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## Contents

### *Articles*

- La plasticidad del cerebro humano como factor limitante de la inteligencia artificial utilizada como herramienta en la argumentación jurídica . . . . . e20416  
Luis Becerril Torres
- La evolución de la experiencia profesional en la evaluación de daños morales . . . . . e20257  
Diana Rocío González Vázquez  
Yeyetsy Guadalupe Ordóñez Azuara  
Raúl Fernando Gutiérrez Herrera  
Jesús Manuel Medina Méndez  
Fabiola Doracely Yépez Rincón
- Deberes contraídos con uno mismo y acciones relacionadas con uno mismo en el sistema de deberes recíprocos. . . . . e20548  
Alexander Espinoza Rausseo  
Jhenny Rivas Alberti
- Entre la legalidad y la legitimidad: perspectivas conductuales sobre la piratería digital y la desobediencia regulatoria. . . . . e20383  
Fernando Ramos
- La construcción jurisprudencial del derecho humano al libre desarrollo de la personalidad en México . . . . . e20570  
Pastora Melgar Manzanilla  
Daniel Márquez Gómez

*Notes*

Crímenes de guerra y ambientales en Ucrania y Gaza . . . . . e20813  
Paulo Borba Casella

## **ARTICLES**

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# Human Brain Plasticity as a Limiting Factor in the Use of Artificial Intelligence as a Tool in Legal Argumentation

*La plasticidad del cerebro humano como factor limitante de la inteligencia artificial utilizada como herramienta en la argumentación jurídica*

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**Abstract:** This article explores the cognitive and legal limits of Artificial Intelligence (AI) in the context of legal argumentation, by using a hermeneutic methodology focused on Mexican *amparo* proceedings. While AI has become an increasingly valuable tool for legal professionals, optimizing time and automating tasks such as the drafting of lawsuits, agreements, and legal documents, its capacity to engage in complex legal reasoning remains questionable. This article analyzes whether AI can properly build *conceptos de violación*<sup>1</sup> up, the argumentative core of *Amparo*, which require a deeper axiological and ontological assessment that surpasses algorithmic programming.<sup>2</sup> The central hypothesis of this article is that, despite recent advancements in natural language processing and machine learning, AI cannot replicate human brain plasticity, which allows jurists to interpret, adapt, and argue within ethical, social, and constitutional contexts.<sup>3</sup> Employing a dogmatic and legal-philosophical methodology, this article examines the structure of *Amparo*, the theoretical foundations of legal argumentation, and the cognitive requirements for higher-level legal rea-

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<sup>1</sup> The *conceptos de violación* is a legal argument derived through judicial hermeneutical reasoning in which the complainant bases their petition for protection, indicating how and why they consider that the act complained of is contrary to the human rights recognized in the constitution and/or in international treaties.

<sup>2</sup> JOSÉ RAMÓN COSSÍO DÍAZ, LA ARGUMENTACIÓN JURÍDICA 88 (Fontamara 2003); ROBERT ALEXEY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 273 (Ruth Adler & Neil MacCormick trans., Oxford Univ. Press 2010).

<sup>3</sup> ALGORITHMIC TRANSPARENCY AND DECISION-MAKING: CHALLENGES TO ACCOUNTABILITY IN THE EU 204 (Karen Yeung & Martin Lodge eds., Oxford Univ. Press 2021); David García Sarubbi, *El principio pro persona en el Sistema Interamericano de derechos humanos*, 8 ANUARIO DE DERECHOS HUMANOS 137, 138 (2012).

soning.<sup>4</sup> The conclusion is that AI can serve as an instrumental support in legal practice, but it faces inherent limitations when confronted with the axiological and interpretive challenges of constitutional law.

**Keywords:** artificial intelligence in law; legal argumentation; axiology; amparo trials; constitutional remedies; means of constitutional control; cognitive limits of AI; neural plasticity; legal reasonings.

**Resumen:** Este artículo explora los límites cognitivos y jurídicos de la Inteligencia Artificial (IA) en el contexto de la argumentación jurídica, utilizando una metodología hermenéutica enfocada específicamente en el juicio de amparo mexicano. Si bien la IA se ha convertido en una herramienta cada vez más valiosa para los profesionales del derecho, optimizando tiempos y automatizando tareas como la redacción de demandas y contratos, su capacidad para participar en un razonamiento jurídico complejo sigue siendo cuestionable. Este estudio analiza si la Inteligencia Artificial puede construir adecuadamente los *conceptos de violación*, núcleo argumentativo de los juicios de amparo, que requieren una profunda valoración axiológica y ontológica que trasciende la programación algorítmica. La hipótesis central de este artículo sostiene que, a pesar de los recientes avances en el procesamiento del lenguaje natural y el aprendizaje automático, la Inteligencia Artificial no puede replicar la plasticidad del cerebro humano, que permite a los juristas interpretar, adaptar y argumentar dentro de contextos éticos, sociales y constitucionales. Empleando una metodología dogmática y jurídico-filosófica, el artículo examina la estructura del juicio de amparo, los fundamentos teóricos de la argumentación jurídica y los requerimientos cognitivos del razonamiento jurídico de alto nivel. La conclusión es que la IA puede servir como un apoyo instrumental en la práctica jurídica, pero enfrenta limitaciones inherentes cuando se enfrenta a los desafíos axiológicos e interpretativos del derecho constitucional.

**Palabras clave:** inteligencia artificial en el derecho; argumentación jurídica; axiología; juicio de amparo; medios de control constitucional; límites cognitivos de la IA; plasticidad neural; razonamiento jurídico.

**Summary:** I. *Introduction*. II. *Artificial Intelligence and Law: An Emerging Relationship*. III. *Human Brain Plasticity: An Irreducible Capacity*. IV. *Artificial Intelligence in Mexican Legal Practice*. V. *“Conceptos de violación”: the Core of Legal Argumentation in Amparo*. VI. *High-Level Legal Argumentation: Axiology, Ontology and Human Reasoning*. VII. *The Myth of the Algorithmic Jurist*. VIII. *Conclusions*. IX. *References*.

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<sup>4</sup> See generally CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 45 (Univ. of Notre Dame Press 1969); AULIS AARNIO, *THE RATIONAL AS REASONABLE: A TREATISE ON LEGAL JUSTIFICATION* 75 (Rechtstheorie Supplement 1997).

## I. Introduction

### 1. *Contextualizing the Use of AI in Law*

The technological revolution of the 21st century has profoundly transformed the ways in which societies communicate, learn, and work. One of the most significant advances in this process has been the development of artificial intelligence (AI), a technology that has shifted from academic abstraction to a practical tool used across numerous disciplines. The legal professional field is not the exception.

AI has begun to play an increasingly relevant role in this field. Tasks that were once exclusively performed by human legal professionals, such as case analysis, document drafting, and even outcome prediction, are now being explored, automated, or partially delegated to advanced computational systems. This shift is particularly evident in areas such as the processing of large volumes of legal data (big data), automated document generation, and the identification of jurisprudential patterns.<sup>5</sup> Internationally, companies like ROSS Intelligence, LexisNexis, and Westlaw have developed AI-based platforms that perform legal research within seconds, locating precedents, doctrines, and relevant regulations with increasing accuracy.<sup>6</sup> In Mexico, although development remains at an early stage, several law firms and notaries public have already implemented automated legal assistance systems.

This progress has generated both enthusiasm and legitimate concern regarding the limitations of AI in the legal professional context. While it is evident that such technologies have optimized time and facilitated mechanical procedures, serious doubts persist about their ability to replicate argumentation, particularly in *amparo* proceedings.<sup>7</sup> Thus, reflecting on the role of AI between legal professionals requires not only a technical approach but also a critical evaluation through the lenses of legal philosophy and argumentation theory.

### 2. *Hypothesis: The Limits of AI in Legal Argumentation*

AI has shown remarkable advancements in the automation of repetitive tasks, classification of legal data, and even the generation of standardized legal documents. However, it cannot replace the argumentative capacity of human beings, especially in contexts that require axiological interpretation, ontological

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<sup>5</sup> ALGORITHMS AND LAW 12-17 (Martin Ebers & Susana Navas, eds., Cambridge Univ. Press 2020); WOODROW BARFIELD, ADVANCED INTRODUCTION TO LAW AND ARTIFICIAL INTELLIGENCE 36-39 (Edward Elgar Publ'g 2020).

<sup>6</sup> ALGORITHMIC TRANSPARENCY AND DECISION-MAKING: CHALLENGES TO ACCOUNTABILITY IN THE EU, *supra* note 3.

<sup>7</sup> See David García Sarubbi, *supra* note 3; PEDRO SALAZAR UGARTE, DERECHOS HUMANOS Y CONSTITUCIÓN: ESTUDIOS SOBRE EL NUEVO CONSTITUCIONALISMO LATINOAMERICANO 112-115 (Universidad Nacional Autónoma de México 2015).

analysis, and creative adaptation, such as those prevalent in the legal field. High-level legal reasoning is not limited to the mechanical application of rules: It involves deliberation, prudential judgment and sensitivity to social, ethical, and historical factors.<sup>8</sup>

This hypothesis is grounded in the concept of “human brain plasticity”, understood as the human brain’s capacity to reorganize, learn, and generate new responses to diverse stimuli. This quality enables legal professionals to integrate multiple normative sources, interpret the spirit of the law, and even create new legal categories in response to social evolution.<sup>9</sup> In contrast, AI lacks consciousness, legal intuition and experiential understanding, which limits its ability to engage in deep axiological reasoning. Consequently, while AI can assist lawyers in technical or procedural tasks within the legal domain, its capacity to replace them in legal argumentation, particularly at *amparo* proceedings, is structurally limited.

### 3. *The Dogmatic and the Legal-Philosophical Methodology*

This article is methodologically grounded in two complementary approaches: Dogmatic legal analysis and legal-philosophical hermeneutics. From a dogmatic perspective, it describes Mexican *amparo* proceedings as a complex procedural institution that emphasizes the central role of *conceptos de violación* (violation of law concepts). It explores their formal and substantive requirements, as well as their significance in the protection of fundamental rights.<sup>10</sup> This approach highlights why certain procedural acts cannot be reduced to mere logical-formal schemas, since they require argumentative construction that incorporates normative interpretation, jurisprudential integration and constitutional contextualization.<sup>11</sup> From a legal-philosophical perspective, the analysis draws on ontological and axiological frameworks, as well as contemporary theories of legal argumentation. We examine authors such as Robert Alexy, Chaïm Perelman, and Aulis Aarnio to explain the difference between arguing based on legal rules and arguing from principles, the latter of which requires balancing, rational deliberation and consequence-based reasoning.<sup>12</sup> These processes are not purely

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<sup>8</sup> RONALD DWORKIN, *LAW’S EMPIRE* 11-13 (Harvard Univ. Press 1986); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 104-109 (William Rehg trans., MIT Press 1996).

<sup>9</sup> Chaïm Perelman & Lucie Olbrechts-Tyteca, *supra* note 4; ROBERT ALEXY, *supra* note 2.

<sup>10</sup> Ley de Amparo, [Amparo Law] Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos. <https://www.diputados.gob.mx>

<sup>11</sup> CARLOS BERNAL PULIDO, *EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES* 89-90 (Centro de Estudios Políticos y Constitucionales 2007).

<sup>12</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 66 (Julian Rivers trans., Oxford Univ. Press 2002); Chaïm Perelman & Lucie Olbrechts-Tyteca, *supra* note 4; AULIS AARNIO, *supra* note 4.

computational but demand practical capacity, ethical experience, and cognitive plasticity.

This article also incorporates insights from cognitive neuroscience to support the thesis that human legal reasoning is deeply rooted in adaptable, plastic neural structures that the current AI cannot replicate. This interdisciplinary approach makes it possible to argue, empirically and conceptually, that AI faces structural limitations in performing the argumentative functions inherent to complex legal reasoning.<sup>13</sup>

## II. Artificial Intelligence and Law: An Emerging Relationship

### 1. *Types of AI Used in the Legal Field*

The use of AI in law is not uniform. It takes different forms depending on the level of autonomy, complexity, and the type of task being automated or assisted. For analytical purposes, we can identify three primary typologies of legal AI, each one with its specific scope and limitations:

**Assistive AI:** It fulfills mechanical or repetitive tasks such as legal research, document classification, and generation of standard templates. Platforms like Westlaw, LexisNexis, or CaseText use this type of AI to optimize legal research.<sup>14</sup>

**Predictive AI:** Designed to forecast judicial or administrative decisions' outcomes using statistical models based on large databases. This type of AI not only organizes information but calculates litigation success probabilities, identifies judicial behavior patterns and estimates legal risks. It includes tools such as Lex Machina and Premonition. However, its predictive power is based exclusively on data stored in the database. Therefore, when new contexts emerge, its algorithm cannot predict them.<sup>15</sup>

**Generative AI:** The most advanced and controversial form, it uses large language models (e.g., GPT, Claude, LLaMA) to produce full legal texts, memos, opinions and simulated rulings based on user prompts. While this type of AI can interact in natural language and generate complex legal writing, it does not understand its output: It lacks legal consciousness, normative intent, or axiological reasoning. Consequently, its use remains problematic.<sup>16</sup>

These three typologies are not mutually exclusive; many legal tools combine assistive, predictive, and generative features. However, as the intellectual and

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<sup>13</sup> David García Sarubbi, *supra* note 3; JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104-109 (William Rehg trans., MIT Press 1996).

<sup>14</sup> ALGORITHMS AND LAW, *supra* note 5.

<sup>15</sup> *Id.* at 55-59.

<sup>16</sup> WOODROW BARFIELD, *supra* note 5 at 67-73.

axiological complexity of a task increases, the structural limitations of AI become more pronounced.

## 2. *Technological Tools in Legal Practice*

At an international level, systems such as ROSS Intelligence, one of the first to enable natural language-based legal searches, or Lex Machina, which allows the analysis of judicial behavior patterns and the development of litigation strategies by using predictive analytics, have gained prominence.<sup>17</sup> Additionally, Thomson Reuters Westlaw Edge has integrated natural language processing functionalities to provide more accurate and context-sensitive responses in legal research.<sup>18</sup> These platforms have primarily been adopted in jurisdictions with high litigation volumes and strong traditions of legal technology use, such as the United States, Canada, and the United Kingdom. However, their global expansion has also led to similar initiatives in other regions, by adapting to local legal frameworks.

In Mexico, the use of AI in legal practice is still at its early stages but shows clear signs of growth. Several law firms have begun implementing virtual legal assistants that automate agreement generation, privacy notices, and standard civil lawsuits.<sup>19</sup> Some notaries public already use AI tools to verify data consistency and prevent formal errors. Pilot projects in universities and courts are also exploring the use of AI in drafting rulings and analyzing legal precedents. It has attracted particular interest, though, in *amparo* proceedings, especially in the drafting of complaints and *conceptos de violación*. Tools like ChatGPT and other generative language models have been used, experimentally or semi-professionally, to draft documents simulating legal argumentation.<sup>20</sup> However, this practice has triggered controversy regarding the authenticity, validity, and depth of the arguments produced, particularly when the goal is to protect fundamental rights against public authorities.

In summary, the presence of AI in legal practice is already a reality, although levels of integration vary depending on the context and the tool used. Its use is undeniable in technical-operational tasks, but the debate over its role in constructing complex legal arguments goes on. This ongoing discussion raises both epistemological and ethical concerns.

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<sup>17</sup> See LEX MACHINA, <https://lexmachina.com/>; ROSS INTELLIGENCE, <https://rossintelligence.com/>

<sup>18</sup> THOMSON REUTERS, WESTLAW EDGE OVERVIEW, <https://legal.thomsonreuters.com/en/products/westlaw/edge> (last visited Oct. 10, 2023).

<sup>19</sup> EASYLEX, <https://easylex.mx/>; TUAPPLLEGAL, <https://tuapplegal.com.mx/>; LEGALARIO, <https://legalario.com/> (last visited Oct. 10, 2023).

<sup>20</sup> Susana Navas Navarro, *Inteligencia artificial y Derecho: impacto en el ejercicio profesional de la abogacía y la Administración de Justicia*, 66 REV. ESP. DER. CONST. 61, 74 (2022).

### 3. *Risks, Opportunities, and Doctrinal Debates Surrounding the Use of AI in the Legal Field*

The emergence of AI in the legal field has generated both high expectations and legitimate concerns, resulting in a wide-ranging doctrinal debate regarding its scope, limitations, and implications. In this context, it is essential to analyze in detail the risks and opportunities that AI presents for law as a normative, social, and axiological system.

Among the main opportunities, AI has the potential to:

- 1) Reduce the workload in courts and law firms.
- 2) Increase procedural efficiency by automating repetitive tasks.
- 3) Improve access to justice through user-friendly interfaces for the public.
- 4) Detect patterns of discrimination or systemic bias by analyzing large datasets of case law or regulations.<sup>21</sup>

These advantages are especially valuable in overburdened judicial systems, where AI can serve as a complementary resource that contributes to procedural efficiency and transparency.

Nevertheless, numerous authors have pointed out structural risks associated with the uncritical implementation of these technologies. The first is the issue of algorithmic opacity, commonly referred to as the “black box” problem, that is, the inability to understand or audit the internal processes by which the AI systems, particularly those based on deep learning, arrive at their decisions. This lack of transparency is fundamentally incompatible with legal principles such as due process and democratic control over judicial functions.<sup>22</sup>

Another major risk is the reproduction of biases: If the data used to train the AI systems contains structural prejudices (based on gender, class, race, etc.), the outputs will inevitably perpetuate those injustices, often without the user’s awareness. As Burri has argued, automation does not neutralize human bias; it amplifies it.<sup>23</sup> On the theoretical level, the central question concerns whether AI can replace the interpretive and deliberative capacities of legal professionals or not. Scholars like Martin Ebers and Susana Navas argue that AI may be useful as a technical tool, but it can never replace the rational, ethical, and argumentative functions required by the legal profession.<sup>24</sup> Others, such as Woodrow Barfield, advocate for a regulated integration of AI, with clear legal limits on the autonomy of intelligent systems in legal decision-making.<sup>25</sup>

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<sup>21</sup> WOODROW BARFIELD, *supra* note 5 at 51-52 (Edward Elgar Publ’g 2020).

<sup>22</sup> *Id.* at 64-67.

<sup>23</sup> ALGORITHMIC TRANSPARENCY AND DECISION-MAKING: CHALLENGES TO ACCOUNTABILITY IN THE EU, *supra* note 6.

<sup>24</sup> ALGORITHMS AND LAW *supra* note 5 at 20-23

<sup>25</sup> WOODROW BARFIELD, *supra* note 5 at 89-93.

This debate has also raised the question of whether AI should be employed in legal areas where principle-balancing and axiological interpretation are central, such as constitutional law and *amparo* proceedings. The prevailing view in legal scholarship appears to be negative, at least as long as AI continues to lack normative awareness, semantic understanding, and practical legal reasoning.

In sum, the doctrinal debate reflects a tension between the promise of efficiency that AI offers and the need to preserve the humanistic foundations of law. This article aligns with the latter position, defending the view that although AI can serve as a useful complementary tool, it cannot occupy the space of human legal reasoning in contexts where principles, rights, and fundamental values are at stake.

### III. Human Brain Plasticity: An Irreducible Capacity

#### 1. *Neuroscientific Foundations of Brain Plasticity*

Brain plasticity is one of the most significant discoveries of contemporary neuroscience. Contrary to the long-held belief throughout most of the 20th century, that the adult brain was structurally rigid and static, recent research has shown that the nervous system is highly dynamic and capable of reorganizing neuronal connections in response to new experiences, learning processes, and changing environments. This phenomenon, known as neuroplasticity, implies a structural and functional adaptability that remains active even in adulthood.<sup>26</sup>

From a biological standpoint, brain plasticity manifests across various levels:

- 1) Synaptic, through the creation or elimination of connections between neurons.
- 2) Cortical, through the functional reassignment of brain areas.
- 3) Behavioral, by modifying response patterns to complex stimuli.

This cerebral dynamism allows humans to learn new languages, develop strategies for novel situations, and generate creative responses to ethical, legal, or social dilemmas. Moreover, studies have shown that processes involving complex deliberation, such as those required in legal argumentation, activate multiple brain regions simultaneously, engaging both rational circuits (e.g., prefrontal cortex) and emotional and memory systems (e.g., amygdala, hippocampus).<sup>27</sup>

In the field of legal epistemology, this plasticity is essential. It enables legal professionals to reinterpret norms in dynamic contexts, balance seemingly con-

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<sup>26</sup> ERIC R. KANDEL, IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF MIND 306-312 (W.W. Norton & Co. 2006).

<sup>27</sup> ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 83-92 (Putnam 1994).

tradictory principles, and create new legal categories in response to emerging social realities. Legal reasoning is not merely about applying pre-established rules; it involves the exercise of practical judgment using a hermeneutic methodology that integrates technical knowledge, social experience, and ethical reasoning.<sup>28</sup>

By contrast, artificial intelligence, no matter how advanced is, lacks an organic system capable of learning in a nonlinear or context-sensitive way. Current language models, such as ChatGPT or LLaMA, operate through statistical correlations across vast text datasets, but they possess no situational, emotional, or ethical awareness. Although they can simulate human responses, they do not have the plastic capacity of a brain, that can reconfigure itself in front of the unexpected.

In short, brain plasticity is not merely a biological trait. It is an epistemic condition for legal thought. It is precisely this capacity for adaptation, reinterpretation, and deliberation that places humans in a privileged position over any artificial system.

## 2. *The Relationship Between Plasticity and Legal Reasoning*

Legal reasoning, particularly in its argumentative dimension, is neither a mechanical nor a strictly deductive process. It requires a series of mental operations involving interpretation, deliberation, contextualization, and assessment of social consequences. These skills do not rely solely on formal logic, but on a plastic and adaptive cognitive capacity that enables jurists to respond to changing scenarios, conflicts between principles, and normative or axiological gaps.<sup>29</sup>

Brain plasticity plays a central role in this process. Thanks to its ability to reorganize itself in response to *novel stimuli*, the human brain can integrate legal, factual, and axiological information in real time, generating arguments that respond not only to formal legality, but to material justice as well. This flexibility is especially evident in contexts lacking of preconfigured solutions, such as *amparo* proceedings or constitutional balancing of fundamental rights.<sup>30</sup> Legal reasoning requires a holistic understanding of the legal system, the capacity to evaluate the normative impact of decisions, and sensitivity to the underlying principles involved.

These cognitive abilities depend on interconnected neural networks that do more than store information. They learn, correct, update, and recreate normative meanings in context.<sup>31</sup>

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<sup>28</sup> Robert Alexy, *supra* note 2.

<sup>29</sup> MANUEL ATIENZA, EL DERECHO COMO ARGUMENTACIÓN 42-43 (Ariel 2013).

<sup>30</sup> PEDRO SALAZAR UGARTE, *supra* note 7 at 115–118

<sup>31</sup> ANTONIO DAMASIO, SELF COMES TO MIND: CONSTRUCTING THE CONSCIOUS BRAIN 132–138 (Pantheon Books 2010).

By contrast, even the most advanced legal AI systems operate under a statistical logic that, while effective in structured tasks, does not reproduce the interpretive or creative nature of human reasoning. Machine learning models learn patterns, but they do not understand meanings; they can imitate legal language, but they do not deliberate legally. They lack of experiential memory, prudential judgment, and the capacity for normative innovation.

Furthermore, brain plasticity enables something beyond the reach of any artificial architecture: the incorporation of vital, emotional, and ethical experience into legal decision-making. It is no coincidence that major advancements in legal argumentation have often emerged in times of crisis, when jurists had to reinterpret the law considering new values or social realities.<sup>32</sup> Such processes demand an epistemic plasticity that no machine can emulate.

In sum, the relationship between brain plasticity and legal reasoning is not incidental but structural. It is the basis that enables human beings to practice law as an interpretive, deliberative, and ethical endeavor. Thus, the belief that AI could replace jurists at this level of reasoning ignores the neurocognitive foundations that sustain legal argumentation.

### 3. *Cognitive Adaptability in Complex Legal Environments*

In complex legal environments, marked by conflicts between fundamental rights, constitutional principal clashes, or normative and/or axiological gaps in response to new social or technological realities, legal actors must deploy a highly flexible type of reasoning. This reasoning does not rely solely on formal logic but entails contextual evaluation, ethical deliberation, cultural understanding, and practical experience.<sup>33</sup> Cognitive adaptability allows, for example, a judge or a lawyer to recognize the need to reinterpret a rule in light of a new social phenomenon (such as AI, climate change, or emerging human rights), while maintaining coherence within the legal system. The tension between stability and change requires a mind capable of reorganizing its categories, revising assumptions, and reformulating interpretive methods.

This way of thinking is not replicable by current AI models. Regardless of how sophisticated they might be in text generation or statistical prediction, algorithms do not have legal consciousness, axiological understanding, and, above all, the ability to redefine their own interpretive frameworks.<sup>34</sup> Machine learning systems can adjust outputs within their training parameters but cannot deliberate on the ultimate meaning of a rule nor anticipate new legal paradigms.

Moreover, law is not merely a system of rules. It is a cultural and normative project in continuous evolution, shaped by history, politics, ethics, and so

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<sup>32</sup> JÜRGEN HABERMAS, *supra* note 14 at 108–110.

<sup>33</sup> ROBERT ALEXY, *supra* note 3 at 66-72; AULIS AARNIO, *ESSAYS ON THE DOCTRINAL STUDY OF LAW* 95-100 (Springer 2011).

<sup>34</sup> ALGORITHMS AND LAW *supra* note 6 at 56-59.

cial practice. In this context, brain plasticity enables jurists not only to adapt to complexity, but to act as agents of normative change, something that AI, by definition, cannot do.<sup>35</sup> Therefore, cognitive adaptability derived from brain plasticity constitutes a foundational condition for legal reasoning in complex environments. It is not only a matter of solving problems within the law, but of reformulating the law itself in response to emerging realities. This level of normative creativity, interpretive prudence, and social sensitivity remains beyond reach of artificial intelligence, reaffirming the thesis that high-level legal argumentation continues to be, at least for now, an exclusively human capacity.

## IV. Artificial Intelligence in Mexican Legal Practice

### 1. *Law Firms and Courts*

In Mexico, the use of AI in the legal field remains in an early stage of development. However, it is showing a growing trend, particularly in the private sector, where operational efficiency is a priority. While there is no unified institutional infrastructure for the systematic use of AI across the Mexican legal system, emerging practices and pilot programs are beginning to shape up a gradual transformation.<sup>36</sup>

In law firms, AI is primarily used to facilitate tasks such as the automated generation of agreements, drafting of basic legal briefs, and organization of legal databases. Some firms have begun to implement AI-based virtual legal assistants using natural language processing (NLP) algorithms that streamline the search for regulations and case law. Although these tools are limited in terms of interpretive depth, they have proven effective in enhancing productivity and reducing human error in repetitive tasks.

Moreover, the use of tools like ChatGPT and Microsoft Copilot has become increasingly common in daily legal practice, not as definitive solutions, but as initial support tools for structuring documents, drafting preliminary legal texts, or systematizing normative contents. While their use remains largely unregulated, many young legal professionals and independent practitioners are turning to these technologies to accelerate their workflow.<sup>37</sup>

In the judicial branch, the integration of AI has been more conservative. Nevertheless, recent institutional efforts point to an ongoing digital transformation within the Mexican judiciary. The Supreme Court of Justice of the Nation

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<sup>35</sup> NORBERTO BOBBIO, *TEORÍA GENERAL DEL DERECHO* 175-179 (Debate 2004).

<sup>36</sup> Jesús Medina Villegas, *La justicia digital en México: entre la modernización y el rezago tecnológico*, 49 *REV. MEX. DE DERECHO* 101, 105-107 (2022).

<sup>37</sup> Alejandro Salazar & Jimena Aguayo, *Abogacía digital: la irrupción de la inteligencia artificial generativa en la práctica jurídica mexicana*, 14 *REV. LATINOAM. DE DERECHO Y TECNOLOGÍA* 67, 71-73 (2023).

(SCJN) has promoted digital case management systems and technological tools for procedural organization, although there is no formal implementation of AI in judicial decision-making processes.<sup>38</sup> At the state level, some local courts have begun to try on with automated jurisprudential analysis tools and alert systems for contradictory rulings, with preliminary but promising results.

In the academic sphere, several Mexican universities have launched pilot projects that incorporate AI in legal simulators and expert consultation systems. Although limited in institutional reach, these initiatives offer a valuable laboratory for exploring the risks, opportunities, and responsible use of AI in the Mexican legal system.

In summary, although the Mexican legal ecosystem is still far from a full AI integration, current uses in firms and courts reflect a progressive interest in strategically incorporating these tools. However, their impact remains mostly operational rather than substantive, as reservations persist, both technical and ethical, regarding the AI's suitability for complex legal argumentation.

## 2. *Automation of Lawsuits and Legal Documents*

One of the most widespread uses of AI in contemporary legal practice is the automation of legal documents, ranging from simple agreements to preliminary court filings, including civil, labor, and even amparo lawsuits. While this practice has been more common in Anglo-American legal systems, it is increasingly gaining ground in the Mexican legal environment, particularly in law firms managing high case volumes and digital legal service platforms. These systems use decision trees and text templates that adapt to the information provided by the user.<sup>39</sup>

Automation is carried out through systems that integrate natural language processing, legal databases, and pre-programmed legal templates. Based on simple inputs or questionnaires, these systems can generate fully structured documents with formal legal validity. In some cases, they also include features for grammatical review, inconsistency detection, and procedural adaptation. Platforms such as Legalario, EasyLex, and TuAppLegal, all of which operate in Mexico, offer services for the automated drafting of agreements, powers of attorney, articles of incorporation, lawsuits, and other legal documents. Additionally, the use of generative models like ChatGPT has become increasingly popular as a support tool for drafting preliminary legal complaints.

Across social media, academic forums, and professional networks, there are numerous examples of users prompting these systems to draft *amparo* com-

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<sup>38</sup> Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], Plan Estratégico de Modernización Tecnológica 2022-2025. <https://www.scjn.gob.mx> (last visited Nov. 20, 2023).

<sup>39</sup> EASYLEX, <https://easylex.mx/>; LEGALARIO, <https://legalario.com/> (last visited Oct. 10, 2023).

plaints, motions for provisional release, or appeals. While often informal, these practices reflect the growing presence of AI in the early stages of legal drafting.

However, this automation involves considerable risks. Firstly, the generated documents typically lack personalized legal assessment, which can result in substantive errors, argumentative omissions, or even legal violations of due process.

Second, there is a danger of trivializing the legal profession, by reducing it to a merely technical function, when in fact legal practice requires critical analysis, contextual interpretation, and ethical judgment. This concern is particularly acute in the case of *amparo* lawsuits, where the drafting of *conceptos de violación*<sup>40</sup> (which are the grounds for constitutional complaint) requires a higher degree of argumentative sophistication. Attempting to automate this core aspect of the proceeding risks not only oversimplifying constitutional reasoning but also creating the illusion of argumentation, one that lacks of the hermeneutic, ontological, and axiological depth that this procedural instrument demands.

Therefore, while document automation represents an important step forward in legal efficiency, its usefulness should be understood as instrumental, limited to low-level argumentative tasks. The use of AI for drafting legal texts cannot replace conscious, critical, and contextually informed legal deliberation, which remains an exclusively human function.

### 3. *AI in Amparo Proceedings: Opportunities and Risks*

*Amparo* (or *juicio de amparo*) is, undoubtedly, one of the most sophisticated institutions of Mexican constitutional procedural law. Its function as a mechanism for constitutional review and the protection of fundamental rights grants it a central role in the Mexican judicial system. Also, *amparo* needs a high degree of precision, argumentative coherence, and axiological depth. In this context, the introduction of AI-based tools has sparked a complex debate regarding their potential applications, advantages, and structural risks.

From a functional perspective, AI can contribute to operational efficiency in the preparation of *amparo* lawsuits, particularly in the initial stages of proceedings. Documented cases exist in which lawyers and students use generative models such as ChatGPT to draft preliminary complaint templates, identify relevant case law, or suggest introductory arguments.<sup>41</sup> In these cases, AI acts as a technical assistant that helps reduce drafting time and systematize the exposition of facts and legal foundations.

However, when it comes to constructing *conceptos de violación*, the core of the *amparo* complaint, the intervention of AI becomes highly problematic. This legal figure forms the central axis of *amparo*, as it connects the allegedly violated constitutional norm with the challenged governmental act. It implies a complex legal operation that far exceeds textual logic or statistical correlation. The lack

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<sup>40</sup> Alejandro Salazar & Jimena Aguayo, *supra* note 38 at 71-73.

<sup>41</sup> *Id.* at 71-72.

of hermeneutic, semantic, axiological, and teleological understanding in current AI models prevents them from developing legal arguments with the depth and rigor required by a valid *concepto de violación*.<sup>42</sup> Although generative systems can produce apparently coherent paragraphs, they lack normative intentionality, prudential judgment and constitutional awareness.

Moreover, the indiscriminate use of AI to draft *amparo* lawsuits could generate counterproductive effects in judicial practice. On the one hand, it could flood the courts with filings devoid of genuine legal reasoning. On the other, it could undermine the integrity of the *amparo* complaint as a last resource guaranteed by trivializing its axiological dimension through automated, uncritical argumentation.

From an ethical standpoint, too, critical questions arise:

- 1) Can AI assume responsibility for arguments that affect human rights?
- 2) Who is accountable for errors, omissions, or deviations in algorithmically generated arguments?

These issues remain unaddressed by current Mexican regulation, creating a worrisome legal vacuum.<sup>43</sup> In conclusion, although AI may offer instrumental support in an *amparo* proceeding, particularly when organizing legal material or drafting basic structures, its involvement must be clearly limited. *Conceptos de violación*, as a complex and context dependent argumentative construction, still requires the exclusive intervention of human jurists, whose cognitive plasticity, prudential judgment, and axiological consciousness remain irreplaceable, regardless of how advanced AI is.

## V. “Conceptos de violación”: the Core of Legal Argumentation in Amparo

### 1. *The Legal Nature of Amparo*

Designed as a mechanism of constitutional control and a procedural guarantee of fundamental rights against arbitrary actions by public authorities, legislation on *amparo* has a dual legal nature: On the one hand, it is a concrete judicial procedure, and on the other, it is an institutional guarantee of the rule of law.<sup>44</sup>

Established in Article 103 of the Mexican Constitution, *amparo* protects individuals against general norms, acts, or omissions by authorities that infringe

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<sup>42</sup> ROBERT ALEXY, *supra* note 13 at 66-72; JÜRGEN HABERMAS, *supra* note 14 at 108-110.

<sup>43</sup> Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], Plan Estratégico de Modernización Tecnológica 2022-2025, <https://www.scjn.gob.mx> (last visited Nov. 20, 2023).

<sup>44</sup> IGNACIO BURGOA ORIHUELA, EL JUICIO DE AMPARO 13-14 (Porrúa 2009).

upon human rights recognized in the Constitution or in international treaties to which Mexico is a party.<sup>45</sup> Through this procedure, the Federal Judiciary evaluates the constitutionality and conventionality of state actions, thus serving as a last line of defense for legality and justice.

Legal scholarship characterizes the existing legislation regarding *amparo* as a *sui generis* procedural instrument, due to its technical structure, specialized procedure, and individualized focus. Unlike other constitutional control mechanisms that operate in the abstract (such as diffuse control in the United States or constitutional actions in Colombia), *amparo* in Mexico is strictly individual in nature. It protects specific persons against specific grievances.<sup>46</sup>

Among the principles governing *amparo* are:

- 1) Instance for the requirement of the aggrieved party (*instancia de la parte agraviada*): only the directly affected party may bring the action.
- 2) Relativity of judgments, inter-party effect (*efecto inter partes*): The protection applies only to the claimant.
- 3) Principle of definitiveness: A trial is admissible only after exhausting ordinary legal remedies.
- 4) Strict procedural formalism: Governed by rigid technical rules and deadlines.

One of the most legally and argumentatively significant aspects of *amparo* is that it is not merely a defensive procedural mechanism; it is also a privileged space for constitutional argumentation. The lawyer must not only identify the challenged act he or she is facing, but also argue its incompatibility with constitutional principles and values, and articulate *conceptos de violación*, which require a high-level normative reflection, systematic interpretation, and ethical reasoning.<sup>47</sup>

The abovementioned makes *amparo* a field in which human legal reasoning reaches its highest complexity. It also raises serious doubts about the possibility of delegating its construction, even partially, to artificial intelligence systems. As long as the legislation on *amparo* remains a mechanism for defending human dignity and applying the pro-persona principle, its exercise will require a form of reasoning that cannot be reduced to algorithms or replicated through past data models.

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<sup>45</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], art. 103, Diario Oficial de la Federación [DOF], 5 de febrero de 1917 (Méx.); see also Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], Constitución comentada: <https://www2.scjn.gob.mx> (last visited Oct. 10, 2023).

<sup>46</sup> HÉCTOR FIX-ZAMUDIO & EDUARDO FERRER MAC-GREGOR, EL JUICIO DE AMPARO EN EL SIGLO XXI 61-65 (Universidad Nacional Autónoma de México-Porrúa 2011).

<sup>47</sup> PEDRO SALAZAR UGARTE, *supra* note 8 at 143-145

## 2. *Conceptos de Violación: a Central Element of Amparo*

Within the technical structure of *amparo*, *conceptos de violación*, which are the grounds for constitutional complaint, constitute the most important elements. The correct formulation of them determines the scope for the constitutional analysis that the court will carry out. In other words, they serve as the starting point and central axis of the legal argumentation in the process.<sup>48</sup>

In practice, this means formulating arguments that integrate facts, legal norms, values, and consequences. For example, in alleging a violation of due process, it is not sufficient to cite Article 14 of the Constitution. The claimant must show how the authority deviated from constitutionally required procedures, how substantive rights were affected, and how the Supreme Court or the Inter-American Court of Human Rights' case law support the claim.<sup>49</sup>

Many *conceptos de violación* involve conflicts between constitutional principles, such as the best interests of the child versus due process, or freedom of expression versus the right to honor. In such scenarios, the legal practitioner must go beyond the mere rule application to ponder principles, to justify interpretive choices, and to propose legally and morally coherent solutions: A task that requires a high-level hermeneutic and ethical effort.<sup>50</sup>

## 3. *Argumentative Complexity in the Analysis of Principles*

The analysis of principles in constitutional legal reasoning represents one of the most complex, sensitive, and demanding tasks in legal practice. Unlike rules, which can be applied through logical subsumption, principles are optimization mandates that often appear in conflict and whose application is neither binary nor automatic, but rather contextual, deliberative, and justified.

As Robert Alexy has argued, principles are not applied in an “all or nothing” manner. Instead, they must be pondering against other valid principles, with the result depending on the circumstances of the specific case. This intellectual operation requires a form of practical, ethical-legal, and axiological reasoning that goes beyond the knowledge of the norm. It requires the understanding of its purpose, context, and impact on human dignity.

The jurist must analyze the facts, the legal context, the relevant values, the applicable jurisprudence, and construct a justification that is coherent, proportional, and reasonable throughout the hermeneutic deliberation. This is the essence of high-level legal reasoning: A combination of hermeneutic capacity, prudential deliberation. AI, in contrast, operates based on statistical models trained on massive amounts of text, and while it can replicate linguistic

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<sup>48</sup> Héctor Fix-Zamudio & Eduardo Ferrer Mac-Gregor, *supra* note 47 at 153-157.

<sup>49</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.] art. 14; *see also Corte IDH, Caso Castillo Petruzzi y otros v. Perú, Sentencia de 30 de mayo de 1999, Serie C.Nº. 52, para. 128.*

<sup>50</sup> PEDRO SALAZAR UGARTE, *supra* note 8 at 149-152.

structures, it cannot evaluate, weigh, nor justify an argument from an ethical perspective. It neither possess legal intentionality, institutional awareness, nor moral responsibility.

Furthermore, principal balancing requires deeper contextual understanding of social, political, and historical background. Such understanding is accessible only to a human mind with ethical experience, cultural knowledge, and empathy. Brain plasticity allows the jurist to revise premises, adjust reasoning, and propose novel solutions to evolving realities; this ability is fundamentally missing in current AI systems.

In conclusion, the complexity of principle-based reasoning confirms the structural limits of AI in law. As long as law remains a justice-oriented normative system grounded in human dignity, it will require legal actors capable of deliberating, interpreting, and deciding beyond what is preprogrammed. This is the boundary that separates algorithms from jurists: The capacity to choose responsibly in a morally complex world.

## VI. High-Level Legal Argumentation: Axiology, Ontology, and Human Reasoning

### 1. *Contemporary Theories of Legal Argumentation*

Modern legal systems, particularly those influenced by constitutionalism, demand that legal decision-making be based not only on formal legality, but on rational justification, value coherence, and respect for human dignity. In this context, legal argumentation has become a central theme in contemporary legal theory, giving rise to diverse schools of thought focused on the conditions, methods, and validity of legal reasoning.

One of the foundational theorists in this area is Chaïm Perelman, who redefined legal argumentation as a process of persuasion oriented towards rational audiences, where the strength of an argument depends not only on its formal structure but also on its ethical and contextual relevance. For Perelman, legal discourse must be justified in relation to justice, social order, and the reasonable expectations of citizens.<sup>51</sup>

Following a more analytical line, Robert Alexy proposed a model that integrates legal positivism with discursive ethics. In his works *Theory of Legal Argumentation* and *Theory of Constitutional Rights*, Alexy conceptualizes legal reasoning as a practical discourse guided by principles of rational justification, coherence, and proportionality. He argues that legal norms, particularly constitutional principles, must be applied through a process of weighing, in which the arguments must be justifiable to all participants in a legal discourse.<sup>52</sup>

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<sup>51</sup> Chaïm Perelman & Lucie Olbrechts-Tyteca, *supra* note 3 at 45-47.

<sup>52</sup> ROBERT ALEXY, *supra* note 3 at 273-278; ROBERT ALEXY *supra* note 13 at 66-72.

In contrast, Aulis Aarnio emphasized the internal rationality of legal discourse, focusing on the role of interpretive coherence, doctrinal justification, and cultural legal context. For Aarnio, legal argumentation involves not only the application of rules, but the interpretive construction of normative meaning based on the legal culture in which the argument takes place as well.<sup>53</sup>

All of these theories share a common premise: Legal reasoning is a deliberative, value-laden, and discursively structured activity that cannot be reduced to formal logic. It requires the integration of moral values, institutional context, and practical consequences. Therefore, legal argumentation is not algorithmic. It is a human act of understanding and justification.

This implies that the replacement of high-level legal argumentation by AI faces not only technical obstacles but also epistemic and philosophical limitations. As long as the AI systems miss the capacity for axiological deliberation, contextual interpretation, and discursive justification, they will be unable to satisfy the requirements established by the main theories of legal reasoning.

## 2. *Balancing Principles: Perelman, Alexy, and Aarnio*

Another demanding area of legal argumentation is what is called balancing of constitutional principles. This task arises when two or more principles, each one with constitutional validity, come into tension or conflict in a specific case. The resolution of these cases does not follow a deductive or mechanical logic; it requires a deliberative process that involves assigning relative weight to each principle in the context of concrete facts and social values.

For Perelman, resolving these conflicts involves appealing to a universal audience, i.e., developing arguments that would be acceptable to any rational and ethically situated observer. The criterion of reasonableness plays a crucial role: the jurist must articulate a justification that is coherent, proportionate, and oriented toward justice. Robert Alexy, on the other hand, developed a structured model of principle balancing that includes the so-called Weight Formula, which allows evaluating:

- 1) The intensity of interference with one principle (e.g., privacy),
- 2) The degree of importance of the conflicting principle (e.g., public security), and,
- 3) The probability that the measure will effectively achieve the pursued objective.

This model reflects the gradual and non-binary nature of constitutional principles and underscores the need for justifiable reasoning to resolve conflicts. Aulis Aarnio, in turn, emphasized the need to consider legal culture, doctrinal coherence, and institutional legitimacy when resolving these tensions. For

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<sup>53</sup> AULIS AARNIO, *supra* note 34 at 95-100.

Aarnio, a principle is not only a norm but also a cultural construction with historical meaning, which requires being interpreted considering evolving social practices too. In all cases, the process of balancing principles is not merely technical. It involves a type of reasoning that requires the ability to understand values, anticipate consequences, and provide reasoned justifications that are transparent and ethically sound.

### 3. *Legal Ontology and Its Limits for AI*

Legal ontology refers to the philosophical and conceptual foundation upon which the legal system has been built up. It encompasses not only the structure of legal norms, but also the conceptual categories, institutional relationships, and interpretive frameworks that give coherence and meaning to the law. Understanding law ontologically implies going beyond the text to address questions such as: What is the nature of legal obligation? What is the source of authority behind a norm? How is legal validity constructed? This level of analysis reveals that law is not simply a system of rules, but a semantic and institutional reality that emerges from a specific historical, social, and axiological context.<sup>54</sup> Legal concepts such as “state,” “rights,” “due process,” or “human dignity” do not have fixed meanings. They evolve, are debated, and are reconstructed based on social practices, jurisprudential developments, and constitutional interpretation.<sup>55</sup>

From this ontological perspective, legal reasoning requires the ability to navigate multiple layers of meaning, to interpret categories within historical and political contexts, and to articulate normative positions that respond to human dignity and justice. It is not simply a matter of identifying the applicable rule, but of understanding why and how that rule fits into the legal system and whether it serves for the purposes for which it was created.

In this sense, the limits of AI become clear. Although AI systems can analyze texts, identify patterns, and simulate legal writing, they do so without semantic awareness, ontological understanding, or juridical intentionality. They are incapable of discerning the deep meaning of legal categories or questioning their foundations. They cannot deliberate on normative purposes, institutional legitimacy, or the ideological premises of a legal norm.<sup>56</sup> Even so-called legal ontologies developed in the field of computer science, such as ontology-based legal information systems, operate on syntactic and taxonomic models, but not on philosophical or constitutional reflection.<sup>57</sup> While they help to organize da-

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<sup>54</sup> RONALD DWORKIN, *supra* note 9 at 90-96.

<sup>55</sup> LUIGI FERRAJOLI, *PRINCIPIA IURIS: TEORÍA DEL DERECHO Y DE LA DEMOCRACIA* vol. I, 83-85 (Trotta 2007).

<sup>56</sup> Mireille Hildebrandt, *Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics*, 68 U. TORONTO L.J. 12, 23-26 (2018).

<sup>57</sup> Giovanni Sartori, *Legal Reasoning: A Cognitive Approach to the Law*, 17 ARTIFICIAL INTELLIGENCE & LAW 217, 220-223 (2009).

tabases and classify legal terms, they cannot reproduce the interpretive and deliberative reasoning required in complex cases.

The inability of AI to access legal ontology also prevents it from addressing concrete cases, where the law does not offer a clear or predetermined solution. In these scenarios, jurists must go back to fundamental principles, institutional roles, and axiological commitments that transcend all over formal texts. This reasoning demands critical distance, moral responsibility, and intellectual creativity, all of which depend on brain plasticity, social experience, and ethical sensitivity, none of which AI possesses.

Therefore, any attempt to substitute or emulate ontological legal reasoning with artificial intelligence not only falls short on a technical level but fails conceptually and epistemologically as well. Law is not a closed logical system that can be solved through computational efficiency. It is a human cultural construction, subject to change, controversy, and ethical evaluation. It requires interpreters who are committed to the search for justice and the defense of human dignity.

## VII. The Myth of the Algorithmic Jurist

### 1. *The Illusion of Substitutability*

In recent years, the idea of an “algorithmic jurist” has gained ground in both academic and public discourse. This concept refers to the hypothetical possibility of replacing human legal reasoning with artificial intelligence systems capable of processing legal information and issuing decisions with speed, accuracy, and neutrality. The image of the “robot judge” or the “AI lawyer” has emerged in news headlines, corporate promotions, and even in experimental judicial programs in various countries.<sup>58</sup>

However, this idea, fascinating as it may be, rests on a false premise: that legal reasoning can be fully reduced to a computational process, and that legal decision-making is merely a matter of applying rules to facts via formal logic. This notion ignores the foundational dimension of legal argumentation: Its interpretive, axiological, and human character.<sup>59</sup>

The illusion of substitutability is rooted in a mechanistic view of law, one that sees legal work as a series of operations that can be standardized, digitized, and ultimately replaced by artificial systems. But this perspective neglects the plurality of legal sources, the ambiguity of language, the conflict of values, and the historical contingency that characterizes all legal reasoning. It assumes a

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<sup>58</sup> MIREILLE HILDEBRANDT, *LAW FOR COMPUTER SCIENTISTS AND OTHER FOLK* 3-6 (Oxford Univ. Press 2020); *see also* RICHARD SUSSKIND, *ONLINE COURTS AND THE FUTURE OF JUSTICE* 117-123 (Oxford Univ. Press 2019).

