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## ARTICLES

## NOTE

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# THE LIMITS OF THE INTERNATIONAL JUDICIAL FUNCTION OF THE MEXICAN FEDERAL JUDICIARY

Virdzhiniya Petrova Georgieva*

Abstract: *Mexican judges are increasingly acting as international law judges. Their international judicial function includes a basic understanding of a judicial function per se: dispute resolution through the application and interpretation of legal rules by an independent and impartial judicial body. The international character of this work depends on the recourse to international law as a legal basis for the dispute settlement of the particular cases brought to their jurisdiction. Mexican judges are performing an international judicial function when they interpret international law norms and principles, when they guarantee private persons' rights and duties under international law, and when they assess the conformity of domestic legislation with the international law commitments of the Mexican state. However, at present, Mexican judges are not behaving as ordinary judges of all international law. The place of international law in the Mexican Constitution, the slow democratization of the Mexican presidential regime and the deference of Mexican judges to the executive in foreign affairs help explain the constraints upon the international judicial function as experienced by Mexican judges. The general context of the Mexican political regime impacts the role of the federal judiciary with regards to the promotion of respect for the rule of law, domestically and internationally.*

Keywords: *Mexican Courts and Tribunals, international judicial function, interpretation, conventionality control, Mexican Constitution.*

Resumen: *Los tribunales mexicanos actúan con cada vez más frecuencia como jueces de derecho internacional. Su función judicial internacional incluye el entendimiento genérico de toda función judicial: la resolución de controversias por parte de un órgano judicial independiente e imparcial, a través de la interpretación y aplicación de reglas jurídicas abstractas a casos fácticos concretos. La naturaleza internacional de dicha función depende del recurso al derecho internacional como base legal para el arreglo judicial de los litigios, presentados ante su foro. En este sentido, los tribunales mexicanos ejercen una función*

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*judicial internacional cuando interpretan las normas y principios del derecho internacional, cuando protegen derechos que el derecho internacional reconoce en el patrimonio jurídico de los particulares y cuando controlan la conformidad de las normas de derecho interno con los compromisos adquiridos por el Estado Mexicano en virtud del derecho internacional. No obstante, en la actualidad, los jueces mexicanos no actúan como jueces ordinarios de todo el derecho internacional. El lugar que ocupa este ordenamiento normativo en la Constitución de 1917, la lenta democratización del régimen presidencial mexicano y la deferencia de los miembros de la Judicatura Federal hacia el titular del Poder Ejecutivo Federal en asuntos de Política Exterior son importantes limitantes para la función judicial internacional de los tribunales mexicanos. El entorno general del sistema político mexicano ejerce un impacto considerable en la capacidad del Poder Judicial Federal de garantizar el respeto del estado de derecho, interno e internacional.*

Palabras clave: *Tribunales mexicanos, función judicial internacional, interpretación, control de convencionalidad, Constitución Mexicana.*

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## I. Introduction

The ideas of the great French jurist Georges Scelle are gaining new attention in international law. In 1930, Scelle developed his theory of role splitting (*théorie du dédoublement fonctionnel*) in order to explain the new characteristics of the global society (*société globale*) in the period after the First World War.

The theory of *dédoublement fonctionnel* endorses the presumption that in every legal system there are three basic functions: legislative, executive and ju-

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dicial. In domestic legal systems, state bodies, the so-called executive, legislative and judicial branches fulfill these functions. But a problem arises in the international legal system, as it lacks central executive, legislative and judicial branches, that could act in the name of the international community as a whole. Scelle's response to this inherent failure of international law was to argue that national bodies and agents of the executive, legislative and judicial powers of each state ought to perform a double function: act as bodies and agents of their own state within its internal legal order and, at the same time, as agents and bodies of international law.[1]

To this day, there are no central legislative or executive powers in the international legal order.[2] Although international law has suffered from the unavailability of independent and impartial judicial bodies for more than three centuries,[3] today we are living in an era of the "judicialization" of international law.[4] At the end of the 20th Century and at the outset of the 21st Century, the proliferation of international courts and tribunals fundamentally changed the landscape of dispute settlement in international law. In Scelle's lifetime there were no more than three active international judicial bodies, at present, at least fifty such bodies perform an international judicial or quasi-judicial function.[5] The existence of so many international courts and tribunals could suggest that Scelle's diagnostic of *dédoublement fonctionnel* is not accurate for 21st Century domestic judges, as they no longer have to struggle with the double personality of international and domestic law agents Nevertheless, it appears that the multiplication of international courts and tribunals hasn't led to the suppression of the international judicial function of domestic judges.

The international judicial function of national judges includes a basic understanding of the judicial function *per se*: dispute resolution through the application and interpretation of legal rules[6] by an independent and impartial judicial body. Thus, the internal or international character of the judicial function depends only on the nature of the legal rules that domestic tribunals

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[1] Antonio Cassese, *Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law*, *1 EJIL* 212 (1990).

[2] Some authors argue that the UN Security Council sometimes acts as an "international legislator" (Stefan Talmon, *The Security Council as a World Legislator*, 99 *AJIL*, 2005, 175-193).

[3] Georges Michel Abi Saab, *The Normalization of International Adjudication: Convergence and Divergence*, *43 NYUJ Int'L Pol 1-4* (2010).

[4] Antonio Augusto Cancado Trindade, La expansión de la jurisdicción internacional y su importancia para la realización de la justicia, UN Lecture Series, *http://legal.un.org/avl/ls/Cancado-Trindade_HR_video_2.html*; Virginia Petrova Georgieva, *La "judicialización": una nueva característica del orden jurídico internacional*, XV *Anuario Mexicano de Derecho Internacional* (2015).

[5] Roger Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 *AJIL*, 2000, 160; Philippa Webb, International Judicial Integration and Fragmentation 1 (Oxford University Press 2013).

[6] Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 *LoyLAIntl&CompLRev* 13 (2011).

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will have to interpret and apply. National judges perform an international judicial function each and every time that they have recourse to international law as a legal basis for the dispute settlement of cases brought to their jurisdiction.[7]

But what kind of international legal norms and principles can be invoked in domestic proceedings before national courts and tribunals? It is possible to classify said norms and principles into three categories: horizontal, vertical and transnational legal norms. Horizontal normas apply to relations between primary subjects of international law: states and international intergovernmental organizations. Vertical international legal norms are relevant to the relations between states and/or intergovernmental organizations and non-state actors (individuals, private companies, non-governmental organizations (NGOs), etc.). Finally, transnational norms deal exclusively with interactions between private persons.[8]

In principle, parties will not invoke the horizontal norms of international law in internal judicial proceedings, as their subjects (states and international intergovernmental organizations) have a special legal status as regards the jurisdiction of domestic courts and tribunals. Both legal entities enjoy immunity from jurisdiction for acts performed in the course of public functions.[9] Unless they expressly admit a waiver of immunity, by virtue of the principle *pars in parem non habet jurisdictionem*, states are not allowed to appear before another state's national tribunals. In addition, litigants cannot initiate legal proceedings against international organizations before the domestic judges of their member states. However, there is an ongoing discussion about the possibility of limiting the jurisdictional immunity of states and international organizations. Some domestic courts have accepted judging foreign states for acts committed in violation of *jus cogens* rules.[10] Additionally, national judges have resolved cases concerning the interpretation and application of horizontal rules of international law, such as those prohibiting the use of force in international relations or those governing the recognition of states and governments.[11]

Today, the main field for the performance of an international judicial function by domestic judges remains the application and interpretation of vertical

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[7] Tzanakopoulos, *Supra*, 137.

[8] David Sloss and Michael Van Alstine, *International Law in Domestic Courts* 7 (2015), *available at http://digitalcommons.law.scu.edu/facpubs/889*.

[9] States and international organizations are immune from the jurisdiction of domestic tribunals only for their acts de *iure imperii* (acts performed in the use of their sovereign prerogatives). The immunity does not cover acts de *iure gestionis* (commercials acts realized on behalf of the State or the international organization).

[10] Servine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 *Northwestern Journal of International Human Rights* 149 (2011).

[11] André Nollkaemper and August Reinisch (eds.), International Law in Domestic Courts. A casebook 88 (Oxford University Press 2018).

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and transnational types of norms. One of the revolutions in contemporary international law is the recognition of the international legal personality of private persons. Conventional and customary rules of international law create direct rights and duties upon private persons, and establish their access to international mechanisms of dispute settlement.[12] Although individuals and companies have *locus standi* before some international tribunals, there are other international courts, such as the International Court of Justice, the International Tribunal for the Law of the Sea or the Dispute Settlement Body of the World Trade Organization, that are closed to private persons. Thus, in the specialized grounds for the application of international norms, private subjects of international law depend on their national courts and tribunals to advance the protection of their rights and to enforce their respective duties under international law.[13] Even the customary rule regarding the exhaustion of local remedies shows the "natural judge" of individuals and private companies is a domestic judge, even as regards international law.[14] In the same sense, the competence of national judges in the protection of the rights and duties of private persons under international law is summed up in the expression "ordinary judges of international law", which was used for the first time in the legal context of the European Union.[15]

Transnational norms are another strong point of connection between domestic judges and international law. Nowadays, states that are members of the global community have adopted international multilateral conventions. The principal objective of these conventions is to develop uniform conflict

[12] Individuals are the primary subjects of norms established by international human rights law, international economic law and international criminal law. Private companies have rights under international human rights law and international economic law, particularly in the investment protection field, but they still have no binding obligations under international law. The UN and other international organizations have made many efforts in order to establish the social responsibility of companies in international law.

[13] Sloss, *Supra*, 2

[14] By virtue of this rule, individuals and private persons cannot bring a claim before international courts and tribunals, and states can't exercise diplomatic protection in their favor, until they exhaust all existing remedies in their domestic legal order. The aim of this rule is to permit States to redress any possible violation of international law commitments through the jurisdiction of their own tribunals.

[15] This expression was first used in the legal order in the European Union in order to consider domestic judges "ordinary judges of communitarian law" ("*juges de droit commun du droit communautiare*"). Since the *Van Gend en Loos*, *Costa* and *Simmenthal* decisions of the Court of Justice of the European Union, the EU law established several duties upon national judges as the *prima facie* protectors of the rights granted to individuals by the laws of the European Union. In particular, they have to directly apply EU provisions that recognize the rights and duties of private persons, and set aside or leave unapplied any national provision that is contrary to EU law and hold the State responsible for any violation of EU law that is directly applicable to private persons. *See*: Saida El Boudouhi, *The National Judge as Ordinary Judge of International Law? Invocability of Treaty Law in National Courts*, 28 *LJIL* 286 (2015).

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rules within private international law, as well as to harmonize substantive rules in many fields of transnational private relations (including civil and family law, trade law, administrative and procedural law). By applying these important treaties of private international law and resolving disputes between private parties that are subjects of more than one national legal system, domestic judges frequently behave as *prima facie* private international law judges.

The horizontal, vertical and transnational norms of international law enter the internal legal orders of states through different forms of domestication or internalization; unless they are vested by direct effect or enjoy direct applicability in national law. The domestication or filter proceedings differ from one country to another, depending on the constitutional system for the reception and incorporation of international law into the national legal order. Once domesticated, the norms of international law become part of domestic law. From a formalist point of view, when applying and interpreting those norms, national judges have recourse to domestic norms, but from a substantive point of view, they would use international law in the resolution of particular disputes.[16] In other words, the domesticated norms of international law have formal validity based in domestic law, while the content of these norms has substantial foundations in international law. The use of domesticated international law in national dispute resolution also entitles domestic judges to perform an international judicial function.

Consequently, national judges have sufficient lawful basis for fulfilling an international judicial function. But the question remains: are they willing to do so? There is no legal obligation upon domestic judges to act as ordinary judges of international law. Neither domestic nor international law create such a duty on behalf of domestic judiciaries. The call for national judges to behave as judges of international law is of a persuasive nature, and depends on the voluntarism and internationalism present in the attitudes of judges. Some domestic tribunals, especially in dualistic legal systems, even have the possibility of using "avoidance techniques" to keep them away from the interpretation and application of international law in domestic cases. What factors can inhibit or exhibit the ability and the potential of domestic judges to act as ordinary judges of international law?

This article will analyze the performance of international judicial functions by Mexican judges. Are Mexican judges ordinary judges of international law, and if so, to what extent? What is the scope of their international judicial function? What are the constraints on their capacity and willingness to act as judges of international law?

The first part of this article will analyze the scope of the international judicial function of Mexican judges. It will focus on the methods of interpretation and application of international law used in specific resolutions. In particular, it will demonstrate that Mexican judges are performing an inter-

[16] Tzanakopoulos, *Supra*, 143.

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national judicial function when they interpret international law norms and principles, when they guarantee the rights and duties of private persons under international law, and when they control the conformity of domestic law and international law committed to by the Mexican state. The first part of this article will examine how the international judicial function of Mexican judges is limited, as Mexican judges are not behaving as ordinary judges of *all* international law.

The second part of this article will consider the general legal and sociopolitical context in which Mexican judges are active, and the influence that context has on their willingness and ability to fulfill an international judicial function. The place of international law in the Mexican Constitution, the slow democratization of the Mexican presidential regime and the deference to the executive power in foreign affairs on the part of Mexican judges are essential to understanding the constraints upon their international judicial function.

## II. The International Judicial Function of Mexican Courts and Tribunals

### 1. *Mexican Judges as Protectors of the Rights and Duties of Private Persons under International Law*

As mentioned earlier, the vertical norms of international law have granted rights and duties to private persons, which can be invoked in domestic proceedings before national judges. There are several areas in which international law grants direct rights and duties to individuals. Many international norms and principles, applicable at the regional and universal level, protect the rights of some categories of individuals (refugees, stateless persons or workers) and the human rights of all private persons. Additionally, some regional human rights courts (like the European Court of Human Rights) have considered companies to enjoy a limited number of human rights. Private persons can invoke their human rights before international bodies (some UN bodies are competent in human rights protection) and before specialized regional courts and tribunals (like the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court of Human Rights). All international human rights instruments establish the exhaustion of local remedies as a prerequisite for international judicial protection. Thus the ordinary, and primary, responsibility to protect international human rights belongs to national judges.

As noted, Mexican judges are increasingly acting as "ordinary judges of international human rights law". They have actively assumed a new role as "inter-American judges".[17] In a growing number of cases, Mexican judges

[17] Suprema Corte de Justicia de la Nación, Líneas generales de trabajo 2019-2022, Minis-

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have afforded individuals judicial protection of their human rights, granted directly by international treaties.

Since 2008, circuit courts have considered that individuals can invoke human rights provisions contained in international treaties in constitutional protection lawsuit (*amparo)* proceedings.[18] In other words, the circuit courts recognized that Mexican judges have jurisdiction over disputes related to the violations of human rights. This is recognized not only in the Mexican Constitution, but also in international human rights treaties.

In a 2007 case, the Supreme Court guaranteed the freedom of expression and the prohibition of censorship, in accordance with Article 7 of the Mexican Constitution and Article 13 of the American Convention on Human Rights.[19] The Court mentioned that freedom of expression can't be restricted without the approval of competent authorities and that this freedom is co-substantial to the rule of law and democracy. In a case decided in 2008, the Supreme Court extended the scope of the judicial protection of the right to health, pursuant to Article 25 of the Universal Declaration of Human Rights, Article 12 of the International Pact on Economic, Social and Cultural Rights and Article 10 of the Additional Protocol of the American Convention on Human Rights on Social, Economic and Cultural Rights (which is also called the San Salvador Protocol). In 2008, Mexico's Supreme Court clarified the meaning of the right to respect of private life, enounced in Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Pact on Social and Political Rights, Article 11 of the American Convention on Human Rights and Article 16 of the Convention on the Rights of the Child.[20] The Supreme Court emphasized that the right to health, in conformity with these international law instruments, includes the access to a wide range of facilities, goods and services, as well as access to all other conditions necessary to enjoy a state of optimum health.[21] In 2000, the Supreme Court protected the right to life, by virtue of the provisions of the Convention on the Rights of the Child and the International Pact on Civil and Political Rights.[22] In an interesting case, resolved in 2011, a circuit court assumed possible violations to the right to honor, even if it is not granted by the Mexican Constitution. The court considered itself competent to afford protection regarding the right to honor, based solely on the provisions of the American Convention on Human Rights and the International Pact on Civil and Political Rights.[23]

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tro Arturo Zaldívar, p. 37, *https://www.scjn.gob.mx/sites/default/files/carrusel_usos_multiples/documento/2019-01/lineas-grales-trabajo-mp-arturo_zaldivar_lelo_de_larrea.pdf*.

[18] Amparo directo 344/2008, June 10, 2008.

[19] Amparo en revisión 1595/2006, November 29, 2006.

[20] Amparo directo en revisión 2044/2008, June 17, 2009.

[21] Amparo en revisión 173/200, April 30, 2008.

[22] Acción de inconstitucionalidad 10/2000, Diputados integrantes de la Asamblea Legislativa del Distrito Federal, January 30, 2002.

[23] Amparo directo, 4/2012, Mayo 31, 2012.

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In other cases, Mexican judges have been activists regarding the recognition of individual rights as human rights in international law. In the *Florence Cassez* case,[24] the Mexican Supreme Court took a position on the ongoing controversy surrounding the acceptance of the right to information on consular assistance as a human right. This is established in Article 36 of the Vienna Convention on Consular Relations. In accordance with the Advisory Opinion of the Inter-American Court of Human Rights *OC-16/99*[25] and in dissonance with the *Avena* case[26] of the International Court of Justice, the Mexican Supreme Court considered that Article 36 grants this human right to individuals. In a clear performance of an international judicial function, Mexico's Supreme Court considered "the right to notification, contact and consular assistance as an encounter point of two basic international law requirements. In the first place, the strengthening of the position of consular offices as representative of the sovereignty of the sending State and, on the other hand, the respect for human rights and the importance of their effective judicial protection, as an element of the due process of law."[27] The Supreme Court then ordered the liberation of Florence Cassez, a French citizen, arrested in violation of her right to information on consular assistance, without dismissing the criminal claims against her.

These recent cases show the willingness of Mexican judges to afford judicial protection of individual human rights under international law. In almost all ongoing cases in which Mexican judges deal with human rights violations, they have recourse not only to a constitutional basis in domestic law, but also, complementary or exclusively, to a basis in international human rights treaties. This evolution has significantly strengthened individual human rights protection in the Mexican legal order, and has paved the way towards a growing acceptance of the performance of an international (human rights) judicial function by Mexican judges.

Mexican judges can act not only as protectors of individual human rights, as granted by international law, but also as guarantors of the international duties of an individual. At present, individuals are active subjects of international human rights law and passive subjects of international criminal law. According to the norms and principles of this specialized branch of international law, individuals have the obligation not to commit so-called international crimes, such as genocide, war crimes, crimes against humanity and crime of aggression. Even if the 20th Century has witnessed the development of international criminal Courts and Tribunals (such as the International Criminal Court, the International Criminal Tribunal for ex-Yugoslavia

[24] Amparo Directo 517/2011, January 23, 2013.

[25] Opinión Consultiva OC-16/99, "*El derecho a la información sobre la asistencia consular y su relación con las garantías mínimas del debido proceso legal*", October 1st, 1999.

[26] ICJ, *Avena* and Other Mexican Nationals, (Mexico vs. United States of America), Judgment, I. C. J. Reports 2004, 12.

[27] *Cassez Case*, *Supra*, 82.

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or the International Criminal Tribunal for Rwanda), the jurisdiction of domestic courts is essential for the prosecution of these crimes. In fact, national courts are ordinary judges of international criminal law on two counts. All domestic judges are vested with the authority to perform so-called "universal jurisdiction". Since the *Eichmann* case,[28] which was decided by Israeli tribunals after the Second World War, it has been admitted that domestic judges can hold individuals accountable for the commission of international crimes, even if the offender is not a citizen of their state and the crimes were committed abroad. All domestic judges in states that have ratified the Rome Statute are, by virtue of its provisions, "complementary judges to the International Criminal Court".[29]

Mexican judges have so far not admitted their role as international criminal law judges. There are no cases in which they have exercised universal jurisdiction, as such. However, in the *Cavallo* case, decided in 2003,[30] the Mexican Supreme Court accepted the extradition to Spain of an Argentine national for the commission of international crimes in Argentina.[31] The Supreme Court emphasized that "the tribunals of a State can exercise, in the name of the international community, as a whole, jurisdiction over some crimes", particularly over genocide, torture and terrorism. No cases have been decided, until now, on the ground of Mexican judges' complementarity to the International Criminal Court, nor have they ruled on the recognition of individual criminal responsibility under international law.

### 2. *Mexican Judges as Interpreters of International Law*

As mentioned above, domestic judges will act as ordinary judges of international law whenever they apply and interpret international law norms and principles in cases brought before their jurisdiction. Articles 31 to 33 of the Vienna Convention on the Law of Treaties establish the principal methods of interpretation of international law, and most domestic judges have recourse to these methods.[32]

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[28] District Court of Jerusalem, Israel, Criminal Case No. 40/61, Judgment, December 11, 1961.

[29] According to Article 1 of this treaty, the International Criminal Court "(…) shall be complementary to national criminal jurisdictions." Additionally, pursuant to Article 17, a case before the Court "is inadmissible where: (a) 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".

[30] Amparo en Revisión 140/2002, June 10, 2003.

[31] Manuel Becerra Ramírez, *El caso Cavallo*, 4 *Anuario Mexicano de Derecho Internacional* 610 (2004).

[32] For an example of international treaties interpretation, according to the Vienna Convention methods, see: Canadian Supreme Court, *Pushpanathan and Canadian Council for Refugees*

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Mexican judges have interpreted international law norms according to the same methods. The first case, rendered in 2002, dealt with the conformity of Mexican tax laws with the provisions of the Global Agreement on Trade and Tariffs (GATT).[33] By a unanimity of votes, the Mexican Supreme Court decided that the rules of interpretation of Articles 31 and 32 of the Vienna Convention are binding on the Court, but only if they don't fall apart from the provisions of Article 14 of the Mexican Constitution. The Court found that Article 31 establishes three principal methods of interpretation: literal, systematic and teleological. International law scholars use the terms textual, systemic and teleological to refer to the methods of Article 31. These differences in language show an intent by the Mexican Supreme Court to "accommodate" the Vienna Convention's methods to its own methods of interpretation, according to the provisions of domestic law.[34]

In another case in 2002, the Mexican Supreme Court interpreted the Convention on the Prevention and Punishment of the Crime of Genocide, through the systematic (systemic) method, derived from Article 31 of the Vienna Convention.[35] In particular, the Supreme Court took into account the Convention's *travaux préparatoires* and concluded that the political motives of the author of genocide are not one of its constitutive elements. In a more recent case, decided in 2004,[36] the Supreme Court considered the interpretation of North American Free Trade Agreement (NAFTA) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) should be carried out in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties. However, in that case, the court did not proceed with a detailed interpretation process of the above-mentioned treaties.

Mexican judges have not only been interpreters of international law, by the use of international law's own methods of interpretation, as there are some recent cases where Mexican judges developed the so-called "consistent interpretation" technique. By way of this technique, domestic judges interpret national laws in conformity with the international law commitments of their respective States. Initiated in the US with the *Charming Betsey Case* in the US Supreme Court,[37] "consistent interpretation" is an obligation for some domestic judges, particularly in the European Union.[38] In other cases, the obligation of "consistent interpretation" is included in the Constitution

*(Intervening) vs. Minister of Citizenship and Immigration*, 4th June 1998; UK House of Lords, *M, Re, King vs. Bristow Helicopters*, 28th of February 2002.

33 Amparo en revisión 402/2001, August 16, 2002.

34 Rodiles, *Supra*, 94.

35 Amparo en revisión 140/2002, June 10, 2003.

36 Amparo en revisión 237/2002, April 2 2004.

37 U.S. Supreme Court, *Murray v. The Charming Betsey*, 6 U.S. 2 Cranch 64 64 (1804).

38 Since the *Van Kolson* and *Kamann* cases of the Court of Justice of the European Communities (Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891. See also Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentación*, [1991] ECR 4135,

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of states.[39] Even with a lack of express obligation to do so, many domestic judges, in either monist or dualist countries, have interpreted domestic law in conformity with international rules and principles.[40] Consistent interpretation can render dualist systems, like Mexico's, monist in some sense[41] through the oeuvre of domestic judges. In fact, through consistent interpretation, domestic judges can use international law instruments not incorporated or otherwise received in their respective domestic legal order, so as to shape the meaning of national legal norms and principles.[42]

Domestic judges use the "consistent interpretation" technique with more frequency when they have to apply domestic legal provisions to human rights protection. In fact, national judges, particularly those working in Supreme and Constitutional Courts, always try to show that their interpretations of human rights, granted by internal norms and principles, are in conformity with international human rights instruments.[43]

Mexican judges are not separate from this global judicial movement toward consistent interpretation of domestic law with international human rights law. In some case law decisions, Mexican judges have interpreted national legal provisions in accordance with international human rights instruments. In 2008, a circuit tribunal considered that the illegal deprivation of liberty is contrary to Articles 1, 14, 16, 103 and 107 of the Mexican Constitution, and must be interpreted in accordance with international human rights

esp. paras. 8–9), all the domestic judges of EU member States have the obligation to interpret domestic law in conformity with EU Law.

39 Thus, for example, Article 10-2 of the Spanish Constitution expressly states that constitutional human rights provisions shall be interpreted in conformity with international human rights treaties ratified by Spain.

40 See, for example: Supreme Court of Canada, *Baker*, [1999] 2 SCR 817, House of Lords of the UK, *A (FC) v. Secretary of State for the Home Department* (*Conjoined Appeals*) (2005) UKHL 71; Israeli Supreme Court, *Kav La'oved Association v. Israel*, HCJ 4542/02; ILDC 382 (IL2006) [37].

41 El Boudouhi, *Supra*, 294.

42 Jean D'Aspremont, The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order, in Ole Kristian Fauchald and André Nollkaemper, *The Practice of International and National Courts and the De-fragmentation of International Law* 142, (ed. Hart Publishing) (2012); Wayne Sandholtz, How Domestic Courts Use International Law, *38 Fordham IntelLIJ*, 2015, 598.

43 Thus, for example, the Supreme Court of Canada, in *Slaight Communications Inc. v. Davidson case* ([1989] 1 S.C.R. 1038) considered that all constitutional provisions regarding human rights protection shall be interpreted in conformity with international human rights law. Similarly, the Supreme Court of India emphasized that international human rights norms and principles shall be taken into account in the interpretation of the rights to equality and no discrimination, protected by the their Constitution (*Vishaka v. The State of Rajasthan*, A.I.R. 1997 S.C. 3011 para. ¶13 (India)). The Supreme Court of Germany also established in its case law that fundamental rights recognized in the German Constitution shall be interpreted in conformity with the European Convention on Human Rights. (Sadholtz, *Supra*, 599).

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instruments regarding the protection of the right to honor and reputation.[44] In an important 2011 case, the Supreme Court emphasized the importance of the interpretation of all domestic law in conformity with the objectives of human rights protections and related provisions of the Mexican Constitution and international treaties ratified by the Mexican state. The Supreme Court distinguished between two types of consistent interpretation: consistent interpretation in a broad and a limited sense. In a broad sense, it found that all domestic judges shall interpret the domestic legal order consistently with human rights, recognized in the Constitution and in international treaties... In a more limited sense, in the view of the Supreme Court of Mexico, "whenever there is more than one plausible interpretation, domestic judges shall prefer the one that is closer to the Constitution as well as to the international treaties to which the Mexican State is part".[45] In the same case, the Supreme Court emphasized that a consistent interpretation shall always take into account the *pro homine* principle, which has become the guiding interpretative principle of the Court in the field of international human rights law.

The *pro homine* principle has been developed through the jurisprudence of international human rights courts, especially in the case law of the Inter-American Court on Human Rights. The *pro homine* principle is essentially an international human rights principle. By basing their own rules of interpretation in a hermeneutical principle of international (US) human rights law, Mexican judges have demonstrated that they feel bound by an international (human rights) judicial function.

A 2011 constitutional reform included the *pro homine* rule of interpretation of international and domestic human rights instruments in the first article of the Mexican Constitution.[46] Nevertheless, even before Constitutional reform, Mexican judges started to have systematic recourse to the *pro homine* principle. In a case, decided in 2004, a circuit tribunal affirmed

> the *pro homine* principle is a hermeneutical principle, established in many international treaties and coincident with the fundamental nature of human rights. By virtue of this principle, human rights provisions shall always be interpreted in a broader sense when it comes to protecting human rights and in a more limited sense when it comes to restricting them.[47]

One year later, another circuit court considered that recourse to the *pro homine* principle is not optative but obligatory, this because of its recognition in international treaties, which are part of domestic law and, thus are binding

[44] Amparo directo 344/2008, July 10, 2008.

[45] Varios 912/2010, July 14, 2011.

[46] According to this article: "The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times".

[47] Amparo en revisión 799/2003, April 21, 2004.

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for Mexican judges.[48] In 2011, the Supreme Court confirmed the binding nature of the *pro homine* principle not only for judges, but for all State authorities. According to the Supreme Court: "all State authorities, in their respective spheres of competence, have the duty to apply norms, favoring at all times an interpretation that can afford a broader protection in favor of individuals".[49]

### 3. *The Role of Mexican Judges in Assessing the Conformity of Domestic Legislation with International Law*

In many domestic legal orders, the "conventionality control" (*contrôle de conventionnalité, control de convencionalidad*) refers to the obligation of domestic judges to control the compliance of domestic legislation with international law. The most advanced system of conventionality control was developed in the EU legal context. In the *Simmenthal* case,[50] the Court of Justice of the European Communities considered that domestic judges should leave all domestic provisions which are contrary to EU law "unapplied".[51] The judicial "non-application" of the rule doesn't mean its formal abrogation, as it is an exclusive competence of the national legislators. However, it permits domestic judges to assure the efficacy of EU law commitments of their States and to protect the rights and duties EU legal norms grant to private persons. The *Simmenthal* doctrine has been one of the pillars of the conversion of domestic judges in EU member states to "ordinary judges of EU law".[52] Beginning in the early 1990s, national courts of EU member States accepted this role and started to control the compatibility of domestic legislation with EU law.

Another international court has recently developed the duty of domestic judges to assess the compatibility of national legislation with international human rights treaties. In the *Almonacid Arellano vs. Chile* case,[53] the Inter-American Court of Human Rights (IACHR) incorporated the *Simmenthal* doctrine in the Inter-American system in the following terms: "when States have rati-

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48 Tesis: I.4o.A.464, Materia administrativa, February, 2005.

49 SCJN, Varios 912/2010, July 14, 2010.

50 TJUE, June 19, 1990, aff. C-213/89, Rec. I.2433.

51 According to the Court: "Furthermore, in accordance with the principle of precedence of community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provisions of national law but- in so far as they are an integral part of, and take precedence in the legal order applicable in the territory of each of the member states- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions".

52 Antoine Vauchez, *Integration-Through-Law': Contribution to a Socio-History of EU Political Common Sense*, *EUI Working Paper No. RSCAS 2008/10,* 11.

53 September 26, 2006, para. 124.

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fied an international treaty, such as the American Convention on Human Rights, their domestic judges, as State officials, are also submitted to the treaty... Consequently, according to the IACHR, domestic judges have the duty to avoid an annulation of the Convention's provisions *effet utile* in domestic legal orders by the application of domestic legislations that are contrary to its objectives and purposes. In other words, in the Court's opinion, domestic judges shall perform *some type* of conventionality control between the domestic legal norms invoked in concrete cases before them and the American Convention on Human Rights.

The Inter-American Court affirmed that the assessment of the compatibility of national legislation with the American Convention amounts to some type of conventionality control (*una especie de control de convencionalidad*), when this, in fact, is the only type of conventionality control. This shows the misunderstandings human rights judges can have regarding core concepts of general international law. Even the Inter-American Court's President Eduardo Ferrer considered in 2010 that the duty of national judges within the American Convention on Human Rights´ member States to control the conformity of domestic legislation with this treaty is a new type of "diffuse conventionality control" that gives them a "new mission" and converts them into "Inter-American judges".[54] This is how a well-developed principle of international law at the European and global scale over the past decades has been recently *discovered* in the Latin American and the Inter-American contexts. Even if a legal basis for conventionality control has been present in Mexico's Constitutional Article 133 since 1917,[55] Mexican judges have only recently started to perform conventionality control.

In 2005, a circuit court controlled the conformity of Article 128 of the Federal Code on Criminal Proceedings with Article 8.2 of the American Convention on Human Rights, declaring the non-compatibility of the domestic law provision with the international treaty.[56] In 2007, the Federal Electoral Tribunal reviewed the conformity of the Constitution of Baja California Sur with Article 25 of the International Pact on Civil and Political Rights and Article 23-2 of the American Convention on Human Rights, in relation with the possible restriction of the right to take part in public affairs and elections.[57] In a decision rendered in 2009, a circuit court found that the performance of conventionality control is a duty upon Mexican judges in the area of human

[54] Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, in La reforma constitucional de derechos humanos. Un nuevo paradigma (Miguel Carbonell y Pedro Salazar coords., IIJ- UNAM 2012).

[55] According to Article 133 of the Mexican Constitution: "...The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provisions that may appear in the constitutions or laws of the states".

[56] Amparo directo 402/2004, October 14, 2004.

[57] SUP-JDC-695/2007.

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rights protection.[58] The court considered that domestic judges must control conformity between national and "supranational norms," in order to apply not only internal but also international legal instruments that afford protection of individual human rights. Also in 2009, another circuit tribunal asserted the compatibility of Article 190 of the Criminal Code of the state of Aguascalientes with Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Pact on Civil and Political Rights.[59] In 2010, another circuit tribunal affirmed that "conventionality control shall be assumed by Mexican judges, in the resolution of cases brought before their jurisdiction, in order to verify that domestic legislation is not contrary to the objectives and aims of the American Convention on Human Rights".[60] None of these cases dealt with the effects produced by conventionality control as regards the survival and/or future application of domestic legislation which is declared contrary to international human rights law.

The Mexican Supreme Court ruled on this question in an important case which was resolved in 2011.[61] The Court incorporated almost to the letter the *Simmenthal* doctrine of the European Court of Justice, and ruled that, by virtue of Article 133 and Article 1 of the Mexican Constitution, Mexican judges have the duty to "prefer human rights, granted by the Constitution and international human rights treaties, even in the case of the existence of contrary provisions in any inferior rule". The Court added that even if judges are not allowed to do a general declaration upon the validity of the contrary rules or remove them from the domestic legal order, they do have the duty to leave unapplied these rules and give preference to those contained in the Constitution and in the international treaties. The Supreme Court also considered that conventionality control concerns only human rights provisions of international law and represents a duty for all judges in the Mexican State than can be performed *ex officio*.

To date, there are few cases in which Mexican judges have accepted to control the conformity of domestic legislation with non human rights provisions of international law. My research found only one recent case where a Mexican tribunal reviewed the compatibility of domestic legislation with international law provisions related to the protection of intellectual property rights. In a decision, rendered in 2004, the Supreme Court controlled the conformity of domestic legislation on industrial property with the Mexican State's commitments in NAFTA and TRIP agreements. The Court developed a double step proceeding in conventionality control. First, it asserted that the above-mentioned treaties have been legally incorporated in domestic law and, consequently, are part of the domestic sources of legality. After that, the Supreme Court showed that there is no incompatibility between domes-

58 Amparo directo 1060/2008, July 2, 2009.

59 Tesis: XXIII.3o. J/2, Materia(s): Constitucional, Penal, October, 2002.

60 Amparo directo 505/2009, January 21, 2010.

61 *Radilla, "Varios"*, July 12, 2011.

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tic law provisions and these agreements. Instead, the Court emphasized that both provisions are not only harmonious but also complementary.[62]

## III. Constraints on the Fulfilment of an International Judicial Function by Mexican Judges

### 1. *International Law in the Mexican Constitution*

The place of international law in the Mexican Constitution is a very important limit for the scope of the international judicial function of Mexican judges. In fact, the Mexican Constitution includes few articles that deal with international law, and they are spread throughout the corpus of the fundamental norms. In particular, Articles 89, 104, 105, 117, 76, 15 and 133 deal with questions related to the sources of international law, their reception and incorporation in the Mexican legal order and their respective place in the internal hierarchy of norms. As will be demonstrated in what follows, the position of the federal judiciary towards these subjects is important.

With respect to the distribution of functions between the federation and federal entities (the states), the Political Constitution of the United Mexican States provides that the control of foreign policy belongs to the federation.[63] Regarding the distribution of functions between the three branches of the federation (the federal executive, the federal legislature and the federal judiciary), the Constitution designates an almost total power to the federal executive with regards to international relations. In Mexico's presidentialist regime, the President of the Republic is the principal authority in matters of international law.[64] The Constitution expressly prohibits the federal executive from celebrating specific types of international treaties.[65] By virtue of these checks

[62] Amparo en revisión 237/2002.

[63] In this sense, by virtue of Article 117: "In no case shall the states: I. Conclude alliances or coalitions, or make treaties with any other state or foreign government".

[64] Pursuant to Article 89 of the Mexican Constitution: "The powers and rights of the President of the Republic are the following: (...) III. To appoint, with approval from the Senate, the ambassadors, general consuls, executive employees of the Treasury, and the members of the collegiate bodies in charge of regulation in the matters of telecommunications, power and economic competence; (...) X. To lead the foreign policy; to make and execute international treaties; as well as to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations relating such treaties and conventions, requiring the authorization of the Senate. For these purposes, the President of the Republic shall observe the following principles: the right to self-determination; non-intervention; peaceful solution of controversies; outlawing the use of force or threat in international relations; equal rights of States; international cooperation for development; the respect, protection and promotion of human rights; and the struggle for international peace and security".

[65] According to Article 15 of the Constitution: "The United Mexican States disallow in-

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and balances, it is a combination of constitutional doctrine and legislative power that restrain the president's foreign policy and approve the international treaties celebrated by the president.[66] Regarding the division between Federal and Local Judiciaries in the Mexican federation, "Federal Courts have jurisdiction over: II. Any civil or mercantile controversy arisen about the observance and enforcement of federal laws or international treaties signed by Mexico... VIII. All controversies regarding diplomats and consuls".[67]

The highest federal court (the Supreme Court of Justice of the Nation) is vested with the power to control the constitutionality of international treaties.[68] The Supreme Court has controlled the constitutionality of treaties in some concrete cases under its jurisprudence. In the 2003 *Cavallo* case, the defense tried to demonstrate the unconstitutionality of Articles V, VI and VII of the Convention on the Prevention and Punishment of Torture due to their incompatibility with the principle of self-determination of people and non-interference in domestic affairs, established in Article 89 of the Mexican Constitution. The Supreme Court rejected these arguments and considered that the treaty was not contrary to the Constitution.[69] In 2004, the Supreme Court clarified the consequences of a declaration of the unconstitutionality of a treaty;[70] in 2007 it considered all treaties to have a presumption of constitutionality.[71]

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ternational treaties for extradition when the person to be extradited is politically persecuted, or accused of ordinary crime while having the condition of a slave in the country where he/she committed the crime, as well as the agreements or treaties that alter the human rights established by this Constitution and the international treaties signed by the Mexican State".

66 By virtue of Article 76, "the Constitution grants the Senate several exclusive powers: (...) I. Power to analyze the foreign policy developed by the President of the Republic, based on the annual reports submitted to the Senate by the President and the Secretary of Foreign Affairs. The Senate shall have the power to approve the international treaties and conventions subscribed by the President of the Republic, as well as his decision to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations related to such treaties and conventions; II. Ratify appointments made by the President of... the Ambassadors and General Consuls; the directive employees of the Foreign Affairs Ministry...".

67 Article 104 of the Mexican Constitution.

68 Article 105 of the Constitution allows the Supreme Court to receive cases related to: "II. Unconstitutionality lawsuits directed to raise a contradiction between a general regulation and this constitution." Unconstitutionality lawsuits can be initiated by: "b) Thirty-three percent of the members of the Senate against federal laws or laws enacted by the Congress and applicable to Federal District, or against international treaties signed by the Mexican State".

69 Amparo en revision 140/2002, June 10, 2003.

70 The Supreme Court admitted that a treaty declared unconstitutional shall no longer be applied in the Mexican legal order and that the executive power shall inform the other contracting parties of the unconstitutionality declaration. In the same sense, the executive shall take measures towards "annulment" of the treaty or the insertion of reservation on its unconstitutional elements (Amparo en Revisión 237/2002).

71 The Supreme Court decided that whenever treaties fulfil the constitutional requirements regarding their celebration and incorporation in the Mexican legal order, their con-

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The submission of treaties to constitutionality control is questionable from the perspective of international law. In fact, the *a posteriori* constitutionality control of a treaty is contrary to the principle of *pacta sunt servanda* and amounts to a unilateral amendment of the legal instrument. As emphasized by the Supreme Court of Turkey in a recent case, "it is a universally accepted principle that treaties should not be submitted to a constitutionality control," as this control is contrary to the reciprocity and equality that govern interstate relations in international law.[72] Through the acceptance of unconstitutionality lawsuits against treaties, the Mexican Constitution and the Supreme Court are actually confirming the full supremacy of the Constitution over Mexico's international law commitments.

Finally, Article 133 of the Constitution determines the hierarchy of international law within the Mexican legal order.[73] The text provides that the Constitution, treaties and federal laws "shall be the supreme law of the country", without giving any more precision on the relationship between the three.[74] The Supreme Court resolved this question in more recent case law. Initially the Court proclaimed the supremacy of the Constitution over treaties and considered treaties to have the same hierarchy as federal laws.[75] Fortunately, the Court modified its position and in 1999 recognized that treaties have supra legislative rank, as they are superior in the hierarchy of norms to all internal laws.[76] The Supreme Court reaffirmed this reasoning in 2007. In a decision on February 13, 2007, the Court concluded that "international treaties are hierarchically inferior to the Constitution, but superior to federal, general and local laws".[77]

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stitutionality shall not be contested, unless otherwise proven in the legal proceedings of an unconstitutionality lawsuit (Amparo en revisión 120/2002, May 30, 2007).

72 Turkey's Supreme Court found that if a state leaves the door open for unconstitutionality lawsuits against a treaty as an *a posteriori* reservation technique, the other contracting parties will not have incentives to enter in any future treaties with that State, because of his unwillingness to preserve the efficacy of a treaty and its full observance in good faith (*President of the Turkish Republic of Northern Cyprus vs. Assembly of the Turkish Republic of Northern Cyprus*, 25th November 2005).

73 In a near copy of Article V-II of the US Constitution, this article states: "This Constitution, the laws derived from and enacted by the Congress of the Union, and all the treaties made and executed by the President of the Republic with the approval of the Senate, shall be the supreme law of the country. The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provisions that may appear in the constitutions or laws of the states".

74 What happens if there is a conflict between a treaty and a federal law or between a treaty and the Constitution? In other words, do treaties have infra-constitutional and infra-legislative hierarchy or are they hierarchically supra-constitutional and supra-legislative in nature?

75 Amparo en revisión 1475/98, May 11, 1999.

76 Amparo en Revisión 1475/2008, October 15, 2008.

77 Amparo en Revisión 120/2002, October 1, 2004.

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Additionally, in 2011, the Mexican legislature achieved an important constitutional reform in the area of human rights that modified the content of Article 1 of the Constitution, as well as the place of international human rights treaties in the Mexican legal order.[78] This provision placed international treaties that grant human rights to individuals on the same hierarchical level as the Constitution itself. In the area of human rights, it created a so-called "constitutionality bloc," which includes constitutional and conventional provisions. In the words of the President of the Mexican Supreme Court, it marked the "Conventionalization of the Mexican Constitution".[79] However, the reform was silent with regards to the resolution of a possible conflict between a human rights treaty and the Constitution. The Supreme Court had to interpret the new Article 1 and adjust the hierarchy between both legal instruments. In a case resolved in 2014,[80] the Supreme Court decided that if there is a "constitutional restriction" on the exercise of human rights granted by a treaty, the constitutional restriction shall prevail. The Court has since reaffirmed this solution.[81]

This Constitutional design of the place of international law in the Mexican legal order has important implications for the scope of the international judicial function performed by the Mexican federal judiciary. As stated above, the Constitution only includes references to treaties as a source of international law and completely ignores all other sources. Article 38 of the Statute of the International Court of Justice, which is binding for Mexico, lists at least two more formal sources of international law: custom and general principles of law. Additionally, there are modern sources such as unilateral acts of the State, resolutions of international organizations, international jurisprudence, soft law, gentlemen's agreements, and so on.[82] However, regarding its treatment of sources of international law, the Mexican Constitution is monothematic and seems to correspond to the level of development of international law sources doctrine common in the 19th Century.[83] If Mexican judges use

[78] By virtue of Article 1 of the Constitution, which states: "In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself".

[79] Suprema Corte de Justicia de la Nación, Líneas generales de trabajo 2019-2022, *Supra*, p. 40.

[80] Contradicción de tesis 293/2011, September 3, 2013.

[81] Jurisprudencia P. /J. 22/2014 (10a.). The present state of the question of the hierarchy of treaties in Mexican domestic law is the following: human rights treaties are at the same level as the Constitution and are superior to all other internal laws, if there is a constitutional restriction of a human right recognized in a treaty, the Constitution prevails. All other non-human rights treaties are superior to internal laws, but inferior to the Constitution.

[82] Manuel Becerra Ramírez, Las fuentes contemporáneas del derecho internacional 36 (IIJ- UNAM 2018).

[83] Manuel Becerra Ramírez, La recepción del derecho internacional en la Consti-

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the Constitution as a legal guide for the application and interpretation of international law in their judicial practice, they could have recourse only to treaties as a source of binding international law norms. Custom and general principles of law, as well as other possible sources, would be absent from their case law. As we take a closer look to the case law of Mexican judges analyzed in the previous section, this indeed appears to be true.

As demonstrated in the first part of the article, Mexican judges have protected the private rights and duties of individuals under international law in some recent cases of jurisprudence. In all of these cases, Mexican judges based their protection in an international treaty. Again, the most prominent example is the judicial protection of human rights. All the cases analyzed had to deal with the human rights granted by treaties (especially the American Convention on Human Rights, the International Pact on Civil and Political Rights, the International Pact on Social and Cultural Rights, the UN Convention on the Rights of the Child, and the UN Convention on Prohibition of Torture). Recent jurisprudence by Mexican judges in this field have failed to mention other sources of international law.

The previous section of this article made clear that Mexican judges are interpreters of international law. All the cases where they had recourse to the methods of interpretation of the Vienna Convention on the Law of Treaties and all the cases where they utilized the "consistent interpretation" technique and developed the *pro homine* principle to deal with the interpretation of international treaties. From all the cases included in the first section of the article, none contains an interpretation of international customary law or general principles of law. Mexican judges have mentioned the existence of international customary law in only one case of their jurisprudence; in another case, they asserted the value of a soft law instrument within the Mexican legal order,[84] and in another they analyzed the existence of a *jus cogens* rule on the prohibition of torture.[85]

The place of treaties as a unique source of international law in the Mexican Constitution can explain why the international judicial function of Mexican domestic judges, at present, is limited to the interpretation and application of treaty law only.

Another possible constraint on the international judicial function of Mexican judges is the special place of human rights treaties in the constitutional design for the reception and incorporation of international law in the inter-

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TUCIÓN DE 1917. HACIA UN NUEVO SISTEMA, *available at https://archivos.juridicas.unam.mx/www/bjv/libros/10/4731/3.pdf*.

[84] According to a circuit court ruling, "the criteria and guiding lines adopted by international organs, intervening in the promotion and protection of fundamental rights are useful for each State, individually, as they should guide state practice and the improvement of the institutions, in charge of the unrestrictive promotion, control and guarantee of human rights" (Amparo en revisión 215/2014, October 16, 2014).

[85] Tesis 1ª. CCV/2014 (10a.), May, 2014.

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nal legal order. As explained above, the 2011 constitutional reform in the human rights field elevated those treaties to a constitutional hierarchical level. This reform was particularly significant for Mexican judges with regards to their willingness to apply and interpret international human rights treaties in the performance of their international judicial function.

As shown in the first section of this article, the jurisprudence of Mexican tribunals has been devoted to the protection of individual human rights as set forth in international treaties. Additionally, the decisions examined above demonstrate that the interpretation of international law by Mexican judges has focused almost exclusively on human rights instruments. Mexican judges control over conventionality developed into a judicial review of the conformity of internal acts and legal norms with international human rights instruments. The only exception is the recent compatibility control of the Industrial Property Law with TRIP agreements and supranational bodies like the WTO and NAFTA.

As discussed, the special place of international human rights treaties in the Mexican Constitution seems to constrain the ability and willingness of Mexican judges to act as "ordinary judges of *all* international law". So far, they have only accepted to be "judges of international human rights law". The constitutional reform of 2011 significantly altered the place of international human rights in the Mexican Constitution, and Mexican judges became more aware of their international judicial function, in the specific area of human rights protection. Vast segments of general international law and its specialized branches (international economic law, international criminal law, international environmental law, international maritime law, etc) are still completely ignored by the Mexican Constitution and by Mexican federal judges.

