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ARTICLES

NOTES

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TORTURE, MISTREATMENT, AND FORCED CONFESSIONS IN MEXICO'S ACCUSATORIAL CRIMINAL JUSTICE SYSTEM

Rita E. Kuckertz*

Abstract: *This article examines the impact of Mexico's 2008 criminal justice reform on the practice of utilizing torture and mistreatment to extract criminal confessions. Complaint data submitted to the National Commission on Human Rights (Comisión Nacional de Derecho Humanos, CNDH) and detainee survey data compiled by the National Institute for Statistics and Geography (Instituto Nacional de Estadística y Geografía, INEGI) were employed to assess if the use of torture and mistreatment by judicial sector operators had decreased (1) in states with advanced levels of reform implementation and (2) in judicial districts that had already implemented the reform. The author also examined the incidence of forced confessions before and after the reform's implementation at the judicial district level. The author hypothesized that decreases in torture, mistreatment, and forced confessions would be observed in each of these cases. Basic correlation and regression tests were employed to assess the geographic hypothesis, while two chi-square tests for independence were used for judicial district data. The results of these analyses demonstrate evidence rejecting the null hypothesis in each instance, suggesting that the reform can indeed be credited for small but meaningful reductions in torture, mistreatment, and forced confessions in Mexico. The author argues that reforms must be accompanied by further action to address the pervasive use of torture and mistreatment in Mexico.*

Keywords: *Torture, mistreatment, criminal justice, accusatorial system, human rights.*

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Resumen: *Este artículo examina el impacto de la reforma al sistema de justicia penal en México aprobada en 2008, en específico sobre el uso de tortura y malos tratos en la obtención de confesiones de culpabilidad. Los datos sobre las denuncias presentadas ante la Comisión Nacional de Derechos Humanos (CNDH) y sobre las encuestas a población privada de su libertad compilados por el Instituto Nacional de Estadística y Geografía (INEGI) se utilizaron para evaluar si el uso de la tortura y los malos tratos por parte de operadores del sistema de justicia disminuyeron (1) en los estados con niveles avanzados de implementación de la reforma y (2) en los distritos judiciales a partir de la implementación del nuevo sistema. La autora explora la incidencia de confesiones forzadas antes y después de la implementación de la reforma penal a nivel de distrito judicial. La autora plantea la hipótesis de que a partir de la implementación del sistema se observarían disminuciones en el uso de tortura y malos tratos, así como en la incidencia de confesiones forzadas. Para tal efecto, se emplearon pruebas básicas de correlación y regresión para evaluar la hipótesis geográfica, además se utilizaron dos pruebas de independencia chi-cuadrado para los datos a nivel de distrito judicial. Los resultados de estos análisis demuestran que el cambio de sistema, en efecto, puede explicar disminuciones pequeñas, pero significativas, en la tortura, los malos tratos y las confesiones forzadas en México. La autora sostiene, sin embargo, que la implementación del sistema debe ser acompañada de otras medidas para abordar, específicamente, el uso generalizado de la tortura y los malos tratos en México.*

Palabras clave: *Tortura, malos tratos, justicia penal, sistema acusatorio, derechos humanos.*

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I. Introduction

This article examines the impact of Mexico's 2008 criminal justice reform on the use of torture and cruel, inhuman, or degrading treatment (herein referred to as "mistreatment") by judicial sector operators as prosecutorial tools. Specifically, it analyzes how the reform has reduced the practice of employing torture and mistreatment to extract criminal confessions by imposing new constraints, incentive structures, and institutional norms to re-shape the behavior of judicial actors. It employs data from two sources in order to determine whether or not the implementation of the Accusatorial Criminal Justice System (*Sistema de Justicia Penal Acusatorio*, SJPA) has resulted in a reduced incidence of torture and mistreatment by judicial sector personnel.

First, this study tests the geographic relationship between reform performance and the incidence of torture and mistreatment on an annual basis from 2015 to 2018. It employs torture and mistreatment complaint data from the National Commission of Human Rights (*Comisión Nacional de Derechos Humanos*, CNDH) National Alert System, population projections from Mexico's National Population Council (*Consejo Nacional de Población*, Conapo), and state-level SJPA implementation rankings from "*México Evalúa*" in order to conduct these analyses. Next, it utilizes detainee survey data from the National Institute of Statistics and Geography (*Instituto Nacional de Estadística y Geografía*, INEGI) to perform chi-square tests for independence in order to detect any significant differences

in the number of reports of (1) torture and mistreatment and (2) the number of forced confessions following judicial district-level SJPA implementation. Finally, this research tested for significant reductions in torture and forced confessions pre- and post- reform implementation at the state level in order to capture the reform's subnational effects.

This investigation hypothesized that a decrease in the incidence of torture and mistreatment would be observed in states with higher levels of SJPA implementation. Furthermore, the research hypothesized that reports of (1) torture and mistreatment and (2) forced confessions would decrease following the SJPA's judicial district-level implementation. While the study's findings suggest that the SJPA represents a significant step toward reductions in human rights abuses by judicial sector officials, these reforms must be accompanied by further action to address the current epidemic of torture and mistreatment in Mexico.

II. Torture and Reform in Mexico

1. *A Human Rights Crisis*

Over the past decade, Mexico has seen a growing number of human rights violations at the hands of state and non-state actors. According to official data reported by Justice in Mexico, the number of intentional homicides has increased steadily since 2015, claiming 34,588 individual victims in 2019 alone.[1] While the government stopped tracking disappearances in 2018,[2] previous reporting has suggested that the number of disappearances continues to rise each year.[3] These findings have been accompanied by further unquantifiable human rights violations, as documented by international organizations and civil society groups. In particular, human rights advocates have noted the sustained prevalence of torture and mistreatment in Mexico.[4]

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[1] Justice in Mexico, *Organized Crime and Violence in Mexico: 2020 Special Report* at 8 (Jul. 2020).

[2] *México no Tiene una Cifra Oficial de Desaparecidos*, Forbes (aug. 29, 2019).

[3] The *Comisión Nacional de Derechos Humanos* (National Commission of Human Rights, CNDH) reported that from 2007 to 2016, the number of cases of disappearances increased from 662 to 3,768, respectively. Comisión nacional de derechos humanos [CNDH], *Informe Especial de la Comisión Nacional de Derechos Humanos sobre Desaparición de Personas y Fosas Clandestinas en México* 28 (2016).

[4] *See* Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C. [PRODH], *Informe sobre Patrones de Violaciones a Derechos Humanos en el Marco de las Políticas de Seguridad Pública y del Sistema de Justicia Penal en México* (Jun. 8, 2015), available at *https://centroprodh.org.mx/2015/06/09/informe-sobre-patrones-de-violaciones-a-derechos-humanos/*; Comisión Mexicana de Defensa y Promoción de los Derechos Humanos [CMDPDH], *Informe alternativo de las organizaciones de la sociedad civil de México al Comité contra la Tortura de la ONU* (May 17, 2019); Gustavo Fondevila, *et al.*, *¿Cómo Se Juzga en el Estado de México?: Una Radiografía de la Operación del Sistema de*

While substantial reporting by scholars and civil society organizations has underscored the magnitude of the crisis, there is very little publicly available information documenting the prevalence of institutionalized torture as a whole. Mexico's national human rights ombudsman, the CNDH, registers complaints of torture and cruel, inhuman, and degrading treatment filed against government bodies, but scholars and nongovernmental organizations (NGOs) have noted the contradictory and inconsistent nature of official data on the practice.[5] This is the case despite the efforts of civil society groups and international organizations documenting the institutionalized use of torture within Mexico.

For example, in 2003, the United Nations Committee Against Torture (UN CAT) released a report illustrating the systematic nature of the practice. The committee examined hundreds of reports of torture in Mexico and found that victims of torture reported eerily similar experiences. Most reported that their torturers forced them to confess to crimes they had not committed, including homicides, kidnappings, robberies, and sexual offenses. Similarly, victims reported nearly identical methods of torture, including electric shocks, asphyxiation, mock executions, and direct threats of harm to family members.[6]

From 2005 to 2007, the CNDH released 4 official recommendations to government organizations based on complaints of torture filed against them. However, from 2008 to 2010, this figure increased to 28 total recommendations. Similarly, the number of complaints of cruel, inhuman, and degrading treatment presented to the CNDH increased during the same time period. At the start of Calderón's term, in 2006, the commission received 330 total complaints, and by 2010, the figure had increased to 1,161.[7]

In 2014, the UN conducted a second assessment on torture in Mexico, sending Special Rapporteur on Torture and Other Cruel, Inhuman, or De-

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Justicia Penal Acusatorio (2016); United Nations Comm. Against Torture [U.N.C.A.T.], *Observaciones Finales sobre el Séptimo Informe Periódico de México,* U.N. Doc. CAT/C/MEX/CO/7 (jul. 24, 2019); United Nations Comm. Against Torture [U.N.C.A.T.], *Report of the Sepcial Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*, U.N. Doc. A/HRC/22/53 (feb. 1, 2013).

[5] *See* Amnesty International, *Paper Promises, Daily Impunity: Mexico's Torture Epidemic Continues* (oct. 23, 2015); Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C., *Informe sobre Patrones de Violaciones a Derechos Humanos en el Marco de las Políticas de Seguridad Pública y del Sistema de Justicia Penal en México* (Jun. 8, 2015); Jodi Finkel, *Explaining the Failure of Mexico's National Commission of Human Rights (Ombudsman's Office) After Democratization: Elections, Incentives, and Unaccountability in the Mexican Senate*, 13 Human Rights Review (2012); Denise González-Núñez, *The widespread use of torture in Mexico and its impacts on the rule of law*, 22 The International Journal of Human Rights (2018).

[6] United Nations Comm. Against Torture [U.N.C.A.T.], *Report on Mexico Produced by the Committee under Article 20 of the Convention, and Reply from the Government of Mexico*, U.N. Doc. CAT/C/75 (May 26, 2003).

[7] Human Rights Watch, *Ni Seguridad, Ni Derechos: Ejecuciones, Desapariciones, y Tortura en la "Guerra contra las Drogas" de México* (2011).

grading Treatment or Punishment Juan E. Méndez to document the practice's incidence. Méndez reports that torture continues to be "generalized" throughout Mexico, particularly in the context of a growing security crisis. Similar to the 2003 report, Méndez notes that suspects are often detained for alleged links to organized crime and are tortured using common methods. The 2014 UN report also cites Mexico's continued indifference to the use of forced confessions.[8]

The UN specifically cites the role of Mexico's public prosecutors in obtaining forced confessions. While judicial police, or other security officials, are typically responsible for carrying out acts of torture, Mexico's public prosecutors are often complicit in the practice, accepting forced confessions as evidence in their cases. Furthermore, UN reporting found that some public prosecutors were allegedly present while the accused was tortured, and in some cases, the prosecutors sent the accused back to the police to be tortured after they had refused to confess to committing crimes.[9] Recent scholarly work has also cited widespread failure by judges to identify when acts of torture have taken place in law enforcement custody. In a particular study on criminal cases in "*Estado de México"* from 2010 to 2014, researchers found that 97% of cases in which injuries consistent with torture were reported by a doctor, judges refused to exclude evidence obtained during detention. In 100% of such cases, judges failed to liberate the accused from detention.[10]

Nongovernmental human rights organizations have substantiated these findings for years, documenting the cases of torture and forced confessions in detail, albeit with limited access to official data. The PRODH Center (*Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C*) first alerted the UN CAT of these abuses in 1998 and has since released dozens of reports documenting the institutionalized practice of torture and mistreatment. The PRODH Center argues that the practice has become a *modus operandi* within Mexico's military and security institutions, particularly within the army; the navy; and police forces at all levels of government. Consistent with UN and Human Rights Watch reporting, PRODH documents government officials detaining and torturing suspects for the purpose of extracting coerced confessions.[11]

2. *A Brief History of Torture in Mexico*

The use of torture has been a recurring phenomenon throughout Mexico's history, from the conquest to the present. However, Mexico is not unique in its use of this abusive practice-both historically and in recent years. As Rejali

[8] U.N.C.A.T. *supra* note 4.

[9] *See id.*

[10] Fondevila *et al.*, *supra* note 4.

[11] PRODH *supra* note 4.

warns, once the use of torture is legitimized by a state, the corrosive practice roots itself in the judicial, intelligence, and military institutions that employ it, lingering for decades.[12] For instance, for all of its opposition to the practice on the world stage, research has found that the United States propagated torture for decades. Since as early as 1950, the U.S. intelligence community began developing a standard of torture ("interrogation") techniques to fight communism, which it disseminated to law enforcement and military agencies in Asia, Latin America, and Central America during the Cold War.[13] After the turn of the century, the United States employed torture as a counter-terrorism measure post-9/11.[14] Thus, while the observed phenomenon in Mexico is grave, it is clear these practices are far from unique.

The historic practice of torture in Mexico closely follows the pattern outlined by Rejali.[15] As early as the 1920s, torture was exercised as an investigative tool as a form of "energetic interrogation". Police officers typically employed the practice prior to the criminal indictment to produce a confession, often staging mock executions, administering electric shocks, and directly threating harm to the victim's family members.[16]

During single-party rule under the Institutional Revolutionary Party (*Partido Revolucionario Institucional*, PRI) from 1929 to 2000, torture was practiced as a means of political and social control. In the 1950s and 1960s, protest movements led by farmers, doctors, railroad workers, professors, and students surged, resulting in a brutal crackdown by the PRI-controlled state. During this time, the government illegally detained, forcibly disappeared, and tortured hundreds, if not thousands, of citizens who were thought to threaten the stability enjoyed during the previous decades.[17]

In Mexico's case, current methods of torture employed by law enforcement are strikingly similar to past methods. As Piccato explains, police investigators in the 1920s employed torture for the same reason that law enforcement officers employ the practice today; if police could obtain a confession of guilt, other forms of investigation became unnecessary, and the officers could

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[12] Darius Rejali, *Torture and Democracy: What Now?*, in Torture: Power, Democracy, and the Human Body (Shampa Biswas, *et al.* eds., 2011).

[13] Alfred W. McCoy, *Two Thousand Years of Torture*, in A question of torture: CIA interrogation, from the cold war to the war on terror (Alfred W. McCoy ed., 2017).

[14] *See* Jared Del Rosso, Talking about torture: How political discourse shapes the debate (Jared Del Rosso ed., Columbia University Press 2015); McCoy *supra* note 13; David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 Georgetown Law Journal (2020).

[15] Rejali *supra* note 12.

[16] Pablo Piccato, A History of Infamy: Crime, Truth, and Justice in Mexico 117-119 (University of California Press, 2017).

[17] *See* Gladys McCormick, *The Last Door: Political Prisoners and the Use of Torture in Mexico's Dirty War*, 74 The Americas (2017); Jorge Mendoza García, *La Tortura en el Marco de la Guerra Sucia en México: Un Ejercicio de Memoria Colectiva*, 7 Polis (2011).

successfully close the case.[18] In recent years, public prosecutors have seen an increased volume in criminal cases, resulting in fewer than one in five being resolved satisfactorily. This has aggravated the historic pattern observed by Piccatto, increasing the pressures for prosecutors to extract relevant information during the preliminary inquiry stage, often to the detriment of the accused's human rights.[19]

3. *Mexico's "Mixed Inquisitorial" System: The Roots of Abuses by Law Enforcement*

To understand how torture became a *modus operandi* within Mexico's criminal justice system, it is important to establish the mechanisms that incentivized and sustained the practice. During the post-revolutionary era, Mexico began to depart from more traditional inquisitorial systems of criminal justice, affording new powers to the public prosecutor. These changes were enshrined in the 1908 Organic Law of the Federal Public Prosecutor (*Ley Orgánica del Ministerio Público Federal y Reglamentación de sus Funciones*), the 1908 and 1917 Organic Law of the Federal Judiciary Branch (*Ley Orgánica del Poder Judicial Federal*), the 1938 Organic Law of the Federal Attorney General (*Ley Orgánica de la Procuraduría General de la República*), and numerous subsequent pieces of legislation passed throughout the twentieth century that gradually enhanced the autonomy of the public prosecutor.[20]

Thus, the practice of torture as a prosecutorial mechanism can be traced to gradual changes within Mexico's criminal justice system. As such, González-Núñez frames the contemporary practice of torture by Mexican officials in this historic context, reinforced by mechanisms within the country's previous "mixed inquisitorial" criminal judicial system.[21] As a result of "procedural immediacy", or the judicial practice of accepting criminal suspects' initial statements over subsequent ones, Mexico's prosecutors and law enforcement bodies were incentivized to use torture as a means to produce confessions. These coerced statements were often accepted as the sole basis for incrimination, reducing the prosecutor's responsibility to produce objective scientific evidence against the accused.[22] Combined with a high degree of autonomy

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[18] Piccato, *supra* note 16, at 117-119.

[19] Guillermo Zepeda Lecuona, *Criminal Investigations and the Subversion of the Principles of the Justice System in Mexico*, in Reforming the Administration of Justice in Mexico (Wayne A. Cornelius & David A. Shirk eds., University of Notre Dame Press; Center for U.S.-Mexican Studies, 2007).

[20] *See* Octavio Rodríguez Ferreira & David A. Shirk, *Criminal Procedure Reform in Mexico, 2008-2016: The Final Countdown for Implementation*, Justice in Mexico (Oct. 2015); David A. Shirk, *Reforma de la Justicia Penal en México*, in La Reforma al Justicia Penal en México (O. Rodríguez Ferreira & David A. Shirk eds., University Readers, 2013).

[21] González-Núñez, *supra* note 5.

[22] *See id.*

as a result of twentieth century legislation, public prosecutors were able to continue this practice unrestrained.[23]

These practices were reinforced by regulations governing criminal detention. Specifically, Article 16 of the 1917 Constitution allows judicial and preventive police to arrest any person caught "in the act" of committing a crime (*en flagrante*).[24] When a suspect is arrested *en flagrante*, they are handed over to the state or federal public prosecutor. However, the definition of *en flagrante* was gradually expanded, and in many cases, arrests were made up to seventy-two (72) hours after the crime was allegedly committed.[25] This rule allowed police and prosecutors to operate without oversight, increasing the number of criminal suspects in detention. In fact, one study found that arrests *en flagrante* may have at one time accounted for up to 60% of total arrests in Mexico City.[26] Prisoner survey data from 2002 confirms this finding, with 60% of 1,615 randomly sampled prisoners detained in Mexico City, Estado de México, and Morelos reporting having been arrested *en flagrante*.[27]

This reliance on detention reinforced police and prosecutorial confessions using torture and mistreatment. In its 2003 report, the UN CAT found that the incidence of torture was highest during the period between detention and committal for trial, when suspects were held at police or public prosecutor's offices.[28] Thus, police and prosecutors possessed not only the *incentive* to extract criminal confessions, but they were also provided ample *opportunity* to do so in the context of criminal detention. Indeed, in the same 2002 survey of 1,615 inmates in Mexican prisons, half of the prisoners reported confessing to a crime due to intimidation or torture.[29] Thus, on the whole, Mexico's former "mixed inquisitorial" criminal justice system possessed numerous institutions and procedural elements that reinforced the practice of employing torture and mistreatment to extract confessions.

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[23] Shirk, *supra* note 20.

[24] Article 16 reads, "Any person can detain the defendant at the moment they are committing a crime or immediately after having committed it, placing them without delay at the disposal of the nearest civil authority, and with the same promptness, at that of the Public Prosecutor. There will be an immediate record of the arrest" [author's translation]. Constitución Política de los Estados Unidos Mexicanos de 1917 [Const.], Art. 16, 5, *Diario Oficial de la Federación* [D.O.F], reformado 26 de marzo de 2019 (Mex.).

[25] Niels Uildriks, *Mexico's Criminal Justice System: Organized Chaos*, in Mexico's Unrule of Law 61-88 (Lexington Books, 2010).

[26] Arturo Alvarado Mendoza, *Elements for a Study on Crime in Mexico City*, in Toward a Society under Law: Citizens and their Police in Latin America (Joseph S. Tulchin & Meg Ruthenberg eds., 2006).

[27] Elena Azaola & Marcelo Bergman, *The Mexican Prison System*, in Reforming the Administration of Justice in Mexico (Wayne A. Cornelius & David A. Shirk eds., University of Notre Dame Press; Center for U.S.-Mexican Studies, 2007).

[28] U.N.C.A.T., *supra* note 4.

[29] Azaola & Bergman, *supra* note 27.

4. *"Revolution in Latin American Criminal Procedure"*[30]

While the UN and other international organizations began to shed light on these abuses in Mexico, a revolutionary wave of criminal procedure reforms was sweeping Latin America. These reforms included the introduction of oral, public trials and often sought to resolve longstanding issues relating to a lack of transparency and due process.[31] By the time that the UNCAT released its report on Mexico in 2003, a dozen Latin American countries had already introduced accusatorial criminal codes.[32] Langer argues that this series of successive criminal code reforms was largely a result of "peer pressure" on states that had not yet implemented such changes. Specifically, a group of Latin American activists advocated for the adoption of accusatorial systems, along with the help of USAID and other international organizations. This combination of advocacy and pressure by non-state actors played a crucial role in the judicial reform projects of countries like Bolivia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, and Mexico.[33]

5. *Mexico's Reform: A Step toward Judicial Accountability*

Although Mexico's national reform project began in 2008, the judicial reform movement began at a subnational level, with some states transitioning to an accusatorial system as early as 2004.[34] Following state-level initiatives, the Mexican Congress passed the 2008 constitutional reform that would seek to strengthen transparency, due process, and accountability throughout the criminal process, transforming Mexican criminal procedure from the traditional "mixed inquisitorial" model to an oral adversarial system.[35]

The previous system was based in civil law traditions descended from Europe rather than the common law systems of the U.S., British, and Australian judiciaries.[36]

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[30] A reference to the title of Máximo Langer's 2007 article examining the diffusion of judicial reform throughout the region. Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 THE AMERICAN JOURNAL OF COMPARATIVE LAW (2007).

[31] *See id.*

[32] The following Latin American countries had implemented accusatorial reforms by the year 2003: Argentina (1991), Guatemala (1992), Costa Rica (1996), El Salvador (1997), Paraguay (1998), Venezuela (1998), Bolivia (1999), Honduras (1999), Chile (2000), Ecuador (2000), Nicaragua (2001), Dominican Republic (2002). Langer, *supra* note 30, at 631.

[33] Langer, *supra* note 30, at 663.

[34] Nuevo León was the first to adopt a system of adversarial criminal procedure (2004), followed by Oaxaca (2007) and Chihuahua (2007). Rodríguez Ferreira & Shirk, *supra* note 20, at 22-23.

[35] Rodríguez & Shirk, *supra* note 20.

[36] Jane Kingman-Brundage, *Mexico's Traditional Criminal Justice System: a Layperson's Guide* (2016).

Nonetheless, Mexico's "mixed inquisitorial" model differed in several key areas from its ancestral European systems. Throughout the twentieth century, Mexico gradually adopted practices that expanded the role of the prosecutor. Consequently, the public prosecutor began overseeing large portions of the criminal process, including police and detective work during the investigation. The prosecutor also maintained a central role during the accusatory phase, particularly as the defense possessed limited ability to challenge prosecutorial evidence or arguments during the trial and sentencing. Furthermore, it was not uncommon for judges to base sentences exclusively on evidence presented by the prosecutor, resulting in more frequent "guilty" verdicts. This practice was compounded by the fact that the sentencing judge was often the same judge that initially found sufficient cause to proceed with a criminal investigation against the accused.[37]

The 2008 reform sought to realign many of the aforementioned imbalances in favor of a system that allowed the prosecution and defense to engage in oral, adversarial argument. The reform introduced the Accusatorial Criminal Justice System (*Sistema de Justicia Penal Acusatorio, SJPA*) that would institute oral, adversarial criminal trials; alternative sentencing; and alternative dispute resolution mechanisms (ADRs). The introduction of ADRs was meant to relieve congestion in Mexico's penal system, allowing for increased capacity to appropriately follow procedure. The SJPA would also afford stronger rights to those accused of crimes through the presumption of innocence, proper due process, and adequate legal defense. Lastly, the reform would seek to alter the roles of police and prosecutors under the traditional system.[38]

Specifically, the reform introduced a procedure that would establish probable cause as the basis for criminal indictment. By reducing the threshold of evidence required for a criminal indictment, the reform limited the public prosecutor's previously dominant role over the preliminary administrative phase of the criminal proceeding, or the *averiguación previa*. This diminished the public prosecutor's incentives to produce an immediate criminal confession, as testimonies and declarations to be considered as evidence would have to be presented later in the criminal process before a judge at trial.[39]

Under the new system, the axis of oversight shifted from the public prosecutor to the judge, who became responsible for monitoring police and prosecutor activities throughout all stages of the criminal proceeding.[40] This

[37] Rodríguez & Shirk, *supra* note 20, at 7.

[38] *See* Rodríguez & Shirk, *supra* note 20; Guillermo Zepeda Lecuona, *La Reforma Constitucional en Materia Penal de junio de 2008. Claroscuros de una Oportunidad Histórica para Transformer el Sistema Penal Mexicano* (ITESO, 2008); Matthew Ingram, *et al.*, *Assessing Mexico's Judicial Reform: Views of Judges, Prosecutors, and Public Defenders* (2011); David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 Mexican Law Review (2010).

[39] Shirk, *supra* note 38; Zepeda Lecuona, *supra* note 38.

[40] Zepeda Lecuona, *supra* note 38.

structural shift was accompanied by an explicit prohibition of the use of torture to produce confessions during pre-trial detention, providing judges a mechanism to dismiss cases when torture is suspected.[41]

6. *Reducing Torture: Institutions, Incentives, and Norms*

To understand the widespread use of torture in Mexico, it is necessary to first examine the political environments in which states employ this form of abuse. According to Wantchekon and Healy, illiberal and liberal states practice torture for different reasons. While illiberal states, such as dictatorships, use torture and mistreatment as a means of social control, liberal states only employ torture to extract information.[42] Luban identifies specific motivations within these broader categories, citing one reason why liberal states employ torture and four reasons why illiberal states do so.[43]

Specifically, Luban argues that illiberal states may utilize torture in the context of military victory (what Luban deems "victor's pleasure"), to incite terror, to punish alleged criminals, and finally, to extract confessions. In this last scenario, actors within the criminal justice system employ the practice as a result of institutionalized norms establishing the legitimacy of confessions as culpatory evidence. Meanwhile, liberal states typically torture in a scenario termed "the ticking bomb".[44] In this case, the state employs torture to gather intelligence to prevent future evils, such as terrorist attacks.

However, distinctions based on regime type provide a limited explanation of Mexico's state-sanctioned torture. While this literature requires the characterization of regimes as dichotomous (illiberal versus liberal), most scholarly work acknowledges that states fall on a continuum from fully authoritarian to fully democratic.[45] In Mexico's case, most agree that democracy is hardly a finished project.[46] While the country has managed to adopt

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41 Shirk, *supra* note 38.

42 Leonard Wantchekon & Andrew Healy, *The "Game" of Torture*, 43 The Journal of Conflict Resolution (1999).

43 David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Virginia Law Review (2005).

44 *See id.*

45 *See,* The Economist Intelligence Unit, Democracy Index 2018, The Economist (2019); Gustavo Ernesto Emmerich, et. al., *The State of Democracy in Mexico*, 5 Norteamérica 247-285 (2010); Diane Ethier, *Processes of Transition and Democratic Consolidation: Theoretical Indicators,* in Democratic transition and consolidation in southern europe, latin america, and southeast (Diane Ethier ed., 1990); Julia Preston & Samuel Dillon, Opening Mexico: The Making of a Democracy (New York, Farrar, Straus and Giroux, 2004); Ignacio Walker, *Democracy of Institutions*, in Democracy in Latin America: Between Hope and Despair (2013).

46 The Economist Intelligence Unit, *supra* note 45; Emmerich, et. al., *supra* note 45; Preston & Dillon, *supra* note 45.

promising frameworks in support of democratic reform, the implementation of such mechanisms often lags behind.[47] In part, this has resulted in growing concerns regarding human rights abuses, impunity rates, and absences in the rule of law. As Levy, Bruhn, and Zebadúa write, "Mexico's road toward democratization is lined with potholes, red lights, yellow lights, wrong turns, and very disputed speed limits".[48] While Mexico has made major strides toward the consolidation of its democracy since 2000, the country still faces obstacles ahead. As a result, it is somewhat fruitless to classify Mexico's state-sanctioned torture as fully "illiberal" or fully "liberal", according to Luban's framework.

Additionally, scholars have found certain exceptions to democratic states' behavior. Indeed, previous literature has found that the effect of democratic institutions on reducing torture diminishes when the state is faced with "violent dissent".[49] As Gambetta writes, "the bigger and nastier the threat is (or is thought to be) the harsher are the infringements on civil liberties that can be justified and accepted by the public".[50] In other words, the political checks and balances that typically prevent the executive from committing or sanctioning acts of torture tend to erode in the face of violent threat. While this work largely examines the role that terrorist groups play in creating this "violent dissent" in democratic polities,[51] Magaloni & Rodriguez apply this line of reasoning to Mexico, arguing that the activities of criminal organizations have resulted in harsh repression by the state.[52] Since Mexico's democratic opening, the country has faced growing levels of insecurity as a result of these criminal groups.[53] In response, the government increased its militarized counter-drug operations against trafficking organizations under President Felipe Calderon, resulting in increased levels of violence.[54] Magaloni, Mag-

[47] Emmerich *et al.*, *supra* note 45.

[48] Daniel C. Levy, *et al.*, *Difficult Democracy*, in Mexico: The Struggle for Democratic Development (Oakland, University of California Press, 2006).

[49] Christian Davenport, *et al.*, *The Puzzle of Abu Ghraib: Are Democratic Institutions a Palliative or Panacea?*, SSRN Electronic Journal (2007).

[50] Diego Gambetta, *Reason and Terror: Has 9/11 Made It Hard to Think Straight?*, 29 Boston Review 33 (2003).

[51] *See* Luban, *supra* note 43.

[52] Beatriz Magaloni & Luis Rodríguez, *Torture as a Method of Criminal Prosecution: Democratization, Criminal Justice Reform, and the Mexican Drug War* (2019).

[53] *See* Javier Osorio, *The Contagion of Drug Violence: Spatiotemporal Dynamics of the Mexican War on Drugs*, 59 The Journal of Conflict Resolution (2015); Viridiana Rios, *Why did Mexico Become So Violent? A Self-reinforcing Violent Equilibrium Caused by Competition and Enforcement*, 16 Trends in Organized Crime (2012).

[54] *See* Magaloni & Rodríguez, *supra* note 52; Osorio, *supra* note 52; Ríos, *supra* note 52; Beatriz Magaloni, *et al.*, *La tortura como método de investigación criminal: el impacto de la guerra contra las drogas en México* (2018); David A. Shirk & Joel Wallman, *Understanding Mexico's Drug Violence*, 59 The Journal of Conflict Resolution (2015).

aloni, & Razu present empirical evidence demonstrating increased levels of torture during this time period, particularly when criminal suspects were detained or accused of drug trafficking.[55]

However, Davenport, Moore, and Armstrong identify a mediating variable that may predict a state's repressive response to violent threats. They argue that governments that possess "veto", or constraints on an executive's authority as a result of the separation of powers, are less likely to employ torture as a repressive response. Polities with high levels of veto necessarily contain incentive structures that push actors to challenge an executive's use of torture. These states will consist of competitive legislatures and independent judiciaries, including at the subnational level. As the authors demonstrate, the greater the level of separation of powers, the greater the likelihood that any actor will expose the executive's use of torture. This acts as an implicit check on the executive's potential responses to violent threats, reducing the likelihood of torture.[56]

This work is in line with existing literature demonstrating how institutions can restrain state behavior.[57] As Walker argues, democratic institutions provide the structure for autonomous political actors to pursue their individual interests. This structure includes both incentives and restrictions that guide actors' behavior.[58] Mexico's criminal justice reform seeks to provide such a structure to re-shape the behavior of government actors, albeit in a challenging security environment. As outlined above, the reform provides stronger counterweights to the role that the prosecutor played in the former system, increasing the veto power of other judicial actors, such as judges, and reshaping the incentive structures that drive the behavior of these actors. As Zepeda Lecuona explains, reductions in torture cannot be explained by mere changes in attitude; rather, reductions in these types of abuses are the result of changes to the incentive structures that influence how judicial actors operate within the system.[59] Even in the face of Mexico's mounting security challenges, empirical evidence suggests that reforms introducing such changes may have a significant effect on state actors' repressive behaviors.

In addition to institutionalized structures that shape actors' behavior through a system of incentives (or disincentives), Langer points to the relevance of norms in the context of judicial reform. Specifically, the diffusion of Latin American criminal procedure reforms was accompanied by a cor-

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55 Magaloni, *et al.*, *supra* note 54.

56 Davenport, *et al.*, *supra* note 49.

57 *See generally* Walker *supra* note 45; Douglass C. North, *Institutions*, 5 The Journal of Economic Perspectives (1991); Adam Przeworski, *Institutions Matter?*, 39 Government and Opposition 527-40 (2004).

58 Walker, *supra* note 45.

59 Guillermo Zepeda Lecuona, Crimen sin Castigo: Procuración de Justicia Penal y Ministerio Público en México 331 (Centro de Investigación para el Desarrollo, A.C., 2004).

responding diffusion of norms that aimed to increase transparency and accountability of judicial actors—particularly as public security and due process concerns arose throughout the region at the end of the twentieth century.[60]

An ample body of literature has demonstrated the power of these types of norms on the behavior of state actors[61] and their impact on the behavior of judicial actors, such as police. As Worden and McLean point out, policing is a task that involves a high degree of uncertainty, and as a result, officers must frequently make choices with ambiguous implications and consequences.[62] In other words, there is no procedural manual that explains in full how policing should be conducted. To fill this information void, police often rely on institutional norms in order to make daily decisions[63]—from the volume of citations issued to the manner in which interrogations are conducted.[64] As this analysis features police behavior as a primary subject of investigation, it will consider how Mexico's judicial reform may have reshaped both institutionalized incentive structures and more informal conduct norms, impacting the incidence of torture and mistreatment.

7. *Evaluating the Reform: Challenges and Achievements*

The success of democratic reforms in reducing the incidence of torture is dependent on the comprehensive implementation of such reforms. As Zepeda Lecuona argues, "80% of the criminal reform's success lies in its implementation" [own translation].[65] As such, this section discusses the trajectory of Mexico's national reform since its 2008 enactment, examining its successes, weaknesses, and existing challenges to full implementation.

While the constitutional reform was passed in 2008, certain states approved and began the use of oral adversarial proceedings as early as 2004

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[60] Langer, *supra* note 30.

[61] *See*, *e.g.,* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms,* 86 Virginia Law Review (2000); Lawrence E. Mitchell, *Understanding Norms*, 49 The University of Toronto Law Journal (1999).

[62] Robert E. Worden & Sarah J. McLean, *Police Departments as Institutionalized Organizations,* in Mirage of police reform 14-15 (University of California Press, 2017).

[63] *See*, *e.g.*, James Q. Wilson, *Police Discretion,* in Varieties of Police Behavior: The Management of Law and Order in Eight Communities, with a New Preface by the Author 98 (Harvard University Press, 1978); Jan Litavski, *Professional Culture, Ethics, Errors and Police Accountability* (2012).

[64] In particular, one study found that a set of interactional norms among Australian police directly influenced the establishment of protocols to prevent misconduct during criminal interrogations. David Yoong, *Initiating, Pasuing, Resuming, and Ending Police Questioning: Due Process as Interactional Norms in an Australian Police Interrogation Room,* 5 Policing: A Journal of Policy and Practice (2011).

[65] Lecuona, *supra* note 38, at 124.

(Nuevo León in 2004, Chihuahua in 2007, and Oaxaca in 2007). These initiatives provided a precedent for other states' penal reforms and served as precursors to the constitutional reform.[66] Thus, in 2008, the Mexican Congress provided the country with an eight-year timeframe to fully implement the changes outlined in the reform. While the deadline of June 18, 2016 has long passed, Mexico's judicial districts are still in the process of implementing and consolidating these sweeping changes. As México Evalúa noted in its most recent performance review of the SJPA, there is still much work to be done. Specifically, judicial training and professionalization efforts have diminished since the implementation phase (2008-2016), and these efforts often lack inter-institutional coordination that could result in more profound improvements to SJPA functioning. México Evalúa also argues that judicial actors lack the resources and training necessary to conduct thorough criminal investigations that would produce legitimate evidence to be presented in criminal trials. Lastly, the report calls attention to the lack of statistical information that is shared across judicial agencies and with the public. As the authors note, this information void has made evaluation of the SJPA's performance a burdensome task.[67]

Despite challenges in establishing and implementing proper metrics for the reform, there is early evidence suggesting that in certain states, police and prosecutors continue to employ illegal interrogation practices under the reformed system. In a 2016 of Estado de México's criminal justice system, Fondevila and colleagues found that between 2010 and 2014,[68] 18% of legal proceedings analyzed contained statements from a medical professional documenting injuries consistent with torture and/or mistreatment.[69] Furthermore, the authors found that just 10.3% of individuals for whom a legal proceeding was initiated had access to a defense attorney during their time at the public prosecutor's office.[70] Combined with the results of this analysis, Fondevila *et al*.'s findings suggest that SJPA outcomes may vary significantly at the subnational level, depending on a variety of institutional factors outlined above. As such, this article examines torture and mistreatment at both national and state levels.

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66 Rodríguez & Shirk, *supra* note 20.

67 México Evalúa, *Hallazgos 2018: Seguimiento y Evaluación del Sistema de Justicia Penal en México* (2019).

68 Estado de México began operation under an accusatorial model in 2009. Fondevila *et al*., *supra* note 4, at 7.

69 The authors estimated that this figure could be even higher as a result of medical examiners' close ties with law enforcement, resulting in a decreased incentive to report cases of abuse. Fondevila *et al*., *supra* note 4 at 18.

70 Fondevila *et al*., *supra* note 4, at 22. In addition, Fondevila *et al*. found that in Estado de México, when police were responsible for criminal investigations, the most commonly utilized form of evidence was interrogation of witnesses (30.5%) and interrogation of experts (27.5%), followed by observations and follow-up (15.5%). Fondevila *et al*., *supra* note 4, at 24.

Despite methodological challenges and pessimistic findings at the state level, researchers have been able to demonstrate the reform's overall positive impact on the incidence of human rights abuses in Mexico. For instance, World Justice Project (WJP) presented data demonstrating a marked difference in the incidence of forced confessions between states that implemented the reform between 2007 and 2012 (Baja California, Chihuahua, Estado de México, Morelos, Guanajuato, Oaxaca, Yucatán, and Zacatecas) and states that implemented the reform after 2012. Specifically, WJP reported that from 2005 to 2016, early implementer states observed a 70% decrease in the number of confessions that were the result of pressure or aggression, while all other states cumulatively observed a 34% decrease during the same period.[71]

Magaloni and Rodriguez produce similar findings by analyzing data from the National Survey of the Population Deprived of Liberty (*Encuesta Nacional de Población Privada de la Libertad*, ENPOL), a survey of 58,127 individuals that were imprisoned in Mexico in 2016.[72] Magaloni and Rodriguez examined prisoners' reports of torture (e.g., electric shocks, burns, sexual abuse) and compared reports of individuals arrested before and after the implementation of the National Code of Criminal Procedure (*Código Nacional de Procedimientos Penales*, CNPP). This code was implemented in a staggered fashion across Mexico's judicial districts from 2014 to 2016 and standardized criminal procedure under the reform at both state and federal levels.[73] The researchers employed 65 distinct dates of implementation to capture a more localized effect of the CNPP. The findings demonstrated statistically significant declines in the reported incidence of torture and threats in the period after implementation.[74]

While initial research suggests that the incidence of torture has decreased since the implementation of the reform, further analysis is needed to confirm the reform's impact on the incidence of forced confessions. WJP has presented preliminary data supporting the connection between SJPA implementation and a reduced incidence of forced confessions. However, a judicial district-level analysis of these figures pre- and post- reform has yet to be conducted. As such, this study seeks to build on both the findings of WJP and Magaloni and Rodriguez regarding torture, while also providing evidence of the reform's impact on the use of forced confessions as a prosecutorial tool at the level of implementation.

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71 *World Justice Project, Mexico's New Criminal Justice System: Substantial Progress and Persistent Challenges (2018).*

72 Instituto Nacional de Estadística y Geografía [INEGI], *Encuesta Nacional de Población Privada de la Libertad* [ENPOL] (2016).

73 Gilberto Higuera Bernal, *Introducción,* in Reforma en Materia de Justicia Penal: El Código Nacional de Procedimientos penales (Fondo de Cultura Económica, 2017).

74 Specifically, the probability that a prisoner would experience torture in the new system fell by 6%. Magaloni & Rodríguez, *supra* note 52.

8. *A "Disturbing Imbalance": Criminal Detention under the SJPA*

Indeed, the SJPA represents a paradigm shift toward a criminal justice system more sensitive to principals of accountability, transparency, and human rights. Still, the reform contains certain measures that have remained controversial among human rights advocates—namely, the continuance of *arraigo*. *Arraigo* is a form a preventive detention that does not require criminal charges. As such, the practice defies the principle of presumption of innocence in Mexico's criminal justice system.[75] As Zepeda Lecuona argues, the extension of *arraigo* under the SJPA represents a "disturbing imbalance" in Mexico's criminal justice system, as it reduces the standard required to subject an individual to the criminal process [own translation].[76] While public prosecutors are normally required to present evidence before a judge establishing the need for a criminal suspect's detention, *arraigo* suppresses this requirement. Instead, the prosecutor need only demonstrate the possibility of the suspect's involvement in certain criminal activities.

In the SJPA's current format, *arraigo* is now restricted to cases involving organized crime; however, detention is allowed for a continuous period of forty (40) days, which can be extended for up to eighty (80) days.[77] As previously discussed, the reliance on detention in Mexico's criminal proceedings has served to reinforce the practice of torture and mistreatment by police and public prosecutors by providing ample opportunity for such acts to occur. In fact, evidence suggests that public prosecutors may intentionally classify certain criminal acts under the umbrella of organized crime to allow for a suspect's detention. Under this procedure, the prosecutor is then permitted to introduce evidence that has not been formally reviewed and sanctioned during a criminal trial—a step required for all other criminal evidence under the SJPA.[78] This only serves to dismantle the reform's incentive structures meant to restrict prosecutorial abuses, such as torture and forced confessions, in the context of criminal detention.

As such, *arraigo*'s presence in the reformed system is the ultimate paradox; its existence sabotages the very reforms meant to curb judicial misconduct and human rights abuses. Indeed, substantial reporting has confirmed the link between *arraigo* and increases in reports of torture and forced confessions.[79] In its most recent review of Mexico, the UNCAT urged the country

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[75] Uildriks, *supra* note 25; Janice Deaton & Octavio Rodríguez Ferreira, *Detention without Charge: The Use of Arraigo for Criminal Investigations in Mexico* (2015).

[76] Lecuona, *supra* note 38, at 118.

[77] *Seventh Periodic Report Submitted by Mexico under Article 19 of the Convention, Due in 2016*, U.N. Doc. CAT/C/MEX/7 (Feb. 1, 2018).

[78] Lecuona, *supra* note 38.

[79] *See* Magaloni, *et al.*, *supra* note 54; Deaton & Rodríguez Ferreira, *supra* note 75; U.N.C.A.T. [U.N. Doc. A/HRC/22/53] *supra* note 4; Comisión Mexicana de Defensa y Promoción de los

to permanently halt the use of *arraigo* in order to reduce the incidence of torture and forced confessions during this type of detention.

Thus, despite the introduction of a sweeping criminal justice reform, institutions that reinforce the use of torture and forced confessions continue to exist within Mexico's judicial system. As such, in its current form, the SJPA is not a silver bullet capable of abolishing the practice of torture and mistreatment. Substantial opportunity for reform still exists, particularly in the realm of criminal detention. Still, the reform represents a significant step toward the consolidation of Mexico's democratic institutions and toward the implementation of prosecutorial accountability measures. While far from a complete solution, initial research demonstrates the link between the reform and observed reductions in torture and mistreatment. As such, this study seeks to provide further evidence of the reform's positive impact on Mexico's human rights paradigm.

III. Research Question and Methodology

While the overall impact of the reform is yet to be determined, initial research has suggested that the transformation to an accusatorial model of criminal justice has reduced torture, mistreatment, and forced confessions by judicial sector personnel. This study expands upon previous research by examining the incidence of the practice both geographically and temporally using two separate data sets, as outlined below. It builds upon recent findings demonstrating the reform's impact on the incidence of torture and mistreatment by judicial sector officials, while also examining how the reform influenced the use of torture and mistreatment as a prosecutorial tool. As such, this study will provide evidence in response to the following research question: How did Mexico's criminal justice reform impact the incidence of torture and mistreatment by judicial sector officials?

1. *Defining Torture and Cruel, Inhuman, or Degrading Treatment*

To allow for effective comparison with existing literature, this analysis employs the common definition of torture as outlined in the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by the UN General Assembly in 1984:

> ...any act by which severe pain or suffering, *whether physical or mental*, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a *confession*, punishing him for an act he or a third person

Derechos Humanos [CMDPDH], *La tortura como crimen de lesa humanidad en el marco de la guerra contra las drogas: informe para el Comité contra la Tortura de las Naciones Unidas* (2018).

> has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the *consent or acquiescence of a public official* or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions[80] [emphasis added].

According to this definition, torture encompasses harm inflicted for one of the following explicit purposes: (1) extraction of information or confessions, (2) punishment, or (3) intimidation or discrimination. Furthermore, torture is always carried out with the "consent or acquiescence" of state officials or anyone acting in an official state capacity.[81] While torture has historically been used for all three purposes in Mexico, as outlined above, this study will examine the first use of torture defined under the convention: torture as form of extracting information or confessions.[82]

Although the convention outlines specific criteria for torture, it does not provide a definition for "other cruel, inhuman, or degrading treatment or punishment". Consequently, scholars have debated the degree to which these two acts differ. Some argue that the severity of suffering is greater for acts of torture, while others maintain that the threshold for severity of suffering is equal, but that the purpose of the acts themselves differ. Nonetheless, substantial research demonstrates that victims of acts typically defined as "other cruel, inhuman, or degrading treatment or punishment," such as humiliation, fear, and threats of torture, experience similar levels of psychological pain and suffering as victims of torture. Consequently, there is reason to question the separation of these terms in international and domestic law, as the distinction may imply that "other cruel, inhuman, or degrading treatment or punishment" is a less severe form of torture.[83]

In its official database of human rights complaints, the CNDH considers torture and "other cruel, inhuman, or degrading treatment or punishment" to be two separate violations. According to Mexico's Office of Domestic Affairs (*Secretaría de Gobernación*, SEGOB), the difference in classification may lie in the severity of suffering.[84] Nonetheless, SEGOB also notes that the Inter-American Convention to Prevent and Punish Torture (IACPPT) specifies that acts do not have to cause grave suffering in order to be classified as torture.[85]

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[80] G.A. Res. 39/46, article 1, ¶ 1, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

[81] *See id.*

[82] Luban, *supra* note 43.

[83] Metin Başoğlu, *A Theory-and-Evidence-Based Approach to the Definition of Torture*, in Torture and Its Definition in International Law (Metin Başoğlu ed., Oxford University Press, 2017).

[84] Secretaría de Gobernación [SEGOB], *Derecho a la vida, integridad física, libertad y seguridad personal: tortura* (n.d.).

[85] *Inter-American Convention to Prevent and Punish Torture* [IACPPT], O.A.S. T.S. No. 67, article 2, Feb. 28, 1987.

SEGOB concludes that each case must be analyzed individually in order to determine its proper classification. As such, it is not fully known how the CNDH distinguishes between these types of human rights violations.

However, there is evidence to suggest that officials intentionally classify cases of torture as "other cruel, inhuman, or degrading treatment or punishment" in order to reduce the perceived severity of certain incidents. In 2003, the UNCAT reported that police often threaten and beat suspects prior to their arrival at the Public Prosecutor's office. While many of these cases meet the constitutional threshold for torture, they are frequently categorized as cases of "other cruel, inhuman, or degrading treatment or punishment."[86] Thus, the distinction between these cases in Mexico likely fails to capture any difference in the severity of abuse. Consequently, this study takes a comprehensive approach, examining both types of abuse in the context of the judicial reform in Mexico.[87]

2. *National Commission of Human Rights Alert System*

This analysis first examines torture and mistreatment using a hand-compiled database of torture complaints published by the CNDH on its National Human Rights Violation Alert System (*Sistema Nacional de Alerta de Violación a los Derechos Humanos*).[88] It includes complaints filed with the CNDH from January 2014 to December 2019 against institutions at all levels of government (municipal, state, and federal).[89] Each complaint is classified by the state in which the individual was arrested and also by one of six institutional categories classifying the type of government agency implicated in the report. These categories include (1) public security forces (*e.g.*, police), (2) military, (3) public prosecutor's offices, (4) penitentiaries, (5) municipal agencies, and (6) "other" institutions.[90] Additionally, a portion of the complaints included in this data set do not identify an institution responsible for the reported violation (listed at "N/D" in Figure 1).

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[86] U.N.C.A.T., *supra* note 6.

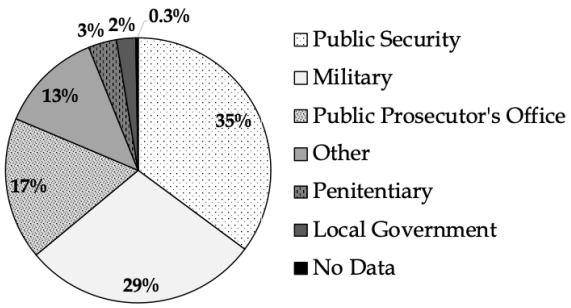
[87] For purposes of brevity, this study refers to incidents of "other cruel, inhuman, or degrading treatment or punishment" generally as "mistreatment."

[88] Comisión Nacional de Derechos Humanos [CNDH], *Sistema Nacional de Alerta de Violación a Derechos Humanos*, available at *http://appweb2.cndh.org.mx/SNA/inicio.asp* (last visited Feb. 22, 2020).

[89] However, because the CNDH is the national human rights ombudsman, a large proportion of the published complaints were submitted against state or federal institutions as opposed to municipal bodies.

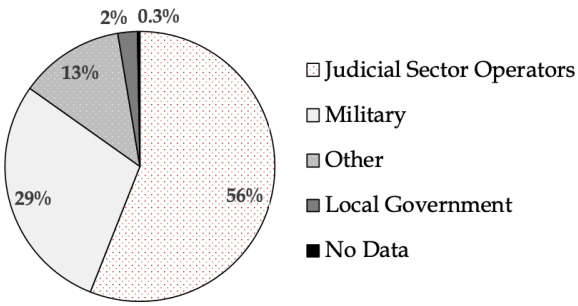
[90] The "other" category includes government bodies such as the National Institute of Migration (*Instituto Nacional de Migración,* INM); Mexico's state oil company, *Petroleos Mexicanos*; the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS); state public health offices; and various other institutions that could not be grouped into a single classification.

FIGURE 1. CNDH TORTURE & MISTREATMENT COMPLAINTS BY INSTITUTION TYPE (JAN. 2014-DEC. 2019)[91]



Of the institutional categories outlined in Figure 1, three operate directly within Mexico's criminal justice system: Public Security Forces, Public Prosecutor's Offices, and Penitentiaries. Together, these government bodies represent a majority of cases of torture reported to CNDH from 2014 to 2019, with 2,275 of 4,072 total complaints (see Figure 2).

FIGURE 2. CNDH TORTURE & MISTREATMENT COMPLAINTS AGAINST JUDICIAL VERSUS OTHER INSTITUTIONS (JAN. 2014-AUG. 2019)[92]



In order to examine how the judicial reform impacted the incidence of torture and mistreatment complaints made to CNDH, this analysis exclusively examines cases in which judicial institutions were reported to be responsible for alleged abuse(s) (n = 1,669).[93] As previously mentioned, these include complaints implicating Public Security Institutions, Public Prosecutor's Offices, and Penitentiaries. These cases were summed by state (n= 32) for each year that indicators were available (2015-2018). Next, to compare data geographi-

[91] *Data source*: CNDH, supra note 88.

[92] *Data source*: CNDH, supra note 88.

[93] A total of 2,275 cases of torture and mistreatment were documented by the CNDH National Alert Center from 2014 to 2019, but this analysis only examines reports from 2015 to 2018 (n = 1,669), as reform indicator variables were not available for 2014 or 2019.

cally, CONAPO (*Consejo Nacional de Población*) state population estimates were retrieved for each year.[94] These figures were used to calculate complaints of torture per one million inhabitants for each state, controlling for state population.

Data was also collected from annual reports produced by the Center of Investigation for Development A.C. (*Centro de Investigación para el Desarrollo A.C.*, CIDAC) and México Evalúa measuring the comparative level of judicial reform implementation and performance across Mexico's thirty-two states. These reports evaluate state reform performance on a variety of measures, including the capacities of judicial institutions and the implementation of reform mandates and programs. CIDAC and México Evalúa aggregate these measures into an annual index with a scale of 0 to 1,000, with 1,000 representing the "ideal standard" of judicial reform implementation in a given state.[95]

For each year from 2015 to 2018, separate correlation and regression analyses were conducted to detect any geographic relationship between the criminal justice reform and the number of CNDH torture complaints. Based on the observations of previous research, this study hypothesized that states with higher scores of judicial reform performance would see decreased CNDH reports of torture by judicial operators.

While the results of this analysis are useful in evaluating the initial relationship between the reform and the use of torture by judicial operators, this methodology has its limitations. One challenge of employing CIDAC and México Evalúa index data is that it is an indirect measure of judicial operator behavior and accountability. The index is a broad measure that considers state resources, capacity, and adherence to reform mandates. While it is probable that police and prosecutors operating in states with higher reform implementation scores are held to higher ethical standards, no data exists to draw this conclusion directly. As such, the results of this analysis are meant to serve as a point of departure for further investigation.

