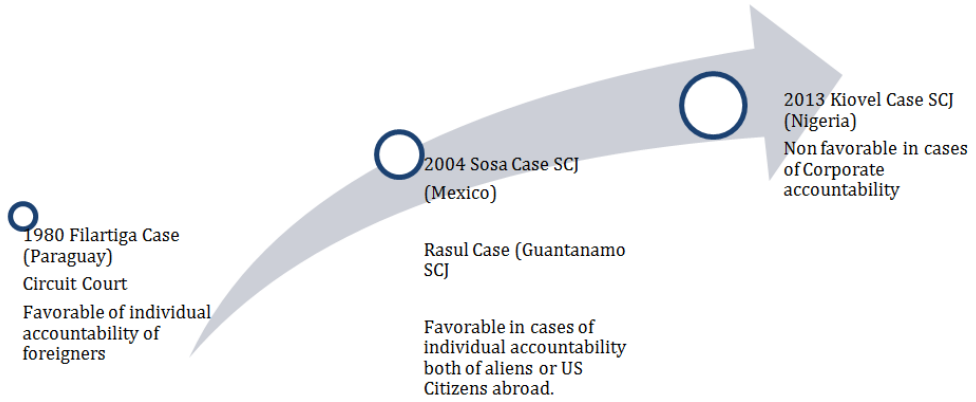
---

[57] *See* CYNTHIA SOOHOO ET AL., BRINGING HUMAN RIGHTS HOME (Greenwood Publishing Group, 2007); SHAREEN HERTEL & KATHRYN LIBAL, HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM (Cambridge University Press, 2011).

[58] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (W.W. Norton, 2011).

was used for the first time as a human rights tool in *Filartiga v. Peña Irala*[59] and then in many cases as *Kiovel v. Dutch Petroleum.*[60] The graph below shows some important milestones in the use of the ATS by the Supreme Court.

GRAPH 3. JUDICIAL RULINGS REGARDING HUMAN RIGHTS ABUSES IN THE UNITED STATES



4. *The inside model*

The U.S. judiciary's rulings in these matters exemplify the model "human rights from within legal enforcement" approach. The U.S. courts took into account the "Law of the Nations"[61] in a contemporary context, as recognition of international responsibility to protect human rights norm but based on domestic law: 1789 ATS (28 U.S.C. § 1350).

In effect, the application of this statute represents a choice between domestic and universal jurisdiction, allowing the judiciary of USA to sue a citizen of another State linked with[62] or living in the USA for grievances against humanity or human

---

[59] *Filartiga v. Peña Irala*, 630 F.2d 876 2d. Cir. (1980).

[60] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

[61] The idea of Law of the Nations was originated in the XVIII Century, to refer to the customs and values that the international community accepts as bases of the relationships beetwen its members. Contemporarily this idea is behind the idea of human rights legal enforcement.

[62] Refers to pleople with "close ties" with USA, for example a person or a company that makes business within the United States.

rights, based in the recognition of the norm of the international responsibility to protect.

In the latter part of the twentieth century, as many commentators have noted, many courts began citing the ATS as a source of human rights law.[63] The turning point was *Filartiga v. Peña Irala*[64] (*1980)* during the Carter administration.

This case involved Dolly and Joel Filartiga, children of a Paraguayan doctor living in Paraguay who served poor patients and was an outspoken critic of the Stroessner dictatorship. When Doctor Filartiga was away from home, an armed group broke into the house, then proceeded to abduct, torture and murder his son Joel.

Despite the Filartiga family's attempt to seek justice for the killing, the Paraguayan justice system failed to even properly investigate the case.

In 1979, when Dolly Filartiga was living in Washington DC, she discovered that one of Joel´s murderers, Americo Peña Irala, was also residing in Brookling (New York). The Filartigas immediately sought legal advice at the Center for Constitutional Rights (CCR), which sued Peña under the Alien Tort Statute.[65]

The ATS established that the "district court shall have original jurisdiction of any civil action by an alien for a tort only (civil liability), committed in violation of the Law of the Nations or a treaty of the United States" (28USC §1350). After several appeals, the Second Circuit of the District of Columbia finally reinstated the lawsuit and debated whether the alleged human rights infringement constituted a violation of the Law of the Nations. The circuit court finally recognized that torture did violate the Law of the Nations, and granted a reparation of U.S. $10 million dollars to the Filartiga family.

---

[63] *See* JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS (Cambridge University Press, 2008); BETH STEPHENS, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Martinus Nijhoff Publishers, 2008).

[64] *Filartiga v. Peña Irala*, 630 F.2d 876 2d. Cir (1980).

[65] *See* Center for Constitutional Rights (CCR) *Filartiga v. Peña Irala*, *http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1-irala*, (last visited August 15, 2013).

This decision was a turning point in U.S. federal law concerning international human rights issues. Based on *Filartiga*, many lawsuits for human rights violations committed abroad were filed by both aliens and U.S. citizens in cases of torture committed during the "war on terror,"[66] as well as by public officers and private agents.[67]

As the Center for Justice and Accountability has noted,[68] various legal approaches have been taken in ATS cases: a) *Individual accountability*: human rights violations perpetrated by foreigners against foreigners in other countries who are living in the U.S., such as Filartiga; b) *Governmental accountability*: human rights violations perpetrated by U.S. officers against persons in other countries (or areas like Guantanamo Bay) such as *Rasul v. Bush* (2004),[69] and c) *Corporate Liability*, such as *Due v. Unocal* (2009)[70] or *Kiovel v. Dutch Petroleum Co*. (2013),[71] in which corporations are accused of participating in human rights violations against citizens of foreign countries (Burma and Nigeria, respectively).

The first approach was confirmed by *Sosa vs. Alvarez Machain*[72] (2004), which held that the ATS granted jurisdiction to the federal courts to hear cases involving "universally accepted norms" of international law.

The second approach, involving human rights abuses committed by U.S. officers against foreigners outside the U.S., was established by *Rasul vs. Bush*[73] (2004),

---

[66] An example of this line of litigation was *Rasul v. Bush*, 542 U.S. 466. (2004).

[67] To see an extended description of many of the most important cases using ATS it is possible to consult the web page of Center for Constitutional Rights *http://www.cja.org/article.php?id=334* (consulted 3 May, 2015).

68 *See* The Center for Justice & Accountability (CJA) The Alien Tort Statute. A means of redress for survivors of human rights abuses, *http://www.cja.org/article.php?id=435*, (last visited 15 August, 2013).

[69] *Rasul v. Bush*, 542 U.S. 466 (2004).

[70] *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

[71] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

[72] *Sosa v. Álvarez-Machain*, 542 U.S. 692 (2004).

which held that the U.S. Justice System had the authority to decide if non-U.S. citizens held in Guantanamo Bay were wrongly detained.

The third approach, corporate liability, was determined by *Kiobel vs. Royal Dutch Petroleum Co case* (2013),[74] which rejected the plaintiffs' claims about the international responsibility of corporations for human rights violations that take place outside the U.S. Its main argument was that the ATS did not apply extraterritorially in this case because it does not expressly affirm this right.

As many have concluded,[75] the SCOTUS supports the use of international human rights norms when they are clearly set forth in law —except in cases involving corporate liability. In other words, established that cases must "touch and concern" to the United States to be considered by the federal justice system of the country.

IV. TWO MODELS, SOME SIMILARITIES

Notwithstanding their differences, some similarities exist between the Mexican and U.S. approaches that shed light on problems shared by all domestic courts that attempt to embrace cosmopolitan human rights standards.

1. Socialization of human rights norms: The adoption of certain human rights principles by courts was and remains controversial. In both the U.S. and Mexico, there have been advances and setbacks between sovereigntist and cosmopolitan approaches.
2. Separation of Powers: Autonomous legal decisions about international human rights norms may infringe on the foreign policy powers of the Executive Branch, expanding (at the risk of constitutional violation) the judicial branch's role in international affairs.

Despite these similarites, there are also many differences between the two models, most notably concerning *extraterritoriality* and *hierarchy*.

---

[73] *Rasul v. Bush*, 542 U.S. 466 (2004).

[74] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

[75] *See* JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS (Cambridge University Press, 2008).

Extraterritoriality. Refers to the legitimate rights of the judiciary of one country to judge the citizens of a foreign country. In the U.S., this problem can be seen in many of the rulings regarding the use of the ATS. For example, under what conditions can a domestic court extend its jurisdiction to judge human rights violations committed in other countries? In the "human rights from within" model, foreign cases are admissible: (a) if the country where the human rights violations were committed is unable to bring the case to justice; or (b) if domestic law specifically allows extraterritorial powers.

Hierarchy. Although extraterritoriality is not a problem in Mexico, Mexican courts face another major issue: hierarchy. Do international norms in domestic human rights enforcement cases take precedence over domestic law? Put differently, is international human rights law considered at the same level of importance as the nation's constitution?

And if the Supreme Court rules that international human rights law deserve the same level of judicial review as domestic law, to what extent can lower courts apply these norms in domestic cases without change judicial hierarchy?

In sum, while in the U.S. the main issue is the relationship "from the inside to the outside"; in Mexico, the problem is the relationship "from the outside to the inside". However both of them are examples of ways to enforce the international responsibility to protect norm. The scope is in what cases the jurisdiction of the international community can rule at the domestic level.

V. FINAL REMARKS

This article has attempted to show two distinct human rights enforcement models currently in operation. Since World War II, diverse ways of human rights enforcement have been developed. Although no way necessary excludes any others, they illustrate two major concerns: a) human rights legal enforcement is polarized between legal sovereigntism and legal cosmopolitanism doctrines, and b) the conditions that allow human rights legal enforcement into and between States.

Probably the main remark of this article is that human rights legal enforcement is a contested arena and the judges and justices that are immerse in it face different dilemmas: the legal doctrine one, the separation of powers one; the extraterritoriality one and the judicial organization one.

The different models show diverse ways in which human rights legal enforcement are possible, from the strictly domestic to international ones. But once this was stated the second step was to analyze some of the dilemmas that judges took into account in their actual decisions.

The aim of this second step was to fill the gap between human rights and judicial politics. Two contrasting models were compared: the one that followed the Mexican judiciary after 2010 with the Radilla case, and the one that followed the U.S. judiciary after the Filartiga case of 1979.

The Mexican federal judiciary was a clear example of a contested change in the legal doctrine that favored the human rights from the outside, specifically from the Interamerican System. On the other hand, the U.S. judiciary was a clear example of contested legal doctrine that favored human rights from the inside.

