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AN EXPLANATORY MODEL OF CONSTITUTIONAL TRANSITIONS FROM A LEGAL PERSPECTIVE*

Carla Huerta O.**

Abstract: *A constitutional transition understood as a legal transition is not a revolution, because as Zippelius wrote, from a legal standpoint, a revolution is the extralegal modification of the fundamental principles of the existing legal system.*[1] *An explanatory model is proposed to analyze transitions from the perspective of legal theory so as to distinguish ordinary revisions from transformations of legal systems that could be called "constitutional transitions" strictly speaking. Transitions are discussed here according to legal criteria, considering two different instances: replacing a constitution and its gradual modification. The idea is to explain the processes of constitutional transformation and to introduce a theoretical model for that purpose. To consider law as a system of rules is one of the most important premises of this proposal.*

Keywords: *Transition, legal dynamics, constitutional transformation, theoretical model.*

Resumen: *Una transición constitucional, entendida como proceso de transición jurídica, no es una revolución, porque como decía Zippelius, desde el punto de vista jurídico, una revolución es la modificación extralegal de los principios fundamentales del orden jurídico existente. Para analizar las transiciones desde la perspectiva de la teoría del derecho se propone aquí un modelo explicativo para distinguir las reformas ordinarias de las transformaciones de los sistemas jurídicos que podrían denominarse "transiciones constitucionales" en sentido estricto. Las transiciones se discuten conforme a criterios jurídicos, considerando dos casos: la sustitución de la constitución y su modificación paulatina. La idea*

* This article is based on a model I developed for the study of legal transitions in Mexico. *See* Carla Huerta, Teoría del derecho. Cuestiones relevantes (UNAM, 2009).

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[1] "Success determines the legal qualification of revolutions. If they fail, their significance is legal-criminal; if they succeed, they have legal-political importance." Reinhold Zippelius, Teoría General del Estado 136 (Porrúa-UNAM, 1989).

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es explicar los procesos de transformación constitucional y presentar un modelo teórico para tal fin. Entender el derecho como sistema de normas es uno de los presupuestos más importantes de esta propuesta.

Palabras clave: *Transición, dinámica jurídica, transformación constitucional, modelo teórico.*

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I. Introduction

Since the transitional context has been largely discussed from a political perspective, the transformation of a constitution in ordinary and transitional times will be discussed here only from the point of view of legal theory. Constitutional design has been governed by the universalistic liberal ideal; the transformation of a legal system is, therefore, usually led by the rule of law, which plays a definitive role in a legal system's change focusing on legal certainty. The rule of law is a standard of constitutionality even if it is only considered a formal principle. The starting point for the explanation of legal systems and their transformation in Western models of constitutionality is to consider the constitution as the supreme source of law.

The debate has revolved around the rule of law without discussing its meaning but rather starting from idealized models assumed to be generally understood in the same way.[2] Nevertheless, the rule of law as an ideal developed historically in the European legal tradition, is understood as a combination of statutory regulation and judicial decisions to keep law and order, to control the government according to the principle of separation of powers,

[2] This discussion would go beyond the object of this article, the rule of law will be henceforth considered only by its general characteristics.

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and to provide for the protection of individual rights and a certain degree of democracy.[3]

A constitutional transition implies a profound transformation of a legal system, and it can be analyzed by considering the procedures used to modify a constitution or its contents. Given the complexity of constitutional dynamics, it is relevant to distinguish the creation of a constitution from its revision. I will focus here on the general aspects from a material perspective. Without trying to suggest specific contents, which the modern constitutionalism has examined sufficiently,[4] the idea is to propose a model that could be helpful to explain constitutional dynamics and the process of transformation of a legal system. For that purpose, the basic contents of a constitution could be used as guidelines to assess the degree of change.

For some countries, the discussion about a transition is related to constitutional amendments, especially after multiple and constant reforms made to said constitutions; for others, it arises from the process of enacting a constitution or substituting a constitution that is still in force. Two different meanings of constitutional transition are then to be discussed: ordinary and extraordinary transformations.

In order to speak of constitutional transitions —here considered as a specific form of legal transitions, since the study will be conducted from an analytical perspective some of the most significant concepts for this matter, such as constitution and legal system will be revisited. The purpose is not to define these concepts, but to build an explanatory model of constitutional transitions, so only a general delimitation will suffice. It is important to remember that the object of this article is to explain legal transitions, not political or democratic transitions. I will only focus on the role of law in the constitutional transformation of a legal system. Since the constitution is considered here as the first legal rule of a legal system, the analysis revolves exclusively around profound transformations of a constitution.

Understanding the legal system and the structure of the constitution as well as their operational rules, is a methodological requirement to explain the scope and limits of a legal transformation. A specific concept of the legal system, as a dynamic system, is considered necessary to explain the different forms of transformation of the legal system; that is, ordinary modifications that produce gradual transitions, as well as replacing a constitution. An appropriate analysis of a legal system requires its understanding as an individual coherent set of interrelated rules for identifying constitutional transitions.

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[3] As Viola mentions the rule of law concerns a legal system; it is a set of principles and procedures deemed necessary for its existence and for it to work "properly". Francesco Viola, *The Rule of Law in Legal Pluralism*, in Law and Legal Cultures in the 21st. Century. Diversity and Unity 106 (Gizbert-Studnicki and Stelmach eds., Wolters Kluwer 2007).

[4] Constitutionalism understood as the theory or set of theories that analyzes the transformation process of law by the Constitution and its effects.

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Due to the founding nature of constitutions, it is important to study legal transitions according to the dynamic theory of law. As Kelsen held, it is a unique property of the law that it governs its creation.[5] The dynamics of the system is law's regulating principle that guides the identification of constitutional transitions. Since the constitution regulates the rule creation process, it is logically superior to the other rules of the system, which implies a hierarchical structure, and to understand it as the supreme norm of a legal system. Law as a system is a system of rules, and legal rules interrelate because they form a whole according to a specific criterion, which from the perspective of legal systems can only be another legal rule that regulates its transformation.

II. Constitution and Legal Transitions

Legal transitions must be explained starting from the constitution, not only as a result of its foundational function as the first legal rule of a legal system, but also due to its normative nature. The question of the validity of the first rule is placed apart since the transition from one legal system to another by virtue of the creation of the first constitution of a legal system will not be addressed here.[6] The existence of power-conferring norms to amend a constitution or frame one is of paramount importance for transitions to be characterized as legal procedures. Otherwise, the result cannot be properly called a legal transition.

The concept of "legal transition" implies that the modification of the legal system happens by legal means. Yet, formal procedures will not be analyzed because the transition is explained here as a process of material transformation of a legal system. When a constitution is substituted by a revolutionary act, it cannot then be called a constitutional transition from a legal point of view.[7] In the classical view, revolutionary political change may result in constitutional change as an extra-legal modification of the fundamental principles of the existing constitutional order; illegality is inherent to a revolution.[8] Therein lies the conceptual dilemma of considering the process to enact a constitution after a revolution as a legal transition strictly speaking.

However, constitution-making does not need to be the result of a revolution, even if it is usually the consequence of profound political change. It is an act of foundation given within a certain political and legal framework and could be the outcome of negotiations or a pact somehow upheld in the previ-

[5] Hans Kelsen, Introduction to the problems of legal theory 63 (Bonnie Litschewski Paulson and Stanley Paulson trans., OUP 1992).

[6] The problems resulting from the substitution of a constitution, *e.g.*, its validity, or the question of the legal fundament of the new legal system will not be here discussed. These issues, due to their relevance and complexity, require a separate investigation.

[7] Kelsen, *supra* note 5, at 59.

[8] As Zippelius mentions, *supra* note 1, at 136.

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ous legal order. Higher lawmaking should be though a process conditioned by heightened, deliberative decision-making because it is done with the intention to create a new political entity.

Traditionally, a constitution has been considered as a State's fundamental political arrangement, inasmuch as it lays out its organization. Nowadays, it is also considered the most important rule of a legal system and its constitutive function is warranted by the control mechanisms it regulates. It is a binding rule, directly valid and its content forms the basis for decisions of a constitutional court.

According to Kelsen, a constitution represents the highest level of positive law. Its main function "consists in governing the organs and the process of general law creation", and it "may determine the content of future statutes".[9] In Hart's terms, a constitution has provisions considered as primary rules, *i.e.*, fundamental rights, and secondary rules such as power-conferring rules and procedural rules.[10]

The term "transition" means to change from one form to another, or the process by which it happens,[11] but it can also refer to a period of changing from one state or condition to another.[12] So, legal transitions regarded from a constitutional perspective can be distinguished by their "transformative" effect, and we can speak of total or partial transitions. A "total transition" occurs when a legal system is substituted by another when a new constitution is enacted, as would be the case of the German Constitution of 1949, for example. "Partial transitions" happen when relevant legal institutions are included or transformed in such a manner that the original model[13] is modified or substituted within a constitution. The Constitution of the United States, *e.g.*, underwent a partial transition process with the inclusion of civil rights and liberties. To distinguish the procedures and given their effects, the first can be considered a legal system transition, and the second a constitutional transition *stricto sensu*, even if constitutional provisions are involved in both cases.

1. *Total Constitutional Transition*

Total transitions can result from different events: revolutions, ruptures or reforms. This kind of legal transition is instantaneous. In this sense, transition means a change from one legal system to another as a consequence of replacing the constitution. The enforceability of the new constitution is essential to consolidate a total transition.

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9 *Id.,* at 64.

10 H.L.A. Hart, The Concept of Law esp. chapters 3-6 (OUP 1961).

11 *See: https://dictionary.cambridge.org/.*

12 *See: https://www.oxfordlearnersdictionaries.com/.*

13 In this sense, a model is a regulatory construction of a form of State and society desired to be legally pursued, this concept will be further explained in section IV, 2.

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A total transition may be due to a major reform in relation to the change in the form of state or government, with which the people and the governing bodies are satisfied, or mostly agree. These processes can rarely be called legal in the strict sense of the word because the legal basis for such a change of the constitution cannot be a provision established by the previous system that the new constitution is overturning, and negotiation generally takes place on a political level.[14] But a change of system is not necessarily the result of a revolution or formally illegal. It may so happen that the change of system occurs through reforms provided for in legal documents issued by competent authorities. And when these legal reforms result in a new constitution, they produce a change of legal system.

However, this is not the usual process in the case of a change of legal system. On the contrary, this generally happens through violence undermining the established legal system and through behaviors the system classifies as criminal. The legal effects are the abrogation of the constitution in force and the creation of a new legal system. When a new constitution is enacted, the previous constitution thus loses its validity, and a legal system transition takes place.

The political effects are the change of regime, the modification of the established order, the substitution of the government and the conformation of a new social order. Ruptures are mostly caused by claims related to a needed transformation of the regulation and operation of any of the fundamental elements of a constitution.[15] A total transition is a system rupture manifested by replacing the constitution. The new contents generally reflect a change in the conformation of the State, but especially in the form of the government's integration. A transformation can be then perceived when important parts of the subject matter of the constitution are modified based on a specific model.

By enacting a new constitution, a new legal system emerges. Yet, the rules of the previous system (pre-constitutional rules) that do not contravene the new constitution may still be considered applicable and integrated into the new system. This option depends on the provisions of the new constitution and the decisions made by the law-applying organs regarding their compatibility. But those that contravene the constitution will lose their validity due to their newly acquired unconstitutionality. It can be said that after a total transition, the new legal system operates at first by "importing" all legal material than can still be called valid according to the provisions of the new constitution. This was the case in Mexico, for example, after the revisions made were enacted as the new Constitution of 1917.

Legal systems can admit partial constitutional continuity for law originating in a previous constitution and so confer validity to pre-constitutional law

[14] As P. Peska stated, it must also be considered that "the change of a system must be distinguished from the change of a regime, the latter occurring, above all, within a system or during the transition to a different system", quoted by Karel Klíma, *Constitutional Law of the Czech Republic*, 5 Cuestiones Constitucionales, 173, 177 (2001).

[15] *See* section IV, 1.

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by resorting to the principle of coherence. The validity of those rules is more a question of compatibility of the previous rules with the new constitution than an issue of the moment when they were issued. It can thus be said that the rules in effect on the day a new constitution enters into force may be deemed valid if they are consistent with the new order.

2. *Partial Constitutional Transition*

In relation to changes within a legal system, the constitutional reform procedure allows *ad intra* transitions while maintaining social peace and order. An internal constitutional transformation can be considered as evolution, and several stages can be identified by analyzing the relevant revisions made. Legal transition, in this sense, is a process, a construction that implies a decision to issue new laws or carry out radical reforms to the constitution.

Due to the dynamic nature of law and as the object that it regulates is human behaviour, the power to modify the constitution is indispensable. The extent of a revision may produce a partial and gradual internal constitutional transition. This kind of transition reflects a need to adapt the constitution so that it preserves the continuity of the legal system. So, a transformation that occurs within the constitution is here considered a partial constitutional transition.

Constitutional transitions can then occur slowly, by amending different legal institutions and preserving legal continuity. An example of a smooth constitutional transition is the amendments to the Constitution of the United States regarding individual rights. When done step by step, it can be considered as legal development, and this can be "channeled through pattern-borrowing and transplants".[16] The substantial elements of continuity can be identified by reference to the basic structure of a contemporary constitution, which are key elements of the doctrine adopted by the dominant model in the constitution. This structure is discussed below in section IV, 1. The organization of State power as a system of the highest State bodies is a typical element of continuity and since legal traditions are formed in the process, they are also indicative of it. Constitutional change can be evaluated according to the criteria of model, institutional design and institution provided in sections IV, 2 and 3.

It could be difficult to admit a profound transformation of the constitution that might seem "revolutionary" -in a figurative sense- as legal transition. It would also lead us to reflect upon its identity and even question whether it is formally the same constitution. A constitution is in constant transformation through the interpretation of the competent courts and the revisions made.

[16] Csaba Varga, Transition? To rule of Law? constitutionalism and transitional justice challenged in central and eastern europe 10 (Pomáz, 2008).

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A balance between the modification and the application of a constitution is thus necessary to preserve its normative force.[17] A subtle transformation considered evolution of the legal system is also possible by means of its application and interpretation, but it could not be considered a transition because a profound transformation of the constitution is only possible by means of constitutional revisions even if their implementation also has an important impact on the changes of the meaning of its legal institutions.

Constitutional amendments are modifications that do not formally imply the substitution of a constitution, despite the degree of change made. According to a rule of law model, there must be coherence between the actual text and the revisions made to the constitution and intended to reinforce individual liberties and to guarantee the exercise of fundamental rights.

III. Dynamic Explanatory Model of Legal Transitions

Due to the dynamic nature of law, an adequate explanation of legal transitions, requires, in my opinion, a differentiation between the concepts of legal system and legal order,[18] as in the case of Raz,[19] who distinguishes the concept of legal system from that of momentary legal system to differentiate them, or Alchourrón and Bulygin who have already suggested this for other purposes.[20]

This methodological consideration is important for constitutional transitions, especially to analyze transformations within a legal system to then separate periods of time distinguished by a dominant model. With total constitutional transitions, it becomes important to ascertain when a constitution is "legally" replaced and when a new constitution does not acquire sufficient legitimation or efficacy and the former constitution recovers its full normativity.[21]

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[17] Hesse warns us against frequent revisions of the Constitution because of the negative impact it has on its normative force. Konrad Hesse, Escritos de derecho constitucional 68 (Pedro Cruz Villalón trans., Centro de Estudios Constitucionales, 1992).

[18] Though usually used as synonyms, these terms will serve to make a distinction because as von Wright mentions in *Norm and Action*, a philosopher is free to give to "two words different meanings for the purpose of marking some conceptual distinction which he thinks important". G.H. von Wright, Norm and Action, available at: *https://www.giffordlectures.org/books/norm-and-action/iii-act-and-ability*.

[19] Joseph Raz, The concept of a legal system, esp. chapters 4-6 (OUPress, 1970).

[20] Alchourrón and Bulygin proposed this distinction to explain legal gaps. The terms are used here as in Carlos Alchourrón & Eugenio Bulygin, Sobre la existencia de las normas jurídicas 61-63 (Fontamara, 1997). They first proposed this distinction in Normative Systems (Springer, 1971).

[21] The Mexican Constitution has a provision to warrant its permanence in article 136 called the inviolability clause. Article already provided for in the 1857 Mexican constitution through which it regained its applicability in 1867.

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The analysis of these two types of constitutional transitions can be better understood from a systematic perspective by differentiating a legal system from its momentary legal orders. A total constitutional transition can be recognized by a new legal system marked by a new constitution that guides the adaptation process, as the new system is accepted and becomes efficacious and the previous one loses its validity -what I call the inter-system period. And a partial or internal transition can be determined by following the development of the constitution after a new model is inserted or modified by some specific institutional design, from the moment certain legal institutions enter in force until their derogation. Both processes of change point towards a certain form of transition that will alter the operation of the legal system.

The method regarding the second type requires us to distinguish different legal orders in time centering on an institution considered significant for qualifying a constitutional change as a transitional process. In this way, an internal legal transition can be studied by comparing different yet characteristic institutions to a specific model. The interval between the two moments during which some institutions are added or modified to introduce a new model or to adapt it can be called a transition.

The difference between legal system and legal order can be explained by the way the rules function over time, since the operation of the rules that belong to the system is diachronic, and that of the rules of the legal orders is synchronic. To distinguish one legal order from another thus make it possible to specify a moment to determine the rules in force at that specific moment. The legal system could therefore be represented as a horizontal line, starting with the constitution and, ending only when a new constitution substitutes it.

All the rules issued according to the prescriptions of a legal system belong to it, even if their validity is only *prima facie.*[22] In addition to the provisions in force at the time of making a decision, the repealed rules are considered part of the system so as to preserve legal certainty and the validity of the acts and legal effects already produced. The assumption is that the function of derogation is not to eliminate legal provisions, but to prevent them from producing new effects in the future because they will not be in force anymore. In legal practice, derogated rules can be applied exceptionally by means of transitory legislative provisions to that end, or based on diverse principles regarding legal certainty, especially in criminal law, for example.

Following Alchourrón and Bulygin, a dynamic system of norms can be described as an infinite succession of legal orders, which differ from each other by the set of norms comprised in each one. [23] So, a legal system is therefore a sequence of sets of norms. It should be pointed out, that a legal order, regard-

[22] In most legal systems, the validity of the rule is assumed, and it can only be deprived of its force by a declaration from the competent authority, which is why invalid rules can be applied.

[23] Alchourrón & Bulygin, *supra* note 20, at 62. As in continental tradition, they use the term "norm" which refers to rules in general, that is, prescriptions.

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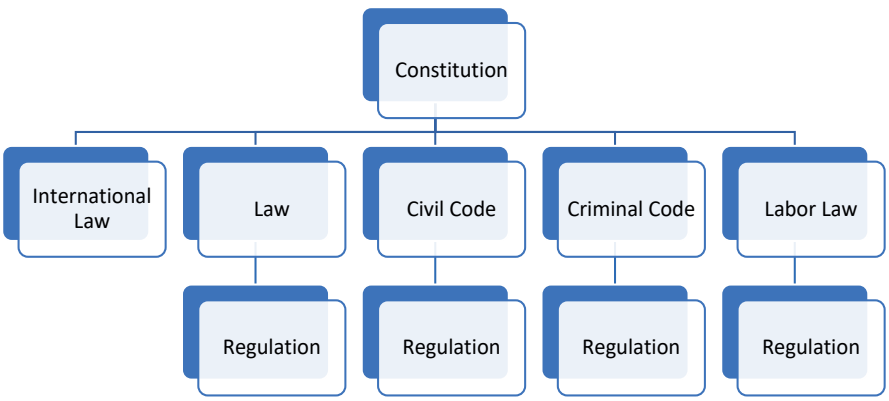
ed as a set of rules, is equivalent to the system only when the Constitution enters into force. By introducing a general rule, this coincidence ceases and gives way to the successive legal orders that form the system. The criterion to identify the rules is their membership to the system, which is not affected by the modification of their validity or effectiveness. This understanding of the legal system helps explain different legal phenomena, such as the retroactivity and ultra-activity of the rules because it allows to move in time to determine the applicable norm to a specific case.

As mentioned above, a legal order is synchronic. It identifies a set of rules that are applied simultaneously. This can be represented by a vertical diagram that provides legal certainty by determining the rules that can be applied at a specific moment. A legal order is then understood as a set of rules applicable at a certain moment to one or many specific cases. This is a static representation since changing a single general rule results in a different set of rules and the change from one legal order to another.

FIGURE I. LEGAL ORDER



Every time the legal system is modified either by the creation or derogation of a general rule, the current legal order is replaced by another one because the set of rules has changed. Derogation causes a change of legal order and thus derogated rules do not form part of the new one. Regarding constitutional transitions, the possibility to distinguish legal orders from the legal system helps to determine the moment when a transformation starts or the duration of a certain model. This kind of transition requires time, so a period of change must be selected to evaluate the degree of the modification based on its effects.

Each legal order shares with the previous orders most of its rules, and all of these depend on the constitution, which determines their meaning and the relations between rules. Due to its function, the position of the constitution in this representation is at the beginning of the legal system for it constitutes

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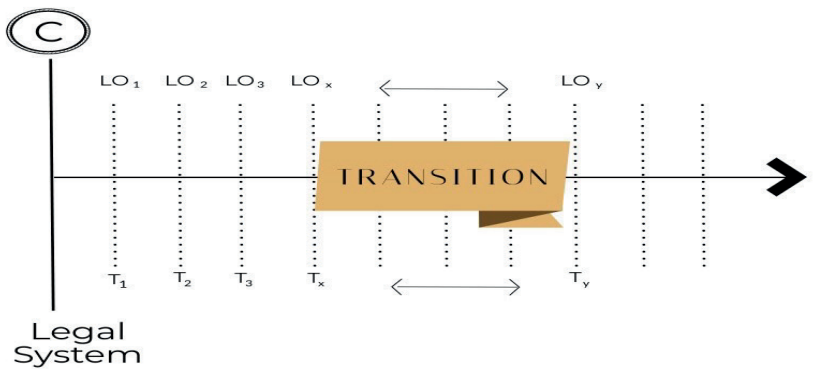
the system as a whole, as well as above the rules of each legal order at a given moment.

FIGURE II. LEGAL TRANSITION



A partial legal transition is identified by studying the revisions made in a certain time frame, analyzing the interval between LOx and LOy for example.

IV. THE TRANSFORMATION OF A CONSTITUTION

The notion of system implies its development according to an axiom or set of axioms. In this case a legal system arises from a rule, the constitution, mainly because its validity is not legally questionable.[24] All the rules of the legal system derive from this first rule, not in a logical, but in a legal sense according to the provisions of the fundamental norm. Following Kelsen's theory, the validity of the norms of a legal system depends on the possibility of tracing its legal norms to the constitution.[25]

Since the constitution itself operates as a system, to understand it as a unity allows for its systematic interpretation, which can produce modifications of the institutions it regulates as a consequence of the process known in constitutional legal science as "mutation".[26] In German doctrine, "mutation" is the possibility of altering the meaning of a provision without modifying the linguistic sentence that expresses it; the legal sentences are preserved, but are given a different meaning.[27] Despite not being modified by the regulated

[24] It can nevertheless be questioned in terms of its legitimacy or efficacy.

[25] Kelsen wrote that: "A plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity". KELSEN, *supra* note 5, at 55.