Another constitutional constraint on the ability and willingness of Mexican judges to act as judges of international law is the hierarchy of international law in the domestic legal order. As explained above, the text of the Constitution and the jurisprudence of the Supreme Court both affirm the supremacy of Mexican Constitution over treaties, excepting human rights treaties. This situation can predispose Mexican judges to consider international treaties other than human rights treaties and international law in general as a subaltern and subsidiary legal order in its relation to domestic (constitutional) law. Another important consideration regarding the conception of the hierarchy of international law is the recognition, in the Mexican Constitution, and in the Supreme Court's jurisprudence over the possibility to control the constitutionality of a treaty.[86]

This vision of the supremacy of the Constitution over international law has permeated the lower Courts with regards to the limits of their interna-

[86] As mentioned above, the Supreme Court has accepted the exercise of this control and has considered that unconstitutional treaties should be cancelled or reservations presented regarding content.

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tional judicial function. The case law analysis of the previous section demonstrates that Mexican judges have applied and interpreted the norms of international law through their acceptance in domestic law, and only when they confirm existing provisions of domestic law. In other words, Mexican judges feel bound by domestic law considerations in the fulfilment of their international judicial function. In almost all cases reviewed over the course of this study, Mexican judges have tried to demonstrate that international law can apply because it is consistent with the Constitution. They usually cite constitutional provisions followed by provisions of international treaty law.[87] When they perform conventionality control, Mexican judges first have to assert that the treaties in question have fulfilled the constitutional conditions for incorporation into the domestic legal order.[88] When Mexican judges interpret international treaties, they use methods of interpretation of constitutional law only when they conform to constitutional methods of interpretation and are "accommodated" in the hermeneutical techniques of domestic law.[89] When these judges interpret domestic legislation in conformity with international law, they need to show its conformity with the Mexican Constitution. Thus, from the perspective of Mexican judges, international law appears to be a more persuasive argument, based primarily in domestic constitutional law. The supremacy of the Mexican Constitution over international law can explain why Mexican judges maintain "first loyalty" to domestic law and to the belief that they can apply international law only through the lens of the Mexican Constitution.

Some judges have expressed this clearly. When defining the value of soft law[90] a circuit court judge argued that the recognition of this value: doesn't mean the *original* observance of the national legal order is disregarded. The court also insisted on "the *subsidiary nature of supranational norms*, by whose virtue, the international protection of human rights is only applicable after the exhaustion, and with the failure of internal safeguards. During the discussion in the Supreme Court surrounding its last pronouncement on the hierarchy of international human rights treaties, Margarita Luna Ramos, one of few female judges in Mexico said that "To recognize the supremacy of international treaties over the Mexican Constitution is to sell the motherland".[91]

The dualism of the Mexican Constitution has determined the legal mindsets and beliefs of Mexican judges. Mexican judges see themselves as domestic judges and guardians of the Mexican Constitution and the internal legality of Mexican law, and not as "ordinary judges of *all* international law".

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87 Amparo en revision 1595/2006, Amparo directo 344/2008.

88 Amparo en revision 237/2002.

89 Amparo en revisión 402/2001.

90 Amparo en revisión 215/2014, October 16, 2014.

91 *See, https://www.quadratin.com.mx/principal/Traicion-a-la-patria-comparar-tratados-internacionales-con-Constitucion/*.

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The sovereign and protective spirit of the Mexican Constitution is a product of many centuries of Mexican social and political history, characterized by foreign invasions,[92] United States imperialism and foreign interferences of all types in internal affairs. One can easily understand why Mexican judges may harbour an innate instinct of protection and preservation of the autonomy of the Mexican legal order in the face of foreign elements, including international law. The legal nationalism of Latin American countries may be the most important constraint on the fulfilment of an international judicial function by Mexican judges. The loss of sovereignty that this would entail is mixed with the fear and rejection of the legal otherness in Mexico's young and still fragile democracy.

### 2. *Mexican Judges and Deference to the Executive Branch in Foreign Affairs*

The specific relationship between domestic judges and the executive branch can be decisive for the potential of these judges to become international law judges.[93] From a domestic legal perspective, state governments apply laws within the limits established in a national constitution. In international law, governments are political powers that exercise effective control over their territory and citizens. Although international law distinguishes states from their governments, the foreign policy of states is adopted and executed by government officials. It is they who decide to enter in diplomatic and consular relations with other governments; who negotiate and sign international treaties and whose wrongdoing can compromise a state's international responsibilities. Consequently, the norms of international law have to do primarily with the legal regulation of governmental acts at the international and internal level.

In all countries, domestic tribunals are, of course, independent from the executive branch. However, when they control governmental conformity with international law, domestic judges can restrain governmental margin of appreciation in the implementation of foreign policy objectives. Judges can even adopt judicial decisions that contradict those objectives. Thus, the general dynamics of interaction between domestic judges and the executive influences their ability and willingness to assume an international judicial function.

As Benvenisti shows,[94] when the application of international norms by national courts is sought in an attempt to constrain the activities of the executive branch, domestic judges might be more timid and reluctant regarding their potential in the international arena. In the author's opinion, a judiciary that is formally independent from the executive branch of the government might seem a perfect forum for the application and enforcement of international law in

[92] Becerra Ramírez, *Supra.*

[93] Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 *EJIL* 159 (1993).

[94] *Idem*.

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the domestic legal order. However, the jurisprudence of domestic judges seems to be consistent in protecting short-term governmental interests. Judges are careful not to impinge with their decisions on the international policies and interests of the government.[95]

The tendency for domestic judges to rule on international law issues in favor of the interests of their executive branch has been a driving force behind the creation of various international dispute settlement mechanisms. One of the main reasons for the success of international commercial and investment arbitration is the fact that arbiters are not state agents and are supposed to be more independent than national judges are when they apply or interpret international law.[96] In the same sense, the International Center for Settlement of Investment Disputes (ICSID) Convention expressly provides for a non-application of the rule of exhaustion of local remedies in international investment arbitration cases. The NAFTA arbitration system and the creation of international courts and tribunals casts doubt on the ability of domestic judges to preserve the efficacy of the norms and objectives of international law when it goes against the will of their own government.

In the Mexican context, the deference of domestic judges to the executive branch in foreign affairs matters is one of the mightier limits to their ability to perform an international judicial function, as well as to their perception of themselves as ordinary judges of international law. This political constraint essentially relates to the capacity of Mexican judges to review foreign policy actions and decisions taken by the executive power under international law. In this sense, the international judicial function of Mexican judges turns out to be, fundamentally, a rule of law function, which seeks the subordination of the executive branch to that of international law.

Mexico is a young democracy. The evolution of the Mexican political system, as a whole, has represented a true challenge to the ability of the judiciary to guarantee the respect for the rule of law. The division of power in the Mexican Constitution is characteristic of a presidential regime. However, the dominance of the hegemonic Institutional Revolutionary Party (PRI) on the political landscape during the second half of the 20th Century distorted the checks and balances of the regime in favor of the executive branch. For many years, Mexico's President has been an all-powerful legal and political figure, this executive "preponderance"[97] over the other two branches of the state (legislative and judicial) has been called a perfect dictatorship. The omnipresence of the executive in relation to the judiciary[98] affected the in-

[95] *Idem*, 161.

[96] One of the concerns that forced the development of international investment arbitration was the desire to protect international investors from the lack of independence between domestic judges and the executive branch, especially in developing countries.

[97] Diego Valadés, *Reforma del sistema presidencial mexicano*, 130 *Pluralidad y Consenso* 2 (2011).

[98] Jorge Chaires Zaragoza, *La independencia del Poder Judicial*, 110 *Boletín Mexicano de Derecho Comparado*.

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dependence of the judicial branch, which was formally recognized in the Constitution but did not exist in reality. Consequently, Mexican judges were not able to develop strong judicial oversight of governmental activities. Their judicial function throughout this period fell away from guaranteeing respect for the rule of law within the Mexican legal order.

Before 1990, the relation Mexican judges had with international law was utterly distant.[99] The number of international law related questions raised in internal proceedings before Mexican Judges was extremely limited. Additionally, case law decisions from that time showed Mexican judges had serious doubts regarding basic notions of international law. In 1985, the Plenary of the Mexican Supreme Court was still questioning whether international treaties are acts that need legislative motivation[100] and whether these treaties possess a legislative nature.[101] In 1990, circuit tribunals had to determine if the existence of a treaty needs to be proven by the party that invoked it, and how treaties were to become part of the domestic legislation.[102]

The judicial reform adopted in 1994 was important because it tried to guarantee the independence of the Mexican federal judiciary. This coincided with a new willingness on the part of Mexican tribunals to deal with international law.[103] The slow democratization of the Mexican political system was complementary with a modification of the priorities of the foreign policy objectives on the part of the executive branch. In fact, the executive began to adopt a more liberal foreign policy based in a necessary change in the location of international law within the domestic legal order. In 1992, President Carlos Salinas de Gortari decided to open the Mexican economy to globalization. The signing of NAFTA represented an important inflexion point in the move towards a better reception mechanism for international law within the domestic legal order.[104] In 1998, Mexico accepted the compulsory jurisdiction of the IACHR.[105] Those two events sparked a slow internationalization of the Mexican legal order.

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99 Rodiles, *Supra*, 92.

100 Amparo en revisión 8396/84, May 14, 1985.

101 *Idem.*

102 Amparo directo 832/90, October 4, 1990.

103 Alejandro Rodiles Rodiles et al., *Unity or uniformity? Domestic Courts and Treaty Interpretation*, *27 LJIL* 93 (2014).

104 Treaty incorporation in the domestic legal order supposed major legislative reforms in order to harmonize domestic law with NAFTA commitments (Becerra Ramírez, *Supra*, p. 8).

105 Curiously, previous to this date, two of the Presidents of the IACHR were Mexicans (Héctor Fix Zamudio and Sergio García Ramírez) even while the country itself was not subject to the Court's jurisdiction. The recognition of the Court's jurisdiction with regards to human rights violations committed by state officials had a great significance for the "internationalization" of the judicial function of Mexican judges and for their public perception as agents able to protect individual rights granted by the American Convention on Human Rights and other human rights treaties.

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The Mexican federal judiciary began to perform an international judicial function around the same time. Most of the cases analyzed in this article date from the end of the 1990s and the beginning of the 2000s. The late and slow democratization of the Mexican legal order culminated with the victory of Vicente Fox Quesada of the National Action Party (PAN) in presidential elections in the year 2000, which allowed a more active role for Mexican judges with regards to the subordination of the executive under the law. The internationalization of the Mexican legal system, promoted by the executive branch, brought a change in attitudes among Mexican judges regarding the possibility of ensuring the legality of governmental acts under international law.

However, even after 2000, the jurisprudence of Mexican judges in matters related to international law revived "their previous self-perception as subordinated to the Executive Branch to which deference was owed in questions of international law."[106]

In this sense, my analysis in the previous section demonstrates how decisions adopted by Mexican judges have always narrowly interpreted the articles of the Mexican Constitution that deal with the incorporation and hierarchy of international law in the domestic legal order. In doing so, they have reduced their own possibility of controlling the legality of governmental acts under international law.

The Supreme Court's refusal to recognize the existence of and to consider sources of international law outside of treaties shows the persisting deference of the Supreme Court to the executive power on foreign affairs. The court only mentions treaties in its case law, because treaties are the best expression of state's consent to the creation of rights and duties on its governmental power. Mexican judges have thus adopted a positivist vision regarding the sources of international law, which consider the only valid sources of international law as those which express governmental consent as bound by legal rules.[107] This vision expresses the rejection of the possibility of creating legal limits to governmental action in international law against the expression of free will on behalf of the executive branch.[108] This consent is particularly easy to prove in the case of treaties. Treaties are direct expression of the will of states to create reciprocal and binding rights and duties under international law. It is generally admitted that international treaties are analogous with contracts in domestic law.[109] The state's consent to the two other sources of international law, as stated in Article 38 of the Statute of the International Court of

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[106] Rodiles, *Supra*, 93.

[107] Raimondo Fabian, General Principles of Law in the Decisions of International Criminal Courts and Tribunals 65(Martinus Nijhoff 2013).

[108] Juan Carlos Velázquez Elizarrarás, *Reflexiones generales en torno a la importancia de los principios del derecho internacional*, 12 *Anuario Mexicano de Derecho Internacional* 407-453 (2012).

[109] Hersch Lauterpacht, Private Law Sources and Analogies in International Law (ed. The Lawbook Exchange 2002)

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Justice (custom and general principles of law) is more difficult to establish.[110] Consequently, Mexican judges have a tendency to apply treaties only in the performance of their international judicial functions, as only this source of international law is government consent friendly regarding the imposition of legal limits to the executive power in foreign affairs related matters.

The refusal of Mexican judges to establish the supremacy of international treaties (including human rights treaties) over the Mexican Constitution demonstrates their unwillingness to reign in governmental power and reduce the government's margin of influence beyond the limits of the domestic constitutional order. Mexican judges will not interpret constitutional provisions regarding the hierarchy of international law in the internal system in a way that would increase their power to influence the executive's respect for international law.

As discussed earlier, the only field where Mexican judges have taken their international judicial function seriously, without deference to the executive branch, is in the protection of human rights. This shows that they have a particular understanding of their role as guardians of the international rule of law. It seems that Mexican judges are willing to control governmental actions related to international law only when those actions constitute human rights violations. In all other cases, they fulfill their judicial review function regarding the legality of the actions of the executive in accordance with domestic law.

## IV. Conclusion

Mexican judges are not, at present, ordinary judges of *all* international law. Their international judicial function is limited to the interpretation and application of treaties and does not cover any other sources of international law. The judicial protection they afford to individual rights and duties under international law focus almost exclusively on international human rights treaties. The interpretations of Mexican judges concern only human rights conventional norms. The conventionality control they perform is a control of the conformity of domestic legislation with international human rights treaties, and especially with the American Convention on Human Rights. Thus, Mexican judges act only as international treaty law judges and as international human rights judges.

It is possible to envisage the interpretation and application, by members of the Mexican federal judiciary, of other sources of international law. Mexican

[110] State consent for the creation of an international custom is implied in the development of a consistent state practice (*consuetudo*) and in the acceptance of its binding legal character (*opinio iuris*). State consent in the creation of general principles of law can be traced back to the recognition by "civilized nations", as well as through their presence *in foro domestic* (in respective domestic national legal orders) (Bin Cheng, General Principles of International Law as Applied by International Courts and Tribunals 1 (Cambridge University Press 2003) (1951).

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tribunals can use international customary law and general principles of law as a legal basis for the resolution of cases brought to their jurisdiction.

Many international treaties codify the pre-existing customary norms of international law, some treaties constitute the *consuetudo* required for the development of a custom at the international level. The benefits of the domestic judicial application of this second formal source of international law are clear. Treaties only legally bind state members, while customary norms can create rights and duties for states that have not participated directly in the law creation process. Thus, through the application and interpretation of customary norms of international law in the cases submitted to their jurisdiction, Mexican judges could fill the gaps that the non-ratification of a treaty would create for the protection of a private persons' rights and duties under international law. As mentioned above, there is already a case where Mexican tribunals had recourse to international custom. We can hope that this case will not be the only one for long, and that Mexican judges will improve their understanding of the system of sources of international law in order to extend their international judicial function to the application and interpretation of customary norms as foundational elements of international law.

Additionally, the interpretation and application of treaties could be enriched by the use of general principles of law as a source of international law. General principles of law are essential for the fulfilment of any judicial function, internal and/or international, as they serve to fill the gaps of other written norms pertaining to a legal system. General principles also guide the interpretation of the provisions of the conventional norms of international law and facilitate the resolution of conflicts. General principles of international law, such as *bona fides, pacta sunt servanda, rebus sic standibus*, *ex consensu advenit vinculum* o *res inter alios pacta*, and *lex superior derogat legi anteriori* form a general legal background for the efficient application and interpretation of all treaties. Thus, the general principles of law deserve special consideration with regards to the possible extension of the scope of the international judicial function of Mexican Judges.

There are, as well, many new forms international legality is being manifested. In this sense, Mexican judges could have recourse to unilateral acts of states and/or international organizations, including *soft law* and *ius cogens* rules. These contemporary sources of international law can also complement the interpretation and application of treaties in the fulfilment of the international judicial function of the Mexican federal judiciary.

Regarding the material scope of the international norms that are used in the resolution of concrete cases, Mexican judges could extend their judicial function to other branches of international law. The protection of human rights should not be the exclusive field of the exercise of an international judicial function by the Mexican tribunals. Rather, it could also encompass the prevention and punishment of international crimes, environmental protection or the resolution of maritime problems, based on the norms and principles of international law. Regardless, the possibility of extending the scope

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of the international judicial function of the members of the Mexican federal judiciary will have to face and surmount many political limitations.

The place of international law in the Mexican Constitution and the traditional deference on the part of Mexican judges to the executive branch are strong constraints on the ability and willingness of Mexican judges to fulfil an international judicial function. The general context of the Mexican political regime has an important impact on the role of the federal judiciary in the promotion of the rule of law, internally and internationally.

One way to foster the performance of an international judicial function by Mexican domestic judges would be to implement reforms regarding the place and significance of international law in the Mexican Constitution. The most important step is to suppress constitutionality control of treaties. In addition, all contemporary sources of international law should be mentioned in the Constitution.[111] Only after following these steps can conventionality control by Mexican judges recover its true meaning as judicial control of the conformity of international law with domestic law.

A more radical option would be to abandon dualism and to accept a monist system of reception and incorporation of international law in the Mexican legal order. A greater openness in the Mexican Constitution to international law would be an expected consequence of the ongoing process of normative inter-penetration in a legally pluralistic global order.

Another way to extend the international judicial functions carried out by Mexican judges would be to strengthen their familiarity with international law norms and institutions. In this sense, better knowledge and specialized education in international law could significantly improve the scope of their international judicial function. This is true for judges themselves, as well as for private parties and litigants that bring cases to their jurisdiction. If parties were to invoke more international law norms and principles in their demands and defenses, Mexican judges would have more opportunities to develop their potential to act as international law judges.

A lessened deference to the executive branch and the consolidation of the formal and informal independence of the Mexican federal judiciary in domestic and foreign legal affairs would create another important incentive for the development of the international judicial function of Mexican judges.

The increasing acceptance of the performance of an international human rights judicial function is, of course, a sign that Mexican judges are aware of the need to go further in the internationalization of their judicial activity. However, the self-perception of Mexican judges as international human rights judges has advanced only little by little and has begun only recently, especially if we consider the urgent and dramatic situation of human rights protection in Mexico. Thus, we can expect their willingness to act as ordinary judges of all international law will also advance slowly and will not become visible, nor should it be expected to become so in the near future.

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111 Becerra Ramírez, *Supra*.

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# MEXICO 2018: AN OPPORTUNITY FOR POPULAR CONSTITUTIONALISM

Roberto Niembro O.*

Abstract: *In 2018 Mexicans chose the most profound political change since the transition to democracy, leaving behind what in another work I have called authoritarian constitutionalism. The alternation has meant a change of regime in which a social transformation is announced. The transformation can take different paths and must be accompanied by ideas that inspire it. In this frame of mind, popular constitutionalism can be a useful theory in order for the transformation to take a democratic, participative and egalitarian direction, since it fosters political participation and democratic equality. It is time to forego the elitist theories of constitutional law and the minimalist understandings of democracy.*

Keywords: *Participation, popular constitutionalism, transformative constitutionalism, Mexico.*

Resumen: *En 2018 los mexicanos y mexicanas elegimos el cambio político más profundo desde la transición a la democracia, dejando atrás lo que en otro trabajo he denominado constitucionalismo autoritario. La alternancia ha significado un cambio de régimen en el que se anuncia una transformación social. La transformación puede tomar distintos rumbos y debe ser acompañada por ideas que la inspiren. En esta tesitura, el constitucionalismo popular puede ser una teoría útil para que la transformación sea en una dirección democrática, participativa e igualitaria, pues incentiva la participación política y la igualdad democrática. Es momento de dejar atrás las teorías elitistas del derecho constitucional y las concepciones minimalistas de la democracia.*

Palabras clave: *Participación, constitucionalismo popular, constitucionalismo transformador, México.*

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## I. Introduction

We live in a moment of political alternation in which a national transformation is being announced. This alternation has meant a change of political elites and a different way of doing politics. There is no doubt that Mexico's transformation is urgent in different spheres, particularly in those in which structural inequalities exist.[1] In constitutional matters, this transformation can take different paths, because the alternation alone does not ensure us that it will advance towards a regime of rights and freedoms or towards an authentically democratic system.

In his article about transformative constitutionalism, Klare defined this as:

> A long-term Project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in historical context of conductive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase "reform", but something short of or different from "revolution" in any traditional sense of the word.[2]

[1] See Pius Langa, *Transformative Constitutionalism*, *Stell. LR* 2006, 352.

[2] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, *South African Journal on Human Rights* 146 (1998).

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In order for Mexico's constitutional transformation to take a democratic, participatory and egalitarian direction as Klare proposed for South Africa, and which we yearn for also, popular constitutionalism can be a source of inspiration. In Mexico during the 20th century and the ongoing 21st century the institutional design and the prevailing democratic ideas were inspired by elitist understandings of constitutional law that sideline popular participation in the creation, interpretation and application of the constitution, in as much as these consider that citizens are not able to debate on constitutional topics. Also, these are based in a minimalist conception of democracy that is focused solely in elections and the electoral process, without taking into account the importance of the involvement of citizens and their active participation during the lapse from one election to another.

As I have argued elsewhere, the phase that recently ended in 2018 can be deemed as an authoritarian constitutionalism, in which the liberal democratic constitution in force had been used by political elites for authoritarian purposes.[3] This phase started with what a few have called the "transition towards democracy". For some the transformation has already taken place and, therefore, it is unnecesary to think about it. I obviously do not share this outlook of the democratic transition, for as I have mentioned for several years, we have lived in a sort of authoritarian constitutionalism.

The starting point to outline a constitutional transformation is not a trivial matter, because the proposed change is made about the existing situation. That way, if our starting point is that the system currently in force is that of a more or less functional democracy, then there is no need for a transformation but for a reform instead. However, if the *status quo* is a sort of authoritarian constitutionalism, there is no other choice but to make a transformation. Even more, understanding authoritarian constitutionalism as a starting point can prevent us from erring upon the path, because it shows that a series of reforms is not enough to carry out the transformation. In fact, in this new phase it will be crucial not to make the same mistake as in the past, which is to consider that some liberal and democratic legal modifications are enough to eradicate our authoritarian culture and practices.[4]

In the achievement of this constitutional transformation, the academy has the responsibility to contribute intellectually to its accomplishment, because we cannot just notice the historic moment and wait to be part of it in our own benefit. Hence, for the announced transformation to be truly significant and to become a deep change it must be oriented towards a sort of popular constitutionalism. To understand how this change can be achieved, I will describe a few of the main characteristics of the authoritarian constitutionalism that we live in, I will take up the thesis that upholds popular constitutionalism as

[3] Roberto Niembro Ortega, *Conceptualizing authoritarian constitutionalism*, 4 VRÜ, 2016, 339.

[4] Jaime Cárdenas Gracia, *Popular Constitutionalism and Forms of Democracy*, XI *Mexican Law Review* (2019).

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a source for inspiration, and I will defend the participation of citizenship as the most effective way to make this transformation a reality. In other words, in this article I aim to think about the difficult task of transforming an authoritarian constitutionalism into a kind of popular constitutionalism.

## 1. *Mexico Has Lived under Authoritarian Constitutionalism*

Authoritarian constitutionalism refers to the exercise of power within the framework of a liberal democratic constitution.[5] Of course, a constitution that does not fulfill the promises of constitutionalism[6] makes authoritarian constitutionalism a thin constitution.

So, authoritarian constitutionalism emphasizes the tension between the exercise of power within ill-defined limits, lack of accountability, and how the ruling elites execute and mask its violence under the forms of the constitution[7] and the idea of constitutionalism. This tension makes authoritarian constitutionalism a perplexing but not absurd category; perplexing because of the inconsistencies it points out and helps us both understand and critique. These inconsistencies exist between the functions that some constitutional provisions fulfill in a liberal democracy (limiting the power of the state and empowering those who would otherwise be powerless), and the liberal democratic ideology behind constitutionalism, on the one hand, and the functions that those same provisions and a constitutionalist discourse fulfill in authoritarian constitutionalism, on the other.

In a liberal democracy, where power is widely and evenly distributed, the provisions that theoretically have the purpose of limiting power do have this *effect*.[8] Conversely, authoritarian constitutionalism turned liberal democratic constitutions inside out.[9] Elites used constitutions to achieve goals, such as controlling political opponents, or to bolster a regime's claim to legal legitimacy in so far as it served the regime´s interests.[10] Consequently, the application of constitutional provisions varied according to the interests of the ruling elite.

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5 Niembro, *supra* note 4.

6 Ogendo Hastings W. Okoth, *Constitutions without Constitutionalism: Reflections on an African Political Paradox,* in Constitutionalism and Democracy: Transitions in the Contemporary World 60-66 (Douglas Greenber, S. Katz, B. Oliviero and S. Wheatley eds., 1993).

7 The Federalist No. 10, at 75 (James Madison) (Clinton Rossiter ed., 1961).

8 Stephen Holmes, *Constitutions and Constitutionalism,* in Oxford Handbook of Comparative Constitutional Law 154 189, 207 (Michel Rosenfeld and András Sajó eds., 2012).

9 Turkuler Isiksel, *Between text and context: Tuskey´s tradition of authoritarian constitutionalism*, 11 *Int'l J. Const. L.*, 702, 714 (2013).

10 Mark Tushnet, 2013, at 53, 62, 69.

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Under authoritarian constitutionalism constitutions do not effectively limit power or empower those who would otherwise be powerless. However, as we will see, that doesn't impede ruling elites from trying to use the constitution as legitimate force. When that is no longer possible, they use the constitution to stabilize the regime generating continuous aspirations while making implausible any real change.

Thus, under authoritarian constitutionalism the liberal democratic constitution does not limit ruling elites. For example, the rules that regulate elections serve to coordinate succession of power in a peaceful manner without it entailing an empowerment of the electorate; horizontal and vertical separation of powers is a mechanism of coordination amongst elites but not of mutual control; the rules that prescribe sanctions against the improper exercise of public service are used to control subordinates, etc. In this way, the fact that ruling elites use the language of liberal democratic constitution does not report any benefit to the citizens. Actually, it makes things even worse because constitutional discourse is used to cloak authoritarian functions, which can lead to the disenchantment or rejection of constitutionalism, and to authoritarian transitions.

In my opinion, this instrumental use and flexible application of the constitution tells us more about the ideology of the elites. Indeed, according to Linz, based on Theodor Geiger, authoritarian ruling elites have a more emotional than rational mentality–in contrast to an ideology in terms of rigor–-which allows them to react in a more flexible way in different situations. Mentality is fluctuating and with little rigor, close to the present or the past, without being utopian.[11] Unlike ideologies, mentalities are weak and flexible.

Therefore, the ideas that guide authoritarian ruling elites allow them to adopt constitutions with a content that in theory must limit their power, but that they implement according to their convenience. Their pragmatic mentality allows them to easily adapt to upcoming situations and to adopt liberal democratic dispositions to the extent that these yield a benefit.[12]

Likewise, the liberal democratic constitution helps ruling elites to adopt a spoken discourse of constitutionalism. Thus, they appeal to the constitution, the rule of law, respect for human rights or the life of democracy. In that sense, the text matters insofar as it gives the ruling elite the material basis —which make it more credible— to use to their benefit the spoken discourse of constitutionalism.[13] Of course, there is no normative architecture —that is, conventions and practices, principles and understandings[14]—that makes

[11] Juan J. Linz, Totalitarian and Authoritarian Regimes 162, 163 (Lynne Rienner Publishers 2000).

[12] *Id.*, at 162-64.

[13] Alan Hunt, Explorations in Law and Society Toward a constitutive theory of law 4 (Routledge 1993).

[14] Graham Walker, *The Idea of Nonliberal Constitutionalism*, in Ethnicity and Group Rights 165 (I. Shapiro and W. Kymlicka eds., 1997).

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constitutionalism a reality. In the mentality of the ruling elite, there is no commitment to the limitation of power.

This is a superficial constitutionalist discourse because it does not further the liberal democratic ideology that is needed for constitutionalism to work properly. I mean values such as individualism, plurality, neutrality, participation, and disagreement. As in cases of authoritarian constitutionalism, its pillars are the conservative cultural values of order, community bent, value consensus rather than contention, etc., and, of course, in authoritarian constitutionalism ruling elites do not make any attempt to undermine them by spreading liberal democratic values.

The ruling elites use this constitutionalist discourse —written and spoken— for ideological purposes. The goal of this discourse is to stabilize domination or engender the belief of being a legitimate domination.[15] Stabilizing domination might be easier than engendering the belief of its legitimacy, and it is possible that the younger the regime the greater possibilities to develop this belief. Conversely, as time goes by and people realize that the constitution is not respected and the discourse of constitutionalism is just a sham, its legitimating force would tend to reduce.

To achieve these goals, ruling elites need to generate continuous aspirations through the constitution and other legal instruments, even though at the same time they make any substantial change impossible. In this way, the constitution is alienated and turned into an enemy weapon.[16]

### A. *Creating Continuous Aspirations through the Constitution and other Legal Instruments*

To achieve this purpose, they have to create an illusion of possible change. This can be achieved, for example, by granting rights that formulate the interests of the powerless without changing the conditions—social, economic and institutional power relations—to make them effective.

Commonly, this grant of human rights is accompanied by theories that further the idea that the dogmatic and organic parts of the constitutions are independent or interrelated in a peaceful way. Accordingly, it is possible to make some progress just focusing on human rights. However, as has been argued by Roberto Gargarella based on the Latin American experience, this thesis seems doubtful. Constitutions should be seen as made up of components that are related and interdependent and recognize the special influence that the organization of powers has on the functioning of the entire constitution, and in consequence, the necessary attention that has to be paid to it. Not

[15] Raymond Geuss, The Idea of a Critical Theory Habermas and the Frankfurt School 15 (Cambridge University Press 1981).

[16] Carlos de Cabo Martín, Pensamiento crítico constitucionalismo crítico 83 (Trotta 2014).

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recognizing this difficult relation among the components of the constitution may hide failures of the political branches to comply with the constitution, blind the presidential hindering of social rights implementation, or ignore the inactivity of Congress to implement participatory clauses.[17]

This logic may explain why, for example, in Latin America in the last decades constitutional amendments have focused on granting more human rights, even though no substantial change has taken place in the vertical organization of power. Moreover, in cases where the organic part of the constitution has been amended to establish more democratic procedures or vehicles for popular participation, in the statutes or in practice, they are not respected.[18]

In those cases, although rights reflect interests of the powerless, they rather further elites´ interests.[19] The logic is that the law has to be responsive in some degree to social needs in order to be repressive, that is, to secure control by ruling elites.[20] Indeed, the powerless make some minor gains and the elites maintain control over the state.[21]

In fact, without any respect or inclusion of the powerless, it would be very difficult for any constitutionalist discourse to be persuasive.[22] Creating constitutional aspirations depends on identifying real but partial freedoms and equalities. Delusion is plausible and effective because norms selectively articulate real needs, relations, and potentials of the powerless.[23]

This real, but feigned, achievement of constitutionalism creates an illusion of living in a constitutional state.[24] It is an illusion because there is no overwhelming evidence that the belief is false. On the contrary, the inclusion of human rights, separation of powers, and some respectful practices make people believe that it is possible to achieve a constitutional state. The discourse satisfies the wish of the people to live in a place where power is limited. However, under the existing conditions it is implausible that this could happen[25]. In other words, there is no evidence that under the existing conditions the constitution will limit power and would be respected without relying on the varying considerations of the ruling elites.

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17 Gargarella, 2013, at 157-206.

18 *Id.*, at 148-186.

19 Geuss, *supra* note 16, at 38.

20 Philippe Nonet & Philip Selznick, Law & Society in Transition: Toward Responsive Law 29 (Transaction Publishers 2001).

21 Hugh Collins, Marxism and law (Clarendon Press 1982).

22 Terry Eagleton, Ideology An Introduction 14, 15, 26 (Verso 2007).

23 Mark Warren, *Liberal Constitutionalism as Ideology: Marx and Habermas,* 17 *Pol. Theory* 511, 525-526 (1989).

24 Edward Palmer Thompson, Whigs and Hunters The origin of the Black Act 263 (Panteon Books 1975). As E.P. Thompson explains, for law to be able to fulfil its ideological function it must appear as foreign to manipulation and seem fair, being fair on some occasions.

25 Geuss, *supra* note 16, at. 42.

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### B. *Making Implausible any Real Change*

At the same time that ruling elites generate continuous aspirations they make any real change implausible. For this purpose, they have to conceal and reproduce reality. For example, they must conceal politics behind the scenes using democratic procedures as a façade[26], present group interest as the interest of the whole, hinder or obstruct the creation of opposition powers manipulating electoral rules, and co-opt them if they come to existence.[27]

Likewise, ruling elites must conceal the conditions under which normative potentials might be realized.[28] The dissimulation masks the conditions of realization of a desirable political situation. They highlight some kinds of social contingencies or power relations and suppress others.[29] For example, they may highlight the importance of human rights provisions while disregarding the organic provisions of the constitution or the uneven power relations in society. Or they may point to frequent elections without considering any other auxiliary precautions.[30]

Elites use the constitution to provide symbols and generate appearances in order to mask contrary practices.[31] Moreover, elites may make sham constitutional attempts to counteract the conditions that allow them to implement the constitution according to their varying wishes. These conditions are wide corruption, weak civil society,[32] and rigid verticality in the political system, popular ignorance of the constitution,[33] material inequality,[34] and so on.

Among these conditions, one of great importance is the creation of an authoritarian coalition.[35] This coalition is made up of the provision of ben-

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[26] Andreas Schedler, *The Logic of Electoral Authoritarianism*, in Electoral Authoritarianism The Dynamic of Unfree Competition 1, 16 (2006).

[27] Geuss, *supra* note 16, at 13-14.

[28] Warren, *supra* note 24, at 512.

[29] Geuss, *supra* note 16, at 14.

[30] Even though frequent and fixed elections were very important for the framers of the American Constitution, they also knew that "A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives [...]" The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

[31] Malcolm M. Feeley, *Book Review: Law, Legitimacy, and Symbols: an Expanded View of Law and Society in Transition*, *Michigan Law Review* (1979), at 899. Feeley, 1979, at 905.

[32] It is worth recalling that according to Madison restraints need constitutional laws and the vigilant spirit of the people. The Federalist No. 57, at 350 (James Madison) (Clinton Rossiter ed., 1967).

[33] Tushnet, *supra* note 11, at 49. Mark Tushnet says that if participants of a system cannot clearly identify who violates the constitution, then people cannot coordinate themselves against who does it.

[34] Gargarella, *supra* note 18, at 206.

[35] Tushnet, *supra* note 11, at 51.

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efits to other officials, the opposition, political parties, and social powers such as mass media. Therefore, the lack of virtue among men of self-government makes it possible to create an authoritarian coalition between several members of government and private fortunes. This authoritarian coalition renders the constitutional means ineffective.[36] To use the words of the Federalist Papers, there are no longer any personal motives to resist encroachments or violations of rights and liberties, there is no ambition to counteract ambition, no opposite or rival interest or mutual checks.[37]

Finally, ruling elites may want to misidentify and justify existing power relations. By the misidentification of the causal origins of social phenomena they are removed from the realm of possible political action. Examples include pointing to the constitution as the legal impediment of change, make a subsequent constitutional amendment and subverting the purpose in the laws or in practice. On the other hand, justification makes the prevailing distributions of power something right, proper, and good, such as appealing to the existence of more or less regular elections and formal representative procedures to justify decisions adopted behind the scenes and without public deliberation.[38]

In sum, amongst the ideological functions there is the generation of incessant aspirations in order to keep people in the game, whilst making any real change implausible.

### C. *Some Examples*

In other works, I have analyzed in greater depth the practice of authoritarian constitutionalism in Mexico and how constitutional reforms were some of its main tools. For this reason, I will restrict myself to provide only a couple of examples about authoritarian constitutionalism.

In 2013, after several failed attempts, there was an amendment to the Mexican Constitution regarding the oil and hydrocarbon investment regulation that allowed private investment. This amendment was negotiated by a small group of congressmen, government leaders, and party leaders outside congress in what has been called the Board of the Mexican Agreement (*Pacto por México*).

The *Pacto por México* was a political agenda set up by the three major political parties when Enrique Peña Nieto came to office. Moreover, they put in place a Board that negotiated and wrote up the law proposals. Of course, there

[36] Remember that for republican governments to function properly private fortunes should not be sources of danger, improbability of mercenary and perfidious combination of the several members of government, accountability, and sufficient virtue among men of self government. The Federalist No. 10, at 343 (James Madison) (Clinton Rossiter ed. 1961).

[37] The Federalist, *supra* note 31, at 319.

[38] Warren, *supra* note 24, at 513-514.

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was no transparency in their discussions; they just turned in the proposal to Congress to be approved.

In fact, according to article 135 of the constitution, this amendment required the approval of a super majority in both houses and a majority of state legislatures. Even though this procedure is theoretically rigid, the constitutional amendment was approved by the House of Representatives the next day after receiving it from the Senate, and the state legislatures passed it in just a few days. Moreover, according to the members of the leftist opposition, there were some irregularities in the committees of the House. And some state legislatures approved the amendment within hours after receiving it without any further proceedings.[39]

After state legislatures passed the amendment, Congress made a public declaration of its constitutionality. Some days later the President, congressman of PRI and the members of the right wing party defended this constitutional amendment in a big TV presentation arguing that it would promote the country´s development, and make electricity and combustibles cheaper. Moreover, ruling elites argued that the amendment was inevitable under current conditions and emphasized that the amendment respected all the rules established on the constitution, so it was constitutional.

In this case, a critical theory might point out at least three critical ideological flaws. First, it could call our attention to how ruling elites argued that a particular interest of some faction, the oil companies, is presented as the general interest of the population. Second, it could question how inevitable the amendment was. And finally, it would denounce how a representative and federal procedure works neither to refine nor to enlarge public views nor to discern public interest.[40] In other words, how a democratic procedure was used as a façade of democracy.

Another noteworthy example is the constitutional creation of the national anticorruption system through a reform published in the Official Journal of the Federation on May 27 2015, a few months after a special news report by *Aristegui Noticias* was broadcasted on November 2014 about President Enrique Peña Nieto's white house, built by *Grupo Higa*, one of the main contractors in his administration.[41] Even though the anticorruption reform was pushed forward by the academy and civil society, it is conspicuous that it was published a few months after the scandal that the aforementioned news report caused and that undermined the legitimacy of the government in turn. In fact, the Decree by which the anticorruption reform was published prescribed in its transitory articles the entry into force of some of its minor provisions on the day following its publication and the deferred entry into force of the more

[39] Tania Montalvo, *2013 deja 12 reformas, pero 11 están a medias*, Animal Político, Dec. 16, 2013, *https://www.animalpolitico.com/2013/12/2013-deja-12-reformas-que-se-aplicaran-hasta-2014/*.

[40] Madison, [1787] 1961, at 76-79.

[41] Aristegui Noticias, 2014.

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important dispositions, until the regulatory laws were issued on the following 180 days.

In this manner, the constitutional reform regarding the fight against corruption served as an immediate response to the legitimacy crisis that the government went through at the time as a consequence of the news report that was published. At the same time, the transitory articles allowed the government to defer its implementation, which is currently pending. What is more, to this very date the Anticorruption Prosecutor is yet to be appointed. From this episode we must not forget the suspicious firing of the journalist Carmen Aristegui in March 2015 after she made the news report public.

## II. Popular Constitutionalism as a Source of Inspiration for Constitutional Transformation

The constitutional transformation that we have voted for needs ideas that serve as a source of inspiration. For the constitutional transformation to take a democratic, participatory and egalitarian direction, we can draw from the popular constitutionalism trend.[42] In general terms, popular constitutionalism is particular because it broadly distributes (among the population) the responsibility over the constitution and it reinforces the people's role in its interpretation.[43] In Kramer's words: "The people's role is not limited to occasional acts of constitutional creation, but to an active and continuous control about the interpretation and implementation of the Constitution."[44] According to the Stanford professor, it is not enough that the people can create constitutional law through the constitutional reform process; it must also vindicate its role as a constitutional interpreter.[45]

Popular constitutionalism recognizes that the public debate over the constitution is carried out independently from legal interpretations or even against itself.[46] The constitution obliges all governmental powers, and none of them–the judiciary power included–has any special authority over it. If judges can interpret the constitution it is not because they have any specific attributes that make them more able for the task or because they have to do it exclusively, but because the constitution compels them as much as any other.

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[42] See Roberto Niembro & Ana Micaela Alterio, *Constitutional Culture and Democracy in Mexico. A critical view of the hundred-year-old Mexican Constitution*, in Constitutional Democracy in Crisis? (Mark Graber, Sanford Levinson & Mark Tushnet eds., 2018).

[43] Mark Tushnet, Taking the Constitution Away from the Courts 108 (Princeton University Press ed., 1999).

[44] Kramer, 2004, at 959, 973, 980.

[45] Kramer, 2005, at 1344.

[46] Tushnet, 2006, at 991.

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According to this outlook, the judiciary power is another agent of the people whose duty is to be an opinion leader, without imposing a unique vision.[47]

Populars don't intend to say that the people's interpretation is the only interpretation or even the best one,[48] but to remind us that people as much as judges can make mistakes, thus the inclination for one or the other depends on the outlook that is held on the function of judges and on the people's ability to interpret the constitution. On one hand, people can be considered to be purely emotional, ignorant and limited, in contrast to informed, attentive and intelligent elites, in which case judges will be the only constitutional interpreters,[49] in a way that the discussion ends when they state what Law is. On the contrary, the right of the judges to interpret the constitution can be recognized, without implying that the possibility to do it outside courthouses is also affected.[50]

Hence, on one side there are those committed to the government of the people who are pessimistic and afraid about what it could produce and therefore seek to establish extra guarantees, and on the other hand there are those that have greater faith in the citizen's ability to self-govern responsibly, without the risks that it entails being enough to control them by non-democratic means. The choice between one mean and the other–Kramer follows–is a decision of the people.

Another distinctive trait of this trend is the way to understand the relationship between politics and law, because the former is not mere will and decree, and the latter is not pure rationality. Both need each other reciprocally and are different phases of a longer and inclusive social process. The constitution is their confluence point and therefore it stands as a legal-political rule and not only as a legal one. Treating it according to this latter approach has mistakenly made judges and lawyers believe that its interpretation belongs to them exclusively[51]. Nevertheless, for Populars the constitution goes beyond legal boundaries[52]. Hence, they seek to end the distinction between a constitution in which principles reign and over which the tribunal rules and a political and non-principle oriented where mere majoritarian preferences rule. On the contrary, they seek a policy oriented by the Declaration of Independence's principles,[53] and a constitutional law that takes into account the legal and the political.[54]

However, the school of popular constitutionalism is not homogeneous. In fact, there are important differences among its followers, because for some of

47 Kramer, 2001, at 49, 53, 82.

48 Tushnet, *supra* note 43, at XI.

49 Kramer, *supra* note 44, at 242.

50 Tushnet, *supra* note 43, at 6-7.

51 Post, 2010, at 1319-1350.

52 Post & Siegel, 2007, at 29.

53 Tushnet, *supra* note 43, at 187.

54 Tushnet, *supra* note 46, at 992.

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them judges can be an instrument to channel popular expression. This last strand, represented by Post and Siegel and known as democratic constitutionalism, considers that the legitimacy of the constitution lies in its ability to be recognized by citizens as their constitution. This way to conceive constitutionalism is upheld by traditions of popular activism that authorize citizens to bring forward claims about the meaning of the constitution and to oppose the government when they consider that it doesn't respect them. In this process, courts play a legal-political role that is constitutionally attributed to them.[55]

In fact, according to Post and Siegel the Supreme Tribunal is a possible collaborator of democratic institutions in the construction of constitutional meaning, like a catalyst of popular constitutionalism. The relationship between constitutional judges and democracy does not amount to zero, because the former can fortify the latter.[56] Just as the people's constitutional compromises are inspired and upheld by the constitutional law created by courts, this right is inspired and upheld by those commitments.[57]

In any case, I am now interested in highlighting that citizens are authors of the mentioned right and that they should regard themselves as such. Democratic beliefs about the constitution authorize and empower citizens to debate about its sense, even when they differ from the legal interpretation. They aim at creating a series of attitudes and practices that trigger and sustain the involvement of people in constitutional matters. Thus, their theoretical proposal seeks to account for the different spaces, practices and means, through which the constitutional debate takes place, and which, according to them, are ignored or undervalued by traditional theory.[58]

In this way, for Post and Siegel, popular deliberation of constitutional matters, whether it ends up being reflected in institutional reforms or not, is a guideline for legal action. This does not mean that judges are limited to reflect social developments, but that they participate in a social debate about the meaning of the Constitution, which is a necessary condition for democracy.[59] From that point of view, the Tribunal is in a permanent dialogue with political culture, from which it cannot stray too far if it wishes to prevent a crisis.[60] In this respect collective deliberation is the last source of legitimacy of constitutional law, which requires institutions that allow the people to be involved in the creation of Law. Therefore, popular participation is the democratic basis of the constitution, and it must not be regarded with suspicion, on the contrary, it must be considered as a means to mediate the conflict.[61]

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55 Post & Siegel, *supra* note 52, at 373-433.

56 *Id.*, at 404.

57 Post & Siegel, 2004, at 1038.

58 Siegel, 2001-2002, at 320-326.

59 *Id*, at 315.

60 Post & Siegel, 2003, at 26.

61 Siegel, 2006, at 1339-1350.

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Hence, they consider that social movements shape the constitutional sense by generating new understandings that guide the official postures. Therefore, they propose to surpass traditional descriptions of how constitutional changes are made, for more complex one that takes account of the importance of said movements. In this way, they detract from court-centric descriptions of North American constitutional tradition, because, in their opinion, they leave aside the existing communication channels between legal reasoning and claims raised outside courthouses.[62]

Social movements are configured in part of what they call constitutional culture, which is an argumentative practice carried out both within and outside governmental institutions, beyond formal channels of creation of Law recognized by the legal system. Citizens as well as rulers can set different constitutional postures, which are in a dynamic balance and which are conditioned reciprocally. No authority, not even the High Tribunal, would have the authority to set the sense of the constitution without the possibility of it being challenged.[63]

In this manner, the constitution and with it the common community to which the debaters belong to, are expressed through argumentation, which is linked to social structures that mediate between the one that sends and the one that receives the message. That said, for these new constitutional conceptions to last, they need to persuade. Hence the recommendation to use constitutional language to issue their petitions and appeal to the traditions of the people they address.[64] Thus, they speak of two restrictions that distinguish these social movements as creative agents of constitutional law. The first one is the "condition of consent", that is, not to use coercion but persuasion. They must respect the authority even if in some occasions they perform irregular and disruptive, or even illegal procedural activities. Secondly, there is the "condition of public value", because to convince citizens that don't belong to their ranks, they must express their values as public values, just like the women's suffragist movement did.

In this way, they conceive social movements as mediators between the government and the citizenry, allowing citizens to express their concerns, criticisms or their total resistance to the governmental policy. Among the functions of social movements there is the one to educate and incite public opinion to modify the agenda of electoral policies, as well as to model the development of constitutional law. Even so they recognize that their informality, partiality and lack of public responsibility make them a bad candidate to speak for the people, apart from the fact that they only represent some people. Therefore, they can only speak for everyone if they succeed and their interpretation is accepted by the authorities that declare the content of constitutional law.[65]

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62 Siegel, *supra* note 58, at 300.

63 *Id.,* at 303-344.

64 Siegel, *supra* note 61, at 1350-1366.

65 Siegel, 2005, at 260-270.

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In sum, popular constitutionalism is based on the idea that all of us must participate in the configuration of constitutional law through our political actions,[66] as this gives citizens a central role in the interpretation of the constitution and demystifies the dominant visions on the impact of court's decisions; it shows the way in which society influences, rebuilds and sometimes undermines the value of legal decisions, it pushes forward a greater participation in political and economic structures,[67] and defends a compartmentalized look of the constitution's control, according to which no branch of State power has the right to claim supremacy over the others.[68]

## III. Popular Participation as an Indispensable Mechanism for Constitutional Transformation

It is too soon to know if the authoritarian coalition of the past has been completely relegated from public power. Now, irrespective of whether that happens or not, it is essential to defend popular participation as a necessary mechanism for constitutional transformation. In my opinion, the constitutional transformation in Mexico needs citizens that know, understand and interpret the constitution in a non-legalistic way that is to say, creating a constitutional culture[69]. It's true that to know the constitution a certain degree of stability in its text is required–which the Mexican Constitution lacks. However, advocating for stability cannot become an argument in favor of constitutional fundamentalism, that is, to consider that the constitution is a sacred instrument that cannot be reformed. One of the traits of a democratic constitution is the possibility of reforming it in accordance with the changes in interests or popular preferences that are configured through social deliberation.[70]

In this frame of mind, one of the institutions that is fundamental to achieve the knowledge and understanding of the constitution is popular participation in the constitutional amendment procedure prescribed in article 135 of the Mexican Constitution,[71] which must incorporate a sort of mechanism–initia-

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66 Tushnet, *supra* note 43, at 157.