But what were the main dilemmas that the judges dealt with, and continue to deal with, in the last decades we testify a "justice cascade"[76] following diverse human rights legal enforcement models: Two *Ad Hoc* International Tribunals (For Rwanda and for the Former Yugoslavia and the ICC were established; the Pinochet affair took place; Efrain Ríos Montt was prosecute for genocide in Guatemala; thousand of trials against Argentinian perpetrators of human rights abuses had been made etc. The examples developed here can be understood as part of this "cascade" and this dilemmas. Here some reasons about why, how and in what cases some judges have accepted international human rights norms were given. Nevertheles, more comparative research on the topic must be done to better understand the tensions that domestic judges and judicial institutions face in this endeavor.[77] To do that a judicial politics approach embedded in human rights politics and policies context (like the one applied) here can be helpful.

---

[76] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (W.W. Norton, 2011); Kathryn Sikkink & Hum Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations,* 9-1 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 269,285 (2013) *doi:10.1146/annurev-lawsocsci-102612-133956*; TRICIA D. OLSEN, ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (U.S. Institute of Peace, 2010).

[77] Ezequiel Gonzalez Ocantos, *Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina* 46-4 COMPARATIVE POLITICS, FORTHCOMING, 279,298 (2014).

THE BECOMING-OTHER OF LAW: PRELIMINARIES FOR A CITIZEN'S CONCEPTUALIZATION OF LAW

RICARDO MIRANDA[1]

ABSTRACT. *The author's hypothesis is that modern legal theories view law solely from the standpoint of ruling class or, in Hartian language, from the external point of view. Why? In sume because legal philosophers have implicitly accepted law as the exclusive domain of government and partisan politics. This approach, however, has been disrupted by poststructuralist political developments, which serve as a powerful impetus to modify prevailing concepts. This analysis begins with Benjamín Arditi's idea regarding what he calls "the becoming other of politics," an argument to radically change how the law is conceived. It then examines a very particular point of the theory proposed by the legal philosopher Herbert Hart, who distinguishes between the "external" and "internal" points of view with respect to how the rules of a legal system may be described or evaluated. In effect, Hart distinguishes between: (i) the external aspect, which is the independently observable fact that people tend to obey rules with regularity; and (ii) the internal aspect, which is the obligation felt by most individuals to follow the rules. It is from this latter "internal sense" that the law acquires its normative quality. Unfortunately, Hart only applies the internal point of view to government officials, in effect rendering his thesis inconsistent. The article ends with a brief analysis of Dworkin's Herculean judge theory, arguing that Dworkin also gets trapped between the paradigm of government and partisan politics.*

KEY WORDS: *Post-liberal democracy, Benjamín Arditi, apocryphal jurisprudence, post-liberal law, post-structuralist legal studies.*

RESUMEN. La hipótesis del autor es que el derecho en las teorías jurídicas modernas ha sido considerado solamente desde el punto de vista de los gobernantes o, en lenguaje hartiano, desde el punto de vista externo, y ello es así porque los filósofos del derecho ven a éste, al

---

[1] Visiting Researcher Birkbeck Law School, University of London, email: *mirandam.jricardo@gmail.com*. LL. B. Law School, UNAM; LL. M. Law School, UNAM. The author is grateful to two anonymous reviewers of MLR for their very helpful suggestions.

menos implícitamente, como un producto exclusivo de la política estatal y de partidos. Sin embargo, este formato en el cual la política ha sido elaborada comienza a ser rebasado hoy en día. Por lo tanto, si el concepto de la política está cambiando, el concepto de derecho debe igualmente cambiar. Esta es la razón por la cual el autor toma como punto de partida la explicación de Benjamín Arditi sobre "el devenir-otro de la política", tal explicación es el soporte para sugerir un cambio radical en la manera en que el concepto de derecho ha sido entendido. De este modo, el autor argumenta que, a pesar de ser Herbert Hart el iusfilósofo que hizo la importante distinción entre los puntos de vista externo e interno de las normas, Hart mismo es inconsistente con su tesis ya que refiere el punto de vista interno como exclusivo de los funcionarios estatales. En este sentido, la tesis que se intenta defender es que no habría diferencia alguna en considerar al derecho de esta manera o considerarlo solamente desde el punto de vista externo. Finalmente, el autor realiza un breve comentario sobre el juez Hércules dworkiniano para mostrar cómo Dworkin se encuentra también atrapado en el formato de la política estatal y de partidos.

PALABRAS CLAVE. *Democracia post-liberal, Benjamín Arditi, jurisprudencia apócrifa, derecho post-liberal, estudios jurídicos post-estructuralistas.*

TABLE OF CONTENTS

I.INTRODUCTION

This article attempts to analyze how the underlying logic of current major theories of law, by nature, contravenes democratic principles.[2] The main reason is that all modern legal theories are inherently elitist insofar as the enactment of law requires official

[2] Without going into additional detail here, we shall use Shapiro's definition: "democracy is better thought of as a means of managing power relations so as to minimize domination." IAN SHAPIRO, THE STATE OF THE DEMOCRATIC THEORY 3 (Princeton University Press, 2005).

intervention. As explained below, this is based on how politics is conceived and put into practice.

To explain this, I start with the notion that legal theory should assimilate and foster democracy, which requires that we discard the idea that legal theory can or must explain every legal system regardless of its nature. This latter idea must be abandoned as Western political (and legal) history has been characterized by ongoing democratization, what Samuel Huntington once termed "democratizing waves."[3] If legal theory seeks to understand and explain modern legal systems it can not ignore this reality. Given that these processes seem irreversible,[4] legal theory can no longer ignore political reality.

In sum, modern legal theory requires a radical transformation. Accordingly, this article aims to outline some preliminaries of a theory of law that I believe better enables and fosters democracy.[5] Thus drawing upon the writings of two of the most influential legal theorists of the 20th century, Herbert Hart and Ronald Dworkin I focus on what I call the *democratic ambiguity* of modern legal theory.

Broadly speaking, the most prominent legal theories are now based upon legal concepts and ideas, in particular *liberal democracy*, that are deeply rooted in the 20th century. This is problematic for two reasons: (i) these theories universalize a specific concept of law, *i.e.*, they confuse a historical appearance of law with its only possible manifestation, and (ii) this reductionist approach renders the concept of law as abstract and detached from reality. As a result, modern legal theories continue trapped in a logic of democratic ambiguity.

---

[3] This does not imply that nations have not experienced difficulties with democratic consolidation — "counter-waves," using Huntingon's terminology. *See* SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (University of Oklahoma Press, 1991) regarding contemporary "waves of democratization." The success of this author is precisely that category which describes the process of democratization in Western culture, however, it should be noted, that the rest of his thesis are rather conservative and have nothing to do with the democratic ideal taken seriously.

[4] The irreversibility of democratization in any political regime has depended and will depend, of course, on civil society and not on the ruling elites.

[5] In this way, this article serves as a starting point and not as an arrival point of such a radical transformation. Namely, all what is defending here is a first approach to the problem; however, this of course does not exclude the critique that can be made to it.

This article is divided into three main sections. In the first, I start with Benjamin Arditi's analysis of our current political situation. In essence, Arditi supports the idea that politics is beyond the electoral representation; in this way he defines political modernity as a process of continuous territorialization and re-terrtorialization; that is to say that where the frontier of the political has undergone a series of changes within a migratory arc, ranging from the sovereign state until liberal democracies. Furthermore —and this is Arditi's main thesis— the liberal democratic model of the 20th century is being disrupted by a confluence of social movements, organized interests and networks global issues and actors.

The second part addresses Hart's distinction between external and internal point of view of legal rules, beginning with Hart's critique of the Austinian conception of law as habitual obedience backed by threats. In essence, Hart considers this legal theory to be limited because its normative foundation is rooted solely in the "external point of view." As such, this approach fails taken into account the internal aspect which, in Hart's view, represents a distinctive feature of law. However, despite the democratic potential presented in this thesis, Hart himself ends up undermining it. Thus I will intend to explain, foIlowing Peter Fitzpatrikc's elaboration on this topic, how Hart's analytical distintion about the normative external an internal point of view is rooted in democratic ambiguity.

The third section analyzes the metaphor of Judge Hércules, one of the key elements of Ronald Dworkin's theory of law. The case of Dworkin ends to eliminate the major democratic trail, that loomed in Hart's theory, by naturalizing –*i. e.* presenting as the only possible and necessary one —the political order of liberal representative democracy making the idea of a theory of law beyond liberalism virtually unthinkable. Dworkin's elitism is embodied in the figure of the judge[6] and is therefore not able to break with the juridical and political paradigm that represents liberal democracy, on the contrary he

[6] Nowadays, this excessive concern of legal theories with the judge has begun to be reverse it with the appearance of legal and political studies on legislation. Other works regarding this issue include: MANUEL ATIENZA, CONTRIBUCIÓN A UNA TEORÍA DE LA LEGISLACIÓN (Civitas, 1991); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (Cambridge University Press, 1999); LUC. J.WINTGENS (ed), THE THEORY AND PRACTICE OF LEGISLATION (Ashgate Publishing, 2005) and LUC J. WINTGENS & A. DANIEL OLIVER-LALANA (eds.) THE RATIONALITY AND JUSTIFICATION OF LEGISLATION (Springer, 2013). However, these works in certain way remain thinking about law as exclusive product of state officials.

ends reinforcing it. With all that Dworkin sets the grounds on which contemporary legal theory moves, those grounds are also within the liberalism paradigm thus his theory ends up in democratic ambiguity as well.

I should mention here that this article tries to stimulate a discussion about the development of a democratic theory of law from the post-structuralist studies on jurisprudence or, more precisely, from *apocryphal jurisprudence* —borrowing words from Manderson.[7] In legal theory and philosophy apocryphal jurisprudence has generally been ignored simply because it "fall[s] outside the framework of the [two] parties [the orthodox and the heresy]."[8] Briefly, taking the term from William Lucy, Manderson identifies *the orthodoxy* with iuspositivism and *the heresy* with CLS.[9] However, as Manderson claims "[t]he choice for scholars is not just between the orthodoxy or thesis of positivism and the heretical antithesis of Critical Legal Studies; not yet to accomplish a species of synthesis, which perhaps deserves the label *ecumenical*. These are all ways of maintaining a tradition. But it is also possible to look where the tradition is blind."[10] The idea of seeking where the tradition is blind takes the form of "an emerging non-traditional literature... This emergent literature is not orthodox. Neither is it heretical. Rather, what is being developed here is a new genre of legal theory..." [11] Thus this article aims to keep developing that new genre of legal theory: apocryphal jurisprudence.

II. THE BECOMING OTHER OF POLITICS

---

[7] Desmond Manderson, *Apocryphal Jurisprudence*, 26 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY 27-60 (2001).

[8] *Id*. at 29.