[26] HESSE, *supra* note 17, at 25 ff.

[27] *Id.*, at 25.

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process, the constitutional provision acquires new meaning. In a way, we can think that a form of mutation also happens by means of amendments that result in legal transitions.

Identifying a transformation in a legal system that could be called a partial constitutional transition (or internal transition) requires examining specific amendments or the sum of reforms made during a certain period. The explanation and analysis of the contents of a constitution requires the study of its institutions, identifying their institutional design and the form in which they correlate. Therefore, it is important to understand the structure of the constitution since the meaning and operation of legal institutions depends on the models operating within the constitutional frame; I shall proceed to explain these concepts in the following sections. Any change in a constitution, but especially in the model and the institutional designs, produces a change in the interpretation and application of subsequent legal orders.

1. *The Structure of a Contemporary Constitution*

Because legal rules form a system, they do not operate in isolation and their meaning depends on the way they relate to each other. Some constitutional provisions are operative in the form of legal institutions -such as due process, rule of law or separation of powers. This implies that many legal provisions are connected to each other in a special way. One could say that an institution is a group of rights and obligations operating together in unity.

Every constitution is drafted according to certain ideals or following some kind of model. Contemporary constitutions envisage one or multiple models that are modified over time by various institutional designs that transform the meaning of some of the legal institutions regulated in the fundamental norm and these designs can be used to produce a modification of the model itself.

Based on article 16 of the Declaration of the Rights of Man and of the Citizen of 1789,[28] modern Constitutions, that is, those following the rule of law tradition, share a common constitutional structure. It is generally accepted by constitutional theory that this basic constitutional structure must include fundamental rights and the separation of powers. These mandatory contents are the elements that identify a rule as a constitution. Most western contemporary constitutions share this common constitutional structure and State power, as regulated in a constitution, is usually exercised by three types of bodies: the legislative, executive, and judicial branches.[29] Any modification of the balance of powers assigned to these organs can be indicative of

[28] Article 16: Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution, available at: *https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf*.

[29] Despite this classical description, the principle of separation of powers is now understood as a distribution of functions, rather than in a mere organic sense.

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a partial constitutional transition, for example: amendments to increase the powers of the executive branch could indicate a transition to a more presidential form of government while the creation of constitutional autonomous bodies in charge of specific functions could point towards a more decentralized model.

Ever since the constitution began to be considered a legal norm instead of a political document -one could say that the decision in *Marbury v. Madison* was the turning point in this matter, judicial review becomes the third fundamental pillar in the structure of the supreme norm. In this way, a balance between fundamental rights and the separation of powers is legally warranted. The possibility of a judicial control of the constitutionality is at the core of the effectiveness of the constitution since it ensures its normative force. The purpose of this form of control is to safeguard constitutional supremacy by subordinating legislators and the law to the constitution.

These three pillars form the constitutional structure, but given the complexity of contemporary constitutions it is important to also consider three other elements in order to have a complete picture of the constitution and its operation. The supplements to this constitutional structure are the sources of law, the democratic or participatory procedures and the regulation of the economy, all of which provide a better understanding of the nature and function of a constitution.

As the foundational rule of a legal system, a constitution regulates the sources of law, which are directly related to the control of constitutionality. Competence norms and judicial review are key to explaining the dynamics of law because of their role in the creation and modification of a legal system. The proliferation of sources can be indicative of a transition in a legal system because it shows unbalance in the separation of powers perceptible in the regulatory powers of the Public Administration, for example.

Since the regulation of democracy has become an important aspect of the constitution, provisions on participation in decision-making processes must be considered in the evaluation of a constitutional transition and in relation to the constitutional design of the principle of separation of powers. A democratic transition for example can be explained according to a given theoretical framework, looking for modifications in some institutions made in a specific way. This is also so in the design of a specific kind of democracy, deliberative or participative, for example.[30]

The third complementary element to consider in the evaluation of a constitutional transition is the role of the State in economic relations in terms of the economic model adopted in the constitution, which is closely related to

[30] For Nino, the analysis of constitutionalism focuses on the elements that seem *prima facie* to be the strongest bearers of the values associated with that idea, like the historical Constitution, democratic or participatory processes, and the protection of individual rights. Carlos Nino, The constitution of deliberative democracies 11 (Yale University Press, 1996).

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many fundamental rights.[31] All these structural elements are correlated and ultimately overseen by means of constitutional controls.

The analysis of constitutional transitions must consider first the three pillars of the constitutional structure, that is, the fundamental rights, the separation of powers and the judicial review of the constitutionality of legal rules, but also the economic model, methods for participation in decision-making processes and sources of law. Constitutional transitions can so be evaluated according to these fundamental criteria, so much so, that they can be considered content references of a legal system that operates according to a certain model.

2. *Constitutional Models*

Within a constitutional structure, legal institutions operate according to a model which is determined by the relation established in the constitution between each of the above-mentioned elements of the constitutional structure. Regarding the process of constitution-making, the concept of model can be understood as the representation of a certain form of political organization of society recognizable by the way in which distinctive institutions are regulated in its constitution.

When a certain model, be it liberal, social, or democratic, for example, is introduced in a constitution, it sets a goal to be achieved and portrays the kind of society desired. The criteria that outline a model could be the main functions of the State, the guarantee of fundamental rights or specific values, for example. These ideas would act as rules for the interpretation of the constitutional provisions.

The model can be identified by the prevalence of one or other pillar of the constitutional structure and a tendency towards one extreme. The balance between each one of the structural elements goes beyond the mere distribution of power among constitutional bodies —checks and balances—. It also implies, at least, providing for their accountability, the protection of fundamental rights and a warranted constitutional control.

Each model delimitates the legal institutions that can be included in the constitution. There may be more than one model in operation in a constitution, but there is usually a predominant model that determines the general nature and operation of the constitution. Constitutional models can be identified according to certain principles, values, or goals, or by selecting a group of institutions that are recognizable as a whole upholding some common justification or object. The models can interact with each other, and a new model does not necessarily replace a pre-existing one. The degree of how effectively they work together will depend on the extent to which they complement each other.

[31] Zagrebelsky points out the relevance of the role of the recovering by the State of the political competence in the economy. Gustavo Zagrebelsky, El derecho dúctil 99-103 (Ed. Trotta, 1997).

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Models are created following interests deemed relevant at a specific historical moment and answer therefore to historical circumstances and social expectations. The decision to introduce a new model is usually a response to a serious claim that requires immediate attention. The object is to produce a profound transformation of behavioral patterns or to change the form of government, for example.

Whether there is an intent for a genuine transition with a change of model —especially regarding governments fond of reforms— is not always clear. The transformation of the current model cannot be determined *a priori* because the degree of change of a legal system is only perceived over time. The model is sometimes copied from other legal systems, sometimes instrumentalized. A legal system transition is often carried out by importing a model or receiving legal institutions considered important. International Law and globalization have had an influence in legal transitions that is noticeable in constant legal transfers and the importing of legal institutions in many constitutions. For a constitutional transition, coherence regarding legal institutions brought from foreign models is of the utmost importance; otherwise, they end up being dysfunctional.

So, within the frame of the pillars that form its structure, a constitution contains a model that must be carried out. This model establishes the guidelines regulating the State's and society's action. Every new constitution contains a foundational model, which over time can be modified in different degrees to answer to a country's new needs and expectations. As consequence of current social and political dynamics -whether national or international- other models can later be introduced into the constitution.

Models can coexist even when they seem conceptually contradictory. The introduction of a new model produces a sort of "mutation" to the meaning of the institutions.[32] As already mentioned, a new model does not necessarily reject or substitute a previous one; they can function together. They are ordinarily inserted within the constitutional structure successively, and usually interact together. Each model has diverse representative institutions that can be created and modified according to a certain design.

The models are not rigid. Their meaning can change according to the modification or introduction of certain institutional designs to adapt particular legal institutions in a specific way to achieve an object, as well as through court decisions. The designs are rational mechanisms created to provide legal coherence to the existing models. They are answers or reactions to the operative deficiencies of regulated legal institutions to preserve the coherence of a constitution as a whole.

For that purpose, the interpretation of constitutional amendments, especially when new designs are added, is guided by the principle of non-contradiction

[32] For example, the model of the Mexican Constitution of 1857 was liberal. The reforms made in 1917 added a social model, which resulted in a new operating model.

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to eliminate situations that seem to produce contradictions between constitutional provisions. So, when legal sentences allow it, the principle of coherence sees to the compatibility of institutions to preserve the unity of the constitution. If an instance of incompatibility cannot be overcome by interpretation, the legal means to solve it would have to be provided for in the constitution. This could be a case of the so-called "unconstitutional amendments", but that is another issue. The scope and limits of the ability to interpret the amendments must be adequately regulated to avoid problems due to excesses committed by constitutional courts that can produce transformations in a legal system beyond mutations through interpretations considered acceptable.

The dynamic of the constitution presupposes the existence of a foundational model that establishes the meaning of the institutions regulated by the constitution. In time, the model can either consolidate or require modifications to stabilize it. There are also periods of normalization or review of the model. Historical constitutions with a long life can also experience a process of modernization. "Transition" is perhaps an adequate term to speak of the transformation of a constitutional model as it describes the uncertainty regarding the predominant model and its characteristics.[33] When the drafting of the constitutional model is not premeditated, the new type of model that emerges from the reforms will remain unknown until its effective operation can be evaluated.

From a scientific standpoint and for the purpose of analyzing constitutional transitions, models could be thought of as "ideal types"[34] because they do not describe the real world. A model is a mental construct considered desirable and often originally a theoretical product.[35] Reforms to a constitution can be evaluated according to certain properties attributed to a specific model, such as the regulation of property or civil rights and liberties in the liberal model. The assessment of a constitutional transition and its degree of transformation is done retrospectively since it can only be evaluated *ex post* by its effects or success in achieving its objective.

3. *Institutional Design*

Based on the preliminary notions given, the institutional design is understood here as a group of provisions that are related by a specific criterion, en-

[33] Although this term is usually associated with a change from an authoritarian regime to a democratic one, as already mentioned, I use it here only in connection with the process of a material transformation of a legal system.

[34] The concept of "ideal type" understood in the Weberian sense is an analytical tool for historical studies of partial constitutional transitions. Max Weber, Economía y sociedad chapter I (Fondo de Cultura Económica, 1988).

[35] Zippelius mentions that models are developed to evaluate and critically appreciate reality as better alternatives. In his opinion models serve as representations of objectives and have a pragmatic-regulatory function, *supra* note 1, at 8.

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acted to improve the efficiency of regulated legal "institutions" by modifying the rights or obligations established according to a certain model. The design thus serves to imprint a specific meaning on some legal institutions to fulfill a certain foreseen objective that should be identifiable through the justification of the proposed constitutional revision.

"Institutional design" is a tool aimed at correcting a model and is used for its interpretation and redefinition as it changes the meaning of legal institutions. Its function is to make the institutions compatible, since their meaning has been altered with the introduction and possibly the superposition of different models in a historical constitution. These designs are often created to respond to a situation or offer short-term solutions that should satisfy certain political and social needs within a determined lapse of time.

The design can be identified as a package of constitutional reforms carried out simultaneously or within a relatively short period of time, based on certain criteria that give them a sense of connectedness. Sometimes, when the institutions prove to operate together, the institutional design can be formally identified by the enactments of the reform of various constitutional articles justified in a common end or value.

Institutional design determines the operation and interpretation of institutions because it establishes the way they interact to produce a specific result. The design is made evident by the selection of the institutions connected by the same purpose. A partial transition can be perceived in the incorporation and implementation of an institutional design regarding the form of government, for example.

There are two types of institutional design. Distinguished by their objective, there is a "constructive design" that aims at creating a new reality or form of interaction between the government and the governed. The second type is "justificatory" because it has a legitimating effect on a changing reality. The first one is, so to say, an intellectual creation instrumented to change the reality through regulation by combining some institutions according to a planned design in which the costs and benefits of including said new design in the constitution, as well as its implementation, have been calculated.

In the case of the justificatory design, its object is not only to legitimate and legalize an actual way of behaving, but also to correct unwanted or negative effects of non-regulated uses and practices that have a certain degree of acceptance. When the latter are considered convenient, they can be construed as institutions by adapting them to the legal system in such a way that they can acquire legal force and act as limits and obligations to authorities. This kind of design is frequently used when reality surpasses the lawmakers because of great advances in technology or the increasing speed of the dynamics of international relations, especially in trade matters, for example.

The institutional design assumes a consideration on the suitability of including some institutions in the system or whether their operation and meaning should be modified. The analysis of their compatibility with other in-

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stitutions in the system and the calculation of possible side effects must also be made. Even if it is true that because of the complexity of law all the alternatives of possible interpretations of a rule in a legal system cannot be determined *a priori*, when the project is developed, besides the historical reasons and the opportunity of the reform, the coherence and independence of the institutional design must be taken into account. Legal practice is another important factor to be considered when determining the meaning and application of an institutional design.

V. Conclusions

To speak of transitions from the point of view of legal theory, it is important to understand the structure of the constitution, since the meaning and operation of its institutions depend on the predominant model within its construction. The analysis of legal institutions is key to the identification of legal transitions to determine the evolution of a legal system and help distinguish a new model.

An adequate application of constitutional rules requires that the structure of a constitution, as well as the model that the framers of the constitution intended to establish with the regulation, be considered. The elements of the constitutional structure are of paramount importance to interpret the constitutional amendments so as to determine whether a constitutional transition has taken place.

Some institutions are hallmarks of specific constitutional models and the change of those institutions, or their design, may have a profound impact on the meaning of many constitutional rules. Any change in the constitution, but especially the modification of institutional designs, produces a change in the interpretation and application of its provisions.

The adaptation of the models is first instrumentalized by courts decisions and the public administration. The implementation of public policies are other indicators of the model prevailing in a constitution. It is up to the judges and the administrative authority that apply legal rules, to determine which institutions define the model. The balance between the exercise of the State's functions and the administration of justice provides for the rationality in lawmaking and application of the law. The last word on the meaning of a model corresponds nevertheless to constitutional courts.[36]

[36] Zagrebelsky considers that in a constitutional State, judges warrant the structural complexity of law because for him they are the guardians of the "necessary and ductile coexistence between law, rights and justice." Zagrebelsky, *supra* note 31, at 153.

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HOW EFFECTIVE ARE HYBRID ANTI-CORRUPTION AGENCIES IN TACKLING POLITICAL CORRUPTION? THE CASE OF THE COMMISSION AGAINST IMPUNITY IN GUATEMALA

Gabriela Aguirre Fernández*

Abstract: *Literature on political corruption agrees that in contexts with widespread corruption, curbing it through institutions is insufficient. That is, formal rules like laws and anti-corruption agencies are not always obeyed or enforced because individuals regard corruption as the expected behavior. Therefore, some legal mechanisms remain unenforced. In addition, the conventional perspective suggests that fighting corruption is a problem of collective action and lack of civil society engagement. Nonetheless, scholars have ignored the role of international hybrid agencies in tackling this situation. In this article, I will propose elements to fill this gap and demonstrate that the Commission Against Impunity has proven to be an effective means of fighting political corruption and impunity in Guatemala. Similarly, the Commission's legacy challenges theoretical mainstream anti-corruption theories. Using case study methodology and pursuing a documentary review, I argue that the Commission was competent in tackling impunity, overcoming the collective action dilemma, and encouraging social participation. These outcomes were possible due to the Commission's institutional design and, to a lesser extent, cooperation between local and international actors.*

Keywords: *Political corruption, CICIG, institutions, impunity, collective action, enforcement.*

Resumen: *La literatura sobre la corrupción política coincide en que, en contextos de corrupción generalizada, frenarla a través de las instituciones es insuficiente. Es decir, las reglas formales como leyes y agencias anticorrupción no siempre se obedecen o hacen cumplir porque las personas consideran la corrupción como la conducta esperada. Por lo tanto, algunos mecanismos legales siguen sin aplicarse. Además, la perspectiva convencional sugiere que la lucha contra la corrupción es un problema de acción colectiva y falta de participación*

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de la sociedad civil. No obstante, los académicos han ignorado el papel de las agencias híbridas internacionales para ayudar a abordar esta situación. En este artículo, proporcionaré elementos para llenar este vacío y demostrar que la Comisión Contra la Impunidad ha demostrado ser un medio eficaz para combatir la corrupción política y la impunidad en Guatemala. De manera similar, el legado de la Comisión implica un reto a las principales teorías de combate a la corrupción. Siguiendo una metodología de estudio de caso y realizando una revisión documental, argumentaré que la Comisión fue competente para enfrentar la impunidad, superar el dilema de la acción colectiva y fomentar la participación de la sociedad. Estos resultados fueron posibles gracias al diseño institucional híbrido de la Comisión y en menor medida, a la cooperación entre actores locales e internacionales.

Palabras clave: *corrupción política, CICIG, instituciones, impunidad, acción colectiva, cumplimiento de la ley.*

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I. Introduction

Corruption in all its manifestations is a phenomenon that has always existed but had not been much studied until recently. Political corruption is a widespread malaise mainly visible in countries with low-democratic development. Political corruption refers to grand corruption, "…which implies distortion or subversion of the exercise of public office so that it meets private, partisan or sectional interests".[1] Or, to State capture, that is, "…where corrupt relations are used to pass laws that entrench, extend and render 'legitimate' corrupt gains".[2] These approaches are quite broad and include several branches

[1] Mark Philip, *The Definition of Political Corruption*, in Routledge Handbook of Political Corruption 22 (Paul Heywood ed., 2015).

[2] World Bank, Anti-corruption in transition: a contribution to the policy debate (Policy Research Working Paper, 2000).

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of the State. In this article we are interested in evaluating political corruption from the perspective of impunity, a non-existence or weakness of the rule of law and a lack of enforcement overview.

The fight against political corruption has been studied from different angles, from the institutional and enforcement viewpoint to the sociological and anthropological perspective. All of them contribute to understand the phenomenon, prevent it and strive to reduce it. These approaches take into account diverse reference frameworks in an attempt to tackle the problem. Nonetheless, they all highlight the importance of the context: the tools for assessing are not necessarily the same in a mature democracy compared to those in an incipient one. In the former case, working on incentives and increasing penalties could have satisfactory results. However, in the latter setting, the results would not be as positive if relying only on institutional means.

In order to counteract grand corruption, anti-corruption institutions and agencies have been set in motion. Building anti-corruption agencies is a recent phenomenon which generates regular debates. Likewise, a great deal of literature has focused on assessing the mechanisms for the implementation, creation and application of formal rules and specialized laws. The International Commission to Combat Impunity in Guatemala (CICIG by its Spanish acronyms) provides meaningful insights to theoretical and empirical anti-corruption studies for several reasons. First, because it is the first institution of its kind; that is, it is unique in its legal nature and implies an institutional experiment to address a specific social problem. Secondly, it is important in revealing how theories on the fight against corruption (i.e., principal-agent and collective action) fit in this new empirical institution. Third, on an academic level, it is very interesting to observe how CICIG coexists with the Guatemalan reality. Guatemala is one of the countries with the highest rates of homicide, impunity, lack of enforcement and political corruption in the world.[3] Finally, as will be further explained, it is important to spot how an international agency works with national institutions.

This article offers an original research in anticorruption literature. Hybrid Anticorruption Agencies are a new phenomenon, and some literature has discussed such agencies. For instance, Charles Call & Hallock[4] systematize what happened in Guatemala and Honduras during the lifespan of their hybrid agencies. Some legal literature has explained the *sui generis* legal nature of Guatemala's Commission. Zamudio-González[5] analyzed the nature of the Commission in Guatemala as a self-governing organization and focused her analysis on the Commission´s management from an organizational theory

[3] Hal Brands, Crime, violence, and the crisis in guatemala: a case study in the erosion of the state (Strategic Studies Institute, 2010).

[4] Charles Call & Jeffrey Hallock, *Too Much Success? The Legacy and Lessons of the International Commission Against Impunity in Guatemala*, 24 CLALS Working Paper Series (2020).

[5] Laura Zamudio-González, *La Comisión Internacional contra la Impunidad en Guatemala (CICIG). Una organización autodirigida*, LVIII 3 (233) Foro Internacional (2018).

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perspective. In addition, this author studied the work of hybrid anticorruption agencies in their fight against corruption. This scholar concludes by stating that the Commission in Guatemala was effective but a victim of its own originality. However, despite this theoretical progress, some issues need to be addressed. This article focuses on contrasting the main anti-corruption theories in contexts with systemic corruption with that which empirically occurred in Guatemala with the CICIG.

This article contributes to anticorruption studies in several ways. Initially, it brings ideas about the role of international hybrid institutions in helping tackle grand corruption; then, it offers a critical review of the existing literature while providing insights on policy-building and institutional-strengthening. Considering the fact that the CICIG experience sheds light on civic engagement to fight corruption, this article proposes some of the lessons learned and opportunities for future progress. Lastly, this work highlights topics that have not been addressed in available and could be the focus for further analysis.

This article argues that CICIG was effective in reducing impunity (political corruption) in Guatemala due to the uniqueness of the Commission's legal status as a joint complainant (co-prosecutor) (*querellante adhesivo*), as well as an autonomous entity in terms of its functions, operations and financial structure. In addition, the CICIG's good performance was possible because of cooperation among local justice institutions, the Commission and the international community. A holistic approach to fighting corruption aids to dismantle illegal networks by capturing key political elites and provides legal assistance in consolidating national judicial institutions. The CICIG´s performance was a positive sign for Guatemalan citizens. As a result, collective action dilemmas were overcome, and civil society mobilized against political corruption in Guatemala.

The first part addresses the theories on fighting corruption contained in current literature. The next part details the analytical framework, followed by a description of the situation of pervasive corruption in Guatemala. The following section lists the favorable CICIG actions and achievements during its 12-year existence. The effectiveness of the CICIG´s performance in the Central American country is then analyzed. Finally, conclusions, public policy recommendations, and areas for future research are outlined.

II. Literature Review: The Institutional and Collective Action Approach to Fighting Corruption

Studying institutions is fundamental for political science and legal research because understanding how institutions (in)formally work provides a holistic explanation to come up with a better approach to deal with social, economic, or political issues. Institutions determine the opportunities in a society and

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direct the way actors behave. Institutions matter[6] because they set the rules of the game, which in turn shape human behavior and spearhead incentives in all types of political, social, or economic exchanges. Since institutions organize political and social order, they reduce uncertainty by providing a structure to everyday life.[7]

When discussing the concept of institution, it is important to distinguish between formal and informal ones. A formal institution is a relatively "enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances".[8] As mentioned, formal institutions are all the structures and processes put together in a specific place and context and applied among different actors. Conversely, informal institutions refer to "socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels".[9] Thus, an informal institution is better understood as a cultural value, a tradition or an action that is only possibly interpreted within a particular place and time.

The way we approach the concept of institution is worth clarifying. An institution constitutes a set of incentives which rules power relations and constrains actors´ behavior. Institutions refer to practices, traditions, and customs, as well as political organizations. From an etymological and semantic point of view, the concept of institution resembles that of an organization or an agency; that is, to the physical representation of a mandate or obligation. For the purposes of this article, we refer to the concept of institution in both senses: broadly as incentives and as a synonym of organization or agency.