3. *National Survey of the Population Deprived of Liberty (ENPOL)*

This study also examines torture, mistreatment, and forced confessions, as reported by members of Mexico's detained population. Specifically, the ENPOL survey conducted by INEGI asks 58,127 participants to report their experiences and interactions with the criminal justice process in

[94] Consejo Nacional de Población [CONAPO], *Proyecciones de la Población de los Municipios de México, 2015-2030* (last visited Jan. 10, 2020).

[95] Centro de Investigación para el Desarrollo A.C. [CIDAC], *Hallazgos 2015: Evaluación de la Implementación y Operación a Ocho Años de la Reforma Constitucional en Materia de Justicia Penal* (May 4, 2016); Centro de Investigación para el Desarrollo A.C. [CIDAC], *Hallazgos 2016: Seguimiento y Evaluación de la Operación del Sistema de Justicia Penal en México* (Jun. 18, 2017); México Evalúa, *Hallazgos 2017: Seguimiento y Evaluación del Sistema de Justicia Penal en México* (2018); México Evalúa, *Hallazgos 2018: Seguimiento y Evaluación del Sistema de Justicia Penal en México* (2019).

Mexico.[96] In order to assess any significant differences in respondent data before versus after the reform, this analysis employs judicial district-level implementation dates. While the 2008 criminal justice reform set an implementation deadline of June 18, 2016, many judicial districts began operation under the new system prior to this date. As such, the implementation date used to compare torture and mistreatment reports before and after the reform varies by judicial district. In total, this analysis includes 55 separate dates of implementation (December 2004-June 2016) compiled by a group of Justice in Mexico researchers, including the author.[97] The use of implementation dates at the judicial district-level helps to capture the reform's localized effect on the incidence of torture and forced confessions.[98]

The ENPOL asked respondents if they were subject to specific types of violence both after their arrest and during their pre-trial interactions with the public prosecutor's office. The instrument specifically asked if the detained individual was: (1) punched or kicked, (2) beaten with an object, (3) burned, (4) electrically shocked, (5) injured as a result of any part of their body being flattened with an object, (6) injured by a knife, (7) injured by a firearm, and/or (8) forced by threat or physical violence to engage in sexual activities.[99]

This analysis examined responses to items two (2) through eight (8) to determine if a respondent was subject to torture or mistreatment. Item one (1), punching or kicking, was excluded to separate incidents of excessive use of force from cases of torture and/or mistreatment. Participants that responded affirmatively to any of the aforementioned items were included in the pool of cases for analysis. To assess the impact of the judicial reform, a chi-square test for independence was employed to test for a significant difference in reported use of torture before and after the reform's implementation.[100] This study hypothesized that the use of torture by judicial operators would demonstrate a significant decrease following the reform's implementation.

The survey also asked respondents to report which types of evidence were presented against them at trial. Categories of evidence included *a)* the ac-

[96] INEGI, *supra* note 72.

[97] These dates were compiled and verified using judicial announcements and local media sources reporting when each judicial district began operation under the SJPA ("*entrada en vigor*"). Note that this date differs from the date of implementation of Mexico's standardized criminal procedure code (CNPP).

[98] In a small portion of cases, the judicial district implementation date was not clear based on official reports (180 of 2,459 municipalities). As such, cases in which the respondent was arrested in a judicial district with an unknown implementation date were excluded from this analysis. Additionally, this analysis excluded cases in which detainees were accused of a federal crime in order examine the isolated effect of a state's reform implementation on the handling of criminal cases. This left a total number of 30,196 cases for analysis.

[99] INEGI, *supra* note 72.

[100] This specific statistical test was employed, as it allows for relational analyses using two categorical variables—in this case, presence of judicial reform (present versus not present) and reports of torture (present versus not present).

cused's confession; *b)* statements made by individuals who claimed to have witnessed the crime; *c)* statements about the accused's criminal record made by individuals that knew the accused; *d)* statements made by accomplices to the crime; *e)* statements made by other detained persons; *f)* phone records, recordings, photos, or texts; *g)* fingerprints, blood, hair, or DNA found at the scene of the crime; and/or *h)* psychological evaluations conducted at the Observation and Classification Center.

To examine the phenomenon of torture as a prosecutorial tool, a second statistical analysis was conducted using ENPOL response data from detained persons that had already been convicted of a crime and received their sentence. Specifically, this study examined the responses of sentenced participants to items *a)*, *f)*, and *g)*, as outlined above. Together, these items determined the extent to which the prosecution's case rested on the accused's confession as culpatory evidence. Respondents that reported the use of their confession *a)* as culpatory evidence, but no documentation or forensic reporting presented to support these statements [*f)*, *g)*] were included in the analysis. Respondents that met these criteria and reported being the victims of torture were considered to have been subject to a forced confession.

To examine how the criminal justice reform may have influenced the incidence of forced confessions, a second chi-square test was conducted to detect any significant differences in the phenomenon before and after the reform. In line with recent findings demonstrating a significant reduction in certain types of human rights abuses after the implementation of the reform,[101] this study hypothesizes that a significant reduction in forced confessions will be observed following the judicial district-level implementation of the criminal justice reform. Following two generic chi-square tests, this analysis also conducted separate chi-square tests for individual states to examine any changes in torture and forced confession at the state level.[102] The author hypothesized that states with higher SJPA performance scores would demonstrate greater reductions in torture and forced confessions following the reform's judicial district-level implementation.

IV. Results

1. *National Commission of Human Rights (CNDH) Alert System*

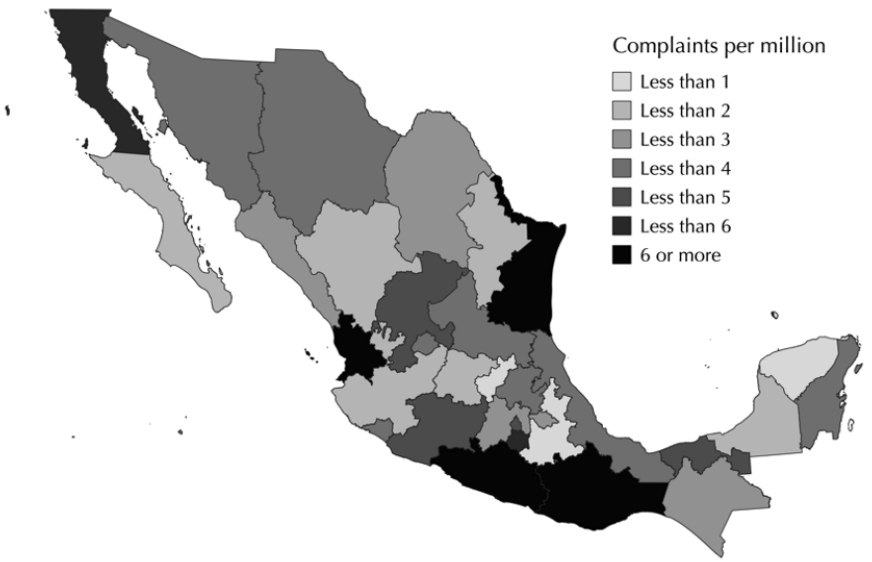
An initial analysis revealed that the incidence of torture and mistreatment complaints against judicial sector operators varied both temporally and

[101] Magaloni & Rodríguez, *supra* note 52; World Justice Project, *Impactos de la Reforma de Justicia Penal* (2019).

[102] Certain states were excluded from individual chi-square analyses because of limited data, as discussed below.

geographically. From 2015 to 2018, the states with the lowest average incidence of CNDH complaints per one million inhabitants were Yucatán (0.36), Querétaro (0.65), and Puebla (0.8). Conversely, Tamaulipas (12.10), Nayarit (6.94), and Guerrero (6.70) demonstrated the highest average rate of torture and mistreatment complaints against judicial sector operators during this time period (See Map 1).

Map 1. CNDH Complaints of Torture and Cruel, Inhuman, or Degrading Treatment against Judicial Sector Operators per 1 Million Inhabitants (Average 2015-2018)[103]

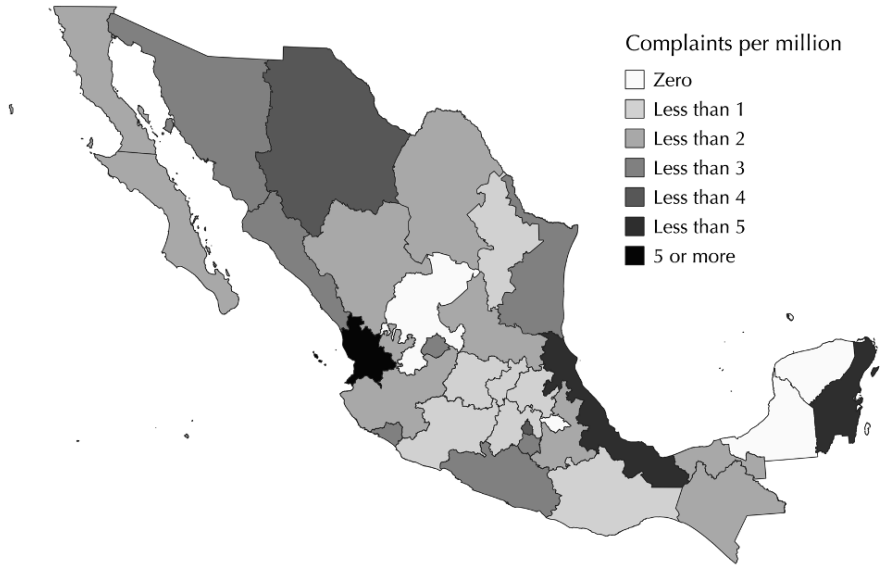


However, state-level data show that the incidence of CNDH complaints has decreased over time. In 2018, the state with the highest complaint rate was Nayarit (5.60), followed by Quintana Roo (4.70) and Veracruz (4.37). Additionally, four states registered zero complaints in 2018 (Campeche, Tlaxcala, Yucatán, and Zacatecas) (See Map 2).

As outlined above, this study hypothesized that states with higher scores on judicial reform performance would see fewer CNDH reports of torture and mistreatment by judicial operators. An initial analysis assessing the geographic relationship between criminal justice reform performance and torture complaints revealed little to no association between the two variables from 2015 to 2017. However, in 2018, the variables demonstrate a significant negative relationship. In other words, states with higher reform performance scores did indeed demonstrate moderately reduced levels of torture by judicial sector operators that year.

[103] *Data sources*: CNDH supra note 88; CONAPO supra note 94.

MAP 2. CNDH COMPLAINTS OF TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT AGAINST JUDICIAL SECTOR OPERATORS PER 1 MILLION INHABITANTS (2018)[104]



Separate tests were conducted for each year that data for both indicators were available (2015-2018), as shown in Table 1. In 2015 and 2017, a mild negative correlation was observed (r = -0.24), while 2018 data produced a moderate negative correlation (r = -0.43). However, only data from 2018 revealed a significant relationship (p = .01), while analyses conducted using 2015, 2016, and 2017 data were not significant (p > .05).

Annual regression analyses revealed a similar pattern to annual correlation tests. While 2015, 2016, and 2017 did not yield significant results, data from 2018 demonstrated a significant R-Squared value (R^2 = .18, p = .01). In other words, the level of state SJPA performance accounted for 18% of observed variation in the incidence of torture and mistreatment complaints made to CNDH.

Moreover, consistent with the results presented in Table 1, states identified as having the highest incidence of torture complaints in 2018 (see Map 2) also possessed the lowest reform performance scores. Nayarit, Quintana Roo, and Veracruz not only demonstrated the highest rates of torture in 2018, but they were also ranked among the bottom four performers in terms of state SJPA performance scores (31, 30, and 29 of Mexico's 32 states, respectively). Furthermore, two states with zero registered complaints in 2018, Yucatán and Zacatecas, ranked in the top eight states in terms of reform performance (5 and 8 of Mexico's 32 states, respectively).

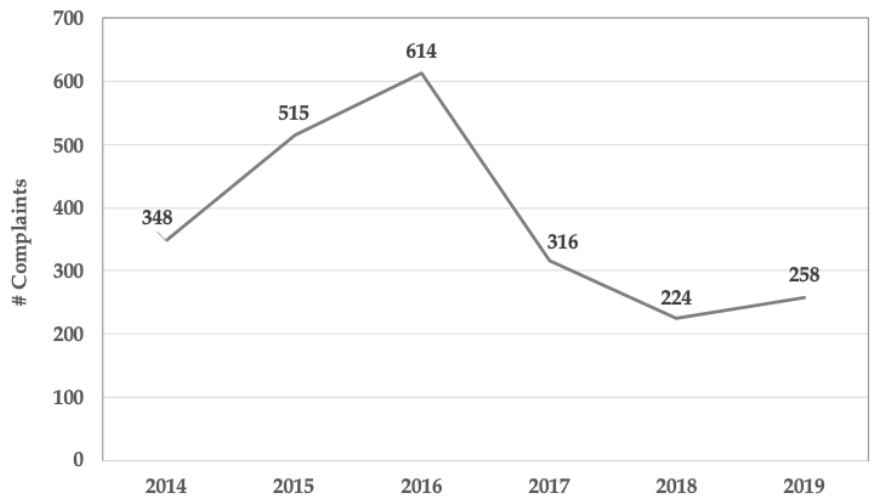
104 *Data sources*: CNDH supra note 88; CONAPO, *supra* note 94.

TABLE 1. RESULTS OF ANNUAL CORRELATION AND REGRESSION ANALYSES BETWEEN CIDAC/MÉXICO EVALÚA RANKING INDEX AND NUMBER OF TORTURE AND MISTREATMENT COMPLAINTS PER 1 MILLION INHABITANTS[105]

Year	*Correlation coefficient*	*R-Squared*	*P-Value (Significance)*
2015	r = -.24	R^2 = .06	p > .05
2016	r = -.04	R^2 = .00	p > .05
2017	r = -.24	R^2 = .06	p > .05
2018	*r = *-.43*	*R^2 = .18	*p = .01

As shown in Table 1, the relationship between judicial reform performance and the incidence of torture complaints was weakest in 2016 (r = -.04, R^2 = .00). While the factors influencing this result have yet to be identified, a frequency analysis revealed that in the same year, the number of torture and mistreatment complaints submitted to the CNDH increased significantly (See Figure 3). This suggests that some combination of factors unrelated to judicial SJPA performance may be associated with the increase observed in 2016. This study discusses these potential factors in detail below.

FIGURE 3. CNDH TORTURE AND MISTREATMENT COMPLAINTS AGAINST JUDICIAL OPERATOR INSTITUTIONS (2014-2019)[106]



[105] *Data sources:* CNDH *supra* note 88; CONAPO *supra* note 94; CIDAC *supra* note 95; México Evalúa *supra* note 95.

[106] *Data source*: CNDH *supra* note 88.

As such, this investigation's geographic hypothesis that states with greater SJPA performance would see reduced levels of torture by judicial sector operators was only partially substantiated. While annual correlation analyses revealed a mild to moderate relationship, only data from 2018 yielded a significant association. Annual regression analyses demonstrated a similar pattern of results, yielding insignificant and negligible associations from 2015 to 2017. However, a moderately strong relationship between judicial reform performance and the incidence of torture complaints was observed in 2018. These findings suggest that factors unrelated to judicial reform influenced rates of torture complaints, particularly from 2015 to 2017. However, they also indicate that the SJPA may be partially responsible for recent reductions in torture complaints. Nonetheless, analyses conducted using detainee survey data provided more reliable evidence of the reform's effect on torture as a prosecutorial tool in Mexico.

2. *National Survey of the Population Deprived of Liberty (ENPOL)*

As previously mentioned, it was hypothesized that a significant reduction in reports of torture would be observed after the implementation of the judicial reform. A chi-square test for independence was conducted using ENPOL data to detect any such difference following the localized implementation of the judicial reform. This test sought to build upon the findings of Magaloni and Rodriguez[107] by examining incidents of torture pre- and post- reform, as reported by members of Mexico's detained population.

Indeed, a chi-square test examining respondent reports of torture revealed a significant difference in the phenomenon following judicial district-level implementation. Specifically, the chi-square test showed an extremely significant difference in the number of detained persons (pre-sentenced and sentenced) subject to torture pre-SJPA implementation and post-SJPA implementation, χ^2 (1, N = 30,196) = 37.8, p = .000 (See Table 2).

Table 2. Results of Chi-square Test and Descriptive Statistics for Reports of Torture and Mistreatment by Presence of Reform Implementation at Time of Arrest[108]

	Presence of Reform at Time of Arrest	
	Not Present	*Present*
No Torture	10,183 (45.6%)	3,915 (49.7%)
Torture	12,129 (54.4%)	3,969 (50.3%)

Note. χ^2 = 37.8, df = 1. Numbers in parentheses indicate column percentages.
***p = .000

[107] Magaloni & Rodríguez, *supra* note 52.

[108] *Data source:* INEGI, *supra* note 72.

The observed reduction was in line with the findings of Magaloni and Rodriguez (2019). Namely, 54.4% of respondents who were arrested prior to the reform's implementation reported being subject to torture from the time of their arrest to their time in the Public Prosecutor's office. However, 50.3% of respondents arrested in judicial districts that had already implemented the reform reported having experienced torture, representing an extremely significant 7.4% decrease pre —to post— reform.

This study also hypothesized that a corresponding decrease would be observed in forced confessions after the reform's judicial district-level implementation. Indeed, a chi-square test for independence revealed a marginally significant reduction in forced confessions reported by sentenced detainees after the implementation of the reform, $X^2(1, N = 16{,}098) = 3.6$, $p = .058$. Specifically, 33.3% of respondents arrested pre-reform reported having been subject to a forced confession, while 31.6% of respondents reported the same post-reform. Overall, these data reflect a marginally significant 5% decrease in the reports of forced confessions after judicial district-level SJPA implementation.

Table 3. Results of Chi-square Test and Descriptive Statistics for Reports of Forced Confessions by Presence of Reform Implementation at Time of Arrest[109]

	Presence of Reform at Time of Arrest	
	Not Present	*Present*
No Forced Confession	8,093 (66.7%)	2,713 (68.4%)
Forced Confession	4,036 (33.3%)	1,256 (31.6%)

Note. $\chi^2 = 3.6$, df = 1. Numbers in parentheses indicate column percentages.
p =.058

The above findings suggest that the reform's localized implementation had a significant impact on the incidence of torture and forced confessions. These decreases can also be observed in figures 4 and 5, during the period of reform implementation from 2008 to 2016. While the data above (Tables 2 and 3) examine cases from 1980 to 2016, the graphs below capture a snapshot of the reform period, during which Mexico implemented the reform in a staggered fashion at the judicial district-level. As observed, the percentage of detainees reporting torture and forced confessions decreases during this period of gradual implementation. Consistent with the above statistical findings, these data provide further evidence of the reform's impact on the incidence of torture and forced confessions.

[109] *Data source:* INEGI, *supra* note 72.

FIGURE 4. PERCENTAGE OF DETAINEES REPORTING TORTURE AND MISTREATMENT FROM TIME OF ARREST THROUGH STAY AT PUBLIC PROSECUTOR'S OFFICE BY ARREST YEAR (2008-2016)[110]

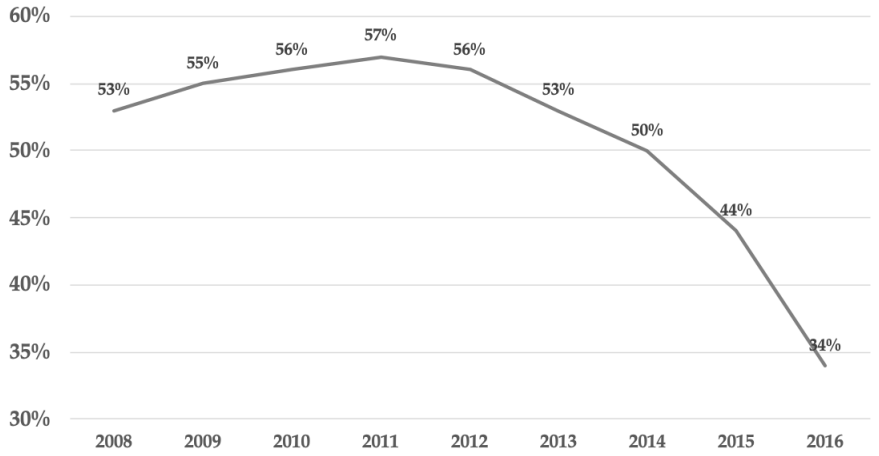
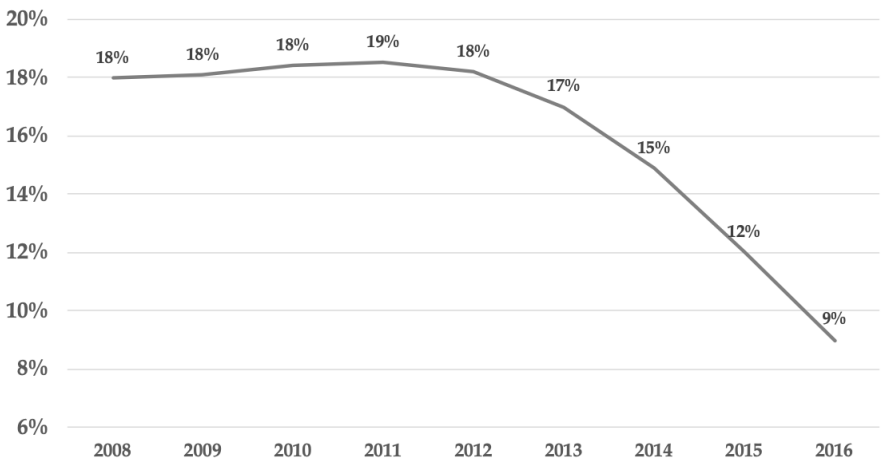


FIGURE 5. PERCENTAGE OF DETAINEES REPORTING FORCED CONFESSIONS BY ARREST YEAR (2008-2016)[111]



However, chi-square tests for independence conducted at the state level yielded mixed results, albeit in line with the trend observed in Figure 4. In most cases, significant differences in torture between detainees arrested before versus after the reform were not observed simply due to the small sample

110 *Data source:* INEGI *supra* note 72.

111 *Id.*

size at the state level. As such, a reporting threshold was established at 250 cases for each group (arrest pre-reform versus arrest post-reform), or 500 cases per state.[112] This allowed the investigation to examine a more robust pool of survey data before versus after SJPA implementation.

TABLE 4. RESULTS OF INDIVIDUAL CHI-SQUARE TESTS BY STATE, REPORTS OF TORTURE BY DETAINEES ARRESTED PRIOR TO REFORM IMPLEMENTATION VERSUS AFTER REFORM IMPLEMENTATION[113]

State	N	*Pre-Reform*			*Post-Reform*			% Change	2016 *Hallazgos* Score (0-1,000) and rank (1-32)
		n	# Tortured	% Tortured	n	# Tortured	% Tortured		
Baja California	1,762	1,230	674	54.8%	532	177	33.3%	-39.3%***	384 (3rd)
Durango	568	252	138	54.8%	316	105	33.2%	-39.3%***	286 (10th)
Mexico City	3,944	3,388	1,472	43.4%	556	183	32.9%	-24.2%***	240 (14th)
Estado de México	2,860	1,050	651	62.0%	1,810	1,075	59.4%	-4.2%	230 (17th)
Morelos	742	334	221	66.2%	408	231	56.6%	-14.4%**	251 (12th)

***p<.001, **p<.01

[112] Due to the timing of the survey (2016), there were significantly fewer cases of individuals arrested prior to the reform's judicial-district level implementation than cases of individuals arrested after implementation. In fact, half of all states (16) examined in this analysis possessed fewer than 100 cases of individuals arrested under the adversarial system who were also represented in the ENPOL survey. Another eight states possessed fewer than 200 total cases (or ENPOL respondents) post-reform. Conversely, 21 out of Mexico's 32 states possessed more than 400 respondents each that were arrested prior to SJPA implementation (with nine states having 1,000 or more respondents and no states having less than 100). As such, it was necessary to establish a case thresholds pre- and post- reform implementation to ensure that data pools would be comparable, producing reliable results.

[113] *Data sources:* INEGI *supra* note 72; México Evalúa *supra* note 95.

As shown in Table 4, each state that met the threshold for 250 cases in each group (500 per state) demonstrated reductions in reported torture pre- to post-reform implementation. However, these reductions were only significant in four out of five states (Baja California, Durango, Mexico City, and Morelos). Nonetheless, these states saw reductions in reported torture well beyond the national average of a 7.4% decrease. Specifically, Baja California and Durango each demonstrated an extremely significant 39% decrease pre- to post-reform. Mexico City also saw an extremely significant decrease of 24% after the reform's implementation and Morelos showed a significant 14% decrease. Estado de México, on the other hand, demonstrated a smaller 4.2% reduction that was not significant pre- to post- reform (p=.17).

Nonetheless, only five states met the selection criterion of 500 cases per state, and only four yielded significant results in individual chi-square tests. Thus, it was not possible to evaluate the subnational hypothesis that state with higher SPJA performance scores would see greater reductions in torture. Still, it is worth noting that the state with the highest *Hallazgos* score saw the greatest significant reduction in torture (Baja California), while states with lower SJPA scores saw the smallest significant reductions of the five states (Mexico City, Morelos) (See Table 4). However, due to the limited number of cases, more data is necessary to evaluate the subnational hypothesis regarding torture.

Results of state-level chi-square tests for independence examining reports of forced confessions by sentenced detainees pre- to post- reform yielded more varied findings (See Table 5). Similar to the methodology employed for reports of torture, a threshold of 75 cases per group (150 total per state) was imposed prior to analysis in order to exclude states that lacked sufficient data for analysis.[114] It was necessary to employ a significantly smaller threshold, as the overall data pool was smaller in this case (N= 16,098). Of the nine cases that met this criterion, seven demonstrated reductions in forced confession after judicial district-level implementation (Baja California, Chihuahua, Mexico City, Estado de México, Morelos, Querétaro, and Zacatecas). However, these reductions were statistically significant in just three cases (Mexico City, Morelos, and Querétaro). Furthermore, two states showed increases in reports of forced confessions after the reform's implementation (Chiapas and Durango), although none of these increases were close to reaching statistical significance.

In fact, all statistically significant results for state-level analyses demonstrated decreases in torture and forced confessions consistent with the trends observed in Figures 4 and 5. While the size of these reductions varied by state, each of these findings supported the hypothesis that reports of torture and forced confessions would decrease following judicial district-level SJPA implementation.

[114] Similar to data on torture, there were significantly fewer respondents that met the selection criteria that were arrested post-reform than pre-reform. 18 of 32 states saw fewer than 50 respondents arrested post-reform, while 25 states saw fewer than 100. Conversely, nearly all states (29) had more than 100 respondents represented on the ENPOL that were arrested pre-reform (and 19 states possessed more than 250).

TABLE 5. RESULTS OF INDIVIDUAL CHI-SQUARE TESTS BY STATE, REPORTS OF FORCED CONFESSIONS BY SENTENCED DETAINEES ARRESTED PRIOR TO REFORM IMPLEMENTATION VERSUS AFTER REFORM IMPLEMENTATION[115]

State	N	*Pre-Reform* n	*Pre-Reform* # forced confes-sions	*Pre-Reform* % subject to forced confession	*Post-Reform* nn	*Post-Reform* # forced confessions	*Post-Reform* % subject to forced confession	% Change	2016 *Hallazgos* Score (0-1,000) and rank (1-32)
Baja California	8851	6674	2263	39.0%	1177	58	32.8%	-16.02%	384 (3rd)
Chiapas	383	285	93	32.6%	98	40	40.8%	25.1%	264 (11th)
Chihuahua	772	123	38	30.9%	649	180	27.7%	-10.2%	388 (2nd)
Durango	243	138	20	14.5%	105	22	21.0%	44.6%	286 (10th)
Mexico City	1,655	1,472	415	28.2%	183	33	18.0%	-36.0%**	240 (14th)
Estado de México	1,726	651	229	35.2%	1,075	371	34.5%	-1.9%	230 (17th)
Morelos	452	221	60	27.1%	231	41	17.7%	-34.6%*	251 (12th)
Querétaro	322	247	41	16.6%	75	2	2.7%	-83.9%**	376 (4th)
Zacatecas	2235	1149	332	21.5%	886	17	19.8%	-9.96%	327 (8th)

**p<.01, *p<.05

[115] *Data sources:* INEGI *supra* note 72; México Evalúa *supra* note 95.

However, as only nine cases met the selection criterion of 150 cases per state, it was not possible to evaluate the subnational hypothesis that states with higher *Hallazgos* scores would demonstrate greater reductions in forced confessions post-implementation. Furthermore, of these nine states, only three demonstrated significant results in a chi-square test comparing reports of torture pre- versus post- reform (Mexico City, Morelos, and Querétaro). Still, like the results observed in state analyses of torture, the state with the highest SPJA performance score also saw the greatest significant reduction in forced confessions (Querétaro). Meanwhile, states with lower SJPA scores yielded smaller reductions in forced confessions (Mexico City, Morelos) (See Table 5).

Nonetheless, due to the small number of states (and individual respondents) included in this analysis, additional data is needed to evaluate the subnational hypothesis regarding the effect of SJPA performance on the incidence of reported forced confessions.

V. Discussion of Findings

Overall, this study's findings present evidence supporting the hypothesis that Mexico's criminal justice reform has resulted in a reduced incidence of torture and the practice of forcing confessions by judicial sector operators. While a geographic analysis of state reform implementation compared to the rate of torture and mistreatment complaints in each state did not reveal an association from 2015 to 2017, data from 2018 support the hypothesis. Furthermore, a temporal analysis of detainee complaints of torture and forced confessions revealed that these phenomena saw significant decreases following judicial district-level SJPA implementation at both a national and subnational level. An evaluation of the subnational association between a state's SJPA performance and reductions in torture and forced confessions following the reform's implementation yielded promising results.

However, this analysis was limited by a relatively small survey sample size per state. Thus, further research is necessary to determine if a state's level of adherence to the reform's mandates affects the number of cases of torture and forced confessions at the judicial district-level.

The following sections will discuss the significance of these findings and their theoretical implications for the study of state-sanctioned torture. Additionally, this discussion will identify the methodological limitations of this study and propose areas of future research necessary to establish an empirical relationship between the reform and reductions in torture by judicial operators. This analysis will serve as the basis for specific policy recommendations that could help to reinforce existing mechanisms that have served to reduce torture and mistreatment in the criminal judicial sector.

1. *The Drug War: Data Implications*

While this study's findings point to the significance of the judicial reform in reducing the incidence of torture, these data also suggest that judicial reform is not the only factor influencing the incidence of these abuses. Evidence supporting the geographic hypothesis was found for 2018; however, as illustrated in Table 1, this pattern was not observed from 2015 to 2017. In particular, 2016 figures demonstrated the weakest association between reform implementation and the incidence of torture complaints. In the same year, a marked increase was observed in the total number of complaints of torture and mistreatment against judicial sector operators (see Figure 3).

In general, scholars have documented the Mexican government's tendency to react to increased organized criminal activity with militarized enforcement, particularly beginning under Felipe Calderón's *sexenio.*[116] These enforcement operations often involve violent tactics, which have been associated with increased violence by OCGs as a result of group fragmentation.[117] In line with these findings, one potential explanation for the observed increase in torture complaints in 2016 is the impact of such enforcement tactics. Specifically, in 2015, the conflict between the government and the Jalisco New Generation Cartel (*Cartel de Jalisco Nueva Generación,* CJNG) began to escalate. In March of that year, a series of confrontations began between federal and state officials with the CJNG which resulted in the deaths of numerous police officers. In July, Joaquín Guzmán, head of the then-dominant Sinaloa cartel, escaped from prison and was believed to continue running operations for the cartel until his recapture one year later. During this period, public security forces devoted their resources to both containing the threat of the CJNG and to the recapture of Guzmán.[118]

While it is not known if increased public security operations directly contributed to the rise of complaints of torture and mistreatment from 2015 to 2016, there are numerous victim testimonies suggesting a relationship. Many report having been detained and tortured until they confessed to associations with specific OCGs.[119] Furthermore, Human Rights Watch confirmed that it was common practice among Mexico's military and security forces to torture individuals to coerce confessions of involvement with specific OCGs.[120] As such, with the enhanced public security operations that accompanied the rise

116 Osorio, *supra* note 53; Shirk & Wallman *supra* note 54; Laura Y. Méndez Calderón, *et al.*, *Organized Crime and Violence in Mexico* (Apr. 2019).

117 Osorio, *supra* note 54; Angelica Duran-Martinez, *To Kill and Tell? State Power, Criminal Competition, and Drug Violence*, 59 The Journal of Conflict Resolution (2015).

118 Lucy La Rosa & David A. Shirk, *The New Generation: Mexico's Emerging Organized Crime Threat*. Justice in Mexico (Mar. 19, 2018).

119 Amnesty International, *Paper Promises, Daily Impunity: Mexico's Torture Epidemic Continues* (Oct. 23, 2015).

120 Human Rights Watch, *supra* note 7.

of the CJNG and the fall of Guzmán, it is possible that officials also increasingly employed torture as an investigative and prosecutorial tool. This might help to explain the negligible geographic relationship observed between the implementation of the SJPA and the incidence of torture complaints per 1 million inhabitants from 2015 to 2017, and particularly in 2016. In short, the pressures to investigate and prosecute OCGs may have caused Mexico's public security apparatus to default to more familiar practices—namely, the use of torture to investigate and prosecute criminals.

2. *Measuring Reform Implementation across States*

Although a geographic relationship was observed between SJPA implementation and a reduced incidence of torture, this finding was only significant in 2018. One potential explanation for weaker associations between these variables is that the México Evalúa SJPA score employed for this analysis measures a wide range of factors. Specifically, the index examines inter-institutional coordination, judicial planning mechanisms, monetary and infrastructural resources, and public policy surrounding reform implementation.[121]

While each of these measures is a crucial ingredient to the SJPA's successful consolidation, a more direct indicator assessing accountability measures established by the reform may have yielded stronger correlations. As this study examines the behavior of prosecutors and other judicial sector operators, a measurement evaluating state performance in this area would help to confirm the geographic hypothesis.

Nonetheless, this investigation's finding that reform implementation had a significant effect on the incidence of torture and mistreatment complaints in 2018 is strong evidence of the SJPA's positive impact on human rights in Mexico. As the constitutional reform was officially implemented in 2016, a large portion of judicial districts had not begun operation under the new system until that year. In fact, 27% of the 2,279 municipalities included in this analysis did not begin operation under the SJPA until 2016. Furthermore, a majority (57%) of municipalities did not begin operation until the last quarter of the implementation period, from 2015 to 2016, despite the reform being passed in 2008. As a result, insignificant associations between implementation scores and the incidence of torture complaints from 2015 to 2017 may reflect the SJPA's lack of consolidation during this period. Simply stated, it may have

[121] Specifically, México Evalúa factors into its index the following seven conditions for judicial operation: (1) the national technical coordination system; (2) the institutional technical coordination system; (3) the comprehensive, continuous, and public planning process; (4) Information recording, processing, and reporting systems; (5) adequate protection and efficient utilization of financial resources, (6) publicity, transparency, accountability, and citizen participation; and (7) institutional symmetry. México Evalúa *supra* note 95.

taken several years for the new system to enter into force, producing an observable effect on human rights violations in 2018.

This study's 2018 findings support this assumption. As illustrated in Map 2, the states with the highest incidence of torture complaints were Nayarit, Quintana Roo, and Veracruz. Coincidentally or not, these states also ranked in the bottom four of Mexico's thirty-two (32) states on México Evalúa's index measuring SJPA performance. As previously stated, two of the four states with zero registered complaints in 2018 (Yucatán and Zacatecas) also ranked in the top eight on the same index. Although this study did not observe a relationship between judicial reform and decreased torture complaints from 2015 to 2017, the significance of the observed relationship in 2018 should not be overlooked. Particularly as the reform is just entering its consolidation phase, early findings demonstrating a link between the criminal justice reform and decreased torture complaints may point to future advances in human rights protections.

Nonetheless, localized analyses examining the effect of SJPA implementation at the judicial district level yielded evidence suggesting that the reform reduced rates of torture and forced confessions among Mexico's detained population. While state-level performance indicators may have made it difficult to track the reform's impact on these abuses, judicial district-level data allowed a more localized analysis of the reform's effects. Thus, findings at the judicial district-level support the trends observed in 2018 with respect to state level SJPA performance and reduced incidents of torture complaints.

3. *Constraining Judicial Behavior: Gradual Improvements*

The findings outlined above imply that the reform's initial implementation has had a significant positive impact on the behavior of judicial actors. Before the reform's proposal in 2008, Mexico failed to implement measures constraining the behavior of criminal justice system operators.[122] As a result, following Mexico's 2000 democratic opening, these actors defaulted to familiar practices that had served as the *modus operandi* of criminal investigation for decades. Torture continued to serve as an investigative and prosecutorial tool in the twenty-first century, suggesting that Mexico needed a comprehensive reform providing structural incentives to re-shape the behavior of judicial actors.

While the use of torture and forced confessions is still prevalent in Mexico, this study's results suggest that such institutions, even in their early days of implementation, may create new incentive structures and procedural norms that constrain human rights abuses by state officials, despite mounting security challenges. In the case of the SJPA, this study found that in just the

[122] David A. Shirk & Alejandra Ríos Cázares, *Introduction: Reforming the Administration of Justice in Mexico*, in Reforming the Administration of Justice in Mexico (Wayne A. Cornelius & David A. Shirk eds., Notre Dame, University of Notre Dame Press, 2007).

initial years of the reform's implementation, torture and mistreatment by judicial sector operators had already decreased significantly. While a 7% decrease in reports of torture and a 5% decrease in the incidence of forced confessions following the reform may appear to be negligible reductions, the SJPA has only just begun its consolidation in Mexico. Moreover, certain states have already demonstrated larger, significant reductions in detainee reports of torture and forced confessions, suggesting that there may be valuable lessons to learn from the experiences of those states.

Additionally, according to the most recent México Evalúa report published in 2019, no state in Mexico has reached the "ideal standard" for implementation at 1,000 points on the index, and just five of Mexico's thirty-two (32) states have reached the "halfway point" of 500 points on the index.[123] In short, while Mexico's SJPA was nominally implemented as of June 2016, there is still much work to be done in terms of actual consolidation. Consequently, relatively small improvements in prosecutorial accountability should be viewed as meaningful steps toward a fully consolidated criminal justice system. As this study's findings suggest, future advances in the reform's implementation should be accompanied by further decreases in investigative and prosecutorial abuses, such as the use of torture to extract confessions.

4. *The Limits of Official Data in Mexico*

While this study provides evidence to support the relationship between Mexico's criminal justice reform implementation and a reduction in the use of torture by justice sector officials, there are several limitations presented by the data employed. Most importantly, scholars, civil society representatives, and international organizations have repeatedly raised concern that official sources of data reporting state human rights abuses in Mexico are opaque, unreliable, and incomplete.[124] Specifically, this literature cites the lack of a national registry compiling all complaints of torture.

As Anaya Muñoz explains, the absence of a national registry requires that researchers employ proxy variables to approximate the incidence of human rights abuses. In this case, CNDH complaints published on the organization's National Alert System were employed for the task. However, the use of any type of proxy variable will introduce alternative explanations for observed phenomena. As Anaya Muñoz notes, the number of complaints submitted to the

[123] México Evalúa, *supra* note 95.

[124] *See* Amnesty International, *supra* note 119; PRODH, *supra* note 4; González-Núñez, *supra* note 5; *Alejandro Anaya Muñoz, Violaciones a los derechos humanos en el marco de la estrategia militarizada de lucha contra el narcotráfico en México 2007-2012 (Jun. 2014); Catalina Pérez Correa, et al., Deadly Forces: Use of Lethal Force by Mexican Security Forces 2007-2015, in Mexico's Human Rights Crisis (Alejandro Anaya-Muñoz & Barbara Frey eds., University of Pennsylvania Press, 2019).* Inter-Am. Comm'n H.R., *The Human Rights Situation in Mexico* (2015).

CNDH for a particular type of abuse may coincide with the public's level of awareness of these crimes or with their access to oversight organizations within civil society. It is also possible that as CNDH resources increase, they will in turn become more productive, increasing their capacity to receive complaints.[125]

Furthermore, while the CNDH's National Alert System compiles complaints made to the CNDH, the national ombudsman, it does not include complaints made to state institutions. As the PRODH Center notes, there are roughly four times the number of criminal proceedings at the state level compared to the national level. As a result, a large majority of human rights complaints relating to criminal proceedings would likely be registered with state agencies.[126] To complicate matters, each state maintains its own complaint records, making it methodologically impossible to analyze the phenomenon on the whole. Furthermore, many cases of torture go unreported altogether due to fear of reprisal and official misclassification of torture to lower level crimes, such as abuse of authority.[127]

As a result, data collected from the CNDH's National Alert System and employed in the aforementioned analyses possess significant methodological limitations. Had this analysis achieved access to state-level data on torture complaints against judicial sector operators, the observed negative correlations with SJPA implementation may have been stronger. As such, one future avenue of research would be to collect state-level complaint data in order to re-test the geographic hypothesis presented in this study.

In the absence of more accurate official statistics on the phenomenon, this study sought to substantiate initial findings using official data by also employing a publicly available survey data. While the ENPOL survey only included members of Mexico's detained population, which may not be inclusive of all individuals that experienced torture and mistreatment, its exhaustive list of questions helped to capture all forms of torture and mistreatment from the time of arrest to time spent in the Public Prosecutor's office. While it is still possible that detainees underreported the incidence of torture for fear of reprisal, the data retrieved in connection with this survey are, at the very least, more comprehensive than any existing source of government data on the practice.

In an effort to understand how the reform may have impacted states differently, this analysis disaggregated ENPOL data by state. These subnational analyses revealed large reductions in reports of torture and forced confessions amongst Mexico's detained population after SJPA implementation. Significant reductions in torture ranged from 14% (Morelos) to 39% (Baja California, Durango), while significant reductions in forced confessions ranged from 36% (Mexico City) to 84% (Querétaro). As such, these findings provide compelling evidence of the positive impact of the reform's judicial district-level

125 Anaya Muñoz, *supra* note 124.

126 PRODH, *supra* note 4.

127 González-Núñez, *supra* note 5.

implementation. Nonetheless, the small sample sizes associated with these analyses require that future research employ more robust sources of data to confirm these results and to assess the relationship between SJPA performance and reports of torture and forced confessions. While state-level data on torture and forced confessions has not been publicly available, perhaps a larger sample size of detainees at the state level could help to fill this data void and provide opportunities for further inquiry.[128]

VI. Policy Recommendations

Informed by the findings and analysis outlined above, this section proposes several avenues of policy recommendations to address the use of torture and mistreatment in Mexico's criminal justice system. Specifically, the author recommends that Mexico improve official sources of data that track torture and forced confessions, explicitly condemn these practices, and impose appropriate sanctions on those found guilty of these crimes, strengthen the rights of detainees and abolish the practice of *arraigo*, and stand firm against calls for counter-reform. While these proposals are quite broad in nature, there are a number of specific recommendations outlined below to continue reducing torture and mistreatment in Mexico's criminal justice system.

1. *Improving Official Data Sources*

As discussed, one of the limitations of this study is the lack of reliable official data on the phenomenon of torture in Mexico. Over the years, scholars, NGOs, and international organizations have advocated for the creation of a national registry on torture that would catalog all cases in the same database.[129] In the face of these pressures, Mexico passed the General Law against Torture (2017) mandating the creation of such a registry. The law required public prosecutors' and attorney generals' offices, public human rights organizations, and victims' commissions to aggregate complaint data to better understand and analyze incidents of torture.[130] However, three years after

[128] CIDE (*Centro de Investigación y Docencia Económicas*) researchers have produced several state-wide surveys of prisoners for states such as Estado de México and Mexico City over the last two decades that have helped to fill this information void. Studies such as these will be crucial to continue monitoring and evaluation efforts of the SJPA. *See e.g.,* Marcelo Bergman, *et al.*, *Delito y Cárcel en México, Deterioro Social y Desempeño Institucional. Reporte Histórico de la Población en el Distrito Federal y el Estado de México, 2002 a 2013: Indicadores Clave* (CIDE, 2014).

[129] PRODH *supra* note 4; U.N.C.A.T. [2019], *supra* note 4; U.N.C.A.T. [2013], *supra* note 4; David Velasco-Yáñez, *La Práctica de la Tortura y su Normalización en México*, 25 Xipe Totek (2016).

[130] Ley General para Prevenir, Investigar y Sancionar la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes [General Law to Prevent, Investigate, and Sanction Tor-

the law's enactment, Mexico has yet to demonstrate any progress toward the creation of the registry.

In fact, in its most recent review of Mexico, the UNCAT set a deadline of May 17, 2020 for Mexico to create such a system with publicly available data.[131] However, there is no information regarding the extent to which the Mexican government has diverted resources toward the implementation of such a registry. In reaction to this lack of transparency, a group of Mexican civil society organizations recently joined to create the Observatory against Torture (*Observatorio contra la Tortura*), which provides publicly-available data on specific indicators measuring the law's implementation.[132] While the observatory provides substantial data on individual indicators, such as the number of investigations of torture and the number of criminal sentences for the crime of torture, it is inherently limited in scope due to a lack of state transparency.

While civil society has been hugely active in monitoring the practices of torture and mistreatment in Mexico, the government has largely failed in providing accurate and reliable data to complement these efforts. Though the enactment of the General Law against Torture was undoubtedly a necessary step toward the eradication of the practice, it has thus far fallen short of its mandates. In the absence of a national registry or similar tracking mechanism, researchers and civil society organizations will continue to encounter obstacles in measuring how recent reforms, such as the SJPA, have affected the incidence of torture in Mexico. This study managed to employ survey data in order to create a proxy variable for the phenomenon, but future research will require data beyond 2016 in order to measure the SJPA's impact over time. Thus, Mexico must heed its own legal mandates by working to establish a reliable and effective tracking mechanism.

In the absence of such official sources of data, survey instruments such as the ENPOL provide a crucial source of insight into citizens' experiences in Mexico's criminal justice system. As such, Mexico must ensure that this study continues in the years following the SJPA's implementation. Both the UNCAT and a large network of civil society organizations headed by the CMDPDH have urged Mexico's government to ensure that this survey instrument continues to be implemented in the coming years.[133] Without access to these data, researchers and human rights advocates have few reliable sources of information with which to analyze the prevalence of torture in Mexico's judicial system.

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ture and Other Acts of Cruel, Inhuman, or Degrading Treatement], art. 83-85, Diario Oficial de la Federación [D.O.F], 26 de junio de 2017 (Mex.).

131 U.N.C.A.T., *supra* note 4.

132 Natalia Cordero, *Ley General de Tortura, ¿Fin de la Tortura en México?*, Animal Político, (nov. 14, 2019); Observatorio contra la Tortura, *Observatorio contra la Tortura: Monitoreo Ciudadano de la Implementación de la Ley General contra la Tortura* (2019).

133 *Seventh Periodic Report Submitted by Mexico under Article 19 of the Convention, Due in 2016*, U.N. Doc. CAT/C/MEX/7 (feb. 1, 2018); CMDPDH, *supra* note 4.

2. *Explicitly Condemning Torture*

Mexico has already taken certain steps, albeit delayed, to reduce the prevalence of torture as an investigative practice. As mentioned, Mexico passed the General Law against Torture (2017), which established a common definition for the crime of torture, identified specific institutions to investigate and sanction these crimes, designated minimum sentencing requirements for offenders, and established victim support mechanisms.[134]

Importantly, this law mandates that cases of torture be investigated even in the absence of a complaint; any case in which torture may have occurred must be investigated to the full extent of the law.[135] Moreover, it states that there is no statute of limitation on the crime of torture[136] and institutes a minimum sentence of ten years for those convicted.[137] The law also explicitly prohibits evidence obtained using torture,[138] placing the burden of proof on the prosecutor to demonstrate that evidence was legally obtained.[139]

While these regulations represent a crucial first step toward the prohibition of torture, the state must ensure that its institutions comply with these newly established regulations. In line with UNCAT recommendations, Mexico's government must explicitly and publicly condemn torture and other forms of mistreatment, sending a strong message that the practice will no longer be tolerated.[140] Moreover, the government must immediately investigate all instances of torture, placing those accused on administrative suspension in order to reduce the likelihood of coordinated reprisals against complainants.

As the General Law against Torture establishes that there is no statute of limitations for the crime of torture, Mexico must eventually investigate and prosecute all previous reports of torture. This is a tremendous task, as torture has been employed for decades both as a prosecutorial tool and for motivations of social control.[141] Nonetheless, if Mexico wishes to comply with its own legal mandates and ensure the consolidation of its fledgling judicial system, this will be a crucial step toward institutional legitimacy.

To complicate matters, Mexico already wrestles with staggering impunity rates. According to a recent study conducted by the *Universidad de las Américas Puebla* (UDLAP), Mexico currently possesses the highest impunity rate in Latin America and the fourth highest on a list of 69 countries, behind the

134 *Supra* note 130; Centro de Derechos Humanos Miguel Agustín Pro-Juárez A.C., *10 Preguntas Clave sobre la Ley General contra la Tortura* (dec. 18, 2018).

135 [D.O.F], *supra* note 130, Art. 7.

136 [D.O.F], *supra* note 130, Art. 8.

137 [D.O.F], *supra* note 130, Art. 26.

138 [D.O.F], *supra* note 130, Art. 50.

139 [D.O.F], *supra* note 130, Art. 51.

140 U.N.C.A.T. [2019], *supra* note 4.

141 McCormick, *supra* note 17.

Philippines, India, and Cameroon.[142] The number of criminal convictions for torture and mistreatment in Mexico supports this finding. In 2016, state attorneys general reported 3,214 complaints of torture and mistreatment affecting 3,569 victims. However, just eight of these criminal cases were adjudicated. Similarly, in the period from 2006 to 2015, there were only 15 federal convictions for torture, despite the submission thousands of complaints to the CNDH in the same period.[143]

As UDLAP explains, Mexico's impunity rate at the state level is highly associated with low levels of capacity; states with fewer judges tend to possess the country's highest impunity rates (i.e., Aguascalientes, Baja California, Coahuila, Hidalgo, Estado de México). This lack of capacity has further diminished public confidence in the judicial system, resulting in an increase in the percentage of crimes that go unreported, or the *cifra negra.*[144]

As such, the investigation and prosecution of those accused of torture comes with significant capacity and professionalization challenges. Nonetheless, Mexico must begin by publicly and explicitly backing the General Law against Torture. It must remain firm in its condemnation of torture as an investigative tool and begin to establish mechanisms that track the law's incorporation into the SJPA. At the very least, this will allow researchers to identify areas for improvement and strategies toward full implementation.

3. *Strengthening the Rights of the Detained*

While crucial steps toward the eradication of torture, reforms such as the SJPA and the General Law against Torture have fallen short. As discussed, one of the SJPA's primary critiques is that it contradicts itself. It seeks to guarantee the rights of the accused while also permitting practices that reinforce human rights violations—namely, the use of detention without charge, or *arraigo*. As such, scholars and international organizations have consistently called upon the Mexican government to outlaw the practice.[145]

Under the reform, prosecutorial powers to detain organized crime suspects were expanded, allowing detention for an initial period of 40 days, which can be extended to 80 days. The extension can be granted based on the prosecutor's argument that the suspect represents a flight risk. However, the prosecutor's office is not often required to substantiate such claims, affording them

[142] Universidad de las Américas Puebla [UDLAP], *Índice Global de Impunidad México 2018: La Impunidad Subnacional en México y sus Dimensiones IGI-MEX 2018* (2018).

[143] CMDPDH, *supra* note 4.

[144] UDLAP, *supra* note 142.

[145] *See* U.N.C.A.T. [2014], *supra* note 4; U.N.C.A.T. [2019], *supra* note 4; Deaton & Rodríguez Ferreira, *supra* note 75; Velasco-Yáñez *supra* note 129; Jacobo García, *"El nuevo sistema penal ayuda pero no resuelve los problemas estructurales de la justicia en México" Juan Carlos Gutiérrez, abogado experto en DDHH y coautor del libro 'Arraigo Made in Mexico'*, El País, (jun. 17, 2016).

ample discretion in determining the length of detention.[146] Thus, as long as *arraigo* continues in Mexico, police and prosecutors will always possess the incentive and opportunity to continue the longstanding practice of torture. Indeed, *arraigo* represents an "invitation to torture".[147]

In addition to abolishing the practice of *arraigo*, the state must also strengthen protections for criminal detainees. Upon a suspect's arrest, police or other officials must immediately bring the individual to the public prosecutor's office, reducing the possibility of torture during the initial stages of the criminal process. Additionally, all detainees should be immediately informed of the reason(s) for their detention, granted prompt access to an attorney, and given the opportunity to inform a relative or other person of their detention. In cases where these protections are not afforded, a judge must determine that the accused's due process rights were violated and take appropriate action.

In cases where torture is suspected, suspects must be granted immediate access to medical professionals trained to examine victims of such abuses. These individuals should be thoroughly trained according to the Istanbul Protocol, a set of international standards for investigating and documenting torture and mistreatment.[148] However, the burden of proof should rest on the prosecutor to establish that torture was *not* employed while the suspect was in the custody of police or the prosecutor's office.

Lastly, in line with UN and civil society recommendations, Mexico must establish a national registry of detainees that documents the name of each individual in detention.[149] Such a registry should also record the date and time of a suspect's detention in order to prevent officials from doctoring data to disguise misconduct or abuse.