[9] Although Manderson identifies *the orthodoxy* with iuspositivism and *the heresy* with CLS, the terms orthodox and heretical jurisprudence must be understood in a broad way, *i. e.*, in both orthodoxy and heresy we find authors that we would not see as belonging either positivism or CLS. About this issue, *see* WILLIAM LUCY, UNDERSTANDING AND EXPLAINING ADJUDICATION (Oxford University Press, 1999). Also it should be noted that though this article adheres more to heretical than orthodox jurisprudence, it differs from the former insofar as apocryphal jurisprudence poses "very different questions and derive[s] from different and irreconcilable concerns", *see* Manderson, *supra* note 7, at 29.

[10] Manderson, *supra* note 6, at 29, 30.

[11] *Id*. at 31. Specifically, the ideas outlined in this article align more with Fitzpatrick work. *See* PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW, ch. 6 (Routledge, 1992).

Let's begin with arguments made by Benjamín Arditi regarding what he terms *the becoming other of politics*. With this Arditi explores the ontological basis of current politics which, according to him, must be understood not as completed but as something in continual construction or reconfiguration.[12]

What is the becoming other of politics?[13] Benjamín Arditi's describes it as the decentralization of politics, *i. e.*, politics can not only be circumscribe to the set of actors, relationships and institutions belonging to the state and partisan format. Arditi justifies this assertion in two ways: first, if politics refers only to government authorities and partisanship interests "we would be reducing it to its 20th century liberal-democratic format, tacitly committing us to accept the thesis of the end of (political) history;"[14] secondly, "such a reduction would leave the political condition of organized interest groups, social movements and global actors in a conceptual limbo."[15]

These two reasons may be viewed as two faces of the same coin. In light of the impact of organized interest groups, social movements and global actors on public affairs it is difficult for social scientists to simply ignore their role in the (re)configuration of politics

---

[12] It is not my intent to exhaustively review Arditi's theory of politics for two reasons. First, this is not the main purpose of the article and second, the theory is, in Arditi's words, still under construction. My purpose here is simply to outline Artidi's thesis as a reference to what I argue here. For Arditi's main ideas on politics *see* BENJAMÍN ARDITI & JEREMY VALENTINE, POLEMICIZATION: THE CONTINGENCY OF THE COMMONPLACE (New York University Press, 1999), and BENJAMÍN ARDITI, POLITICS ON THE EDGES OF LIBERALISM: DIFFERENCE, POPULISM, REVOLUTION, AGITATION (Edinburgh University Press, 2007).

[13] Before proceeding, I'd like to clarify the analytical distinction made by Arditi between politics and the political —as this is central to the arguments made herein. Stated simply, the political is the instituting moment of politics –*i. e.*, the never conclusive declarative/performative act (*e. g.*, 1917 Mexican constitution) which founds a particular form of politics—, thus politics would be what is instituted. For this reason the political can always exceeds the confines of institutional politics. The former is the larger system by which a society is unified despite its divisions; while the latter is the particular sphere or subsystem in which modern societies circumscribe politics activity. Benjamín Arditi, *The Becoming-Other of Politics: A Post-Liberal Archipelago*, 2 CONTEMPORARY POLITICAL THEORY 307-309 (2003).

[14] *Id.* at 310.

[15] *Id.*

—and even law.[16] And this is a clear indication that our actual politics exceeds the 20th century liberal democratic format (a state and partisan focused format) and the thesis of the end of political history should be abandoned.

Note that Arditi's thesis encompasses more than the simple idea that current politics would be better understood as a cluster of subsystems —goverment and partisan actors and others— for this would be just to pluralize the singular and that "is not satisfactory, for it suggests a mere arithmetic growth, whereas a condition of polyphony has to account for the qualitative differentiation of sites and modes of political engagement."[17]

Arditi's reading begins with the idea that we should understand political modernity as a continuous migration to *new topoi*, *i. e.*, politics has always been characterized by a steady colonization of new territories and borders. So with each shift of the border the shape of politics transforms, behaving in effect as a constant process.

Briefly, according to Arditi, modernity begins with the emergence of the absolutist state. Absolutism is therefore the first *topoi* of modern politics. And how politics is seen from absolutism? Bodin and Hobbes viewed absolute rule as a system with its own dynamics that belongs solely to the state.

In absolute rule the monarch embodies and becomes the sole subject of politics. But what follows this model? Migration to a new *topoi*: liberalism. With the advent of liberalism —the democratization of the absolutist state— politics expands to the sphere of parties and elections, emerging the sphere of territorial representation. But "[t]his migration did not cancel the political status of the state, but neither did it leave the original field untouched. It triggered a process of de-territorialization that stripped the

---

[16] This is especially important in Mexico where civil society's impact in the public sphere has major significance. Examples include recent social movements and organized interest groups such as *Movimiento por la paz con justicia y dignidad* (Movement for Peace with Justice and Dignity) which achieved the enactment of a major law regarding victims of crime, *Yo soy 132* (I'm 132) which became part of an historic debate between three of the four presidential candidates in the 2012 elections, *Movimiento ciudadano por la justicia 5 de junio* (Citizen Movement for Justice June 5) which spurred the enactment of a law on proper child care, and others concerning diverse matter including: *Frente de defensa de Wirikuta* (Wirikuta Defense Front), *Activistas pro animales* (Pro Animal Activists), *Grupos de autodefensa* (Self-defense Groups), *Congreso popular* ("Popular Congress"), *Movimiento estudiantil del IPN* (IPN's student movement), etc.

[17] ARDITI, *supra* note 12, at 310-311.

state of its purported monopoly over politics, and a parallel process of re-territorialization that inserted it into a new political scene."[18]

Arditi reminds us, however, that this at first not mean a democratic scenario since representation and party competition are compatible with a truly restricted notion of citizenship and political rights, *thus* a liberal state is not always democratic. It is then when in the second half of the nineteenth century, with a surge in civil rights movements and the rise of the popular vote, other *topoi* emerged: democratic liberalism; either as a code for effective practice, or as regulative idea.[19] Thus liberal democracy "empowers citizens *as* voters and backs organized intermediation of interests by conceiving politics along the lines of partisan representation."[20]

This model, characterized by a "link between electoral citizenship, partisan competition and the nation state [that] inaugurates and epoch when the political is hegemonized not by the state but by the sphere of territorial representation within the physical borders of the state"—[21] would be where *prima facie* we are immersed nowadays. I use *prima facie* because another dominant political model is now emerging: post-liberal democracy.[22]

---

[18] *Id.* at 314.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 317.

[22] Stated briefly, post-liberal democracy would be a political model that, whilst trying to overcome liberal democracy, it still works from it. That is to say post-liberal democracy begins with electoral citizenship and partisan competion but it also goes beyond this sphere since is engaged whit new forms of activism and democratic practices. We can see the emergence of this new political model all around the world, exemples include: the waves of demonstrations and protests in the Arab world (since 2010), the anti-corruption movement behind Aam Aadmi in India (during 2011 and 2012); the intellectual and activist struggle behind Podemos in Spain (since 2014); the huge mobilizations of poor and working people against the Troika's austerity plan in Greece (in 2015); the anti-austerity protests against Tory party across UK (in 2015); the activist and people support behind the new constitucional processes in Bolivia (2006) and Ecuador (2007-2008); the continuous zapatist movement which in December 2012 displayed its strength by mobilizing tens of thousands in a silent march through San Cristobal de las Casas (since 1994) and the Ayotzinapa's social movement which to this day continues organizing various mobilizations and protests acts (since 2014) in Mexico; and many others.

For Arditi politics in its state and partisan format begins to be exceeded, that area is no longer the only one where politics is manifested. Social movements, for instance, are already an "exploration of modes of political exchange that open up spaces, identities, and forms of collective action alongside the party system." In this way, different social movements "chose to avoid the party format. They managed to create and sustain collectives based on non-partisan means of identification, aggregation, and representation of interests. Their actions contributed to renewing the political culture, expanded the public sphere, and extended the democratic revolution beyond the confines of electoral citizenship."[23]

As Arditi states while liberal democracy has hegemonized the political, this should not be confused with total absorption of the political by politics. Liberal democracy —we have to remember the distinction between the political and politics stated above— is just a single politics manifestation of the political, as another is absolutism or liberalism. If the political is always an act of human will, not divine, if it is "the moment of antagonism where the undecidable nature of the alternatives is presented"[24] it is logical that the politics subsystem, where the political is concretized, is not always the same and can suffer also some transformation process at any time.

This transformation, as mentioned above, represents a migration towards a post-liberal democracy, a new topoi which, according to Arditi, "focuses on the possible clustering of some voices, spaces, and practices into systematic constellations. We may eventually describe these clusters as political tiers coexisting with the electoral arenas of the national state —the classical site of the liberal format of politics— and characterize the emerging scenario as a political archipelago of sorts, one that is both phocentric and has multiple levels."[25]

Arditi visualizes this subsystem as three "islands" (archipelago): the first island or level is based on liberal electoral democracy; the second on movements, associations and organized interest groups; and the third takes politics beyond the borders of the national state (supranational). Each "island" has a configuration of interests, demands, identities,

---

[23] *Id.*

[24] *Id.* at 309.

[25] *Id.* at 320.

institutions and procedures associated with various modes of citizenship: 'primary' or electoral, inherited from the liberal tradition, 'second' or social, and supranational or global, in the making trough the outward growth of politics."[26]

Until recently politics moved in the first mode of citizenship exclusively: the electoral one. As mentioned above, however, social movements, organized interest groups and global actors play an increasingly important role in shaping politics and law. Arditi has taken the first step in order to build a conceptual apparatus that allows us describe and explain better our politics today. But with that setting about the becoming other of politics an interesting problem for theory of law emerges. Legal theory —even more than political theory— is based upon partisanship and state interests. If politics is undergoing a reconfiguration, should not something similar happen to law? This is especially true considering that law is essentially politics.[27] If politics is undergoing a radical transformation, law also experiences some transformation in the same way.

III. HERBERT HART AND LEGAL THEORY'S DEMOCRATIC AMBIGUITY

The first thing to do to explain the becoming-other of law is to see, albeit in summary fashion, how the concept of law has been understood in contemporary legal theory, resorting to two of its greatest exponents: Herbert Hart and Ronald Dworkin. These two legal philosophers show how the theory of law remains trapped in government authority and partisanship politics. Thus these thinkers' approach is mistaken as the disruption of the old paradigm now taking place will have significant implications for our current legal concepts and theories. The following section begins with a brief review of an important element of Herbert Hart's legal theory. This element is strategic to think the becoming other of law -*i. e.* law viewed not from the official or partisan perspective but from citizen's point of view. Despite the fact that Hart highlights this element, his theory of law fails to fully considerer its implications.