<sup>59</sup> RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 115-118 (Harvard Univ. Press 2011).

level of determinacy and objectivity that does not exist in constitutional, human rights, or public interest law.<sup>60</sup>

Even in relatively clear-cut areas, such as administrative or tax law, legal interpretation requires contextual judgment, ethical considerations, and social awareness. Far from being reducible to formulas, law requires a capacity for practical judgment that takes into account the unique circumstances of each case and the normative weight of different values involved. In contrast, AI systems operate based on pattern recognition, statistical inference, and machine learning algorithms trained on past data. These technologies can be useful tools, capable of assisting in research, organizing information, or drafting preliminary documents, but they lack the deliberative consciousness and axiological intentionality required for legal reasoning. They do not deliberate; they predict. They do not interpret; they approximate. They do not justify; they imitate.<sup>61</sup>

Therefore, the notion that the AI could replace the human jurist is not only technically premature, but also epistemically unfounded and philosophically unsustainable. It is a myth that confuses instrumental efficiency with normative judgment, and text processing with legal argumentation.

## 2. *The Role of a Jurist in the Age of AI*

In this technological context, the role of the human jurist is not diminished but transformed. Rather than being replaced, the legal professional must become a critical operator capable of navigating, managing, and ethically integrating new technological tools into legal practice.<sup>62</sup>

This new role implies several challenges:

- 1) Technical competence: Jurists must understand the basic functioning, scope, and limits of AI systems. This includes distinguishing between reliable and biased data, recognizing the logic behind algorithms, and being able to interpret automated results critically.<sup>63</sup>
- 2) Epistemic vigilance: It is essential to maintain a critical attitude toward the apparent objectivity of algorithmic results. Jurists must question the episte-

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<sup>60</sup> DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 43-45 (NYU Press 2004).

<sup>61</sup> FRANK PASQUALE, *NEW LAWS OF ROBOTICS: DEFENDING HUMAN EXPERTISE IN THE AGE OF AI* 64-68 (Harvard Univ. Press 2020).

<sup>62</sup> Karen Yeung, *A Study of the Implications of Advanced Digital Technologies (Including AI Systems) for the Concept of Responsibility Within a Human Rights Framework*, (European Parliament Research Paper PE 634.452, 10-12, 2019).

<sup>63</sup> Sandra Wachter, Brent Mittelstadt & Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, 7 *INT'L DATA PRIV. L.* 76, 80-83 (2017).

mological validity of outputs, trace the decision-making process behind AI recommendations, and avoid the automatization of judgment.<sup>64</sup>

- 3) Ethical responsibility: Legal professionals must preserve their ethical role in defending justice, equality, and dignity values that cannot be delegated to machines. In legal reasoning, especially when fundamental rights are at stake, moral deliberation is irreplaceable.<sup>65</sup>
- 4) Interpretive capacity: The jurist continues to play an indispensable role in the interpretation of norms, balancing of principles, and justification of decisions. These tasks require a hermeneutic, cultural, and axiological sensitivity that cannot be replicated by the AI. In this way, rather than competing with artificial intelligence, the jurist must become its critical counterpart: An interpreter of the law who knows how to use technology without surrendering their own judgment. Far from disappearing, the legal profession becomes more relevant, as it must now guide, supervise, and ethically filter the growing power of intelligent systems.<sup>66</sup>

Ultimately, the future of legal practice in the age of the AI does not depend on the replacement of jurists, but on their capacity to remain human in the most profound and responsible sense of the word. The great challenge is not to make law more automatic, but to ensure that it remains just, human-centered, and ethically oriented, even in the digital age.

## VIII. Conclusions

Throughout this article, we have examined the complex relationship between AI and legal reasoning, particularly within the framework of the Mexican legal system and *amparo*. Our central thesis has been that, despite the enormous technological advances and growing instrumental utility of AI in the legal field, a higher-level legal argumentation remains a distinctively human task, rooted in neurocognitive, axiological, and ontological dimensions that the current AI is unable to replicate.<sup>67</sup>

We have shown that AI can contribute meaningfully to the automation of routine tasks, the organization of information, and the drafting of preliminary legal documents. These applications offer clear advantages in terms of efficiency, cost reduction, and access to legal services. However, such contributions must not be confused with the ability to reason, interpret, or justify in legal

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<sup>64</sup> MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW 169-172 (Edward Elgar 2015).

<sup>65</sup> Luciano Floridi et al., *AI4People-An Ethical Framework for a Good AI Society*, 28 MINDS & MACHINES 689, 692-696 (2018).

<sup>66</sup> FRANK PASQUALE, *supra* note 65 at 182-185.

<sup>67</sup> RONALD DWORKIN, *supra* note 62; ANTONIO DAMASIO, SELF COMES TO MIND: CONSTRUCTING THE CONSCIOUS BRAIN 132-138 (Pantheon Books 2010).

terms, functions that require brain plasticity, semantic awareness, and moral responsibility.<sup>68</sup>

Using *amparo* as a paradigmatic case, we have demonstrated that the construction of legal arguments, particularly the drafting of *conceptos de violación*, involves an interpretive, deliberative, and value-oriented reasoning that AI is structurally incapable of performing. This process is not merely linguistic or formal, but rather epistemic, hermeneutic, and ethical. It requires understanding the meaning of constitutional principles, weighing conflicting rights, and proposing just solutions based on context.<sup>69</sup>

We also critically addressed the idea of the “algorithmic jurist,” highlighting its epistemological weaknesses and its tendency to reduce law to a mechanistic procedure. In contrast, we defended a model of legal practice centered on the human jurist as an interpreter, whose function is not limited to applying rules, but includes transforming the legal system considering new realities, social demands, and emerging rights.<sup>70</sup> Finally, we proposed that the true role of jurists in the age of AI is not one of replacement, but of critical integration: To use AI as a tool without surrendering their own discernment, deliberation, and ethical commitment. In this way, the legal profession not only maintains its relevance but becomes more vital than ever, as it is tasked with guiding, supervising, and humanizing the use of intelligent systems in law.

In conclusion, while AI will undoubtedly reshape many dimensions of legal practice, the core of legal argumentation remains firmly anchored in the human capacity to reason, deliberate, and pursue justice. It is here, in this irreducible human dimension, where law preserves its dignity, its purpose, and its future.

## IX. References

Alejandro Salazar & Jimena Aguayo, *Abogacía digital: la irrupción de la inteligencia artificial generativa en la práctica jurídica mexicana*, 14 REV. LATINOAM. DE DERECHO Y TECNOLOGÍA 67, 71-73 (2023).

ALGORITHMIC TRANSPARENCY AND DECISION-MAKING: CHALLENGES TO ACCOUNTABILITY IN THE EU 204 (Karen Yeung & Martin Lodge eds., Oxford Univ. Press 2021).

ALGORITHMS AND LAW 12-17 (Martin Ebers & Susana Navas, eds., Cambridge Univ. Press 2020).

ANTONIO DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 83-92 (Putnam 1994).

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<sup>68</sup> Luciano Floridi et al., *supra* note 68 at 692-696.

<sup>69</sup> ROBERT ALEXY, *supra* note 12 at 66-72; CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *supra* note 4.

<sup>70</sup> FRANK PASQUALE, *supra* note 64 at 182-185.

- ANTONIO DAMASIO, SELF COMES TO MIND: CONSTRUCTING THE CONSCIOUS BRAIN 132-138 (Pantheon Books 2010).
- AULIS AARNIO, ESSAYS ON THE DOCTRINAL STUDY OF LAW 95-100 (Springer 2011).
- AULIS AARNIO, THE RATIONAL AS REASONABLE: A TREATISE ON LEGAL JUSTIFICATION 75 (Rechtstheorie Supplement 1997).
- CARLOS BERNAL PULIDO, EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES 89-90 (Centro de Estudios Políticos y Constitucionales 2007).
- CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 45 (Univ. of Notre Dame Press 1969).
- Constitución Política de los Estados Unidos Mexicanos [C.P.], Diario Oficial de la Federación [DOF], 5 de febrero de 1917 (Méx.).
- Corte IDH, Caso Castillo Petruzzi y otros v. Perú, Sentencia de 30 de mayo de 1999, Serie C No. 52, para. 128.
- David García Sarubbi, *El principio pro persona en el Sistema Interamericano de derechos humanos*, 8 ANUARIO DE DERECHOS HUMANOS 137, 138 (2012).
- DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 43-45 (NYU Press 2004).
- EASYLEX, <https://easylex.mx/>
- ERIC R. KANDEL, IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF MIND 306-312 (W.W. Norton & Co. 2006).
- FRANK PASQUALE, NEW LAWS OF ROBOTICS: DEFENDING HUMAN EXPERTISE IN THE AGE OF AI 64-68 (Harvard Univ. Press 2020).
- Giovanni Sartori, *Legal Reasoning: A Cognitive Approach to the Law*, 17 ARTIFICIAL INTELLIGENCE & LAW 217, 220-223 (2009).
- HÉCTOR FIX-ZAMUDIO & EDUARDO FERRER MAC-GREGOR, EL JUICIO DE AMPARO EN EL SIGLO XXI 61-65 (Universidad Nacional Autónoma de México-Porrúa 2011).
- IGNACIO BURGOA ORIHUELA, EL JUICIO DE AMPARO 13-14 (Porrúa 2009).
- Jesús Medina Villegas, *La justicia digital en México: entre la modernización y el rezago tecnológico*, 49 REV. MEX. DE DERECHO 101, 105-107 (2022).
- JOSÉ RAMÓN COSSÍO DÍAZ, LA ARGUMENTACIÓN JURÍDICA 88 (Fontamara 2003).
- JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104-109 (William Rehg trans., MIT Press 1996).
- Karen Yeung, *A Study of the Implications of Advanced Digital Technologies (Including AI Systems) for the Concept of Responsibility Within a Human Rights Framework*, (European Parliament Research Paper PE 634.452, 10-12, 2019).
- LEGALARIO, <https://legalario.com/>
- Ley de Amparo, [Amparo Law] Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos. <https://www.diputados.gob.mx>
- LEX MACHINA, <https://lexmachina.com/>

- Luciano Floridi et al., *AI4People-An Ethical Framework for a Good AI Society*, 28 MINDS & MACHINES 689, 692-696 (2018).
- LUIGI FERRAJOLI, PRINCIPIA IURIS: TEORÍA DEL DERECHO Y DE LA DEMOCRACIA vol. I, 83-85 (Trotta 2007).
- Mireille Hildebrandt, *Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics*, 68 U. TORONTO L.J. 12, 23-26 (2018).
- MIREILLE HILDEBRANDT, LAW FOR COMPUTER SCIENTISTS AND OTHER FOLK 3-6 (Oxford Univ. Press 2020).
- MIREILLE HILDEBRANDT, SMART TECHNOLOGIES AND THE END(S) OF LAW 169-172 (Edward Elgar 2015).
- NORBERTO BOBBIO, TEORÍA GENERAL DEL DERECHO 175-179 (Debate 2004).
- PEDRO SALAZAR UGARTE, DERECHOS HUMANOS Y CONSTITUCIÓN: ESTUDIOS SOBRE EL NUEVO CONSTITUCIONALISMO LATINOAMERICANO 112-115 (Universidad Nacional Autónoma de México 2015).
- RICHARD SUSSKIND, ONLINE COURTS AND THE FUTURE OF JUSTICE 117-123 (Oxford Univ. Press 2019).
- ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (Julian Rivers trans., Oxford Univ. Press 2002).
- ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 273 (Ruth Adler & Neil MacCormick trans., Oxford Univ. Press 2010).
- RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 115-118 (Harvard Univ. Press 2011).
- RONALD DWORKIN, LAW'S EMPIRE 11-13 (Harvard Univ. Press 1986).
- ROSS INTELLIGENCE, <https://rossintelligence.com/>
- Sandra Wachter, Brent Mittelstadt & Luciano Floridi, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, 7 INT'L DATA PRIV. L. 76, 80-83 (2017).
- Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], Constitución comentada: <https://www2.scjn.gob.mx>
- Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation], Plan Estratégico de Modernización Tecnológica 2022-2025. <https://www.scjn.gob.mx>
- Susana Navas Navarro, *Inteligencia artificial y Derecho: impacto en el ejercicio profesional de la abogacía y la Administración de Justicia*, 66 REV. ESP. DER. CONST. 61, 74 (2022).
- THOMSON REUTERS, WESTLAW EDGE OVERVIEW, <https://legal.thomsonreuters.com/en/products/westlaw/edge>
- TUAPPLLEGAL, <https://tuapplegal.com.mx/>
- WOODROW BARFIELD, ADVANCED INTRODUCTION TO LAW AND ARTIFICIAL INTELLIGENCE 36-39 (Edward Elgar Publ'g 2020).

# The Evolution of Professional Expertise in Moral Damage Assessment

*La evolución de la experiencia profesional en la evaluación de daños morales*

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**Abstract:** This article addresses the use of experts in the assessment of moral damage. It analyzes several different systems used to quantify compensation for moral damage: the subjective system, the scale-based system, the scale system with an algorithm, and the mixed expert-judicial system. The article reveals that the complexities involved in the quantification of moral damage and the lack of uniformity and objectivity in the application of these various systems demonstrate the need for standardized methodologies. While the use of experts has become increasingly accepted, this practice faces challenges in calculating complete and equitable compensation. The article concludes by suggesting

that a robust mixed expert-judicial system would be the most advantageous, as judicial decisions are based on objective criteria provided by experts who specialize in the disciplines most relevant to a particular case, such as psychology, medicine, criminology, social work, dentistry, bioethics, engineering, and accounting. Using this system would allow for a more individualized and equitable assessment of moral damages, thereby overcoming both the limitations inherent in a system that uses judicial discretion alone and the rigidity of systems that utilize fixed scales.

**Keywords:** expert assessment; valuation; moral damage; reparation of moral damage.

**Resumen:** Este documento trata sobre la participación de especialistas en la valoración del daño moral. Analiza diferentes sistemas para cuantificar la compensación por daño moral: el sistema subjetivo, el sistema basado en baremos, el sistema de baremos con algoritmo y el sistema mixto pericial-judicial. El estudio revela que la cuantificación del daño moral es compleja y su falta de uniformidad y objetividad en la aplicación de estos sistemas demuestra la necesidad de metodologías estandarizadas. Se argumenta que, si bien la participación de expertos es cada vez más aceptada, aún enfrenta desafíos para lograr una compensación justa y completa. Las conclusiones del estudio proponen que un sistema mixto pericial-judicial robusto es el más ventajoso, ya que las decisiones judiciales se basarían en criterios objetivos proporcionados por expertos especializados en diversas disciplinas como psicología, medicina, criminología, trabajo social, odontología, bioética, ingeniería y contabilidad. Esto permitiría una evaluación más personalizada y equitativa del daño moral, superando las limitaciones de la discrecionalidad judicial pura y la rigidez de los sistemas que emplean baremos.

**Palabras clave:** peritaje; valuación; daño moral; reparación del daño moral.

**Summary:** I. *Introduction*. II. *Methodology*. III. *Results*. IV. *Discussion*. V. *Conclusions*. VI. *References*.

## I. Introduction

A person's obligation to compensate another for damage caused by his actions, whether lawful or unlawful, is a legal concept that has evolved from notions of private revenge embodied in the Law of Talion, which demanded "an eye for an eye and a tooth for a tooth", to modern debates addressing the restorative and compensatory aspects of damage which provide a more comprehensive perspective.<sup>1</sup> Historically, the concept of damage had been limited to actual in-

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<sup>1</sup> Juliana Nanclares Márquez & Ariel Humberto Gómez Gómez, *La reparación: una aproximación a su historia, presente y prospectivas*, 33 CIVILIZAR 59, 60-63 (2017), <https://doi.org/10.22518/16578953.899>

jury to one's physical body or the loss of one's assets resulting from crime, such as theft or killing a slave, or wrongdoing, such as breaking a fence. These were damages that had to be compensated for. In 286 B.C., the Roman *Lex Aquilia* contemplated aspects of damage beyond those that were immediate and objectively quantifiable.<sup>2</sup> These included harm to individuals that was less direct or evident, even encompassing long-term damage. This would later become known as loss of profits, that is, the profits no longer enjoyed as a direct consequence of the damage, or as consequential loss, damages which are an indirect result of the initial damage.

At that time, the criteria used for compensating damage was based on what we would identify today as Mommsen's difference theory, or a counterfactual premise, which proposes evaluating the damage caused by comparing the value of the assets before the event that caused it to the value of the assets after the event that caused it.<sup>3</sup> This proposition, based on the concept of breach of contract, sought to return things to the state they were in before the damage occurred, but did not contemplate reparation for non-patrimonial damage.

The concept of moral damage began to take shape in 19th-century French and German legislation which recognized the concept referred to as *pretium doloris* ("the price of pain"), known in German as Schmerzensgeld ("pain money"), because it was primarily claimed for pain suffered as a consequence of physical harm caused to a person.<sup>4</sup> But it was not until the 20th century, when various countries around the world began to legislate on the subject, that an attempt was made to include not only the physical suffering of a human being, but subjective aspects of damage, such as damage to one's image or reputation. This concept even extended to damage suffered by a legal entity such as a corporation.

Various dramatic cases highlighted the need to legislate on moral damage. One such case was the sinking of the British ship, the *Lusitania*, by a German submarine during World War I. The United Nations' compilation of rulings on the case highlighted the issue of moral damage and how to approach the issue of compensation for the loss of life resulting from that attack. Those rulings affirmed the proposition that in civil liability cases it is "impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained, involving such inquiries as how long the deceased would probably have lived but for the fatal injury; the amount he would have

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<sup>2</sup> Armando José Torrent Ruiz, *Pretium affectionis o daños morales en la aestimatio damni ex lege Aquilia*, in 6 FUNDAMENTOS ROMANÍSTICOS DEL DERECHO CONTEMPORÁNEO 1245 (Justo García Sánchez dir. & Margarita Fuenteseca Degeneffe coord., 2021).

<sup>3</sup> FRIEDRICH MOMMSEN, BEITRÄGE ZUM OBLIGATIONENRECHT. 2 ZUR LEHRE VOM INTERESSE 27 (Braunschweig, Schwetschke & Sohn, 1855).

<sup>4</sup> Andrey T. Tabunshikov et al., *Compensation for Moral Harm in Foreign Law and Order*, 27 OPCIÓN 2090, 2082-2098 (2020).

earned... and many other inquiries concerning elements universally recognized as constituting recoverable damages”.<sup>5</sup>

The rulings also emphasized a principle attributed to Grotius positing that damages must be measured by pecuniary standards because “money is the common measure of valuable things.”<sup>6</sup> This pragmatic, though not universally accepted, assertion helped establish the precedent for considering monetary payment as the appropriate method for compensating moral damages.

Even today, there are no uniform criteria for the assessment of moral damage and this can lead to discrimination against certain sectors of the population. A study by the University of Chicago<sup>7</sup> found that average tort awards increase as the population rates of black and hispanic people in counties increase, and especially as poverty rates in those counties increase. In contrast, average tort awards decrease with rising poverty rates among the white population.

Legal discourse encompasses debates on the foundational question of the legality of compensating for moral damage or any type of non-patrimonial damage, questioning why an individual’s financial assets should be supplemented when the harm suffered was not related to their assets. These debates extend to the methodologies used for determining the monetary sums that might constitute adequate compensation for such damage. Today, a growing number of jurisdictions now recognize the necessity of providing compensation beyond purely economic losses in order to ensure more equitable reparation of the damage caused.

Indeed, even the definition of moral damage is evolving. The Inter-American Court of Human Rights notes that non-pecuniary damage “may include both the suffering and distress caused by the violation, as well as the impairment of values that are very significant to individuals, and any alteration of a non-pecuniary nature in the victim’s living conditions”.<sup>8</sup> Currently, the most widely used term is non-patrimonial damage or moral damage.

In Mexico, the Código Civil Federal (Federal Civil Code) states that “moral damage is understood as the effect a person suffers in their feelings, affections, beliefs, dignity, honor, reputation, private life, physical appearance, or the way others view them”.<sup>9</sup> In Mexico, as in other countries, the damage is quantified by the judge or magistrate hearing the case based on the evidence presented of the existence of damage. But the question as to exactly how the judge is to calculate a monetary amount that can repair damages to a person’s feelings or honor, for the loss of a loved one, or for the deprivation of a human right has been left unanswered, leading to disparate and often arbitrary results.

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<sup>5</sup> *Lusitania Cases*, 7 U.N. Rep. Int’l Arb. Awards 32 (Mixed Claims Comm’n 1923).

<sup>6</sup> *Id.*

<sup>7</sup> Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27 (2003), <https://doi.org/10.1086/344560>

<sup>8</sup> *Muelle Flores v. Perú*, No. 375 (Mar. 6, 2019), *Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C)*. [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_375\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_375_esp.pdf)

<sup>9</sup> CÁMARA DE DIPUTADOS DEL CONGRESO DE LA UNIÓN, CÓDIGO CIVIL FEDERAL (D.O.F., 2024).

In contrast to economic damages, which may be quantified with relative facility by an expert assessing repair costs, replacement value, loss of profits, or consequential damages, the determination of moral damages is a subject of considerable debate. This challenge arises because moral damages involve remedying harms that are not readily quantifiable or do not have a direct monetary equivalent.

The question also arises as to who is the appropriate professional to quantify the damage and express it in monetary terms. Forensic accountants can perform the rigorous task of adding up amounts, while a person with a post-graduate degree in valuation might have access to the more advanced tools necessary to make a more comprehensive calculation, considering relevant economic and market factors. In practice, experts try to provide moral damage valuation reports that are viewed positively by judges. However, they face rigid obstacles imposed by the more familiar and convenient system employing judicial discretion.<sup>10</sup>

Few attempts have been made to create scientific, standardized methodologies which permit a more objective calculation of damage that is essentially subjective, with the aim of attaining a more equitable administration of justice by ensuring that when an order for the reparation of damage is issued, its determination was done in a well-grounded and equitable manner.

The objective of this overview is to identify the various systems used in the valuation of moral damage and the mechanisms used for its measurement, particularly highlighting the role played by experts. To this end, we carry out an analysis of the legal procedures employed and the methodological approaches proposed, focusing primarily on those used in the judicial field.

## II. Methodology

This is an exploratory and descriptive qualitative study. We conducted a literature review of various sources of information, including the use of search engines and databases such as Google Scholar, SciELO, and ScienceDirect. We also included reviews, research articles, and book chapters. Subsequently, we did a content analysis, detected patterns and classified the results into categories.

We obtained information from the following countries: Argentina, Bolivia, Chile, Costa Rica, the United States of America, Mexico, Nicaragua, Germany, Spain, Holland, England, Iran, North Macedonia, Kazakhstan, Russia, and Ukraine.

Knowledge of the resources currently available for the quantification of moral damage, as well as familiarity with the problems with their use, will allow for the construction of a guide document containing the methodological

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<sup>10</sup> COLEGIO DE PERITOS DEL NORTE, INFORME DE LAS ASAMBLEAS DE TRABAJO SOBRE RETOS DE LOS PERITOS VALUADORES (2024).

options for the valuation of moral damage. In the future, this guide may assist researchers attempting to develop a standardized methodology for the quantification of moral damage.

### III. Results

The Mexican association, Colegio de Peritos del Norte, which monitors the forensic practices of experts across various disciplines, has reported in its working assemblies on the challenges faced by valuation experts. Analyzing texts from various countries, we found abundant information regarding the theoretical aspect of moral damage —its existence, definition, and composition— but very little information which contributes to the topic of how to calculate compensation for moral damage.

After the literature review, certain observations common to all authors stand out. It is consistently recognized that moral damage is both difficult to define and to compensate for; that there is a lack of uniformity and objectivity in compensation determinations; and, that a standardized methodology is required to provide certainty to victims as well as to the offending parties.

The only classification system found was that of Margarita Zhuravlyova who classified various ways of valuing moral damage both qualitatively and by means of a formula.<sup>11</sup> Hers is a simpler version of the categories we have identified in this article. We refer to them as systems because they employ a set of rationally linked principles that contribute to a specific object of inquiry. We identified four distinct systems: the subjective system, the baremo-based system, the baremo with an algorithm system, and the mixed expert-judicial system.

#### 1. *The Subjective System*

In the subjective system, the judge determines whether or not moral damage is present based on subjective factors and quantifies the damage using his or her own discretion. Moral damage is presumed to exist, its existence does not need to be proven, only its magnitude. That is, if some offense or wrongdoing has been committed and moral damage is claimed, then moral damage is presumed to exist, as if it were an inevitable consequence of the improper conduct. The judge may make minor use of expert reports and scales, but it is mainly through the exercise of judicial discretion that a final quantification of moral damage will be arrived at.

In Kazakhstan, in translating the amount of compensation for moral damage into monetary terms, the Supreme Court of the Republic takes into account a subjective evaluation by the victim of their right to life, their right to

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<sup>11</sup> Margarita Zhuravlyova, *Validez del uso de la presunción de daño moral por parte de psicólogos expertos*, 32 SLOVO OF THE NATIONAL SCHOOL OF JUDGES OF UKRAINE 170 (2020).

health, as well as other considerations such as their right to privacy, their entitlement to a certain degree of personal or family honor, etc. The Court also evaluates the severity of both physical or moral suffering, the existence or absence of malice, as well as other objective data that can be supported by evidence.<sup>12</sup>

The quantification of moral damage is not conducted in the conventional manner as is done with economic damage. For example, already existing schedules not designed for the specific purpose of quantifying moral damage may nevertheless be used, such as the table for disability payments from social security institutions, life expectancy tables, or schedules used by insurance companies for the payment of claims against their insurance policies. However, these are not binding on the judge.

In Germany, France, Mexico, and some other countries, previous judicial rulings in comparable cases create informal jurisprudential norms that can guide quantification. In the Netherlands, although court decisions do not establish a judicial precedent, in practice they have persuasive force and are usually followed, thus constituting the most important authority on the matter. In Dutch law, an attempt is made to achieve some uniformity by using the index of judicial decisions on compensation for moral damages, initiated in 1964 by the lawyer Van der Veen and published every three years, which is generally accepted by courts and experts as a guide for evaluations.<sup>13</sup>

There is, however, no standardized way to calculate or assign a monetary amount to something that is not an economic asset or valuable in terms of money.<sup>14</sup> Therefore, technically, damage is not calculated in money terms. Rather, a calculation is made as to how much money is necessary to compensate an individual for the damage they have suffered, because moral damage cannot be repaired, but it must be compensated.<sup>15</sup>

The American Convention on Human Rights establishes that the reparation of damage must integrate all related claims by guaranteeing the victim full restitution, that is, by returning them as completely as possible to their situation prior to the damage. They must be indemnified for all material, physical, and moral damage through economic compensation. They must be completely rehabilitated physically, medically, psychologically, and socially. Measures of satisfaction must also be considered, such as the right to truth and punishment of

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<sup>12</sup> S. M. Vorobiev, *Moral damage as one of the consequences of property crimes*, 9 *LAWYER* (2004), quoted in M. A. Akimbekova et al., *Matters on Compensation of Moral Damage: Practical Aspects*, 17 *INT'L J. ENVIL. & SCI. EDUC.* 9733 (2016).

<sup>13</sup> Frans J. A. Van Der Velden, *The Dutch law of pretium doloris*, in *NETHERLANDS REPORTS TO THE ELEVENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* (Hans Ulrich & Jessurun D'oliveira eds., 1982).

<sup>14</sup> Jesús Abraham Martínez Montoya, *La indeterminación económica de daño moral*, 6 *HEURÍSTICA JURÍDICA* 59 (2013), <https://erevistas.uacj.mx/ojs/index.php/heuristica/article/view/1201>

<sup>15</sup> Ramón Maciá Gómez, *La dualidad del daño patrimonial y del daño moral*, *REV. DE RESPONSABILIDAD CIVIL Y SEGURO* 21, 32 (2010), <https://www.asociacionabogadosrcs.org/doctrina/rc-36doctrina2.pdf>

offending parties. The non-recurrence of the damage must be guaranteed.<sup>16</sup> These parameters are grounded in the case law resulting from established through citizen lawsuits brought by citizens against the state alleging human rights violations and demanding comprehensive legal safeguards.

There are various methods used to compensate for moral damages, based both on monetary terms as well as on non-monetary remedies<sup>17</sup> such as publication of the judgment,<sup>18</sup> public apologies, the provision of scholarships, the creation of trusts, adequate medical and psychological assistance, etc.<sup>19</sup>

The subjective quantification system is used in Spain for cases not involving traffic accidents, which has its own specific set of regulations. It is also the system adopted by most countries, including Mexico. In this regard, the Supreme Court of Justice of Mexico recently established various guidelines for the quantification of moral damage that supersede all previously used procedures.

Under this system, compensation for damage suffered must be comprehensive, equitable, and just, that is, not limited to material damages, and there must be no limitation on its imposition. It establishes that damages should not be confused with their quantification. The elements of quantification of an indemnification are only indicative factors. Compensation may vary in cases of strict liability, that is, when the damage is not caused by malice or fault. It also emphasizes that overcompensation should be avoided, and that compensation may be reduced when it is to be paid by a natural person with limited resources.<sup>20</sup>

Although these various rules or guidelines have been established, the way damages are quantified remains within the discretion of the judge, and equity is not guaranteed, nor is there even consensus as to what is equitable. Under such a system one might legitimately ask: whether the quantification of moral damage would be different if a person were run over by a company's employee-driver versus a private driver; whether there will be an impact on the compensation award based on the fact that the victim was in charge of minor children or if they were a retired elderly adult; or whether a person with a higher income should pay more in compensation than one with a lower income, even though he caused the same damage.

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<sup>16</sup> Convención Americana sobre Derechos Humanos, 22 de nov. de 1969, 1144 U.N.T.S. 123. [https://www.oas.org/dil/esp/1969\\_Convenci%C3%B3n\\_Americana\\_sobre\\_Derechos\\_Humanos.pdf](https://www.oas.org/dil/esp/1969_Convenci%C3%B3n_Americana_sobre_Derechos_Humanos.pdf)

<sup>17</sup> Abbas Mirshkari & Fatemeh Sadat Hosseini, *A Comparative Study of the Method of Compensating Moral Damages with an Emphasis on the Approach of Iranian Judicial Practice*, 121 JUDICIARY'S L.J. 351, 378 (2023), <https://doi.org/10.22106/jlj.2022.544179.4557>

<sup>18</sup> Mohammad Eshaghi et al., *A Comparative Study of Compensation for Moral Damages in the Legal System of Iran and England* International, 6 J. ETHICS & SOC. 38, 31-40 (2024).

<sup>19</sup> LUCÍA ALEJANDRA MENDOZA MARTÍNEZ, *LA ACCIÓN CIVIL DEL DAÑO MORAL* 136 (Instituto de Investigaciones Jurídicas UNAM, 2014). <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3636/10.pdf>

<sup>20</sup> Alfonso Curiel Valtierra, Carlos Alberto Vela Treviño & Arturo Lara-Hernández, *Mexico: Mexican Supreme Court issues guidelines to calculate compensation for moral damage*, LEXOLOGY, (Sept. 13, 2023), <https://www.lexology.com/library/detail.aspx?g=3c402ff6-c56a-4adf-9930-7452248bbe26>

To understand what judges mean by moral damage, Lazcano Maturana and Toro Cáceres conducted a study of 141 judgments that resulted in compensation awards for moral damage in Chile to determine what elements were considered in reaching the results of each case. They observed that even in different courts and with different judges, similar expressions were repeated without any justification for their use. These expressions were classified into five categories: annoyance or discomfort; suffering or psychological affliction; physical pain; harm to dignity and honor; alteration of normal life and loss of time.<sup>21</sup> These categories exceed the classic definition of *pretium doloris* and are more in line with modern conceptions of moral damage.

The absence of a uniform standard, common across many diverse jurisdictions and apparent in the disparate rulings of individual judges within the same legal system, constitutes a fundamental impediment to the quantification of moral damage and the reliable and effective determination of equitable compensation.

## 2. *The Baremo-based System*

The first baremos (standardized compensation schedules) were developed for the purpose of quantifying, in a standardized manner, damages sustained by individuals resulting from a crime or other illicit act. A baremo is a scale that associates an amount or percentage with a specific type or instance of damage, allowing compensation to be established simply by summing these amounts or percentages and then translating the result into money terms.

A baremo allows for the consolidation of quantification criteria so that similar cases are valued equally. It also facilitates alternative dispute resolution mechanisms which can enable parties to reach agreement on damage compensation that are satisfactory both to them as well as to insurance companies whose business it is to make provision for such costs.<sup>22</sup>

In France, a case comparison system is used for damage compensation. Under this system, insurers' offers are published, allowing individuals to review them and decide whether or not to accept a proposed settlement. However, a key aspect of this approach is that the compensation offers are made exclusively by the insurance companies. Additionally, there are capitalization tables used for calculating future damages using two variables: the interest rate and life expectancy. Currently, judicial practice incorporates several different capi-

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<sup>21</sup> Magdalena Lazcano Maturana & Javiara Toro Cáceres, *Estudio cuantitativo de la indemnización de perjuicios extrapatrimoniales por infracciones a los derechos de los consumidores*, 245 REV. DE DERECHO 110, 99-131 (2019), <http://dx.doi.org/10.4067/S0718-591X2019000100099>

<sup>22</sup> F. BANDRÉS MOYA, S. DELGADO BUENO & J. SÁNCHEZ-CARO, CUADERNOS DEL MÁSTER EN DERECHO SANITARIO VOL. III (Universidad Complutense de Madrid, Facultad de Medicina, Departamento de Toxicología y Legislación Sanitaria 2004) quoted in Luis Corpas Pastor, *La (In)suficiencia del Baremo de Tráfico en la Valoración del Daño Dental*, 18 ACTUALIDAD JURÍDICA IBEROAMERICANA 856 (2023). See *infra* note 24.

talization scales proposed and published in the *Gazette du Palais*. However, some view use of these scales as subordinating the judge to the expert, whereas under French law, an expert's conclusions should be used merely as an aid to the judge's decision.<sup>23</sup>

In Spain, there is a system for the valuation of damages caused to people involved in traffic accidents based on objective criteria related to personal injury, such as age; particular circumstances, such as being the sole breadwinner; and economic damage, which includes consequential damage and loss of profit, not only to the victim, but also to any affected family members.<sup>24</sup>

In this system, degrees of damage are assessed and assigned percentages, and tables then indicate the monetary amount for individual cases considering such specific characteristics as the age of the surviving spouse or the duration of their marriage, or for sequelae affecting the victim's psychophysical well-being, quality of life, or aesthetics. In the same vein, there is a compensation schedule for damages arising from healthcare activities. However, that schedule covers psychophysical and functional damage, but does not encompass the entire range of moral damage.<sup>25</sup>

Quantification through the use of schedules is a method primarily used by insurance companies, especially in cases of physical injury and death. Tables are constructed that determine the amount to be paid by the insurer according to the injuries suffered, the degree the injuries affect the person's movement, aesthetics, or functionality, without going into further detail.

In the case of damages resulting from crimes in the Russian Federation, Erdelevsky constructed a table to compensate affected persons for the moral damage caused by the criminal, based on medical condition, statistics, and other data. He suggested taking a certain number of minimum wages as a base and then awarding different compensation amounts for harm caused by different types of crimes. He used a three-level assessment tool to measure the degree of suffering as either "weak", "strong", or "unbearable", depending on the individual experience of the victim.<sup>26</sup>

In Erdelevsky's proposed method, however, the attempt to quantify not only the physical damage but also the moral damage stands out. This author's system was heavily criticized for its lack of a clear basis on which to establish those

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<sup>23</sup> ÉCOLE NATIONALE DE LA MAGISTRATURE, RÉFÉRENTIEL INDICATIF DE L'INDEMNISATION DU PRÉJUDICE CORPOREL DES COURS D'APPEL, 7 (2024).

<sup>24</sup> Luis Corpas Pastor, *La (In)suficiencia del Baremo de Tráfico en la Valoración del Daño Dental*, 18 ACTUALIDAD JURÍDICA IBEROAMERICANA 856 (2023), [https://revista-aji.com/articulos/2023/18/AJI18\\_31.pdf](https://revista-aji.com/articulos/2023/18/AJI18_31.pdf)

<sup>25</sup> Manuel Clavero Ternero, *Daños Morales: una visión multidisciplinar*, ECONOMIST & JURIST 18, 18-29 (2011), [https://www.economistjurist.es/wp-content/uploads/sites/2/2014/02/doc\\_id\\_483.pdf](https://www.economistjurist.es/wp-content/uploads/sites/2/2014/02/doc_id_483.pdf)

<sup>26</sup> ALEKSANDR M. ERDELEVSKY, MORAL DAMAGE: ANALYSIS AND COMMENTARY OF LEGISLATION AND JUDICIAL PRACTICE 103 (3d ed., 2004), quoted in M. A. Akimbekova et al., *Matters on Compensation of Moral Damage: Practical Aspects*, 17 INT'L J. ENVTL. & SCI. EDUC. 9733 (2016).

amounts and percentages. In a structured compensation system, while the goal is to standardize how compensation is calculated, if the mechanism used for its construction is not known, it can be perceived as arbitrary.

Erdelevsky's structured compensation system consisted of a formula that assumed one person's suffering was the same as another's and therefore the quantification of such damage should be the same. This presumption was made by the author based on his interpretation of the criminal code's use of different degrees of punishment for different crimes and an indemnification scheme based on presumptive damage, which he was unable to justify.<sup>27</sup> A review by experts in psychology revealed the lack of scientific rigor of his procedure and the inadequacy of attempts to measure psychological damage by people not versed in that science.

By contrast, in Europe, the Parliament commissioned the preparation of a draft report with recommendations to the Commission on a European Disability Rating Scale. This scale, which serves as a guide for the assessment of physical and psychological injuries, proposes a percentage-based system for medically verifiable physical and psychological injuries. The guide is intended to be used by medical experts and not by the judge.<sup>28</sup> The guide does not quantify damage in monetary terms. It specifically states that it is not a pseudo-mathematical formula. Rather, it is based on the compendium of a group of experts who have established damage percentages based on their experience. It also assumes that a medical expert in charge of an evaluation, in addition to their own experience, obtains reports from other specialists when particular sequelae are involved, thus constituting an interdisciplinary mechanism that seeks to ensure that damage to the same organs and the same functions are compensated by equivalent amounts.

In Chile and Mexico, there are similar schedules but these are oriented towards determining the degree of work-related disability. In Mexico, this schedule serves social security institutions in the granting of disability pensions. While this schedule can be considered by a judge in a legal process involving a matter other than labor law, it does not purport to claim that its criteria regulate the quantifying of moral damage.

Although the proposal of schedules that quantify the total amount of moral damage may appear to be a systematic, standardized, equitable, and just option, it currently does not find significant support among legislators or judges in most countries.

### 3. *The Baremo with Algorithm System*

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<sup>27</sup> Zhuravlyova, *supra* note 11.

<sup>28</sup> COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET OF THE EUROPEAN PARLIAMENT, DRAFT REPORT WITH RECOMMENDATIONS TO THE COMMISSION ON A EUROPEAN DISABILITY RATING SCALE 2003/2130 (2003), <https://www.europarl.europa.eu/meetdocs/committees/juri/20040223/505310EN.pdf>

Given the complexity of comprehensively addressing issues of compensation for moral damage and the rigidity of the various scales that have evolved from mere general tables to attempts to standardize aspects as subjective as the psychological suffering of individuals, the creation of scales that include an algorithm to obtain a more comprehensive assessment of compensation has been opted for. Unlike those mentioned in the previous system, which are usually based on expert opinion, these scales are founded on statistics and the construction of databases that can be used for consultation.

They have been applied in the United States, United Kingdom, and Australia in the form of software that tallies the specific characteristics of the injury and triangulates these with specific characteristics of the person. For instance, the software Colossus is utilized for the calculation of bodily injury claims, while Xactimate is employed for estimating repair and rebuilding costs in property claims. However, detailed information regarding its operational methodology is limited as it is proprietary. What we know primarily consists of disclosures by legal firms offering their services in challenging its use.

The algorithm used is confidential. It is based on creating databases of previous cases to form statistics. These statistics could be used to predict life expectancy, career success, whether one will have a family, whether or not someone might survive a particular medical treatment based on their race, sex, age, etc., all without anyone being able to objectively evaluate or assess the multitude of correlations the software might generate.

The baremo-based system is the most specific mechanism by which one might attempt to standardize amounts of compensation for different types of moral damage. This is why it is the preferred method of insurance companies. However, its utility in judicial proceedings would be significantly limited, as it incorporates elements susceptible to challenge for violating certain fundamental human rights, specifically, the right to non-discrimination on the grounds of age, gender, social status, and other protected classes.

#### 4. *The Mixed Expert-Judicial System*

The judiciary increasingly recognizes the need for tools to standardize its damage assessment criteria. In the meanwhile, it increasingly relies on expert evidence, at least to determine the existence of damage, the degree and scope of damage, and for estimates of compensation for specific types of damage, although not for the determination of the final judgment which is a power they continue to reserve for themselves. This sharing of responsibilities is why we have named this system the mixed expert-judicial system. It is the direction in which the subjective system is evolving.

A survey conducted among civil and commercial judges in Bolivia revealed that 70 % of respondents held the view that, concerning the quantification of moral damage, equitable and reasonable judicial discretion by itself is not suf-

ficient. Rather, it necessitates the use of specific instruments to inform and support judicial reasoning.<sup>29</sup>

Expert evidence, complemented by circumstantial evidence, constitutes a set of non-binding instruments available to the court for its consideration. At the same time, various methodological proposals advanced by professionals in medicine, psychology, dentistry, and economics have sought to contribute to the understanding and quantification of moral damages, to the extent permissible by legislative provisions.

The initial methodologies for the valuation of non-pecuniary damages originated from proposals by economists who focused on the themes of quality of life and the effects of injuries on an individual's life project, often by contrasting factors that contribute to joy with those that induce suffering. These economists achieved their valuation by adapting standard asset valuation and decision-making methods. Specifically, the technique involves valuing analogous goods, subtracting the claimant's lost income, and combining these results with decision-making models to assess moral damages.

Among these methodologies are the contingent valuation method of Ciriacy-Wantrup of 1947; Rotman's methodology for valuing moral damage based on the cost of reversal of 1981; Ghersi's structural model of 2006; the multi-criteria analytical valuation by Aznar, Estruch, and Aragonés-Beltrán of 2011; and the valuation of the life project using a combination of the analytic hierarchy process and the net present value of income developed by Alanís López of 2023.

The contingent valuation method, which focuses on environmental issues, is based on the idea that some aesthetic or caregiving actions generate benefits for which people are willing to pay more, and that these can be detected and measured through surveys.<sup>30</sup> This method implies there are certain qualities of life that are highly valued (like traveling, living near the sea, living far from noise) that do not necessarily have a high cost, but whose deprivation affects the intensity of the moral damage suffered, because their absence decreases one's quality of life. Therefore, by calculating the value of intangible qualities of life the victim has been deprived of, the value of the moral damage can be monetized.

Following the same criteria, Rotman, in his methodology of valuing moral damage by its cost of reversal, proposes that quantification consider the value of real estate, vehicles, academic activities, as well as travel, as valuable qualities of life that should be considered when monetizing the value of moral damage.<sup>31</sup>

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<sup>29</sup> Paola Karen León Gutiérrez, *Reparación del daño moral con base en los lineamientos de la Corte Interamericana de Derechos Humanos*, 8 REV. LEX 116 (2020), <https://doi.org/10.33996/revistalex.v3i8.509%20>

<sup>30</sup> Siegfried von Ciriacy-Wantrup, *Capital Returns from Soil-Conservation Practices*, 29 AMER. JOUR. OF AGRI. ECON. 1181 (1947), <https://doi.org/10.2307/1232747>

<sup>31</sup> Rodolfo B. Rotman, *Valuación del daño moral por su costo de reversión*, LA LEY (1981), quoted in M. G. BURGUEÑO IBARGUREN, *DOSIER DOCTRINARIO*, (2020).

Gherzi proposes a structural model to measure and quantify moral damage. He identifies three crucial variables: *a)* the victim's age, specifically focusing on key periods of her life; *b)* the victim's status within the economic, social, and cultural spheres, particularly their ascribed and perceived social class; and *c)* the measurement of the intensity of the moral damage based on actual, observed symptoms. These characteristics would be assessed by a psychological evaluation, which highlights the distinction between moral damage which falls under the purview of the psychologist, and psychic and psychological damage which are regarded as a separate category of damage falling under the purview of a psychiatrist.<sup>32</sup>

These opposing variables are to be identified and combined: pain or suffering versus pleasure or joy. Subsequently, the author proposes tourism as one method to combat pain and suffering, establishing it as one tool that can be used to assist in the quantification of damage necessary to achieve complete reparation.

Thus, this structural model implies the quantification be carried out by an expert psychologist who begins by standardizing qualities of life that are not typically standardized by the general population. He asserts that there is a base of suffering which is greater to the degree an individual is more cultured. This base eventually reaches a maximum and then decreases in old age. Old age, combined with low social status, implies limited resources for tourism, which leads to the conclusion that reparations should be lower for elderly people with limited resources. He even suggests that any award of compensation be distributed as an annuity, the intention being to facilitate an ongoing pursuit of activities that might bring the victim pleasure.

The author presents a practical vision of moral damage, but does not consider the special circumstances of particular individuals. It implies that to eliminate a person's suffering, he must be compensated with joy. He fails to acknowledge, however, that the suffering resulting from losing a leg, for example, cannot be erased by taking a trip. Therefore, although this methodology could provide a means of objective quantification, it is not conceived of in a way that repairs the actual damage. Nor does it take into account other factors that the author leaves for a separate valuation, such as the psychological or psychic damage mentioned above, which for him is distinct from moral damage and should be quantified separately.

We consider Álvarez Vigaray to be correct when he refers to compensatory satisfaction, that receiving a sum of money does provide joy to most people, but does not annul or make suffering disappear, since "it would be contrary to logic and sentiment to say that money is capable of procuring pleasures capable of canceling out and neutralizing pain".<sup>33</sup>

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<sup>32</sup> CARLOS ALBERTO GHERSI, CUANTIFICACIÓN ECONÓMICA, DAÑO MORAL Y PSICOLÓGICO. DAÑO A LA PSIQUIS (Astrea, 3a ed., 2006).

<sup>33</sup> Rafael Álvarez Vigaray, *La responsabilidad por daño moral*, 19 ANUARIO DE DERECHO CIVIL 81

Regarding the concept of assessing damage to the life project or personal fulfillment, the Inter-American Court of Human Rights says this approach “focuses on the comprehensive development of the affected person, taking into account their vocation, aptitudes, circumstances, potential, and aspirations, which enable them to set reasonable expectations and achieve them” (Loayza Tamayo v. Perú, Sentencia de Reparaciones y Costas, Inter-Am. C.H.R (Nov. 27, 1998)).

The multi-criteria analytical valuation method (AMUVAM) consists of a combination of the analytic hierarchy process (AHP) and the net present value of income, in order to quantify expectations regarding the life project. To apply this method, various economic values are assigned to goods that are not necessarily available for sale on the market, but nevertheless have a social value or provide some personal benefit. The sum of these values is called the Total Economic Value (TEV). However, of these values, the only one that can be expressed in monetary terms is the Direct Use Value (DUV), which is considered the pivot value from which the monetary valuations of the remaining components are estimated.<sup>34</sup>

The valuation specialist Alanís López, in his search for a standardized methodology for valuation of the life project, revisits the previous method, and identifies five “indispensable variables in every human being’s project: health, family life, professional life (cash flow), social life, spiritual life, and recreation”.<sup>35</sup> Through a survey of five professionals, he concludes that these variables constitute the life project and calculates the corresponding weight that each represents within that project. An expert calculates the net present value of current earnings over a period of time (which is referred to as the pivot value), adjusts this value taking country-specific risks and the individual’s probability of mortality into consideration. Once this monetary amount has been calculated and the variables have been assigned their appropriate weight, it can then be applied to the various other spheres of the life project to determine each component’s value. Finally, these individual values are aggregated to yield the total overall value of the life project.