4. *Countering the Counter-Reform*

A lack of official data inhibits the efforts of researchers and policymakers to contest claims that the SJPA has exacerbated human rights abuses in Mexico. Indeed, critics have claimed that corruption and impunity are inherent to the SJPA and that the system has contributed to increased levels of insecurity

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146 Uildriks, *supra* note 25; Amnesty International, *Mexico: Eliminating Arraigo Will Be an Important Step towards Protecting Human Rights* (2005).

147 Janice Deaton, *Arraigo and the Fight against Organized Crime in Mexico* [Working paper presented at the NDIC-TBI Bi-national Security Conference hosted at the University of Guadalajara] (2010).

148 U.N. Office of the High Comm'r for Human Rights, *Istanbul protocol: manual on the effective investigation and documentation of torture and other cruel, inhuman, or degrading treatment or punishment* (New York, U.N. 2004).

149 *See* CMDPDH, *supra* note 4; U.N.C.A.T. [2014], *supra* note 4; U.N.C.A.T. [2014], *supra* note 4.

across Mexico.[150] Critics view the SJPA as a "revolving door" that releases criminal actors from detention while failing to protect victims.[151] Recently, these critical voices have gained traction, and experts monitoring the SJPA's performance agree that the threat of counter-reform grows more credible.[152]

On January 15, 2020, Mexico's National Prosecutor Alejandro Gertz Manero and the president's chief legal advisor Julio Scherer announced a package of nine proposed judicial reforms after a draft was leaked several days prior. According to Gertz Manero and Scherer, the objective of these reforms was to reduce impunity and recidivism. However, as the proposal is currently drafted, these changes would undermine a significant number of hard-won human rights safeguards established under the SJPA.[153]

Most importantly, the proposed counter-reform would allow prosecutors to present evidence obtained by torture before a judge. The SJPA and the subsequent General Law against Torture specifically prohibited the use of evidence obtained by torture, mandating that judges dismiss such evidence when torture is suspected. Nonetheless, the proposed constitutional amendment would afford judges total discretion over evidence admitted at trial-including evidence obtained through human rights violations.[154]

In addition, the proposed counter-reforms would reintroduce many of the prosecutorial incentives to practice torture that the SJPA sought to expel. While Mexico's constitution mandates that no suspect be held for more than 72 hours without judicial review,[155] the proposed changes would remove both judicial oversight and the time limit. Thus, if a suspect were charged for a crime that mandated pretrial detention, they could be detained throughout the duration of the criminal investigation and trial with no judicial review or opportunity to challenge evidence presented against them. Moreover, the package of counter-reforms would expand *arraigo* beyond organized crime-related cases, allowing prosecutors to seek prolonged detention without criminal charges in any type of case.

This expansion of the prosecutorial right to detain would reintroduce institutional norms and incentives to practice torture and obtain forced confessions.[156] As esteemed political commentator Denise Dresser writes, the

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[150] World Justice Project, *supra* note 71; Patricia Dávila, *"Corrupción en el Nuevo Sistema de Justicia Produce esta Terrible Impunidad": Martí*, Proceso, (jun. 2, 2016).

[151] Astrid Sánchez, *Sistema Penal Divide Opiniones*, El Universal (jul. 11, 2017).

[152] México Evalúa [2019], *supra* note 95; Irene Tello Arista, *La Contrarreforma que Viene*, El Universal (jul. 12, 2019).

[153] Human Rights Watch. *Mexico: Justice System Proposals Violate Fundamental Rights* (jan. 30, 2020); Denise Dresser, *La Cuarta Inquisición*, Diario de Yucátan, (jan. 21, 2020).

[154] Human Rights watch, *supra* note 153.

[155] Constitución Política de los Estados Unidos Mexicanos de 1917 [Political Constitution of the United Mexican States of 1917], art. 19, *Diario Oficial de la Federación* [D.O.F], reformado 3 de septiembre de 1993 (Mex.).

[156] Human Rights watch, *supra* note 153.

counter-reform would introduce "[the] power to detain arbitrarily, spy legally, torture unconstitutionally, and return to the old system that existed prior to the 2008 reform" [author's translation].[157]

While the results of this study suggest that the SJPA is not a silver bullet solution for eradicating human rights abuse, they also reveal that the SJPA can be credited for small but meaningful reductions in torture and mistreatment among judicial sector actors. This evidence runs counter to claims that the reform encourages further abuse by officials.

According to Shirk and Ríos Cázares, achieving the rule of law in new democracies is often an inherently destabilizing process. During the transition phase, state institutions such as the police and the criminal justice system may adjust too slowly to democratic changes to meet the needs of society. As such, citizens may experience reduced access to justice during this period, negatively influencing their perception of democratic reforms and increasing public demands for justice and accountability. Ironically, this period is marked by decreased public confidence in reforms meant to strengthen the rule of law. In SJPA's case, it may also result in calls to revert back to known, authoritarian models of criminal justice. However, as Shirk and Ríos Cázares warn, these appeals threaten to erode the very institutions that serve as the foundation for the rule of law.[158]

As Mexico finds itself in this transition process, threats to fledgling democratic institutions must be taken seriously. Mexico must be diligent in its SJPA consolidation efforts, despite existing counter-reform proposals. As Irene Tello Arista, Executive Director of *Impunidad Cero*, argues, the counter-reform does not seek to establish better protections for victims, as it claims. Instead, its objective is to reestablish a regulatory backing for abuse and judicial malpractice, attempting to solve problems through legislative action rather than tangible change or follow-through.[159] Given these concerns, Mexico must ensure that its commitment to the system's full implementation remains steadfast.

VII. Conclusion

This article sought to examine the impact of Mexico's 2008 criminal justice reform on the practice of torture in the criminal justice system. Based on literature documenting the factors that institutionalize and incentivize such crimes, it was hypothesized that the reform would be associated with decreased levels of torture in the judicial sector. Specifically, this article presumed that high subnational SJPA performance scores would be associated with reduced rates of torture by judicial sector officials in those states. Ad-

[157] Dresser, *supra* note 153.

[158] Shirk & Ríos Cázares, *supra* note 122.

[159] Tello Arista, *supra* note 152.

ditionally, it was predicted that after the reform's judicial district-level implementation, detainee reports of torture and forced confessions would decline at a national level. While this research also hypothesized that states with higher SJPA performance scores would demonstrate greater reductions in reports of torture and forced confessions following implementation, it was not possible to confirm this conclusion due to insufficient data.

Still, results partially confirmed the geographic hypothesis outlined above. Annual correlation and regression analyses between state reform performance scores and state-level rates of torture and mistreatment complaints against judicial sector operators did not produce significant associations from 2015 to 2017. However, analyses employing 2018 data yielded a significant relationship between the two variables, suggesting that the reform's consolidation over time has had a positive impact on human rights in Mexico's judicial system. Furthermore, insignificant findings from 2015 to 2017 may be explained by factors unrelated to the judicial reform. While it was beyond the scope of the study to identify other variables affecting the relationship, the author hypothesizes that increases in drug war-related enforcement measures may have played a role in earlier years.

Furthermore, this study's findings substantiated the temporal hypothesis with regard to torture. A chi-square test for independence revealed a significant reduction in the percentage of detainees that reported being subject to torture following the reform's implementation at the judicial district-level. The temporal hypothesis examining forced confessions was partially confirmed, as a second chi-square test for independence revealed a marginally significant decrease in the percentage of sentenced detainees that reported being subject to a forced confession.

While the observed reductions were relatively small (a 7.4% decrease in torture and a 5% decrease in forced confessions), these results nonetheless represent compelling evidence in favor of the SJPA's impact on Mexico's human rights situation. As the SJPA's official implementation date fairly recently in 2016, there is still much work to be done to fully consolidate the reform's mandates. As Mexico continues to progress toward the SJPA's full and effective implementation, researchers should observe further reductions in the incidence of torture by judicial sector officials. This is supported by the results of state-level chi-square tests, which also showed large and significant reductions in the percentage of detainees reporting torture and forced confessions (39% reductions in torture in Baja California and Durango, 24% reduction in torture in Mexico City, 14% reduction in torture in Morelos, a 36% decrease in forced confessions in Mexico City, and an 84% reduction in forced confessions in Querétaro).

Nonetheless, the existing criminal justice reform may not be enough to address the epidemic of torture. Mexico must also *a)* improve official sources of data used to track cases of torture and mistreatment, allowing researchers to monitor the success of state efforts to reduce the practice; *b)*

explicitly and publicly condemn the practice, instituting appropriately severe penalties for those found guilty of such crimes; *c)* establish strong protections for detainees and their families, banning the practice of detention without charge, or *arraigo*; and lastly, *d)* remain steadfast in defending the criminal justice reforms amidst growing calls to revert to familiar judicial practices characteristic of one-party rule in Mexico. While these proposals are tied to Mexico's broader challenges in addressing corruption, impunity, and capacity issues, they represent crucial steps toward the country's democratic consolidation and the establishment of institutions that respect its citizens' human rights.

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FEMICIDES: DIFFERENT APPROACHES FROM THE REGIONAL PROTECTION OF HUMAN RIGHTS

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Abstract: *Since the adoption of the term femicide for gender-based killings of women, the theoretical development and transition of this definition to a legal concept has contributed to the acknowledgment of this phenomenon as the most extreme manifestation of violence against women. In the international sphere, the regional systems of protection of human rights appear as fertile soil for victims of femicide to claim protection. Consequently, the European Court, Inter-American, and the ECOWAS Court of human rights play an important role in the investigation, prosecution, and reparation of femicide in their regions. Nevertheless, through their jurisprudence in the matter, regional courts of human rights have adopted different approaches for femicide. This shows striking differences in the recognition of the phenomenon of femicide, the development of State obligations, and the reparation for victims. The minimalistic approach applied by the European Court in its cases, as well as a single precedent of feminicide studied by the ECOWAS Court, makes us turn the view to the Inter-American Court of Human Rights. Based on its maximalist approach, the Inter-American Court has gone beyond its sister courts to establish a consolidated recognition of the phenomenon of femicide, and to develop in a wider and deeper way the scope of State obligations and reparations on femicide cases.*

Keywords: *Femicide, violence against women, human rights, regional courts of human rights, Inter-American Court of Human Rights.*

Resumen: *Desde la adopción del término feminicidio para los asesinatos de mujeres por razón de género, el desarrollo teórico y la transición de esta definición a un concepto legal ha contribuido al reconocimiento de este fenómeno como*

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la manifestación más extrema de violencia contra las mujeres. En el ámbito internacional, los sistemas regionales de protección de los derechos humanos se erigen como un terreno fértil para que las víctimas de femicidio reclamen la protección de sus derechos. En ese sentido, la Corte Europea, la Corte Interamericana y el Tribunal de la Comunidad ECOWAS juegan un papel importante en la investigación, enjuiciamiento y reparación del feminicidio en sus regiones. Sin embargo, a través de su jurisprudencia en la materia, los tribunales regionales de derechos humanos han adoptado diferentes enfoques para el femicidio. Esto evidencia diferencias notables en el reconocimiento del fenómeno del femicidio, el desarrollo de las obligaciones del Estado y la reparación a las víctimas. El enfoque minimalista aplicado por la Corte Europea en sus casos, así como un solo precedente de feminicidio estudiado por el Tribunal de la Comunidad ECOWAS, nos hace volver la mirada hacia la Corte Interamericana de Derechos Humanos. Partiendo de su particular enfoque maximalista, la Corte Interamericana ha ido más allá de sus tribunales hermanos para establecer un reconocimiento consolidado del fenómeno del feminicidio y desarrollar de manera más amplia y profunda el alcance de las obligaciones y reparaciones estatales en casos de feminicidio.

Palabras clave: *Feminicidio, violencia contra las mujeres, derechos humanos, cortes regionales de derechos humanos, Corte Interamericana de Derechos Humanos.*

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I. Introduction

Violence against women and girls or gender-based violence has been deemed by international organizations such as the United Nations[1] and the World Bank[2] as a global pandemic. Hence, considering that approximately fifty percent of the world's population are women, it may be said that gender is not only the most important category of social division but also the main reason for inequity, discrimination, and violence around the globe.

However, within the spectrum of violence that women and girls suffer, the feminicide o femicide[3] can be considered as the most radical act of violence against them. Feminicide is the murder of a woman or a girl because of their gender, and it can be perpetrated under a variety of circumstances and committed by different individuals, most of them their partners or former partners. But also, feminicide can be perpetrated by individuals that do not have a close relationship with the victim, even some femicides are committed by strangers who kidnap women. The use of the term feminicide or femicide has been recognized as a political way to differentiate the deaths of women because of their gender from homicides. It has led to a better understanding of the dimensions of violence against women, and it has been the beginning of data collection,[4] policies design, and one of the most important: the claim for justice in the national and international arena.

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[1] *Ending inequality means ending "global pandemic" of violence against women – UN chief*, UN News (2018), available at *https://news.un.org/en/story/2018/11/1026071*.

[2] *Gender-Based Violence (Violence Against Women and Girls)*, The World Bank (2019), available at *https://www.worldbank.org/en/topic/socialdevelopment/brief/violence-against-women-and-girls*.

[3] For this document, the author uses the term femicide or feminicide indistinctly for reasons that will be explained further.

[4] The World Health Organization has stated: "Collecting correct data on femicide is challenging, largely because in most countries, police and medical data-collection systems that document cases of homicide often do not have the necessary information or do not report the victim-perpetrator relationship or the motives for the homicide, let alone gender-related motivations for murder (4-6). However, data on the nature and prevalence of femicide are increasing worldwide, illustrated by the following findings from the literature." World Health Organization, *Understanding and addressing violence against women*, WHO/RHR/12.38 (2012), available at *https://apps.who.int/iris/bitstream/handle/10665/77421/WHO_RHR_12.38_eng.pdf?sequence=1*.

At a national level, the asymmetric relations between women and men, the high levels of violence against women, and the lack of effective mechanisms of prevention, investigation, and sanction of the crime of feminicides usually pushes victims to elevate their claims at a supranational level. At that level, and after a long path in their seek of justice, victims usually find an opportunity to be heard within the regional systems of protection of human rights.

Regional systems of human rights have protected and developed a strong platform that can be used by victims of human rights violations to claim justice and reparations. At the same time, their institutions, especially their courts, have become respected and prestigious tribunals lead the agenda of human rights in its regions.

Currently, the most prominent system of protection of human rights is based in Europe, America, and Africa. Each system has its own characteristics, agenda, and concerns according to the region they represent. But all of them are, in theory, a fertile soil where the global phenomenon of feminicide can be addressed.

This article attempts to explore the treatment given to cases related to femicides by the European, Inter-American, and African courts of human rights. The article begins by highlighting the theoretical development of femicide as a specific term for gender-based killings of women and its transition to a legal concept. Part II goes on to stress the importance of the European, Inter-American, and African Systems of Human Rights in promoting women's rights, and the analysis of the femicide cases studied for each court. Part III explores the similarities and differences between these tribunals' approach in their feminicides cases, their acknowledgment of the phenomenon, as well as the impact of those approaches on the recognition and analysis of the problem of feminicide. Finally, the conclusions point out some areas of improvement of the three tribunals on the analysis of feminicides. But also, the findings will show that, as a part of its maximalist approach, the Inter-American Court has developed the scope of State obligations and reparations in a wider and deeper way as compared to those developments made by the European Court of Human Rights and by the ECOWAS Court.

II. Violence Against Women: Femicide

Understanding the phenomenon of discrimination and violence against women involves several explanations and factors that always lead to the same place: a culture of patriarchy that shows the asymmetric relations between gendered beings. Since their birth women and men are assigned specific places and roles in society from which, depending on their economic situation, nationality, race, age, and education, among other categories, they face inequalities and adopt different privileges. In the case of women, the intersection of all those categories combined with gender seems to be always an adverse condition that operates against their rights.

As a form of discrimination, violence against women has received particular attention from the international community because of the danger it infringes on women's dignity and rights. The international concerns have been established through the adoption of several international instruments whose aim is to prevent, investigate and eradicate that risk. At a regional level, the most important treaty adopted based on violence is the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará. Adopted in 1994, it was the first treaty to establish the right of every woman "to be free from violence in both the public and private spheres".[5]

Violence against women englobes, as well as discrimination a wide spectrum of manifestations that can cause physical, sexual, or psychological harm to women. Some of these practices include intimate partner violence, child marriage, human trafficking, sexual violence and harassment, and female genital mutilation, among others. Unfortunately, in most of those cases, violence can escalate to the killing of women, which is in itself a whole field of study.

1. *Killing a Woman: A Crime of Passion or Honor?*

Deprivation of life is one of the most serious attempts against human dignity. According to that reasoning, the right to life is strongly protected by human rights instruments as an essential right. Every second, women as well as men, are deprived of life for different reasons. However, some of those killings are related to the gender of the victim. In the case of killings of women, a considerable amount of them are a result from the fact of the victims being females.

In 2019, the United Nations Office on Drugs and Crime (UNODC)[6] established that from 87 000 women that were killed intentionally, almost 60% were killed by intimate partners and other relatives, which means that every day 137 women are killed by a relative. It does not mean that all of them are gender-related killings, but most of them are. The problem is how to identify those that hide gender motives.

Distinguishing a gender-based killing from the killing of a woman demands an investigation of the circumstances of death[7] conducted with a gender perspective. It means to identify gender motives that led the perpetrator to kill a woman or a girl. However, in most of the cases, gender-based killings —especially those committed by the intimate partner— are reduced to be called a crime of passion. Society and authorities still consider that

[5] OAS, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women "Convention of Belém do Pará" June 9, 1994, article 3.

[6] *Global study on homicide: Gender-related killing of women and girls,* UNODC 10 (2019).

[7] Shelah S. Bloom, Violence Against Women and Girls 179 (2008).

women killings by their husbands, fathers or siblings can be justified for personal, honor, religion issues, or because of women's fault, or as a result of intimate partner violence.

Historically and socially, feminicide has been accepted and regarded as a crime of passion. The question is whether the category of "crime of passion" is helpful to understand the problem. The Legal Information Institute of the University of Cornell cites the definition of a crime of passion as:

> A crime committed while in the throes of passion, with no opportunity to reflect on what is happening and what the person is about to do. For example, a husband who discovers his wife in bed with a lover and who attacks and kills the lover in a blind rage has committed a crime of passion. Because the husband has been overcome with emotion, he lacks the specific intent to kill, which is necessary for a conviction of murder. If a jury believes that he acted in the heat of passion, they will convict him only of manslaughter, which does not require an intent to kill.[8]

In the case exemplified, the difference between killing the lover or the wife could be minimal, considering that the conduct of the husband is motivated and can be justified later under the heat of passion. Some of the gender-based killings of women are qualified by authorities as crimes of passion, an action that justifies the conduct of the killer as a state of jealousy or impulsiveness.[9] This has led in part to romanticize the crime as killing for love,[10] and at the same time to deny the structural problem that entails the killing of a woman. Hence, qualifying killings of women as crimes of passion is a category that seems to explain and justify the killing from the perspective of the perpetrator.

A similar situation appears when the killing of a woman is considered a crime of honor, as it occurs in the Middle East and North Africa. Honor killings are spread in those regions where religion and society values are used to justify the punishment of women who allegedly have brought disgrace to their families.[11] For example, women are victims of honor killings for refraining from forced marriage, being the victim of rape, getting divorced, having sexual relationships, or carrying out adultery.[12] In those cases, killings of

[8] Definition, available at *https://www.law.cornell.edu/wex/crime_of_passion*.

[9] Juan Carlos Romero Puga, *Del crimen "pasional" al feminicidio*, Letras Libres (2018), available at *https://www.letraslibres.com/mexico/cultura/del-crimen-pasional-al-feminicidio*.

[10] Paulina Molina, *Domestic Violence in Chile: Calling Out Femicide*, Nieman (2019), available at *https://nieman.harvard.edu/articles/chile-femicide-is-not-a-crime-melodrama/*.

[11] Bijan Pirnia, Fariborz Pirnia & Kambiz Pirnia, *Honour killings and violence against women in Iran during the COVID-19 pandemic*, 7 The Lancet Psychiatry 60 (2020).

[12] Justin J Gengler, Mariam F Alkazemi & Alanoud Alsharekh, *Who supports honor-based violence in the Middle East? Findings from a national survey of Kuwait*, Journal of interpersonal violence (2018). In: Pirnia, *supra* note 11.

women are socially accepted under the reasoning that those are punishments in the name of family honor and strong traditions that oblige women to live in a system where they are expected to fulfill specific roles as daughters, wives, and respectable and obedient women.

Both crimes of passion and honor killings are categories that justify and explain violence against women, as a hard consequence for women's abandonment of their duties and also as a provocation for their killers who act as punishers. But the most relevant, the use of those categories as a justification for killings of women denies and impedes to recognize a system of violence and entrenched power relations that create and encourage this kind of demonstration of contempt and authority over women's lives.

Understanding the nature of gender-based killings from a gender perspective, and avoiding to categorize them as simple crimes of passion or honor, is necessary in order to review the circumstances of the death, the relation between the victim and the perpetrator, the motivations of the perpetrator, and sometimes even the context of spread violence against women.

It is necessary to the understanding of the phenomenon, collection of data, and exposure of the subtle differences that can separate the death of a woman from the one resulting from misogyny.

2. *Femicide and Feminicide: Putting a Name to a Face?*

Differentiating gender killings from other women's deaths is a required step to discover the magnitude and the intensity of the problem of violence against women. At the same time, the adoption of a term to call those specific killings seems to be an effort to define the problem, and a political act. It has led to the emergence of the term femicide promoted by Diane Russell, who has explained its origin: "I first heard this word 37 years ago in 1974 when a friend in London told me that she had heard that a woman in the United States was planning to write a book titled «Femicide». I immediately became very excited by this new word, seeing it as a substitute for the gender-neutral word «homicide»".[13]

Through the adoption of this term, as Russell explained above, came the need to identify gender as the reason to distinguish a sex-based hate crime from other deaths. That made visible a specific kind of killings that before that moment seemed to be relegated within the category of homicide. Later in 1976, Russell applied this term in a declaration at the first Tribunal on Crimes Against Women and defined it as "the killing of females by males *because* they are female".[14]

[13] Diana E. Russell, *The origin and importance of the term femicide* (2011), available at *http://www.dianarussell. com/origin_of_femicide. html.*

[14] Jill Radford & Diana EH Russell, Femicide: The politics of woman killing xiv (1992).

In *Femicide: The Politics of Woman Killing*, which is considered the first study where the concept was developed, femicide was defined as "the misogynist killing of women by men".[15] The concept of femicide originated within the Anglo-Saxon academy and was taken to Latin America, where it was adopted and adapted to other terms such as *feminicide* and *systemic sexual feminicide.*[16]

The usage of femicide to describe the highest level of violence against women was immediately embraced by the feminist movement[17] in different regions. In Latin America, the term was translated to Spanish as "feminicidio" by the Mexican anthropologist Marcela Lagarde to name the phenomenon of the women of Ciudad Juárez, a series of femicides involving the disappearance of many women, some of whose bodies were found in public spaces during the 90s. However, Lagarde impregnated the concept of feminicide of a strong claim against the State and its role in the prevention, investigation, and sanction of those killings. From this viewpoint, the application of the term feminicide has a political aim to rebuke the impunity and inaction of the authorities and institutions of the State.[18] According to Marcela Lagarde:

> Silence, omission, negligence, and the collusion of authorities in charge of preventing and eradicating these crimes concur in a criminal manner for femicide to occur. Femicide occurs when the *S*tate does not provide guarantees to women and does not create conditions of safety for their lives in the community, at home, or in work, transit, or recreational spaces. It happens when the authorities do not perform their functions effectively. If the State fails, impunity is created, crime proliferates and femicide does not end. That is why femicide is a crime of the *S*tate.[19]

After the embracement of the term in Latin America, it has been modified to explain specific kinds or particularities of feminicide. For example, Julia Monarrez has coined the term *systemic sexual feminicide*, who has explained it as:

> Systemic sexual femicide is the murder of a girl/woman committed by a man, where all the elements of the unequal relationship between the sexes are found: the generic superiority of the man versus the generic subordination of the

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[15] *Ibid*. at XI.

[16] Julia Estela Monárrez Fragoso, *Feminicidio sexual sistémico: impunidad histórica constante en Ciudad Juárez, víctimas y perpetradores*, 1 Estado & comunes, revista de políticas y problemas públicos 88 (2019).

[17] *See*, Magdalena Grzyb et al., Femicide across Europe: Theory, research and prevention (2018).

[18] Femicide and feminicide, Guatemala Human Rights Commission, USA Fact Sheet, available at *http://www.ghrc-usa.org/Programs/ForWomensRighttoLive/factsheet_femicide.pdf*.

[19] Marcela Lagarde, *El feminicidio, delito contra la humanidad*, in Feminicidio, justicia y derecho. México. Comisión Especial para Conocer y Dar Seguimiento a las Investigaciones Relacionadas con los Feminicidios en la República Mexicana ya la Procuración de Justicia Vinculada 156 (2005).

> woman, misogyny, control, and sexism… [it] has the irrefutable logic of the body of poor girls and women who have been kidnapped, tortured, raped, murdered, and thrown into sexually transgressive settings.[20]

In other regions, femicide has been studied and categorized depending on the reality of each country in which this term has been adopted. The same as in Latin America, the term femicide was adopted in Southeast Asia, where feminists use this concept to refer to the "intentional murder of women by men and of women by other women for men's interests".[21]

In general, naming femicide has permitted to create —with the use of the term— a political flag to face violence against women, and an opportunity to get attention for the government to recognize the problem and to adopt legislative and judicial measures. Regarding the political impact of the adoption of the term "femicide", the creator explained it later:

> Just as U.S. Professor Catharine MacKinnon's invention of the new feminist term sexual harassment was necessary before laws against these crimes could be formulated, so I believed that inventing a new term for sexist/misogynist killings of females was necessary for feminists to start organizing to combat these heretofore neglected lethal forms of violence against women and girls.[22]

However, beyond the political impact that the adoption of this term has represented for the movement against gender-based violence —which is relevant in itself—, there are still some discussions about the scope of its definition. For example, some experts have posed questions related to whether the term femicide should also apply to girls' killings and to women killed by other women.[23] It makes it necessary to elaborate on the characteristics and tools to identify femicide.

3. *What is Femicide and What is Not?*

Femicide is the most extreme manifestation of the power of patriarchy over women's lives. Identifying femicide from a women's murder makes it necessary to identify the gender factor. This is a political action that press to acknowledge that there is a system that allows a person to kill a woman.

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[20] Fragoso, *supra* note 16.

[21] Walter Dekeseredy & Linda MacLeod, *Counting the pain and suffering: The incidence and prevalence of woman abuse in Canada - Intimate Femicide*, in Walter DeKeseredy, Woman abuse: A sociological story (1997). Cited by: Feminicidio, justicia y derecho. México. Comisión Especial para Conocer y dar Seguimiento a las Investigaciones Relacionadas con los Feminicidios en la República Mexicana ya la Procuración de Justicia Vinculada 139 (2005).

[22] Russell, *supra* note 13.

[23] *See also*, Magdalena Grzyb et al., Femicide across Europe: Theory, research and prevention (2018).

However, it is important to notice that not all the deaths of women are femicides and that is possible to make a difference between them. Russell insists that femicide can be differentiated from the murder of women as well as that "murders that target African Americans can be differentiated from those who are racist from those who are not".[24]

The most important aspect to identify femicide from a non-femicidal murder is that in femicide the victim has been killed by her gender condition: being a woman. This gender condition comes from an entrenched system that establishes power relationships between women and men, establishing the idea that men, husbands, fathers, and even strangers are enough legitimated to dispose of women's lives. Femicidal agent motivation coincides with the idea of the power of men over "the lives and bodies of women to punish them, and ultimately, to preserve social orders of inferiority and oppression".[25] Under that reasoning, the system creates a violent environment for women where a husband can dispose of his wives' life during an episode of domestic violence; a father can kill his daughter because she disobeyed religious or moral values, or even a stranger can kidnap a woman to rape and to kill her.

Gender-related motives must be a relevant factor for the perpetrator to establish that a woman killing it is, in fact, femicide; otherwise, it is a non-gender-related murder.[26] According to the OHCHR, in this differentiation it is very important to focus on the presence or absence of gender-related motives that led to or explain the killing of the woman namely: context surrounding the death; circumstances of the death, and the disposal of the body; the history of violence between the victim and the perpetrator; the modus operandi and the type of violations committed before and after death; the family, intimate, interpersonal, community, work and other connections between the perpetrator and the victim; the victim's situation of risk and vulnerability at the time of the killing, and the power inequalities that existed between the victim and the perpetrator.[27]

4. *Typologies of Femicide*

Important efforts have been done to understand and classify femicide according to aspects such as the perpetrator, the relationship between the perpetrator and the victim, characteristics of the victim, or even the motiva-

[24] Diana Russel, *Definición de feminicidio y conceptos relacionados,* in Feminicidio, Justicia y Derecho, México: Ciudad de México: Comisión especial para conocer y dar seguimiento a las investigaciones relacionadas con los feminicidios en la República Mexicana ya la procuración de justicia vinculada (2005).

[25] Camilo Bernal Sarmiento et al., *Latin American model protocol for the investigation of gender-related killings of women (femicide/feminicide)*, United Nations (2014).

[26] Russell, *supra* note 24.

[27] Sarmiento et al., *supra* note 25.

tion of the femicidal agent. However, the author considers that the typology proposed by Diane Rusell —based on other valuable classifications—[28] allows to appreciate a more developed effort of classification. Additionally, the general classification suggested by the United Nations Special Rapporteur on violence against women, its causes, and consequences, as well as by the Latin American Protocol Model for Investigating Violent Deaths of Women gives a general idea of the categorization of this phenomenon.

Diane Russell has established two important typologies of femicide based on previous classifications. The first of them answers recent debates on whether a woman can commit femicide.[29] Based on Hindu feminists' definition of femicide,[30] Russell identifies three possible scenarios where women can kill women under a gender motivation.[31] The first of them refers to women acting as agents of patriarchy, which can include dowry-related murders or mothers-in-law who kill their daughters-in-law. Secondly, women acting as agents of the perpetrator, as partners in crime in femicides related to gangs or honored-based killings. And the third, women responding to interests, which can include jealousy, greed, or even ideological rivalry.

The second typology establishes four kinds of femicides based on the link between the victim and the perpetrator.[32] One of them is the femicide committed by an intimate partner, which is usually the husband, the boyfriend, the sexual partner, among others.[33] Another type is called familiar femicide, which can be performed by women siblings. The third type is the one committed by colleagues, friends, or authority figures of the victim, and others. And finally, femicides committed by strangers, which can entail a sexual motivation.

The United Nations Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, has suggested another classification of femicides. Under this typology, femicides can be active or direct, which include "killings as a result of intimate-partner violence; sorcery/witchcraft-related killings; honor-related killings; armed conflict-related killings; dowry-related killings; gender identity- and sexual orientation-related killings; and ethnic- and indigenous identity-related killings".[34] But also, femicides can be passive or indirect because of deaths "due to poorly conducted or clandestine abortions; maternal mortality; deaths from harmful practices; deaths linked to human trafficking, drug dealing, organized crime, and gang-related activities;

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28 *See* Russell, *supra* note 24.

29 *See*, for example: Shalyah Vail, Consuelo Corradi & Marceline Naudi, Femicide Across Europe: Theory, Research and Prevention 154 (2018).

30 In Southeast Asia, hindu feminists use this concept to refer to the "intentional murder of women by men and of women by other women for men's interests". Russell, *supra* note 24.

31 Russell, *supra* note 24, at 140.

32 Russell, *supra* note 24, at 145.

33 According to the creator of the classification, this kind of femicide is the most popular.

34 UN General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Rashida Manjoo, UN Doc. A/HRC/20/16 (May 23, 2012), para. 16.

the death of girls or women from simple neglect, through starvation or ill-treatment; and deliberate acts or omissions by the State".[35]

In addition to the UN typology, the Latin American Protocol Model for Investigating Violent Deaths of Women establishes other modalities of femicide such as intimate, non-intimate, girl killing, committed by relatives, by connection, systemic sexual femicide, due to prostitution or stigmatized occupations, for human trafficking, transphobic and lesbophobic femicide, racist killing and through genital mutilation.[36]

The invention of typologies of femicides is useful to understand the different scenarios of femicide, but also to build a stronger theory around femicide by widening this field of study. At the same time, it also contributes to normalize the use of the term and to promote the debate in different regions and levels of government. However, defining femicide and taking this term from theory to laws and criminal codes to investigate, to sanction, and to produce data about these crimes is still a challenge.

5. *From Theory to Law: A Challenge*

During the last years, the world has gained awareness on the issue of gender-related killings of women and girls. This has entailed the transition from theory to law. However, it is a very long process of transformation that is still not finished and is not uniform throughout different regions. In this process, three important problems can be identified: difficulties in designing a legal concept of femicide, adoption of laws about femicide, and the impunity of femicide cases despite the categorization of femicide as a crime in laws.

Some have raised the difficulties of transiting from the political category of femicide to a legal concept of femicide that fulfills the requirements of a crime under criminal law. For example, considering feminicide —defined as a State crime in which the State participates by remaining inactive—[37] as a crime would hardly fulfill the requirements of punishable conduct under criminal law.[38] According to Alicia Elena Perez Duarte, to establish a crime of femicide in criminal laws, it is necessary to determine the conduct or behaviors that are punishable and to "find ways to integrate the elements of the criminal offense that will set the standard in the investigations and the analyses that must be carried out in criminal proceedings until a conviction is reached".[39] In sup-

[35] *Ibid.* at para. 16.

[36] Sarmiento *et al.*, *supra* note 25.

[37] This concept is the one proposed by Marcela Lagarde.

[38] Alicia Elena Perez Duarte N., *Feminicidio: Traducción de una categoría política en un concepto jurídico*, in Feminicidio, justicia y derecho. México. Comisión Especial para Conocer y dar Seguimiento a las Investigaciones Relacionadas con los Feminicidios en la República Mexicana y a la Procuración de Justicia Vinculada 213 (2005).

[39] *Id.*

port of this, recent debates about the importance and usefulness of adopting a legal concept —and beyond some positions on whether femicide should be developed as a concept of criminal law or not— consider the importance of establishing femicide as a crime to protect women and to make visible an important social problem.[40]

Beyond those problems, efforts to create awareness among States about the need to punish femicide have included the adoption of important documents such as international treaties, protocols, resolutions, declarations, and others.[41] Among those efforts, the inclusion of the term femicide in laws within States has become a reality in some regions such as Latin America. Currently, all Latin American countries, except Cuba and Haiti, have passed laws that criminalize femicide.[42] This is not a coincidence since —according to UN Women— 14 of the 25 countries with the highest rates of femicide in the world are Latin American and Caribbean nations.[43]

However, the considerable extent of impunity in femicide cases in this region has shown that, despite the acknowledgment of femicide in laws and policies, the implementation of laws and protocols as well as the adoption of a gender perspective by the actors involved in investigations is still in the early stages. For example, in Mexico, impunity for the crime of femicide in 2019 was estimated at 51.4%, which implies that about 5 out of 10 femicides were solved.[44] In Argentina, only 7.5% of the cases of femicide obtain a condemnation for the perpetrator,[45] while in El Salvador, only 32.88% of the cases that occurred during 2018 and 2019 were punished.[46]

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[40] *See also*; Alejandra Araiza Díaz, Flor Carina Vargas Martínez & Uriel Medécigo Daniel, *La tipificación del feminicidio en México. Un diálogo entre argumentos sociológicos y jurídicos*, 6 Revista interdisciplinaria de estudios de género de El Colegio de México (2020).

[41] According to FemicideWatch, there are some landmarks documents for the strategy against femicide: UNODC, Study on Global Homicide: Gender-related killings of women and girls, 2019; UNGA, Resolution 68/191 (2014) on Taking Action against Gender-related Killing of Women and Girls; Beijing Declaration and Platform for Action; MESECVI, Follow-up Mechanism to the Belém do Pará Convention, 2004; UNGA, Declaration on the Elimination of Violence Against Women 48/104, 1993; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women "Convention of Bélem do Pará", 1994; Latin American Model Protocol for the Investigation of Gender-related Killings of Women (femicide/feminicide), 2015; Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011; and the Vienna Declaration on Femicide 2012.

[42] *Analysis of Legislation about femicide/feminicide in America Latina and the Caribbean and supplies for a model law*, UN Women, at 34.

[43] Mireille Widmer, Gendered Analysis of Violent Deaths (2016).

[44] Guillermo Raúl Zepeda & Paola Guadalupe Jiménez, *Impunidad en homicidio doloso y feminicidio en México: Reporte 2020*, Impunidad cero 15 (2020).

[45] Esther Pineda, *El Femicidio En Argentina (2014-2017): Un Análisis desde La Criminología Cautelar*, 4 Revista de la Facultad de Derecho y Ciencias Políticas (Cusco) 107–125 (2019).

[46] Mayoría de violencia feminicida ha quedado en la impunidad, ElSalvador.com, July 15, 2019, available at *https://www.elsalvador.com/eldiariodehoy/mayoria-de-violencia-feminicida-ha-quedado-en-la-impunidad/621632/2019/*.

The impunity of femicide is strongly related to the prevalence of sexism and gender stereotypes among the personnel who investigate and judge feminicide. According to the National Commission to Prevent and Eradicate Violence Against Women in Mexico:

> Investigating a femicide requires special sensitivity on the part of all the people involved in the process: from the expert personnel who review and select the evidence at the crime scene, through the people responsible for its transfer and protection; the doctors who perform the autopsy and the respective forensic analysis; the police personnel in charge of investigating the facts until they reach the judges who pass the sentence.[47]

In the European region, the situation is different from the one in Latin America. A recent study of femicide across 26 countries in Europe has shown that there is not even a wide use of a theoretical concept of femicide nor a legal definition of femicide in criminal laws.[48] Additionally, official statistics on femicide do not exist in most European countries and feminicide data sources are extremely varied.[49]

In Africa, and particularly in South Africa, femicide has been adopted recently as a theoretical and advocacy concept. Some studies indicate the use of the concept of intimate partner femicide,[50] and recently, femicide has been the topic for important laws against violence[51] and for social protests and statements[52] against high levels of violence against women.

As we have seen, developing awareness about the phenomenon of femicide and translating it from theory into practice is a process still under way. Unfortunately, the lack of uniformity in how the concept is understood and in the inclusion of this crime in laws hinder the ability of the States to guarantee the production of data and also to grasp the dimensions of the

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[47] *Análisis forense y debida diligencia en la investigación del delito de feminicidio,* Comisión Nacional para Prevenir y Erradicar la Violencia Contra las Mujeres (2018).

[48] Magdalena Grzyb et al., Femicide across Europe: Theory, research and prevention 154 (2018).

[49] *Id.*

[50] *See*, for example: Naeemah Abrahams et al., *Intimate partner femicide in South Africa in 1999 and 2009*, 10 PLoS Med (2013). Naeemah Abrahams et al., *Every eight hours: Intimate femicide in South Africa 10 years later*, 2012 South African Medical Research Council Research Brief 1, 4 (2012). Shanaaz Mathews et al., *Intimate femicide-suicide in South Africa: a cross-sectional study*, 86 Bulletin of the World Health Organization 542–558 (2008).

[51] Hassan Isilow, *S.Africa announces gender-based violence law*, AA (September 7, 2020), available at *https://www.aa.com.tr/en/africa/safrica-announces-gender-based-violence-law/1965718.*

[52] Thuso Khumalo, *South Africa Declares "Femicide" a National Crisis*, VOA (September 20, 2019), available at *https://www.voanews.com/africa/south-africa-declares-femicide-national-crisis*. Oluwadamilola Akintewe, *Why rape and femicide across Africa is more deadly than Covid-19*, OurSecureFuture (August 12, 2020), available at *https://oursecurefuture.org/blog/guest-blog-rape-femicide-africa-more-deadly-covid.*

problem.[53] In most cases, nearly all the initiatives to collect data come from civil society and organizations.

Efforts to deal with femicides are not uniform in all countries and regions, and they are not enough to protect women from gender killings in the local sphere. Even though feminicide is already included in laws and protocols, the refusal of authorities to investigate with diligence and gender perspective are still strong barriers to provide justice for victims. The result is the seeking of justice and arrival of victims to regional systems of human rights, as we will expose later.

III. Regional Systems of Human Rights: Three Different Approaches for Femicide

In the face of a lack of response from State institutions, the global platform created by the international law of human rights is a refuge for those who claim justice, women included. As one of the protagonists of this platform, Regional Systems of Human Rights ("RSHR") are seen by victims as the last opportunity to tell their stories of struggle, to be heard, and to obtain justice and remedies. In response, designed to respond to the needs of specific regions, Regional Systems have the absolute mandate to look after the respect, protection, guarantee, and promotion of human rights in its regions.

Nowadays, Europe, America, and Africa have their RSHR. Within the existent RSHR, regional Courts play an important role in supervising and judging States who have violated human rights. In the case of femicide, and beyond the debates about the difficulties mentioned before about achieving a legal concept in the local sphere, regional Courts oversee whether States parties have protected victim's rights when femicide occurs. After all, femicide is an undeniable severe violation of human rights.

However, the function of regional Courts should not be mistaken for criminal justice. While criminal law investigates and condemns perpetrators of femicide, regional courts of human rights are responsible for declaring responsibility on a State party that breached their international obligations to protect the right to life of women, the right of the families of the victim to access a remedy to investigate femicide, and the right of women not to be subjects of gender-based violence.[54] For that purpose, a regional court should supervise, for example, whether the State party had enough legal frameworks and policies to prevent, to investigate, and to sanction femicide, or whether it investigated with due diligence a disappearance of a woman that was in danger to be killed.

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[53] Shalvah Vail et al., Femicide Across Europe: Theory, Research and Prevention (2018).

[54] González *et al.* ("Cotton Field") *v.* Mexico, Inter-Am. Ct.H.R. (ser. C) No. 205 (Nov. 16, 2009).

Having said that, the court's judgments are the product of the last instance in the international arena, and the impact of those decisions can transform the reality of victims in the national sphere. The RSHR represents an opportunity for victims of femicide to claim justice and reparations; however, each system has addressed femicide in different ways. In the following lines, we will explore the main features and significant differences among the femicide cases issued by the three regional courts.

1. *The European System of Human Rights*

Created by the European Convention on Human Rights (ECHR) in 1954, the European RSHR is responsible to ensure human rights in Europe from a regional dimension. After the suppression of the European Commission of Human Rights in 1998, the European System of Human Rights is formed by a full-time court: the European Court of Human Rights (ECtHR).

Even though it happened 26 years after its creation, in 1985 the ECtHR addressed for the first-time discrimination against women in the decision *Abdulaziz, Cabales and Balkandali v. UK*.[55] Though slowly, after that decision some others came to increase the current jurisprudence body in the matter. However, the ECtHR has been subjected to criticism because of the low number of decisions in this field despite the crisis of violence against women across the European continent.[56] According to that, in the period between 1985 and 2017, the ECtHR had issued only 34 cases in which it has found discrimination against women.[57] The latest number of cases up to December 2019 is 35.[58] Despite the low number of cases related to women's rights, the ECtHR has had the opportunity to tackle the problem of feminicide. The first one was the leading case of *Opuz v. Turkey*[59] that was followed by the cases of *Branko Tomašić and others v. Croatia*[60] and *Bopkhoyeva v. Russia*.[61]

Moreover, one of the most important steps against femicide within this RSHR has been the adoption of the Convention on preventing and combating violence against women and domestic violence, known as the Istanbul

[55] Abdulaziz, Cabales and Balkandali *v.* UK, 1985 Eur. Ct. H.R, available at *http://hudoc.echr.coe.int/eng?i=001-57416*.

[56] Lisa McIntosh Sundstrom et al., Courting gender justice 1-27 (2019).

[57] *Ibid.* at 3.

[58] This is the latest case issued in 2019: Volodina *v.* Russia, 2019 Eur. Ct. H.R, available at *http://hudoc.echr.coe.int/eng?i=001-194321*.

[59] Opuz *v.* Turkey, 2009-II Eur. Ct. H.R. 107.

[60] Branko Tomašić and others *v.* Croatia, 2009 Eur. Ct. H.R, available at *http://hudoc.echr.coe.int/eng?i=001-90625*.

[61] Bopkhoyeva *v.* Russia, 2018 Eur. Ct. H.R, available at *http://hudoc.echr.coe.int/eng?i=001-180849*.

Convention. It was adopted by the Council of Europe Committee of Ministers in 2011, and it is the second treaty —after the Convention Belem do Pará— that addresses specifically violence against women. One of its contributions is the acknowledgment of domestic violence as an endemic crisis across Europe,[62] a topic that is strongly involved in the cases of femicide analyzed by the Court, as will be seen below.

A. *The European Cases of Femicide*

The cases *Opuz v. Turkey,*[63] *Branko Tomašić and others v. Croatia*[64] and *Bopkhoyeva v. Russia*[65] raise three different scenarios in which femicide can occur. Nevertheless, the cases contain at least three common elements shared among them: *a)* the victims sustained a close relationship with the perpetrators, they were their intimate-partners or their family in law; *b)* the femicide occurred within a domestic violence context, something that has been acknowledged as a generalized problem in Europe; and *c)* the authorities did not provide appropriate protection to the victims nor investigated their killings under a gender perspective, that is as gender-based killings.

Having said that, it is important to mention that the ECtHR did not use the term of femicide in its jurisprudence, nor did it address the cases as gender-based killings even though they contain some elements that allow us to suspect that the three killings were manifestations of extreme acts of violence against women based on their gender. As we will notice, in one of them, the ECtHR identified that the killing was a product of domestic violence that was not investigated due to gender stereotypes and tolerance of gender-based violence by the State. In the other two, the Court seemed to ignore some gender and contextual elements that had helped the Court in two ways: a) to identify possible gender-violence and gender-stereotypes as the cause of the victim's deaths and as the reason why the authorities did not investigate those killings, respectively, and b) to order the States to conduct investigations of those killings under a gender perspective in the local sphere.

a. *Case of Opuz v. Turkey*

This case is considered the first and most important case issued by the ECtHR regarding feminicides. In this case, the perpetrator killed his mother-

[62] *What is the Istanbul Convention? Who is it for? Why is it important?*, Council of Europe, available at *https://ec.europa.eu/justice/saynostopvaw/downloads/materials/pdf/istanbul-convention-leaflet-online.pdf.*

[63] Opuz, *supra* note 59.

[64] Branko, *supra* note 60.

[65] Opuz, *supra* note 61.

in-law. The facts occurred within a context of domestic violence between the applicant and the perpetrator, who finally shot the mother of the applicant while she was trying to help her daughter to flee the matrimonial home.

Previously, the applicant, as well as her mother, had reported several incidents to authorities, which included physical violence, an attempt to run over the applicant and her mother with a car leaving the mother seriously injured, and an assault in which the applicant was stabbed seven times.[66] The perpetrator had already threatened his mother-in-law under the justification that she discouraged his wife to return to him, and he wanted to keep his family together. According to the facts, two weeks before the shot, the victims had reported again the risk situation to the authorities, who were already aware of the previous death threats. Nevertheless, the authorities considered that they could not intervene in a "family matter" and did not take protective measures.

The applicant argued that Turkey had failed to fulfill its obligation towards the right to life, the prohibition of torture or inhuman or degrading treatment, the right to an effective remedy, and freedom from discrimination. The Court declared the violation of articles 2, 3, and 14 of the ECHR.[67] In its analysis, the tribunal stated that the authorities had breached their positive obligation to protect the applicant and her mother and determined that: *a)* there was a foreseeable risk that the authorities knew about, and it was not avoided; *b)* the authorities did not adopt protective measures for the victims, and *c)* there was not an effective investigation of the killing, whose criminal investigation extended for more than six years even when the perpetrator had already confessed. All those violations were the result of a general and discriminatory judicial passivity in the State regarding violence against women that contributed to the execution of the gender-based killing.

In general, the Court also noticed that domestic violence was tolerated by the authorities, who did not investigate women's complaints and assumed the role of mediator while tried to convince them to return home and drop their complaints. In this case, femicide was executed within a complex situation of gender violence that was followed by a lack of prevention and adoption of protective measures for the victims by the State party. The State party tolerated the situation under stereotypes and beliefs that the violence suffered by the victim was a family issue. The applicant and her mother had been victims of gender-based violence and even after the femicide was perpetrated it has been kept unpunished.

Concerning reparations, the Court ordered the State to pay monetary compensation to victims for non-pecuniary damages and legal aid.

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[66] The perpetrator had been convicted for those offenses with a three-month prison sentence and a fine.

[67] Opuz, *supra* note 59, at para. 35, 36.

b. *Case of Branko Tomašić and others v. Croatia*

In this case, the femicide was perpetrated by the intimate partner, who shot his wife and his son dead, before committing suicide. According to the facts, the couple had been living in the parent's house of the victim, but after some discussions with siblings, the perpetrator moved out. The victim and her daughter continued living with her parents, and during that time, she alleged on several occasions that the perpetrator had come to her home or had called her to say he was going to kill her and their daughter with a bomb unless she agreed to come back to him.[68] These threats continued for almost two years. The victim filed a criminal proceeding, and he was sentenced to five months' imprisonment and, as a security measure, was ordered to have compulsory psychiatric treatment.[69]

However, once he served his sentence, he shot her partner and his daughter and committed suicide by turning the gun on himself. The ECtHR declared violations to article 2 of the ECHR after an effective investigation of the killings of the victims and a lack of adoption of "domestic laws which protect the right to life".[70] Reaching its decision, the Court noticed three factors: *a)* the authorities were aware of the seriousness of the threats made by the perpetrator to the victim; *b)* during the criminal proceedings, the authorities had failed to order and carry out a search of his premises and vehicle even when they knew about the threats to attack the victim with a bomb; and *c)* the perpetrator did not receive psychiatric treatment in prison nor after his release. According to the tribunal, these elements contributed to the lack of adoption of protective measures for the victim and her daughter.

Another relevant aspect of this case is the fact that the Court did not consider these killings were based on gender violence. In this regard, it is important to analyze the intimate relationship between the perpetrator and the victim from a gender perspective. As the facts indicate, the threats against the victim were made in a context of a discussion where the perpetrator exercised pressure on her to come back to him, which makes evident an asymmetric power relationship in which the perpetrator felt that he had the right to own the victim. Nevertheless, the Court seemed concentrated on the analysis of the psychiatric disorders of the perpetrator without taking into consideration that gender-based violence and psychiatric problems are, in fact, very related.

Again, the ECtHR did not mention a gender element nor femicide at all although there were key elements in the facts to establish that it was femicide. For example, there was an intimate relationship between the perpetrator and

[68] Branko, *supra* note 60, at para. 5.

[69] According to the judgment, the documents submitted showed that his treatment in prison had consisted of conversational sessions with prison staff, none of whom was a psychiatrist.

[70] *Ibid.* at 18.

the victim, the killings occurred after the victim's refusal to come back to the perpetrator, and the perpetrator had the motivation to kill her unless she accepted to continue their relationship.

Regarding reparations, the Court ordered the State to pay monetary compensation to victims for non-pecuniary damages.

c. *Case of Bopkhoyeva v. Russia*

This case is about femicide committed by the family-in-law of the victim. The applicant, who had been in a coma since 2010, was represented by her mother. According to the case, after she was abducted by S who intended to marry her, the victim's mother opposed the marriage, and S's relatives took the applicant back to her mother's house, but the next day, the victim was obliged by her deceased father's siblings to go back because the marriage had been consummated. She was kept living with S's family home as his wife, where she was forced to live in a locked room without being able to communicate with people outside. During that time, she was poisoned by her mother-in-law. She visited the municipal hospital on diverse occasions until she was diagnosed with a vegetative state and was released to her mother's care,[71] who complained to the local police department and prosecutor's office that his daughter had been obliged to live with S's family in "inhuman conditions which led to a deterioration of her health".

Nevertheless, after several complaints and appeals, the authorities refused to open criminal proceedings against S's family and repeatedly dismissed the complaint. The argument not to open a criminal investigation was that the victim's medical case file did not contain information accounting for the cause of her medical condition.

The ECtHR declared violations to article 2 of the ECHR because the complaint containing allegations of ill-treatment suffered by the victim had been kept pending by local authorities for almost 8 years. According to the tribunal, there was a non-effective investigation of the charges of attempt to murder and damages to health. The State party acknowledged the failure of authorities to conduct an effective investigation.

In its analysis, the Court determined that as a part of the positive obligation, the State had a duty to establish a "legislative and administrative framework to provide effective deterrence against threats to the right to life".[72] In the Court's view, the State failure to start criminal prosecution of the most probable direct perpetrators undermined "the effectiveness of the criminal-law mechanism aimed at prevention, suppression, and punishment of unlawful killings". The State had failed its obligation to conduct an effective investigation.

[71] Bopkhoyeva, *supra* note 61, at para. 2, 3.

[72] *Ibid.* at para. 34.

The ECtHR did not go deep into the probable reasons why in the local sphere authorities refused to begin a criminal investigation. According to the local procedures filed by the victim's mother, an appellate court determined that the investigator who refused to start a criminal investigation had failed to question some important witnesses and to establish the cause of the applicant's condition. For example, the mother had previously informed the local police department that the victim had been repeatedly beaten up and deprived of her liberty by her family-in-law.

In this case, although the ECtHR ordered the State to initiate a criminal investigation, it is problematic that the Court did not identify a possible pattern of gender-based violence in this case nor order the State to investigate with a gender perspective. In our opinion, it is possible to notice some elements that —considered under a gender perspective— would allow suspecting that the victim suffered a femicide attempted by her mother-in-law. This could be labeled as femicide committed by a woman. The victim was abducted by S, who abandoned her with his family before moving to another town. She was deprived of her liberty, locked inside a room with no opportunity to communicate with her family and was poisoned by her mother-in-law. It is hard not to see that the circumstances she lived were embedded in entrenched relations of power that deprived her of her right to life.