---

[26] *Id.*

[27] On this topic see the different works of critical legal theory, specially: Carlos Cárcova, Teorías jurídicas alternativas. Estudios sobre derecho y política (Centro Editor de América Latina, 1993); Óscar Correas, Introducción a la crítica del derecho moderno (Fontamara, 2006); Alan Hunt & Peter Fitzpatrick (eds.), Critical Legal Studies (Basil Blackwell, 1987); Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (New York University Press, 2004).

Hart departs from John Austin's version of positivism. In a sense, Hart renew the methods of legal positivism by bringing analytic, particularly linguistic, tools to legal analysis. Thus, employing linguistic analysis, he argues that the question "what is law?" has become an enigma –*i. e.*, was much too vague— because all the answers given so far make the same error: rest on a linguistic confusion. For Hart the origin of this error comes from the need to recognize some pehomena to which the word "law" invariably refers. From this perspective the word "law" has an essential or inherent sense.

We must remember that the philosophy of language comes in clear opposition to such essentialist perspective of correspondence. Thus Hart claimed that up to that time, legal philosophers had commited precisely that error. Two examples include: (i) John Austin, who described law as orders backed by threats, and (ii) Oliver Holmes, who defined law in terms of how judges made rulings. These two concepts clearly show, according to Hart, the type of confusion that blurred the philosophy of language, because they attempted to link the word "law" with factual situations, that is, with certain observable facts and in so doing they obfuscated rather than clarified major legal concepts especially the concept of law. For this reason, Hart advocated that "there is plainly need for a fresh start"[28] to the concept of law.

Hart considered the Austinian theory of law, habitual obedience to orders backed by threats, to be limited to the external point of view of the rules. This approach failed to taken into account the internal perspective which, in Hart's view, represented a distinctive feature of law. In Hart's own words:

> For such an [external] observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy Street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in a conformity to rules which make stopping when the light is red a standard of behaviour and an obligation. To mention this is to bring into the account the

[28] HERBERT HART, THE CONCEPT OF LAW 77 (Oxford University Press, 1961).

> way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.[29]

The internal point of view of the rules represents, borrowing foreign words, "the most distinctive and valuable element in the work of Hart as jurist."[30] Paradoxically, however, "it is the same internal aspect that undermines Hart's conceptions of law and legal system"[31] impregnated with democratic elements which Hart tries to maintain.

Hart's internal point of view is a valuable contribution for developing a genuinely democratic theory of law for such a perspective enhances our understanding of law in terms of "a critical reflective attitude."[32] A critical reflection shared by both the rulers and subjects. If we do not take into account the internal perspective of legal rules, citizens become automatons who simply obey rules imposed by authority.

But once Hart recognizes the vital importance of the internal point of view both for legislators, judges and goverment officials and for ordinary citizens, he explicitly denies it to the latter.[33] His justification is that "law-making, law-identifying, and law-applying operations" solely applies to "officials or experts of the system" in contrast to "the mass of the population" or "ordinary citizen." From this perspective, citizens are nothing more than ignorant and passive participants who "may know nothing more about the laws than that they are 'the law'."[34]

In this sense, the internal aspect of rules is considered solely from the perspective of those in power as this is its only reason for being. Thus the democratic character of Hart's theory begins to lose force. According to Hart:

> There are... two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's

---

[29] *Id.* at 87-88. Emphasis original.

[30] NEIL MACCORMICK, H. L. A. HART 29 (Edward Arnold, 1981).

[31] FITZPATRICK, *supra* note 11, at 188.

[32] HART, *supra* note 28, at 55.

[33] FITZPATRICK, *supra* note 10, at 197-201.

[34] *Id.* at 59-60.

> ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever.[35]

Hart attempts to provide a general analysis of obligation in terms of a critical reflective social attitude. Although he sees this analysis as clearly distinguishing his view from those of Austin and other positivists, his emphasis on acritical and individualistic obedience places Hart's theory uncomfortably close to Austin's ideas. Nowhere does Hart require citizens to understand and accept laws in a critically reflective manner. This is true despite his assertion that "in a healthy society they [the citizens] will in fact accept... rules as common standards of behaviour and acknowledge an obligation to obey them."[36] Indeed Hart asserts that the "ordinary citizen":

> ...need not think of his conforming behaviour as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards. He need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply. Instead, he may think of the rule only as something demanding action from *him* under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations. But this merely personal concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts.[37]

In summary, by exposing inconsistencies implicit in all orthodox or positivist theories of law, Hart's ideas regarding internal and external perspectives contravene fundamental principles of democracy. First, by recognizing that citizens possess a critical reflective attitude (capable of evaluating and following rules), Hart asserts that the internal point of view is critical to understanding a legal system. Second, despite this recognition,

---

[35] *Id.* at 113. Emphasis original.

[36] *Id.*

[37] *Id.* at 112. Original emphasis.

however, he claims that this internal point of view only applies to lawmakers —in particular, to judges— since citizens must solely *obey* laws and regulations.

IV. RONALD DWORKIN AND LEGAL THEORY'S ELITISM

In *Law's Empire* Dworkin[38] argues that legal theory should not merely identify the rules of a legal system, but also interpret and evaluate them. In other words, legal theory must not only consider the relation between law and coercion (*i.e.* the "force" of law), but the relation between law and rightfulness or justifiability (*i.e.* the "grounds" of law). In this theory of law, the role played by judges is fundamental.

According to Imer Flores the most important chapter of *Taking Rights Seriously* is "Hard Cases,"[39] in which Dworkin cites Hércules, a judge

> ...of superhuman skill, learning, patience and acumen... I suppose that Hercules is a judge in some representative American jurisdiction. I assume that he accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.[40]

In this way, Hércules is a deific super-judge, endowed with unmatched knowledge of the law and unlimited time to consider the implications of legal principle. He fully understands the law's purpose, and makes just, wise and fair decisions in ways that best facilitate proper adjudication. Based on this, Dworkin reconnects law whith political morality as for him "[l]aw is an interpretive concept, which does not have an identity apart from the activity of interpreting law."[41] In this sense, understanding law as an

---

[38] RONALD DWORKIN, LAW'S EMPIRE (Harvard University Press, 1986).

[39] Imer Flores, *¿Ensueño, pesadilla y/o realidad? Objetividad e (in)determinación en la interpretación del derecho*, *in* PROBLEMAS CONTEMPORÁNEOS EN LA FILOSOFÍA DEL DERECHO 187 (Instituto de Investigaciones Jurídicas, 2005).

[40] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105, 106 (Harvard University Press, 1977).

[41] DWORKIN, *supra* note 38, at 413.

interpretative activity leads Dworkin, as Fitzpatrick states, to adopt an internal point of view on law.[42]

Despite these virtues, however, Dworkin —similar to Hart and other positivist legal theories— still falls into democratic ambiguity. Why? Because he makes a clear division between rulers and subjects. For Hart, this division did not pose any problem, as the internal point of view of judges, lawmakers and other officials ensure the protection of citizens' rights. Neither is this problematic for Dworkin, but for a different reason: a metaphorical judge like Hércules, in all his wisdom, ensures the protection of citizens' rights.

Considering all the virtues of Dworkinian interpretative and argumentative model, it appears feasible that judges have the last word in resolving hard cases. After all such cases, in a democracy, can not be unresolved, someone has to resolve them. But the Dworkinian model really justifies judiciary as the ultimate decision-maker? My claim is that the argumentative model does not solve the problem about the legitimacy of the last decider in post-liberal democracies. Legal theory should address this problem without obviates the question of the political model in which law is immersed. To be clear, I do not advocate the disappearance of current judiciary institutions. I argue that the problem must be understood beyond the common answer that this is just a technical question –*i. e.*, a matter of mere institutional design. The problem could be technical but it is also an epistemological and political one.

In a theory like Dworkin's the problem of the political model in which law is immersed is not taken into account and judicial review becomes the last guarantee of protection of citizen's rights. For Dworkin, Hércules and his rational arguments maintain the law's integrity and represent the ideal form of adjudication. Imer Flores notes that by accepting Hércules, we assume that there is one right way to decide a case, and that the judge is capable of always finding the right solution. The problem, however, is not whether or not the correct answer exists but that the discovery of it is the exclusive

[42] FITZPATRICK, *supra* note 11, at 5.

privilege of a super-judge, a metaphor which fails to account for "the political context within which he decides or that indeed generates the cases that come before him."[43]

In this sense, what supports Hércules's rulings –and ultimately the basis for judicial review– would be his "claim to a special and higher rationality"[44] as:

> He may live amid that mass of irrationality that is our tax and immigration law, the decadence of administrative agencies and the perpetual threat of and preparation for war, but the Rule of Law and the rule of reason will reign if judicial decisions are grounded in appropriate rules, principles and standards and rationality defended. The province of judicial action is indeed a very wide one. In choosing which of the two parties before him is right the truly knowing judge need not only look to the rules to come to a rational decision, he may also grounds his argument on the principles inherent in the political order of which he is a member and to its implicit standards of political morality. In doing so he does not legislate or excercise discretion, because his arguments *are derived from hierarchy of norms*, not from considerations of policy, efficiency, or public welfare.[45]

It is here that we find the grounds of judicial rationality as "Dworkin, of course, knows that policy choices can easily be translated into the language of principles. Indeed legislators and private persons do it all the time. The rationality of judicial discourse, nevertheless, does depend on this formally normative characteristic. As long as it remains within the limits of normative logic its rationality cannot be impugned."[46]

Thus, if "judiciary is not alone in claiming a rational standing; [and] other agencies of government also have their share of "tribunality," that is, principled reasoned decision making,"[47] it is clear that citizens enter here as well. In this way there is not enough reason to completely assign the power to decide hard cases to the courts. When they are located in their proper political context and we are aware of "their relative position in the political order as a whole" and if, as Dworkin argues, the concept of law implies a

---

[43] Judith Shklar, *Political Theory and the Rule of Law*, *in* POLITICAL THOUGHT AND POLITICAL THINKERS 34 (Chicago University Press, 1998).

[44] *Id.* at 35.

[45] *Id.* at 34, 35. Emphasis added.

[46] *Id.* at 35.

[47] *Id.*

necessary recognition of the community's political morality, judges are no longer the best placed to decide the difficult disputes but the citizens themselves. That as long as we dare to overcome the legal positivist epistemology —and the political base underlying it: liberal democracy— with its radical division between rulers and subjects within which judges possess a privileged status because of its special and superior rationality.