Institutionalism endorses the principal-agent theory, which is one of the main analytical frameworks used to analyze politics, legal enforcement, institutional change, and political order. Principal-agent perspective assumes that actors behave rationally to maximize their interests. Principals are normally identified as individuals (citizens) while agents are viewed as powerholders like bureaucrats, incumbents, decision-makers, or public officials. Both parties pursue their interests, yet they remain constrained by laws and institutions. Under this logic, agents engage in corruption when they assess the potential profit to outweigh the risk. In order to satisfy a general common good, the principal actor gives the agent power to act on behalf of the constituency.

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[6] Douglas North, Institutions, institutional change and economic performance (Cambridge Univ. Press, 1st ed.,1991); Adam Przeworsky, *Institutions Matter?* 39 (4) Gov. and Opp. 527 (2004).

[7] James March & Johen P. Olsen, *Institutional perspectives on political institutions*, 9 (3) Governance 247 (1996).

[8] James March & Johen P. Olsen, *Elaborating the New Institutionalism,* in The Oxford Handbook of Political Institutions 3 (Oxford University Press, 1st ed., 2008).

[9] Gretchen Helme & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda,* 2 (4) Perspectives on Politics 730 (2004).

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However, corruption occurs anytime agents pursue their own interests instead of complying with the collective will and therefore, undermine social wellbeing. If the rules are effectively designed and enforced, agents will reduce the number of incentives to engage in corruption because they know the consequences. This is the reason why building and enforcing institutions is fundamental for fighting corruption.

While this legal framework and theoretical approach have been useful in more advanced democracies,[10] it has not been that helpful in reducing systemic corruption in countries with weak institutions.[11] In contexts where corruption rules, a principal-agent approach is still an unsatisfactory theoretical explanation because there are no incentives for agents to defend institutions. An actor may obtain more benefits from noncompliance than by obeying formal rules. Wherever corruption is endemic, formal institutions are largely not obeyed and anticorruption agencies are hardly functional or are implemented ineffectively.[12] Rather than respecting formal rules, patterns of informal institutions prevail in weak institutional contexts and political leaders "seem to at least passively maintain the corrupt system".[13] In the context of a corrupt setting, it is more costly to be honest than to engage in corrupt activities because there are no incentives to uphold anticorruption agencies.

In places with mature institutions and the rule of law, fixing the incentives (in terms of the principal-agent framework) or increasing the penalties suffice to tackle corruption. Nonetheless, in less fortunate places, the institutional perspective is useful but requires other analytical tools. To understand corruption and the way it works in highly corrupt places, corruption must be seen as a component of the economic, legal, and political system.[14] Collective action scholars shed light on this situation. According to this analytical framework,[15] "what action should be taken should be expected to depend on

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[10] Michael Johnston, *Fighting systemic corruption: Social foundations for institutional Reform*, 10 Eur. J. Dev. Res. 85 (1998).

[11] Derick W. Brinkerhoff, *Assessing political will for anti-corruption efforts: an analytic framework*, Pub. Admon. And Development 239 (2000); Odd-Helge Fjeldstad & Jan Isaksen, Anti-corruption reforms: challenges, effects and limits of world bank support (IEG World Bank Working Paper, 2008); Michael Johnston, Syndromes of corruption. Wealth, power and democracy (Cambridge Univ. Press, 1st ed., 2005); Jakob Svensson, *Eight Questions about Corruption*, 19 (3) Journal Of Economic Perspectives 19 (2005). Morris Szeftel, *Misunderstanding African Politics: Corruption and the Governance Agenda*, 25 (76) Review of African American Political Economy 221 (1998).

[12] *Id.*

[13] Anna Persson et al., *Why Anti-Corruption Reforms Fail-Systemic Corruption as a Collective Action Problem,* 26 (3) Governance an International Journal of Policy, Administration, and Institutions 449 (2013).

[14] Rasma Karklins, The system made me do it. Corruption in post-communist societies (Routledge, 1st ed., 2016).

[15] Eleonor Ostrom, Governing the commons: the evolution of institutions for collective action (Cambridge Univ. Press, 1st ed., 1990).

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shared expectations about how other individuals will act".[16] Therefore, our expected gain from corruption crucially depends on the number of other people we expect to be corrupt.[17] In places plagued with corruption, neither the agent nor the principal is expected to be honest due to the fact that being corrupt outweighs the benefits of being honest. Hence, the expected behavior is to act dishonestly.

Mungiu-Pippidi[18] refers to this situation when she explains the transition from competitive particularism to ethical universalism. In a context of competitive particularism, despite contested elections and pluralism, the rule of law is unequally enforced, the allocation of resources is not uniform and rent seeking is a frequent practice. The step after electoral democracy is to work on institutional strengthening and governance. In order to achieve the next stage, other components must be considered within the democratic equation. An organized civil society, moral values, free media or culture and social capital are some of the tools needed to attain ethic universalism and better governance. However, as explained by this author, collective action is difficult to overcome because the expected actions are based on particularism and self-interested motivation rather than on broader collective gain.

Corruption is now a problem of collective action because it is not just the sum of individuals seeing to satisfy their keenest interest. Corruption has a social component and organizational dynamics;[19] corruption is socially dense;[20] or even has deeply cultural and anthropological backgrounds;[21] corruption is contextual;[22] it is the result of bad social and state planning, of a deviation of public policies; it is the consequence of partial or incomplete development or incomplete democratization.[23] In other words, it is not just about evaluating

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16 Robert J. Aumann & Jacques.H. Dreze, When all is said and done, you play and what should you expect? (Center for Rationality and Interactive Decision Theory, The Hebrew University of Jerusalem, 2005); Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 (3) Evolution and Human Behavior 153 (2012).

17 Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 (3) Journal of Economic Literature 1331 (1997).

18 Alina Mungiu-Pippidi, *Controlling Corruption Through Collective Action*, 24 (1) Journal of Democracy 101 (2013). For further reading, *see* Heather Marquette & Caryn Pfeiffer, Corruption and collective action u4 research paper (2015). Available at: *http://www.dlprog.org/publications/corruption-and-collective-action.php*.

19 David Arellano Gault, *Corrupción como proceso organizacional: comprendiendo la lógica de la desnormalización de la corrupción*, 62 (3) Rev. Contad. Adm. 810 (2017).

20 *Id.*, at 811.

21 Davide Torsello, *The ethnographic study of corruption: Methodology and research focuses,* in Routledge Handbook of Political Corruption (Gaults de Graaf ed., 2010).

22 NORAD, *Contextual Choices in Fighting Corruption: Lessons Learned*, Norwegian Agency for Development Cooperation (2011).

23 Larry Diamond, Developing democracy: toward consolidation 92 (Ed. John Hopkins University Press, 1999); Alina Mungiu-Pippidi, *Corruption: Diagnosis and Treatment*, 17 (3) Journal of Democracy 86 (2006).

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human behavior to pursue their involvement in their particular action or not; it is a holistic stance; it is about networks of people, processes and routines, organizational dynamics, actions that make up a state complexity in which corrupt practices are either present or not. The concept of corruption is very complex. In this article, we hold a comprehensive approach to study the conceptualization and fight against corruption.

Literature on corruption has ignored the role of international commissions in tackling political corruption. Despite the empirical failure of anticorruption reforms in contexts with widespread corruption, the argument provided herein suggests that international commissions have acted as hybrid institutions helping local ones to curb corruption effectively and have contributed to reducing endemic corruption. This has been possible because of the Commission's legal status which guarantees the autonomy of its financial and administrative operations. As an institution with co-prosecutorial faculties, the Commission has had a satisfactory role in the Guatemalan judicial system. As the Commission is independent and remains separate from the political order and preferences, it aids in providing a new order and political equilibrium.

III. Analytical Framework

Corruption is a very complex phenomenon. Its study has an interdisciplinary perspective, and no single approach outweighs another. All contributions are equally valuable. It is not just about individual acts, but also about social actions and networks that frame and maintain a corrupt system. At a micro level, corruption arises when individual daily actions deal with the public misappropriation of State agencies (bureaucratic corruption or petty corruption). On the other hand, political corruption covers the highest spheres of power, involving political actors ranging from decision-makers, judges, the private sector, or parallel State structures to organized crime. This article analyzes the political corruption dynamics when confronting anti-corruption agencies.

Two points should be explained in detail: a) the fight against corruption from an institutionalist approach and b) hybrid institutions and their dynamics in working with international and local recipients. Regarding the former, we have already mentioned that corruption is mainly analyzed through a cost-benefit approach. To the extent that specialized anti-corruption agencies are established, institutions are expected to be capable of curbing massive acts of political corruption. Anti-corruption agencies (ACAs) have been established in both advanced and more fragile democracies. Empirical evidence suggests that after their implementation, ACAs have been unsuccessful in less democratic contexts.[24]

[24] Fjeldstad & Isaksen, *supra* note 11, at 25. Tomas Otahal, Petr Wawrosz & Milan Plat, *What is the contribution of the Theory of Redistribution Systems to the Theory of Corruption?* 13 (2) Review

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As to the second distinction, international institutions are "a formal, continuous structure, established by agreement between governmental and/or non-governmental members of two or more sovereign states with the purpose of achieving a common interest".[25] The name of hybrid agencies (HAs) is given to certain kinds of agencies according to the level of participation and involvement of national and international actors. Empirically, some examples consider international participation a mainstay compared to domestic agents; other instances might prioritize national sovereignty over external involvement. For some international relations scholars, hybrid institutions are related to peace courts and State-building assistance.[26]

As far as the literature and empirical recent review show, no hybrid anti-corruption nor anti-impunity agency has preceded the Commission Against Impunity in Guatemala. To some extent, this situation can be explained by the fact that, in order to create the HA, some requirements must be fulfilled. HA have been set up in contexts with adverse circumstances related to maintaining public peace, working with a precarious public order or other core governance activity failures. In the fight against corruption, these institutions have been designed to face contexts of State capture.

Besides Guatemala, this kind of institutional architecture was later developed in Honduras and planned for El Salvador. These countries suffer from devastating conditions of ungovernability. These scenarios illustrate how impunity and political corruption outstripped the rule of law and the State's capacity to counteract them. Therefore, the institutional design of hybrid anti-corruption agencies (HACAs)[27] represents an initial step towards greater opportunities to curb political corruption. Besides design, other conditions must coexist to have better chances of success.

First, a state capture situation is required. In this particular case, it is worth mentioning the overwhelming failure of institutions for the administration of justice. A captured State is not a failed State in the sense defined by interna-

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of Economic Perspectives 93 (2013); Nicolas Charron, *Mapping and Measuring the Impact of Anti-Corruption Agencies: A New dataset for 18 countries* (November 2008) (unpublished manuscript, Paper presented at the New Public Management and the Quality of Government Conference); World Bank Institute, Anti-corruption commissions: panacea or real medicine to fight corruption? (2004).

25 Clive Archer, International Organizations 33 (Routledge, 2014) (1983).

26 Greg Fry & Tarcisius Tara Kabutaulaka, Intervention and state-building in the pacific: the legitimacy of co-operative intervention (Manchester University Press, 2008); Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States,* 29 (2) International Security 84 (2004); Aila Matanock, *Shared Sovereignty in State-Building: Explaining Invited Interventions* (August 29, 2013) (unpublished manuscript, Paper presented at the American Political Science Association Annual Meeting, Chicago, IL).

27 I borrowed the term from Laura Zamudio-González, *Hybrid Anticorruption Agencies*, in International Intervention Instruments Against Corruption in Central America 19-43 (Zamudio G. ed., 2020).

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tional relations; that is, the failure or structural anomie in public goods provisions or services or the inability to meet citizen demands.[28] This has broad consequences for aligning State order. For the purposes of this article, we constrain ourselves to the legal and judicial perspective of State capture; that is, a captured State as an unpunished State where the lack of punishment and the absence of legal compliance prevails. This leads to a situation of institutional weakness[29] and the co-optation of justice performance.[30] There lies the debate: in a perception of systemic and institutional weakness explained by the elites' lack of political will to enforce the rule of law.

Michael Johnston[31] suggests a typology to classify political corruption based on the participation of individuals and institutional strength or weakness. The author argues that the penetration of corruption is complex even in advanced democracies. Johnston defines corruption in consolidated democracies as influence markets and elite cartels while contexts with more fragile institutions are known as oligarchs, clans and official moguls.[32] The main distinction between each category is based on the fact that even when corruption takes on pervasive roles, this situation does not imply a generalized condition in more democratic countries. We are in the presence of isolated events and institutions are strong enough to hold back this problem. In contexts of weaker democracies, corruption is a structural problem, institutions are weak, and State capture is visible.

Therefore, it is important to highlight that although consolidated democracies with complex corruption problems exist, these problems are not comparable with more fragile democracies where corruption is pervasive. There is much debate on the levels of democratic development and there are no guarantees to ensure that established democracies will not suffer backsliding into authoritarianism. In fact, this is an unfortunate practice in several countries.[33] What is important to bear in mind is the level of penetration of corruption in government institutions. In other words, institutional weakness

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28 Daniel Thürer, *The "failed State" and international law*, 81 (836) Intl. Rev. Red Cros 731 (1999); W. Zartman et al., Collapsed states: the disintegration and restoration of legitimate authority 1-15 (William Zartam ed., Lynne Rienner Publishers,1995). John Sebastian Zapata Callejas, *La teoría del Estado Fallido: entre aproximaciones y disensos*, 9 (1) Revista de Relaciones Internacionales Estrategia y Seguridad 89 (2014).

29 Steven Levitsky & María Victoria Murillo, *Variación en la Fortaleza Institucional*, 24 Revista de Sociología 31 (2010).

30 CICIG, Guatemala: un estado capturado (2019).

31 Johnston, *supra* note 10, at *3*8.

32 *Id.*

33 Nancy Bermeo, *On Democratic Backsliding*, 27 (1) Journal of Democracy 5 (2016); Anna Lührmann et al., *A third wave of autocratization is here*: *What is new about it?* 26 (7) Democratization 1095 (2019). For Latin America experience, *see* Aníbal Perez Liñán, Presidential impeachment and the new political instability in latin america (Cambridge Univ. Press, 2007).

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translated into impunity and lack of enforcement are the criteria used to judge whether a State has been captured in its judicial and justice authorities. Many countries with structural corruption have gained democratic conditions such as political competition, the presence of civil society, and accountability mechanisms, among others.[34] Guatemala, which Johnston considers an example of pervasive corruption, safeguards electoral democratic elements and accountability. As a matter of fact, civil society played a decisive role in fostering the creation of the CICIG. Therefore, it is pertinent to stay with the argument that (un)democratic presences adopt forms that go beyond traditional definitions. Then, it is better to focus on justice administration capture as the leading idea in our argument.

Second, the argument suggests political will as a condition in establishing a hybrid anti-corruption agency (HACA). This step requires a) official acknowledgement of the situation and b) an official request for international assistance. These constitute the ideal circumstances for compliance and may seem fairly simple requirements, but they are not. A country is rarely willing to delegate its sovereignty. Literature on international relations has studied how the degree of delegating sovereignty to a third party brings positive or negative consequences on the provision of public goods[35] or how to design strong domestic institutions on a long-term basis extending beyond external assistance.[36]

International non-governmental institutions are a relatively frequently used tool in international law. Through them, sovereignty is delegated so that one or several external actors can cooperate with local institutions in the provision of a public good (i.e., security, peace, rule of law). The degrees of delegation vary. In some agreements, foreign aid can be reduced to simple advice or recommendations, while in others it implies full delegation; in other words, substituting national authorities for external ones. In this regard, interesting debates have arisen in an attempt to discover how the type and degree of delegation affects the provision of a service.[37]

In the particular case of anti-corruption agencies, the CICIG is the first hybrid organization that seeks to address the problem of systemized corruption in a given context.[38] The fight against corruption has been confined to national agencies. Therefore, the legal nature of the CICIG gains importance because it implies a commitment to the fight against corruption from the per-

[34] This refers to an incomplete democratization. Even with democratic electoral conditions, accountability mechanisms, it still lacks progress in guaranteeing rights, eliminating corruption, strengthening institutions, and so on.

[35] Aila Matanock, *Governance Delegation Agreements: Shared Sovereignty as a Substitute for Limited Statehood*, 27 (4) Governance: an Int. Journal of Pol., Adm. and Inst. 589 (2014).

[36] Theresa Reinold, The causes and effects of hybrid anti-impunity commissions: outline of a research agenda (Global Cooperation Research Papers, 2020).

[37] *Id.*

[38] *Id.*

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spective of cooperation between local and international actors. Likewise, the CICIG was considered a success story by the international community. Thus, some neighboring Central American countries (Honduras and El Salvador) sought to replicate the exercise in their territory.

The hybrid legal nature of the anti-corruption agency implies a balance between different factors: the sovereignty of the host state must not be placed at risk and national institutions must be respected; similarly, domestic, and external efforts should address law-enforcement culture. Interference from powerful political elite networks must be left out. A hybrid design implies an appreciation for local sovereignty, which means that a HACA operates under host State laws, under host State courts and under local criminal procedure. International law is not enforced, so HACAs must be committed with host country's culture of legality and favor policies strengthening national justice institutions.

Another key element acting as a causal mechanism is internal and external inter-institutional cooperation. Any legal and institutional framework requires an adequate chain of enforcement. For that, the actors involved must be willing to cooperate. When facing a scenario which includes national and international actors, coordination and willingness to work together are key elements to succeed. The pact is functional for all parties in the extent that everyone agrees. Thus, the actors feel they are part of the agreement, pursue normative preferences towards democracy,[39] and extend their time frame beyond short-term expectations.[40] Powerful actors should not be excluded from bargaining or if excluded, said actors should not be powerful enough to revert the agreement.[41]

This model is mostly designed for advanced democracies. The Latin America region is plagued with informal institutions and powerful actors operating outside the law. Although it is a bleak picture, institutions can work through inclusiveness, negotiation, cooperation, and legitimacy among stakeholders. Furthermore, an advantage in HACA design is that it combines this duality (formality-informality) and strives to transmit the strength, independence, and impartiality of external demands to the local context.

This argument suggests that the institutional design and internal and external inter-institutional cooperation yield positive results in the fight against political corruption, especially if a holistic[42] approach to combat it is taken

[39] Aníbal Pérez-Liñán & Scott Mainwaring, *La supervivencia de la democracia en América Latina (1945-2005)*, 68 América Latina Hoy: Revista de Ciencias Sociales 139 (2014).

[40] Levitsky & Murillo, *supra* note 29, at 34-37; Guillermo O'Donnell, *Estado, democratización y ciudadanía*, 128 Nueva Sociedad 62 (1993).

[41] *Id.*

[42] This implies taking into account a comprehensive and not an individual perspective of the dynamics of corruption in which this problem is the result of a set of (in)actions and processes in which "various actors - individual and collective - with interests and diverging agendas." *See* Gault et al., *supra* note 19, at 95.

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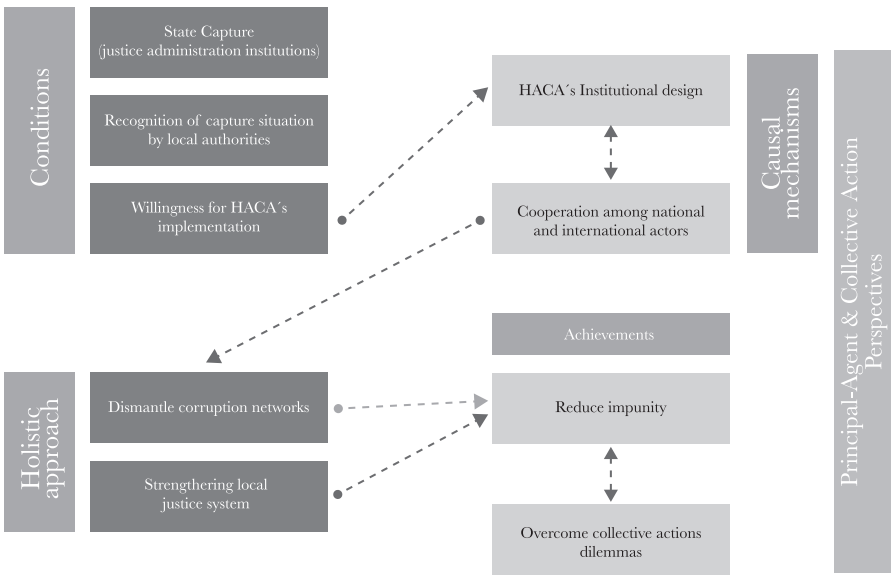
into account and resources are invested in domestic institutional strengthening. The consequences show a tendency to a reduction of impunity when dismantling criminal networks. In turn, HACAs gain a favorable opinion in citizen perception and favorable insights to overcome collective actions.[43] This social phenomenon is a crucial outcome to reactivate public trust in the institutions for the administration of justice and in popular support. An individualistic stance on corruption is thus abandoned as it becomes a social request and a collective demand. The argument described above is illustrated in the following figure:

FIGURE 1: THE IDEAL OPERATION OF HACA'S



SOURCE: Author.

IV. THE CONTEXT OF GUATEMALA'S ENDEMIC CORRUPTION

Guatemala suffered a violent civil war (1960-1996) with massive human rights violations, extrajudicial assassinations, and thousands of civilian disappearances. To bring an end to the conflicts and after much negotiation, peace agreements were made. Their main objectives were to pacify/ the country and minimize the presence of Illegal Clandestine Security Apparatuses (*cu-*

[43] To overcome collective actions problems (dilemmas) refers to the idea of lack of individual incentives that discourages social action to pursue a common (mainly beneficial) goal. This situation refers to a failure to achieve a social gain due to the fact of self-interested and rational individuals who are unwilling to cooperate or if cooperating they fail in coordinating.

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erpos ilegales y aparatos clandestinos de seguridad; CIACS). These groups consisted of illicit networks that infiltrated the highest spheres of power. Despite efforts (the United Nations were involved in several peace processes),[44] progress was non-existent and the CIACS continued their operations. In 2000, the National Police of Guatemala reported 2904[45] homicides per 100,000 inhabitants. By 2007, this number reached 5781. Guatemala, along with the other Central American Northern Triangle countries (El Salvador and Honduras), has one of the highest homicides rates in the world.[46] This comes with endemic impunity, political prisoners and a security crisis. These countries underwent continuous authoritarian regressions[47] and their institutions remain very weak.[48] This situation ignited public opinion. Civil society as well as domestic authorities asked for international help. After several attempts, a petition came into being in the form of the Agreement on the Establishment of the International Commission Against Impunity in Guatemala (CICIG by its Spanish acronym).

In addition to the situation of violence and the general weakness of the political institutions in the Guatemalan system, the administration and prosecution capture situation is alarming. The head of the executive branch has been able to submit to the legislature by buying congressmen to approve the presidential political agenda. The judicial system is plagued with irregularities, a lack of transparency and accountability, and many higher-ranking judicial positions driven by appointment favors. Furthermore, organized crime has infiltrated institutions and reached decision-makers. Economic and private elites are also colluded with the partial justice system and in many cases operate by illicitly financing electoral campaigns in exchange for million-dollar contracts.[49]

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44 Brands, *supra* note 3.

45 CICIG, *Informe de Cierre EL legado de justicia en Guatemala;* Informe Anual de Labores CICIG 2019 ¡Juntos Lo Hicimos!, Comisión Internacional Contra la Impunidad en Guatemala (2019).