Based on an analysis of his proposal, the selection of variables is notably limited in scope. The method only involved five experts whose professional backgrounds were undisclosed. It also overlooks numerous proposals presented by other authors on the subject, the different ways these proposals can be grouped or classified, and the diverse impact each might have when applied to different individuals.

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(1966), <https://revistas.mjusticia.gob.es/index.php/ADC/article/view/3469/3469>

<sup>34</sup> Jerónimo Aznar, Vicente Estruch & Pablo Aragonés-Beltrán, *Environmental assets valuation method using AMUVAM application to the assessment of the Natural Park of Ebro River Delta*, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON THE ANALYTIC HIERARCHY PROCESS (2011).

<sup>35</sup> Oscar Andrés Alanís López, *Avalúo de Proyecto de Vida*, LVIII Congreso Internacional de Valuación (Veracruz, 2023).

The Analytic Hierarchy Process to which the author refers is a system developed by Thomas L. Saaty<sup>36</sup> and had been primarily designed to evaluate decision-making and the solving of complex problems by comparing prioritized criteria at different levels of a hierarchy to determine possible alternatives. Therefore, using this system to determine the criteria that constitute moral damage, while allowing for a quantification, is nevertheless limited and even controversial.

This methodology also discards the psychological aspect of suffering resulting from the damage. It does not, for example, allow for resolving cases affecting one's honor. Nor does it consider what Palyuk emphasized, that establishing a minimum or maximum amount of moral damage violates the victim's rights, as there will be those who do not want monetary compensation, but something else, such as an apology from the person who caused the damage.<sup>37</sup> Therefore, calculating compensation for moral damage without considering the victim's point of view constitutes an injustice.

These methods from the field of economics offer an effective solution for quantifying subjective losses. However, they do not address specific issues related to the victims' subjective perception of the damage, the suffering it has caused them, or the long-term impact it will have on their lives. Nevertheless, authors like Burgueño Iburguren have concluded that this approach represents a reasonable method which aligns with economic realities. It ensures the damage amount is calculated by weighing the substitutive and compensatory satisfactions that the awarded sums could provide. In contrast, relying on expert testimony inflates the cost and prolongs the judicial process. This is particularly true since, in most instances, *in re ipsa* the loss is evident. This fact, coupled with the complexity of the calculations, may deter legal professionals from selecting this method".<sup>38</sup>

It is worth noting that the quantification methods proposed by experts mainly come from professionals hoping to use their particular scientific perspective to contribute to the objective quantification of moral damages. However, these proposals typically originate from private practice where it is easier for an expert to objectively observe a system's deficiencies compared with an expert who is dependent on a public institution, whose fees are paid by the state, and whose mission is not to highlight deficiencies.

Among other proposed methods, Bermúdez in Argentina stands out. He proposes aesthetic damage be estimated by a physician via the application of three methodologies: the description of alterations, both static and dynamic,

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<sup>36</sup> THOMAS L. SAATY & LUIS G. VARGAS, *MODELS, METHODS, CONCEPTS & APPLICATIONS OF THE ANALYTIC HIERARCHY PROCESS* (Springer, 2nd ed., 2012).

<sup>37</sup> V. P. Palyuk, *Indemnización por daños morales (no patrimoniales)*, monograph 272 (2nd ed., 2000) quoted in Margarita Zhuravlyova, *Validity Of The Use Of Presumptive Moral Damage By Expert Psychologists*, 32 *SLOVO OF THE NATIONAL SCHOOL OF JUDGES OF UKRAINE* 170 (2020).

<sup>38</sup> MANUEL GONZALO BURGUEÑO IBARGUREN, *DOSIER DOCTRINARIO (Poder Judicial Provincia del Chubut, 2020)*.

that diminish the injured person's attractiveness; the qualitative measurement of the degree of aesthetic damage utilizing a specific rating scale; and the quantitative measurement of the subject's functional deficit percentage, based on the use of established percentage-based schedules, such as those in the Work-Related Risks Laws.<sup>39</sup>

This proposal, which is similar to the European guide, allows the medical expert to provide not only a report with a percentage of damage to be repaired, but to substantiate how that determination was reached, which requires enlightening the judge regarding particular characteristics or circumstances of the victim that are not always contemplated by a schedule. Affording judges the opportunity to hear directly from the expert would allow them to understand these aspects more deeply and make more just decisions.

In Spain, the traffic accident fee schedule serves as a non-binding guideline for cases involving liability for dental malpractice. However, its use is complicated by the fact that although the evaluating expert is a medical professional, he is not necessarily an expert regarding dental practices. For this reason, the damage schedule of the Consejo General de Colegios Oficiales de Dentistas de España (General Council of Official Colleges of Dentists of Spain) was created, in order to have its own specialized schedule.<sup>40</sup> Surprisingly, however, it is not required that this schedule be applied by an expert in dental matters, or even a dentist.

Some professionals approach the problem of quantifying moral damage by first determining its existence and degree of intensity, while others return to general principles, hoping to establish some type of standardized nomenclature.<sup>41</sup>

Psychologists evaluate moral damage from the perspective of its consequences on the individual, identifying a syndrome or establishing a set of symptoms characteristic of a specific disease or condition. In doing so, they contribute to the effort to define moral damage in a systematic and scientific manner.<sup>42</sup> Additionally, they have contributed to the creation of scales, such as the Moral Injury Symptom Scale-Military (MISS-M), which measures 45 symptoms of moral injury in veterans and active-duty military suffering from post-traumatic stress disorder,<sup>43</sup> and addresses factors such as guilt, shame, loss of faith, and others that are often overlooked in legal contexts.

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<sup>39</sup> Jorge Bermúdez, *Valoración del daño estético por cicatrices*, PERITAJEMEDICOFORENSE.COM, (last visited June 7, 2025), <https://www.peritajemedicoforense.com/Bermudez.htm>

<sup>40</sup> See *supra* note 24.

<sup>41</sup> COUR DE CASSATION, RAPPORT DU GROUPE DE TRAVAIL CHARGÉ D'ÉLABORER UNE NOMENCLATURE DES PRÉJUDICES CORPORELS (Jean-Pierre Dintilhac ed., 2005).

<sup>42</sup> Brett T. Litz et al., *Defining and Assessing the Syndrome of Moral Injury: Initial Findings of the Moral Injury Outcome Scale Consortium*, 13 FRONTIERS IN PSYCHIATRY 13, 1-16 (2022), <https://doi.org/10.3389/fpsy.2022.923928>

<sup>43</sup> Harold G. Koenig, *Measuring symptoms of moral injury in Veterans and Active Duty Military with PTSD*, 9 RELIGIONS 86 (2018), <https://doi.org/10.3390/rel9030086>

In Costa Rica, an actuarial expert is responsible for taking the percentage calculated by the medical expert who performed the damage assessment and transforming it into monetary terms to determine the victim's economic compensation. The actuarial expert is an expert in subjects such as "calculations of premiums, reserves, and guaranteed values in life insurance operations, quantitative analysis of actuarial systems in collective and social insurance and pension plans, the study of pricing problems and technical reserves in non-life insurance".<sup>44</sup>

The use of medical, psychological, dental, and accounting experts in each individual case allows a more personalized assessment guaranteeing that decision-making on compensation for moral damage is in harmony with the actual needs of the particular victim. It allows the damage award valuation to be both well-founded and falsifiable.

### 5. *The Actors in the Quantification of Moral Damages*

Based on the quantification systems analyzed above, a clear pattern emerges in the process employed by the various actors involved in the quantification of moral damage. This process consists of seven fundamental stages that form a comprehensive framework for identifying, evaluating, and quantifying moral damage. This framework consists of three main phases:

1. **Identifying Damages:** This phase involves two stages, establishing the existence of moral damage and identifying the specific harms suffered by the claimant.

2. **Evaluating Damages:** The second phase requires determining causation, intentionality, the degree and intensity of the harm, and then outlining potential methods of reparation.

3. **Quantifying Damages:** The final phase focuses on quantifying the amounts needed to repair each distinct harm and establishing a total monetary value for all moral damages.

In each of these phases, various actors contribute to quantifying moral damage: the judge or judicial authority, the victim or offended party, witnesses, experts or technicians, and the standardized compensation schedules. These elements may vary depending on whether the particular context is a hearing, court trial, jury trial, arbitration proceeding, or insurance settlement.

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<sup>44</sup> Mario Herrera Flores, *Cálculo de Indemnizaciones por daño corporal y moral y su relación con los dictámenes médico legales*, 25 MED. LEGAL DE COSTA RICA 47 (2008).

Table 1. Key Actors in the Process of Quantifying Moral Damages Compensation

Phases	Subjective System	Baremo and Baremo with Algorithm Systems	Mixed Expert-Judicial System
Existence	Judge	Judge, expert or baremo	Experts and Judge
Damages	Victim, offended party, witness and judge	Expert or baremo	Victim, offended party, witness, and experts
Modes	Victim, offended party, witness, or expert	Baremo or not applicable	Experts
Degree of Reparation	Judge, Victim, offended party, and judge	Baremo	Experts, Victim, offended party, and experts
Quantification	Judge	Baremo	Judge

Source: Author's own elaboration.

### A. *The Existence of Damage*

Each country's legislation will define the parameters required to establish the existence of damage. These will typically include identifying the occurrence of the harmful event, identifying the party responsible for the damage, and evaluating the legitimacy of the injured party's claims. In the subjective valuation system, the judge determines whether damage exists. In some cases, damage is presumed to exist. In the mixed system, as well as in the baremo-based systems, experts may participate, but not necessarily to prove the existence of moral damage, but rather to prove that the harmful action occurred.

The risk of delegating the determination of the damage's existence to a judge's discretion is that the decision may be influenced by personal bias if no binding laws or protocols constrain the action. This has occurred in cases involving violence against women and cases involving forced disappearances by the state,<sup>45</sup> where misogynistic criteria or political loyalties can interfere with the victim's right to justice.

For example, thanks to advances in many countries regarding the right of women to be free from violence, judges have been prevented from denying compensation to a woman raped by her husband. In the past, some judges con-

<sup>45</sup> Amparo en revisión 554/2013, Suprema Corte de Justicia de la Nación [S.C.J.N.], (Mex. Mar 25, 2015).

sidered that such an act could not result in moral damage, whereas others did not even regard such conduct as a crime.

Another possible problem is that judicial discretion allows the judge to presume the legitimacy of the victim's moral damage claims without requiring sufficient proof. The mere existence of kinship does not, however prove the existence of a caring or dependent relationship,<sup>46</sup> which creates opportunities for fraud.<sup>47</sup> An individual lacking an affective relationship with the victim may thus establish standing as an aggrieved party to seek compensation. Moreover, an offender can leverage this vulnerability by securing a relative, for financial consideration, to execute reparatory agreements and grant judicial pardons that ultimately allow the offender to avoid a custodial sentence.

### B. *The Damages Caused*

Damages can include all direct or indirect losses or injuries caused by the wrongful act of another. These need not be legally protected rights. They can include physical health, mobility, freedom of transit, mental health, emotional stability, work capacity, public fame, spirituality, and aesthetics, each of which are subjective and no consensus exists on how the deprivation of these qualities of life constitute moral damage.

There is no approach from philosophy, ethics, or bioethics that exhaustively determines what elements constitute morality, what acts can damage it, and in what ways. In Mexican jurisprudence, moral damage has been divided into damage to honor, aesthetic damage, and damage to feelings,<sup>48</sup> providing categories in which to frame each particular case.

There is a tendency to ensure that the reparation of moral damage is comprehensive, which is why researchers seek to break down and define each category. However, excessive classification has been criticized as impractical,<sup>49</sup> and often avoids distinctions that exist between bodily injury, pecuniary damage, and moral damage.

In the subjective system, the judge determines which of the person's rights have been damaged, but this determination can extend to losses that are not legally defined. For example, the right to health is not the same as the loss of a leg or the loss of one's self-esteem; freedom of worship is not the same as the

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<sup>46</sup> Benjamin Musso Arratía, *Sobre la prueba de los daños extrapatrimoniales*, 42 ACTUALIDAD JURÍDICA 581 (2020), <https://derecho.udd.cl/actualidad-juridica/files/2021/01/AJ42-P581.pdf>

<sup>47</sup> Cristián Eduardo Aedo Barrena & Renzo Munita Marambio, *La vinculación entre el concepto y la prueba del daño moral. Un análisis jurisprudencial*, 30 REV. DE DERECHO (COQUIMBO) 10 (2023), <http://dx.doi.org/10.22199/issn.0718-9753-4824>

<sup>48</sup> Amparo Directo 30/2013, Primera Sala, Suprema Corte de Justicia de la Nación [S.C.J.N.] (Mex. Feb. 26, 2014), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AD%2030-2013.pdf>

<sup>49</sup> German Antonio Orozco Gadea, *Concepto de daño moral*, 28 REVISTA DE DERECHO 3 (2020), <https://doi.org/10.5377/derecho.v0i28.10142>.

hopelessness that results from being deprived of a place of prayer; the right to freedom of movement is not the same as being unable to leave your home. To develop a deeper understanding in order to make an appropriate assessment of losses in a particular case, the judge may consider the testimony of victims or other witnesses.

In the other systems mentioned above, experts are used, though often in a limited capacity. For instance, medical experts can assess dental and even psychological damage and offer opinions on matters outside their specific area of expertise. However, in any system, entrusting the determination of psychological damage to a person who is not an expert in psychology risks injustice.

### *C. Modes of Damage Causation*

The modes of damage causation include intentionality, negligence, and the degree of responsibility of the person who caused the damage. The victim's own responsibility must also be considered. In the subjective system, the judge must listen to the testimony of the victim and other witnesses to ascertain the existence of malice or negligence; any provocation or contributory involvement by the victim in the events; the presence of any justifying circumstances; and the perpetrator's capacity to discern right from wrong.

In the latter case, both in the subjective and mixed systems, if it is suspected that the offender cannot be held responsible for his actions, an expert psychologist and a medical expert are required, depending on the possible origin of the disability. In the baremo-based systems, on the other hand, this issue might invite a superficial or null approach, as these systems have been designed to simplify and standardize resolutions, not individualize them.

In the mixed system, there is increasing expert specialization. These experts play a crucial role in determining how damage originated and shedding light on whether negligence or criminal intent was involved. For example, a civil engineering expert could assist in a determination of negligence by identifying the lack of maintenance of a structure that had collapsed. It is even possible for a criminologist to assist in gathering evidence related to intentionality, or for a criminalist to analyze the unfolding of events. However, prosecutors frequently do not request these types of expert reports.

### *D. The Degree of Damage*

The evaluation of the degree of damage refers to the long-term impact on a person's overall quality of life and life project. This assessment must distinguish whether the damage is correctable in the short, medium, or long term, or if it is altogether irreparable.

In the subjective system, the judge listens to all of the participants' statements and analyzes the established facts. Using principles of logic, prudent

assessment, and common knowledge, the judge makes a determination, categorizing the damage as mild, moderate, or severe.

In the baremo-based systems, the assessment is highly standardized. The percentages that gauge the severity of the damage are determined by predetermined categories that directly correlate with a specific compensation amount.

The mixed system employs an expert to evaluate the degree of damage. The expert considers various factors —such as age, sex, social condition, life history, and religiosity— to ensure their opinion is scientifically supported. This method exhaustively addresses the severity, extent, and intensity of the damage by attending to its specific effects on the individual.

### E. *Reparation*

The ideal objective of compensation is *restitutio in integrum*: providing actual reparation for all damage caused and restoring the injured party to their pre-damage state. Where this is not feasible, monetary compensation must be substituted. Present and future expenses resulting from the damage must be included. The judge in the subjective system awards a monetary sum. However, he could also accept, at the victim's request, that compensation be made in a different form, such as an apology or a publication in a newspaper or on social media. On the other hand, in the baremo-based systems, the exact amount of compensation is already established as well as any compensation for optional factors the schedule allows for that might be applicable to the case.

In the mixed system, experts may identify the short and long-term effects victims face as well as how these effects will impact their life project. Thus, they might propose both monetary compensation and medical or psychological treatment. Or they may suggest the victim be compensated in additional ways. For example, restorative justice provides mechanisms that allow the victim to regain security and control of their lives by meeting with their offender in a controlled environment and giving them the opportunity to offer an apology. Sometimes, the offender's acknowledgment of the harm he caused and the public disclosure provides a mechanism preventing similar situations from recurring. In some cases, this can be one of the most significant remedies for the victim, such as in cases involving crimes committed by the state against private individuals.

### E. *Quantification*

The process of determining the monetary value for repairing or compensating specific damages involves calculating the financial cost of each necessary action required for restoration. Alternatively, it may involve establishing a monetary sum that can temporarily address the loss, negative impact, or reduction in the quality of life experienced by the victim.

Judges operating in the subjective and mixed systems determine monetary amounts by assessing the type of damage, the right violated, the degree of victim impact, and the offender's intent, but they are not required to clarify their precise methodology. Although expert opinions may contain compensation proposals supported by substantiated studies, these serve only as a non-binding reference for the court.

In contrast, the baremo-based system establishes the exact compensation amount—and any optional, supplementary compensation—upfront. However, the parameters used to construct the schedule are often unjustified or unstated. This lack of transparency makes it impossible to discern why one concept of damage receives a high monetary value while another, potentially more critical to the victim, receives a lower one.

### *G. Total Compensation*

The total quantum of the moral damage, is the sum of the economic amounts required for full reparation and compensation for each identified injury, or, as the case may be, any in-kind ways to do so. In this phase, the judge in the subjective and mixed systems may consider, before making a final calculation, any particular conditions or characteristics of the offender and the victim, both economic and those related to their support networks. Therefore, the final amount of compensation for moral damage can be very different even in similar cases.

In judicial proceedings, the judge typically determines the total amount of reparation required, as does the arbitrator in arbitration cases. This differs from the systems where a standardized compensation schedule, or baremo, by itself dictates the amount. This is especially common in cases resolved by insurance companies.

No single expert is responsible for quantifying total moral damage. Although expert reports may have been presented in court that assess a person's life project and propose a monetary value for the moral damage, judges consider these as just one piece of evidence among others, which they may or may not take into account in their final ruling.

## **IV. Discussion**

We identified four systems used for the quantification of moral damage, each of which is imbued with subjectivity, although with the aim of avoiding arbitrariness. The very concept of moral damage, with the difficulties regarding its definition and the standardization of the various aspects of damage it covers, carries the risk of injustice when awarding excessively high or low compensation. Some attempts to provide objectivity seek to mix these systems, creating

scales combined with expert evidence to assist in the prudent exercise of discretion by the judge.

The subjective system is the most common, although not in its pure form, as it may make use of experts or even some schedules. However, the judge's decisions based on logic, sound judgment, and maxims of experience predominate—a method also called judicial discretion—which, although it compels use of a certain jurisprudential method of analysis in valuation determinations, still provides room for subjectivity and arbitrariness. The result is that awards for moral damage can be very dissimilar from one court to another, or even from one case to another involving the same judge.

Baremo-based systems aim to standardize decision-making regarding the assessment of moral damage. However, the development of these systems has not always involved professionals from relevant fields, such as physicians, dentists, psychologists, priests, accountants, or others whose expertise might be pertinent to a specific case. The baremo that utilizes algorithms—essentially, one based on statistical data—offers a more standardized approach and can be seen as more objective and fair. Nevertheless, it also faces criticism for failing to consider individual subjective factors, such as people's individual expectations. When these expectations are unmet, they can lead to depressive emotional states that affect one's quality of life and future opportunities. Additionally, this approach can be perceived as somewhat discriminatory against certain groups based on gender, age, ethnicity, race, or place of residence.

The mixed expert-judicial system is, in our opinion, a more objective way to approach the quantification of moral damage, as it makes greater use of the opinions of experts in various branches who could support the judge's decision-making, and provides them with a scientific basis for their final judgments. This system is progressively replacing the subjective one, thanks to international jurisprudence that has been encouraging the consolidation of a system of integral reparation, especially when it concerns damages caused by the state to its citizens. Therefore, the standards of reparation have become increasingly broad, and the need for a system based on scientific principles is more imperative.

However, the impact of experts who propose a total quantification of moral damage, whether in a multidisciplinary or individual manner, is still low. Although the psychology expert's report typically specifies the required number of weekly sessions and the average cost per session, it does not necessarily conclude that the total treatment cost can be determined simply by multiplying these two figures. The medical expert can refer to the cost of prosthesis or present or future medical expenses; an accountant or actuary can calculate the amounts the victim would cease to earn by being unable to work. In fact, with the partial contributions from each expert, the judge can make decisions based on objective criteria.

Currently, expert reports on the valuation of a victim's life project have been submitted in courts, which include a quantification of the moral damages suffered. These reports are issued by expert witnesses who represent one of the

parties in the lawsuit, but they are not typically challenged by similar expert testimony from experts appointed by the court. This is in part because if the judge were to request such a report from official experts, it would legitimize these reports as a valid means of quantifying moral damages.

The proposal for a permanent panel of court-remunerated expert witnesses, along with the alternative that the public exchequer bear the fees for any report they issue, has met with resistance. Although requiring the parties to absorb the costs of numerous such reports can be prohibitively expensive, no expense should be spared to ensure a top-tier justice system, a standard the state is obligated to guarantee its citizens.

Claims for non-pecuniary damages in civil actions and compensation for damages imposed in criminal cases are similar in their need to establish clear and equitable procedures to quantify the amounts of compensation and restitution. When it comes to criminal cases, determining the existence of a crime sometimes requires the participation of various experts in different scientific fields who contribute not only to determining if the act actually occurred, but also how it happened, and whether there was intent or negligence that aggravated it, or any justification that mitigated it.

These expert opinions can be used in subsequent phases of the case when there is a need to quantify any non-pecuniary damage suffered, especially if they include information regarding economic expenses an individual will need to incur in the future. They can also establish, for example, the existence of damage to a person's physical or mental health, the intensity of the harm suffered, and whether its impact on the individual will be over the short, medium, or long term. Following these examples, experts in each specialty should determine the form, intensity, and lifelong impact of the harm, and then make proposals for economic or symbolic compensation.

However, the creation of a system where experts determine the existence of damage, its effects and characteristics, causation, degree, forms of reparation and quantification, remains distant. It faces significant practical and institutional barriers, as well as detractors among lawyers who find the use of experts costly, and among judges who refuse to abandon the stance of considering themselves *peritus peritorum*, or the expert of experts.

While the use of judicial discretion is unavoidable, it must not be arbitrary.<sup>50</sup> Its effects can be restrained when effective jurisprudential parameters are in place. However, the emotional dimension of moral damage determination necessitates specialized instruments to ensure sound decision-making.

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<sup>50</sup> Juan B. Etcheverry, *Discrecionalidad Judicial*, in 2 ENCICLOPEDIA DE FILOSOFÍA Y TEORÍA DEL DERECHO 1389, 1389-1418 (Jorge Luis Rodríguez Blanco & Verónica Fabra Zamora eds., 2015). <https://dialnet.unirioja.es/servlet/articulo?codigo=6346062>

## V. Conclusions

The moral damage compensation systems in the countries analyzed for this article fall into four categories: subjective, baremo-based, baremo-with-algorithms, and a mixed expert-judicial system that is currently consolidating.

Procedures for calculating moral damage are often not standardized and sometimes lead to inconsistent judgments in similar cases. While this lack of standardization might permit more personalized and fair compensation through the prudent use of judicial discretion, it also creates uncertainty for both the victim and the offender regarding the minimum or maximum amount of compensation. This situation emphasizes the need to establish objective criteria in order to limit judicial discretion or to implement techniques and tools to make the process of quantifying damage more objective.

Current legislation emphasizes the goal of comprehensive compensation for moral damage. However, this does not imply that monetary awards should always be higher or that they are the only form of reparation. To fully understand how actions impact individuals and how to compensate them appropriately, judges must rely on experts in the relevant fields.

The main limitation of this article is that each country faces unique circumstances based on its own legal framework, justice system, and available resources. As a result, creating a single proposal applicable to all countries presents a significant challenge. However, the overall proposal of establishing standardized mechanisms to quantify non-pecuniary damages that ensure fair decisions for both the victim and the offender is one which addresses common issues faced by all countries.

The goal is not to create a “moral damage expert” who performs the final quantification. Rather, it is to provide judges with objective parameters for their determinations that are based on multidisciplinary contributions. We advocate greater involvement of experts from various fields, including psychology, medicine, criminology, social work, dentistry, bioethics, engineering, and accounting, tailored to the needs of each specific case.

Some professionals could assist in the initial phases by identifying and evaluating moral damage through discussions with both the victim and the offender. Others could participate in the later stages of the moral damages claim, determining methods for quantifying the harm and proposing a comprehensive assessment.

This approach seeks to standardize an equitable and personalized procedure for assessing and quantifying moral damage, transcending a simple pecuniary award. It would require experts involved in the judicial process to include a section in their reports that presents a proposal the judge could use to justify their decisions in non-pecuniary damage claims.

The objection to expert involvement, often based on cost rather than their qualifications, presents an obstacle that can be overcome. For instance, state-

funded panels of experts could ensure independence and impartiality. Although funding such panels may be a burden on the state, an effective and fair judicial system is one of the guarantees that the state is obligated to provide to its citizens.

We contend that a robust, hybrid expert-judicial system offers the greatest advantage for achieving just outcomes in non-pecuniary damages cases, since it grounds judicial decisions in objective, expert-provided criteria. We hope this article guides researchers in standardizing methodologies within their fields.

## VI. References

- Abbas Mirshkari & Fatemeh Sadat Hosseini, *A Comparative Study of the Method of Compensating Moral Damages with an Emphasis on the Approach of Iranian Judicial Practice*, 121 JUDICIARY'S L. J. 351, 378 (2023). <https://doi.org/10.22106/jlj.2022.544179.4557>
- Alfonso Curiel Valtierra, Carlos Alberto Vela Treviño & Arturo Lara-Hernández, *Mexico: Mexican Supreme Court issues guidelines to calculate compensation for moral damage*, LEXOLOGY, (Sept. 13, 2023), <https://www.lexology.com/library/detail.aspx?g=3c402ff6-c56a-4adf-9930-7452248bbe26>
- Amparo Directo 30/2013, Primera Sala, Suprema Corte de Justicia de la Nación [S.C.J.N.] (Mex. Feb. 26, 2014), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AD%2030-2013.pdf>
- Amparo en revisión 554/2013, Suprema Corte de Justicia de la Nación [S.C.J.N.], (Mex. Mar 25, 2015).
- Andrey T. Tabunshikov et al., *Compensation for Moral Harm in Foreign Law and Order*, 27 OPCIÓN 2090, 2082-2098 (2020).
- Armando José Torrent Ruiz, *Pretium affectionis o daños morales en la aestimatio damni ex lege Aquilia*, in 6 FUNDAMENTOS ROMANÍSTICOS DEL DERECHO CONTEMPORÁNEO 1245 (Justo García Sánchez dir. & Margarita Fuenteseca Degeneffe coord., 2021).
- Benjamin Musso Arratia, *Sobre la prueba de los daños extrapatrimoniales*, 42 ACTUALIDAD JURÍDICA 581 (2020). <https://derecho.udd.cl/actualidad-juridica/files/2021/01/AJ42-P581.pdf>
- Brett T. Litz et al., *Defining and Assessing the Syndrome of Moral Injury: Initial Findings of the Moral Injury Outcome Scale Consortium*, 13 FRONTIERS IN PSYCHIATRY 13, 1-16 (2022). <https://doi.org/10.3389/fpsy.2022.923928>
- CÁMARA DE DIPUTADOS DEL CONGRESO DE LA UNIÓN, CÓDIGO CIVIL FEDERAL (D.O.F., 2024).
- CARLOS ALBERTO GHERSI, CUANTIFICACIÓN ECONÓMICA, DAÑO MORAL Y PSICOLÓGICO. DAÑO A LA PSIQUIS (Astrea, 3a ed., 2006).

- COLEGIO DE PERITOS DEL NORTE, INFORME DE LAS ASAMBLEAS DE TRABAJO SOBRE RETOS DE LOS PERITOS VALUADORES (2024).
- COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET OF THE EUROPEAN PARLIAMENT, DRAFT REPORT WITH RECOMMENDATIONS TO THE COMMISSION ON A EUROPEAN DISABILITY RATING SCALE 2003/2130 (2003), <https://www.europarl.europa.eu/meetdocs/committees/juri/20040223/505310EN.pdf>
- COUR DE CASSATION, RAPPORT DU GROUPE DE TRAVAIL CHARGÉ D'ÉLABORER UNE NOMENCLATURE DES PRÉJUDICES CORPORELS (Jean-Pierre Dintilhac ed., 2005).
- Cristián Eduardo Aedo Barrena & Renzo Munita Marambio, *La vinculación entre el concepto y la prueba del daño moral. Un análisis jurisprudencial*, 30 REV. DE DERECHO (COQUIMBO) 10 (2023). <http://dx.doi.org/10.22199/issn.0718-9753-4824>
- ÉCOLE NATIONALE DE LA MAGISTRATURE, RÉFÉRENTIEL INDICATIF DE L'INDEMNISATION DU PRÉJUDICE CORPOREL DES COURS D'APPEL, 7 (2024).
- Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27 (2003). <https://doi.org/10.1086/344560>
- Frans J. A. Van Der Velden, *The Dutch law of pretium doloris*, in NETHERLANDS REPORTS TO THE ELEVENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (Hans Ulrich & Jessurun D'oliveira eds., 1982).
- FRIEDRICH MOMMSEN, BEITRÄGE ZUM OBLIGATIONENRECHT. 2 ZUR LEHRE VOM INTERESSE 27 (Braunschweig, Schwetschke & Sohn, 1855).
- German Antonio Orozco Gadea, *Concepto de daño moral*, 28 REVISTA DE DERECHO 3 (2020). <https://doi.org/10.5377/derecho.v0i28.10142>.
- Harold G. Koenig, *Measuring symptoms of moral injury in Veterans and Active Duty Military with PTSD*, 9 RELIGIONS 86 (2018). <https://doi.org/10.3390/rel9030086>
- Jerónimo Aznar, Vicente Estruch & Pablo Aragonés-Beltrán, *Environmental assets valuation method using AMUVAM application to the assessment of the Natural Park of Ebro River Delta*, in PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON THE ANALYTIC HIERARCHY PROCESS (2011).
- Jesús Abraham Martínez Montoya, *La indeterminación económica de daño moral*, 6 HEURÍSTICA JURÍDICA 59 (2013). <https://erevistas.uacj.mx/ojs/index.php/heuristica/article/view/1201>
- Jorge Bermúdez, *Valoración del daño estético por cicatrices*, PERITAJEMEDICOFORENSE.COM, (last visited June 7, 2025), <https://www.peritajemedicoforense.com/Bermudez.htm>
- Juan B. Etcheverry, *Discrecionalidad Judicial*, in 2 ENCICLOPEDIA DE FILOSOFÍA Y TEORÍA DEL DERECHO 1389, 1389-1418 (Jorge Luis Rodríguez Blanco & Verónica Fabra Zamora eds., 2015). <https://dialnet.unirioja.es/servlet/articulo?codigo=6346062>
- Juliana Nanclares Márquez & Ariel Humberto Gómez Gómez, *La reparación: una aproximación a su historia, presente y prospectivas*, 33 CIVILIZAR 60-63 (2017). <https://doi.org/10.22518/16578953.899>

- Loayza Tamayo v. Perú*, Sentencia de Reparaciones y Costas, Inter-Am. C.H.R (Nov. 27, 1998). [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_42\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_42_esp.pdf)
- LUCÍA ALEJANDRA MENDOZA MARTÍNEZ, *LA ACCIÓN CIVIL DEL DAÑO MORAL* 136 (Instituto de Investigaciones Jurídicas UNAM, 2014). <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3636/10.pdf>
- Luis Corpas Pastor, *La (In)suficiencia del Baremo de Tráfico en la Valoración del Daño Dental*, 18 ACTUALIDAD JURÍDICA IBEROAMERICANA 856 (2023). [https://revista-aji.com/articulos/2023/18/AJI18\\_31.pdf](https://revista-aji.com/articulos/2023/18/AJI18_31.pdf)
- Lusitania Cases*, 7 U.N. Rep. Int'l Arb. Awards 32 (Mixed Claims Comm'n 1923).
- M. A. Akimbekova et al., *Matters on Compensation of Moral Damage: Practical Aspects*, 17 INT'L J. ENVTL. & SCI. EDUC. 9733 (2016).
- Magdalena Lazcano Maturana & Javiera Toro Cáceres, *Estudio cuantitativo de la indemnización de perjuicios extrapatrimoniales por infracciones a los derechos de los consumidores*, 245 REV. DE DERECHO 110, 99-131 (2019). <http://dx.doi.org/10.4067/S0718-591X2019000100099>
- Manuel Clavero Ternero, *Daños Morales: una visión multidisciplinar*, ECONOMIST & JURIST 18, 18-29 (2011). [https://www.economistjurist.es/wp-content/uploads/sites/2/2014/02/doc\\_id\\_483.pdf](https://www.economistjurist.es/wp-content/uploads/sites/2/2014/02/doc_id_483.pdf)
- MANUEL GONZALO BURGUEÑO IBARGUREN, *DOSIER DOCTRINARIO (Poder Judicial Provincia del Chubut, 2020)*.
- Margarita Zhuravlyova, *Validez del uso de la presunción de daño moral por parte de psicólogos expertos*, 32 SLOVO OF THE NATIONAL SCHOOL OF JUDGES OF UKRAINE 170 (2020).
- Mario Herrera Flores, *Cálculo de Indemnizaciones por daño corporal y moral y su relación con los dictámenes médico legales*, 25 MED. LEGAL DE COSTA RICA 47 (2008).
- M. G. BURGUEÑO IBARGUREN, *DOSIER DOCTRINARIO*, (2020).
- Mohammad Eshaghi et al., *A Comparative Study of Compensation for Moral Damages in the Legal System of Iran and England International*, 6 J. ETHICS & SOC. 38, 31-40 (2024).
- Muelle Flores v. Perú*, No. 375 (Mar. 6, 2019), *Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C)*. [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_375\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_375_esp.pdf)
- Oscar Andrés Alanís López, *Avalúo de Proyecto de Vida*, LVIII Congreso Internacional de Valuación (Veracruz, 2023).
- Paola Karen León Gutiérrez, *Reparación del daño moral con base en los lineamientos de la Corte Interamericana de Derechos Humanos*, 8 REV. LEX 116 (2020). <https://doi.org/10.33996/revistalex.v3i8.50%20>
- Rafael Álvarez Vigaray, *La responsabilidad por daño moral*, 19 ANUARIO DE DERECHO CIVIL 81 (1966). <https://revistas.mjjusticia.gob.es/index.php/ADC/article/view/3469/3469>
- Ramón Maciá Gómez, *La dualidad del daño patrimonial y del daño moral*, REV. DE RESPONSABILIDAD CIVIL Y SEGURO 21, 32 (2010). <https://www.asociacionabogadosrcs.org/doctrina/rc36doctrina2.pdf>

Siegfried von Ciriacy-Wantrup, *Capital Returns from Soil-Conservation Practices*, 29  
AMER. JOUR. OF AGRIC. ECON. 1181 (1947). <https://doi.org/10.2307/1232747>  
THOMAS L. SAATY & LUIS G. VARGAS, *MODELS, METHODS, CONCEPTS & APPLICATIONS OF THE ANALYTIC HIERARCHY PROCESS* (Springer, 2nd ed., 2012).

# Duties Towards Oneself and Self-Regarding Actions in the System of Reciprocal Duties

*Deberes contraídos con uno mismo y acciones relacionadas con uno mismo en el sistema de deberes recíprocos*

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**Abstract:** In this article, we aim to examine the relationship between behaviors that are exclusively governed by internal legislation and those that are also subject to external legislation. The former are governed exclusively by *prima facie* duties towards oneself, while the latter establish the scope of *prima facie* duties towards others. We propose that the sphere of duties towards oneself serves as the basis for the entire system of reciprocal duties. The self-determination of the individual constitutes the cornerstone of a system of duties and rights across various levels or corresponding to the individual, social, and public spheres. Duties towards oneself allow for the evaluation of options in the cognitive process of self-regulation of the individual. From those premises, rational individuals can determine their own ends and exercise free will. This internal process is expressed in the world of the senses through behavior, which may include acts relating to oneself in the private sphere or acts relating to others in the social and public spheres. Therefore, their effects are not limited to the internal sphere but are part of complex reciprocal relationships.

**Keywords:** reciprocal duties; self-regarding acts; principle of reciprocity; duties towards others; free will.

**Resumen:** En este artículo, nos proponemos examinar la relación entre las conductas regidas exclusivamente por la legislación interna y aquellas sujetas también a la legislación externa. Las primeras se rigen exclusivamente por deberes *prima facie* hacia uno mismo, mientras que las segundas establecen el alcance de estos deberes hacia los demás. Proponemos que la esfera de los

deberes hacia uno mismo sirve de base para todo el sistema de deberes recíprocos. La autodeterminación del individuo constituye la piedra angular de un sistema de deberes y derechos en diversos niveles o correspondientes a las esferas individual, social y pública. Los deberes hacia uno mismo permiten la evaluación de opciones en el proceso cognitivo de autorregulación del individuo. A partir de estas premisas, los individuos racionales pueden determinar sus propios fines y ejercer el libre albedrío. Este proceso interno se expresa en el mundo de los sentidos a través de la conducta, que puede incluir actos relacionados con uno mismo en la esfera privada o actos relacionados con otros en las esferas social y pública. Por lo tanto, sus efectos no se limitan a la esfera interna, sino que forman parte de complejas relaciones recíprocas.

**Palabras clave:** deberes recíprocos; actos propios; principio de reciprocidad; deberes hacia los demás; libre albedrío.

**Summary:** I. *Introduction*. II. *Duties Towards Oneself*. III. *From Duties Towards Oneself to Self-Regarding Acts*. IV. *From Self-Regarding Acts to the Model of Spheres*. V. *Self-Regarding Contracts*. VI. *Conclusion*. VII. *References*.

## I. Introduction

According to Kant, ethics is characterized by internal legislation that occurs through the autonomous determination of an individual's maxim of will. In contrast, the legal system (Recht) is the framework that governs external relations between individuals insofar as their actions can affect each other.<sup>1</sup> Fichte refined this idea. The concept of law presupposes two necessary conditions. In first place, a group of rational beings find themselves in a social sphere. Only in this case is law possible. If no such social sphere exists, then everyone can follow their own understanding and will. In second place, in this common sphere, there must be the possibility that the freedom of one person interferes with that of another. This interference can be remedied only by the legal system. If there is no possibility of interference, then there is no law.<sup>2</sup>

Kant classifies the duties to oneself within the field of ethics, which is separate from the legal system. This dichotomous scheme is characteristic of deductive logic based in a priori principles; a distinction is made between opposing concepts: "...of every A, the opposite is not A".<sup>3</sup> However, this article proposes establishing relationships that allow for the integration of concepts, forming

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<sup>1</sup> Immanuel Kant, *Die Metaphysik der Sitten. Metaphysische Anfangsgründe der Tugendlehre*, in KANT'S GESAMMELTE SCHRIFTEN 230 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band VI, 1914).

<sup>2</sup> JOHANN GOTILIEB FICHTE, RECHTSLEHRE: VORGETRAGEN VON OSTERN BIS MICHAELIS 1812 7 (Felix Meiner Verlag, 1980).

<sup>3</sup> IMMANUEL KANT, IMMANUEL KANTS LOGIK: EIN HANDBUCH ZU VORLESUNGEN. § 113 (Königsberg, Bey Friedrich Nicolovius, 1800).

thus a reciprocal duties system, where ethics and law coexist. We aim to understand the complex interplay between situations determined solely by internal legislation in the sphere of prima facie duties toward oneself and situations that also admit external legislation, which establish the content and scope of prima facie duties toward others. First, we ask what place duties toward oneself have within a holistic system of reciprocal duties. We will consider Kant's moral doctrine from the perspective of his predecessor, Pufendorf, his contemporaries, Humboldt and Fichte, and the evolution of the theory of self-regarding acts of Mill and Feinberg.

In this article, we aim to examine the relationship between behaviors that are exclusively governed by internal legislation and those that are also subject to external legislation. The former are governed exclusively by prima facie duties towards oneself,<sup>4</sup> while the latter establish the content and scope of prima facie duties towards others. We will maintain that the sphere of duties towards oneself serves as the basis for the entire system of reciprocal duties. The self-determination of the individual constitutes the cornerstone of a system of duties and rights across various levels corresponding to the individual, social, and public spheres. From those premises, rational individuals can determine their own ends and exercise free will. This internal process is expressed through a person's behavior, which may include acts relating to oneself in the private sphere or acts relating to others in the social and public spheres. Therefore, the effects of an individual's action are not limited to the internal sphere but are part of complex reciprocal relationships regarding rights and duties towards others.

In chapter 1, we will study the concept of prima facie duties towards oneself and their relationship with the free will of the individual. In chapter 2, we will examine the role of duties towards oneself within the framework of jural relationships. We will argue that an individual's will, free from external coercion, is a fundamental component of individual rights. From this perspective, subjective rights can be seen as the external expression of duties towards oneself. Once an individual has autonomously chosen their maxim of will, the function of individual right acts as the execution of that will and is directed against the social will, to make the individual will a prima facie duty of all people. From a factual perspective, the above process may be divided into two scenarios: non-conflictual relationships and conflictual relationships. We will distinguish between non-conflictual jural relationships, which contain elements that do not admit or require external legislation, and conflictual jural relationships, which must be resolved to reestablish a peaceful state of no-right.

In chapters 3 and 4, we will review several problematic aspects of the doctrine of self-regarding acts, based on case studies. We will analyze the relationship between the concept of self-regarding acts and the model of spheres. We will distinguish between the intimate sphere (as the core of the private sphere), in which the individual acts as the sole and final judge of acts referring to himself, and the social and public sphere, in which conduct is subject to duties towards others, based on criteria of justice derived from the social contract. In

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<sup>4</sup> We will use Pufendorf's division between duties towards oneself and duties to others.

chapter 5, we will attempt to determine whether and to what extent the doctrine of self-regarding acts is applicable to contractual relationships. The reference to duties towards oneself and towards others also serves to delineate the subject matter; we will not address issues relating to subjects who do not have full capacity to act rationally and who, therefore, cannot be the bearers of duties.

## II. Duties Towards Oneself

The prima facie duties towards oneself are the reasons that allow the conscience to act as an internal judge in order to comply with the duty. This process constitutes the initial step of a system of duties and rights based on the principle of autonomy. Pufendorf first distinguishes between the divine, natural and civil spheres, which may overlap and conflict.<sup>5</sup> Natural law is divided into two categories: the duties that individuals owe to themselves and the duties that individuals must exercise towards others. The content of the duties towards oneself is “to put himself into the best condition he can, and to obtain all the Happiness of which he is innocently capable”.<sup>6</sup>

According to Pufendorf, the duties of the individual towards himself have a twofold foundation. On the one hand, such duties are rooted in “that love which every Man by Nature hath of himself”.<sup>7</sup> However, these responsibilities extend beyond mere egoistic considerations. Given that each person is not born for himself alone but has been created by God to become a valuable member of human society, there is a responsibility to cultivate and improve those gifts and to contribute to the benefit of human society to the greatest extent possible.<sup>8</sup> From this perspective, these duties stem from religion and sociability. Therefore, a connection is formed between the personal sphere of the individual and the social sphere of the citizen. This connection challenges the dichotomy relationship between personal interests and social interests. It serves as a point of reference and overlap between these two spheres of life.<sup>9</sup>

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<sup>5</sup> Michael Seidler, *Introductory essay*, in SAMUEL PUFENDORF’S ON THE NATURAL STATE OF MEN: THE 1678 LATIN EDITION AND ENGLISH TRANSLATION 22 (Michael Seidler ed. and trans., Edwin Mellen, 1990).

<sup>6</sup> SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE 56 (R. Gosling, 1735).

<sup>7</sup> *Id.*; SAMUEL PUFENDORF, *Officia Hominis & Civis*, in SAMUEL PUFENDORF, GESAMMELTE WERKE 133 (Wilhelm Schmidt-Biggemann ed., Band 2, 1997) (1673).

<sup>8</sup> Pufendorf, *supra* note 6, at 56; Pufendorf, *supra* note 7, at 133.

<sup>9</sup> Raz has rejected the dichotomy between self-interest and the moral demands of others and with it the dichotomy between egoism and altruism. The conflict between individual welfare and the common good coexists with an essential mutually sustaining connection between them: “Instead of essentially competing with the well-being of the individual, the common good is presupposed by it.” JOSEPH RAZ, *Rights and Individual Well-Being*, in ETHICS IN THE PUBLIC DOMAIN. ESSAYS IN THE MORALITY OF LAW AND POLITICS 57, 58 (Clarendon Press, 1992).

To become a useful member of human society, an individual has the duty to take the utmost care of his body and soul. He must be instructed so that he can form a just opinion about everything pertaining to his duty and office.<sup>10</sup> We must use our utmost care and endeavor to procure and preserve our reputation as good and honest men. If this reputation is affected by the lies and slander of wicked men, we must do everything in our power to dispel them.<sup>11</sup> Everyone should learn something appropriate to their ability and status, so they do not become useless to himself and to society.<sup>12</sup>

Duties to oneself also occupy a central place in Kant's system of duties:

For suppose there were no such duties: Then there would be no duties whatsoever, and so no external duties either. For I can recognize that I am under obligation to others only insofar as I at the same time put myself under obligation, since the law by virtue of which I regard myself as being under obligation proceeds in every case from my own practical reason; and in being constrained by my own reason, I am also the one constraining myself".<sup>13</sup>

Next, we will review objections to the concept of duties to oneself (1) and distinguish between their individual and social obligatoriness (2). Then, we will conclude with their *prima facie* character (3) and highlight their relationship to the valuation of conduct in both the private and social spheres (4).

### 1. *An Apparent Contradiction*

Kant recognized the relevance of clarifying the apparent contradiction inherent in the concept of duties towards oneself. He observed that such an expression could be interpreted as an obligation in which the condition of active and passive subject, who demands and who must fulfill is united in the same person. At the same time the passive subject could be released from the obligation at any time, so that he would not be obligated.<sup>14</sup> Similar objections have been raised by Marcus Singer. Singer rejected the possibility of the existence of a right against oneself and argued that the power to release oneself is incompatible with the concept of duty.<sup>15</sup> However, Singer notes that duties to oneself are not socially binding unless they are also duties to others.<sup>16</sup>

To address this apparent contradiction, Kant first emphasizes the fundamental role of practical reason, from which derives the law by virtue of which the

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<sup>10</sup> Pufendorf, *supra* note 6, at 57; Pufendorf, *supra* note 7, at 133.

<sup>11</sup> Pufendorf, *supra* note 6, at 62; Pufendorf, *supra* note 7, at 135.

<sup>12</sup> Pufendorf, *supra* note 6, at 136.

<sup>13</sup> Immanuel Kant, *supra* note 1, at 418.

<sup>14</sup> *Id.*

<sup>15</sup> Marcus G. Singer, *On Duties to Oneself*, 69 *ETHICS* 202 (1959). <http://www.jstor.org/stable/2379349>.

<sup>16</sup> *Id.*

subject can consider itself bound to itself and to others.<sup>17</sup> Kant distinguishes between the aspect of a person that is morally legislative and the aspect that is morally constrained.<sup>18</sup> On the one hand, a person is a sensory being and, on the other hand, a rational being. This being, endowed with inner freedom, is capable of being bound and can recognize a duty to itself.<sup>19</sup>

Although consciousness is an internal process, philosophers have used a second-person perspective to refer to it. In the metaphor of internal judgment, consciousness determines whether behavior conforms to the individual's established sense of duty. According to Pufendorf, conscience is accompanied by peace or uneasiness of mind depending on whether "it makes us expect the peace or anger of the legislator and the benevolence or hostility of others toward us."<sup>20</sup> Kant concurs with Pufendorf. It would be illogical for the court to be under the sole authority of a single person, as this would result in the accused individual always losing.<sup>21</sup> Similarly, Feinberg draws inspiration from the metaphor of self-government in Plato's Republic. In Feinberg's democratic model, government is entrusted to "King Reason", who functions as a traffic cop, ensuring that desires move in an orderly fashion towards their respective destinations without congestion or collisions.<sup>22</sup> For Darwall, moral agency refers to an individual's capacity to adopt a second-person perspective, making judgments, and regulating their behavior.<sup>23</sup> From this perspective, the concept of moral obligation suggests that the obligated individual has the capacity to hold themselves accountable as a representative person.<sup>24</sup>

## 2. *Enforceability of Duties Towards Oneself*

External coercion is not an inherent element of the concept of duty. Kant distinguished two elements of all legislation. The first is a law representing an objectively necessary action. In other words, such law makes the action a duty. The second element is an artificial incentive that connects the law to a ground

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<sup>17</sup> Immanuel Kant, *supra* note 1, at 418.