Once we discover the foundation of judicial review in "a special and higher rationality" —compatible with the democratic ambiguity typical of contemporary theories of law— it will be necessary to acknowledge that the problem of judicial review, and law in general, should be rethinking in a post-liberal democracy since, as with Hart, for Dworkin law only exists because "officials... take... decisions that commit a community to rights and duties that make up law."[48] This especially makes sense if we take into account, as Judith Shklar states, that "[t]he only political order in which the kind of principled reasoning that Dworkin attributes to the rational judge is possible at all, is of necessity a representative democracy, and as such it is particularly given to jurisdictional and open-minded interminable disputes."[49]

We may be well-advised to remember the words of Harold Berman who said that:

> We need to overcome the reduction of law to a set of technical devices for getting things done; the separation of law from history; the identification of all our law with national law and of all our legal history with national legal national history; the fallacies of an exclusively political and analytical jurisprudence ("positivism", or and exclusively philosophical and moral jurisprudence ("natural-law theory"), or and exclusively historical and social-economic jurisprudence ("the historical school", "the social theory of law"). We need a jurisprudence that integrates the tree traditional schools and goes beyond them. Such an integrative jurisprudence would emphasize that law has to be believed in or it will not work; it involves not only reason and will but also emotion, intuition, and faith. It involves a total social commitment.[50]

And if we accept that current theories of law have serious problems due to the democratic ambiguity that characterize them, it does not seem appropriate to take into

---

[48] DWORKIN, supra note 39, at. 97.

[49] *Id.* at 35, 36.

[50] HAROLD BERMAN, LAW AND REVOLUTION. THE FORMATION OF THE WESTERN LEGAL TRADITION VI, VII (Harvard University Press, 1983).

account just the official view (legislator, judges and so on) for explaining law since law is not the exclusive product of ruling class. In this way, citizens should be those who decide what is law as "[t]he ability of Hercules to prevail in such a polity [a representative democracy] depends less on the rationality of his specific style of argument than on his power, which is in any case what his name implies. The rationality of his office depends not merely on the rational quality of his decisions, but far more on his relatively aloof place in the political order as a whole."[51] In sum, if want to take democracy seriously law, paraprashing Dworkin's statement, does not exists because "officials... take... decisions that commit a community to rights and duties that make up law" but rather because citizens, with their daily political struggle, decide so.

V. CONCLUSION

Everything to this point can be summarized as follows: any legal theory that distinguishes between rulers and subjects fosters "democratic ambiguity" and, as such, fails to match the realities of contemporary post-liberal democracy. As mentioned in the introduction, some elements from both Hart's and Dworkin's theories provide an excellent starting point for the construction of a theory of law in the service of democracy. Both give us two distinct features that may be utilized to build such a theory. Hart's ideas shed light on the importance of participants' internal point of view. Dworkin's thesis, on the other hand, illustrates the necessary link between law and political morality.

Nonetheless, as shown above, Herbert Hart's theory contains a paradox; although he advocates a genuine democratic theory of law by considering both internal and external points of view, he undermines this principle by applying it solely to the ruling class. He thus limits the participation of citizens in the legal system to mere obedience. This is not too far from the tradition espoused by Hobbes, followed by Austin and found in other modern legal philosophers including Kelsen, Ross and Raz, among others. With Dworkin, the dilemma does not appear to the same extent as it does in Hart. But he also limits citizens' participations as for him the sole valid interpretation is the official one – especially that of judges.

As I have argued liberal representative democracy can no longer be the political basis for the construction of a democratic legal theory. For this reason, the disruption of this

[51] Judith Shklar, *supra* note 43, at 36.

paradigm can start with the two important ideas mentioned above, both of which are present in Hart's and Dworkin's work. No democratic theory of law can rest entirely on the elite perspective of lawmakers ––—in particular judges— as it has been in contemporary legal philosophy. For this reason, the inclusion of citizens is necessary in building institutions and greater participation in decision-making. This is the lesson of Arditi's work, that current politics requires going beyond the state and partisan format. If we talk about the conditions of possibility of a legal system, and therefore the power that supports it, it is mandatory introduce in the explanation of law, a popular item, namely, democratic.

THE EXHAUSTION OF DOMESTIC REMEDIES AND THE NOTION OF AN EARLY STAGE IN THE CASE OF BREWER CARÍAS. IS THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AT RISK?

Angel Gabriel CABRERA SILVA[1*]

ABSTRACT. *This note analyzes the judgment delivered by the Inter-American Court on Human Rights in the case of Brewer Carías v. Venezuela. It argues that the criteria that allowed the preliminary objection of non-exhaustion of domestic remedies contravenes the precedents of the Inter-American line of case law. By examining the origin and implications of the newly-introduced concept of an "early stage" in domestic proceedings, this note then reaches to the conclusion that it could endanger the accessibility and impact of the Inter-American Human Rights System.*

KEY WORDS: *Exhaustion of domestic remedies, Inter-American Court on Human Rights, preliminary objection, early stage.*

RESUMEN. *Esta nota analiza la sentencia dictada por la Corte Interamericana de Derechos Humanos en el caso Brewer Carías vs. Venezuela. Se sostiene que los criterios utilizados para admitir la excepción preliminar de falta de agotamiento de recursos internos, contraviene los precedentes establecidos en la línea jurisprudencial del Sistema Interamericano. Mediante un estudio del origen e implicaciones del recién introducido concepto de una "etapa temprana" en los recursos internos, se concluye que esta noción podría implicar un riesgo para la accesibilidad y el impacto del Sistema Interamericano de Derechos Humanos.*

[1] The author is an LLM candidate at Harvard Law School. He received his B.A. in Law from the University of Guadalajara. Recently he worked as a Research Fellow appointed to the Observatory of the Inter-American Human Rights System of the Institute for Legal at the National Autonomous University of Mexico (IIJ-UNAM). He has been a Fellow of the Botin Foundation Program for the Strengthening of Latin-American Institutions and the Emerging Leaders the America's Program sponsored by the Canadian Bureau for International Education. He has professional experience at the Inter-American Commission on Human Rights, the Supreme Court of Justice of Mexico, the Mexican Commission for the Defense and Promotion of Human Rights (NGO), and the Human Rights Commission of the State of Jalisco. Email: *angel.cabrera.silva@gmail.com.*

PALABRAS CLAVE. *Agotamiento de recursos internos, Corte Interamericana de Derechos Humanos, excepción preliminar, etapa temprana.*

TABLE OF CONTENTS

On May 26th, 2014 the Inter-American Court on Human Rights (hereinafter referred to as the I/A Court H.R.) delivered its judgment on the Case of *Brewer Carías v. Venezuela*[2] (hereinafter referred to as the case of *Brewer).* This decision allowed a preliminary objection of non-exhaustion of domestic remedies based on unprecedented criteria.

This note analyses the aforesaid judgment and sustains that the standards contained therein establish a judicial precedent that could affect the accessibility and impact of the Inter-American Human Rights System (hereinafter referred to as IAHRS). This work has been divided into four sections: the first one briefs the facts and the decision delivered in the Case of *Brewer;* the second section elucidates about the generalities concerning the procedural exigency to exhaust domestic remedies; the third part explains how this requisite has been applied by the IAHRS, in order to describe the changes that were introduced through the Case of *Brewer* particularly regarding the concept of an "early stage" in domestic proceedings*;* the last section exposes the consequences of these changes, and proposes a way for the Inter-American Commission on Human Rights (hereinafter referred to as the IACHR) to counter its negative effects.

I. THE CASE OF BREWER IN BRIEF[3]

Professor Allan Brewer Carías filed a petition before the IACHR in order to challenge a criminal prosecution instigated against him for his alleged participation during the

[2] *Allan R. Brewer Carías* case, 2014 Inter-Am. Ct.H.R. (Ser.C) No. 278, (May 26, 2014).

[3] This chapter summarizes the facts and legal arguments that were presented by the petitioner before the IACHR, as they were published in: *Allan R. Brewer Carías v. Venezuela*, case 12.724, Inter-Am C.H.R., Report 171/11, (November 3, 2011) at 8-53.

Venezuelan *coup d'état* attempt of 2002 lead by Pedro Carmona against President Hugo Chávez. Professor Brewer was suspected to have taken part in drafting the *Carmona Decree,* which was the document establishing a transitory government after the temporary suspension of Chávez's authority.

Starting from 2002, various provisory prosecutors conducted the criminal investigation against Professor Brewer. The first appointed prosecutor did not file any accusation and neither did the second; as a consequence they were both removed and one of them was even killed. Subsequently, the third appointed prosecutor finally accused Professor Brewer of committing conspiracy against the government.

The case was then brought before a provisory criminal judge who was substituted after having delivered a restriction order that was revoked by the Court of Appeals. The second judge was also suspended on his functions and a third provisory judge was appointed to subpoena the parties to the public hearing in which the court had to deliver a decision on the admissibility of the accusation.

After the prosecutor filed the accusation and while a third provisory judge conducted the first stage of the criminal process, Mr. Brewer moved to the city of New York in order to assume a position as Professor of the University of Columbia. Subsequently, the judge issues a detention order against Prof. Brewer in 2006, whose execution remains pending after a couple of failed extraditing attempts. Up to this moment, as the detention order remains valid, Professor Brewer would be incarcerated if he returns to Venezuela.

Brewer's absence from Venezuela has kept him from being detained, however it has also caused an indefinite suspension of his criminal trial, as the domestic law does not allows an accused person to be judged *in absentia*.

Consequently, in order to raise Professor Brewer's claims before the domestic courts and as a mean for terminating the criminal accusation without having to suffer from a detention, the defendant's attorney requested a declaration of nullity against the criminal proceedings as a whole. Nevertheless, in spite of the defendant's arguments, the court deemed that such a request for annulment had to be decided during the public hearing in which Professor Brewer's attendance was necessary.

At present, both the criminal trial and the request for the declaration of nullity are still suspended and awaiting that Professor Brewer returns to Venezuela in order to attend the public hearing, which would also imply that he presents himself to be detained and

incarcerated. Therefore, as the Venezuelan law does not provide any other mean for legal redress, Professor Brewer considered that his case was suitable to be presented before the IACHR.

The petition was filed on January 24, 2007 and claimed that the provisory character of the prosecutors and judges deprived Professor Brewer of his judicial guarantee to an impartial trial, as those officials were always subject to the authority of their hierarchical superiors' political interests. It also denounced several irregularities that presumably affected his rights of defense and judicial protection.

Regarding the admissibility requirements, the petitioner contended that he ought to be exempted from exhausting domestic remedies in accordance to Article 46.2 of the American Convention on Human Rights (hereinafter referred to as the ACHR) because:

a) The domestic law does not affords due process of law for the protection of his rights as the structural deficiencies in the Venezuelan justice system establish a provisory character to prosecutors and judges.

b) He has been denied access to remedies under domestic law, as he was arbitrarily prevented from exhausting the request for annulment by conditioning its processing to the appearance of the defendant before the court, although that would mean he would be subject to detention.

c) There had been an unwarranted delay in the processing of his request for annulment, as more than 3 years had passed since it was filed without it been decided.