46 Dinorah Azpuru, *Peace and Democratization in Guatemala: Two Parallel Processes,* in Comparative Peace Processes in Latin America, (Stanford, Stanford University Press, 1999); Adriana Beltrán & Susan Peacock, Hidden powers in post-conflict Guatemala (WOLA, 2003), available at: *https://www. wola.org/sites/default/files/downloadable/Citizen%20Security/past/Hidden%20Powers%20 Long%20Version.pdf*.

47 *See* Polity IV Project: Political Regime Characteristics and Transitions, available at: *https://www.systemicpeace.org/polity/polity4.htm*; Anibal Pérez-Liñán et al., *Presidential Hegemony and Backsliding in Latin America, 1925-2016,* 26 (4) Democratization 606 (2019).

48 Steven Levitsky, et al., The politics of institutional weaknesses in latin america (Cambridge Univ. Press, 1st ed. 2020); *Judicial Corruption in Central America*, (Foundation for Due Process), available at: *http://www.dplf.org/sites/ default/files/1196715002_0.pdf*.

49 CICIG, *supra* note 30; Fundación Myrna Mack, Impunidad y redes ilícitas: un análisis de su evolución en guatemala (2019).

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1. *CICIG*

In response to a petition drawn up by civil society and supported by both the public and private sectors, the Guatemalan government signed an agreement with the United Nations to create the International Commission Against Impunity in Guatemala (*Comision Internacional de Combate a la Impunidad; CICIG)* in December 2006. The CICIG differs from other kinds of already created international commissions.[50] While some scholars highlight the underlying nature of the Commission as a transnational justice figure,[51] many others stress its hybrid status.[52] The CICIG has a hybrid configuration that combines cooperation between international authorities and national authorities.

The CICIG functions stipulated in the Agreement on the establishment are: a) to investigate and dismantle illegal groups and clandestine security organizations (CIACS) that have infiltrated the State and undermined human rights; (b) to collaborate with the State to dismantle CIACS; and (c) to provide public policy recommendations designed to eradicate CIACS and prevent their return, including judicial and institutional reforms.[53] In the first article of the aforementioned agreement, CIACS are defined as groups that illegally undermine citizens' ability to exercise political and civil rights and that have links to State officials or that can create impunity for their actions (Art. 1).

The CICIG is a hybrid institution which balances international and domestic political institutions and actors. Unlike other UN missions (i.e., peace or aid) where UN intervention is considerable in appointing, supervising, funding, etc., the UN only intervenes in the CICIG to appoint the Commis-

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[50] International assistance institutions were originally created by the United Nations in order to accompany peace processes in collapsed States after traumatic events like civil wars. *See* Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 (2) International Security 29 (2004). For instance, Sierra Leone and Guatemala went through civil wars and both countries were supported by the UN after the end of its internal conflicts. The UN has helped to clarify past events such as genocides, large-scale crimes, and human rights violations through the creation of Historical Truth Commissions (i.e., Ecuador, Ayotzinapa in Mexico, Sierra Leone). In some cases, sovereignty is fully delegated (trusteeships); in others, the mission pursues a shared sovereignty *modus operandi,* while in yet others, the UN serves as an advisor and policy guide. None of these missions includes years of overseeing investigations or cooperation and staff collaboration. The CICIG focuses on Guatemala's current situation of impunity.

[51] Tove Nyberg, *The International Commission Against Impunity in Guatemala: A Non-Traditional Justice Effort,* 28 (1) Revue Québecoise de Droit International 157 (2015).

[52] Michael, Günther, *Intervention by Invitation? Shared Sovereignty in the Fight against Impunity in Guatemala*, 101 European Review of Latin American and Caribbean Studies 5 (2016); The International Commission Against Impunity in Guatemala: A WOLA Report on the CICIG Experience (Washington, DC: The Washington Office on Latin America, June 2015).

[53] Commission Against Impunity in Guatemala (CICIG; Spanish acronym) Agreement Between the United Nations and the State of Guatemala on the Establishment of an International Commission against Impunity in Guatemala, December 2006.

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sioner. UN assistance is limited to guiding policy and reforming proposals, as well as mutual staff cooperation. The Commission does not have independent prosecution faculties. However, it serves as a *querellante adhesivo*[54] in which the CICIG Commissioner acts as a joint complainant(co-prosecutor) or *querellante adhesivo* and does not at any point imply sharing sovereignty. Local Guatemalan institutions (Public Ministry, National Police) carry out investigations, criminal prosecution, and the administration of justice. All procedures follow Guatemalan national laws.[55] The CICIG intervenes to accompany criminal investigations and prosecution processes. Under the principle of complementarity, the Commission has independent investigation capacity but is constrained to present cases to the Public Prosecutor.[56] The CICIG does not have enforcement mechanisms or penalties for non-compliance either.[57]

Initially, CICIG functions focused on dismantling criminal networks. Later, the mandate was adjusted to focus on fighting impunity. The CICIG is an unprecedented institution *ex profesamente* designed to aid in the eradication of impunity and political corruption within an endemic corruption context. Independence of its functions was secured with its political, financial, and administrative autonomy. The CICIG is not financially accountable to the UN or to the Guatemalan State, but rather to international donors, such as the United States, Sweden, Canada, the Netherlands, and the European Commission, among others. Accountability is monitored through annual reports. Political autonomy is consequently achieved because the Commission does not rely on the Guatemalan government, but rather acts as an external collaborator. The CICIG's initial term lasted two years and has been renewed five times until 2019.[58]

V. How Effective Was the CICIG in Curbing Grand Corruption in Guatemala?

The CICIG contributed to the reduction of political corruption in Guatemala. Such was its success that some neighboring countries replicated the model and others have considered implementing a similar structure. The

54 *Querellante adhesivo* or Adhesive claimant. Article 116: "In crimes of public action, the aggrieved party with civil capacity or his representative or guardian in case of minors or incapable, or the tax administration in matters of its competence, may provoke criminal prosecution or adhere to that already initiated by the Public Prosecutor's Office". *See* Guatemala Criminal Code.

55 *Id.*

56 Laura Zamudio-González, *supra* note 5, at 493.

57 Andrew Hudson & Alexandra W. Taylor, *The International Commission Against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms*, 8 (1) Journal of International Criminal Justice March 53 (2010).

58 Renewal must be authorized by the president.

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achievements are mainly observed on two levels: high-profile captures and the dismantling of the illicit political economic network CIACS and to a lesser extent to the strengthening of the local justice system. The awakening of civil society is another positive consequence that is rarely analyzed and is having interesting repercussions. Quantitatively speaking, indicators give a picture of a number of effective trends.[59] All this together has had repercussions for civil society, which has played an increasingly active role in the fight against corruption. However, the CICIG is not a panacea. It is not because an institution, no matter how well-designed and advanced it may be, requires other factors to put an end to something as complex as political corruption. The cooperative environment was increasingly hostile because the political and economic elites will never be willing to give up power or their historical benefits. It is therefore an incessant struggle. However, the CICIG offers fresh and different elements to the fight against systemic corruption.

From a theoretical point of view, the CICIG presents significant challenges. The anti-corruption community has focused on studying ACAs while ignoring hybrid agencies. This work tries to advance in providing new insights from the anticorruption theoretical debate to this new empirical reality. Thus, it is argued that the CICIG and HACAs are functional to the extent that they make it possible to predict behaviors based on incentives. In other words, as mentioned before, in contexts with structural corruption, reducing the incentives so as not to be corrupted is fruitless since the most pragmatic logic of action for agents and principals implies acting corruptly. But when a third party intervenes (a hybrid agency), the incentives and, therefore, ways of acting, become more predictable.

Similarly, the CICIG and these types of agencies fit well with collective action theory.[60] The CICIG was able to devise suitable scenarios to overcome

[59] "In 12 years of work, CICIG worked on 1540 indictments in 120 cases involving over 70 illicit networks that were damaged if not dismantled". (Call & Hallock, *supra* note 4, at 22); Moreover, between 2018-2019, 43% of the convictions handed down during the entire period of existence of the CICIG were obtained (CICIG, Informe Legado de Justicia, 2020, 51). Similarly, the efficiency rate of joint work between the FECI (Specialized Prosecutor's Office against Impunity), for its acronym in Spanish, and the CICIG is close to 85%, which far exceeds the national average. (*Id*., 52; Miguel Zamora, *Institutional Inosculation: The International Commission Against Impunity in Guatemala, International Rule of Law Mechanisms, and Creating Institutional Legitimacy in Post-Conflict Societies*, 57 (3) Columbia Journal of Transnational Law 583 (2019). Regarding violence, the country homicide victim rate per 100,000 people assessed by UN Office on Drugs and Crime dropped from a basis of 45.4 in 2008, which reflects one of the highest rates in Guatemala contemporary data, to 22.5 in 2018. *See*: united nations office on drugs and crime (UNODC), available at: *https://dataunodc.un.org/content/data/homicide/homicide-rate*. *See also*: Fact sheet: the cicig's legacy in fighting corruption in Guatemala, Wola, (August 27, 2019), available at: *www.wola.org/analysis/cicigs-legacy-fighting-corruption-guatemala*.

[60] Collective action theory was first proposed in 1965 by Mancur Olson´s The Logic of Collective Action. This theory has had a broad impact in social sciences and have been adapted to many social situations. The fight against political corruption is an example of it.

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the collective action problems of its recipients. Civil society was a key element in the fight against corruption in Guatemala. Different types of NGOs, human rights groups and civil society have always served as allies of the Commission. In the ideal model, the objective is to move from a society governed by a particularistic logic towards one guided by universalist principles.[61] In practice, this is far more complex. Although this outcome was not achieved, it is helpful to identify the victories in the CICIG's performance, as well as to learn what to expect from it.

ACAs have been implemented in many countries with many examples in Asia, Africa, and Eastern Europe. Despite following an exemplary model led by the World Bank and legitimized by transnational NGOs like Transparency International, most of them have had disappointing results.[62] The underlying reasons have to do with a lack of autonomy, a lack of budget, and a lack of investment in institutional capacities.[63] Successful examples are very particular to special contexts and to not very democratic practices.[64] However, beyond that and as the literature on the subject has shown, this failure is associated with a theoretical misunderstanding of the dynamics of corruption in contexts with pervasive corruption. As mentioned in the literature review, the main agent theoretical approach is not the most appropriate to design such models.

In the principal-agent theory, the principal and agents are differentiated among themselves; their interests are equally separate. It is normally assumed that principals are good, that they pursue the common welfare and, in general, that they are interested in exposing corruption. Likewise, agents are assumed to be bad; by enjoy discretionary spaces for action and information asymmetry, agents take advantage of the situation to meet their short-term objectives. These conditions increase the incentives for their private interest to prevail over that of the collective. Following this logic, anti-corruption reforms seek to increase punishments, decrease spaces for discretion, and set in motion policies such as transparency of resolutions to reduce schemes that encourage corrupt practices.

However, in contexts of systemic corruption, there are neither principals nor agents who enforce the law. The principals are not interested in doing so and benefit from the situation or, if they did want to report corrupt behavior, they know that no results would ensue or perhaps it is simply more costly to

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61 Mungiu-Pippidi, *supra* note 18, at 94.

62 Fjeldstad & Isaksen, *supra* note 11.

63 Alan Doig, Dave Watt & Robert Williams, *Why do developing country anti-corruption commissions fail to deal with corruption? Understanding the three dilemmas of organizational development, performance expectation, and donor and government cycles*, 27 (3) Public Administration and Development 251 (2007).

64 Bertrand de Speville, *Anticorruption Commissions: The Hong Kong Model Revisited*, 17 (1) Asia-Pacific Review 47 (2010).

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be honest in a context of structural corruption. Agents will not comply with the law because there are no incentives to do so and/or they benefit from the status quo. In keeping with this idea, all possible lines of contention-reporting corruption are immersed in a perverse game. Therefore, it is a vicious circle in which all participants benefit or at least do not see their status reduced or else have the widespread and sustained belief that there is no way out of the situation. The latter is linked to the contributions of the theory of collective action. We know that since people's behavior is influenced by shared expectations as well as by individual and short-term interests, in an environment of systemic corruption there is no apparent solution through the incentive model.

In such a national systemic context, there is no clear difference among the main agents. Anyone can adopt this role. It does not matter if the main actors are citizens or the bureaucracy; local authorities conveniently maintain a cycle of impunity that benefits everyone. Ordinary citizens are accomplices because they are unwitting participants in daily corruption, knowing that it is the way things work.[65] Other types of citizens have close ties with the government, and this allows them to mutually benefit to the detriment of the collective interest. Legal reforms may be enforced, exceptional legal frameworks may be enacted, or model institutions may even be designed, but political will is what allows or inhibits activating all mechanisms for change. As long as there is no transition towards universalism or the idea of the State as a common good, electoral democracies cannot consolidate real and complete democratization.[66]

Thanks to HACAs incorporation into national rules, the incentive model changes.[67] I have mentioned that the legal nature and CICIG faculties are crucial factors in the institution's performance against corruption. In a system of systematized political corruption (State of capture, particularism, or competitive particularism), citizens have very low expectations that judicial institutions will actually punish the corrupt (high-level cases) because they know that the guilty parties are protected by a pact of impunity,[68] or the persecutions are fake. However, with the establishment of the CICIG, the rules have changed: new actors have been incorporated and interests have been adjusted.

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[65] Donatella Della Porta & Alberto Vanucci, The hidden order of corruption: an institutional approach 126 (Routledge, 2012).

[66] Pippiddi, *supra* note 18, *supra* note 23, Michael Johnston, Corruption, contention, and reform. The power of deep democratization (Cambridge Univ Press, 2014).

[67] It is worth mentioning that in the consolidated cases of Hybrid Commissions to Combat Corruption (Guatemala and Honduras), the request for help began from civil society and later governments requested assistance from international organizations.

[68] Steven Levitsky & María Victoria Murillo, *Lessons from Latin America: Building Institutions on Weak Foundations,* 24 (2) Journal of Democracy 93 (2013).

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A relevant component is the figure of the CICG Commissioner, who is designated by United Nations. However, Guatemalan State laws are obeyed, and trials are carried out in national courts under local legislation. Likewise, although the Commissioner is empowered to carry out independent investigations, he works closely with local law enforcement agencies. That is, the Commissioner emerges as a mixed figure who respects national sovereignty but enjoys autonomy by being appointed by an international body and financed by different countries (European Union and USA).

Under the principal-agent model, the agents —whether citizens, the bureaucracy or domestic law enforcement authorities, etc.— ask for compliance regarding the Commissioner (in)actions because they have delegated key responsibilities (sovereignty) to him/her. The Commissioner is outside the State logic of cost-benefit distribution and incentives. The Commissioner is an external agent that, although a rational agent that pursues personal interests, is alien to State logic (social trap, vicious circle). To the extent that an external (international) actor intervenes as a Commissioner with sufficient faculties, the balance of power is altered; the vicious circle can be fragmented because the logic of complicity between State actors is unraveled. An external Commissioner is the innovative element that makes it possible to forge a possible virtuous circle.

CICIG is different from other HACA's in its nature as an independent investigator and joint complainant (co-prosecutor) with the Office of the Public Prosecutor. In no other agency has such delegation existed. As mentioned before, HACA hybrid agreements should ignore absolute sovereignty delegation or avoid signing a shared sovereignty agreement. This initially happened in Guatemala and the Constitutional Court invalidated the arrangement.[69] It is essential to strive for a balance. In Honduras, the logic of delegation was different and perhaps this has contributed to its short life and lower impact.[70] The MACCICH[71] (Misión de Apoyo contra la corrupción en Honduras, by its Spanish acronym) existed briefly (2016-2021) and also fell under the pressure of civil society after a corruption scandal was exposed.[72] Furthermore, the conditions of capture in Honduras were truly alarming. Like Guatemala,

[69] Arturo Matute, *Guatemala Stumbles in Central America´s Anticorruption Fight*, International Crisis Group, available at: *https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/guatemala-stumbles-central-americas-anti-corruption-fight.*

[70] Honduras did not have an external Commissioner to investigate independently and prosecute together with the Office of the Public Prosecutor. The Office of the Prosecutor and the Office of the Attorney General were the only institutions authorized to prosecute.

[71] Acuerdo de creación entre el gobierno de Honduras y la organización de estados americanos, *available at: http://www.oas.org/es/sap/dsdme/maccih/new/mision.asp*.

[72] The corruption scandal arose as a result of channeling funds from the Honduran Social Security Institute to the campaign of then-president Juan Orlando Hernández. This action provoked outrage and citizen demonstrations which demanded the resignation of President Hernández and the creation of the Honduran Commission against Impunity.

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Honduras had the second highest homicide rate in the world in 2015, as well as widespread violence from organized crime and gangs.[73]

In its short life, the MACCIH made significant achievements such as assisting in the capture of 133 people and 14 high-profile investigations including former first lady Bonilla de Lobo who was sentenced to 58 years in prison.[74] However, it did not have independent investigative powers or independent powers to prosecute.[75] Another issue that may have influenced its brief existence lies in the fact that the Mission in Honduras did not have the physical presence of a Commissioner as it did in Guatemala. The equivalent of a CICIG Commissioner in the Honduran case was the head of the MACCIH, a position delegated to the Secretary General of the OAS (Organization of American States), Luis Almagro.

In analyzing the MACCIH's legacy, call notes that the OAS made the Mission's work difficult because of excessive interference. Such intervention did not occur in Guatemala. The creation of other HACAs in El Salvador and Ecuador were promised. El Salvador launched its Special Commission against Impunity in El Salvador (CICIES for its Spanish acronyms) in November 2019. The CICIES follows a structure similar to that of the MACCIH in Honduras. The OAS General Secretary is one of the most empowered actors advising El Salvador´s criminal and policy reform. Similar to the MACCIH, the Salvadorean case is not endowed with the power to pursue independent persecutions or act as joint complainant (co-prosecutor). In sum, the CICIES resembles an advisory body rather than a formal institution to tackle corruption.[76]

With the inclusion of an international agent, information asymmetry[77] spaces are reduced while discretionary spaces for action are more controlled. Similarly, enforcement incentives expand because an external agent represents an outsider to the interests created previously in the political game.[78]

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73 Charles T. Call, *International Anti-Impunity Missions in Guatemala and Honduras: What Lessons for El Salvador?*, 21 Clals Working Paper Series (2019).

74 *Id.*

75 Reinold, *supra* note 36, at 15.

76 *Id.*

77 Information asymmetry refers to the idea that powerholders always have access to extra information compared to the one citizen possess. This information is essential to deal with public issues and make public decisions. No matter how transparent a State is, some official information never discloses.

78 In a study on the potential of the CICIG as an international intergovernmental organization, Zamudio González refers to the CICIG's ability to survive in a hostile political environment and invest itself as a self-directed actor. This implies that the CICIG as an organization, as well as an actor, was able to adapt and reinvent itself in terms of its relevance, tasks, and organization in the face of external threats. The agency in the CICIG is personified in the figure of the Commissioner who was able to draw up adequate strategies and make the pertinent decisions that allowed him to renew the mandate of continuity of the Commission as well as to "expand the object of investigation of CIACAS (Illegal Corps and Apparatus Clandes-

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Genuinely independent and autonomous institutions boost popular legitimacy. In an environment of particularism, political and economic elites reinforce each other. Those close to power receive benefits and the closest circles reward the government. One way to alter this pact of impunity is to incorporate outsiders. This power is now embodied in the figure of the Commissioner. Thus, the new rules of the game are now set in motion where success depends on the collaboration of the new players.

A crucial complementary element relies on internal and inter-institutional cooperation. Unfortunately, in practice, this was very difficult to carry out since the political and economic elites were not willing to give in. The CICIG is facing an extremely complex situation due to the fact that the Commission has attempted to overthrow the Guatemalan co-opted State. According to different reports prepared by the CICIG on the *modus operandi* of illicit parallel networks,[79] the Executive anchored its presence in Congress by bribing congressmen to approve the president's policies. The judiciary is a disputed field regarding the appointments of magistrates and ministers.[80] A privileged part of the private sector is colluded with public sectors as it seeks to finance political campaigns to later reap benefits through contracts and other tenders.[81] Organized crime plays a dominant role in public decisions. On the other hand, the Commission remains close to civil society, NGOs, independent media, some private sector actors, and international support. The relationship with the United States of America is crucial as it is its main donor.

An interesting element is the relationship between the CICIG and the Office of the Public Prosecutor or of the Attorney General, a government institution in charge of investigating and prosecuting crimes. Despite the levels of State capture, the role of the prosecutor was essential. In places with systemic corruption like Guatemala where most of the government powers have been overtaken by political corruption, a light of hope shines with the role of the Attorney General, which has remained on the sidelines. An ideal working scheme would be one made up of a proactive, independent, Commissioner and Prosecutor. This has not happened, at least not working together as a team. The Attorney General is appointed by the President of the Republic. The Executive branch always protected itself by strategically nominating public officials. Thus, the Claudia Paz y Paz (2010-2014) appointment as prosecutor is surprising given that she always maintained a

tino) to RPEI (Illicit Political Economic Networks), which involves a broader phenomenon.", Zamudio-González, *supra* note 56, at 516.

79 CICIG, *supra* note 30; CICIG, *supra* note 45.

80 There is what is known as parallel commissions, where political operations are carried out illegally and in which the appointments of judges related to certain interests were agreed upon with legislators beforehand. There is also a network of lawyers at the service of criminal networks. *See* CICIG, Informe Comisiones de Postulación: Desafíos para asegurar la independencia judicial (2019).

81 CICIG, Financiamiento de la política en Guatemala (2015).

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proactive policy to combat impunity. What is not striking is that she has not been reelected.

The Commissioners faced four main challenges: developing a strategy, negotiating with the opposing sector, bargaining with their main ally, the Public Prosecutor, and pushing legal and judicial reforms through Congress. Given the size of the capture, the main reforms to discuss included modifications in the justice system and one related to the political party financing. Since the Commission renewal depends on results and structural reforms may take long to approve, the Commission's short-term objective focus lay in tackling historical impunity. Therefore, the strategy consisted in capturing high-profile cases. To this end, the CICIG, the Commissioner and his work team undertook independent investigation or in some cases did so with the assistance of the Office of the Public Prosecutor.

The CICIG had a twelve-year lifespan (2007 to 2019). The first years of the Commission were years of adaptation and institutional legitimacy. Presidential power was invested by the leftist government of Álvaro Colom (2008-2012). The CICIG sought to establish cooperation with other government agencies. An important moment occurred in 2011 when the Office of the Public Prosecutor was inaugurated by Claudia Paz y Paz, who turned out to be one of the best prosecutors in the history of Guatemala. With their work in collaboration with the Commissioner, they were able to investigate and prosecute organized crime heads, as well as high-profile cases against the military and high-level government officials. Former dictator Efraín Ríos Montt was sentenced to 80 years in prison. These were infallible and historical examples of the fight against impunity. Even though the Constitutional Court overruled the decision days later, without CICIG's and Prosecutor Paz's relentless work, these resolutions would not have never come to light.

In 2013, Otto Pérez Molina and Roxana Baldetti assumed the presidency and vice-presidency of the country, respectively, under the auspices of the right-wing Patriotic Party. The political environment was hostile to the CICIG because it was a space that privileged the military past and status quo. Commissioner Iván Velasquez's arrival marked the beginning of one of the most momentous periods, one which greatly echoed in its recipients. Citizens in Guatemala were able to observe tangible CICIG's results. It can also be considered the political juncture that drew the closest to a political change. The whole equation made sense when the Commission conducted investigations and exposed major corruption scandals. With the strong support of the United States of America and a population fed up with corruption, these events triggered a political earthquake in 2015. Some analysts even dubbed it the Arab Spring in Guatemala.