As reparations, the Court ordered the State to pay monetary compensation to victims for non-pecuniary damages.

2. *The Inter-American System of Human Rights*

Being second in creation —by the American Convention on Human Rights (ACHR)— and integrated by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR), the Inter-American System of Human Rights adopted the protection and promotion of women's rights in the American region as one of its goals. As part of its legal framework, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the "Belem do Pará Convention" was adopted in 1994. This treaty was the first instrument in the world that focused on the problem of violence against women,[73] and is a key instrument used by the IACtHR in femicide cases.

The IACtHR has ruled in several cases related to violence against women. Its first judgment in the matter was in 2006 on the *Case of the Miguel Castro Castro Prison v. Peru,*[74] 30 years after the Court's creation, and since that moment,

[73] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belem do Pará), Mechanism to the Belém do Pará Convention (MESECVI), OAS, 3, available at *https://www.oas.org/en/mesecvi/docs/Folleto-BelemdoPara-EN-WEB.pdf.*

[74] Miguel Castro Castro Prison *v.* Peru, Inter-Am. Ct.H.R. (ser. C) No. 160 (Nov. 25, 2006).

it has decided on 15 cases[75] of gender-based violence. Three of them have addressed feminicide: *Case of González et al. ("Cotton Field") v. Mexico,*[76] *Case of Véliz Franco et al. v. Guatemala*[77] and *Case of Velásquez Paiz et al. v. Guatemala.*[78]

In their femicide judgments, the Court has widely adopted the concept of femicide and promoted the use of the term in the region. Moreover, through femicide cases, the Court has obliged States to acknowledge the problem of feminicide and to create legislation frameworks to prevent, to investigate, and to sanction it. As we will see below, when studying femicide cases the IACtHR has focused on three important aspects: a) the duty of prevention and due diligence during investigations; b) the eradication of gender stereotypes as barriers to femicide investigations, and c) comprehensive reparations for victims.

A. *The Inter-American Cases of Femicide*

a. *Case of González et al. ("Cotton Field") v. Mexico*

This case is the most emblematic gender-related case issued until now by this tribunal. The applicants claimed international responsibility for the disappearance and murder of three women in Mexico. Their bodies were left by the perpetrators in a cotton field in Chihuahua, Mexico, and their families' claims for justice were ignored by the State authorities despite the relationship of those killings with the "existence of a pattern of gender-related violence that had resulted in hundreds of women and girls murdered"[79] called "Dead women of Juarez" (in Spanish "*Las muertas de Juárez*").

The IACtHR declared the violation of different aspects of articles 4, 5, 7, 8, and 25 of the ACHR, as well as articles 7, b) and c) of the Convention of Belem do Pará. In its analysis, the Court determined that the three feminicides "were gender-based and were perpetrated in an acknowledged context of violence against women in Ciudad Juárez".[80] Concerning the duty of prevention, the tribunal observed the performance of the State for two moments (two-moment standard): before the disappearance of the victims and before the discovery of their bodies. The Court determined that, even though the State could not respond unlimitedly for the disappearance of any women or girl (the first moment), the State had a rigorous duty —once it became aware

[75] The most recent case is: Case Guzmán Albarracín y otras *v.* Ecuador, Inter-Am. Ct.H.R. (ser. C) No. 405 (Jun. 24, 2020).

[76] González *et al.* ("Cotton Field") *v.* Mexico, Inter-Am. Ct.H.R. (ser. C) No. 205 (Nov. 16, 2009).

[77] Véliz Franco *et al. v.* Guatemala Inter-Am. Ct.H.R. (ser. C) No. 277 (May. 19, 2014).

[78] Velásquez Paiz *et al. v.* Guatemala Inter-Am. Ct.H.R. (ser. C) No. 307 (Nov 19, 2015).

[79] González *et al.*, *supra* note 76 at para. 2.

[80] *Ibid.* at para. 231.

of the disappearance of a woman— to seek the victims alive, which included investigating with due diligence considering the "real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed".[81]

Moreover, the Court highlighted how gender stereotypes negatively impacted the investigation of the disappearances and death of victims. The tribunal noted that authorities in charge of investigation "made light of the problem and even blamed the victims for their fate based on the way they dressed, the place they worked, their behavior, the fact that they were out alone, or a lack of parental care".[82]

Concerning reparations, and in line with its concept of "integral reparation"[83] the tribunal ordered important measures of non-repetition such as a comprehensive, coordinated, and long-term policy and programs to prevent and investigate cases of violence against women; standardization of protocols and legislation to combat feminicides; pieces of training with a gender perspective for authorities, among others.

b. *Case Veliz Franco et al. v. Guatemala*

The case is related to the disappearance of María Isabel, 15 years old, and the finding of her body. Her mom reported the disappearance, but authorities required her to wait the official term to report her daughter as a missing person. One day later, the body of the victim was found. Diligences to investigate her murder namely a pathology test to find out if she had been raped were not performed. The investigation was conducted with gender stereotypes about the social reputation and behavior of the victim. The Court emphasized that the killing of María Isabel was part of a "violent context" that affected women during the 2000s. In this period not only the number of women killings increased but also the cruelty of the murders that included in some cases severe sexual abuse and mutilation.[84]

The IACtHR found violations to different aspects of articles 1, 4, 5, 19, 24, 8, and 25 of the ACHR, and articles 7, b) and c) of the Convention of Belém do Pará. Throughout the analysis of the case, the tribunal determined that the State had not fulfilled its duty to prevent the murder of the victim. Particularly, considering the duty of prevention (before the disappearance of the victim and before the discovery of her body), the Court noted that when the State became aware that the victim had disappeared (second moment), it did not conduct an immediate and diligent investigation.[85] On the contrary, the Court determined

[81] *Ibid*. at para. 282, 283.

[82] *Ibid*. at para. 154.

[83] *Ibid*. at para. 450.

[84] Véliz *et al*., *supra* note 77, at para. 68.

[85] Concurring opinion of Judge Eduardo Ferrer Mac-Gregor on the case of Véliz *et al*., *supra* note 76, at para. 25.

that gender stereotypes had a "negative influence on the investigation of the case, insofar as they transferred the blame for what happened to the victim and her family members, closing other possible lines of investigation into the circumstances of the case and the identification of the perpetrators".[86]

Concerning reparations, and following its previous case, the tribunal ordered several measures namely requesting to enhance the institutional capacity to combat impunity in cases of violence against women, adopting public policies and institutional programs to eliminate discriminatory stereotypes, and public apologies, among others.

c. *Case of Velásquez Paiz et al. v. Guatemala*

In this case, the State was declared responsible for the lack of protection of the life and personal integrity of Claudina Isabel Velásquez Paiz. Her disappearance was reported by her parents, but the authorities asked them to wait at least 24 hours to initiate an investigation. In spite of the awareness of the authorities about Claudina's disappearance and the context of violence against women, the State did not adopt enough measures to seek and protect her. Her body was found one day after her disappearance with signs of extreme sexual violence[87] but her death was not investigated properly because she was categorized "as a loose woman" due to the place where her body was found, her clothes and piercings, as well as to the fact that she was wearing sandals.

In its analysis, the Court pointed out the duty of States to conduct a diligent investigation under a gender approach attending to the context of violence against women and the imminent risk for the victim, which was known by the State when the parents informed the disappearance of the victim. Particularly, it considered that in cases like this "the prompt and immediate action of the police, prosecution and judicial authorities is essential, ordering prompt and necessary measures to discover the victim's whereabouts".[88]

Concerning stereotypes and the categorization of the victim, the tribunal determined that authorities had acted following gender stereotypes that hinder the execution of a proper investigation. Under this reasoning, the Court remarked that the presumptions made by authorities in categorizing a victim of feminicide as a gang member or a "loose woman" reinforce the stereotypical idea that those women are not "considered sufficiently important to be investigated, while also making the woman responsible for or deserving of being attacked".[89] In this case, the Court mentioned three important aspects

[86] Véliz *et al.*, *supra* note 77, at para. 213.

[87] Velásquez Paiz *et al.*, *supra* note 78 at para. 1.

[88] *Ibid.* at para. 122.

[89] *Ibid.* at para. 183.

regarding the consequences resulting from a lack of gender approach in the criminal investigation of a feminicide.[90]

As in its previous cases, the Court ordered several measures of reparation such as educational programs on non-discrimination and violence against women, institutional strengthening for the investigation of cases of violence against women, and policies, among others.

3. *Africa: the African System of Human Rights and the Economic Community of West African States Court of Justice*

Africa has several regional platforms for ensuring human rights, such as the African RSHR and the Economic Community of West African Court of Justice (ECOWAS Court). The African RSHR, formed by the African Commission and African Court on Human and Peoples' Rights, has powerful instruments to protect women's rights. Some of them are the Banjul Charter and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, called Maputo Protocol. Nevertheless, the African RSHR has been silent about feminicide in the decisions and jurisprudence.

On the other hand, the ECOWAS Court seems to be the leader in this topic. As the judicial institution of the Economic Community of West African States, the ECOWAS Court was empowered to address cases of human rights violations in 2005. It was just the beginning of the journey of the incursion of a regional court into the realm of human rights. Some years after, and despite some doubts about its mandate and suitability,[91] the ECOWAS Court has taken advantage of the African RSHR in gender topics during the last years.[92] In 2018, the ECOWAS Court delivered its judgment on the case of *Mary Sunday v. Federal Republic of Nigeria* that —according to the media—[93] is one of the most important decisions for the promotion of accountability

[90] *Ibid.* at para. 197.

[91] Solomon T. Ebobrah, *Critical Issues in the Human Rights Mandate of the ECOWAS Court*, 54 Journal of African Law 1, 1-25 (2010).

[92] In 2017, the ECOWAS Court delivered a judgment about vagrancy laws that targeted female sex workers. *Dorothy Chioma Njemanze & 3 Ors v. Federal Republic of Nigeria*, ECOWAS Court, ECW/CCJ/JUD/08/17 (2017). Currently, this tribunal is analyzing a case related to a government ban that does not allow pregnant girls to go to school. Sierra Leone: Amnesty International joins legal challenge against a government ban on pregnant girls attending school, Amnesty International (2019) available at *https://www.amnesty.org/en/latest/news/2019/06/sierra-leone-amnesty-international-joins-legal-challenge-against-government-ban-on-pregnant-girls-attending-school/*.

[93] Siobhan Airey, *Landmark decision in the first case of domestic violence brought to ECOWAS Community Court of Justice (ECCJ) (Ruling ECW/CCJ/APP/26/15, 24th January 2017)*, INTLAWGRRLS (2017), available at *https://ilg2.org/2017/02/19/landmark-decision-in-first-case-of-domestic-violence-brought-to-ecowas-community-court-of-justice-eccj-ruling-ecwccjapp2615-24th-january-2017/*.

for women's human rights violations in Africa. This case involves domestic violence in Nigeria.[94]

A. *Case of Mary Sunday v. Federal Republic of Nigeria*

This decision has been described as a "historic milestone"[95] for the promotion of the protection of women's rights, as well as an important step towards the recognition of the violence against women as a violation of human rights. The claim of this case is based on the domestic violence suffered by Mary Sunday. His fiancé, who was a policeman, beat her during an argument. She tried to escape the beatings and ran to a neighbor's house, but her fiancé followed her and "was able to force his way into the kitchen and poured a burning stove with a cooking pot of stew on it on Mary Sunday's head and body, setting her on fire".[96]

The victim claimed, among others, gender-based discrimination and violations of her right to a remedy. Concerning discrimination, the Court refused the victim's allegations and determined that the facts belonged to the private or family sphere and that domestic violence could not be connected to the State participation. The Court remarked that facts on which the Court was invoked were subject to national criminal courts and involved a purely individual and personal responsibility.

The representation of the victim argued that the State had violated the right to a remedy and the right to dignity. According to the claim, the police closed the investigation under the conclusion that it had been an accident, and the facts had occurred in a different way than that related by the victim. The police supported that the victim had accidentally burned herself with the contents that she tried to pour over her fiancé. According to this, the tribunal stated that "given the gravity of the events involving a police officer and the divergence of versions supported by the parties involved, the police should have refrained from drawing definitive conclusions on the case and content themselves with referring the case and the parties to the competent courts to be pronounced".[97]

As we can observe, the Court refused the claims of the victim regarding gender-based discrimination. This determination was established because the Court considered that the episode of domestic violence suffered by the victim —which can be cataloged as an attempt of femicide— had a private nature in which the State could not be involved.

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[94] Mary Sunday *v.* Federal Republic of Nigeria, ECOWAS Court, ECW/CCJ/JUD/11/18 (2018).

[95] Siobhan Airey, *supra* note 93.

[96] IHRDA & WARDC On Behalf of Mary Sunday v. The Federal Republic of Nigeria (Mary Sunday Case), IHRDA (2015), available at *https://www.ihrda.org/2015/12/ihrda-wardc-on-behalf-of-mary-sunday-v-the-federal-republic-of-nigeria-mary-sunday-case/*.

[97] *Ibid.* at 8.

Nevertheless, the Court also did not go deep into the reasons why the police closed the investigation and supported the version of the fiancé while, at the same time, it ignored the claims of the victim. In this line, the tribunal missed some elements that could have helped to corroborate if the police closed the investigation acting under the tolerance of domestic violence or gender stereotypes. Particularly, it is taking into consideration that domestic violence is in most countries a problem that is tolerated and ignored by authorities when victims try to complain.

Concerning reparations, the tribunal ordered the State to pay compensation to the victim for damages.

IV. Europe, America, and Africa: Different Stages of Acknowledgement of Femicide?

As we observed in the previous chapter, the RSHR offers its platforms to victims of gender-based killings to raise their cases and to obtain justice and reparations from States. Nevertheless, each Court has its approach and, in some cases, their approaches to women's killings do not necessarily coincide with the theoretical and legal development of the concept. Some of them do not consider them as gender-based killings and, as the ECtHR and the ECOWAS Court, some do not even use the term femicide for gender-based killings, for example.

The aim of this chapter is to analyze the status of the acknowledgment of femicide as a phenomenon in the RSHR, as well as some of the implications of the different approaches of gender-based killings by the ECtHR, the IACtHR, and by the ECOWAS Court. This includes to identify different aspects: *a)* the adoption of the term, *b)* the identification of women's killings as gender-based killings and the different kinds of femicides, *c)* the way in which the maximalist approach of the IACtHR vs. the minimalistic approach of the ECtHR contribute to establish the obligations of States in cases of femicide and to promote awareness of femicide in their regions, and *d)* the transformation of local realities through reparations for victims.

1. *Three Regions: Different Names but the Same Phenomenon*

As we stated at the beginning of this document, the adoption of the concept of femicide as a political flag but also as a means to name and to define a problem is an important point to discuss, especially when gender-based killings of women is a common problem in the globe. In this regard, the IACtHR is the only regional court that acknowledges gender-based murders of women as femicides. Since its first case, the Court recognized the usage of the term by the victims and experts who qualified the phenomenon of Ciudad Juárez as

femicides[98] and, in its following cases, the Court has also considered that the term *feminicidio* has been incorporated to the Spanish Dictionary by the Spanish Royal Academy.[99] In comparison with the ECtHR and the ECOWAS Court, which do not use the concept at all, this recognition and usage of the term by the IACtHR can be also understood as a transition process of the concept from theory and advocacy to international law. The fact that the IACtHR has adopted and used the concept of femicide has contributed to consolidate the term in the region, and to compel the States of the region to consider this topic in their agendas.

The adoption of this term by a regional court entails a clear understanding of the fact that not all the women murders can qualify as gender-based killings, but that the root of femicide is an extreme manifestation of hate against women. In the future, it would be desirable to have a uniform use of the term in regional courts of human rights to globally understand the phenomenon and to create strategies to understand, analyze, and eliminate it.

However, although the adoption of the term by a Court is important, this is just one of several actions through which the regional Courts can contribute to the elimination of femicides, as we will see below.

2. *Making the Problem Visible: Identification of Gender-Based Killings, and Different Kinds of Femicides*

Beyond the adoption of a specific term to refer to gender-based killings, the identification of a gender-based killing from a non-related-gender killing is an important step to make femicide visible. In this regard, the IACtHR is at this moment the most progressive court before the ECtHR and the ECOWAS Court. This may be because this Court has had the opportunity —through the cases that have reached the system— to study the specific contexts of violence against women that prevail in Mexico and in Guatemala, where advocates and academia have pushed the topic to the international sphere, but also because the IACtHR has also been proactive to identify the specific problematic of gender discrimination. This tribunal has been consistent in the treatment of sexual femicides[100] concerning identifying the cause of femicides, the duties of States as well as the reparations for victims.

However, the ECtHR has not given the same treatment to its cases. This court has barely referred to gender-based murders, even when the three cases previously analyzed contain elements to consider them as gender-based killings. In this sense, which is a very clear example of femicide, the Court high-

[98] González *et al.*, *supra* note 76 at para. 137.

[99] Concurring opinion of Judge Eduardo Ferrer Mac-Gregor on the case of Véliz *et al.*, *supra* note 76, at para. 2.

[100] Celeste Saccomano, *The causes of feminicide in Latin America*, 24 Student Paper Series (2015).

lighted the issue of gender-based discrimination against women as the origin of the murder of the victim's mother in the Case *of Opuz v. Turkey*. However, in the following cases, *Branko Tomašić and others v. Croatia* and *Bopkhoyeva v. Russia*, the Court focused on the mental health diseases of the perpetrator and the lack of an investigative process of the attempt of murder of the victim, respectively. These two cases represent different kinds of femicide according to the typologies of femicide. The first one was an intimate femicide committed by the husband who also suffered a mental disease, and the second one was attempted by the mother-in-law of the victim. Unfortunately, the tribunal missed the opportunity to make visible that even when those crimes occurred in different scenarios, they share the element of discrimination against women.

Something similar occurred with the case analyzed by the ECOWAS Court. In this case, the fiancé of the victim attempted to kill her because of a domestic violence context, and later the police refused to hear the claims of the victim and denied her access to a remedy for the investigations of the facts. Those elements could help the Court to identify that the main problem of the case was violence against women. Nevertheless, the Court decided there were no elements to address the gender discrimination claims of the victim, considering that domestic violence was, in fact, a family matter.

Moreover, the striking differences in the way in which the three tribunals have tackled women's murders could be also related to the use of gender perspectives among judges. It is important to mention that to identify femicide different from a non-gender-related killing, a gender perspective is a necessary tool which is helpful to keep in mind how power relationships among women and men must be taken into consideration when analyzing a woman murder committed by her intimate partner or siblings. In the following years, it would be helpful if regional courts adopt the gender perspective as a necessary tool to improve their capacity to evaluate in a proper way a case of femicide.

3. *Maximalist Approach versus Minimal Approach*

In the case of femicide and the impact of regional courts in its acknowledgment among countries, the approach taken by a tribunal —in this case by the ECtHR, the IACtHR, and the ECOWAS Court— takes on relevance because its judgments will be addressed to a country but will speak to a whole region. According to literature, "a court dealing with human rights cases may take a more minimalist or maximalist approach to adjudication"[101] depending on how far the tribunal can reach in each case. A minimalistic approach entails issuing a brief judgment that refrains from comments and detailed

[101] Álvaro Paúl, *Decision-Making Process of the Inter-American Court: An Analysis Prompted by the in Vitro Fertilization Case*, 21 ILSA J. Int'l & Comp. L. 102 (2014).

evidence, only referring to the main issue of the case.[102] In that sense, it can be said that the ECtHR applies a minimal approach over the cases when it is diligent in the establishment of responsibility of a State without analyzing every branch or detail of the case.[103]

The ECtHR is known for its minimalistic approach. On one hand, in its first and leading case Opuz v. Turkey about gender-based killings, it can be said that the tribunal adopted a moderate position between being maximalist or minimalist. Even though the court did not identify the gender-based killing of the case as femicide but as a result of domestic violence, the ECtHR went deep into the study of the facts and the context of domestic violence in Turkey.[104] It took into consideration reports concerning domestic violence and the situation of women in Turkey and cited previous judgments of the IACtHR and resolutions of the Committee on the Elimination of All Forms of Discrimination Against Women about gender-based violence. Moreover, it established responsibility on the State for violations of the rights to life, to not to be subject of torture or to inhuman or degrading treatments, and to not to be discriminated against, and it briefly ordered compensations for damages.

In its following two cases, however, the ECtHR has applied a minimalist approach.[105] As it can be observed in the judgments for cases *Branko Tomašić and others v. Croatia* and *Bopkhoyeva v. Russia*, the analysis is very brief and focused only on determining the responsibility of States by the facts. The tribunal has not even established a connection between the deaths and affectations to the victims and gender-based crimes, and therefore, it has not been considered essential to study in detail the context of the situation of women in the denounced countries. For these reasons, this Court has not consolidated a strong jurisprudence that can be cited as a reference on the matter.

On the other hand, the aim of the IACtHR to analyze every detail to establish abstract rules in cases shows the maximalist approach adopted by this Court.[106] Particularly, its case *González et al. ("Cotton Field") v. Mexico* is an example of the work of the Court to analyze in detail every aspect of the case and to respond to every claim raised by victims. This judgment is an extensive document that is a rich source of references to experts' opinions, international standards, and a meticulous study of the facts and the sequence of State actions. The echo of the document on the region is still producing several discussions and academic products on the matter.[107] This case initiated a

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[102] *Ibid.* at 102.

[103] *Ibid.* at 103.

[104] Opuz, *supra* note 59.

[105] Branko, *supra* note 60, and Bopkhoyeva, *supra* note 61.

[106] Paúl, *supra* note 101 at 104.

[107] *See*, also: Lucía Melgar, *A 10 años de la sentencia de campo algodonero*, El Economista (Nov. 11, 2019). IACtHR, *Seminario: De la sentencia González y otras Vs. México ("Campo Algodonero") a la de Mujeres Víctimas de Tortura Sexual en Atenco: Avances y pendientes* (March 6, 2020) available at *https://www.corteidh.or.cr/noticias.cfm?n=14*.

strong and consolidated sequence of three cases of femicide in the Americas, followed by the cases of *Véliz Franco et al. v. Guatemala* and *Velásquez Paiz et al. v. Guatemala*. In both cases, the Court analyzed every claim of the victims and the Commission. Also, it mentioned important doctrines and concepts to explain the phenomenon of violence against women,[108] and it referred to statements made by expert witnesses.[109]

Regarding the ECOWAS Court, it can be said that its approach is like the ECtHR. For example, in the case of Mary Sunday v. The Federal Republic of Nigeria, this court limited its brief decision to the arguments of the victim, those from the State, and the performance of the authorities to declare responsibility. The tribunal did not go further to establish a general context in which the case was circumscribed, particularly the context of domestic violence in which the case was embedded.

Considering these differences among approaches, and beyond some considerations about the suitability of one approach over another, the maximalist approach is, without doubt, a powerful tool to increase awareness about femicide in different regions. Hence, the adoption of a maximalist approach is beneficial in the fight against femicide for three reasons: *a)* through a maximalist approach the tribunals can learn and analyze the phenomenon of femicide to guide States to eliminate it in the local sphere; *b)* this approach gives voice to the claims of victims and of the civil society, and shows the complex dynamics in which femicide operates in countries, and *c)* given the relevance of the judgments of regional courts for their regions, the jurisprudence on femicide can generate a great echo. In the case of the IACtHR, its maximalist approach has allowed this tribunal to develop specific States' obligations and reparations.

4. *The Scope of The State's Obligations*

Another important point is how these courts have developed the scope of the State's obligations. According to the analysis, the three Courts agree in all their cases that gender-based violence triggers duties in States.[110] In this regard, the IACtHR has established that States have obligations to respect and to guarantee women's rights[111] and the ECOWAS Court has stated that the State cannot ignore what occurs in the private sphere, especially in violations against personal integrity.[112] Particularly, the duty to guarantee and its specific obligations of prevention and due diligence have been highlighted by regional courts.

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108 González *et al*., *supra* note 76, at para. 143.

109 *Ibid.* at para. 141.

110 Opuz, *supra* note 59, at para. 74.

111 González *et al*., *supra* note 76, at 61-64.

112 Mary Sunday, *supra* note 94, at 7.

Feminicide cases have allowed regional human rights courts to explore the duty of prevention. In cases of feminicides related to domestic violence, the ECtHR frequently ascertains whether local authorities have taken preventive measures as a part of its duty to protect the victims.[113] Concerning that obligation, this tribunal has also remarked the importance of determining whether if authorities were aware of a real and immediate risk to the life of the victims.[114]

The most important development of the scope of that duty has been led by the IACtHR. This Court has developed a double-moment standard to analyze the fulfillment of this duty according to two moments: before the victim's disappearance and before the discovery of the body. Regarding the first moment, the Court has stated that "the eventual failure to prevent the disappearance does not entail per se the international responsibility of the State because" the State does not have an "unlimited responsibility concerning any illegal act against" women and girls.[115] About the second moment, it has mentioned that, in the view of the context of violence, it is important to know whether the State "was aware that a real and immediate danger existed that [the victim] would be attacked".[116] In most of the cases, as a result of the reports initiated by the parents, the authorities were aware of the dangerous situations of victims, but they did not act with due diligence.

Both the ECtHR and the IACtHR have emphasized the specific duty of due diligence of States in cases of violence against women. On one hand, the ECtHR has stated that even when in the context of domestic violence victims are "intimidated or threatened into either not reporting the crime or withdrawing complaints", the State has the responsibility to "ensure accountability and guard against impunity".[117] It has also added that "while a decision not to prosecute in a particular case would not necessarily be in breach of due diligence obligations, law or practice which automatically paralyzed a domestic violence investigation or prosecution where a victim withdrew her complaint would be".

On the other hand, the IACtHR has emphasized the obligation of authorities to act with due diligence during the investigative process. The Court has expressed concern about the application of gender stereotypes during the investigation of a femicide[118] or a disappearance[119] because it can affect the opportune adoption of measures or lines of investigation. Even though the ECOWAS Court has not explicitly mentioned diligence in its jurisprudence, in the case of *Mary Sunday v. Nigeria* this tribunal criticized

[113] Opuz, *supra* note 59, at para. 131.

[114] Branko, *supra* note 60, at para. 50.

[115] Véliz *et al*., *supra* note 77, at para. 139.

[116] *Ibid.* at para. 141.

[117] Opuz, *supra* note 59, at para. 126.

[118] Velásquez Paiz *et al*, *supra* note 78, at para. 170 and Véliz *et al*., *supra* note 77, at para. 209.

[119] González *et al*., *supra* note 76, at para. 147.

the performance of police authorities who dismissed in their police report the urgency of turning the case to the competent authorities.[120]

Although the ECtHR established the context of domestic violence in one of its cases, the IACtHR has paid attention to the regional situation of violence against women in all its cases.[121] The establishment of contexts of gender violence is a tool used by both the ECtHR and the IACtHR, and in both cases, those Courts have adopted reports issued by NGO's and other data provided by official entities.[122] However, the IACtHR is the only one that has been consistent in this practice[123] of reviewing in detail the actions adopted by States to prevent gender-based violence. For instance, in all its cases about feminicide, it has established the general context of the country regarding gender-based violence, something that has helped it to determine how widespread is the duty of prevention of States in cases of feminicide. And, in some cases, the IACtHR has used the data obtained from those contexts to demand States the adoption of measures and to declare the breach of State obligations.[124]

5. *Reparations*

As a part of their mandates to protect and look for the reparations of human rights violations, the three courts ordered States to repair the damage. Nevertheless, there are evident differences in the way in which each court believes that it is an adequate reparation. And there is a different conception about how to avoid the repetition of those violations.

In the case of the ECtHR, this tribunal is not used to order measures beyond the payment to victims.[125] Following that direction, in its cases reviewed the only measure of reparation by damages was the order for States to pay an amount of money for non-pecuniary damages.[126] The position of the ECOWAS Court is similar to this feature. In consequence, it only ordered the State to make a payment for the damages suffered by the victim.

On the contrary, following its concept of *integral reparation*[127] the IACtHR has been consistent while ordering States to adopt measures of satisfaction and guarantees of non-repetition, rehabilitation, and compensation. Accord-

[120] Mary Sunday, *supra* note 94.

[121] For example, in Opuz *v.* Turkey, the ECtHR made an exercise of comparison among laws from diverse countries in Europe. Opuz, *supra* note 59 at, paras. 87-90.

[122] *Ibid.* at paras. 91 to 106.

[123] The IACtHR has followed this structure in all its cases of feminicide.

[124] Velásquez Paiz *et al*, *supra* note 78, at para. 133.

[125] Darren Hawkins & Wade Jacoby, *Partial compliance: a comparison of the European and Inter-American Courts of Human Rights*, 6 J. Int'l L & Int'l Rel. 35, 84 (2010).

[126] Branko, *supra* note 60, at para. 78.

[127] González *et al*., *supra* note 76, at para. 450.

ing to this approach, the IACtHR contributes through its measures for reparations to the transformation of all the State system to prevent the repetition of the acts and to concrete the healing of victims. The Court usually designs an exhaustive plan of reparations for victims that includes the creation of policies,[128] public apologies,[129] banks of data,[130] among others. Particularly, the Court paid special attention to the investigation of femicides and to the design of training, institutional programs and policies to deal with violence against women in the local sphere. For example, in the three cases of femicide, the Court ordered public apologies and public acts of acknowledgment of international responsibility.[131] Additionally, the Court has considered that enacting policies and programs to eliminate discriminatory socio-cultural patterns against femicide is a very important point so that States can fulfill their international obligations to protect women.[132]

Compared to the ECtHR and the ECOWAS Court, the consistent practice of the IACtHR and the scope of its reparations for victims of gender-based killings is by far more useful to tackle the problem of femicide in the local sphere not just for the countries who received the judgment, but also for the countries that are members of the system. It has allowed the IACtHR —in collaboration with civil society and victims who collocate the topic in the system— to use its reparations also as catalyst for the analysis of the problem, the creation of solutions and goals to end femicide.

V. Conclusions

As the most extreme expression of gender-based violence and human rights violation against women, feminicide is a phenomenon that affects all regions across the world, and its acknowledgment, as well as its theoretical and legal development, are still in process. Consequently, from the human rights international law, RSHR are international platforms entitled to protect victims of femicide. Nevertheless, each regional court of human rights has adopted a particular approach to evaluate gender-based killings. Some of these diverse approaches have not been consistent in the identification of gender-based killings in their cases, as occurs with the ECtHR and the ECOWAS Court, while the IACtHR has built a strong and consistent jurisprudence on the matter, which has helped to consolidate the analysis of the phenomenon of femicide in its region. Depending on their maximalist or minimalist approach, all those tribunals have developed the scope of the States' obligations and ordered the

[128] Velásquez Paiz *et al*, *supra* note 78, at para. 262.

[129] *Ibid.* at para. 240.

[130] González *et al*., *supra* note 76, at para. 512.

[131] *See*, for example: *Ibid*. at para. 469; Velásquez Paiz *et al*, *supra* note 78, at para. 240, and Véliz *et al*., *supra* note 77, at para. 257.

[132] Véliz *et al*., *supra* note 77, at para. 274.

reparation of damages. In this regard, although the ECtHR and the IACtHR three courts have addressed specific State's obligations of prevention and due diligence, the ECOWAS Court has been shyer in this respect. However, having adopted a maximalist approach, the IACtHR has developed in a much deeper way the State obligations and the scope of reparations of victims, which has contributed to tackle the problem and to guide States to eliminate femicide in the local sphere.

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AN INVITATION TO MEXICAN COURTS TO ENGAGE WITH TRANSNATIONAL SOURCES OF LAW

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Abstract: *In 2009, Mexican Courts started to engage in a transnational conversation between foreign courts. After Mexico was sentenced by the Inter-American Court of Human Rights (IACHR) in the case of Radilla Pacheco, the Mexican Supreme Court determined, among other things, that all national judges must examine the human rights interpretations issued by the Federal Judiciary and the IACHR, choosing the most favorable and effective interpretation to protect human rights, applying the pro homine principle. Nonetheless, nothing has been said about using case law from foreign courts as persuasive authority to find this "most favorable and effective interpretation of human rights" in Mexico. This article analyses whether Mexican courts should take into account the interpretations of foreign courts as persuasive authority when determining standards and scope of human rights, besides IACHR case law. I evaluate different theories that support the use and citation of foreign precedents, as well as arguments that raise concerns about citing foreign courts to interpret domestic legal frameworks. I conclude that, in order to make use of the most effective principles and standards of human rights, as the pro persona principle suggest, Mexican Courts should consider foreign case law.*

Keywords: *Human Rights, case law, sources of law, persuasive authority, pro persona principle.*

Resumen: *En el año de 2009 los tribunales mexicanos comenzaron a participar en la conversación trasnacional que existe entre tribunales extranjeros. Después de que México fue sentenciado por la Corte Interamericana de Derechos Humanos (CIDH) en el caso Radilla Pacheco, la Suprema Corte de Justicia de la Nación determinó, entre otras cosas, que todos los jueces nacionales deben examinar las interpretaciones de derechos humanos emitidas tanto por el Poder Judicial de la Federación como por la CIDH, eligiendo la interpretación más favorable y efectiva para la protección de derechos humanos, aplicando el principio pro persona. No*

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obstante, nada ha sido establecido en México sobre el uso de la jurisprudencia establecida por tribunales extranjeros como autoridad persuasiva para encontrar esta interpretación más favorable y efectiva sobre derechos humanos. Este artículo analiza si los tribunales mexicanos deberían tomar en consideración, además de la jurisprudencia de la CIDH, las interpretaciones de tribunales extranjeros, como autoridad persuasiva, al determinar los estándares y alcance de los derechos humanos; lo anterior evaluando distintas teorías que apoyan el uso de precedentes extranjeros, así como aquellos argumentos que señalan preocupaciones sobre citar a tribunales extranjeros para interpretar el derecho interno. Al finalizar, concluyo que, con el objeto de aplicar los principios y estándares más eficientes de derechos humanos, como lo sugiere el principio pro persona, los tribunales mexicanos deben considerar la jurisprudencia extranjero al interpretar dichos derechos.

Palabras clave: *Derechos Humanos, jurisprudencia, fuentes de derecho, autoridad persuasiva, principio pro persona.*

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I. Introduction

Since the end of World War II, there has been an ongoing development of human rights protections at international and regional levels. Most countries have signed and ratified human rights charters and treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. Furthermore, supranational human rights courts have been established, and several international organizations and bodies have been created to promote, implement, and protect human rights. The proliferation of human rights law has also taken place within national legal systems, where States have adopted legislation to deal with abuses, drafted bills of rights, or even applied and incorporated international and regional human rights law into their domestic legislation.[1] Along with the legal development of human rights, legal methods of dispute resolution and interpretation have been used as an essential tool to protect and further these legally-based human rights values.[2]

In the last few decades, we have witnessed the Supreme Court of the United States recognize women's right to decide whether to have an abortion,[3] the Constitutional Court of South Africa declare that the State must devise and implement a program to satisfy the right of access to adequate housing,[4] the Supreme Court of Canada strike down a ban on wearing a Sikh kirpan to school as it violated freedom of religion,[5] and so on.

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[1] Christopher McCrudden, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 Oxford Journal of Legal Studies 499-532, 500 (2004).

[2] *Ibid.* at 500.

[3] Roe *v.* Wade, 410 U.S. 113 (1973) (U.S.A.).

[4] South Africa *v.* Grootboom, 2001 (1) SA 46 (South Africa).

[5] Multani *v.* Commission Scolaire Marguerite-Bourgeoys (2006) 1 SCR 256. 167 (Canada).

Nonetheless, for decades, the Mexican courts, like other Latin American courts, did not engage in this constitutional interpretation of human rights.[6] Until recently, there were no judgments dealing with the rights to freedom of expression, non-discrimination, education, health, and housing, among other issues.[7] Mexican courts only began to use modern techniques of constitutional interpretation, acknowledging their role as guarantors of human rights in the last decade of the twentieth century.[8]

Moreover, as I explain further on, in 2009 after the Inter-American Court of Human Rights (IACHR) ruling in the case of *Radilla Pacheco*, Mexico took another step forward in the protection of human rights. The Mexican constitution was amended in order to adjust the hierarchy of international human rights law and the *pro persona* principle was introduced. This principle sets two interpretative rules for Mexican authorities: *i)* human rights provisions norms must be interpreted in the most extensive way possible and human rights limitations in the least restrictive way possible, and *ii)* if there is a conflict or clash between different human rights provisions, either the more protective one or less restrictive one must be adopted.[9]

Furthermore, when the Mexican Supreme Court discussed how the judicial power in Mexico should fulfil the judgment of the mentioned case, the Court, among other things, determined that all national judges must enact a "conventionality control". Thus, they must try to harmonize national provisions with the Constitution and the human rights treaties ratified by Mexico.[10] Additionally, they must examine national human rights interpretations issued by the Federal Judiciary and IACHR, choosing the most favorable and effective interpretation to protect human rights, applying the *pro homine* principle.[11]

Accordingly, the acceptance of the conventionality control by Mexico opened its courts to participate in the transjudicial dialogue of human rights. However, the understanding of such dialogue has been quite limited, as judicial interpretations of human rights provisions in other jurisdictions have been ignored as a source of judicial authority in the interpretation of human rights.

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[6] Jorge Alejandro Amaya, *La Interpretación Constitucional de los Derechos Fundamentales y el Uso del Derecho Comparado,* 12 LEX-Revista de la Facultad de Derecho y Ciencias Políticas 55-71, 65-66 (2014); Miguel Carbonell, *La Interpretación Constitucional de Los Derechos Fundamentales y El Uso Del Derecho Comparado En El Diálogo Jurisprudencial*, in Diálogo Jurispruencial en Derechos Humanos entre Tribunales Constitucionales y Cortes Internacionales 601 (Eduardo Ferrer Mac-Gregor and Alfonso Herrera eds. Tirant lo Blanch, 2013).

[7] Carbonell, *supra* note 6, at 601.

[8] *Ibid.* at 601-602.

[9] Valerio de Oliveira Mazzuoli, *The Pro Homine principle as a fundamental aspect of International Human Rights Law*, 47 Journal of Global Studies 1-9, 5 (2016).

[10] Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Exp. Varios 912/2010 (Méx.).

[11] *Id.*

Consequently, in this article I argue that Mexican courts should not only examine national interpretations and IACHR's case law when interpreting human rights, as the conventionality control doctrine suggests, but they should also engage with foreign human rights case law, as persuasive authority, in order to look for the most beneficial standard for human rights protection or the least restrictive limitation to such rights, as required by the *pro persona* principle.

Before moving forward, it is important to mention that by "Mexican courts" I am referring to all national judges in the United Mexican States, both from the federal judicial branch and the local courts in each of the thirty-two states. Further, by "foreign courts" I mean apex courts from other liberal democratic regimes, as these countries are the ones which have participated in the expansion of human rights and, according to Slaughter, are those States which have "some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system dedicated to the rule of law".[12] Also, as McCrudden found "in the main, it is the judiciaries of liberal democratic regimes that cite each other".[13]

Finally, for the purpose of this article, "human rights" are the goods, services, opportunities, and protections that all humans are entitled to for a life of dignity and the set of practices or conditions for their supply.[14]

The article is organized as follows. In Section II, I justify my claim by explaining the development of the opening-up of the Mexican courts to the transnational dialogue by describing the implications of the conventionality control doctrine and the *pro persona* principle. Furthermore, I describe the process of the adoption of both the conventionality control doctrine and the *pro persona* principle by Mexican courts. In Section III, I analyze the current use of foreign case law for the interpretation of human rights in Mexico. In Section IV I argue that in order to enforce the *pro homine* principle in the best possible way, Mexican courts should take into account, as persuasive authority, foreign courts' interpretations about human rights, engaging with them when they are more favorable or less restrictive than domestic precedents or IACHR's case law. In Section V, I evaluate the reasons for engaging with foreign human rights case law when looking for the most favorable or least restrictive interpretation of human rights. In Section VI, I consider several counterarguments to my claim. Finally, in Section VII I conclude that Mexican courts should acknowledge foreign courts' interpretations when looking for human rights principles and standards, as it is compatible with the understanding of human rights law within its legal system while restricting their

[12] Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 European Journal of International Law 503-538, 511 (1995).

[13] McCrudden, *supra* note 1, at 518.

[14] Jack Donnelly, *Toward a Theory of Human Rights*, 3 Universal Human Rights in Theory and Practice 7-23, 17 (2013).

analysis only to domestic interpretations and IACHR case law, only enforcing the conventionality control, can limit the protection of human rights.

II. The Opening-up of Mexican Courts to the Transnational Dialogue

After the IACHR judgment in the case of *Radilla Pacheco* on June 10, 2011, the Mexican constitution was amended to adjust the hierarchy of international human rights law in Mexico's legal system. In consequence, a new notion of human rights was introduced, as well as a new requirement for their interpretation, the *pro persona* principle. Moreover, Mexican courts accepted IACHR conventionality control doctrine, thus, they opened to participate in the transnational judicial dialogue taking place around the world.

1. *IACHR Conventionality Control Doctrine*

Despite the fact that the IACHR is the primary body in charge of interpreting the American Convention of Human Rights, it has formulated the conventionality control doctrine for judges in the Inter-American system to apply international rules and standards when interpreting human rights within their spheres of competence.[15] This doctrine requires national judges to attempt a harmonization between domestic legislation and the American Convention on Human Rights.[16] Additionally, it mandates that if domestic legislation differs from what the American Convention on Human Rights states, judges shall give preference to the latter, as they are bound by it, as well as by IACHR interpretations.[17]

The conventionality control doctrine is not found in the text of the American Convention on Human Rights. The IACHR first formulated it on September 26, 2011, when deciding the case *Almonacid Arellano v. Chile*, in which the Court found Chile to be responsible for violating Luis Alfredo Almonacid Arellano's rights when enacting and enforcing amnesty laws in favor of the policemen who executed him in 1973 during the Pinochet regime. The Court determined the following:

> 124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force

[15] Jorge Contesse, *The international authority of the Inter-American Court of Human Rights: A critique of the conventionality control doctrine*, 22 International Journal of Human Rights 1168-1191, 1170 (2017).

[16] Max Silva Abbot, *Internal Control of Conventionality And Local Judges : A Faulty Approach*, 14 Estudios Constitucionales 1-18, 2 (2016).

[17] Contesse, *supra* note 15, at 1170.

> within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[18]

Hence, the IACHR established that when a State ratifies the American Convention on Human Rights, their judges are obliged to consider it and discard any domestic legislation that may be contrary to its object and purpose. Thus, they must enact a "conventionality control" among domestic legislation and the Convention, as well as to apply IACHR interpretations of the Convention.

The conventionality control doctrine seeks a jurisprudential dialogue between the IACHR and the domestic courts of the States under its jurisdiction.[19] The IACHR expects national courts to be the first Inter-American judges and for them to harmonize domestic legislation with the standards of the Inter-American system as the "primary and authentic guardians" of the American Convention on Human Rights.[20]

The IACHR has found this dialogue to be very valuable as it has enhanced human rights protection in the region and has even helped develop to the Court's case law.[21] Nonetheless, the role of national judges introduced by the IACHR has not been received in the same way by all States, whereas countries like Brazil and Venezuela have not welcomed this doctrine, as I mentioned, Mexico has adopted it as a rule for the interpretation of human rights.[22]

2. *The Pro Homine or Pro Persona Principle*

The *pro homine* or *pro persona* principle originated in Latin America through the IACHR interpretation of Article 29 (b) of the American Convention on

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[18] Almonacid Arellano *v.* Chile Case, 2006 Inter-Am. Ct.H.R. (Ser. C) No. 154, at 124 (Sept. 26, 2006).

[19] Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, 9 Estudios Constitucionales 531-622, 618 (2011).

[20] *Ibid.* at 620; Yota Negishi, *The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control*, 28 European Journal of International Law 457-481, 458 (2017).

[21] Ferrer Mac-Gregor, *supra* note 19, at 618.

[22] Laurence Burgorgue-Larsen, *Context, Techniques and Effects of the Interpretation of the American Convention of Human Rights*, 12 Estudios Constitucionales, 105-161, 134-135 (2014).

Human Rights,[23] which expresses that "no provision of the Convention shall be interpreted as restricting to the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the States is a party".[24]

In Advisory Opinion OC-1/82 of September 24, 1982, the IACHR considered that, when interpreting human rights, the Court must not exclude other international human rights treaties that are binding to the American States, as it would weaken the full guarantee of rights and would enter into conflict with Article 29 (b) of the American Convention of Human Rights.[25]

Later on, in Advisory Opinion OC-5/85 of November 13, 1985, the Court stated that since Article 29 (b) indicates that no provision of the Convention may be interpreted as restricting the enjoyment or exercise of any right or freedom. Then, if the same situation arises and both the American Convention and another international treaty are applicable, the rule that is more favorable to the individual must prevail.[26]

In this regard, the interpretation principle called *pro persona* is a "hermeneutic criterion", which implies that the broader rule or interpretation must prevail when recognizing individuals human rights, and inversely, when imposing limits to human rights, the less restrictive rule or interpretation must be preferred.[27] Just as in other areas of law we find similar principles such as *favor debitoris* in civil law, *in dubio pro reo* in criminal law and *in dubio pro operario* in labor law, the *pro homine* principle looks to even out the inequalities between the individual and the State, when the former exercises his or her human rights.[28]

Consequently, the interpretation that optimizes the fundamental right, either because it amplifies the scope of protected subjects or the scope of protection of the right, must be preferred over other available interpretations.[29] Thus, the interpreter is not free to choose the rule or interpretation

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[23] Alejandro Rodiles, *The Law and Politics of the Pro Persona Principle in Latin America*, 1 The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence 153-174, 162.

[24] Article 29 (b) of the American Convention on Human Rights.

[25] IACHR. Advisory Opinion OC-1/82 Of September 24, 1982. "Other Treaties " Subject to The Consultative Jurisdiction of the Court (Article 64 American Convention on Human Rights).

[26] IACHR. Advisory Opinion OC-5/85, November 13, 1985. Compulsory Membership in An Association Prescribed by Law for The Practice of Journalism (Articles 13 and 29 American Convention on Human Rights).

[27] Monica Pinto, *El principio pro homine. criterios de hermenéutica y pautas para la regulacion de los derechos humanos* (July 24, 2020), available at *http://repositoriocdpd.net:8080/bitstream/handle/123456789/594/CL_PintoM_PrincipioProHomine_1997.pdf?sequence=1*.

[28] Humberto Henderson, *Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio pro homine*, 39 Revista IIDH 71-100, 91-92 (2005).

[29] Carbonell, *supra* note 6, at 605-606.

they wish, as they must choose the one that best protects the human right in question, regardless of the hierarchy that applicable rules have within a country's legal order.[30]

The concrete and substantial parameters to comply with the constitutional mandate for the interpretation and application of the *pro persona* principle are yet to be fully determined. However, as Gerardo Mata claims, in order to choose which rule or interpretation must be chosen when applying the *pro persona* principle, courts should opt for the one that protects the greatest number of people, for the longest period of time and in the best possible way.[31]

3. *Facts of the Radilla Pacheco Case and the IACHR Decision*

In August 1974, Rosendo Radilla Pacheco was arrested and presumably disappeared by members of the Mexican Army in the state of Guerrero. Radilla's daughters filed four criminal complaints regarding the forced disappearance of their father, all of which were unsuccessful in finding him or identifying, prosecuting, or punishing those responsible for his disappearance.[32]

On 2001, Mr. Radilla's case was presented to the Inter-American Commission on Human Rights, which determined that Mexico had violated the rights of Mr. Radilla and his family, and eventually submitted the case to the IACHR.[33]

The IACHR determined that Mexico violated multiple articles of the Inter-American Convention by failing to conduct an effective and diligent investigation of Mr. Radilla's arrest and subsequent disappearance, as well as to effectively investigate, identify, prosecute and punish the responsible parties.[34] Particularly, by applying military jurisdiction to the case which involved a forced disappearance, the State infringed Mr. Radilla's next of kin's right to a competent court and deprived her of effective recourses to contest his arrest and disappearance.[35]

The Court claimed that, as it had mentioned before, domestic judges shall exercise a conventionality control, thus take into consideration the American Convention of Human Rights and IACHR case law when inter-

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[30] *Ibid.* at 606.

[31] Gerardo Mata, La Interpretación Conforme En El Sistema Constitucional Mexicano, 46 Revista del Instituto de la Judicatura Federal, 213-247, 235-236 (2018); Gerardo Mata, El principio *pro persona*: la fórmula del mejor derecho, 39 Revista Mexicana de Derecho Constitucional 201-228, 211 (2018).

[32] Radilla-Pacheco *v.* Mexico, Inter-Am. Ct.H.R., 2009 (Ser. C) No 209 (November 23, 2009).

[33] *Id.*

[34] *Id.*

[35] *Id.*

preting national rules; therefore, the competence criteria of military jurisdiction in Mexico should be adjusted to correspond with the principles established in IACHR case law.[36] Moreover, the Court declared that Mexico had to reform its Military Criminal Code, in a reasonable period of time, in order to make it compatible with the international standards of the field and the American Convention of Human Rights.[37]

4. *The Incorporation of the Conventionality Control Doctrine and the Pro Persona Principle in Mexico*

A. *Amendment of the Mexican Constitution*

As mentioned, after the ruling on the case of *Radilla Pacheco*, the Mexican constitution was reformed, ushering in a new appreciation of human rights law. Article 1 now declares the following:

> 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.[38]
>
> 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.[39]
>
> 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. As a consequence, the State must prevent, investigate, penalize, and rectify violations to Human Rights, according to the law.[40]

B. *The Decision in the Varios 912/2010 File*

The amendment of the Constitution, as well as its scope and importance, was interpreted by the Supreme Court in the resolution of the "Varios 912/2010" file, where the Mexican Supreme Court analyzed the role of the Federal Judiciary in the enforcement of the judgment issued in the case of *Radilla Pacheco*.

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[36] *Id.*

[37] *Id.*

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

[39] *Id.*

[40] *Id.*

The Supreme Court concluded, among other things, that the Supreme Court cannot review, analyze, or decide whether an IACHR judgment is correct or appropriate.[41] Moreover, the judgments issued by IACHR in cases where the Mexican State is one of the parties are binding, regarding both the final decision and the merits such resolutions may contain. According to the Supreme Court, this interpretation follows the fact that in the dispute before the IACHR, the Mexican State has the opportunity to participate and defend itself against the victim's claims.[42] Besides, Mexico has accepted IACHR jurisdiction under the terms stated in Articles 62.3, 67, and 68 of the American Convention of Human Rights, committing to comply with its decisions.[43]

Moreover, the Supreme Court decided that the IACHR case law dictated in cases where the Mexican State was not a party is not binding but must be considered as guiding when the standards and scope of human rights protection it establishes are broader and more favorable to the person than those established by the Mexican Judiciary.[44]

Besides, one of the primary obligations arising from the *Radilla Pacheco* case for Mexican Judicial Federal Power is that all judges must thereafter enact the conventionality control, between national legislation and the American Convention on Human Rights, within their constitutional power.[45] The Supreme Court declared that this obligation is consistent with the amendment to Article 1 of the Constitution, which mandates that all authorities are obliged to protect the human rights contained in the Constitution and the international human rights treaties to which the Mexican State is a party, choosing the most favorable interpretation, as the doctrine known as the *pro persona* principle suggests.[46]

Finally, the Supreme Court reinterpreted Article 133 of the Constitution,[47] in order to harmonize it with the amendment of Article 1. Consequently, the Supreme Court declared that, when interpreting human rights issues, all judges must avoid applying unconstitutional or unconventional national laws.[48] Nonetheless, not all courts are empowered to make a general declara-

[41] Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Exp. Varios 912/2010 (Mex.).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Article 133 of the Political Constitution of the United Mexican States declares: "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 provision that may appear in the constitutions or laws of the states", available at *https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente*.

[48] *Id.*

tion about such unconstitutionality or strike down unconstitutional provisions since such power is reserved only for the Federal Judicial Power under the terms of the Constitution.[49]

C. *The Decision in File 293/2011*

Later on, in the "Contradicción de Tesis 293/2011" file, when deciding between contradicting interpretations issued by two Federal Courts regarding the hierarchy of international human rights law in Mexico's legal system, as well as the conventionality control doctrine scope and the obligatory nature of IACHR case law, the Supreme Court resolved that the human rights contained in the Constitution and international human rights treaties form a "constitutional regularity control" for domestic laws.[50] Nonetheless, if there is an express restriction in the Constitution, such restriction must be applied even if there is a more protective provision in an international human rights treaty.[51]

Most importantly, the Supreme Court determined that IACHR case law is binding for Mexican judges when it is more favorable for the protection of human rights than national interpretations, even in cases where the Mexican State has not been a party, because such interpretations determine the content of the human rights contemplated in the Inter-American Convention of Human Rights.[52]

III. The Current Use of Foreign Courts' Case Law by Mexican Courts

Following the events described in Section II, at the present time, all judges must analyze the compatibility of national norms and the Inter-American Convention of Human Rights, its Protocols, and IACHR case law.[53] Furthermore, the interpretations of the IACHR are considered binding for Mexican courts whenever they are more favorable to the person than domestic ones, regardless whether Mexico was a party in the dispute that generated the interpretation or not.[54] Thus, judges are obliged to analyze and acknowledge the interpretations issued by both the Mexican Judiciary and the

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[49] *Id.*

[50] Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Exp. Contradiccion de Tesis 293/2011 (Méx).

[51] *Id.*

[52] *Id.*

[53] Ferrer Mac-Gregor, *supra* note 19, at 531.