II. A GENERAL APPROACH TO THE RULE OF EXHAUSTION OF DOMESTIC REMEDIES

The rule of exhaustion of domestic remedies (hereinafter referred to as "the rule of exhaustion") is a principle of International Law that reaffirms the subsidiary and complementary character of international organizations. This general principle was incorporated as a procedural rule of the mechanisms implemented by the international human rights law,[4] since then, it has developed a particular content to provide States

[4] This rule is laid down in Article 46.1 of the American Convention on Human Rights, as well as in Article 35 of the European Convention on Human Rights, 56.5 of the African Charter on Human and People's Rights, 2 of the Optional Protocol to the International Covenant on Civil and Political Rights, and 3.1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

with the opportunity to remedy any given violation to a human right committed by its' officials without suffering international intervention.

Practically every international organization with competence to process individual petitions regarding human rights issues has recognized that the rule of exhaustion refers only to available and effective means of legal redress,[5] that is to include only those remedies that are able to rectify the grievances and are capable of producing the result for which they were conceived.[6]

However, in spite of this consensus, various international organizations have shaped some criteria about the rule of exhaustion in a different manner. It is relevant for this note to distinguish nuances in the flexibility with which this rule is applied. For instance, whereas the I/A Court H.R. has considered that the only remedies that need to be exhausted are those that existed at the moment of any given violation,[7] the European Court on Human Rights (hereinafter referred to as the ECHR) has dismissed petitions for the non-exhaustion of remedies that were created after a violation occurred, as long as they were accessible to the petitioner by the moment when the petition was filed.[8]

The different legal instruments that are subject to interpretation underlie these distinctions in the criteria of international courts. It is not surprising that more restrictive criteria has been stablished within the European System than in the IAHRS, if we take into account that the I/A Court H.R. can rely on rules that explicitly allow to increase the

[5] INTER-AMERICAN SYSTEM: *Velásquez Rodríguez* case, 1988 Inter-Am Ct.H.R. (Ser. C) No. 4 (July 29, 1988) at 63; *Landaeta Mejías Brothers* and others case, 2014 Inter-Am Ct.H.R., (Ser. C) No. 281 (August 27, 2014) at 22. EUROPEAN SYSTEM: case of *Kemmache v. France*, 14992/89 Eur. C.H.R., (June 17, 1990); case of *Nada v. Switzerland*, 10593/08 Eur. Ct. H.R., GC, (September 12, 2012) at 140. AFRICAN SYSTEM: case of *Tanganyika Law Society and Legal and Human Rights Centre v. The United Republic of Tanzania*, Afr. Ct. H.P.R. at 82.1 (June 14, 2013); case of *Sir Dawda K. Jawara v. The Gambi*a, Afr. C. H. P. R., Communication N° 147/95, (May 11, 2000) at 31-32. UNIVERSAL SYSTEM: case of *Farid Faraoun v. Argelia*, UN H.R.C., Communication N°1884/2009 (October 18, 2013) at 6.4.

[6] HÉCTOR FAÚNDEZ, EL AGOTAMIENTO DE LOS RECURSOS INTERNOS EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS 59 and 78 (Estudios de Derechos Humanos Caracas, 2007).

[7] *Cf.* Case of *Claude Reyes* and others, 2006 Inter-Am Ct. H.R., (Ser. C) No. 151 at 140 (September 19, 2006); case of *Liakat Ali Alibux*, 2014 Inter-Am Ct.H.R., (Ser. C) No. 276 (January 30, 2014) at 19.

[8] *Cf.* Case of *Andrasik* and others *v. Slovakia*, 57984/00 Eur. Ct. H.R. (October 22, 2002) at 11-12.

flexibility of the rule of exhaustion, while the ECHR is limited by its necessity to expand the scope of narrower rules.[9]

III. THE RULE OF EXHAUSTION WITHIN THE INTER-AMERICAN SYSTEM: PRECEDENTS AND CHANGES

The line of case law designed by the I/A Court H.R. distinguishes itself for setting parameters that facilitate the petitioners to comply with the rule of exhaustion or to be exempted thereof.[10] The few times a claim has been rejected because the non-exhaustion of domestic remedies demonstrates that the I/A Court H.R. has minimized its application.[11] An important factor leading to this trend is that the rule of exhaustion has not been understood as an unbreakable principle, but rather as a guarantee that can be handed down by the States and whose consideration by the I/A Court H.R. is conditioned to some formalities.

International bodies created by the International Human Rights Law have established several conditions that must be met in order for an objection of non-exhaustion to be allowed. For instance, the I/A Court H.R. takes into account the timeliness of its presentation within the procedure before the IACHR, the specificity of the State's claim regarding the existence of a domestic remedy that meets with the effectiveness standard,

[9] Whereas the I/A Court H.R.'s criteria on admissibility is based on the exceptions laid down in article 46.2 of the American Convention on Human Rights, the ECHR has to deliver a systematic interpretation of article 35 of the European Convention on Human Rights, in relation to articles 6 and 13 of the said legal instrument. Former Commissioner of the IACHR agrees with this perception in: Dinah Shelton, *The Jurisprudence of the Inter-American Court on Human Right*s, Vol. 10, AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 1994, at 344.

[10] An academic paper has even tried to claim that, within the IAHRS, the rule of exhaustion has lost its effectiveness as a mean of defense for the States. *Cf.* Andrés González, La excepción preliminar: Falta de agotamiento de recursos internos ¿Un mecanismo efectivo de defensa estatal?, Prolegómenos. Derechos y valores, 2011.

[11] It is interesting to note that, within the last 5 years (2009-2014) the I/A Court H.R. has analyzed more than 29 cases where the State raised the preliminary objection of non-exhaustion of domestic remedies. However, only 3 of those cases allowed the objection (cases of *Chitay Nech v. Guatemala, Díaz Peña v. Venezuela and Brewer Carías v. Venezuel*a). This is only an illustrative statement about a general trend; we are aware that a more profound analysis will need to classify the reasons that lead to the rejection of the preliminary objection; however, that's not the purpose of this note.

and the adequacy of proof provided by the defendant State in order to sustain the soundness of its claim.[12]

Nevertheless, recently, this reasoning has ceded before a more rigid interpretation regarding the rule of exhaustion. This section will analyze the medullar aspects of this modification in the Inter-American jurisprudence, principally in relation to the Case of *Brewer.* However, before analyzing that particular decision, it is imperative to briefly revise a previous case that was the anteroom for the modification in the line of case law.

In 2010 the I/A Court H.R. decided the case of *Díaz Peña v. Venezuela.* This judgment redirected the admissibility criteria set by the IAHRS up to that moment, which defined that the exhaustion of one suitable mean of redress is sufficient to comply with the rule of exhaustion according to the procedural regulation of the American Convention on Human Rights.[13] In that case, the I/A Court H.R. considered that the legal actions pursued by the victim in order to remedy an allegedly arbitrary imposition of preventive detention were not sufficient to comply with the rule of exhaustion, although they could have provided an effective mean to achieve a pretrial release decision.

The victim of that case, José Raúl Díaz Peña, was convicted because of his alleged participation in the protests of "Plaza de Francia" and the bombings occurred in Caracas on February 23, 2003. The criminal proceedings against the petitioner lasted for 4 years and 5 months.[14] The trial, having been conducted before several provisory judges, was contested for not been impartial.[15] Díaz Peña was held in preventive detention throughout the duration of the proceedings and until a definitive judgment was delivered;

---

[12] We can highlight that both, the I/A Court H.R. and the ECHR, apply similar criteria regarding the specificity with which the preliminary objection of non-exhaustion of domestic remedies has to be raised by the States, and also concerning the burden of proof to sustain this objection. *Cf.* Mayagna Community (Sumo) Awas Tingni case, Inter-Am Ct.H.R., (Ser. C) No. 66 at 53 (February 1, 2000); case of *McFarlane v. Ireland*, 31333/06 Eur. Ct. H.R., GC, at 107 (September 10, 2010)

[13] *Cf. Raúl José Díaz Peña v. Venezuela*, Petition 1133-05, Inter-Am C.H.R., Report 23/09 at 45 (March 20, 2009) compared to: *Humberto Antonio Palamara Iribarne v. Chile*, case 11.571, Inter-Am C.H.R., Report 77/01 at 36, (October 10, 2001). This criteria was recently reiterated in*: Daniel Urrutia Labreaux v. Chile*, Petition 1389-05, Inter-Am C.H.R., Report 51/14, OEA/Ser.L/V/II.151 at 22 (July 21, 2014).

[14] Case of *Díaz Peña,* 2012 Inter-Am. Ct. H.R., (Ser. C) No. 244 (June 26, 2012) at 87.

[15] *Raúl José Díaz Peña v. Venezuela*, case 12.703, Inter-Am C.H.R., Report 84/10 (July 13, 2010) at 38.

during this time, the defendant's attorneys presented numerous remedies that were suitable to review the proportionality of the preventive detention. However, the final judgment was not appealed on the merits.

The petition filed before the IACHR claimed that the criminal process was lacking impartiality and that the preventive detention was not proportional; it also denounced inappropriate conditions of detention. This latter issue was the only one on which the I/A Court H.R. delivered a final decision.

Even if it was foreseeable that the claims regarding the procedural irregularities were inadmissible for not having exhausted the final appeal for review against the final judgment, the claims concerning the preventive detention were surprisingly rejected because the I/A Court H.R. accepted the preliminary exception of non-exhaustion of domestic remedies raised by the State of Venezuela.[16]

Although the petitioner had exhausted several requests for the review of his preventive detention during the years he was subject to criminal proceedings, the I/A Court H.R. did not analyze the suitability of those remedies.[17] On the contrary, the I/A Court H.R. only noted that the final decision of conviction had not been appealed, and that this would have been a suitable mean to redress procedural irregularities, as well as an effective way to raise his claim against the preventive detention which he considered to be a violation to the right to liberty protected by article 7 of the ACHR.[18]

The modification in the criteria to apply the rule of exhaustion was not as evident in the case of *Díaz Peña,* nor this judgment was as controversial as the decision delivered in the case of *Brewer.* While the change in the line of case law was barely noticeable on the former, the implications and consequences of this approach are most conspicuous on the latter.

---

[16] In its report on admissibility, the IACHR considered that the several request for revision of the preventive detention were sufficient to comply with the rule of exhaustion. *Raúl José Díaz Peña v. Venezuela*, Petition 1133-05, Inter-Am C.H.R., Report 23/09 at 42, 50 (March 20, 2009).