La Linea was the most explosive and consequential case during the CICIG's term. Since the early 1970s, mafias and criminal groups had been illegally trading goods through Guatemala's main customs ports. Even if the situation started off a gradual democratization at the end of the civil war and dur-

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ing Rosendo Portillo's government (2000-2004), the customs port persisted as an iceberg, a complex high-level political and economic corruption network infiltrated by both organized crime and the political elites.[82] In April 2015, Ivan Velázquez and the Attorney General disclosed the corruption network named *La Linea* in customs services with the involvement of the local tax authority (the Tax Administration Board or SAT), the National Police Service and other political authorities. *La Linea* charged importers fees to fraudulently lower the tariffs on goods they brought into Guatemala.[83] "(…) The fixers contacted importers to arrange for drastically reduced customs duties in exchange for commissions using a telephone number they called *the line*".[84] A group worked inside the SAT to coordinate customs operations while another faction managed the outside operations with the shipping containers. After more than one year of investigation, the CICIG and the Attorney General revealed at a press conference that President Perez Molina and Vice-President Roxana Baldetti were top leaders of the *La Linea* criminal organization.[85] All of these events unleashed discontent in civil society and people took to the streets for more than 20 weeks demanding that both the president and the vice-president resign. Both political figures were finally arrested and prosecuted.[86]

The CICIG exposed yet another prominent case. Although the Guatemalan Institute of Social Security (IGSS) was a hot spot for many other corruption scandals, the public health institution was the center of illicit public procurement contracts for medication. Additional significant corrupt affairs concerning senior administrative officials and even the energy sector[87] and the national civil police[88] came to light. Aceros de Guatemala was another striking case of tax evasion and collusion between the economic elites and the private sector.[89]

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82 Open Society Justice Initiative, *Against the Odds*, CICIG in Guatemala (2020).

83 *Cooptación del Estado de Guatemala*, CICIG, (August, 2010), available at: *https://www.cicig.org/casos/caso-cooptacion-del-estado-de-guatemala/*.

84 *Id.*

85 *Id.*

86 *Political Turmoil in Guatemala: Opportunities and Risks*, International Crisis Group, (August 15, 2020), available at: *https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/political-turmoil-guatemala-opportunities-and*; A. Rojas et al., *Miles de guatemaltecos manifiestan durante más de 18 horas contra corruptos,* Prensa Libre (May 31, 2015), available at: *https://www.prensalibre.com/guatemala/comunitario/manifestacion-guatemala-renuncia-30mgt/*.

87 Juan Alberto Fuentes Knight, *State Capture and Fiscal Policy in Latin America*, Plaza Pública, (2016), available at: *https://www.plazapublica.com.gt/content/state-capture-and-fiscal-policy-latin-america*.

88 Michael Lohmuller, *Guatemala's Government Corruption Scandals Explained*, Insight Crime, (August 15, 2020), available at: *https://www.insightcrime.org/news/analysis/guatemala-s-government-corruption-scandals-explained/*.

89 *Id.*

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Besides public administration, the CICIG also targeted congressional malfeasance. Some deputies were indicted for peddling and fraud related to the GISSA scandal and many others were charged with embezzling money to secure votes in the legislature. The Commission unveiled the Patriotic Party's alarming corruption to fund campaigns and elections. The case revealed promised preferential treatment for State contractors in exchange for illegal campaign funding. The co-op State case uncovered a criminal structure led by President Perez Molina and Vice-President Baldetti. The CICIG and the Office of the Public Prosecutor discovered that, once in office, the Patriotic Party was able to offer at least 450 preferential State contracts.

Civil protests were the natural consequence of society having had its fill of corruption. When the case of *La Linea* was revealed, civil society organized and called for a massive mobilization demanding the resignation of President Otto Pérez Molina and Vice President Baldetti.[90] The citizen movement complaint was organized by urban-youth sectors[91] which was convened through Facebook under the hashtag #RenunciaYA[92] (#Quit Now). The movement leaders made it clear that no political party was behind them and called for peaceful protests. Tens of thousands demonstrated in the streets against corruption asking for specific demands. These demands were met almost instantaneously. In addition to civil society rage, an important group from the business sector[93] supported the initiative.

After the success of #RenunciaYA and Baldetti's resignation, other protests were also organized via Facebook insisting that Pérez Molina leave office[94] and other cities joined the demonstrations. As a result, more than 20 high-profile public officials resigned. Besides cleaning up politics, the mobilization group called for general elections and an electoral reform on public financing.[95] After Molina's ousting, new elections were held. Candidates from official parties (the Patriotic party and the opposition party LIDER were also

90 *Sectores se unen para exigir renuncia de Otto Pérez*, Prensa Libre (August 28, 2015), available at: *www.prensalibre.com/guatemala/politica /sectores-se-unen-para-exigir-renuncia-de-otto-perez*.

91 Walter Flores, *Youth-Led Anti-Corruption Movement in Post-Conflict Guatemala: 'Weaving the Future'?*, 50 (3) IDS BULLETIN 37 (2019).

92 Tim Rogers, *How 9 strangers used Facebook to launch Guatemala´s biggest protest movement in 50 years*, Splinter (March 15, 2021), available at: *https://splinternews.com/how-9-strangers-used-facebook-to-launch-guatemalas-bigg-1793848431*.

93 An important business sector from the Committee of Agricultural, Commercial, Industrial, and Financial Associations (CACIF) joined the movement. For more details, *see*, Walter Flores & Miranda Rivers, *Curbing Corruption after Conflict: Anticorruption Mobilization in Guatemala*, Special Report, (2020), available at: *https://www.usip.org/publications/2020/09/curbing-corruption-after-conflict-anticorruption-mobilization-guatemala*.

94 *Guatemalans Force Corrupt President and VP to Resign*, Global Nonviolent Action Database (2015), available at: *https://nvdatabase.swarthmore.edu/content/guatemalans-force-corrupt-president-and-vp-resign-2015*.

95 Gabriella Torres, *How a Peaceful Protest Changed a Violent Country*, BBC News (2015), available at: *https://www.bbc.com/news/blogs-trending-32882520*.

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involved in corruption scandals) were left out. The winning candidate was an outsider, who managed to position himself favorably with an electoral platform focused on the fight against corruption.

When Jimmy Morales[96] was sworn in as president in 2016, the demonstrations quieted down. Morales lobbied to terminate the Commission's mandate after Commissioner Velasquez accused him of illicit financing in his electoral campaign. After the mobilizations, the CICIG felt victorious and empowered partly by citizens and partly by international bodies supporting it. The Commissioner tried to take advantage of this situation and continued to claim acts of corruption that allegedly reached the political and economic elites. The business sector (CACIF) which had originally backed the public outcry, withdrew its support after being immersed in accusations of corruption. Thus, a group of political and economic elites exposed by MP and CICIG revelations joined efforts to sway the United States against the anti-corruption movement in Guatemala, demanding the departure of the Commissioner and the non-renewal of his mandate.[97] A crucial circumstance in the adverse outcome of the Commission's future was then-President Trump's indifference and lack of financial support.[98]

The CICIG was able to overcome collective action problems. Breaking the logic of collective action implies breaking circles of complicity, as well as the idea of an individualistic and short-term fight against corruption. When corruption is systematically plagued, agents and principals behave passively towards corruption. Nonetheless, the theoretical model suggests that HACAs contribute to break collective action problems, generate consequences of social awareness and foster the control of corruption through civil society. The most desired goal is to move from particularism to universalism. In order to achieve that objective, three interconnected moments need to take place: the first one is to do away with collective action problems; then, corruption must be attacked by civil society; finally, there must be a transition towards the idea of State universalism.

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96 *Former TV comedian expected to become Guatemala´s next president*, The Guardian (2015), available at: *https://www.theguardian.com/world/2015/oct/25/guatemala-president-election-comedian-jimmy-morales*.

97 Elisabeth Malkin, *Guatemala President Who Championed Honesty Orders Anticorruption Panel Chief Out*, New York Times (Aug., 27, 2017), available at*: www.nytimes.com/2017/08/27/world/americas/jimmy-morales-guatemala-corruption.html*.

98 Richard Messick, *The Legacy of Guatemala´s Commission Against Impunity*, Global Anticorruption Blog (2019), available at: *https://globalanticorruptionblog.com/2019/09/11/the-legacy-of-guatemalas-commission-against-impunity/*; Richard Messick, *Dear American Congress, Please Don´t Destroy Guatemala´s Best Hope for Combatting Corruption*, Global Anticorruption Blog (2018), available at: *https://globalanticorruptionblog.com/2018/05/16/dear-american-congress-please-dont-destroy-guatemalas-best-hope-for-combatting-corruption/*; Mathew Stephenson, *The CICIG Crisis in Guatemala: How the Trump Administration Is Undermining US Anticorruption Leadership*, Global Anticorruption Blog (2019), available at: *https://globalanticorruptionblog.com/2019/02/19/the-cicig-crisis-in-guatemala-how-the-trump-administration-is-undermining-us-anticorruption-leadership/*.

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Collective action problems are overcome when genuine changes are perceived in public institutions. Positive effects in the fight against corruption includes convictions in high-level cases, as well as dismantling corrupted and illegal networks. These events demonstrate the effectiveness of the work done by justice-seeking institutions. In fragile democracies, citizens usually have a negative opinion towards State institutions. Thanks to the CICIG's achievements and further social awakening, citizens have come to shape a more positive attitude toward such institutions. Overall, this situation generates a more constructive attitude towards institutions and towards the fight against corruption because citizens no longer see corruption as an elusive and unrelenting evil. Rather than viewing corruption as the generalized and socially perceived behavioral norm, citizens behold a possible way out. In quantitative terms, this can be observed in the historical levels of trust towards the CICIG.[99] Similarly, during the CICIG's lifespan, statistics reveal the increase in the number of complaints filed by the Office of the Public Prosecutor.[100] These data can explain a great deal when compared to data from neighboring countries.

The second moment implies giving free rein to civil and genuinely non-partisan protests to repudiate corruption. How and why do citizens decide to take to the streets? According to the collective action theory applied to the fight against political corruption, when facing public exposure of a corruption scandal, society remains indifferent. It is interesting and theoretically enticing to analyze the circumstances under which a corruption scandal generates such a response from civil society to motivate the general public to mobilize, especially in contexts as complex as those in Latin America. In the Guatemalan case, the CICIG positively influenced citizen uprisings. Citizen awakening brings together young people, urbanites, students, the middle class, human rights defenders, NGO activists and even some business sectors.[101] These protests continued for months and achieved very specific objectives and results. The agenda always focused on issues related to transparency, accountability and the fight against corruption. An elite group led the movement, remained non-partisan and extended their influence by means of the communicative power of social networks (especially Facebook).

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99 *See*, for example: Elizabeth J. Zechmeister & Dinorah Azpuru, *What Does the Public Report on Corruption, the CICIG, the Public Ministry, and the Constitutional Court in Guatemala?* Latin American Public Opinion Project (2017); Zamora, *supra* note 59, 580; *Los guatemaltecos confían más en la CICIG que en la iglesia católica*, Prensa Libre (2015) available at: *https://www.estrategiaynegocios.net/lasclavesdeldia/868160-330/cicig-instituci%C3%B3n-mejor-valorada-por-guatemaltecos-presidencia-la-peor*; David Lunhow, *Guatemala Outsources a Corruption Crackdown*, The Wall Street Journal (Sep. 11, 2015), available at: *https://www.wsj.com/articles/guatemala-outsources-a-corruption-crackdown-1442001944*.

100 Zamora, *supra* note 59, at 586.

101 Walter Flores, *supra* note 91.

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Despite its obtaining specific historical results, the social movement suffered setbacks. For instance, it failed to connect with the longstanding structural reforms demands exacted by indigenous groups. Moreover, the movement did not seem to have a leader with whom negotiate. Additionally, protesters assumed that with the resignation of President Molina and Vice President Baldetti, things would improve on their own.[102] Social unease persisted and emerged again in 2017, when President Morales unilaterally decided not to renew the CICIG mandate. The 2015 #RenunciaYA movement turned into #JusticiaYA. Morales's anger apparently stems from the disclosure of illicit donations made to the Jimmy Morales campaign. While young people were protesting in the streets, President Morales manipulated the State machine against the CICIG to declare Ivan Velasquez as *persona non-grata* and end the legacy of the Commission.

During that time, civil society received a second important impact. #JusticiaYA joined forces with other interest groups, such as "trade unionists, indigenous leaders, students, some members of the middle class and sectors of the private group,"[103] and together they created the *Alianza por las Reformas*, a conglomerate of civil society organizations promoting structural reforms in Guatemala. Their demands included the resignation of Morales and other members of Congress, as well as electoral reforms to end private financing, the permanence of the CICIG and the creation of a specialized group to draft a new Constitution.[104] In the end, although Guatemalan society continued to act, national and international contexts had changed. There was no international support to continue financing the CICIG and the anti-corruption movement. The US stopped its funding, in part due to the indifference of the Trump administration and in part due to lobbying of Guatemalan political and economic elites against the work of the CICIG. In sum, these events thwarted the survival of the CICIG and possible large-scale changes.

The last component towards major political change advocates the strengthening of local institutions. According to the literature on institutional weakness,[105] institutions can be strengthened or at least activated by an external event, a systematic crisis, civil war confrontations, international pressure or even insistence from civil society. In the Guatemalan experience, the CICIG was created in response to political crisis and violence. The request for its establishment surged from the demands of civil society. The CICIG was not a panacea, but even then, the Guatemalan HACA paved the way

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102 Flores & Rivers, *supra* note 93.

103 *Id.*, at 14.

104 *Id.*

105 Levitsky & Murillo, *supra* note 29; Levitsky, *supra* note 48; Levitsky & Murillo, *supra* note 68; Bo Rothstein, The quality of government: corruption, social trust, and inequality in international perspective (University of Chicago Press, 2010).

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for justice institutions to be strengthened and reactivated. The Office of the Public Prosecutor and the Intelligence Units against Corruption are good examples of that. Institutional strengthening and high-profile captures (dismantling corruption networks) point at their outstanding legacy. Furthermore, the active participation of civil society in the fight against corruption is a very remarkable achievement in contemporary Guatemalan history. Nevertheless, components of the political system such as political will, internal and external scenarios, as well as the restructuring of lawful and unlawful networks, pose both an analytical and an empirical puzzle to be solved in order to transition towards complete democratization.

VI. Conclusions

This article has analyzed the effectiveness of the CICIG as a hybrid agency in the fight against systemic corruption. Although the Commission is not a magic bullet and pursues its own interests like any other actor, the CICIG acted effectively. To a large extent, this was made possible by its institutional design and, to a lesser extent, cooperation between local and international actors. In addition to its positive results, the CICIG challenges the dominant theories on combating corruption in capture contexts. Contrary to what is established in the principal-agent theory, institutions with their own ideas of incentives are well-equipped to counteract political corruption and impunity in countries with systematized corruption. Correspondingly, the CICIG was able to overcome typical collective action problems in democracies with fragile institutions.

Institutional design is a key issue. A balance between local and external interests seems to be a good solution for a problem as complex as that of Guatemala or any other context with similar conditions of capture and impunity. Such a balance implies that national sovereignty is respected, and hybrid agencies are sufficiently empowered. For this to happen, the protection of sovereignty must be guaranteed since the Commission's task must respect national laws and procedures. CICIG functions were also limited by having to deliver the results of its investigations to the Office of the Public Prosecutor so as to jointly prosecute the corresponding charges.

Inter-institutional and international cooperation merits discussion. This essay highlighted the importance of cooperation at various levels. First of all, the Commission came to life as a result of the cooperation between Guatemalan institutions, particularly the negotiation between the Executive branch with international bodies (UN). Second, at the local level, the Office of the Public Prosecutor was the CICIG's main ally. This point is worth mentioning since it proves that despite the pervasive environment of impunity and capture, some actors and institutions are self-contained, can move beyond short-

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term goals and back regulatory democratic tendencies[106] over short-term results. Third, the CICIG has other allies: much of its mandate was legitimized by the relentless support of civil society, some business sectors, and to a large extent the international community (especially donors).

The CICIG worked according to the principal-agent theory because the circle of impunity was fragmented. Whenever the balance of power shifts, whenever law enforcement institutions are activated (mainly the Office of the Public Prosecutor), and to the extent that incentives change because an external actor enters the scene, favorable results are predicted. At this point, this article has already noted the CICIG's achievements: deactivating corruption networks, strengthening local justice system, reducing impunity by punishing public and private officials at the highest level, and finally incorporating civil society as an actor in the fight against corruption. Positive results were possible thanks to the proper functioning of the institutions, as well as proactive leadership on behalf of both the Commissioner and Attorney General.

A less explored field, but one with a great impact, is the role of civil society in combating corruption in capture contexts. The CICIG contributed considerably to the awakening of society. As explained in this article, in an ideal sequential model, a society seeks to move towards universalism or complete democratization. In this case, the first step was to overcome collective action problems. This only happened when citizens stopped being indifferent to corruption, when they began to actively take part in politics through demonstrations and, generally speaking, by being a counterweight sector to unilateral actions. Along the same vein, the next step consisted of making society aware that it had the power to control systemic corruption. The mobilizations against the impunity of presidents, vice-presidents and former presidents lasted for months and were constant from 2015 until the disappearance of the CICIG. These movements will go down in Guatemala's history as genuinely historic.

The final step is not conclusive. In this regard, no significant change was achieved because systemic corruption is still anchored in government bodies. Political and economic illicit networks hinder the progress of democratization. For much of the CICIG's existence, the Commission faced opposition from State institutions. They were not willing to compromise. Circumstances change; actors sometimes cooperate and sometimes do not. The indifference of the Trump administration as a regional leader in tackling corruption was an unfortunate situation. Even worst were the attempts by the political and economic elites (led by President Jimmy Morales) before the US Congress to discredit the Commission's legacy.

Hardly, the institution, in the sense of either its definition or incentives, has succeeded in performing transformative tasks. Evolving towards more

[106] Pérez-Liñán, *supra* note 39.

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substantive democracies is a complex process as it is not linear and suffers regressions. Long-term political will is crucial. HACAs present an innovative approach to combat malfeasance although research on this empirical phenomenon is lacking. Finally, in the presence of HACAs or new institutional designs, corruption scholars must rethink anti-corruption theories from both perspectives: principal-agent and collective action.

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CAN JUDGES BE REPLACED BY MACHINES? THE BRAZILIAN CASE

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Abstract: *The objective of this article is to study the development and use of artificial intelligence (AI) in the Brazilian judiciary in order to assess the likelihood that machines could ultimately replace the judge, and to identify the necessary conditions that might allow for such replacement. To this end, we will examine the relevant concepts related to AI and the scholarship addressing the possibility of replacing the judge with machines in the near future. The methodological procedure used was doctrinal research specific to both new technologies and artificial intelligence. Our conclusion is that AI will reduce the cost of the judicial machinery by allowing many relatively simple and frequently occurring judicial tasks to be resolved more quickly, while leaving ultimate responsibility for judicial decision-making with the judge. Replacement of the judge by automated algorithmic tools would require specific, necessary conditions, even if it were to promote efficiency and cost reduction. These conditions are (i) the adequacy and efficiency of AI generated results, and (ii) the ability of computerized routines to adapt and improve the quality of their application of the law by accommodating and incorporating human corrections of the automated decisions. We also diagnose the philosophical issue that replacing judges with machines might signal a possible "end of interpretation," even though ongoing human inspection and correction of the computerized systems would be necessary.*

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KEYWORDS: *Artificial intelligence; process; cost; judicial decision-making; judge.*

RESUMEN: *El objetivo de este artículo es estudiar el desarrollo y el uso de la inteligencia artificial (IA) en el Poder Judicial brasileño para evaluar la probabilidad de que las máquinas puedan acabar sustituyendo al juez, e identificar las condiciones necesarias que podrían permitir esta situación. Para ello, se realizará el estudio del concepto de IA y se debatirá la posibilidad o no de reemplazar al juez por la máquina en un futuro próximo. El procedimiento metodológico utilizado ha sido la investigación doctrinal específica de las nuevas tecnologías y la inteligencia artificial. Como resultado, se entiende que IA reducirá el costo de la máquina judicial al permitir que muchas tareas judiciales relativamente sencillas y frecuentes se resuelvan con mayor rapidez, dejando al mismo tiempo la responsabilidad última de la toma de decisiones judiciales en manos del juez. La sustitución del juez por herramientas algorítmicas automatizadas requerirá condiciones específicas y necesarias, incluso si promoviera la eficiencia y la reducción de costos. Estas condiciones son (i) la respuesta adecuada y eficiente al caso en discusión y (ii) la evaluación constante y la adecuación de las rutinas computarizadas a la calidad de la aplicación de la ley, en base a posibles correcciones humanas a la decisión automatizada. También diagnosticamos un problema de orden filosófico, dada la posibilidad de sustitución del juez por la máquina, podría suponer el posible "fin de la interpretación", aunque sería necesaria la inspección humana y por ende la corrección de los sistemas informatizados.*

PALABRAS CLAVE: *Inteligencia artificial; proceso; costo; decisión judicial; juez.*

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I. INTROCUTION

This article will assess the possibility of replacing the magistrate with artificial intelligence, that is, with an AI system, given the current Brazilian legislative

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reality. To begin, existing conceptions about AI will be analyzed, as well as the difficulty of limiting this conception to any single perspective. Furthermore, it will be demonstrated that the complexity of conceptualizing AI has, in fact, facilitated the research and development of that field. AI has already been implemented in several courts across Brazil, some involving activities considered to be merely bureaucratic, such as the Clara system, to more complex systems which can assist magistrates in the judicial decision-making process, such as Radar.

In Brazil, AI has provided an opportunity to reduce the cost of the judicial branch. Recently, the cost of the judiciary to the nation was determined to be R$90,846,325,160.00. Is it possible that AI systems could evolve to the point where sentences and judgments would no longer be handed down by human beings? Would a decision on the legal merits of a case reached by an AI system be valid? Would such a system be able to effectively analyze all the relevant issues of fact and law presented in any given lawsuit? These are some of the questions researchers will be contending with in the coming years as the application of computer technologies to the law increases.

II. Artificial Intelligence: The Concept

The concept of technology has expanded over time, acquiring new contours, and changing definitions, and the study of its meaning and societal implications involve an extensive global network of researchers and interdisciplinary projects.[1] Technology is a broad concept and can be evaluated from various perspectives.[2] As Antonio Enrique Pérez Luño warns, new technologies are omnipresent in both the individual and collective lives of human beings. New technologies directly impact the exercise of citizenship. The introduction of new technologies into society requires deep reflection on the resulting legal and political implications.[3] In dialogue with Luño, Klaus Schwab also emphasizes the importance of evaluating the impact of new technologies on society, for example, the mobile internet, small electromagnetic sensors, and the increased potential of artificial intelligence.[4] In the words of Ricardo Luis Lorenzetti:

The rise of the digital age has raised the need to rethink important aspects related to social organization, democracy, technology, privacy, and freedom. The open, interactive, and global character of the internet, added to the low transaction costs it presents as technology, have a great impact on a wide category of issues belonging to legal sociology and, therefore, to dogmatics: the

[1] Eduardo Magrani, The internet of things 31 (2018).