[54] Alfonso Herrera, *El Dialogo Jurisprudencial de La Suprema Corte Mexicana Con El Derecho Internacional de Los Derechos Humanos tras las Reformas Constitucionales del 2011*, in Diálogo Jurispruen-

IACHR to weigh which one is more favorable and beneficial to the right that must be protected. [55]

In this regard, the conventionality control introduced in Mexico, what is known as "transjudicial dialogue",[56] which essentially means the practice performed by domestic courts to incorporate the findings of foreign courts into their own decisions.[57] However, I believe that the use of such dialogue has been quite limited, as judicial interpretations of human rights provisions in other jurisdictions have been ignored as a source of principles or standards in the interpretation of human rights.

Notwithstanding the fact that the *pro persona* principle mandates that judges must interpret human rights in the most favorable way possible and limitations of rights on the least restrictive manner, both the Mexican Constitution and the Supreme Court have only considered the conventionality control doctrine as a tool for judges to decide which interpretation should be applied as being more beneficial for the protection for rights. Judges must analyze whether to apply the interpretations issued by the Mexican Federal Judiciary or those dictated by the IACHR.

Even after the analysis made in the "Varios 912/2010" file on the meaning and scope of the *pro persona* principle, the Supreme Court also declared that, when confronted with multiple possibilities to resolve a human rights issue, the *pro persona* principle obliges judges to select the provision or interpretation that protects the rights in the broadest scope.[58] Consequently, judges must employ the legal norm or interpretation that embodies the broadest protection, or the provision that least restricts the exercise of the right.[59] Nevertheless, the Supreme Court has not declared anything regarding the possibility of Mexican courts to look beyond national and international in-

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cial en Derechos Humanos entre Tribunales Constitucionales y Cortes Internacionales 874-875 (Eduardo Ferrer Mac-Gregor and Alfonso Herrera eds.Tirant lo Blanch) (2013).

55 *Ibid.* at 874-875.

56 Slaughter, *supra* note 12, at 524; Naomi Hart, *Complementary protection and transjudicial dialogue: Global best practice or race to the bottom?*, 28 International Journal of Refugee Law 171-209, 172 (2016); Antje Wiener & Philip Liste, *Lost Without Translation? Cross-Referencing and a New Global Community of Courts*, 21 Indiana Journal of Global Legal Studies 263, 267 (2014); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 University of Richmond Law Review , 29 (1994); McCrudden, *supra* note 1, at 527.

57 Hart, *supra* note 56, at 172.

58 Principio pro personae. congruente con su interpretación por la suprema corte de justicia de la nación y la corte interamericana de derechos humanos, en los procedimientos o juicios en los que, además de los entes estatales, estén involucradas personas (partes) con intereses contrarios, debe aplicarse velando por que todos los derechos humanos de éstas sean respetados y no solamente los de quien solicita su protección. Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro V, Tomo 1, Febrero de 2012, Tesis 1a. XXVI/2012 (10a.), p. 659 (Mex.).

59 *Id.*

terpretations of human rights to find the most favorable understanding and scope for their protection.

As a result, Mexican courts only have the legal obligation, as mandated in the constitution and interpreted by the Supreme Court, to rely on national case law and IACHR precedents to interpret human rights and making sure to apply the one that is more favorable and beneficial to the individual, thus exercising the conventionality control doctrine.

However, as the Chief Justice of the Norwegian Supreme Court pointed out: "it is the duty of national courts-and especially of the highest court in a small country-to introduce new legal ideas from the outside world into national judicial decisions".[60] Thus, as I will argue hereunder, Mexican courts should consider foreign case law and precedents as persuasive authority to find the most protective or favorable interpretations of human rights.

IV. The Use of Foreign Human Rights Interpretations to Enforce the Pro Persona Principle

I propose that, in order to enforce the *pro persona* principle in the best possible way, Mexican courts should take into account, as persuasive authority, foreign human rights law interpretations, engaging with them to analyze if they provide a more favorable understanding of human rights or a less restrictive limitation to such rights than binding domestic or international precedents, including IACHR case law. Indeed, by just applying the conventionality control, examining only national interpretations and IACHR case law, judges may be limiting the protection of human rights when there might be even more progressive views elsewhere.

Dworkin argues that in disputes about rights and obligations, lawyers "make use of standards that do not function as rules but operate differently as principles, policies, and other kinds of standards".[61] Whereas policies set goals to be reached for the improvement in some economic, political, or social feature of the community, principles are standards to be observed because they are a requirement of justice, fairness or some other dimension of morality.[62] Furthermore, principles are different from legal rules. Dworkin claims: "rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision".[63] On the other hand, principles do not set out legal consequences that follow automatically when the conditions provided are met; they state a reason that

[60] Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l LJ 191, 195 (2003).

[61] Ronald Dworkin, Taking Rights Seriously 22 (Gerald Duckworth & Co Ltd., 1977).

[62] *Ibid.* at 25.

[63] *Ibid.* at 24.

argues in one direction but does not necessitate a particular decision.[64] Even though they might incline the court to consider them in its decision, principles must be weighted with other policies, principles, and standards.[65]

There is no formula to test how much or what kind of institutional support is necessary to make a principle a legal principle, but when arguing its value judges must confront it "with a whole set of shifting, evolving and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all of these to contemporary moral practices and hosts of other such standards".[66] Waldron believes that deep background principles, legal principles, may be inferred not from only one body of positive law, as Dworkin argued, but also from multiple systems together.[67] According to Waldron, principles can be found in a whole array of legal systems, as "laws common to all mankind" or "*ius gentium*".[68]

Furthermore, Waldron proposes that courts should adopt this global consensus not only because of its normative force, but because they can work as persuasive precedents; thus, courts are bound to take them into account and give them the appropriate weight, though not binding weight as their balance with other standards might incline courts to rule another way.[69]

The present analysis takes Waldron's claim concerning the sources where principles and standards to interpret human rights may be found. I propose that Mexican courts should also look for these principles in foreign courts' interpretations, not only in domestic and international law, as the conventionality control doctrine intends. However, unlike Waldron I do not believe they should do it to find if there is a *ius gentium*, but to explore if there is a more protective understanding of rights or a less restrictive comprehension of their limits, and consequently apply such interpretation, as the *pro persona* principle suggests.

Furthermore, similar to Waldron's theory, I propose that Mexican courts should cite foreign case law as a persuasive precedent or authority, engaging with principles and standards of human rights established by foreign courts, weighting them with relevant national and international principles and standards in each case.

There are two kinds of "authority" in judicial interpretation: "binding authority" and "persuasive authority". Binding authority refers to the sources of law that courts are legally obliged and bound to apply and follow.[70] In con-

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64 *Ibid.* at 25.

65 *Ibid.* at 25-27.

66 *Ibid.* at 40.

67 Jeremy Waldron, "Partly Laws Common to All Mankind": Foreign Law in American Courts 63-67 (Yale University Press, 2012).

68 *Ibid.* at 63-67.

69 *Ibid.* at 59-62.

70 McCrudden, *supra* note 1, at 604.

trast, persuasive authority refers to other material that might be relevant to the decision to be made by the court, but its application is not compulsory by the hierarchical rules of the national system.[71] The use of persuasive authority gives those in charge of the application of law freedom in the choice of sources of law to be used, which may sometimes be the only real alternative to arbitrary conduct or could even be more effective than to follow binding, but unpersuasive, law.[72]

It is important to mention that there are three different positions towards using transnational precedents and law: resistance, convergence, and engagement. The resistance standpoint defends that only national legal provisions should be considered when interpreting law, while foreign and international law are rejected as sources of authority.[73] The posture of convergence lies in the idea that national law should be identifiable with transnational and international provisions. [74] Finally, the engagement point of view is founded on the belief that courts should deliberate either to harmonize or reject transnational provisions when interpreting domestic laws.[75]

Additionally, according to Vicki Jackson, there are two ways of engaging with foreign law, the deliberative and the relational models.[76] In the deliberative model, foreign law and experience are used to examine national traditions and possibilities by analyzing the reflection of others, either to identify differences or reveal similarities,[77] such as in the case of *Lange v Australian Broadcasting* on defamation and political figures when the High Court of Australia rejected the US Supreme Court's approach in the case of the *New York Times v Sullivan,* because the Australian constitutional context was very different from the American one.[78] On the other hand, the relational model includes a rational presumption in favor of considering international or foreign law, either because there is an explicit constitutional mandate to consider it, or because judges feel an obligation to acknowledge or apply it.[79] A useful example is the Constitution of South Africa, which, in its Article 39, declares that when interpreting the Bill of Rights, courts, tribunals and forums must consider foreign and international law.[80]

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71 *Id.*

72 H. Patrick Glenn, *Persuasive Authority*, 32 Revue de Droit de McGill 262-298, 263-264 (1987).

73 Vicki Jackson, Constitutional Engagement in a Transnational Era 8 (Oxford University Press, 2010).

74 *Ibid*. at 8.

75 Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 Harvard Law Review 109-128, 9 (2005).

76 Jackson, *supra* note 73, at 72.

77 *Ibid.* at 73-77.

78 Lange *v.* Australian Broadcasting Corporation (1997) 189 CLR 520 (Australia).

79 Jackson, *supra* note 76, at 77-78.

80 Article 9 (1) (c) of the South African Constitution, 1996.

Whereas Mexican courts must apply the relational model to consider international human rights law and IACHR case law when they are more beneficial to the individual than domestic law, according to the Supreme Court's interpretation of Articles 1 and 133 of the Constitution, I propose that they should use the deliberative mode of engagement with foreign courts interpretations of human rights. Consequently, when interpreting human rights Mexican courts should not only apply the conventionality control, *i.e.*, choosing only between domestic interpretations or IACHR case law to find the most beneficial understanding of rights; they should also acknowledge foreign decisions as persuasive authority.

The IACHR has mentioned that the most favorable protection must be chosen if doing so does not alter the country's legal system.[81] Consequently, foreign courts' interpretations should not be considered binding; even if they are the most protective, they should always be weighted with relevant national and international principles and standards.

That said, the use of foreign courts' human rights case law by Mexican courts in order to apply the most favorable understanding and protection of rights is not incompatible with the current understanding of human rights and their interpretation in Mexico. As former IACHR president Eduardo Ferrer Mac-Gregor has claimed, the IACHR interpretations are a "minimum standard" for national judges, which should be followed but can be set aside when there is a more protective interpretation.[82] Thus, the conventionality control can be expanded by other national, international, and foreign interpretations.

Likewise, Gerald Neuman argues that the "saving clauses" or "favorable to the individual" clauses (such as the one contained in Article 1 of the Mexican Constitution and Article 29 of the American Convention) "are intended to ensure that international protection operates as a floor, not as a ceiling, for human rights".[83] Hence, if the most protective or favorable interpretation is found in a foreign precedent, Mexican courts should consider it as persuasive authority when interpreting human rights.

Slaughter claims that municipal institutions in liberal democratic States, in particular domestic courts, rather than international institutions, are the reason why a "new transnational legal order" is being constructed and enforced.[84] Further, human rights conflicts are discussed much sooner before domestic courts than before international courts, such as the IACHR.

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[81] Viviana Gallardo v. Costa Rica, 1981 Inter-Am. Ct.H.R. (Ser A) No. G 101/81, at 16 (June 30, 1983).

[82] Ferrer Mac-Gregor, *supra* note 19, at 395.

[83] Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 Stanford Law Review 1863-1900, 1886 (2003).

[84] Slaughter as cited in: Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter's Liberal Theory of International Law*, 18 Leiden Journal of International Law 1-30, 2 (2005).

Hence, foreign courts might have a progressive understanding of the scope of protection of a certain right that has not even been discussed by the IACHR.

In this regard, Mexican courts should engage with such foreign courts' standards of protection when analyzing human rights issues in order to help them determine the most protective or least restrictive interpretation, as the *pro persona* principle suggests.

As Fredman argues, in disputed human rights cases there may not be only one right answer, but the concern that judges will impose their own subjective beliefs and values can be overcome by an analysis that is persuasive and balances a variety of alternative solutions, for which comparative materials are a significant contribution.[85] If courts in other jurisdictions have faced similar human rights problems and have already discussed and weighed the arguments in different directions, these should be taken into account by Mexican courts as part of their decision-making process.[86]

V. Reasons to Consider Foreign Case Law as Persuasive Authority

There have been different reasons to support the use and citation of foreign precedents in deciding the scope, content, and limits of human rights. However, not all of them are convincing reasons to rely on foreign case law when trying to look for principles that provide standards about the most protective or least restrictive interpretation of human rights, as the *pro persona* principle suggests. In this section I will analyze each of these reasons.

1. *Universalism*

One reason for using foreign human rights law interpretations is based on the theory that human rights are universal,[87] meaning that all constitutional courts are figuring out how to identify, interpret, and apply the same set of provisions that are transcendent legal principles and have existed before positive rules of law and legal doctrines.[88] Consequently, judges should harmonize these universal values when interpreting human rights because of their "supra-positive" aspect.[89] As Posner has argued, "citing foreign deci-

[85] Sandra Fredman, *Foreign Fads or Fashions? the Role of Comparativism in Human Rights Law*, 64 International and Comparative Law Quarterly 631-660, 634 (2015).

[86] *Ibid.* at 641.

[87] *Ibid.* at 636.

[88] Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Indiana Law Journal 819-892, 825 (1999).

[89] Neuman, *supra* note 83, at 1868.

sions as precedents is to flirt with the idea of universal natural law or to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience".[90]

However, accepting the universalism theory is to assume that there is only one right answer to human rights issues and their interpretation, which is not possible as there is little, if any, consensus worldwide, or even within societies, as to which rights are considered human rights, as well as what their content, scope, limits, and interpretation are. As Fredman claims, even if there were universal human rights values, it would still be necessary to determine their application to the local context of each jurisdiction.[91] Thus, it is unlikely that we will find universal answers to decide how human rights must be balanced, limited, and weighed with other conflicting rights.[92]

Consequently, to affirm that Mexican courts should apply a particular foreign case law, when trying to find the most beneficial interpretation of a right, as demanded by the *pro persona* principle by claiming that such interpretation is a universal standard would be a flawed and unfounded argument. Foreign judgments are not cited because they lay down a discovered truth or a higher law, but rather because courts in other jurisdictions have struggled with the same conflicting principles.[93]

Nevertheless, universalist arguments need not be so profoundly skeptical and dismissing them solely because they have been equated to natural law theory would be precipitated.[94] Certainly, the law is not merely a body of rules, but a body of principles that are not inherently limited to a particular society.[95] Thus, if the same kind of problems arise in different legal systems and are resolved similarly, as Choudhry argues, a foundation for the grammar and theoretical concepts of a universal legal language can eventually emerge.[96]

In that case, if the solutions proposed by different legal systems regarding human rights have gained global recognition and are more progressive than national or international case law, Mexican courts should then apply such standards when deciding similar human rights cases. Comparative case law can offer a convenient shortcut to attaining the same goal, protecting the individual against human rights violations.[97]

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90 Richard A. Posner, *A Political Court*, 119 Harvard Law Review 31-102, 86-87 (2005).

91 Fredman, *supra* note 85, at 637.

92 *Id.*

93 McCrudden, *supra* note 1, at 528.

94 Michael Elliot, *Rethinking the Use of Foreign Law in Adjudicating Rights Claims : Paying Heed to the Importance of Analytical Methodology*, 30 National Journal of Constitutional Law 107-146, 117 (2012); Choudhry, *supra* note 88, at 825.

95 Elliot, *supra* note 94, at 117.

96 Choudhry, *supra* note 88, at 834.

97 *Ibid.* at 835.

2. *Fairness*

Fairness (treating like cases in the same way) is one of the typical reasons for courts to apply national judicial precedents or case law.[98] Therefore, one might argue that applying standards that have been already discussed and accepted by foreign courts would be the fair thing to do.

Bronaugh discusses that it is unclear why precedents should only be followed when similar cases have been resolved within a particular jurisdiction, being that relevant similarities can also be obtained from across national borders.[99] He believes that following a precedent that derives from a foreign court can lead us to a fair outcome and to not follow it can result in an unfair decision, as one cannot "say that the «same things» never happen in other legal systems".[100]

However, as McCrudeen explains, we cannot justify the appropriateness of citing foreign precedents as persuasive authority only because of the similarity of the cases, especially since for the principle of "fairness" to operate, the judge must have an obligation to treat those similar cases in the same way.[101]

Mexican courts have the legal duty to solve similar cases in the same sense, as well as to apply the case law of higher court cases that are alike, respecting the principle of "legal certainty" and "fairness". However, as I previously argued, the *pro persona* principle does order Mexican courts to look for the most protective and beneficial interpretation of human rights. Consequently, if a foreign court has already issued a more progressive interpretation than those that are binding to Mexican courts in a similar human rights case, it would certainly be fair to apply it, not because courts should treat cases in the same manner foreign courts do, but because the standard of protection is higher than the one available in the binding sources of authority.

3. *Ius Gentium*

Waldron defines *ius gentium* as "a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems".[102] As previously discussed, Waldron believes that some legal principles can be found in multiple legal systems taken together, thus their presence in these different legal systems will mean that they are "laws com-

98 McCrudden, *supra* note 1, at 513.

99 Bronaugh as cited in McCrudden, *supra* note 1, at 513.

100 McCrudden, *supra* note 1, at 513.

101 *Id.*

102 Jeremy Waldron, *Foreign Law and The Modern Ius Gentium*, 119 Harvard Law Review 129-147, 133 (2005).

mon to all mankind."[103] However, this *ius gentium* does not derive from natural law, but from reaching the same legal answer to similar legal problems.[104]

Consequently, courts should behave towards this transnational consensus the same way health authorities would deal with a new disease, looking abroad to see what scientific conclusions and strategies have emerged, have been tested, and have been mutually validated in other countries.[105]

However, Waldron's theory has been opposed by critics such as Fredman, who argued that the view of *ius gentium* might be problematic as there is not a well-defined set of commonly shared principles.[106] Nonetheless, as Waldron claims, *ius gentium* should be considered as a persuasive precedent; thus, the court must take it into account and give it appropriate weight even if it rules differently.[107]

I believe that if various domestic legal systems share a common answer to a common problem or an *ius gentium*, Mexican courts should give it the appropriate weight when deciding on human right cases. Nonetheless, the *pro persona* principle would require them to apply it only if it is a more favorable interpretation or provides a less restrictive standard than the ones established by domestic courts or the IACHR.

4. *A Global Framework*

Slaughter argues that judges of liberal democracies should participate in a transnational process to articulate provisions for other judges to enforce.[108] She believes that a global set of human rights should be framed by the collective judicial deliberation among national courts through the acknowledgment and use of each other's decisions.[109] In consequence, such transjudicial communication would lead to an emerging "global jurisprudence" created by a "global community of courts".[110]

Slaughter's account has been criticized because it assumes that courts of liberal democratic States operate systematically and that there is homogeneity among liberal regimes, being that although they may share some principles such as the separation of powers, judicial independence, and impartiality, they are also very different in several ways.[111] Furthermore, not all courts have welcomed the use of foreign law and interpretations, and they should be careful

103 Waldron, *supra* note 67, at 63-67.

104 Waldron, *supra* note 102, at 143-145.

105 *Ibid.* at 143.

106 Fredman, *supra* note 85, at 640.

107 Waldron, *supra* note 67, at 61-62.

108 Slaughter, *supra* note 56, at 121-122.

109 *Id.*

110 Slaughter, *supra* note 60, at 202.

111 Mills & Stephens, *supra* note 84, at 21.

when considering its applicability in each case since a legal model that has succeeded in one jurisdiction might not work in a different legal environment.[112]

In this regard, Mexican courts should take part of this transnational judicial dialogue of human rights, not only exercising the conventionality control, but also considering precedents from foreign courts. Nevertheless, they should not do it under the presumption that they must converge with foreign interpretations because of the idea of a global case law about a particular human rights-related standard. Instead, they should measure domestic practices and IACHR case law with foreign precedents to evaluate if they are actually more beneficial to the individual, engaging with such interpretations and principles to define whether it is appropriate to apply them in a particular case, recognizing the values, ideals, principles, practices, and institutions important to Mexican society.

5. *Persuasiveness or Legitimacy*

Another reason to rely on foreign case law to interpret human rights is based on the view that judgments will have greater legitimacy.[113] Slaughter has pointed out that courts might borrow an idea or a legal solution from a foreign decision if they believe it will strengthen their decision.[114] Judges want to be acknowledged for doing a "good job", thus, they might cite a foreign case because it contributes to convincing their audience of the appropriateness of their decision.[115]

While foreign constitutional court decisions may be helpful in the most controversial choices and offer hope of greater impartiality, the legitimacy of looking to foreign experience will vary depending on the issue.[116] A legitimate legal argument requires the wise use of these foreign sources, including acknowledging the context of the decision and recognizing differences of opinion.[117] Courts must be aware that constitutional democracies have quite different approaches to abortion, hate speech, criminal procedure, and public support for religion.[118] However, this does not mean they should not look at foreign judgments to resolve the cases upon them, but simply that it requires an issue-by-issue, as well as a thoughtful and well-informed, analysis.[119]

In this sense, Mexican courts must be cautious when comparing cases using a foreign understanding of human rights when looking for the most pro-

[112] Fredman, *supra* note 85, at 639.

[113] Jackson, *supra* note 73, at 46.

[114] Slaughter, *supra* note 56, at 119.

[115] McCrudden, *supra* note 1.

[116] Jackson, *supra* note 75.

[117] *Ibid.* at 126.

[118] *Ibid.* at 128.

[119] *Ibid.* at 128.

tective interpretation. The persuasiveness of their arguments and legitimacy of their decision will also depend on the analysis of the context of the foreign decision and its applicability to the case.

6. *Text Similarities*

An additional motive for using foreign interpretations follows the presumption that legal texts share the same meaning and autonomy. Especially since constitutional ideas were not developed on their own, constitutions have been designed and influenced by each other.[120] Furthermore, bills of rights have been inspired by human rights covenants; consequently, it can be assumed that a transnational consensus regarding human rights might be reached, as nations commit themselves to a shared set of principles, values, and aspirations.[121] Hence, interpretations issued by other courts could be beneficial.[122]

Mexican courts should indeed look into how foreign courts have interpreted similar legal texts regarding human rights provisions. Nonetheless, they should not take their considerations only because of similarities between texts, but because they offer a more extensive understanding of such human rights provisions than those reached by national courts or the IACHR.

7. *Law as an Inquiry*

Another posture of engagement is viewing law as a form of inquiry.[123] This position is supported by Patrick Glenn and it proposes to embrace the use of non-binding and non-national sources of law in order to reach better ways of interpreting national law and enhancing judicial self-awareness.[124] Glenn believes that legal officers are free to use extra-national sources as persuasive authority.[125] He further explains that "the extent that the law used by these officers is not definitely made and imposed upon them but is rather chosen by them in an ongoing process, the underlying notion of law is that of enquiry".[126]

Consequently, in their process to find and determine which is the most protective interpretation of a right or the least restrictive limitation, Mexican courts should adopt Glenn's view and consider non-binding and non-national sources of law in order to reach better ways to decide human rights cases.

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120 Jackson, *supra* note 73, at 52

121 *Id.*

122 *Id.*

123 *Ibid.* at 82.

124 Jackson, *supra* note 73; Glenn, *supra* note 72.

125 Jackson, *supra* note 73, at 82; Glenn, *supra* note 72, at 288.

126 Jackson, *supra* note 73, at 82; Glenn, *supra* note 72, at 288.

8. *Constitutional Law as Mediating the Domestic and the Global*

Engaging with foreign interpretations might also be considered helpful because constitutions serve as mediating institutions between national and global scopes. Even though they are created for a particular polity, their texts do not only include domestic necessities, but they also take into consideration international expectations, incentives, and relationships.[127]Consequently, if constitutions harmonize the internal polity of a nation with other national States, courts might feel an obligation to consider foreign constitutional law and international law.[128]

As I have stated, according to the Mexican Supreme Court, Mexican courts do have an obligation to consider international law as Articles 1 and 133 of the Mexican Constitution mandates them to do so. However, this is not the case with foreign law. The use of foreign precedents as persuasive authority must not emanate from wanting to mediate with the global aspects, but because they can find good reasons to apply a foreign interpretation for being more progressive than national case law or IACHR interpretations.

9. *Pedagogical Impulse and Pragmatism*

Claire L'Heureux-Dube noted that "human rights issues like assisted suicide, abortion, hate speech, gay and lesbian rights, environmental protection, privacy, and the nature of democracy are being placed before judges in other jurisdictions at approximately the same time".[129] Consequently, courts might have the pedagogical impulse to look abroad merely because it helps them do a better job, in the sense that they can resolve the cases upon them more creatively or with greater insight, as foreign decision can provide a broader range of ideas and experiences, as well as better and more reflective views.[130]

Indeed, judges must be pragmatic and must look to make the best judgment bearing all factors in mind.[131] Thus, they must benefit from considering world public opinion and foreign laws and practices as facts, which can be a more profitable inquiry than trying to find some evidence of what the framers of the Constitution wanted courts to understand.[132]

As Choudhry has pointed out, "comparative jurisprudence can be an important stimulus to legal self-reflection".[133] Foreign interpretations can help

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127 Jackson, *supra* note 73, at 85.

128 *Ibid.* at 85-86.

129 Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 Tulsa Law Review 15-40, 23 (1998).

130 Slaughter, *supra* note 60, at 201.

131 Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo Law Review 1-20, 13-14 (1996).

132 *Ibid.* at 13-14

133 Choudhry, *supra* note 88, at 836.

national courts understand their own constitutional systems and case law.[134] Moreover, not all constitutional courts have a long history exercising their role as human rights protectors; hence, there might be little or no domestic case law to consult from when interpreting a particular issue.[135] Consequently, judgments from elsewhere can be useful to develop human rights case law and to fill in gaps when no precedent exists.[136]

Mexican courts should indeed feel a pedagogical impulse to engage with foreign courts' decisions to be pragmatic and find the most favorable or least restrictive standard when deciding about human rights issues. Therefore, they should take into account more creative or greater insights than those available within national boundaries or issued by the IACHR, which would give them a broader range of ideas and experiences that can result in a better and more reflective understanding of rights.

This is even more relevant since Mexican courts have just recently engaged in the interpretation of human rights and began to exercise their role as human right's protectors, foreign experiences can be a worthy persuasive source for the understanding of human rights and their scope.

10. *Existence of Common Alliances*

McCrudden has identified that a deliberate "alliance" appears to be one reason for citing foreign sources in human rights cases, as courts might use judicial judgements from particular jurisdictions because they believe their decisions are part of a larger project of economic or social integration, or a continuation of a shared history.[137] Likewise, Choudhry has argued that "genealogical relationships" between countries are essential when borrowing and lending interpretations because where there is no historical relationship comparative legal study is not appropriate.[138]On the other hand, Choudhry believes that "genealogical relationships" justify the importation and application of entire areas of constitutional doctrine, and that they confer sufficient authority and validity.[139]

The European Court of Human Rights has held that, although the countries under its jurisdiction have a "margin of appreciation" in determining what is "necessary in a democratic society", when a substantial number of other European States which are parties to the Convention have interpreted rights differently, the State's burden of justification will be higher.[140] In the Dudgeon

134 *Id.*

135 L'Heureux-Dube, *supra* note 129, at 23.

136 *Id.*

137 McCrudden, *supra* note 1, at 521.

138 Choudhry, *supra* note 88, at 839.

139 *Ibid.* at 825.

140 McCrudden, *supra* note 1, at 522.

case, the Court considered that the criminalization of acts of sodomy in Northern Ireland was not "necessary in a democratic society", partly because the majority of European countries have decided to decriminalize sodomy.[141]

Through the conventionality control doctrine, the IACHR aims for the countries under its jurisdiction to create a common understanding of the American Convention of Human Rights. Furthermore, several authors have referred to an emerging "Ius Constitutionale Commune in Latin America".[142] However, Mexican courts should not limit their scope to Latin American countries, as other democratic States elsewhere might have progressive interpretations about human rights and their purview.

Still, courts do need to consider the political and social realities, values, and traditions of the country where the decision was made.[143] Especially since human rights issues are very different between developed and developing countries,[144] and Mexico being a developing country might need a different solution to a specific problem than a country such as the U.K. might. This does not mean that it is not helpful to look to foreign courts' interpretations because the context of their decision might be different; but simply that courts should deliberate whether if it is appropriate or not in each case.[145]

VI. Responding to Counterarguments

The use of comparative case law raises difficult theoretical questions and critics, which arise from the differences between legal systems and other kinds of concerns. Next, I will respond to all these counterarguments.

1. *Constitutions are Self-Constituting and Self-Expressive*

One source of reasoning against foreign and international law is the idea that constitutions may be conceived as serving what Mark Tushnet called an "expressivist" role, which embodies a national identity and self-understanding.[146] Furthermore, under this view, constitutions are designed to sustain or respond to a nation's particular history and political traditions.[147] Hence, the legal par-

[141] *Id.* Dudgeon *v.* UK 4 Eur. Ct. H.R. 149 (1981).

[142] Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan, Ximena Soley, *Ius Constitutionale Commune en América Latina: A Regional Approach to Transformative Constitutionalism*, in Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune 464 (Oxford Constitutional Law, 2017).

[143] L'Heureux-Dube, *supra* note 129, at 26.

[144] *Id.*

[145] *Id.*

[146] Tushnet cited in: Jackson, *supra* note 73, at 18.

[147] *Ibid.* at 20.

ticularism of one's own system serves as a barrier to use comparative case law because the differences between legal systems can really be profound and a comparison would be an inappropriate tool to understand one's own system.[148]

Nonetheless, with the constitutional reform of 2011, Mexico opened up to transnational influence, at least regarding international human rights and IACHR case law. Thus, there is not a strong resistance to transnational dialogue to help reach protective human rights standards. On the contrary, the mentioned amendment shows that one of Mexico's national commitments is towards the progressive protection of human rights in the country.

Furthermore, cases such as the one known as "*Pabellón 13*" serve as examples of the open position Mexico has towards transnational human rights and progressive standards. In the 2014 *Pabellón 13* case, after resolving that Mexican authorities had failed to fulfill their obligation to ensure the health of HIV patients under the terms of Article 4 of the Constitution and Articles 2 and 12 of International Covenant on Economic, Social and Cultural Rights, as well as to take into consideration the standards on the right to health the Committee on Economic, Social and Cultural Rights had set in several opinions, the Supreme Court of Mexico ordered the authorities to provide HIV patients with adequate treatment, either by remodeling a section of the clinic or by building a new hospitality wing.[149]

Consequently, conceiving the Mexican Constitution as a self-expressive or self-constructing is not a convincing counterargument to stop courts from engaging with foreign case law to find the most protective or least restrictive interpretation of human rights in order to apply the *pro persona* principle.

2. *Originalism and Popular Sovereignty*

Jackson has also noted that resistance to foreign interpretations regarding national law, including human rights, is associated with the idea that constitutions must be interpreted by looking for the original meaning of the moment when its text was adopted, as well as the intention of its framers.[150] Consequently, importing foreign interpretations has been considered to be inconsistent with self-governing; thus they should be interpreted in the way that they were consented to, in the time and context in which they were democratically adopted.[151]

These ideas rest on the assumption that constitutions are legitimate when they are accepted consensually by a society.[152] Consequently, foreign and in-

[148] Choudhry, *supra* note 88, at 835.

[149] Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], *Exp. Amparo en Revision 378/2014* (Méx).

[150] Jackson, *supra* note 73, at 20.

[151] *Ibid.* at 21.

[152] *Ibid.* at 22.

ternational law can be considered when it is consistent with the original understanding of the constitution agreed upon by the popular sovereignty.[153]

No provision in the Mexican Constitution mandates that courts are bound to interpret rights according to the original intention of the drafters. On the contrary, Article 1, as interpreted by the Supreme Court, instructs authorities to interpret human rights by relying not only on the Constitution but to also consider international human rights treaties and IACHR case law, always choosing the most favorable understanding.

Consequently, there is no reason to question Mexican courts' use of foreign case law arguing that the interpretation of human rights in Mexico is committed to the original intention of its constitution's framers. Foreign sources can undoubtedly be used to develop human rights understanding and their scope of protection in a more favorable way.[154]

3. *It is Anti-democratic*

Professor Roger Alford argued that using foreign interpretations can threaten "majoritarian" approaches to constitutional interpretation, which do not refer to the original meaning intended by the framers, but contemplates positions that may defer to legislative or executive decisions, who are elected by popular majorities and hence reflect their will.[155] Under this view, the understating or interpretation of the constitution may evolve, but will depend on the will and views of the contemporary majorities.[156]

Consequently, comparative human rights law is seen as anti-democratic, as foreign courts and legal systems have no democratic accountability in the national legal system.[157] Elliot has held that regardless of whether or not judicial review is democratic, the decisions of foreign judges and legislatures are decidedly not, because despite how domestic judges are appointed, they are at least within the "democratic orbit" of a particular society, while foreign lawmakers and courts exist outside of it.[158]

However, engaging with foreign legal materials with a deliberative approach does not mean that they should have the same authority as domestic law; courts should only apply them as far as they improve their judicial reasoning.[159] As Jackson has pointed out, majorities might find the foreign experience useful, and other societies might also share a commitment to ma-

153 *Id.*

154 *Ibid.* at 80.

155 Alford cited in Jackson, *supra* note 73, at 23.

156 *Id.*

157 Fredman, *supra* note 85, at 649.

158 Elliot, *supra* note 94, at 115.

159 Fredman, *supra* note 85, at 650.

joritarianism and the judicial protection of rights.[160] Thus, how their constitutional courts resolve challenges regarding human rights violations can be not only helpful but can also be relevant.[161]

Judges are accountable through the explanations they provide for their decisions; hence, if foreign materials improve the quality of their reasoning process, this will legitimize the application of such sources of law as persuasive authority.[162] Indeed, it is not through the express authorization of the citizens or the constitutional texts that judges derive their legitimacy in referring to foreign sources, but through the persuasiveness of their reasoning and arguments given.[163]

As an example, we could look at the judgment where the Mexican Supreme Court relied on US, Uruguayan and Dutch laws on cannabis control and use in order to test whether the General Health Law was unconstitutional for establishing an absolute prohibition on the use of cannabis, including for recreational purposes. The Supreme Court showed that other countries have less restrictive prohibitions, and therefore, the absolute prohibition contained in the General Health Law was not a proportional restriction and subsequently violated the rights to the free development of the personality.[164]

Consequently, if the reasons for Mexican courts to rely on foreign case law when interpreting the scope of protection of human rights are persuasive mainly because they are more protective or less restrictive than binding national or international interpretations, their decisions will be legitimized by enforcing with the *pro persona* principle in the best possible way.

4. *Cherry-picking*

One of the most significant concerns about using foreign interpretations is that judges must be constrained from using these interpretations to legitimize their own preferences. Posner said, "if foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's *corpora juris* to find it."[165] Moreover, Young argues that citing foreign case law when interpreting constitutional rights can generate decision and error costs to courts, including what he calls "indeterminacy costs", which arise from the great variety of foreign jurisdictions and sources of interna-

[160] Jackson, *supra* note 73, at 23.

[161] *Id.*

[162] Fredman, *supra* note 85.

[163] *Ibid.* at 651.

[164] Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], *Exp. Amparo en Revision 623/2017* (Méx).

[165] Posner, *supra* note 90, at 86.

tional law, which are often so ambiguous that the whole enterprise can be profoundly manipulable.[166]

Antonin Scalia, a former Justice of the Supreme Court of the United States, also argued against using foreign law to interpret domestic rights. For him, the citation of foreign law is a pretext judicial elites use to impose their own moral and social views, subjective values, and thinking.[167]

Nonetheless, the purpose of Mexican courts' use of foreign case law is to apply the most progressive interpretation and scope of human rights, as intended by the *pro perso*na principle. Far from being able to impose their own predetermined judgment, courts must use foreign case law as persuasive authority to interpret human rights scope of protection in the broadest way possible. Thus, there is no room for personal moral value; courts must base their choice within the extent to which a particular interpretation widens or limits the scope of protection of the human right at hand.

5. *Lack of Understanding*

Another concern about relying on foreign law to interpret domestic cases lies in the judges' limitations regarding their competence, understanding, training, and expertise on international or foreign law.[168] According to Young, courts dealing with foreign materials face language and cultural barriers, as well as training in comparative analysis which could lead to unacceptable error costs.[169]

Furthermore, the foreign context and constitutional system may be different; thus, the lack of knowledge about the technical legal aspects of other jurisdictions could lead to mistakes when using foreign cases as persuasive authority.[170] Consequently, the use of comparative materials requires knowledge not only of the foreign law, but also of the country's social and political context.[171]

Undoubtedly Mexican courts would be challenged in the face of all the difficulties described. However, Article 14 of the Federal Civil Code indicates that when applying foreign law, judges must apply it as the foreign court would. Hence, judges can collect all the information necessary about the text,

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166 Ernest A. Young, *Foreign Law And The Denominator Problem*, 119 Harv. Int'l LJ 148-168, 167 (2005).

167 Norman Dorsen, *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 International Journal of Constitutional Law 519-541, 540-541 (2005).

168 Young, *supra* note 166, at 166.

169 *Id.*

170 McCrudden, *supra* note 1, at 527.

171 O Kahn-Freund, *On Uses and Misuses of Comparative Law* (1974), 37 The Modern Law Review 27.

meaning, and scope of said law.[172] This could also be implemented when interpreting human rights as judges can analyze the context of foreign decisions. As Elliot argues, the difficulties of understanding the context of foreign decisions need not be understood to deny the relevance of comparative analysis altogether, but simply to challenge the notion that courts are capable of engaging with it in such a way as to preclude misunderstandings.[173]

6. *Cultural Elites*

Another source of resistance is based on the perception that foreign or international law may be used by self-interested cultural elites to remake national policies in opposition to democratic decisions by ruling cases.[174] Further, opposition to the consideration of the transnational also relies on the fear that the disadvantaged and marginalized, as well as collective rights and groups, might be ignored in favor of individual rights.[175]

However, I propose that Mexican courts engage with foreign case law to find the most protective interpretation of human rights and their scope. Hence, they cannot simply cite and choose foreign decisions over binding interpretations without them being more progressive and weighted with other standards. Therefore, courts cannot manipulate foreign case law to benefit certain groups or individuals because the reason for its adoption must be its benefits in understanding human rights.

Nonetheless, it is also certainly necessary to increase mechanisms to effectively protect the excluded.[176] In any event, ignoring the problem of participation, while at the same time refusing to engage in the human rights dialogue with foreign judges, may weaken human rights protection rather than reinforce it,[177] which runs in counter to the purpose of the *pro persona* principle.

VII. Conclusion

Mexican courts should adopt a posture of engagement in a deliberative manner with foreign courts' interpretations of human rights, honoring the *pro persona* principle commitment foreseen in Article 1 of the Constitution. Consequently, when deciding the most favorable way to interpret human rights

[172] Código Civil Federal [C.C.F.] [Federal Civil] as amended, *Diario Oficial de la Federación* [D.O.F], 26 de mayo, 14 de julio, 3 y 31 de agosto de 1928 (Mex.).

[173] Elliot, *supra* note 94, at 114.

[174] Jackson, *supra* note 73, at 30.

[175] *Ibid.* at 29.

[176] *Ibid*. 531-532.

[177] *Ibid.* at 531-532.

and the least restrictive way to limit them, they should not only rely on the conventionality control doctrine.

Indeed, Mexican courts should also look for principles and standards in other legal systems rather than just domestic precedents and international sources, such as the case law of the IACHR. Foreign decisions can assist them in their role of human rights guarantors by providing them with progressive interpretations of human rights.

Nonetheless, not all the conclusions reached by foreign courts must be followed. Comparative materials should not be considered binding; they should only be acknowledged as persuasive authority. Consequently, courts can diverge from them, even when they are more beneficial to human rights understanding, as the weight of other principles, policies or standards in the Mexican legal system can persuade courts to decide in a different sense, especially if a foreign decision alters said legal system. Nonetheless, this does not mean that foreign precedents should not be part of the process of their decision.

Mexican courts should not engage with foreign interpretation about human rights because human rights are universal principles or a part of *ius gentium*. Nor because Mexican courts should become part of a "Latin American alliance" or a "global community of courts" that will contribute to "global jurisprudence" on the meaning and scope of human rights. Nor is it the case that these foreign precedents will legitimize their decision just by randomly citing them or because they interpret a similar text to the one, they need to clarify.

Mexican courts should look to foreign courts' case law regarding human rights because they might have already weighted principles and other standards in order to decide the best way to protect human rights, thus their conclusions can provide further tools for judges than those determined by domestic courts or the IACHR. This will then lead them to a more beneficial appreciation or a less restrictive limitation of rights.

The concerns about using foreign precedent are overcome with the understanding that Mexican courts will engage with them to exploit the *pro persona* principle, looking for the most protective standard or least restrictive limitation of rights in different legal systems. Consequently, courts must not use foreign decisions to impose preferences or to benefit specific groups, the weight of their applicability and appropriateness will depend directly on the capability of the foreign judgment to protect human rights better than domestic sources or international standards, such as the ones issued by the IACHR. This approach to the interpretation of human rights in Mexico is not inconsistent with its current legal system, as it has already opened to the transnational influence to advance in the protection of human rights by adopting the conventionality control. Nonetheless, engaging with more foreign sources might just help take the protection of human rights a little step further.

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RETROGRESSION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: MEXICO IN THE CONTEXT OF AUSTERITY AND CRISIS

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Abstract: *Mexico is facing a time of change in the allocation and distribution of public funds due to what the Mexican government has called "republican austerity". Such change has caused public discordance since it is said to be regressive to human rights. The first article of the Mexican Constitution explicitly states the obligation of all authorities, within the scope of their powers, to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility, and progressivity. Also, Mexico is a member state of international covenants on human rights, such as the International Covenant on Economic, Social and Cultural Rights, from which some obligations derive. One of these obligations is the progressive realization of economic, social, cultural rights, and the prohibition of retrogression. Even though, limited economic resources require the careful allocation and redistribution of public spending, a practice that has led to the reduced allocation of public resources for some programs considered essential in the acquisition of human rights. The shift in the allocation of public spending in Mexico may ultimately deepen in the coming months and couple years, because of the imminent economic crisis caused by the COVID-19 pandemic. This article analyses the extent to which the Mexican government can, based on austerity, redistribution, or economic crises, make decisions that imply retrogression of rights without violating the obligation to progressive fulfillment stated in the International Covenant on Economic, Social and Cultural Rights.*

Keywords: *Retrogression of right, International Covenant on Economic, Social and Cultural Rights, Mexico, austerity; crisis.*

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Resumen: *México atraviesa un momento de cambios en la asignación y distribución de los fondos públicos, debido a lo que su gobierno ha denominado "austeridad republicana". Dichos cambios han provocado críticas y protestas porque se dice que son regresivos a los derechos humanos. El primer artículo de la Constitución mexicana establece explícitamente la obligación de las autoridades, en el ámbito de sus competencias, de promover, respetar, proteger y garantizar los derechos humanos de conformidad con los principios de universalidad, interdependencia, indivisibilidad y progresividad. Además, México es un Estado miembro de pactos internacionales de derechos humanos, como el Pacto Internacional de Derechos Económicos, Sociales y Culturales, del que se derivan obligaciones. Una de ellas es la realización progresiva de los derechos económicos, sociales y culturales y la prohibición de la regresión. No obstante, los recursos económicos limitados requieren una asignación y redistribución cuidadosa del gasto público y ello ha llevado a reducir la asignación de recursos públicos a algunos programas considerados esenciales para garantizar los derechos humanos. Los cambios en la asignación del gasto público en México pueden profundizarse en los próximos meses y par de años debido a la inminente crisis económica provocada por la pandemia de COVID-19. En este artículo se analiza si el gobierno mexicano puede, con base en la austeridad, la redistribución o crisis económica, tomar decisiones que impliquen la regresión de derechos sin violar la obligación de realización progresiva establecida del Pacto Internacional de Derechos Económicos, Sociales y Culturales.*

Palabras clave: *Regresión de derechos, Pacto Internacional de Derechos Económicos, Sociales y Culturales, México, austeridad, crisis.*

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I. Introduction

One of the Mexican government's key policies is "republican austerity", a tool used to mitigate social inequality, corruption, greed, waste of national

assets and resources, efficient resource management, effectiveness, economic deterioration, transparency and honesty.[1] However, one of the consequences of republican austerity has been budget cuts to programs which are precisely linked to making human rights effective. For example, in the budget for 2019, resources were not assigned to the community dining program (*Programa Comedores Comunitarios*);[2] a program in operation since 2013 that was subsidized with federal resources. Similarly, the budget for the Infant Stay to Support Working Mothers Program (*Estancias Infantiles para Apoyar a Madres Trabajadoras*) decreased to almost half of its former value. The Ministry of Welfare argued that they were working on the rules of operation for the program and that it was not going to disappear. The same Ministry stated that the principle of progressive realization of human rights was not being violated.[3] According to the new operating rules for 2019, the support was to be delivered directly to the mother, father, or guardian, according to the authorized budget.[4]

Both resource change allocations were met with criticisms and protests. One argument against the changes was that they could affect human rights and that they violated the principle of progressive realization of human rights.[5] In the case of Children's Stay to support working mothers' program,

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[1] Ley Federal de Austeridad Republicana [L.F.A.R] [Federal Law of Republican Austerity], as amended, *Diario Oficial de la Federación* [D.O.F], 19 de noviembre de 2019 (Mex.).

[2] The Federal Budget and Fiscal Responsibility Law (*Ley Federal de Presupuesto y Responsabilidad Hacendaria*), article 77, provides that the Chamber of Deputies, in the expenditure budget, may indicate the programs through which subsidies are granted. The community kitchens program is a program within the National Crusade Against Hunger, which emerged in 2013 and sought to eradicate food poverty. The program came to host a network of more than five thousand five hundred community kitchens distributed throughout the country dedicated to serving more than one million meals. *See*, Presidencia de la República EPN, Sexto Informe de Gobierno (2018) (Oct. 25, 2020), available at *https://www.gob.mx/epn/articulos/sexto-informe-de-gobierno-173378?idiom=es*. However, in its 2016 Public Account report, the Superior Audit of the Federation concluded that the program did not meet its objectives. *See*, Auditoria Superior de la Federación, Informe General Executivo. Cuenta Pública 2016 (2018), at 64, available at *https://www.asf.gob.mx/Trans/Informes/IR2016ii/documentos/InformeGeneral/IG2016.pdf*.

[3] *See*, Secretaría de Bienestar, *Cambios en el Programa de Estancias Infantiles no Incumplen el Principio de Progresividad ni Violan Derechos Humanos* (2019), available at *https://www.gob.mx/bienestar/prensa/cambios-en-el-programa-de-estancias-infantiles-no-incumplen-el-principio-de-progresividad-ni-violan-derechos-humanos-206703*.

[4] Acuerdo por el que se emiten las Reglas de Operación del Programa de Apoyo para el Bienestar de las Niñas y Niños, Hijos de Madres Trabajadoras para el ejercicio fiscal 2019 [Agreement by which the Operating Rules of the Support Program for the Well-being of Girls and Boys, Children of Working Mothers are issued for fiscal year 2019], *Diario Oficial de la Federación* [D.O.F], 28 de febrero de 2019 (Mex).

[5] María Elena Morera, *Hacia atrás...*, El Universal (2019), available at *https://www.eluniversal.com.mx/articulo/maria-elena-morera/nacion/hacia-atras*; Víctor Polenciano, *Más de mil personas son afectadas por cierre de comedores*, El Universal (2019) (Oct. 01, 2020), available at *https://www.eluniversalqueretaro.mx/municipios/mas-de-mil-personas-son-afectadas-por-cierre-de-comedores*; Redacción

even the National Human Rights Commission recommended the Secretary of Welfare, among others, to take immediate and necessary actions in order to guarantee the rights of girls and boys to: a dignified life, survival and development, well-being, a healthy integral development, education, health protection, inclusion, participation, play, and recreation based on their best interests. The necessary actions also included the implementation of procedures by the Secretary of Welfare on its own, and before the corresponding authorities, towards the establishment of a mechanism that, regardless of its name, restores to girls and boys, fathers and mothers, managers and workers of children's stays, the rights that were violated on the occasion of the issuance of the Rules of Operation of the Welfare Support Program and the reduction of budget.[6]

The case was taken to court and after various injunctions, the Judicial Power of the Federation determined in *Amparo* trial to suspend provisionally the reduction of financial resources that was made to the Infant stay to support working mothers' program in the Expenditure Budget of the Federation for the fiscal year 2019. The provisional *Amparo* resolution determined that children, parents, or guardians be granted the support that corresponds to them in accordance with the program's operating rules for the fiscal year 2018.[7]

Televisa, *Crisis en Guerrero por cancelación de programas sociales*, Televisa, 2019 (Oct. 01, 2020), available at *https://noticieros.televisa.com/ultimas-noticias/guerrero-programas-sociales-cancelados-afectan-pobres/*; Elías P. Medina, *Cierran comedores populares; hay 4 mil afectados*, El Sudcaliforniano, 2019 (Oct. 01, 2020), available at *https://www.elsudcaliforniano.com.mx/local/cierran-comedores-populares-hay-4-mil-afectados-3184701.html*; Redacción Animal Político, *Cancelación de estancias infantiles dejó a niños sin cuidado y puso en riesgo el trabajo de sus padres CNDH*, Animal Político, 2019 (Oct. 01, 2020, 13:00 PM), available at *https://www.animalpolitico.com/2019/06/recomendacion-cndh-estancias-infantiles/*; Redacción de Milenio, *Piden a AMLO aceptar recomendación de CNDH sobre estancias infantiles*, Milenio Digital, 2019 (Oct. 01, 2020), available at *https://www.milenio.com/politica/amlo-piden-presidente-seguir-recomendaciones-cndh-apoyo-estancias*; Redacción La Silla Rota, *Cancelación de estancias infantiles impide el pleno desarrollo de las mujeres: ONG*, La Silla Rota, 2019 (Oct. 01, 2020, 13:00 PM), available at *https://lasillarota.com/nacion/cancelacion-de-estancias-infantiles-impide-el-pleno-desarrollo-de-las-mujeres-ong-ong/29488*.

[6] Comisión Nacional de los Derechos Humanos, *Recomendación No. 29/2019 Sobre el caso de la violación a los derechos humanos de las personas usuarias y beneficiarias del "Programa de Estancias Infantiles para Apoyar a Madres Trabajadoras"*, available at *https://www.cndh.org.mx/sites/default/files/documentos/2019-06/Rec_2019_029.pdf.*

[7] *See*, suspensión provisional en el amparo promovido contra la reducción de recursos económicos al programa de estancias infantiles para apoyar a madres trabajadoras, efectuada en el presupuesto de egresos de la federación para el ejercicio fiscal 2019. procede concederla a las madres trabajadoras, padres solos o tutores que trabajan, buscan empleo o estudian y a sus hijos, para que se les otorguen los apoyos que les correspondan conforme a las modalidades establecidas en las reglas de operación para el ejercicio fiscal 2018. Tribunales Colegiados de Circuito (T.C.C.) [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 67, Tomo VI, junio de 2019, Tesis: XVII.1o.P.A. J/25 (10a.), p. 4948 (Méx.); and: Suspensión provisional en el amparo promovido contra la reducción de recursos económicos al programa de estancias in-

Another case that has been subject to discussion is the extinction of various public trusts. On April 2020, by decree, the President of Mexico instructed the agencies and entities of the Federal Public Administration and other organizations to carry out the corresponding processes for the extinction of public trusts, mandates and those alike, unless they were established by mandate of Law or legislative decree, and whose extinction required constitutional and legal amendments.[8] In November 2020, legislative amendments for the extinction of remaining trusts established by mandate of law and legislative decree were enacted.[9]

For the current government, the extinction of trusts is part of its commitment to growth with austerity, without corruption and to the fight against the waste of national assets and resources.

The mentioned cases are just examples of the link between the allocation of budgetary resources and the effectiveness of human rights, but there are

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FANTILES PARA APOYAR A MADRES TRABAJADORAS, EFECTUADA EN EL PRESUPUESTO DE EGRESOS DE LA FEDERACIÓN PARA EL EJERCICIO FISCAL 2019. PROCEDE CONCEDERLA A LOS RESPONSABLES DE DICHOS ESTABLECIMIENTOS, PARA QUE SE LES OTORGUEN LAS CANTIDADES QUE LES CORRESPONDAN CONFORME A LAS MODALIDADES ESTABLECIDAS EN LAS REGLAS DE OPERACIÓN PARA EL EJERCICIO FISCAL 2018. Tribunales Colegiados de Circuito (T.C.) [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta, Décima Época, Tomo VI, junio de 2019, Tesis: XVII.1o.P.A. J/24 (10a.), Libro 67, p. 4950 (Méx.).

[8] Decreto por el que se ordena la extinción o terminación de los fideicomisos públicos, mandatos públicos y análogos [Decree ordering the extinction or termination of public trusts, public mandates and similar] *Diario Oficial de la Federación* [D.O.F], 02 de abril de 2020 (Méx.).