[17] Consequently, the I/A Court H.R. used a standard that is even stricter than the criteria applied by the ECHR. In fact, the ECHR has considered that, when multiples suitable remedies exist, compliance with the rule of exhaustion only requires for the petitioner to pursue all of the vertical instances for one of such means of redress. Cf. *Case of Kozacioglu v. Turkey*, 2334/03 Eur. Ct. H.R., GC (February 19, 2009) at 40.

[18] Case of *Díaz Peña,* 2012 Inter-Am. Ct. H.R., (Ser. C) No. 244 (June 26, 2012) at 123, 125.

While analyzing the judgment delivered in the case of *Brewer,* on the one hand, it stands out that there was a change on the adjective criteria to evaluate the timeliness, specificity and burden of proof concerning the preliminary objections for non-exhaustion of domestic remedies. Following some of the arguments presented by the dissenting judges,[19] modifications may be briefed as follows:

a) The specificity requirement would normally oblige a State to mention the remedy that should have been exhausted in order to comply with the rule of exhaustion. Moreover, when a petitioner has already exhausted a domestic remedy, this requisite forces the State to explain why such a remedy should not be taken into account while assessing compliance with the rule of exhaustion. However, in this case the Court adopted a more flexible interpretation by allowing Venezuela to simply state that the criminal proceedings had not been concluded, and that an appeal, a cassation and review where available to remedy the grievances (even if a request for annulment was already presented by the petitioner).

b) According to the requisite of timeliness, a State must present its preliminary objections during the admissibility stage before the IACHR. Consequently, in this case Venezuela could not amend the lack of specificity regarding its preliminary objection of non-exhaustion. However, the Court considered that the way the State raised its' objection before the Commission sufficed to comply with this requirement.

c) Finally, the exigencies normally placed upon the state regarding the burden of proof would have required Venezuela to present sound arguments and evidence that the pending domestic remedy would have met the Inter-American standards of effectiveness and adequateness. Nevertheless, the Court did not study how the proposed remedies would have provided sufficient relief to all of Mr. Brewer claims; instead, the Court based its decision on the sole precedent that could sustain this approach: the case of *Díaz Peña v. Venezuela.*

In addition to these adjective (or secondary) modifications, the most substantial change was the use of the concept of an "early stage" in domestic proceedings. By using this newly introduced notion, the Court vaguely explained that Mr. Brewer had filed the

[19] Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, to the I/A Court H.R. judgment on the *Allan R. Brewer* Carías case, 2014 Inter-Am Ct. H.R., (Ser. C) No. 278, Dissenting Opinion (May 26, 2014) at 33-45.

petition in an untimely manner because he presented it before the appropriate moment according to domestic law, that is, before the start of oral proceedings. Nevertheless the I/A Court H.R. did not provide a clear definition of what it understood as an "early stage", even so, this concept was used as a main argument to allow the preliminary objection of non-exhaustion of domestic remedies.

Fortunately, the joint dissenting opinion of judges Ferrer and Ventura did offer important remarks to better comprehend the notion of an "early stage."[20] In brief, the dissenting judges explained that the use of the concept of an "early stage" would prevent the Court to determine any violation to the due process that could find a remedy at an ulterior stage of the proceedings. As judges Ferrer and Ventura noted, this would mean that the I/A Court H.R. would rank the severity of violations according to the procedural stages and not the actual impact over the human rights related to the due process of law. This approach would allow the States to take advantage of an unwarranted delay, as any procedural violation could not contravene the ACHR, while the trial before a national court remains pending.

This description sheds enough light to understand that the I/A Court H.R. created this concept based on the essentially similar notion of a *premature case* used by the ECHR. Just as the notion of an "early stage," the ECHR refers to a "premature case" in order to reject claims presented before the last procedural stage that could remedy a grievance. However, although both concepts may share a similar origin, the manner in which the I/A Court H.R. used the concept of "early stage" differs notably from the way that the ECHR would normally use the "premature case" notion. As a point of comparison, we can exemplify two situations, somewhat similar to the case of *Brewer,* in which the ECHR rejected a petition for being a *premature case*:

a. The ECHR has dismissed allegations that challenged a definitive decision within a process, when the decision, in order to materialize a violation, depends on the execution of further acts that could be subject to an independent judicial revision.[21]

[20] Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, to the I/A Court H.R. judgment on the *Allan R. Brewer Carías* case, 2014 Inter-Am Ct. H.R. (Ser. C) No. 278, Dissenting Opinion (May 26, 2014) at 46-64.

[21] Cf. Case of *Vijayanathan and Pusparajah v. France*, 17550/09 Eur. Ct.H.R (August 27, 1992).

b. In a similar fashion, the ECHR has considered that a claim that challenges a process because a lack of impartiality at its first instance is inadmissible if the decision could be challenged through an appeal before a superior court that, evidently, will provide that guarantee.[22]

These examples illustrate that the concept of a *premature case* must be linked to the understanding of the judicial process "as a whole,"[23] that is, that the Court cannot simply reject a claim because it is on an initial stage, without previously assuring that the further stages will evidently provide the guarantees of a due process of law. The Human Rights Committee and the I/A Court H.R. have shared these understanding of the process "as a whole" and have applied it consistently through the interpretation of the right to a judicial review.[24] From this perspective, the notion of an "early stage" could be compatible with the IAHRS' precedents if it was understood in the same way as the ECHR comprehends a *premature case*.

Nonetheless, the extent of the concept, as applied in the case of *Brewer,* goes far beyond. Its application ignored precedents that would have rose on the necessity of joining the analysis on admissibility with the merits,[25] and ensued an advanced judgment lacking of sufficient analysis on the allegations brought before the Court.

This irregularity was pointed out in the dissenting opinion to the sentence, where it was made evident that, while evaluating the exception provided by Article 46.2, Section b of the ACHR, the I/A Court H.R. had to assess the impact that the lack of impartiality at the first stage of the domestic proceedings would have in the rest of the trial (in order to

[22] Cf. Case of *Barry v. Ireland*, 41957/98 Eur. Ct.H.R. (July 6, 2000); Case of *Muscat v. Malta*, 69119/10, Eur. Ct.H.R., (September 6, 2011).

[23] The ECHR establishes that its competence is limited to analyze if the procedure "as a whole" reunites all of the elements required by the due process of law. *Cf.* Case of *Doorson v. The Netherlands*, 20524/92 Eur. Ct.H.R. (March 26, 1996) at 67; case of *Barry v. Ireland*, 41957/98 Eur. Ct.H.R. (July 6, 2000).

[24] Mainly in the cases where these bodies have specified that these rights imply an integral revision of the process. *Cf.* Case of *Barno Saidova v. Tajikistan*, UN C.H.R., Communication 964/2001 (August 20, 2004) at 6.5; The I/A Court H.R. has settled that the second instance is granted in order to allow an adverse ruling to be reviewed by a different judge or court of higher rank." *Mohamed* case, 2012 Inter-Am Ct.H.R., (Ser. C.) No. 255 (November 23, 2012) at 98.

[25] *Velásquez Rodríguez* case, 1987 Inter-Am Ct.H.R., (Ser. C) No. 1, (June 26, 1987) at 96; *Ríos* and others case, Inter-Am Ct.H.R., (Ser. C) No. 194 (January, 18, 2009) at 40.

analyze if the petitioner was in fact deprived of the due process of law). Furthermore, regarding the exception contained in Article 46.2, section c of the ACHR, it would have been crucial to identify the reason that caused the 3 years delay in deciding the request for annulment filed before the domestic court, and to deliver a decision on whether such a delay was unwarranted or not.[26]

Therefore, even if the concept of an "early stage" could have been compatible with the precedents of the Inter-American line of case law, its application on the case of *Brewer* contravened them. Relying on this notion, the I/A Court H.R. sustained an argument that was substantially inconsistent.

Although it would be hasty to affirm that the claims should have been accepted on the merits, it is evident that the judgment, as delivered, has brought some direct and indirect consequences that could have been prevented if the petition had undergone a deeper substantial analysis. Not only the I/A Court H.R. may have failed to protect the rights of the petitioner, but by dismissing the case solely on a newly created procedural ground ("early stage"), the I/A Court H.R. decided to covertly reject the claims brought by Mr. Brewer without providing a direct response to his arguments. Instead of serving justice the I/A Court H.R. may have planted a seed that would threaten to undermine some of the most valuable pillars of the Inter-American jurisprudence.

IV. THE CONSEQUENCES OF INTRODUCING THE CONCEPT OF AN "EARLY STAGE" IN THE INTER-AMERICAN JURISPRUDENCE

After the decision of the case of *Brewer,* it is reasonable to expect that defendant states will start using the concept of an "early stage" as a jurisprudential ground to sustain the inadmissibility of petitions filed against them before the IAHRS. Both the IACHR and the I/A Court H.R. will have to decide whether to reiterate the soundness of such an allegation or to reinstate the previous line of case law.

This section will focus on the acceptance of the preliminary exception of the non-exhaustion of domestic remedies regarding the lack of impartiality of prosecutors during

[26] *Cf.* Joint Dissenting Opinion of Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot, *Allan R. Brewer Carías* case, 2014 Inter-Am Ct. H.R., (Ser. C) No. 278, Dissenting Opinion (May 26, 2014) at 19-26.

the first stage of the criminal trial (that is to say on the inapplicability of Article 46.2, Section b of the ACHR in the case of *Brewer*). However, it is important to note that these conclusions may also be applicable in other cases where the impartiality is contested against judges during the initial stage of judicial proceedings (which could have also been the case of Mr. Brewer, had he decided to present himself before a Venezuelan Court to continue his trial in detention).

In relation to that claim, according to the I/A Court H.R's judgment, it would have been necessary for the petitioner to be subjected to a trial he deemed to be *ab initio* lacking of impartiality in order to overcome the obstacle raised by the concept of an "early stage". In other words, the Court considered that the rule of exhaustion required the deliverance of a final domestic decision in order to eventually appeal a conviction order issued against Prof. Brewer and challenge every procedural irregularity, including the lack of impartiality during the prosecution.

If the bodies of the IAHRS were to incorporate the concept of an "early stage" and decide to apply it in a similar fashion as in the case of *Brewer,* the principal and most evident consequence would be a significant decrease in the capacity and effectiveness of the IAHRS to protect human rights. Simultaneously, this notion could bring a serious increase in the rigidity and formalism at the stage of admissibility, which would reduce the accessibility to the IAHRS and will cut off its potential impact, depriving both petitioners and States from the opportunity to amend or prevent further human rights violations.