[2] *Id.,* at 30.

[3] Antonio Enrique Pérez Luño, Ciberciudadaní@ o ciudadaní@.com? 57 (2003).

[4] Klaus Schwab, The fourth industrial revolution 11 (2016).

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notion of time, space, frontier state, place, privacy, public goods, and others that appear equally affected.[5]

One of these issues is the impact technology has had on legal relations, more precisely, on the judicial process. Technological advances require the constant assessment of potential challenges which could impact society and legal science.[6] The concept of artificial intelligence, however, does not have a single or widely accepted definition among scholars on the subject.[7] On February 19, 2020, the European Union published its "White Paper on Artificial Intelligence-A European Approach to Excellence and Trust",[8] which created a paradigm asserting that human intelligence is not substitutable by systems based on artificial intelligence. In addition, these new technologies must be transparent, explainable, and capable of inspiring confidence in both the business and social spheres.

This perspective warrants close examination. Alan Turing, one of the predecessors of modern AI studies, had focused his efforts on the potential for computers to replicate not the human thought process itself, but rather, achieving the same external result.[9] Turing's test was the "game of imitation," in which a computer attempts to convince an interrogator that it is human and not a machine.

Today, the possibility of designing a computational intelligence capable of creativity could be the last frontier of investigations relating to artificial intelligence.[10] The human brain represents an inexhaustible source of surprises and the unknown. However, it is creativity which places humanity at a level

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5 Ricardo Luis Lorenzetti, Teoria da decisão judicial: fundamentos de direito 50 (2009).

6 Adriano M. Godinho & Nelson Rosenvald, *Inteligência artificial e responsabilidade civil de robôs e seus fabricantes,* in Responsabilidade Civil-Novas Tendências 21, 23 (Foco, 2019).

7 "Any AI regulatory regime must define what exactly it is that the regime regulates; in other words, it must define artificial intelligence. Unfortunately, there does not yet appear to be any widely accepted definition of artificial intelligence even among experts in the field much less a useful working definition for the purposes of regulation... The difficulty in defining artificial intelligence lies not in the concept of artificiality but rather in the conceptual ambiguity of intelligence. Because humans are the only entities that are universally recognized (at least among humans) as possessing intelligence, it is hardly surprising that definitions of intelligence tend to be tied to human characteristics." Matthew Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies*, 29 Harv. J. L. & Tech. 353, 359 (2016).

8 *White Paper on Artificial Intelligence - A European Approach to Excellence and Trust*, Publications office of the European Union (April 15, 2020), available at: *https://op.europa.eu/en/publication-detail/-/publication/aace9398-594d-11ea-8b81-01aa75ed71a1/language-pt.*

9 Alan Turing, *Computing Machinery and Intelligence*, 236 Q. Rev. of psychol. & Phil. 433, 433 (1950).

10 Computational creativity is defined as "[P]hilosophy, science and engineering of computational systems which, by taking on particular responsibilities, exhibit behaviours that unbiased observers would deem to be creative." Simon Colton and Geraint A Wiggins, *Computational Creativity: The Final Frontier?* 242 ECAI 2012 21, 21-26 (2012).

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of cognitive superiority over other animals. Humanity employs both philosophical and technological tools in order to better understand how we think, and this fact alone indicates that the imitation of human intelligence may be unattainable for algorithmic models whose aim is merely to simulate human thinking. At the current time, AI is essentially comprised of a set of technologies that combine data, complex algorithms, and computational capacity.[11]

Artificial intelligence seeks to reproduce a specific intelligence. Creativity, on the other hand, is a new combination of ideas that suddenly take on a meaningful value.[12] This is a significant distinction. Intelligence is understood to be something beyond deductive or inductive thinking. It is related to the capacity for abstraction, that is, the ability to consider reality, to recognize intertextuality (which includes context), and to arrive at a conclusive position based on logical-linguistic phrases (semantics). This is what Roszak argues, that it is through ideas, not information, that the mind develops thought.[13] In this sense, he sought to demonstrate the existence of a link between experience, memory, and learning, in order to distinguish human thought from that of machine processes. This perspective will be important to keep in mind when evaluating John R. Searle's proposed distinction which will be set out below.

From Roszak's perspective, the greater the number of ideas we have, the greater our capacity for critical comparison. Thus, a brain capable of producing few ideas does not have the capacity to defend the convictions it adopts with sufficient care and rigor of thought. Thus, it is not the amount of information available to the person which qualifies him or her to perform a certain activity. Rather, it is the quality of the information that allows for the construction of the idea. This is an important characteristic of the human mind which researchers attempt to simplify and mimic through the use of analytical models.

There is an additional point which must be considered. Many events experienced by human beings occur in a fragmentary way and are stored in the memory in that fashion. There is no methodology for storing or categorizing

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[11] Lucana María Estévez Mendoza, when lecturing on the subject, offers the following: "Be that as it may, AI has sneaked into our lives and is ready to stay in them. Given this irruption of intelligent machines, it seems clear that Law, as a science that intervenes in social conflicts, cannot remain on the sidelines, leaving to the discretion of the parties or groups that partially defend their interests, their resolution, although they can do it more or less legitimately." Lucana María Estévez Mendoza, *Regulación de la inteligencia artificial y protección de los derechos fundamentales en la cuarta revolución industrial.*, in Memórias do XXIII Congresso Ibero-Americano de Direito e Informática 265, 267 (Cia do eBook, 2019).

[12] Boden argues that "Creativity is the ability to come up with ideas or artefacts that are *new*, *surprising* and *valuable*." Margaret Boden, The creative mind: myths & mechanisms 1 (2003).

[13] Theodore Roszak, El culto a la información. Tratado sobre alta tecnología, inteligencia artificial y el verdadero arte de pensar 121 (2006).

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the information stored by the central nervous system. Computerized systems also have memory. But the problem is, as Roszak explains, that any comparison would be similar to associating "saw teeth to a person's teeth".[14] Intelligent systems store much more information than a human being is capable of, and the way data is captured, and information stored is very different.

Edwina L. Rissland[15] highlights the fact that a machine can beat a world champion in chess by merely using mathematical calculations of probability regarding all possible moves between the black and white domains, and that this operation is relatively simple. In contrast, common communication is much more difficult for machines. The difficulty lies in the interpretation of semantic differences and connections which would allow for the recognition of these similarities and differences in a context composed of diverse sources of information: documents, images, videos, and in the case of the law, judicial decisions.

The question that arises from this line of reasoning is whether human thought activity is capable of being transformed into machine commands via some type of system of approximations.[16] This perspective is related to the view of man as a machine, and envisions the systematic organization and execution of commands using the communication, analysis, and control of logical symbols by rigorous, linear, coded, and predictive programming.[17] This model follows the conception of the complete rationalization of thought formulated by Alan Turing in his well-known imitation game, as well as that of Norbert Weiner's control-feedback studies (cybernetics). Despite the evolution in the eighties of techniques which led to the construction of the so-called expert machines, that is, machines specialized in solving specific problems or acting as if they were geniuses or very specialized professionals, developers had sought to add high levels of information or knowledge to the artificial intelligence existing at that time. However, all of the information was supplied by the developer, with no self-learning being performed by the computer.

From this perspective, computers work with coded instructions and predefined knowledge, and they perform operations supported by structural bases that are created and destroyed with each advance of neuroscience. The human brain, on the other hand, does not employ such linearizable characteristics, but instead, acts more like a network which responds to various

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[14] *Id.*, at 129.

[15] Edwina L Rissland, *Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning*, 99 The Yale Law Journal 1957-1981 (1990).

[16] Juan J. Álvarez Álvarez, Aproximación crítica a la inteligencia artificial. Claves filosóficas y prospectivas de future 62 (2013).

[17] Álvarez states, "[T]he rules the machine follows can only operate with symbols (and not their interpretation), it is essential that the symbolic representation of these aspects be complete, systematic, so that the problem we face - whatever it is - can be effectively resolved." *Ibidem,* at 18 [authors' translation].

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impulses (signals) of excitation or inhibition. This is to say that the human brain works in parallel (receiving/sending information), which is a model of brain functioning that reveals a greater capacity for both the processing of information and speed. From this perspective, a machine's "intelligence" is not something provided in advance, and its rules of conduct are neither accurate nor predictable. Computer performance is to be oriented towards "learning" based on "experience" and the information that reaches the system so that the performance of the activity may improve.[18] This is what has been called "machine learning." Russell and Norvig[19] assert that even if it is impossible to achieve omniscience, it is possible to apply the so-called "laws of thought" to computers, depending on advances in neuroscience and the technical capacity of applying aspects of neurophysiology to computers, because solving problems in theory does not mean solving them in practice. In other words, the logic used by technologically advanced machines surpasses the limits of the historical syllogism and attempts to approach the complex logic of probabilities precisely because it incorporates the same semantic capacity of information processing that the human brain has.[20]

In conclusion, according to Searle, computer language is syntactic (logical-formal), whereas human language is semantic (logical-substantial). As a result, it is possible to use robots to translate texts from Chinese or Arabic into any language without the machine knowing the content of the translation, and even when no scientist knows the respective languages. They simply need to know about logic, computing, and statistics – the machine language. The quest to introduce semantic thinking into machines is an advancement of computational science that has generated a great deal of discourse and explains why IBM's Watson has attracted so much interest and praise.

However, in their work *Artificial Intelligence: A Modern Approach*, Stuart Russel and Peter Norvig identify four categories of AI: thinking like a human, acting like a human, thinking rationally, and acting rationally.[21] Similarly, Enrique Cáceres[22] emphasizes that the reproduction of the human way of thinking is crucial[23] and uses the idea of machines imitating human behavior in the game of chess as an example:

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[18] Juan Álvarez Álvarez, *supra* note 17, at 20-23.

[19] Russell and Norvig point out "[A]ll computer programs do something, but computer agents are expected to do more: operate autonomously, perceive their environment, persist over a prolonged time period, adapt to change, and create and pursue goals." Stuart J. Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach* 4 (3st ed., 2016).

[20] John R. Searle, The rediscovery of the mind 201, 202 (1990).

[21] Stuart J. Russell & Peter Norvig, *supra* note 19.

[22] Enrique Cáceres, *Artificial Intelligence, Derecho and E-Justice*, 39 (116) Bol. Mex. Der. Comp. 593, 593-595 (2006).

[23] Computers could play chess in 1960, and by 1997 they could easily beat the best chess player in the world. Wolgang Hoffmann-Riem, when lecturing on the subject, stated, "AI is a transversal technology that aims to empower computers, using large amounts of data (big

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> [I]n the case of systems that play chess, it is clear that the intelligent universes are very different, because while the human is biochemical in nature, the computer is electromagnetic. However, it is possible to classify the 'behaviors' of said systems as intelligent.

From the foregoing analysis, it is possible to reconstruct the relevant distinction between weak artificial intelligence and strong artificial intelligence proposed by John R. Searle. First, as a matter of logic, the human mind is not a computer program, which is what separates Searle's thinking from Turing's vision.[24] However, operations of the human mind can be reproduced or simulated. The distinction between weak and strong AI, therefore, is determined by the way we visualize the comparison of the mind with artificial intelligence. If we assume the mind has a program to be reproduced, the construction of strong artificial intelligence is sought. If it is assumed that brain processes can be simulated by means of codes executed by machines, then we are talking about weak artificial intelligence. Finally, if the organization of the system is based on equating the brain with computational intelligence, we are talking about cognitivism.[25]

The line of reasoning brought up here serves to illustrate the *ex-ante* environment of the advancement that computational creativity would require: the possibility of reproducing a model of the brain which approaches that of human beings (strong AI) in search of innovation. The task is not a simple one. The information processing capacity of the human brain reaches one million times the processing capacity of processors in terms of petabytes per second. So, what makes artificial intelligence a useful tool? The question incorporates the view that the algorithms that use machine learning are capable of building complex models, detecting patterns, and inferring rules of behavior of the systems under analysis. Computer applications are able to produce intelligent responses to complex problems very rapidly. In other words, they allow for (i) the detection of similarities in the analyzed situations, and (ii) a prediction of a result based on a statistical analysis of previous results. In the words of Thomas Ramge, "to create an intelligent machine, it takes at least two elements: a robust collection of rules and an apparatus that can process the information originating from the conclusions obtained from this database".[26]

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data), appropriate computational capacities and specific analysis and decision processes, to achieve achievements that approach human capacity or even exceed it at least in some aspects." Wolfgang Hoffmann-Riem, Artificial Intelligence as an Opportunity for Legal Regulation 16 RDU 11, 11-38 (2019).

[24] Nick Bolstrom, Superinteligência: caminhos, perigos e estratégias para um novo mundo (2018).

[25] John R. Searle, *supra* note 20, at 201, 202.

[26] Thomas Ramge, Who´s afraid of ai? fear and promise in the age of thinking machines 32 (2019).

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AI has also affected the legal profession. John O. McGinnis and Russell G. Pearce, in an article published in the Fordham Law Review, entitled *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services,* maintain that common, repetitive legal services, such as searching for legal doctrine and relevant jurisprudence, generating legal documents or petitions, and creating letters and memos will be easily performed by machine learning. The lawyer will be left with activities involving the analysis of complex issues or highly specialized areas of law, as well as courtroom activity and preparatory work for which the lawyer's physical presence is essential. The authors conclude:

> The market for electronic legal services is at a relatively early, yet significant, stage in terms of the disruptive effect of machine intelligence in undermining lawyers' monopoly. As machine intelligence in lawyering develops exponentially, it will take an increasingly larger role in five areas of legal practice: discovery, legal search, generation of documents, creation of briefs and memoranda, and predictive analytics. Eventually, machine intelligence will prove faster and more efficient than many lawyers in providing those services. Lawyers will continue to provide services that cannot be commoditized if they are superstars, practice in highly specialized areas of law subject to rapid change, appear in court, or provide services where human relationships are central to their quality. Otherwise, no effective barriers to the advance of machine lawyering in legal practices exist-not even in the law and ethics of lawyering. Lawyers will continue to embrace machine intelligence as an input and fail to prevent nonlawyers from using it to deliver legal services. Ultimately, therefore, the disruptive effect of machine intelligence will trigger the end of lawyers' monopoly and provide a benefit to society and clients as legal services become more transparent and affordable to consumers, and access to justice thereby becomes more widely available.[27]

Jordi N. Fenoll believes[28] the future of artificial intelligence is "promising" and capable of achieving "spectacular" results. The intelligence of the machine will perform work previously done manually, based on the search for keywords selected by professionals, and it will do it more efficiently. A more sophisticated example is IBM's Watson, whose programming substitutes the search for keywords with a semantic search using a semantic network.[29] This semantic network is a form of graph comprised of both nodes, which represent concepts (including legal concepts and facts), and arcs, which represent relationships between the concepts.

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[27] John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 Fordham Law Review [S.l.] 3065 y 3066 (2014).

[28] Jordi Nieva Fenoll, Inteligencia artificial y proceso judicial 28 (2018).

[29] IBM Watson Debater, available at: *https://www.youtube.com/watch?v=WFR3lOm_xhE.*

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The usefulness of tools based on machine learning will only be achieved when they are capable of reliably selecting and analyzing past cases given a specific set of criteria. Technological advancement has increased both storage capacity and processing speed, allowing the content of documents to be collected and organized in such a way that it is possible to identify the patterns necessary for the resolution of legal cases (decisions), something which was not available in the eighties and nineties. The regularity of the resulting decision pattern will allow for a probabilistic assessment of what might happen in cases that have not yet been decided. The use of technology would be more reliable in predicting an outcome due to the greater amount of data on which the forecast is based. Without the use of technology, the only available tool for predicting an outcome would be the knowledge and experience of the individual professional, which is not qualitatively measurable and is subject to error.[30] The data requiring analysis include fact patterns, jurisprudence (and precedents), as well as the outcomes of cases already decided.[31] This type of technology would have a particular significance for Brazil due to the considerable volume of laws at the municipal, state, and federal levels, as well as the jurisprudence generated by the different member states and the administrative collegiate bodies. This, combined with the volume of matters previously decided, favor the standardization of the national law in the superior courts, and make the legal field suitable for data mining (information processing).[32]

The desire to combine a model of legal reasoning capable of jurisprudential analysis (the use of precedent), together with a rules-based approach, is not new and has generated significant discussion. However, systems designed

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[30] Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases: Biases in judgments reveal some heuristics of thinking under uncertainty*, 185 (4157) Science 6 (2008).

[31] For example, one form of legal analysis might use patterns of facts and jurisprudence from the Superior Court of Justice based on the Repetitive Demand Resolution Incident to assess the probability of procedural success and possible outcomes that might result from judicial resolution of the conflict. This might be useful for various purposes, including adopting arbitration procedures or the payment of debts or title, with the objective of saving time and financial resources.

[32] Ephraim Nissan is illustrative on this subject: "Machine learning is a branch of artificial intelligence (AI, the latter is also called machine intelligence). Machine learning enables AI systems to improve their performance by augmenting their knowledge. Machine learning is prominent in data mining, the pool of techniques for sifting through a huge mass of data to come up with information and patterns. Types of data mining include, for example, predictive data mining (whose aim is to learn from sample data in order to make a prediction and whose techniques include neural networks, rule induction, linear, multiple regression); segmentation (whose aim is to automatically group data into groups/clusters and to discover meaningful groups in sample data and whose techniques include means clustering, self-organizing maps); summarization of the data (to automatically present data in a way that makes interpretation easier, helping the user visualize patterns or find associations within the sample data); time series, for forecasting; and text mining (i.e. data mining whose data are textual corpora)." Ephraim Nissan, *Digital Technologies and Artificial Intelligence's Present and Foreseeable Impact on Lawyering, Judging, Policing and Law Enforcement*, 32 AI & Society 444, 441-464 (2017).

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for the prediction of judicial results do currently exist. These types of systems are based on the proposition that in-depth research on how judges decide cases (judicial behavior) would be invaluable for the lawyer, helping him better prepare his case or formulate arguments. Jordi Nieva Fenoll, analyzing judicial behavior and its possible integration with systems based on artificial intelligence, points out:

> There is no total consensus on what the term artificial intelligence means, but it could be said that it describes the possibility that machines, to some extent, think, or rather imitate human thought, based on learning and using the generalizations that people use to make our usual decisions.[33]

Fenoll notes that most of the time the judges act in a quasi-mechanical way in order to reach similar decisions in similar cases, often just changing the names of the parties and adjusting the terms of the judgment (use of models). In this sense, magistrates adopt a particular standard of conduct with the goal of reaching similar decisions in cases having factual identity. Thus, the individual magistrate uses a priori resources and guidelines, either from his own memory (heuristics), or from the jurisprudential data,[34] in order to simplify the resolution of cases involving similar fact patterns.[35]

Jack Copeland emphasizes that his use of the term "think" as applied to machines is nothing more than a metaphor. He says it is merely a comfortable way of expressing himself and is easy to understand.[36] Another more recent conception defines AI as intelligence with the ability to perform particular tasks.[37] The objective of modern AI, as it is currently defined, includes the ability to achieve pre-established goals, a component inserted in the category of "acting rationally" as defined by Stuart Russel and Peter Norvig. In their work, these authors use the concept of the "rational agent" as a definition of AI, since such an agent "acts as if it were fulfilling the best result".[38] They also

[33] Jordi Nieva Fenoll, *supra* note 28, at 20.

[34] *Id.*, at 44.

[35] Patterns are used by all people. If we take an illustrative case: a person who is thirsty and sees a water fountain. It will be a simple operation to fill his bottle with water (easy case). This would not be the case if his thirst had arisen in the middle of the desert. In that case, the person must make use of plastic or a raincoat to plug a hole in the sand and attempt to capture the moisture (distillation) and gather the water droplets into a pool (rigid box). Experience teaches us that, for a thirsty human being, it is better to be near the water fountain than in the desert. Amos Tversky and Daniel Kahneman argue that "Subjective probabilities play an important role in our lives. The decisions we make, the conclusions we reach, and the explanations we offer are usually based on our judgments of the likelihood of uncertain events such as success in a new job, the outcome of an election, or the state of the market". Amos Tversky & Daniel Kahneman, *supra* note 30, at 30.

[36] Jack Copeland, Artifical inteligence: a philosophical introduction 64 (1996).

[37] Matthew Scherer, *supra* note 7, at 360.

[38] Stuart J. Russell & Peter Norvig, *supra* note 19.

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maintain that AI includes tasks such as learning, reasoning, planning, perception, understanding language, and robotics. We can synthesize the objectives of AI as achieving learning and reproducing the human reasoning process in order to provide answers and facilitate progress in all the areas of knowledge and performance that man may need.[39]

AI can also be conceptualized as the science and engineering of creating smart machines, specifically, smart computer programs. This would include research and engineering using digital technology to create systems capable of performing activities that usually require intelligence when performed by an individual.[40] According to Richard Bellman, AI is the automation of activities that we associate with human cognition, such as decision-making, problem solving, and learning.[41] Interestingly, the absence of unanimity in the conceptualization of AI may have actually enhanced development in this field as researchers have not been restricted by any limiting definition.[42] Thus, AI is an umbrella term. It can encompass many areas of study and techniques, such as computer vision, robotics, natural language processing, and machine learning, among others.[43]

Artificial intelligence makes use of systems programmed to respond in a specific way given an available database. These systems are called algorithms. An algorithm is a pre-defined action plan to be followed by the computer so that the repeated performance of simple tasks may be carried out with minimal expenditure of human work. The algorithm is a rule used to automate the processing of data, a finite set of instructions that result in the performance of a specific task.[44] An algorithm is essentially a simple thing: a rule used to automate the processing of data.[45] As Fabiano Hartmann Peixoto explains, "An algorithm can be defined, in a simplified way, as a set of rules that precisely defines a sequence of operations, for various purposes, such as forecasting models, classification, specializations".[46]

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39 Angie Verónica Rubio Velásquez, *IA en contacto con el Derecho*, in Memórias do XXIII congresso ibero-americano de direito e informática 314, 315 (Cia do eBook, 2019).

40 Nilton Correia da Silva, Artificial Intelligence 36 (Artificial Intelligence and Law: Ethics, Regulation and Responsibility / Coordination, Ana Frazão and Caitlin Mulholland) (2019).

41 Richard Bellman, In introduction to artificial intelligence: can computers think? (1978).

42 Peter Stone et al., Artificial Intelligence and Life in 2030: the one-hundred-year study on artificial intelligence (2016).

43 Fabiano Hartmann Peixoto, Artificial intelligence and law 75 (2019).

44 *Id.*, at 71.

45 Wilson Engelmann & Deivid Augusto Werner, *Artificial Intelligence and Law,* in Inteligência Artificial e Direito: Ética, Regulação e Responsabilidade 149, 157 (Thompson Reuters Brasil ed., 2019).

46 Fabiano Hartmann Peixoto, *supra* note 43, 71.

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We conclude that artificial intelligence presents itself as the most sophisticated example of an algorithm whose goal is the imitation or simulation of the thought processes of a human agent when confronted by a situation requiring a decision. To this end, a set of routines is designed in order to guide the way the automated system can arrive at a decision *(output)*. The more elaborate the programmed routine, that is, the degree to which is goes beyond the mere use of a decision tree or flowchart, the stronger an artificial intelligence is *(strong AI)*, whereas the more rudimentary the routine and dependent on human intervention, the weaker the algorithmic model of the automated application is (*weak AI).*[47]

This distinction is important to the question of replacing the magistrate in judicial decision-making because such an innovation would require establishing which tasks could be performed by systems without significant human intervention, and which tasks would require direct human supervision. Having made this brief introduction to the general concept of AI, we will now evaluate the impact it has had on the law, more specifically, its impact on the Courts of Justice.