<sup>18</sup> Lara Denis, *Kant's Ethics and Duties to Oneself*, 78 PAC. PHIL. Q. 321, 335 (1997). <https://doi.org/10.1111/1468-0114.00042>.

<sup>19</sup> Immanuel Kant, *supra* note 1, at 418

<sup>20</sup> Sam. L. B. A Puffendorf, *De Jure Naturae et Gentium: Libri octo (Buch I)* 541 (Ex Officina Knochiana, 1744) (1672).

<sup>21</sup> Immanuel Kant, *supra* note 1, at 438.

<sup>22</sup> JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 41 (Oxford University Press, 1989).

<sup>23</sup> STEPHEN DARWALL, *Moral Obligation: Form and Substance*, in *MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS* 40, 47 (Oxford University Press, 2013).

<sup>24</sup> STEPHEN DARWALL, *Introduction*, in *MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS I, XIII* (Oxford University Press, 2013).

for each individual to determine a choice subjectively. Ethical law combines necessity and motive. Duties toward oneself are not enforced by external coercion, nor do they correspond to the rights of others. They are based only on “free self-constraint”.<sup>25</sup> In contrast, duties towards others (duties of right) do admit external coercion. The ability or power to free oneself from duties towards oneself is available to the obligated subject, unlike duties of right.

### 3. *Prima Facie Duties Towards Oneself*

In contrast to Kant’s view, Pufendorf asserts that lying is only wrong when the other party has a right to understand the matter accurately and we have a duty to clearly express our intentions. However, an individual is not held accountable for lying when he employs a false narrative for a good purpose, such as entertaining children, protecting the innocent, appeasing an angry man, comforting someone who is suffering, or cheering someone who is afraid.<sup>26</sup>

Considering these circumstances, Ross identified the presence of a plurality of principles<sup>27</sup> or reasons that determine the qualification of a given conduct as either correct or reproachable. This enables a resolution of an emerging conflict between duties. Therefore, Ross affirmed the need to distinguish between prima facie duties and actual or absolute duties.<sup>28</sup> In contrast to rights and duties proper, the enforceability of prima facie rights and duties can be assessed on a gradual scale and weighed against the eventual intervention of some other, stricter prima facie obligation.<sup>29</sup> Ross explained that the term “duties” was chosen instead of “rights” because the latter have the disadvantage of posing the issue from the point of view of the persons affected by the action. “Rights” would be appropriate only for duties towards other persons. However, “duties” more accurately describes the relationship between the agent and his will to improve his own character or his own intellect, i.e., his duties towards himself.<sup>30</sup>

Pufendorf recognized the possibility of two conflictual prima facie duties. In such cases, it is reasonable to prioritize the one that can be justified as the better or more useful of the two.<sup>31</sup> This is exemplified by the scenario of self-defense,

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<sup>25</sup> Immanuel Kant, *supra* note 1, at 383.

<sup>26</sup> Pufendorf, *supra* note 6, at 128.

<sup>27</sup> W. DAVID ROSS, FOUNDATIONS OF ETHICS: THE GIFFORD LECTURES DELIVERED IN THE UNIVERSITY OF ABERDEEN, 1945-6 88 (Oxford at the Clarendon Press, 1951) (1939); Bert Heinrichs, *Single-Principle Versus Multi-Principles Approaches in Bioethics*, 27 J. Applied Phil. 72, 73 (2010). <https://doi.org/10.1111/j.1468-5930.2009.00474.x>

<sup>28</sup> DAVID ROSS, THE RIGHT AND THE GOOD 28 (Oxford University Press, 2003) (1930).

<sup>29</sup> Ross, *supra* note 27, at 271.

<sup>30</sup> Ross, *supra* note 27, at 85.

<sup>31</sup> SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW [*De officio hominis et civis*] 111 [James Tully ed., Michael Silverthorne trans., Cambridge University Press, 1991] (1673).

where the duties of self-preservation and non-interference conflict.<sup>32</sup> Kant admitted the possibility of a collision of grounds of obligation (*rationes obligandi*) in order to establish which duty expresses the objective, practical necessity of certain action, and thus, when an act is in accordance with or contrary to the duty. If two similar reasons oppose each other, then the stronger reason to obligate retains the position (*fortior obligandi ratio vincit*).<sup>33</sup> Scanlon eventually employs the term “prima facie reason”.<sup>34</sup> According to Phillips, Ross’ concept of prima facie duties can be redefined in terms of normative reasons if it includes moral and selfish reasons.<sup>35</sup> Hohfeld recognized the distinction between privileges or liberties and rights. Freedom is defined as the privilege to act or refrain from action, and the existence of a right “is ultimately a question of justice and policy; and it should be considered, as such, on its merits”.<sup>36</sup>

#### 4. Rationality and Free Choice (*Freie Willkür*)

In Pufendorf’s work, the concept of human dignity is intricately tied to the social contract theory. The rational nature of all individuals endowed with the light of intellect makes it possible to consider each of us as members of human society and thus governed by social contract, the rules of which can be recognized by all.<sup>37</sup> From natural reason flows the general guilt of people, through which they learn to behave well toward one another in human society.<sup>38</sup> The understanding of natural law can be achieved through the light of reason, considering that “the general and most useful points thereof are so plain and clear, that they initially compel agreement and become firmly established in the minds of people, that nothing can eradicate them afterwards.”<sup>39</sup> Pufendorf defines the capacity for rational self-determination as the ability to “understand the general precepts of the natural law, which are those most frequently used in common life, and to perceive how they are compatible with the rational and moral nature of man.”<sup>40</sup> Pufendorf’s perspective aligns with that of Hobbes,

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<sup>32</sup> *Id.* at 48.

<sup>33</sup> Immanuel Kant, *supra* note 1, at 224; On the relationship between Kant’s grounds of obligation and Ross’s prima facie duties, see Jens Timmermann, *Kantian Dilemmas? Moral Conflict in Kant’s Ethical Theory*, 95 ARCHIV FÜR GESCHICHTE DER PHILOSOPHIE 36, 47 (2013). <https://doi.org/10.1515/agph-2013-0002>; Richard McCarty, *Moral Conflicts in Kantian Ethics*, 8 *History of Philosophy Quarterly* 65 (1991). <http://www.jstor.org/stable/27743963>

<sup>34</sup> T. M. SCANLON, WHAT WE OWE TO EACH OTHER 65 (Harvard University Press, 2000).

<sup>35</sup> DAVID PHILLIPS, ROSSIAN ETHICS: W. D. ROSS AND CONTEMPORARY MORAL THEORY 37 (Oxford University Press, 2019).

<sup>36</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 36 (1913). <https://doi.org/10.2307/785533>

<sup>37</sup> Pufendorf, *supra* note 20, at 40.

<sup>38</sup> SAMUEL PUFENDORF, *Vorrede des Herrn von Pufendorff* 101, in GESAMMELTE WERKE. BD. 2. DE OFFICIO (Gerald Hartung Hrsg., Akad. Verl, 1997) (1673).

<sup>39</sup> Pufendorf, *supra* note 6, at 41.

<sup>40</sup> Pufendorf, *supra* note 20, at 40.

recognizing the capacity to comprehend natural law as the pivotal factor in assessing civil capacity. “No man of mature age and endowed with reason is so stupid as to be incapable of understanding the general precepts of the natural law.”<sup>41</sup>

The rational nature of man is the foundation for his moral freedom, and from this, the concept of equality and the freedom of all human beings is derived.<sup>42</sup> Pufendorf defines freedom as “the intrinsic faculty of doing or omitting what one judges for oneself”.<sup>43</sup> While slaves are only permitted to engage in tasks with the authorization of their masters, free citizens are autonomous in their own actions.<sup>44</sup> Those in a natural state have not placed their will under anyone else’s authority. Rather, their actions are guided solely by their own judgment, adjusted to the natural law.<sup>45</sup> If an individual places significant trust in the counsel of another whom they perceive as more knowledgeable, or if the other voluntarily offers guidance, perhaps the latter’s counsel will become more valuable to the individual. However, the ultimate decision regarding one’s personal affairs rests with the individual.<sup>46</sup> This concept is also central to Kant’s conception of the innate right to freedom. Freedom can be defined as “independence from being constrained by another’s choice (Willkür)”, insofar as it can coexist with the freedom of any other according to a universal law.<sup>47</sup>

The theory of will is rooted in this concept of freedom. A subjective right is defined as the power or sphere of the will of the individual.<sup>48</sup> In our opinion, the determination of ends, grounded in reasons for duties towards oneself, is inextricably linked to the will, which is intrinsic to subjective rights and serves as the foundation for the entire system of reciprocal duties. The internal process of autonomous determination of the individual’s maxim of will is expressed externally through conduct protected by the right of freedom. While these two concepts are interconnected, the distinction between them is decisive for the Kantian differentiation between ethics and law (Recht). The concept of individual rights pertains exclusively to the external and practical relationship between two parties, namely the reciprocal relationship between one’s choice

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<sup>41</sup> Pufendorf, *supra* note 20, at 40.

<sup>42</sup> HANS WELZEL, DIE NATURRECHTSLEHRE SAMUEL PUFENDORFS: EIN BEITRAG ZUR IDEENGESCHICHTE DES 17. UND 18. JAHRHUNDERTS 6 (Walter de Gruyter, 2012); ALBRECHT RANDELZHOFFER, DIE PFLICHTENLEHRE BEI SAMUEL VON PUFENDORF: FESTVORTRAG GEHALTEN AM 2. DEZEMBER 1982 IM KAMMERGERICHT AUS ANLASS DER FEIER ZUR 350. WIEDERKEHR SEINES GEBURTSTAGES IN ANWSENHEIT DES HERRN BUNDESPRÄSIDENTEN 27 (Walter de Gruyter, 1983).

<sup>43</sup> Pufendorf, *supra* note 20, at 142.

<sup>44</sup> SAMUEL PUFENDORF, *On the natural state of men*, in SAMUEL PUFENDORF’S ‘ON THE NATURAL STATE OF MEN’. THE 1678 LATIN EDITION AND ENGLISH TRANSLATION 109 (Michael Seidler ed. and trans., Lewiston, 1990) (1678).

<sup>45</sup> *Id.* at 120.

<sup>46</sup> *Id.* at 120.

<sup>47</sup> Immanuel Kant, *supra* note 1, at 237.

<sup>48</sup> Marietta Auer, *Subjektive Rechte bei Pufendorf und Kant: Eine Analyse im Lichte der Rechtskritik Hohfelds*, 208 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 584, 594 (2008). <http://www.jstor.org/stable/40996023>

and the other's.<sup>49</sup> The internal process of determining ends produces external effects regulated by law, but not the other way around; law cannot regulate the internal process. This establishes a standard for differentiating between the private sphere of the individual and the social sphere of the citizen.<sup>50</sup> This criterion serves as the basis for immunity from external coercion in self-regarding acts. As we will discuss later, this is an objective area of non-law.

The individual right then serves as the execution of the will. According to Kant,

When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right".<sup>51</sup>

The act of choice is mandatory, based on the principle of reciprocity, which means that "the limitation that I place on the actions of others in relation to myself implies a like restriction of my actions in relation to them".<sup>52</sup> This creates an internal obligation that corresponds to the external obligation.<sup>53</sup> In contrast to the will of the individual Kant conceives the existence of an a priori unified will (vereinigten Wille)<sup>54</sup> or collective-general (common) will (kollektiv-allgemeiner (gemeinsamer) Wille).<sup>55</sup> It can be affirmed a priori that the equivalent element to the will in the individual sphere is the social will in the social sphere, in the same way that individual interests are equivalent to social interests<sup>56</sup> and the individual rights to social or societal rights. In this way, the individual right is directed against social will, making the individual will a *prima facie* duty of all.

### III. From Duties Towards Oneself to Self-Regarding Acts

There is a close relationship between the idea of duties towards oneself and the theory of acts relating to oneself. Just as the performance of duties to oneself is not subject to social control, the doctrine of self-regarding acts asserts its total immunity from the law. Duties towards oneself are located in an internal sphere

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<sup>49</sup> Immanuel Kant, *supra* note 1, at 230

<sup>50</sup> Adela Cortina Orts, *Preliminary study*, in IMMANUEL KANT, LA METAFÍSICA DE LAS COSTUMBRES, at XXXIX (A. Cortina & J. Conill trans., Tecnos, 2008).

<sup>51</sup> Immanuel Kant, *supra* note 1, at 256

<sup>52</sup> MARY GREGOR, LAWS OF FREEDOM 59 (Blackwell, 1963).

<sup>53</sup> *Id.*

<sup>54</sup> Immanuel Kant, *supra* note 1, at 263.

<sup>55</sup> Immanuel Kant, *supra* note 1, at 256; Also in this sense, FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS: BD. 1 24 (Veit und comp., 1840).

<sup>56</sup> Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943). <https://doi.org/10.2307/1334970>

and are the object of a cognitive process. This process of self-regulation leads to the determination of the ends and the arbitrium in the individual will.

Wilhelm von Humboldt developed the harm principle as a mechanism for limiting State action. He argued that “any State interference in private affairs, not directly implying violence done to individual rights, should be absolutely condemned.”<sup>57</sup> In his essay “Über den Gemeinspruch”, Kant refers to the harm principle as a criterion for delimiting the private sphere. “[E]verybody may pursue his happiness in the manner that seems best to him, provided he does not infringe on other people’s freedom to pursue similar ends”.<sup>58</sup> Mill held that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”<sup>59</sup>

The right to liberty protects the external expression from the internal process of determining duties towards oneself. From a factual perspective, the process could be followed by jural relations that can be either conflictual or non-conflictual. In situations involving conflictual relationships, two or more individuals propose ends that are incompatible with each other. Alvin’s right of prima facie imposes on Beto a prima facie social duty that conflicts with his own duties to himself. Equally, Beto’s prima facie right generates a conflict of Alvin’s prima facie duties.

A non-conflictual jural relationship can arise in three circumstances. As we will see below, the first occurs in the absence of a factual conflict of rights, i.e., when all other members of human society recognize the validity of an individual’s claim and conform their conduct to the performance of the required obligation. This scenario aligns with Hohfeld’s concept of privilege. The second scenario of a non-conflictual jural relationship arises in so-called self-regarding acts. The third possibility corresponds to a legal relationship of right-duty in the Hohfeldian sense. In this case, a prima facie conflict of duties has been resolved, and the existence of a definite relationship of rights and duties has been established.

### 1. *The Absence of a Factual Conflict of Rights*

According to Hohfeld, a privilege is the opposite of a duty. It is to refrain from doing something. «X» has the privilege of entering on the land; that is, he has no duty to stay off.<sup>60</sup> Alf Ross adds that freedom means that «X» has neither a

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<sup>57</sup> WILHELM VON HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT 20 [Chap. 3 par. 1] (Coulthard Joseph trans., ed., John Chapman 1854) (1791).

<sup>58</sup> Immanuel Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in KANT’S GESAMMELTE SCHRIFTEN 290 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band VIII, 1910) (1793).

<sup>59</sup> JOHN STUART MILL, ON LIBERTY (Stefan Collini Ed., Cambridge University Press, 2012) (1859).

<sup>60</sup> Hohfeld, *supra* note 36, at 32.

duty to do something nor a duty to abstain.<sup>61</sup> Hohfeld's argument, which draws on the analogy with legal relations of individual rights and legal duties, asserts that the correlative of a privilege is a "no-right". Therefore, "the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter".<sup>62</sup> Privilege is then the freedom to do something at will because there is no contrary right of another. However, since the freedom of «X» does not necessarily imply a duty of everyone not to interfere, Hohfeld rejects the possibility of claiming that the correlative of the freedom to do something is the duty of others not to interfere.<sup>63</sup>

Hohfeld's argument sought to refute the classical notion that the existence of freedom inherently entailed the imposition of a duty on others to refrain from interference.<sup>64</sup> In our analysis, we disregard the notion that an individual's liberty rights are established through a relationship with the State (State action doctrine). However, it does not constitute an immediate horizontal relationship with another individual. Instead, it is regarded as a relationship with all members of society or, as Kant would say, a collective-universal (common) will. It only establishes a mediate relationship with an individual as part of the collective.

However, the representation of the legal relation of the privilege of «X» to do «Z» as opposed to the no-right of «Y» to demand from «X» a contrary conduct «-Z» can lead to the error of supposing that we are dealing with an actual no-right, that is, the same type of no-right that is opposed to the legal right. Conversely, the legal right and the privilege belong to categories of a different nature.<sup>65</sup> While the legal right is part of an actual legal relationship, in which rules are established that regulate the conduct of two parties, the privilege is part of a *prima facie* jural relationship, in which the interests of the participants concur as principles or values. These *prima facie* rights are only considered definitive when there are no other, more compelling interests to consider.<sup>66</sup>

[Case 1: Right to exclude] Alvin is the owner of the land upon which his home is situated. He has demarcated the boundaries of his property with a fence and visible signs indicating that he does not wish to allow trespassers to enter. Alvin's property is located at the midpoint between Beto's residence and the city. Beto exercises caution and respect for Alvin's property by avoiding crossing it. We will assume that there is no social interest in allowing others to enter Alvin's property. All participants are competent adults, well informed, capable of acting rationally, and free from undue pressure.

In a non-conflictual relationship, Alvin's right to exclude others from his property is opposed (↔) to Beto's no-right to enter the property. The absence of controversy in the procedural sense has led some authors to argue that this

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<sup>61</sup> ALF ROSS, *ON LAW AND JUSTICE* 198 (Oxford University Press, 2019).

<sup>62</sup> Hohfeld, *supra* note 36, at 33.

<sup>63</sup> *Id.* at 36.

<sup>64</sup> Joseph William Singer, *The legal rights debate in analytical jurisprudence from Bentham to Hohfeld*, *Wis. L. REV.* 975, 993 (1982).

<sup>65</sup> Hohfeld, *supra* note 36, at 33.

<sup>66</sup> Ross, *supra* note 27, at 271.

is not a true jural relationship.<sup>67</sup> However, this approach obscures a more complex scheme. This relationship is characterized by a combination of ethical and legal components.

The owner's right of defense is correlated with the duty of non-interference by others.<sup>68</sup> Hohfeld recognized that the structure of certain rights of freedom corresponds to in rem rights (multital rights).<sup>69</sup> Feinberg has demonstrated that, akin to property rights, rights of freedom function as rights of defense against duties of non-interference.<sup>70</sup>

The mediate correlation between the prima facie right to defense and the prima facie social duty of all to refrain from interference stems from the principle of reciprocity. Pufendorf refers to the reciprocal duties of each man towards each other: "what one Man may rightfully demand or expect from another, the same is due to others also (Circumstances being alike) from him".<sup>71</sup> Kant explains that in the declaration that something external is mine "...involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his..." [MS:254].<sup>72</sup>

Among several *prima facie* duties towards himself, Alvin has chosen to exclude others from his property. This decision is equivalent to interference in the freedom of others. Beto does not demand a contrary right and refrains from crossing Alvin's property. Beto has a *prima facie* no-right to enter, either as an individual or as a member of society. This means he has a *prima facie* no-right of defense against Alvin's intervention. This leads to Alvin's prima facie social no-duty to refrain from excluding Beto. Thus, Alvin has a *prima facie* no-duty of non-interference.

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<sup>67</sup> Regarding the discussion of whether legal liberties that are not accompanied by corresponding duties on others constitute a legal category, Singer, *supra* note 64, at 991.

<sup>68</sup> On the principle of correlativity, see H. L. A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 188 (1955), <https://doi.org/10.2307/2182586>; J. Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 20 (1984), <https://doi.org/10.1093/ojls/4.1.1>; TOM L. BEAUCHAMP & JAMES F. CHILDLESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 371 (Oxford University Press, 5th ed., 2001); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 109 (Harvard University Press, 2009).

<sup>69</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 733 (1917), <https://doi.org/10.2307/786270>.

<sup>70</sup> Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 139 (1966), <http://www.jstor.org/stable/20009200>; Joel Feinberg & J. Narveson, *The nature and value of rights*, 4 J. VALUE INQUIRY 243, 249 (1970), <https://doi.org/10.1007/bf00137935>; Ripstein, *supra* note 70, at 69; GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *INTRODUCTION TO PROPERTY THEORY* 76 (2012).

<sup>71</sup> Pufendorf, *supra* note 6, at 97.

<sup>72</sup> Immanuel Kant, *supra* note 1, at 74.

A:		B:	
Pf social no-duty of non-interference	◀	Pf social no-right to defense	◀
▶	Pf duty to exclude	▶	Pf no-right to defense
			▲

Beto acknowledges the validity of Alvin’s *prima facie* right. Among several *prima facie* duties to himself, Beto has chosen the mutual benefit of not interfering with the property of others. On the other hand, Alvin asserts that society should respect his decision. As a result of his internal process of self-regulation, Alvin has the *prima facie* right to defend his own ends. Alvin’s right of defense does not stem from an individual contract, but rather from the principle of reciprocity inherent in the social contract. The owner’s freedom to choose is an interest that members of a civilized society recognize as worthy of protection. As a member of civilized society, Beto has a *prima facie* social duty to refrain from interfering with the property of others. He has a *prima facie* duty of non-interference.

B:		A:	
Pf social duty of non-interference		Pf social right to defense	
Pf duty towards himself not to enter		Pf right to defense	

There is no conflict of duties. Alvin’s *prima facie* duty to himself to exclude is opposed ( $\diamond$ ) by a *prima facie* social no-duty not to exclude. Beto’s *prima facie* duty towards himself not to enter is opposed ( $\diamond$ ) by a *prima facie* social duty not to enter. There is no conflict of rights. As a result, we can affirm a mediated correlative relationship ( $\sim$ ) between Alvin’s *prima facie* right of defense and Beto’s *prima facie* social duty of non-interference. The same is true for Beto’s *prima facie* no-right to enter and Alvin’s *prima facie* social no-duty to refrain from excluding Beto. This same scheme would apply in reverse. Suppose that, given that entering Alvin’s property is the best route between Beto’s residence and the city center, Beto chooses to enter Alvin’s property (pf right of freedom), and Alvin decides not to interfere with Beto’s freedom of choice (pf no-right).

## 2. The Self-Regarding Acts

Self-regarding acts refer to conduct that is carried out and only has effects within the sphere of privacy reserved for the individual. In Mill’s words, it is the “sphere of action [...] comprehending all that portion of a person’s life and conduct which affects only himself, or if it also affects others, only with their

free, voluntary, and undeceived consent and participation.”<sup>73</sup> In this scenario, the individual’s *prima facie* duties to himself are in opposition to the *prima facie* social no-duty towards others.

[Case 2: Voluntary intoxication] In his personal life, Alvin engages in alcohol consumption, which temporarily hinders his ability to perform tasks requiring rapid decision-making and physical agility («Z»). We will assume that his actions do not harm other individuals. Beto is worried about Alvin. He wonders if he can legally intervene and force him to change his habits. All participants are competent adults, fully informed, capable of acting rationally, and free from undue pressure.

While this behavior may have constituted a violation of a duty to himself,<sup>74</sup> its control lies solely with his own conscience. And, since it does not affect Beto’s interests, Beto has a *prima facie* no-right to prevent or hinder Alvin from becoming intoxicated. Alvin has a *prima facie* social no-duty to refrain. The will of the active subject is opposed to a social no-duty.

A:	B:
Pf social no-duty to «-Z»	Pf social no-right of interference
Pf duty towards himself to «Z»	Pf no-right of interference

Alvin’s *prima facie* right of defense derives from the determination of his own ends. From Beto’s point of view, his concern for Alvin’s well-being stems from his duty of beneficence, which is opposed to Alvin’s right to self-defense and the social duty of noninterference. For Kant, the paternalistic beneficence of forcing another to be happy according to one’s own concepts of happiness would be contrary to the legal duty to respect their freedom to make themselves happy according to their own choice.<sup>75</sup> As a result, all other things being equal, the individual right of Alvin is correlated with the social duty of Beto to not interfere.

B:		A:
Pf social duty of non-interference	◀	Pf social right of defense
▶ Pf duty towards himself to «-Z»	▶	Pf right of defense

It can be concluded that society lacks the authority to impose prohibitions or obligations on conduct related to oneself. In these cases, the individual has a

<sup>73</sup> Mill, *supra* note 69, at Chap. 1, par. 12.

<sup>74</sup> Immanuel Kant, *supra* note 1, at 427.

<sup>75</sup> *Id.*, at 454.

social non-duty to refrain from pursuing his own ends. According to Kant, external legislation is only possible for duties of law (*officia iuris*), while in the case of duties of virtue (*officia virtutis s. ethica*), such legislation is not possible.<sup>76</sup> Mill distinguishes between the external relations of the individual, in which one is responsible to those whose interests are concerned or to society, and self-regarding acts, in which the conscience of the agent himself must take the place of the judge in a case that cannot be submitted to the judgment of his fellow men.<sup>77</sup>

In this instance, the relationship is analogous to that outlined in the section on the absence of a factual conflict of rights. The distinction lies in the fact that, in the absence of a factual conflict of rights, the act affects the freedom of others. The passive subject's no-right derives from their own self-regulation. Whereas in self-regarding acts, the no-right of all is the result of the active subject's conduct not significantly affecting other individual, social, or public interests.

### 3. *Conflictual Relationships*

Conflictual jural relationships arise from a factual conflict of *prima facie* opposing rights. In determining their own ends, Alvin and Beto desire something that is mutually exclusive. Both have chosen to do «Z», and their conduct expresses the exercise of a right of defense not to be prevented from doing «Z». This is a situation equivalent to the Hobbesian state of nature: “if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies...”<sup>78</sup> Kant also recognizes that this is a factual relationship between one person and another, “insofar as their actions, as facts, can have (direct or indirect) influence on each other”<sup>79</sup> According to Fichte, the freedom of two rational beings cannot be in conflict with each other. Rather, a conflict between them only arises when one makes use of their freedom in a manner contrary to law and duty, with the intention of oppressing the freedom of another.<sup>80</sup> As a result, the factual conflict between *prima facie* opposing rights is followed by a conflict of *prima facie* social duties, by virtue of the social will, that is, a collective-universal (common) will.<sup>81</sup>

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<sup>76</sup> *Id.*, at 239.

<sup>77</sup> Mill, *supra* note 59, at Chap. 1, par. 11.

<sup>78</sup> THOMAS HOBBS, *LEVIATHAN* 190 (Ch. 13) (Noel Malcolm ed., Clarendon Press, 2012) (1651); THOMAS HOBBS, *LEVIATÁN O LA INVENCION MODERNA DE LA RAZÓN* 222 (Cap. XIII) (Editora Nacional, 1979) (1651); DANIEL EGGERS, *DIE NATURZUSTANDSTHEORIE DES THOMAS HOBBS: EINE VERGLEICHENDE ANALYSE VON |‘THE ELEMENTS OF LAW’, ‚DE CIVE‘UND DEN ENGLISCHEN UND LATEINISCHEN FASSUNGEN DES‘ LEVIATHAN‘* 163 (Vol. 84) (Walter de Gruyter, 2008).

<sup>79</sup> Immanuel Kant, *supra* note 1, at 230.

<sup>80</sup> JOHANN GOTILIEB FICHTE, *System der Sittenlehre nach den Principien der Wissenschaftslehre*, in *SÄMMLICHE WERKE* 300 (VOL. 10) (Veit und comp, 1834) (1798).

<sup>81</sup> Immanuel Kant, *supra* note 1, at 256.

[Case 3: Dinner with friends] Alvin has organized a dinner party for friends. However, he has decided to exclude Beto based on discriminatory grounds. Beto insists on his right to be invited.

[Case 4: Private school] Alvin is the proprietor of a private school that has decided to exclude Beto on discriminatory grounds. Beto insists on his right to be admitted.

[Case 5: Private town] Alvin has decided to exclude Beto from a town he owns due to the nature of Beto's ideas. Beto insists on his right not to be prevented from expressing his opinion on sidewalks that are open to the public.

We will assume that Alvin's conduct does not affect any other social interest. All participants are competent adults, well informed, capable of acting rationally, and free from undue pressure.

In cases 3 and 4, Alvin's *prima facie* duty to himself to exclude others is opposed ( $\diamond$ ) to his own *prima facie* social duty not to interfere with Beto's *prima facie* right:

A:		B:	
Pf social duty of non-interference	◀	Pf social right of defense	◀
▶ Pf duty towards himself to «Z»	▶	Pf right of defense	▲

In Case 5, Alvin's *prima facie* duty to himself to exclude others, conflicts ( $\diamond$ ) with his own *prima facie* social duty not to interfere with Beto's *prima facie* right and with his *prima facie* public duty not to interfere with the free market of ideas. Beto has a right to defense as an individual, as a member of civilized society, and as a member of a democratic society:

A:		B:	
Pf public duty of non-interference	◀	Pf public right of defense	◀
Pf social duty of non-interference	◀	Pf social right of defense	◀
▶ Pf duty towards himself to «Z»	▶	Pf right of defense	▲

And in cases 3, 4 and 5 Beto also faces a conflict of *prima facie* duties. Beto's *prima facie* duty to himself is opposed ( $\diamond$ ) to his own *prima facie* social duty not to interfere with Alvin's *prima facie* right to property:

B:		A:	
Pf social duty of non-interference	◀	<i>Pf social right of defense</i>	◀
▶	<i>Pf duty to himself to «Z»</i>	▶	Pf right of defense
			▲

The conflict is resolved in the first instance in the internal forum through a judgment that weighs the conflictual duties. The result may also be subject to external review, as far as it does not refer only to a conflict of *prima facie* duties towards himself but to the determination of the fulfillment of social or public duties.

#### 4. *Conflictual Relationships and Actual Rights*

The resolution of a conflictual jural relationship, through the determination of the actual rights and duties of the parties, gives rise to a non-conflictual legal relationship:

In his private sphere (Case 3), Alvin has an actual right to exclude Beto, despite Beto's insistence on being invited to a dinner with friends. According to the concurring opinion of Judge Harlan II in *Peterson v. City of Greenville* (1963), we must recognize the preferential value of Alvin's *prima facie* right to "...chase his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations."<sup>82</sup> Alvin has a no-duty to refrain and the actual right to exclude Beto from his residence. Alvin's right is correlated ( $\sim$ ) with Beto's duty to stay off the property and is opposed ( $\diamond$ ) to the Beto's social no-right to be invited.

A:		B:	
Social no-duty to not exclude	◀	Social duty of non-interference	◀
▶	Right to exclude	▶	No-right to defense
			▲

In the social sphere (Case 4), Alvin has no right to exclude Beto from the private school he owns on discriminatory grounds and has a social duty to admit Beto.<sup>83</sup> Beto has an actual right to be admitted to Alvin's school and no duty to refrain from entering. Beto's right correlated with Alvin's duty to admit him, and it is opposed to Alvin's no-right to exclude Beto.

<sup>82</sup> *Peterson v. City of Greenville*, 373 U.S. 244, 250 (1963), available at <https://supreme.justia.com/cases/federal/us/373/244/>.

<sup>83</sup> *Runyon v. McCrary*, 427 U.S. 160 (1976), available at <https://supreme.justia.com/cases/federal/us/427/160/>.

A:		B:
Social duty to not exclude	◀	Social no-duty of non-interference
▶		▶
No-right to exclude		Right to defense
	▶	▲

In the public sphere (Case 5), Alvin has no right to exclude Beto and a social and public duty to allow him to enter. Beto has an actual right not to be prevented from expressing his opinion on the sidewalks of a private town owned by Alvin,<sup>84</sup> and he also has no social duty to refrain. Beto's right to enter is correlated ( $\sim$ ) with Alvin's duty to allow access to the property. It is also opposed ( $\diamond$ ) to Alvin's no-right to prevent expressive activities of public relevance in areas of free public access.

A:		B:
Public duty to not exclude	◀	Public no-duty of non-interference
Social duty to not exclude	◀	Social no-duty of non-interference
▶		▶
No-right to exclude		Right to defense
	▶	▲

Actual rights and duties establish non-conflictual relationships. The right of the active subject is opposed to the no-right, and the duty of the passive subject is its correlate. This determination results from resolving a prima facie conflict of duties. In the private sphere, Alvin's duty to defend his privacy ( $>$ ) prevails over his social duty of non-discrimination. In the social and public spheres, however, Alvin's duty to society and the public prevails over his duty to himself to defend his privacy. The holder of the actual right has the power to decide whether to enforce the obligation. However, as we have seen, will is not limited to freely disposing of the right; it has a broader function in determining ends through internal judgment.

## 5. Results

Duties toward oneself belong to a different category than social and public duties toward others. The former are binding only internally; the necessity of the action and motive are determined by ethical laws. They are imperfect duties. This is because they are not correlated with rights.<sup>85</sup> Instead, they are the inner

<sup>84</sup> Marsh v. Alabama, 326 U.S. 501 (1946), available at <https://supreme.justia.com/cases/federal/us/326/501/>.

<sup>85</sup> Pufendorf, *supra* note 6, at 111; JOHN STUART MILL, *Utilitarianism* 222, in UTILITARIANISM

face of a right. The latter are binding through external coercion according to legal laws. They are perfect duties because they are correlated with the social and public rights of everyone.<sup>86</sup> This refutes the objection to the correlation between duties and rights that refers to the existence of duties for which there are no corresponding rights.<sup>87</sup> If charity or benevolence are only internal duties<sup>88</sup> and not duties toward others, then the theory of correlativity cannot be objected to on the grounds that there are duties that do not necessarily imply rights.<sup>89</sup>

Non-conflictual jural relationships play a structural role in society. In a Hobbesian state of nature, where no one considers themselves bound by obligations unless an external power intervenes, it is difficult to imagine the state's coercive power being effective enough to maintain peace. There is no public force capable of monitoring everyone at all times and in all places. Furthermore, such a force would be undesirable. Additionally, there is no judicial system capable of judging and punishing if we could not count on citizens preferring the mutual benefits of a civilized society to their immediate interests. The difference between non-conflictual and conflictual relationships is that the former are resolved internally by the parties involved, while the latter require external social intervention. The latter has been the focus of interest by jurists, while philosophers have focused on the former.

#### IV. From Self-Regarding Acts to the Model of Spheres

The theory of self-regarding acts is a refined development of Pufendorf's classification criterion between the duties of an individual to himself and his duties to others. This theory can also be considered a mechanism for distinguishing between private and social spheres. Among the criteria for delimitation, the element of harm occupies a prominent place. According to Pufendorf, the duty of non-interference is the most important of the reciprocal duties toward others: "It is also the most necessary, because without it Human Society cannot be preserved".<sup>90</sup>

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AND ON LIBERTY: INCLUDING MILL'S' ESSAY ON BENTHAM AND SELECTIONS FROM THE WRITINGS OF JEREMY BENTHAM AND JOHN AUSTIN (Blackwell Publishing Ltd, 2d ed., 2003) (1863).

<sup>86</sup> H. L. A. HART, *Legal rights*, in *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY* 168, 178 (OUP Oxford, 1982); MATTHEW H. KRAMER, *Rights Without Trimmings*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL INQUIRIES* 59 (Oxford University Press, 2000).

<sup>87</sup> CARL WELLMAN, *REAL RIGHTS* 183 (Oxford University Press, 1995); CARL WELLMAN, *AN APPROACH TO RIGHTS: STUDIES IN THE PHILOSOPHY OF LAW AND MORALS* 2 (Springer Science & Business Media, 1997).

<sup>88</sup> Immanuel Kant, *supra* note 1, at 220; JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 323 (Clarendon Press, 1907) (1823).

<sup>89</sup> The same conclusion is reached by Beauchamp, *supra* note 69, at 372.

<sup>90</sup> Pufendorf, *supra* note 6, at 89.

In his essay «Über den Gemeinspruch» Kant established the order of the a priori principles necessary for establishing a state: freedom, equality, and independence. The scope of human freedom in the private sphere is limited by the principle of harm: “...everybody may pursue his happiness in the manner that seems best to him, provided he does not infringe on other people’s freedom to pursue similar ends...”.<sup>91</sup> In the social sphere, the principle of equality prevails. Everyone has the same innate rights. According to universal law, subjects’ freedom is mutually limited, entitling each individual to compel others to observe the bounds within which their use of freedom is compatible with that of others.<sup>92</sup> In the public sphere, only those who are their own masters and are not in the service of anyone else can participate in the coalition of private and individual wills to form a communal and public will (gemeinschaftlichen und öffentlichen Willen).<sup>93</sup> Although Mill rejects the idea of a social contract, he nevertheless acknowledges the existence of social duties of protection and non-interference. He asserts that living in society obligates everyone to not harm interests that are regarded as rights, whether by legal provision or tacit understanding, and to defend society or its members from harm and nuisance.<sup>94</sup>

The German Federal Constitutional Court has applied the sphere theory to distinguish between the intimate, private, and social spheres.<sup>95</sup> This model provides criteria for assessing the balancing process. Balancing goes beyond a utilitarian calculation of the benefits of protecting an individual’s interests (his own good) versus the damage to the faculty of self-determination or the suffering caused by repressed desires.<sup>96</sup> In our view, balancing is not just weighing individual rights against each other, because social and public interests must also be considered. As we have seen, the principle of reciprocity plays a role in this consideration. These elements are integrated into the content of social and public duties.

To determine if and to what extent society could review the judgment made by the active subject, it must first be established if the conduct took place in the private or in the social or public sphere of the individual’s life. Balancing tests should seek to strike a balance between an individual’s personal and social or public duties. As Humboldt said, “...the freedom of private life increases exactly to the extent that the freedom of public life decreases”.<sup>97</sup> However, the roles of individual and citizen are not exercised simultaneously, but rather, alternately.

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<sup>91</sup> Immanuel Kant, *supra* note 58, at 290.

<sup>92</sup> *Id.*, at 293.

<sup>93</sup> *Id.*, at 297.

<sup>94</sup> Mill, *supra* note 59, at Chap. 4, par. 3.

<sup>95</sup> ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* 327 (Suhrkamp, 1985). Habermas’s critique of the model of spheres emphasizes the shift from the liberal legal model to the social state model. JURGEN HABERMAS, *FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* 481 (Suhrkamp, 1996).

<sup>96</sup> H. L. A. HART, *LAW, LIBERTY, AND MORALITY* 22 (Stanford University Press, 1963).

<sup>97</sup> Humboldt, *supra* note 57, at 10 [Chap. I, par. 2].

Therefore, it is possible to establish a rule of proportionality. The greater the protection of an individual's core privacy and intimacy, the greater the justification required for intervention. To the extent that the active subject's conduct relates to his or her private life, greater value must be given to self-determination, proportionally reducing the weight of social and public duties. Conversely, conduct in the social or public sphere gives rise to a stronger duty of protection and non-interference.<sup>98</sup> In this case, the indirect effects of conduct may justify societal intervention. In their intimate sphere, individuals have an actual right of defense against the intervention of others and a social and public no-duty to refrain. However, the relationship between the private and social spheres is fluid, making a strict demarcation difficult. Cases of the indirect social effects of acts apparently related to oneself and cases of consent to the intervention of another are particularly problematic, as we shall see below.

Mill occasionally employs these criteria: "No person ought to be punished simply for being drunk, but a soldier or policeman should be punished for being drunk on duty."<sup>99</sup> Selling fermented liquors is a social act, but the solution is not to prohibit consumption, which is an act proper to the individual sphere.<sup>100</sup> Hart observes that the justification for criminalizing behavior depends not on its morality but on its effect on public decency when it takes place in public.<sup>101</sup>

### 1. *The Indirect Effect on Social Interests*

In our opinion, the indirect effect on social interests cannot justify the prohibition of conduct that constitutes an individual's core privacy. However, when it comes to conduct that falls within the social sphere, the indirect effects of that conduct may justify intervention by society. Thus, the balancing method may be modified by the assessment criteria specific to each sphere. We will test this thesis through case analysis.

[Case 6: The use of motorcycle helmets]. Alvin has chosen to live a care-free life full of risks and thrills. He declines to assume the duty of safeguarding himself and to wear a protective helmet during his motorcycle expeditions. All participants are competent adults, fully informed, capable of acting rationally, and free from undue pressure.

The discussion of whether an individual should submit to an apparently trivial restriction such as a motorcycle helmet or seat belt to reduce the high risk of serious injury, gives rise to a conflict of *prima facie* duties to oneself. In this scenario, the motorcycle driver must determine whether to prioritize his *prima facie* duty of self-preservation against countervailing motives. These might include

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<sup>98</sup> Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45, 56 (1959), [https://www.normfri-esen.info/forgotten/little\\_rock1.pdf](https://www.normfri-esen.info/forgotten/little_rock1.pdf).

<sup>99</sup> Mill, *supra* note 59, at Chap. 4, par. 10.

<sup>100</sup> Mill, *supra* note 59, at Chap. 4, par. 19.

<sup>101</sup> Hart, *supra* note 86, at 45.

the discomfort of wearing a helmet, the desire to take risks, or the judgment that specific traffic conditions make the risk of injury unlikely. Should he choose not to wear a helmet, an objective observer will likely find a marked disproportion of interests.<sup>102</sup> Feinberg rejects the assessment of a trivial restriction and argues that personal sovereignty cannot be subject to a cost-benefit calculation.<sup>103</sup>

While Feinberg is not willing to compromise on personal freedom, he may be open to considering the admissibility of justification in cases involving indirect effects. Harcourt has warned that the debate on acts directed at oneself has shifted from the protection of the individual against himself to a focus on the indirect harms of conduct.<sup>104</sup> The discussion now concerns whether and to what extent the indirect effects of self-directed conduct on third parties or society can justify the restriction of freedom. This trend is also evident in German case law. The German Federal Constitutional Court has dismissed the challenge to the constitutionality of the motorcycle helmet mandate, ruling that it does not violate personal liberty.<sup>105</sup> The court's reasoning centered on the broader societal interests and the protection of third parties, rather than on the individual's right to personal choice. It should be noted that there is no mention of protection for oneself. Rather, the focus is on the indirect effects on others in decisions regarding the obligation to wear seat belts,<sup>106</sup> the criminal prohibition of homosexuality,<sup>107</sup> the consumption of cannabis,<sup>108</sup> and incest between siblings.<sup>109</sup>

After rejecting other potential rationales, Feinberg does not dismiss the possibility that the obligation to wear a protective helmet stems from a balance between the interest in not wearing a helmet and the psychological distress of those involved in the accident, such as medical workers, traumatized witnesses, and, above all, the other driver.<sup>110</sup> German case law refers to the duty to protect individuals who have been involved in a traffic accident. Wearing a protective helmet would enable motorcyclists to better contribute to preventing risks to the

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<sup>102</sup> Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 79 (1972), <http://www.jstor.org/stable/27902250>.

<sup>103</sup> Feinberg, *supra* note 22, at 94.

<sup>104</sup> Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY (1973-) 109 (1999), <https://doi.org/10.2307/1144164>; Bernard E. Harcourt, *The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in United States v. Windsor, John Stuart Mill's Essay on Liberty (1859), and H. L. A. Hart's Modern Harm Principle*, 437 U OF CHICAGO, PUBLIC LAW WORKING PAPER (August 16, 2013), <http://dx.doi.org/10.2139/ssrn.2311329>.

<sup>105</sup> BVerfG, Beschluss vom 26. Januar 1982 - 1 BvR 1295/80 u.a. - BVerfGE 59, 275/279.

<sup>106</sup> BVerfG, 24.07.1986 - 1 BvR 331/85, 1 BvR 623/85, 1 BvR 982/85.

<sup>107</sup> BVerfGE 6, 389/437 – Homosexuelle, available at <https://www.servat.unibe.ch/df/bv006389.html>.

<sup>108</sup> BVerfGE 90, 145/187 – Cannabis, available at <https://www.servat.unibe.ch/df/bv090145.html>.

<sup>109</sup> BVerfGE 120, 224 – Geschwisterbeischlaf, available at <https://www.servat.unibe.ch/df/bv120224.html#Rn122>.

<sup>110</sup> Feinberg, *supra* note 24, at 141.

life and physical integrity of other people after an accident. This would enable them to administer first aid or contact emergency medical services. They may also help prevent further damage by taking measures to secure the accident site, for example by setting up warning triangles or drawing attention to the accident site and clearing obstacles from the road.<sup>111</sup> In such cases, the relationship is no longer a non-conflicting relationship. Instead, the *prima facie* duties to oneself are now opposed to the *prima facie* social duties of protection and non-interference towards others.

While this is often considered a case of protection against oneself, traffic regulations are actually intended to govern behavior that occurs in social-public spaces. The social-public sphere is defined by the equal and voluntary participation of individuals in an activity, which is open to all and subject to public scrutiny. This environment is characterized by objective and impartial relationships. Nevertheless, they lack public relevance.<sup>112</sup> Driving a motor vehicle on public roads is a behavior that occurs within a social sphere. The primary objective of traffic regulation is to safeguard individuals and property in environments where accidents are likely to occur. In this case, the spheres of harm to oneself and to others are intertwined. In this social sphere, even mediate and relatively unlikely effects, compared to other direct and frequent harms in vehicle traffic, may justify a limitation of the individual's freedom of self-determination.

The driver who would have preferred to avoid wearing a helmet faces a *prima facie* conflict of duties. Alvin's *prima facie* duty to himself to autonomously choose to drive without discomfort is opposed (◊) by the mediate *prima facie* social right of everyone to avoid increasing risk on public roads and their *prima facie* social duty of protection and non-interference. It is unclear how we should value individual freedom.

According to the Hobbesian concept of freedom, the decision not to wear a helmet may appear trivial. If we also take into account the freedom to choose autonomously, then Alvin's position deserves further consideration. Feinberg has proposed distinguishing the motorcyclist's interest in not wearing a helmet, depending on whether it is based on mere convenience or comfort, a sense of freedom, romantic symbolism, or an adventurous lifestyle. However, he also acknowledges the challenge of determining the significance of a particular behavior for an individual's life through rational calculation. For example, consider the case of the mountaineer who wonders how important it is for him to climb Mount Everest.<sup>113</sup> In our view, these parameters can be valuable in resolving an internal conflict of duties to oneself. However, in the context of behaviors

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<sup>111</sup> BVerwG, Urteil vom 04.07.2019 - 3 C 24.17 / 21 - [ECLI:DE:BVerwG:2019:040719U3C24.17.0].

<sup>112</sup> Alexander P. Espinoza Rausseo & Jhenny de Fátima Rivas Alberti, *La triple dimensión de los derechos fundamentales y la doctrina del foro público en el derecho norteamericano, con especial referencia a las facultades de exclusión en las redes sociales*, 32 DERECHO Y CIENCIAS SOCIALES 5, e125 (2025), <https://doi.org/10.24215/18522971e125>.

<sup>113</sup> Feinberg, *supra* note 22, at 103.

that impact others within a social sphere, the assessment must incorporate the principle of reciprocity. In this case, we must consider whether not wearing a protective helmet on public roads is in accordance with everyone's freedom, according to a universal law. The answer is no. It is reasonable to expect that all parties will take every possible measure to minimize the risk of accidents on public roads.

Given that social duties tend to prevail in the social sphere to the same extent that the importance of autonomously choosing a free-of-interference course of action diminishes, it could be argued that the social duties of protection and non-interference of the motorcyclist are in this case more important (>) than his duties to himself and that the obligation established by law is not a violation of his right to freedom. However, the issue of justice in specific cases remains where an individual's assessment is often more precise than a legislator's prognosis. For instance, in a scenario where the factual conditions would have precluded any possibility of social interaction, such as on a road that is inaccessible to other drivers.<sup>114</sup>

## 2. *Suicide*

[Case 7: Vertical Limit]. Boyce Garrett has decided to take a trip to Utah, where he will enjoy rock climbing with his two sons, Peter and Annie. Due to the negligence of two other climbers, they are hanging from a single anchor point. Boyce recognizes that the anchor in the rock will not be sufficient to hold the weight of all three and instructs Peter to cut the rope. Boyce falls into the void and saves Peter and Annie's lives.<sup>115</sup>

The exercise can be approached from the perspective of the right of necessity, in the sense of Peter's action of taking his father's life to save his own. According to Kant, this should not be judged as irreproachable but only as not punishable.<sup>116</sup> However, we will first review Mr. Boyce's decision in the context of his *prima facie* duties to himself. This analysis will allow us to determine whether there is a social duty of non-interference on Peter's part.