Regarding the accessibility to the IAHRS, the concept of an "early stage" will have two effects. On the one hand, on the normative aspect, it would imply that the exception provided by Article 46.2, Secction b could not rely on allegations related with procedural irregularities whose effects are bound to verification, even if they exist *ab initio*,[27] but

[27] E.g. the necessity to prove the consequences of the claim related to the lack of impartiality of the control judges that, because of their temporariness, were removed at the initial stage of the process followed against Brewer. A similar situation would arise regarding a claim about the lack of guarantees of due process in a trial pursued under Decree-Laws 25.659 and 25.708 in Peru, in the case where a military court had assumed jurisdiction without having delivered a final judgment. On this subject, the IACHR has considered unnecessary to exhaust domestic remedies because those Decree-Laws were challenged for not providing the guarantees of due process; *Cf. Castillo Petruzzi* and other case, 1998 Inter-Am Ct.H.R., (Ser. C) No. 41 (September 4, 1998) at 51-53.

rather on reasons that are external to the process.[28] On the other hand, from an empirical perspective, it would require that, in order to raise a claim about an intra-procedural irregularity, the victim would have to yield to the trial that he or she intends to challenge *ab initio*.[29]

Regarding the consequences related with the potential impact of the IAHRS, the formalism imposed by the concept of an "early stage," would hamper the future development of the Inter-American case law and the regional standards for the protection of human rights.

For instance, without prejudging about the claims raised by Professor Brewer, we consider that an analysis on the merits would have brought, at the least, an opportunity for the I/A Court H.R. to make a statement about the lack of impartiality of the judiciary in Venezuela, from the perspective of the accused party in a criminal process before provisionary prosecutors and judges.[30] The case would have also presented a chance to develop the Inter-American standards regarding the institutional guarantees that must be respected in order to preserve the impartiality of prosecutors and assure the existence of a due process of law.

On this matter, in order to provide a less speculative example about the negative impact of this precedent, it is useful to analyze the consequences that the concept of an "early stage" would have brought upon the IAHRS if it had been used in the case of *Tristán Donoso v. Panamá.*

---

[28] E.g. The situation where a victim suffers from indigence, when the competent Court has interrupted its functions, etc.

[29] Thus, in order for his petition to be admissible, Mr. Brewer would have to return to Venezuela and submit to the trial that he considers irregular *ab initio* and to the detention decreed against him, to subsequently challenge it through the domestic remedies, which will include the appeal of the criminal process if we take into account the criteria laid down by the I/A Court H.R. in: case of *Díaz Peña,* 2012 Inter-Am. Ct. H.R., (Ser. C) No. 244 (June 26, 2012) at 123-124.

[30] On this matter, the IACHR has delivered opinions through its monitoring mechanisms (particularly through the IV chapter of its annual report), while the I/A Court H.R. has only delivered judgments in cases where the victims were the judges affected by their provisional appointment. *Cf. Chocrón Chocrón* case, 2011 Inter-Am Ct.H.R., (Ser. C) No. 227 (July 1, 2011); *Reverón Trujillo* case, Inter-Am Ct.H.R. (Ser. C) No. 197 (June 30, 2009); *Apitz Barbera* and others ("First Court of Administrative Disputes") case, Inter-Am Ct.H.R. (Ser. C) No. 182 (August 5, 2008).

Several similarities exist among the procedural standing before the rule of exhaustion during the admissibility analysis of the case of *Brewer,* and that of the petition filed by Mr. Tristán Donoso:[31]

a) The petitioner had been accused for a crime he deemed to be contrary to his right to freedom from *ex post facto* laws, and consequently he contended that the criminal proceeding was *ab initio* affected of nullity.

b) The petition was filed before the IAHRS while the criminal trial was still being processed before the domestic court.

c) The State of Panama did not provide sufficient proof to sustain that the unconcluded domestic criminal proceeding met the adequacy and effectiveness standards in relation to the human rights violations alleged by the petitioner.

d) The State's allegations did not pointed to the existence of any other specific domestic remedy adequate to redress the alleged violations with sufficient specificity.

Were the concept of an "early stage" exist before the filing of Mr. Donoso's petition, his main claim would have been rejected, as the rule of exhaustion would have required him to await until a decision was delivered through an appeal for the review of the final judgment.[32]

If the I/A Court H.R. would have made such a decision the consequences would not have been minor. Firstly, it would have kept the I/A Court H.R. from determining the unconventionality of a sanction intended to restrict the freedom of speech; secondly, the

[31] Case of *Santander Tristán Donoso v. Panamá,* case 12.360, Inter-Am. C.H.R., Report 71/02 (October 24, 2002).

[32] This case was deemed admissible before the final judgment was delivered in the domestic criminal trial, mainly because: 1) The State did not comply with the specificity to claim the non-exhaustion of domestic remedies, and; 2) the criminal trial was challenged ab initio, due to the alleged unconventionality of the crime definition of defamation. If the criteria used on the Case of Brewer had been applied, the lack of specificity would not have entailed the preliminary objection and a definitive judgment would have been necessary, in order to raise a petition before the IAHRS. *Cf. Santander Tristán Donoso v. Panamá*, Petition 12.360, Inter-Am C.H.R., Report N°71/02 (October 24, 2002) at 17, 22.

Court would have lost an opportunity to advance an important statement concerning the impartiality of prosecutors during the investigation.[33]

However, the most notorious drawback for the development of Inter-American Human Rights Law would have been that, by rejecting the case of Tristán Donoso, the I/A Court H.R. would have withhold the opportunity to deliver the first judgment addressing the violation of the right to privacy trough the illegal intervention of communications.

This example makes it evident that the concept of an "early stage" could provoke an over-rigidity of the rule of exhaustion that would pose a serious threat to the objective and development of the IAHRS.

First of all, by undermining its accessibility, the notion of an "early stage" would be discouraging the individuals to look up to the IAHRS as a mean to obtain justice and it would simultaneously hamper the system's mission, which is to promote and defend human rights.

However, what is most preoccupying is that, by stiffening its admissibility criteria, the IAHRS would be brought to reject petitions that would otherwise present an opportunity to develop standards that would assist States to comply with the provisions of the ACHR. This would deprive domestic courts of precedents that could orientate their reasoning towards the Inter-American standards.

Up until this point, we have succinctly described the main consequences that could be generated by the introduction of the concept of an "early stage" in the Inter-American jurisprudence. Our objective, beyond criticizing the judgment delivered on the case of *Brewer*, was to present an analysis of its potential negative effects.

On a brighter side, we must take into account that this regressive criteria has not yet been reiterated. A chance exist to prevent the foreseeable consequences if the IACHR exercises its autonomy[34] and does not incorporate the concept of an "early stage" in its decisions on admissibility, or if it starts to shape it in a way that is compatible with the line of case law that preceded the judgment delivered in the case of *Brewer.* Furthermore,

[33] These precedents are important within the IAHRS even if, in the concrete case, the crime definition was not found to violate the ACHR, and the lack of impartiality of prosecutors was not proven. Cf. *Tristán Donoso* case. Inter-Am Ct.H.R., (Ser. C) No. 193 (January 27, 2009) at 130.

[34] *Cf.* Advisory Opinion OC-19/05, Inter-Am Ct.H.R., (Ser. A) No. 19 at opinions 1, 3 (November 28, 2005).

Mr. Brewer may still hold a last chance to obtain justice if the IACHR would decide to act in accordance to its autonomy.

The structure of the Inter-American Human Rights System grants the IACHR total autonomy to regulate and oversee the quasi-jurisdictional procedure before it. In fact, in a recent case the I/A Court on H.R. has emphazised that "it is outside this Court's competence to conduct a control of legality in the abstract —merely with a declarative purpose— of the processing of a case before the Commission."[35] Accordingly, the IACHR is not obliged to defer to any admissibility criteria set forth by the Court, as far as it does not deprives a State from its right to defense.

By affirming its autonomy, the IACHR would grant the I/A Court H.R. with the chance to retake its previous criteria or at the least, it would ensure that the proceedings before the IACHR maintain a higher level of accessibility and impact.

Moreover, the exercise of the IACHR's autonomy may also provide a solution in favor of Mr. Brewer. Following the precedent of the case of *Alfonso Martín del Campo Dodd vs. Mexico*, the independence of the procedures before the Commission allows it to overview State's compliance of its recommendations, even after the I/A Court H.R. had deemed a case inadmissible. This possibility would offer a last chance to serve justice in the case of Mr. Brewer.

Through the case of *Alfonso Martín del Campo Dodd vs. Mexico*, the IACHR found Mexico responsible for violating the human rights of the petitioner after imprisoning him based on proofs obtained by torture.[36] Subsequently, the State failed to comply with the recommendations issued by the IACHR and the Commission filed the case before the I/A Court H.R. However, the Court rejected the case by allowing the preliminary objection *ratione temporis,* based on a dubious definition of the extent in which the effects of torture can persist through time.[37]

---

[35] *Rodríguez Vera & others* (Palacio de Justicia) case, 2014 Inter-Am Ct.H.R., (Ser. C) No. 287 (November 14, 2014) at 54.

[36] Case of *Alfonso Martín del Campo Dodd v. Mexico*, case 12.228, Inter-Am. C.H.R., Report 81/01 (October 10, 2001).

[37] The IACHR noted that the torture had occurred at a moment before Mexico had accepted to submit to the jurisdiction of the Court, however, the Commission contended that even if the torture had ceased, the effects of the proofs obtained by it would remain and persist through time. On the other hand, the I/A Court H.R.

In spite of this decision, the IACHR continued supervising its original recommendations. While debating if the Commission was actually entitled to this competence under articles 50 and 51 of the ACHR, it was stated that, "by rejecting the complaint on this formal ground, the Commission maintains material jurisdiction to follow up on its recommendations."[38] Because of this decision, the initial report on the merits continued to be supervised until Mr. Martín del Campo was released from prison in March, 2015.

If the IACHR decided to act in a similar fashion, Mr. Brewer may still have a chance to obtain a remedy through the overview of an international quasi-jurisdictional body. Since the I/A Court H.R. did not make any decision on the merits, the Commission still counts with enough legal attributions to follow up on its initial findings and recommendations. Even if the Court's decision may have deprived Mr. Brewer from a quicker response to his grievances, a remedy to the violations suffered may be reachable on the long run.

considered that the torture cannot have continuous effects as it is in act that extinguishes as soon as the torture ceases. In that sense, the Court considered that it lacked legal competence to analyze the case, as the principle of non-retroactivity had to apply to torture that happened before Mexico's acceptance to the jurisdiction of the Court. *Martín del Campo Dood v. Mexico*, 2004 Inter-Am Ct.H.R., (Ser. C) No. 113 (September 03, 2014).

[38] Case of *Alfonso Martín del Campo Dodd v. Mexico*, case 12.228, Inter-Am. C.H.R., Report 117/09 (November 12, 2001).