67 Roberto Gargarella, *Una disputa imaginaria sobre el control judicial de las leyes. El constitucionalismo popular frente a la teoría de Nino, in* El canon neoconstitucional 403, 407-420 (M. C. Jaramillo ed., 2010).

68 Gargarella, 2007.

69 Niembro & Alterio, *supra* note 42, at 353.

70 Velasco, 2002, at 38.

71 Article 135 of the constitution currently in force establishes:

Art. 135.- The present constitution can be added to or be reformed. For the additions or reforms to become a part of it, it is required that the Federal Congress, by vote of two thirds of the individuals present, agrees upon the reforms or additions, and that these are approved by the majority of the legislatures of the States and Mexico City.

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tive, referendum, etc. —of deliberative participation[72] that involves citizens in a learning and understanding process of the constitution and that allows the interaction between informal public opinion and the institutions on a constitutional level.[73] One of these fundamental mechanisms to shape a constitutional culture is deliberative participation in constitutional amendment procedures,[74] such as open meetings, participatory forums, public hearings, popular initiatives, referenda[75] or deliberative polling.[76] Participatory constitutional amendments would allow the citizenry to learn and understand the contents of the constitution, and it is a way of interaction between public opinion and institutions.[77] Participatory constitutional amendments have similar qualities to the ones Tocqueville found in juries as a republican institution that "places the real direction of society in the hands of the governed or of a portion of them, and not in the hands of those governing."[78] For Tocqueville, a jury has the following qualities: it serves to give the mind of all citizens a part of the mind habits of the judge. It spreads in all classes respect for the thing judged and for the idea of right, it teaches men the practice of equity and not to retreat from a responsibility for their own actions, and makes citizens feel they have duties to fulfill toward society and that they belong in their government. It serves to form the judgment and to augment the natural enlightenment of the people. It is a free school, where each juror comes to be instructed about his rights and enters into daily communication.[79] And it's likely that when citizens make decisions in a jury they are attentive to proceedings and focused on deciding the cases correctly.[80] Likewise, participation in constitutional amendment processes makes citizens likely to be attentive to the procedure and focused on verifying that the amendment is correct.

Education through participation requires deliberation.[81] Deliberation can be achieved by different institutional mechanisms, such as two votes separated by a period of time for deliberation, or the requirement of electing a

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The Federal Congress or the Permanent Commission in its case will compute the votes of the Legislatures and the declaration of the approval of the additions or reforms.

72 Alterio, 2017, at 209-231.

73 Habermas, 2000, at 374-375; Pateman, 2003, at 46.

74 Siegel, "Constitutional Culture, Social Movement Conflict," 1339.

75 Gabriel Negretto, "Constitution-Making in Comparative Perspective," *Oxford Research Encyclopedia of Politics* (July 2017): at 17–19.

76 James Fishkin and Gombojav Zandanshatar, "Deliberative Polling for Constitutional Change in Mongolia: An Unprecedented Experiment", *Constitution Net*, September 20, 2017, *http://www.constitutionnet.org/news/deliberative-polling-constitutional-change-mongolia-unprecedented-experiment*.

77 See Habermas, *supra* note 73, at 374, 375; Pateman, *supra* note 73, at 46.

78 See Tocqueville, *Democracy in America*, at 445.

79 *Id.*, at 273-277.

80 Lahav, 2014, at 1036-1038.

81 Farrel, Harris & Suiter, 2017, at 131.

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new decision maker to approve the amendment.[82] The idea is to incorporate popular participation provided with information and time to deliberate.[83]

In comparative constitutional law there are very useful examples of how to design a participative and deliberative mechanism. For example, referendum design needs to avoid manipulation from the elites and an accurate drafting of the question. It is necessary to avoid high percentage for approval in order to encourage mobilization, and there should be enough time to deliberate.[84]

Now, beyond the modification of the constitutional amendment procedure, it is necessary to encourage popular interpretation of the constitution in the informal public sphere, in order to create a citizen constitutional culture. From this perspective, popular interpretation of the constitution is an open and incomplete process that requires active participation of the citizens. Conflict and disagreement about its content and function are foreseeable,[85] but conflict and disagreement generate deliberation, social mobilization, and the creation of civil associations.

Through deliberation, it is possible to learn and understand a constitution that contains ambiguous and vague terms, as well as the structures and processes it establishes. In fact, constitutional clauses do not have only one meaning and they relate in complex ways. In other words, learning and understanding the constitution is done by a reflective process of deliberation.[86] Through deliberation we acquire or modify our knowledge about constitutional dispositions, their origin, the possible interpretations of the text, how they are related, what purposes they can achieve, etc. Regarding the constitution, before the deliberative process, not even the best expert can know and understand the constitution or consider that his interpretation is the correct one, for through the collective process of deliberation the interpreter collects, classifies and elaborates the necessary information to interpret it, for example, the characteristics that arise in concrete cases or the facts that stem from the cultural evolution of society.[87]

This does not mean constitutional interpretation is limited to the constitutional text. The language of the constitution is a point of departure that in some degree constrains constitutional debates, but it is not an unchangeable text and its interpretation is disputable. Hence, popular interpretation of the constitution goes beyond the constitutional text. Otherwise, political struggles are formalized and reduced to the terms established by legal experts.[88] If this

82 Amar, 1995, at 111; Laporta, 2007, at 225; Contiades & Fotiadou, 2017, at 14.

83 Contiades & Fotiadou, *supra* note 82, at 19.

84 *Id.*, at 25-26.

85 Ferejohn, Rakove & Riley, 2011, at 14.

86 Habermas, *supra* note 73, at 399.

87 Manin, 1987, at 372 y 420.

88 Waldron, 1993, at 26 y 27.

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should be the case, power remains on the ones that participate in constitutional amendments procedures and in the judicial branch, as the only authority to establish and interpret the constitution.[89]

Moreover, through deliberation the people help establish what the constitution means, accomplishing a rational, and not only emotional, respect for the constitution. In democracy, the constitution motivates us because it is ours, it is interpreted through a rational debate,[90] which is rational because we give it meaning through the exchange of reasons about its content and interpretation.[91]

The function of social movements in the process of constitutional interpretation is to spontaneously present new interpretations of the constitution, either because they defend a different perspective of a stale problem, they problematize and make visible issues that were considered to be peaceful before, they provide contributions, commentaries and interpretations, or because they articulate interests and needs.[92] The existence or not of social mobilization over the interpretation of the constitution is largely conditioned by the role that citizens and law professionals consider that the people have over constitutional interpretation *vis-à-vis* the judges.[93] If the people consider that through social mobilization changes to the interpretation of the constitution can be achieved, and the institution remains porous to subjects, appraising orientations, contributions and programs, acceptance and adherence can be generated to it.[94]

The relationship between social mobilization and civil organizations is pretty obvious, because these are the basis for social mobilization and the ones that form opinion.[95] Besides, it is through civil associations that we learn about democracy[96], because we experience firsthand the restraint of power. The importance of civil associations for the conformation of a constitutional culture in the period after the establishment of the American Constitution has been highlighted by Mazzone, who argues that civil associations gave the people the experience to administer and self-govern.[97]

Furthermore, it is necessary to stress the importance of the complementarity between participatory constitutional amendments and participation in the public sphere at shaping public opinion. Shaping a constitutional culture requires both. On the one hand, even in countries like Mexico with a high

89 Méndez Hincapíe & Sanin Restrepo, 2012, at 110-111.

90 Balkin, 1999, at 179.

91 Cover, at 49.

92 Habermas, *supra* note 73, at 390-393, 435, 439 462.

93 Siegel, *supra* note 61, at 1342.

94 *Id.*, at 1342, 1343.

95 Habermas, *supra* note 73, at 378, 379, 436; Tuori, 2012, at 228.

96 Putnam, 2003, at 157, 158 y 164.

97 Mazzone, 2005, at 673-674.

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rate of constitutional amendments, habits of discussing and interpreting the constitution are acquired by daily participation. Only constant communication and participation can foster a constitutional culture. On the other hand, participation in the public sphere is not enough, if there are no institutional mechanisms that oblige public officials to dialogue with the people.[98]

## IV. Conclusions

Mexicans have reached the year 2018 with the will to change the situation of our country, because we want to leave behind the severe and complex humanitarian crisis we live in. In order to achieve that, we have democratically chosen a government that has promised to accomplish this. Nevertheless, our duty must not end there. After the election we must continue participating, discussing, demanding and criticizing, because the construction of an authentically democratic country is a job for each one of us that is affected by its decisions. Only through participation and continuous deliberation we will achieve a constitutional transformation.

Mexican scholars and constitutional lawyers have a special responsibility in this transformation, for we propose and discuss different conceptions of constitutional law. For a long time, Mexico has followed elitist constitutional theories that are focused on expert opinions and a minimalist democratic conception that forsakes *we the people*. It is time to look at different perspectives. Popular constitutionalism could be a useful theory that inspires us in our constitutional transformation because it is centered on popular participation and democratic equality. We cannot forget that without the involvement of the citizenry there is no chance of a constitutional transformation.

98 Post, 2016, at 34-36.

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# CHOOSING THE MOST FAVORABLE VENUE: FORUM SHOPPING, SHOPPING FORUMS, AND LEGAL PLURALISM IN ECUADOR

Oswaldo Ruiz-Chiriboga*

Abstract: *This article is based on an extensive literature review and the findings obtained after three trips to Ecuador, during which interviews and informal conversations were held with members of Indigenous communities, communal leaders, national judges, prosecutors, academics and practitioners. It uses the concepts of "forum shopping" and "shopping forums," showing how these phenomena are present in both types of legal systems in Ecuador: Indigenous legal systems and the ordinary legal system. The examples provided by respondents or studied within existing legal doctrine are shared first, followed by a discussion of the opportunities and challenges the choice of forums and disputants may experience in terms of access to justice. The article also examines the ne bis in idem principle, which has been implemented to control or reduce forum shopping and shopping forums. According to this principle an individual who has faced trial in one system should not be prosecuted again in the other system. If well controlled and carefully analysed on a case-by-case basis, forum shopping and shopping forum could be beneficial to individuals and communities, fostering access to justice and the protection of human rights, without disrespecting the autonomy of communities. Conversely, if poorly controlled or badly regulated, forum shopping and shopping forum could irreparably affect justice, harm individual rights or create impunity, leaving victims or the less powerful members of communities unprotected.*

Keywords: *Legal Pluralism, Forum Shopping, Indigenous Customary Law, Access to Justice*

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Resumen: *Este artículo se basa en una extensa revisión de literatura y los resultados obtenidos en tres investigaciones de campo a Ecuador, durante las cuales se realizaron entrevistas y conversaciones informales con miembros de comunidades indígenas, líderes comunitarios, jueces, fiscales, académicos y litigantes. Presenta los conceptos de forum shopping y shopping forum, mostrando cómo estos fenómenos están presentes en ambos tipos de sistemas legales que tiene Ecuador: los sistemas legales indígenas y el sistema legal ordinario. Primero se comparten los ejemplos proporcionados por los entrevistados o estudiados por la doctrina, seguidos de una discusión sobre las oportunidades y desafíos que la elección de foros y disputas puede tener en términos de acceso a la justicia. El artículo también examina una solución que se ha implementado para controlar o reducir el forum shopping y el shopping forum, a saber, el principio ne bis in idem, según el cual una persona que ha sido juzgada en un sistema no debe ser procesada nuevamente por el otro sistema. El artículo concluye que si se controla bien y se analiza cuidadosamente caso por caso, el forum shopping y el shopping forum podrían ser beneficiosos para los individuos y las comunidades, fomentando el acceso a la justicia y la protección de los derechos humanos, sin dejar de respetar la autonomía de las comunidades. Por el contrario, si están mal controlados o mal regulados, el forum shopping y el shopping forum podrían afectar irreparablemente a la justicia, afectar los derechos individuales o crear impunidad, dejando desprotegidas a las víctimas o a los miembros menos poderosos de las comunidades.*

Palabras clave: *Pluralismo Jurídico, Forum Shopping, Derecho Consuetudinario Indígena, Acceso a la Justicia.*

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## I. Introduction

### 1. *Indigenous Peoples in Ecuador and Legal Pluralism*

Ecuador is an ethnically rich and diverse country. There are four main ethnicities: Mestizos (Spanish descendants mixed with Indigenous populations), Afro-Ecuadorians (descendants of enslaved Africans brought by the Spanish during colonial times), Indigenous Peoples (descendants of the inhabitants of the territory before the Spanish colonization), and Montubios (rural peasants from the country's coastal zone).[1] The Indigenous population is not homogenous, and is divided into 14 different nations (called *nacionalidades* or nationalities).[2]

Legal pluralism has always existed in Ecuador.[3] National law and Indigenous legal systems co-existed even before independence from Spain. However, the manner in which plural legal orders have been accommodated has varied considerably across time. When the Spanish Crown colonized the *Tawantinsuyo* (the Inca Empire), it applied a segregationist model that kept Indigenous legal systems only for local, non-serious cases between *indios*, which were permitted as long as they were not contrary to the Spanish religion or laws and did not affect the colonial economic and political order—Indigenous legal systems were subordinate within legal pluralism.[4] In 1830 the

[1] Instituto Nacional de Estadísticas y Censos [National Institute of Statistics and Census], *Censo de Población y Vivienda 2001* [2001 Population and Housing Census], *available at http://www.inec.gob.ec/estadisticas/?option=com_content&view=article&id=232&Itemid=176*.

[2] Indigenous peoples classify themselves in nations (*nacionalidades*), peoples (*pueblos*) and communities (*comunidades*). There are 14 Indigenous nations, each one with its own culture, language, dress, organization, etc. The Kichwa nation, the largest in the country (47.5% of the Indigenous population), is divided into 14 *pueblos*. The Manta-Huancavilca-Puná nation is divided into three *pueblos*. These *pueblos* are formed by communities. A community is a grouping of families. The rest of the nations are only formed by communities (not *pueblos*). See, Ministerio Coordinador de Patrimonio [Ministry Coordinator of Heritage] and UNICEF (2008), *Nacionalidades y pueblos indígenas, y políticas interculturales en Ecuador* [Nationalities and Indigenous peoples, and intercultural policies in Ecuador], *available at http://www.unicef.org/ecuador/policy_rights_23964.htm*.

[3] Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 *Journal of Legal Pluralism and Unofficial Law* 37, 37 (2002) (This article defines legal pluralism as the simultaneous existence of two or more legal orders pertaining to more or less the same set of activities within "one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state"). See also: Franz von Benda-Beckmann and Keebet von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, 53-54 *Journal of Legal Pluralism and Unofficial Law* 1,14 (2006); Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 *Journal of Latin American Studies* 207 209 (2000).

[4] Marc Simon Thomas, The Challenge of Legal Pluralism. Local Dispute Settlement and the Indian-State Relationship in Ecuador 49-50 (Routledge 2017) (This text describes how that the Spanish colony was divided into two "republics": the Spanish Republic

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independent Republic of Ecuador replaced the segregationist model with an assimilationist one, with the purpose of creating one republic under one normative system, with one official language and one official religion.[5] Indigenous legal systems became illegal. Yet, Indigenous peoples continued to use and apply their laws. From the 1920s onward, an integrationist model came into play; certain collective rights and Indigenous cultural particularities were legally protected, but the monist legal order remained in force.

The exclusion of Indigenous peoples' legal systems is an example of the marginalization they have suffered over time. In response, Indigenous peoples organised a peasant resistance, which later became an Indigenous struggle that created one of the strongest social movements in the region.[6] Ecuador's biggest Indigenous organization was founded in 1986. The *Confederación de Nacionalidades Indígenas del Ecuador* (Confederation of Indigenous Nationalities of Ecuador, CONAIE) is a national organization which has contributed to a relative improvement in the social position of the Indigenous population.[7] In collaboration with its own political party, Pachakutik, CONAIE members mounted a series of actions, including protests, strikes and participation in elections.[8]

The so-called "Indigenous uprising" of 1990 and the Indigenous movement's continuous pressure during that decade, whether in the streets or through Pachakutik in politics,[9] contributed to the adoption of a new Consti-

(*República de españoles*) and the Indian Republic (*República de indios*), each republic had different laws. Rural Indigenous peoples could resort to Spanish law, but they could also use customary law to settle internal disputes).

[5] *Id* at 50-52 (stating that the division into two different "republics" was abolished and the process of building a single unified nation started).

[6] *Id* at 52-54.

[7] For a description of CONAIE's history and achievements, see Deborah J. Yashar, Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge (Cambridge University Press 2005); Leon Zamosc, *The Indian Movement in Ecuador: From Politics of Influence to Politics of Power*, in The Struggle for Indigenous Rights in Latin America (Nancy Grey Postero & Leon Zamosc eds., Sussex Academy Press 2004).

[8] Marc Becker, Indians and Leftist in the Making of Ecuador's Modern Indigenous Movements (Duke University Press 2008).

[9] Ileana Almeida et al. Indios. Una reflexión sobre el levantamiento indígena de 1990 [Indians. A Reflection on the Indigenous Uprising of 1990] (Abya-Yala 1991); Pablo Ospina, *Reflexiones sobre el transformismo: movilización indígena y régimen político en el Ecuador (1990-1998)* [Reflections on Transformism: Indigenous Mobilization and Political Regime in Ecuador (1990-1998)], in Los movimientos sociales en las democracias andinas [The Social Movements in the Andean Democracies] 125 (Julie Massal & Marcelo Bonilla eds., FLACSO 2000); Fernando Guerrero & Pablo Ospina, El poder de la comunidad. Ajuste estructural y movimiento indígena en los Andes ecuatorianos [The Community's Power. Structural Adjustment and Indigenous Movement in the Ecuadorian Andes] (CLACSO 2003); Pablo Dávalos, *Movimiento indígena, democracia, Estado y plurinacionalidad en Ecuador* [The Indigenous Movement, Democracy, State and Plurinationality in Ecuador], 10(1) *Revista Venezolana de Economía y*

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tution in 1998.[10] Among the changes brought by the 1998 Constitution[11] was the recognition of Indigenous legal systems as a way to solve internal conflicts. This was the first time in Ecuadorian history that a legal system other than the State-controlled one was formally accepted as valid within the territory. The monistic legal culture began to yield to a pluralistic legal culture.[12]

Customary Indigenous law is an integral part of the culture and a key element of ethnic identity, to the point that some authors affirm that an Indigenous community without its legal system has lost an important part of its identity.[13] Indigenous legal systems embrace a variety of norms, procedures and authorities that regulate the social life of their communities, and that permit them to resolve their conflicts in accordance with their own worldviews, values, necessities and interests.[14]

The 1998 Constitution did not last long. It was seen as neoliberal and tailor-made to represent the interests of the county's elite. Rafael Correa Delgado started his presidential campaign in 2006 by advocating for a new, more democratic and socialist constitution.[15] Correa won the elections and imme-

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*Ciencias Sociales* 175 (2004); Ana María Larrea Maldonado, *El movimiento indígena ecuatoriano: participación y resistencia* [The Ecuadorian Indigenous Movement: Participation and Resistance], 13 OSAL 67 (2004); José Sánchez Parga, El movimiento indígena ecuatoriano. La larga ruta de la comunidad al partido [The Ecuadorian Indigenous Movement. The Long Route from the Community to the Party] (Centro Andino de Acción Popular 2010).

[10] Office of the High Commissioner for Human Rights (OHCHR), Viviendo la justicia. Pluralismo jurídico y justicia indígena en el Ecuador [Living Justice. Legal Pluralism and Indigenous Justice in Ecuador] (OHCHR 2012).

[11] The most important changes brought by the 1998 Constitution were: (a) the acknowledgement of diversity in unity, which intended to consolidate and reinforce the unity of the Ecuadorian nation, while recognizing at the same time the diversity of its regions, peoples, ethnicities and cultures; (b) the emergence of a new State which should be multi-cultural and multi-ethnic; (c) the official recognition of Indigenous languages used in Indigenous territories; and (d) a number of collective rights for Indigenous peoples concerning identity, social organization, consultation, levels of authority, education, etc. See, Atik Kurikamak Yupanki, *Justicia indígena en el Ecuador: visión de un saraguro* [Indigenous Justice in Ecuador: A Vision of a Saraguro], in Justicia intercultural en los países andinos: contribuciones para su estudio [Intercultural Justice in the Andean Countries: Contributions for Its Study] 86 (Aníbal Gálvez Rivas & Cecilia Serpa Arana eds., Red Andina de Justicia de Paz y Comunitaria 2013).

[12] Solveig Hueber, *Cambios en la administración de justicia indígena en Ecuador después de la Reforma Constitucional de 1998* [Changes in the Administration of Indigenous Justice in Ecuador after the Constitutional Reform of 1998], 83 *Ecuador Debate* 109 (2011).

[13] Rodolfo Stavenhagen, Derecho indígena y derechos humanos en América Latina [Indigenous Law and Human Rights in Latin America] (Instituto Interamericano de Derechos Humanos 1988); María Teresa Sierra, *Autonomía y pluralismo jurídico: el debate mexicano* [Autonomy and Legal Pluralism: The Mexican Debate", LVIII *América Indígena* 21 (1998).

[14] Raquel Yrigoyen, *El debate sobre el reconocimiento constitucional del derecho indígena en Guatemala* [The Debate on the Constitutional Recognition of Indigenous Law in Guatemala], LVIII *América Indígena* 81 (1998).

[15] Alberto Acosta et al. Entre el quiebre y la realidad. Constitución de 2008 [Between Rupture and Reality. Constitution of 2008] (Abya-Yala 2008).

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diately called for a referendum, asking Ecuadorians if they agreed to change the Constitution. The electorate answered yes and by the end of October 2008, Ecuador had a new Constitution.[16]

The Constitution of 2008[17] declares Ecuador an "intercultural and plurinational state".[18] The Constitution maintains, strengthens and incorporates new and special rights for Indigenous peoples and Afro-descendants;[19] and awards Indigenous peoples, Afro-Ecuadorians and Montubios the right to establish territorial constituencies to preserve their cultures.[20] The most important provisions for the purpose of this article are the Articles 57(10)[21] and 171 of the Constitution,[22] which provide legal plurality, recognizing judicial and legislative functions to the authorities of Indigenous peoples, based on ancestral traditions and customary law within their territory.

With the recognition of the Indigenous authorities' powers of adjudication, the Ecuadorian state advanced towards "formal legal pluralism,"[23] which moved from the sphere of a struggle by members of excluded cultures to become a state policy.[24] The constitutional recognition of Indigenous legal

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[16] For an analysis of the 2008 constitutional change, see: Rafael Quintero López, La Constitución del 2008. Un análisis político [The Constitution of 2008. A Political Analysis] (Abya Yala 2008); Adrian López & Paula Cubillos Celis, *Análisis del referéndum constitucional 2008 en Ecuador* [Analysis of the 2008 Constitutional Referendum in Ecuador], 33 *Íconos* 13 (2009).

[17] See, Constitution (Ecuador), R.O. No. 449, 20 October 2008.

[18] *Id* Art. 1.

[19] *Id* Art. 57.

[20] *Id* Art. 60.

[21] *Id*, Art. 57(10), which reads: "The State recognizes and guarantees to the Indigenous communes, communities, peoples and nationalities, in accordance with the Constitution and the treaties, covenants, declarations and other international instruments on human rights, the following collective rights: [...] (10) To create, develop, implement and practice their own customary law, which may not violate constitutional rights, in particular women, children and adolescents' rights".

[22] *Id* Art. 171, which reads: "The authorities of Indigenous communities and nationalities exercise judicial functions, based on their ancestral traditions and their own systems of law, within their territory, with a guarantee of participation of and decision-making by women. The authorities shall apply rules and procedures for resolving internal conflicts, and not contrary to the Constitution and human rights recognized in international instruments. The State shall ensure that Indigenous jurisdiction decisions are respected by public institutions and authorities. Such decisions will be subject to constitutional review. The law shall establish mechanisms of coordination and cooperation between Indigenous jurisdiction and ordinary jurisdiction."

[23] André Hoekema, *Hacia un pluralismo jurídico formal de tipo igualitario* [Towards a Formal Legal Pluralism of an Egalitarian Nature], LVIII *América Indígena* 263 (1998).

[24] Catherine Walsh, *Interculturalidad, reformas constitucionales y pluralismo jurídico* [Interculturality, Constitutional Reforms and Legal Pluralism], in Justicia indígena. Aportes para un debate [Indigenous Justice. Contributions for a Debate] 23 (Judith Salgado ed., Universidad Andina Simón Bolívar 2002).

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systems has had multiple impacts. First, it gives Indigenous laws the same value and binding power as national laws.[25] Second, public institutions, particularly judges and courts, must modify their legally monistic practices,[26] by interpreting and applying the Constitution and secondary laws in an intercultural way.[27] Third, the Parliament lost its legislative monopoly. Today, Indigenous authorities share the power to create, modify and abolish the laws that regulate their internal affairs.[28] Finally, Indigenous legal systems were put on equal footing with national law, which means *inter alia* that Indigenous authorities have the same legal and judicial powers as national authorities.[29]

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[25] Luis Fernando Ávila Linzán, *Los caminos de la justicia intercultural* [The Paths of Intercultural Justice], in Derechos ancestrales: Justicia en contextos plurinacionales [Ancestral Rights: Justice in Plurinational Contexts] 145, 178 (Carlos Espinosa & Danilo Caicedo eds., Ministerio de Justicia y Derechos Humanos 2009).

[26] Gina Chávez Vallejo, *El derecho propio: ¡Destapando la caja de Pandora!* [Own Law: Uncovering the Pandora's Box!], in Desafíos constitucionales: La Constitución ecuatoriana del 2008 en perspectiva [Constitutional Challenges: The Ecuadorian Constitution of 2008 in Perspective] 67, 82 (Ramiro Ávila Santamaría, Agustín Grijalva Jiménez & Rubén Martínez Dalmau eds., Ministerio de Justicia y Derechos Humanos 2008).

[27] Agustín Grijalva, *El Estado plurinacional e intercultural en la Constitución ecuatoriana de 2008* [The Pluri-national and Intercultural State in the 2008 Ecuadorian Constitution], in Derechos ancestrales: Justicia en contextos plurinacionales [Ancestral Rights: Justice in Plurinational Contexts] 389, 394 (Carlos Espinosa & Danilo Caicedo eds., Ministerio de Justicia y Derechos Humanos 2009). See also, *Código Orgánico de la Función Judicial* (Organic Code of the Judiciary), R.O. Sup. No. 544, 9 March 2009, Article 344, which requires ordinary judges, prosecutors, public defenders, the police, and other public servants to apply the following principles: (1) *diversity*: the law, customs and traditional practices of Indigenous communities and peoples must be taken into account, with the aim of guaranteeing the maximum recognition and the full realisation of cultural diversity; (2) *equality*: to take measures to understand the rules, procedures and legal consequences of the proceedings in which Indigenous peoples are involved; (3) *ne bis in idem*: the decisions of Indigenous authorities shall not be assessed or reviewed by ordinary judges or administrative authorities, without prejudice to constitutional review; (4) *pro Indigenous jurisdiction*: in case of doubt between ordinary jurisdiction and Indigenous jurisdiction, the latter shall be used; and, (5) *intercultural interpretation*: when Indigenous individuals or groups appear before ordinary judges or administrative authorities, the latter shall take into consideration relevant Indigenous customary law when interpreting and applying the Constitution and international human rights instruments

[28] Oswaldo Ruiz-Chiriboga, *La justicia indígena en el Ecuador: pautas para una compatibilización con el derecho estatal* [Indigenous Justice in Ecuador: Guidelines for Compatibility with State Law], in Aportes andinos sobre derechos humanos. Investigaciones monográficas [Andean Contributions on Human Rights. Monographic Researches] 53, 69 (César Gamboa et al, Universidad Andina Simón Bolívar 2005).

[29] Agustín Grijalva & José Luis Exeni Rodríguez, *Coordinación entre justicIas, ese desafío* [Coordination between Justices, that Challenge] in Justicia indígena, plurinacionalidad e interculturalidad en Ecuador [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 581, 592 (Boaventura de Sousa Santos & Agustín Grijalva eds., Abya Yala 2012). See also, Esther Sánchez Botero & Isabel C. Jaramillo, *La jurisdicción especial indígena* [The Special Indigenous Jurisdiction], in Derechos ancestrales: Justicia en contextos plurinacionales

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That said, the actions of Indigenous authorities must be compatible with the Constitution and with international human rights law. This is clearly stated in the same constitutional provisions that grant legislative and judicial powers to Indigenous groups. Article 57(10) state "customary law [...] may not violate constitutional rights, in particular women, children and adolescents' rights". Article 171 stipulates that Indigenous authorities may not act contrary to the Constitution or human rights as recognized in international instruments.

Similarly, ILO Convention 169 (1989) and the UN Declaration on the Rights of the Indigenous Peoples (2007) seem to suggest that the international community is more lenient and willing to accept and enforce Indigenous legal systems. Nevertheless, these international instruments demand that Indigenous systems respect recognised human rights standards. The scope of human rights and states' responsibilities to their citizens, however, is not always completely clear. Sometimes these standards cannot be interpreted and applied in the same way they are interpreted or applied in regular proceedings in western states.[30]

### 2. *Cooperation and Coordination Between Indigenous Legal Systems and Ecuador's Ordinary Legal System*

In Ecuador there is no single Indigenous legal system, rather there are many. As was noted by various respondents, there could be as many legal systems as Indigenous communities. I was able to see by myself that there are variations in the proceedings even between two communities that belong to the same group, speak the same language, live a few kilometres apart, and have continuous contact with each other.[31]

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[Ancestral Rights: Justice in Plurinational Contexts] 125, 160-171 (Carlos Espinosa & Danilo Caicedo eds., Ministerio de Justicia y Derechos Humanos 2009). This text explains that, since ordinary and Indigenous authorities are on equal footing, they both have the *notio*, *iudicium*, and *imperium* powers. The *notio* is defined as the power to hear matters that are under the jurisdiction of each judge, according to the national or Indigenous laws. It includes the power to summon the parties, collect evidence, make notifications, etc. The *iudicium* is the ability to resolve the matter under consideration. The *imperium* is the power to enforce the law and to implement judicial decisions. It presupposes the power to enact penalties and sanctions for breaches of the law).

30 Rosembert Ariza Santamaría, Coordinación entre sistemas jurídicos y administración de justicia indígena en Colombia [Coordination between Legal Systems and Indigenous Justice Administration in Colombia] (Inter-American Institute of Human Rights 2010); Oswaldo Ruiz-Chiriboga, *You Have no Right to Remain Silent: Self-Incrimination in Ecuador's Indigenous Legal Systems*, 65 *The American Journal of Comparative Law* 659 (2017).

31 Boaventura de Sousa Santos, *Cuando los excluidos tienen Derecho: justicia indígena, plurinacionalidad e interculturalidad* [When the Excluded Have Law: Indigenous Justice, Plurinationality and Interculturality], in Justicia indígena, plurinacionalidad e interculturalidad en Ecuador [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 13 (Boaventura de Sousa

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Being that there are multiple forums in which legal battles can play out it is not surprising to see clashes of jurisdictions between Indigenous legal systems (called *justicia indígena*, which translates as "Indigenous justice") and the state's justice system (called *justicia ordinaria*, "ordinary justice") or among different Indigenous legal systems. When there is a conflict between two or more Indigenous forums, a solution is sought through negotiation, and the results vary. Indigenous adjudicators[32] from different communities may decide that one of them should hear the case, that the adjudicators of all involved communities should decide the case together, or that the case should be referred to the authorities of the *Pueblo*, the authorities of the Indigenous nation, or even to the ordinary justice system.[33]

Conflicts between Indigenous justice and ordinary justice are another matter. Negotiation plays no role and, according to the Constitution, the Parlia-

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Santos & Agustín Grijalva eds., Abya Yala 2012) (explaining the main differences between Indigenous legal systems); Raúl Llasag Fernández, *Avances, límites y retos de la administración de justicia indígena en el Ecuador año 2010: El Caso La Cocha* [Advances, Limits and Challenges of the Administration of Indigenous Justice in Ecuador 2010: The Case La Cocha] in Develando el desencanto. Informe sobre derechos humanos Ecuador 2010 [Unveiling the Disenchantment. Human Rights Report Ecuador 2010] 94 (Universidad Andina Simón Bolívar 2010) (arguing that different groups create different norms in different ways).

[32] The broad term "adjudicator" is used in Ecuador to cover the different types of investigative and deciding authorities that Indigenous peoples have. For instance, if there is a conflict within the family, the deciding authorities will be the parents, grandparents or godparents. If the conflict is not solved or if it affects multiple families, then the *Cabildo* (a council of leaders) is involved. Serious cases or conflicts not solved by lower authorities are referred to the *Asamblea* (Assembly), which is the gathering of every single one of the community's members, children included. The *Asamblea* is the highest authority in which everyone is able to participate, whether supporting one of the parties, confirming or challenging the versions of the witnesses, questioning the participants, giving input to solve the conflict, or determining the proper punishments. For a description of Indigenous proceedings in Ecuador's highlands, see: Jaime Vintimilla, Derecho indígena, conflicto y justicia comunitaria en comunidades kichwas del Ecuador [Indigenous Law, Conflict and Community Justice in Kichwa Communities of Ecuador] (Instituto de Defensa Legal 2007); Fernando García, *Experiencias de dos comunidades de las provincias de Chimborazo y Tungurahua* [Experiences of Two Communities in the Provinces of Chimborazo and Tungurahua], in Normas, procedimientos y sanciones de la justicia indígena en Colombia y Ecuador [Rules, Procedures and Sanctions of Indigenous Justice in Colombia and Ecuador] 59 (Eddie Cóndor ed., Comisión Andina de Juristas 2012); Fernando García, *No se aloquen, no vayan a carrera de caballo, vayan a carrera de burro: comunidades Chimborazo y Chibuleo* [Do Not Go Crazy, Do Not Go at Horse Step, Go at Donkey Step: Chimborazo and Chibuleo Communities], in Justicia indígena, plurinacionalidad e interculturalidad en Ecuador [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 501 (Boaventura de Sousa Santos & Agustín Grijalva eds., Abya Yala 2012); Judith Salgado (ed.), Justicia indígena. Aportes para un debate (Universidad Andina Simón Bolívar 2002).

[33] María Mercedes Lema, Acceso a la justicia y derechos humanos en Ecuador [Access to Justice and Human Rights in Ecuador] (Instituto Interamericano de Derechos Humanos 2009). This text explains how certain communities agree among themselves on how they are going to resolve a conflict when the parties in the case belong to different communities.

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ment should have passed a law on the cooperation and coordination among both types of justice systems. No such law has been adopted yet, despite the different drafts that have been submitted over the past decade.[34]

This article will present the different scenarios Ecuador's legal pluralism offers to citizens and forums towards the settlement of disputes. It is the result of documentary research and fieldwork conducted in the country in 2013, 2014 and 2015 by means of interviews, informal conversations, and archival research in seven cities (Quito, Guayaquil, Cuenca, Saraguro, Guaranda, Loja and Riobamba) and four Indigenous communities: Saraguro and Tucarta (Province of Azuay), San Lucas (Province of Loja), and Pambabuela (Province of Bolívar). All of these communities belong to the Kichwa Nation.[35] The interviews were with judges, prosecutors, public servants, academics, activists and Indigenous leaders. In total, 33 interviews were conducted.[36]

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[34] On the different drafts submitted to the Parliament see: Salgado, *supra* n. 32; Simon Thomas, *supra* n. 4; Lieselotte Viaene & Guillermo Fernández-Maldonado, *La brecha entre el compromiso y el cumplimiento con los derechos de los pueblos indígenas. Reflexiones sobre los avances y retrocesos en materia de justicia indígena en Ecuador* [The Gap between Commitment and Compliance with the Rights of Indigenous Peoples. Reflections on the Advances and Setbacks in the Area of Indigenous Justice in Ecuador], in DESAFÍOS DEL PLURALISMO INTEGRATIVO Y JURÍDICO [Challenges of Integrative and Legal Pluralism] 63 (Anna Margherita Russo, Oswaldo Ruiz-Chiriboga & Guerino D'Ignazio eds. Special Edition 9 (1) *INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS JOURNAL* 2016).

[35] The communities were selected based on the following criteria: (a) high level of organization, (b) frequent administration of justice or close contact with state officials (e.g. judges, prosecutors, police officers); (c) location in provinces with high percentages of Indigenous population; and (d) openness to receive outsiders and give interviews. I was not allowed by the Indigenous leaders to do direct observation, and therefore I did not witness any interrogation, trial or sentencing hearings.

[36] The respondents were selected as follows: (a) academics and activists were chosen beforehand, based on the researcher's perception of their knowledge of relevant topics and because of their published papers or public declarations; (b) Indigenous leaders were selected in the field and after they were introduced to the researcher by a third person; and (c) public servants were selected because of their functions and contact with Indigenous communities, either because they directly serve them (e.g. police officers), have jurisdiction over the same territory as the interviewed Indigenous adjudicators (e.g. judges and prosecutors), or have competence over judicial affairs in the selected provinces (e.g. public servants working for the Judicial Council). All were semi-structured interviews. At the beginning of each interview, all the participants were instructed about the objective and methodology of the study and they received information on the researcher. The respondents were also informed of their right to stop collaboration at any point. The researcher requested their permission to audiotape the interview. Based on this information, all participants gave their informed consent and agreed to the interview and its recording. At the end of each interview, participants were offered the contact details of the researcher in case they needed additional information. The researcher also offered anonymity to the respondents, but the majority of the respondents wanted the researcher to name them or gave their authorization to do so. Only in a few cases interviewees specifically chose anonymity, and therefore remain anonymous. Additionally, informal conversations (unrecorded) were held with a wide variety of individuals in the different cities and communities the researcher

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The remainder of this article will be structured as follows: section II presents the concepts of "forum shopping" and "shopping forums", showing how these phenomena are present in Ecuador. Examples given by the respondents or through existing legal doctrine are given, and the opportunities and challenges regarding the choice of forums and disputants may have in terms of access to justice are discussed. Section III shows that Ecuador's Constitution provides that the administration of Indigenous justice is a collective right Indigenous nations have, but this study maintains that such a collective right does not imply absolute discretion by Indigenous adjudicators. Their discretion is limited by the members' individual rights to access to justice. Exercising discretion means having a choice, and therefore every time the adjudicators decide to accept a complaint they are "shopping" the dispute. Section IV examines a strategy that has been established to control or reduce forum shopping and shopping forums, namely through the *ne bis in idem* principle, according to which an individual who has faced trial in one system should not be tried again under the other system. Finally, Section V includes concluding remarks, stating that if well controlled and carefully analysed on a case-by-case basis, forum shopping and shopping forums could, in fact, be beneficial to individuals and communities, fostering access to justice and the protection of human rights, without disrespecting the communities' autonomy. Conversely, if poorly controlled or badly regulated, forum shopping and shopping forums could irreparably affect justice, harm individual rights or create impunity, leaving victims or less powerful members of the communities unprotected.

## II. Choosing the Forum and Being Chosen by the Forum

Forum shopping has been defined as "the act of seeking the most advantageous venue in which to try a case".[37] It occurs when disputants "have a choice between different institutions and they base their choice on what they hope the outcome of the dispute will be, however vague or ill-founded their expectations may be".[38] Traditionally, forum shopping was understood to take place horizontally or vertically.[39] A party forum shops *horizontally* when they choose the best venue for their interests from among multiple same-level courts (e.g. choosing among courts belonging to the same federal state or among first instance criminal courts of the same locality). Forum shopping

visited. The researcher talked with members of Indigenous communities, police officers, public registers, judicial assistants, lawyers, court clerks, and other public servants.

[37] Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 *Nebraska Law Review* 79 (1999).

[38] Keebet von Benda Beckmann, *Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra*, 19 *Journal of Legal Pluralism* 117 (1981).

[39] Garvey Algero, *supra* n. 37 at 80.

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can also take place *vertically* when a party is trying to move between courts of different levels (e.g. moving from a state court to a federal court). Modern conceptions of forum shopping not only include the strategic choice of adjudicatory forum but also attempts to litigate identical or related claims in multiple forums at the same time (*simultaneous* forum shopping) or presenting successive related petitions (*sequential* forum shopping).[40]

The idea behind all these types of forum shopping is the same: the party that shops is seeking an advantage or wants to begin the proceedings with the odds in their favor. The choice of forum would then be a "rational choice" where disputants act strategically in order to maximize their interests and benefits.[41] However, empirical research in Ecuador shows that forum shopping is not always a strategic and rational action. The decision-making process is far more complex, involving reasons related to power and politics, or lack of access to formal justice due to factors including time, money or language. As Simon Thomas put it, "Legal anthropological research shows that forum-shopping practices are embedded in social, cultural, and political contexts and therefore encompass a broader scope than legal scholars' rational choice assumptions".[42]

The options for choosing the venues in which to allocate a case can vary for number of reasons.[43] Individuals may have a limited knowledge of national law, and therefore it is not really an option for them. Similarly, individuals may understand national law very well, but it is not accessible, and therefore they are forced to resort to Indigenous law. Individuals with good knowledge of national law and who have the means (economic, linguistic, cultural, etc) to access it have more options to choose from.[44]

The parties are not the only ones that shop forums, as the opposite could also occur: forums search for disputes to advance their own interests. This is known as shopping forums. In studying a legally pluralistic society, Von Benda-Beckmann noted:

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[40] Laurence R. Helfer, *Forum Shopping for Human Rights*, 148(2) *University of Pennsylvania Law Review* 285, 290 (1999).

[41] Luis Fernando Ávila Linzán, *Disputas de poder y justicia: San Lucas (Saraguro)* [Disputes of Power and Justice: San Lucas (Saraguro)], in Justicia indígena, plurinacionalidad e interculturalidad en Ecuador [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 373, 412-413 (Boaventura de Sousa Santos & Agustín Grijalva eds., Abya Yala 2012).

[42] Marc Simon Thomas, *Forum Shopping: The Daily Practice of Legal Pluralism in Ecuador*, in Andeans and Their Use of Cultural Resources: Space, Gender, Rights & Identity 85, 94 (Arij Ouweneel ed., CEDLA 2013).

[43] This is why some authors consider forum shopping not to be a useful concept to describe Ecuador's legal reality (Simon Thomas, *supra* n. 42).

[44] On the topic of knowledge of national law see, Susan Berk-Seligson, *Judicial Systems in Contact: Access to Justice and the Right to Interpreting/Translating Services among the Quichua of Ecuador*, 10 International Journal of Research and Practice in Interpreting 9, 12 (2008); García, *Experiences of Two Communities*, *supra* n. 32 at 86-96; Simon Thomas, *supra* n. 42 at 96.

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Not only do parties shop, but the forums involved use disputes for their own, mainly local political ends. These institutions and their individual functionaries usually have interests different from those of the parties, and they use the processing of disputes to pursue these interests. So besides forum-shopping disputants, there are also 'shopping forums' engaged in trying to acquire and manipulate disputes from which they expect to gain political advantage, or to fend off disputes which they fear will threaten their interests. They shop for disputes as disputants shop for forums. Indeed, manipulating with disputes seems to be a favorite pastime of many functionaries.[45]

In talking about Ecuador, Ávila Linzán shows that in certain communities their members access either ordinary or Indigenous courts. Generally, when ordinary justice delays a ruling on a case or does not rule in the benefit of a community member, community members may resort to Indigenous justice (sequential forum shopping).[46] Indigenous adjudicators can also be political, administrative or religious leaders in their communities, and can seek to legitimize their management policy by incentivising forum shopping, demonstrating how they can solve a conflict that took too much time or was not solved properly, in their view, in the ordinary justice system.

Grijalva claims Indigenous justice and ordinary justice as appear to operate in a subsidiary and parallel way (although not necessarily in an equal and just level playing field). When one jurisdiction fails, it seems to activate the other one. Therefore, in his opinion, it is not unusual that those who are not satisfied by the decisions of Indigenous justice to attempt to activate ordinary justice, and at the same time, those who reject the decisions of ordinary courts can trigger the involvement of Indigenous courts.[47]

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45 Von Benda-Beckmann, *supra* n. 38 at 117.

46 Ávila Linzán, *supra* n. 41 at 412-413.

47 Agustín Grijalva, "Conclusiones de todos los estudios: experiencias diversas y convergentes de la justicia indígena en el Ecuador", in JUSTICIA INDÍGENA, PLURINACIONALIDAD E INTERCULTURALIDAD EN ECUADOR [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 551, 554 & 567 (Boaventura de Sousa Santos & Agustín Grijalva eds., Abya Yala 2012). De Sousa Santos (*supra* n. 31 at 49) argues that citizens living in a legally pluralistic society may decide to use one legal system in certain "dimensions" of their lives (marriage, inheritance, divorce, domestic violence, custody over children), and another legal system in other "dimensions". "The specific practices of coexistence or articulation between the two [legal systems] carried out by the population are numerous and reveal social and cultural creativity well beyond what can be legislated" (author's translation). Forum shopping would thus seem to be available not only for Indigenous individuals, but for non-Indigenous individuals as well. García and Beltrán report cases of Indigenous adjudicators deciding on disputes where a non-Indigenous person was a party (García, *Experiences of Two Communities*, *supra* n. 32 at 73-74; Bolívar Beltrán, *El proceso penal indígena: desde el delito hasta la sanción* [The Indigenous Criminal Process: From the Crime to the Punishment], 12 *ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO,* 807, 810 (2006). The same was reported by "Efraín", an Indigenous leader (interview, 13 March 2014). Nevertheless, since Ecuador has not passed a law on the coordination and cooperation between the Indigenous and the ordinary justice, the jurisdiction *ratione*

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In criminal law cases, the choice of forums could stem from an effort to try to avoid jail time for serious crimes. Indigenous legal systems in Ecuador do not use prison as punishment, because it is considered useless. The aims Indigenous justice are said to have include truth-finding, redressing victims and avoiding retaliation from the victims' families, recovering the harmony within the community, and "curing" the accused.[48] To accomplish these goals, those who are found guilty must apologize in public, compensate the harm, and depending on the crime, receive a cleansing bath with ice-cold water, be whipped or receive other types of corporal punishment, do communal work, or be expelled from the community temporarily or even definitively if the adjudicators believe that the offender cannot be rehabilitated. The choices available would then be, on the one hand, to stand trial in an Indigenous forum and, if found guilty, being convicted to sanctions not involving jail time, or, on the other hand, to stand trial in an ordinary court and, if found guilty, face imprisonment.

Some individuals are well aware of the choice between Indigenous sanctions and ordinary jail-time punishment, and when the moment comes they seek to maximise their benefit. For example, on June 2012, Nelson assaulted a 13 year old girl in her own house. Nelson was found guilty of the crime of rape by an ordinary criminal court and convicted to 16 years of criminal imprisonment. Once Nelson learned the punishment, he self-identified as an Indigenous man and managed to convince Indigenous leaders of a Cayambi Indigenous community to request the ordinary court to refer Nelson's case to the Cayambi Indigenous adjudicators. The ordinary court accepted the request and the case was sent to the Indigenous justice system. Nelson was found guilty again by the Indigenous adjudicators, but this time he got a different punishment. Nelson received in total six lashes. He had to take a cleansing bath with stinging nettles, aromatic smoke and rose petals. He had to pay US$10,000 to the victim's family, turn over US$8,000 for the purchase of a property for the victim, and US$2,000 for the victim's psychological treatment. Finally, Nelson was sentenced to six years of communal work.[49]

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*personae* of Indigenous adjudicators is still under debate. I express my position on this issue in Oswaldo Ruiz-Chiriboga, *Finding the Right Judge: Challenges of Jurisdiction between Indigenous and Ordinary Adjudicators in Ecuador*, 49 (1) The Journal of Legal Pluralism and Unofficial Law 3 (2016).

[48] Fernando García, El derecho a ser: Diversidad, identidad y cambio [The Right to Be: Diversity, Identity and Change] (FLACSO 2004); Carlos Poveda Moreno, *Jurisdicción indígena. Reconocimiento de derechos, exigibilidad de obligaciones* [Indigenous Jurisdiction. Recognition of Rights, Enforceability of Obligations], 8 *Foro* 179 (2007); Diego Zambrano Álvarez, *Justicias ancestrales: analogías y disanalogías entre sistemas jurídicos concurrentes* [Ancestral Justices: Analogies and Dysanalogies between Concurrent Legal Systems], in Derechos ancestrales: justicia en contextos plurinacionales [Ancestral Rights: Justice in Plurinational Contexts] 219 (Carlos Espinosa & Danilo Caicedo eds., Ministerio de Justicia y Derechos Humanos 2009).

[49] *El Universo,* "Acusado de violación se declaró indígena para evitar la justicia ordinaria"

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Nelson's case and similar cases of the rape of children and the elderly received the attention of the national media and several critics.[50] For instance, "Irene," a feminist activist, said: "it was outrageous to see how a rapist bathes with cold rose water, as part of the punishment! That is a message, a meaning and a terrible symbolism of what rape means to women".[51] As a result, the Judicial Council (*Consejo de la Judicatura*), which oversees the functioning of the ordinary Judicial branch, opened administrative proceedings against the judges from this system who referred the cases to Indigenous adjudicators, and the President of the Judicial Council publicly requested the Parliament to pass the Coordination Act mandated by the Constitution, and to define the jurisdiction of the Indigenous justice.[52] That Act has not yet been adopted. Both the feminist activist and the President of the Judicial Council criticized Nelson's case because they believed his crime remained in impunity.