III. Artificial Inteligence in Brazilian Courts: the Contemporary Reality

According to Mariana Amaro, about 30% of the positions that today are occupied by human beings will be claimed by robots.[48] Another study was conducted in 2017 regarding the probability that specific professions might ultimately be replaced by automation or AI. That study concluded there was a 3.5% probability of replacement for lawyers, however, for judicial activities in particular, the likelihood was found to be 40%.[49]

Artificial intelligence technology has already changed the way in which both law firms and the judiciary operate. Technology, as applied to the law, generally has one objective: to make it easier for legal practitioners to perform simple or repetitive tasks, allowing more time for more complex tasks. For the judiciary, such technology would allow judges more time to judge. In Brazil, experimentation in this area has already begun in several jurisdictions. The Courts of Justice of Minas Gerais, Rio Grande do Norte, and even the Federal Supreme Court, have been using artificial intelligence in an attempt

[47] This construction has been formulated through the interpretation of Stuart J. Russell & Peter Norvig, *supra* note 19.

[48] Mariana Amaro, *Find Out What the Professions of the Future Will Be*, Exame Magazine (July 23, 2017), available at: *https://vocesa.abril.com.br/geral/saiba-quais-sao-as-profissoes-do-futuro/*.

[49] Rachel Hall, *Ready for Robot Lawyers? How Students Can Prepare for the Future of Law,* The Guardian (Jul 31, 2017), available at: *https://www.theguardian.com/law/2017/jul/31/ready-for-robot-lawyers-how-students-can-prepare-for-the-future-of-law*.

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to provide society with more agile and efficient service. One example is a system called Radar. This system was able to resolve 280 cases in less than one second. The system separated the resources that had identical orders. The appellants drafted the standard vote, based on these established by the Superior Courts and by the Minas Gerais Court of Justice.[50]

A second example is Poti, which performs the tasks of blocking, unlocking values in accounts, and issuing certificates related to Bacenjud (the system that links the Justice system with the Central Bank and the banking institutions which was designed to speed up requests for information and the transmission of court orders to the National Financial System via the internet). These tasks once took weeks when performed by officials of the judiciary. Now they are done in seconds. Judge Keity Saboya, from the 6th Tax Execution Court in Natal, explained, "A server was able to execute a maximum of 300 blocking orders per month. Today it takes 35 seconds to complete the task".[51]

According to Keity, the sector that had once handled foreclosures in the Natal region became unnecessary and was eliminated thanks to Poti. He adds that in the 6th Court, there are no pending orders. The robot also updates the value of tax enforcement actions and transfers the blocked amount to the official accounts indicated in the process. If there is no money in the account, Poti can be programmed to retrieve the amount for consecutive periods of 15, 30, or 60 days.[52]

Two additional systems, Jerimum and Clara, are currently undergoing testing and improvement. Jerimum classifies and labels processes. Clara reads documents, suggests tasks, and recommends decisions, such as the termination of an execution when the tax has already been paid. In this case, a standard decision will be inserted in the system, which will be confirmed by a server or not.[53]

The president of the Rondônia court (TJ/RO), Walter Waltenberg, assesses that the success of the judiciary will depend on the virtualization of processes and their automation. As a result, he says, the court has invested in technology, and in 2018 created an artificial intelligence nucleus, which developed the Synapses system. With that system, a 60% drop in the processing time of the shares is anticipated. One of Synapses' features is a cabinet module which informs the judge of the necessary steps of a particular process, for

[50] Demétrio Beck da Silva Giannakos, *O Judiciário e a Inteligência Artificial.* Federasul, Federadul (May 7, 2019), available at: *https://www.federasul.com.br/o-judiciario-e-inteligencia-artificial/*. Demétrio Beck da Silva Giannakos, *A inteligência artificial nos tribunais brasileiros: um redutor de custos de transação*, 3 Revista de Direito da Empresa e Dos Negócios 91, 86-102 (2019).

[51] *Tribunais investem em robôs para reduzir volume de ações*, Confederação Nacional das Instituições, CNF (March 18, 2020), Financeiras, available at: *https://cnf.org.br/tribunais-investem-em-robos-para-reduzir-volume-de-acoes/*.

[52] *Id.*

[53] *Id.*

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example, movement and assistance in the elaboration of sentences based on the suggestion of phrases.[54]

The Federal Supreme Court (STF), in turn, created Victor, which will initially be tasked with reading all the extraordinary resources that come to the STF and identifying which are linked to recurring themes of general repercussion. Victor is in the process of having its neural networks constructed based on thousands of decisions already handed down by the Supreme Court regarding the application of various themes of general repercussion. Victor performs the following tasks: 1) converts images to text; 2) identifies the beginning and end of procedural documents; 3) separates and classifies procedural documents; and 4) identifies the most relevant topics.[55]

The State Court of Rio Grande do Sul (TJ/RS), which uses the electronic e-procurement system, now has one more cutting-edge feature: the use of artificial intelligence (AI) in tax executive processes - judicial collections filed by public entities such as states and municipalities against their debtors.[56]

The solution has already been made available to the Tramandaí District for their opinion and assessment. In the near future, its use will be expanded to other courts, including the 14th Court of Public Finance in Porto Alegre, which has exclusive jurisdiction over state tax executives.[57]

The available AI solution works as follows: the Magistrate, after distributing of the process, uses the tool to classify the order to be delivered. The mechanism processes the documents attached to the initial tax execution and suggests the type of initial order: summons, subpoena, and prescription, among others. In large volumes, as is the case with tax executives, the functionality minimizes the time for analyzing documents, allowing the magistrate to focus on divergent points and other procedural activities.[58]

As the number of actions of tax executives who enter annually is around 150 thousand, the tool will be able to automate the task for 120 thousand that, without AI, require individual human analysis.

In a recent interview, the current president of São Paulo's State Court, Judge Geraldo Pinheiro Franco spoke to the issue of the application of AI in Brazilian courts. Pinheiro Franco highlighted the fact that since the 1988 Constitution, the number of lawsuits in the judiciary paulista has been con-

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54 Têmis Limberger & Demétrio Beck da Silva Giannakos, *A Inteligência Artificial como garantia de efetivação do processo,* in Políticas Públicas no Brasil–Ensaios Para um Gestão Pública Voltada à Tutela Dos Direitos Humanos 214, 220 (Dom Modesto, 2020).

55 *Id.*

56 Carlos Alberto Machado de Souza, *Inteligência Artificial acelera a tramitação dos processos de execução fiscal e agiliza a cobrança de receita pelos entes públicos*, Tribunal de Justiça do Estado do Rio Grande do Sul (nov., 21, 2019), available at: *https://www.tjrs.jus.br/novo/noticia/inteligencia-artificial-acelera-a-tramitacao-dos-processos-de-execucao-fiscal-e-agiliza-a-cobranca-de-receita-pelos-entes-publicos/*.

57 *Id.*

58 *Id.*

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stantly increasing, and that "the priority of his management (biennium 2020-2021) will be the investment in computerization and artificial intelligence, to speed up the trials".[59]

When asked about the São Paulo State Court budget deficit, Pinheiro Franco replied, "Today, it is R$600 million. Something related to R$290 million that remained from 2019, and the rest is related to this year, including the decrease in the budget, which was around R$12 billion for 2020. We are projecting this number ahead of time. In theory, there will be a shortage of R$300 million for the court to close the accounts in December".[60]

This is, therefore, another case in which the use of AI is seen as a way to combat the high cost of the judiciary in Brazil.[61] A survey released in August 2018 revealed the total expenditure of the judiciary in 2017 to be R$90,846,325,160, which was an increase of 4.4% over the year 2016.[62] There are now 18,168 magistrates, 272,093 servers and 158,703 auxiliaries. The combined cost of the various state judicial systems is extremely expensive in Brazil, costing the respective states a total of R$52,155,769,079.00.[63] In conclusion, the total expense of the nation's various judicial systems amount to 1.4% of the nation's Gross Domestic Product (GDP), or 2.6% of total spending by the Union, the states, the Federal District, and the municipalities.[64]

IV. Limits on the Application of Artificial Intelligence: the Debate on Replacing Judges with Machines

It has long been conjectured that AI solutions could help solve the well-known problem of the slowness of justice, but it could also result in eliminating the positions of lawyers, servants, and magistrates, culminating in the figure of a robot judge delivering sentences and resolving conflicts.

If someone consults the managers of the justice system, a function legally assigned to a court's presiding magistrate, one will hear statements such as "AI systems will serve to unburden the courts, allowing the faster administration of justice in the country", or, "The court he chaired is already investing heavily in AI solutions".

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59 Tábata Viapiana and Thiago Crepaldi, *"Robôs ajudarão juízes a decidir processos," diz presidente do TJ-SP*, Barbosa & Ragagnin (Feb 23, 2020), available at: *https://www.conjur.com.br/2020-fev-23/entrevista-pinheiro-franco-presidente-tj-sp*.

60 Têmis Limberger & Demétrio Beck da Silva Giannakos, *O princípio constitucional da eficiência e transparência, analisado sob a perspectiva do custo da justiça: como uma melhoria na responsabilidade de entregar a provisão judicial*, 3 Revista Eltrônica/Cnj 101 (2019).

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

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In Brazil, the fact that different judges presiding over cases involving the same factual scenario can often reach widely divergent results is a serious problem. This can even occur in the same court. With the implementation of the Code of Civil Procedure in 2015, the legislature's idea was to introduce the concept of legal precedent into Brazilian reality. This concept was integrated into the Brazilian legal system by the passage and implementation of Articles 926[65] and 927[66] of the 2015 Code of Civil Procedure. Nevertheless, the judiciary in Brazil remains strongly opposed to the concept of legal precedent.

Unfortunately, we have a juridical reality that is very much based on positivist concepts that are poorly understood by the Brazilian judiciary which manifests itself in judicial functioning that often goes well beyond the principles expressed in the Constitution and current legislation.

We can attribute this to the fact that, over the past 50 years, after many countries have freed themselves from despotic and arbitrary regimes, more and more judges have been empowered to control the way in which the two elected branches of government exercise their authority with respect to the coercive power of the State. It became the responsibility of the judiciary to determine whether politicians and other government officials had exceeded the limits of their authority.[67]

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[65] Brazilian Code of Civil Procedure, Art. 926: "Courts must standardize their jurisprudence and keep it stable, complete and consistent. § 1 In the established form and according to the assumptions established in the internal regulations, the courts will edit summary statements corresponding to their dominant jurisprudence. § 2 When editing summary statements, the courts must adhere to the factual circumstances of the precedents that motivated their creation".

[66] Brazilian Code of Civil Procedure, Art. 927: "Judges and courts observe: I. the decisions of the Federal Supreme Court regarding concentrated control of constitutionality; II. the statements of the binding summary; III. the judgments incident assumption of competence or resolution demands repetitive and repetitive trial of extraordinary and special features; IV. the statements of the summaries of the Supreme Federal Court in constitutional matters and of the Superior Court of Justice in infraconstitutional matters; V. the orientation of the plenary or the special body to which they are linked. § 1 Judges and courts will observe the provisions of art. 10 and in art. 489, § 1, when they decide on the basis of this article. § 2 The alteration of the legal thesis adopted in a summary statement or in the judgment of repetitive cases may be preceded by public hearings and the participation of people, bodies or entities that may contribute to the rediscussion of the thesis. Paragraph 3. In the event of a change in the prevailing jurisprudence of the Federal Supreme Court and the higher courts or that arising from the judgment of repetitive cases, there may be modulation of the effects of the change on social interest and legal security. § 4 The modification of the summary statement, pacified jurisprudence or thesis adopted in the judgment of repetitive cases will observe the need for adequate and specific reasoning, considering the principles of legal security, protection of trust and isonomy. § 5 The courts will publicize their precedents, organizing them for a decided legal matter and disseminating them, preferably, on the world wide web".

[67] Dominique Rosseau, regarding the term Constitution, states, "The Constitution is, in fact, a text, that is, a set of written words; words that undoubtedly manifest values - freedom,

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However, even with the creation of constitutions and the assimilation of countries into a general democratic state of law, these constitutional texts, in practice, often do not delimit or even mention the manner in which judges should make decisions in certain situations.[68]

According to Freddy Escobar and Eduardo Nieto, "Modern law is the product of an act of the will and of human reason and, in that sense, it is precisely a matter of knowing what is the end and purpose of said will".[69]

It ends that the judicial voluntarism practiced by Tribunais hairs, not the moment in which a scale of common and uniform decisions on certain matters is not created, leaving only judicial "decisionism" to a specific case. Such a problem is rooted in the moral use of the hairs in the hour at the foundation of their decisions.

Brazil, being a developing country, has been unable to provide a significant part of the population with basic and fundamental rights, resulting in the constant increase in lawsuits in an attempt to enforce those rights listed in the Federal Constitution. With the intensification of judicial activity, a culture developed, and strengthened, to the point that judicial activism was viewed as necessary[70] for the realization of rights. Essentially, a legal imaginary was

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equality ... words that, equally undoubtedly, have the ambition to be the bearers of norms, but that are, above all, words. This "discovery" logically led the constitutionalists to open up to other disciplines and in particular to the different philosophies of language to understand the ways of determining the meaning of words. If, whatever the writing efforts, the words always carry different meanings, it is necessary, in order to know what the obligation of behavior prescribes this or that statement, to decide on the meaning of that statement; it is necessary, by means of an intellectual operation, to give it a meaning that allows ordering this behavior. In other words, it is the meaning that makes the norm, not the word". Dominique Rosseau, *Continuous Constitutional Law: institutions, guarantees of rights and utopias*, 8 RECHTD 261, 263 (2016).

[68] David Beatty, in his work *"The Essence of the Rule of Law"*, stresses the fact that significant gaps exist in most Constitutions: "The problem is that the constitutional exhortations that proclaim the inviolability of life, freedom and equality, which are the nodal pieces of almost every bill of rights, in reality tell the judges very little about how to resolve the intricate real-life disputes they are called upon to decide. The excellent and grandiose expressions characteristic of all constitutional texts provides little practical guidance on controversial issues, such as women's right to abortion or the right of gays and lesbians to marry people of the same sex. Whether or not religious communities have the right to found separate schools and to seek state support for them and whether those schools can refuse to admit and / or employ people whose customs and/or religion are different from theirs... Likewise, when the Constitutions contain positive guarantees such as, for example, emergency medical treatment or access to adequate housing, the text does not tell the Court whether a person who is dying of renal failure is entitled to receive dialysis treatment or if one homeless is entitled to a shelter against the cold; at least, not explicitly." David M. Beatty, The Essence of the Rule of Law 7 (2014).

[69] Freddy Escobar & Eduardo Nieto, ¿Es el análisis económico del derecho una herramienta válida de interpretación del derecho positivo? 52 Themis Revista de Derecho 341, 346 (2006).

[70] Georges Abboud and Guilherme Lunelli, discussing judicial activism, state, "The idea of judicial activism finds its roots in American law, relating to the hermeneutical difficulties in the interpretation and application of the American Constitution, known to be synthetic and abstract". Georges Abboud & Guilherme Lunelli, *Judicial Activism and Instrumentality of the Process*,

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created in which Brazilian law became dependent upon judicial decisions, or rather, dependent upon judicial definitions about the most important issues in society.[71] The judiciary became the necessary and indispensable branch for the fulfillment of the constitutional text.[72]

Lenio Streck strongly criticizes the doctrine and jurisprudence that insist on the thesis that the "product" of this hermeneutic process "should be in charge of the judge's conviction," a phenomenon that appears under the alibi of arbitrariness. It is as if the Constitution allows itself to be "complemented" by any investor, in spite of the regulatory legislative process.[73]

The activist role of the judiciary inevitably encouraged a large number of lawsuits across the country, leading to a considerable diversity of decisions on identical legal matters.[74]

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242 Revista de Processo 21, 21 (2015). The authors continue, "And it is at this point that the problem of discretion, personal convictions, and, consequently, judicial activism emerges: can the meaning of the constitutional text (or even the laws) be summed up to a mere judgment of convenience of the judge? Is the meaning of the texts available to the interpreter, so that this "pince" –or even creates– the one that, depending on his ideological convictions, pleases him most?... For no other reason, the understanding of judicial activism always leads us to discussions about the normal and adequate function / performance of judges. When we talk about activism, it is mandatory to clarify that we are talking about exceeding the limits of the judiciary activity". *Id.*, at 21, 24.

71 Clarissa Tassinari, Jurisdição e ativismo judicial: limites a atuação do poder judiciário 26 (2013).

72 There are authors, however, who have a different perspective on the role of the judiciary in resolving conflicts, including the process as representative of democracy itself. In this sense, Darci Guimarães Ribeiro explains, "[T]he State must provide that, the essential element of democracy, is exercised in its broadest fullness. However, citizenship is up to the active citizen himself to pressure institutions to realize his interests. In this perspective, the judge appears as a determining actor in the effective creation of the law and in the solution of legitimate social concerns, so that democracy itself is realized when the case presented to the judiciary is resolved." Darci Guimarães Ribeiro, da tutela jurisdicional às formas de tutela 96 (2010). Mauro Cappelletti defends a more creative role for the judge, "It is implicit, in other words, the recognition that a certain degree of creativity is inherent in the judicial interpretation of legislative law. The point, moreover, became explicit by Barwick himself when he writes that even the best art of drafting laws, and even the use of the simplest and most precise legislative language, always leave, in any case, gaps that must be filled by the judge and always allow ambiguities and uncertainties that, ultimately, must be resolved via the judicial process." Mauro Cappelletti, Juízes legisladores? 20-21 (1999). The same author, at a given moment, makes a reservation to this creative power of the judge: "Discretionary does not necessarily mean arbitrariness, and the judge, although inevitably the creator of the law, is not necessarily a creator completely free of ties. In fact, every civilized legal system has sought to establish and apply certain limits to judicial freedom, both procedural and substantial". Mauro Cappelletti, Juízes legisladores? 23-24 (1999).

73 Lenio Luiz Streck, O que é isso? – decido conforme minha consciência? 48 (4st. ed., 2013).

74 Demétrio Giannakos, *A uniformização da jurisprudência: uma justificativa baseada na Hermenêutica Jjurídica e na Análise Econômica do Direito*, 288 Revista de Processo 395, 369 (2019).

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There are several areas of the law that have become extremely judicialized such that courts have had great difficulty in establishing even minimal guidelines or standards, leaving them with few defined decision-making criteria. The health insurance and private contracts sectors are good examples of this.[75]

To resolve the absence of standards used by the judiciary in its decision-making, study of the standardization of jurisprudence is important, especially in light of the provisions of Article 926 of the Civil Procedure Code. The existence of predictability in court decisions can create necessary disincentives for filing lawsuits. Behavioral economics, as applied to judicial proceedings, focuses on this issue. In the words of Eyal Zamir and Doron Teichman:[76]

> A rational plaintiff who considers whether to settle or litigate a case would first calculate the expected return of the case, based on the expected judicial award (or the monetary equivalent of other judicial reliefs), and the probability of attaining it. She would then subtract her expected costs of litigation from the gross expected return, to determine the minimal amount for which she might settle the case —that is, her reservation value. The defendant's reservation value— the maximum amount he might agree to pay to settle the case out of court— would be the expected judicial award plus his litigation costs. Under conditions of full information, accurate assessments of the expected award, and positive litigation costs, a settlement would be Pareto superior to litigation. As long as litigation costs are sufficiently high, even asymmetric information and divergent assessments of the expected judicial outcome do not obstruct settlement.

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[75] Professors Luciana Yeung and Paulo Furquim, in another text written on this subject, address the issue of inefficiency*:* "Judiciary staff members usually credit inefficiency to the lack of resources. Judges and judicial employees argue that human and material resources at all levels are not sufficient to deal with the large number of cases. In recent years, the greatest concern is the continued underutilization of modern electronic procedures. However, legal experts, who are not involved in the daily operations of the courts, point to different explanations. In their view, knowing how to wisely manage available resources is more important than demanding more. Some high-ranking judges also agree with this argument. Another traditional explanation for court inefficiency is the very bureaucratic procedural law that Brazil inherited from the Portuguese and the civil law traditions. This is unanimously agreed upon as one of the primary reasons for the inefficiency. Slackness, a complex system of procedural rules, and an overemphasis on format are traces still present in the law today. In addition to that, criticisms are often directed to the ease of appealing judicial decisions. Some lawyers consider the large number of appeals unavoidable because, they say, it minimizes trial errors. Yet, this conclusion is not supported by the data. Rosenn (1998) shows that 90% of all decisions made in first instance courts is maintained by judges in the appellate courts. In other words, the high level of appeals simply means more useless work, more slackness, and more waste of resources". Luciana Luk-Tai Yeung & Paulo Furquim de Azevedo, *Measuring the Efficiency of Brazilian Courts from 2006 to 2008*: What do the Numbers Tell Us? (2011), available at: *https://www.insper.edu.br/wp-content/uploads/2012/10/2011_wpe251.pdf*.

[76] Eyal Zamir & Doron Teichman, Behavioral law and economics 496 (2018).

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For example, if we had well-defined decisions on specific matters, filing a lawsuit contrary to that precedent would have a low probability of success. In the words of Joshua D. Wright and Douglas H. Ginsburg, making bad decisions is expensive.[77]

The absence of clear answers inevitably results in opportunism on the part of those involved in the judicial process. Oliver Williamson defines it using a famous formulation: "By opportunism I mean self-interest seeking with guile".[78] Williamson adds, "More generally, opportunism refers to the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse".[79] To a certain extent, the economy[80] can assist the law in identifying and diagnosing problems that cannot be resolved by the law itself.

Faced with this problem of opportunism and the general inefficiency of the judiciary, various alternatives have been proposed, including arbitration, mediation, conciliation, procedural legal affairs, and even the application of artificial intelligence.

However, having identified these problems, the question remains as to how to incorporate AI techniques in the provision of judicial services, and how to guarantee that its use will be guided by the appropriate values of justice and fairness. Here, it is important to highlight the word justice, which encompasses the social value of correct, equitable, and adequate resolution of legitimate disputes, as distinguished from the mere provision of judicial services. Thus, the same word addresses concepts having different meanings and objectives which often do not go together.

Richard and Daniel Susskind[81] stress that countless changes result from technological advances and have an effect on the professional's everyday experience, as is the case with the constant digitization of documents and new forms of communication technology, which are implicated in the convergent points of "automation and innovation". In *Tomorrow's Lawyers: An Introduction*

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77 Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033, 1033 (2015).

78 Oliver E. Williamson, The economic institutions of capitalism: firms, markets, relational contracting 47 (1985).

79 *Id.*, at 47.

80 For Adolfo Figueroa, the fundamentals of the economy are as follows: Economic science is concerned with studying particular types of social relationship: those that are established between individuals for the purpose of satisfying needs via the acquisition of goods. These are the economic relations. They give rise to economic activity. The object of economic activity is to produce goods and distribute them among individuals. Because economic activity is constantly repeated, the production and distribution constitute a process, the economic process. This repetition makes it possible to observe certain regularities or laws in economic activity. Adolfo Figueroa, Economic theories of capitalism 19 (1996).