After determining that all other means of saving a life are impossible, Mr. Boyce faces a conflict of duties. On the one hand, he has a *prima facie* duty to preserve his own life. On the other hand, he has a *prima facie* duty of beneficence to do what is necessary to save Peter and Annie's lives. However, this duty of beneficence cannot be considered a legal duty toward others. Sacrificing one's life would exceed the limits of a duty of beneficence. In the context of rock climbing, a strong sports ethic is generally accepted. However, this conduct is

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<sup>114</sup> BVerfGE 90, 145/193 – Cannabis, available at <https://www.servat.unibe.ch/dfr/bv090145.html>.

<sup>115</sup> VERTICAL LIMIT (O'Donnell, C., Paxton, B., & Campbell, M. Dir., Marmot Library Network, 2000), available at <https://cmc.marmot.org/Record/.b2623208x?searchId=711715074&recordIndex=4&page=1>.

<sup>116</sup> Immanuel Kant, *supra* note 1, at 236.

not reasonably enforceable based on the principle of reciprocity in the social sphere. It is an imperfect duty to himself.

In principle, suicide is considered contrary to one's duty to oneself. According to Pufendorf, suicide violates the individual's duty to lead a dignified life and be useful to society. However, it would be admissible under certain conditions. It would be permissible if certain types of work would provoke a painful life for an individual but served a useful purpose for human society.<sup>117</sup> For Kant, using oneself as a mere means to an end distorts one's humanity. However, he leaves open questions such as whether it would be permissible to save one's country, humanity in general, or prevent others from contracting diseases such as rabies.<sup>118</sup>

Boyce Garrett decides to sacrifice his own life in a *prima facie* conflict of duties to himself. Since duties to oneself are not enforceable through external coercive mechanisms, an individual's decision to end his own life would not be reviewable by society on its merits. Kant argues that suicide can also be considered a transgression of duty toward others (e.g., spouses, children, rulers, fellow citizens, and God).<sup>119</sup> It must then be determined whether the indirect effects of the conduct can justify its reprehensible nature. In our view, all other circumstances being equal,<sup>120</sup> the direct effects on the individual determine that his conduct takes place in the private sphere. Mediate effects can also be part of one's duties to oneself, as in the case of self-realization for the sake of being useful to society. However, the idea of an external duty to exist would lead to the instrumentalization of the person. The principle of human dignity does not impose an objective duty on members of society to prevent Mr. Boyce from taking his own life.<sup>121</sup> In our opinion, this source of protection rights does not derive from the individual's capacity for self-determination, but rather from an objective value or interest of all members of human society. The principle of human dignity can only give rise to objective duties if the individual lacks the capacity to act freely and rationally. A different position would be incompatible with a system based on individual freedom.

In the social sphere, each of us recognizes the value of respecting freedom of choice, even if it endangers the individual's own life.<sup>122</sup> This complies with

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<sup>117</sup> Pufendorf, *supra* note 6, at 71.

<sup>118</sup> Immanuel Kant, *supra* note 1, at 423.

<sup>119</sup> Immanuel Kant, *supra* note 1, at 422.

<sup>120</sup> In the film *Monsieur Lazhar*, the suicide of a teacher in a classroom profoundly impacts the students, some of whom witness the incident. *MONSIEUR LAZHAR* (Falardeau, P. Dir., Canadá: Aceprensa, 2011).

<sup>121</sup> BVerfGE 153, 182 (264) – Suizidhilfe, available at <https://www.servat.unibe.ch/dfv/bv153182.html>; STC 19/2023, FJ 6 C) b) (i), available at <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/29280>.

<sup>122</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), available at <https://supreme.justia.com/cases/federal/us/197/11/> y *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990), available at <https://supreme.justia.com/cases/federal/us/497/261/>.

the principle of reciprocity contained in the formula of universal law. From this derives the no-right of others and of society. The German Federal Constitutional Court has ruled that decisions about one's voluntary end-of-life do not require additional explanation or justification. According to the court, self-determination in this area belongs to the "most fundamental area of personality" of human beings. In this area, individuals are free to choose their own rules and decide according to them.<sup>123</sup> Boyce Garrett's decision to sacrifice his life is therefore governed by the principle of autonomy, which tends to prevail in the private sphere, especially in the absence of direct harm to others.

Mr. Boyce's choice to sacrifice himself to save Peter and Annie's lives stems from his assessment of his duties to himself in the context of a non-conflicting relationship. Mr. Boyce's freedom of self-determination opposes ( $\diamond$ ) the social no-right of everyone and the no-duty of Mr. Boyce to others. The right of defense is the external face of determining the end. In a non-conflictive relationship, this becomes an actual right and is correlated ( $\sim$ ) with a duty for each of us, the other members of society, not to interfere in that resolution.

### 3. *Assistance in Suicide*

[Case 8: Vertical Limit II] Was Peter's decision to cut the rope a violation of his father's right to life? Peter is an adult who can make decisions independently. He faces a *prima facie* conflict of duties to himself. His duty to preserve his own life, his duty of benevolence to save Annie's life, and his duty of obedience to his father could conflict with his duty of benevolence to save his father's life. As we have noted, the latter would be supererogatory. It would therefore not be enforceable as a duty towards others. However, unlike in Boyce's case, Peter may have a duty of non-interference in his father's life. At this point, we must ask whether his father's decision releases Peter from his *prima facie* duty not to interfere with his father's life. As in the case of society's objective duty to protect people's lives, we believe that there can be no duty of non-interference on Peter's part without his father's correlated right of self-defense. As we have seen, his father had chosen an end other than preserving his life. Thus, Peter's *prima facie* duty of non-interference is not a social duty but rather an imperfect duty to himself. Although Peter's actions have serious consequences for others, consent determines that the action occurs in the private sphere.

Whether Peter's conduct in cutting the rope is reprehensible or not depends on everyone's social duty not to interfere in Boyce Garrett's decision. It is no longer just a question of Peter sacrificing the life of someone who wasn't causing danger to save his own, but rather, of him acting as an instrument to carry out his father's resolution. The father's lack of means to carry out his resolution is a factual element. Peter has the knife and carries out the experienced climb-

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<sup>123</sup> BVerfGE 153, 182 (263) – Suizidhilfe, available at <https://www.servat.unibe.ch/dfr/bv153182.html>.

er's decision. This is the approach of the German Federal Constitutional Court regarding assisted suicide. A legal prohibition would prevent those who lack the physical capacity to do so themselves from carrying out their determination to take their own life. This would be an indirect or *de facto* prohibition. A social prohibition of Peter's actions in cutting the rope would contradict everyone's duty to not interfere with Boyce Garrett's decision.

## V. Self-Regarding Contracts

Freedom of contract adds an additional level of complexity to the problem of self-regarding acts. Is a contract valid and enforceable if one party agrees to act in a way that falls within their intimate sphere? What is the relationship between the bilateral will of the parties and the social will? These are issues that arise in the context of marriage, concubinage, prostitution, the acquisition of human organs or tissues, and consensual slavery. Feinberg describes a hypothetical case in which a person agrees to become a slave in exchange for ten million dollars, either to be paid in advance to a loved one or a worthy cause or as payment for prior enjoyment of a supreme benefit, as in the legend of Faust.<sup>124</sup>

Often, the contract is deemed invalid. Kant argued that a contract by which one party completely renounces their freedom for the benefit of the other would be contradictory and, therefore, null and void “since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force”.<sup>125</sup> Both Rawls and Ripstein agree with Kant that slaves become objects who cannot hold obligations.<sup>126</sup> According to Ripstein, freedom of contract is limited to those compatible with the principle of reciprocity: “...you cannot give another person a right to treat you as a mere means by binding you in ways in which you cannot bind them”.<sup>127</sup> Mill would concede the limitation of will for the protection of freedom. The sale of a person would be a renunciation of all future use of freedom: “The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom”.<sup>128</sup> However, this is the same argument we rejected regarding suicide. The German Federal Constitutional Court rejected the argument that suicide deprives a person of dignity because suicide simultaneously renounces self-determination and status as a subject.<sup>129</sup> Feinberg upholds the principle of soft paternalism. According to this principle, a person's right to

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<sup>124</sup> Feinberg, *supra* note 22, at 74.

<sup>125</sup> Immanuel Kant, *supra* note 1, at 283.

<sup>126</sup> JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 120 (Harvard University Press, 2001); Ripstein, *supra* note 69, at 135.

<sup>127</sup> Ripstein, *supra* note 69, at 18.

<sup>128</sup> Mill, *supra* note 59, at chap. V, para. 10; Dworkin, *supra* note 104, at 75.

<sup>129</sup> BVerfGE 153, 182 (264) – Suizidhilfe, available at <https://www.servat.unibe.ch/dfr/bv153182.html>.

self-determination prevails even over their own good. Interference is justified only when necessary to determine if a choice is voluntary and truly theirs, or to protect them from choices that are not theirs.<sup>130</sup> However, in the case of the slavery contract, Feinberg seems willing to extend this principle to the point of denaturing it. He argues that “the state might be justified simply in presuming nonvoluntariness conclusively in every case as the least risky course”.<sup>131</sup>

Most authors remain faithful to the historical account, leading them to acknowledge the possibility of a de jure system of slavery. However, we do not see the usefulness of this approach. A legal system that permits the ownership of people must be based on the idea that, despite belonging to humanity, an individual or group does not deserve to be treated as a person but as a thing. This was the Court’s argument in *Dred Scott v. Sandford* (1856), when it stated that “[African Americans] were at that time considered as a subordinate and inferior class of beings... and had no rights or privileges...”.<sup>132</sup> And in Shakespeare’s work, the power to demand or not demand fulfillment of an obligation that could lead to the death of the obligated party seems to have been transferred through the contract.<sup>133</sup>

In our opinion, the analysis must point out the impossibility of de jure slavery without taking a paternalistic stance. Despite historical evidence, it is necessary to maintain the claim of counterfactual validity of the law.<sup>134</sup> Alexy has argued that the Kantian concept of law is non-positivist. According to Alexy’s inclusive non-positivism, moral defects only undermine legal validity if the threshold of extreme injustice is crossed.<sup>135</sup> This degree of nullity has been applied by the German Federal Constitutional Court. The Court declared that attempting to

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<sup>130</sup> Feinberg, *supra* note 22, at 60.

<sup>131</sup> Feinberg, *supra* note 22, at 79; Ben Saunders, *Reformulating Mill’s Harm Principle*, 125 MIND 1005, 1024 (2016), <https://doi.org/10.1093/mind/fzv171>.

<sup>132</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856), available at <https://supreme.justia.com/cases/federal/us/60/393/>.

<sup>133</sup> Posner argues that neither civil law nor common law would impose a penalty involving physical injury for nonpayment of a debt in the enlightened 16th century. Rather, it could be a metaphor to express the injustice of the penal bond. See RICHARD A. POSNER, *Law and Commerce in The Merchant of Venice*, in SHYLOCK ON TRIAL: THE APPELLATE BRIEFS 8 (University of Chicago Press, 2013). On the contrary, Niemeyer has argued that Shylock’s contract was possible and, according to the law at that time, valid. Th. Niemeyer, *The Judgment against Shylock in the Merchant of Venice*, 14 Mich. L. Rev. 20, 30 (1915), <https://doi.org/10.2307/1276185>. For a comparison between the legal systems of England and 16th-century Venice, see James Otis Rodner Smith, Felicity Ann Rodner & Ana Valentina Lameda, *Law and Justice in William Shakespeare’s The Merchant of Venice*, 18 REVISTA VENEZOLANA DE LEGISLACIÓN Y JURISPRUDENCIA 57 (2022), <http://rvlj.com.ve/wp-content/uploads/2022/08/RVLJ-18-57-78.pdf>; Tim Stretton, *Contract, debt litigation and Shakespeare’s The Merchant of Venice*, 31 ADELAIDE LAW REVIEW 111 (2010), <https://www.austlii.edu.au/au/journals/AdelLawRw/2010/7.pdf#page=10.00>.

<sup>134</sup> NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 222 (Suhrkamp, 1993).

<sup>135</sup> Robert Alexy, *Kant’s Non-Positivistic Concept of Law*, 24 KANTIAN REVIEW 503 (2019), <https://doi.org/10.1017/S1369415419000281>.

physically and materially destroy certain population sectors based on “racial” criteria flagrantly contradicts fundamental justice principles.<sup>136</sup>

According to Kant, an external object that can be owned can only be a corporeal thing toward which one has no obligation. Therefore, a person cannot be the object of ownership.<sup>137</sup> The a priori impossibility of a real right over a person, such as de jure slavery, derives from the ontological difference between persons and things. For Kant, the object of rights can only be something that is externally yours or mine. What is internal is an innate right, and only what is external can be acquired.<sup>138</sup> Private law regulates the acquisition of external objects.<sup>139</sup> Something externally mine is a thing outside me.<sup>140</sup> It is an object merely distinct from me.<sup>141</sup>

The determining factor of whether the involvement of one or more individuals in the body of another falls within the intimate sphere or the social sphere is the presence of valid consent. In the intimate sphere, one of the parties may consent to intervention in their body. This sphere does not adhere to the principle of reciprocity. Individuals are free to legislate on the values that determine their closest relationships. If an individual changes the determination of their ends, they are at liberty to unilaterally modify or terminate the bond. By accepting the promise, a right/duty relationship is not established; rather, a no-right/no-duty relationship is formed because the intimate sphere is excluded from the social coercion of the law.

In the absence of consent from the individual concerned, conduct falls within the social sphere. In this sphere, the legality of external actions is determined by social will. Conduct may result in harm, and its conformity to law will depend on the principles of justice that are applicable in the social sphere. Unlawful interference with a person’s body is contrary to the principle of reciprocity and is therefore unlawful. However, if violence is used against an illegitimate aggressor, as in self-defense, the conduct would no longer be contrary to the criteria of justice of the social contract. As Epstein notes, “coercion is objectionable where it is a hindrance to a person’s right to freedom, but legitimate when it takes the form of hindering a hindrance to freedom”.<sup>142</sup> This criterion leads Kant to affirm the possibility of property rights over those who have been deprived of their personality by a crime.<sup>143</sup>

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<sup>136</sup> BVerfGE 23, 98/106 - Ausbürgerung I, available at <https://www.servat.unibe.ch/df/bv023098.html>.

<sup>137</sup> Immanuel Kant, *supra* note 1 at 269.

<sup>138</sup> *Id.*, at 237, 245.

<sup>139</sup> *Id.*, at 245.

<sup>140</sup> *Id.*, at 249.

<sup>141</sup> *Id.*, at 245.

<sup>142</sup> Ripstein, *supra* note 69, at 55.

<sup>143</sup> Immanuel Kant, *supra* note 1, at 283.

## 1. *The Merchant of Venice*

Basanio, a young Venetian, wants to win the hand of Portia, a beautiful and wealthy heiress from Belmont. He turns to his best friend, Antonio, the Merchant of Venice, and asks for a loan of 3,000 ducats. Since Antonio's wealth is tied up in his fleet, which is currently at sea, he must ask Shylock, a Jewish moneylender whom he despises, for the money. Shylock lends him the money but makes him sign a contract stipulating that, if Antonio does not repay the loan on time, Shylock can take a pound of Antonio's flesh as payment. When Antonio fails to repay the loan, Shylock demands his pound of flesh, to be cut from Antonio's heart. Assuming all parties are competent adults who are well-informed, capable of acting rationally, and free from undue pressure, the situation unfolds as follows.

We wonder if a self-regarding act can be the subject of a contract. Is this obligation legally enforceable? First, we will review Antonio's obligation to return 3,000 ducats to Shylock. Next, we will review the bond agreement, which states that if Antonio fails to repay the money within the established time frame, he agrees to settle the debt by giving up one pound of his flesh.

## 2. *The Jural Relationship of the Loan Agreement*

According to Kant's proposed classification, the acquisition of something external that is mine or yours can be divided in terms of the matter (the object). I can acquire either a corporeal thing or another person's performance or the status of that person himself.<sup>144</sup> Depending on the mode of acquisition, it is divided into real rights, personal rights, or personal-real rights.<sup>145</sup> The contract for the interest-free loan of money between Shylock and Antonio is a personal obligation.

According to Kant, a personal right is the possession of another's choice, as the capacity to determine it by my own choice to a certain deed in accordance with laws of freedom (what is externally mine or yours with respect to the cau-

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<sup>144</sup> Immanuel Kant, *supra* note 1, at 259; Kant acknowledged the existence of "rights to persons akin to rights to things, which permit the "possession of an external object as a thing and use of it as a person", 276. This refers to the domestic sphere, which Kant said has characteristics like real and personal rights. Acquisition is not through a contract, but through the law. Examples include the marital contract, whereby one person uses another as a thing; the rights of parents over their children; and servitude. In this category of rights, if a spouse, child, or servant escapes, the remaining spouse, parents, or owner has the right to recover them "just as it is justified in retrieving a thing", 282; 283. In response to certain criticisms, Kant defended the a priori nature of this category in an appendix published in the second edition (1798). He acknowledged that a right to a person akin to a right to a thing, do not allow persons to be treated as things (Sachen) in all respects, 358 and that they do not imply ownership of another person, because a human being cannot have property in himself, much less in another person, 359."

<sup>145</sup> *Id.*, at 260.

sality of another).<sup>146</sup> For Savigny, the debtor's freedom is subject to limitation in a sphere where the creditor's will reign supreme.<sup>147</sup> The creditor has extended freedom as dominion over another's will, while the debtor has limited freedom as dependence on another's will.<sup>148</sup> Kant observes that a contract is the unified will of two persons, whereby what belongs to one person passes to the other.<sup>149</sup> If a period is allowed between accepting the promise and delivering what has been promised, the contract does not transfer ownership of the promised item. Rather, it transfers the promise of the other party to perform an act.<sup>150</sup> The creditor acquires the right against a natural person; that is, the right to act at their discretion to produce something for the creditor. Accepting the promise leads to performance, which is a personal right, not a real right.<sup>151</sup>

Money naturally belongs to the social sphere of exchange. Kant recalls Achenwall's definition: "*Money is a thing that can be used only by being alienated*".<sup>152</sup> Antonio's obligation to return 3,000 ducats does not contradict the axiom of external freedom or the universal law of social will. The obligation to hand over a sum of money is in accordance with the principle of reciprocity: "...coercion which constrains everyone to pay their debts can coexist with the freedom of everyone, including debtors, in accordance with a universal external law".<sup>153</sup> Shylock's right allows him to act on Antonio's choice,<sup>154</sup> to put him in possession of the thing.<sup>155</sup> From this point of view, and with all other circumstances being equal, the contract is valid and enforceable. Antonio's freedom may be subject to limitation in a sphere where the creditor's will prevails.<sup>156</sup>

### 3. Antonio's Obligation to Deliver One Pound of his Flesh

The object of the contract, in which Antonio agrees to give 1 pound of his flesh, is the person himself. His decision to offer his body as guarantee for the loan may have been an economic calculation or the result of romantic passion. Shylock's interest probably stems from a desire for personal revenge. However,

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<sup>146</sup> *Id.*, at 271.

<sup>147</sup> Also in this sense, FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS: BD. 1 24 (Veit und comp., 1840).

<sup>148</sup> FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS: BD. 8 201 (Veit und comp., 1849).

<sup>149</sup> Immanuel Kant, *supra* note 1, at 271, 272.

<sup>150</sup> *Id.*, at 274-275.

<sup>151</sup> *Id.*, at 275.

<sup>152</sup> *Id.*, at 286.

<sup>153</sup> *Id.*, at 232.

<sup>154</sup> *Id.*, at 74.

<sup>155</sup> *Id.*, at 275.

<sup>156</sup> Savigny, *supra* note 147, at 7. In Savigny's view, in every obligation the creditor has extended freedom, as control over another's will, while the debtor appears as limited freedom, as dependence on another's will. Savigny, *supra* note 150, at 201.

an individual's motives and the importance of their actions do not seem to be decisive in assessing their social duty.

To determine whether Antonio has a legal obligation to deliver 1 pound of his flesh, we must consider the following points: (1) whether Antonio can validly consent to the removal of 1 pound of flesh from his body; (2) whether Antonio's consent has an irreversible effect; and (3) whether Shylock has a legal right to demand performance of the obligation. What is the role of social will in this context? (4) Whether Shylock should be compensated for the breach, or whether he should be punished for attempting to take Antonio's life.

### A. *The Validity of Antonio's Consent*

We must consider whether Antonio can validly consent to the removal of 1 pound of flesh from his body or whether, on the contrary, Antonio's promise should be null and void because of a social duty to protect all citizens, even from themselves. We have argued that Antonio faces a *prima facie* conflict of duties towards himself. According to Kant, actions such as self-mutilation, the surrender or sale of a body part, and even the onerous alienation of one's hair, would be considered forms of partial suicide. These actions would be contrary to the *prima facie* duty towards oneself of self-preservation.<sup>157</sup> However, Antonio decides to keep the promise he made to Basanio in his private sphere. Antonio has consented to the removal of certain organs and tissues from his body in the event of a breach of the principal obligation, an intervention that would inevitably result in his death.

This conduct only has direct effects in the sphere of privacy reserved for the individual. If it does not directly affect the interests of others or society, the act falls within the private sphere rather than the social sphere. Whether conduct breaches a duty to oneself can only be determined by internal judgment. Others or society have no right to prevent Antonio from putting himself in a situation where he could lose his life. Antonio has no social duty to refrain. His *prima facie* right of defense, which is opposed ( $\diamond$ ) to the no-right of everyone, derives from the determination of his own ends. This right is correlated ( $\sim$ ) with the *prima facie* duty of everyone to refrain from interference. For these reasons, we must conclude that, all other circumstances being equal, the social will cannot prohibit Antonio's promise because it is part of his intimate sphere. As can be seen, internal legislation applies in this area, not the justice criteria of the social contract.

### B. *The Implications of Consent*

We have argued that it is logically impossible to have property right over a person. Given that it is not possible to acquire a real right over a person, Antonio's

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<sup>157</sup> Immanuel Kant, *supra* note 1, at 423.

consent does not have an irreversible effect. This does not imply a complete cessation of personal identity or a renunciation of future autonomy. The situation regarding Antonio's contract to deliver 1 pound of flesh or the example of voluntary slavery is distinct from the cases of assisted suicide or irreversible interventions. In the first case, the subject retains the capacity for self-determination. In the second case, the subject's inability to change his initial position is a factual impossibility. Antonio reserves the possibility of reevaluating his decision. This enables him to reevaluate his duties to himself.

### C. *Shylock's Claim-Right*

No one asks Antonio whether he would prefer to preserve his life. This may be because it is presumed that this would align with his objective interest, or rather because it is assumed that the authority to release him lies exclusively with Shylock. However, given the absence of voluntary compliance, it can be deduced that at the time of the claim, Antonio had changed his mind. On this occasion, he chooses the duty of self-preservation. Antonio's choice of the duty of self-preservation establishes his right of defense. Therefore, it is necessary to examine whether Shylock has a legal right to demand compliance.

We have argued that Antonio cannot be prevented from voluntarily surrendering 1 pound of meat. The doctrine of self-regarding acts should not only prevent intervention to protect the individual from themselves but should also have a broader scope. This is a free area of law, meaning external coercion is not possible. According to Kant, the law in general only has as its object what is external to actions.<sup>158</sup> This principle forms the foundation of a rule of negative competence. Society is not permitted to intervene in the internal sphere. The social will cannot demand that an individual perform an action that is detrimental to their own well-being. This is an objective no-right sphere, in which the freedom of the individual is opposed to a social no-duty. Antonio's obligation to deliver 1 pound of flesh to Shylock cannot be a duty enforceable by external coercion of the law; it remains in the sphere of duties towards oneself. In a similar way to intimate relationships in marriage, concubinage, prostitution contracts, contracts for the acquisition of human organs or tissues, or slavery, Antonio's obligation is not part of the external relationships that are regulated by law. We do not share the position that the passive subject is incapable of giving consent. Rather, we believe that the conformity of the bilateral will with the social will is subject to control when the creditor demands compulsory performance of the obligation.

The social will does categorically exclude the transformation of the human body into a market commodity. Trust in the legal system is not undermined by breaches of obligations that fall outside the domain of law. Therefore, Antonio's duty to fulfill his obligations (*pacta sum servanda*), which conflicts with his du-

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<sup>158</sup> Immanuel Kant, *supra* note 1, at 232.

ty to preserve life, is a duty to himself, which can only be binding in the internal forum. Shylock and society have no-right to demand its fulfillment. Antonio's right of defense is correlated ( $\sim$ ) with the actual duty of all to refrain from interference. For these reasons, we must conclude that, all other circumstances being equal, Antonio's promise cannot be demanded by the social will.

Humboldt arrived at a similar conclusion. He argued that the State should not prevent the formation or execution of contracts in which one party becomes an instrument of another's designs. For instance, this occurs when a contract results in the enslavement of the contracting party. The State should only deny the right of coercion provided by its laws. According to Humboldt, certain contracts that give rise to personal obligations, such as marriage, should be revocable without the need to provide further reasons.<sup>159</sup> Kant argued that concubinage and prostitution cannot have legal validity because a person who enters into such a contract cannot be compelled to fulfill their promise if they change their mind. In a prostitution contract, in which one party gives themselves over to the other's control, either party may cancel the contract at any time without grounds for complaint.<sup>160</sup> Servitude can also be terminated because a contract in which one party renounces their entire freedom for the benefit of the other is null and void.<sup>161</sup>

#### D. Consequences for Shylock

We must consider whether Shylock should be indemnified for the breach, or whether he should be prosecuted for attempting to take Antonio's life. Mill's position on retraction aligns with that of Humboldt. Except for contracts pertaining to monetary matters, Mill believes in maintaining the freedom of retraction. However, he also recognizes that if retraction harms the legitimate interests of another, that party must be liable for the damage.<sup>162</sup>

The legality of Shylock's claim can be determined in light of the categorical imperative: "Act upon a maxim that can also hold as a universal law".<sup>163</sup> According to Pufendorf, compelling others to engage in slavery against their will would contradict the principle of reciprocity and be considered unlawful, as it would assert a right against others that one is not willing to grant to oneself.<sup>164</sup> As with the contract of slavery, the obligation to deliver 1 pound of flesh would contradict the fundamental principles of humanity, which prohibit the treatment of other persons as commodities: "Act in such a way that you use humanity, both in your own person and in the person of any other, always at the same

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<sup>159</sup> Humboldt, *supra* note 57, at 104 [Chap. XI, par. 2].

<sup>160</sup> Immanuel Kant, *supra* note 1, at 279.

<sup>161</sup> Immanuel Kant, *supra* note 1, at 283.

<sup>162</sup> Mill, *supra* note 59, at chap. V, par. 10.

<sup>163</sup> Immanuel Kant, *supra* note 1, at 225, 230, 256.

<sup>164</sup> *Pufendorf*, note 36, at 125.

time as an end and never merely as a means”.<sup>165</sup> Since Shylock’s will does not align with the law, it would not give rise to a legitimate expectation either.

In turn, Shylock’s demand cannot be regarded as an external act. The debate before the Duke of Venice is a theoretical discussion. Its purpose is to resolve the conflict of *prima facie* duties. Therefore, it is not an external interference against another and could not give rise to a criminal sanction against Shylock, as occurs in the play. Other examples of acts referring to oneself that cannot be enforced by law include the condition imposed by Antonio on Shylock to convert to Catholicism, as well as certain testamentary clauses imposing conditions of a similar nature.

## VI. Conclusion

For Fichte, “only where there is a conflict of freedoms is there right”.<sup>166</sup> This is the case with the external imposition of social duty in conflicting jural relationships. Fichte’s conclusion is that the state and law only apply “insofar as moral law has not yet achieved universal validity, and as preparation for its validity”.<sup>167</sup> The general rule of the latter would lead to the repeal of the former. The resolution of the conflict is certainly conducive to the establishment of a non-conflictual relationship, in which the non-right of one of the parties is involved. From this perspective, the state and the law serve a corrective function that is triggered when ethical law malfunctions during the individual’s self-regulatory process. We are unable to ascertain whether acting in accordance with a no-right derives from the preventive effect of legal sanctions or from a sense of duty for duty’s sake. However, it is important to note that the former would clearly be insufficient without the latter. If, apart from cases where there is a well-founded fear of discovery and punishment, the individual did not have a sense of duty, non-conflictual relationships would be exceptional and the whole system would collapse. On the other hand, the imposition of limitations and prohibitions under the threat of punishment does not promote the development of the ability to determine for oneself and in each case what the right choice is, or even to learn from one’s own mistakes, but rather a culture of obedience. External obligation must leave room for free will.

It has been proposed that it would be reasonably acceptable for the government to have limited power to intervene when the decisions of adults demonstrate the same deficiencies as those of an incompetent person.<sup>168</sup> This criterion

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<sup>165</sup> Immanuel Kant, *Grundlegung zur metaphysik der sitten*, in KANT’S GESAMMELTE SCHRIFTEN 429 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band IV., 1911) (1785).

<sup>166</sup> Fichte, *supra* note 2, at 7.

<sup>167</sup> *Id.*, at 8.

<sup>168</sup> Dworkin, *supra* note 102, at 77; Ernesto Garzón Valdés, *¿Es éticamente justificable el paternalismo jurídico?*, 5 DOXA 155 (1988), <https://doi.org/10.14198/DOXA1988.5.08>.

is the exact counterpart of the system of duties based on individual rationality. The state could impose a maxim of conduct on the individual from above. By taking this action, the state differentiates itself from the social will to become the “ethical whole,” to which, according to Hegel, the individual is subordinate.<sup>169</sup> This establishes a vertical relationship, like the contract of subjection in an absolute monarchy. In contrast, in a liberal state governed by the rule of law, the social will is formed based on the ability of citizens to make rational decisions autonomously. The freedom of the individual in the private sphere, the equality of citizens among themselves in the social sphere, and the independence of capable and self-determined citizens (without relations of domination) in the public sphere are interdependent elements. In this system, the impairment of one element can hinder or prevent the functioning of the rest. The principle of individual freedom, which is most strongly expressed in the private sphere, serves as the foundation of the system of spheres. If, in the private sphere, the individual is no longer regarded as a subject capable of acting autonomously, then the existence of duties could not be upheld, since citizens would no longer be accountable. Paternalism can be seen as a form of despotism.

## VII. References

- Adela Cortina Orts, *Preliminary study*, in IMMANUEL KANT, LA METAFÍSICA DE LAS COSTUMBRES, at XXXIX (A. Cortina & J. Conill trans., Tecnos, 2008).
- ALBRECHT RANDELZHOFFER, DIE PFLICHTENLEHRE BEI SAMUEL VON PUFENDORF: FESTVORTRAG GEHALTEN AM 2. DEZEMBER 1982 IM KAMMERGERICHT AUS ANLASS DER FEIER ZUR 350. WIEDERKEHR SEINES GEBURTSTAGES IN ANWESENHEIT DES HERRN BUNDESPRÄSIDENTEN 27 (Walter de Gruyter, 1983).
- Alexander P. Espinoza Rausseo & Jhenny de Fátima Rivas Alberti, *La triple dimensión de los derechos fundamentales y la doctrina del foro público en el derecho norteamericano, con especial referencia a las facultades de exclusión en las redes sociales*, 32 DERECHO Y CIENCIAS SOCIALES 5, e125 (2025). <https://doi.org/10.24215/18522971e125>
- ALF ROSS, ON LAW AND JUSTICE 198 (Oxford University Press, 2019).
- ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 109 (Harvard University Press, 2009).
- Ben Saunders, *Reformulating Mill’s Harm Principle*, 125 MIND 1005, 1024 (2016). <https://doi.org/10.1093/mind/fzv171>
- Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY (1973-) 109 (1999). <https://doi.org/10.2307/1144164>
- Bernard E. Harcourt, *The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court’s Opinion in United States v. Windsor, John Stuart Mill’s Essay*

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<sup>169</sup> GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS: ODER, NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE MIT HEGELS EIGENHÄNDIGEN NOTIZEN UND DEN MÜNDLICHEN ZUSÄTZEN 148 (1970) (1832).

- on Liberty* (1859), and H. L. A. Hart's *Modern Harm Principle*, 437 U OF CHICAGO, PUBLIC LAW WORKING PAPER (August 16, 2013). <http://dx.doi.org/10.2139/ssrn.2311329>
- Bert Heinrichs, *Single-Principle Versus Multi-Principles Approaches in Bioethics*, 27 J. Applied Phil. 72, 73 (2010). <https://doi.org/10.1111/j.1468-5930.2009.00474.x>
- BVerfGE 6, 389/437 – Homosexuelle, available at <https://www.servat.unibe.ch/dfr/bv006389.html>.
- BVerfGE 23, 98/106 – Ausbürgerung I, available at <https://www.servat.unibe.ch/dfr/bv023098.html>.
- BVerfGE 90, 145/187 – Cannabis, available at <https://www.servat.unibe.ch/dfr/bv090145.html>.
- BVerfGE 90, 145/193 – Cannabis, available at <https://www.servat.unibe.ch/dfr/bv090145.html>.
- BVerfGE 153, 182 (263-264) – Suizidhilfe, available at <https://www.servat.unibe.ch/dfr/bv153182.html>.
- BVerfGE 120, 224 – Geschwisterbeischlaf, available at <https://www.servat.unibe.ch/dfr/bv120224.html#Rn122>.
- CARL WELLMAN, AN APPROACH TO RIGHTS: STUDIES IN THE PHILOSOPHY OF LAW AND MORALS 2 (Springer Science & Business Media, 1997).
- CARL WELLMAN, REAL RIGHTS 183 (Oxford University Press, 1995).
- Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 262 (1990), available at <https://supreme.justia.com/cases/federal/us/497/261/>.
- DANIEL EGGERS, DIE NATURZUSTANDSTHEORIE DES THOMAS HOBBS: EINE VERGLEICHENDE ANALYSE VON | 'THE ELEMENTS OF LAW', 'DE CIVE' UND DEN ENGLISCHEN UND LATEINISCHEN FASSUNGEN DES 'LEVIATHAN' 163 (Vol. 84) (Walter de Gruyter, 2008).
- DAVID PHILLIPS, ROSSIAN ETHICS: W. D. ROSS AND CONTEMPORARY MORAL THEORY 37 (Oxford University Press, 2019).
- DAVID ROSS, THE RIGHT AND THE GOOD 28 (Oxford University Press, 2003) (1930).
- Dred Scott v. Sandford, 60 U.S. 393, 404 (1856), available at <https://supreme.justia.com/cases/federal/us/60/393/>.
- Ernesto Garzón Valdés, *¿Es éticamente justificable el paternalismo jurídico?*, 5 DOXA 155 (1988). <https://doi.org/10.14198/DOXA1988.5.08>
- FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS: BD. 1 24 (Veit und comp., 1840).
- FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS: BD. 8 201 (Veit und comp., 1849).
- GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS: ODER, NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE MIT HEGELS EIGENHÄNDIGEN NOTIZEN UND DEN MÜNDLICHEN ZUSÄTZEN 148 (1970) (1832).
- Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 79 (1972). <http://www.jstor.org/stable/27902250>

- GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, INTRODUCTION TO PROPERTY THEORY 76 (2012).
- HANS WELZEL, DIE NATURRECHTSLEHRE SAMUEL PUFENDORFS: EIN BEITRAG ZUR IDEENGESCHICHTE DES, 17. UND 18. JAHRHUNDERTS 6 (Walter de Gruyter, 2012).
- Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45, 56 (1959). [https://www.normfriesen.info/forgotten/little\\_rock1.pdf](https://www.normfriesen.info/forgotten/little_rock1.pdf).
- H. L. A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 188 (1955). <https://doi.org/10.2307/2182586>
- H. L. A. HART, LAW, LIBERTY, AND MORALITY 22 (Stanford University Press, 1963).
- H. L. A. HART, *Legal rights*, in ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY 168, 178 (OUP Oxford, 1982).
- Immanuel Kant, *Die Metaphysik der Sitten. Metaphysische Anfangsgründe der Tugendlehre*, in KANT'S GESAMMELTE SCHRIFTEN 230 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band VI, 1914).
- Immanuel Kant, *Grundlegung zur metaphysik der sitten*, in KANT'S GESAMMELTE SCHRIFTEN 429 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band IV., 1911) (1785).
- IMMANUEL KANT, IMMANUEL KANTS LOGIK: EIN HANDBUCH ZU VORLESUNGEN 113 (Königsberg, Bey Friedrich Nicolovius, 1800).
- Immanuel Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in KANT'S GESAMMELTE SCHRIFTEN 290 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band VIII, 1910) (1793).
- Jacobson v. Massachusetts, 197 U.S. 11 (1905), available at <https://supreme.justia.com/cases/federal/us/197/11/>.
- James Otis Rodner Smith, Felicity Ann Rodner & Ana Valentina Lameda, *Law and Justice in William Shakespeare's The Merchant of Venice*, 18 REVISTA VENEZOLANA DE LEGISLACIÓN Y JURISPRUDENCIA 57 (2022). <http://rvlj.com.ve/wp-content/uploads/2022/08/RVLJ-18-57-78.pdf>
- Jens Timmermann, *Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory*, 95 ARCHIV FÜR GESCHICHTE DER PHILOSOPHIE 36, 47 (2013). <https://doi.org/10.1515/agph-2013-0002>
- JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 323 (Clarendon Press, 1907) (1823).
- Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 139 (1966). <http://www.jstor.org/stable/20009200>
- JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 41 (Oxford University Press, 1989).
- Joel Feinberg & J. Narveson, *The nature and value of rights*, 4 J. VALUE INQUIRY 243, 249 (1970). <https://doi.org/10.1007/bf00137935>
- JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 120 (Harvard University Press, 2001).

- JOHN STUART MILL, *ON LIBERTY* (Stefan Collini Ed., Cambridge University Press, 2012) (1859).
- JOHN STUART MILL, *Utilitarianism*, in *UTILITARIANISM AND ON LIBERTY: INCLUDING MILL'S ESSAY ON BENTHAM AND SELECTIONS FROM THE WRITINGS OF JEREMY BENTHAM AND JOHN AUSTIN* 222 (Blackwell Publishing Ltd, 2d ed., 2003) (1863).
- JOHANN GOTILIEB FICHTE, *RECHTSLEHRE: VORGETRAGEN VON OSTERN BIS MICHAELIS 1812 7* (Felix Meiner Verlag, 1980).
- JOHANN GOTILIEB FICHTE, *System der Sittenlehre nach den Principien der Wissenschaftslehre*, in *SÄMMTLICHE WERKE* 300 (VOL. 10) (Veit und comp., 1834) (1798).
- JOSEPH RAZ, *Rights and Individual Well-Being*, in *ETHICS IN THE PUBLIC DOMAIN. ESSAYS IN THE MORALITY OF LAW AND POLITICS* 57, 58 (Clarendon Press, 1992).
- Joseph William Singer, *The legal rights debate in analytical jurisprudence from Bentham to Hohfeld*, *WIS. L. REV.* 975, 993 (1982).
- J. Raz, *Legal Rights*, 4 *OXFORD J. LEGAL STUD.* 1, 20 (1984). <https://doi.org/10.1093/ojls/4.1.1>
- JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* 481 (Suhrkamp, 1996).
- Lara Denis, *Kant's Ethics and Duties to Oneself*, 78 *PAC. PHIL. Q.* 321, 335 (1997). <https://doi.org/10.1111/1468-0114.00042>.
- Marcus G. Singer, *On Duties to Oneself*, 69 *ETHICS* 202 (1959). <http://www.jstor.org/stable/2379349>
- Marietta Auer, *Subjektive Rechte bei Pufendorf und Kant: Eine Analyse im Lichte der Rechtskritik Hohfelds*, 208 *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS* 584, 594 (2008). <http://www.jstor.org/stable/40996023>
- Marsh v. Alabama, 326 U.S. 501 (1946), available at <https://supreme.justia.com/cases/federal/us/326/501/>.
- MARY GREGOR, *LAW OF FREEDOM* 59 (Blackwell, 1963).
- MATTHEW H. KRAMER, *Rights Without Trimmings*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL INQUIRIES* 59 (Oxford University Press, 2000).
- Michael Seidler, *Introductory essay*, in *SAMUEL PUFENDORF'S ON THE NATURAL STATE OF MEN: THE 1678 LATIN EDITION AND ENGLISH TRANSLATION* 22 (Michael Seidler ed. and trans., Edwin Mellen, 1990).
- MONSIEUR LAZHAR (Falardeau, P. Dir., Canadá: Aceprensa, 2011).
- NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 222 (Suhrkamp, 1993).
- Peterson v. City of Greenville, 373 U.S. 244, 250 (1963), available at <https://supreme.justia.com/cases/federal/us/373/244/>.
- RICHARD A. POSNER, *Law and Commerce in The Merchant of Venice*, in *SHYLOCK ON TRIAL: THE APPELLATE BRIEFS* 8 (University of Chicago Press, 2013).
- Richard McCarty, *Moral Conflicts in Kantian Ethics*, 8 *HISTORY OF PHILOSOPHY QUARTERLY* 65 (1991). <http://www.jstor.org/stable/27743963>
- Robert Alexy, *Kant's Non-Positivistic Concept of Law*, 24 *KANTIAN REVIEW* 503 (2019). <https://doi.org/10.1017/S1369415419000281>
- ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* 327 (Suhrkamp, 1985).

- Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943). <https://doi.org/10.2307/1334970>
- Runyon v. McCrary, 427 U.S. 160 (1976), available at <https://supreme.justia.com/ca-ses/federal/us/427/160/>.
- SAM. L. B. A PUFFENDORF, DE JURE NATURAE ET GENTIUM: LIBRI OCTO (BUCH 1) 541 (Ex Officina Knochiana, 1744) (1672).
- SAMUEL PUFENDORF, *Officia Hominis & Civis*, in SAMUEL PUFENDORF, GESAMMELTE WERKE 133 (Wilhelm Schmidt-Biggemann ed., Band 2, 1997) (1673).
- SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW [*De officio hominis et civis*] 111 (James Tully ed., Michael Silverthorne trans., Cambridge University Press, 1991) (1673).
- SAMUEL PUFENDORF, *On the natural state of men*, in SAMUEL PUFENDORF'S 'ON THE NATURAL STATE OF MEN'. THE 1678 LATIN EDITION AND ENGLISH TRANSLATION 109 (Michael Seidler ed. and trans., Lewiston, 1990) (1678).
- SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE 56 (R. Gosling, 1735).
- SAMUEL PUFENDORF, *Vorrede des Herrn von Pufendorff*, in GESAMMELTE WERKE. BD. 2. DE OFFICIO 101 (Gerald Hartung Hrsg., Akad. Verl, 1997) (1673).
- STC 19/2023, FJ 6 C) b) (i), available at <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/29280>.
- STEPHEN DARWALL, *Introduction*, in MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS I, XIII (Oxford University Press, 2013).
- STEPHEN DARWALL, *Moral Obligation: Form and Substance*, in MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS 40, 47 (Oxford University Press, 2013).
- Tim Stretton, *Contract, debt litigation and Shakespeare's The Merchant of Venice*, 31 ADELAIDE LAW REVIEW 111 (2010). <https://www.austlii.edu.au/au/journals/AdelLawRw/2010/7.pdf#page=10.00>
- T. M. SCANLON, WHAT WE OWE TO EACH OTHER 65 (Harvard University Press, 2000).
- Th. Niemeyer, *The Judgment against Shylock in the Merchant of Venice*, 14 Mich. L. Rev. 20, 30 (1915). <https://doi.org/10.2307/1276185>
- THOMAS HOBBS, LEVIATHAN 190 (Ch. 13) (Noel Malcolm ed., Clarendon Press, 2012) (1651).
- THOMAS HOBBS, LEVIATÁN O LA INVENCIÓN MODERNA DE LA RAZÓN 222 (Cap. XIII) (Editora Nacional, 1979) (1651).
- TOM L. BEAUCHAMP & JAMES F. CHILDLESS, PRINCIPLES OF BIOMEDICAL ETHICS 371 (Oxford University Press, 5th ed., 2001).
- VERTICAL LIMIT (O'Donnell, C., Paxton, B., & Campbell, M. Dir., Marmot Library Network, 2000), available at <https://cmc.marmot.org/Record/.b2623208x?searchId=711715074&recordIndex=4&page=1>.
- W. DAVID ROSS, FOUNDATIONS OF ETHICS: THE GIFFORD LECTURES DELIVERED IN THE UNIVERSITY OF ABERDEEN, 1945-6 88 (Oxford at the Clarendon Press, 1951) (1939).

Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 733 (1917). <https://doi.org/10.2307/786270>

Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 36 (1913). <https://doi.org/10.2307/785533>

WILHELM VON HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT 20 [Chap. 3 par. 1] (Coulthard Joseph trans., ed., John Chapman 1854) (1791).

# Between Legality and Legitimacy: Behavioral Insights into Digital Piracy and Regulatory Disobedience

*Entre la legalidad y la legitimidad: perspectivas conductuales sobre la piratería digital y la desobediencia regulatoria*

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**Abstract:** In the past few decades, the exponential growth of digital goods has overwhelmingly reshaped the landscape of cultural production, access, and distribution, creating new challenges in terms of legality, legitimacy, and accessibility. One prominent issue that has emerged is digital piracy, a practice that continues to gain ground worldwide. While often considered a violation of intellectual property rights, it remains widespread, with segments of society viewing it as morally acceptable, thus highlighting a gap between legal standards and public moral perception. This disconnect has prompted a growing debate on how digital piracy should be regulated, particularly when traditional legal mechanisms seem ineffective in addressing the underlying causes of this phenomenon. This article aims to develop a comprehensive framework that views digital piracy not merely as an infringement of law, but as a multifaceted social issue, incorporating moral, cognitive, distributive, and participatory governance dimensions. It also proposes a paradigmatic shift from punitive approaches to more equitable, inclusive regulatory strategies. Our findings show that punitive legal models fail to account for the social, moral, and psychological factors instigating piracy. Instead, piracy is often framed as a form of resistance against perceived injustice and exclusion from cultural goods. This article concludes that addressing digital piracy in a more meaningful way requires a more nuanced regulatory approach, combining incentives, participatory governance, and distributive justice to create a fairer and more ethical framework for managing piracy in the digital era.

**Keywords:** access to information; cultural policy; intellectual property; piracy; social justice.

**Resumen:** La expansión exponencial de los contenidos digitales ha transformado profundamente la producción y distribución cultural, dando lugar a debates sobre su legalidad, legitimidad y acceso. Es así como la piratería digital, práctica extendida en la sociedad, desafía las normas legales y es frecuente-

mente percibida como moralmente aceptable por amplios sectores, evidencia una brecha entre la ley formal y las intuiciones morales. En ese contexto, el objetivo de este estudio es desarrollar un marco que conceptualice la piratería digital como un fenómeno social complejo, al integrarse dimensiones morales, cognitivas, distributivas y de gobernanza participativa, se propone un giro desde el enfoque punitivo hacia regulaciones más equitativas. Los resultados muestran que los modelos tradicionales basados en la sanción no logran abordar las justificaciones sociales y morales profundamente enraizadas de la piratería. Por lo tanto, la piratería se interpreta como una forma de resistencia ante la injusticia percibida y la exclusión estructural en el acceso a bienes culturales. En conclusión, se subraya que, para abordar de manera efectiva la piratería digital, es necesario un enfoque multidimensional que incorpore incentivos, gobernanza participativa y justicia distributiva, más allá de la simple disuasión. De ese modo, se ofrece una estrategia más legítima, eficaz y ética para gestionar la piratería en la era digital, permitiendo una regulación más sensible a las realidades sociales y económicas actuales.