[9] Decreto por el que se reforman y derogan disposiciones de la Ley para la Protección de Personas Defensoras de Derechos Humanos y Periodistas; de la Ley de Cooperación Internacional para el Desarrollo; de la Ley de Hidrocarburos; de la Ley de la Industria Eléctrica; de la Ley Federal de Presupuesto y Responsabilidad Hacendaria; de la Ley General de Protección Civil; de la Ley Orgánica de la Financiera Nacional de Desarrollo Agropecuario, Rural, Forestal y Pesquero; de la Ley de Ciencia y Tecnología; de la Ley Aduanera; de la Ley Reglamentaria del Servicio Ferroviario; de la Ley General de Cultura Física y Deporte; de la Ley Federal de Cinematografía; de la Ley Federal de Derechos; de la Ley del Fondo Mexicano del Petróleo para la Estabilización y el Desarrollo; de la Ley de Bioseguridad de organismos Genéticamente modificados; de la Ley General de Cambio Climático; de la Ley General de Víctimas y se abroga la Ley que crea el Fideicomiso que administrará el fondo de Apoyo Social para Ex Trabajadores Migratorios Mexicanos [Decree amending and repealing provisions of the Law for the Protection of Human Rights Defenders and Journalists; the Law of International Cooperation for Development; of the Hydrocarbons Law; of the Electricity Industry Law; of the Federal Law of Budget and Fiscal Responsibility; of the General Law of Civil Protection; of the Organic Law of the National Finance Office for Agricultural, Rural, Forestry and Fishing Development; of the Law of Science and Technology; of the Customs Law; of the Regulatory Law of the Railway Service; of the General Law of Physical Culture and Sports; of the Federal Cinematography Law; of the Federal Law of Rights; the Law of the Mexican Petroleum Fund for Stabilization and Development; of the Law of Biosafety of Genetically modified organisms; of the General Law of Climate Change; of the General Victims Law and the Law that creates the Trust that will administer the Social Support Fund for Former Mexican Migrant Workers is repealed] *Diario Oficial de la Federación* [D.O.], 06 de noviembre de 2020 (Méx.).

others. Indeed, fiscal policy, in its two dimensions: budgetary and taxation, is related to the effectiveness of human rights. This leads us to ask, what is the margin of maneuver that the Mexican government has in the allocation of budgetary resources to the different programs that are linked with the effectiveness to guarantee the protection of human rights? Moreover, in times of austerity or crisis, are measures that lead to the retrogression of rights admissible without violating the obligation to ensure progressive realization of ESCR, obligation contracted in the International Covenant on Economic Social and Cultural Rights?

The relationship between fiscal policy and human rights was first addressed by the Inter-American Commission on Human Rights (IACHR) in 2015 in a thematic hearing within the 156th period of sessions. At the time, the foundations were laid for the debate on fiscal injustice as a human rights issue. The role of fiscal policies towards inequalities, the transformative and redistributive potential of fiscal policy, and the obligations of States to use their resources to guarantee human rights were also discussed.[10] In this sense, without pretending, at this time, an assessment on the correctness of the resource allocation in the cases mentioned above or others, there is a need to discuss the margin of maneuver of the State and its government in the design of fiscal policy. It becomes more important in the current context of "republican austerity" and crisis which Mexico and several other States are experiencing as a result of the so declared COVID-19 pandemic.

Given the austerity policy and the crisis caused by COVID-19, it is not unreasonable to think that the adjustments in the allocation of Mexico's public resources to the different policies and programs will continue. Thus, the tensions and conflicts amongst the different actors with preferences, motivations, and different interests in how the budget should be allocated may also continue. The problem is not minor since allocation affects, in one way or another, the enjoyment of the human rights. As Bobbio points out, the underlying problem with respect to the rights of man (or humans rights) is not so much that of justifying rights but rather of protecting them,[11] and the allocation of resources is an important part of such protection.

Public administration manifests through policies and programs, which constitute the means through which the political system materializes human rights. Therefore, such policies and programs must be justified in terms of human rights' obligations. The objective of this work is to determine whether the Mexican State and its government can, based on arguments of austerity, redistribution, or crisis, make decisions that imply the retrogression of certain human rights without falling in non-compliance of its obligation to the progressive realization of rights stated in the International Covenant on

[10] OAS, IACHR Wraps Up its 156th Session (Oct. 28, 2015), available at *http://www.oas.org/en/iachr/media_center/PReleases/2015/120.asp*.

[11] Norberto Bobbio, El problema de la guerra y las vías de la paz 128 (Gedisa, 1982).

Economic, Social and Cultural Rights. As noted, the intention is not to assess the allocation of resources made by the current government. Although the topic is of utmost importance, it is a matter for another discussion.

II. Fiscal Policy as a Tool for the Redistribution of Wealth

1. *Redistributive Fiscal Policy*

Allusion to redistribution is justified since, in the case of Mexico, the government considers austerity and the reallocation of public resources as a means for redistribution. Fiscal policy is considered a tool for the redistribution of wealth or well-being. Thus, in this article, the concept of redistributive fiscal policy implies that fiscal or financial purpose is not the only justification of public revenue, and that tax neutrality is not always desirable.

According to the Merriam-Webster dictionary, to redistribute means "to alter the distribution of: Reallocate" or "to spread to other areas".[12] Therefore, the redistribution of wealth or welfare implies its distribution in a different manner from how it was done previously. The redistribution of wealth can serve many purposes, even contradictory ones. Tax policy is any deliberate use of taxes and public spending to influence macroeconomic variables.[13] For the purpose of this article, we refer to the redistribution that is justified by social welfare reasons and is understood as one that seeks to benefit the groups less provided for in the collectivity.[14]

Fiscal policy is a branch of economic policy that is made up of three elements: 1. Public spending, which refers to the allocation of resources to different collective, social or public needs through expenses whether specific or general. In Mexico, these assignments are provided in an expenditure budget or as an exception, in a latter law issued by the Congress of the Union; 2. Revenue, which refers to resources obtained by the State, for example, tax revenues (taxes are considered the most significant state revenue) and non-tax revenue; and 3. Debt, which refers to financing or accrual of indebtedness, both internal and external. In Mexico, revenue and accrual of debt are projected in a revenue budget law of the federation for each fiscal year.

From a legal perspective, fiscal policy can be conceived as the set of both public revenue and expenditure programs designed to achieve previously established social purposes. That is, legally validated or motivated conducts

[12] Merriman-Webster Dictionary, *Redistribute* (Oct. 28, 2020 updated), available at *https://www.merriam-webster.com/dictionary/redistributio*.

[13] James M. Buchanan, Hacienda Pública 68 (Editorial Derecho Financiero, 1968).

[14] Aldo A Arnaud, *Política fiscal y redistribución del ingreso*, 5 (1-2) Revista de Economía y Estadística 45, 63 (1961).

related to the administration of three elements: revenue, expense, and debt. In addition to the laws of revenue and expenditure, provisions contained in article 31, section IV, of the Mexican Constitution that establishes the obligation to contribute to public expenditures in the proportional and equitable manner indicated by law, as well as article 25 of the constitution, which specifies that it corresponds to the State the leadership of national development to guarantee, among other things, a fairer distribution of income and wealth, are of interest.

Fiscal policy then, serves to pursue political, economic, and social ends, that is, extra-fiscal purposes,[15] in addition to fiscal or financial ones. When fiscal policy is carried out by governments with the objective of influencing equality, it is called redistributive fiscal policy. It is a discretionary fiscal policy because it aims to affect people's wealth through allocations in the expenditure budget and in the collection of taxes or other contributions. In this way, using fiscal policy as a tool for redistribution implies influencing inequality, and using public spending and taxation in specific ways, therefore, redirecting public spending. We may note, that redistributive fiscal policy is a circular process where the State captures tax and non-tax revenue and reinvests them in the society. To the extent to which the State captures resources from those who have the most, through taxation, and reinvest them in the society, especially in a way that resources reach those who have the least, it will be considered to redistribute and affect inequality.

2. *Fiscal Policy and Human Rights*

Material wealth is a central dimension of social inequality in modern societies. Alongside with money it can be converted into assets such as: security, health, housing, education, and others. According to John Finnis' theory of goods,[16] the central notion of rights refers not to the mere choice or personal autonomy, nor to the simple benefit or individual interest, but to the organization of rights; rights to a set of basic human goods, which constitute the central aspects of full human fulfillment. We can disagree with the author on the idea of natural law, or with his list of basic goods because of its arbitrariness or incompleteness, or with basic goods as the foundation of human rights. Nevertheless, we may be able to notice with him the relationship between basic goods and human rights. By this token, the basic goods of society such

[15] Although examples of the application of taxes and public spending for non-fiscal purposes can be found in the past, for example, in scholastic doctrine and mercantilism, fiscal policy as it is understood today is associated with the Great Depression of 1929 and it was born in the theoretical field of Keynesian ideas. It appears as a result of the change in the conception of fiscal activity in the public sector and its influence on economic life. *See*, José Ramón Álvares Rendueles, *Política fiscal y desarrollo económico,* 54 Revista de Economía Política 7, 8 (1970).

[16] John Finnis, Natural law and natural rights (Oxford, Clarendon Press, 1980).

as: health, housing, education, security, among others, can be understood as human rights.

Following Philip Alston,[17] extreme poverty can be defined as a condition in which most human rights have no chance of being realized. He points out that radical inequality inevitably sustains extreme poverty, just as it sustains extreme wealth. Therefore, inequality is not only a human right but an economic issue. This means that inequality and poverty must end to ensure that everyone receives the goods of value from society, that is, for the effectiveness of human rights for all. One way is through redistributive fiscal policies (though we must accept that this one measure will not solve the entire problem of poverty). Redistribution implies ensuring that all people obtain basic goods, that human rights are protected and guaranteed for everybody.

On the other hand, in terms of Holmes and Sunstein,[18] all human rights have a cost, not just economic, but social and cultural. Therefore, to know what rights a community guarantees, one should not look only at the constitution of that community, but to how many resources are allocated to ensure such rights. In this sense, for the authors, the government is an indispensable device to mobilize and direct dispersed resources of the community to strategically apply them to problems in specific operations. To point out, as evident truth, that rights depend on governments, it is necessary to add a logical corollary, rich in implications: rights cost money. They cannot be protected or enforced without funds. Therefore, we cannot unlink redistribution or the guarantee of human rights from fiscal policy.

Alston issues similar ideas when drawing attention to the relationship between resources and the nature of the obligation to guarantee respect for civil and political rights.[19] Alston notes that existing approaches have too often been based on the illusion that resource considerations are not relevant to assess government compliance with international human rights obligation issues. The issues on the availability of resources and equal access to those resources have been largely eliminated from discussions of international human rights with respect to civil and political rights; while in the case of economic, social and cultural rights they were given an overwhelming importance, so that the qualification contained in the International Covenant on Economic, Social and Cultural Rights, that the obligations of a state extend only to the maximum of their available resources is often invoked to excuse non-compliance.

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[17] Philip Alston, *Extreme inequality as the antithesis of human rights*, OpenGlobalRights (Aug. 27, 2015), available at *https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/*.

[18] Stephen Holmes & Cass R Sunstein, El costo de los derechos. Por qué la libertad depende de los impuestos 33 (Siglo Veintiuno Editores, 2011).

[19] Alston, supra note 17

Indeed, the problem of resources is critical because human rights depend on them; civil, political, economic, social, and cultural. In other words, fiscal policy on both sides of the equation: allocation of resources and taxation, is closely linked to the effectiveness of human rights. Fiscal policy is human rights policy. Thus, the report on poverty and human rights in the Americas highlights that fiscal policy is a public policy, and as such, is subject to the human rights obligations of the States. Human rights principles constitute a framework that underpins the key functions of fiscal policy and taxation: mobilization of resources to finance social progress to the maximum of available resources; redistribution of economic gains to reduce socio-economic inequality; accountability between the State and citizens; and the correction of market failures which drive violations of rights.[20]

To finish this section, it is important to remember that decisions in tax and budgeting matters determine, to a large extent, the level of effective enjoyment of human rights. In contexts of austerity and crisis, the management or administration of resources for the protection of rights becomes more important.

III. State Obligations Under the ICESCR

Although this article refers to state obligations that derive from the ICESR, the obligations mentioned are also internal law obligations, and violations of such obligations imply violations of the first article of the Mexican Constitution. The article asserts that in México, all people will enjoy the human rights recognized in the constitution and in international treaties of which México is part; and that norms related to human rights shall be interpreted in accordance with the constitution and with international treaties, favoring the most extended protection of people at all times.

Granting one can distinguish between civil and political rights, and economic, social, and cultural rights (ESCR) theoretically, in practice, this distinction is blurred by the interrelation between the different sets of rights. For example, the right to freedom of expression is important to claim economic, social, and cultural rights; but also, without the right to education, it is difficult to understand and practice civil rights. Now, regarding the cost of rights without a good justice system, which of course, implies economic resources, it is difficult to talk about the realization of civil and political rights.[21] However, since it is at the level of economic, social, and cultural rights where doctrine about the link between fiscal policy and human rights has been developed, the focus of this work is on economic, social and cultural rights.

[20] Asociación Civil por la Igualdad y la Justicia, *et al.*, *Política Fiscal y Derechos Humanos en las Américas* (2015), available at *https://www.cesr.org/sites/default/files/cidh_fiscalidad_ddhh_oct2015.pdf* (last visited Oct. 15, 2020).

[21] *See*, *supra* note 18.

After the acceptance of the Universal Declaration of Human Rights in 1948, came the need to transform human rights into legally binding obligations for States. The result was two Covenants adopted and opened for signature, ratification, and accession in 1966, which entered into force in 1976: The International Covenant on Civil and Political Rights (ICCPR)[22] and the International Covenant of Economic, Social and Cultural Rights (ICESCR).[23] In the first case, the covenant establishes that:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[24]

From the abovementioned, the obligation of the States parties to respect and guarantee civil and political rights without regard to cost is established. But when costs of rights are not considered, it can lead to the defense of empty formulas insofar as resources are not unlimited, and an entire administrative and judicial apparatus is needed to guarantee them.

In the second case, the ICESCR, establishes that:

> 1. Each State Party to the present Covenant undertakes to make efforts, individually and through international assistance and co-operation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.[25]

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[22] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[23] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[24] International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

[25] International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3.

From the abovementioned, a series of obligations for the States Parties stand out:

— Take appropriate measures through the mobilization of the maximum resources available for the effective implementation of ESCR.
— Prohibition to discriminate.
— Ensure the minimum content of the rights enshrined in the Covenant.
— Progressive and non-regressive realization of ESCR.

The first three are obligations of immediate fulfillment that are not conditioned or limited to any other condition. The obligation to not discriminate implies *a)* non-discriminatory budgets; *b)* removal of inequalities; and, *c)* adoption of positive measures and their financing to end structural disadvantages in order to achieve the full participation of certain groups in society.[26] Taking appropriate action involves deliberate, concrete actions that are oriented as clearly as possible towards the satisfaction of obligations recognized in the Covenant.[27] It includes legislative measures, judicial and administrative remedies, financial, educational, and social measures, as well as international and technical assistance, among others, in view of the circumstances of each State.

On the financial or budgetary side, the idea of taking appropriate measures includes the allocation of sufficient resources to rights and implies that States must design their budgets in accordance with the rights enshrined in the covenant. It also includes analyzing and evaluating budgets, especially how many resources are destined to each ESCR and to other state purposes not linked to rights.[28] We should remember that the ultimate objective of fiscal policy, budgetary and tax, is the fulfillment of rights. Economic growth and economic stability should be seen as a means for human development and not as an end in itself.[29] This involves making decisions about rights, prioritizing rights and in parallel, assigning the appropriate public resources.

As for securing the minimum content of ECSR, each State has the obligation to guarantee at least the essential levels of each ESCR.[30] Nonetheless, to assess a State's compliance with its obligation to guarantee the minimum content of the rights, the resources of the State in question must be considered.[31] Since States have the obligation to take the necessary measures up to the maxi-

[26] Horacio Corti, *La política fiscal en el derecho internacional de los derechos humanos: presupuestos públicos, tributos y máximos recursos disponibles*, 17 Revista Institucional de la Defensa Pública 192 (2019).

[27] *Id.*

[28] *Id.*

[29] CRC, *Day of General Discussion on "Resources for The Rights of The Child – Responsibility of States"* (Sep. 26, 2007).

[30] *Id.*

[31] *Id.*

mum of resources available, for a State to attribute its failure to meet the minimum obligations due to a lack of resources, they must first demonstrate that every effort to use all the resources that are at its disposal in an effort to satisfy with priority those minimum obligations have been made.[32] This effort includes that the State is collecting the correct amount of taxes.

Once the minimum content is assured, the obligation to progressive realization implies moving towards the full effectiveness of rights and not moving in retrogression. The progressivity of ESCR implies two dimensions: a positive one that refers to the obligatory nature of gradual advancement towards the full satisfaction of rights to all people; whereas the negative dimension refers to the prohibition of a return to previous conditions, that is, retrogression in the protection and guarantee of ESCR.[33] This means that the general rule is progressiveness, however, exceptionally, regression may be allowed without non-compliance of the ICESCR.

IV. Austerity Policies and Human Rights Financing

Redistributive fiscal policy seeks to impact on poverty and inequality, to assure the effective protection of human rights of all people. The management of financial resources becomes more important in contexts of crisis or growth reduction. It is in such contexts that human rights are most neglected, especially ESCR. Regressive measures acquire all their value in times of austerity, where generally austerity policies in response to crisis scenarios or reduced growth have an impact on the reduction in the allocation of resources to ESCR. For example, in Mexico, according to González, budget cuts for 2015 and 2016 contributed to the increase in poverty and extreme inequality in the country.[34]

Austerity policy is based on the reduction or contraction of the public budget and consequently, of public spending. Usually, these policies seek to reduce fiscal deficits or meet debt obligations. Despite the term austerity used by Mexican government, if we accept, as the Secretariat of Civil Service points out, that republican austerity is not a contraction of government spending, but a reorientation of public spending towards the people who

[32] CRC, "Day of general discussion on resources for the rights of the child – responsibility of states. Recommendations from the Committee on the Rights of the Child" (21 September 2007), 46th session of the CRC, para. 26.

[33] Toribio Toledo, *El principio de progresividad y no regresividad en materia laboral*, 23 Derecho y Cambio Social (2011).

[34] CESCR, *Política Fiscal y Derechos Humanos en Tiempos de Austeridad Diálogo auspiciado por la Comisión Interamericana de Derechos Humanos (CIDH) en el marco del 157 periodo de sesiones* (2016), available at *https://www.cesr.org/politica-fiscal-y-derechos-humanos-en-tiempos-de-austeridad* (last visited Oct. 01, 2020).

have less,[35] we may think more of a redistributive policy seeking to generate savings by reducing the cost of government to finance other programs or policies than of an austerity policy based on a contraction in public spending. Thus, without assessing its effectiveness, the republican austerity policy that began in December 2018 in Mexico is a policy instrument that seeks the financial viability of the Mexican government to finance social programs that aim at the redistribution of wealth.[36] This implies the reallocation of budget so, necessarily some programs or budget items will stop receiving or will receive fewer resources and the resources allocated to other programs or budget items will increase. It is in this scenario that disagreements with the form of allocation of resources may occur.

Be as it may, with the health and economic crisis due to COVID-19, the scenario changes. Resources allocated to different areas of public spending must be used for the health emergency. On the other hand, the economic crisis entails less economic activity, less money to spend and poorer people. According to the National Institute of Statistics and Geography (INEGI), there was a decrease of (-) 17.1% in real terms in the period comprising April to June 2020 compared to the previous quarter year. Also, in its annual comparison, the Gross Domestic Product (GDP) declined (-) 18.7% in the same time period.[37] Regarding poverty, according to the National Council for the Evaluation of Social Development Policy (CONEVAL), by 2020, income poverty could increase between 7.2 and 7.9 percentage points, that is, between 8.9 and 9.8 million people. Extreme income poverty may also increase between 4.9 and 8.5 percentage points: between 6.1 and 10.7 million people. Furthermore, it estimated an increase in the unemployment rate from 3.3 to 5.3 percent and from 37.3 to 45.8 percent in working poverty in the second quarter of 2020.[38]

The Committee on ESCR has reflected on tax policies in times of crisis and has indicated that a flexibility device is required that reflects the realities of the real world and the difficulties that it implies for each country to ensure the full effectiveness of ESCR. It also indicated that States have the obligation to proceed as expeditiously and efficiently as possible with a view to achieve

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[35] HRC, *Report of the Independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona*, U.N. Doc. A/HRC/17/34 (Mar. 17, 2011).

[36] Jesús Rivero Casas, *La política de austeridad como instrumento para el bienestar y el crecimiento económico en el gobierno de la "cuarta transformación": lógica y problemas de implementación*, 27 Buen Gobierno (2019), available at *https://www.redalyc.org/jatsRepo/5696/569660565002/569660565002.pdf*.

[37] Instituto Nacional de Estadística y Geografía, *Producto interno bruto de México durante el segundo trimestre de 2020* (Ago. 26, 2020), available at *https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/pib_pconst/pib_pconst2020_08.pdf*.

[38] Consejo Nacional de Evaluación de la Política de Desarrollo Social (CONEVAL), La política social en el contexto de la pandemia por el virus SARS-CoV-2 (COVID-19) en México 12 (CONEVAL) (2020), available at *https://www.coneval.org.mx/Evaluacion/IEPSM/Documents/Politica_Social_COVID-19.pdf*.

that objective, and that all deliberately retroactive or regressive measures require careful consideration and should be fully justified by reference to all of the rights provided for in the Covenant and in the context of making full use of the maximum available resources.[39]

In other words, the Committee on ESCR accepts that, exceptionally, there may be retrogression of ESCR without non-compliance with the ICESCR, but it must be justified. General Comment 19 further explains justification of retrogression of ESCR and provides a six points criterion for the justification of retrogression:

— A reasonable justification for the measures.
— That possible alternatives are thoroughly studied.
— An examination of the measures and alternatives must be carried out with the true participation of the affected groups.
— The measures must not be directly or indirectly discriminatory.
— The measures should not have a sustained impact on the exercise of the right or an unjustified effect on the rights acquired or deprive any person or group of the minimum level indispensable of the right.
— There should be an independent review of the measures at the national level.[40]

The aforementioned refers to a general criterion, applicable in an environment of everyday life but maintained applicability even in moments of austerity or economic crisis. Thus, while recognizing the need for adjustments due to crisis or austerity, the Committee on ESCR was punctual in suggesting that the protection of ESCR is more urgent and not less urgent in times of austerity and crisis. In other words, in times of crisis, it is more important that States pay attention to ESCR.[41] Thus, the doctrine on retrogression or non-retrogression did not allow a change for times of crisis or austerity.

As Warwick notes,[42] the Committee on ESCR, when faced with economic crises, did not show much flexibility to national governments. This is noted in several concluding remarks. For example, in 1999, the Committee on ESCR takes into account the Solomon Islands situation and despite the fact that it indicates that due attention must be paid to the political, economic and social conditions prevailing in the country at that time, and that it recognized that

[39] UN CESCR, *General Comment No 3: The nature of States Parties obligations (Art 2, para. 1)* (1990) UN Doc E/1991/23.

[40] UN CESCR, *General Comment No. 19: The right to social security (Art. 9 of the Covenant)* (2008) UN Doc E/C.12/GC/19.

[41] UN CESCR, General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant) (1990) UN Doc E/1990/23.

[42] Ben T.C. Warwick, *Socio-economic rights during economic crises: A Changed Approach to non-retrogression*, 65, ICLQ, 249-265 (2016).

Solomon Islands were being severely affected by financial limitations caused by the economic crisis, the Committee on ESCR expresses concern about the lack of guarantee of different ESCR such as access to employment due to the reduction of the public sector and education due to absence of compulsory primary education.[43]

In the case of Mongolia in 2000, ICESCR Committee recognizes the situation in the country caused by the process of transition to a market economy, however, it regrets the decline in public spending on education and worries about school dropouts, especially among children belonging to families of shepherds who have to work. Furthermore, it urged the State to continue to urgently address the nutritional needs of its population and recommended to ensure that people living in remote areas have progressive access to essential health services.[44]

Regarding Mexico, in 1999, Committee on ESCR notes that the economic crisis experienced in 1995 had negative effects on the enjoyment of ESCR yet expressed concern about the insufficient efforts taken by the State to comply with the concluding observations and specific recommendations made after the examination of the country's previous report. It worries about the little progress of the State despite its fight against poverty, and that more people live in poverty or extreme poverty. It considered that, unless the structural causes of poverty be addressed properly, a more equitable distribution of wealth will not be achieved.[45]

As can be noticed from the examples mentioned, despite acknowledging the crisis situation of the States, the Committee on ESCR did not suggest a treatment of greater acceptance to the lack of protection of the minimum content of ESCR or retrogression. However, following Warwick, as of 2012, with the Letter addressed to the State Parties[46] by the president of the Committee on ESCR, there was a break in the approach of the Committee. Substantive adjustments were made to non-retrogression which, according to the

[43] UN CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant- Non-Reporting States. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Right. Solomon Islands* (pars. 7, 9, 18 and 23) UN Doc. E/C.12/1/Add.33 (May. 14, 1999).

[44] UN CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant- Non-Reporting States. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Right. Solomon Islands* (pars. 9, 17, 24 and 25) UN Doc. E/C.12/1/Add.47 (Sep. 1, 2000).

[45] UN CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 of the Covenant- Non-Reporting States. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Rights.* Mexico (pars. 12, 15, 16 and 31) UN Doc. E/C.12/1/Add.41 (Dec. 8, 1999).

[46] *Letter addressed by the chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. HRC/NONE/2012/76, Ref: CESCR/48th/SPMAB/SW (May. 16, 2012).

author, show a clear emergency character. The focus shifted from "business as usual" to an "accommodation to emergency situations".[47]

Before 2012, States that wanted to adopt retrogressive measures had to adopt the criterion indicated in General Comment 19, which is a very onerous criterion, therefore, despite the existence of some flexibility, it was not easy to justify the lack of guarantee of the minimum contents of the DESC or retrogression.

With the 2012 letter, there was a change and, although the letter states that all State parties must always avoid decisions that lead to the denial or contempt of ESCR,[48] it also admits that State parties have a margin of appreciation to design policies that respect the ESCR and comply with the ICESCR;[49] and that economic or financial crises, as well as lack of growth impede the progressive realization of ESCR and can lead to the retrogression of the enjoyment of rights and, therefore, certain adjustments in the implementation of Covenant rights may be necessary.[50] The letter establishes a four points criterion that States must meet in times of crisis or austerity before regression of ESCR:

— The policy should be a temporary measure and only cover the period of crisis.
— The policy must be necessary and proportionate in the sense that the adoption of any other policy, or lack of action would be more detrimental for ESCR.
— The policy is not discriminatory.
— The policy identifies the minimum basic content of the rights and guarantees their protection.[51]

As can be seen, the requirements are less onerous than those established in General Comment 19. Furthermore, two of the criteria, the last two, are long-standing general criteria and immediate obligations, so the standard for non-retrogression actually comes down to just the first two criteria.[52] In this sense, in times of economic, financial and health crises, natural phenomena, austerity, in accordance with this doctrine of non-retrogression that arises in 2012, regressive measures can be implemented complying with the following general criteria: non-discriminatory and ensuring the minimum content of the right; and specific criteria: the measures must be temporary, necessary and proportional.

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47 Ben T.C. Warwick, *supra* note 42.

48 *Letter addressed by the chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, U N Doc. HRC/NONE/2012/76, Ref: CESCR/48th/SPMAB/SW (para. 3) (May 16, 2012).

49 *Ibid.* at para. 4.

50 *Ibid.* at para. 45.

51 *Ibid.* at para. 6.

52 Ben T.C. Warwick, *supra* note 42, at 259.

This new criterion can be seen in Concluding Observations to state parties after 2012. Thus, for example, in 2015, the Committee on ESCR recommended that Italy examine, based on a human rights impact assessment, all the measures adopted in response to the financial crisis in force, in order to guarantee the enjoyment of ESCR. It also highlighted that: sizable cuts in social spending and essential services made during the financial crisis disproportionately affected disadvantaged and marginalized individuals and groups.[53]

That is, the evaluation is carried out according to the criterion established in the open letter of 2012. In the case of Ireland, after recalling the requirements indicated in its open letter to the States of 2012, the Committee on ESCR recommended the country to ensure that austerity measures be phased out gradually and the effective protection of the rights recognized in the ICESCR be strengthened in line with the progress achieved in the period of recovery of the economy after the crisis.[54] In this case, there is emphasis put on the first criteria.

Now, while it is true that international treaties such as the ICESCR are legally binding and interpretation criteria such as those contained in the General Comments or Consideration Reports are not, they are soft law and show a particular institutional position which grants some legal significance to be used in jurisdictional forums and become later common practice. In the case of the 2012 Letter addressed by the chairperson of the Committee on ESCR to States parties, according to Nolan,[55] doesn't even have the status of soft law. Still, as was noted, Concluding Observations to States do take them into account and thus, the criteria in the letter makes its way into soft law and therefore should be taken seriously; it shows an institutionalized interpretation criterion and institutionalized interpretations are used frequently in the international arena for compulsion. Besides, in the evolving dynamics of international law, soft law and hard law are now substantively comparable in their effectiveness.

V. Tax Policies, Maximum Available Resources and Human Rights

State parties of the ICESCR have the obligation to enforce ESCR progressively up to the maximum of the resources available. To assign the maximum

[53] UN CRC, *Concluding observations on the fifth periodic report of Italy* (pars. 9 and 34) (Oct. 28, 2015) UN Doc. E/C.12/ITA/CO/5.

[54] UN CRC, *Concluding observations on the third periodic report of Ireland* (par. 11 a) and b) (Jul. 08, 2015) UN Doc. E/C.12/IRL/CO/3.

[55] Aoife Nolan, *Putting ESR-Based Budget Analysis into practice: Addressing the conceptual challenges*, in Human rights and public finance: budgets and the promotion of economic and social rights 50 (Hart, 2014).

of available resources means to allocate sufficient resources with respect to minimum content, progressive development, and stable maintenance of the full content of ESCR. Maximum available resources mean those resources that a certain society has as a whole and can be legitimately captured through taxation and other means, not just those resources that the State allocate to a particular ESCR in its budget, or the resources available in budgets, or those actually collected.[56] To capture maximum available resources leads to just taxation and involves going beyond budgetary decisions to mobilizing resources available from the society to form public revenue, especially through taxes. Meaning, to meet the obligation to assign maximum available resources to ESCR a prior step is to mobilize socially available resources or wealth. For the mobilization or use of the maximum available resources it is necessary to examine not only the allocation of resources but also the collection mechanisms of State parties, that is, taxation or fiscal policy and public debt.

In countries that are a part of the Organization for Economic Co-operation and Development (OECD), fiscal policy plays a significant role in reducing inequality. The GINI coefficient drops 36% after transfers and direct taxes compared to only an 8% drop in Mexico (2011 data).[57] This means that in Mexico there is an opportunity to improve the role of tax policy as a tool for wealth redistribution. This idea is reinforced if we consider that in Mexico, tax collection represented, on average, 16.1% of GDP, while in the countries that make up the OECD it represents 34.3% and for Latin American and Caribbean countries it represents 23.1% (data from 2018).[58] Likewise, losses in tax collection in Mexico range between 2.6 and 6.2% of GDP.[59] Tax evasion rate with respect to the collection potential is estimated at 16.1% (2016).[60]

It is necessary to identify the real ability to pay of the members of society so that taxation actually corresponds to ability to pay. Taxes, to be fair, must capture the real ability to pay and affect wealth through progressive taxation, but without having confiscatory effects. This perspective is held by the Inter-American Commission on Human Rights, who highlights that

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[56] Horacio Corti, *La política fiscal en el derecho internacional de los derechos humanos: presupuestos públicos, tributos y máximos recursos disponibles*, 17 Revista Institucional de la Defensa Pública 207, 208 (2019).

[57] Michael Hanni *et al.*, *El potencial redistributivo de la fiscalidad en América Latina*, 116 Revista CEPAL 12-13 (2015).

[58] OECD, Base de datos global de estadísticas tributarias, available at *http://www.oecd.org/tax/tax-policy/base-de-datos-global-de-estadisticas-tributarias.htm*.

[59] José Luis Clavellina Miller *et al.*, *Alternativas para reducir la evasión y elusión de impuestos de las Empresas "Factureras" o "Fantasmas"*, 60 Instituto Belisario Domínguez 1 (2019).

[60] Juan Manuel San Martín Reyna *et al.*, *Evasión Global 2017* (UDLAP 2017) (Oct. 01, 2020), available at *http://omawww.sat.gob.mx/administracion_sat/estudios_evasion_fiscal/Documents/Evasion_global2017.pdf.*

the low collection of public revenues hinders the ability to reduce social and regional inequalities. And that tax revenues have been insufficient due to the low tax burden and also to the regressive profile of some taxes. The Inter-American Commission on Human Rights has said that there are numerous tax deductions, exemptions, and loopholes, as well as tax evasion and avoidance and other similar practices. It noted that in several countries in the region, people living in poverty are not beneficiaries, but net payers of the social system.[61]

Since 2014, the Report of the Special Rapporteur on extreme poverty and human rights recommended, among others to: 1) Increase the tax revenue in a manner consistent with human rights obligations on non-discrimination and equality, and increase the allocation of revenues collected in budget areas that contribute to the enjoyment of the rights; 2) Increase the use of personal and direct taxes, and design all taxes in a way that reduce their regressive effect and gender bias; 3) Carefully analyze the income tax threshold to ensure that tax policies do not further impoverish people below or near the poverty threshold. The recommendations are to help States take advantage of the full potential of tax collection as a tool to generate income for the fulfillment of human rights obligations, among others.[62]

As can be seen, fiscal policy related to tax collection plays a critical role in complying with the obligation to allocate resources up to the maximum available in order to ensure ESCR. Indeed, appropriate redistributive measures through fiscal policies are essential to guarantee the full respect for human rights. Also, tax collection in times of crisis is of special importance. For example, issues such as the regressive or progressive nature of the tax structure, the groups which are granted tax exemptions and the purposes of such exemptions, deductions or any tax privileges, and the tools to combat tax evasion and avoidance, all determine how available resources are captured and allocated among the population. This affects inequality and the enjoyment of human rights. In its concluding observations to Ireland in 2015, the Committee on ESCR was emphatic when considering that the response of the state party to crisis focused disproportionately on the introduction of cuts in public spending in the areas of housing, social security, health care and education, without altering its fiscal regime. The Committee recommended that the State consider the possibility of reviewing its tax regime, in order to increase its income to establish the levels of public services and social benefits before the crisis.[63]

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[61] IACHR, *Report on Poverty and Human Rights in the Americas* (para. 495), OEA/Ser.L/V/II.164 Doc.147 (Sep. 7, 2017).

[62] UN, HRC, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, UN Doc. A/HRC/26/28 (May 22, 2014).

[63] UN CRC, *Concluding observations on the third periodic report of Ireland* (para. 11) (Jul. 08, 2015) UN Doc. E/C.12/IRL/CO/3.E/C.12/IRL/CO/3.

IV. Admissibility of Retrogression of ESCR due to Austerity and Crisis in Mexico

Under the ICESCR and other international treaties on human rights, Mexico, like any other State party, has acquired a series of international legal obligations which prevents the establishment of arbitrary fiscal policies[64] however, this does not totally invalidate the possibility of decision-making by the State in the collection and resource allocation. State governments have a margin of appreciation and can make decisions about rights and prioritization of rights; therefore, they have a certain margin of maneuver around fiscal policy. Obligations related to human rights are fulfilled through the development and implementation of policies, programs, mobilization of the resources to finance them, and the allocation of sufficient budget to policies and programs. Of course, a latter and necessary step is the evaluation to determine whether the policies and programs applied are successful in making human rights progressively effective.

Budgetary and tax policies are important to make human rights a reality regardless of the recognition of human rights in international treaties and in the constitutions. If human rights are to be effectively guaranteed they cannot be alienated from political considerations and decisions about which budgetary items are assigned resources and how many resources are allocated. This is so because resources are not unlimited and thus, not sufficient to make fully effective the entire plethora of human rights recognized in international human rights instruments. Since allocation of resources in budgets and the protection of ESCR are to some extent political decisions, there is not only a single path to protect rights but several. In other words, there are a variety of possible alternatives on allocating and mobilizing resources effectively to guarantee human rights and on which rights are prioritized.

In times of austerity and crisis, this scenario can cause more conflicts, given that it implies certain interests will be dismissed. In effect, deciding implies the selection between multiple possible alternatives, which causes a course of action in a certain sense and with a view to specific consequences. However, political decisions determine which interests will be satisfied and which will not. The ICESCR Committee seems to have accepted with General Comment 19 and with the Letter to the States Parties of 2012 that in times of austerity and crisis resources are even scarcer than in other times. Although it is true that the State parties to the ICESCR cannot arbitrarily decide not to guarantee ESCR at any time, the Committee on ESCR has recognized that a flexibility device that reflects the realities of the real world and the difficulties for each country is required to ensure the full effectiveness of ESCR. It has even recognized the possibility of implementing deliberately retroactive mea-

[64] HRC, *Report of the Independent expert on the question of human rights and extreme poverty, Magdalena Sepulveda Carmona*, U.N. Doc. A/HRC/17/34 (Mar. 17, 2011).

sures or retrogression, although it has specified that when making decisions about the implementation of such measures careful consideration is required, in addition to full justification by reference to all the rights provided for in the ICESCR and in the context of making full use of the maximum available resources.[65] The opposite would be to unlink the effectiveness of the human rights from economic considerations; however, this could result in defending empty formulas.

In this sense, in times of economic, financial and health crises, natural phenomena, of austerity, according to the doctrine of non-regression, especially the doctrine that arises since 2012, regressive measures can be implemented, fulfilling the following criteria: the measures must be temporary, necessary, and proportional, non-discriminatory, and ensure the minimum content of the right.

In Mexico, there are problems with the lack of effectiveness of human rights, which is consistent with the high poverty rate; there are also redistribution problems and the country is now in a context of crisis caused by the COVID-19 pandemic. In this sense, to the question of whether the Mexican State can, based on austerity, redistribution or crisis make decisions that imply retrogression of certain ESCR without violating the obligation, assure progressive realization of the ICESCR, the answer is yes. By way of exception, there may be retrogression of ESCR without non-compliance of ICESCR obligations, but the indicated criterion of justification must be met. This implies that, in addition to establishing the measures as temporary, the State is obliged to justify its decisions.

To assess whether measures such as the termination of trusts or the decrease or lack of allocation of budgetary resources to certain programs are being carried out in violation of the obligation to assure progressive realization contained in the ICESCR (without forgetting that they are political decisions with a certain margin of maneuver, but without the possibility of falling into arbitrariness), it is first necessary to establish the relationship of these programs with the ESCR and subsequently determine if the criterion in the aforementioned 2012 Letter is being met. This implies that the current government must carry out and extensive work of justification where it argues comprehensively that decisions of resource allocation, resource reduction, elimination of programs, or others, are necessary, proportional (another decision or lack of action will be more harmful for ESCR as a whole) and non-discriminatory measures. It would even have to explain and justify the allocation of resources to programs or projects that do not appear to be linked to the effectiveness of the human rights.

On the other hand, another requirement that is not found explicitly neither in General Comment 19 nor in the 2012 letter, but which derives of the

[65] UN CESCR, *General Comment No 3: The nature of States Parties obligations (Art. 2, para. 1)* (1990) UN Doc E/1991/23.

obligations of the States contained in the ICESCR can be identified. This is a prerequisite to the adoption of any policy that may be regressive to ESCR. It is the obligation to take measures to muster the maximum of resources available for the progressive realization of human rights. This is the obligation of the Mexican State to mobilize resources available through its tax policy before establishing policies that imply retrogression of ESCR. In this regard, it is important to also analyze tax policy: the measures to avoid or reduce tax evasion and avoidance, the progressivity of taxes, among other measures that ensure tax justice. Of course, other issues that involve accountability and policies to prevent corruption are also important. They remain undiscussed because they are not part of the objective of this article.

So, the cuts (and regressive measures) need to be evaluated considering fiscal policy as a whole. Hence, reasonable alternatives to spending cuts (in times of austerity) can be found on the taxation side, designing reforms that increase the progressivity of the collection system and the collection of available resources in society; that is, taxes according to the actual taxable capacity. In times of austerity or economic crisis, it seems even more important to put emphasis on collection, on fair taxation in such a way that they mobilize all socially available resources for the protection of rights human rights, ensuring the effectiveness of the minimum of rights before deciding on regressive measures. If this is done, if there are measures for the mobilization of socially available resources and even with such measures there are not enough resources for ESCR, along with other justification, retrogression of ESCR would not mean non-compliance of ICESCR.

VII. Conclusion

Fiscal policy as a set of revenue expenditure programs designed to meet established purposes serve not only for financial ends but also to achieve political, social, and economic goals related to human rights. Realization of all human rights come along with a financial burden thus fiscal policy, in the allocation of budgetary funds as well as in the collection of funds from society through taxes, is associated with the effectiveness of human rights.

Government channels resources and strategically allocates them to solve problems, including for the realization of different human rights. This allocation becomes especially relevant when there is need for redistribution or when economic resources are limited due to emergency or crisis situations.

State parties to the ICESCR, in accordance with their obligations derived from the Covenant, cannot arbitrarily decide their fiscal policy without considering human rights. Even so, they have room for maneuver in making decisions about their budget and tax policy. On the other hand, although one of their obligations is the progressive realization of human rights, the interpretations emanating from the ICESCR after 2012 (especially in General

Observation 19 issued by the Committee on ESCR in accordance with the letter addressed by the chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights in 2012 that refers specifically to times of crisis, and Concluding Observations to state parties made by the Committee on ESCR), recognizes the need for flexibility in cases of austerity or crisis and allows, in crisis circumstances, certain retrogression of rights. Although these interpretations that conform the doctrine on retrogression or non-retrogression are not hard law, they are soft law that show an institutionalized position with sufficient legal significance to be held even in jurisdictional forums.

In light of such interpretations, in the case of Mexico, given that all effort are made to mobilize maximum available resources through tax policy, for a specified time that cover the period of crises, and only by meeting certain requirements: that measures be necessary and proportionate; that measures are not discriminatory, and that measures identify the minimum basic content of the rights and guarantees their protection; it is possible to justify the retrogression of rights without violating the obligation to progressive realization of rights contained in the ICESCR.

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THE MORAL CLAUSE IN PATENT LAW AND THREATS POSED BY HUMAN GERMLINE GENOME EDITING

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Abstract: *This article examines whether the lack of closure of moral clauses in patent laws, particularly in dealing with the issue of human germline genome editing, causes such clauses to fail to function as a moratorium in countries like Mexico. The hypothesis posed here is that a general, open, moral clause in intellectual property legislation, specifically in patent law, is ineffective when confronted with a foreseeable but strong innovation that alters an area of applied biology such as human germline genome editing. Using the deductive method, this research aims to determine whether countries like Mexico need to provide more specific guidance in their legislation on technological innovations like human germline modification in order to foster an atmosphere of legal certainty. A comparative analysis of the closed morals clause in the European Patent Convention and the open morals clause in Mexico's intellectual property law confirms this hypothesis. Specifically, the lack of closure of a morals clause in patent law, when confronted with novel and complex technological advances, will likely fail to function as a moratorium.*

Keywords: *Human Genome, Moratorium, Moral Clause in Patent Law, Mexico.*

Resumen: *Este artículo examina si la falta de cierre de las cláusulas morales en las leyes de patentes, particularmente al tratar el tema de la edición del genoma de la línea germinal humana, hace que tales cláusulas no funcionen como una moratoria en países como México. La hipótesis planteada aquí es que una cláusula moral general abierta en la legislación de propiedad intelectual, específicamente en la ley de patentes, es ineficaz cuando se enfrenta a una innovación fuerte pero previsible que altera un área de la biología aplicada como la edición del genoma de la línea germinal humana. Utilizando el método deductivo, está investigación tiene como objetivo determinar si países como México necesitan brindar*

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una orientación más específica en su legislación sobre innovaciones tecnológicas como la modificación de la línea germinal humana para fomentar un ambiente de certeza jurídica. Un análisis comparativo de la cláusula de moral cerrada en la Convención Europea de Patentes y la cláusula de moral abierta en la ley de propiedad intelectual de México confirma esta hipótesis. Específicamente, la falta de cierre de una cláusula moral en la ley de patentes, cuando se enfrenta a avances tecnológicos novedosos y complejos, probablemente no funcionará como una moratoria.

Palabras clave: *Genoma Humano, Moratoria, Cláusula Moral en el Derecho de Patentes, México.*

Table of Contents

I. Introduction

A technological innovation that has sparked a lot of discussion, scrutiny and broad speculation across the scientific world is CRISPR (Clustered Regularly Interspaced Short Palindromic Repeats), a technology discovered in 2012. Debate has been particularly heated regarding the genetic editing of the human germline. For the first time ever, aside from science fiction caricatures, scientists have created a sufficiently precise, inexpensive, and replicable tool capable of editing the very code that originally led to the appearance of human beings, the DNA.

In the short time that has elapsed since the discovery of this new technology, two babies (as far as official records go) have been born after having had their germline genetically edited, a patent rights case involving two prestigious academic research institutions has been vigorously litigated in court, and an international moratorium on the use of this technology has been proposed and drafted. At the same time, research on somatic cells, that is, cells that divide themselves through mitosis, and don't generate inheritable changes, is happening, and more discoveries are on the way in that field as well. One of the main challenges facing the law will be devising a mechanism that can respond effectively to these rapid changes and serves as a bridge between scientific research and the market. Historically, this has been the domain of Intellectual Property.

Some researchers argue that existing legislation in many countries already addresses this issue and contain mechanisms designed to deny patent requests for technologies that violate the standard institute of Intellectual Property's moral clause, typically incorporated in patent laws. The question then becomes: Are morals clauses sufficient in facing innovations that involve complex, novel innovations? This article will narrow the focus of this question to an analysis of the effectiveness of morals clauses in dealing with the use of CRISPR technology to genetically alter the human genome. Thus, the specific question posed for the purpose of this article is: Is it possible to verify whether the lack of closure of the moral clause in patent law, particularly when referring to human germline genome editing, acts merely as a general clause of prohibition that, in practice, fails to function as a moratorium?

Answering this question first requires resolving two fundamental, underlying issues. The first issue is whether morality alone is able to provide a sufficient foundation on which to organize a complex society. This is an issue many legal researchers may find easy to answer considering one of the primary reasons the law itself originated was as a consequence of the determination that morality is an insufficient organizing principle given the complexity of modern human society. Nevertheless, this issue will be specifically addressed in Section 4.

The second issue is more complicated and will be evaluated in Section 3. This issue concerns whether human germline genome editing is such a complex subject that it requires a more sophisticated assessment mechanism than a moral scheme alone is able to provide. After consideration of the evidence presented in this text, the moral scheme will be shown to be insufficient.

The hypothesis posed here is that a general, open moral clause in iIntellectual Property legislation, specifically in patent law, is likely to fail when presented with an unprecedented innovation such as human germline genome editing. The method used to test this hypothesis will be the deductive method.

This text will be divided into four principal sections with these corresponding objectives: (1) introduce aspects of the Autopoietic Systems Theory necessary for an understanding of the argument in this article; (2) show how CRISPR technology is an innovation beyond the scope of anything traditional moral clauses have previously had to address; (3) explain moral clauses and how they function, particularly as they apply to an innovation such as CRISPR technology ; and (4), discuss the morals clause in Mexico's legislation and evaluate its capacity to address the issues raised by technological innovations such as CRISPR.

II. Basic Concepts of the Autopoietic Systems Theory

The Autopoietic Systems Theory will be used as the theoretical paradigm. This theory allows incorporation of both dynamic and complex factors into

the analysis of a system. As applied to the field of legal sociology, this is a significant advantage for an understanding of the issues that will be raised here. The theory is also capable of accounting for external elements which impact the legal system, as will be made clear in the development of this chapter.

To begin, a brief explanation of some of the basic theoretical elements of the Autopoietic Systems Theory is necessary. The theory was developed by the German jurist, Niklas Luhmann, and was inspired by the autopoiesis theory in biology formulated by Chilean researchers, Humberto Maturana and Francisco Varela.[1] The inspiration came as a factor of modification of an existing theory, Talcott Parsons' Systems Theory, which was itself based on biology.

Parsons' theory considers society to be like an organism comprised of various distinct yet interdependent subsystems, each of which engages in different activities (actions), interdependent and exclusive to systems.[2] A simple example of such interconnected systems are the digestive and circulatory systems of the human body. The two systems perform complementary operations, one absorbs energy from food and the other distributes this energy throughout the body. Each has distinct yet interdependent functions, without one, the other cannot continue to function. For example, without energy, blood will not circulate, and without the energy distribution performed by the circulatory system, there can be no digestion. The two systems are not capable of changing tasks, that is, the circulatory system cannot digest, nor can the digestive system circulate blood. Furthermore, each system acts and reacts according to changing conditions within the overall system. For example, poor circulation can directly affect digestion, and poor digestion can directly affect circulation. For Parsons, these biological systems metaphorically represent the various social systems. Each system acts within the social organism fulfilling its role within the social system[3] by employing their distinct yet interdependent characteristics.

> The fundamental starting point is the concept of social systems of action. The interaction of individual actors, that is, takes place under such conditions that it is possible to treat such a process of interaction as a system in the scientific sense and subject it to the same order of theoretical analysis which has been successfully applied to other types of systems in other sciences [...] The frame of reference concerns the "orientation" of one or more actors — in the fundamental individual case biological organisms — to a situation, which includes other actors. The scheme, that is, relative to the units of action and interaction, is a relational scheme. It analyzes the structure and processes of the systems

[1] Leo Peixoto Rodrigues *et al.*, Niklas Luhmann: A sociedade como sistema 23 (Edipucrs, 2012).

[2] Talcott Parsons, The Social System 1 (2. ed. Routledge, Taylor and Francis Group, 2005).

[3] *Ibid.* at 16.

> built up by the relations of such units to their situations, including other units. It is not as such concerned with the internal structure of the units except so far as this directly bears on the relational system.[4]

In creating the Autopoietic Systems Theory, however, Luhmann proposes an important change. He exchanges Parsons' action-based theory for a theory based on communication. For Luhmann, society exists primarily as communication.[5] Inspired by Maturana and Varela's proposition that the operation between system units (or subsystems) would occur not through action, but by independent interaction,[6] Luhmann extends the Autopoietic Systemic Theory from biology for the field of sociology.

Maturana and Varela[7] posit that an individual organism has a dual nature to its functioning. First, it interacts with the world via the transmission of information, that is, by either observing the environment, or influencing it. Second, it interacts with itself through operations within its own systemic limits. For example, a human being can be viewed as a system that communicates with the environment through its sensory capabilities while operating within its cognitive limits. This sensory opening is the means by which a human being understands the world and also allows for modification or adaptation. Thus, a human being is only able to operate directly on factors within its envelope, within its cognitive limit,[8] and can only generate changes in the external environment — everything outside this envelope — indirectly, via influence.

Luhmann calls this envelope "operative closure", and refers to an individual's sensory capacity as the "cognitive opening". Applying these concepts to a legal system means that it operates and is understood within its own system, for example, by defining that system's boundaries. It observes and communicates with everything outside its own system by internalizing information gathered from the external environment and making assessments regarding possible legal implications. The legal system itself is limited to that which constitutes legal communication.

> O modo de operação, que o sistema da sociedade produz, e reproduz, é a comunicação provida de sentido. Isso permite dizer que o sistema jurídico, à medida que é um sistema-parte da sociedade, utilizado como modo de operação

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[4] *Ibid.* at 1.

[5] Niklas Luhmann, Theory of Society: volume 1, 113 (Rhodes Barrett trans. Stanford University Press, 2012).

[6] Humberto Maturana, *et al.*, Autopoiesis and cognition: The realization of the living XIX-XX (Springer Science & Business Media, 1991).

[7] Humberto Maturana, *et al.*, Autopoiesis and cognition: The realization of the living (Springer Science & Business Media, 1991).

[8] Humberto Maturana, *et al.*, *Autopoiesis: The organization of living systems, its characterization and a model*, 5 (4) Biosystems 187, 196 (1974).

> da comunicação, não pode fazer nada que não seja — como meio do sentido mediante a comunicação — compor formas (sentenças). É trabalho do sistema social possibilitar e tornar isso evidente no curso de uma longa evolução sociocultural. No sistema jurídico, isso funciona como garantia de que, por exemplo, nem papel, nem tinta, nem pessoas, nem outros organismos, nem em tribunais, nem em seus espaços, nem aparelhos telefônicos, nem computador, que ali são utilizados, façam parte do sistema.[9]

The characteristic of operative enclosure is a very important characteristic for the understanding of the Autopoietic Systems Theory and even more important for the development of the present work. First, due to the fact that it defines the autonomy of systems, that is, it defines that in a normal situation only the system that decides on the juridicity of something is the juridical system, while all that this system can do in relation to its environment, is communicating this operation of juridical decision, generating consequences on the environment, but not being able, for example, to judge on the economic viability of a post-legal practice.[10] Second, because it opens space for understanding systemic evolution, especially the selection stage, which is exactly the step that the present work will assess on the pressures that the moral clause for the protection of intellectual property will suffer on the hands of the economy.

In the Autopoietic Systems Theory, autonomy results from a process of systemic differentiation, or self-differentiation[11] As society expands and develops, it generates communication complexities such that various systems will eventually differentiate themselves and gain autonomy. An example of this is the social development that has led to the separation of religion from the state.

Today, the normal operation for such communications is that the State organizes and operates politically within its limits, and Religion organizes and operates within its own limits as well. To use a biological analogy, it is as if a single cell, which was on its way of finishing cellular reproduction, but was still interconnected to another cell, had finished the process and each of the

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[9] Niklas Luhmann, O Direito da Sociedade 46 (Saulo Krieger trans., Martins Fontes, 2016) (1993). Free translation: The *modus operandi*, which society's system produces, and reproduces, is meaningful communication. This allows us to say that the legal system, as it is a system which is part of society, used as a way of operating communication, cannot do anything other than — as a means of meaning through communication — compose forms (sentences). It is the job of the social system to enable and make this evident in the course of a long socio-cultural evolution. In the legal system, this works as a guarantee that, for example, neither paper, nor ink, nor people, nor other bodies, nor in courts, nor in their spaces, nor telephones, nor computers, that are used there, are part of the system.

[10] An example of this would be an environmental penalty that does not preclude the economic practice that generated environmental damage in the first place: despite being rejected by the legal system, the economic system does not necessarily refrain from doing it, due to its judgment on the profitability of the practice.

[11] Niklas Luhmann, Theory of Society: volume 2 13 (Rhodes Barrett trans. Stanford University Press, 2013).

two resulting cells consequently has operative autonomy within its own cell wall. This operative autonomy is the element that characterizes the operational closure of the system.