When a forum is perceived to favor one of the parties, its impartiality could be questioned. For instance, "Carlos", a first instance judge in the ordinary justice system, explained that during his two years in office in a region where the Indigenous population is high, his ideas on the Indigenous justice gradually changed. In Carlos' opinion, the party seeking justice would be the one that presented the complaint in his office, and the party that wanted to escape justice or was afraid of a penalty was the one activating Indigenous justice and demanding Indigenous leaders request the ordinary judge relinquish jurisdiction and refer the case to the Indigenous forum. In the judge's words:

When I arrived at this court [...] I used to think that the Indigenous justice was good. Who would be better to solve their problems than themselves! I used to [think that] if I have a problem in my family, who better to solve the problem but ourselves. I was saying the same regarding Indigenous justice: they should solve their own problems. So I came with high expectations of collaboration and coordination with Indigenous justice. It was good, I thought it was very good. However, since I have been here, they have requested I relinquish my jurisdiction, and absolutely all the requests have come from the debtor who did not want to pay. The debtor who did not want to pay, he wants me to relinquish my jurisdiction. The lawbreaker, the one who punched someone else, the one who stole, they want me to relinquish my jurisdiction. The one that doesn't want to go to prison, they're the one who wants me to relinquish my jurisdiction. The father who owes child support and cannot pay or doesn't want to pay, he wants the relinquishment of my jurisdiction. Ultimately, the person who wants to benefit from something or

[Accused of rape declared himself Indigenous to avoid ordinary justice], 19 May 2013; *El Télégrafo,* "Reforma urgente a la justicia indígena genera debate" (Urgent reform to Indigenous justice generates debate], 30 May 2013.

[50] *Id.*

[51] "Irene", interview, 2014 (author's translation).

[52] *El Universo,* "Jalkh pide a la Asamblea aclarar norma sobre justicia indígena" [Jalkh asks Parliament to clarify provision on Indigenous justice], 28 May 2013.

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wants a more benevolent penalty is the one requesting the relinquishment of jurisdiction. The others did not ask me to relinquish, rather, the other parties rather oppose the request [...] Justice is called into question, the impartiality of the Indigenous authorities gets questioned, the objectivity of the Indigenous justice, their disinterest. I do not like this! [...] To ordinary justice comes the one who wants to be paid, the one who feels wronged. But to Indigenous justice, to trigger Indigenous justice, goes the person fearful of facing a penalty. He is the one activating Indigenous justice, the one who urges Indigenous authorities to request me to relinquish my jurisdiction".[53]

Carlos' impression is confirmed by ethnographic studies[54] that argue that in *certain* localities young Indigenous women seem to have more trust in the ordinary justice system than in the Indigenous system.[55] Cases involving domestic violence, divorce, paternity disputes, and child support are submitted to the ordinary justice system by Indigenous women, "who are becoming aware that solutions can be found in places outside the Indigenous justice".[56] Choosing the ordinary forum is not well perceived by the male members and it goes against the customs of the community, but nevertheless, women search for a different solution from their own justice, an attitude that "could force a review of the community rules".[57]

Indigenous women, however, do not always succeed in getting protection in a different forum. Lavinas Picq discusses the case of an Indigenous woman, Nono, who repeatedly suffered mistreatment by her husband, Remache, an important Indigenous leader of their locality and a congressman in the national Parliament at the time. "Whenever Nono tried to report violence in the community, she was told that this was a personal matter to be solved

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53 "Carlos," interview, 2014 (author's translation).

54 Judith Salgado, *Violencia contra las mujeres indígenas: entre las 'justicias' y la desprotección. Posibilidades de interculturalidad en Ecuador* [Violence against Indigenous Women: Between 'Justices' and the Lack of Protection. Possibilities of Interculturality in Ecuador], 6 *Anuario de Acción Humantaria y Derechos Humanos* 61 (2009); Rachel Sieder & María Teresa Sierra, M.T, *Indigenous Women's Access to Justice in Latin America*, CMI Working Paper (2010), *available at http://www.cmi.no/publications/publication/?3880=Indigenous-womens-access-to-justice-in-latin*; García, *Do Not Go Crazy, supra* n 32, Manuela Lavinas Picq, *Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador*, 54 (2) *Latin American Politics and Society* 1 (2012).

55 The word "certain" is italicized to highlight that it is not in *all* localities that women have more trust in the ordinary justice system. Informal conversations conducted in the field for this research show that in certain localities women in fact prefer to send their cases to the ordinary forum, but there are localities where women were satisfied with their Indigenous forum and which have women as members of the adjudicating body. As a matter of fact, ordinary Indigenous peoples do not always think in terms of a dichotomy between the Indigenous and the ordinary systems, but in terms of "interlegality" (Simon Thomas, *supra* n 4).

56 García, *Do Not Go Crazy, supra* n 32 at 545 (author's translation).

57 García, *Experiences of Two Communities*, *supra* n 32 at 106 (author's translation).

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within her home. Yet, she found little support to secure her well-being."[58] Nono denounced Remache before the ordinary justice system, but Remache, his lawyers, and several Indigenous leaders strongly argued that the case had to be handled by the Indigenous justice system. After being pressured by her in-laws, Nono dropped the charges in the ordinary system, while Remache remained unpunished. Lavinas Picq concluded that this case "reveals how Indigenous justice can be used as a tool to shield the accused from accountability instead of protecting victims".[59]

Leaders or persons close to them being shielded from prosecution was also reported by "Bolívar," a lawyer who has been studying the Indigenous justice and supporting Indigenous communities for a long time. He recognised that there is corruption in some communities where lawyers use Indigenous leaders to have prisoners released from jail, the result of these practices being impunity.[60] Similarly, Llasag Fernández, an Indigenous lawyer, claims that some Indigenous authorities are being used by political parties in response to particular interests.[61]

The lack of clear rules on jurisdiction offers an opportunity for forum shopping, with all the accompanying possibilities of injustice and impunity. At the same time, this can also create an opportunity for forum selection that could enhance efficiency, or advance the rights of vulnerable or marginalized groups or individuals in Indigenous communities. Everything depends on *who* is doing the shopping. Is it a rapist who wants to avoid prison? Is it an abusive husband or the corrupt leader who wants to be shielded from prosecution? Or is it a victim of domestic violence who has not received a solution to her problem? Is it a mother who has not received alimony or child support for several months and does not have enough resources to feed her children? Was the decision-making process conducted individually, within the family, or within a subsection of the main group? These type of questions are im-

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58 Lavinas Picq, *supra* n 54 at 5.

59 *Id* at 7.

60 "Bolívar", interview, 2014.

61 Raúl Llasag Fernández, *Justicia indígena ¿delito o construcción de la plurinacionalidad?: La Cocha* [Indigenous Justice, Crime or Construction of Plurinationality?: La Cocha], in JUSTICIA INDÍGENA, PLURINACIONALIDAD E INTERCULTURALIDAD EN ECUADOR [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 321, 326-327 & 368-369 (Boaventura de Sousa Santos & Agustín Grijalva eds., Abya Yala 2012) (holding that individuals with economic or political power use the Indigenous justice to get political benefits for them and their allies. The author mentions specifically the case of Lourdes Tibán, an Indigenous lawyer who has a strong political relevance in her province, Cotopaxi, who has economic power, and who was related to the President of the *Movimiento Indígena de Cotopaxi* (Indigenous Movement of Cotopaxi). Additionally, the author describes that in the La Cocha Indigenous community a section of the leadership supported the political party Alianza País, while another section supported the party Pachakutik. According to the supporters of Alianza País, Pachakutik was advising the Indigenous authorities who administer justice, and therefore the authorities were being used to foster private interests).

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portant to pose, so as to clarify whether the parties' right to access justice has been enhanced or diminished.

As to shopping forum, to encourage the use of the Indigenous justice system as a way of recovering or strengthening an important feature of one's culture is one thing. Another altogether is capturing cases to propel political, economic, or religious interests in favor of the few. Moreover, as will be explained in the next section, the administration of Indigenous justice is conceived of as a collective right of Indigenous nations, but such a collective right does not imply absolute discretion of Indigenous adjudicators. Their discretion is limited by the individual right of community members to access to justice. Having discretion means having a choice, and when adjudicators decide which cases they are going to hear, they are "shopping" for the controversies they want to handle while ignoring others, which could have serious impacts on the individuals whose cases were not selected.

## III. To Hear or Not to Hear a Case, That is the Question

Article 57(10) of the Constitution provides that the State recognizes and guarantees to Indigenous communities, peoples and nations, in accordance with the Constitution and with the covenants, agreements, declarations and other international instruments on human rights, "the right to create, develop, apply, and practice their own customary law".[62]

Indigenous justice is a collective right, but the discretion the Indigenous nations have in deciding whether to exercise this right is not absolute. Members of Indigenous communities also have the right to access to justice as individuals, including to access their own legal system. In other words, the collective right of an Indigenous group to use and apply their laws is limited and reinforced by the individual right of members of the group to access to their own legal system. Both rights reinforce each other in the sense that both point to the direction of recognising Indigenous law as an adequate venue to resolve conflicts, a venue that respects and reinforces the culture, social organization and autonomy of Indigenous peoples. But the individual rights of the members of the community also serve as a limit to collective rights. For instance, every person whose human rights have been violated is entitled to obtain clarification of the events that led to the violation of human rights and the corresponding responsibilities, through the investigation and prosecution of those responsible.[63] Individuals have the right

[62] Constitution, *supra* n 17, Art. 57(10).

[63] IACHR, *Barrios Altos v. Peru*. 2001, para. 48.

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> to go to a tribunal when any of [their] rights have been violated, to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.[64]

Implicit in the collective right of Indigenous nations to administer justice is the individual right members of their communities have to demand their authorities resolve conflicts through the application of their customs, culture and customary laws by their own competent authorities. International human rights law provides that the right to be heard by a competent judge is one of the basic due process of law guarantees states must offer to individuals in order to achieve a fair trial.[65] In fact, the right to be heard by a competent judge is not only a basic principle of due process of law[66] but a pre-condition of it.[67] When an incompetent judge hears a case, "there was no due process, given a failure of an essential nature, and that no actions taken in such conditions could have produced [...] legal effects".[68]

It is not the task of international law to define who should be the competent judge. This is the exclusive duty of national law. As the Inter-American Court of Human Rights (IACHR) put it, "the existence and jurisdiction of the competent tribunal derive from the law".[69] The only requirement international law sets is that individuals have to be tried by courts or tribunals using established legal procedures. "Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".[70] Remov-

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[64] Inter-American Commission on Human Rights, *Raquel Martín de Mejía v. Peru*, 1996, p. 22.

[65] For instance, the American Convention on Human Rights (ACHR), 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S., Art. 8(1) states: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature". The International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 1916 U.S.T. 521 999 U.N.T.S. 171, Art. 14(1) states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

[66] IACHR, *Castillo Petruzzi et al. v. Peru,* 1999, para. 129; IACHR, *Lori Berenson Mejía v. Peru,* 2004, para. 143, IACHR, *Palamara Iribarne v. Chile,* 2005, para. 125.

[67] IACHR, *Barreto Leiva v. Venezuela*, 2009, para. 75.

[68] IACHR, Separate Opinion of Judge García Ramírez, *Usón Ramírez v. Venezuela*, 2009, para. 10.

[69] *Id* para. 76.

[70] Principle 5 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offend-

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ing individuals from their natural courts and referring their cases to special courts, for instance, to military tribunals, has been determined to be a violation of the right to a fair trial.[71]

Consequently, there would be a violation of the right to be heard by a competent court if an individual who was supposed to be heard by an Indigenous legal system is brought to the ordinary justice system, or vice versa. If such a violation is detected, the proceedings would be invalid, because one of the pre-conditions —the competence of the judge— was not met. This demonstrates the importance of determining who the competent judge is: the validity of the entire procedure rests on the competence of the adjudicator.

At the same time, the individual right to be heard by an Indigenous adjudicator should not be absolute. In certain cases, good reasons could be brought forward by the community in order to refuse to hear a particular case (for instance, the protection of community cohesion). Therefore, the discretion of adjudicators in deciding whether they are able or willing to resolve a conflict should be carefully exercised and balanced with the individual right to access a particular legal system. Indigenous authorities should give good reasons if they decide to refer the dispute to the ordinary justice system. García mentions that the decision to send a case to the ordinary justice system should be agreed upon by the adjudicators and the parties.[72] It goes without saying that if Indigenous authorities refuse to hear a case, they should not prevent the individual from searching for justice in another Indigenous forum or in the ordinary system. The worst case scenario would be that the individual, having access to multiple forums, is not heard by any of them.

Practices in this regard are heterogeneous. "Efraín" mentioned that only in extreme cases, usually involving serious crimes, he and other Indigenous authorities decide to refer the case to the ordinary justice system. "We entrust [the case] to you, Mr Prosecutor, Judge. We've come this far," were Efraín's words. [73] He also mentioned that it was very risky for them to attempt to solve every type of conflict, because his community was still in a process of reconstructing and strengthening its customary law.

I was told that in some communities, everyone knows that certain issues are not heard by the Indigenous authorities, either because the authorities have no expertise in resolving those issues, because the conflicts are too serious to be handled in the "mediation style"[74] Indigenous adjudicators use,

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ers held at Milan from August 26 to September 6, 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; IACHR, *Barreto Leiva v. Venezuela*, 2009, para. 75.

[71] IACHR, *Loayza Tamayo v. Peru,* 1997; IACHR, *Castillo Petruzzi et al. v. Peru,* 1999*;* IACHR, *Durand and Ugarte v. Peru,* 2000*;* IACHR, *Radilla Pacheco v. Mexico,* 2009.

[72] García, *Experiences of Two Communities*, *supra* n 32 at 70.

[73] "Efraín", Indigenous leader, interview, 2014.

[74] Ramiro Ávila Santamaría, *¿Debe aprender el derecho penal estatal de la justicia indígena?* [Should the State Criminal Law Learn from the Indigenous Justice?], in JUSTICIA INDÍGENA, PLURINA-

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or because there has been a decision by leaders that it is better for the community's stability and cohesion to refer specific cases to the ordinary system. "Mesías" mentioned that his community does not hear paternity disputes and child support disputes.[75] "Homero," an Indigenous lawyer working at the Public Prosecutor's Office on Indigenous Affairs,[76] said that in his locality rape was very rare, and because of that the few cases that occurred in Indigenous settlements were referred to his office.[77] Mario Melo, an activist and academic, commented that when a murder occurs in Sarayaku territory, the leaders expel the murderer from the community and at the same time they refer the case to the ordinary justice system.[78] In Melo's opinion, that is a valid decision, based on community self-determination.[79]

There is also the possibility that Indigenous authorities work with authorities in the national justice system. "Pepe," an Indigenous lawyer who works at the Public Prosecutor's Office on Indigenous Affairs,[80] sometimes receives criminal complaints concerning Indigenous individuals. Pepe is a public prosecutor and has at his disposal all the investigative tools of the Public Prosecutor's Office (laboratories, crime scene investigators, etc.). He starts the investigation, and when he has enough evidence against the alleged perpetrator, he presents his results not to an ordinary judge, but to the Indigenous adjudicators of the perpetrators' locality, so that they can hold a hearing and decide on the guilt of the suspects. Pepe proceeds in this way every time he believes

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CIONALIDAD E INTERCULTURALIDAD EN ECUADOR [Indigenous Justice, Plurinationality and Interculturality in Ecuador] 279, 300 (Boaventura de Sousa Santos & Agustín Grijalva eds., Abya Yala 2012). (This paper argues that in Indigenous justice the great majority of conflicts are resolved through conciliation); Simon Thomas, *supra* n 4, states that Indigenous customary law is not only about norms but it also involves agreements, and the litigants may choose the local authorities and select the procedures these authorities may use.

75 "Mesías", Indigenous leader, interview, 2014. See also, Simon Thomas, *supra* n 4, who after reviewing judicial archives in ordinary courts, states that three out of four cases concerning people living in the Indigenous parish he studied were about child support.

76 In 2007, the Public Prosecutor's Office (*Fiscalía General del Estado*) created the Public Prosecutor's Office on Indigenous Affairs (*Fiscalía de Asuntos Indígenas*). This office has eleven Indigenous prosecutors that speak the Indigenous language of the localities they serve (see, Public Prosecutor's Office No. 064 MFG-2007, 8 November 2007, and Simon Thomas *supra* n 4). These Indigenous prosecutors are part of the ordinary justice system and they report their findings to ordinary courts. However, I interviewed "Pepe", an Indigenous prosecutor who sometimes reports his findings to Indigenous forums (see *infra* n. 80 and accompanying text).

77 "Homero," interview, 2014.

78 It could be argued that there is a violation of the *ne bis in idem* rule in this type of case. The defendants are expelled from the community because they are regarded as guilty of the crime of murder, the expulsion being a sanction passed in the Indigenous forum. If the defendants' case is referred to the ordinary justice system, they would be tried again based on the same facts (see *infra* Section IV).

79 Mario Melo, interview, 2014.

80 "Pepe," interview, 31 March 2014.

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the Indigenous forum has jurisdiction to hear the dispute. In his legal-anthropological research in Ecuador's highlands, Simon Thomas discussed a case where the parties, both of them Indigenous, solved an adultery case using traditional ways of dealing with conflicts, but before a *Teniente Político*, an appointed political official from the ordinary system. Simon Thomas concluded that the line between customary law and Ecuadorian national law is in practice rather blurred.[81]

The coordination between authorities is not always easy or even planned. "Miguel", an Indigenous leader,[82] recounts a case in which a man was accused of murdering his wife. Both the perpetrator and the victim were Indigenous, but the case was in the hands of a public prosecutor from the ordinary justice system. The family of the victim, tired of waiting for the prosecutor to accuse the alleged perpetrator and outraged to see him walking free, petitioned Miguel and his fellow Indigenous authorities to intervene in the matter. Miguel and the other authorities, without challenging the jurisdiction of the public prosecutor, started their own investigation (this being a good example of simultaneous forum shopping). After questioning the suspect for three days, he confessed to the crime and gave details of important evidence (including the location of the clothes he wore during the murder, which were covered with the victim's blood). With all that evidence, Indigenous authorities went to the prosecutor's office, and according to Miguel:

We clearly said to the prosecutor and the police: 'What have you done so far? These are our results. Here's the suspect. Take a good look at him so you do not demonize us saying that we had punished him. Here is the person, completely healthy and safe. There he is. You check.' They looked at him, and then we continued: 'Mr Prosecutor we leave this individual in your hands.' The daughters did not allow their father to stay at home. They said, 'how are we going to live with a criminal in the house. Suppose that he kills us too'. We didn't even think of sending him to jail. No. Because of the daughters and other relatives insisted: 'he has to go to jail, we do not want him here.' Because of that we told the prosecutor: 'Mr Prosecutor here he is, and here's our job, the report in writing of all our activities. Here Mr Prosecutor, that's how it's done!'".

Indigenous adjudicators or the parties may not only seek the support of the ordinary system, but for also the support of Indigenous authorities from other communities. "They ask us to do them the favor of solving their conflict", was a phrase I heard from several Indigenous respondents. Similarly, Simon Thomas studied a murder case in Zumbahua, in which the suspects all originated from Guantópolo, but it was solved in La Cocha. The authorities of Guantópolo believed that the authorities of La Cocha had more expertise

81 Simon Thomas, *supra* n 4.

82 "Miguel," interview, 2014.

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in murder cases, and the La Cocha community seemed to offer more guarantees of impartiality.[83]

It is also possible that Indigenous leaders remain passive. Kurikama Yupanki, an Indigenous lawyer working on Indigenous justice, mentioned that he personally knew several communities where the president of the *cabildo* (the organization of Indigenous leaders that among other activities administers justice) remained inactive regarding certain cases, but acted with diligence in others, the only difference being whether the cases were considered interesting or not. In an interview, Mr Yupanki recalled a dialogue between himself, a community member and the president of a *cabildo*:

"There are presidents who run when something is of their interest, but when they do not care, they don't do it!" [A community member talking to Mr Yupanki] '*Compañero* (comrade), five months ago we ask the president to do [justice]. He didn't do it! He didn't do justice!' And some even say '*compañero*, I have begged so much for him [the president] to do me a favor, and he doesn't want to do me a favor'. I say [to the president of the *cabildo*]: 'excuse me! Dammit! How come you do not want to do them a favor? You don't have to do favors! You, according to the Constitution, must be the authority. According to the Constitution, you are the authority, you must do justice!' [*With a sarcastic voice and imitating the president*] 'I don't want to do them a favor, I don't want to do them a favor!' And this happens in many communities![84]

The examples mentioned above demonstrate two possible outcomes of shopping forums. Having different forums could, in fact, foster individual access to justice and respect the autonomy of Indigenous communities. If for good reasons the Indigenous adjudicators are unwilling or unable to solve a controversy, the authorities or the parties involved may seek the support of the ordinary justice system or other Indigenous forums. But if there are no good reasons for the Indigenous authorities to abstain from resolving the controversy, a pernicious effect could occur. The Indigenous forum could be shopping for disputes that are important or relevant for the adjudicators, either because one or both of the parties are influential or well-connected persons within the community, or because the controversy is attractive enough

[83] According to Simon Thomas, "the five suspects were captured by local residents and handed over to the *cabildo* of La Cocha, another neighbouring community. This was an interesting aspect of the case, given that the community of Guantópolo has a *cabildo* of its own. But, those who captured the five young men probably either knew or suspected that at least one of them was related to a member of the *cabildo* of Guantópolo and therefore might receive preferential treatment in that community. A second reason not to hand the five suspects over to the *cabildo* of Guantópolo, was that it had absolutely no experience with serious crimes such as homicide. On the other hand, because of its exemplary handling of a murder case in 2002, the *cabildo* of La Cocha was considered to be the most trustworthy authority in such a serious legal matter" (Marc Simon Thomas, *Legal Pluralism and the Continuing Quest for Legal Certainty in Ecuador: A Case Study from the Andean Highlands*, 7(2) *Oñati Socio-Legal Series*, 57, 71 (2012).

[84] Kurikama Yupanki, interview, 4 April 2014 (author's translation).

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to expend some time solving it, because the authorities are in the mood for "doing favors" to those who seek their intervention. Conflicts involving community members with no political or economic influence, without any *extra parte* repercussion, or whose cases are not attractive enough, could be discarded by the Indigenous authorities in an unfair and illegitimate use of their jurisdictional discretion. If the affected individuals lack the means to turn to the ordinary justice system or if they are unable to convince other Indigenous forums to solve the dispute, their right to access justice would be illegitimately violated. As mentioned above, the worst possible scenario would be to have multiple forums available to solve disputes, but for none of them actually solve the case.

## IV. The *Ne Bis In Idem* Rule: a Failed Attempt to Limit the Possibility of Forum Shopping?

This section will discuss the *ne bis in idem*[85] rule as a mechanism originally intended to limit forum shopping and shopping forums. The first attempt to apply the rule was the *La Cocha 1* first instance judgment, which decided that the ordinary forum should not hear the case because it had already been resolved by an Indigenous forum. The judgement was quashed in appeal, but it contributed to the debate on the issue. The Constitution of 2008 recognized the *ne bis in idem* rule as a way of limiting the action of one system if the other has already decided the case. However, the Constitutional Court in *La Cocha 2* emitted an interpretation that opened the possibility of a second trial.

### 1. *La Cocha 1 Murder Case: The First Attempt to Apply the* Ne Bis In Idem *Rule*

On 21 April 2002, Maly was murdered in the Indigenous community of La Cocha. Indigenous authorities conducted inquiries and investigations, after which, on May 5, 2002, the community's General Assembly, its highest authority, determined that Nicolas, Juan and Jaime were responsible for Maly's death.[86] The three wrongdoers were punished according to Indigenous customary law.[87] Two months later, on July 3, 2002, a public prosecutor from the

85 "Not twice for the same".

86 Constitutional Court, Judgement No. 0002-2003-CC, 2003.

87 The customary sanctions included: a cleansing bath with ice-cold water, rubbing with stinging nettles while receiving advice, US$6,000 as compensation to the widow and her children, public apologies, and expulsion from the community for two years (Fernando García, *El estado del arte del derecho indígena en Ecuador* [The State of the Art of Indigenous Law in Ecuador], 41 Revista IIDH 151, 153 (2005); Marc Simon Thomas, *Legal Pluralism and Interlegality in Ecuador. The La Cocha Murder Case*, 24 *Cuadernos del CEDLA* 1, 64-65 (2009).

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ordinary justice system decided to open a criminal investigation against the wrongdoers, disregarding that they already received punishments according to the Indigenous system. On September 9, 2002, a public hearing was conducted before Mr Poveda, the criminal judge appointed to the case.[88] Judge Poveda passed his judgement the next day. He declared that the case had already been resolved by the Indigenous authorities of La Cocha and that the *ne bis in idem* rule had to be applied.[89] The public prosecutor appealed Judge Poveda's decision arguing that the ordinary forum and not the Indigenous forum had jurisdiction over the matter. The case was referred to the Court of Justice of Cotopaxi (*Corte Superior de Cotopaxi*), which agreed with the prosecutor and quashed Judge Poveda's ruling, sending the case back to the first instance court. The new first instance judge appointed to the case decided to convict the three wrongdoers to imprisonment according to Ecuador's Criminal Code. Nevertheless, the three men were never apprehended. Two of them returned to the community where they were rehabilitated and offered economic assistance to Maly's widow.[90]

Judge Poveda's ruling, although it was not confirmed in appeal, provided food for thought to the arguments for[91] and against the application of the *ne bis in idem*.[92] In 2008, with the adoption of the current Constitution, this issue was settled. Article 76(7)(i) of the 2008 Constitution provides that "no one shall be tried more than once for the same cause and matter. The cases decided by Indigenous jurisdiction should be considered for this purpose".[93] The new Organic Code of the Judiciary reinforced that rule by stating in Article 344: "the decisions of the authorities of Indigenous justice shall not be reviewed by the judges of the Judiciary or by any administrative authority, at any stage of the proceedings, without prejudice of constitutional review".[94] Finally, Article 5(9) of the new Criminal Code states: "no person shall be tried

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88 García, *supra* n 87 at 153.

89 *Juzgado Tercero de lo Penal de Cotopaxi* [Third Criminal Court of Cotopaxi], Case No. 43-2002, Judgment, 10 September 2002. A transcript of this judgement can be found in Luis Fernando Sarango, *La administración de justicia indígena en el Ecuador. Una práctica ancestral con reconocimiento constitucional* [The Administration of Indigenous Justice in Ecuador. An Ancestral Practice with Constitutional Recognition], 5 *Yachaykuna* 53, 92-102 (2004).

90 Simon Thomas, *supra* n 87 at 70-71.

91 García, *supra* n 87; Marcelo Bonilla Urvina, *Pluralismo jurídico en el Ecuador. Hegemonía estatal y lucha por el reconocimiento de la justicia indígena* [Legal Pluralism in Ecuador. State Hegemony and Struggle for the Recognition of Indigenous Justice], in Hacia sistemas jurídicos plurales. Reflexiones y experiencias de coordinación entre el derecho estatal y el derecho indígena [Towards Plural Legal Systems. Reflections and Experiences of Coordination between State Law and Indigenous Law] 51 (Rudolf Huber ed, Konrad Adenauer Stiftung 2008).

92 Rubén D. Bravo Moreno, *La justicia indígena y el principio non bis in ídem* [Indigenous Justice and the *ne bis in ídem* principle], *Derecho Ecuador* (2005), *available at https://www.derechoecuador.com/la-justicia-indiacutegena-y-el-principio-non-bis-in-idem*.

93 Constitution (2008), *supra* n 17.

94 Organic Code of the Judiciary, *supra* n 27.

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or punished more than once for the same facts. The cases decided by Indigenous jurisdiction are considered for this purpose".[95]

Ecuadorian law seemed to be very clear in stopping sequential forum shopping. The general *ne bis in idem* constitutional rule covers all cases of double jeopardy, whether the deciding authority is Indigenous or not. For the Constitution, it suffices that the "cause" or "matter" is the same to trigger the *ne bis in idem* rule. It is equally forbidden for Indigenous adjudicators to hear a case already tried by ordinary adjudicators, as well as for ordinary adjudicators to hear a case already tried by Indigenous adjudicators. The Criminal Code goes even further by prohibiting double trial or punishment on the basis of the same "facts". Unlike the Constitution and the Criminal Code, the Organic Code of the Judiciary only prohibits double jeopardy if the first deciding authority was an Indigenous one. The Organic Code of the Judiciary remains mute regarding cases where the first deciding authority is from the ordinary justice system.

The only exception to the prohibition of ordinary judges reviewing the decisions of Indigenous adjudicators is the constitutional review the Constitutional Court carries out when an individual submits a "motion for extraordinary protection" (*acción extraordinaria de protección*). According to Article 65 of the Organic Law on Jurisdictional Guarantees and Constitutional Control (*Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional*), "those who were dissatisfied with the decision of an Indigenous authority exercising judicial functions, for violating constitutionally guaranteed rights or discriminating against women for being women, may appeal to the Constitutional Court and present a challenge to that decision, within the term of twenty days after the decision was made known".[96]

This exception has not been exempt from criticism. If both legal systems are on equal footing, as some argue,[97] why should the Constitutional Court, which belongs to the ordinary justice system, control the decisions of the Indigenous systems? Wouldn't this mean that in practice the ordinary system has a higher rank than Indigenous systems? De Sousa Santos writes that in

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[95] Organic Integrated Criminal Code (*Código Orgánico Integral Penal*), R.O. No. 180, 10 February 2014.

[96] Organic Law of Judicial Guarantees and Constitutional Control (*Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional*), R.O. Supp. No. 52, 22 October 2009.

[97] Ávila Linzán, *supra* n 25 at 78; Miguel Hernández Terán, Justicia indígena, derechos humanos y pluralismo jurídico [Indigenous Justice, Human Rights and Legal Pluralism] 108 (Corporación de Estudios y Publicaciones 2011); Chávez Vallejo, *supra* n 26 at 82. My respondents held a similar position: "I, for example, as an [Indigenous] authority, as a former president [of the community] and as an ancestral authority, I am at the same level as the [ordinary] judge" ("Efraín," Indigenous leader, interview, 13 March 2014, author's translation); "The constitutional rule is very clear, [...] it states in the last paragraph of [Article] 171 that the decisions of the Indigenous justice must be respected. The principle of equal status of both jurisdictions is implicit" (María Mercedes Lema, Indigenous lawyer and judge in the ordinary justice system, interview, 19 February 2014, author's translation).

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order to overcome this issue, the composition of the Constitutional Court should be modified by appointing experts on Indigenous legal systems.[98] Baltazar Yucailla goes a step further and argues that the Constitutional Court should have a special chamber on Indigenous collective rights, such a chamber would be composed of "Indigenous professionals who understand the traditions and customs of Indigenous nationalities and peoples in the application of Indigenous justice".[99] Whether these solutions would enhance mutual cooperation and the understanding of the different legal systems or do the opposite, separating the systems by ethnicity, which could impact professionals, conceptions and values, is a matter that requires further research.

In another murder case in the community of La Cocha (*La Cocha* 2), the Constitutional Court appears to have created a particular conception of the *ne bis in idem* rule, allowing Indigenous defendants already sanctioned by Indigenous adjudicators to be tried again by ordinary criminal judges and face the punishments established in the Criminal Code.

### 2. *La Cocha 2 Murder Case: The Constitutional Court and Its Particular Conception of the* Ne Bis In Idem *Rule*

On July 30 and September 11, 2014, the Constitutional Court passed two judgments in another murder case decided by the La Cocha community. The case is known as *La Cocha 2* to distinguish it from the murder case of Maly (*La Cocha 1*) described above. The facts of *La Cocha 2* are as follows: on May 9, 2010, Marcelo was found dead in the village of Zumbahua, located in the Ecuadorian province of Cotopaxi. The next day, five men suspected of his murder were caught and handed over to Indigenous authorities. In two separate sessions, the General Assembly of La Cocha-Zumbahua found the accused guilty. They all received the same penalties: a fine of US$5000, a ban from all social and cultural celebrations for two years, expulsion from the community for two years, mandatory subjection to cold baths and stinging nettles for a period of one half-hour, one lash with a leather strap by each communal leader, and the tasks of carrying a hundredweight while seminaked and making public apologies.[100] Nevertheless, the five defendants were arrested by the national police and put on trial before an ordinary criminal

[98] De Sousa Santos, *supra* n 31at 41.

[99] Rosa Cecilia Baltazar Yucailla, *La justicia indígena en el Ecuador* [Indigenous Justice in Ecuador], in Derechos ancestrales: Justicia en contextos plurinacionales [Ancestral Rights: Justice in Plurinational Contexts] 451, 469 (Carlos Espinosa & Danilo Caicedo eds., Ministerio de Justicia y Derechos Humanos 2009) (author's translation).

[100] General Assembly of La Cocha-Zumbahua, *Acta* (handwritten record) No. 24, 16 May 2010. See also, Simon Thomas, *supra* n 83 and *supra* n 4; Llasag Fernández, *supra* n 31; Carlos Poveda Moreno, *La Cocha: 2002-2010: Retrocesos en un estado constitucional de derechos y justicia, social, democrático, soberano, independiente, unitario, intercultural, plurinacional y laico* [La Cocha: 2002-2010:

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judge. At the same time, the three Indigenous leaders who heard the case were arrested for kidnapping. Additionally, the brother of the deceased submitted a motion for extraordinary protection before the Constitutional Court challenging the constitutionality of the Indigenous adjudicators' decision.

The case against the Indigenous leaders was allocated to the *Juzgado Tercero de Garantías Penales de Cotopaxi* (Third Criminal Guarantees Court of Cotopaxi), while the case against the men accused of murder was allocated to the *Tribunal de Garantías Penales de Cotopaxi* (Criminal Guarantees Tribunal of Cotopaxi). The *Juzgado* decided to suspend the proceedings and send the case to the Constitutional Court to decide on the constitutionality of the proceedings.[101] In the *Juzgado's* opinion, the Indigenous leaders were facing criminal charges for performing functions expressly permitted by the Constitution. The *Tribunal* decided to suspend the proceedings against the men accused of murder and referred the case to the Constitutional Court, asking the following question: "is it possible to indict for a second time Indigenous individuals belonging to an Indigenous community, if they have already been sanctioned by the authorities of that community?"[102]

In sum, the Constitutional Court received three different applications: 1) the motion for extraordinary protection submitted by the brother of the deceased, challenging the constitutionality of the decision of the Indigenous authorities; 2) a consultation from the *Juzgado* deciding on the criminal responsibility of the Indigenous leaders, and 3) a consultation from the *Tribunal* deciding on the criminal responsibility of the alleged perpetrators of the murder.

On July 30, 2014, the Constitutional Court decided on the application submitted by the brother of the victim,[103] and on September 11, 2014, it passed a single judgment on the consultations presented by both the *Juzgado* and the *Tribunal*.[104] In its judgments, the Constitutional Court studied the evidence submitted regarding the legal system of the Indigenous community to which the Indigenous leaders, the victim, and the perpetrators belong. It concluded that when the adjudicators of the Indigenous community resolved the murder case, they did not decide on:

> the legally protected value of life as an end in itself, but in terms of the social and cultural effects that the death caused in the community [...], while on the

Setbacks in a Constitutional State of Rights and Justice, Social, Democratic, Sovereign, Independent, Unitary, Intercultural, Plurinational and Secular], 49 *Novedades Jurídicas*, 6 (2010).

101 According to Art. 438 of the Ecuadorian Constitution, supra n. 17, when a court, ex officio or upon request, considers that a legal rule is contrary to the Constitution or international human rights instruments, it may suspend the proceedings and refer the case in consultation to the Constitutional Court, for it to decide on the constitutionality of the legal rule.

102 Constitutional Court, Judgment No. 006-14-SCN-CC (author's translation).

103 Constitutional Court, Judgment No. 113-14-SEP-CC.

104 Constitutional Court, Judgment No. 006-14-SCN-CC.

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> other hand, the prosecution and the ordinary criminal courts acted under the constitutional and legal obligation to investigate and prosecute, respectively, the individual responsibility of those allegedly involved in the death.[105]

In the Constitutional Court's opinion, there was no violation of the *ne bis in idem* rule because Indigenous justice was protecting the *collective* dimension of the right to life, while ordinary justice was protecting the *individual* dimension of that right.[106] The Court ruled that: (1) Indigenous authorities committed no violation of national law when they heard and solved the murder case, and therefore the criminal case against them before the *Juzgado* should be dismissed, and (2) the public prosecutor and the *Tribunal* committed no violation either in initiating a criminal case against those who were already punished by the Indigenous adjudicators, and therefore the criminal proceedings against the men accused of murder before the *Tribunal* should continue.

Finally, the Constitutional Court established a general rule applicable to every future case related to Indigenous legal systems. In the Court's view, the ordinary justice system upholds the right to life as a value in itself, while Indigenous legal systems uphold the right to life as a means to contribute to the realization of the community as its highest value. Such a view was insufficient, according to the Constitutional Court, to guarantee the individual right to life as guaranteed in the Constitution, in the international human rights instruments Ecuador has ratified, and in *ius cogens* norms.[107] Therefore, the Court ruled that all future cases involving the right to life shall be heard exclusively by the ordinary justice system, with Indigenous authorities no longer having any subject-matter jurisdiction over these cases.[108]

The Constitutional Court's judgment was severely criticized by the Indigenous movement.[109] Nina Pacari, an Indigenous leader and politician, called the judgment "nefarious and shameful" (*nefasta y vergonzosa*).[110] The CONAIE

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105 Constitutional Court, Judgment No. 113-14-SEP-CC (author's translation).

106 Constitutional Court, Judgment No. 006-14-SCN-CC.

107 *Ius cogens* are fundamental principles of international law that are considered by the international community as norms from which no derogation is permitted (see, Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 American Journal of International Law 55 (1966).

108 Constitutional Court, Judgment No. 113-14-SEP-CC.

109 See for instance, "*Dirigentes indígenas exigen nulidad de resolución de la Corte Constitucional*" [Indigenous leaders demand the annulment of the Constitutional Court's decision], *Ecuavisa*, 5 August 2014, *available at http://www.ecuavisa.com/articulo/noticias/nacional/74546-dirigentes-indigenas-exigen-nulidad-resolucion-corte-constitucional*.

110 "*Nina Pacari: Acerca de cómo comprenden la dominación los Pueblos Indígenas y a los gobiernos progresistas*" [Nina Pacari: On how Indigenous peoples understand domination and progressive governments], *Periodismo Humano,* 13 September 2014, *available at http://guatemalacomunitaria.periodismohumano.com/2014/09/13/nina-pacari-acerca-de-como-comprenden-la-dominacion-los-pueblos-indigenas-y-a-los-gobiernos-progresistas/*.

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announced that it will not respect the Court's ruling.[111] Sixto Yaguachi, an Indigenous leader from the ECUARURANI (the organization of the Indigenous communities of the Kichwa Nation of Ecuador's highlands), stated: "Whatever they say, whatever they do, we will continue with this disobedience applying our principles because we are supported by our international rights".[112] Most of the criticism was aimed at the limitation of subject matter jurisdiction in Indigenous legal system, an issue that is beyond the scope of this article.[113]

### 3. *The Implications of the* La Cocha 2 *Judgment*

The first and most obvious consequence of the Constitutional Court's ruling is the eradication of forum shopping in criminal cases when the right to life is involved. The disputants no longer have the choice of forums in cases related to Articles 140-149 of the Criminal Code (all forms of murder, manslaughter, feminicide, and abortion). The second consequence, closely linked to the first, is the eradication of shopping forums. The Indigenous forum and the ordinary forum will not have to compete in to attract disputants in right-to-life cases. The Constitutional Court made the "final purchase" and gave the ordinary forum exclusive jurisdiction.

One should bear in mind that this is a *legal* eradication of forum shopping and shopping forums, but in reality, these phenomena may still occur, despite the Constitutional Court's prohibition. If the Indigenous authorities keep their word by not complying with the Court's decision, Indigenous communities could decide to go "underground" in the administration of their justice, as they did during the centuries that Indigenous legal systems were tacitly permitted but not formally recognized by Ecuador's monistic legal culture.[114] The outcomes could vary from a complete agreement between the parties to not alert ordinary authorities because they all agree with the solution reached by Indigenous adjudicators, to cases in which powerful defendants could still

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111 "*CONAIE rechaza fallo de CC sobre justicia indígena y anuncia que se unirá a la marcha del FUT*" [CONAIE rejects the CC ruling on Indigenous justice and announces that it will join the march of the FUT], *Ecuador Inmediato,* 21 August 2014, *available at http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=2818768418&umt=conaie_rechaza_fallo_cc_sobre_justicia_indigena_y_anuncia_que_se_unira_a_marcha_del_fut*.

112 "*La CONAIE no acatará la sentencia de la CC*" [The CONAIE will not abide by the decision of the CC], *El Mercurio,* 8 August 2014, *available at http://www.elmercurio.com.ec/442545-la-conaie-no-acatara-la-sentencia-de-la-cc/#.VcY32vlvIuQ* (author's translation).

113 My position on the jurisdiction *ratione materiae, personae* and *loci* of Indigenous adjudicators can be found in Ruiz-Chiriboga, *supra* n 47.

114 Raquel Yrigoyen, *The Constitutional Recognition of Indigenous Law in Andean Countries*, in The Challenge of Diversity: Indigenous Peoples and Reform of the State in Latin America 197, 206-207 (Willem Assies, Gemma van der Haar & André Hoekema eds., Thela Amsterdam 2000); Simon Thomas, *supra* n 87 at 35-38 and *supra* n 42 at 59-60.

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shop for an Indigenous forum while a weak accuser could be pressured to accept an Indigenous forum and be prevented from seeking intervention in the ordinary justice system.

As to the *ne bis in idem rule,* the Constitutional Court's distinction between the individual and collective dimensions of the right to life creates more problems than solutions. First, it could make the same distinction with regards to many other rights. For instance, the right to personal integrity, which includes the right not to be tortured,[115] rape cases,[116] or the prohibition of cruel, inhuman and degrading treatments and punishments,[117] could also be divided into distinct individual and collective realms. If Indigenous adjudicators solve a right-to-personal-integrity case focusing on the *collective* dimension of this right, could then ordinary authorities subsequently start criminal investigations to deal with the *individual* dimension of that right? Like the right to life, the right to personal integrity is a fundamental right protected by the Constitution,[118] the international treaties Ecuador has ratified,[119] and the *ius cogens* rules.[120] If Indigenous adjudicators solve a right-to-personal-integrity case focusing on the *collective* dimension of this right, could we then deduce that rape cases shall be also excluded from Indigenous jurisdiction? If one follows the reasoning of the Constitutional Court in *La Cocha 2*, the answer to this question would be yes. However, the Constitutional Court in a subsequent judgment stated that the only competent forum to deal with right to life cases is the ordinary forum, Indigenous forums being excluded, but in other cases not involving the right to life, ordinary judges "are obliged to stop hearing the case" and refer it to an Indigenous forum if so requested.[121] The Court did not explain why in these other cases the individual versus collective approach was not applicable.

The second problem with the Court's ruling is that it seems incompatible with the national and international understandings of the *ne bis in idem* rule. As mentioned above, Ecuador's Criminal Code forbids a second prosecution based on the "same facts."[122] The Spanish version of Article 8(4) of the American Convention on Human Rights also forbids a second prosecution for "*los mismos hechos*" (the same facts). The English version talks about the "same cause," but the Inter-American Court has stated that the *ne bis in idem* "is based on the prohibition of a new trial on the same facts that have

115 IACHR, *Bueno Alves v. Argentina*, 2007.

116 IACHR, *Fernandez Ortega v. Mexico,* 2010.

117 IACHR, *Cabrera García and Montiel Flores v. México*, 2010.

118 Constitution, *supra* n. 17, Art. 66(3).

119 For instance, Art. 5 of the American Convention on Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

120 IACHR, *Gómez Paquiyauri Brothers v. Peru*, 2004.

121 Constitutional Court, Judgment No. 008-15-SCN-CC, Cases Nos. 0005-11-CN; 0058-11-CN; 0021-12-CN; and 0003-13-CN, 5 August 2015.

122 Criminal Code, Article 5 (9).

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been the subject of the judgment under authority of res judicata."[123] The relevance lies in the "same facts," and not in whether those facts produced different offences, or whether one jurisdiction has a different aim than the other one.

### 4. *Exceptions to the* Ne Bis In Idem *Rule*

The *ne bis in idem* rule, while important, is not absolute. According to the Inter-American Court, the rule is not applicable in two circumstances: 1) when the proceedings were not conducted independently and impartially in accordance with due procedural guarantees, and 2) when there was no real intention of bringing those responsible to justice, because the judicial investigation, the proceedings and the judicial decisions "were not truly intended to elucidate the facts, but rather to obtain an acquittal of the accused".[124] Furthermore, the Inter-American Court has stated that States have the duty to avoid and fight against impunity.[125] Impunity may arise in different manners: as a result of the State's failure to organize the mechanisms necessary to investigate a crime;[126] or by carrying out domestic proceedings that result in delays and undue hindrances;[127] or by failing to formally define crimes, which prevents the adequate performance of criminal proceedings;[128] or by adopting self-amnesty laws;[129] or by failing to enforce the imposed sentence;[130] or by imposing upon those found guilty insignificant punishments that are fully inconsistent with the seriousness of the crime,[131] among others.

The Inter-American Court's standards could have assisted the Constitutional Court in reaching a more solid decision. If Indigenous adjudicators were not impartial or independent, if the proceedings before them did not provide procedural guarantees, if there was no real intention to punish the crime, then there was an *apparent* res judicata,[132] and the *ne bis in idem* rule

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123 IACHR, *Mohamed v. Argentina*, 2012, para. 125. The Inter-American Court also acknowledged that Article 8(4) of the American Convention afforded a "much broader" protection to the defendant than other international treaties, such as Article 14(7) of the International Covenant on Civil a Political Rights that only forbids a second prosecution for the same "offence" (*Id* para. 121).

124 IACHR, *Carpio Nicolle et al. v. Guatemala*, 2004, para. 131; IACHR, *Almonacid Arrelano et al. v. Chile*, 2006, para 154; IACHR, *Nadege Dorzema et al. v. Dominican Republic*, 2012, para. 195.

125 IACHR, *Tiu Tojín v. Guatemala*, 2008, para. 69.

126 IACHR, *Velásquez-Rodríguez v. Honduras,* 1988, paras. 176-177.

127 IACHR, *Bulacio v. Argentina,* 2003, para. 115.

128 IACHR, *Heliodoro-Portugal v. Panamá,* 2008, para. 183.

129 IACHR, *Barrios Altos v. Peru,* 2001, para. 43.

130 IACHR, *Valle-Jaramillo et al. v. Colombia*, 2008, para. 165.

131 IACHR, *Vargas-Areco v. Paraguay,* 2006, paras. 106-109.

132 IACHR, *Nadege-Dorzema v. Domincan Republic,* 2012, para. 196.

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would not be applicable. Similarly, had the Constitutional Court have considered that the crime was not formally defined in the Indigenous legal system; or if the decision was not enforced properly by the Indigenous adjudicators; or if the imposed punishments were not consistent with the seriousness of the crime, or did not provide results that are important in a democratic society (deterrence, prevention, retribution, rehabilitation, etc.), leading the case to linger in total or partial impunity, a re-trial could have been ordered. Sadly, the reasoning of the Constitutional Court did not touch upon any of these issues.

## V. Conclusions

Having different legal systems coexisting in the same place and at the same time creates a laboratory for forum shopping and shopping forums. The multiplicity of authorities, procedures and regulations fosters the possibility that some disputants can choose a system that offers the best probabilities of success. However, not all the disputants are in an equal position of choosing, and some do not even know that they have a choice. Power imbalances and inequalities within Indigenous communities play an important role in these choices.

Forum shopping can be a blessing or a curse. Depending on who is buying, it could be an unfair and utilitarian exploitation of the system, a way of taking advantage of legal loopholes in the coordination and cooperation between different systems, or a selfish manner by which to bypass of the consequences of wrongful acts. At the same time, it could improve access to justice for those who were traditionally the minority within the minority, less powerful subgroups, or vulnerable individuals. The focus should be on the "buyer" and his or her reasons to choose one forum over the other.

As to shopping forums, Ecuador's Constitution states that the administration of justice is a collective right of Indigenous peoples. Being a right, its right-holder (Indigenous communities) may decide to exercise it or not. When Indigenous adjudicators decide to administer justice or decide not to administer justice, they are in fact "shopping" the controversies.

Indigenous individuals have the right to be tried by a competent judge, that is to say, a natural judge, from their own system and culture. Consequently, the decision of Indigenous adjudicators to solve a case or not should be weighed against the right of individuals to access justice. Neither the collective right nor the individual right should be absolute. Good reasons should be given if one right is to be limited or restricted in favor of the other.