**Palabras clave:** acceso a la información; política cultural; piratería; propiedad intelectual.

**Summary:** I. *Introduction.* II. *The Moral Paradox of Digital Piracy.* III. *Theoretical Foundations for a Broader Interpretation.* IV. *Towards an Integrative Analytical Framework: Moral-Economic Legitimacy.* V. *Criticism of the Punitive Paradigm.* VI. *Proposed Guidelines for a Legitimate Public Policy.* VII. *Conclusions.* VIII. *References.*

## I. Introduction

In recent decades, the exponential growth of digital goods has profoundly altered the dynamics of cultural production, distribution, and consumption, giving rise to new tensions between legality, legitimacy, and access. Digital piracy has emerged as a widespread phenomenon that challenges conventional legal frameworks, calling into question not only the efficacy of existing regulatory mechanisms but also the perceived legitimacy of restrictions imposed on the use and circulation of cultural content. Unlike physical theft, which is subject to near-universal moral condemnation, unauthorized access to digital goods is frequently tolerated and, in some cases, even justified by broad segments of society, pointing to a structural disjunction between legal rules and moral intuitions.

Within this context, the contributions of diverse theoretical approaches reveal the multidimensional nature of the problem. Indeed, behavioral economics has highlighted the weight of social norms, reciprocity, and perceived legitimacy in shaping patterns of legal compliance.<sup>1</sup> Moreover, theories on distributive justice have examined the criteria governing access to both essential and cul-

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<sup>1</sup> ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990), <https://doi.org/10.1017/CBO9780511807763>; Ernst Fehr & Simon

tural goods, and thereby questioned the presumed neutrality of market-based distribution.<sup>2</sup> Likewise, advances in moral psychology show that purportedly rational decisions are, in fact, mediated by emotions, situational pressures, and moral justifications that influence the building ethical self-awareness.<sup>3</sup>

Despite these conceptual advances, a notable theoretical and empirical gap remains. Public policy and regulatory models continue to operate largely within a legalistic and punitive paradigm, founded on the assumption that offenders act out of either information deficit or instrumental rationality. Such an approach neglects the subjective conflicts that arise when legal provisions are perceived as unjust or without social legitimacy, particularly in settings marked by significant economic inequality and limited access to cultural goods. While the academic literature offers a wealth of sector-specific analyses, it has often failed to produce a holistic framework capable of bridging the divide between formal legality and socially constructed legitimacy.

Against this backdrop, this article seeks to examine the dissonance between codified legality and perceived legitimacy in the context of digital piracy. The analysis is grounded on the view that regulatory effectiveness cannot be reduced to external compliance alone but must rest upon the alignment of legal provisions with internalized values, collective expectations, and institutional credibility. By identifying the cognitive processes, moral frameworks, and distributive conditions that inform this practice, this research aims not only to account for its continued existence, but also to inform the development of regulatory strategies that are more attuned to actual patterns of human behavior in digital environments.

The practical implications of such an approach are manifold. First, it casts doubt on the efficacy of policies grounded solely on deterrence, while advocating instead for incentive-based mechanisms and the co-creation of regulations. Second, it opens the door to institutional innovation through models of progressive access, social licensing, and digital education that reconnect consumption with broader implications for the cultural value chain. Third, it recognizes that legitimate compliance is not the automatic result of sanctions, but rather the product of an incremental process involving dialogue, reciprocity, and a shared sense of justice. In doing so, the approach seeks to recast the relationship between users, creators, and the State, moving from a paradigm of coercion to one rooted in mutual legitimacy.

At a historical juncture marked by escalating challenges in digital governance, including the consolidation of power on certain global platforms and

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Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159, 181 (2000), <https://doi.org/10.1257/jep.14.3.159>.

<sup>2</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press, 1971); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Alfred A Knopf, 1999).

<sup>3</sup> JONATHAN HAIJD, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (Vintage, 2012); DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE - ESPECIALLY OURSELVES* (Harper Perennial, 2012).

the erosion of traditional intellectual property models, the distinction between what is lawful and what is legitimate has become increasingly blurred. This reality necessitates a fundamental reconsideration of the normative underpinnings of the knowledge economy. In such a context, addressing digital piracy not merely as a matter of enforcement, but as a manifestation of deeper normative tensions, is essential to developing more adaptive and democratically responsive forms of regulation.

The overarching objective of this article is to construct an explanatory framework that incorporates behavioral, ethical, and distributive dimensions in order to conceptualize digital piracy as a complex and normatively ambivalent phenomenon. Through this lens, this research seeks to contribute to scholarly and policy debates concerning normative legitimacy in digital environments, while also proposing institutional strategies that aim not only at legal compliance, but also at fostering moral and distributive legitimacy. In so doing, this article aspires to move beyond a punitive approach to offer instead a more nuanced, humane, and context-sensitive understanding of economic behavior in the digital age.

## II. The Moral Paradox of Digital Piracy

Digital piracy, understood as the unauthorized reproduction of copyrighted content, poses a regulatory challenge whose complexity exceeds the boundaries of mere legal transgression. Although it is subject to legal sanction, it enjoys a degree of social legitimacy that destabilizes the very distinction between legality and illegality. In fact, this dissonance between formal prohibition and informal acceptance indicates that the conventional categories of legal and moral reasoning are insufficient to address the changes introduced by the digital environment. What is ultimately at stake is not a technical infringement, but a broader redefinition of property, harm, and justice within technologically mediated contexts.

From the standpoint of Western legal-philosophical tradition, the right to property has long been grounded in assumptions of scarcity and exclusion. Locke conceives property as originating in labor, since individual effort confers entitlement over what is produced.<sup>4</sup> Conversely, Hegel links property to the externalization of freedom, whereby possession materializes individual will.<sup>5</sup> Despite their different premises, both perspectives coincide in presupposing that the object of appropriation is finite, competing, and materially excludable. However, such logic, deeply embedded in the ontology of tangible goods, loses explanatory power when applied to digital assets.

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<sup>4</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1988).

<sup>5</sup> GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H. B. Nisbet trans., 1991).

Indeed, digital goods escape the constraints of scarcity and rivalry, as they can be replicated endlessly at negligible cost. Moreover, their consumption is non-rival, since simultaneous access by multiple users does not generate mutual exclusion. As noted before, this feature destabilizes the normative basis of intellectual property regimes, because digital copying does not entail direct material deprivation.<sup>6</sup> The extension of copyright protections to such goods upholds the conventional logic of ownership only by means of analogous reasoning which, although legally valid, proves to be conceptually fragile. In fact, critical perspectives argue that expanding the scope of copyright responds less to necessity than to corporate interests within the digital marketplace.<sup>7</sup>

This incongruity between inherited legal frameworks and the ontological traits of digital goods undermines not only the legitimacy of regulation but also the way in which society interprets harm and moral responsibility in piracy. Empirical evidence demonstrates that, from the user's perspective, duplicating a file does not carry the same moral weight as stealing a tangible object. The absence of observable loss, the lack of an identifiable victim, and the impersonal nature of the act diminish its perceived severity. For example, it has been shown that piracy is routinely judged as less serious than other property offenses, even when statutory penalties are equivalent.<sup>8</sup> Further studies reveal that users frequently justify their behavior by appealing to fairness, economic necessity, or the absence of direct harm.<sup>9</sup>

Such moral attenuation is linked to the figure of the absent victim. Unlike physical theft, where harm is visible and the victim identifiable, digital copying generates damage that is abstract or speculative, often framed in terms of unrealized revenue or symbolic rights. This ambiguity obstructs empathetic engagement and weakens the moral inhibitions that would otherwise constrain transgression. Psychological approaches explain this through the concept of distance: the more remote and diffuse the consequences, the lower the moral and emotional involvement.<sup>10</sup> The dematerialized and often anonymous dynamics of the digital environment amplify this distance, which enables moral neutralization.

Nonetheless, such neutralization should not be reduced to ethical deficiency. Rather, it reflects the cognitive mechanisms by which individuals preserve a

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<sup>6</sup> LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (The Penguin Press, 2004).

<sup>7</sup> James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, SSRN JOURNAL (2003), <https://dx.doi.org/10.2139/ssrn.470983>.

<sup>8</sup> Donald Marron & David Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 ECONOMIC INQUIRY 159 (2000), <https://doi.org/10.1111/j.1465-7295.2000.tb00011.x>.

<sup>9</sup> Gilles Grolleau, Naoufel Mzoughi & Angela Sutan, *Please Do Not Pirate It, You Will Rob the Poor! An Experimental Investigation on the Effect of Donation on Piracy*, SSRN JOURNAL (2006), <https://dx.doi.org/10.2139/ssrn.930388>.

<sup>10</sup> Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 PSYCH. REV. 440 (2010), <https://doi.org/10.1037/a0018963>.

favorable moral self-image. Research has shown that people deploy rationalizations to reconcile minor infractions with their ethical identity, often invoking phrases such as “I am not hurting anyone” or “they already have enough money.”<sup>11</sup> This mechanism aligns with the observation that moral judgments are contingent on the perception of concrete harm: when no clear victim is present, condemnation weakens significantly.<sup>12</sup>

The tenacity of these rationalizations does not point at a trivial phenomenon but at a transformation in social legitimation mechanisms. Behavior that might elsewhere be described as misappropriation is, in digital contexts, reframed as cultural resistance, equitable access, or symbolic entitlement.<sup>13</sup> Piracy may thus appear as a response to corporate practices regarded as exclusionary or exploitative. In this sense, digital disobedience becomes not only a legal offense but also a form of informal negotiation of rules, where individuals challenge regulatory systems, they perceive as unfair on distributive or ethical grounds. The normalization of these practices, especially among younger generations and marginalized groups, suggests that piracy must be understood as a conflict between codified legality and socially perceived justice.

This paradox, namely, the informal acceptance of practices that are still formally unlawful, demands rethinking the conceptual tools used to address the issue. Appeals to legality and categories inherited from material contexts no longer suffice. What is needed is a more comprehensive framework—one capable of integrating economic, psychological, and cultural dimensions to account for the complexity of this ethical landscape. Only through such an integrated approach can one explain why legal rules, regardless of their formal coherence,

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<sup>11</sup> ARIELY, *supra* note 3.

<sup>12</sup> HAITT, *supra* note 3.

<sup>13</sup> Pastora Melgar Manzanilla, *Retgression of Economic, Social and Cultural Rights: Mexico in the Context of Austerity and Crisis*, 1 MEX. L. REV. 121 (2021), <https://doi.org/10.22201/ijj.24485306e.2021.1.16094>. within the scope of their powers, to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility, and progressivity. Also, Mexico is a member state of international covenants on human rights, such as the International Covenant on Economic, Social and Cultural Rights, from which some obligations derive. One of these obligations is the progressive realization of economic, social, cultural rights, and the prohibition of retrogression. Even though, limited economic resources require the careful allocation and redistribution of public spending, a practice that has led to the reduced allocation of public resources for some programs considered essential in the acquisition of human rights. The shift in the allocation of public spending in Mexico may ultimately deepen in the coming months and couple years, because of the imminent economic crisis caused by the COVID-19 pandemic. This article analyses the extent to which the Mexican government can, based on austerity, redistribution, or economic crises, make decisions that imply retrogression of rights without violating the obligation to progressive fulfillment stated in the International Covenant on Economic, Social and Cultural Rights.”,”container-title”.”Mexican Law Review”,”DOI”.”10.22201/ijj.24485306e.2021.1.16094”,”ISSN”.”2448-5306, 1870-0578”,”issue”.”1”,”journalAbbreviation”.”Mex Law Rev”,”page”.”121”,”source”.”DOI.org (Crossref

lose normative traction in environments where the perception of harm and of fairness has been redefined.<sup>14</sup>

### III. Theoretical Foundations for a Broader Interpretation

Understanding digital piracy as both a social and a normative phenomenon requires transcending purely legalistic or technical frameworks to incorporate conditions of legitimacy, reciprocity, and perceived justice. In this respect, it is particularly important to recall that Ostrom's work provides fertile ground for analyzing how communities regulate shared resources without resorting to hierarchical or coercive governance. Her notion of non-competing commons proves especially significant when applied to digital environments, where cultural and educational resources are not depleted by use and do not intrinsically demand technological exclusion. Consequently, the governance of digital commons depends less on formal legality than on shared rules legitimized by consensus and active participation.<sup>15</sup>

Moreover, initiatives such as free software projects or Wikipedia demonstrate that cooperation can be sustained through non-exclusionary models, thereby challenging the normative boundaries of intellectual property. Within these collaborative spaces, legitimacy stems not from external legal imposition but from deliberative practices that reinforce internally generated norms. Even practices, like piracy, that operate outside legal frameworks may be better understood when interpreted as functional responses to regulatory schemes seen as lacking moral authority. In this light, such practices do not appear to be merely acts of transgression, but informal regulatory mechanisms aligned with the collective expectations of access, fairness, and reciprocity.

This argument becomes even stronger when considering Ostrom's subsequent developments, particularly in the emphasis she places on reciprocity as a cornerstone of cooperative institutions.<sup>16</sup> In digital contexts, fairness and reciprocity play a decisive role: when cultural industries impose excessive prices, restrictive licenses, or geo-blocking, compliance with legal rules erodes. Non-compliance then ceases to be perceived as deviant, acquiring instead the nature of negative reciprocity in response to structural exploitation. Thus, unauthorized distribution becomes legitimized as a corrective practice in contexts where legal regimes are seen as unfair.

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<sup>14</sup> Jersain Zadamiq Llamas Covarrubias, *Cybersecurity in Mexico: An In-Depth Analysis of a Fragmented Regulatory Landscape*, 1 MEX. L. REV. 69 (2025), <https://doi.org/10.22201/ijj.24485306e.2025.1.19686>.

<sup>15</sup> OSTROM, *supra* note 1.

<sup>16</sup> Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association, 1997*, 92 AM. POL. SCI. REV. 1 (1998), <https://doi.org/10.2307/2585925>.

The validity of this claim is supported by the theory of strong reciprocity, according to which prosocial punishment is conditional on the justice of the rule itself.<sup>17</sup> When intellectual property laws are associated with monopolistic rents or exclusionary practices, their moral authority collapses. In such cases, widespread piracy reflects not only enforcement deficits, but also collective disengagement grounded in ethical delegitimization. From a contrasting perspective, breakdowns in cooperation often arise from differences between social expectations of openness and restrictive designs imposed by market logic.<sup>18</sup> The result is the spontaneous emergence of informal mechanisms aimed at restoring equity, suggesting that transgression embodies distributive reasoning rather than simple deviance.

This reasoning resonates with Rawls's theory of justice, particularly his difference principle, which maintains that inequalities are acceptable only if they benefit the least advantaged.<sup>19</sup> When applied to cultural goods, such reasoning implies that intellectual property regimes should enable, rather than obstruct, access to essential resources for democratic participation. In fact, digital cultural goods may be conceived as primary goods indispensable for furthering autonomous life plans. When economic or territorial barriers preclude such access, the distributive principles underpinning justice are violated, and piracy emerges as a critique of exclusionary design rather than as mere disobedience.

In addition, inequities in pricing schemes deserve special attention. When global pricing disregards local economic conditions, it creates structural injustices that hinder access to culturally significant content. In such contexts, piracy assumes a redistributive function which, despite its legal irregularity, conveys a moral claim grounded in material justice. It follows that punitive approaches alone cannot resolve the discrepancy between legality and legitimacy; instead, what is required is an ethical reconsideration of access to cultural goods.

Furthermore, Sen's capability approach deepens this analysis by distinguishing between formal entitlements and substantive freedoms. The mere availability of digital platforms does not ensure inclusion when economic, technical, or regulatory obstacles impede their effective use. Justice, therefore, cannot be measured solely through the recognition of legal rights but must also consider individuals' actual capacity to exercise them.<sup>20</sup> From this vantage point, piracy acts as an informal compensatory practice that mitigates structural exclusions obstructing the development of essential capabilities. The resulting tension between distributive justice and freedom illustrates why normative disobedience may, in conditions of systemic exclusion, represent a rational moral response rather than an arbitrary violation of law.

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<sup>17</sup> Fehr and Gächter, *supra* note 1.

<sup>18</sup> YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* (Currency, 2011).

<sup>19</sup> RAWLS, *supra* note 2.

<sup>20</sup> SEN, *supra* note 2.

Insights from moral psychology further clarify the cognitive dimension of this phenomenon. It has been shown that the principle of harm, central to moral judgment, is not easily triggered in cases of piracy because the victim is absent, and the damage seems to be abstract.<sup>21</sup> Equally significant is the self-deception mechanism individuals use to reconcile lawbreaking with a positive moral self-image. Rationalizations such as “it’s only a copy” or “nobody gets hurt” illustrate this process.<sup>22</sup> Additionally, psychological distance reduces moral engagement by attenuating the perceived consequences of mediated actions.<sup>23</sup> This effect is amplified by moral disengagement processes that neutralize guilt and weaken the symbolic authority of law.<sup>24</sup>

For these reasons, digital piracy cannot be reduced to a simple legal transgression. Rather, it must be understood as a phenomenon situated at the intersection of legitimacy, reciprocity, and cognitive self-justification. Its prevalence does not merely expose deficiencies in enforcement but also reveals the erosion of moral adherence to rules that fail to embody justice. Hence, what is required is a multidimensional framework capable of integrating economic, cultural, and psychological dimensions in order to explain the conditions under which laws retain, or lose, their normative traction.

#### IV. Towards an Integrative Analytical Framework: Moral-Economic Legitimacy

Understanding digital piracy requires more than a conventional legal analysis, since the reduction of the phenomenon to a mere breach of intellectual property rules occludes the moral, social, and cognitive dimensions that sustain it. Although legal provisions are indispensable, addressing piracy exclusively through their lens neglects the deeper tension between codified legality and perceived legitimacy. In this sense, its tenacity does not appear as marginal deviance but as an expression of structural conflict that compels the integration of moral cognition, distributive justice, and social processes of legitimation. Only such an integrated approach can explain the paradox whereby certain legal provisions, while formally valid, lose their normative force in everyday practices.

A central factor in this dynamic lies in the difficulty of identifying clear and personalized harm. As said, before, moral psychology shows that intuitive judgments are activated with greater intensity when there is visible damage and a tangible victim.<sup>25</sup> By contrast, the non-depletable character of digital goods,

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<sup>21</sup> Haidt, *supra* note 3.

<sup>22</sup> Ariely, *supra* note 3.

<sup>23</sup> Trope & Liberman, *supra* note 10.

<sup>24</sup> Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 *PERSP. SOC. PSYCH. REV.* 193 (1999), [https://doi.org/10.1207/s15327957pspr0303\\_3](https://doi.org/10.1207/s15327957pspr0303_3).

<sup>25</sup> Haidt, *supra* note 3.

together with their infinite replicability, attenuates the perception of harm and gives rise to the construct of the “absent victim.” Within this framework, the act of downloading content —whether academic or recreational— rarely provokes unequivocal condemnation, since the damage appears to be abstract or imperceptible. This invisibility, in turn, is accentuated by moral disengagement mechanisms that weaken the sense of causal responsibility.<sup>26</sup>

However, the issue cannot be reduced to individual psychology, as the legitimacy of rules is closely tied to social endorsement. As has been demonstrated, laws derive their authority not only from formal validity but also from how they line up with shared moral expectations.<sup>27</sup> When the alignment greatly differs, tolerance thresholds emerge to reframe the breach as morally permissible. This is especially evident in contexts of inequality, where legal protections are perceived as barriers to substantive justice.<sup>28</sup> In this light, piracy often operates less as disobedience and more as an objection to rules considered illegitimate in matters of distribution.

The contextual sensitivity of moral evaluation further explains the variability of compliance. Experimental evidence shows that anonymity and emotional detachment facilitate rule violations, particularly when legal systems are viewed as protecting concentrated interests.<sup>29</sup> The alienation generated by restrictive intellectual property regimes thus fosters individualized ethical reasoning in which the law loses symbolic authority. Consequently, piracy emerges not in an ethical void but in a space shaped by structural discontent and distrust.

In terms of discourse, this corrective remedy acquires legitimacy through processes of moral neutralization. Research indicates that individuals employ strategies such as euphemistic labeling —“sharing,” “copying,” or “accessing”— to replace the stigmatized notion of “piracy”.<sup>30</sup> Such redefinitions are not mere semantics; they constitute moral filters that recast illegality as ethically tolerable. In some cases, they even generate narratives of inverted victimhood, where users perceive themselves as excluded subjects resisting monopolistic structures.<sup>31</sup> In this way, transgression is redefined as an act of distributive resistance rather than as criminal deviation.

This interpretive framework elucidates why piracy maintains social acceptance despite punitive regimes. The convergence of emotional distance, distributive injustice, and discursive rationalization erodes the deterrent capacity of law. Consequently, any regulatory response that confines itself to repression proves insufficient. What is required, instead, is a normative reorientation ca-

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<sup>26</sup> Bandura, *supra* note 24.

<sup>27</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton University Press, 2nd ed. 2006).

<sup>28</sup> SEN, *supra* note 2.

<sup>29</sup> BENKLER, *supra* note 18; ARIELY, *supra* note 3.

<sup>30</sup> Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 *AM. SOCIO. REV.* 664 (1957), <https://doi.org/10.2307/2089195>; Bandura, *supra* note 24.

<sup>31</sup> SOCIAL SCIENCE RESEARCH COUNCIL, *MEDIA PIRACY IN EMERGING ECONOMIES* (Joe Karaganis ed., 2011).

pable of reconciling legality with perceived justice. Without such reconciliation, the authority of intellectual property laws will remain fragile, and practices of informal redistribution will continue to emerge as legitimate alternatives in the eyes of those excluded from cultural access.

## V. Criticism of the Punitive Paradigm

For decades, institutional responses to digital piracy have been shaped by a punitive rationale that assumes the deterrent effect of penalties and technological restrictions. This approach built upon the premises of classical deterrence theory, which posits that individuals act as rational calculators of costs and benefits.<sup>32</sup> The expectation is clear: if penalties are sufficiently severe and the likelihood of being caught is high, unlawful behavior should diminish. Nevertheless, in digital environments this strategy has shown both limited effectiveness and an acute lack of connection among the moral, cognitive, and distributive dimensions that condition user behavior.

In practice, intellectual property law infringement rarely corresponds to the rational-choice model. Empirical studies corroborate that the escalation of penalties has not reduced piracy rates in proportion to the severity of enforcement. On the contrary, piracy continues to thrive in jurisdictions with advanced surveillance and stricter sanctions, suggesting that coercion misinterprets the drivers of legal obedience. What is overlooked is that compliance often stems from perceptions of justice rather than from threats deterring such behavior.<sup>33</sup> Where legitimacy erodes, voluntary compliance structurally deteriorates, leaving deficient levels of formal enforcement.

The erosion of legitimacy in the case of intellectual property is particularly associated with the view that copyright systems privilege concerted corporate interests while penalizing socially accepted practices. Indeed, many users perceive intellectual property not as a normative good but as an exclusionary mechanism that imposes artificial barriers to access culture.<sup>34</sup> This perception is exacerbated by pricing policies that disregard distributive justice. It has long been noted that fixed prices applied to non-rivalrous goods generate distortions, since digital content can be replicated at negligible cost.<sup>35</sup> When pricing fails to account for local inequalities, piracy becomes reinterpreted as a morally defensible reaction to structural exclusion. In this sense, the gap between formal

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<sup>32</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968), <https://doi.org/10.1086/259394>.

<sup>33</sup> TYLER, *supra* note 27.

<sup>34</sup> SOCIAL SCIENCE RESEARCH COUNCIL, *supra* note 31.

<sup>35</sup> Joseph E. Stiglitz, *Chapter 15 Pareto Efficient and Optimal Taxation and the New Welfare Economics*, 2 HANDBOOK OF PUBLIC ECONOMICS 991 (1987), [https://doi.org/10.1016/S1573-4420\(87\)80010-1](https://doi.org/10.1016/S1573-4420(87)80010-1).

availability and real accessibility, clearly articulated in the capability approach, constitutes the terrain where informal legitimization of piracy flourishes.<sup>36</sup>

Such economic asymmetries are amplified by market concentration, which consolidates editorial and audiovisual power. Research has shown that a small group of corporations dominate the flows of information and content, suppressing competition, inflating prices, and reducing cultural diversity.<sup>37</sup> Moreover, the expansion of copyright protections has been linked less to creative incentives than to corporate interest lobbying.<sup>38</sup> Within this landscape, piracy implies structural dissent rather than opportunistic deviance, as said before. What emerges, therefore, is a conflict between the exclusionary legitimacy of markets and the distributive legitimacy of cultural access.<sup>39</sup>

Attempts to address these challenges through technical protection measures such as DRM, geo-blocking, or restrictive licensing have produced similarly counterproductive effects. According to the theory of psychological reactance, individuals resist limitations perceived as arbitrary, which often increases the very behavior these measures attempt to deter.<sup>40</sup> When users are denied legitimate uses, for instance, when digital purchases are limited by format or geographical region, they frequently interpret circumvention not as misconduct, but as justified resistance to technological overreach. Such perceptions reinforce the delegitimization of the law and normalize infringement as morally defensible.

The inefficiency of these mechanisms is compounded by their unintended consequences. Digital controls not only restrict unlawful use, but also obstruct legitimate practices, including education, research, and non-commercial innovation.<sup>41</sup> By harming lawful users without substantially reducing piracy, these measures undermine perceptions of fairness and weaken regulatory credibility. Thus, enforcement ceases to function as a neutral safeguard of creativity and instead becomes a source of institutional mistrust.

This accumulated evidence demonstrates that the punitive model is both normatively fragile and practically ineffective. An insistence on coercion overlooks the fact that non-compliance is rooted not in ethical indifference but in reasoned objection to laws regarded as unfair. Consequently, rethinking public policy is imperative. Future frameworks must incorporate insights from behavioral economics, distributive justice, and participatory governance to build hybrid models of intellectual property that balance the incentive to create with the

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<sup>36</sup> SEN, *supra* note 2.

<sup>37</sup> BENKLER, *supra* note 18; Alejandro Faya, *Competition and Regulatory Policies Intertwined: Towards a Comprehensive Oversight of Digital Platforms*, 2 MEX. LAW REV. 3 (2025), <https://doi.org/10.22201/ijj.24485306e.2025.2.19349>.

<sup>38</sup> Boyle, *supra* note 7.

<sup>39</sup> NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (Columbia University Press, 2009).

<sup>40</sup> JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (Academic Press, 1966).

<sup>41</sup> LESSIG, *supra* note 6.

right to access. Such an endeavor requires abandoning the binary opposition between legality and illegality, to instead embrace the ethical, distributive, and cultural complexities that characterize the digital ecosystem. Only then will it be possible to design systems capable of reconciling enforceability with legitimacy and thereby restore the normative traction that current strategies have noticeably lost.

## VI. Proposed Guidelines for a Legitimate Public Policy

The structural steadfastness of digital piracy, even in contexts where enforcement systems and technological controls have become increasingly sophisticated, demonstrates that the punitive model has reached the limits of both its explanatory and operational potential. To assume that legal transgression in digital environments can be effectively deterred through sanctions or restrictions reflects not only an incomplete but also a reductive understanding of behavioral dynamics. What is at stake is a shift in the way things work in terms of legitimacy, cooperation, and justice in the information economy, which cannot be adequately addressed without incorporating moral, distributive, and cognitive dimensions into public policy design.

In this regard, behavioral economics offers one of the most compelling challenges to the reductionist logic of punitive enforcement. Unlike classic models that posit individuals as rational utility-maximizers, behavioral economics emphasizes the influence of cognitive biases, emotions, and contextual factors. Within this framework, the concept of “choice architecture” underscores the role of decision-making environments in shaping behavior through non-coercive mechanisms.<sup>42</sup> This perspective is particularly important in digital contexts, where environments can be designed to encourage lawful practices. Indeed, interventions like highlighting the financial impact of piracy on independent creators or facilitating access to legitimate free sources operate as “nudges” that preserve independence while placing choices within a morally intelligible framework.

Nevertheless, for such interventions to be both effective and legitimate, they must rest upon empirical evidence and not on paternalistic intuitions. Controlled experiments, field studies, and context-sensitive evaluations are indispensable to ensure that interventions respect user independence and avoid covert manipulation. Thus, the challenge is not merely technological but fundamentally normative: how to design environments that foster compliance without infantilizing users or transferring systemic responsibility onto them.

From the standpoint of distributive justice, differentiated models, whether through adaptive licensing, tiered access, or freemium schemes, are not only

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<sup>42</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale University Press, 2008).

feasible but normatively superior. In fact, the capabilities approach reinforces the fact that justice should not be measured by formal availability alone but by individuals' effective capacity to benefit from cultural and educational goods.<sup>43</sup>

Equally important is the role of participatory governance in generating legitimacy. Empirical evidence demonstrates that collective rule-making, mutual monitoring, and proportionate sanctioning often provide more sustainable governance than hierarchical enforcement.<sup>44</sup> Rendering this principle into digital contexts requires mechanisms that allow users to co-determine rules regarding access, redistribution, or monetization. This does not imply idealizing self-regulation, which varies in effectiveness, but rather recognizes that legitimacy is more robust when derived from deliberative processes than from unilateral imposition.

Such participatory logic aligns with the proposal of hybrid governance models. As has been argued, digital environment regulation cannot be reduced to legal enforcement alone, but must be understood as the interplay between law, markets, rules, and technological architectures.<sup>45</sup> Hybrid institutions that incorporate creators, users, platforms, and public authorities, whether in the form of citizen observatories, participatory audits, or ethics committees, could serve as checks against distortions in distribution, providing corrective measures before legitimacy collapses.<sup>46</sup>

The intellectual property system itself also requires critical reassessment. The sterile polarization between absolute copyright protection and radical calls for open access has obscured the potential of hybrid alternatives. Scholars have highlighted that digital goods constitute a new type of commons, requiring flexible models of regulation.<sup>47</sup> Initiatives like Copyfair licensing, time-limited exclusivity, or strengthened digital commons are promising ways of reconciling incentives to create with rights of access. Such approaches imply setting up access thresholds, reasonable exclusivity periods, symbolic recognition of authorship, and redistributive mechanisms to mitigate the concentration of benefits.

The moral dimension cannot be overlooked either. Where norms are perceived as illegitimate or exclusionary, any policy that aspires to be effective must include restorative elements. The framework of restorative justice, centered on repairing harm rather than imposing punishment, offers valuable guidance.<sup>48</sup> In digital contexts, this could involve symbolic or material user contributions,

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<sup>43</sup> SEN, *supra* note 2.

<sup>44</sup> OSTROM, *supra* note 1.

<sup>45</sup> LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books, 1999).

<sup>46</sup> Patricia Villa Berger, *Legal Process Automation as a Tool for Access to Justice: A Proposal to Restructure First Contact Interviews in the Federal Institute of Public Defenders*, 2 MEX. LAW REV. 41 (2022), <https://doi.org/10.22201/ijj.24485306e.2023.2.17617>.

<sup>47</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale University Press, 2006); Boyle, *supra* note 7.

<sup>48</sup> Steve Kirkwood, *A Practice Framework for Restorative Justice*, 63 AGGRESSION AND VIOLENT BEHAVIOR 101688 (2022), <https://doi.org/10.1016/j.avb.2021.101688>.

such as subtitling, metadata curation, or small voluntary payments, that reinforce the value of creative work without resorting to stigmatization. These practices would allow users to assume co-responsibility while avoiding the criminalization of widespread behaviors that already enjoy social legitimacy.

Taken together, these considerations suggest that the punitive model not only fails to curb piracy but also deepens its moral delegitimization. If public policy continues to rely exclusively on coercion, it will perpetuate the gap between legality and legitimacy. By contrast, an approach that combines behavioral insights, distributive justice, participatory governance, regulatory hybridization, and restorative mechanisms offers a more coherent and ethically grounded framework. Only by bringing these dimensions together can regulatory design hope to reconcile the incentive to create with the fundamental right to cultural access.

## VII. Conclusions

The continued existence of digital piracy, despite increasingly more stringent legal and technological enforcement measures, reflects a deeper dissonance between regulatory compliance and its underlying moral justification. This tension, far from being sporadic, reveals a structural gap between formal legality—rooted in models of scarcity and exclusion—and a digital environment defined by frictionless reproduction, dematerialization, and a growing sensitivity to principles of distributive justice. Within this context, we propose a conceptual shift that moves beyond legalistic and punitive paradigms, drawing upon insights from behavioral economics, moral psychology, and contemporary theories of justice to construct an interpretive framework capable of addressing current forms of digital non-compliance through the lens of legitimacy.

By reconceptualizing digital piracy as a manifestation of normative dissonance, rather than as a purely intentional violation of the law, this framework incorporates the moral dimension of individual decision-making in conditions of symbolic or material exclusion. Such an approach enables us to understand unlawful behavior not as opportunistic defection, but as a cognitively justified response to legal norms perceived as inequitable. The notion of moral reciprocity, alongside mechanisms of self-justification and psychological distancing from harm, becomes central to explaining the erosion of adherence to rules which, though legally binding, have lost their ethical resonance across broad segments of society.

From a policy standpoint, these findings support a reorientation of public regulatory strategies away from coercive enforcement and toward the redesign of the normative environment itself. Choice architecture offers a viable approach to aligning individual decision-making with collective goals without resorting to punitive measures. This shift entails recalibrating pricing structures to

reflect users' actual purchasing power, recognizing alternative modes of cultural circulation, and developing inclusive digital platforms grounded in principles of procedural justice. In an era of increasing normative pluralism, legitimacy is no longer secured through the imposition of rules, but through their capacity to align with morally shared expectations.

A broader research agenda remains open—one that should empirically examine how narratives of legitimacy and resistance are constructed within digital ecosystems. Priority must be given to understanding how contextual variables—economic, cultural, and technological—shape perceptions of normative justice. Equally important is a critical reassessment of the role of digital platforms as de facto regulatory actors, and the extent to which their discretionary governance practices shape the moral architecture of online environments. This line of inquiry calls for a more situated epistemology, paying careful attention to the material and social conditions under which normative judgments are produced and internalized.

What is ultimately at stake is not mere compliance with legal provisions, but the capacity of those norms to elicit moral assent within an environment in which foundational concepts such as property and exclusion have undergone radical transformation. In such a setting, legitimacy does not follow from legality—it constitutes its very precondition. The theoretical and political imperative, therefore, is to reexamine the ethical foundations of regulatory compliance, incorporating user experience, distributive justice, and the expanding expectation of institutional co-responsibility. In contexts of accelerated technological and social transformation, the sustainability of legal regimes depends, more than ever, on rebuilding their legitimacy from the ground up.

## VIII. References

- Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSP. SOC. PSYCH. REV. 193 (1999). [https://doi.org/10.1207/s15327957pspr0303\\_3](https://doi.org/10.1207/s15327957pspr0303_3)
- Alejandro Faya, *Competition and Regulatory Policies Intertwined: Towards a Comprehensive Oversight of Digital Platforms*, 2 MEX. LAW REV. 3 (2025). <https://doi.org/10.22201/ijj.24485306e.2025.2.19349>
- AMARTYA SEN, DEVELOPMENT AS FREEDOM (Alfred A Knopf, 1999).
- DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE - ESPECIALLY OURSELVES (Harper Perennial, 2012).
- Donald Marron & David Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 ECONOMIC INQUIRY 159 (2000). <https://doi.org/10.1111/j.1465-7295.2000.tb00011.x>
- Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association, 1997*, 92 AM. POL. SCI. REV. 1 (1998). <https://doi.org/10.2307/2585925>

- ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990). <https://doi.org/10.1017/CBO9780511807763>
- Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159, 181 (2000). <https://doi.org/10.1257/jep.14.3.159>
- Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). <https://doi.org/10.1086/259394>
- GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H. B. Nisbet trans., 1991).
- Gilles Grolleau, Naoufel Mzoughi & Angela Sutan, *Please Do Not Pirate It, You Will Rob the Poor! An Experimental Investigation on the Effect of Donation on Piracy*, SSRN JOURNAL (2006). <https://dx.doi.org/10.2139/ssrn.930388>
- Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664 (1957). <https://doi.org/10.2307/2089195>
- JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (Academic Press, 1966).
- James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, SSRN JOURNAL (2003). <https://dx.doi.org/10.2139/ssrn.470983>
- Jersain Zadamiq Llamas Covarrubias, *Cybersecurity in Mexico: An In-Depth Analysis of a Fragmented Regulatory Landscape*, 1 MEX. L. REV. 69 (2025). <https://doi.org/10.22201/ijj.24485306e.2025.1.19686>
- JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1988).
- JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard University Press, 1971).
- JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (Vintage, 2012).
- Joseph E. Stiglitz, *Chapter 15 Pareto Efficient and Optimal Taxation and the New Welfare Economics*, 2 HANDBOOK OF PUBLIC ECONOMICS 991 (1987). [https://doi.org/10.1016/S1573-4420\(87\)80010-1](https://doi.org/10.1016/S1573-4420(87)80010-1)
- LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (Basic Books, 1999)
- LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (The Penguin Press, 2004).
- NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (Columbia University Press, 2009).
- Pastora Melgar Manzanilla, *Retrogression of Economic, Social and Cultural Rights: Mexico in the Context of Austerity and Crisis*, 1 MEX. L. REV. 121 (2021). <https://doi.org/10.22201/ijj.24485306e.2021.1.16094>
- Patricia Villa Berger, *Legal Process Automation as a Tool for Access to Justice: A Proposal to Restructure First Contact Interviews in the Federal Institute of Public Defenders*, 2 MEX. LAW REV. 41 (2022). <https://doi.org/10.22201/ijj.24485306e.2023.2.17617>
- RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale University Press, 2008).
- SOCIAL SCIENCE RESEARCH COUNCIL, *MEDIA PIRACY IN EMERGING ECONOMIES* (Joe Karaganis ed., 2011).

- Steve Kirkwood, *A Practice Framework for Restorative Justice*, 63 *AGGRESSION AND VIOLENT BEHAVIOR* 101688 (2022). <https://doi.org/10.1016/j.avb.2021.101688>
- TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton University Press, 2nd ed. 2006).
- Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 *PSYCH. REV.* 440 (2010). <https://doi.org/10.1037/a0018963>
- YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* (Currency, 2011).
- YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale University Press, 2006).

# The Jurisprudential Construction of the Human Right to the Free Development of Personality in Mexico

*La construcción jurisprudencial del derecho humano al libre desarrollo de la personalidad en México*

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**Abstract:** This article critically explores the jurisprudential construction of the human right to the free development of personality within the Mexican constitutional framework, emphasizing the interpretive role of the federal judiciary after the 2011 constitutional human rights reform. Grounded in the principle of progressivity and the broader mandate of harmonizing domestic law with international human rights standards, this article examines how the free development of personality has been shaped by judicial reasoning on diverse legal themes. Drawing on qualitative, jurisprudential-analytical methodology, it researches a selection of landmark rulings issued by the Mexican Supreme Court and federal courts. These decisions are grouped into nine main categories in which the right to free development of personality has been recognized or expanded: gender identity, recreational drug use, marriage equality, no-fault divorce, same sex concubinage, reproductive autonomy, children's rights, bodily autonomy, and private autonomy in contractual relationships. Through doctrinal analysis and comparative reference, particularly to the German Constitutional Court's *Elfes* and *Cannabis* decisions—this article shows the evolution of constitutional logic in Mexican case law.

**Keywords:** free development of personality; human dignity; constitutional jurisprudence.

**Resumen:** Este artículo examina críticamente la construcción jurisprudencial del derecho humano al libre desarrollo de la personalidad en el marco constitucional mexicano, con énfasis en el papel interpretativo del Poder Judicial

Federal tras la reforma constitucional en materia de derechos humanos de 2011. Con base en el principio de progresividad y el mandato más amplio de armonizar el derecho interno con los estándares internacionales de derechos humanos, el estudio examina cómo este derecho ha sido moldeado a través de la argumentación judicial en distintos temas legales. A partir de una metodología cualitativa de análisis jurisprudencial, el trabajo estudia una selección de sentencias relevantes emitidas por la Suprema Corte de Justicia de la Nación y por tribunales federales. Estas decisiones se agrupan en nueve áreas sustantivas en las que el derecho al libre desarrollo de la personalidad ha sido reconocido o ampliado: identidad de género, uso recreativo de drogas, matrimonio igualitario, divorcio sin causa, concubinato entre personas del mismo sexo, autonomía reproductiva, derechos de la niñez, autonomía corporal y autonomía privada en relaciones contractuales. Mediante análisis doctrinal y referencias comparadas —en particular, a las sentencias *Elfes* y *Cannabis* del Tribunal Constitucional Alemán— el artículo muestra la evolución de la lógica constitucional en la jurisprudencia mexicana.

**Palabras clave:** libre desarrollo de la personalidad; dignidad humana; jurisprudencia constitucional.

**Summary:** I. *Introduction*. II. *Human Rights and the Principle of Progressivity*. III. *Construction of the Human Right to the Free Development of Personality in Mexican Jurisprudence*. IV. *Critical Reflections of the Right to Free Development of Personality in México*. V. *Conclusions*. VI. *References*.

## I. Introduction

This article examines the jurisprudential construction of the human right to the free development of personality, particularly considering its evolution after Mexico carried out its constitutional reform on human rights on June 10, 2011. Based on the principles of universality, interdependency, indivisibility and progressivity, its constitutional mandate is to harmonize domestic law with international human rights standards. This study explores how this right has been progressively shaped by the interpretive practices of the Mexican Supreme Court of Justice of the Nation (hereinafter, SCJN) and federal judiciary.

This article adopts a qualitative, jurisprudential-analytical methodology to examine a selection of landmark judicial decisions that have constructed, interpreted, or expanded this right across nine main areas: gender identity, recreational drug use, same-sex marriage, no-fault divorce, same-sex concubinage, reproductive autonomy, children's rights, bodily autonomy, and contractual freedom.<sup>1</sup>

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<sup>1</sup> GIOVANNI ALEXANDER SALGADO CIPRIANO, *Cuaderno de Jurisprudencia núm. 16: Libre desarrollo de la personalidad* (Suprema Corte de Justicia de la Nación, Centro de Estudios Constitucionales ed., 2022), [https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2023-01/CUADERNO%20NUM%2016%20DH\\_LIBRE%20DESARROLLO\\_FINAL%20DIGITAL.pdf](https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2023-01/CUADERNO%20NUM%2016%20DH_LIBRE%20DESARROLLO_FINAL%20DIGITAL.pdf).

These rulings include noteworthy *amparos*,<sup>2</sup> *acciones de inconstitucionalidad*,<sup>3</sup> and *contradicciones de tesis*.<sup>4</sup> The final section provides a doctrinal and hermeneutical critique of the current construction of the right to the free development of personality.

The cases chosen for this article illustrate both the doctrinal architecture and the normative flexibility of the right as they emphasize its transformation into a defining standard for adjudicating claims of personal autonomy.

The article is based on four analytical hypotheses:

- Human rights are the standards for human dignity and equality under both international law and domestic law.
- As public-subjective rights, no one puts into doubt their content, enforceability, or effectiveness. They constitute an expression of the rule of law (they must be obeyed by everyone).
- There is broad consensus concerning the content (rights and obligations) of these human rights.

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<sup>2</sup> *Mexican juicio de amparo is a constitutional remedy for protecting fundamental rights. It allows individuals to challenge different acts of authority, legislative acts and competence conflicts that allegedly violate rights enshrined in the Mexican Constitution or international human rights treaties that Mexico is a part of. Amparo is governed by Articles 103 and 107 of the Mexican Constitution and by the Ley de Amparo. See Articles 103-107, Constitución Política de los Estados Unidos Mexicanos [C.P.E.U.M], as amended, Diario Oficial de la Federación, 5 de febrero de 1917 (Mex.) and Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación, 2 de abril de 2013 (Mex.). The amparo en revisión is an annulment phase within the Mexican amparo proceeding. It allows a higher federal court, typically a Collegiate Circuit Court or, in exceptional cases, the Supreme Court, to review the decision issued by a district court in an indirect amparo. This stage examines questions of constitutional interpretation, legality, and procedural correctness, and plays a central role in shaping binding jurisprudence (jurisprudencia obligatoria) within Mexico's decentralized system of constitutional review. See Articles 107(IX), Constitución Política de los Estados Unidos Mexicanos [C.P.E.U.M], as amended, Diario Oficial de la Federación, 5 de febrero de 1917 (Mex.) and Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, arts. 80–92, Diario Oficial de la Federación, 2 de abril de 2013 (Mex.).*

<sup>3</sup> *Acción de inconstitucionalidad is a constitutional review in Mexican law. It allows designated public actors such as the federal Attorney General, legislative minorities, autonomous constitutional bodies, and the human rights commission to challenge the constitutionality of general provisions before the Supreme Court. The acción de inconstitucionalidad aims to annul unconstitutional laws always with general erga omnes effects. See Article 105(I), Constitución Política de los Estados Unidos Mexicanos [C.P.E.U.M], as amended, Diario Oficial de la Federación, 5 de febrero de 1917 (Mex.) and Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación, 23 de mayo de 1997 (Mex.).*

<sup>4</sup> *The contradicción de tesis (Contradiction of Precedents) is a constitutional procedure through which the Supreme Court of Justice of the Nation (Suprema Corte de Justicia de la Nación, SCJN) resolves conflicting legal interpretations (tesis) issued by different federal courts. When federal courts of the same or different circuits adopt contradictory positions on the same legal issue, the Supreme Court or the circuit collegiate and regional court plenaries are empowered to unify the conflicting legal interpretations by determining the appropriate legal interpretation, thereby creating a binding precedent (jurisprudencia). See Ley de Amparo [Amparo Law], arts. 197-203 (Mex.), DOF 4 de marzo de 2013 (Mex.).*

- In the Mexican legal system, there is both a concentrated and diffuse constitutional review, and it is the responsibility of federal and local courts to adjudicate matters involving these rights.

Building on domestic jurisprudence and comparative sources, especially the German Constitutional Court’s *Elfes* and *Cannabis* ruling, our analysis positions Mexican jurisprudence within a broader transnational context. While the SCJN has employed the right to the free development of personality to improve individual freedoms, we identify areas of doctrinal overreach, conceptual ambiguity, and insufficient links to other constitutional rights like privacy, equality, and legal certainty.

Rather than offering an exhaustive survey of all relevant case law, this article provides a selective account of doctrinally significant rulings to map the evolution of this right and to assess the methodological and normative coherence of its current jurisprudential structure. In doing so, we seek to contribute to constitutional theory and human rights scholarship by examining how abstract rights are operationalized within an evolving legal system. However, the expanding use of human rights language in Mexico has also led to a proliferation of human rights discourse, which has created considerable conceptual “noise.”<sup>5</sup> This overabundance of interpretations often complicates a systematic legal analysis.

This article makes use of *Cuaderno de Jurisprudencia núm. 16: Libre desarrollo de la personalidad*, published by the *Centro de Estudios Constitucionales de la Suprema Corte de Justicia de la Nación*<sup>6</sup> as a valuable reference for identifying and organizing important judicial precedents concerning the right to the free development of personality in Mexico. It also draws on Juan Antonio García Amado’s analysis in *Consumo lúdico de marihuana y libre desarrollo de la personalidad*, particularly his discussion on the right to free development of personality as a “catch all” right or residual right.<sup>7</sup>

## II. Human Rights and the Principle of Progressivity

According to contemporary human rights doctrine, two core values support the notion of human rights: human dignity and equality.<sup>8</sup> The former is commonly

<sup>5</sup> See ELIZABETH LUNA TRAILL, ALEJANDRA VIGUERAS ÁVILA & GLORIA ESTELA BÁEZ PINAL, *Diccionario básico de lingüística* 1251 (Universidad Nacional Autónoma de México ed., 2005) (defining “ruido” [noise] as a “defective sound that may cause the loss of information. It occurs in the encoding of the message due, among other things, to the following causes: an imperfect knowledge of the code by one of the members of the communicative process; any error in the code itself; or some defect in the transmission of the sound wave through the air”).

<sup>6</sup> See GIOVANNI ALEXANDER SALGADO CIPRIANO, *supra* note 1.

<sup>7</sup> Juan Antonio García Amado, *Consumo lúdico de marihuana y libre desarrollo de la personalidad*, ALMACÉN DE DERECHO (May 20, 2019), <https://almacenederecho.org/consumo-ludico-de-marihuana-y-libre-desarrollo-de-la-personalidad>.

<sup>8</sup> COUNCIL OF EUROPE, *What Are Human Rights?*, in COMPASS: MANUAL FOR HUMAN RIGHTS ED-

understood as “the quality or state of being worthy, honored, or esteemed”<sup>9</sup> while the latter refers to “the quality or state of being equal.”<sup>10</sup> Within this framework, the normative foundation of human rights is rooted in a shared commitment to dignity and respect, situated within a context of equality.