> If we describe society as a system, it follows from the general theory of autopoietic systems that it must be an operationally closed one. At the level of the system's own operations there is no ingress to the environment, and environmental systems are just as little able to take part in the autopoietic processes of an operationally closed system. This is the case even, indeed especially, where such operations are observations or operations whose autopoiesis requires self-observation — a difficult thought that runs counter the entire epistemological tradition.[12]

Autonomy is the element that guarantees the systemic integrity of operations carried out within the system. Without autonomy, the communications of one system could overlap or conflict with those of another system. This would be considered a setback referred to as social dedifferentiation. "A imposição de um dos campos de linguagem aos outros importaria a própria destruição da heterogeneidade das esferas discursivas e dos respectivos sistemas de comunicação".[13] An example of dedifferentiation would be if Religion and the State were to return to the prior situation of having less social differentiation, that is, if Religion were to begin operating within the defined operational limits of the State. Intersecting operations of different systems is referred to as communicational overlap.[14]

Communicational overlap often occurs in situations where specific economic interests are affected by the operations of other systems. An example of this is the pharmaceutical industry's *modus operandi* regarding patent protection and the exercise of exclusive rights over the products it develops. In this manner, health communication is replaced by profit communication.[15] It is not by chance that the development of technological innovations resulting from the genetic editing of the human germline encounters similar pressure from the economic communication since that communication focuses on the paradox of scarcity which overlaps with the domain covered by the morality clause, as will be developed further in this text.

> ...ciência, esporte, religião. Todos estes âmbitos têm sua atuação limitada externamente pela escassez. O único sistema capaz de lidar com esse paradoxo é o econômico. Por isso, todos os outros sistemas pressupõem operações econômicas

[12] Luhmann, *supra* note 6, at 49.

[13] Marcelo Neves, Transconstitucionalismo 38 (Martins Fontes, 2009). Free translation: The imposition of one of the language fields on the others would imply the very destruction of the heterogeneity of the discursive spheres and the respective communication systems.

[14] Salete Oro Boff, *et al.*, *Sistema de Patentes na Saúde: o sistema econômico sobrepondo-se à comunicação de saúde*, in Propriedade Intelectual e Gestão da Inovação (Deviant, 2018).

[15] *Id.*

> para poderem prosseguir. É o que Luhmann denomina interpenetração. Esses pontos precisam ser mais bem aclarados para que se compreenda toda a complexidade envolvida por qualquer operação social que lide com recursos escassos.[16]

Systemic evolution demonstrates the "autopoiesis" of Luhmann's theory. It is the process through which a system, within the limits of its operative closure and cognitive opening, either assimilates or rejects new elements and evolves as a result of that response.[17] Systemic evolution is a process that takes place in three successive phases. These phases are: variation, selection, and re-stabilization.[18]

Variation is the phase of evolution through which points of provocation are perceived. These may be elements allowing for innovation, elements that are not stable within the current systemic structure, or elements that are no longer irrelevant to the communicational context within the system itself.

The recognition of these elements as variations is the first phase of systemic evolution. Since the environment outside any system has more complexity than the system itself, most variations tend to be perceived through systemic observation, that is, via the system's cognitive opening. Systemic variation is the aspect of the Autopoietic Systemic Theory that describes the process of technological innovation Human germline genetic editing is one such innovation which will be perceived as a variation inside the Social System, in both the economy and Law as systems.

Selection is the second phase of systemic evolution. In this phase, variations go through a process of either acceptance or rejection in relation to the internal context of the system. That is, selection is the process by which the system decides whether an element of variation will be treated differently in the future compared to the treatment it has received this far (if any at all), or how it will be treated if a difference is created in the process. One result could be a complete change of treatment from prohibition to permission, for example, as with a procedure such as abortion. Another possibility is that a plan to accommodate the variation will be developed for something that had not been previously considered by the system. An example of this is found in the juridical sphere where a new process had to be developed to deal with cyber crimes since no such process had previously existed.[19] The juridical assessment as to whether

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[16] José Gladston Viana, Sociologia dos Direitos Sociais: escassez, justiça e legitimidade 68 (Saraiva, 2014). Free translation: science, sport, religion. All of these areas are limited externally due to scarcity. The only system capable of dealing with this paradox is the economic system. For this reason, all other systems presuppose economic operations in order to proceed. This is what Luhmann calls interpenetration. These points need to be better clarified in order to understand all the complexity involved in any social operation that deals with scarce resources.

[17] Luhmann, *supra* note 6, at 275-276.

[18] Luhmann, *supra* note 6, at 275-305.

[19] It is important to note that selection by rejection of a variation is not the same thing as a situation where the variation has not been taken into account by the system at all. This is

inventions such as human germline genome editing warrant intellectual property protection must be focused on how the morality clause should be applied in intellectual property cases.

Re-stabilization, the final phase of systemic evolution, has a paradoxically important role. Re-stabilization is the phase in which the selection of the variation is absorbed into the system's operational context and incorporated into its communicational code. However, even after the variation has been fully incorporated, an element of eccentricity persists. Systemic restabilization can never be fully complete because the restabilized element itself remains subject to further variation, which would trigger a renewed process of systemic evolution. This apparently paradoxical element of restabilization stems from the fact that the objective of systemic evolution is not the final resolution of a particular problem within the system, but rather, the operational perpetuation of the system itself via the adaptive mechanism of systemic evolution.

III. Genetic Editing of the Human Genome as an Important Variation

Recent scientific advances in genetic editing have not fundamentally transformed or expanded the capabilities of editing processes. Rather, these innovations have typically involved reducing margins of error and increasing accessibility by dramatically reducing the cost of genetic editing tools. In fact, this is not unique to genetic engineering. In many fields, a simple advance, as predicted by Moore's law[20] can lead to the rapid dissemination of new technologies. It could be said that the most significant socially observable innovations are those which result in increased accessibility, in terms of both cost and ease of access, to already existing technology rather than the creation of new technologies themselves.

> Back in the 1980s, scientists had been content to edit individual genes at efficiencies that were just fractions of a percent. By the early 2000s, the efficiencies moved into the low-single-digit percentages, and it became possible to alter genes in a couple of new ways.[21] But with CRISPR, gene editing was now so powerful and multifaceted that it was often referred to as genome engineering, a reflection of the supreme mastery that scientists held over genetic material inside living cells.[22]

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because an explicit rejection of the variation will produce a systemic structural reaffirmation of the rejection for the variation itself.

[20] Robert Schaller, *Moore's law: past, present and future*, 34 (6) IEEE Spectrum 52, 59 (1997).

[21] The techniques alluded to here are ZFN (Zinc Finger Nuclease) and TALEN.

[22] Jeniffer Doudna *et al.*, A Crack in Creation, Gene editing and the unthinkable power to control evolution 100 (Mariner Books, 2017).

Early genetic editing techniques requiring access to extremely sophisticated and expensive research facilities as well as highly specialized scientists. The prohibitive costs associated with this research discouraged many laboratories that would otherwise have been interested in working with genetic editing techniques.[23] The entry of CRISPR technology radically altered the range of possibilities for researchers. This technology is now so inexpensive that even high school students can practice genetic editing in laboratories with limited resources. In fact, complete kits for the genetic editing of bacteria are currently available to consumers for as little as US$130.[24]

On June 8, 2012, an American biochemist at the University of California, Jennifer Doudna, after a one-year collaboration with French researcher Emmanuelle Charpentier, submitted the results of their work to the journal, *Science.* That work is now regarded as the first scientific work on the capabilities of genetic editing using the CRISPR tool.[25] The work was accepted for publication on June 28, 2012, and published less than two months later on August 17, 2012.[26] Early in the following year, on February 15, 2013, two related works were submitted to the same journal. One outlined the possibilities for the genetic engineering of eukaryotic cells,[27] and the other described the editing procedure using CRISPR in cells.[28]

Following the publication of the first two scientific articles mentioned in the last paragraph, a patent dispute arose between the Broad Institute at MIT and the University of California.[29] The dispute centered on the patent applications made to the USPTO (United States Patent and Trademark Office) by those two institutions. The Broad Institute claimed its patent application contained a specific description of performing genetic editing on eukaryotic cells, and that the patent application of the University of California only described the process in a general manner.[30]

The legal cause of action was the University of California's claim of "interference",[31] that is, that the patent granted to the Broad Institute en-

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[23] *Ibid.* at 111.

[24] *Id.*

[25] *Ibid.* at 85

[26] Martin Jinek *et al.*, *A programmable dual-RNA–guided DNA endonuclease in adaptive bacterial immunity*, 337 (6096) Science 816, 821 (2012).

[27] Le Cong *et al.*, *Multiplex genome engineering using CRISPR/Cas systems*, 339 (6121) Science 819, 823 (2013).

[28] Prashant Mali, *et al.*, *RNA-guided human genome engineering via Cas9*, 339 (6121) Science 823, 826 (2013).

[29] The University of California is joined by the University of Vienna and Professor Emmanuelle Charpentier in this litigation. As a result, these parties to the litigation are often referred to collectively as "CVC" in court documents and news articles.

[30] Heidi Ledford, *Broad Institute wins bitter battle over CRISPR patents*, 542 (7642) Nat. News, 401 (2017).

[31] *Id.*

croached on the patent granted to the University of California. On February 15, 2017, a three-judge panel from the Patent Trial and Appeal Board (PTAB) found in favor of the Broad Institute, and the University of California's subsequent appeal of that decision was denied by the US Court of Appeals for the Federal Circuit on September 10, 2018.[32] However, litigation surrounding this dispute is ongoing due to the fact that the University of California filed a second interference claim against the Broad Institute. Proceedings in this related second case are still in the discovery phase, leaving many of the original issues unresolved. Nevertheless, several points raised by this case have extremely important economic implications for the field of genetic editing in general, one of which is significant for the present work:

> The dispute centered on the rights to commercialize products developed by using the CRISPR–Cas9 system to make targeted changes to the genomes of eukaryotes — a group of organisms that includes plants and animals. Although many patents have been filed describing various aspects of CRISPR–Cas9 gene editing, the Broad Institute and UC patent applications were considered to be particularly important because they covered such a wide swath of potential CRISPR-Cas9 products. Investors have watched the case closely, even as they poured millions into companies that aim to develop medicines and crops using CRISPR–Cas9. The zeal with which both institutions defended their patents was unusual, says Jacob Sherkow, a legal scholar at New York Law School in New York City. Normally, he says, such institutions would settle out of court before the case reached this point.[33]

The intensity of the dispute demonstrates how the exclusive appropriation of a new technology through intellectual property mechanisms can be extremely valuable, especially a genetic editing tool that can be used to modify the human genome. Although the unit value of the tool itself would not seem to justify multimillion dollar investments of both public and private capital, the fact that it will be used on a massive scale explains why this technology would have great economic value to the patent holder.

On November 26, 2018, the announcement of the birth of Chinese twins whose CCR5 gene had been disabled by genetic engineering took the scientific community by surprise and led to immediate calls for a moratorium on hereditary genetic engineering applied to humans.[34] The objective of He Jiankui, the scientist who performed the genetic editing of the zygote using CRISPR technology, was to make the children immune to the HIV. Although

[32] Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board, Case No. 106,048, 2018 (USA).

[33] Heidi Ledford, *Pivotal CRISPR patent battle won by Broad Institute*, Nature News, Springer Nature America, Inc (2018).

[34] Eric Lander, *et al.*, *Adopt a moratorium on heritable genome editing*, 567 Nature 165, 168 (2019), available at *https://doi.org/10.1038/d41586-019-00726-5*.

Jiankui's conduct was universally criticized, it must be pointed out that risky experimentation is not unprecedented in the history of not only medical practices, but of successful medical practices.

Perhaps the paradigmatic example of innovative tests being carried out at great risk to a patient's life due to unpromising forecasts of success is the case of Edward Jenner. Jenner invented the modern version of what we call a vaccine, an innovation responsible for the preservation of countless human lives (a reminder the world post-COVID-19 may find unnecessary). On May 14, 1796, Jenners injected an eight-year-old boy named James Phipps, with a known lethal pathogen, cowpox, which causes smallpox in humans, without any solid medical evidence that this would not lead to the boy's death.[35] At the time, Jenner was intensely criticized by the medical community and characterized as irresponsible for putting a child's life at risk based on a hunch, whereas today, he is regarded as a great discoverer, a hero of medicine.[36] It is important to keep in mind that the moral condemnation of He Jiankui could also change over time.

> His case is in such a way analogous to Jenner's that the success of his experiments and their side effects are highly uncertain and elude his ultimate control, making it a case of potential moral luck. Even though Jenner might not have crossed established ethics consensus, laws and regulations as obviously as He did, medicine in Jenner's century was not an "ethical wild West" either.[37]

Despite the possibility that Jiankui's achievement could eventually be regarded as a case of moral good luck, the immediate reaction of the scientific community was to call for a moratorium on hereditary genetic editing in humans.[38] A moratorium is merely a request to postpone, in this case, to postpone the practice of hereditary genetic editing of the human genome. A moratorium was necessary, according to the text of the moratorium itself,[39] due to the birth of the twins with genomes edited by CRISPR technology, and the lack of clarity in the declaration of the international summit on genetic editing[40] when it comes hereditary genetic editing the human genome.

The moratorium calls for voluntary compliance. Its primary aim is raising awareness about the risks presented to society by Jiankui's experiment

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[35] Martin Sand, *et al.*, *After the fact-the case of CRISPR babies*, European Journal of Human Genetics 1, 4 (2019).

[36] *Id.*

[37] *Id.*

[38] Lander, *supra* note 45.

[39] *Id.*

[40] David Baltimore, *et al.*, *On Human Gene Editing: International Summit Statement*, National Academy of Sciences (2015), available at *https://www.nationalacademies.org/news/2015/12/on--human-gene-editing-international-summit-statement.*

and alerting the public to the fact that this type of practice may become inevitable in the coming years.[41] The European Society of Human Genetics has endorsed the moratorium, and the consensus of the international scientific community is to respect it.[42] It is important to highlight that the deadline proposed by the moratorium is five Years,[43] which would delay introduction of this type of procedure into mainstream scientific practice until the year 2024. Some scientists, however, consider a five-year delay to be too conservative.

> From a utilitarian perspective, no principled reasons exist to support a risk-averse "precautionary" delay on an early-use HGGM[44] attempt. However, a modest delay would have pragmatic benefits, a notion that has been given added impetus by the recent news of an ethically questionable and apparently not entirely successful first attempt at HGGM. I suggest that utility will be maximized if we kickstart the next biomedical revolution by proceeding not immediately but within around 1–2 years to intervene in the human germline.[45]

It is important to note that the uses of genetic editing technology covered by the moratorium,[46] and referred to by the author above,[47] are very limited and only apply to cases in which preimplantation *in vitro* fertilization is not being used to prevent offspring from inheriting their parents' genetic diseases. The only difference between these two perspectives is their assessment of the reasonableness of the five-year waiting period. Whereas the moratorium considers five years to be reasonable, Smith claims it is not.

There are two points where technological innovations involving hereditary genetic editing will encounter a bottleneck due to an inevitable confrontation with the legal communication, that is, where the innovation is guaranteed to generate a response from the juridical system.

The first point of confrontation is related to scientific communication. Legal authorization will be required in order to conduct innovative research and to secure the exclusive rights to the use of new technologies guaranteed by the Intellectual Property schem.[48] Given that human germline genome editing

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41 Lander, *supra* note 45.

42 Sand, *supra* note 36, at 1, 4.

43 Lander, *supra* note 35.

44 HGGM is an acronym for Human Germline Genome Editing.

45 Kevin Smith, *Time to start intervening in the human germline? A utilitarian perspective*, 34 (1) Bioethics 90, 104 (2020).

46 Lander, *supra* note 35.

47 Smith, *supra* note 46.

48 Even though CRISPR technology already enjoys patent protection, it is important here to discuss how innovations in general are dealt with by intellectual property institutions. Some innovations may be so unique that they require *sui generis* protection, but that is a subject beyond the scope of this work.

research is already taking place, and that public selection of this technology will occur in the context of Intellectual Property legislation, this article will consider societal approval of an innovation to be the official authorization of Intellectual Property protection for that innovation.

The second point of confrontation will come from economic communication. This is the communication most likely to force the variation through the aforementioned bottleneck. In economic terms, since the surge in use of CRISPR genome editing technology in 2013, the market has been making massive investments in biotechnology. By 2014, the genetic editing market alone was worth US$1.84 billion,[49] and by the following year, biotechnology had become the second most well-financed sector in the United States[50] And, as was shown above, the economic pressure behind the CRISPR technology has become so intense that it has even penetrated academia in the United States. Instead of working purely for the advancement of science and the free dissemination of knowledge, universities themselves are aggressively litigating their intellectual property rights in order to maintain their market positions and protect their exclusive rights to pursue potentially lucrative commercial opportunities and advantageous projects with eminent non-profit institutions.[51]

IV. The Meaning of Moral Clause and an Example of Closure

Morality is a term broadly defined as human judgment in relation to individual and social conduct. This judgment is typically derived from behaviors either condoned or disfavored by society as a whole, or by specific social groups within a Society.[52] Morality, therefore, is an element that exists in human society as a mechanism for contextual, temporal, and spatial judgment, which derives from individual or collective rationality, and serves to approve or reject certain practices in the environment in which the judgment takes place.

> We find on further enquiry that most, perhaps all, actual moral judgements are fairly closely correlated with what we may call social demands: any society or social group has regular ways of working, and, in order to maintain these, requires that its members should act in certain ways: the members — from whatever motive, perhaps mainly habit, which has compelled them to adapt

[49] Katelyn Brinegar *et al.*, *The commercialization of genome-editing Technologies,* 37 (7) Critical Reviews in Biotechnology 924, 932 (2017).

[50] *Id.*

[51] Knut Egelie *et al.*, *The emerging patent landscape of CRISPR–Cas gene editing technology*, 34 (10) Nature Biotechnology 1025, 1031 (2016).

[52] John Mackie, *A refutation of morals*, 24 (1-2) The Australasian Journal of Psychology and Philosophy, 77-90 (1946).

> their desires to the established customs — obey these requirements themselves and force their fellows to do so, or at least feel obliged to obey and approve of others obeying.[53]

Human moral judgment is evolutionarily critical to maintaining the intensely social lifestyle that characterizes the human species[54] in the same way that the evolution of moral thought within society tends to generate a complex system of norms endowed with cogency.[55] Social complexification is typically accompanied by challenges to social stability. Morality alone is not a sufficiently solid institution on which to maintain a high level of social complexity, precisely because moral judgment lacks formality in its conception. It exists more as a judgment made based on a specific contextual evaluation rather than from an attempt to observe moral facts.[56]

From an historical perspective, the relationship between morality and law is one in which the complexification and formalization of morality gave rise to law as an object.[57] From a social perspective, generalized moral judgments tend to become part of the legal system due to the fact that, ultimately, the legal system must adapt itself to social moral judgment.[58] Two observations follow. First, morality has served, and continues to serve, as the origin of law, whether historically or socially. Second, in addition to the difference in the element of cogency, morality is more fluid and responds more quickly and easily to social judgment, without the need to alter structural formalities in the same way that occurs within the law. In the present work, this characteristic of morality will be referred to as dynamism.

Morality's dynamism is one of its most interesting characteristics, especially considering that legal institutions will sometimes use it as a justification when faced with the absence of formal, decision-guiding mechanisms on a particular subject. Moral judgment depends solely on societal reactions or expectations regarding specific behaviors, and is therefore subject to change. The flexibility of these judgments is only as formally bureaucratic as the change of opinion of human individuals.

> Para apresentar a função normativa comum à moral e direito, pensemos numa sociedade sem nenhum tipo de autoridade pública, isto é, sem tribunais nem legisladores, onde o controle da vida social se exerceria somente pela atitude

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53 *Id.*

54 William Allman, Stone Age Present: How Evolution Has Shaped Modern Life—From Sex, Violence and Language to Emotions, Morals and Communities 21 (Simon and Schuster, 1995).

55 Aluisio Schumacher, *Sobre moral, direito e democracia*, 61 Lua Nova: revista de cultura e política 75, 96 (2004).

56 Mackie, *supra* note 53.

57 Schumacher, *supra* note 56.

58 *Id.*

> geral do grupo em relação a seus próprios modelos de comportamento. Em tal contexto, práticas contrárias às expectativas sociais poderiam ser objeto de desaprovação. Assim, determinadas expressões faciais ou modalidades de linguagem corporal, com o uso, poderiam se consagrar como maneiras de censurar comportamentos, sendo aprendidas e mantidas de geração em geração.[59]

The moral clauses of various legal systems around the world often allow for decision-making on issues requiring authorization or prohibition without requiring formal amendment of the law. Legal changes can occur based solely on the change of the social assessment of the morality of a particular conduct, and at times, can even override clear legal commandments. This will be discussed further below. To illustrate this interplay between law and morality in the context of technological innovation, this article will examine the moral clause of the European Patent Convention.

According to the European Parliament,[60] "The patent system encourages companies to make the necessary investments in innovation and encourages citizens and companies to devote resources to research and development." The institution charged with handling patent issues is the European Patent Office. The legislation that governs the granting of patents is the European Patent Convention. This is the legal text which will be analyzed here.

Due to its comprehensive scope, the European Patent Convention will serve the present work as a structural comparison for the related Mexican text. It is important to emphasize that the discussion here will address the appropriation of Intellectual Property, and will not be concerned with the morality of the innovations themselves. The focus will be on the morality of the commercial exploitation of these innovations and will employ the same terminology used by the European Patent Convention.[61]

In Article 53, the European Patent Convention[62] lists the exceptions to patentability that must be considered by the European Patent Office when granting patents. The first exception identified by Article 53(a) is the moral patent-

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[59] Schumacher, *supra* note 56, at 75, 96.Free translation: To present the normative function common to morals and law, let us think of a society without any type of public authority, that is, without courts or legislators, where the control of social life would be exercised only by the general attitude of the group in relation to its own models of behavior. In such a context, practices contrary to social expectations could be objects of disapproval. Thus, certain facial expressions or body language modalities, with use, could become established as ways to censor behaviors, being learned and maintained from generation to generation.

[60] European Parliament, Intellectual, industrial and commercial property (2019) available at *https://www.europarl.europa.eu/factsheets/en/sheet/36/propriedade-intelectual-industrial-e-comercial*.

[61] Viola Prifti, *The limits of "ordre public" and "morality" for the patentability of human embryonic stem cell inventions*, 22 (1-2) The Journal of World Intellectual Property 2, 15 (2019).

[62] European Patent Office, The European Patent Convention. Convention on the Grant of European Patents (1973), available at *https://www.epo.org/law-practice/legal-texts/html/epc/2016/e/ma1.html*.

ability clause, which is a closed moral clause. The closure results from the fact that the morality issue is addressed in two different sections of that legislation. Article 53(a) of the Convention announces the morals clause, and Rule 28(1) of the Convention's Implementing Regulations explicitly references and further clarifies Article 53(a). Article 53(a) states: "European patents shall not be granted in respect of: (a) inventions the commercial exploitation of which would be contrary to "ordre public" or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States".[63]

Article 53(a) identifies two issues of interest for the present work. The first is the way in which the exception addresses the law of the Contracting States to the European Patent Office. By emphasizing that patent protection will not be deemed contrary to public morality or "ordre public"[64] simply because it is prohibited in some or all of the Contracting States, the Convention effectively places the determination of morality and public order in the Convention itself, superior to the patent protection mechanisms of all signatory States. This grant of legal supremacy to the Convention in the area of patent protection has more to do with avoiding delays due to legislative bureaucracy than making an assessment of the social function of patents.[65] Because patents facilitate the development of new technologies, and those new technologies serve to improve the quality of life of society as a whole, protection of inventions may serve the "ordre public" despite a prohibition by any individual signatory state.[66]

In the context of the Autopoietic Systems Theory, this means that the European moral clause gives the patent granting authority a moral opening that overlaps with the legal communications of all signatory states to the Convention. If Article 53(a) had not been clarified in Rule 28(1)(b),[67] the resulting moral openness would have invited pressure from outside the juridical system to simply approve patent protection for human germline genome editing.

The second issue of interest is that Article 53(a) is interdependent with Rule 28(1) of the Convention's Implementing Regulations. Rule 28(1)(b) expressly prohibits the grant of patents for innovations in biotechnology which concern "processes for modifying the germ line genetic identity of human beings".[68] This rule obviates the need for any juridical assessment of "morality" or "or-

[63] *Id.*

[64] The present work will not analyze the term "ordre public" beyond identifying it as a term used in the Convention which is considered an important element in the patent concession process. The term refers to patent grants that have the potential to generate public commotion and protest (Prifti, 2019, p. 5), a concern that can be interpreted as indicative of society's negative moral judgment in relation to concessions.

[65] Prifti, *supra* note 62, at 2, 15.

[66] *Id.*

[67] European Patent Office, *supra* note 63.

[68] *Id.*

dre public" by removing the entire subject matter of human germline genome editing from consideration.[69] Thus, the morals clause is considered closed, meaning it is directly connected to the legislation's text only, and not by the moral opening that the clause generically has.[70]

One of the principal motivations for including a moral clause in legislation is the expectation of unpredictability, that is, the recognition that unanticipated issues will arise that may elude clear legal interpretation due to the Law's formality. Inflexibility can leave Intellectual Property laws incapable of preventing the development of potentially harmful inventions. An extreme example would be attempting to patent a means for committing genocide, or a technique whose implementation could result in great risk to society at large. When a new, complex variation triggers the morals clause, as is the case with human germline genome editing, a normative closing of the clause removes the moral judgment from the equation and predisposes the system toward prohibition. Such a closure fosters legal certainty by eliminating the possibility that decisions relating to selection of a variation will be based on a general moral statement which is open to interpretation. Closure allows interested parties to know that authorization can only occur by a change of the law.

Considering the legal closure of the moral clause contained in the European Patent Convention, it is possible to identify how the debate developed in the European Union. Despite the clear prohibition in the text of the European Patent Convention, there are strong indications that this prohibition has an expiration date. On May 9, 2019, the German Ethics Council published Press Release 03/2019[71] which calls for a moratorium, but also encourages using various decision-making mechanisms to address the issue of genetic editing for both the prevention of hereditary diseases and for human improvement.

> Last year, the birth of the first genetically modified babies shook the world. The German Ethics Council now presents a comprehensive ethical investigation into possible interventions in the genome of human embryos or germ cells. The Council does not deem the human germline to be inviolable. It does, however, consider germline interventions to be ethically irresponsible at the present time because of the associated incalculable risks. The Council, therefore, calls for an

[69] Prifti, *supra* note 62, at 2, 15.

[70] Rule 28(1)(b), by its own language, is limited to innovations that modify the "germ line genetic identity of human beings". It is possible that this language might still allow the European Patent Office to authorize patents for processes where the resulting genetic changes are not significant enough to be called a modification of the germline identity of human beings. This issue is, however, beyond the scope of this article.

[71] German Ethics Council, PRESS RELEASE 03/2019, Ethics Council: germline interventions currently too risky, but not ethically out of the question, available at *https://www.ethikrat.org/en/press-releases/2019/ethics-council-germline-interventions-currently-too-risky-but-not-ethically-out-of-the-question/*.

> application moratorium and recommends that the Federal Government and the Bundestag work towards a binding international agreement.[72]

The German Ethics Council, the Deutscher Ethikrat, issued the aforementioned press release accompanied by a text expressing the opinion of the Council, as well as a decision tree and organizational chart through which all ethical issues related to the genetic alteration of the human germline must pass.[73] This is noteworthy considering Germany is a country that does not prohibit basic genetic research involving stem cells derived from fetuses, yet does expressly prohibit the clinical application of such research, which includes implantation of these cells.[74]

As long as genetic research is being conducted, even when clinical application is not permitted, innovations continue to occur which can be appropriated and reserved through Intellectual Property mechanisms, even without the legal system explicitly granting these protections. As a result, when innovations do appear, it is possible they are kept under lock and key and will only become known to the public at some point in the future when they can be legally appropriated. In the meantime, the economic system, anticipating profit from the exclusivity rights the intellectual property scheme guarantees, will favor selection of the innovation and apply pressure on the legal system for its preference for prohibition based on either the closure constructed in the European system, or in the moral clause, where closures such as the aforementioned do not exist.

In Germany, the only type of genetic editing currently permitted for scientific research is genetic research involving somatic cells.[75] Research on germline cells and the creation of fetuses for research purposes are both not only illegal, but a crime under German law.[76] However, even somatic cell research can generate results useful to germline genetic editing, since a successful editing of any of the more than two thousand diseases directly linked to the human genome[77] could be applied later to germline cells.

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[72] *Id.*

[73] *Id.*

[74] Andrea Boggio *et al.*, Towards a Human Rights Framework for the Regulation of Human Germline Genome Modification. Human Germline Genome Modification and the Right to Science: A Comparative Study of National Laws and Policies 4-5 (Andrea Boggio *et al.*, ed., Cambridge University Press, 2019).

[75] Timo Faltus, *The Regulation of Human Germline Genome Modification in Germany*, in Towards a Human Rights Framework for the Regulation of Human Germline Genome Modification. Human Germline Genome Modification and the Right to Science: A Comparative Study of National Laws and Policies 241 (Andrea Boggio *et al.*, ed., Cambridge University Press, 2019).

[76] *Ibid.* at 245.

[77] Francisco José Ayala, ¿Clonar Humanos? Ingeniería genética y futuro de la humanidad 103 (Alianza editorial, 2017).

The issues raised by human germline genome editing, including the proposed moratorium, warrant intense public debate,[78] and the process of legislative change would benefit from a specific and detailed decision-making scheme such as the synoptic table created by the German Ethics Council.[79] Economic forces are able to apply a great deal of pressure on the legal system in their attempt to obtain approval for innovations related to the alteration of the human germline. However, the autonomy of the legal system will not be compromised as long as the legal system's operational limits are clearly closed.

The European Patent Convention contains a closed moral clause in a context where discussion regarding the appropriation of innovations relating to the manipulation of the human germline is in vogue. This is not necessarily the status quo in Latin American countries. The exercise of moral judgment by a society depends on the existence of a legal closure in the relevant legislation, as well as the capacity of its institutions to deal with unusual or controversial innovations. The case of Mexico will now be examined to determine how that country responds to innovations as a result of the moral clause contained in its Intellectual Property legislation.

V. Open Moral Clause, the Mexican Example

In Mexican legislation, the moral clause pertaining to industrial property is found in Article 4 of the Ley de la Propiedad Industrial.[80] Similar to moral clauses in the laws of many other countries, but in contrast to that of the European Patent Office, the Mexican morality clause is not closed. It is an open, normative declaration. Article 4 reads: "No se otorgará patente, registro o autorización, ni se dará publicidad en la Gaceta, a ninguna de las figuras o instituciones jurídicas que regula esta Ley, cuando sus contenidos o forma sean contrarios al orden público, a la moral y a las buenas costumbres o contravengan cualquier disposición legal".[81]

Mexican social morality derives from its overwhelmingly Catholic Christian society, and moral determinations tend to follow Catholic morality.[82] As a result, intellectual property protection for procedures related to human

[78] Eric Lander, *et al.*, *Adopt a moratorium on heritable genome editing*, nature Comment (2019), available at *https://doi.org/10.1038/d41586-019-00726-5*.

[79] German Ethics Council, *supra* note 72.

[80] Ley de la Propiedad Industrial [L. P. I.] [Industrial Property Law], as amended, Diario Oficial de la Federación [D.O.F], June 27th, 1991 (Mex.).

[81] *Id.*, Free translation: No patent, registration or authorization will be granted, nor will publicity be given in the Oficial Journal of the Federation, to any of the legal figures or institutions that regulate this Law, when its content or form is contrary to public order, morals and good customs or goes against any legal provision.

[82] Elsa Guzmán *et al.*, *Back to Basics Mexican Style: Radical Catholicism and Survival on the Margins*, 16 (3) Bulletin of Latin American Research 351, 366 (1997).

germline genome editing tends to be rejected as contrary to Article 4. However, there is evidence that even when intense moral disapproval exists, given the excessive restraint of the Mexican legal system, the moral clause will yield to economic pressure.

The regulatory gaps in Mexican legislation have consequences for clinical science. While the moral clause of the industrial property law does not protect innovations in the field, and limits Intellectual Property rights in this area, the biotechnology regulations need improvement in terms of their responsiveness to questions regarding clinical and experimental use in Mexico.[83]

In fact, the lack of regulatory clarity has already led to numerous problems due to the resulting uncertainty about the limits of allowable research and clinical applications, particularly for institutions engaged in the research and development of new technologies who operate within the national territory.[84] Mexico's GMO biosafety law, the Ley de Bioseguridad de Organismos Genéticamente Modificados, defines organisms for purposes of that law and specifically excludes human beings from that definition. The text of Subsection XX of Article 3 states:

> XX. Organismo: Cualquier entidad biológica viva capaz de reproducirse o de transferir o replicar material genético, quedando comprendidos en este concepto los organismos estériles, los microorganismos, los virus y los viroides, sean o no celulares. Los seres humanos no deben ser considerados organismos para los efectos de esta Ley.[85]

By specifically excluding human beings from this legislation, Mexico has left a significant gap in its regulatory scheme relating to medical innovations.[86] The result is that researchers enjoy a great deal of autonomy concerning biosafety issues related to human genome experimentation. In fact, even though Mexico has had a biosafety law governing GMOs since 2005, no legislation in that country made any mention of the human genome in its general health law, the *Ley General de Salud*, until a legislative amendment was added in 2011.[87]

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[83] Sarah Chan *et al.*, *Genome editing and international regulatory challenges: Lessons from Mexico*, 2 (3) Ethics, Medicine and Public Health 426,434 (2016).

[84] *Id.*

[85] Ley de Bioseguridad de Organismos Genéticamente Modificados [L. B. O. G. M.] [GMO Biosecurity Law], as amended Diario Oficial de la Federación [D.O.F], March 18th, 2005 (Mex.). Free translation: XX. Organism: Any living biological entity capable of reproducing, transferring or replicating genetic material, including sterile organisms, microorganisms, viruses and viroids, cellular or not. Human beings are not to be considered organisms for the purposes of this Law.

[86] César Palacios-González, *et al.*, *Mitochondrial replacement techniques and Mexico's rule of law: on the legality of the first maternal spindle transfer case*, 4 (1) Journal of Law and the Biosciences 50, 69 (2017).

[87] Ley General de Salud [L. F. S.] [General Health Law], as amended, Diario Oficial de la Federación, [D.O.F], February 7th, 1984 (Mex.).

The 2011 amendment has eight entries under the heading "The Human Genome" (*El Genoma Humano*), and this is the extent of the treatment of the subject at the national level.[88] At the state level, each Mexican state has its own health law, although the general law supersedes state laws where they overlap.[89] The wide variation among state laws is partially responsible for the phenomenon of clinical tourism that has developed in Mexico. The aforementioned "Human Genome" provision of the Mexican general health law fails to clarify, or even specifically address, important elements critical to understanding the limits of permissible experimentation in this area.

> While the GHA contains a section on "The Human Genome" (Título Quinto Bis), this mainly concerns the uses of genetic information; genetic modification is not explicitly dealt with. As for the regulation of research on human embryos, gametes and stem cells, this has long been a contested area in Mexico; while the GHA and its associated regulations contain various provisions that might be interpreted to apply, they are very broadly framed, and hence the national regulatory framework remains unclear.[90]

This uncertainty has created an opening for the commercialization of various types of clinical treatments in the country, since the absence of prohibition has effectively created a de facto authorization. In Mexico, stem cell treatments without scientific proof of efficacy are advertised in the United States as "alternative treatments with stem cells not yet approved by the FDA".[91] This is an example of how the country has become a destination for clinical tourism of unscientific procedures.

Clinical tourism in Mexico reached its mediatic apex when the first baby in the world with genetic material inherited from three different parents was born on April 6, 2016.[92] This experimental procedure was performed by Dr. John Zhang. Zhang had previously practiced in the United States, but, due to the unreceptive regulatory environment there, he transferred his entire embryonic implantation operation to Mexico.[93] Similar restrictions were also in place at that time in England where he had previously studied.[94]

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88 Palacios-González, *supra* note 87, at 50,69.

89 *Id.*

90 Chan, *supra* note 84.

91 María de Jesús Medina, *The Rise of Stem Cell Therapies in Mexico: Inadequate Regulation or Unsuccessful Oversight?* 63 Revista Redbioética/UNESCO 63, 78 (2012).

92 Palacios-González, *supra* note 87, at 50, 69.

93 María de Jesús Medina Arellano, *The Regulation of Human Germline Genome Modification in Mexico*, in Towards a Human Rights Framework for the Regulation of Human Germline Genome Modification. Human Germline Genome Modification and the Right to Science: A Comparative Study of National Laws and Policies 129 (Andrea Boggio *et al.*, ed., Cambridge University Press, 2019).

94 Palacios-González, *supra* note 87, at 50, 69.

Zhang's procedure employed a technique called mitochondrial replacement.[95] The genetic material inherited by the child was not nucleic material, but rather specific genetic material of the mitochondria itself.[96] Zhang elected to use this procedure due to the fact that the couple seeking his help had previously experienced the death of two of their children, an eight-month old baby and a six-year-old child.[97] Both children had died as a result of "Leigh's syndrome", a neurological disorder directly linked to mitochondrial DNA.[98]

Mexico's regulatory ambiguity affects a wide range of clinical procedures, not just those as sophisticated as mitochondrial replacement. Even assisted reproduction procedures encounter regulatory gaps in the country's legislation:

> A consequence of the lack of specific regulation concerning assisted reproduction is that, at the federal level, no organization or authority regulates, evaluates, and compiles information about the way in which ARTs are carried out in Mexico, or the persons who carry them out. It also means, among other things, that there is no legal certainty about what kind of information should be collected for epidemiological and legal purposes, and the length of time that gametes and embryos should be stored. In terms of actual clinical practice, the Mexican Association of Reproductive Medicine and the Latin American Network of Assisted Reproduction (RedLara)—among other professional bodies—provide recommendations and regulations relating to the practice of assisted reproduction in Mexico. Nonetheless, clinics that offer assisted reproductive services follow their recommendations and regulations only on a voluntary basis.[99]

There is no internal legislation in Mexico, nor is there any international treaty to which Mexico is a signatory, that expressly prohibits the genetic editing of the human genome, be it somatic or germinal.[100] This lax legal environment tends to foster clinical tourism, and economic actors in the genetic editing market could potentially take further advantage of this opening in the future.

These types of open moral clauses have a high likelihood of yielding to the economic communication, which prefers selection of the new technology and the Intellectual Property protections that accompany it. Recognition of two important points may assist countries like Mexico in forestalling this eventuality. First, the legal system does, in fact, have control over the open-

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95 The mitochondria is a cellular organelle whose role is to generate energy for the cell and which carries genetic information in the form of mitochondrial DNA.

96 Palacios-González, *supra* note 87, at 50, 69.

97 *Id.*

98 Sanna Matilainen *et al.*, *Defective mitochondrial RNA processing due to PNPT1 variants causes Leigh syndrome*, 26 (17) HUMAN MOLECULAR GENETICS 3352, 3361 (2017).

99 Palacios-González, *supra* note 87, at 50, 69.

100 *Id.*

ness of the morals clause itself, at least as it relates to facilitating decision-making in relatively simple cases. Second, the state has a duty to specifically address the issue of human germline genome editing in a responsible and robust manner.

Action on these issues is necessary not only to resolve the ethical issues raised by the science surrounding the genetic editing of human beings, but also to avoid falling behind other countries in this field, both technologically and economically. Inadequate regulation could lead to international disapproval or even liability, but strict prohibition could impede the country's ability to compete in the global market.

VI. Conclusion

The question posed at the outset of this article[101] required the resolution of two preliminary issues. The first issue was relatively simple, that is, whether morality alone is a sufficient basis on which to organize a complex society. The discussion presented in Section 4 revealed that morality alone is not a sufficient basis.

The second issue is one that carried with it a bit more complexity. That issue was whether human germline genome editing technology is so complex that it requires more explicit regulation than moral clauses are able to provide. Considering the evidence presented in Section 3, human germline genome editing has been shown to be a very sophisticated technology whose use raises significant and complicated ethical issues. As a result, the conclusion is that this technology does require detailed and unambiguous regulation.

A comparison of the language of the European Patent Convention in Section 4 with the related Mexican patent law provisions discussed in Section 5 reveals that a lack of closure in moral clauses promulgated by juridical systems can pose significant dangers. The Autopoietic Systems Theory demonstrated its usefulness by helping guide the analysis toward this conclusion. That theory revealed how systems with competing interests within a society use their communications to further their own interests, and how those communications themselves can trigger responses from other systems, adding a additional layer of complexity to the decision-making process.

Although moral clauses are useful and can be of great assistance in many cases, their limitations become apparent when confronted with complex and predictable issues. With a technology that messes with such a potent concept as human germline genome editing, it would be prudent to first ascertain whether the moral clause of the juridical system under consid-

[101] Is it possible to verify whether the lack of closure of a morals clause in patent law, particularly when referring to human germline genome editing, acts merely as a general clause of prohibition that, in practice, fails to function as a moratorium?

eration is open or closed, as this may be the main factor determining its effectiveness for mechanisms of juridical decision. Thus, the hypothesis originally posed in this article is confirmed. It has been shown that the lack of closure of a moral clause in patent law, especially as it relates to human germline genome editing, fails, in practice, to operate as a moratorium in countries like Mexico.

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NOTES

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MEXICAN NOTARY PUBLICS IN THE FIGHT AGAINST MONEY LAUNDERING

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Abstract: *The main task of the Mexican notary is to provide, at the request of individuals, certainty and security to legal acts and facts through the exercise of public trust, which is characterized by the specialization of its function and the expertise required to perform the activity. However, in modern times, its obligations have been expanded to include assisting national and international authorities in the fight against the crime of money laundering and its provenance, such as drug trafficking, extortion, theft, corruption, embezzlement, tax and investment fraud, terrorism and its financing, among others. Therefore, the main objective of this note is to analyze the mandatory burden on notaries within the national legal framework, which has been established in accordance with globally imposed demands to combat the perpetration of such illegal behaviors. Similarly, the possible penalties that may apply in the event of non-compliance with the applicable provisions shall be examined from a critical and theoretical perspective. The research problem is addressed from a dogmatic and formalist methodology consistent with the subject of study, providing an explanation based on the factual, regulatory, and axiological dimensions.*

Keywords: *Money laundering, illicit proceeds, Notary Public, mandatory burden.*

Resumen: *La principal labor del notariado mexicano es brindar a solicitud de los particulares, certeza y seguridad jurídica a los hechos y actos jurídicos por medio del ejercicio de la fe pública, la cual se caracteriza por la especialidad de su función y por la pericia requerida para el desarrollo de la actividad. Sin embargo, en épocas actuales, se advierte la ampliación de sus obligaciones esenciales con la finalidad de auxiliar a las autoridades nacionales e internacionales en el combate contra el delito de lavado de dinero y sus precedentes, tales como el tráfico de drogas, extorsión, robo, corrupción, malversación de*

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fondos, fraude fiscal y de inversión, terrorismo y su financiamiento, entre otros. Es por ello por lo que el principal objetivo de la presente nota es analizar la carga obligacional establecida a los notarios dentro del marco jurídico nacional, la cual se ha determinado en concordancia con las exigencias que a nivel global han sido impuestas para luchar contra la comisión de dichas conductas ilícitas. Asimismo, se examinarán las posibles sanciones a las que pueden ser acreedores en caso de inobservancia de las disposiciones aplicables desde una perspectiva crítica y con fundamento teórico. El problema de investigación se aborda desde una metodología dogmático-formalista coherente con el objeto de estudio, realizando una explicación a partir de las dimensiones fácticas, normativas y axiológicas.

Palabras clave: *Lavado de dinero, recursos ilícitos, Notario Público, carga obligacional.*

Table of Contents

I. Introduction

This note centers on the analysis of the mandatory burden imposed on the Mexican *Notariat*. This burden arises from the legal framework of anti-money laundering and the possible penalties that may be applied in the event them do not comply with the provisions establishing mechanisms to prevent and minimize the use of illicit proceeds.

The importance of this note lies in the need to identify, first of all, the process of money laundering and the related felonies that have global effects, as well as to give an in-depth explanation of the administrative obligations set out to the *Notariat* to assist the authorities in the fight against such crimes.

The hypothesis presented in this note is that the mandatory burden of anti-money laundering imposed to the Mexican *Notariat* exceeds the material possibility of compliance, among other reasons, because of the lack of technological and human infrastructure, putting notaries in a difficult situation regarding the proper exercise of their duties and making it difficult to provide the service under different scenarios.

The problem is addressed from a dogmatic-formalist methodology, as it provides consistent elements with which to study the phenomenon.

II. Anti-Money Laundering Legal Framework

An outline of the global legal framework for anti-money laundering and principle crime-fighting organizations will be drawn in this chapter, starting with the Financial Action Task Force (FATF)[1] which is an inter-governmental policy-making body with the ministerial mandate to establish international standards for combating crimes committed with illicit resources. This organization defines what "money laundering" is: the process through which the origin of illegally-obtained funds are disguised, thus allowing criminals to enjoy profits without jeopardizing their source.[2] Such unlawful conduct involves the commission of other crimes, which have become mainstream topics on the global agenda since its practice compromises the economy,[3] as well as the national and international security of the countries.[4]

In this regard and as the most important international group that works together with governments, policy-makers and citizens to establish standards and solutions for a range of social and economic challenges,[5] the Organization for Economic Co-operation Development (OECD) explains that money laundering must be stopped because criminals all around the world accumulate significant sums of money by committing crimes such as drug and human trafficking, theft, investment fraud, extortion, corruption, embezzlement and tax fraud, posing a serious threat to the economy and the integrity of financial institutions.[6]

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[1] Financial Action Task Force, *An introduction to the FATF and its work*, FATF-GAFI (2010), available at *http://www.fatfgafi.org/media/fatf/documents/brochuresannualreports/Introduction%20to%20the%2 FATF.pdf*.

[2] Financial Action Task Force, Official Website, *What is money Laundering?* FATF-GAFI (2020), available at *https//www.fatf-gafi.org/faq/moneylaundering/*.

[3] "Money laundering causes a diversion of resources to less productive areas of the economy which in turn depresses economic growth. The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. The economic and political influence of criminal organizations can weaken the social fabric, collective ethical standards, and ultimately the democratic institutions of society". Vandana A. Kumar, *Money Laundering: Concept, Significance and its Impact*, 2 Eur. Jour. Bus. Man. 115 (2012), available at *https://core.ac.uk/download/pdf/234624157.pdf*.

[4] "Money laundering poses international and national security threats through corruption of officials and legal systems, undermines free enterprise by crowding out the private sector, and threatens the financial stability of countries and the international free flow of capital". US Department of State, Bureau of International Narcotics and law Enforcement Affairs, *Money Laundering and Terrorist Financing: A Global Threat,* Narcotics Control Reports (2004), available at *https://2009-2017.state.gov/j/inl/rls/nrcrpt/2003/vol2/html/29843.html*.

[5] Organization for Economic Co-operation Development, Official Website, *Who we are?* OECD (2020), available at *https://www.oecd.org/about/*.

[6] Organization for Economic Co-operation Development (OECD), Money Laundering Awareness, Handbook for Tax Examiners and tax Auditors 11 (2009), available at *http://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf*.

It has been observed, as Lucian noted,[7] that globalization has allowed a leap for the business of transnational organized crime groups, providing them an ideal environment for business development and ways of obtaining illegal goods gained by opening borders to trade flows. This is why it has been important to set up international instruments in order to combat it from being committed. These include the 40 Recommendations from the Financial Action Task force (FATF),[8] the United Nations Global Program against Money Laundering,[9] the Statement of Principles of Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering of the Basel Committee on Banking Regulations and Supervisory Practice,[10] the 19 recommendations of the Caribbean Financial Action Task Force (CFATF),[11] the Council of the European Communities on prevention of the

[7] *Dragoş* Lucian *Rădulescu*, *The Concept of Money Laundering in Global Economy*, 4 Int. Jour. Tra. Econ. Fin. 359 (2010), available at *http://www.ijtef.org/papers/63-F20026.pdf*.

[8] "The FATF Recommendations set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. Countries have diverse legal, administrative and operational frameworks and different financial systems, and so cannot all take identical measures to counter these threats. The FATF Recommendations, therefore, set an international standard, which countries should implement through measures adapted to their particular circumstances". Financial Action Task Force, Official Website, *The FATF Recommendations,* FAFT-GAFI (2020), available at *fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html*.

[9] "Through the Global Program against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, UNODC assists Governments in confronting criminals who launder the proceeds of crime through the international financial system. It also provides Governments, law enforcement authorities and financial intelligence units with strategies to counter money-laundering, advises on improved banking and financial policies and assists national financial investigation services. Strategies include granting technical assistance to authorities from developing countries, organizing training workshops, providing training materials and transferring expertise between jurisdictions". U.N. *Technical assistance against money-laundering* (2020), available at *https://www.unodc.org/unodc/en/money-laundering/technical-assistance.html?ref=menuside*.

[10] "The attached Statement is a general statement of ethical principles which encourages banks' management to put in place effective procedures to ensure that all persons conducting business with their institutions are properly identified; that transactions that do not appear legitimate are discouraged; and that cooperation with law enforcement agencies is achieved". Bank of International Settlements, Official Website, *Prevention of criminal use of the banking system for the purpose of money-laundering*, BIS (2020) available at *https://www.bis.org/publ/bcbsc137.html*.

[11] "In Aruba, representatives of Western Hemisphere countries, in particular from the Caribbean and Central America, convened to develop a common approach to the phenomenon of the laundering of the proceeds of crime. Nineteen recommendations constituting this common approach were formulated. These recommendations, which have specific relevance to the Region were complementary to the original forty recommendations of the Financial Action Task Force (FATF) established by the Group of Seven at the 1989 Paris Summit", Caribbean Financial Action Task Force, CFATF Overview (1992-2020) available at *https://www.cfatf-gafic.org/index.php/home/cfatf-overview*.

use of the financial system for the purpose of money laundering,[12] Naples Political Declaration and Global Action Plan,[13] the Ministerial Communiqué of the Summit of the Americas Conference concerning the Laundering of Proceeds and Instrumentalities of Crime,[14] the Political Declaration and Action Plan against Money Laundering[15] and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[16]

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[12] "In order to respond to these concerns in the field of money laundering, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering was adopted. It required Member States to prohibit money laundering and to oblige the financial sector, comprising credit institutions and a wide range of other financial institutions, to identify their customers, keep appropriate records, establish internal procedures to train staff and guard against money laundering and to report any indications of money laundering to the competent authorities". Council Directive 2005/60/EC of the European Parliament and Council, 2005, available at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005L0060*.

[13] "The fight against organized crime should be accorded high priority by States and by all relevant global and regional organizations, with the necessary support of the general public, the media, business, institutions and non-governmental organizations. Transnational crime threatens the social and economic growth of developing countries and countries in transition, and the international community should assist these countries in their efforts to strengthen criminal justice institutions. States which have not yet become party to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 are urged to do so". Naples Political Declaration and Global Action Plan (1994), available at *http://www.nzdl.org/gsdlmod?e=d-00000-00---off-0cdl--00-0----0-10-0---0---0direct-10---4-------0-1l--11-en-50---20-about---00-0-1-00-0-0-11-1-0utfZz-8-00&cl=CL1.139&d=HASH406891975 9b42c6b335ec3.9.24&gt=1*.

[14] "The Heads of State and Government of the Western Hemisphere agreed at the Summit of the Americas in December 1994, that the was a need for intensified action by all of their Governments, individually and collectively, to address the problem of illicit production and trafficking of drugs and their illegal use, as well as the laundering of the proceeds, property, and instrumentalities used in criminal activities (hereinafter referred to as money laundering)". International Money-Laundering Information Network, *Ministerial Conference Concerning the Laundering of Proceeds and Instrumentalities of Crime Ministerial Communiqué* (1995), available at *https://www.imolin.org/imolin/badecl95.html*.

[15] "Recognizing the political will expressed by the international community, especially as reflected in such initiatives as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted in 1990 by the Committee of Ministers of the Council of Europe, the Ministerial Communiqué of the Summit of the Americas Conference Concerning the Laundering of Proceeds and Instrumentalities of Crime, held at Buenos Aires in December 1995, and by such bodies as the Inter-American Drug Abuse Control Commission of the Organization of American States, the Asia/Pacific Group on Money Laundering, the Caribbean Financial Action Task Force, the Offshore Group of Banking Supervisors and the Commonwealth, all of which are well-recognized multilateral initiatives aimed at combating money-laundering and constitute legal or policy frameworks within which concerned States are defining and adopting measures against money-laundering". International Money-Laundering Information Network**,** *Political Declaration and Action Plan against Money Laundering* (1998) available at *https://www.imolin.org/imolin/ungadec.html*.

[16] "The aim of this Convention is to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof.

Money laundering in Mexico is formally referred to as the crime of Operations involving Resources Derived from Illicit Sources, governed by Articles 400 Bis and 400 Bis 1 of the Federal Criminal Code, stipulating that those who purchase, dispose of, manage, safeguard, possess, exchange, covert, deposit, withdraw, transfer or transport, within or outside the national territory or vice versa, resources or goods of any nature, with the knowledge that said resources are the proceeds of illicit acts are committing said crime. Furthermore, the applicable legal framework links such conduct with national and international terrorism and its financing as set out by Articles 139, 139 Bis, 139 Ter, 139 Quater, 139 Quinqui, 148 Bis, 148 Ter and 148 Quater. It should be noted that despite the fact that these offenses may seem unconnected, Thony[17] explains that laundering criminal funds aims at giving a legal appearance to dirty money, whereas laundering of terrorist funds aims at obscuring assets of a legal origin, both of which represent the same threats to financial systems and public institutions.