Ecuadorian law included the *ne bis in idem* rule as a way of limiting forum shopping and shopping forums. In theory, if a case has been decided by one legal system, the other system should refrain from hearing the same case again. However, according to the Constitutional Court, Indigenous justice deals with

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the collective dimensions of the right to life, while ordinary justice deals with its individual dimension. Because of this, the Court found no violation of the *ne bis in idem* rule in a case where ordinary adjudicators heard a case already resolved by Indigenous adjudicators. The reasoning of the Court was flawed and it appears to contradict the purposes of the inclusion of the *ne bis in idem* rule. Finally, the rule is not absolute, and there are certain cases in which it is not applicable, mainly because the first trial demonstrated serious deficiencies or there was no real intention to bring the defendant to justice. In such cases, there is apparent res judicata and it is possible to order a second trial. The Constitutional Court did not explore the non-absolute nature of the rule, which demands a case-by-case analysis. Instead, it passed a general prohibition against Indigenous adjudicators hearing future cases related to the right to life. Whether the Court limited the jurisdiction of Indigenous adjudicators beyond what is possible or desirable in a legally pluralistic society is a topic that deserves further research. For the purposes of this article, the Court's decision fits awkwardly with the *ne bis in idem* rule.

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# LEGAL RECOGNITION OF THE DIGITAL TRADE IN PERSONAL DATA

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ABSTRACT: *In the digital world, millions of consumers transfer their personal data to access and use new Internet technologies every day. The technology industry is making immense profits from this data. It is a social and economic fact that peoples' personal data is used as an asset in the digital economy. Should consumers be compensated for the value of their personal data? This article argues that it is time to legally recognize the trade in personal data. As a response to increasing cross-border flows, governments protect personal data with privacy frameworks. However, it remains the decision of the consumer to give consent for the transfer of their data. This article proposes that an international framework that recognizes the trade of personal data could generate proper protection for the digital trade, while incentivizing free cross-border data flows and allowing the market to determine the value of the personal data. Moreover, consumers could share in the profits made from their personal information and will personally control their information and privacy. The use of personal data as an asset is a reality that can no longer be avoided. It is necessary to create legal standards to make trade of personal data more transparent, efficient and fair. This article aims to explore the idea of trading in one's personal data is not a surrealistic scenario, rather, in practice this trade already exists.*

KEYWORDS: *Digital Trade, Personal Data, Cross-border Data Flows, Digital Economy, Privacy Framework, Consumer, and Ownership Rights.*

RESUMEN: *En el mundo digital, cada día millones de consumidores transfieren sus datos personales con el objetivo de acceder y utilizar las nuevas tecnologías en Internet. La industria tecnológica obtiene una enorme ganancia de estos datos. Es un factor social y económico que los datos personales se utilizan como un activo en la economía digital. ¿Deberá el consumidor ser compensado por el valor de sus datos personales? Este artículo argumenta que es tiempo de reconocer legalmente el comercio de datos personales. Como respuesta al creci-*

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*miento del flujo de datos transfronterizos, algunos gobiernos protegen los datos personales con marcos de privacidad. Sin embargo, el consumidor puede dar su consentimiento para la transferencia de sus datos. Este artículo sostiene que un marco internacional que reconozca el comercio de datos personales generará una protección adecuada para el comercio digital, incentivará los flujos de datos transfronterizos libres y permitirá que el mercado determine el valor de los datos personales. Adicionalmente, el consumidor compartirá la ganancia obtenida por su información personal y controlará sus datos y privacidad. El uso de datos personales como un bien es una realidad que no puede seguir en negación. Es necesario crear estandares legales para comercializar con datos personales en una forma transparence, eficaz y justa. Este artículo tiene como objetivo comunicar al lector que la idea de comercializar con los datos personales para nada es surrealista ya que en práctica existe.*

Palabras Clave: *Comercio Digital, Datos Personales, Flujo de Datos Transfronterizos, Economía Digital, Marco de Privacidad, Consumidor y Derecho de Propiedad.*

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## I. Introduction

Every day consumers input their personal data to access and use websites, social media, Internet of Things (IoT), and different available technologies. In this regard, cross-border data flows have exponentially increased in the digital world. Personal data has become an asset used by technology companies for profit. However, consumers are not adequately compensated for the value of their data.

Personal data flows are a social and economic reality that can no longer be avoided. This article argues that the trade of personal data should be legally recognized in an international context. The legal status given to such data will incentivise digital trade since cross-border data flows will not be restricted, and a new market will be legalised and protected. Moreover, consumers would share the profits generated by their own data.

The response of governments to the evolution of digital trade has been the creation of privacy policies to protect personal data. One main concern is the risk of misuse of personal data when transferred across borders, at the same time, there is concern that overprotection of this data might harm trade. If personal data were to be considered a tradable asset, trade regulations would have to cope with a privacy framework. This article argues that privacy law is ancillary protection to the consumer, as through consent the trade is possible. Is it time to legally accept personal data as a tradable good?

There are three main reasons for recognizing personal data as a tradable asset. First, the data subject, the consumers that are active on the Internet, should share the profit made out of their personal information and should be the one controlling their own information and privacy. Second, companies are legally protected if the data subject/owner consents to the use of personal data. Third, digital trade could benefit as data trading becomes recognized by the law, cross-border data flows would become more free and responsive to the market, leading to enhanced competitiveness and innovation in the data economy,[1] as the value of personal data is freely determined by unrestricted supply and demand.

This article does not discuss whether personal data should be treated as a good rather than a service, this distinction is a matter best left to research.[2]

[1] European Commission, Building a European Data Economy, COM (2017) 9 final (2017).

[2] For practical reasons, this article will name the trade of personal data as a good.

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The important thing here is that personal data is considered a tradable asset. This study emphasises the benefits and needs for individual's personal data to be regulated as an object of trade. It is structured in four substantive parts. Part I introduces the reader in the subject matter of this article. Part II gives a general overview of personal data, its use and cross-border transfer. Part III examines profits generated from cross-border data flows. Part IV outlines the possible constraints a legal framework that accepts personal data as a tradable asset might face. This article concludes that personal data is an asset in the digital economy, and posits that recognising the right to trade with it will contribute to freeing digital trade.

## II. Personal Data

In the digital era, everyday users of the Internet, IoT, and new technologies input personal data to access websites, smartphones, GPS, apps, social media, e-commerce, and a massive array of options that new technologies have to offer. High tech companies are collecting this personal information to make a profit out of it. This article argues that the users should enjoy compensation for the use of their personal data.

This section gives background on essential aspects of the transfer of personal data, defining the type of personal data that the article will refer to. The use of personal data will then be examined, to understand how the companies collect personal data. Finally, this section will look at the fact that data is exchanged through the Internet, causing cross-border data flows and generating legal and commercial consequences.

### 1. *Defining Personal Data*

There is a range of definitions of personal data. These definitions depend on whether the data is related to an identifiable natural person, and the strength of that link. The differentiation between 'personal data' and 'non-personal data' remains in force.[3] In the broadest sense, 'personal data' could be considered the DNA of a person, which would thus be subject to human rights. However, 'non-personal' data, which is included in personal data, is data produced by the person, it is this 'non-personal data' that is the subject of this article, however, it will be referred to as personal data.

To clarify which type of data is included in this definition, this section includes an analysis of the researcher Václav Janeček, who divides personal data between extrinsically and intrinsically private. Janeček's classification fol-

[3] *See* Nadezhda Purtova, *Do Property Rights in Personal Data Make Sense after the Big Data Turn?: Individual Control and Transparency*, 10(2) Journal of Law and Economic Regulation, Tilburg Law School 27 (2017).

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lows the traditional contrast between personal and non-personal data.[4] According to Janeček, intrinsically personal data contain "intrinsically private information",[5] controlling it is like controlling one's identity. However, not all personal data are intrinsically personal, as regards for example GPS data, IP addresses, or data held in personal task managers. Janeček argues that this type of data is personal only extrinsically and therefore does not face the same conceptual, ethical, and legal issues as intrinsically private data.[6] Thus extrinsically private data can be the object of transactions.

Whether it is called extrinsically private or non-personal data, it is clear that there is a type of personal data produced by the users of the Internet, especially consumers, that is used to create economic value. International law has to be revolutionary and legally recognize personal data is an asset subject to ownership and to trade. This article proposes that the trade of personal data is only possible for extrinsically private personal data, since this does not attempt against the privacy of the individual, as he or she can consent (or veto) the exchange of this type of information.

### 2. *Use of Personal Data*

This section examines how online consumers use data to interact on the Web. At the same time data is used by the subject, it is collected by third parties, for example, by websites. Given the full range of possibilities for collecting personal data, individuals use their data to interact. For example, through blog accounts, social media, e-commerce, gadgets known as IoT and even by interacting with government bureaus such as health, tax, or finance.

The Privacy Guidelines of the organization for Economic Co-operation and Development (OECD) considers personal data the following type of information:[7]

- User-generated content: blogs, commentaries, photos and videos;
- Activity or behavioural data: what people search for, what they buy online and the methods of payment;
- Social data: for instance, social networking sites;
- Locational data: residential addresses, GPS and geo-location and IP address;
- Demographic data: age, gender, race, income, sexual preferences, and political affiliation;

[4] *See* Václav Janeček, *Ownership of Personal Data in the Internet of Things*, 34(5) Computer Law & Security Review 1039–1502 (2018).

[5] *Id.*

[6] *Id.*

[7] OECD Privacy Guidelines *(2013)*, Jul. 11, 2013, OECD (2013).

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- Data of an official nature: financial information, account numbers, health information, national health or social security numbers, and police records.[8]

The data is created by and about people. The World Economic Forum divides personal data in three: (a) volunteered data, which is created and explicitly shared by individuals, for example in social network profiles; (b) observed data, captured by recording the actions of individuals, for example through IoT; and, (c) inferred data about individuals based on the analysis of observed information, for example by the purchase history.[9]

Statistics show that on an average day, users send around 47 billion emails and submit 95 million "tweets" on Twitter[10]. Each month, users share about 30 billion pieces of content on Facebook. [11] According to the International Data Corporation, in 2010 individuals' actions generated about 70 percent of digital data. This data is created by activities such as sending emails, taking digital pictures, turning on mobile phones or posting content online.[12]

These statistics demonstrate how personal data is required to interact in the digital society. Hence, individuals become creators and users of their data, and become the subject and the object of their data. From the individual perspective, one must use data to cope with the demands of everyday modern life.[13]

### 3. *Cross-Border Data Flows*

The data that is uploaded to the Internet technically does not face border barriers because physical jurisdictions do not restrict the Internet and the digital space. It is well known that the Internet enables the possibility of people interacting with one another across the globe. The same case applies to consumers using Websites from different parts of the world. "Cross-border

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[8] OECD, *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value*, OECD Digital Economy Papers 220 (Apr. 2, 2013) *https://www.oecd-ilibrary.org/science-and-technology/exploring-the-economics-of-personal-data_5k486qtxldmq-en.*

[9] *See* The World Economic Forum, *Personal Data: The Emergence of a New Asset Class,* The World Economic Forum 40 (2011).

[10] *See* Kevin Thau, *Twitter + Ping = Discovering More Music*, Twitter Blog, Nov. 11 2010, *https://blog.twitter.com/en_us/a/2010/twitter-ping-discovering-more-music.html.*

[11] The World Economic Forum, *supra* note 9.

[12] *Id.*

[13] The generalisation applies to the people that have access to the Internet and IoT. Statista measured that in July 2018, over 4.1 billion people were active internet users and 3.3 billion were social media users.

*See also* Statista, *Global Digital Population as of July 2018 (in Millions),* Statista, Jul. 2018, *https://www.statista.com/statistics/617136/digital-population-worldwide/.*

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data flow refers to the movement of personal information (or data) across national borders".[14]

The use of the Internet facilitates the exchange of personal data without border restrictions. Huge corporations enable the movement of personal data within different jurisdictions, for example, Facebook, Google, Amazon and Twitter.

Today, international businesses are handling customer data in many areas. These cross-border data flows have raised concerns for governments in different countries. One key worry is that personal information may be at risk. For example, in 2005, undercover reporters from the Australian Broadcasting Corporation "were allegedly offered for sale personal data of 1,000 Australians for around US$10 per person."[15] Governments argue that data is more secure if it is locally stored since they are in a better position to enforce privacy regulations. [16]

As privacy protection is on the agenda of several countries, there is an increasing tendency to regulate cross-border data flows. These changes in the global policy include administrative requirements such as consumer consent, the right to be forgotten, and sanctions for non-compliance.[17]

On the contrary, some academics and businesspeople argue that too much data regulation may block trade. The OECD issued a report that compares the nexus between policy motivations and cost considerations. It stated: "While there are legitimate policy concerns associated with cross-border data flows, there is a growing sense of danger in the business community that these measures are being put in place without a proper analysis of their trade-inhibiting effects and with little guarantee that privacy concerns will be addressed."[18]

While it is crucial that policy barriers address issues cross-border data flows may face, the focus of this article is not the actions that governments have taken to protect personal data. Rather, the concern is connected to the legal rights that consumers should have concerning their data and how that is related to the trade. The privacy issue is a secondary aspect that will be addressed later on, but only as it relates to available protection to the consumer, not as compensation for consumer data.

In this sense, the importance of the cross-border data flows to this article is that the data has value across borders and industries. The following sec-

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[14] *APEC Privacy Framework (2015),* APEC#217-CT-01.9 (Reports) 8493, (2015).

[15] *See* Australian Law Reform Commission, *Cross-Border Data Flows,* Australian Government (Aug. 16, 2010), *https://www.alrc.gov.au/publications/31.%20Cross-border%20Data%20Flows%20/introduction*.

[16] *See* OECD, *Working Party of the Trade and Agriculture Directorate,* 56, *Emerging Policy Issues: Localisation Barriers to Trade*, TAD/TC/WP (2014)17/FINAL (May 12, 2015).

[17] *See* L. Lee Tuthill, *Cross-Border Data Flows: What Role for Trade Rules?*, in Research Handbook on Trade in Services 357 (Pierre Sauvé and Martin Roy eds., 2016).

[18] OECD, *supra* note 7.

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tion will delve more extensively into the implications these flows have on the digital trade.

## III. Profit and Cross-Border Data Flows

Trade today is associated with data crossing borders in at least some element of the transaction or as the product itself. [19] It is recognized that data has value across borders and industries. However, the value is different from the one attributed to physical commodities such as oil.[20] According to the Swedish National Board of Trade, "companies need to transfer data to trade." [21]

Personal data is used by corporations and governments as a means to make a profit. Increasingly, consumers are seeking a share of that profit; however, it is still unclear how they are to be compensated for the transfer of their data. This article proposes that the trade in personal data should be legally recognized and organized by a legal framework. The data flow would then be more free and responsive to market supply and market demand. Furthermore, the legal recognition of trade of personal data would ensure the exchange of personal data on the Internet is transparent.

This section analyses the value in the personal data itself, subject to the transaction, as well as the value that corporations, government and consumers secure from this data. Studies show that consumers can obtain a profit from their personal data.

### 1. *The Value of Personal Data*

Personal data is an essential asset in today's digital society. There have been several studies to estimate the economic value of personal data, this value is of interest to corporations, governments, and consumers (who themselves are the source of the data).

In 2012, the Boston Consulting Group published a report called *The Value of Our Digital Identity*. It shows that the value of personal data can be massive. The report projects to the year 2020. Data is estimated to be worth €1 trillion in Europe, and for European businesses and governments, the use of personal data will deliver an annual benefit of €330 billion. It is the public sector and health care that are expected to profit the most, totalling 40 per cent of their total organizational revenues. For the data of individuals, the value will be €670 billion.[22] The consumer value is generated via reduced

[19] OECD, *supra* note 7.

[20] *See* Michael Mandel, *The Economic Impact of Data: Why Data Is Not Like Oil*, Progressive Policy Institute 20 (2017).

[21] Tuthill, *supra* note 17.

[22] *See* John Rose, Olaf Rehse and Björn Röber, *The Value of Our Digital Identity,* The Boston

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prices, time savings through self-service transactions, and the valuation of free online services.[23]

A World Economic Forum study published in 2010 highlighted the relevance of personal data as an economic asset that could be perceived as the new "oil."[24] It classifies the use of personal data as a product in itself and as a primary component of varied economic activities.[25]

US based Data Driven Marketing Institute published a report on the role of Individual-Level Consumer Data (ILCD). In providing marketing services, the value was around $156 Billion in 2012. According to this study, the most substantial contribution to the economic value of data-driven market economies is the exchange of ILCDs between firms.[26]

The OECD carried out a study which identifies the monetary value of personal data to a firm. The value can be calculated by the stock value, by the revenues or by the price of data records on the market. Alternatively, it can be calculated by the costs of a data breach and through the price of personal data on an illegal market.[27] In addition, *The Financial Times* published an interactive sheet calculating market prices for specific sorts of data, such as demographic data, family and health data, property, leisure activities, and consumer data.[28]

These studies show that personal data is being used as an asset by corporations and even by governments. The questions that this article raises are: which is the value associated to the consumers for their own data, and how they should be compensated? In this article data subjects are generalised as consumers because they give their information in exchange for a free service; while interacting through e-commerce, surveys, or other activities that involve economic values such as a good or a service.

The Boston Consulting Group found that consumers, with an awareness of how their data is used, require 26 per cent more benefit in return for sharing their data. [29] Consumers that can manage their privacy are up to 52

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Consulting Group, Nov. 20, 2012, *https://www.bcg.com/publications/2012/digital-economy-consumer-insight-value-of-our-digital-identity.aspx*.

[23] *See* Marc Van Lieshout, *The Value of Personal Data*, in Privacy and Identity Management for the Future Internet in the Age of Globalisation 26 (Jan Camenisch, Simone Fischer-Hubner and Marit Hansen eds., 2015).

[24] The World Economic Forum, *supra* note 10.

[25] Van Lieshout, *supra* note 23.

[26] Van Lieshout, *supra* note 23.

[27] *See* OECD, *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value* (OECD Digital Economy Papers No 220, OECD, 2 April 2013) *https://www.oecd-ilibrary.org/science-and-technology/exploring-the-economics-of-personal-data_5k486qtxldmq-en* ('*Exploring the Economics of Personal Data*').

[28] *See* Emily Steel et al., *How Much Is Your Personal Data Worth?*, Financial Times, June 13, 2013.

[29] Rose, Rehse and Röber, *supra* note 22.

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per cent more willing to share information against those who are not able to manage their privacy. Thus, privacy controls and sufficient benefits, mean consumers are more willing to share their data.[30] The Boston Consulting Group's study reflects that consumers need to perceive the benefits of sharing their data in order to ensure the flow of data in the digital market. As an additional argument, privacy would be secured if the consumer is involved directly in the control of their information.

Mainly the corporations and the governments make profit out of the value of the personal data. Since consumers are the source of the data, they should share the economic benefit from it. The previous studies show that personal data can produce value for the consumer. The remaining question is how the consumer will receive the benefits of such an asset.

### 2. *The Market*

Access to the Internet has given rise to a number of data-sharing practices. Through different platforms, people share details about their location, their mood and their activities. They leave traces with their smartphones and devices, or through their click behaviour. The value of this information is well understood by marketers, who collect as much data about personal behaviours and preferences as possible. More data allows these marketers to follow purchasing habits and strategies, and make targeted offers to consumers.[31]

The highest economic value of the new tech companies is their access to data. We live in a multidirectional trade market where within the Internet everyone trades with everyone; and data is the product and the service. The global integration of business has become dependent on Information Technology (IT) and data.[32] Similarly, governments are making a profit out of data collection and its use within public services. This section analyses the current market with regards to personal data.

#### A. *Corporations*

The exponential growth of tech companies was spurred by collecting, aggregating, analysing and monetising personal data. Innovative businesses are built on the economics of personal data, as is the case with Google, Facebook and Instagram.[33] Besides using personal data in social media companies or tech companies, a market of personal data brokers has emerged, in this market, data is the product. Data brokers are entities that collect information

30 Rose, Rehse and Röber, *supra* note 22.

31 Van Lieshout, *supra* note 23.

32 Tuthill, *supra* note 17.

33 The World Economic Forum, *supra* note 10.

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about consumers and sell it to other data brokers, companies, and individuals. They can be divided into three categories: sites for finding persons, data brokers that focus on marketing, and data brokers who offer risk mitigation products to verify identities and help detect fraud.[34]

There is a cluster of major data brokers in the marketing field. The first is Acxiom. In the early 1980s, Acxiom pioneered the business model of collecting data on people, segmenting that data and selling it to be used in marketing. It is described as "the biggest company you have never heard of" by Bernard Marr.[35] Currently, Acxiom's data is said to be used to make 12 percent of direct marketing sales in the US.[36] The second is Nielsen. It has been in the market since 1923 and has established itself as a leader in market research and ratings. Nielsen is active in gathering data on consumers from 100 different countries.[37]

The third is Experian. This company combined credit scoring with database and marketing expertise to offer its services, initially to financial industries and then to all sectors. It also sells data directly to consumers by offering insights into their creditworthiness. In 2011, Experian reported total revenues of US$4.2 billion realised over 600 million individual records and 60 million business data records. [38]

Large service providers such as Google and Apple have also become personal data brokers. Today, Google owns brokers such as AdMob and Double Click. Apple has its own ad-broker with iAd. The ad-broker sector is growing. For example, BlueKai[39] offers a data exchange platform that captures more than 30,000 attributes over 300 million users. [40]

Besides their role as data brokers, multinational corporations such as Facebook, Google and Twitter are monitoring everything we do. They probably know as much, or more, about us. Apparently these companies offer their services for free; however, their economic profit comes from the users' data.

The famous Cambridge Analytic Scandal led Mark Zuckerberg to admit that Facebook not only provides data to advertisers but works for them. Face-

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[34] *See* Yael Grauer, *What Are 'Data Brokers,' and Why Are They Scooping Up Information About You?,* Motherboard, Mar. 28, 2018, *https://motherboard.vice.com/en_us/article/bjpx3w/what-are-data-brokers-and-how-to-stop-my-private-data-collection*.

[35] *See* Bernard Marr, *Where Can You Buy Big Data? Here Are The Biggest Consumer Data Brokers,* Forbes 1, September 7, 2017.

[36] *Id.*

[37] *Id.*

[38] Marr, *supra* note 35.

[39] *Cf.* BlueKai is a cloud-based big data platform that enables companies to personalise online, offline, and mobile marketing campaigns.

Oracle, *Oracle Buys BlueKai*, Oracle and Bluekai (Feb. 24, 2014), *https://www.oracle.com/corporate/acquisitions/bluekai/*.

[40] Van Lieshout, *supra* note 23.

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book makes its money through advertising.[41] In 2017, Facebook made US$40 billion in revenue from which 39.9 billion came from digital advertisements,[42] primarily Facebook Ads, which target user profiles.

Google is well known for its famous search engine, email service, web browser, as well as a host of online tools we use daily. Its revenue in 2017 was of US$110.8 Billion, gained mainly from its proprietary advertising service, Google AdWords. It works in the following way: when one uses Google to search for anything, one is given a list of search results generated by Google's algorithm. This algorithm provides the most relevant results, accompanied by related suggested pages from an AdWords advertiser. Advertisers pay Google each time a visitor clicks on their advertisement.[43]

The economic profit from personal data for corporations is in the realm of billions of dollars, mainly in the advertisement business and in data analytics. Hence, the importance of gathering, controlling, analysing and selling data is massive. It isn't only advertising companies, but also specific companies like data brokers and social media corporations, use personal data as their main asset.

### B. *Government*

An increasing tendency is for governments and public sector institutions to use data as a public utility. E-governance initiatives can improve the efficiency and effectiveness of communication among public organizations and with citizens.[44] Governments gather personal information through different portals. For instance, the government of Mexico collects official tax declarations through its online portal.[45]

Government agencies also use personal data to deliver a range of services, including health, education, welfare and law enforcement.[46] Moreover, government demands for data held by the private sector have increased. This is called systematic access, and is divided into two types: direct access by the government to private-sector databases or networks, and government access to data mediated by the company that maintains the database or network.[47]

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41 *Cf.* Ben Gilbert, *How Facebook Makes Money from Your Data, in Mark Zuckerberg's Words,* Business Insider Australia, April 12, 2018.

42 *Cf.* Rakesh Sharma, *How Does Facebook Make Money?*, Investopedia, Jul. 25, 2018, *https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp.*

43 *Cf.* Eric Rosenberg, *How Google Makes Money,* Investopedia, Oct. 9, 2018, *https://www.investopedia.com/articles/investing/020515/business-google.asp.*

44 The World Economic Forum, *supra* note 9.

45 *E.g,.* 'Portal de Trámites y Servicios - SAT', *https://www.sat.gob.mx/personas*.

46 The World Economic Forum, supra note 9.

47 *See* Ira S. Rubinstein et al., *Systematic Government Access to Personal Data: A Comparative Analysis*, 4(2) International Data Privacy Law 96 (2014).

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In 2014, the *Harvard Business Review* published an article titled "How Cities Are Using Analytics to Improve Public Health." Two examples in which personal data was used were described. In one, the Chicago Department of Public Health (CDPH) in association with the Department of Innovation and Technology, identified data related to food establishments and their locations. Using this data, they constructed models that calculated a score for every food establishment, "with higher scores correlating with an increased risk of critical public health violations." [48] In the other, the city of Chicago partnered with the Eric & Wendy Schmidt Data Science for Social Good Fellowship at the University of Chicago (DSSG) to develop a model to better predict which homes are more likely to have lead-based paints (lead presents a severe health risk, particularly for children who are exposed to it). The DSSG used the data from home inspection records, assessor value, history of blood lead level testing, census data and other factors.[49]

The public sector uses personal data and analytics of that data to improve their services. Governments are starting to be aware of the use they can give to all this big data. Furthermore, while implementing e-governance, governments collect sensitive data, including financial information, which generates economic value even if a privacy framework protects it.

### 3. *The Consumer's Perspective*

While the market of personal data is apparent in the private sector and visible in the public sector, the value of this data to the individuals themselves is unclear. This section examines different cases to demonstrate how individual users have attempted to make a profit out of their personal data.

#### A. *Personal Data For Sale*

In 2014, Shawn Buckles set up an online auction to sell his personal data to the highest bidder. He offered a one-year subscription to his profile, his location tracking records, his train tracking records, his calendar, his email conversations, his online conversations, his consumer preferences, his browsing history, as well as his thoughts to the firm that offered the highest price. The winner was The Next Web who paid €350 for it.[50]

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[48] *Cf.* Keck School of Medicine, University of Southern California, *Big Data and Public Health*, Master of Public Health Online (Online), 2018, *https://mphdegree.usc.edu/resources/articles/big-data-and-public-health/*.

[49] *Id.*

[50] *Cf.* Shawn Buckles, *For $ale Personal Data*, Personal Data: I will sell you my soul, Apr. 12, 2014, *http://shawnbuckles.nl/dataforsale/*.

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As part of his project, Shawn Buckles made a pamphlet to raise awareness about the commercialisation of personal data and the consequences for privacy. He showed that people could attribute a specific monetary value to their personal data.

This case was an individual project, which showed that personal data can be publicly commercialized. The importance of this project was not the monetary amount Shawn Buckles won, but rather it was the demonstration that an individual has the possibility of making a profit out of their own data, which in any case is already being collected by major corporations or governments. What would have happened if instead of Shawn Buckles acting alone, the offer to sell personal data was drawn up by a group of people?

Data clearly has a value, but it is up to every person to claim it. Instead of being benefited by the use of free services, such as Facebook or Google, consumers should enjoy economic compensation for the data they introduce into the Internet. The case of Shawn Buckles proves it is possible.

### B. *Surveys and Apps*

The Internet is full of new ideas and ways to make money. The advertising market has reached a point where they pay consumers for responding to surveys. Even more innovative is the release of apps that pay for personal data. The impressive fact is that consumers accept and use these websites and apps to make money out of their data.

Paid surveys are a revolutionary market that has not been properly addressed. It is becoming a trend to respond to surveys in exchange for reward cards, and consumers make a profit from their data. The British newspaper *The Telegraph* printed an article where it disclosed the ten most profitable survey sites. The pay depends on the time invested, the terms and the effort involved.[51] Two of those survey sites are examined below.

The first one is MySurvey. Here, the user earns points by completing online surveys via PC, Laptop, Tablet or Mobile Phone. The points are exchanged for a variety of products, gift cards, e-certificates and vouchers. The rewards include PayPal and Amazon vouchers. A typical survey might reward a user with around 100 points. They can get a £3 PayPal payment for 345 points, or a £5 Argos voucher for 550 points. The average time needed to complete a survey is between 15 to 20 minutes.[52]

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[51] *Cf.* Sophie Christie, *Five-Minute Guide to Making Easy Money with Online Surveys*, The Telegraph (Online), Jul. 3, 2018, *https://www.telegraph.co.uk/money/consumer-affairs/five-minute-guide-making-easy-money-online-surveys/*.

[52] *Cf.* My Survey UK, *How Do Paid Surveys Work?*, MySurvey UK (2018), *https://uk.mysurvey.com.*

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The second one is Crowdology which "offers paid online surveys that fit in with your day".[53] The surveys can be completed in between 2 and 15 minutes. Responses are anonymous and are used by brands and companies to improve their products and services. The user will earn cash paid into a PayPal account. The price is around 40p to £10 per survey. One can argue that Crowdology is buying personal data in a commercial context. In exchange for a service or good, depending on how it is to be classified as the input of personal data, the website pays users with money.[54]

Another new market is the release of apps that have as the object the collection of data. *The New York Times* published an article called "4 Free Apps that Can Earn You Extra Cash". This article states that there are a few cell phone apps designed to earn money, in the form of cards and even cash. In return, the app will track some of the user's data. Commonly, the collection of this personal data is for marketing purposes. Apps collect information about the websites visited, real-time locations, online purchases and the use of other apps as well as the user's contact list and search queries.[55]

These examples support the argument that personal data is subject to commercialisation. Privacy policies have not prevented the making of profit through the use of personal data. Consumers could be the ones using technological innovations to make a profit out of their personal data, instead of giving it away it in exchange for free services, such as Facebook or Google. Instead, this data could be traded with companies that openly and directly collect their data.

The question that remains is: Is it time to legally regulate personal data as a tradable good? The next section briefly examines the perspective of consumers with regards to disclosing their data in order for it to be traded.

### C. *The Opposite Direction: Privacy*

So far this article has studied the possibility that data be considered an asset. In doing so, it is crucial to address the opinion of consumers, to see whether they are indeed open to trading their data or would instead prefer to protect their privacy. This section addresses two studies in this direction. The first one was carried out by Acxiom and it studies the population of the UK with regards to perspectives on data privacy. The second study focuses on consumer willingness to buy their personal data that is already in the cloud.

In February 2018, Acxiom published a study titled "What the consumer thinks," which looked at data privacy. It found that three-quarters of people

53 *Cf.* Crowdology, *Take Paid Surveys Online | Get Cash for Your Opinions*, Crowdology (2016), *https://crowdology.com/uk/surveys/*.

54 *Id.*

55 *See* Kristin Wong, *4 Free Apps That Can Earn You Extra Cash*, The New York Times, February 13, 2018, at B5.

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surveyed are either unconcerned or pragmatic about the data they share with organizations. The pragmatic group, which represents 50 per cent of the total of the surveyed population, seeks a clear reward or value in exchange for their data. Consumers increasingly regard their personal data as an asset and the concern about privacy has decreased.[56]

The study reveals that in 2017, the number of people in the UK who claim to be concerned about online privacy was 75 per cent while in 2012 it had been 84%. In 2017, among 18 to 24-year-old consumers it was just 58 per cent. Furthermore, 61% of 18-24-year-olds view data exchange as vital to modern society. [57] Survey respondents stated that considerations for engaging in the data economy include trust and transparency in organizations or businesses, as well as the possibility of sharing the benefits.[58] Finally, 48 percent of consumers surveyed in the UK believe they should have ultimate responsibility for their data security, while only 10 per cent believed that the government should bear the responsibility. At the same time, 41 per cent of consumers are happy for government departments to share personal information in order to enhance the efficiency of public services.[59]Acxiom's study revealed that often, consumers are open to exchanging their data, as long as they benefit from it, either monetarily or through the provision of public services. Privacy concerns are reducing, but in exchange, the consumer wants to have control of their data. They feel that it is their responsibility, not the government's.

In a separate study named 'Psychology of Ownership and Asset Defense: Why People Value Their Personal Information Beyond Privacy'[60], Spiekermann investigated what people are willing to pay to keep private their data previously left on Facebook. [61] The experiment was performed with over 1,500 Facebook participants. It offered three hypothetical scenarios:[62]

*a)* Mark Zuckerberg retires from Facebook. He offers users to either repurchase their information or have it destroyed.
*b)* A third party takes over Facebook. Participants can leave their data on the platform or repurchase their data.
*c)* Participants are offered a share in the revenues of the third party that took over Facebook.

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56 *See* Foresight Factory et al., *Data Privacy: What the Consumer Really Thinks*, The Direct Marketing Association *29* (2018).

57 Factory, *supra* note 57.

58 *Id.*

59 *Id.*

60 *See* Sarah Spiekermann, Jana Korunovska & Christine Bauer, *Psychology of Ownership and Asset Defense*, in Thirty Third International Conference on Information Systems (2012).

61 Van Lieshout, *supra* note 24.

62 *Id.*

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The results showed that the willingness to pay/protect was lowest in the first option, valued at €16; the option to pay/protect for preventing the data to be sold to a third party was valued at €54; and in the third option of sharing in the revenues, the data was valued at €507. Spiekermann thus concludes that ownership is more relevant to consumers than privacy concerns.[63]

These studies reveal that the consumers have an interest in sharing their personal data in exchange for compensation. The protection of their privacy is of minor concern. However, it seems that privacy is weighed against the benefit that the consumer receives by releasing their information. Nonetheless, the first study showed that the consumer is aware of privacy protection and they feel that it is their responsibility to protect it. This article dares to suggest that the personal data belongs to the consumer, both in terms of the benefits it can create, and in terms of privacy rights.

Cross-border flows of personal data remain an area of development. For that reason, the transfer of personal data should be regulated to set the necessary legal provision to control, enforce and establish the parameters by which such transfer is done, and through creating a legal framework for the trading of personal data.

This would help to create a trade relationship between the consumer and technology companies: rather than being a mere user, the consumer will have bargaining power. It would also protect companies against claims made by consumers, since consumers consented to the transfer and obtained a remuneration, rather than only accepting terms and conditions.

The digital trade will benefit, as cross-border data flows will be consented to and accepted by the subject of the data. Further, the trade of personal data will represent another innovation in the digital economy.

## IV. Challenges of Data as a Tradable Good

Personal data is collected and purchased by the marketing industry; consumers exchange their data for free services, reward cards or for money. In other words, personal data is an asset in the digital trade. A consumer might be aware or unaware of the use given to their data, but the law should be at the forefront of its regulation.

The privacy protections of personal data are on the agenda of many governments. The key concern is the risk of misuse of personal data when transferred across borders, at the same time there is a concern about over protection, which could harm trade. There is a general acceptance that at the end it is the consumer or data subject that bears the right to consent the use of his or her own data.

63 Van Lieshout, *supra* note 24.

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International treaties should thus focus on creating a legal framework that regulates the consent, control, and transaction of the personal data. This framework would incentivise digital trade by not restricting the personal data flows and will legalize and protect the new market.

The answer to the social issues noted in the previous section should be a legal framework that recognizes and regulates the sale of personal data *as a good*. This section analyses the legal structure necessary to recognize personal data as an asset and finalizes with a proposal on how this could be achieved.

### 1. *Protection of Personal Data*

The response of governments to the evolution of digital trade was to protect personal data with privacy policies. If personal data were to be considered a tradable good, the trade regulations would have to cope with the privacy framework. This section briefly addresses the importance of privacy policies to personal data.

The regulatory phenomenon has its origin in the potential infringement of "internal" or "external" peace.[64] According to Polcak and Svantesson, two sorts of risks, direct and indirect, are associated with the presence of information footprints. The infringement of individual sovereignty, internal peace and the right to be let alone constitutes a direct risk. Indirect infringement means individual data has untraceable effects of group manipulation or social engineering. This data is used to control the environment, with no significant or provable individual effects. It is difficult to protect this data, because it is impossible to find any aspect of being let alone in the processing of personal data.[65]

The international community has issued legislation on this matter. This section will briefly study the privacy framework of the OECD and the Asia-Pacific Economic Cooperation (APEC), as well as the position of the free trade agreement Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the General Agreement on Trade in Services (GATS) related to the privacy protection of the personal data.

The EU recently issued the General Data Protection Regulation in 2018, which is a leading legal mechanism in the matter. However, this article will not make further reference to it. The scope of application is the EU, and though it does have effects on countries outside the EU, privacy protection is a complementary matter to this article.

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64 *See* Radim Polcak & Dan JB Svantesson, *Private Information Sovereignty*, in PRIVATE INFORMATION SOVEREIGNTY: DATA PRIVACY, SOVEREIGN POWERS AND THE RULE OF LAW 81 (Radim Polcak and Dan JB Svantesson eds, 2017).

65 Polcak & Svantesson, *supra* note 64.

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### A. *The OECD Privacy Guidelines*

The organization for Economic Co-operation and Development adapted the OECD Privacy Guidelines in 2013 to meet the demands of the new digital trade era. These guidelines include principles that are of paramount importance in the protection of the privacy of the data subject. The Privacy Guidelines suggest that governments should not over-restrict the cross-border data flows.

The OECD promotes respect for privacy as a fundamental value and a condition for the free flow of personal data across borders.[66] Their concern is that a growing number of online entities collect vast amounts of personal data. To harmonize privacy regulation among its members, the Privacy Guidelines develop basic principles for national application. A summary of the principles included in the OECD Privacy Guidelines is further developed.

The collection of personal data has limits and should be obtained by lawful means with the knowledge or consent of the data subject. [67] The purpose should be specified and the subsequent use limited to the fulfilment of those purposes or not incompatible them. [68] As a limitation, personal data should not be disclosed, made available or otherwise used for purposes other than those specified except with the consent of the data subject or by the authority of law. [69] Finally, "personal data should be protected by security safeguards against the risks of loss or unauthorised access, destruction, use, modification or disclosure of data". [70]

The OECD Privacy Guidelines address the relationship between individuals and the data controller. The individuals have the right to obtain from a data controller "confirmation of whether or not the data controller has data relating to them and communication of the data related to them". [71] In the case of denial, the individual has the right to challenge such denial and if they are successful, to have the data erased, rectified, completed or amended. [72]

Finally, "the data controller should be accountable for complying with measures that give effect to the previous principles". [73] They are also accountable for personal data under their control, without regard to the location of the data, hence cross-border data.

The OECD Privacy Guidelines provide that member countries should not enact laws that unnecessarily create obstacles to cross-border flows of per-

66 *OECD Privacy Guidelines (2013)*.

67 *Id*, art. 7.

68 *OECD Privacy Guidelines (2013)*, art. 9.

69 *Id*, art. 10.

70 *Id*, art. 11.

71 *Id*, art. 13 § a.

72 *Id*, art. 13.

73 *Id*, art. 14.

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sonal data.[74] The Council recognizes that 'Member countries have a common interest in promoting and protecting the fundamental values of privacy, individual liberties and the global free flow of information'.[75] A nationally coordinated strategy is needed to achieve the right balance between the social and economic benefits of data and analytics.[76]

### B. *The APEC Privacy Framework*

The APEC Privacy Framework was created in 2015 to promote electronic commerce throughout the Asia-Pacific region. It is consistent with the 2013 OECD Privacy Guidelines.[77] This framework includes principles to protect personal data. However, it gives more freedom for the transfer of data than the OECD Guidelines.

APEC Members consider that "the information flows are vital to conducting business in a global economy. They realise the enormous potential of electronic commerce to expand business opportunities, reduce costs, increase efficiency, improve the quality of life, and facilitate the greater participation of small business in global commerce." [78] Thus, a framework that enables local data transfers will benefit consumers, businesses, and governments. The APEC Privacy Framework "promotes that Members should avoid the creation of unnecessary barriers to information flows".[79]

The Framework includes principles for privacy protection. Due to the similarities with the OECD Guidelines, it is not necessary to repeat all of them; however, it is essential to enhance the fact that the APEC gives freedom to the individual concerning their personal information.[80] Two articles are of relevance, Article 9 and 19, which are developed below.

APEC Principle 9 is essential. It says that "accountability should follow the data."[81] According to Crompton and Ford, "this principle is the most important difference between the APEC Framework and the EU Directive on border controls".[82] In the Framework, once an organization has collected personal information, it remains accountable for the data "whether domestically or internationally".[83] This principle is important because it relies upon

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74 Australian Law Reform Commission, *supra* note 16.

75 *OECD Privacy Guidelines (2013)*.

76 *Id.*

77 *APEC Privacy Framework (2015)*.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Malcolm Crompton and Peter Ford, Implementing the APEC Privacy Framework: A New Approach*, International Association of Privacy Professionals, December 01, 2005.

82 *Id.*

83 *APEC Privacy Framework (2015), principle 9.*

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the protection in the data itself and the parties to it, the person itself and the collector. The Framework does not create a cross-border barrier to the transfer of personal data.

Within Principle 3, the Framework requires that "the collection of personal information should be limited to information that is relevant to the purposes of collection and any such information should be obtained by lawful and fair means, and where appropriate, with notice to, or consent of, the individual concerned." [84] The exception to this rule is found in Principle 4 which allows the collection of personal data through "the consent of the individual whose personal information is collected, when necessary to provide a service or product requested by the individual; or, required by law". [85] Furthermore, Principle 5 states that individuals have the right to "exercise choice about the collection, use and disclosure of their personal information… However, it may not be the case in publicly available information".[86]

The APEC Privacy Framework encourages cross-border cooperation between members. These may include mechanisms to assist in investigations and identify and prioritise cases for cooperation in severe cases of privacy infringement.[87]

There have been some arguments against this Framework, calling it too weak in the protection of privacy. For instance, Professor Graham Greenleaf argues that it has a bias toward the free flow of personal information. [88] The requirement of accountability, coupled with a requirement either of consent or that the disclosed takes reasonable steps to protect the information is said to be very soft compared to the EU Directive.[89]

On the other hand, the APEC Privacy Framework responds to the social factor behind personal data. That fact is required to protect the individual once they have traded with their data because it gives protection to the data subject but allows the data flow.

### C. *The CPTPP*

The CPTPP is a free trade agreement involving 11 countries in the Pacific region, including Australia, Mexico, and Canada. It is an example of how free trade agreements protect personal data but at the same time require their members to allow cross-border data flows in order to promote trade. Accord-

84 *Id, principle 3.*

85 *Id, principle 4.*

86 *Id, principle 5.*

87 *Id.*

88 Australian Law Reform Commission, *supra* note 16.

89 *Id.*

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ing to Deborah Elms of the Asian Trade Centre, the CPTPP it the "most important trade agreement we've had in two decades."[90]

The CPTPP includes a chapter related to electronic commerce in which in Article 14.8 of the TPP protects personal information. Within it, "the Parties recognize the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce."[91]

Article 14 requires each party to maintain a legal framework that protects the personal information of the users of electronic commerce. They should take into account principles and guidelines related to privacy protection. It also requires "each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks."[92]

The other relevant article is the 14.11 for the cross-border transfer of information by electronic means. Even though each Party may have its regulatory requirements, they "shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person".[93]

### D. *The GATS*

The General Agreement on Trade in Services includes a safeguard for individual privacy. The GATS is a leading mechanism for digital transactions. It contains the World Trade Organization (WTO) rules that affect data flows.[94] Hence it is essential to make a brief reference to its provisions regarding privacy protection.

Within the General Exceptions, in Article XIV, the Governments have to take measures for the protection of the privacy of individuals about the processing and dissemination of personal data. Privacy, morals, public order, health, and the prevention of fraud, which are among the reasons to control data flows, are referenced in the provisions as policy objectives.[95]

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90 *See* A. F., *What on Earth Is the CPTPP? - The Economist Explains*, The Economist, May 12, 2018.

91 Foreign Affairs Trade and Development Canada, *Chapter 14–Electronic Commerce*, in Consolidated TPP Text (Government of Canada, 2016).

92 *Id.*

93 *Id.*

94 *See* Aditya Mattoo and Joshua P Meltzer, 'International Data Flows and Privacy' (2018) Policy Research Working Paper (8431) *World Bank* 30.

95 Tuthill, *supra* note 17.

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The principle of data flow or, at least its fundamental trade objective, can be found in the GATS. According to Tuthill, the movement of capital can be compared to data flows. If that is the case, the GATS are recognizing that data is an essential part of the service itself. The cross-border movement of capital is found in a footnote to Article XVI on market access. [96] It states: "If a Member undertakes a market-access commitment concerning the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I[97]And *if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allowing such movement of capital.* If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I[98], it is thereby committed to allowing related transfers of capital into its territory"[99] [emphasis added].

Accordingly, Members allow cross-border data flows. However, one remains with the uncertainty of why can the data be recognized as the capital which is the essential part of the service and yet cannot be recognized as the service itself. Meaning that data might as well be recognized as the service subject to trade.

Businesses that visit the WTO have suggested that in some countries there is a lack of transparency regarding the data flow regulations, this can become a serious challenge to doing day-to-day business and trading around the world.[100]

International treaties should focus on creating a legal framework that regulates the trade of personal data. The international community should incentivise digital trade by not restricting the personal data flows but rather should create a legal framework that legalises and protects the market.

Privacy frameworks will remain available to the individual, as protection that can be exercised at all times. The difference will be that the right to keep the information private will be upon the individual. The principle of *volenti non fit injuria* applies in this case. The law limits the protection to the extent that corresponds to the will of those who are entitled to it. In the matter of personal data, consent makes lawful conduct that otherwise would be a violation.[101]

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96 *Id.*

97 Section 2 (a) of Article I: '(a) from the territory of one Member into the territory of any other Member;'

98 Section 2 (c) of Article I 'c) by a service supplier of one Member, through commercial presence in the territory of any other Member;'

99 GATS 1994: General Agreement on Trade in Services 1994, signed Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183 (1994).

100 Tuthill, *supra* note 17.

101 Polcak & Svantesson, *supra* note 64.

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### 2. *Trade Aspects*

This study argues that personal data will eventually be recognized as an asset subject to trade. To achieve this, a whole new series of regulations have to be created. An international framework is needed in order to allow cross-border data flows and trade regulations must be harmonized within different jurisdictions. Due to the fact that the Internet erases the physical borders, it is of paramount importance to create global recognition of the trade of personal data.

In order to trade in personal data, the ownership of personal data should be allocated. The data subject has the right to make a profit from their data, thus, they should be the ones bearing the right of ownership. Once the allocation of ownership is done, a legal framework should be created that specifies the characteristics of the sale of personal data. However, some may argue against such practice which leads this article to make reference to such counterarguments. This section addresses the regulation of ownership, its counterarguments and makes a proposal regarding the trade of personal data.

#### A. *Ownership*

The question ownership of personal data is still to be resolved. It is essential to recognize ownership if personal data is to be legally considered subject to trade. For instance, as a first step in the data strategy of the European Union, in 2015, Commissioner Günther Oettinger announced: "We need a virtual and digital law of property that includes data." [102] He stated that the creation of a legal basis clarifying who owns data is needed. [103]

Janeček, the postdoctoral researcher at the Oxford Internet Institute, proposed that four elements have to exist to recognize the ownership of personal data: control, protection, valuation and allocation. Those four elements are essential. This article uses these four elements to develop further the characteristics of the ownership of personal data.

First, control is necessary because through it the owner can fully use personal data by accessing, storing, sharing, selling, or processing it. It also allows the owner to destroy or abandon the data.[104] As an example, the General Data Protection Regulation framework is based on control and certainty. Recital 7 states that "Natural persons should have control of their own personal

[102] *See* Andreas Wiebe, *Protection of Non-Personal Data: A New Legal Framework for Data Ownership?*, in Value of Information: Intellectual Property, Privacy and Big Data 9–27 (Maciej Barczewski ed., 2018).

[103] *Id.*

[104] Janeček, *supra* note 4.

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data".[105] According to Andreas Wiebe, this regulation tries to put the data subject in control of their personal data through ownership. He rationalises this as follows: "if my data belongs to me, then I should have control over it and decide who should have access to it and what is done with it."[106]

Second, protection excludes third parties from controlling personal data and makes available a legal remedy for infringement of data. The protection is for the ownership right as an object, not for the personal information. The privacy regulation would protect the latter.

The protection of the ownership of personal data could be achieved through control and access to information. New technologies might make this possible, for instance, one project proposed a platform that protects personal data through blockchain. It relied on a blockchain that recognizes the users as the owners of their data, codifying services as guests with delegated permissions. Each user has complete transparency over what data is being collected and how it is accessed, and at any time they may alter the set of permissions and revoke access to previously collected data.[107]

A new company named Wibson, launched in 2018, offers a blockchain-based decentralized marketplace for consumers. It allows consumers to make a profit from selling their personal data.[108] Mat Travizano, the CEO of Wibson says "Wibson will change an opaque, buyer-dominated ecosystem into a transparent and fair market where consumers are compensated for their data based on their personal preferences and comfort level." [109] He affirms that "Individuals own their data," and he remarks "Now, Wibson allows them to profit from it as well."[110]

The company assumes the subject of the data as the owner of personal data and aims to change the marketplace of personal data. This is a practical example of how fast the market is evolving. Wibson did not wait until the law allocated the ownership of personal data to the consumer to allow trade of personal data, but went ahead and created a platform that makes it possible. The company targets fairness, transparency and control over personal data through their product.