Undoubtedly, there are various theoretical perspectives concerning the nature of human rights. Among these are the historical, positivist, natural law, and sociological approaches. Each provides a distinct angle through which the evolution and function of human rights may be interpreted. However, for the purposes of this study and in line with our methodological approach, we adhere to the assumption of the legal existence of human rights, as recognized and articulated in positive legal provisions and authoritative international interpretations. Consequently, our analysis engages with human rights as juridically constructed entities, rather than as abstract philosophical or moral claims.

In its Preamble, the Universal Declaration of Human Rights (UDHR) outlines the foundational principles of the modern concept of human rights. It affirms that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>11</sup> It further states:

[...] the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.<sup>12</sup>

These principles: inherent dignity, equal rights and inalienable rights, establish the moral and legal basis for the protection and promotion of human rights at the international level. Additionally, Article 1 of the UDHR proclaims a core normative principle: “All human beings are born free and equal in dignity and rights.”<sup>13</sup> This provision captures the essence of the human rights framework: the universality and indivisibility of rights grounded in the inherent dignity of every person.

The Inter-American Court of Human Rights has played an important role in the ongoing development of the doctrine of “implied rights”. According to this, the rights explicitly enumerated in the Convention do not comprise a closed catalogue; rather, they are susceptible to judicial expansion through in-

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UNICATION WITH YOUNG PEOPLE, <https://www.coe.int/en/web/compass/what-are-human-rights->

<sup>9</sup> Merriam-Webster Dictionary, *Dignity*, <https://www.merriam-webster.com/dictionary/dignity>

<sup>10</sup> Merriam-Webster Dictionary, *Equality*, <https://www.merriam-webster.com/dictionary/equality>

<sup>11</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (December 10, 1948). Preamble, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>12</sup> *Id.*

<sup>13</sup> G.A. *supra* note 11, Art. 1.

terpretation. The Court has operationalized this approach by deriving implicit rights from the textual, structural, and normative content of existing provisions, claiming that such rights are not discretionary or supplementary, but essential extensions necessary for the full realization of those expressly guaranteed.<sup>14</sup>

In relation to the principle of progressivity, Grégor Puppincq offers a critical perspective on the expansive trajectory of human rights. He writes that this “progress of human rights” is destined to increase indefinitely through the logical development of pre-existing rights.<sup>15</sup> He adds that the progress of human rights is commonly seen as the result of the combined advancement of science and morality, translated into law through the mechanisms of universal principles. These principles, such as equality and liberty, are so powerful that no tangible reality seems capable of resisting them. Consequently, the logic of rights progressively extends over the full range of human experience. Human rights are thus compelled, by their own internal logic, to be updated, to expand, and to eliminate any obstacle to the ideal of the free human being. Although this mechanism yields rational decisions, it may lack prudence, insofar as such decisions are often conceived at the level of abstract principles. As a result, the public may perceive these developments as excessive or ideological—particularly when the obstacles being dismantled are foundational structures of society.<sup>16</sup>

In Puppincq’s critique, the ideas of “increase indefinitely” or “rights progressively extend” point at a central tension in the doctrine of progressive realization: while grounded in rational legal development and internal doctrinal coherence, the expansion of human rights may provoke public resistance when it confronts deeply entrenched cultural or institutional social traditions. This tension between legal rationality and social acceptance reveals the need for a more balanced approach, one that upholds the dynamic potential of human rights without exceeding the prudential limits of legal interpretation, and its transformation into ideology.

The arguments show that to proceed with conceptual precision, it is important to define the principle of progressivity, particularly in its application in the field of human rights. Within this context, progressivity refers to States’ obligation to advance the fulfillment of rights gradually and continuously, in accordance with their available resources and in response to evolving social, economic, and cultural conditions. The term “progressivity” derives from the adjective “progressive,” defined as “advancing or increasing gradually,”<sup>17</sup> and implies a normative commitment to non-regression and constant improvement in the recognition, protection, and realization of fundamental rights.

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<sup>14</sup> Gonzalo Candia-Falcón, *El Estado de Derecho y la Corte Interamericana de Derechos Humanos*, 24 *DÍKAION* 225, 244 (2015). <https://doi.org/10.5294/DIKA.2015.24.2.2>

<sup>15</sup> Grégor Puppincq, *ECHR Human Rights and Progressivism*, EUR. CTR. FOR L. & JUST. (Apr. 28, 2023). <https://eclj.org/philosophy/echr/droits-de-lhomme-et-progressisme>

<sup>16</sup> *Id.*

<sup>17</sup> Real Academia Española, “Progresivo”. <https://dle.rae.es/progresivo>

In the same way, one of the definitions given by the Merriam-Webster Dictionary is that progressivity is characterized by continuous improvement or advancement.<sup>18</sup>

The Pan-Hispanic Dictionary of Legal Spanish (*Diccionario Panhispánico del Español Jurídico*) identifies three primary meanings of the *principio de progresividad* (principle of progressivity):

- 1) The principle that should guide the tax system, entailing more-than-proportional taxation of taxable and assessable bases of any basic tax in the tax system, such that, taken together, the tax structure produces a progressive outcome.
- 2) In the field of human rights, the principle according to which no regression in the level of guarantees may be afforded, except where such regression is duly justified.
- 3) The principle by which State parties commit to adopting measures, both domestically and through international cooperation, particularly of an economic and technical nature, to gradually ensure the full enjoyment of rights derived from economic, social, educational, scientific, and cultural rights.<sup>19</sup>

For the purposes of this article, the second and third meanings are directly relevant as they relate to the logic of public-subjective rights and align with international human rights law, particularly as reflected in Article 26 of the American Convention on Human Rights and Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

From a doctrinal and jurisprudential perspective, in *Jurisprudencia* 1a./J. 85/2017 (10a.), concerning the scope of the principle of progressivity in human rights, the First Chamber of the SCJN offers up a detailed constitutional interpretation of the principle of progressivity.<sup>20</sup>

This binding court precedent contains four key dimensions of the principle as it applies within the Mexican constitutional order:

- 1) The principle of progressivity is enshrined in Article 1 of the Mexican Constitution and reiterated in various international human rights treaties ratified by Mexico.<sup>21</sup>

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<sup>18</sup> Merriam-Webster Dictionary, “progressive”. <https://www.merriam-webster.com/dictionary/progressive>

<sup>19</sup> Real Academia Española & Consejo General del Poder Judicial, “Principio de progresividad”. <https://dej.rae.es/lema/principio-de-progresividad>

<sup>20</sup> PRINCIPIO DE PROGRESIVIDAD EN MATERIA DE DERECHOS HUMANOS. CONTENIDO Y ALCANCES DEL MANDATO PREVISTO EN EL ARTÍCULO 10. DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Suprema Corte de Justicia de la Nación (Primera Sala) [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo IV, Oct. 2017, *Jurisprudencia* 1a./J. 85/2017, at 1396 (Mex.). <https://sjf2.scjn.gob.mx/detalle/tesis/2015305>

<sup>21</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into

- 2) It orders that the scope and level of protection of human rights be expanded to the greatest extent possible, considering both legal frameworks and factual circumstances.
- 3) The principle imposes both positive and negative obligations on all public authorities (whether legislative, administrative, or judicial). Positive obligations require lawmakers (whether acting formally or materially) to adopt legal provisions that increase rights protections and require adjudicators and administrators to interpret and apply those rules in ways that enhance such protections. Negative obligations prohibit lawmakers from adopting measures that reduce, restrict, or eliminate previously established rights protections, and similarly prohibit adjudicators from adopting regressive interpretations that undermine existing standards.
- 4) Accordingly, the level of protection recognized at any given time must be treated as a non-regressible minimum, imposing an immediate obligation on the State to respect that baseline, while simultaneously demanding that rights be progressively expanded over time.

This jurisprudential construction points out that progressivity is not merely an aspirational principle, but a binding constitutional and international mandate. It imposes concrete legal obligations on all branches and all levels of government to respect, protect, and promote human rights, ensuring the active development of rights while considering evolving standards of dignity, equality, and justice alongside the prevention of regression.

Thus, the principle of progressivity of human rights can be expressed as follows:

Lexicographic	Jurisprudential
In terms of human rights, no regression in the level of guarantees is permitted, except when duly justified.	It is prohibited to issue legislative acts that limit, restrict, eliminate, or ignore the scope and protection already recognized for human rights.

force July 18, 1978) (published in *Diario Oficial de la Federación* [DOF], May 7, 1981); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force Nov. 16, 1999) (published in DOF, Sept. 1, 1998); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, 29 I.L.M. 1447 (entered into force Aug. 28, 1991) (published in DOF, Sept. 1, 1998); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (published in DOF, Jan. 25, 1991); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (published in DOF, May 20, 1991); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (published in DOF, May 12, 1981); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

Human rights standards must not be interpreted regressively or recessively.	Judicial and administrative authorities are prohibited from adopting regressive interpretations, that is, interpretations that diminish or negate previously established levels of protection.
States are committed to adopting measures to progressively achieve the full effectiveness of rights derived from economic, social, educational, scientific and cultural norms.	Legislators have the obligation to expand the legal recognition and protection of human rights; implementers (judges, administrators) have the duty to interpret legal provisions in ways that enhance and broaden the scope of such rights.

It can be clearly stated that, for both legislators and law enforcers, the principle of progressivity in human rights entails the following duties and behaviors: *a)* to increase the scope of protection afforded to human rights; *b)* to prevent any regression in the guarantees, particularly those related to the procedural mechanisms for enforcing such rights; *c)* to refrain from issuing or applying legal provisions that limit, restrict, or eliminate recognized human rights and their corresponding protections; *d)* to actively promote the full realization and implementation of human rights; *e)* to interpret legal provisions in a manner that broadens the scope and application of human rights; and *f)* to prohibit interpretations that result in a regression or weakening of established human rights standards.

### **III. Construction of the Human Right to the Free Development of Personality in Mexican Jurisprudence**

As previously established, the principle of progressivity serves as a normative benchmark for incorporating new human rights into the framework of Western constitutionalism. In the Mexican context, this principle underlies several rulings in which federal judicial bodies have contributed to the doctrinal construction of the human right to the free development of personality. This section analyzes a selection of such decisions, informed, in part, by the work of Flores Mendoza and Márquez Gómez, who have proposed a regulatory framework for the legal use of cannabis in Mexico.<sup>22</sup>

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<sup>22</sup> See IMER BENJAMÍN FLORES MENDOZA & DANIEL MÁRQUEZ GÓMEZ, TERCERA LLAMADA, TERCERA... HACIA UN MODELO DE REGULACIÓN DE LOS DIVERSOS USOS DEL CANNABIS EN MÉXICO (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2020).

Collí Ek and Pérez Inclán have likewise examined the emergence of this right in Mexican Supreme Court jurisprudence, identifying four areas of growth: sexual and gender identity, civil status, recreational activities, and external appearance, following the 2011 constitutional human-rights reform. Their article offers a descriptive summary of how the Court has incorporated the notion of personal autonomy into these different fields of litigation.<sup>23</sup>

The federal judicial decisions discussed below include these same substantive domains and are not only thematically significant but also reveal a shared normative architecture grounded in Mexico's constitutional and international commitments. According to Salgado Cipriano, the contours of the right to the free development of personality have historically been shaped through judicial interpretation, beginning with the *Elfes* case before the German Constitutional Court. As he notes:

Since its inception in the *Elfes* case before the German Constitutional Court, the outline of the right to the free development of personality has been defined primarily through case law. In Mexico, this fundamental right stems from the right to human dignity, as established in Article 1 of the Constitution and in international human rights treaties.<sup>24</sup>

This suggests that the construction of the right to the free development of personality in Mexico rests on two principal normative pillars: *a*) the right to human dignity, and *b*) the international human rights treaties to which Mexico is bound. These foundations reflect both domestic and transnational commitments, reinforcing the judiciary's mandate to interpret rights expansively and progressively.

### 1. *The Elfes Case and Article 2(1) of the German Basic Law*

The central issue in the *Elfes* case<sup>25</sup> concerns the interpretation of Article 2(1) of the Basic Law for the Federal Republic of Germany, which provides: "Every person shall have the right to free development of their personality insofar as they do not violate the rights of others or offend against the constitutional order or the moral law."<sup>26</sup>

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<sup>23</sup> Víctor Manuel Collí Ek & Freddy Martín Pérez Inclán, *El derecho al libre desarrollo de la personalidad en la doctrina jurisprudencial de la Corte mexicana*, 45 CUEST. CONST. 451, 467 (2021). <https://doi.org/10.22201/ijj.24484881e.2021.45.16671>

<sup>24</sup> GIOVANNI ALEXANDER SALGADO CIPRIANO, *supra* note 1.

<sup>25</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 253/56, paras. 1-36, (Jan. 16, 1957), [https://www.bverfg.de/e/rs19570116\\_1bvr025356en.html](https://www.bverfg.de/e/rs19570116_1bvr025356en.html) (holding that the general freedom of action under Article 2(1) of the Basic Law protects the free development of personality, subject to limitations by the rights of others, constitutional order, and moral law).

<sup>26</sup> *Grundgesetz für die Bundesrepublik Deutschland Basic Law*, Art. 2 (1), translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html) (Ger.). The German version states: *Art 2 (1)*

In 1953, Wilhelm Elfes, a supporter of the idea of a “United Germany,” applied to renew his passport at the *Mönchengladbach* passport office. His application was denied on June 6, 1953, pursuant to § 7(1)(a) of the *Passport Act* [*Gesetz über das Paßwesen*] of March 4, 1952. No justification was provided for the denial.<sup>27</sup>

Elfes challenged the denial through a series of administrative proceedings, all of which failed: first before the Düsseldorf Land Administrative Court [*Landesverwaltungsgericht*], then on appeal to the Münster Higher Administrative Court [*Oberverwaltungsgericht*], and finally before the Federal Administrative Court [*Bundesverwaltungsgericht*].<sup>28</sup>

The case was ultimately brought before the Federal Constitutional Court [*Bundesverfassungsgericht*], First Senate, composed of Justices Wintrich (President), Scheffler, Heiland, Heck, Scholtissek, Stein, Wessel, Ritterspach, and Lehmann, following a hearing held on October 30, 1956. In the Reasons section of its decision issued on January 16, 1957, the Court gave several key doctrinal arguments concerning Article 2(1) of the Basic Law.

- a) The Court first rejected a narrow reading of Article 2(1) that would limit its protection to the core of one’s personality as moral-intellectual beings. It reasoned that if the right only covered that essential core of one’s personality, it would be illogical to subject it to limitations based on the rights of others, moral law, or constitutional order. On the contrary, it is precisely because Article 2(1) allows for such limitations that the provision must protect the general freedom of action in a broader sense.<sup>29</sup> The Court further emphasized that, beyond this general clause, the Basic Law also contains specific fundamental rights tailored to protect individual freedom in domains that have historically been vulnerable to public interference.<sup>30</sup>
- b) Building on that premise, the Court held that the phrase “constitutional order” [*verfassungsmäßige Ordnung*], which limits the scope of the right under Article 2(1), must be understood as referring to the general legal order, which must conform not only to the formal requirements of valid legislation, but also to the substantive principles of the Constitution.<sup>31</sup> The Court aligned its interpretation with the Münster Higher Administrative Court,

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*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*

<sup>27</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 253/56, 2, Jan. 16, 1957, translated in *Judgment of the First Senate of 16 January 1957*, at 2, [https://www.bverfg.de/e/rs19570116\\_1bvr025356en.html](https://www.bverfg.de/e/rs19570116_1bvr025356en.html).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 14 (holding that Article 2(1) protects the general freedom of action, not merely a narrow core of personality).

<sup>30</sup> *Id.* at 16 (noting that other provisions of the Basic Law protect specific vulnerable areas of freedom, such as religion, expression, and assembly).

<sup>31</sup> *Id.* at 17 (interpreting “constitutional order” to require both formal and substantive constitutional consistency).

which had defined *constitutional order* as a legal regime “in accordance with the Constitution and in keeping with its limits.” Consequently, the Court concluded that an individual’s general freedom of action may be legitimately restricted by any legal provision that is both formally enacted and substantively consistent with constitutional standards.<sup>32</sup>

- c) The Court then addressed scholarly concerns that such a reading might render the right under Article 2(1) meaningless by allowing another statute to override it. The Court rejected this view, stressing that mere formal legality is insufficient: a statute must also comply with the fundamental values of the Basic Law.<sup>33</sup> These include human dignity, the rule of law, and the social state principle, all of which are embedded in the Basic Law’s value system.<sup>34</sup> Most critically, the Court affirmed that human dignity, as enshrined in Article 1(1), is the supreme constitutional value. Any law that infringes on human dignity, or that restricts intellectual, political, or economic freedom to the extent that the core of those rights is compromised, violates Articles 1(3), 2(1), and 19(2) of the Basic Law. The Court thus recognized that the Constitution guarantees a sphere of inviolable personal autonomy, beyond the reach of public authority. Laws that intrude upon this domain can never form part of the *constitutional order* and must be declared void.<sup>35</sup>

Towards the end of the decision, the Court addressed the behavior of the passport authority. While the constitutional complaint was dismissed, the Court made it clear in its concluding remarks that this outcome did not amount to endorsing the administrative procedure. The Court underlined that the rule-of-law principle [*Rechtsstaatsprinzip*] obliges State authorities to provide reasons for any interference with individual rights that might arise.<sup>36</sup> Failure to do so would deprive citizens of the opportunity to defend themselves effectively. The Court refrained from annulling the administrative decision solely because the grounds for the denial were subsequently disclosed during court proceedings, and the complainant could contest them. Ultimately, the decision was found to be justified.<sup>37</sup>

The *Elfes* decision remains an important ruling in the constitutional jurisprudence of the Federal Republic of Germany, as it recognizes Article 2(1) as

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<sup>32</sup> *Id.* (citing the Münster Higher Administrative Court’s definition of the constitutional order as “in accordance with the Constitution and in keeping with its limits”).

<sup>33</sup> *Id.* at 28 (responding to critiques that Article 2(1) could be nullified by legislation).

<sup>34</sup> *Id.* (discussing the role of unwritten constitutional principles such as the rule of law and social state).

<sup>35</sup> *Id.* (holding that laws infringing on the core rights of personal freedom and dignity must be invalidated).

<sup>36</sup> *Id.* at 36 (noting that individuals must be informed of the reasons for State interference to ensure their right to legal recourse).

<sup>37</sup> *Id.* (upholding the administrative action only because the reasons were later disclosed and subjected to judicial review).

a guarantor of general freedom of action. Grounded in human dignity and bounded only by the constitutional order, the rights of others, and moral law, the Federal Constitutional Court laid the foundation for a jurisprudential construction of the right to the free development of personality as a normative framework applicable to various spheres of individual autonomy. An important point is that in the German case, the right to free development of personality has an explicit constitutional basis, which is important because its Federal Constitutional Court only interpreted the constitution while in the Mexican case, tribunals had to create a “new right”.

Germany’s interpretive model has resonated beyond Germany, even influencing Mexican constitutional interpretation where the principle of progressivity and the right to dignity similarly underpin the recognition and expansion of human rights. Below we examine how Mexican federal courts have developed that right through jurisdictional decisions.

## 2. Mexican Constitutional Jurisprudence on the Free Development of Personality

### A. Amparo Directo 6/2008: Gender Identity and the Free Development of Personality

In *Amparo Directo 6/2008*, decided on January 6, 2009, and linked to the *Facultad de atracción*] 3/2008-PS,<sup>38</sup> the Mexico’s SCJN addressed a matter concerning the rectification of a birth certificate. The case involved an individual assigned male at birth and who, over time, developed feminine physical characteristics, medically diagnosed as *female pseudohermaphroditism*. The *amparo* was adjudicated by the SCJN plenary, which framed the issue in terms of sex reassignment and the right to gender identity.

In its reasoning, the Court identified several fundamental rights at stake, including those of human dignity, equality and non-discrimination, the right to privacy, the right to private life and to one’s own image, the free development of personality (subject of our analysis), and the right to health.<sup>39</sup>

This *amparo* ruling cites key international human rights instruments, including the Universal Declaration of Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The Court emphasizes several foundational principles regarding the right to the free development of personality:

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<sup>38</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo 6/2008*, relacionado con la Facultad de Atracción 3/2008-PS, Pleno, Jan. 6, 2009 (Mex.), <https://desc.scjn.gob.mx/sites/default/files/2021-09/MÉX10-Sentencia.pdf>. In Mexican constitutional law, the *facultad de atracción* refers to the Supreme Court’s (SCJN) discretionary authority to assume jurisdiction over a case of interest, even if it would not ordinarily be heard by this Court (like the certiorari). In this context, *Facultad de atracción 3/2008-PS*” is a technical procedural reference.

<sup>39</sup> See *Id.* at 75.

- 1) The *psyche* is identified as the locus where the free development of legal personality resides, as it reflects the personal decisions through which an individual exercises autonomy and dignity.<sup>40</sup>
- 2) Every individual, regardless of their identity, possesses the right to freely and autonomously choose their life plan, including the means by which they pursue the goals and objectives they deem personally significant. The free development of personality is therefore conceptualized as the realization of that life plan, understood as an expression of personal autonomy.<sup>41</sup>
- 3) This right entails State recognition of each person's natural capacity to be as they choose to be, free from coercion, unjustified restrictions, or interference by others. It affirms that each human being has the sovereign authority to determine the meaning and direction of their existence, according to their own values, ideas, expectations, and preferences.<sup>42</sup>
- 4) The right to the free development of personality encompasses, among other aspects, the freedom to marry or not, to have children or not, including the number and timing, to determine personal appearance, to choose a profession or occupation, and, importantly, to exercise free sexual choice. These factors constitute essential aspects of how a person chooses to project themselves and to live and thus must be subject only to individual and autonomous decision.<sup>43</sup>
- 5) Consequently, the ruling affirms that the fundamental right to the free development of personality necessarily includes the rights to sexual identity and gender identity, since it is precisely through these that the individual defines and expresses themselves, both personally and socially.<sup>44</sup>

Accordingly, *Amparo Directo* 6/2008, the human right to the free development of personality is based not only on the principle of human dignity, but also on the minimum sphere of individual liberty necessary to pursue personal goals. It upholds the importance constitutional, and human rights have in respecting individual identity as part of the broader framework of legal personhood and autonomy. This case served as a first step in Mexican constitutional jurisprudence, linking gender identity to a broader framework of personal autonomy and human rights protections.

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<sup>40</sup> *Id.* at 54.

<sup>41</sup> *Id.* at 85.

<sup>42</sup> *Id.* at 86.

<sup>43</sup> *Id.* at 86.

<sup>44</sup> *Id.* at 97.

*B. Amparos en Revisión 237/2014, 1115/2017, 623/2017, 547/2018, and 57/2019: Constitutional Criteria on the Recreational Use of Marijuana and the Right to Free Development of Personality*

Mexican Supreme Court of Justice has developed a line of constitutional jurisprudence addressing the recreational use of marijuana and the right to free development of personality. This body of case law is built primarily on *amparos en revisión* 237/2014, 1115/2017, 623/2017 and 547/2018,<sup>45</sup> which challenged several provisions in Mexico's General Health Law that had been characterized as a "system of administrative prohibitions." In contrast, *Amparo en Revisión* 57/2019<sup>46</sup> dealt with a legislative omission. Under this regulatory framework, the administrative system acted as a legal barrier to engaging in activities relevant to personal marijuana consumption, such as planting, cultivation, harvesting, preparation, conditioning, possession, and transportation.<sup>47</sup>

For purposes of analysis, special attention will be given to *Amparo en Revisión* 1115/2017, in which the petitioner had previously requested authorization from the Federal Commission for Protection Against Sanitary Risks (COFEPRIS) to perform various activities associated with habitual personal consumption of *Cannabis sativa* (including its seeds, resin, and psychoactive component THC), exclusively for recreational purposes. Such actions included planting, cultivating, harvesting, preparing, possessing, transporting, and consuming cannabis for personal use, while explicitly excluding any commercial activity. The request was denied based on Articles 235, 237, 245, 247, and 248 of the General Health Law (LGS).

The petitioner alleged that COFEPRIS's refusal to authorize the request constituted unjustified constraints on several fundamental rights including: the right to personal identity, the right to self-image, the right to the free development of personality, the right to personal autonomy and liberty. All these rights

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<sup>45</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 237/2014, Primera Sala, Nov. 4, 2015 (Mex.), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-01/AR%20237-2014%20v.%20p.%C3%BAblica%20PDF.pdf>; *Amparo en Revisión* 1115/2017, Primera Sala, Mar. 14, 2018 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-03/AR-1115-17-180316.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-03/AR-1115-17-180316.pdf); *Amparo en Revisión* 623/2017, Jun. 13, 2018 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2017/2/2\\_218619\\_4160\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2017/2/2_218619_4160_firmado.pdf); *Amparo en Revisión* 547/2018, Oct. 31, 2018 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2018/2/2\\_238462\\_4213\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2018/2/2_238462_4213_firmado.pdf)

<sup>46</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 57/2019, Primera Sala, Aug. 14, 2019 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/2/2019/2/2\\_249483\\_4263\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/2/2019/2/2_249483_4263_firmado.pdf)

<sup>47</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 1115/2017, Primera Sala, Mar. 14, 2018 (Mex.), (resolving the constitutionality of prohibitions on the personal use of cannabis under the right to free development of personality, *I.- Marco regulatorio sobre el control de estupefácientes y psicotrópicos en la Ley General de Salud*) [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-03/AR-1115-17-180316.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-03/AR-1115-17-180316.pdf)

were invoked in connection with the principle of human dignity and the right to health.

The First Chamber of the SCJN granted the *amparo* and ordered COFE-PRIS to authorize the requested acts, declaring that the provisions of the LGS were unconstitutional insofar as they categorically prohibited personal, recreational use of cannabis use. It relied on both domestic and comparative constitutional jurisprudence, including the abovementioned *Amparo Directo* 6/2008, in which the SCJN recognized the right to the free development of personality as deriving from the principle of human dignity. In his reasoning, the reporting minister also drew on the German Federal Constitutional Court's *Elfes* decision, which established that certain "life spaces" not explicitly covered by specific fundamental rights nonetheless fall under the broader umbrella of personal autonomy.

On the doctrinal side, theorists such as Aharon Barak,<sup>48</sup> Carlos Bernal Pulido,<sup>49</sup> Carlos Santiago Nino,<sup>50</sup> Ernesto Garzón Valdés,<sup>51</sup> Robert Alexy,<sup>52</sup> Luis María Díez-Picazo,<sup>53</sup> and Eduard J. Eberle<sup>54</sup> were cited.

The court's main legal reasoning was as follows:

- 1) The Mexican Constitution grants broad protection to people's autonomy, by guaranteeing the enjoyment of certain goods that are indispensable for the choice and fulfillment of the life plans that individuals propose.
- 2) Fundamental rights serve the purpose of "reinforcing" these goods against State measures or third-party actions that may affect personal autonomy. Thus, the rights included in this protected sphere are linked to the satisfaction of those basic goods that are needed to fulfill any life plan.
- 3) The most generic good required to guarantee people's autonomy is precisely the freedom to carry out any act that does not harm third parties.
- 4) Fundamental rights, in this view, operate as safeguards for the basic goods essential to autonomy, offering protection against State interference or third-party constraints.

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<sup>48</sup> AHARON BARAK, PROPORTIONALITY. CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 19 (Doron Kalir trans., Cambridge U. Press, 2012).

<sup>49</sup> CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES-CEPC, EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES 45 (Centro de Estudios Políticos y Constitucionales-CEPC, 2007).

<sup>50</sup> *Ética y Derechos Humanos. Un ensayo de fundamentación* 223 (Astrea, 1989).

<sup>51</sup> ERNESTO GARZÓN VALDÉS, *Algo más acerca del "coto vedado"*, 6 DOXA. CUADERNOS DE FILOSOFÍA DEL DERECHO 209, 2013 (1989). <https://doi.org/10.14198/DOXA1989.6.12>

<sup>52</sup> CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES-CEPC, TEORÍA DE LOS DERECHOS FUNDAMENTALES 197-201 (Carlos Bernal Pulido trans., Centro de Estudios Políticos y Constitucionales-CEPC, 2007).

<sup>53</sup> LUIS MARÍA DIEZ-PICAZO, SISTEMA DE DERECHOS FUNDAMENTALES 70 (Thomson Reuters Civitas ed., 2005).

<sup>54</sup> EDWARD J. H. EBERLE, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 4 UTAH L. REV. 979 (1997).

- 5) Among these basic goods, the most general one is the freedom to engage in any behavior that does not harm others, a principle that underpins liberal constitutionalism.
- 6) The Constitution and international human rights instruments recognize a catalogue of “freedom rights”, which not only grant individuals permission to carry out valuable personal acts (such as expressing opinions, moving freely, forming associations, or choosing a profession), but also impose negative obligations on the State and third parties to refrain from unjustified interference.
- 7) The right to the free development of personality represents a categorical rejection of State paternalism, affirming that, if the rights of others are not infringed, each person is the best judge of their own interests. It is, in this sense, a constitutional proclamation of personal sovereignty.
- 8) This right is explicitly grounded in human dignity, as provided for in Article 1 of the Mexican Constitution, and is reinforced by the international human rights treaties to which Mexico is a party.
- 9) The broad, undefined freedom safeguarded that is the right to free development of personality complements more specific freedoms (e.g., freedom of conscience or expression) by protecting a “personal sphere” not covered by these traditional rights. In contemporary contexts, this function becomes especially important considering the emerging threats to individual freedom.
- 10) The right to free development of personality has both external and internal dimensions. Externally, it guarantees the individual generic freedom of action to undertake any act deemed necessary for their self-realization. Internally, it protects a private sphere against external incursions that impair an individual’s ability to make autonomous decisions.

In contrast, in *Amparo en Revisión 57/2019*,<sup>55</sup> the claim centered on a legislative omission, and not on the recreational use of marijuana. The complainant alleged that the competent authorities’ failure to comply with the Fourth Transitory Article of the Reform Decree—which required standardizing the regulatory framework governing the therapeutic use of THC—constituted a legislative omission that violated multiple rights and principles. This omission infringed upon the rights to legal certainty and the principle of legality.

The complainant argued that the regulatory omission violated his right to health, since this omission prevented him from accessing therapeutic means from cannabis and its derivatives.

From a teleological and systematic interpretation of the Reform Decree, the Court states that the legislative intent was to legalize the medicinal use of cannabis and to establish the legal foundation for research, production, com-

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<sup>55</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión 57/2019*, Primera Sala, Aug. 14, 2019 (Mex.).

mercialization, exportation, and importation of cannabis and its derivatives. It argued that the Decree required the Ministry of Health to align existing norms with the new regulatory framework, ensuring that pre-reform rules would not undermine or contradict the new ones. Moreover, the Ministry of Health failed to comply with its obligation to homogenize the regulations and standards on the therapeutic use of THC, even though the fourth transitory article of the Decree expressly obliges it to do so within a given period.

*C. Acción de Inconstitucionalidad 28/2015: Same-Sex Marriage and the Right to Free Development of Personality*

In its decision in *Acción de Inconstitucionalidad 28/2015* the Plenary of the SCJN formulated a constitutional interpretation affirming the right of same-sex couples to marry. This right, the Court held, is grounded in the principle of human dignity and, more specifically, in the right to the free development of personality.<sup>56</sup>

The Court emphasized that this right includes the freedom to marry or not, to procreate or not, to determine one's personal appearance, and to exercise one's sexual autonomy.<sup>57</sup> It clarified that this sphere of self-determination is protected as part of a broader understanding of liberty and is not contingent on explicit textual recognition.

Although the Constitution does not expressly mention a right to marry, the Court found that the decision to do so is an act of personal self-determination and thus protected under the right to the free development of personality.<sup>58</sup> This interpretation embraces a substantive, rather than merely formal, concept of liberty.

The Court further affirmed that the choice to unite one's life with another, to plan a family, and to decide whether to have children, all form part of the intimate core of autonomy protected by the right to free development of personality.<sup>59</sup> In doing so, it endorsed earlier rulings like the aforesaid *Amparo Directo 6/2008*, extending constitutional protection to the personal and relational dimensions of human dignity.

This doctrinal framework has been consistently applied in subsequent jurisprudence, including *Amparos en Revisión 183/2017*<sup>60</sup> and

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<sup>56</sup> Suprema Corte de Justicia de la Nación [SCJN] [Sup. Ct.], *Acción de Inconstitucionalidad 28/2015*, Pleno (Mex.), [https://www.cndh.org.mx/sites/default/files/doc/Acciones/Acc\\_Inc\\_2015\\_28\\_Demanda.pdf](https://www.cndh.org.mx/sites/default/files/doc/Acciones/Acc_Inc_2015_28_Demanda.pdf) (holding that refusing marriage to same-sex couples violates the right to dignity and free development of personality under Article 1 of the Constitution).

<sup>57</sup> *Id.* 47.

<sup>58</sup> *Id.* 50.

<sup>59</sup> *Id.* 52.

<sup>60</sup> See Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión 183/2017*, Primera Sala, Nov. 7, 2018 (Mex.), <https://www.scjn.gob.mx/sites/default/files/listas/documentos/dos/2018-11/ADR-183-2017-181113.pdf>

1364/2017,<sup>61</sup> and *Acciones de Inconstitucionalidad* 22/2016<sup>62</sup> and 113/2018.<sup>63</sup> It has also informed decisions involving marital property regimes, such as *Amparo en Revisión* 7290/2018.<sup>64</sup> These decisions collectively underline a constitutional commitment to safeguarding individual autonomy, equality, and dignity in all matters related to personal identity and family life.

#### D. *Contradiction de Tesis* 73/2014: Divorce and Free Development of Personality

In *Contradicción de Tesis* 73/2014,<sup>65</sup> the SCJN analyzed the constitutional validity of requiring a specific cause to dissolve marriage without mutual consent. Framing its reasoning within the context of the right to the free development of personality, the Court stressed that this right is rooted in human dignity and that individuals have the autonomy to determine their own life plans, including the choice of marital status.<sup>66</sup> Drawing on the work of Luis María Díez-Picazo, particularly *Sistema de derechos fundamentales* and Carlos Nino, particularly *Ética y derechos humanos. Un ensayo de fundamentación*, the Court highlighted that: 1) whether as a fundamental right or as an informing principle of the legal order, comparative law has understood that the free development of personality grants each individual the possibility of determining their own life plan, without the State being able to interfere in these decisions, except to safeguard similar rights of other people; 2) the free development of personality constitutes the legal expression of the liberal principle of ‘personal autonomy’; 3) since the free individual choice of life plans is valuable in itself, the State is prohibited from interfering in these choices; and 4) the State must limit itself to designing institutions that enable the individual pursuit of these life plans and the satisfaction

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<sup>61</sup> See Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 183/2017, Primera Sala, (Min. Alfredo Gutiérrez Ortiz Mena, speaker), asunto sobre edad mínima para contraer matrimonio, Asunto ID 228903, Nov. 7, 2018 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=228903>

<sup>62</sup> See Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 22/2016, Pleno, Nov. 6, 2017 (Mex.), [https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AI%2022-2016\\_0.pdf](https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AI%2022-2016_0.pdf)

<sup>63</sup> Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 113/2018, Primera Sala, sent. Sept. 19, 2018 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/3/2018/19/3\\_248590\\_5075\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/3/2018/19/3_248590_5075_firmado.pdf)

<sup>64</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión* 7290/2018, Primera Sala, res. Jan. 8, 2020 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=246168>

<sup>65</sup> *Contradicción de Tesis* is a constitutional mechanism in Mexican law that allows the Supreme Court to resolve conflicting legal interpretations issued by different collegiate circuit courts. When such contradictions are identified, the Court issues a binding precedent (*jurisprudencia por contradicción*) that homogenizes the interpretations of the contested legal issue across the federal judiciary.

<sup>66</sup> Suprema Corte de Justicia de la Nación [SCJN], *Contradicción de Tesis* 73/2014, Primera Sala, res. Feb. 25, 2015 (Mex.), <https://www.sitios.scjn.gob.mx/cec/sites/default/files/page/files/2020-09/CT%2073%202014%20V.%20P%20C3%20BAblica%20Inconstitucionalidad%20Divorcio%20Necesario.pdf>

of the ideals of virtue that each individual chooses, while preventing interference from others in the pursuit of these life plans.<sup>67</sup>

The Court further noted that, under the Mexican constitutional framework, the free development of personality is a fundamental right that derives from the broader right to human dignity. Accordingly, any legislative measure that restricts this right must undergo a proportionality test, which in Mexican constitutional jurisprudence is comprised of three stages: (i) suitability [*idoneidad*], (ii) necessity [*necesidad*], and (iii) proportionality in the strict sense [*proporcionalidad en sentido estricto*].<sup>68</sup> This test determines whether the restriction is constitutionally justified.

The Court emphasized the dual nature of this fundamental right. Before judicial review, it is presumed to have a *prima facie* scope, meaning it enjoys full constitutional protection. Once the proportionality analysis has been completed, the Court either confirms the full scope of the right or narrows it down if the legislative restriction proves to be justified. If the law fails the proportionality test, the *prima facie* content of the right becomes its definitive content.<sup>69</sup>

The reasoning in *Contradicción de Tesis 73/2014* links divorce directly to the right to the free development of personality, the SCJN affirmed that personal autonomy, not institutional preservation, is the normative essence of marital regulation. The judgment not only elevated individual self-determination as a constitutional standard but also refined the use of the proportionality analysis as a methodological tool to evaluate legislative limits on fundamental rights. In doing so, the Court shifted the focus of family law from paternalistic norms to the adjudication of autonomy-based rights, setting a precedent for future cases involving intimate personal decisions.

The doctrine established in *Contradicción de Tesis 73/2014* can also be seen in subsequent rulings on similar issues, including *Amparos en Revisión 5339/2015*,<sup>70</sup> *5198/2016*,<sup>71</sup> and *7262/2016*.<sup>72</sup>

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<sup>67</sup> Suprema Corte de Justicia de la Nación [SCJN], *Contradicción de Tesis 73/2014*, at 26-27, Primera Sala, res. Feb. 25, 2015 (Mex.), <https://www.sitios.scjn.gob.mx/cec/sites/default/files/page/files/2020-09/CT%2073%202014%20V.%20P%C3%BAblica%20Inconstitucionalidad%20Divorcio%20Necesario.pdf> (citing Luis María Díez-Picazo, *Sistema de derechos fundamentales* (2d. ed. 2003), and Carlos S. Nino, *Ética y derechos humanos: un ensayo de fundamentación* (1984)). (Translated by authors).

<sup>68</sup> *Id.* at 28-29.

<sup>69</sup> *Id.*

<sup>70</sup> See Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión 5339/2015*, Primera Sala (Min. Alfredo Gutiérrez Ortiz Mena, speaker), sent. Apr. 4, 2016 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2015/10/2\\_187891\\_3174\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2015/10/2_187891_3174_firmado.pdf)

<sup>71</sup> See Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión 5198/2016*, Primera Sala (Min. Norma Lucía Piña Hernández, speaker), sent. Mar. 29, 2017 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2017-03/ADR-5198-2016-170323.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2017-03/ADR-5198-2016-170323.pdf)

<sup>72</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión 7262/2016*, Primera Sala (Min. Arturo Zaldívar Lelo de Larrea, speaker), sent. Aug. 23, 2017 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=208693>

*E. Amparo en Revisión 1127/2015: Same-Sex  
Concubinage and Free Development of Personality*

In *Amparo en Revisión 1127/2015*,<sup>73</sup> decided on February 17, 2016, the First Chamber of the SCJN addressed the constitutionality of limiting the legal definition of *concubinato* (concubinage: cohabitation or common-law union; “cohabitation of persons not legally married”)<sup>74</sup> to relationships between a man and a woman. This case resulted in the issuance of a non-binding court precedent [*tesis aislada*], identified as Tesis 1a. CCXXIII/2016 (10a.).<sup>75</sup>

In the precedent, the Court held that defining concubinage exclusively as a heterosexual relationship is unconstitutional, as it violates the right to the free development of personality and constitutes a form of double discrimination (multiple discrimination or intersectionality). First, it excludes same-sex couples from legal recognition and protection under family law solely based on their sexual orientation. Second, it reinforces a restrictive and exclusionary understanding of personal and family life that undermines the constitutional guarantee of equality and non-discrimination.<sup>76</sup>

The Court’s reasoning builds upon the broader constitutional doctrine that recognizes the legitimacy of diverse family structures and affirms that sexual orientation cannot serve as a valid basis for restricting access to legal institutions such as marriage or concubinage. By declaring the heterosexual limitation of *concubinato* unconstitutional, the Court further aligned family law with the principles of human dignity, personal autonomy, and substantive equality.

*F. Acciones de Inconstitucionalidad 16/2016 and 148/2017:  
Reproductive Autonomy and Free Development of Personality*

The SCJN has developed jurisprudence protecting the reproductive rights of women and gestating persons under the constitutional principle of the free development of personality. In *Acción de Inconstitucionalidad 148/2017*,<sup>77</sup> The *Procuraduría General de la República* (actual *Fiscalía General de la República* or Attorney

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<sup>73</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión 1127/2015*, Primera Sala (Min. Jorge Mario Pardo Rebollado, speaker), sent. Febrero 17, 2016 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2015/2/2\\_187600\\_3149\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2015/2/2_187600_3149_firmado.pdf)

<sup>74</sup> Merriam-Webster Dictionary, “concubinage”. <https://www.merriam-webster.com/dictionary/concubinage>

<sup>75</sup> CONCUBINATO. ES INCONSTITUCIONAL QUE PARA SU CONFIGURACIÓN SE EXIJA QUE SEA ENTRE UN HOMBRE Y UNA MUJER, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Tenth Epoch, Primera Sala, Tesis 1a. CCXXIII/2016 (10a.), (Mex.); A non-binding court precedent [*tesis aislada*] is a non-binding interpretative criterion issued by one of the Court’s chambers that may contribute to persuasive legal reasoning but does not have *jurisprudential* force unless repeated in multiple consistent decisions.

<sup>76</sup> *Id.*

<sup>77</sup> Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad 148/2017*,

General's Office) challenged several provisions of the Criminal Code of the State of Coahuila de Zaragoza, particularly Articles 195 and 196, which criminalized abortion at any stage of pregnancy. The challenge argued that these provisions violated constitutional rights, especially the rights to personal autonomy, equality, reproductive freedom, and the free development of personality. The Court argued that reproductive autonomy is a direct expression of personal dignity and self-determination.

The Court stated that, in the specific case of women and the exercise of their dignity in deciding whether to become mothers includes an additional dimension: the freedom to establish their life plan. The indefinite freedom protected by the right to the free development of personality complements other specific freedoms as its function is to safeguard the personal sphere that is not protected by the more traditional and concrete freedoms. Therefore, this right is especially important in the face of the new threats to individual freedom that are surfacing today.<sup>78</sup>

Furthermore, the Court recognized that this right protects both freedom of action and a sphere of privacy that is essential for exercising personal autonomy. It held that autonomy and the free development of personality provide coverage for the freedom of action that allows individuals to carry out any activity that they consider necessary for the development of their personality. Regarding the issue at hand, the pronouncement is that a woman's decision to become a mother or not is protected under the scope of this right, since she is the only one who, due to her intrinsic dignity, can decide the course her life will take, in such a way that the existence of a minimum margin of intimate decision to interrupt or continue her pregnancy must be recognized.<sup>79</sup>

The Plenary of the SCJN concluded that the absolute criminalization of abortion disproportionately impacts the rights of women and gestating persons, violating their dignity and autonomy, and emphasized that criminal law must be used as a last resort [*ultima ratio*].<sup>80</sup>

On the other hand, in *Acción de Inconstitucionalidad 16/2016*,<sup>81</sup> the SCJN extended these principles to the domain of assisted reproduction, including surrogacy agreements. The SCJN reviewed a constitutional challenge [*acción de inconstitucionalidad*] filed by the National Human Rights Commission [*Comisión Nacional de Derechos Humanos*] against Articles 380 Bis (third paragraph) and 380 Bis 3 (fourth to sixth paragraphs) of the Civil Code of the State of Tabasco. These provisions regulated the donation of germ cells and surrogacy agree-

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Pleno, sent. Sep. 7, 2021 (Mex.), [https://www.scjn.gob.mx/sites/default/files/proyectos\\_resolucion\\_scjn/documento/2021-08/AI%20148.2017.pdf](https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%20148.2017.pdf)

<sup>78</sup> *Id.* 65 (Translated by authors).

<sup>79</sup> *Id.* 66 (Translated by authors).

<sup>80</sup> *Id.* 248-250.

<sup>81</sup> Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad 16/2016*, Pleno (Min. Norma Lucía Piña Hernández, speaker), sent. Jun. 7, 2021 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=194229>

ments. The CNDH argued that the lack of a regulatory economic clause in the surrogacy contract, along with the way in which the donation of germ cells was handled, could violate constitutional rights —particularly human dignity, equality, the “best interests of the child”, and the free development of personality—.

The Court defined assisted reproduction techniques as “all treatments or procedures that include the manipulation of oocytes, sperm, or human embryos to bring about a pregnancy.”<sup>82</sup> It underscored that assisted reproduction techniques are now a reality and must be understood along with all the fundamental rights involved, such as, but not limited to, the right to freedom and self-determination; to the free development of personality; to personal and family privacy; to form a family; to life; to health; to liberty; to personal safety and integrity; to decide the number and interval of children; to equality and non-discrimination; to employment and social security; to education; to information; to modify discriminatory customs against women; and to enjoy scientific progress, among others.<sup>83</sup>

This framework has also been applied in *Amparo en Revisión* 553/2018,<sup>84</sup> where the main legal issue was whether same-sex couples have a constitutional right to access assisted reproductive technologies, including surrogacy, and whether the absence of a biological link or specific legal regulation can justify denying the legal recognition of parenthood in such contexts. The Court reaffirmed the centrality of dignity, autonomy, and privacy in matters of reproductive choice and access to assisted reproductive technologies. The Court also emphasized the importance of the will to procreate [*voluntad procreacional*] as a valid basis for establishing filiation in assisted reproductive methods cases.

*G. Amparo en Revisión 800/2017: Autonomy and Free Development of Personality in the Case of Children and Adolescents*

The SCJN has affirmed that the right to the free development of personality fully extends to children and adolescents. In *Amparo en Revisión* 800/2017,<sup>85</sup> the expulsion of a minor from a private school after repeated behavioral incidents was challenged by the minor’s guardian, alleging that the school’s decision violated the child’s constitutional rights, particularly the right to education, the free development of personality and the principle of the best interest of the child.

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<sup>82</sup> *Id.* 74.

<sup>83</sup> *Id.* 128 (Translated by authors).

<sup>84</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 553/2018, Primera Sala (Jorge Mario Pardo Rebolledo, speaker), sent. Nov. 21, 2018 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=218174>

<sup>85</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 800/2017, Primera Sala (Arturo Zaldívar Lelo de Larrea, speaker), sent. May 31, 2017 (Mex.), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/AR800-2017.pdf>

The First Chamber of the SCJN explicitly recognized that minors are entitled to this right as a dimension of their human dignity and autonomy.

According to the SCJN, minors do have and should have the right to the free development of their personality, being that, as has been specified, such development of their being and their capacities as a person should not be understood as an isolated element. It is an integral and interdependent component of the right to education, upbringing and instruction that both the State and parents or other caregivers must provide to minors, within their respective competencies, so that children and adolescents can develop their skills and talents to lead a full and satisfactory life in society.<sup>86</sup>

This interpretation situates the free development of personality within a system of interdependent fundamental rights, notably the rights to education and care. The Court emphasized that even in the case of misconduct, the school was still obligated to apply corrective measures in a way that was pedagogically appropriate and in line with the Constitution. The Court criticized the expulsion as a punitive and exclusionary measure, lacking a comprehensive assessment of the child's needs and failing to respect their dignity and developmental rights.

In doing so, the Court sided its reasoning with international human rights standards, particularly those enshrined in the Convention on the Rights of the Child, hence reinforcing the principle that children are rights-holders and not merely passive recipients of adult protection.