It is also noted that on the basis of international requirements, the Federal Law on the Prevention and Identification of Transactions of Illicit Resources was passed in 2012, in an effort to protect the financial system and the Mexican economy. By establishing measures and procedures to prevent and detect acts or transactions involving resources of illicit origin, it draws on inter-institutional coordination to pursue useful elements to investigate and prosecute crimes, the financial structures of criminal organizations while preventing the use of resources for financing criminal activities. In addition, said law has its accompanying regulations and general rules regarding anti-money laundering activities, both of which were published in 2013.

Financial institutions have also had to adapt to the new guidelines. According to the Vice-presidency for Supervision and Preventive Processes, which acts as an administrative unit attached to the Mexican National Banking Securities Commission (CNBV),[18] the three stages of money laundering[19]

The Convention is intended to assist States in attaining a similar degree of efficiency even in the absence of full legislative harmony. Parties undertake in particular: to criminalize the laundering of the proceeds of crime and to confiscate and proceeds (or property the value of which corresponds to such proceeds)". Council of Europe Portal, *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (1993) available at *https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141*.

[17] Jean-Francois Thony, *Money Laundering and Terrorism Financing: An Overview, 3* Cur. Dev. Mon. Fin. L., International Monetary Fund, 4 (2005), available at *https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/thony.pdf*.

[18] Vice-presidency for Supervision and Preventive Processes, Money Laundering, National Banking and Securities Commission (CNBV) (2019) available at *https://www.gob.mx/cms/uploads/attachment/file/71151/VSPP_Lavado_de_Dinero___130701.pdf*.

[19] "Stage 1, Criminals proceeds are transferred to, or collected by, the professional money launderer; Stage 2, Professional money launderers execute layering stage; Stage 3, Laundered funds are handed back to clients for investment or asset acquisition". Financial Action Task Force, *General Business Model of Professional Money Laundering Networks*, Faft Report Professional

have been recognized in Mexico: first there is the placement stage, in which the criminal deposits its illicit proceeds into the financial system; this sets the scene for the second stage called layering or stratification where financial transactions are made with these ill-gotten gains to change its appearance and hinder its being traced; and the third one is the integration, which introduces illegally obtained funds into economy by pretending to be legitimate. The distinction of the above stages provides information as to criminals' *modus operandi* to then be able to establish mechanisms to prevent and combat the crime of Operations involving Resources Derived from Illicit Sources, with the Financial Intelligence Unit in charge of this task on Mexican soil.[20]

III. The Role of the Mexican Notary in the Fight Against the Crime of Money Laundering

To begin this chapter, it must be pointed out that the Mexican *Notariat* has the characteristics of the Latin Notary System, whose main function according to De Prada[21] is to have a professional, independent, legal and impartial expert involved in legal transactions by providing legal transactions with certainty in such a way that whoever acquires property is most likely to do so safely. The Latin system is differentiated from others by notaries' high-level of legal education. Since 1948, the Mexican *Notariat* has belonged to the International Union of Latin Notaries,[22] which according

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Money Laundering, 17 (2018) available at http://www.fatf-gafi.org/media/fatf/documents/Professional-Money-Laundering.pdf.

[20] Financial Intelligence Unit, Official Website, *About us*, UIF (2020) available at *https://www.uif.gob.mx/es/uif/quienes_somos.*

[21] José Ma. De Prada, *Los Sistemas Notariales Anglosajón y Latino*. 106 Revista de Derecho Notarial 90,108 (1994), available at *http://historico.juridicas.unam.mx/publica/librev/rev/dernotmx/cont/106/est/est7.pdf.*

[22] "The International Union of Notaries (UINL) is a non-governmental organization. It aims to promote, coordinate and further the role and activities of notaries throughout the world. It advocates for their dignity and independence in order to provide a better service to people and society in general. Formed by 19 countries at the time of its establishment in 1948, the organization includes 88 countries by October 2, 2018, of which 22 of the 28 member countries of the European Union and 15 of the 19 countries of the G20, thus showing the spread of the European legal system. Today it is having a presence in almost 120 countries, totaling 2/3 of the world population and accounting for over 60% of the world's Gross Domestic Product. Directed by a Steering Committee of 28 councilors, the decision-making body is the General Meeting of member notariats where each country has one vote regardless of its importance. It also has a General Council with 176 members and continental and intercontinental commissions working from scientific (vocational training and research), strategic (development), economic (networks and activities) and sociological (human rights and social protection) standpoints". International Union of Notaries, Official Website, *Mission* (UINL) (2020) available at *https://www.notariado.org/liferay/web/notariado/el-notario/el-notariado-en-el-mundo/uinl.*

to López,[23] a notary is the legal professional in charge of a public service that receives, interprets and gives legal form to the free will of the parties, drafting instruments suited to the purpose requested, conferring them authenticity, preserving the originals of such documents, and issuing copies attesting to their content.

Regarding money laundering, it is noted that the Federal Law on the Prevention and Identification of Transactions of Illicit Resources considers notarial role as a vulnerable activity under the terms of Article 17, Section XII, which provides that notaries must notify the Financial Intelligence Unit of operations that requestors agree upon in a notary's presence regarding transfers or creation of real estate property rights (except for guarantees to financial institutions or public housing agencies); of granting powers of attorney for acts of administration and dominion given irrevocably; the incorporation of legal entities, modifications to their assets resulting from the increase or decrease in capital stock, mergers or spin-offs, the sale of shares or equity interests of such entities; of the establishment or modification of property ownership or collateral trusts; and of granting mutual contracts, mortgage-backed or not, in which the creditor is not part of the financial system or public housing agencies.

This has given rise to obligations for the Mexican *Notariat*, such as compiling user identification files by verifying credentials or official documentation and collecting copies; requesting for information as to whether the user is aware of the existence of beneficial ownership; presenting official documentation to identify inquiries into the business relationship with the subject; compiling a transaction profile; submitting notification of vulnerable activities to the Financial Intelligence Unit;[24] sending vulnerable business notifications through the Mexican Tax Administration Service (SAT), except for those doing so by means of the electronic system for sending declarations under federal tax provisions and providing the necessary facilities for verification visits in order to comply with the provisions of the Federal Law on the Prevention and Iden-

[23] Fortino López Legazpi, *El Notario y el Mundo de Hoy*, 34 Rev. Der. Not. Mex., 15 (1968), available at *http://historico.juridicas.unam.mx/publica/librev/rev/dernotmx/cont/34/cnt/cnt2.pdf*.

[24] "Notices shall be submitted by electronic means and in the office, format established by the Secretary. Such notices shall contain in respect of the act or operation related to the vulnerable activity reported, the following: I. General Data of the person performing the vulnerable activity; II. General data of the user or the beneficial ownership and information on their activity and occupation in accordance with Article 18, Fraction II, of this Law; and III. General description of the Vulnerable Activity for which it is notified. Notaries and Public Brokers shall be considered to satisfied with the obligations to submit the relevant notices using the electronic system by which they report or submit declarations and notices to comply federal tax provisions". Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita [LFPIORPI] [Federal Law on the Prevention and Identification of Transactions of Illicit Resources], as amended, Article 24, Diario Oficial de la Federación [D.O.F], october 17, 2012 (Mex.).

tification of Transactions of Illicit Resources, the Regulation and General Rules Governing the Prevention of Money Laundering.[25]

In addition to the obligations in the preceding paragraph are those related to the identification of the form of payment and restrictions on the use of cash in property transactions that notaries record in their notarial acts by informing users of these limitations and subsequently requesting the necessary documentation that supports the payment of the property. Of particular note is Article 32 of the Federal Law on the Prevention and Identification of Transactions of Illicit Resources, which provides that settling, paying or accepting cash payment, whether in national or international currencies or precious metals, in the creation or transmission of rights in real estate greater in value than or equivalent to 8,025 *UMAS*,[26] on the day the payment is made or the obligation is fulfilled is prohibited.

Complementing the above, in accordance with Article 33 of the same law, notaries are requested to identify how users pay each other. This consideration arises from contracts signed for values greater than or equivalent to 8,025 *UMAS*, even though when the transaction value is less than the abovementioned amount or when the act or operation has been paid in full or in part prior to signing the instrument, it is enough for the users to swear to a statement of truth. This situation is also mentioned in Article 45 of the Regulation of the Federal Law on the Prevention and Identification of Transactions of Illicit Resources, providing that the notary must consider the date and the form of payment the transaction is carried out.

The imposition of anti-money-laundering obligations on the *Notariat* is not exclusive to the Mexican State. In fact, it follows European models,[27] particularly the one launched in Spain, which is considered the epitome of

[25] Money Laundering Prevention Portal, Official Website, *Public Faith, Notaries and Public Brokers* (2020), available at *https://www.pld.hacienda.gob.mx/work/models/PLD/documentos/actividades/act_fep.pdf*.

[26] "The Unit of Measurement and Updating (UMA) is the economic reference in Mexican pesos to determine the amount of payment of the obligations and assumptions provided for in the Federal Laws, of the Federative Entity, as well as in the legal provisions emanating from all previous one". National Institute of Geography and Statistics (INEGI), *Unit of Measuring and Updating (UMA)* (2020) available at *https://www.inegi.org.mx/temas/uma*.

[27] "On 8 July 2019, the Financial Action Task Force (FATF) published its new Guidance for a Risk-Based Approach for Legal Professionals. The previous edition was released in 2007-2008. "The AML system used by Spain's notaries represents a considerable advance for Public Authorities", the FATF notes. "All parties subject to AML requirements may consult the Beneficial Ownership Database (Base de Datos de Titular Real, BDTR)", it highlights. The FATF proposes a series of measures to Governments aimed at combating money laundering and terrorist financing and protecting the integrity of the international financial system. These measures include a model to be followed by the money laundering prevention system employed by notaries in Spain, and more specifically its BDTR. The Guidance has been sent to the 39 countries that form part of the FATF, including Spain, as well as to member associations such as the European Union". Notaries of Europe, *The FAFT highlights the role of the notarial system in*

good notarial practice around the world. But the main difference between the mandatory burden of both countries is that the Spanish *Notariat* has all the tools needed to accomplish the task since it has benefited from the adequate technological infrastructure, resource management and implementation of effective electronic platforms, all of which Mexico lacks:

> The Centralized Organization for the Prevention of Money Laundering (OCP) is the main structure the Spanish Notariat has in place to combat economic crime. Its creation, by the Order EHA 2963/2005, made it possible to intensify and channel the collaboration of notaries in this field with public authorities and judicial and police authorities. The technicians of the Centralized Organization for the Prevention of Money Laundering perform their work by analyzing and crossing-referencing data (always in the context of Spanish data protection regulations), thanks to the fact that operations carried out by notaries are parameterized and stored in the Single Computerized Notarial Index, a powerful database created by the Notariat in 2004. They also receive alerts and notices from notaries themselves about transactions that seem suspicious to them, which they trace and investigate thoroughly.[28]

Taking the above into consideration, it is possible to say that the use of media and technological infrastructure makes easy to fulfill the obligations assigned and to detect subjects or transactions that could be considered suspicious. When placed in the context of Mexico, it shows the complexities the Mexican *Notariat* faces every day, for complying with the mandatory burden, using only criteria issued by the authority and information provided through the Financial Intelligence Unit; like Terrorist Resolutions and Proliferating Weapons of Mass Destruction emitted by United Nations Security Council, as well as the updated list referred to in the Financial Intelligence Holder Agreement, which makes known to the general public the list of persons and entities within the lists of the Resolutions 1267 (1999) and their succession, 1373 (2001) and the others that are issued by United Nations Security Council in basis of United Nations Charter.[29] This indicates that in absence of technological infrastructure and other media by which the anti-money laundering obligations being imposed can be fulfilled, the Mexican *Notariat* usually responds by holding sustained conversations with notarial guilds and asking the authority for criteria that will subsequently be published on the Tax Ad-

the fight against money laundering, CNEU News (July 23, 2019), available at *http://www.notaries-of-europe.eu/index.php?pageID=17370*.

[28] Centralized Organization for the Prevention of Money Laundering, *The collaboration of notaries in the prevention of money laundering, terrorist financing and tax fraud*, OCP Notariado, 1 (2007), available at *http://www.notariado.org/liferay/c/document_library/get_file?p_l_id=15943061&groupId=10218&folderId=15943630&name=DLFE-334444.pdf*.

[29] Money Laundering Prevention Portal, Official Website, *United Nations Security Council Resolutions and Updated List* (2020), available at *https://sppld.sat.gob.mx/pld/interiores/actualizacion listas.html*.

ministration Service's (SAT) electronic platforms as frequently asked questions.[30] These generally refer to the material impossibility of fulfilling certain obligations because of the lack of interpretations of the law or regulatory provisions to enforce the rule, or even because of the lack of knowledge and expertise in fields outside notarial practice indirectly involved in complying with said obligations.

This situation leads to placing the notary in a complicated situation, which usually end in abstaining from the providing the service.[31] There is a real fear of infringing anti-money laundering provisions because the penalties to which they might be creditors are serious. According to Article 58 of the Federal Law on the Prevention and Identification of Transactions of Illicit Resources, when the offender of the provision is a Notary Public, the Ministry will inform the authority in charge of monitoring the notarial function of the infraction committed so that the offender is removed from office and revoked from the fiat. Possible causes of infringement are recidivism for non-compliance of the mandatory burden, delivery of notices to the Financial Intelligence Unit after the deadline or without meeting the exact requirements and allowing users to pay for their benefits in cash when it is prohibited.

It is also seen that, in addition to the loss of the charge, fines may also be added to the pain, which, in accordance with Article 54, are to be applied at the authority's discretion depending on the seriousness of the offence. This may range from 200 UMAS to 100 percent of the value of the property or transaction in question. To this end, according to Article 60, the authority will take into account recidivism of the infringement and the causes, considering it a serious violation if the notary has committed a similar transgression within a two-year period.

Finally, it is important to note that under Article 62, the notary could also be sentenced to prison if their conduct were considered to have been intentional.

IV. Dimensions of the Problem and its Turning Points

In the last chapters, the components of money laundering that cause global affectations were identified, and the mandatory burden set out for the Mexi-

[30] Money Laundering Prevention Portal, Official Website, Frequently Asked Questions and Criteria (2020) available at *https://sppld.sat.gob.mx/pld/interiores/preguntas.html*.

[31] In Mexico, each state has its own notarial legislation, which has been adapted in accordance with the legal framework of anti-money laundering. It is observed, to give an example, that in Queretaro, Article 69 of the Notaries Public Law states that the notary must ensure that the documentation and information that users provide reflects a consistent legal reality and if the data is ambiguous, inconsistent, contradictory or insufficient, the notary must refrain from providing the service.

can *Notariat* was explained with special reference to the possible penalties that may be applied if notaries do not comply with the provisions that establish mechanisms to prevent and mitigate the crime. Therefore, this section analyzes the factual, regulatory and axiological dimensions surrounding the issue object of this note as well as its turning points:

About the factual dimension, it is observed that within daily notarial activity there is some difficulty in complying with the mandatory burden established in the anti-money laundering provisions due to the lack of technological and human infrastructure identified above. Even though the notarial service provided is personal, it is materially impossible for the notary by himself to fulfill all the obligations and responsibilities established for each of the transactions left on record.

On the other hand, it is clear that the relationship with clients has modified because they feel uncomfortable about the disclosure and investigation of personal information, the submission of the documentation requested by law to put together the transactional profile of the subject, knowledge of the existence of beneficial ownership and the creation of the user identification file. Likewise, there is the complexity of complying with the obligation of verifying the clients' documentation without a technological infrastructure where data can be compared. Furthermore, there is a lack of inter-institutional collaboration that allows sharing databases. Therefore, the *Notariat* has seen the need to ask the authority on several occasions for the criteria that guides it so as not to commit any infraction of the anti-money laundering regulations since notaries are aware of the limitations due the lack of graphoscopic and psycho-morphological studies, as well as the biometric instruments[32] that would allow them to indisputably recognize the person they claim to be.

In the regulatory dimension, the lack of normative precision and its regulatory provisions are identified as causes that have the Mexican *Notariat* waiting for interpretations and possible criteria presented by the authorities. In the same way, notarial activity is compromised when, derived from the obligations, the notary must refrain from providing service on the mere suspicion of irregularity in the identification data clients may present, in addition to the fear of relapsing into any of the planned sanctions.

Finally, in the axiological dimension, it is observed that fulfilling a contract could cause a lack of compliance with Notarial Deontology, which, among

[32] Through Bulletin 5513, the Chamber of Deputies of the Mexican Government communicated on December 3, 2020, the approval of the new General Population Act, in which the creation of the "Unique Digital Identity Card" is provided; it will serve as an official identification document before the authorities, inside and outside Mexican territory. However, it is noted that the General Directorate for the Registration of the Population and Identity has planned its implementation in a 4-year range, so in the meantime, measures that may be applicable at present must be taken. Government of Mexico, National Population Register (RENAPO), *What we do?* (2020), available at *https://www.gob.mx/segob%7Crenapo/que-hacemos*.

other things, establishes the principle of confidentiality that could be compromised by complying with the notary's obligation to identify how users pay each other. This consideration arises from the contracts they subscribe since their bank account data is exposed in the public document; due to its notarial nature, it is subject to reproductions. In addition, there is the principle of impartiality and independence,[33] which establishes the need for the notary to avoid any form of discrimination against clients, leaving the notary in a dilemma by refusing to provide notarial service when clients apparently do not meet the administrative requirements established for identification documents or when they do not have bank accounts to comply with the restriction on the use of cash in real estate transactions.

V. Conclusions

This note has explained the worldwide importance of the fight against money laundering, as well as the effort made by different organizations in the implementation of legal instruments that seek to mitigate and prevent the crime, positioning the Notarial System as a key element to achieve the objectives set nationally and internationally. Particularly, the object of study focused on the analysis of the role of the Mexican *Notariat* inside the process of mitigation and prevention of this crime, explaining the mandatory burden of anti-money laundering and the penalties to which notaries may receive in the event of non-compliance. The note concludes that although the notary has been placed in a strategic point in the fight, the necessary elements have not been provided for notaries to carry out the work efficiently. These include, among others, technological and human infrastructure, clear and consistent regulations, as well as fixed and rough guiding criteria established by the authority that clearly dictate a way to comply with the guidelines.

This is how the factual, normative and axiological consequences that anti-money laundering provisions within the notarial activity are notified; highlighting the fact that the ideal scenario would be having the Mexican State providing an electronic system with a database made available exclusively for Mexican *Notariat* consultation as it is done in the Spanish model. Due to the situation the country is experiencing, one proposal is to at least establish inter-institutional work with government entities and the participation of private ones, which have biometric information and means of citizen identification, such as, among others, the National Electoral Institute (INE) and banking institutions. Similarly, the regulatory conflict that has been discussed makes it possible to conclude that there are no clear and precise provisions on the matter. The inconsistency between the severity

[33] International Union of Notaries, Official Website, *Principles of notarial ethics* (UINL) (2020), available at *https://www.uinl.org/principios-de-deontologia*.

of the sanctions that may be applied is also highlighted since the Mexican *Notariat* is a key piece for assisting in the fight against money laundering and not the enemy to be defeated.

To sum up, the complexity that permeates the field of axiology, leaves the non-observation of the principles that govern the notarial essence to comply with the money-laundering framework latent.

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EVIDENCE-BASED LAWS AND THE ADMINISTRATIVE CAPACITY TO GENERATE INFORMATION FOR THE LEGISLATIVE PROCESS

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Abstract: *Traditionally, the legislative practice has been described from the moment the bills enter the Assemblies or Parliaments until they are promulgated into law, but there is a lot of opacity regarding what the doctrine knows about the previous moment, that is, the pre-legislative procedures, which finally determine the way in which a problem will be approached legislatively, the content that these texts will develop and who has influenced the strategy deployed. This note seeks to make visible certain practices within the administration that allow understanding which is the starting point of a bill, how the knowledge of the administration members is structured and some of its problems, which are the sources of information for the elaboration of diagnoses, what should be the previous steps for the creation of a regulation and the existence of an institutionality that gives certainty, who influences the drafting of a legal text, what have some Latin American countries done to advance on this issue and how an evidence-based bill should be structured so that its result is close to the optimum expected in terms of legal effectiveness and transparency and accountability to citizens. Finally, this note concludes on the benefits derived from the strengthening of administrative capacity that allow generating, structuring and articulating technical, impartial and transparent information to promote evidence-based laws whose follow-up and evaluation allow assess their ex post effectiveness.*

Keywords: *Law-making process, better regulations, evidence-based laws, regulation, legislation.*

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Resumen: *La práctica legislativa se ha descrito tradicionalmente desde el momento en que los proyectos de ley ingresan a las Asambleas o Parlamentos hasta que son promulgados como ley, pero existe mucha opacidad respecto a lo que sabe la doctrina sobre el momento previo, esto es, los procedimientos prelegislativos, que finalmente determinan la forma en que se abordará legislativamente un problema, el contenido que desarrollarán dichos textos y quienes han influido en la estrategia desplegada. Esta nota busca visibilizar ciertas prácticas dentro de la administración que permitan comprender cuál es el punto de partida de un proyecto de ley, cómo se estructura el conocimiento de los integrantes de la administración y algunos de sus problemas, cuáles son las fuentes de información para la elaboración de diagnósticos, cuáles deberían ser los pasos previos para la creación de una regulación y la existencia de una institucionalidad que dé certezas, quiénes influyen en la redacción de un texto legal, qué han hecho algunos países de América Latina para avanzar en este tema y cómo debería estructurarse un proyecto de ley basado en evidencia para que su resultado sea cercano al óptimo esperado en términos de eficacia jurídica, transparencia y rendición de cuentas hacia la ciudadanía. Finalmente, esta nota concluye sobre los beneficios derivados del fortalecimiento de la capacidad administrativa que permitan generar, estructurar y articular información técnica, imparcial y transparente para promover leyes basadas en evidencia cuyo seguimiento y evaluación permitan evaluar su eficacia ex post.*

Palabras clave: *Formación de la Ley, Mejora Regulatoria, Leyes Basadas en Evidencia, Regulación, Legislación.*

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I. Preliminary Considerations

One of the biggest challenges in legislation, at a global level, is the need to provide a satisfactory regulatory response to the problems that it is intended to solve.

This efficiency challenge becomes more evident in Latin America, where the regulation deficits are immense, going from the lack of regulatory frameworks, no longer used or out of date laws, to regulations copied from foreign laws without the adjusting them to the social reality in which they are intended to be applied.[1]

This note seeks to provide a modest insight on several topics. The first relates to the existing capacity within States to generate information likely to be used for political decision-making; the second relates to the existence of administrative procedures or other forms of institutionality within the State where this information can be brought together for legislative purposes; and the third relates to the way in which information and procedures can facilitate the drafting and processing of evidence-based laws.

It is noted that this note does not consider the popular initiative of law as part of its analysis. The note will take elements mainly from the Chilean reality, notwithstanding the review of some procedures or instruments from other Latin American countries.

II. How Regulation is Generated Within the State

Regulations within democratic states are generated as a rule through lawmaking processes that take place in the Congress or Parliament.[2] In addition, the Executive Branch has certain administrative powers that allow it to regulate autonomously, without discussion with other branches of government, certain acts that are either not subject to law or have been authorized by it to do so in a more detailed manner (decrees or other forms of subordinate regulations). In the case of Chile, the lawmaking process[3] is constitutionally based

[1] Regulatory deficits could be understood as the result of shortcomings that precede them. Thereon, *see* Bernardo Kliksberg, *¿Cómo enfrentar los déficits sociales de América Latina? Acerca de Mitos, Ideas Renovadoras y el Papel de la Cultura*, 41 (166) Revista Mexicana de Ciencias Políticas y Sociales 89 (1996).

[2] Mercedes García M., *El Procedimiento Legislativo en América Latina,* 38 América Latina Hoy 17-55 (2004). This work clearly explains the centralization of the legislative initiative in the executive powers and the establishment of the discussion of the laws in the Parliaments.

[3] Its concept is divided between what is understood by political science (process) and the philosophy of law (procedure), in this last sphere it is possible to define it as a "legally preordered sequence of the activities of various subjects, in order to achieve a result determined: the formation (or rejection) of the law". Sebastian Soto, National Congress and Legislative Process. Theory and practice 7 (Legal Publishing Chile, 2015). The same author on page 8, defines it as "the union of a set of stages and formal acts that allow the study, debate, vote, and approval of a bill and in which various authorities, officials and other interested parties take part in order to influence the content and processing of the law, which is the case, it will be finally published".

in the National Congress and the President of the Republic, both entities in their capacity as colegislators, concur in the lawmaking process.

This process, whose regulation is expressly described in the Political Constitution, is also detailed in the Constitutional Organic Law of the National Congress, and reveals the existence of a flow of bilateral, and indeed bidirectional, exhortations between the President of the Republic, through the respective Ministry, and the National Congress, through the Senate or the Chamber of Deputies. Both parties exchange technical and political arguments on the bill presented, a discussion that gives shape to the new text that will become the future law, which after being approved in both chambers is sent to the President of the Republic who, if he/she also approves it, will arrange for its enactment as a law (Article 72 of the Chilean Constitution).

Among the characteristics of this process, we cannot fail to mention that it is reserved by constitutional means, most of them and the most important matters of law, to the President of the Republic. In other words, the initiative of this law-making process is placed in the hands of the Executive Branch through the sending of the respective *Message*, which is nothing but a clear example of the president-centered system of government that prevails in Chile.

In Chile, the members of parliament divided in two chambers, both deputies and senators, also have legislative initiative, which is materialized through the so-called parliamentary *Motion*. The importance of the subjects they can address is less relevant than the type of initiative the President of the Republic can have.

This context explains the model that allows the creation of regulations in two ways: in a heteronomous manner within the Assemblies or Parliaments and in an autonomous manner either by constitutional or legal authorization, where the result of both actions will imply the coexistence of rules of greater and lesser hierarchy.

José Meehan[4] has classified the above procedure (of top hierarchy) as that part relating to *external legislative technique*, namely, that relating to the preparation, issuance and publication of legislative acts. The internal legislative technique refers to the analysis of the form and content of the project. It is this last technique that is of interest in this work.

Indeed, the description of what the administrative and epistemic practices of the administration are when creating regulatory projects is scarcely discussed. As we have already mentioned, Latin America has a well-known lack of regulation in various areas, in addition to regulatory frameworks that are too old (frankly obsolete) or without the necessary hierarchy to be recognized by the compelled subjects.

As a general rule, the first drive that produces regulation in the countries is given by government plans or programs, which are true roadmaps where the

[4] José Meehan. Teoría y Técnicas Legislativas 73 (Ediciones Depalma, 1976)

political project of each coalition is expressed before the election and, once they are elected, they allow them to execute a legislative agenda based on the proposals that the citizens favored with their vote.

But there are also other origins for this legislative starting point; a common practice in Latin America are the National Development Plans, which are management tools that are submitted by the executive to the Parliament, which once approved provides the limits or priority areas within which the respective country must legislate during the period for which it was approved.[5]

With the thematic framework defined, the next question is to know the state of the art in the respective subject. Knowing this presupposes a certain professional competence of the bureaucracy responsible for drafting the regulations, i.e. knowing professionally the issue to be addressed, the sources of information to be employed and the arguments to be developed to persuade Parliament.

It is therefore a transformative moment, in such terms that the political will, coupled with the information of reality must be converted into a documentary act that reasonably combines both drives.

In the course of this process, and following good practices for public transparency, this type of action should be subject to citizen participation procedures, where the subjects who are to be the recipients of the laws can provide relevant knowledge or intelligence.[6] If the complexity of the subject matter so warrants it, expert committees could be convened to hear what academia or industry, as the case may be, can contribute in this regard and thus contribute to organizational learning when it is exceeded by the challenges of the legislation.

This is often joined by the participation of an international organization that serves as a promoter of an institutional modernization initiative, by providing either technical assistance or financial resources for the implementation of the new regulations. We will discuss the particularities of their participation and promotion of certain initiatives below.

In the case of subordinate regulations -such as decrees or regulations- the practices of the administration are generally opaque. Often in the face of pressing deadlines, daily urgencies, and the fact that no discussion will be held outside the administration, these regulations will appear approved and published without the slightest public deliberation that could have existed among the technicians and bureaucrats responsible for their creation.

[5] In Latin America, Bolivia, Costa Rica, Colombia, Ecuador and Panama have national development plans. As the objective is strongly focused on poverty, health, education, nutrition, housing, work and gender, it is possible that in many cases it exists under another name, as in the case of Uruguay, which is called the Equity Plan.

[6] Beth Simon, Ciudadanos más inteligentes, Estado más inteligente. Las tecnologías del conocimiento y el futuro de gobernar 286 (CIDE, 2017).

III. Data and Information Available

As noted in previous paragraphs, it is within the administration where, as a general rule[7], the first letter of any project that should become a regulation is written. To begin this process, it is necessary to have a guiding principle to govern the activity and, of course, the inputs of diagnosis or scenario that will be the subject of regulation.

1. *Principles of Legislation*

In his fascinating work "The Morality of Law", Lon Fuller tells the story of a king named Rex, where he formulates the eight ways in which one can fail in law. Through a simple, yet profound story, he is able to illustrate how a regulator can fail in his task. The calamities he describes include those cases in which laws are no longer created; there is not due publicity for the norms, there is an abuse of retroactive legislation, not making comprehensive laws, but making contradictory laws, that are outside the scope of those affected, causing instability of the legal bodies (through successive changes) and through the lack of congruence between the rules according to which they were promulgated and their actual administration.[8]

This reflection has allowed scholars to offer a series of proposals regarding the formulation or existence of certain principles that should guide legislative activity. We can understand the principles of the formation of the law as "those fundamental criteria for the generation of the law and indispensable for the correct development of the legislative function, applicable preferably to the co-legislating organs in the elaboration of a legal initiative, in its original ideas, in its perfection and in its different constitutional procedures, until the completion of the bill".[9]

For example, Jeremy Waldron has pointed out that the principles of legislation could be classified into three types, including substantive principles (common good and general utility), formal principles, and procedural principles. In his work, he focuses on the latter, pointing out that they can be broken down into seven principles that address important aspects of legitimacy. They are particularly important when a debate must be moderated where there are profound differences around substantive principles. This list, however, leaves out the pre-legislative process, since the principles proposed are aimed at regulating a debate in the parliamentary stage and are basi-

[7] I mention it as a general rule because in most Latin American countries, parliamentarians have well-circumscribed areas of legal initiative, most of the time on matters that do not require or do not have a national budget impact.

[8] Lon Fuller, La Moral del Derecho 43-49 (Editorial Trillas,1964).

[9] Pablo Urquízar & Cristobal Aguilera C., La Formación de la Ley 29 (Editorial Metropolitana, 2019).

cally oriented towards ensuring that the debate takes place in a transparent, respectful, and fair environment.[10]

Notwithstanding the above, it is possible to find formulations that are capable of admitting a set of *legislative* principles or *legislation* formulated in such broad terms that they would be inclusive for the administrative stage of formation of regulations. Among the variety offered by the doctrine, mention can be made, for example, of the principles of probity, constitutional supremacy, integrity (unity of matter or congruence), precision or certainty, coherence, reasonability, relevance, timeliness, among others.[11]

2. *Elaboration of a Diagnosis*

For the elaboration of an accurate diagnosis, data sources are needed to produce information schemes that make reasonable and understandable for legislators and the rest of the civil society the state of things and the expected objectives after the regulation.

The diagnosis must be clear about the problem or difficulty that the regulation is intended to solve. Its work should not be limited to the normative aspects that the new regulation will modify, but to the whole spectrum of what is related to the matter.

To a greater or lesser extent, the States have the following sources of data that make it possible to prepare information on the problem intended to be solved:

A) Official statistics. All Latin American countries have National Statistics Offices (NSOs). These organizations are in charge of carrying out surveys and censuses (the latter providing the sample framework for the rest of the statistics), which for all legal purposes will be the official information of the State.

It is quite common for statistical systems in Latin America to be decentralized, which means that in addition to the NSOs, the public services themselves generate their own statistics.

In most Latin American countries, with the exception of Mexico and Brazil, practices in this area are at a basic statistical threshold, that is, generating the simplest data. This can be explained by a historical lack of resources that has affected this part of the

[10] Jeremy Waldron, *Principles of Legislation*, in The Least Examined Branch. The Role of Legislatures in the Constitutional State 17, 18 (Bauman, R. y Kahana, T. ed., Cambrigde University Press, 2006).

[11] These principles can be reviewed in Israel Campero, Manual de Técnica Legislativa 119 and following (Rotembol Graphic Impressions, 2011); José Minor & José Roldán, Manual de Técnica Legislativa 73 (H. Cámara de Diputados, Porrua, 2006); Meehan, *supra* note 4 and Urquízar y Aguilera, *supra* note 9, at 30.

administration, which for inexplicable reasons always lags behind modernization plans. Consequently, the lack of information has resulted in the regulations making little use of this data because they simply do not exist.

The statistical capacity[12] of States is undoubtedly a relevant starting point for any task involving the generation of information for evidence-based decision-making. Nowadays, studies have begun to be carried out that make the use of statistics in the design of public policies visible at an early stage.[13]

The fact that this information is official means that any regulation originating from the administration, regardless of its hierarchy, must reasonably justify these data that have been collected and processed independently and impartially from the political authorities. In other words, it is official because they are reliably reporting facts of reality.

B) Open data. According to the *International Open Data Charter*, these are those digital data that are made available with the necessary technical and legal characteristics so that they can be used, reused and redistributed freely by anyone, at any time and in any place.[14]

The State is essentially a generator of open data, and in this sense, Latin America has been a leading student since it has a high number of adoptions of the principles proposed in the Charter.[15]

The availability, in terms of accessibility, cost-free and interoperability, has begun to generate a supply of data that has had an affirmative response by those who seek information, which has meant that they have begun to be part of government practices through the creation of an open data infrastructure, have responded to citizen concerns for greater access to public information, have facilitated the generation of datasets leading to the resolution of specific public policy problems, and have made it possible to create innovative solutions with social impact.

C) Governance with directives. As can be seen from the previous paragraphs, it is quite frequent that within the State there are mechanisms that collect and share data (statistics) or make available (open

[12] Eduardo Dargent *et al.*, ¿A quién le Importa Saber? La economía política de la capacidad estadística en América Latina 17 (Banco Interamericano de Desarrollo, 2018). Statistical capacity is defined as the existence of a permanent structure or system that has the necessary resources to consistently generate relevant and quality statistical data, to disseminate them adequately and in a timely manner.

[13] Mariko Rusell & Jorge Muñoz-Ayala, Un estudio exploratorio para medir el uso de las estadísticas en el diseño de política pública 4 (Banco Interamericano de Desarrollo, 2015).

[14] Open data chart (Oct. 17, 2019,) available at *https://opendatacharter.net/principles-es/*.

[15] Arturo Muente-Kunigami, & Florencia Serale, Los Datos Abiertos en América Latina y El Caribe 46 (Banco Interamericano de Desarrollo, 2018).

data) sets of information. What is not frequent are the mechanisms or guidelines that organize and coordinate the way these data will be used later. In fact, it is common for data to be disclosed or available but not to be formally reviewed or invoked when generating information for regulation.

To avoid this disconnection, practices of regulatory improvement or coherence have been promoted within States, that is practices that aim to support governments in improving the quality of their regulation by ensuring that it meets their social objectives.[16]

These practices are mainly promoted by the Organization for Economic Cooperation and Development[17] and their aim is to organize the available data and translate it into coherent information, in order to provide an account of the state of affairs that will make it possible to demonstrate and convince, which is the starting point for regulatory reform, as well as the objectives that the new regulation seeks to achieve. In general, the corollary of these initiatives is to have evidence-based regulations. Particularly, the vast majority of them seek to simplify procedures or reduce those that are unnecessary.

These practices are materialized through documents that reflect what has been called Regulatory Impact Assessment. In order to materialize this effort, it is also essential to have an institutional framework that allows coordinating the regulatory flow within the State and monitoring the use of information in each of the *ex-ante* evaluations, the impact and the objectives pursued with the new regulation.

The Latin American countries that have incorporated these guidelines have faced some challenges that are mostly related to the institutionality needed to carry out this task, which, as a rule, is created but lacks enforcement powers. On the other hand, there are challenges associated with the lack of systematic stakeholder participation, mainly due to a lack of knowledge of the mechanism that promotes regulatory improvement.[18]

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[16] A better regulation process is one aimed at causing changes in a specific legal system, in particular through the improvement, adaptation or updating of current legal instruments or through proposals called to cover legal or regulatory gaps in the respective matter. It is a comprehensive process that goes beyond the mere deregulation or simplification of procedures in a sector. Danielle Zaror, The regulatory improvement process for smaller companies in Chile 69 (Postgraduate tesis, University of Chile, 2009).

[17] Recomendación sobre Política y Gobernanza Regulatoria, OCDE (2012) (oct. 17, 2019) available at *https://www.oecd.org/regreform/recomendacion-del-consejo-sobre-politica-y-gobernanza-regulatoria-9789264209046-es.htm.*

[18] Tobías Querbach & Christiane Arndt, Politica regulatoria en América Latina: Un análisis de la situación actual 11-14 (Documentos de Trabajo de Política Regulatoria de la OCDE, 2017).

IV. Administrative Procedure for Generating Information to Justify the Regulation

As noted above, modern states have more or less strongly developed mechanisms for collecting, disseminating and making data available. However, the next phase, which relates to the generation of coherent information to justify regulatory decisions, is an aspect that is still immature.

When looking for information about the existence of administrative procedures related to the lawmaking or regulation process, the truth is that the outlook is rather meager in examples. As Mercedes García said, what is unquestionably regulated is the constitutional lawmaking process, but the previous stage is still an aspect that the States owe in terms of transparency and accountability of the administration.

That said, the pre-legislative procedure, which is the one that interests us, has taken strength in some countries and has begun to become visible through a series of administrative practices, but not necessarily entitled in a legal body (hence its fragility), that allow "ordering ideas" and setting expectations within the administration. Here are some examples:

1) Mexico. In the year 2000, it formalized an institution called the Regulatory Improvement Commission (COFEMER), which is responsible for carrying out the procedure for regulatory improvement in this territory. Mexico is the most significant case in this matter since it is the only country that has established by federal law of administrative procedure a practice of this nature, which is materialized through the so-called *Statement of Regulatory Impact* (MIR). This norm also created a Regulatory Improvement Council for public and private integration that achieved the objective of systematizing the participation of public entities and the private sector. Among the main attributions of COFEMER, we can mention:

   A) It revises the national regulatory framework, diagnoses its application, m and elaborates legislative and administrative proposals, as well as programs to improve regulation in specific activities or economic sectors.
   B) It analyzes and dictates the regulations intended to be issued by the Federal Government's agencies and decentralized bodies, in order to guarantee that their impact, in terms of social benefits, is greater than their costs.
   C) It administers the Federal Registry of Procedures and Services, which is an inventory of the procedures of the Federal Public Administration. The agencies and decentralized organizations may not apply additional procedures to those registered in this registry or apply them differently from what is established in it.

D) It provides technical advice on regulatory improvement for federal entities and municipalities in the country, which is to promote local regulatory improvement laws, adjustments to local regulations and public announcements, systems of rapid opening of companies and state and municipal councils of regulatory improvement.

2) Costa Rica. Law No. 8220 of 2002 established the Protection of Citizens from Excess of Requirements and Administrative Procedures. A Regulatory Improvement Management was created with the mission of leading public and private efforts to achieve an efficient regulatory framework, without unnecessary paperwork or requirements, and without overlapping competition between institutions, which provides legal certainty to the administered, generating a favorable investment climate for companies and a State that provides satisfactory services to citizens and guarantees the protection of their interests. It is also an outstanding example of institutionality with the objective of achieving "efficient" regulation for a better State for its citizens.
3) Chile. It has been trying to develop an *ex-ante* regulatory impact assessment policy at least since 2009, when it joined the OECD. These efforts, however, have not succeeded in having a transversal concretion in the State.
In 2010, Law No. 20416 was passed, establishing special rules for smaller companies. Article 5 of this law declares a Procedure for the Issuance of General Regulations and Rules, stating that:

> All ministries or agencies that issue or modify general legal norms that affect smaller companies, with the exception of municipal ordinances and the rulings that may be issued by State Administration agencies, must keep at permanent availability of the public the necessary preparatory background they deem relevant for their formulation, in their websites, under the terms set forth in Article 7 of Law No. 20285. The precedents must contain a simple estimate of the social and economic impact that the new regulation will generate in the smaller companies and may be prepared by the Administration itself [...] However, the failure to comply with the obligations referred to in the preceding paragraphs will not affect in any case the validity of the act.

As can be seen from the wording of this norm, there is an obligation to think about the impacts that the new regulation will cause, but if this is not done, there is no ensuing consequence. The regulatory impact form, despite being considered an active transparency obligation, has been so far scarcely used.

The lack of institutionality and the poor use of the impact evaluation document led to the creation in 2015, by means of a decree,

of the National Productivity Commission (CNP), which is an advisory, independent and autonomous institution with a mandate to increase productivity in order to improve the life and well-being of the people. The CNP advises the Government of Chile on matters geared towards increasing productivity, proposing public policies, technically supported, that consider the opinion of civil society, with a focus on improving the welfare of citizens.

As can be seen, the institutional framework is fragile and the focus is quite partial, since the only focus on which evidence is sought is that related to productivity.

V. Expert Participation

It is quite frequent that during the pre-legislative process, the professionals of the respective public departments take on the task of drafting the bill that will be presented to Parliament.[19] However, since the process of creating regulations does not necessarily imply formal knowledge, this responds to an urgent social problem that makes it necessary to combine a greater number of aspects, such as the achievement of a politically complex proposal that needs to have a high degree of agreement; administrations usually resort to the talent of professional experts who, within the agency or outside it, will allow for a technical deliberation of the matters submitted to their knowledge. So, for example, we can see Technical Teams, External Commissions, In-house Experts and International Consulting, among others.

1) Technical Teams. When the complexity of the subject requires it, it is very frequent that technical teams from one or more public departments are assembled, made up of professionals from one or more disciplines. The result of these teams should be a unique proposal that harmoniously resolves the challenges of each of the sectors represented in the team.
2) External commissions. They can be of a temporary nature or they can be held in session after being summoned by the authority that implements them. As a general rule, they have an *ad honorem* nature and usually combine a good balance of political forces, and gender, this last criterion being a condition *sine qua non* these days.

   Regardless of the fact that these types of commissions have political balances in mind, they are integrated by people of well-known

[19] Exceptionally, an external entity may be entrusted with the total or partial review of the factual and legal bases for the administration to take a decision. These types of reports are frequent when what is reviewed has to do with the creation of infrastructure and they are duly remunerated through the platforms that regulate public purchases.

prestige, professional or academic, or renown by their leadership in the subjects on which they will contribute.

These commissions can be classified as:

A) *Advisory Council*. These are integrated by those who collaborate with the authorities to make certain decisions by providing arguments, experiences and research to support a particular decision. They meet for a determined period of time, which once extinguished should result in the delivery of a proposal. In Chile, for example, the "Advisory Council for the Modernization of the State" is an entity that made recommendations directly to the President of the Republic regarding regulatory urgencies for the state modernization process.

C) *Resolution councils*. They are those which are established by law and have the competence to approve or reject any measure or proposal. In the case of these Councils, it is difficult to make progress on regulatory changes without their express consent. As a general rule, this type of organ makes no other effort in this process than to give its approval or rejection, which in many cases can be critical. They hold sessions if there are issues that warrant their establishment.

D) *Consulting Councils*. These are instances of consultation on a decision to be made where the response to the consultation received is not necessarily binding on the body that made the decision. These councils can be technical or simply call on interested civil society and their outcome is translated into proposals that can be as many as there are members.

3) *In-house Experts*. On other occasions, the matters to be resolved for the regulatory proposal are of such complexity that this type of highly trained advisors must be sought in the private sector and internalized to work exclusively on the drafting of the regulatory proposal, which once completed may mean the end of the labor relationship with said expert.

4) *International Consulting*. In Latin American countries, it is quite common to find experiences where various public agencies are advised, and in many cases financed in part of their operation, by international entities. It is interesting to look at this type of support in the process of creating regulations, since these entities often promote ideas about what would be right in certain areas. Thus, good international practices are well known to all good regulators, and they form part of almost all the explanatory statements of draft laws. The promise behind many of these Best Practices is that they pave a path to development, a goal so elusive and so pursued in our continent.

This relationship between *law* and *development* has been studied extensively in the U.S. academia, but very little in Latin American academia. It is interesting to see how the vision that considers law as an instrument to introduce transformations in social and economic matters is still very much alive.

These organizations provide experts who are convinced that there is a causal link between legal change and consequent development, that significant reforms will produce the change, and that if the part in need of regulation is well identified, the adjustment will bring about development.

This group of advisors also provides practical and comparative experience through what they have been able to see work out and fail in each of the countries where they have given their advice.

Most of these organizations frequently promote legal transplants, which, as we know, will have to overcome multiple obstacles associated with the social, economic, political or cultural complexities that a given country has.

This type of adjustment, based on successful cases of foreign law, brings many difficulties, among the most frequent being the lack of adjustment with legal systems (when they are different) and the lack of integration with institutional procedures.

Emulating objectives and motivations seem to be part of the limit of what is acceptable, transplanting in a literal way seems to be a path to failure.

There are no studies that have evaluated or measured the role of regulators in the state of progress after the implementation of legal changes (or institutional developments). Consequently, some authors are skeptical of the promises of development through legal changes.[20]

However, this type of advice or technical assistance often provides true navigation charts at the time of writing a regulatory proposal. These advisors do not write the articles, but it is possible to easily identify the "fingerprint" of their participation in the pre-legislative process.

VI. Statement of Reasons

One aspect that should be part of the structure of any bill is the statement of reasons that precedes the text of the articles containing the rules that make up the bill.

In descriptive terms, it is a section that provides an explanation of the historical course of a given situation or institution. In this part we should find

[20] Kevin Davis & Michael Trevilcock, *Relationship Between Law and Development. Optimist versus Skeptics*, 56 (4) The American Journal of Comparative Law 895 (2008).

the origin (material circumstances) that gives the regulatory impulse, which could be based on a scenario that has undergone a crisis, or on the contrary, it could be the result of a long political period that has reflected on it. In many cases, particularly in Latin America, the initiative is reactive to incidents that have caused a great social impact, or it is about issues for which there is little evidence or information, but there is a regulatory tendency that moves the State to legislate (fundamentally when interest groups are capable of rallying public interest).

This part is often seconded by experiences in comparative law that offer different solutions that have been proposed to resolve the issue giving rise to the initiative.

Thereon, the statement of reasons focuses its work on explaining the problem that gives rise to the project, the poor regulation or lack thereof, as the case may be. This part of the exposition can be defined as the diagnosis and in order to provide a clear picture, it is essential that the pre-legislative work is rigorous and adequate.

Next step is to conceptually detail the measures that the bill intends to introduce in the regulation, which would ultimately solve the problems that have been detected in the diagnosis. In this part it is also expected that the legislator will be sufficiently clear and transparent in terms of the main and accessory consequences linked to the implementation of the new regulation.[21]

Finally, it is possible to find the text of the articles that must be consistent with what is indicated in the declarative part of the project. All this information should be sufficient for legislators, the media and civil society to determine whether it is a major or minor legislative change and what has been the rationale (*ratio legis*) behind the proposal.[22]

All this part is essential for the subsequent evaluation of the expected effects once the law is enforced.

From a constitutional perspective, it should be noted that not all Latin American countries are obliged to present this scheme. The article by Mercedes García, already quoted in this work, gives a good account of the fact that countries such as Argentina, Brazil, Ecuador, and Paraguay are not obliged to accompany the presentation of a bill with this section.

But in countries where this obligation does exist, it should not be neglected, as it is considered essential to account for the significant reasons that trigger a quality legislative procedure.

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[21] Constanza Inhen, *La argumentación por consecuencia en el debate legislativo chileno: preguntas críticas para evaluar su suficiencia*, 37 Revista de Lingüística, Filología y Traducción 222 (2016). The Chilean argumentative scheme has been studied and the doctrinal hypotheses suggest that in most cases the new proposal would be (its goodness or benefit) the necessary consequence of the act of regulating in that sense.

[22] Osvaldo Oelckers *et al.*, La Evaluación de las Leyes 15 (Ediciones Universitarias de Valparaíso, 2002).

Among the reasons given for creating an explanatory section is the objective of incorporating core or essential ideas that are necessary to give order and coherence to the legislative debate that will take place within Parliament. In fact, these structural ideas provide a special regulatory framework within which the flow of arguments must move and possible modifications that the legislative initiative may receive. In this sense, the title of the bill is an important part of what should be understood as the core or fundamental ideas, since it is indicative and unequivocally related to the subject matter to be regulated.

The relevance of this point is such, that, for example in the Chilean case, the Constitution provides in its Article 69 that "Every project may be subject to additions or corrections in the corresponding procedures, both in the Chamber of Deputies and in the Senate; but in no case will those that are not directly related to the core or fundamental ideas of the project be admitted".

It has also been estimated that stating these ideas in the explanatory part would fulfill other roles in favor of society and democracy, among them, meaning respect for minorities, generating regulatory certainty, and limiting influence peddling among parliamentarians.[23]

Another aspect in which the explanatory part is constitutionally relevant is related to the transparency to inform what other rules of the current legal system would be affected or modified by the new regulation. This makes the statement of reasons an indispensable part of the subsequent interpretation of the law; therefore, its consultation in case of doubt will make possible a more systemic and harmonious interpretation of the legal system as a whole.[24]

All the above undoubtedly serves, for better intelligence and appreciation of the laws, to prevent the *verum sensus* that motivated the legislator to act in this way.

A final aspect of the statement of reasons, which is equally indispensable and directly linked to the Constitution, is the transparent declaration of the rationality of spending, that is, how much the economic impact of the new regulation will be on the national budget.

Most of the draft laws "detail the objectives and results sought [...] but they are usually generic statements that seek to inspire a narrative, rather than allowing in *a posteriori* evaluation of public policies".[25] In view of the above, it is especially relevant whether the initiative creates a new institutional framework or oversight functions, or whether it should deploy actions with national coverage. It should be noted that this part is different from the evaluation of the economic impact on the regulated, which has already been explained in other paragraphs of this article and which is equally necessary.

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[23] Sebastián Soto, Congreso Nacional y Proceso Legislativo. Teoría y Práctica 309-312 (Thomson Reuters, 2015).

[24] In a partially contrary sense, Minor & Roldán, *supra* note 11, at 18.

[25] Urquízar & Aguilera M., *supra* note 9, at 92.

VII. Conclusions

This note has offered a reflection on the scenarios faced by a regulator within the administration when a bill must be drafted.

From the reading of the respective sections, it is possible to notice that all States, to a lesser or greater extent, have information generation capacities that let us illustrate a better quality pre-legislative procedure. In fact, to the extent that such information is used, formalized, and requested more frequently for the purposes of creating regulations, it is likely that the areas of knowledge of the respective society will expand and thus the preparation of the regulation as a whole will benefit.

The establishment of a clear diagnosis, which accounts not only for the regulatory scenario but also for the cultural, social and political aspects of a given issue, will undoubtedly be the best starting point for any subsequent legislative discussion.

The determination of the objectives pursued, and the expected results are, on the other hand, the best starting point of evaluation that even in the short term can allow the *ex post* evaluation or review of a regulation.

A prominent and in full swing aspect involves the implementation, in a more or less formal manner, of administrative procedures or other forms of institutions that allow for the organization of work within the State, especially when the subject matter to be regulated has an impact in more than one way.

As a general rule, there is a perception from the private sector that the generation of regulation obeys an orderly process within the framework of the authority that provides it, but this could not be farther from the truth. Real legal and political battles are fought within the State, especially when the technical teams belong to different sectors. The struggle to make reasons prevail ends up moving to the field of influence where it is frequent that a common authority is the one that must end up deciding in favor of some arguments over others. If the debate is organized, the decision will end up being fairer because there will be no way to circumvent the information that has been raised for these purposes.

Avoiding disputes that wear down the administration is one of the benefits of having a formalized *ex ante* regulatory evaluation procedure. These procedures add transparency in that they open up a space for other interested parties, both from civil society and from academia, to give their opinion and information on the subject, providing mechanisms for access to information once they are concluded, since they offer citizens effective access to the real reasons behind a regulation.

At this point, we must bear in mind that the participation of industry in these processes must not be neglected, as it often generates information through its trade organizations that the State does not collect or produce precisely because of its weak capacities.

Among other benefits, we can also mention the creation of certainty regarding the problems to be corrected and the moderation of expectations regarding the expected results. These practices as a whole constitute a great mechanism for accountability in this level, which is transcendental, and in which in many countries it is completely invisible.

These mechanisms also generate large spaces of confluence within the State. Once the procedure is known, those responsible will ensure that the best available information is delivered, generating benefits not only for a given process but for all those who will follow in succession as soon as a regulatory capacity is installed. This in turn generates a virtuous flow, contributing to the creation of a great professional capacity within the State, which in turn allows us to trust precisely that the best experts in a given regulation are also in charge of its modification or transformation.

Finally, generating bills based on evidence allows an honest intervention by the authorities in front of the representative power that is exercised in the Assemblies or Parliaments. In this sense, proposing laws that have resulted from the analysis of data and impartial and reliable information allows for better persuasion of those who, through voting, build the regulatory framework of the Nation.

It is a guarantee for the citizenship that it will rely on the existence of professional and previously established processes for the formulation of regulations, thus removing the ghost of corruption and power dealing for the elaboration of "tailor-made" regulations.

Creating this type of instrument and building a robust institutional framework that allows these practices to mature within the administration ensure a State committed to governing with respect to each of its citizens.

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