Third, the valuation is a key element. As noted earlier, personal data is being used by tech companies to make a profit. It is generally assumed that data embody tremendous and increasing value. Personal data has intrinsic

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105 European Parliament and Council, *Recital 7 of General Data Protection Regulation*, (EU) 2016/679, (May 25, 2018).

106 Wiebe, *supra* note 102.

107 *See* Guy Zyskind, Oz Nathan and Alex 'Sandy' Pentland, *Decentralizing Privacy: Using Blockchain to Protect Personal Data*, presented at 2015 IEEE Security and Privacy Workshops 180–184, (San Jose, CA, USA, May 21-22, 2015).

108 *See* Joe Wallen, *As Of Today, European Consumers Can Profit From Selling Their Own Personal Data*, FORBES, October 11, 2018.

109 Wibson, *It's Your Data. Get Paid For it., Wibson*, (2019), *https://wibson.org/*.

110 *Id.*

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value and value depending on the context of its use. The value will have to be assessed, either through the platform that enables the control of personal data or by the traditional movement of the market, i.e. supply and demand.

Fourth and finally, the allocation should be given to the data subject. Some may argue that the controller or the processor are the ones entitled to this allocation. However, throughout this article the argument has been that the consumer/user are the ones not who are not benefitting from their data. The way for them to do so is by recognizing their ownership over their data. After recognising that the user owns their personal data, then they can trade with it and transfer it to a third party.

As proof of the characteristics required for ownership of personal data, there are proposals to establish new property rights in data based on intellectual property rights. These proposals include the specific design of a data right which is further developed in the next paragraph.[111]

First *protection* should be conditioned on the "coding" of data. Then, the subject matter would be limited by a requirement of added value or novelty. Added value requires a substantive *valuation* and novelty draws the question of whether data have been created or stored before, in other words, asking whether it is new data or not. The next issue is that of who data rights should be *allocated* to. In a digital environment, there are many stakeholders who could complicate the allocation. Further limitations, natural to intellectual property rights, are stipulated as to the scope of a data right. As an example, the copying of already existing data, a limit in duration and prolongation in the trademark.[112]

This proposal in the area of intellectual property reinforces the argument that a legal framework that includes such characteristics will determine the property of personal data. If ownership could be regulated, then the exchange of personal data would have a solid foundation for trade. Either as a good, as proposed in this article, or as a licensing right subject to an intellectual property framework, as the example above mentioned. In any case, ownership is made possible through compliance with these characteristics.

A legal framework that addresses elements of consent, protection, valuation and allocation would conclusively determine the ownership of personal data. As a consequence, it would contribute to creating a strong legal foundation to enable the trade of personal data.

### B. *Counter Position*

This article argues that personal data should be considered a property right to legally enable its trade. However, there are opinions against the al-

111 Wiebe, *supra* note 102.

112 Wiebe, *supra* note 102.

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location of ownership and trade of personal data. To create a more objective argument, it is important to make reference to four strong counter arguments.

First, some authors argue that ownership of personal data represents two main problems: the concept by itself and the fact that the data subject can ever have full control over it. It is complicated to conceptualize ownership of a piece of personal data to a single, specific individual. Sometimes the same piece of data belongs to more than one subject. For example, someone's date of birth is the day the mothers gave birth to them. Some argue this is a reason why a data economy will not work. A data economy, where the individual has ownership over their data, would involve individuals storing the data in a kind of data bank account where they can control, manage and exchange it. In the previous example, would it mean that the child can store half of the data related to the day of birth and the mother the other half? For individuals to have full control over their data companies would be required to be completely transparent and comprehensible about the ways someone's data will be used.[113] Some authors state that in virtualized infrastructures, physical control over data is almost impossible.[114]

Second, the regulation of trade also implies difficult scenarios, including the allocation of value. Data is not like money because its value depends on its context and how it is used. It also depends on the way it is stored, if it is as metadata then it has value through the compilation and not by itself. The allocation of the value also brings up the problem that not only the individual contributed to the value of the data but different agents do as well. All of them could be said to have some interest in data. The problem becomes bigger in analytics and big data where the value of the data is not by itself but through the group of data being analysed and modified.[115]

Third, another strong position is the one that questions the fact that through informed consent the data subject will have appropriate control over their data. The Internet has proven that consumers do not necessarily read through pages and pages of complex privacy policies and terms and conditions.[116] In order to comply with laws, companies draft their policies with information that cannot be absorbed by ordinary individuals. So how can the data subject make an informed decision if the information provided is completely biased?[117] The concern that arises is that consent will face the same problem in allowing the trade of personal data.

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113 Wiebe, *supra* note 102.

114 *See* Qumodo Ltd, *Personal data: ownership, consent, and appropriate control*, Medium, December 11, 2018.

115 Wiebe, *supra* note 102.

116 *See* Alan Chiu & Geofrey Masters, *Practical aspects of licensing in the cloud*, in Privacy and Legal Issues in Cloud Computing 261-290 (Anne S Y Cheung ed, 2015).

117 Qumodo, *supra* note 114.

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Fourth, technology companies can be diminished by a change in the marketplace of personal data. Currently, they gather data at no extra cost and free will, only complying with privacy protection. However, if the basis for the transmission of personal data is consent, the data subjects will have too much control over it.[118] The data subject will be able to withhold its data at their discretion. Too much protection might be counterproductive to the market. Others argue that it might even impede innovation, which would be best served by an unlimited flow of data within a policy of open data and open innovation.[119]

This section enumerates strong arguments and concerns against the ownership or trade of personal data. However, this article has shown that the trade of personal data is already a reality, whether it is legally acceptable or not. Thus, these counter arguments could be taken into consideration when drafting a legal framework to enable the trade of personal data. For example, when drafting a legal framework for personal data as an asset, to state ownership, it might be the case that joint ownership applies. The framework should specify the rules for the allocation of value. Whether the consumers are initial right holders, as this article argues, or entrepreneurs or commercial entities, which hold rights as well. And in the case of consent, it could include alternative mechanisms to secure that consent is sought in a way that is both transparent and explicit.

The previous section mentioned that new technologies already exist for the control over personal data, so it is safe to say that control would not be a problem in case of trade of personal data. A legally recognized trade could result in a change of the rules of the market, but this article argues that neither innovation nor the companies will be negatively affected. On the contrary, the exchange of personal data will be led mainly by supply and demand and less restricted by governmental intervention. If companies have to pay for data, they would carefully consider the quantity and quality of data worth collecting and paying for. This would create more efficiency in the interest of all stakeholders.[120]

Even though there are strong arguments and possible constraints to the trade of personal data, this article sustains that its data is an asset in today's economy that is already being used and exchange an object of trade. A legal framework that sets the rules will contribute to fair and transparent practice. The next section specifies the proposal of this article.

### C. *Trade of Personal Data*

Data flows are increasingly cross-border; therefore, their sale should be regulated by an international organization. In the first section of this article,

118 *Id.*

119 Wiebe, *supra* note 102.

120 *Id.*

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it was noted that APEC is an international organization that more freely regulates the cross-border exchange of data, it could also be the body that innovates in the creation of a legal framework for the trade of personal data.

This article proposed that a legal framework for the trade of personal data could be done by APEC, as it is the least restrictive regarding cross border data flows. APEC is used here as an example to create a realistic scenario of how a personal data-trade framework could be issued as a privacy framework. The regulation could also be done as a chapter in a free-trade agreement or convention. For example, the CPTPP already contains a provision for the cross border flow of personal data within their e-commerce chapter. Sooner or later the trade of personal data will be included in legal regulation. This investigation does not dig further which international body is the most likely to do so, rather emphasizing the importance of doing so.

Now, using as an example trade of personal data regulation through an agreement in the APEC, the United Nations Convention on Contracts for the International Sale of Goods could prove to be useful to draft the content of the framework. The United Nations Convention on Contracts for the International Sale of Goods sets out international principles that could be used to govern the formation of contracts for personal data. This Convention strictly applies for sales of goods and personal data is neither considered a good or service so legally it does not apply. Nonetheless, the United Nations Convention on Contracts for the International Sale of Goods is used as an example to demonstrate which elements would be necessary to include in a contract were data to be legally considered a good.

First of all, an offer on personal data should be made which has to be accepted for the contract to exist. Counter-offers could apply. Like any other sale, the price has to be fixed and the good has to be delivered. Finally, the contract would have provisions in case of breach of contract.[121] Consent by the right holder is a crucial element for international treaties to allow the cross-border data flows. Thus, if the data subject made the offer it could be considered as consent to fulfil the regulatory requirements. In general, once consent is given, personal data could be transferred.

The transfer of property might represent a challenge because personal data is a tangible good and can be replicated an infinite amount of times. Personal data could be transferred through a licence, just as software is, this would require particular technology, for example, a blockchain code. The fact that personal data is transferred as the subject of IP rights should be further developed in another research paper. For the moment it is relevant to mention that personal data could be transferred with the protection of blockchain in exchange for a price.

[121] United Nations Convention on Contracts for the International Sale of Goods, opened for signature Apr. 11, 1980, 5 UNTS 1489 (1988).

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This provisions translated to the personal data will read as follows: The user of a Website that allows the use of his or her data, for example in data analytics or any use other than the one required to access the Website by itself, will offer his or her data in exchange for a price. Otherwise, the personal data introduced in the Website will only be used to navigate within the Website. Another case could be one of the surveys and direct sale of personal data, where the user and the Website directly make a contract of sale, and any other purpose than the transfer of personal data would come at a price.

In both cases, personal data has to be controlled. It could be licensed for a determined period or accessed several times via a license. New technological developments could ensure control. One of the reasons for considering the sale of personal data as such is so that the data subject is adequately compensated for the exchange of their data. Through a contract of sale, this compensation is monetized in the price.

Besides the traditional characteristics of a sale, the legal framework could include the aspects discussed in the *Counter Position* section of this article. It would be important to state how ownership and value will be allocated and what the requirements for transparent and explicit consent by the data subject will be.

To sum up, the legal framework that establishes the structure of trade of personal data has to be created by an international organization that influences the market in different countries, such as APEC. It needs to have a contractual legal base, for example, the provisions set in the United Nations Convention on Contracts for the International Sale of Goods. Finally, it should address the specific requirements and possible conflicts given the nature of a transaction of personal data in a virtual environment, as in the Internet.

In conclusion, the trade of personal data will not go against current privacy regulation. As long as the subject gives their consent, trade is possible. However, a legal framework that effectively sets the legal structure for the trade of personal data is required. Given the increase in cross-border data flows, it is of the interest of the international community to do so.

Trade in personal data is a reality that can no longer be avoided. Even if there are constraints for the regulation of personal data, it is necessary to legally recognize its ownership and trade to contribute to the control and protection of it. A legal framework could enhance certainty and transparency as to the beneficiaries of data.

## V. Conclusion

The notion of trading with personal data might seem a bit unconventional due to the risk it may generate to the privacy of individuals. However, commerce is a human activity that, in some instances, does not respond to morality but the demands of the market. This article has shown how companies

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already make a profit out of the use, collection and processing of personal data. This social factor exists, even if the legal community argues that it goes against privacy protection. Personal data can be used as an asset in the digital economy.

This article argues that the consumer, thus the data subject, should share the profits their own personal data is producing. Some people have found ways to reach that goal, either through surveys, apps or even through experiments. The legal recognition of trade of personal data is necessary, that recognition should be done by an international body in response to the cross-border data flows that enable the exchange of information around the world. The trade of personal data is an international matter.

This proposal might seem negative for the corporations that currently are making a profit out of personal data. However, it could turn out to be in their favour, given the fact that free trade will be promoted and the collection of data will be more efficient and transparent. The consumer who consents to such practices and has the necessary protection is unlikely to claim misuse of their personal information. In that sense, corporations could avoid huge scandals that end up costing them millions of dollars. Creating a legal framework of this practice legitimises the already existing trade in personal data.

The legal recognition of the trade of personal data will create an environment in which the consumer receives compensation from the data they introduce on the Internet, the tech companies will use personal data with the express and affirmed consent of the data subject, and the digital trade will continue to develop in a legitimized but less restrictive manner. Furthermore, allowing trade in personal data will trigger the development of proper technologies to control the access and management of personal data. Hence, consumers will protect their own privacy.

Some may argue that legally the trade of personal data is not possible due to the constraints that the allocation of ownership generates. However, this article proposed different perspectives that can be incorporated into a framework that would address specifically how personal data is an asset. Besides the privacy framework, there is no previous material for regulating the current cross-border data flows that generate millions of dollars to technology companies. While lawyers debate the legal basis for personal data, consumers are giving away their data for free.

If the international community is against allowing the trade of personal data, the question would be: How will they control the use of extrinsically personal data? Digital trade is growing, and the law has to evolve accordingly. In the near future, governments will include in their agenda the need to regulate the profits made out of personal data. This article suggests that organizations like APEC should innovate and start incorporating in their agendas the drafting of trade frameworks for personal data. It is important to accept and deal with social forms that might seem to go against government policies but are more incorporated into society than the existing policy.

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# PROFESSIONAL MIDWIVES AND THEIR REGULATORY FRAMEWORK IN MEXICO

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Abstract: *The objective of this article is to show the legal situation of professional midwives in Mexico with respect to their work. The implications of the human rights framework as established in Article 1 of the Mexican Constitution are explored as a basis to regulate professional midwifery. Using comparative analysis methodology, the contents of different regulatory frameworks for sexual and reproductive health in Mexico are studied, including those backed by international treaties and agreements. The results show that Mexican legislation includes midwifery to a certain extent, but fails to define concepts like the professionalization of midwifery, when midwives can work other than in hospitals, and they can be officially trained. Additionally, there is no legal recognition of this profession in educational and work standards. In conclusion, this research shows that there are enough international documents (agreements, conferences and recommendations) to serve as a frame of reference for redrafting Mexican standards, regulations and public policies on birth care provided by professional midwives. This would guarantee the safety of mothers who use midwifery services and give suitable professional training (with the respective creation of schools for this purpose) to the midwives who provide these services. Midwives would then be able to practice legally and help to improve maternal and reproductive health outcomes in the country.*

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KEYWORDS: *Midwife, Professional Midwives, Birth Care, Regulation, Certification.*

RESUMEN: *La presente investigación tiene como objetivo mostrar la situación legal de las parteras profesionalizadas de México, en relación al ejercicio de su trabajo, se exploran las implicaciones de considerar el marco de los Derechos Humanos, como se establece en el Art. 1º de la Constitución, como base para la regulación de la partería profesionalizada, utilizando como metodología el análisis comparativo de contenidos de diversos marcos regulatorios en materia de salud sexual y reproductiva en nuestro país, pero amparados en tratados y convenios internacionales. Los resultados muestran que la legislación mexicana contempla la partería hasta cierto punto, pues faltan definir conceptos como lo que se entiende por partería profesionalizada, en dónde pueden laborar —más allá de los espacios hospitalarios—, los sitios donde se puedan formar con validez oficial, así como dar sustento jurídico al reconocimiento de su profesión, mediante estándares educativos y laborales. A manera de conclusión, se muestra en este trabajo que existen suficientes documentos internacionales (convenciones, conferencias y recomendaciones) que pueden ser un marco de referencia para la reelaboración de normas, reglamentos, así como de políticas públicas, sobre la atención al nacimiento por parteras profesionalizadas en nuestro país de manera regulada, que garanticen la seguridad tanto a madres usuarias de sus servicios como a las parteras que los proporcionan, con una formación profesional adecuada (con la correspondiente creación de escuelas) para hacer frente a los retos de la salud en el país, ejerciendo su trabajo sin el riesgo de que esto suceda en medio de un vacío legal.*

PALABRAS CLAVE: *Partera, parteras profesionalizadas, atención al parto, regulación, certificación.*

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## I. Introduction

It is important to begin this article with the definition of professional midwife. The International Confederation of Midwives (ICM)[1] defines it as follows:

> A midwife is a person who has successfully completed a midwifery education programme that is based on the ICM Essential Competencies for Basic Midwifery Practice and the framework of the ICM Global Standards for Midwifery Education and is recognized in the country where it is located; who has acquired the requisite qualifications to be registered and/or legally licensed to practice midwifery and has the title 'midwife'; and who demonstrates competency in the practice of midwifery.

Mexico has only two officially recognized midwifery schools in the country: the Centro para los Adolescentes de San Miguel de Allende, a nonprofit organization (CASA)[2] in Guanajuato and the Escuela de Parteras Profesionales del Estado de Guerrero, a state school.[3] Another way to study birth care is by obtaining a nursing and obstetrics degree,[4] which gives the person the status of a nurse rather than a professional midwife.

Official Mexican Standard 007 (NOM007-SSA2-2016)[5] on the care of women during pregnancy, childbirth and postpartum, and of newborns recognizes two types of midwives: 1) the Technical Midwife, defined as a person who has graduated from a midwifery training school, whose degree is recognized by the relevant authorities and corresponds to a technical level; and 2) the Traditional Midwife, understood as a person who belongs to indigenous and rural communities, has been trained in and practices the traditional model of care for pregnancy, childbirth, postpartum, and the newborn; and is considered a non-professional, but is authorized to provide this type of care.[6]

NOM007 does not explicitly define whether a technical midwife is synonymous with a professional midwife, or if a degree in nursing and obstetrics is

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[1] The ICM is an international organization. More information can be found at *https://www.internationalmidwives.org/about-us/international-confederation-of-midwives/*.

[2] Centro para los Adolescentes de San Miguel de Allende Asociación Civil A.C (CASA) (Accessed on February 28, 2019 at 8:23PM) *https://casa.org.mx/*.

[3] See *http://guerrero.gob.mx/articulos/marco-juridico-de-la-escuela-de-parteras-profesionales-del-estado-de-guerrero-opd/* Accessed on March 16, 2018, 11:23 a.m.

[4] Graciela Freyermuth, Hilda Argüello, *Viejos y nuevos rumbos de la partería profesional*, in Imagen instantánea de la partería 21-48 (Georgina Sánchez comp., 2015).

[5] Mexican Official Standard 007 (NOM007-SSA2-2016) on the Care of Women during Pregnancy, Childbirth and Postpartum, and of Newborns (NOM007-SSA2-2016, Disposición General 5.5.11), Diario Oficial de la Federación [Federal Official Gazette – DOF 07/04/2016] (Mex.).

[6] Mexican Official Standard 007 (NOM007-SSA2-2016) about women and newborn care during pregnancy, childbirth and post partum, Dario Oficial de la Federación [DOF 07/04/2016] (Mex.).

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equivalent to a degree in midwifery. This is important if one bears in mind that there are international proposals from the United Nations Population Fund (UNPF), the World Health Organization (WHO) and the ICM[7] that encourage and promote professional midwives as a first line of care, especially in developing countries.

International organizations like the UNPF, WHO and Pan-American Health Organization (PHO) have done studies that prove the importance of midwifery services, the demand for which continues to increase because the care provided is different than that at a hospital in that it is less invasive, centered on the mother´s needs and less expensive. Consequently, member countries have been asked to consider professional midwives as the first level of care. These international organizations propose establishing or bolstering midwifery schools, advancing and validating this field of work, as well as granting it official recognition in order to achieve these goals.[7]

The objective is to improve the quality of care in this area and to see midwives as an important asset to health care resources in places like Mexico. Most importantly, obstetric violence (understood as any lack of respect during labor, childbirth and postpartum, which can be serious and range from verbal and psychological abuse, ignoring women in labor, performing medical procedures without informed consent, the use of coercion, lack of confidentiality and lack of privacy to physical abuse or refusing to give medical care) should also be taken into account.[8] Obstetric violence includes one particular phenomenon that can be observed worldwide: an increase in the number of C-sections. Between January 2009 and September 2014, for every 100 registered births in Mexico, 46 were C-sections and 54 were natural births.[9] The number of C-sections has increased by 1% each year since 1999.[10] Between 2000 and 2012, there was a 50.3% increase in C-sections with the biggest increase occurring in the private sector, followed by social care,[11] which is

[7] UNPF, WHO, ICM. *El estado de las parteras en el mundo* 2014. Hacia el acceso universal a la salud, un derecho de la mujer. Fondo de Población de las Naciones Unidas (2014).

CPMSVCH, OMS, OPS, UNFPA, El estado de las parteras en el mundo: Oportunidades y retos para México (2014).

[8] Rosario Valdez et al., El abuso hacia las mujeres en salas de maternidad: nueva evidencia sobre un viejo problema. Resumen ejecutivo. 1-26 (Instituto Nacional de Salud Pública, 2013). See Joaquina Erviti et al., Sociología de la práctica médica autoritaria. Violencia obstétrica, anticoncepción inducida y derechos reproductivos (UNAM, CRIM 2015).

[9] INEGI, Encuesta Nacional De La Dinámica Demográfica, Nota Técnica (2015). (OCT 21, 2016, 2:08PM) *http://www.inegi.org.mx/saladeprensa/boletines/2015/especiales/especiales2015_07_1.pdf*.

[10] Esteban Puentes-Rosas et al., Las cesáreas en México: tendencias, niveles y factores asociados 16-22:46. (Salud Pública de México) (2004).

[11] Leticia Suárez-López et al., Características socio demográficas y reproductivas asociadas con el aumento de cesáreas en México. Salud Publica de México. Vol. 55 suplemento 2 (2013).

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particularly relevant here because of such high numbers.[12] The care given by professional midwives could reduce the number of such events and decrease maternal mortality.[13] Between 1990 and 2013, the number of maternal deaths in Mexico dropped by 53%,[14] going from 88.7 deaths per 100,000 live births to 38.2 per 100,000 in 2013.[15] In 2015, Mexico registered 38 deaths per every 100,000 live births.[16] This decrease is recorded in a document on the status of midwives in the world and universal access to health care, which according to the UN Population Fund is a basic right for women.

In Mexico, Leslie Cragin, et al., (2011) made a comparison of the academic training of general practitioners, obstetric nurses and professional midwives based on the essential competencies established by the ICM. Results showed that professional midwives received the best education, followed by nurses and finally, general practitioners.[17]

In another study by Walker, et al., the research team implemented a pilot care model in three rural medical units belonging to the health departments of the states of Guerrero and Oaxaca, and compared the quality of care among general practitioners, obstetric nurses, and professional midwives. The results mention that professional midwives were the best trained to attend to low risk births,[18] followed by obstetric nurses and lastly general prac-

[12] INEGI, Encuesta nacional de la dinámica demográfica, Nota técnica (2015). (Oct 21, 2016, 2:08PM) *http://www.inegi.org.mx/saladeprensa/boletines/2015/especiales/especiales2015_07_1.pdf*.

Esteban Puentes-Rosas et al., Las cesáreas en México: tendencias, niveles y factores asociados 16-22:46. (Salud Pública de México) (2004).

Leticia Suárez-López et al., Características socio demográficas y reproductivas asociadas con el aumento de cesáreas en México. Salud Publica de México. Vol. 55 suplemento 2 (2013).

[13] Maternal mortality is defined as a mother´s death during pregnancy, childbirth and up to 42 days after childbirth.

[14] Graciela Freyermuth, *Determinantes sociales en la Mortalidad Materna en México*, Revista CONAMED, 21 (1), 25-32 (2016).

[15] UN México. 2016. Objetivos de Desarrollo del Milenio (September 15, 2016, 2:44PM) *http://www.onu.org.mx/agenda-2030/objetivos-de-desarrollo-del-milenio/*.

[16] World Bank. 2015. Tasa de Mortalidad Materna. (Oct 21, 2016 2:48PM) *http://datos.bancomundial.org/indicador/SH.STA.MMRT?name_desc=true*.

[17] Leslie Cragin, Lisa De Maria, Lourdes Campero, Dilys Walker. Educating Skilled Birth Attendants in Mexico: Do the Curricula Meet International Confederation of Midwives Standards? Reproductive Health Matters. Vol 15:30, p. 50-60 (2007), (Oct, 19, 2016) *http://ac.els-cdn.com/S0968808007303327/1-s2.0-S0968808007303327-main.pdf?_tid=d687bd6c-9626-11e6-a23a-*.

[18] A low risk birth is one that is expected to take place without any complications. To reach this determination/conclusion, several factors are considered: the woman´s monthly checkups; clinical tests like biometrics, urine samples and blood tests that detect sexually transmitted diseases; and ultrasounds. When these and physical examination results are within the normal range, these births are deemed low risk in view of the fact that the WHO estimates that of 100 births under these conditions, only 10 to 15% experience complications.

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titioners. In addition, professional midwives provided better prenatal care, postnatal care and breastfeeding support to the mothers who went to health centers. Therefore, the authors support the benefits of birth care by professional midwives.[19]

The National Institute of Public Health has recently carried out studies on the "holistic model of midwifery care" (*modelo integral de partería*),[20] the findings of which coincide with international approaches[21] and that of Walker et al., indicating that midwife services are safe for healthy women with low risk births, and ideal for primary care.[22]

Nonetheless, the Official Mexican Standard 007 legalizes and encourages the transferal of a pregnant woman to the hospital by a midwife, effectively placing birth care under the responsibility and control of the hospital. Due to pressure from the passage of the standard 007, women who live in urban areas are stigmatized by medical personnel if they choose to use a midwife to attend their birth. The use of a midwife by women in rural indigenous communities is looked upon more leniently because they live further from the hospital.[23]

We believe it is important to explore the standards and regulations in Mexico pertaining to the training and practice of professional midwives and thereby demonstrate their legal situation in relation to their work. At the same time, we explore the implications of the human rights framework used as a basis for the regulation of professional midwives. To this end, various regulatory frameworks in the area of sexual and reproductive health were used to make a comparative analysis.

## II. Theoretical Basis for the Research

The discussion about respecting sexual and reproductive rights as a part of human rights is nothing new. With the Declaration of Alma Ata in the 1970s,

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[19] Dilys Walker, Leticia Suárez, Dolores González, Lisa DeMaria, Minerva Romero. Parteras profesionales técnicas y enfermeras obstetras: ¿una opción para la atención obstétrica en México? 80 (Instituto Nacional de Salud Pública, Instituto Nacional de las Mujeres 2011).

[20] Instituto Nacional de Salud Pública, Modelo Integral de Partería (feb, 28, 2019, 10:54AM) *http://www.modelointegraldeparteria.com/*

[21] Patricia Janssen et al., *Outcomes of Planned Home Birth With Registered Midwife Versus Planned Hospital Birth With Midwifery or Physician*, 181(6-7) *Canadian Medical Association Journal* 377-383 (2014).

Elizabeth Schroeder et al., *Cost Effectiveness of Alternative Planned Places of Birth in Woman At Low Risk of Complications: Evidence From the Birthplace In England National Prospective Cohort Study*, 344 *British Medical Journal* E2292 (2012).

[22] Dorothy Shaw et al., *Drivers Of Maternity Care In High Income Countries: Can Health Systems Support Women-Centered Care* Vol. 388 (10057) *The Lancet*, 2282-2295 (2016).

[23] Mexican Official, *supra* note 6.

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the WHO/International Conference on Primary Health Care clearly established access to health care is a human right. This declaration is important in view of the vast differences in the health disparities between developed and developing countries (see, for example, the work of Yamin Alicia).[24] Despite clear evidence of this, there are still those who claim that socio-economic and structural inequalities are not a cause of the rampant mortality in the world's most vulnerable populations.

In regards to sexual and reproductive rights, declarations from the Cairo (1994) and Beijing (1995) world conferences on women clearly point at why these rights are inherent to humankind in general, but particularly important for women and children in view of the dominant patriarchal system that regulates the culture surrounding women's bodies, sexuality, reproduction, autonomy and health.

Since the Cairo and Beijing conferences, Mexico has established precedents on women's sexual and reproductive rights. Article 4 of the Constitution clearly establishes that men and women are equal before the law and that everyone has the right to make free, responsible and informed decisions regarding the number and frequency of their children, as well as a right to health.[25]

In the same way, Article 3, paragraph IV of the General Health Law defines maternal-child care as a matter of general health. Article 61 of the same law recognizes this type of care as a priority and includes caring for mothers during pregnancy, childbirth and postpartum, as well as caring for the newborn and monitoring their growth and development at later stages.

There are also very specific regulations published in the Official Federal Record (DOF in Spanish), such as the above-mentioned Official Mexican Standard 007-SSA2-2016 (published on February 17, 2017), which centers on the care of women during pregnancy, childbirth and postpartum, as well as care for the newborn; and recognizes the contributions of technical and traditional midwives. As stated above, these regulations must be followed by national health system institutions – whether public, private or social. Noncompliance will be punished or fined according to the jurisdiction. This standard also refers to other regulations, such as NOM-005-SSA2-1993 which pertains to family planning services.

In this article, NOM007 will be frequently mentioned because sexual and reproductive rights are an important part of human rights. Article 1 of the Constitution establishes that:

> In the United Mexican States, all individuals are entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such

[24] See *https://www.linkedin.com/in/alicia-ely-yamin-32359114/es.*

[25] *Justia México* (Mar 5 2019 10:44AM) *https://mexico.justia.com/federales/constitucion-politica-de-los-estados-unidos-mexicanos/titulo-primero/capitulo-i/#articulo-4.*

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> human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution.
>
> The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.
>
> All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. Asa consequence, the country must prevent, investigate, penalize and rectify violations of Human Rights, according to the law.
>
> […]
>
> Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.[26] (Constitutional reform of June 10, 2011).

It is therefore clear that in Mexico, issues regarding pregnancy, childbirth and postpartum are covered by the human rights stipulated in Article 1 of the Constitution and in the regulations and laws cited above.

However, in the case of professional midwives, how are they connected to guaranteeing the human rights of women of reproductive age in Mexico? According to our analysis, the link between professional midwives and human rights is that midwives are another option for women, not just for supervising pregnancy, but also for assisting in childbirth, postpartum and other areas related to women's sexual and reproductive health (such as pap smears and contraception, among others), which are a fundamental part of a women's human rights.

Articles 1 and 4 of the Constitution make room for different care alternatives, allowing women to exercise the right to information, which should be clear, opportune and based on scientific evidence in order to decide where, how, when and with whom to give birth.

In addition, these articles effectively establish a commitment that the services women receive must respect both physical and emotional needs, and not put either the mother or the newborn at risk. Professional midwives should perform their clinical practice evidence-based, and when necessary, the prompt and prudent use of appropriate medical technology –everything to safeguard the lives of the mother and the newborn. Through this interpretation of the constitution, a woman's right to comprehensive and safe sexual and reproductive care and her right to receive violence-free treatment is clearly protected, as stipulated by human rights.

The Universal Declaration of Human Rights establishes the free development of personality as a fundamental right, which is directly related to

[26] *Justia México* (Mar 5 2019, 10:46) *https://mexico.justia.com/federales/constitucion-politica-de-los-estados-unidos-mexicanos/titulo-primero/capitulo-i/#articulo-1*.

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autonomous decision-making as in the case of mothers who decide to have a midwife to attend a birth. It is important to mention that autonomous decision-making implies that actions should not harm third parties, thus the midwife is obligated to act in the best interest of the mother and her newborn.

Related to this, the Mexican Supreme Court has clearly established that:

As a higher fundamental right recognized by the Mexican legal system, human dignity is the basis for, among other highly personal rights, the right of every individual to freely and independently choose his or her life project. Therefore, according to comparative jurisprudence and case law, such right is the State's recognition of every individual's inherent power to be the individual he or she wants to be, without coercion or unjustified controls, in order to achieve the goals or objectives he or she sets according to his or her values, ideas, expectations, tastes, etc. Thus, the free development of personality means, *inter alia*, the freedom to marry or not to marry; to have children and how many, or decide not to have any; to choose one's personal appearance; one´s profession or work, as well as free choice of sexual preference, inasmuch as all these aspects are part of the way in which a person wishes to project him or herself and live his or her life and that, consequently, it falls to him or her alone to decide independently.[27]

The work of professional midwives is connected to human rights in two ways: the first concerns the people who use their services, and which, in our opinion, includes women's right to choose the place and type of care they want to receive at the moment of childbirth. The second concerns professional midwives as health care providers. There are a series of fundamental rights that should be taken into account, such as the right to education, labor rights, rights related to professional freedom and, of course, sexual and reproductive rights because this is the sphere in which midwives practice.

This is upheld by Article 5 of the Constitution, which supports the choice of profession, as long as it is lawful. Additionally, this article states that the law of each state shall determine which professions require a degree to be practiced, the requirements for such degree and the corresponding authorities to issue said degree.[28]

NOM007 defines pregnancy as a physiological event, and thus should be treated with dignity. It also mentions that "low-risk term deliveries can be attended by obstetric nurses, technical midwives and trained traditional midwives".[29] At the same time, this regulation mentions the need to promote

[27] *See inter alia*, Court Opinion number 165822 p. lxvi/2009 Pleno. Novena Época. Semanario Judicial de la Federación y su Gaceta. Volume XXX. December 2009.

*See* also the 22nd and 29th articles from the Universal Declaration of Human Rights. adopted and proclaimed by the General Assembly december 10, 1948.

[28] Political Constitution of the United Mexican States, article 5 [const.], as amended Jan 29, 2016, Diario Oficial de la Federación [D.O.F.], February 5, 1917 (Mex.).

[29] Mexican Official, *supra* note 6.

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vertical births, limit episiotomies,[30] encourage immediate breastfeeding, late clamping of the umbilical cord, which, as will be seen below, are actions carried out by professional midwives.

In addition to the legislative documents mentioned above, there is also the 2009 General Agreement on Inter-Agency Collaboration for Obstetric Emergency Care. This convention establishes that a mother in an obstetric emergency can be attended at any national or state health institution (whether part of the Mexican Social Security Institute, the Institute for Security and Social Services for State Workers or the Ministry of Health) without necessarily being a member of that particular system. The criterion for the choice of hospital is distance, meaning that the patient experiencing an obstetric emergency can go to the nearest hospital for help, and thus prevent any possible complications or maternal mortality.[31]

Within the international framework, we can also find documents that support the regulation of professional midwives, like the 1979 and 1994 Conventions on the Elimination of all Forms of Discrimination against Women, which obligates signatory countries to enact laws and provisions that promote and protect gender equality.[32] Even so, two common forms of discrimination against midwives can be observed. The first that affects midwives is that their fundamental right to exercise their chosen profession is not respected in places where midwifery is not recognized as a profession. The second type of discrimination happens when women go to midwives and later are denied of various fundamental rights by medical personnel, as mentioned above, including free development of their personality because these women are labelled as irresponsible or ignorant for using midwifery services.

Another important document is the WHO Recommendation for Childbirth: the 1985 Fortaleza Declaration. This text clearly establishes that women have the right to prenatal care and to play a central role in all its aspects. General and specific recommendations are also given for taking caring of women during childbirth.[33]

The 1994 International Conference on Population and Development in Cairo addressed the importance of satisfying men's and women's needs through access to education and health services, as well as increased employment opportunities. It also widely touched upon the topic of sexual and re-

[30] This is the cut made to the perineum, between the anus and the vagina, in order to enlarge the birth canal at the moment of birth.

[31] Ssa General Agreement on inter-agency collaboration for obstetric emergencies care (september 4, 2018, 10:02am) *http://www.ccinshae.salud.gob.mx/descargas/atencion_de_la_emergencia_obstetrica.pdf*.

[32] PAHO, Gender Equality Policy 2009 (october, 10, 2017, 10:46AM) *http://www.paho.org/hq/index.php?option=com_docman&task=cat_view&gid=6813&itemid=270&lang=es*.

[33] Who, who Recommendations for Childbirth Fortaleza Declaration 1985 (october 10, 2017, 10:46) *http://www.unizar.es/med_naturista/tratamientos/recomendaciones%20de%20la%20oms%20sobre%20el%20nacimiento.pdf*.

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productive rights, which broadened traditional ideas centered solely on family planning.[34]

Likewise, the 1995 Fourth World Conference on Women Beijing Declaration promotes women's rights and gender equality —including the right to enjoy a life free of violence, the right to education, equal pay for equal work and the explicit recognition of all women to control all aspects of their health,[35] which in no way excludes pregnancy and birth.

Lastly, the 2000 World Millennium Development Goals includes ideas for promoting gender equality and women's autonomy, reducing infant mortality and improving women's health.[36]

It is important to mention that there are other documents that are not legally binding but establish precedents on how professional midwives operate, such as the discussions at the 2000 International Conference on the Humanization of Childbirth, in Ceara, Brazil, which established the principles of respectful attention centered on the mother and her family at the moment of birth, as well as holistic treatments which take into account the context of women's social, emotional and health. However, the conference did not culminate in any formal agreements.[37]

Another organization should be mentioned because of its importance in the region is the Regional Conference on Women in Latin America and the Caribbean[38] which has had meetings in:

Argentina 1994: Urging signatory countries to establish actions to protect and promote women's reproductive rights.

Lima 2000: Emphasizing the protection of women's human rights, including sexual and reproductive rights.

Quito 2007: Recognizing that heath is a key issue for women's rights and discussing integrated health services.

Brasilia 2010: Recommending that countries reform their abortion legislation in order to provide safe treatments for women.

Santo Domingo 2013: Proposing safe abortion services for women who do not want to become mothers at the time and ensuring that health services are not violent against women.

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[34] UNPF. Programme of Action - Adopted at the International Conference on Population and Development Cairo (2004) (Feb, 28, 2019, 8:05PM) *https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf.*

[35] Fourth World Conference on Women, Beijing 1995 (october 11, 2017 9:50am) *http://www.unwomen.org/es/how-we-work/intergovernmental-support/world-conferences-on-women.*

[36] Un Millennium Development Goals, 2000 (october 11, 2017, 11:00am) *http://www.onu.org.mx/agenda-2030/objetivos-de-desarrollo-del-milenio/.*

[37] Declaration on Humanizing Childbirth (october 11, 2017 10:24am) *http://www.tobinatal.com.ar/humanizacion/ceara.html.*

[38] CEPAL, Regional Conference About Latin America and Carribean Women (October 9, 2017, 10:58am) *https://oig.cepal.org/sites/default/files/folleto_conferencias_regionales_c1500106.pdf.*

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In addition, international organizations like UNFPA, WHO, PAHO and the ICM have studied the situation of midwives around the world. Their findings were compiled in the 2014 report, which made projections about midwifery to 2030. Their proposals are focused on improving midwives' working, training and legal conditions through activities such as promoting, extending and regulating midwifery studies; normalizing, ordering and regulating childbirth care given by professional midwives; and promoting and strengthening contact between midwives. Mexico is considered a signatory country.[39]

To explore this in more in, the next section discusses professional midwives in Mexico—their current situation and the problems they face.

## III. The Current Situation of Professional Midwives in Mexico

As mentioned in the introduction, professional midwives study the subjects of pregnancy, childbirth and postpartum, breastfeeding and women's sexual health. In Mexico, the way to access such training with official recognition is through the non-profit Centro para los Adolescentes de San Miguel de Allende A.C (CASA) in Guanajuato or the Escuela de Parteras Profesionales in Tlapa de Comonfort in the state of Guerrero. However, there are people with degrees in nursing and obstetrics who work as midwives, medical doctors who take up midwife care, and women who have trained abroad and work as midwives in Mexico. In addition, there are midwifery schools although the training given is not officially recognized (see Table 1).

Table 1

| SCHOOL[1] | LOCATION | FOUNDING DATE | LEGAL STATUS | OFFICIAL RECOGNITION STATUS |
|---|---|---|---|---|
| Centro para los Adolescentes de San Miguel de Allende Asociación Civil (A.C.) "CASA"[2] | San Miguel de Allende, Guanajuato | 1997 | Non-profit organization | Officially recognized by the Guanajuato State Health Department. Agreement 176-97 of July 4, 1997. C.C.T. 11PETO143N |
| Luna Llena A.C.[3] | Oaxaca | 2009 | Non-profit organization | None |
| Mujeres Aliadas A.C.[4] | Erongarícuaro, Michoacán | 2010 | Non-profit organization | None |

[39] UNPF, *supra* note 7.

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| | | | | |
|---|---|---|---|---|
| Escuela de parteras de Tlapa de Comonfort[5] | Tlapa de Comonfort, Guerrero | 2012 | Created by the Guerrero state government | Decree 1258 by which the Escuela de Parteras profesionalizadas del Estado de Guerrero, is established as a Public Decentralized Body |
| Escuela de la Cruz Roja Bachelor's Degree in professional midwifery and reproductive health[6] | Cuernavaca, Morelos | 2015 | No information available | No |

1 *https://asociacionmexicanadeparteria.org/educacion/*.

2 *http://casa.org.mx/escuela-parteras/*.

3 *https://www.facebook.com/Centro-de-Iniciaci%C3%B3n-a-la-Parter%C3%ADa-en-la-Tradici%C3%B3n-de-Nueve-Lunas-Oaxaca-1582405792020383/*.

4 *http://www.mujeresaliadas.mx/pr_educativo.html*.

5 *http://guerrero.gob.mx/articulos/marco-juridico-de-la-escuela-de-parteras-profesionales-del-estado-de-guerrero-opd/*.

6 *http://www.ssm.gob.mx/portal/page/seic/archivos/Parteria.pdf*.

The schools in Oaxaca and Michoacán are civil associations that do not give official professional certification.

In the case of the undergraduate degree offered in Morelos, we have not been able to obtain information so as to determine whether the first generation with graduate with professional certification.

These schools (officially recognized or not) were founded mostly during the last decade in an effort to create more training centers as part of Mexico's response to international guidelines, such as UNFPA, WHO and ICM proposals. These schools also give more options to women who want other forms of childbirth care, distancing themselves from the hospital model where the possibility of receiving bad treatment during childbirth or of having a C-section without medical justification is higher, as documented by authors like Ana Prado[40] or Georgina Sánchez.[41]

40 Ana Prado, *Mujer y Salud. Miradas en Torno al Nacimiento,* III (6) *Clivajes. Revista De Ciencias Sociales* 79-91 (2016).

41 Georgina Sánchez, Espacios para parir diferente, un acercamiento a casas de parto en México (El Colegio de la Frontera Sur) (2016).

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It is also interesting to note that midwives can work in three different environments: birth centers, home visits[42] or in a hospital.

A birth center (BC) is a place that attends low risk births. Various approaches are available, such as providing women information about pregnancy, childbirth and postpartum; promoting vertical births and other free positions to give birth; limiting episiotomies; promoting immediate breastfeeding; and late tying of the umbilical cord, all of which are provided for in NOM007. Birth centers also make it possible for the father or other family members to be present at the childbirth. They are a private non-hospital service located in urban areas, whose facilities often look like a house. In case of emergencies, an action plan is established with the pregnant woman so she can have access to a medical facility as quickly as possible.[43]

It is important to mention that although midwives are best known for birth care, their work is not limited to that. There is documented evidence of their caring for a wide range of ailments such as the threat of miscarriage, vaginal infections, women's normal physiological functions (such as postpartum, breastfeeding and menopause), contraception and pap smears.[44] Hence, they are health professionals that focus on sexual, reproductive and post-reproductive health throughout women's lives.

We will proceed to analyze the principle problems that professional midwives face in their work.

## IV. Main Difficulties in Practicing Midwifery in Mexico

To show the main problems in midwifery work, we will discuss the difficulties midwives face in Mexico, which are: *a)* the lack of recognition of midwifery as a profession, *b)* the difficulty of finding work in a government health facility, *c)* the near impossibility of practicing at a birth center, *d)* limits on giving out and signing birth certificates, and *e)* conflicts when contacting medical or hospital services to handle emergency situations.

In regard to midwifery being recognized as a profession, Marisol Escudero explains that each state sends out its list of professions. As a result, some states recognize midwives, accept midwife training and issue professional certification, but others do not.[45] This means that Mexico does not have uniform na-

[42] Hanna Laako, Mujeres situadas. Las parteras autónomas en méxico (El Colegio de la Frontera Sur) (2017).

[43] Cristina Alonso, Alison Banet, Janell Tryon, Luna Maya, *Una casa de partos femifocal*, in Imagen instantánea de la partería 265-294 (Georgina Sánchez ed., El Colegio de la Frontera Sur, Asociación Mexicana de Partería, 2015).

[44] Georgina Sánchez et al., *Las condiciones de las parteras tradicionales en Chiapas*, in Imagen instantánea de la partería 133-150 (Georgina Sánchez ed., El Colegio de la Frontera Sur, Asociación Mexicana de Partería, 2015).

[45] Marisol Escudero, Speech at Centro de Estudios Superiores de México y Cen-

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tional criteria. For example, states that do not include midwifery on their list of professions are: Aguascalientes, Baja California Norte, Campeche, Coahuila, Colima, Nuevo León, Oaxaca, Tamaulipas and Guanajuato.[46]

The question that arises here is why is it so difficult to validate professional midwives and open new midwifery training schools in a country like Mexico where 3,530,000 births are reported every year[47] and where quality of birth care is seriously questioned as seen in an increased number of unnecessary C-sections and obstetric violence?

One school calls attention to the problem and suggests a solution. In the state of Guanajuato where midwifery is not included on its list of professions, the Centro para los Adolescentes de San Miguel de Allende Asociación Civil A.C (CASA) signed an agreement with the state Department of Education, (Agreement 76-97 July 4, 1997. C.C.T. 11PETO143N), which authorizes the school to issue professional certification for midwife technicians. This could be an option for several institutions where the absence of professional certification is used as an excuse to block new programs from being opened.

Additionally, Escudero mentions the Health Secretary of Mexico (SSA) has only specified 43 positions for professional midwives, demonstrating that the possibility of working in a government health facility is limited due to the lack of positions, though it is no impossible.**46**

Georgina Sanchez's work documents the difficulties midwives face, specifically in terms of the legislative framework that would cover birth centers. Currently, birth centers do not have the legal status to care for healthy women with low-risk births at their facilities because Mexican regulations state that birth care only refers to hospital care. This means that the concept of a birth center does not exist *per se* in legislation.

Because of this, some midwives with professional certification have opened birth centers only to discover that their birth care facility does not officially exist. Therefore, they get work permits to operate as private clinics or hospitals even though they are not the appropriate professionals to work there. In this way, care in birth centers remains on the fringes of the law without a legal framework to regulate such places. In contrast, the concept of birth centers exists in other countries without any major difficulties or differentiation from hospital childbirth care because they work together with the hospital system to ensure the welfare of maternal and newborn health.[48]

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troamérica, Midwifery and Human Rights Symposium, Mexico Legal Framework (october 22 2015)

[46] Georgina Sánchez, Espacios para parir diferente, un acercamiento a casas de parto en México 209-223 (El Colegio de la Frontera Sur 2016).

[47] UNPF, WHO, IMC. *El estado de las parteras en el mundo*, 134. Hacia el acceso universal a la salud, un derecho de la mujer. Fondo de Población de las Naciones Unidas (2014).

[48] Denis Walsh, Improving Maternity Services: Small is Beautiful: Lesson from a Birth Centre (2006).

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Another obstacle reported in the last two annual conferences of the Mexican Midwives' Association A.C (November 2016 and 2017) and in the Senate midwifery forum (March 2017) is related to issuing and signing birth registrations, which are needed to get the newborn's birth certificate. Authorities require that the registrations be signed and stamped by a health institution that can issue said registrations to midwives at its discretion depending on the region and its personal relationship with the midwives. This greatly hampers their performance and autonomy in childbirth care and becomes a way of controlling midwives because they are subject to the whims of the civil servants who issue said documents.

Furthermore, according to the 2013 MacArthur Foundation report, professional midwives encounter difficulties in establishing contact with medical and hospital services for emergency care. When there is an obstetric emergency and a woman is referred to a health institution, especially a government one, midwives report that they are often badly treated. This includes being accused of malpractice or of being the ones who caused the problem.[49] What Escudero calls disconnected services and the necessity to establish good relationships between health institutions and professional midwives all the time, particularly in emergency situations, is clearly observed.[50]

Based on the problems stated, we can affirm that a regulatory framework is needed. This has led some groups of professional midwives to discuss this lack of legislation and their proposals include requests for official certification of their profession.

A group of AMP midwives has focused their efforts on certification —meaning a process to evaluate their abilities in childbirth care based on the competencies proposed by the International Midwives Confederation. They have also considered ISO certification,[51] which would help guarantee midwives' services. In this way, the user would interpret the certification as a validation for safe, quality services not only for the mother, but also for the newborn. (Field Notes October, November and December 2017).

While ISO is an organization that certifies quality processes and is often used in industry, it does not certify people or professions. Therefore, it would not be the proper way to certify midwifery as it does not guarantee official

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Also see E Groh, Birth center Midwifery Down Under in birth Centers: a social Model from maternity Care. Books for Midwives (Mavis Kirkham ed., 2003).

[49] Macarthur Foundation, Diagnóstico situacional de la partería profesional y l a enfermería obstétrica en México: informe final (2013)

[50] See Irazu Gomez, Echar valor. Parteras tradicionales en el contexto biomédico del sector salud. Master's degree Thesis in Anthropology. UNAM-CIMSUR. San Cristóbal de las Casas, Chiapas, Mexico (2017).

[51] ISO is a non-governmental organization established in 1947. Its mission is to promote the development of standards and their related activities in order to facilitate the exchange of goods and services, and to promote cooperation at intellectual, scientific, technological and economical levels. (Consulted at *https://www.gestiopolis.com/que-es-iso/* april 17, 2018)

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recognition by the State or the Ministry of Health. Even so, the Mexican Midwives´ Association is already using this certification as a work standard and promoting it on its website.[52]

This situation reveals the problems that professional midwives face, not only in terms of their training, but also in the practice of their profession.