#### *H. Amparo en Revisión 4865/2018: Tattoos and the Free Development of Personality*

In *Amparo en Revisión 4865/2018*,<sup>87</sup> the First Chamber of the SCJN analyzed the issue of whether tattoos in the workplace —specifically a swastika— was protected under the rights to equality and non-discrimination, freedom of expression, and the free development of personality. This case involves a labor dispute in which a private company terminated an employee after repeatedly showing a swastika tattoo on his arm at work. The employer argued that the symbol offended his co-workers, particularly the Jewish ones, thus creating a hostile work environment.

The case raised complex questions regarding the boundaries of personal autonomy, symbolic expression, and the potential social implications of controversial imagery. Regarding the free development of personality, the Court emphasized that this right fundamentally implies that individuals have the right to

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<sup>86</sup> *Id.* at 111 (translated by authors).

<sup>87</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión 4865/2018*, Primera Sala (Norma Lucía Piña Hernández, speaker), Oct. 30, 2019 (Mex.), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/ADR%204865-2018.pdf>

freely and autonomously choose their life plan and how to reach the goals and objectives that are important to them. According to the principle of the autonomy of will, individuals can structure their personal, *de facto*, and legal relationships freely and however they deem appropriate for their interests.<sup>88</sup>

The Court interpreted the principle of the autonomy of will [*principio de autonomía de la voluntad*] as the foundational element of the right to self-determination, which allows individuals to freely decide how to live their lives in all dimensions—personal, social, and legal—.

The Court stated that the right to the free development of personality entails the right of every person to be as they wish, without unjustified coercion or control by the State or other persons; the right to decide their goals and objectives in accordance with their values, ideas, expectations, tastes, etc.; in short, the right to choose their life plan and how they want to achieve it. Therefore, the freedom to choose their personal appearance, is one aspect that shapes the way they wish to project themselves to others.<sup>89</sup>

The Court concluded that the act of tattooing one's body, particularly as an aspect of personal identity and expression, constitutes a legitimate exercise of both the right to the free development of personality and the right to freedom of expression. As noted in paragraph 80: it is possible to admit that having a tattoo is a form of exercising the rights to the free development of personality and the right to freedom of expression.<sup>90</sup> There is a clear instrumental connection between them, insofar as the self-determination protected by the former to decide about one's own body and its appearance is complemented by the exercise of the latter in terms of its purpose of expressing individuality.<sup>91</sup>

Nonetheless, after applying the proportionality test, the First Chamber of the SCJN established a limitation to the right of free development, concluding that the swastika is a hate symbol with historical and cultural associations<sup>92</sup> and that hate speech—defined as expressions that incite hostility or violence against specific groups—is excluded from constitutional protection under freedom of expression. Hence, its restriction is justified, particularly in environments where it may offend others or promote discrimination.<sup>93</sup> The display of such a symbol is not protected under the rights invoked, especially in a labor context where employers must protect the dignity and equality of all workers. Hate speech, even in a symbolic form (like a tattoo), falls outside the boundaries of constitutional protection.<sup>94</sup>

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<sup>88</sup> *Id.* 62 & 63.

<sup>89</sup> *Id.* 66.

<sup>90</sup> *Id.* 80.

<sup>91</sup> *Id.* 84.

<sup>92</sup> *Id.* 129-130.

<sup>93</sup> *Id.* 115-118.

<sup>94</sup> *Id.* 90-91.

## I. *Amparo Directo* 9/2021: Contractual Autonomy, Constitutional Limits and Free Development of Personality

In *Amparo Directo* 9/2021,<sup>95</sup> the First Chamber of the SCJN addressed the constitutional limits of the autonomy of will [*autonomía de la voluntad*]<sup>96</sup> in contractual relationships.

A divorced couple had included restrictive clauses in their divorce settlement agreement, granting the wife a usufruct over a property provided she remained unmarried, refrained from receiving male visitors, and lived only with her children. The ex-husband later filed a civil suit to revoke the donation, alleging those conditions were violated. The case ultimately reached the SCJN's First Chamber through an *amparo directo*.

The Court had to determine whether contractual clauses restricting a woman's autonomy (e.g., not remarrying or receiving male visitors) were constitutionally valid. Specifically, it examined whether such conditions, even when agreed upon between private parties, violated human rights including free development of personality, privacy and autonomy and equality and freedom from gender-based discrimination.

The ruling reiterated that even in the realm of civil law, where individuals exercise freedom of contract, such autonomy must remain consistent with the axiological content of the Mexican constitutional order and the human rights framework recognized in both domestic and international law.<sup>97</sup>

In other words, the Court noted that freedom of contract is not absolute. While civil law assumes formal equality between contracting parties, this presumption must give way in the presence of power asymmetries or the vulnerability of certain individuals. In such contexts, the principle of the autonomy of will becomes more susceptible to constitutional limitations.<sup>98</sup> Thus, the Court clarified that: "It is invalid for individuals, upon entering into a contract or agreement, to stipulate or agree on the absolute restriction or inhibition of the exercise of a human right."<sup>99</sup>

The Court concluded that:

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<sup>95</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo* 9/2021, Primera Sala (Opinion by Justice Juan Luis González Alcántara Carrancá), judgment of Sept. 29, 2021 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=283663>

<sup>96</sup> *Autonomía de la voluntad* (autonomy of will) is a foundational principle in civil law systems, referring to the legal freedom of individuals to structure their private legal relationships. Under modern constitutional standards, this autonomy is increasingly subject to limitations where human rights or conditions of structural inequality are implicated.

<sup>97</sup> Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo* 9/2021, Primera Sala, (Opinion by Justice Juan Luis González Alcántara Carrancá), judgment of Sept. 29, 2021 (Mex.), 46.

<sup>98</sup> *Id.* 51.

<sup>99</sup> *Id.* 53 (translated by authors).

[...]under the pretext of exercising the autonomy of will, the fundamental right to the free development of personality, privacy, free self-determination, and even the right to lead a life free of violence were violated; and, furthermore, the party was placed at an obvious disadvantage in relation to the other contracting party of the agreement, the interested third party.<sup>100</sup>

This decision contributes significantly to the constitutionalization of private law in Mexico, establishing that private agreements may be declared invalid if they result in the unjustified restriction of human rights, especially where one party is subject to structural vulnerability or coercive disadvantage. This ruling aligns civil contractual principles with the broader obligations arising from constitutional rights and the international human rights treaties to which Mexico is party.

#### *J. Doctrinal Synthesis of the Right to Free Development of Personality in Mexico*

This part of the analysis presents a systematized overview of the leading jurisprudence issued by the SCJN when interpreting the right to the free development of personality as a fundamental constitutional guarantee in Mexican law. Since its foundational declaration in *Amparo Directo 6/2008*, this right has evolved into a main doctrinal argument used to adjudicate a wide array of personal autonomy claims, including those involving gender identity, marriage equality, reproductive and sexual freedom, recreational drug use, contractual autonomy, children's rights, and divorce. By means of dignity-based reasoning and proportionality analysis, the SCJN has progressively established that this right protects not only freedom from unjustified state interference, but also the residual domain of personal sovereignty that ensures individuals can define and pursue their own life plans. The decisions compiled here illustrate both the doctrinal coherence and contextual adaptability of this right, as well as the Court's evolving effort to reconcile constitutional interpretation with human rights standards and liberal democratic principles.

### **IV. Critical Reflections of the Right to Free Development of Personality in México**

The Mexican SCJN jurisprudential construction of the right to free development of personality represents both a bold affirmation of constitutional progressivity and a complex doctrinal evolution marked by moments of innovation, overreach, and conceptual uncertainty. SCJN jurisprudence reflects a distinct temporal and thematic evolution. One foundational moment is in *Amparo Directo*

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<sup>100</sup> *Id.* 55.

6/2008, which marks the Court's first robust engagement with the right in the context of gender identity.

Following the reasoning in Germany's *Elfs* case, the Court entered what may be termed an "expansionist phase" between 2014 and 2016, in which the right to free development of personality was deployed to address broader lifestyle and family-related issues, such as recreational cannabis use as an extension of expressive and bodily autonomy. Similarly, the Court invoked the same principles to support no-fault divorce, holding that State institutions must not obstruct the development of autonomous life plans. This doctrine was extended to marriage equality, and shortly thereafter to concubinage, consolidating a view of personal and sexual autonomy as dimensions of constitutional identity.

These decisions uphold the operation of the principle of progressivity not merely as a non-regression clause, but as a catalyst for doctrinal innovation. The Court's willingness to recognize new rights within the constitutional framework represents jurisprudence that is both dynamic and transformative. However, this rapid expansion also exposes latent and real lure of judicial activism.

From 2017 onward, SCJN jurisprudence gave increased attention to relational and structural dimensions of autonomy, extending the doctrine to children, asserting that minors are rights-holders capable of developing their personalities, though within a framework of coordinated support. This marks a shift from abstract individualism to a model of interdependent autonomy.

The decision on tattoos pushed the boundaries even further by recognizing personal appearance as a dimension of constitutional identity. The Court explicitly framed bodily expression as a protected form of expressive autonomy, while acknowledging the potential for social stigma. These cases illustrate the adaptive capacity of the right, as well as concerns about its scope and internal limits, as in the use of symbols to justify violence.

Indeed, as this article observes, such expansions are exposed to conceptual overextension. Without clearly delimited doctrinal thresholds, the right risks subsuming any and all forms of self-expression or personal choice while weakening its analytical rigor and justiciability and being transformed into a "catch all" or residual right.

At the apex of this doctrinal trajectory is *Amparo Directo 9/2021*, which signals a maturation of the right by incorporating it into the domain of private law. The SCJN held that contractual clauses undermining dignity or reinforcing inequalities of power violate the right to personality development. This move constitutionalizes civil relationships and demonstrates a more sophisticated deployment of the principle of progressivity, putting it not only at the service of expansion but also of critique and correction within entrenched legal structures.

Yet, even at this moment of doctrinal maturity, concerns remain. The elasticity of the right continues to challenge its coherence, particularly where it overlaps with other constitutional guarantees and rights such as privacy, health, and legal certainty. These intersecting domains often provide more precise nor-

mative guidance, and their underutilization represents a missed opportunity to ground doctrine more firmly within existing constitutional frameworks.

While one may sympathize with the notion that adults should be permitted to engage in acts intimately connected to personal autonomy, the judicial construction of the *right to the free development of personality* merits several important considerations:

A) The analytical difference with the *Elfes* decision of the German Federal Constitutional Court, particularly its interpretation of Article 2, paragraph 1 of the German Basic Law. While the German decision was backed by the Constitution, the Mexican decision is just a creative determination issued by Mexican Courts, via interpretation, without any constitutional or legal support.

In addition, compared to other German precedents, the Mexican decision leads to a different result. Mexico's Supreme Court jurisprudence on the recreational use of cannabis disregards the German decision *BVerfGE 90, 145* (often referred to as the *Cannabis case*), that established:

Article 2, paragraph 1 of the Basic Law protects every form of human activity regardless of the importance of the activity for personal development (cf. *BVerfGE 80, 137 [152]*). However, only a core area of private life is absolutely protected and thus exempt from the influence of public authority (cf. *BVerfGE 6, 32 [41]*; *54, 143 [146]*; *80, 137 [153]*). Drug use, in particular intoxication, cannot be considered such due to its diverse social effects and interactions. (...) Restrictions on general freedom of action based on such legal provisions do not violate Article 2 paragraph 1 of the Basic Law (cf. *BVerfGE 34, 369 [378 f.]*; *55, 144 [148]*). Therefore, there is no "right to intoxication" that would be exempt from these restrictions.<sup>101</sup>

This omission is doctrinally significant. While the Mexican Court framed the recreational use of cannabis as an expression of individual autonomy safe-

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<sup>101</sup> Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.], *Cannabis Case*, *BVerfGE 90, 145 (171-72)*, <https://www.servat.unibe.ch/dfr/bv090145.html> (Ger.), establishing: *1. Die Strafvorschriften des Betäubungsmittelgesetzes, die den unerlaubten Umgang mit Cannabisprodukten mit Strafe bedrohen, sind im strafbewehrten Verbot am Maßstab des Art. 2 Abs. 1, in der angedrohten Freiheitsentziehung an Art. 2 Abs. 2 Satz 2 GG zu messen.*

*120 Art. 2 Abs. 1 GG schützt jede Form menschlichen Handelns ohne Rücksicht darauf, welches Gewicht der Betätigung für die Persönlichkeitsentfaltung zukommt (vgl. BVerfGE 80, 137 [152]). Absolut geschützt und damit der Einwirkung der öffentlichen Gewalt entzogen ist allerdings nur ein Kernbereich privater Lebensgestaltung (vgl. BVerfGE 6, 32 [41]; 54, 143 [146]; 80, 137 [153]). Dazu kann der Umgang mit Drogen, insbesondere auch das Sichberauschen, aufgrund seiner vielfältigen sozialen Aus- und Wechselwirkungen nicht gerechnet werden. Im übrigen ist die allgemeine Handlungsfreiheit nur in den Schranken des 2. Halbsatzes des Art. 2 Abs. 1 GG gewährleistet und steht damit insbesondere unter dem Vorbehalt der verfassungsmäßigen Ordnung (vgl. BVerfGE 80, 137 [153]). BVerfGE 90, 145 (171) BVerfGE 90, 145 (172) Darunter sind alle Rechtsnormen zu verstehen, die formell und materiell mit der Verfassung in Einklang stehen (BVerfGE 6, 32 ff.; st. Rspr.). Beschränkungen der allgemeinen Handlungsfreiheit aufgrund solcher Rechtsvorschriften verletzen Art. 2 Abs. 1 GG nicht (vgl. BVerfGE 34, 369 [378 f.]; 55, 144 [148]). Ein „Recht auf Rausch“, das diesen Beschränkungen entzogen wäre, gibt es mithin nicht.*

guarded by the right to the free development of personality; the German Court arrived at a more restrictive conclusion for the same behavior.

The omission is surprising, considering that in *BVerfGE 90, 145*, the Court held that legal restrictions on cannabis use do not violate Article 2, paragraph 1 of the Basic Law. The Court pointed out that there is no “right to intoxication”, which leads to another question: What kind of right are Mexican judges protecting?

B) Interpretive excess. Jurisprudence is “the course of court decisions as distinguished from legislation and doctrine,”<sup>102</sup> yet jurisprudence must be based on a legal provision. As prescribed by Article 14, last paragraph, of the Federal Constitution, the final judgment in civil trials must be in strict adherence to the law or its legal interpretation, and in its absence, it shall be based on the general principles of law. In the case of the human right to free development of personality, the Mexican Court acted without reference to a legal provision. There is no “text of the law”, nor was there an argument based on general principles of law.

Besides, as Ana I. Marrades Puig<sup>103</sup> rightly observes, the concept of free development of personality lacks a clear and precise legal definition. Because “personality” itself incorporates extralegal dimensions —psychological, philosophical, and ethical—, this constitutional category tends to become vague and potentially over-inclusive. As Marrades Puig notes, this conceptual elasticity makes it possible for the right to be invoked in virtually any context, creating the risk of judicial overreach and doctrinal vagueness.

A more grounded hermeneutic approach may be found in the jurisprudence of the Colombian Constitutional Court. In ruling C-221/94, which decriminalized the personal use of drugs, the Court provided a solid concept of personal autonomy and bodily sovereignty by stating that “Everyone is free to decide whether or not to recover their health.” In this sense, “If I am the owner of my life, *a fortiori* I am free to take care of my health —or not— since its deterioration leads to the death that I am lawfully entitled to inflict upon myself.”<sup>104</sup>

From this perspective, a more coherent foundation for the recognition of the right to consume cannabis for personal, recreational purposes in Mexico might have been derived from the negative (non-interference) dimension of the right to health, as recognized in Article 4 of the Mexican Constitution. When combined with the liberal constitutional principle that *everything which is not expressly*

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<sup>102</sup> Merriam-Webster Dictionary, “*jurisprudence*,” <https://www.merriam-webster.com/thesaurus/jurisprudence>. ANA I. MARRADES PUIG, LUCES Y SOMBRAS DEL DERECHO A LA MATERNIDAD: ANÁLISIS JURÍDICO DE SU RECONOCIMIENTO 83 (Univ. de València, 2002).

<sup>103</sup> *Id.*

<sup>104</sup> Corte Constitucional [C.C.], *Sentencia* C-221/94, at 3 (Colom.), [https://norcolombia.ucoz.com/sentencias/C/sentencia\\_C-221\\_de\\_1994.pdf](https://norcolombia.ucoz.com/sentencias/C/sentencia_C-221_de_1994.pdf) (author’s translation). A similar argument may be found in Daniel Márquez Gómez, *Jurisdictio, derecho al libre desarrollo y el consumo lúdico de tetrahidrocannabinol*, 5 REV. DIG. UNIV. (May 1, 2016), <http://www.revista.unam.mx/vol.17/num5/art33/> (translated by authors).

*prohibited by law is permitted*, this approach would arguably provide a firmer and more internally consistent doctrinal basis, especially within the Mexican legal system, than the abstract and open-ended category of free development of personality.

C) From the analysis in points A and B, we can observe judicial activism in the construction of the right to free development of personality. Judicial activism can be understood as “the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent.”<sup>105</sup>

D) Therefore, we can conclude that the right to free development of personality, in Mexican legal jurisprudence is more of a political decision than a legal one.

## V. Conclusions

The jurisprudential trajectory of the right to the free development of personality in Mexico reveals a transformative shift in constitutional interpretation after the 2011 human rights reform. The SCJN and federal judiciary have used this right as a doctrinal vehicle for advancing personal autonomy across a diverse group of legal contexts, including gender identity, reproductive rights, familial relationships, and contractual freedom.

This analysis confirms that the right has been constructed as an extension of human dignity and the principle of progressivity. It now functions as a normative foundation for recognizing emerging freedoms and limiting both public and private restrictions that challenge personal self-determination. This expansive interpretation highlights the Mexican judiciary’s alignment with a dynamic and human-rights-centered constitutionalism.

However, this study has also identified significant risks associated with this doctrinal evolution. Among these is the tendency toward conceptual overextension, whereby the right is invoked as a residual category, without any clear definitional boundaries. This vagueness threatens doctrinal coherence and weakens the justiciability of the right. Moreover, the insufficient articulation between the right and related constitutional guarantees like privacy, equality, and legal certainty, raise concerns about internal consistency and normative control.

A further critique concerns the limited engagement with comparative jurisprudence where it might enhance or temper the interpretive extent of the right. For instance, omitting reference to the German *Cannabis* decision in Mexican rulings on recreational drug use represents a missed opportunity for deeper doctrinal grounding. Similarly, the possibility of anchoring certain claims to other

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<sup>105</sup> Merriam-Webster Dictionary, “*Judicial activism*,” <https://www.merriam-webster.com/legal/judicial%20activism>

rights such as the negative dimension of the right to health or to fundamental principles, such as the one that states that everything which is not expressly prohibited is permitted, remains underexplored.

Ultimately, this article argues for a more disciplined and theoretically justified approach to the judicial construction of the free development of personality. Themes like analytical omission, interpretive excess, judicial activism, and political decision should be identified. Future jurisprudence should aim to refine the conceptual contours of the right, clarify its limits, and ensure its incorporation into Mexico's broader constitutional framework. Doing so would not only preserve the transformative potential of this right but also enhance its legitimacy and legal sustainability within a system committed to the rule of law and human dignity.

## VI. References

- AHARON BARAK, *PROPORTIONALITY. CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 19 (Doron Kalir trans., Cambridge U. Press, 2012).
- ANA I. MARRADES PUIG, *LUCES Y SOMBRAS DEL DERECHO A LA MATERNIDAD: ANÁLISIS JURÍDICO DE SU RECONOCIMIENTO* 83 (Univ. de València, 2002).
- Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.], 1 BvR 253/56, (Jan. 16, 1957), [https://www.bverfg.de/e/rs19570116\\_1bvr025356en.html](https://www.bverfg.de/e/rs19570116_1bvr025356en.html)
- Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.], *Cannabis Case*, BVerfGE 90, 145 (171-72), <https://www.servat.unibe.ch/dfr/bv090145.html>
- CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES-CEPC, *EL PRINCIPIO DE PROPORCIONALIDAD Y LOS DERECHOS FUNDAMENTALES* 45 (Centro de Estudios Políticos y Constitucionales-CEPC, 2007).
- CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES-CEPC, *TEORÍA DE LOS DERECHOS FUNDAMENTALES* 197-201 (Carlos Bernal Pulido trans., Centro de Estudios Políticos y Constitucionales-CEPC, 2007).
- CONCUBINATO. ES INCONSTITUCIONAL QUE PARA SU CONFIGURACIÓN SE EXIJA QUE SEA ENTRE UN HOMBRE Y UNA MUJER, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Tenth Epoch, Primera Sala, Tesis 1a. CCXXIII/2016 (10a.), (Mex.).
- Corte Constitucional [C.C.], *Sentencia C-221/94*, at 3 (Colom.), [https://norcolumbia.ucoz.com/sentencias/C/sentencia\\_C-221\\_de\\_1994.pdf](https://norcolumbia.ucoz.com/sentencias/C/sentencia_C-221_de_1994.pdf)
- Daniel Márquez Gómez, *Jurisdictio, derecho al libre desarrollo y el consumo lúdico de tetrahidrocannabinol*, 5 REV. DIG. UNIV. (May 1, 2016). <http://www.revista.unam.mx/vol.17/num5/art33/>
- Edward J. H. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 4 UTAH L. REV. 979 (1997).

- ELIZABETH LUNA TRAILL, ALEJANDRA VIGUERAS ÁVILA & GLORIA ESTELA BÁEZ PINAL, *Diccionario básico de lingüística* 1251 (Universidad Nacional Autónoma de México ed., 2005).
- Ernesto Garzón Valdés, *Algo más acerca del “coto vedado”*, 6 DOXA. CUADERNOS DE FILOSOFÍA DEL DERECHO 209, 2013 (1989). <https://doi.org/10.14198/DOXA1989.6.12>
- Ética y Derechos Humanos. Un ensayo de fundamentación* 223 (Astrea, 1989).
- G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (December 10, 1948). Preamble, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- GIOVANNI ALEXANDER SALGADO CIPRIANO, *Cuaderno de Jurisprudencia núm. 16: Libre desarrollo de la personalidad* (Suprema Corte de Justicia de la Nación, Centro de Estudios Constitucionales ed., 2022), [https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2023-01/CUADERNO%20NUM%2016%20DH\\_LIBRE%20DESARROLLO\\_FINAL%20DIGITAL.pdf](https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2023-01/CUADERNO%20NUM%2016%20DH_LIBRE%20DESARROLLO_FINAL%20DIGITAL.pdf).
- IMER BENJAMÍN FLORES MENDOZA & DANIEL MÁRQUEZ GÓMEZ, TERCERA LLAMADA, TERCERA. HACIA UN MODELO DE REGULACIÓN DE LOS DIVERSOS USOS DEL CANNABIS EN MÉXICO (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2020).
- Juan Antonio García Amado, *Consumo lúdico de marihuana y libre desarrollo de la personalidad*, ALMACÉN DE DERECHO (May 20, 2019), <https://almacenederecho.org/consumo-ludico-de-marihuana-y-libre-desarrollo-de-la-personalidad>.
- Ley de Amparo [Amparo Law], arts. 197–203 (Mex.), DOF 4 de marzo de 2013 (Mex.).
- LUIS MARÍA DÍEZ-PICAZO, SISTEMA DE DERECHOS FUNDAMENTALES 70 (Thomson Reuters Civitas ed., 2005).
- Merriam-Webster Dictionary, <https://www.merriam-webster.com/>
- PRINCIPIO DE PROGRESIVIDAD EN MATERIA DE DERECHOS HUMANOS. CONTENIDO Y ALCANCES DEL MANDATO PREVISTO EN EL ARTÍCULO 10. DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Suprema Corte de Justicia de la Nación (Primera Sala) [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo IV, Oct. 2017, Jurisprudencia 1a./J. 85/2017, at 1396 (Mex.). <https://sjf2.scjn.gob.mx/detalle/tesis/2015305>
- Real Academia Española, <https://dle.rae.es/>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión* 7290/2018, Primera Sala, res. Jan. 8, 2020 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=246168>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión* 4865/2018, Primera Sala (Norma Lucía Piña Hernández, speaker), Oct. 30, 2019 (Mex.), <https://www.scjn.gob.mx/derechos-humanos/sites/de->

- [fault/files/sentencias-emblematicas/sentencia/2020-12/ADR%204865-2018.pdf](#)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión* 7262/2016, Primera Sala (Min. Arturo Zaldívar Lelo de Larrea, speaker), sent. Aug. 23, 2017 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=208693>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión* 5198/2016, Primera Sala (Min. Norma Lucía Piña Hernández, speaker), sent. Mar. 29, 2017 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2017-03/ADR-5198-2016-170323.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2017-03/ADR-5198-2016-170323.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo en Revisión* 5339/2015, Primera Sala (Min. Alfredo Gutiérrez Ortiz Mena, speaker), sent. Apr. 6, 2016 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2015/10/2\\_187891\\_3174\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2015/10/2_187891_3174_firmado.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo* 9/2021, Primera Sala (Opinion by Justice Juan Luis González Alcántara Carrancá), judgment of Sept. 29, 2021 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=283663>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo Directo* 6/2008, relacionado con la Facultad de Atracción 3/2008-PS, Pleno, Jan. 6, 2009 (Mex.), <https://desc.scjn.gob.mx/sites/default/files/2021-09/MÉX10-Sentencia.pdf>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 57/2019, Primera Sala, Aug. 14, 2019 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/2/2019/2/2\\_249483\\_4263\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/2/2019/2/2_249483_4263_firmado.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 553/2018, Primera Sala (Jorge Mario Pardo Rebolledo, speaker), sent. Nov. 21, 2018 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=218174>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 547/2018, Oct. 31, 2018 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2018/2/2\\_238462\\_4213\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2018/2/2_238462_4213_firmado.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 1115/2017, Primera Sala, Mar. 14, 2018 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-03/AR-1115-17-180316.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-03/AR-1115-17-180316.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 623/2017, Jun. 13, 2018 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2017/2/2\\_218619\\_4160\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2017/2/2_218619_4160_firmado.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 183/2017, Primera Sala, Nov. 7, 2018 (Mex.), [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2018-11/ADR-183-2017-181113.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2018-11/ADR-183-2017-181113.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 800/2017, Primera Sala (Arturo Zaldívar Lelo de Larrea, speaker), sent. May 31, 2017

- (Mex.), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/AR800-2017.pdf>
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 1127/2015, Primera Sala (Min. Jorge Mario Pardo Rebolledo, speaker), sent. Feb. 17, 2016 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/1/2015/2/2\\_187600\\_3149\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/1/2015/2/2_187600_3149_firmado.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Amparo en Revisión* 237/2014, Primera Sala, Nov. 4, 2015 (Mex.), <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-01/AR%20237-2014%20v.%20p%C3%BAblica%20PDF.pdf>
- Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 113/2018, Primera Sala, sent. Sep. 19, 2018 (Mex.), [https://www2.scjn.gob.mx/juridica/engroses/3/2018/19/3\\_248590\\_5075\\_firmado.pdf](https://www2.scjn.gob.mx/juridica/engroses/3/2018/19/3_248590_5075_firmado.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 148/2017, Pleno, sent. Sep. 7, 2021 (Mex.), [https://www.scjn.gob.mx/sites/default/files/proyectos\\_resolucion\\_scjn/documento/2021-08/AI%20148.2017.pdf](https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%20148.2017.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 22/2016, Pleno, Nov. 6, 2017 (Mex.), [https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AI%2022-2016\\_0.pdf](https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/AI%2022-2016_0.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 16/2016, Pleno (Min. Norma Lucía Piña Hernández, speaker), sent. Jun. 7, 2021 (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=194229>
- Suprema Corte de Justicia de la Nación [SCJN], *Acción de Inconstitucionalidad* 28/2015, Pleno (Mex.), [https://www.cndh.org.mx/sites/default/files/doc/Acciones/Acc\\_Inc\\_2015\\_28\\_Demanda.pdf](https://www.cndh.org.mx/sites/default/files/doc/Acciones/Acc_Inc_2015_28_Demanda.pdf)
- Suprema Corte de Justicia de la Nación [SCJN], *Contradicción de Tesis* 73/2014, Primera Sala, res. Feb. 25, 2015 (Mex.), <https://www.sitios.scjn.gob.mx/cec/sites/default/files/page/files/2020-09/CT%2073%202014%20V.%20P%C3%BAblica%20Inconstitucionalidad%20Divorcio%20Necesario.pdf>
- Víctor Manuel Collí Ek & Freddy Martín Pérez Inclán, *El derecho al libre desarrollo de la personalidad en la doctrina jurisprudencial de la Corte mexicana*, 45 CUEST. CONST. 451, 467 (2021). <https://doi.org/10.22201/ijj.24484881e.2021.45.16671>

## **NOTES**

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# War Crimes and Environmental Crimes in Ukraine and Gaza

*Crímenes de guerra y ambientales en Ucrania y Gaza*

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**Abstract:** In violation of current International Law and International Humanitarian Law in force, ongoing aggressions in Ukraine and Gaza endanger the entire international institutional and legal framework, to the extent that both deny the basic rule that the use of force does not create title over a given territory in present day international law.

**Keywords:** international law; international humanitarian law; genocide; war crimes; crimes against humanity; environmental crimes; Ukraine; Gaza.

**Resumen:** En violación del Derecho Internacional y del Derecho Internacional Humanitario vigentes, las agresiones en curso tanto en Ucrania como en Gaza, ponen en peligro todo el marco institucional y jurídico internacional, en la medida en que ambas niegan la norma básica de que el uso de la fuerza no crea título sobre un territorio determinado en el derecho internacional actual.

**Palabras clave:** derecho internacional; derecho internacional humanitario; genocidio; crímenes de guerra; crímenes contra la humanidad; crímenes medioambientales; Ucrania; Gaza.

**Summary:** I. *Introduction*. II. *Russia and Ukraine*. III. *Israel in Gaza*. IV. *Conclusions*. V. *References*.

## I. Introduction

Among recent violations of international law, we must outline two cases: *a)* the aggression war waged by Russia against Ukraine, started in February 2022, and *b)* the massive destruction by Israel of the entire Gaza strip, ongoing since October 7th, 2023, in retaliation for the terrorist attack by Hamas. Both cases con-

stitute serious violations of international law regarding restrictions against the unilateral use of armed force;<sup>1</sup> of the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948);<sup>2</sup> of the Rome Statute of the International Criminal Court–ICC (1998),<sup>3</sup> as well as violations of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)<sup>4</sup> and of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1976).<sup>5</sup>

In addition to the abovementioned crimes, environmental damage during military actions may become a criminal liability for military personnel and/or their contractors before the International Criminal Court (ICC). As a global judicial institution with international jurisdiction complementing national legal systems, the scope of the ICC is to investigate and bring to justice individuals (not countries) who commit the most serious crimes, such as genocide, war crimes, and crimes against humanity (these include widespread murder of civilians, torture, and mass rape). Although crimes against the environment were given very little attention in the negotiations leading to the ICC Statute, the concept of “environmental crime”, which had not been given high priority in the first years of the ICC, is increasingly being brought up.

There are two definitions of environmental crime. The first one establishes that it is “an act committed with the intent to harm or with the potential to cause harm to ecological and/or biological systems”,<sup>6</sup> for the purpose of political gain, military strategy, or securing business or personal advantage. In legal frameworks, according to the Oxford Handbook of Crime and Public Policy, the definition is: “any act that violates an environmental protection statute, such as conventions, protocols and related international instruments”.<sup>7</sup> The Rome Statute of the ICC states:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>8</sup>

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<sup>1</sup> U.N. Charter art. 51.

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, U.N.G.A. Res. 180 (II).

<sup>3</sup> Rome Statute of the International Criminal Court, July 17, 1998.

<sup>4</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984. U.N.G.A. Res. 39/46.

<sup>5</sup> U. N. General Assembly Official Records (GAOR) res. 3068, July 18, 1976.

<sup>6</sup> MARY CLIFFORD, ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY AND SOCIAL RESPONSIBILITY (Aspen Publishers, 1998).

<sup>7</sup> Peter Cleary Yeager & Sally S. Simpson, 13. *Environmental Crime*, in THE OXFORD HANDBOOK OF CRIME AND PUBLIC POLICY 325 (Michael Tonry ed., 2012).

<sup>8</sup> See Rome Statute of the International Criminal Court, *supra* note 3, art. 8, (2)(b)(iv).

Accordingly, environmental crimes should be addressed on the basis of the Rome Statute and other regulatory instruments of the ICC, as well as on applicable environmental treaties, rules of customary international law, and the jurisprudence of other international and national courts.

There are three ways a case may come before the ICC: *a*) referral by a State Party to the Statute; *b*) referral by the UN Security Council; or *c*) initiation of an investigation by the Prosecutor of the ICC.

While there is increasing international awareness that some military actions should be considered environmental crimes, the doctrine on their prosecution during war is still evolving. When the State originating the military action is not a Party to the Rome Statute, the question arises as to whether the ICC has jurisdiction over it. This has been a subject for debate, since the ICC should complement, rather than replace, or substitute, the criminal jurisdiction of states.

Article 17(1) of the ICC Statute, “Issues of Admissibility”, states that the Court shall determine that a case is inadmissible when “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”,<sup>9</sup> or when “the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”<sup>10</sup> or “the case is not of sufficient gravity to justify further action by the Court”.<sup>11</sup>

Environmental crimes are among the war crimes listed in Article 8 of the Rome Statute of the ICC; but it is important to say that the Court’s jurisdiction is “limited to the most serious crimes of concern to the international community as a whole”,<sup>12</sup> and whereas it would be unfair to describe the listing of environmental crimes as an afterthought, it is clear that they aren’t considered serious crimes.<sup>13</sup>

## II. Russia and Ukraine

Without going too far back in the past, we can distinguish a series of recent Russian aggressions against independence attempts either by ex-soviet states or by Russian regions proper: Chechnya, in the late 90s; Georgia, in 2008, and the illegal annexation of Crimea, in 2014. Since February 24, 2022, Russia has been waging an illegal war of aggression against Ukraine.

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<sup>9</sup> See Rome Statute of the International Criminal Court, *supra* note 3, art. 17(1).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Rome Statute of the International Criminal Court, *supra* note 3.

<sup>13</sup> *Id.*

In a contradictory way, Russia quotes the unilateral Declaration of Independence by Kosovo, in 2008, as a precedent for the recognition of South Ossetia and Abkhazia, in 2008; of Crimea, in 2014, and of the hastily formed “Republics” of Donetsk and Luhansk, since 2022. Nevertheless, Russia opposes the recognition of Kosovo’s independence.

Two days after the beginning of the Russian invasion of Ukraine, a request for interim measures was submitted by Ukraine to the International Court of Justice (ICJ) at the Hague (NL), concerning alleged practice of genocide under the Convention for Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation, Order March 16, 2022).

There is a controversy between the parties about whether a genocide is under way in Ukraine. Russia claims that the reason to adopt military measures against Ukraine was to prevent and punish genocide against ethnic Russian population in the east of the country; Ukraine, in turn, considers that Russia has outright lied, which has resulted in severe violations of fundamental rights of millions of Ukrainians, extensive destruction and environmental damages in the eastern European country.

In our opinion, instead of taking military measures, Russia should have addressed the United Nations organs, in accordance with art. VIII of the Genocide Convention;<sup>14</sup> or addressed a claim to the International Court of Justice, according to art. IX of the same convention.<sup>15</sup>

In connection with Russian allegations of genocide, Ukraine requested to the ICJ to determine whether there are ongoing acts of genocide by Ukraine in the regions of Donetsk and Luhansk. Ukraine also requested the ICJ to evaluate whether there are any basis for declarations by Russian president Vladimir Putin, such as the ones of February 21, 2022, describing the situation in Donbass as “horror and genocide, faced by almost four million people”.<sup>16</sup>

In the past, Russia presented itself as the “guardian” of Slavic peoples against atrocities committed by the Ottoman empire. But this claim cannot be maintained today, as Russia systematically oppressed, among others, two Slavic countries along the past centuries: Ukraine and Poland.

In the specific case of Ukraine, several international acts can be listed in the last 100 years, whereby Russia recognized the existence of the Ukrainian State and its boundaries. After the end of the Russian empire and the civil war, on December 30, 1922, the new federated Union of Soviet Socialist Republics emerged in accordance with the Treaty for the establishment of the U.S.S.R.<sup>17</sup>

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<sup>14</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, art. VIII.

<sup>15</sup> Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, art. IX.

<sup>16</sup> *Address by the President of the Russian Federation*, PRESIDENT OF RUSSIA, (Feb. 21, 2022), <http://en.kremlin.ru/events/president/news/67828>

<sup>17</sup> Treaty on the Creation of the Union of Soviet Socialist Republics, First Congress of Soviets of the USSR, 1922.

The 1922 treaty not only remained in force, but was incorporated into the 1924 Constitution of the U.S.S.R. as well.<sup>18</sup> In addition to this, Ukraine and Belarus signed, as founding members, the Charter of the United Nations Organization, in San Francisco, in 1945.

After the collapse of the U.S.S.R., based on the *uti possidetis* principle, the borders between the Russian Federation and Ukraine, as well as with Belarus and the other former U.S.S.R. republics, were restated—and confirmed—by the Minsk Agreement, dated December 8, 1991.<sup>19</sup> This agreement guaranteed the respective territorial integrity and borders of these States.

Special attention deserves the Budapest Memorandum, signed on December 5, 1994, by Russia, Ukraine, the United Kingdom and the United States, providing security guarantees to Ukraine as it adhered to the treaty for non-proliferation of nuclear weapons.<sup>20</sup> But although Ukraine eliminated all nuclear weapons from its territory within the agreed due date, and Russia, the U.K. and the U.S. reaffirmed their commitment regarding Ukraine's territorial integrity, sovereignty and Independence, it clearly didn't serve at all.

We ought to draw parallels of Russian aggressions with other global powers' actions. There have been several equally illegal and unjustified crimes committed by the United States of America against Cuba, Nicaragua, Panama and several other countries in the Americas. The USA has also invaded and occupied Afghanistan and Iraq for long periods of time. Such kind of "special military operations" (as Russia calls its incursion in Ukraine) were also illegal and abusive, with catastrophic consequences, including severe environmental damages. But such precedent violations cannot provide any justification for what Russia is now doing in Ukraine, nor for what Israel has been doing in Gaza.

### III. Israel in Gaza

In accordance with current international law, the unilateral use of force does not create legal title to occupy territories, as stated by the ICJ in the Advisory Opinions on the legal consequences of the construction of a wall in occupied Palestinian territory in 2004,<sup>21</sup> and on the policies and practices of Israel in the West Bank in 2024. Both deserve careful consideration.

Israel has the right to exist. Few countries have had its creation approved by vote at the UN. But its creation also considered the creation of a Palestinian state within its borders, between the sea and the Jordan river. Of course, Israel

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<sup>18</sup> Constitution of the Union of Soviet Socialist Republics, Congress of People's Deputies, January 31, 1924.

<sup>19</sup> Agreements Establishing the Commonwealth of Independent States, December 8, 1991.

<sup>20</sup> U.N.G.A., Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, December 5, 1994.

<sup>21</sup> I.C.J. General Assembly, res. ES-10/14, December 8, 2003.

has the right to defend itself. But even in a war there are limits to what can be done or not. In cases of self-defense,<sup>22</sup> there must be a proportion between the attack and the reaction. All excess is to be condemned, and all such practices are to be investigated and punished. For example, targeting civilian population has long been an international crime,<sup>23</sup> as well as targeting staff from International Organizations working for Humanitarian aid and relief.

The ICJ Advisory Opinion on the construction of a wall in occupied Palestinian territory<sup>24</sup> is to be read in conjunction with the ICJ Advisory Opinion on the Legal consequences arising from the Policies and Practices of Israel in the occupied Palestinian territory, including Jerusalem, dated 19 July 2024.<sup>25</sup>

It is worth remembering the main aspects of the first of those ICJ Advisory Opinions: as stated by the Court, Israel may not invoke the necessity of self-defense — such as building the wall — because such need would not exist without the previous occupation of Palestinian territory.<sup>26</sup> From the Advisory Opinion on the construction of a wall in occupied Palestinian territory of 2004 we can draw the line to the present situation. An occupying power may not claim legitimacy and may not exercise sovereignty over such territory. The Court also stresses that the wall goes forward over Palestinian territory and creates hindrances to the normal life and circulation of the Palestinian population. Fundamental rights are thus being abused.

There are recent additional substantial violations of several rights for the entire Palestinian civilian population — more than 2.3 million people, piled up in the fringe of Gaza territory — subject to forced displacement, systematic bombing, starvation as a war strategy and lack of water, in addition to other international crimes (as presented to the ICJ, in the South Africa v. Israel case on potential breaches of the Genocide Convention, started in 2023).

The situation of the Palestinian civilian population is frightening: There are no ways out, as the territory has been completely isolated by Israeli forces, be it by land, by sea or airway; the border with Egypt remains blocked, except for the supply of scant humanitarian aid, at levels substantially below the needs of such population, and allowing the exit of very few people under strict Israeli military control.

All evidences of war crimes, crimes against humanity, apartheid, genocide and environmental crime, are to be examined, in accordance with International law conventions previously mentioned. In addition, Several Israeli government officers have made alarming statements. The prime minister even declared the scope of “turning Gaza into a deserted island”;<sup>27</sup> while the minister of de-

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<sup>22</sup> U.N. Charter, article 51(VII).

<sup>23</sup> See Rome Statute of the International Criminal Court, *supra* note 4, art. 8.

<sup>24</sup> I.C.J. Advisory Opinion, July 9, 2004.

<sup>25</sup> I.C.J. Advisory Opinion, July 19, 2024.

<sup>26</sup> I.C.J. Advisory Opinion, July 9, 2004, *supra* note 23.

<sup>27</sup> Fears of a ground invasion of Gaza grow as Israel vows ‘mighty vengeance’, Al Jazeera, October 7, 2023.

fense declared that Israel fights against “human animals, and are to be treated accordingly,”<sup>28</sup> entailing a dangerous dehumanization of the opposite side. This situation has similarities with the genocide in Rwanda in 1994, specifically with the infamous speech about “killing the cockroaches”.<sup>29</sup>

In order to determine whether and to what extent genocide, war crimes and crimes against humanity are being committed, South Africa presented a submission to the ICJ.<sup>30</sup> All crimes should be carefully subject to investigation. It is relevant to point out that the ICJ did not a priori dismissed the presentation of this case. There is no reason to reject it, since the evidence collected shows the necessity to have the case examined and judged by the ICJ.

More than two million people —the civilian population— cannot be treated as war targets. There seem to be signs of war crimes, such as: bombing civilian targets and infra-structure, bombing of hospitals, intentionally and systematically blocking all access to food and water —for drinking and cleaning— as well as for the much needed medical, energy and fuel supplies. It seems evident that such war strategy, inflicted upon the Palestinian civilian population, features cruel, inhuman or degrading treatment or punishment (according to the definitions of the Torture Convention, 1984, in force since 1989).<sup>31</sup> To these crimes, it can be added racial discrimination (according to the UN International Convention for the Elimination of All Forms of Racial Discrimination)<sup>32</sup> and the practice of apartheid.<sup>33</sup>

Regarding genocide, it is not a matter of instrumentalizing international law. The substantial humanitarian issues in Gaza and Ukraine extend beyond any war measure or strategy. Both are not only humanly unacceptable, but also criminal under International Law in force.

Submitting a request to the ICJ, as the main judicial organ of the UN, in order to assess if such crimes are being committed and the rendering of a judgment thereon is legitimate for Ukrainian and Palestinian population, as well as for the entire international community. No country can claim to be above International Law, nor can it seek to block investigations concerning State actions; collective interest must be placed above and should prevail over any such claim.

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<sup>28</sup> “Israel paints Palestinians as ‘animals’ to legitimize war crimes: Israeli scholar”, Anadolu Ajansi, October 23, 2023.

<sup>29</sup> *Rwanda jails man who preached genocide of Tutsi ‘cockroaches’*, BBC, (April 15, 2016).

<sup>30</sup> I.C.J., South Africa v. Israel, December 29, 2023.

<sup>31</sup> U.N.G.A., res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984.

<sup>32</sup> U.N.G.A. res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965.

<sup>33</sup> U. N. General Assembly Official Records (GAOR) res. 3068, *supra* note 6.

## IV. Conclusions

War has been present in human history since its very beginning. Classics such as Sima Qian<sup>34</sup> or Kautilya in the Arthashastra<sup>35</sup> are valuable testimonies. The challenge remains on how to put limits to the use of force.

Along history, diplomats and politicians have striven to curb the most primitive and brutal side of human nature. During an armed conflict, there are rules that must be followed—there is a long and relevant tradition regarding “just war”—bellum iustum. Imposing limits on war has been a long-awaited end, although it has been difficult to achieve.<sup>36</sup>

On the one side, there has been progress on this domain in the last 150 years—as built in International Humanitarian Law; whereas, on the other, technological improvements rendered arms more destructive, to extents never imagined before.

Genocide is the worst international crime; it is the crime of crimes, since it concerns the whole humankind, and should not be tolerated in any armed conflict, be it national or international. All States should make efforts to ensure the capacity of their armed forces to maintain observance and strict application of the Geneva Conventions of 1949, of their Additional Protocols of 1977, and of the Rome Statute of 1998, in order to eliminate the practice of genocide, crimes of war, crimes against humanity, and environmental crimes.

The current international legal regime is an important advance: its effective application should not suffer any external constraints, as it aims to limit and avoid the observance of the legal regime.

Finally, environmental crimes committed within an armed conflict are encompassed among the scope of the ICC Rome Statute, although, so far, both the doctrine and the practice in connection with the prosecution of environmental crimes during military actions remain to be developed at its full capacity.

## V. References

- Address by the President of the Russian Federation*, PRESIDENT OF RUSSIA, (Feb. 21, 2022), <http://en.kremlin.ru/events/president/news/67828>
- Constitution of the Union of Soviet Socialist Republics, Congress of People’s Deputies, January 31, 1924.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984. U.N.G.A. Res. 39/46.

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<sup>34</sup> JACQUES PIMPANEAU, INITIATION À LA LANGUE CLASSIQUE CHINOISE À PARTIR D’EXTRAITS DES MÉMOIRES HISTORIQUES DE SIMA QIAN (Editions You Feng, 2000).

<sup>35</sup> KAUTILYA, THE ARTHASHASTRA (Penguin Random House, 2017).

<sup>36</sup> Peter Haggemacher, *Just War and Regular War in Sixteenth Century Spanish Doctrine*, 42 INTERNATIONAL REVIEW OF THE RED CROSS, Oct. 1992, at 434.

- Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, U.N.G.A. Res. 180 (II).
- I.C.J. Advisory Opinion, July 19, 2024.
- I.C.J. Advisory Opinion, July 9, 2004.
- I.C.J. General Assembly, res. ES-10/14, December 8, 2003.
- I.C.J., *South Africa v. Israel*, December 29, 2023.
- JACQUES PIMPANEAU, *INITIATION À LA LANGUE CLASSIQUE CHINOISE À PARTIR D'EXTRAITS DES MÉMOIRES HISTORIQUES DE SIMA QIAN* (Editions You Feng, 2000).
- KAUTILYA, *THE ARTHASHASTRA* (Penguin Random House, 2017).
- MARY CLIFFORD, *ENVIRONMENTAL CRIME: ENFORCEMENT, POLICY AND SOCIAL RESPONSIBILITY* (Aspen Publishers, 1998).
- Peter Cleary Yeager & Sally S. Simpson, 13. *Environmental Crime*, in *THE OXFORD HANDBOOK OF CRIME AND PUBLIC POLICY* 325 (Michael Tonry ed., 2012).
- Peter Haggemacher, *Just War and Regular War in Sixteenth Century Spanish Doctrine*, 42 *INTERNATIONAL REVIEW OF THE RED CROSS*, Oct. 1992, at 434.
- Rome Statute of the International Criminal Court, July 17, 1998.
- Rwanda jails man who preached genocide of Tutsi 'cockroaches'*, BBC, (April 15, 2016).
- Treaty on the Creation of the Union of Soviet Socialist Republics, First Congress of Soviets of the USSR, 1922.
- U.N.G.A., res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984.
- U.N.G.A. res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965.
- U.N.G.A., Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, December 5, 1994.
- U. N. General Assembly Official Records (GAOR) res. 3068, July 18, 1976.