## V. Discussion: Criticism and Proposals for National Legal Regulation

In this article we have established that Mexican laws and regulations provide a certain degree of support for professional midwives´ training and work. However, we also find several limitations, as seen in the previous section. Some such obstacles stem from omissions in the regulatory framework because it does not explicitly recognize midwifery as a profession, nor does it specify the roles of professional midwives. In addition, there is no mention of possible places to give birth other than in a hospital setting.

The lack of consistent recognition of midwifery as a profession affects midwives in their daily work. In order to promote midwifery as a viable training option, a curriculum that establishes the appropriate knowledge and abilities is required. Professional certification is also necessary, as well as officially recognized and regulated work spaces. This requires approval at both state and federal levels, with validation from their respective institutions —including the Ministries of Education and of Health. Without these requisite elements, inconsistencies will persist among the legal framework, regulations, state guidelines and federal legislation. This directly affects the options that Mexican women of reproductive age have to choose the place and type of care they wish for giving birth, as well as other reproductive health services. More importantly, these shortcomings act against their human rights, mainly those related to sexual and reproductive health.

With respect to birth centers, it will be necessary to revise or broaden the scope of the regulatory framework that restricts low-risk birth care in places other than a hospital environment, emulating other countries where birth centers legally exist. These birth centers give maternal care in coordination with hospitals, with midwives and doctors working together based on the principle that each has a specific job and that such alliances enhance the care women receive. In Mexico, this could and should be done.

At the national level, the General Agreement for Inter-institutional Collaboration in the case of Obstetric Emergencies was passed to benefit pregnant women's health through a ruling that gives them access to medical services regardless of their insurance type and protects the midwives who bring them.[33]

[52] Asociación Mexicana de Partería A.C. certificación (mar 16, 2018 2:15PM) *https://asociacionmexicanadeparteria.org/certificacion/*.

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This agreement was created to protect the health of women and children as well as the rights of professional midwives. This means that legally midwives should not face resistance in accessing hospital services for their patients in case of an emergency. Unfortunately, in reality midwives find it very difficult to arrange medical services with hospitals as previously discussed.

Another important issue in need of attention at the legislative level is the unpublished guideline establishing birth care work standards for midwives — *The Technical Regulation of the Competencies Required for the Holistic Care of Women and Babies Before, During and After the Birth, of 2007*. This regulation was written to establish criteria for the evaluation and certification of the work of both technical and traditional midwives; however the project was never published in the Official Federal Record (DOF in Spanish).

With respect to the Mexican Midwives' Associations proposal asking for a process that evaluates their childbirth care abilities based on work competencies recommended by the International Midwives Confederation and possible certification through ISO, there are certain limits. ISO would not be the most appropriate route for certification because it accredits quality processes and not people or professions. While good for quality in industry, it would not guarantee official recognition by the State or the Ministry of Health. It could, however, be used to justify the existence of birth centers. Here we see the importance of a nationwide certification of work competencies for the holistic care of women and children before, during and after the childbirth. With that, the Mexican State, or SSA, can guarantee midwifery services that have been certified as safe for mothers as well as newborns.

With the actions mentioned, the regulation of places for professional midwife training and birth care provided by professional midwives is possible. What is needed is to create processes that will regulate, organize, standardize and legalize what midwives do to thus guarantee their rights. To take it one step further, the State can even establish directories listing midwifery services throughout the country. As mentioned, this is contained in the proposals by international organizations like the UNFPA, WHO and ICM. Moreover, these issues pertain to human rights, especially sexual and reproductive rights, to be enjoyed in the broadest possible interpretation of right to health, therefore honoring Alma Ata's proposal.

## VI. Conclusions

At an international level, the UNFPA, WHO, and the ICM have stressed the importance of professional midwifery as a first option for low-risk childbirth care, as stated in the midwifery proposal for 2030. These organizations urge member countries (Mexico, among them) to improve the training and education as well as workplaces of midwives to increase and improve professional midwifery. This is widely supported by contemporary scientific research in various countries.

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Currently, there are international documents (conventions, conferences and international recommendations) that serve as a reference point for rewriting of regulations, rules, and public policy on properly regulated birth care by professional midwives in Mexico. As a result, mothers who use midwifery services would be ensured that the midwives who offer these services have adequate professional training to confront the challenges of women's health in Mexico, practicing their occupation without the risk of having it happen in a legal vacuum.

We need to consider the fact that in Mexico, 70% of the states already recognize midwives as professionals. In the state of Guanajuato, where midwifery is not recognized as a profession, an agreement was reached in 1997 to create the first school of professional midwifery in Mexico, which provides technical training. Subsequently, in Tlapa de Comonfort, where midwifery is registered as a profession, a specific judicial framework was created and used to establish a second school in 2012. Following the established models in Guanajuato and Tlapa de Comonfort, a curriculum for technical midwives and a degree in professional midwifery could be standardized in each Mexican state. This could be stipulated at the federal level so that regulation would cease to be a problem and more midwifery schools could be opened at both technical and professional levels. For example, in Morelos, a state where the midwifery profession is registered, there are schools which are teaching a similar curriculum, yet neither the professional nor technical degree exists. If more states were able to offer an official degree, the number of professional midwives across the country would increase, giving women of reproductive age in Mexico more options to exercise their human right to care during their pregnancies, childbirth and postpartum.

It has been shown that there are regulations that govern technical midwifery, but it is still necessary to regulate facilities that are not part of a hospital, such as birth centers, at both rural and urban level, (but not under the model of Casas Maternas).[53] This would open care options for pregnant women and in turn uphold that which is stipulated in Articles 1, 4 and 5, as previously mentioned, of the Mexican constitution.

Likewise, the development and publication of work competency standards on birth care provided by midwives is a yet unresolved legislative matter. Such standards would provide Mexican women with another option that guarantees respect for their sexual and reproductive rights.

We have stressed the importance of the judicial framework that already exists and urge that these regulations and standards be implemented in daily life to benefit pregnant women, newborns and professional midwives to allow human rights, in their broadest sense, to be respected since these are rights that everyone in Mexico should enjoy.

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[53] Rogelia Cruz, et al., *La casa materna de comitán, chiapas: los antecedentes y aportes en la atención del embarazo y riesgo obstétrico*, in: Imagen instantánea de la partería 239-255 (Georgina Sánchez, El Colegio de la Frontera Sur, Asociación Mexicana de Partería, 2015).

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# MEXICO AND THE UNITED STATES IN A COMPARATIVE SITUATIONAL APPROACH

Elisa Cruz Rueda*

Abstract: *This article performs a comparative analysis of the constitutional bases of the Mexican and U.S. legal systems, and how they are expressed in two case studies. Both case studies deal with human rights as expressed through a community's relationship to territory. However, the communities in question are differentiated by their status as legal subjects. The U.S. case examines a community primarily comprised of European-American descendants; the Mexican case considers an indigenous community. Nevertheless, in both cases State involvement occurs that favors the interests of energy companies, rather than the expressed interests of the communities. The Mexican case documents an attempt to apply energy reform measures, without taking into account the rights of indigenous communities. The U.S. case shows how legal constructs have evolved to structurally favor corporate interests at the expense of human rights. These examples are used to demonstrate how democratic ideals, ostensibly protected by Mexican and U.S. constitutional systems, remain unfulfilled. While the case studies discuss how the law and the State relate to the governed, particularities exist due to the practices and procedures of the distinct governing bodies involved, and because the governed peoples - a community of European-American descent and an indigenous community in Mexico - are different legal subjects before the law. These are areas for future comparative analysis and beyond the scope of this article.*

Keywords: *State, Property, Law, Human Rights.*

Resumen: *Este artículo realiza un análisis comparativo de las bases constitucionales de México y los Estados Unidos y su aplicación en dos casos. Se reconoce que existen puntos de comparación y otros no. Por ejemplo, en los casos que se aborda, aunque se refiere a las afectaciones territoriales relacionadas con*

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*los derechos humanos, son diferentes. En el caso norteamericano, tenemos una comunidad de ascendencia europea-americana, en el caso mexicano, tenemos una comunidad indígena. En ambos, se vea la participación del Estado de una manera que implícita o explícitamente favorece los intereses de las empresas de energía, más que los intereses de las comunidades en cuestión. El objetivo es mostrar cómo el ideal democrático, teóricamente sostenido y protegido por los sistemas constitucionales tanto mexicano como norteamericano, en realidad no se cumple. El caso mexicano documenta el intento de aplicar medidas de reforma energética, sin tener en cuenta los derechos de las comunidades indígenas y sus pueblos. En el caso de América del Norte, el marco normativo ha evolucionado para favorecer estructuralmente los intereses corporativos, a expensas de los derechos humanos. Si bien los estudios de caso exponen la relación de la ley y el Estado con los gobernados, existen particularidades: las prácticas y procedimientos de los distintos órganos de gobierno involucrados, y el tratamiento de las comunidades ante la ley, por un lado, una comunidad de ascendencia europeo-estadounidense, por otro una comunidad indígena en México. Estas son áreas para futuros análisis comparativos, más allá del alcance exploratorio inicial de este artículo.*

Palabras Clave*: Estado, Propiedad, Derecho, Derechos Humanos.*

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## I. Introduction

This article is the product of a shared experience of two attorneys who have practiced in the Mexican legal context, specifically in the states of Chiapas, Oaxaca and Yucatán, in areas pertaining to the exercise and claiming of agrarian, indigenous, and land rights.

One of the attorneys, a lawyer from the United States (U.S.), participated in this process for two years. Upon returning to the U.S., this process served as a basis for involvement in community struggles related to the demand for rights in U.S. society. Part of this experience was having learned that being a lawyer is not confined to professional practice in court or contentious jurisdictional disputes; community lawyering involves being an agent and ally in social processes in which the affected parties take their demands for rights into their own hands, transforming legal tools into organizing tools. With a viewpoint rooted in the global South, the U.S. attorney joined community organizing efforts in Illinois and Pennsylvania that opposed fracking and advocated community municipal autonomy to confront concentrated power wielded by corporate interests, which superseded the localized interests of communities.

Given this panorama and our continuing contact as fellow attorneys in Mexico and the United States, the objective behind this article was to write about how the rights of human beings, be they citizens or not, and regardless of their ethno-cultural affiliation, are violated in both countries.

This article works from the assumption that there are points of convergence and divergence between both countries, along with coexisting tensions and agreements, and that these are due in part to the philosophical stance or worldview that form the basis for the construction of each State as a nation. Despite the difference in each system's origin—the Anglo-Saxon or common law tradition for the United States and the Romano-Germanic tradition for Mexico—a key point of convergence can be found in a shared desire for a de-

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mocracy based on fundamental ideals that are, simultaneously, antagonistic: non-interference and its counterpart, interventionism.

Without doubt, human rights violations take on different forms in the two distinct contexts. In addition to having developed two Constitutions prior to the current one, as of the year 2015 Mexico boasts over 600 constitutional reforms, whereas the United States has developed a single Constitution with various amendments. Mexico possesses a body of human rights law that is considerable in size and closely tied to the international human rights legal system. By comparison, the United States has signed and ratified relatively few international human rights legal instruments, despite being a proponent of the Universal Declaration of Human Rights of 1948 and being home to the headquarters for the United Nations.[1]

This article's approach examines the constitutional foundations for both countries, so as to conduct a procedural and situational analysis —as opposed to a merely normative or constitutional analysis— that focuses on understanding how the law is applied in practice.

This article is divided into three parts. The first section addresses the central concepts of the Western legal system, and particularities in each country that explain the differentiated manner in which the Mexican and U.S. states have been constructed. The second section presents cases that demonstrate how the law is invoked and applied in both countries. Final reflections are provided in the last section.

## II. The Western Legal System and the Rule of Law: Mexico and the United States

The Western legal system is based on the recognition of certain rights. Regardless of the basis upholding a particular legal system, each one,

> employs a particular vocabulary that corresponds to distinct concepts; groups laws into distinct categories; defines the use of certain techniques with the goal of formulating the rules of the law and certain methods of interpreting them; [and] is rooted in a given conception of social order that determines both the mode of application and the very function of the law itself.[2]

[1] Included among the few international instruments that have been signed and ratified by the United States are the International Covenant on Civil and Political Rights, ratified in 1992; the International Convention on the Elimination of All Forms of Racism, ratified in 1994; and the Convention Against Torture, ratified in 1994.

[2] René David & Camille Jauffret-Spinosi, Los Grandes Sistemas Jurídicos Contemporáneos 12 (2010), *available at https://bibliotecavirtualceug.files.wordpress.com/2017/06/los-grandes-sistemas-juridicos-contemporaneos.pdf* (last visited July 4, 2019).

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In other words, a common characteristic of both the Mexican and U.S. legal systems is that the right to be formed through a social and cultural process becomes a key reference point for understanding identity formation processes (e.g., a person's origin; who is considered to be part of a group or community), which in turn defines a people or a community in the regional and international context. At the same time, the law reveals the importance of the structural aspects that make up a country and position it in terms of its relations and power dynamics within a region and toward other nation-States.

More tangibly, a Constitution embodies the fundamental basis for the nation-State and the law. Such an instrument sets forth the sentiments of a nation, in which at least one version of the values and history of a people are captured: in other words, it is a product of the historical and cultural processes in a society. A Constitution theoretically outlines an individual's rights, duties, and responsibilities; the State's obligations and authority as the custodian of public power; and a description of how the State and the Law should function and be organized.

The construction of the Mexican and U.S. nation-States is reflected in their respective Constitutions, and in the manner by which each State relates to the different peoples inhabiting in, or interacting with, their territories. The following sections explore these relationships by engaging in a comparative dialogue.

## III. The Mexican Constitution: a Brief History

The economic development models imposed by the Spanish Crown in the territories known as "New Spain" marked a huge setback for indigenous peoples. This model's central pillar was the concept of the *indio* ("Indian"),[3] the purpose of which was the invisibilization of the cultural diversity of Native American communities, calling into question the nature and condition of their members as individuals, and thus effectively undermining them as the legitimate inhabitants of their homelands. This policy was centered on the accumulation of capital in the hands of a governing caste (namely, the Crown and the Church) in the colonies, in the Iberian Peninsula, and Europe in general, creating a stranglehold on indigenous communities.

Although the Laws of Burgos formally abolished the enslavement of indigenous peoples while Mexico was still a Spanish colony, these laws did not address the enslavement of other peoples, nor did they eliminate the prevailing caste structure. Following Mexico's independence from Spain, the *Sentimientos de la Nación* ("Sentiments of the Nation") document, drafted by José María Morelos y Pavón in 1813, abolished both the enslavement of all persons and the caste system.

[3] Guillermo Bonfil Batalla, México Profundo: Una Civilización Negada 42 (1987).

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Nonetheless, despite these changes, indentured servitude was subsequently instituted as a "new model" of domination. The economic caste system, intimately linked with racial discrimination, was not abolished; rather, the new national economy continued to be closely tied to the increasingly vigorous world economy. Revolutionary ideals (e.g., an end to tributes, a raise in the daily wage, and one-time tithing, which mitigated opulence and indigence) outlined a general formulation for the development of the national economy, but did so without addressing the issues of the State either as the generator of equity or of equality rooted in diversity and, as such, as the arbiter of economic development. This model, and its subsequent iterations, have invisibilized indigenous peoples, as can be observed in the Constitutions of 1824, 1857, and 1917.

The Constitution of 1917 —which currently governs Mexico—is recognized for being founded on the claims of the Revolution of 1910, particularly for agrarian land distribution, which is at the heart of Article 27 of the Mexican Constitution. Article 27 details rights related to land, water, forests, natural resources, and strategic resources such as petroleum and uranium. To guarantee the equitable distribution of the country's wealth, the Constitution of 1917 established that the State would foster the formal conditions for balancing the interests of vulnerable sectors with those of investors and the owners of production by recognizing rights to social security, work, health, and education. This arrangement was termed the social welfare state. At the same, the central principle of recognizing the Nation as the original owner of all national territory was established.

The State's relationship with indigenous peoples —here termed "indigenous policy"— has passed through various stages:[4] assimilationism, integrationism, critical *indigenismo*,[5] participatory *indigenismo*,[6] and the neo-*indigenismo* of today.

Given the aforementioned history, a key point in the construction of the Mexican State —reflected in its political Constitution, as a federal pact and the supreme law of the nation— is its relationship with indigenous peoples. This relationship is marked by an evolutionist vision that proposed, and continues to propose, the idea that indigenous communities sooner or later would and will abandon their forms of organization and their languages—which are distinct from those of Mexican society writ large. From this viewpoint,

[4] Luis Villoro, Los Grandes Momentos del Indigenismo en México 11 (3rd ed. 1996).

[5] Critical *Indigenismo* acknowledges several documents that attest to the situation of Indigenous Peoples dealing with nation-States, including: (i) the Declaration of Barbados of 1971, from the Symposium on Inter-Ethnic Conflict in South America; (ii) the Declaration of Barbados II of 1977; (iii) the Declaration of Barbados III of 1993; and (iv) the Declaration of San José on Ethno-Development of 1981. These documents also recognize the political importance and protagonism of indigenous peoples as subjects of the law whose rights should be recognized in order to achieve a plural and truly democratic nation.

[6] In 1982, participatory *indigenismo* posited the concept of ethno-development.

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indigenous societies were and are looked down upon, as examples of primitive civilizations that represent "underdevelopment" and unfortunate circumstances that should be left behind. This idea persists, despite the existence in Mexico of a body of law devoted to individual and collective human rights that penalizes and repudiates this type of vision.

Because indigenous peoples and communities were subjected to colonial jurisdiction after the Conquest and colonial laws stripped them of their lands, the relationship between the Mexican State and indigenous peoples originates with colonialism and the Spanish Conquest. Mexican federal law, and subsequently, republican law, is rooted in this colonial history, one in which domination and plundering were legitimized by law.[7]

Legal instruments that have served to legitimate the expropriation of native lands by the Spanish Crown, and later the Mexican State, include the papal Bulls of Donation (also known as the Alexandrine Bulls); the legal institutions related to property, *reducciones*, *encomiendas*, and the "republic of Indians", as used by the Spanish[8] to exert better control over the inhabitants of corresponding lands; and more contemporarily, the Reform and Expropriation Laws, and the Agrarian Reform.[9]

It should be noted that the relationship between the Mexican State and indigenous peoples varies on a regional basis. Amongst other factors, differing levels of community organization within indigenous communities produces a different dynamic vis-à-vis the State. For example, the indigenous movement in Oaxaca is distinct from that in the Yucatán Peninsula; in Oaxaca, it is more articulated and politicized, while in the Yucatán, it is not nearly as pronounced.

### 1. *The Original Property of the Nation*

Mexican history has been marked by a series of events that are reflected in post-1917 constitutional law and policy. Among them are a series of invasions and interventions against the Mexican State by foreign nations, which, under

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[7] José Ramón Medina Cervantes, Derecho Agrario (1987).

[8] Jorge A. González Galván, El Estado y las Etnias Nacionales en México: la Relación entre el Derecho Estatal y el Derecho Consuetudinario 77 (1995).

[9] Elisa Cruz Rueda, Derecho Indígena Dinámicas Jurídicas, Construcción del Derecho y Procesos de Disputa 50 (2014).

Regarding land distribution as a central part of the Agrarian Reform in Mexico, *see*: José Cruz Agüero Rodríguez & Nelly Josefa León Fuentes, *Reparto Agrario e Institucionalización de la Organización Campesina*, Atlas del Patrimonio Natural, Histórico y Cultural de Veracruz: II Patrimonio Histórico 191-98 (2010). *See also* Manuel García Hernández, *Reforma Agraria en México*, 93 Observatorio de la Economía Latinoamericana 1-29 (2008), *available at https://geoamericaunaf.files.wordpress.com/2011/11/reforma-agraria-en-mexico22.pdf* (last visited July 4, 2019).

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the pretext of responding to alleged offenses against their citizens residing in Mexican territory or in response to alleged debts, decided to collect by appropriating Mexican resources and Mexican territories, including mainland, airspace, waters, coastlines, and seas.

This history is the underlying basis for Article 27, which both establishes that the original property of the national territory belongs to the Mexican State, and institutes safeguards to avoid subsequent pretensions of "enemy" nations appropriating the wealth and resources of the Mexican republic. Political authority is delegated to the Mexican federal government in its role as steward of the Mexican economy, encompassing the protection of the nation's resources, which for the purposes of this article shall be referred to as the "energy matrix".

Efforts to establish the Mexican State's sovereignty over matters relating to its energy matrix continued well into the 20th century and included steps such as the nationalization of the petroleum industry in 1938 and the nationalization of the electric energy sector in 1960. Regarding the latter:

> On September 1, 1960, President López Mateos announced the reform of Article 27 of the Constitution, stating that concessions to individuals for public electric energy services shall not be granted.
>
> The nationalization process that begins on this date will conclude on December 29, 1960, with the following addition to Article 27 of the Constitution: 'It is the exclusive power of the Nation to generate, conduct, transform, distribute, and supply electric energy in order to provide electric energy as a public service. No concessions shall be granted to individuals and the nation will profit from the goods and natural resources required for such purposes.' With this measure the services that remained in the hands of foreigners were recovered.[10]

This history indicates that the Mexican nation had total control over its energy matrix. Over time, however, reforms carried out to the legal-judicial/Constitutional framework dismantled these protections in such a way that transnational capital was able to return and reclaim certain components of the energy matrix.

As early as the presidential term of Miguel de la Madrid Hurtado (1982-1988), banking fell subject to privatization. During the presidential term of Carlos Salinas de Gortari (1988-1994), the nationalization of the petroleum industry and the electric energy sector was practically dismantled. Secondary laws that regulated the above-mentioned aspects of the Articles of the Federal Constitution were reformed, thereby permitting the privatization of both industries and marking the beginning of the neoliberal era in Mexico.

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[10] Doralicia Carmona Dávila, *Inicia el proceso de Nacionalización de la industria eléctrica*, Memoria política de México, *http://memoriapoliticademexico.org/Efemerides/9/27091960.html* (last visited July 4, 2019).

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This push toward privatization was further cemented with the agrarian counter-reform in 1992. Carlos Salinas de Gortari, upon announcing reforms to Article 27 of the Constitution of 1992 and the ensuing implementation of the new Agrarian Law, pronounced that agrarian nuclei were the owners of their lands. In actuality, however, per the original Agrarian Reform, *ejidatarios* and communal landholders held this right over their lands; what Salinas de Gortari was really intimating was that the counter-reforms carried out under his watch ushered in the market liberalization of land.

Further steps taken during the presidential term of Ernesto Zedillo (1994-2000) laid the foundation for the energy reforms that were implemented during the presidential terms of Vicente Fox (2000-2006) and Felipe Calderón (2006-2012). These measures found even greater impetus in 2013 under President Enrique Peña Nieto (2012-2018).

Taking advantage of the state of insecurity unleashed during the Calderón administration and the compromised position of left-leaning political forces, Peña Nieto's administration brought about the signing of the *Pacto por México* (Pact for Mexico).[11] The Pact introduced structural reform by constitutionalizing a reversal of the national stewardship of Mexico's energy matrix, thereby creating a new jurisdictional structure and thus restricting the Nation's rights to its own energy matrix. The new reforms legalized forced entry into the lands and territories of indigenous and non-indigenous farmers; new rules were established to generate, store, transmit, and commercialize electric energy; mining concessions were pushed through; and oil drilling and pipeline installation were favored over landowner rights —especially those of *ejidatarios* and co-proprietors whose *ejido* or communal lands will be used for oil drilling or for the passage of oil pipelines. But not only has this new legislation contributed to the surrender of key parts of the Mexican energy sector to private hands; it has also contributed to the dismantling of any possibility of the justiciability over the lands and territories of indigenous peoples or the inclusion of such justice-based norms in national legislation.

### 2. *Energy Reform: The Second Agrarian Counter-Reform*

The 1992 agrarian counter-reform decreed the end of agrarian land distribution and liberalized the sale and purchase of collectively-held lands (*ejido* and communal). Companies, corporate entities, and financial partnerships were given permission to acquire and own lands. The agrarian legal framework that had been oriented toward social and public welfare was liberalized, adding dispositions from civil and commercial court.

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[11] Redacción Animal Político, *Texto completo del "Pacto por México"*. (Dec. 3, 2012) *https://www.animalpolitico.com/2012/12/los-cinco-acuerdos-del-pacto-por-mexico/* (last visited July 4, 2019).

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Subsequently, the 2013 energy reform brought about more changes. The Secretariat of Agrarian Reform, which had been characterized by a centrist and protectionist tendency toward *campesino* communities, was transformed into what is now known as the Secretariat of Agrarian, Territorial, and Urban Development (SEDATU). The SEDATU is the head of the division, and in charge of the directives issued to agencies such as the Federal Agrarian Agency *(Procuraduría Agraria)*. This transformation of name, function, and political priorities can be observed in cases in which the Secretariat and its corresponding agencies should have been present but were absent, or they were present but were clearly biased toward supporting private capital, rather than social welfare.[12]

### 3. *Recognition of, and Demand for, Rights in Mexico - Between Negotiation and the Right to Prior, Free, and Informed Consultation: Kimbilá, Municipality of Izamal, Yucatán*

Kimbilá is located in the state of Yucatán in the Yucatán Peninsula. Our presence in the area came at the request of a student who is a resident of one of the towns and a member of a local indigenous organization. Our involvement has been part of a coordinated action with other colleagues who are concerned with the increasingly pronounced presence of corporate entities in the towns and villages in the area. Information regarding the situation can be accessed on a website maintained for the general public.[13]

Kimbilá is an *ejido* and also the largest of five townships belonging to the Municipality of Izamal. The distance between Kimbilá and the municipality's seat of governance is 12 kilometers.

According to the records of the National Agrarian Registry, Kimbilá was constituted as an *ejido* through an endowment of lands via the Presidential Decree of 1921. The boundaries of these lands were then extended in 1939; that same year, a total of 555 *ejidatarios* were registered in Kimbilá. To date,

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[12] Elisa Cruz Rueda, Capítulo 9: Derecho a la Tierra y el Territorio: Demandas Indígenas, Estado y Capital en el Istmo de Tehuantepec, in Justicia Indígena y Estado: Violencias Contemporáneas (2013).

On the issue of structural reform as an area of constant tension between the Mexican State and indigenous peoples, *see* Articulación Yucatán, *Parques eólicos amenazan la sostenibilidad en Yucatán: expertos* (April 28, 2017), *available at https://mayaenergia.wordpress.com/2017/04/28/parques-eolicos-amenazan-la-sostenibilidad-en-yucatan-expertos/* (last visited July 4, 2019).

*See also* Diario de Yucatán, *Todo Kimbilá, no solo el ejido, debe saber del parque eólico* (March 21, 2016), *available at http://yucatan.com.mx/yucatan/izamal/todo-kimbila-no-solo-el-ejido-debe-saber-del-parque-eolico* (last visited July 4, 2019).

*See also* Daniel Sánchez Dórame, *Guarijíos se oponen a construcción de presa,* excelsior (August 19, 2013), available at https://www.excelsior.com.mx/nacional/2013/08/19/914331.

[13] Proceso Kimbilá, Yucatán, available at *https://procesokimbilayucatan.wordpress.com/* (last visited July 4, 2019).

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the census has not been updated in Kimbilá since 1939, despite the many deaths that have occurred, as well as the transfer of property from *ejidatarios* to other individuals who, although having possession of *ejido* lands, have not been recognized as *ejidatarios* with full rights (e.g., the right to vote in *ejido* assembly meetings). Further, Kimbilá has not been enrolled in the *Programa de Certificación de Derechos Ejidales y Titulación de Solares* (PROCEDE), a certification program for *ejidal* rights which, although controversial in some respects, nevertheless provides updated statistical data on communities within the program.

By invitation of a group of townspeople and *ejidatarios* from Kimbilá, we attended an informational meeting with the townspeople and, three days later, an *ejidatario* assembly meeting in which representatives of ELECNOR, a Spanish-owned company, hoped to elicit town members' agreement to the construction of a wind farm on *ejido* land.

During the initial meeting, information was presented regarding International Labour Organization Convention No. 169; the rights of indigenous peoples and their nations; the legal requirements for convoking an Assembly to decide the fate of *ejido* and communal lands; wind farms, their installation, and their "life" expectancy; and offers that companies typically make to landholders in other parts of Mexico and the world.[14]

The latter sparked suspicion among townspeople and *ejidatarios* as to the interests of ELECNOR. The meeting gave the people greater certainty regarding their right to ask for more information about the wind farm project and the earnings they could obtain before giving consent or signing any contracts. During the meeting there were many questions and concerns to which we tried to respond, highlighting ways in which companies "convince a few" who then convince others. The people asked us if they should accept the contract, and we replied, "We do not know because we have not read the contract. We do not know how much land they will occupy or the conditions needed for the installation of the wind farm, or the infrastructure they will require to distribute the energy that is generated. If you do not know, or do not have the information in front of you, then we certainly do not know, either." We also pointed out, "You cannot oppose or accept something that you do not know anything about. That is why a consultation process with sufficient information, conducted in good faith, is important".

Many young people, especially young women, expressed their indignation, stating that they believed the company was taking advantage of the needs of their fathers, mothers, and older grandparents who could no longer work the fields. As students, they aspired to be professionals, but were not willing to renounce the land that had given them so much. Many of the young people in the vocational high school expressed their interest in further research and in keeping the people informed.

[14] Scott Robinson & Ezer R. May, *Riesgos y retos para el desarrollo eólico en Yucatán* (Jun. 14, 2016) (unpublished dissertation) (presented at the CINVESTAV Colloquium, June 13-14, 2016, Mérida, Yucatán) (on file with the authors).

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After the informational meeting, the people asked us to attend the *ejidatario* assembly meeting at which ELECNOR representatives hoped to receive consent to install the windmills. We accepted on the condition that the people were made aware of their right to request more information and to obtain a copy of the contract in order to organize and to bring the Assembly to a halt if they felt it was necessary. We agreed to attend but not to participate.

At the *ejido* assembly meeting, the *ejidatarios* vocally objected to its proceeding via statements such as: "The formalities of prior notice have not been respected!" and "Nullify the Assembly!" and "There is no Assembly!" Nevertheless, roll was called in the presence of ELECNOR representatives, the *ejido* township council, and a representative from the Federal Agrarian Agency. The meeting, however, could not be carried out because a legal quorum was not met.

After the *ejido* assembly, a group of *ejidatarios* drafted and signed a complaint to the Director of the Federal Agrarian Agency, which alleged certain facts and sought the following relief:

> "FIRST.- Official intervention by the Director of the Federal Agrarian Agency given that the representative of the Agency, the Acting Agency Chief, the Legal Subdelegate of the Regional Agency Office in Yucatán, as well as the President of the *Ejido* Township Council, are violating our rights—as *ejidatarios*, as human beings, and as members of the Mayan Indigenous People.
>
> SECOND.- Precautionary and security measures to AVOID the repetition of the irregular and illegal conduct on the part of the Acting Agency Chief and the President of the Kimbilá Township Council, insofar as their convocation of township assemblies without providing the requisite informed notice to, and without the support of a democratic mandate of, ALL *EJIDATARIOS*".

With this document, the foundation was laid for avoiding the possibility that State or corporate interests invested in the proceeding would improperly interpret the results of the assembly. The complaint made clear that the irregularities surrounding the convocation of, and notice for, the meeting, and the meeting's subsequent occurrence, annulled any decision that anyone might attempt to draw from it.

## IV. The Constitution in the Case of the United States: a Brief History

While the formation of the United States is a complicated amalgamation of contradictory forces, certain lines of action relevant to this article can be identified, particularly those tied to economic and colonial forces. Such actions include the displacement and extermination of Native peoples, often using the law to justify such actions; the immigration of working class European settlers who fled the forces of commerce, capitalism, and land enclosure; the

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introduction and expansion of the slave trade from the African continent; the general prohibition against women as political actors; and the formation of an elite class of gentlemen who benefitted from, and sought to perpetuate, the class structure carried over from Europe.[15]

The U.S. Revolution emerged from this context, as did the legal structures that followed, rejecting British control of the colonies so the colonies might build their own project of westward expansion.[16] The colonies formed the first U.S. constitution, known as the "Articles of Confederation," adopted in 1777 and ratified in 1781, establishing a decentralized form of government. The colonial elite, however, convened a constitutional convention in 1787 that eliminated the Articles of Confederation, and installed the current U.S. Constitution in 1789, which emulated European legal models and concentrated power in the federal government, which tended to favor economic interests.[17] This resulted in the centralized federal government that continues to date, as well as a Constitution that protects economic interests, but falls short of protecting civil rights (the Bill of Rights being added to the Constitution after its drafting).[18]

### 1. *A Brief Note on Property Ownership*

Unlike Mexico's Constitution, the U.S. Constitution does not provide that all land within the country is original property of the nation.[19] The Constitu-

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[15] *See* Howard Zinn, A People's History of the United States (Cynthia Merman ed., Harper & Row 2005, 1980), Chapters 1-7. *Also see* Zinn at 46-48.

[16] *Id.* at 86.

[17] Charles Beard argued the Constitution was drafted to protect economic interests. Other commentators criticize this position. But, as Chemerinsky notes, "there is no doubt that the framers intended to protect economic rights." Erwin Chemerinsky, Constitutional Law: Principles and Policies, 622 (Wolters Kluwer Law & Business, 4th ed., 2011).

[18] For more reading on elite control of the Constitution's drafting, *see* Zinn at Chap. 5 *"A Kind of Revolution"*, and Terry Bouton, Taming Democracy (Oxford University Press, 2007) at Chap. 8, "A Stronger Barrier Against Democracy". Zinn also notes: "The Constitution, then, illustrates the complexity of the American system: that it serves the interests of a wealthy elite, but also does enough for small property owners, for middle-income mechanics and farmers, to build a broad base of support. The slightly prosperous people who make up this base of support are buffers against the blacks, the Indians, the very poor whites. They enable the elite to keep control with a minimum of coercion, a maximum of law —all made palatable by the fanfare of patriotism and unity. The Constitution became even more acceptable to the public at large after the first Congress, responding to criticism, passed a series of amendments known as the Bill of Rights. These amendments seemed to make the new government a guardian of people's liberties: to speak, to publish, to worship, to petition, to assemble, to be tried fairly, to be secure at home against official intrusion. It was, therefore, perfectly designed to build popular backing for the new government. What was not made clear —it was a time when the language of freedom was new and its reality untested— was the shakiness of anyone's liberty when entrusted to a government of the rich and powerful". Zinn at 99.

[19] Due to limited familiarity, the authors do not extend too far into this topic. However, this

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tion does, in Art. IV, Sec. 3, Clause 2, grant Congress the authority to manage and control all territories or other property owned by the United States.[20] But, land ownership in the United States originates from various sources. In the pre-revolutionary era, colonies were private property, owned by individuals or families under private corporate charter issued by the British Crown. Post-Revolution, the United States acquired land by territorial expansion, with the government often encouraging settlers to squat on and claim lands; a settler's ownership might become official following U.S. control of those territories.[21]

Other forms of land ownership currently exist, including state control of state lands, municipal control of municipal lands, individual private property and split estates (where surface and subsurface rights are split), and the relationship between the federal government and Indian reservations. While examples of nationalized property have and do exist, these tend to be the exception rather than the norm. All to say - the question of who owns the land within the United States does not always have a simple answer, and the default is not necessarily the federal government.

### 2. *U.S. Legal Structures and Challenges to Protecting the Land*

The U.S. Constitution, along with common law, are the bases for U.S. law. But, if the Constitution is a document that, amongst other concerns, prioritizes economic growth (as designed by its drafters, who were interested in expanding the fledgling country), laws that emanate from it also tend to be rooted in a particular economic logic.[22] To understand how this translates in practice, it is instructive to examine land defense struggles.

Land defense struggles encounter structural impediments in the law, including challenges within the regulatory system that - albeit perhaps unintentionally - can work to the advantage of corporate interests, along with the legal doctrines of corporate personhood and corporate rights.[23] What follows is a general examination of certain aspects of the U.S. legal system that com-

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marks an important difference from the case of Mexico, and merits mentioning. A "history of property" in the U.S. warrants further research.

[20] U.S. Const. art. IV, § 3, cl. 2.

[21] Zinn at 129. White settlers often served as pawns for federal interests, "pushed into the first violent encounters, but soon dispensable," as they fought Indian tribes who defended their homelands. Zinn at 136.

[22] This is not to say that movements have not attempted to counteract this framework. The Amendments enshrined crucial guarantees for civil liberties - for example, the Thirteenth Amendment abolished slavery - but not completely. Instead, slavery remained a legal option for the punishment of a crime. Michelle Alexander, The New Jim Crow, 31 (The New Press 2012) (2010).

[23] Other structural challenges exist, including the doctrines of state preemption, Dillon's Rule, and particularly the Western worldview of treating land merely as property.

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munities encounter when attempting to oppose projects, usually spearheaded by corporations and usually involving land and environmental concerns.

### A. *The Environmental Regulatory System: Stumbling Blocks*

The current U.S. environmental legal system originated in the 1970s,[24] and is based on a regulatory framework. Structural and philosophical characteristics, ostensibly designed to protect the land, can have the opposite effect under certain conditions.

Structurally, the regulatory system is designed to issue permits to companies. While one benefit of this system is the State's capacity to track and ideally control industrial activity, the drawback to this framework is the State's legalization of a certain degree of harm to the land.[25] And, community consent to a project is not required; the environmental agency must hold public hearings to receive non-binding community input.[26]

Additionally, as administrations change and new agency directors are installed, political priorities can politicize agency agendas.[27] This can result in political appointees from the private sector overseeing the very regulatory programs they spent a career opposing.[28] Likewise, limited agency enforcement capacities due to ever-present budget constraints can compound challenges to effective environmental legal enforcement.

Philosophically, one viewpoint interprets the regulatory system as a framework that facilitates the orderly use of the land and resources by industry and other human needs.[29] While this goal is not inappropriate, this can mean the

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[24] The creation of the environmental regulatory system was galvanized by the publication of the book *Silent Spring* by Rachel Carson on Sept. 27, 1962. Carson documented harms caused by pesticides and criticized the chemical industry's efforts at disinformation and officials' acceptance of industry claims. Its publication impacted national policy, prompting passage of key legislation and the creation of the EPA, and mobilized the environmental movement, leading to the first Earth Day on April 22, 1970. Mary Christina Wood, Nature's Trust 51 (John Berger ed., Cambridge University Press, 2014).

[25] *Id.* at 65.

[26] When communities reach this juncture, they might attempt to appeal the permit. Permit appeals, however, generally focus on permit application deficiencies or relied-upon science, or another technical defect. Once the company resolves those issues, it can usually resubmit its application, and receive the permit once the error is rectified. When the fundamental issue, however, is a general democratic opposition to the establishment of the project, a larger governance question comes into play, namely, who should have the ultimate authority to give final authorization to the project.

[27] *Id.* at 85. For example, at one point U.S. President Donald Trump nominated Scott Pruitt, former Attorney General for the State of Oklahoma, to serve as the federal EPA Administrator. While Attorney General, Pruitt made a point of opposing EPA policies.

[28] *Id.* at 85.

[29] Community Environmental Legal Defense Fund (CELDF), On Community

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protection of the environment occurs as a consequence of the larger overarching goal, rather than being the main priority.[30] Not all commentators, or environmental practitioners, agree with this interpretation of the system's philosophical underpinnings; still, this interpretation has gained support in certain spheres of the general public, such as in the case study discussed further below.[31]

The grounds used to enact environmental laws do not detract from this interpretation. The basis for federal action in the realms of civil rights, labor, and the environment did not exist independently in the Constitution (and understandably so, since those issues were not the immediate concerns of its drafters). When the U.S. Congress sought to pass laws in those areas, it had to turn to an unlikely foothold - the Commerce Clause.[32] Environmental laws were passed by arguing that waterways, air, waste, and wildlife are part of interstate commerce, meaning Congress can enact laws to protect the interstate flow of these "articles of commerce".[33]

Some environmental advocates thus argue that this structure, "carries the seed of its own repudiation--an implicit recognition that the existing constitutional structure is not rights-based but commerce-based, which then requires an exploration of *whether a structure solely focused on protecting commerce can ever provide a foundation for rights and sustainability*".[34]

### B. *Corporate Personhood and Corporate Rights*

In the United States, the legal capacity of corporations appears to have been limited up to the nineteenth century.[35] The case *Trustees of Dartmouth College v. Woodward* appears as a pivotal moment - the court recognized the College's corporate charter as a contract between two parties (the College

Disobedience in the Name of Sustainability 11 (PM Press Pamphlet Series, 2015).

30 CELDF at 11.

31 One viewpoint holds that the system exists to protect the environment. Others who critique the system believe mere reform would be adequate. A newer position harshly criticizes the regulatory system, but posits a guardianship model for land stewardship (*see, generally*, Wood, Nature's Trust).

32 Art. I, Sec. 8 cl. 3 of the U.S. Constitution.

33 CELDF at 11-12. Likewise, civil rights laws were enacted pursuant to Congress' commerce powers, arguing that African-Americans traveling between states amounted to articles of interstate commerce, meaning Congress had the authority to legislate their protection. *See Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel Inc. v. U.S.*, 379 U.S. 241 (1964).

34 CELDF at 12 [emphasis in original].

35 The Yale Law Journal, *Constitutional Rights of the Corporate Person*, 91 Yale L.J. 1641, 1641 (1982). As late as 1809, U.S. courts still did not recognize corporate personhood. *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809), partially overruled by *Louisville, Cincinnati, and Charleston Railroad Co. v. Letson*, 43 U.S. 497 (1844), later superseded by *Hertz Corp. v. Friend*, 130 S.Ct. 1181, 559 U.S. 77 (2010).

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and the British Crown prior to the Revolution).[36] This meant that, as a contract, the College's charter received protection under Article I, Section 10 of the Constitution —the "Contracts Clause"— marking an important moment in limiting government and public intervention with private, corporate charters.[37]

Later, in *Santa Clara v. Southern Pacific Railroad Co.*,[38] the court's decision implied that Equal Protection laws, stemming from the Fourteenth Amendment, applied to corporations. Notably, the court did not conclusively reach that finding. Nevertheless - when the court reporter prepared the case headnotes,[39] he included a statement attributed to the Chief Justice, claiming that Fourteenth Amendment Equal Protection does apply to corporations.[40] This case has been used henceforth as a watershed moment where the courts recognized corporate personhood.[41]

While different theories characterize the Court's approach toward bestowing corporations with rights,[42] corporations have nevertheless amassed a sub-

[36] *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819); James G. Wright III, *A Step Too Far: Recent Trends in Corporate Personhood and the Overexpansion of Corporate Rights*, 49 J. Marshall L. Rev. 889, 893 (2015-2016); Program on Corporations, Law & Democracy (POCLAD), Defying Corporations, Defining Democracy 89 (Dean Ritz ed., The Apex Press, 2001).

[37] *Dartmouth*, 17 U.S. at 518; *Id.* at 667-68; Wright, *A Step Too Far*, at 893; POCLAD at 89.

[38] *Santa Clara v. Southern Pacific Railroad Co.*, 6 S.Ct. 1132, 118 U.S. 394 (1886).

[39] The court reporter was J.C. Bancroft Davis, who had corporate ties as the former President of the Newburgh and New York Railway Company. Headnotes within U.S. case law are brief summaries of important points of law found within a particular case, prepared for the convenience of the profession, but are not legally binding themselves.

[40] *Santa Clara v. Southern Pacific Railroad Co.*, 6 S.Ct. 1132, 118 U.S. 394 (1886); Wright, *A Step Too Far* at 893; POCLAD at 68. The Fourteenth Amendment, adopted on July 9, 1868, was enacted following the U.S. Civil War, with provisions theoretically designed to protect freed slaves, most notably the "Equal Protection" and "Due Process" clauses. Nevertheless, of the 307 cases brought involving the Fourteenth Amendment before the U.S. Supreme Court between 1890 and 1910, only nineteen dealt with the rights of African-Americans, while 288 dealt with corporations. POCLAD at 47-48, John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Corporate Power*, 19 Race, Poverty & the Environment 45, 46 (2012). For context, corporate personhood was established in 1886, thirty-four years prior to the ratification of women's right to vote in 1920 via the Nineteenth Amendment. U.S. Const. amend. XIX.

[41] Some commentators see this as the defining moment for corporate personhood and corporate rights. Wright, *A Step Too Far*, at 893. Others are more reserved, arguing the Court parsed the Fourteenth Amendment's clauses, granting corporations equal protection and due process rights only when necessary to protect shareholder property interests. Naomi Lamoreaux & William Novak, *Getting the History Right*, Slate, March 24, 2014, *available at http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/hobby_lobby_and_corporate_personhood_here_s_the_real_history_of_corporate.html* (last accessed August 26, 2017). Regardless of the perspective, *Santa Clara* marks a point where certain civil rights were understood as applying to corporations (and not just to people).

[42] For a discussion of some of these different theories, *see* The Yale Law Journal, *Constitutional Rights of the Corporate Person*; Wright, *A Step Too Far*.

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stantial body of legally recognized rights. These include First Amendment rights to commercial speech,[43] political speech, and freedom of the press;[44] Fourth Amendment rights against unreasonable searches and seizures;[45] Fifth Amendment protection against double jeopardy[46] and uncompensated takings;[47] a Fifth Amendment right to due process;[48] a Sixth Amendment right to trial by jury in criminal cases;[49] a Seventh Amendment right to a trial by jury in civil cases;[50] and a Fourteenth Amendment right to equal protection[51] and due process.[52] Recently, in *Burwell v. Hobby Lobby Stores, Inc.*, the court recognized a for-profit corporation's claim of religious belief (though the Court argued that it limited its finding to "closely held" corporations).[53]

Corporate personhood and corporate rights are an extension of an economically-driven legal framework and philosophy. Early English charters created the colonies —the vehicles of territorial expansion— which were protected by law.[54] Today, state-issued charters create corporations, which serve as vehicles for the task of expansion, growth, and arguably conquest, and are protected via corporate personhood and corporate rights.[55] The current situation is merely an extension of the legal framework that began at the country's inception.

That is not to say this system has gone unchecked. To the contrary, people have used creative tactics to oppose corporate power.[56] Still, the current situ-

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[43] *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[44] *First Nat'l Bank of Bos. V. Bellotti*, 435 U.S. 765, 777 (1978); *Grosjean v. Am. Press. Co.*, 297 U.S. 233, 244, 251 (1936); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). *See also* Susanna Kim Ripken, *Citizens United, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Power*, 6 U. St. Thomas J.L. & Pub. Pol'y 285 (2011-2012).

[45] *Hale v. Henkel*, 201 U.S. 43, 76 (1906). *See also* Ripken, *Citizens United.*

[46] *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 572 (1977). *See also* Ripken, *Citizens United.*

[47] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[48] *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893).

[49] *Armour Packing Co. v. United States*, 209 U.S. 56, 76-77 (1908).

[50] *Ross v. Bernhard*, 396 U.S. 531, 542 (1970). *See also* Ripken, *Citizens United.*

[51] *See Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896); *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); Ripken, *Citizens United.*

[52] *Minneapolis & St. Louis R.R. v. Beckwith*, 129 U.S. 26 (1889).

[53] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

[54] CELDF at 16-17.

[55] CELDF at 16-17.

[56] Different methods to control corporations have included: denying the issuance of corporate charters when communities opposed a business project; prohibiting incorporated businesses from taking action that legislators did not specifically allow; limiting corporate charters to a set number of years, and dissolving the charter if legislators did not renew it; providing shareholders the power to remove directors at will; asserting State power to take over ownership and control of corporate properties; establishing a fund from corporate

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ation marks a moment where corporations and their advocates are on the winning side of the equation.

This has concrete implications for communities. Because corporations enjoy equal protection and due process rights, once an agency issues a permit, the community has limited legal recourse to cancel or nullify said permit. If a community prohibits a corporation from advancing with the permitted project, the company may sue the community, alleging the community has violated its constitutional rights. The case study of Grant Township, Pennsylvania —discussed below— demonstrates one community's experience that reflects what is outlined above.

Before advancing to the case study, a brief note regarding the community in question is warranted. The community of Grant Township, Pennsylvania, is composed primarily of inhabitants of European-American descent. The positioning of Native communities within the United States as legal subjects is a different positioning than that of communities constituted under the municipal legal framework in the United States; Native communities interact and engage with the U.S. federal government via a different legal framework, grounded in the sovereignty that is recognized for Native communities on Native lands.

The author is familiar with, but not an expert in, the historic and ongoing legal and political challenges confronted by Native communities defending their lives and homelands in the United States. Given a lack of expertise in that particular field, this article does not attempt to extend into the realm of drawing parallels between the challenges faced by indigenous communities in Mexico with those faced by Native American communities in the United States. Rather, working from the experiences on hand, this article seeks to document the similarities that can be identified between an indigenous Mexican community and a European-American-descendant community, as both seek to protect the land they call home.

### 3. *Case Study: Grant Township, Pennsylvania*

#### A. *PGE v. Grant Township*[57]

Located in the state of Pennsylvania, Grant Township is a small, rural community of roughly 700 residents, most of whom are of European-American descent. In 2017, Pennsylvania General Energy Company, LLC ("PGE") operated natural gas wells in the Township, including a deep gas well. PGE sought to convert the deep gas well into an injection well to deposit fracking

profits to buy private utilities to make them public; forbidding the existence of private banks; prohibiting banks from engaging in trade; and including revocation clauses in corporate charters. POCLAD at 61-71.

57 *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

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and other oil and gas waste fluids into the well.[58] Grant Township residents and local officials opposed fracking waste being injected within their community. They expressed concerns about their water, health, and safety.[59]

Grant Township residents originally appealed the permit issued to PGE by the Environmental Protection Agency ("EPA").[60] The Environmental Appeals Board ("EAB") did not allow an appeal to proceed.[61] Seeking a solution, on June 3, 2014, Grant Township residents passed a local law that they entitled a "Community Bill of Rights".[62] The law sought to recognize rights at the local level, including the people's rights to clean air, clean water, and local self-government, as well as rights of nature. The local law prohibited activities that the people believed would violate those rights, including depositing oil and gas waste within the Township.[63]

On August 12, 2014, PGE sued Grant Township.[64] PGE's complaint contained thirteen counts, which fell under three main categories. PGE alleged: (1) the law violated PGE's constitutional rights; (2) the Township lacked the authority to adopt the law; and (3) state laws preempt the local law.[65] On October 13, 2014, Grant Township filed an Answer and Counterclaim, arguing that PGE's lawsuit violated Grant's right to local self-government.[66] On December 15, 2014, both parties filed a Motion for Judgment on the Pleadings.[67] The Court granted PGE's Motion for Judgment on the Pleadings on eight of nine counts, and denied Grant Township's Motion for Judgment on the Pleadings.[68]

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58 ECF Doc. 158 at 1, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

59 *Id.* at 2.

60 For PGE to operate its well, it must receive permits both from the federal environmental regulatory agency, the EPA, and the state environmental regulatory agency, the Department of Environmental Protection ("DEP").

61 *In re Penn. General Energy Co., LLC*, UIC Appeal Nos. 14-63, 14-64, & 14-65, *available at*: https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Published%20and%20Unpublished%20Decisions/3E0F361FC07D687B85257D3B0058F11C/$File/Pennsylvania%20General%20Vol%2016.pdf (last accessed Aug. 26, 2017).

62 ECF Doc. 158 at 2, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

63 *Id.* at 2-3.

64 The complete case docket for PGE v. Grant Township may be accessed via Pacer using the docket number 1:14-cv-00209.

65 ECF Doc. 158 at 3, ECF Doc. 5, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

66 ECF Doc. 158 at 3, ECF Doc. 10, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

67 ECF Doc. 158 at 4, ECF Doc. 50, ECF Doc. 52, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014). A Motion for Judgment on the Pleadings in U.S. federal court is filed after the plaintiff has submitted its complaint and the defendant has submitted its answer. It alleges that the opposing party has failed to state a claim upon which relief can be granted, and so the case should be dismissed.

68 ECF Doc. 158 at 4, ECF Doc. 113, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014). In its order (ECF Doc. 113), the court found that: (i) Grant exceeded its legislative authority by prohibiting corporations and governments from depositing oil and gas waste in the township;

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On November 3, 2015, Grant Township adopted a Home Rule Charter, which repealed the challenged law and transformed Grant from a Second Class Township into a home rule municipality.[69] The Charter included both a bill of rights recognizing the rights that had been included in the repealed law, and a prohibition on depositing oil and gas waste.[70]

Meanwhile, the underlying case on the repealed Community Bill of Rights proceeded. Both parties filed Motions for Summary Judgment[71] in January 2016. On March 31, 2017, the court granted in part and denied in part PGE's Motion for Summary Judgment, while denying Grant Township's Motion for Summary Judgment.[72]

In 2017 the court attempted to negotiate a settlement between the parties. The parties were unable to reach a settlement, and the case moved forward.[73]

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(ii) Grant's prohibition on injecting and storing oil and gas waste improperly excluded legally permitted activities within the Township; (iii) Grant exceeded its authority by prohibiting regulatory agencies from issuing permits to PGE; (iv) Grant exceeded its authority when it created a cause of action for residents to enforce the law; and (v) Grant could not divest PGE of its status as a corporate person.

69 Pennsylvania state law includes the "Home Rule Charter and Optional Plans Law." 53 Pa.C.S.A. § 2901, *et seq.* This statute allows Pennsylvania municipalities to adopt a "home rule charter", which serves as the municipality's organic governing document, akin to a local municipal constitution. The concept of home rule gained traction in the United States during the 1970s. Progressive reforms were advocated throughout the country, and efforts to establish greater local autonomy lead to a push for home rule in many states. In Pennsylvania, if a municipality is "home rule," it has greater control over its local affairs than non-home rule municipalities.

70 Home Rule Charter of the Township of Grant, Indiana County, Pennsylvania (Aug. 25, 2015).

71 In U.S. federal court, a motion for summary judgment occurs after the litigation stream has begun, but before the case has reached trial. Summary judgment theoretically allows the case to be resolved without trial. To win a summary judgment motion, the moving party must show there is no genuine dispute of material fact, and that the moving party is entitled to judgment as a matter of later. ECF Docs. 154-156, 157-159, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

72 ECF Docs. 241-243, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014). The court found PGE already achieved some of the relief it sought via its Motion for Judgment on the Pleadings, but that its constitutional claims remained viable. The Court dismissed PGE's Supremacy Clause claim, Procedural Due Process claim, and Contracts Clause claim. However, the Court granted PGE's Equal Protection claim, finding the law discriminated against corporations because it applied only to corporations and governments, and not to individuals. The Court granted PGE's First Amendment claim. Because the law prohibited PGE from being recognized as a person or enjoying corporate rights, the Court found the law encroached on PGE's right under the Petition Clause of the First Amendment to make a complaint to, or seek the assistance of, the government for the redress of grievances. The Court granted PGE's Due Process claim, finding the law encroached upon corporate constitutional protections. ECF Doc. 241, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

73 ECF Doc. 254, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

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### B. *Intervenors in PGE v. Grant Township*

Though PGE sued Grant Township, other actors also sought to participate in the case. On October 23, 2014, the Pennsylvania Independent Oil & Gas Association ("PIOGA") sought to intervene in the case. PIOGA is "a Pennsylvania nonprofit trade association that represents individuals and corporations with interests in Pennsylvania's oil and natural gas industry. PIOGA's members include oil and natural gas producers, drilling contractors, service companies, manufacturers, distributors, professional firms, and consultants."[74]

On November 18, 2014, the East Run Hellbenders Society, Inc. ("Hellbenders") and the Little Mahoning Watershed ("Watershed") moved to intervene.[75] The Hellbenders is a civil society group, composed of concerned citizens living in Grant Township. The Little Mahoning Watershed encompasses the Little Mahoning Creek and the regional natural communities and ecosystems; Grant Township falls within the Watershed's borders.[76]

On October 14, 2015, the court granted PIOGA's intervention in the case.[77] On the same day, the court denied intervention for both the Hellbenders and the Watershed.[78]

On November 20, 2015, both the Hellbenders and the Watershed appealed the denial of intervention to the Third Circuit.[79] On July 27, 2016, the Third Circuit issued its non-precedential opinion, denying intervention and affirming the district court.[80]

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[74] ECF Doc. 16 at 1, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014). PIOGA sought to intervene arguing that because a number of oil and gas well operators within Grant Township are PIOGA members, the law would "divest its members who operate in Grant Township of their fundamental rights, including, among others, their rights under the First and Fourteenth Amendment and the Supremacy Clause of the United States Constitution." ECF Doc. 16 at 1-2, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

[75] ECF Doc. 37-38, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014). The Hellbenders argued that as residents of Grant Township, they directly benefitted from the recognition of civil rights in the ordinance that was enacted in the Township and should be allowed to defend the local law. The Watershed argued that as the ecosystem whose rights are recognized in the ordinance, it benefitted from and should be allowed to defend the ordinance and corresponding rights.

[76] Brief of Petitioner-Appellant at 11, PGE v. Grant Township, No. 15-3770 (3d Cir. Jan. 11, 2016).

[77] ECF Doc. 116, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

[78] *Id.* at 115. The court deemed representation by the Board of Supervisors to be sufficient to vindicate the rights and interests of the Hellbenders and Watershed, notwithstanding arguments to the effect that, as an elected body, the Board of Supervisors might change personnel and adopt a different posture toward defending the law.

[79] Little Mahoning Watershed and East Run Hellbenders Society, Inc.'s Joint Notice of Appeal, PGE v. Grant Township, No. 15-3770 (3d Cir. Nov. 20, 2015).

[80] Judgment, PGE v. Grant Township, No. 15-3770 (3d Cir. July 27, 2016). The Third Circuit found that the proposed intervenors' interest in the case was nearly identical to that

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C. *Pushback to Community Opposition*

In addition to being sued by PGE, Grant Township's opposition to the injection well received other forms of pushback.

On October 31, 2014, PGE issued multiple notices of deposition, seeking to depose Grant Township's elected officials.[81] PGE also subpoenaed Grant's legal counsel, seeking access to privileged attorney-client communications.[82] After Grant Township filed a Motion for a Protective Order, PGE withdrew its notices of deposition and subpoena on December 15, 2014.[83]

When PIOGA was granted intervention on October 14, 2015, it filed an ethics complaint with the state Office of Disciplinary Counsel against Grant's attorney.[84] The Office investigated and dismissed the complaint on November 24, 2015.[85]

On January 15, 2016, PGE filed a Motion for Sanctions, arguing that Grant and its counsel were pursuing frivolous legal claims and defenses, and that allowing Grant to proceed would abuse the litigation system and court resources.[86] On September 30, 2016, the court dismissed the Motion for Sanctions.[87]

On June 2, 2017, PGE filed a second Motion for Sanctions.[88] PGE sought sanctions against Grant Township, its counsel, and against counsel for the Hellbenders and Watershed.[89]

On August 4, 2017, PIOGA indicated its intent to file for sanctions against Grant Township and its counsel.[90] PIOGA also indicated a desire to see criminal charges brought against Grant Township local elected officials."[91]

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of the Township Board of Supervisors, and that the Supervisors adequately represented the proposed intervenors' interests, and therefore denied intervention.

81 ECF Doc. 21 at 5-6, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

82 *Id.*

83 Case Management Order of Dec. 15, 2014, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

84 ECF Doc. 166-2, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

85 *Id.*

86 ECF Doc. 161, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

87 ECF Doc. 224, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

88 ECF Doc. 249-250, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

89 ECF Doc. 249-250, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

90 ECF Doc. 266-1, *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

91 Anya Litvak, *Oil and gas industry group ponders criminal prosecution of local officials*, Pittsburgh Post-Gazette, Oct. 4, 2016, *available at: http://powersource.post-gazette.com/powersource/policy-powersource/2016/10/04/Oil-and-gas-industry-group-ponders-criminal-prosecution-of-local-officials/stories/201610040004* (last accessed Aug. 26, 2017).

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### D. *DEP v. Grant*

While the above-mentioned case was in process, on March 30, 2015, PGE applied to the state environmental regulatory agency, the Department of Environmental Protection ("DEP"), for the requisite state permit.

On August 12, 2015, the DEP suspended its review of PGE's permit application pending a court decision on the above case.[92]

On November 3, 2015, Grant Township citizens adopted the Home Rule Charter. The Charter prohibited and criminalized the issuance of a government permit that would allow a corporation to deposit oil and gas waste in the community.[93]

On March 27, 2017, the DEP issued a permit to PGE, and sued Grant Township and its elected officials, arguing that: (1) Grant did not have the authority to prohibit the DEP from issuing the permit; (2) state law preempts local law; and (3) Grant could not impose a fine or criminalize state government action.[94] DEP also argued that Grant Township should have appealed the permit, rather than prohibit its issuance.[95] Litigation in this case is ongoing.

### E. *Additional Actions*

Grant Township additionally enacted a local law stating that if a court failed to uphold the Charter's limitations on corporate power, the local residents could enforce the Charter themselves. That ordinance stated that neither criminal charges, nor civil or criminal actions, could be brought against direct action participants.[96]

On April 25, 2017, the Hellbenders filed an appeal of the DEP's well permit to PGE with the state Environmental Hearing Board, which can be accessed via Docket No. 2017-031-R.

### F. *Conclusions*

Given the historical and theoretical background, combined with the experience of Grant Township, several key questions and issues arise.

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92 *PGE v. Grant Township*, 1:14-cv-209 (W.D. 2014).

93 Home Rule Charter of the Township of Grant, Indiana County, Pennsylvania, §§ 301, 303 (Aug. 25, 2015).

94 Petition for Review in the Nature of Complaint Seeking Declaratory and Injunctive Relief, *DEP v. Grant* Township, 126 MD 2017 (Commw. Ct. 2017), *filed* (March 27, 2017).

95 *Id.*

96 Grant Township Ordinance, Establishing a Right to Be Free from Prosecution for Direct Action Carried Out to Enforce the Grant Township Home Rule Charter's Rights and Prohibitions; Legalizing Direct Action Enforcement of the Grant Township Home Rule Charter's Rights and Prohibitions, § 2 (May 3, 2016).

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First, a community opposing the issuance of a permit for a corporate project appears to be in a difficult situation. The procedure for appealing a permit may not yield the results that a community seeks; if that occurs, there do not appear to be other effective legal avenues for the community to take. The unanswered question then becomes - what does a community do in such a situation? Can the legal system respond in a way to address a concern that, at its heart, involves questions surrounding democratic governance? If the answer to the latter question is "No," is that acceptable for a democratic system?

Second, corporate rights are a powerful legal tool that can be used to block community opposition to corporate projects, as seen by the Court's affirmation of PGE's corporate rights, and the Court's subsequent decisions supporting PGE's rights over the relief sought by the community.

There is an open question, then, as to whether the current legal framework is one that adequately protects communities and human rights, or if it is instead structurally skewed to favor corporate interests. If the latter is the case, then the urgent question to be addressed involves seeking a way to transform the existing framework into a form that places greater importance on human rights than corporate rights.

## V. Final Reflections

### 1. *On the Legal Frameworks*

In addition to having had two Constitutions prior to the current one, Mexico has experienced over 600 constitutional reforms by 2015. The most recent Mexican Constitution enshrined protections for land and communities.

The United States was first governed under the Articles of Confederation, but has had only one Constitution, which has undergone relatively few amendments. Protections for land and the environment were developed in the 1970s with the advent of environmental law and the environmental regulatory system.

Despite the protective frameworks that exist both in Mexico and the United States, changes have occurred to whittle away at those frameworks, favoring corporate interests that seek access to land and resources.

In Mexico, a *de facto* change in the Constitution, without the hassle of a constitutional convention, transpired with the privatization of the country's energy matrix and the neoliberal counter-reforms that have allowed private capital access to previously protected communal lands. In the United States, case law has evolved to bestow rights upon corporations that serve as a bulwark against community opposition to corporate projects. Both shifts in the underlying legal frameworks provide concerning scenarios for the ability to engage in democratic governance within both countries.

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2. *On Human Rights*

Mexico possesses a body of human rights law that is considerable in size and closely tied to the international human rights legal system.

Despite being a proponent of the Universal Declaration of Human Rights of 1948 and home of the headquarters of the United Nations, the United States has limited its participation in international human rights legal instruments.

Yet both countries, regardless of their public posture on human rights before the international community, demonstrate current structural features that appear to privilege corporate interests over human rights.

3. *On Historical Processes*

In Mexico, national liberation was not accompanied by the liberation of all sectors of society. Economic class and racial hierarchies remained a governing reality, with a newly installed economy closely tied to an increasingly vigorous world economy.

In the United States, the Revolution achieved national liberation, but did not extend to fulfilling the democratic hopes of all peoples, particularly women, indigenous communities, or slaves and people of African descent.

4. *On Consultations and Public Hearings*

Mexican law provides for the legal right to consultation on all environmental matters, which is regularly ignored or unfulfilled. And, in the United States, the corresponding government environmental agency must hold public hearings before issuing any permits. However, the hearings are not required to be dialogues, and community input is non-binding. In both scenarios, an underlying question regarding the ability for citizens and residents to actually participate in the decision-making for their community is raised.

5. *On the Privileged Status of Corporations*

In Mexico, the step-by-step deregulation of the Mexican State has transformed it into a corporate State, as opposed to a social welfare state. Due to neoliberal reforms that have opened up access for capital to the country's energy matrix, corporations have been able to safeguard their investments.

In the United States, corporations enjoy corporate rights that help elevate their status in the eyes of the law. While corporations do not enjoy all of the rights recognized for human beings, they have obtained a sufficient number

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to allow them to control the fate of lands, properties, and individuals, especially when it comes to the interests of industrial projects.

### 6. *On Democratic Governance*

In Mexico, the underlying framework of governance established through the process of the Mexican Revolution has undergone counter-reforms that have reduced or eliminated democratic protections, permitting corporate interests to gain access to land and resources.

In the United States, structural concerns found within the environmental regulatory system and the legal doctrine of corporate rights present challenges to actual democratic praxis on the part of communities.

For both countries, the corresponding populations are faced with the serious task of determining which aspects of the current legal framework preclude, rather than enhance, democratic governance. From there, they must find a path forward that counteracts those forces and places the law squarely in the hands of the people most affected by governing decisions that are taken regarding the lands upon which they live.

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# NOTE

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# REFLEXIVITY AND RUPTURE: EMANCIPATION IN SOCIALIST AND DEMOCRATIC THOUGHT

Jaime Eduardo Ortiz Leroux*

Abstract: *Based on a critique from both political and theoretical perspectives within the socialist tradition regarding models of social change, placing "revolution" opposite to "reform", an assessment is made of the meaning and scope of both of these models in contemporary societies, where a growth of informal powers can be observed. Democratic theory holds the idea of the reflexivity of the constitutional system, which, however, has never been able to politicize capitalism. The socialist theory of revolution tends to see disruption as a source of social change, although it defends a state-run model that excludes the possibility of political action arising from civil society. This note contends that the failure of both models, together with the rise of necrophiliac capitalism that combines a neoliberal idea of sovereignty with the use of violence, highlights the limits of the model of popular sovereignty and positions resistance and disobedience at the center of understanding social change.*

Keywords: *Revolution, Reform, Democracy, Socialism, Disobedience, Obedience, Popular sovereignty.*

Resumen: *A partir de la crítica, tanto de la perspectiva política como teórica al interior de la tradición socialista acerca de los modelos de cambio social, que opuso "revolución" a "reforma", se desarrolla una reflexión sobre el significado y los alcances de ambos modelos de cambio en las sociedades contemporáneas, donde se observa un crecimiento de los poderes informales. La teoría democrática sostiene la idea de la reflexividad del modelo constitucional de soberanía, la cual no obstante nunca ha logrado la politización del capitalismo; la teoría socialista, vinculada al concepto de revolución, tiende a ver en la ruptura la fuente del cambio social, aunque se sostiene en un modelo estatalista que cierra la posibilidad de la política desde el campo de la sociedad civil.*

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*En esta nota se sostiene que el fracaso de ambos modelos, ligado al ascenso de una forma necrófila de capitalismo, que combina una noción neoliberal de la soberanía con el uso informa de la violencia, ilustra los límites del modelo de soberanía popular como modelo de producción de derecho y coloca a la resistencia y la desobediencia en el centro de la comprensión sobre la forma del cambio social.*

PALABRAS *CLAVE: Revolución, Reforma, Democracia, Socialismo, Desobediencia, Obediencia, Soberanía popular.*

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## I. Introduction

According to Marx, social emancipation is a consequence of political action and produces economic and political changes in a society. From his perspective, legal forms depend on economic relations and represent an ideological discourse that leads to the acceptance of domination. However, Marxist tradition describes emancipation by placing it into legal categories, according to the subject's idea as the author of the rules he follows. Both, revolutionary and democratic perspectives in Marxism, seek to create a new model of sovereignty through the "seizure of power" to be able to create new norms and institutions.

Throughout the twentieth century, these models of political action debated the significance of social relations and the sense of political sovereignty. However, at the dawn of a new millennium, rising informal powers and decreasing State regulatory capacity seem to be a result of the depletion of the idea of emancipation.

The emergence of social movements marked by a radicalization of autonomous policy toward the State has led to a search for new theoretical alternatives in order to understand processes of law-making and change, as well as the political phenomena of resistance and disobedience in contemporary societies.

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This note seeks to show the failure of socialist thought to articulate an alternative social project, a phenomenon that underscores the historical limits of democratic sovereignty and questions the ability of the democratic model to stand for social change processes in the context of necrophiliac capitalism. We argue that it is necessary to understand social change by interpreting it through the struggles of excluded communities.

It seeks to uphold the concept of strategic law processes, in which explanations are not conceived as a rational basis for political action, but as a unifying force pushing towards political change.

## II. The Meaning of Political Emancipation in Marxism

In German philosophy, the concept of emancipation comes from a transcendental and idealistic formulation where the State represents the realization of the Phenomenology of the Spirit, and moves towards a materialistic and negative enunciation centered on the idea of rupture as an overwhelming dialectical force.

However, Marx not only foresaw a political revolution, but also a consciousness one conceived as a stage for the fulfillment of a romantic ideal in which human beings build their own freedom. For him, material contradictions separate a human being from his own work and conscience. Thus, emancipation would require an analysis of the concepts that describe social relations.

Although he includes it in the discourse of sovereignty, Marx's program assigns the State and Law different roles than those given by Kant and Hegel, for whom Law is a realm of freedom founding determination, a logical historical a priori which rules established political obligation;[1] Marx affirmed that Law decisively participates in capitalism under conditions of reproducing its existence.

From Aristotle to Hegel, economic systems had been seen as abstract mechanisms and not as concrete communities. Once it was etched into the history of capitalism, Marx was able to politicize economics and associate the concepts that gave meaning to capitalist relations within a historical context, to thus maintain the need for a praxis that seeks to destroy capitalism and establish another path.

Marx postulated the concept of emancipation as a struggle within society that entails the revision of an ideology and incorporates knowledge into the

[1] Hegel's ideas on the place of economy and the State within philosophy can be found in Hegel's "Phenomenology of Spirit". See: Juan García Del Campo, *El derecho, la teoría, el capitalismo y los cuentos*, In Correas, Oscar & Carlos Rivera Lugo, Comunismo Jurídico 48-52 (Ediciones Coyoacán, CEIICH-UNAM 2013).

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practice of said emancipation. He thought that political freedom forms part of history, a continent where political action is the source of liberation.

According to the approach posed by both Hegel and Marx, revolutions and social movements would provide a concept of reflexive history that simultaneously integrates identity, self-determination and negativity. Social action would reveal power ideological character and build the force destined to destroy it.

The Marxist idea of history is immersed in Hegelian matrix teleology, where the State and the economy are integrated elements. Marx incorporated proletarian revolution into this teleology, as well as the subject of the emancipation of society as a revolutionary actor of change and also an emancipation social subject, a revolutionary transforming actor.[2]

This paved the way for two points of view on emancipation: two strategic revolutionary and reflective visions of political action in socialist theory, each one characterized by the form of emancipation: reform or revolution. This dilemma originates in the position each one assumes in respect to the State and Law.[3]

On the one hand, we find those who consider that bourgeois Law serves the propagation of capitalism. Hence, changes should be carried out by extra-institutional means.[4] Inspired on Jacobin revolution, revolutionaries believe in revolutionary parties need to seize power and build a socialist society from the State.

On the other hand, we find those who believe that Law and State, in the context of republican and liberal institutions, represent the place where economic transformation will take place. The mobilization of the social classes is required to consolidate the institutional reforms needed to regulate an economy that will provide equality and conditions of plurality.

Despite these differences, it is important to observe that the notions both views use to approach the State are the same. Both create a context in which society is conceived as a whole that depends on economic order (as heralded in classical economics), and where change lies in the economic agents' legal relationships transformation consequence.

Both concur that in order to achieve emancipation, it is necessary to appropriate law-making processes and create norms that will serve as triggers for social change. The ensuing conflict would require State intervention in economic relations through the creation of guiding regulations.

However, it cannot be overlooked that both approaches give the name of causes to what Marx identifies as effects. In his famous "Preface to a Contri-

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[2] Karl Marx, The Communist Manifesto (SelfMadeHero 2000).

[3] Few contemporary authors have addressed this problem. Among these are Ernesto Laclau and Chantal Mouffe in Hegemony and Socialist Strategy; and Boaventura de Sousa Santos in Sociología Jurídica Crítica

[4] Boaventura Santos, Sociología Jurídica Crítica 544 (Trotta, 2009).

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bution to the Critique of Political Economy", Marx would have put economy as the principal purpose of State-building, but Marxism identifies Law as the cause of social change and the State as "the one in charge" of providing the laws that will lead to emancipation form the laws of capitalism.[5]

Twentieth century social democracy was based on these abstract concepts. Both Lenin, one of the most important figures of the revolutionary tradition, and K. Kautsky, a central representative of the reform model, believed in the working class as a subject of political action and the State as a space to transform economic relations. In both approaches, the political-legal-ideological superstructure was the objective of the struggle, and not the economic bases that Marx considered the principal object.

## III. Revolution as a Condition for Social Change

Until seventeenth century, as G. Sorel observed, societies feared revolutions that pursued political power as an ungovernable evil. However, after the French Revolution, such uprisings began to be conceived as something desirable, "a people's struggle against a coalition of horror and oppression". G. Sorel wonders what the French revolution would mean if the myths surrounding it were suppressed.[6]

The ideal of modern emancipation conceived a revolution under the same terms that Santo Tomas employed to define a "state of necessity", the result of a causal relation in society,[7] cause and effect of political community, source and ultimate Law's foundation.[8] Romantic ethos linked revolution exigency to its legal effects,[9] the result of a conscious effort to transform conditions of existence and institution.[10]

Revolution as a concept of necessity was also present in Hegel's criticism of the nihilism of slave revolutions. In Marx, the justification for a revolution refers not only to a historical need, but also to a need to revolutionize thought processes. The fundamental factor of such social change, as Bolívar Echeverría points out, implies a "revolutionary transformation in the semiotic field".[11]

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[5] Karl Marx, A Contribution to the Critique of Political Economy (Progress Publishers 1989); Also see: Eric Selbin, Revolution, Rebellion, Resistance: The Power of Story 197 (Zed Books 2010).

[6] *Ibid.* at 150

[7] Georges Sorel, Reflections On Violence 29 (Forgotten Books 2015).

[8] *Ibíd.* at 61-62

[9] Bolívar Echeverría, El Materialismo de Marx, Discurso Crítico y Revolución 85 (Ítaca 2012).

[10] Selbin, *supra* note 6 at 13.

[11] Bolívar Echeverría, Valor de Uso y Utopía 43 (Siglo XXI Editores 2012).

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In this sense, a revolution is not only expressed as social violence, but also as a set of justifications for action, which requires —as M. Foucault explains— a "counter history", a discourse that makes it possible to decipher the underlying inequalities in social relationships in order to provide a promise of change and a requirement for deliverance.[12]

This counter history is not part of the discourse on Law, but permeates it. It is not a *de jure* enunciation, but *de facto evidence that cannot be governed or limited but must be reduced by State powers at the moment when it becomes an end in itself and seeks to seize political power.*[13]

According to Agamben, the fact that necessity can prevail over Law refers to a time without the law so essential to State powers that these must ensure a relationship with it. Its imperative nature is reduced to a decision about something that is undecidable, creating a situation in which the rule appears to be the exception. In this case, the theory of necessity is an exception to justify transgression.[14]

However, the need for a revolution is outlawed;[15] it pursues social re-politicization but it is inevitably accompanied by violence "as if in order to re-establish the Law a relationship with anomie were required."[16] In this sense, when considering revolution a necessity, the State forces us to stop thinking about violence as simply a means and to start seeing it as an end in itself.

Revolutionary action obeys an alternative Law; its deployment accuses and defends, identifies and excludes, and even includes undesirable effects. But, once alternative provisions become State *ratio* are assimilated into natural ones, they become authoritarian, demanding absolute obedience, punishing diversity and repudiating dissidence.[17]

The antithesis of revolution, as a necessity and a state of exception at the same time, concerns a situation in the context of war where the need for social change, far from being an objective, implies being attributed with a meaning that deems the system worthy of being overcome. Therefore, revolution is not revolutionary by necessity and its justification can never be an absolute parameter for political action.

In this context, the Russian Revolution was the first to be done against the Law,[18] although later, like all revolutions, it imposed a new form of entitlement. The arrival of the Communist party to political power created a Soviet

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[12] Michel Foucault, Society Must be Defended 67-69 (Penguin Books 2004).

[13] Echeverría, *Supra* note 11 at 66.

[14] Giorgio Agamben, State of Exception. Homo Saccer, Ii. (Trans. Kevin Attel) 83 (University of Chicago Press 2005).

[15] *Ibíd.* at 68.

[16] *Ibíd.* at 100.

[17] Sorel, *supra* note 8 at 140. Sorel says that the idea of revolution demands an immense sacrifice on behalf of the individual, pushing him towards rebellion, even though it serves other purposes that are not revolutionaries.

[18] Selbin, *supra* note 6.

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federation in charge of promoting transformations in social relations through new laws, as held by P. Stučka.[19]

This revolution would be accomplished in two phases: an insurrectional one in which worker organizations seize political power, and a second moment of social rebirth through legislation that gives order to the new social relationships. Emancipation remains linked to political action and legal concepts whereas revolution is reduced to the State's creating a new economic structure.

The Russian experience gave rise to a kind of power in which the State oversaw social life, where the economy was suppressed in favor of a proletarian identity and the Law prohibited all activity incompatible with the State as a unique economic agent and actor in civil life.[20]

In the twentieth century, this model was used by several national liberation movements around the world, as an emancipation strategy where the economy and the State occupied a central place. Anti-colonial revolutions created independent nations in Asia, the Americas and Africa, and in some cases, they even developed a national economy to counter imperial powers.

Nevertheless, Bolívar Echeverría thinks that the Marxist concept of revolution Marxist is indebted to that of economic freedom, as it is linked to consumption and technology as a source of progress. The Marxist lack of criticism of technology, progress and the obsession with concentrating power would have identified the purposes of the revolution with those of modern capitalism.

Under that perspective, the revolution would have ceased to be the axis of the political action of a subordinated group as it was until the 1960s. According to Santos, rebellion would have occupied a vast field of social action due to its ability to integrate diverse social sectors.[21]

Armando Bartra believes that this phenomenon coincides with a "Promethean crisis",[22] a collapse of romanticism that appears to be a finalist and determinism history models' crisis. Furthermore, there is also the waning idea that the subject fulfills his or her destiny by acting politically.

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[19] P. I Stučka, La Función Revolucionaria del Derecho y el Estado (Juan Ramón Capella tr.) (Península 1974).

[20] L. Bronstein, *Trotsky*, A Russian Revolution leader and head of the Red Army, Trotsky was the first communist to address democracy from within socialism. Trotsky denounced communist party's usurpation of power, for which he was persecuted. Among his works are: "History of Russian Revolution" (1927) and "Permanent revolution" (1932), published in London by Penguin Books.

[21] Santos, supra note 5, at 132.

[22] Armando Bartra, Tomarse la Libertad. La Dialéctica en Cuestión 132 (Editorial Ítaca 2010).

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## IV. Democratic Sovereignty and Economy Regulation

The Marxists who assumed that the main task was to intensify the democratization of the State sought to strengthen its role as a space for economic regulation and for representing social relationships, which is why the analysis and definitions of social democracy have two aspects.

The first one emerged in the first half of the last past century and focuses on the State's role as an economic regulator, as well as its social and employment policies. The other is centers on the justification for democratic sovereignty and reflexive political change. In both cases, democracy represents a form of self- governance that ensures the protection of human rights and social plurality.

The first point of view was born with the defeat of the revolution in Germany.[23] It created a hybrid power resulting from a compromise between socialist and liberal parties that was based on the idea that Law and State are instruments that allow for the control of economic powers and generate instances for the resolution of inherent contradictions.

The legal connections that appeared with this alliance led to a positive mandate where the State played the role of a social balancer through the implementation of economic policy instruments that formed a kind of democracy known as the "welfare state", in which taxation policies are instruments for social equalization and the management of inequalities.

With the State as a main actor, economical regulation became a privileged space for political action and concepts like supply of services, taxation, public infrastructure, social security, minimum wage, working day, subsidies, and others. Meanwhile, the concepts of Leviathan and the Welfare State remain unclear, ensuring stability to capitalist countries.

However, democratic theory (more socialist than liberal) has argued that freedom should be as broad as necessary to ensure citizen dignity and freedom, which would include the necessary regulation to protect not only civil liberties, but also collective human rights.

Along with economic regulation theories, a reflection about democratic sovereignty as emancipation field emerged. Socialist countries' criticism against democracy generated consensus based not on equality and plurality, but on the condemnation of non-State political action, an expulsion of any form of fighting that could represent a break in social order from the political horizon.

[23] German Social Democratic Labor Party leaders A. Babel, E. Bernstein and K. Kautsky promoted a comprehensive reform policy with the participation of workers parties at democratic elections (called the "Effurt Program"). This played an important role in summoning support for the revolution led by K. Liebknecht and R. Luxembourg who lie in wait for political power in post-war Germany.

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Emancipation became an issue of democracy and reforms.[24] Different authors addressed this issue, Kelsen did in "Socialism and State" where he stated that democracy implies that law provides a possibility because it is susceptible to become a modified discourse, so that socialism would only be achievable in its State form.[25]

The democratic nature of Law would give it the presumption of validity and an epistemic superiority that enables it to contend with the reasons for obedience.[26] Law would have the objective of ensuring the autonomy and control of power as well as ensuring obedience. Political obligation would derive from a contract that in guaranteeing identity between society and the government would also ensure its effectiveness.

Democracy would be based on the presumption that law can be changed at any time by means of reflective and unbiased legal procedures. Social change is explained as a people's will to change the result of the law; emancipation would be a legal link that, according to Santos, becomes possible through the liberties granted in a constitutional pact that would resurface as the basis for self-determination and grounds for statutes.[27]

These ideas had a strong influence on contemporary political thought and were put into play in some struggles that sought to contain the advance of capitalism through democratic means, as happened in Bolivia (1954), Guatemala (1954), and Chile (1973). These ideas later reappeared as justifications for a democratic transition, processes that refer both to the "Pacto de la Moncloa" in Spain in the 1980s and to "New constitutionality" in Latin America, in early years of this century.

## V. Political Change and the Rise of Neoliberal Sovereignty

In the last decades, the model of democratic sovereignty has been losing legitimacy as a political paradigm; the idea of democracy is gradually being reduced to an economic value or a procedure-to-create law set. The welfare State has lost its capacity as the capitalist relations manager and has become a corporative State.

The decline of the Welfare State and its inability to represent economic relationships is a result of the imposition of an equity model from the State

[24] Ernesto Laclau & Chantal Mouffe, Hegemony And Socialist Strategy 191-200 (Verso 2014).

[25] Oscar Correas, El Otro Kelsen 35-36 (Instituto de Investigaciones Jurídicas, UNAM 1989). Kelsen saw democracy as a weapon against totalitarianism. According to him, the best thing that socialism could do was to "dispense with anarchism".

[26] Ariel H. Colombo, Desobediencia Civil y Democracia Directa 29-32 (Trama editorial and Prometeo libros 1998).

[27] Santos, *supra* note 4, at 510. Emancipation would be the result of a increasingly complex interactions between society and law.

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and the Law. This has prevented the democratization of social relationships because the consequence of State and Law effectiveness is social and economy depoliticization.[28]

As we know, for some authors contradictions in democratic theory are caused by contradictions between individual and collective human rights. According to Estévez Araujo, this incompatibility arises because of unlimited capital accumulation[29] that gives primacy to mercantile exchanges over any other social regulation.

Oscar Correas, on the other hand, argues that the legal system in capitalist societies is shaped by rules that demand a certain behavior to reproduce the system;[30] legality subjects the meaning of democratic rules to that of trade exchange, creating the idea, as Žižek also points out, that it "is about a legal relationship and not one of power".[31]

In this context, the metamorphosis of contemporary sovereignty should be conceived as the result of a process by which powers seek to eliminate all democratic regulation and find refuge in market and violence. Boaventura Santos thinks that this metamorphosis expresses a State's regulatory capacity for loss in the areas of economics and labor field, which is transferred to the meta-regulation of great economic powers.[32]

The collapse of "real socialism" and the crisis of the Welfare State are concurrent phenomena with the effects of a loss of citizen expectations and the rise of an ultra-liberal political version that claims economic freedom has primacy over democratic liberties.

The nature of contemporary sovereignty, whose implementation was supported by social democratic parties, prescribes the liberalization of strategic resources, the easing of labor, and the privatization of social security, thus creating a context where decisions are passed along to the hands of the important financial forces and the State's role is reduced to passing the measures needed for that purpose.[33]

Nonetheless it is not about a "minimum State" because the function of applying the law is maintained as a State's faculty in order to guarantee the reproduction of the system. On contrary, as a representative of the financial powers, it becomes a strengthened State,[34] whose political class, as Santos

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[28] The W*elfare state* and reformist strategy tend to be presented as a version of depoliticized social change that tends to confuse emancipation with regulation.

[29] José Antonio Estévez Araujo, La Constitución como Proceso y la Desobediencia Civil 110 (Trotta 1994).

[30] Oscar Correas, Introducción a la Crítica del Derecho Moderno (Esbozo) 245-253 (Fontamara 2006).

[31] Slavoj Žižek, En Defensa de la Intolerancia 89 (Ediciones Sequitur 2007).

[32] SANTOS, *supra* note 5, at 410.

[33] Pierre Rosenvallon, The Society of Equals. (Trans. A. Goldhammer) 291 (Harvard University Press 2018).

[34] Santos, *supra* note 4 at 605.

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has observed, provides formal devices to secure the interests of multinational powers.

But formal devices are not enough for the reproduction of the system. Therefore, more and more violence is used to ensure policies of accumulation and privatization. It is a phenomenon called "the recolonization of politics" where State and private agents share the same objectives.[35]

Ana Esther Ceseña points out that, as in the past, market forces have had militarized support. At present, the current level of appropriation-dispossession requires non-institutional support, a certain degree of informal violence to be able to modify the thresholds of social resistance.[36] Economic freedom would find its natural place in genuine powers, which would expand sources of profit and accumulation in Latin America.

These powers would have acted to extend beyond the regulatory field to settle in violence against society, a war that EZLN has defined as the "Fourth World War",[37] whose purpose is to conquer territories and subordinate them to multinational financial capital, a strategy that upholds the pattern of contemporary capitalist accumulation.

## VI. Resistance and Disobedience Within the Interpretation of Social Change

At the highest level of reflexivity (the possibility of changing the system), there is no way to transform the system based on its own rules, like the popular model of sovereignty (that gives basis to the democratic model). This is especially true for those who represent a way of life that is incompatible with capitalist dogma. In this sense, legal interpretation is still an system openness with limits beyond what political action is considered irrational.

What kind of emancipation could come from a legal order where sovereignty is displaced by economic forces and exchange has priority over collective rights? What is the meaning of emancipation in the context of savage capitalism? Is the discourse of Law a reflexive instance to be able to change capitalism?

In "Philosophy of Poverty", P. J. Proudhon analyzed some of the effects of the contradictions between productive forces and production relations. He forewarned of strong dissent against the rise of capital as it would seek to overpower the economy and prevent the law of the market from managing

[35] In extreme cases (Mexico, Colombia and Guatemala), this phenomenon goes through the formation of paramilitaries, extractive companies with State corruption.

[36] Ana Ester Ceseña, *Ayotzinapa, emblema del ordenamiento social del siglo XXI*, *Rebelión,* (April 6, 2017) *http://www.rebelion.org/noticia.php?id=193060*.

[37] Subcomandante Marcos, *The Seven Loose Pieces Of The Global Jigsaw Puzzle*, *Zapatista Statement*, (April 6, 2010), http://www.struggle.ws/mexico/ezln/1997/jigsaw.html.

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to impose itself on a group.[38] Here, we postulate that this dissidence is upheld today despite having exhausted socialist and democratic models.

We should recognize that the transformation of a community is rooted on politics more than on economics. As Clastres points out, the State represents a divided society instituted on political order, by rules established for the use of the territory and of sharing its benefits.[39] From this point of view, emancipation would not depend on the status of the economic subject but on his "capacity as a warrior".[40]

This position emphasizes the legality of the constitutive nature of capitalism, in contrast with the fight against its political nature. Legal discourse emerges individually as an alienation form, an external determination that takes away the possibility of being the Other and fighting submission that emerges from outside the framework of institutional power relations.

Sorel's and Benjamin's distrust regarding the possibility of disciplining capitalism through democratic procedures gains validity. This issue inspired the rise of social ideology in Germany in the 1920s and was taken up in the twentieth century with the fall of democratic theory ideologists, such as E. Laclau or B. Santos, who were searching for alternatives to the rise of neoliberalism.

Different movements have sought to embody a social opposition force that created points of conflict to modify the rules of the game in an attempt to fight against forms of living conditions imposed by capitalism, and to pursue alternate ways to conceive and validate social identity. Movements have defended subjective spaces that give rise to new social logics that challenge the meaning of social action.

Public and private life has remained politicized with the social mobilization that has prevented the establishment of a framework that gives it a definite identity. In this context, anti-capitalist sectors have turned their eyes to indigenous people and communities, who are seen as a resistance and the successful defenders of the land, the vindication of use-value (human freedom) over exchange-value (merchandise).

However, in the context of savage capitalism, the possibility of defending communities within the framework of legal democratic guidelines does not seem to open up. In this sense, Balakrishnan Rajagopal, a MST scholar in

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[38] Michel Onfray, Política del Rebelde. Tratado de Resistencia e Insumisión 121 (Anagrama 2010).

[39] C. Levi Strauss observes that economic exchange is a means for conflict resolution, but it isn't the only one. Pierre Clastres, Society Against State. Essays on Political Anthropology 70 and 195-199 (trans. Robert Hurley) (Zone Books 1987). Also see: Armando Bartra, El hombre de hierro. Los límites sociales y naturales del capital 26-29 (Ítaca, UAM 2008).

[40] *Ibid,* at 212-215. Primitive societies reject risk, immanent to trade, of being colonized. His State rejection is a political economy rejection to submission it entails.

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Brazil, warns that the existence of a variety of regulatory systems does not ensure the success of social movements that have decided to use Law.[41]

In the Latin American legal context, many authors, even those with a more political notion of Law, believe that Law is a reflective discourse where emancipation is played. We do not agree: has law ever been changed by obeying it? What would have been achieved in Ireland if people had not broken the rules? Was not that what Zapatistas did in Mexico?[42]

Boaventura Santos thinks that those who defend "anti-hegemonic globalization" to achieve their goals exclude the use of either "means created by modernity" or violence beforehand.[43] As Foucault points out, in the event of a social uprising, an open stance must be maintained. "No one can live such a necessity in someone else's place".[44]

In this sense, action that seeks the defense of human rights and the politicization of society only comes about by breaking the rules of sovereignty (in this case democratic ones). This occurs at different levels of discourse and only under certain circumstances, such as those needed for survival. An action that does not represent a group in the choice between different possible different life possibilities but a necessity state.

The aim here is not to prescribe violence, or to assess its reach. Neither revolution nor its specific form can be advised because have each one has its own case-by-case motivations and rationale. What is highlighted here is that the growth of the power of necrophiliac capitalism leads to the emergence of certain forms of resistance, a phenomenon that cannot be thought of based on the concepts that pursue its depoliticization.

The loss of a democratic horizon forces opponents and society in general not only to ask themselves if democracy and capitalism are compatible, but

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41 Rajagopal Belakrishnan, *Law Limits In Counter Hegemonic Globalization*, in: Law and Globalization from Below: Towards a Cosmopolitan Legality 168-171 (Cambridge University Press, 2009). Also see: Peter Houtzager, *The Movimiento Sin Tierra and juridical field in Brazil*, in Law and Globalization from Below: Towards a Cosmopolitan Legality 202 (Cambridge University Press, 2009). MST indicates that struggle must be given in the shadow of the law because when conflict becomes legal, it results in no change at all; the success of any movement depends on their ability to make their demands known without arriving at a confrontation.

42 Juan Pedro García del Campo, *Democracia y comunismo*, in Comunismo Jurídico 108 (Oscar Correas and Carlos Rivera Lugo, Ediciones Coyoacán, CEIICH-UNAM, 2013).

43 In a global struggle against neoliberalism, few movements resort to anti-institutional action, but privilege institutional efforts. "Social Global Forum. As subaltern cosmopolitan legality and politics", in Boaventura Santos, Rodríguez Garavito, C. (coord.), Law and Globalization From Below: Towards a Cosmopolitan Legality 53-59 (Cambridge University Press 2009).

44 Michel Foucault, *Useless to revolt*, in Power. The Essential Works of Foucault, 1954-1984, Vol. 3. 449-453 (New Press 1981) Published in "Le Monde" 21st, May 1979. Legal rules will never be strong enough against power nor will universal principles be strict; sometimes it will be necessary to experience "insurmountable laws and unrestricted rights".

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also to rethink the type of society they aspire to, how they intend to achieve it and if that society is compatible with democratic and capitalist law.[45]

In the context of capitalism, emancipation forces resistors to distance themselves from their object. To achieve a structure based on subjectivity, it is necessary to pursue an action that can transform the meaning of society by unveiling a form of ideological domination (capitalism, colonialism, imperialism, patriarchy, statism), a gesture that can transform hierarchies and create new meanings of community.

Resistance and disobedience go on to assume the shape of non-civilian action, which does not usually take part in this setting because it presupposes a rupture with its structure. Unconditioned action against the system that is simplified to include all social order because it does not seek the reaffirmation of its meaning/significance but has in itself its power and potential.[46]

Disobedience is something that cannot be explained; rather it is something that jeopardizes the principles of common sense. So, the production of meaning depends on the ability to shape a collective subject that can take on the risk of confronting normative formulation as an inherent duty.[47]

Hence, legal boundaries would not be placed at the time of reproduction and recognition but at the level of legitimizing social experiences of rupture and resistance against the Law, in those political and sociological categories that ground the negation of the content and form of law.

Nevertheless, to open up new meanings of social relationships, the agent has no other option but to disobey the discourse that establishes his subjectivity, which affirms and denies the agent himself. This rupture entails a moment when emancipation has lost its sense, an act that seeks to transform the meaning of social relationships with one that results in a loss of meaning. It occurs i.e. in the theoretical dispute about the idea of democracy, a formula that still justifies political sovereignty, but is actually besieged by dilemmas "for which there are no modern solutions."[48]

Emancipation would be linked to non-obedience of the law, a "non-right" that consists in a community's possible use of non-legal, illicit or unauthorized means. This is, within the model of the legal configuration of violence, only that which is undetermined by the potential of imbuing an internal system with meaning puts an end to violence itself, option that opens possibilities for the politicization of society.

So, a change in the legal system would not depend only on the criteria to validate or justify acts of disobedience but also on the strength of the action that citizens employ against legal provisions.[49] This force is the only type of

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45 Santos, *supra* note 5, at 504-505.

46 Slavoj Žižek, Arriesgar lo imposible 120 (Trotta 2012).

47 Selbin, *supra* note 5, at 91.

48 Santos, *supra* note 4, at 507.

49 García del Campo, *supra* note 43, at 103.

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compromise in the face of a legal framework favoring the market that politicizes inequalities, defends natural resources, or preserves body and awareness.

The space where political action plays out is not in the State but in society, and it is seen as a complex relationship where the objectives are non-military yet political, where any attempt for autonomy that does not come from a group becomes a simulacrum,[50] where a given freedom does not represent true emancipation.

The source of Law would be more a fact than a right, a forceful act of those who are against the law, an act that is, like many other exceptions, both inside and outside the Law as expressed in its negative form: a "no law" in which the emancipation of Latin American societies has been simulated since the beginning of this century.

## VII. Conclusions

Socialist thought and democratic theory share a belief in the model of popular sovereignty as a political system of self-determination. In this sense, each pursues, by its own means, a common goal: a way to overcome conflicts by attaining an identity between the State and society in the field of economic relationships.

The gradual deterioration of each position and its subsequent failure is an example of the erosion of democratic sovereignty in the representation of a community and as a political model of self-determination.

Neither a revolution nor democratic reforms have fulfilled expectations they have posed; they could not prevent the depoliticization of the economic field or the exclusion of the way of life of the Other; it did not close the gap between the decision-makers and those who obey it; on contrary, they strengthened corporatism and corruption in the State.

This led to the emergence of new and informal figures of economic power, handled outside State channels and rendering political processes innocuous for the shaping of democratic sovereignty.

With the growth of the concept of neoliberal sovereignty, new social movements have emerged in Latin America, representing different aspects of political action against the model of democratic sovereignty. In this sense, the sovereign's body has been exposed as a fragmented entity, that encourages division as a form of emancipation.

The regulatory capacity of the contemporary State loses strength in rethinking a political and legal theory that allows us to understand contemporary political processes not according to formal principles or material validity, but as an effect of discourse linked to the use of force.

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[50] Bolívar Echeverría, Definición de Cultura 233 (Fondo de Cultura Económica, Ítaca) (2013).

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