81 Richard Susskind & Daniel Susskind, The future of the professions: how technology will transform the work of human experts 109 (2015).

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to Your Future, Richard Susskind[82] analyzes the impact of technology on the legal environment, specifically as it relates to the judge's function:

> Looking beyond these rudimentary applications, how profoundly could technology affect the work of judges? In the early 1980s, I came to the conclusion that it was neither possible (technically) nor desirable (in principle) for computers fully to take over the work of judges. My position on this has not changed. Judicial decision-making in hard cases, especially when judges are called upon to handle complex issues of principle, policy, and morality, is well beyond the capabilities of current computer systems. However, I believe that some of the techniques and lessons of this book can be applied to judges as much as to other lawyers.

The legal sciences are substantially valuative and ontological, that is, they refer to the subject itself, in its unrestricted and indispensable complexity. Ethical behavior is generally defined socially as that which is good and is directly linked to the moral rules of society generated by its own history and culture.

The magistrate is the agent of the judiciary entrusted with making decisions that are both fair and in accordance with the law. He must make decisions that resolve the actual conflict presented while also considering the ethical values and legal principles that underlie all judicial activity (transparency, legality, right to be heard, wide defense, etc.). The magistrate bases his actions and decisions not only on legal doctrine and the application of the positive rules of the legal system, but also takes into account a wide range of historical knowledge consolidated from centuries of experience examining diverse aspects of legal phenomena, including legal sociology, the history of law, philosophy of law, ethics, that is, all of the so-called "legal sciences".

The idea that machines could make legal decisions for the courts is not new and has existed for decades. The main question is how to introduce all of this knowledge, which is part of the theoretical training of all magistrates, into AI systems.

In some countries, such as Spain and France, this topic has been frequently debated.[83] In November 2018, Professor Dierle Nunes, in co-authorship with Ana Luiza Pinto Coelho Marques,[84] published an article entitled *Artificial Intelligence and Procedural Law: Algorithmic Biases and the Risks of Assigning Decision-Making to Machines*. The authors warn of the risks of assigning decision-making to machines, and in particular, to artificial intelligence systems:

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82 Richard Susskind, Tomorrow's lawyers: an introduction to your future 102 (2017).

83 Marcos Sierra, *El Constitucional prohíbe por primera vez el uso de inteligencia artificial en España*, Vox Populi (Apr. 24, 2020), available at: *https://www.vozpopuli.com/economia-y-finanzas/robots--ahorrarian-cuarta-parte-trabajo-jueces-espanoles_0_1260174449.html*.

84 Dierle Nunes & Ana Luiza Pinto Coelho Marques, *Artificial Intelligence and Procedural Law: Algorithmic Bias and the Risks of Assigning Decision-Making to Machines*, 285 Revista de Processo 421, 421-447 (2018).

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> [T]he decisions made by humans are impugnable, since it is possible to delimit the factors that gave rise to a specific response and the decision maker himself must offer the tier that induced him to such a response … On the other hand, the algorithms used in artificial intelligence tools are obscure for most of the population —sometimes even for their programmers— which makes them, in a way, unassailable. As a result, the attribution of a decision-making function to artificial intelligence systems becomes especially problematic under the law.

Thus, even starting from a comprehensive database and using precedent, a new decision could come to have normative or binding force, causing any later selection and use to generate incorrect results causing a perpetuation of the error and compounding the difficultly of differentiating cases (distinguishing).[85] The authors continue:

> There is no denying that the use of machines can bring several benefits to legal practice. As exposed at the beginning of this work, the implementation of AI systems for conducting research, classifying and organizing information, linking cases to precedents and drafting contracts has been shown to be effective in practice as it provides greater speed and accuracy. However, assigning them the role of making decisions, acting in the same way as a judge, can mean an even greater expansion of inequalities that permeate our Judiciary system, supporting it, moreover, with a technological decisionism. This is because, however biased the decisions made by judges, there is always a certain degree of access to the reasons (even wrong, subjective or biased) that led them to adopt a certain position, because, even if they decide consciously or unconsciously for implicit reasons, their decisions must be substantiated. Thus, in all cases, those affected can challenge and discuss them.[86]

The issues raised by these authors are extremely important to this debate. However, their concerns may be addressed with the evolution of the technology and subsequent advances in AI. There have already been tests conducted comparing the performance of AI with legal professionals which have demonstrated that the machine's success rate tends to be higher than that of a human and that the work can be completed in much less time. In an experiment conducted by LawGeex, for example, a competition was held between its AI and twenty experienced lawyers. The assigned task was to review five terms of confidentiality. The result was surprising: the AI managed to find 94% of the inconsistencies, whereas the average for lawyers was only 85%. One of the human lawyers was able to match the percentage achieved by the AI, that is, 94%. However, another lawyer found only 67% of the inconsistencies. That lawyer missed 27% of the inconsistencies that were present in the terms

[85] *Id.*

[86] *Id.*

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under examination.[87] Regarding the time required to complete the activity, the AI finished the activity in less than 26 seconds, while the average human lawyer took an hour and a half to complete the same task.

France has banned the publication of statistics related to court decisions. The penalty for those who disclose this data is up to five years in prison. The rule is contained in Article 33 of the Judicial Reform Law,[88] which added provisions to other laws as well, such as the Penal Code. The provision establishes that "the identity data of magistrates and judiciary servants cannot be reused with the aim or effect of evaluating, analyzing, comparing, or forecasting their professional practices, real or alleged".[89]

According to the website Artificial Lawyer, French magistrates were uncomfortable with companies using artificial intelligence to systematize public data regarding how magistrates usually decide cases and rule on certain subjects in an attempt to predict the outcome of trials and compare the results with their colleagues.[90]

In practice, the law prohibits analysis of data related to the French judiciary. The change was endorsed by the French Constitutional Council. That court found that French lawmakers sought to prevent mass data collection from being used to pressure judges to decide cases in a certain way or to devise strategies that could harm the functioning of the judiciary.[91]

Professor Lenio Streck,[92] in an article published on the website Consultor Jurídico (Conjur), entitled *Lawtechs, Startups, Algorithms: Law that is Good, Not to Mention, Right?* Asserts:

> I have spoken of this and warned of the paradox: if extreme technologization works, it will go wrong. It is like research that seeks to objectify or mathematize the brain and emotions, with electrodes and quejandos: if it works, it will go wrong, because it ends philosophy.

Thus, the use of new technologies in the law has generated significant concern and criticism which will have to be thoroughly addressed. Yet, two questions remain. First, will it be possible, at some point, to replace the human judge with artificial intelligence? And second, are Brazilian legal provisions on this subject satisfactory in light of modern demands? These are

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87 Wilson Engelmann & Deivid Augusto Werner, *supra* note 45, at 149, 160.

88 Sergio Rodas, *França proíbe divulgação de estatísticas sobre decisões judiciais*, Conjur (Jun 5, 2020), available at: *https://www.conjur.com.br/2019-jun-05/franca-proibe-divulgacao-estatisticas-decisoes-judiciais*.

89 *Id.*

90 *Id.*

91 *Id.*

92 Lenio Streck, *Lawtechs, Startups, Algorithms: Law that is Good, Not to Mention, Right?*, Conjur (Apr. 6, 2020), available at: *https://www.conjur.com.br/2019-mai-16/senso-incomum-lawtechs-startups-algoritmos-direito-bom-nem-falar-certo*.

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questions that will be answered by the legal community in the coming years. In Brazil, the constant increase in the judicialization of social spheres and the increasing cost of the judicial machinery demonstrate the interplay between the twin interests of "efficiency" and "accuracy" in the application of the law. This is occurring despite the introduction of measures whose aim is to stimulate the self-composition of litigation (mediation and conciliation), and to strengthen arbitration as an alternative to judicialization. Rapid application of the law is not an advantage if the decision is incorrect. Likewise, a correct decision is not a benefit if the decision comes too late. A fertile path facilitates the introduction of new technologies into the Brazilian juridical structures, given the continental conditions of the territory as well as the volume of civil and criminal litigation requiring prompt decisions. Artificial intelligence can provide an acceleration of procedures that do not depend on the immediate performance of the judge and can perform functions that are essentially notarial or mechanical in the sense that they follow a well-established protocol not requiring a deep, probative assessment. Considering the range of technological possibilities available, applications limited to reading petitions or the generic identification of the content of a petition could be adopted in different courts of the Federation in order to expedite judicial processes. Further along the timeline, automated systems might be able to formulate "decision suggestions" for the judge, in order to facilitate the magistrate's analytical work, without replacing or diminishing the magistrate's individual responsibility. The gradual reduction in demands on the magistrate would imply (i) a reduction in the cost of the judiciary, and (ii) increased speed on the part of the state in responding to issues involving the protection and enforcement of the rights of persons whose interests are being adjudicated.

V. Technology Problems and Lack of Supervision: The Brazilian Case

The judicial process in Brazil, some years ago, started to aim for a virtual life, inside the computer, away from papers and inks, as well as from signatures and stamps, which adorned thick notebooks that contained people's lives, their struggles and glory, transcribed in a language —sometimes— polished, all in order to (try) to give each one what is his. Today, in addition to the various types of systems, which sometimes make life difficult for users, narratives have become icons that demand clicks; the computer became the procedural notebook, and the stamps became as important as the landline. The pens, distressed, also have an uncertain future.

Bizarre situations, however, have resulted from this procedural virtualization. Recipes for cooking and unorthodox dialogues have entered the record. Memes and emojis, a cultural product of postmodernity, exist alongside coats

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of arms. In some cases, decisions have been made as if multiple-choice forms had been used, lacking any demonstration of effective reasoning.

The pandemic itself, which showed us how fragile humanity is, combined with cameras and tele presential court sessions, where each person is in the comfort of their home, has already made severe constraints emerge. Such cases are punctual and —sometimes— understandable: we are all human beings. Recently, however, a very disturbing case that demanded our reaction went viral on social media.

The attorney general of a Brazilian municipality filed a tax foreclosure against the agency itself; and urged to clarify the situation, having remained inert, she saw an extinction sentence issued. Against that decision, he filed an appeal for a declaration embargo, upholding a material error and arguing for the suspension of the fact until the location of the defendant (the municipality itself). Then there was a summons from the embargoed, executed party to present counterarguments (the municipality would then respond to the opposing embargoes by itself); and, subsequently, there was a decision canceling such summons and rejecting the appeal, in the absence of any defects in the sentence. Resigned, the municipality appealed, seeking in the Court of Justice the reform of the sentence, so that the fiscal execution of the organ would continue to be processed... against itself. There was a decision recognizing that "referral for counter-reasoning was unnecessary, since the executed party did not" had appointed a prosecutor in the case file and determined that the case file should be sent to the 2nd level of jurisdiction, with the style tributes. On 06/18/2020, the *ex lege* representative of the municipality filed a petition informing that the execution was initiated by "system error" and asked for the extinction of the fact for the withdrawal.

This process has been processed electronically since October 17, 2018 (date of distribution), having taken the space of some other process —criminal or not— as well as consuming public resources, being a paradigmatic and quite embarrassing case. Not only because the public entity filed a lawsuit against itself, but also due to the lack of management of the whole situation, pending its solution quickly and efficiently almost two years after its —already inadequate— start.

Given that Brazil is a developing nation with limited resources, the waste of public money continues to appear in one of its worst manifestations, inefficiency, even though this issue has been specifically addressed by the Brazilian Federal Constitution in its Article 37.[93] This case, therefore, had an aggravat-

[93] *See* Brazillian Constitution article 37. The inclusion of the principle of efficiency in the list of principles that bind the Public Administration, provided by article 37 of the Federal Constitution, is linked to the idea of managerial administration and the results of the administrative activity, with a recognition that the public legal regime, being very procedural, "is not able to guarantee the best advantages." Emerson Gabardo, in turn, justifies the need to use the expression "efficiency of the State," in order to cover the administrative, legislative, and judi-

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ing factor: the continuous and repetitive mistakes were made by public agents, all financed by taxpayers. Due to the lack of adequate supervision, the technology ended up generating more inefficiency. The inefficiency affected not only this case, but also had an impact on other important work of the agency since the hours spent on this case could have been allocated to other cases.

Error is a common part of the human experience and is sometimes necessary for learning and progress. A regular succession of errors, however, demands examination. This reflection calls for prudent action and humility from which the human being, with technologies, ended up breaking free. When used with prudence, technology undoubtedly improves man's life, being imperative that he, as an animal that is, limited and insecure in the face of time and the universe, recognizes itself as small, and, therefore, improves its protocols of performance, continuously supervising himself.

VI. Conclusion

There is no doubt that artificial intelligence is here to stay. This also applies its use in the law. Modern society demands faster and more efficient solutions from the judiciary. The positive, preliminary results obtained in the application of AI to the courts suggest the gradual introduction of AI in day-to-day forensics. It will be up to legal practitioners to adapt to the new reality.[94] Artificial intelligence is the most sophisticated type of algorithm and can be understood as a set of commands which aim to imitate or simulate the human decision-making process. With that objective in mind, a set of routines is designed which direct the course of action an automated system takes to arrive at a decision *(output)*. The more elaborate the programmed routine, that is, the degree to which it operates beyond the use of a decision tree or flowchart, the stronger an artificial intelligence is *(strong AI)*, whereas the more

cial functions. Emerson Gabardo, O princípio constitucional da eficiência administrative 18 (2002). Efficiency is the guiding principle for all Public Administration activities, requiring, among other things, speed, and precision, as opposed to slowness, neglect, omission, or negligence. *See also* Odete Medauar, Direito administrativo moderno 152 (2000). Not only is compliance with legal procedures necessary for the efficient performance of administrative functions, but also achieving the desired result. It is important to emphasize, in the words of José Manuel Sérvulo Correia, that "Administrative legality may mean, in the first place, that the acts of the administration must not contradict the legal rules that apply." In our legal system, it would be the same thing to say that the public administration must adhere to the principle of legality. *See also* José Manuel Sérvulo Correia, Legalidade e autonomia contratual em contratos administrativos 18 (1987). Stated simply, efficiency achieves a greater result, both in a quantitative and qualitative sense, at a lower cost, by doing more and better with less. Efficiency always seeks to achieve the best result given the economic resources available. This is called resource optimization. Demétrio Giannakos, *O princípio da eficiência e public choice*, 5 Revista Luso Brasileira de Direito 573, 579 (2017).

94 Fabiano Hartmann Peixoto, *supra* note 43, 71.

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rudimentary and dependent on human involvement it is, the weaker the algorithmic model (*weak AI).*

In what sense could a judge be replaced by a tool based on artificial intelligence? Examples of the applications of artificial intelligence presented in this article demonstrate that for repetitive activities (middle activity), or for decision-making in situations where the rules and hypotheses are predictable and identifiable (end activity), the machine tends to exceed the level human performance in accuracy, the time required to carry out tasks, or both.

Neveretheless, the future of the idea of replacing of judges with AI remains ambiguous, particularly due to uncertainties attributable to the applications themselves and the databases used by the machine. In addition, the difficulty of formalizing the rules, principles, and ethical values that inform all judicial decision-making adds another layer of complexity. Therefore, what remains for legal practitioners to discuss and validate is the degree to which AI can, or should, be applied to the law, since the debate regarding whether or not AI can be introduced into the legal arena in the first place has already become outdated.

Regarding the Brazilian reality, several issues should be highlighted, particularly for researchers who wish to carry out comparative studies on topics related to the feasibility and practicability of potential applications of artificial intelligence. First, the wide range of judicial demands that are filed in national courts which present recurring and low-complexity issues may be suitable for automated decision-making. Second, artificial intelligence may be able to address the need for increased speed in resolving the growing number of judicial actions brought before Brazilian tribunals. Third, the prospect of replacing the judge with automated systems warrants philosophical debate regarding the parameters and significance of the judge's interpretative activity. Software cannot distinguish social classes or consider the prestige of the lawyer who sponsors a case, such that those who present their cases to the court are treated in a similar, albeit automated, way, without any bias based on appearance or prestige. This implies that the supervision of the work carried out by artificial intelligence will occur later, which suggests a confidence in the technology and an ability to correct any error in the evaluation of the algorithm.

As a result, from a jus philosophical perspective, one could argue that judicial replacement by AI could signal the "end of interpretation." This is because an algorithm would not be able to interpret a case (the facts to be decided), rather, it could only associate or connect a ready answer to the case under consideration (a merely legal response). This position has been elaborated by Professor Lenio Streck. In other words, although the system might be efficient, the legal result could be incorrect due to the absence of a principled or contextual analysis that "escapes" the predetermined commands of the routine. This would be a deviation from the judiciary's objective of protecting the rights of litigants. This is clearly not the intended goal

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of those advocating the introduction of innovative technological tools to the judiciary.

Therefore, we can conclude that the replacement of the judge by automated algorithmic tools would require the assessment of two principal factors, even if it does promote efficiency and reduce costs. These factors are *(i)* the adequacy and efficiency of the response to the case under consideration and *(ii)* the ability of computerized routines to adapt and improve the quality of their application of the law by accommodating and incorporating possible human corrections of the automated decisions. Since the aim of artificial intelligence is mimicking the human decision-making process, it must be capable of performing judicial activity which includes correctly applying the relevant legislation and jurisprudence to the specific set of facts of a particular case, as well as correcting any inaccuracies in the interpretation of facts and legal texts. With this in mind, the application of artificial intelligence could be relied upon to resolve low complexity cases, or those involving simple, recurring issues, whereas complex cases necessitating judicial intervention might require that AI systems be limited to use as an aid to the magistrate in the decision-making process.

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A BRIEF REVIEW OF THE HISTORY OF REFORMS TO THE LEGAL REGULATIONS OF POLITICAL PARTIES IN MEXICO*

Jorge Gerardo Flores-Díaz**

Abstract: *This article studies the major reforms in the history of the legal regulation of political parties in Mexico based on the political context in which they took place. The objective is to explain their origin and characteristics. I argue that: 1) The 1946 reform increased requirements for the recognition of political parties; it was passed to prevent the electoral participation of threats to the official party. 2) The 1977 reform loosened requirements for the recognition of political parties; it intended to open the party system to incorporate the extra-institutional opposition. 3) The 1996 reform increased public funding for political parties; it aimed to benefit the PRI in the case of losing the power. 4) The 2007 reform consisting of regulation of intra-party processes was passed to harmonize the constitution with the electoral court's jurisprudence, establishing procedures and conditions. 5) The 2014 reform —standardization of federal and local legislation on political parties—, intended to transfer the characteristics of the federal electoral process to the states. Finally, 6) the most recent reform proposal, reduction of public funding for political parties, is based on the discredit of these organizations and on the exorbitant amount of money they receive. The study shows that the reforms approved during the era of a hegemonic party system (1946, 1977, and 1996) were aimed at benefiting the official party, while the subsequent reforms reflect a pluralistic context and emerged from the judicial power (2007), the opposition political parties (2014), and the civil society (last reform proposal).*

Keywords: *Legal regulation of political parties, political parties in Mexico, reforms of party law, political parties, party law.*

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Resumen: *En este artículo se estudian las reformas más importantes en la historia de la regulación jurídica de los partidos políticos en México a partir del contexto político en el que tienen lugar. El objetivo es explicar su origen y sus características. Se argumenta que: 1) La reforma de 1946, incremento de los requisitos para el reconocimiento legal de los partidos políticos, se aprobó para prevenir la participación electoral de amenazas para el partido oficial. 2) La reforma de 1977, flexibilización de los requisitos para el reconocimiento legal de los partidos políticos, pretendió abrir el sistema de partidos para incorporar a la oposición extra-institucional. 3) La reforma de 1996, incremento del financiamiento público para los partidos políticos, fue aprobada para beneficiar al PRI en caso de que perdiera el poder. 4) La reforma de 2007, regulación legal de los procesos intrapartidarios, tuvo el objetivo de armonizar la constitución con la jurisprudencia del Tribunal Electoral, estableciendo procedimientos y condiciones. 5) La reforma de 2014, estandarización de la legislación federal y local sobre partidos políticos, pretendió transferir las características del proceso electoral federal a los estados. Finalmente, 6) la última propuesta de reforma, reducción del financiamiento público para los partidos políticos, se sustenta en el descrédito público de estas organizaciones y en los exorbitantes montos de dinero que reciben. El estudio muestra que las reformas aprobadas en la era del sistema de partido hegemónico (1946, 1977 y 1996) buscaron beneficiar al partido oficial, mientras que las reformas posteriores reflejan un contexto plural y surgieron del poder judicial (2007), los partidos políticos de oposición (2014) y la sociedad civil (última propuesta de reforma).*

Palabras clave: *Regulación legal de los partidos políticos, partidos políticos en México, reformas de la ley de partidos, partidos políticos, ley de partidos.*

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I. Introduction

In Mexico political parties began to be subject to legal regulation in 1911. Since then, their rights and obligations have had a remarkable expansion. The electoral law of 1911 only had one article regarding political parties, which established basic requirements to its legal recognition. However, currently there is a specific law on political parties (Ley General de Partidos Políticos) containing 97 articles in which multiple aspects of the political parties, from their electoral participation to their internal life, are regulated in detail.

Studies analyzing the legal regulation on political parties in Mexico have been focused basically on a single topic, such as public funding[1] or intra-party democracy.[2] Yet there are also studies that analyze multiple aspects, which are generally aimed at describing its characteristics and changes.[3] Finally, some works examine the law from a normative point of view, aiming at proposing amendments.[4]

However, in spite of the important contributions, this topic is still being insufficiently studied. Thereby, with the aim to contribute to the knowledge of the legal regulation of political parties in Mexico I present in this article an analysis of the most important reforms from its origin to the present (also considering the most recent reform proposal). The reforms are the follow-

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[1] *See* Adam Brinegar et al., *The PRI's Choice: Balancing Democratic Reform and its Own Salvation*, 12 (1) Party Politics 77-97 (2006); Alonso Lujambio, *México*, in Dinero y Contienda Político-Electoral. Reto de la Democracia 368-386 (Manuel Carrillo, Alonso Lujambio, Carlos Navarro and Daniel Zovatto ed., FCE, 2003); Lorenzo Córdova, *El financiamiento a los partidos políticos en México*, in Financiamiento de los Partidos Políticos en América Latina 351-368 (Pablo Gutiérrez and Daniel Zovatto ed., IIJ and IDEA, 2011); Juan Mondragón, Financiamiento de partidos, rendición de cuentas y corrupción en México (FLACSO, 2014).

[2] *See* Francisco Reveles, La democracia en los partidos políticos: premisas, contenidos y posibilidades (IEEM, 2008); Javier Arzuaga, Consideraciones sobre la democracia interna en los partidos políticos. modelos de partidos y debates en torno a su vida interna en México (IEEM, 2012).

[3] *See* José de Jesús Orozco Henríquez & Carlos Vargas Baca, *Regulación jurídica en los partidos políticos en México*, in Regulación jurídica de los partidos políticos en América Latina 579-639 (Daniel Zovatto ed., UNAM, 2006); Francisco José de Andrea, *La regulación jurídica de los partidos políticos en México desde la constitucionalización semántica de los partidos de 1963 hasta la elección presidencial de 1976: un ejercicio de retrospectiva histórica comparada con énfasis especial en el voto de los jóvenes*, 2 Revista Mexicana de Derecho Electoral 59-78 (2012); Francisco José de Andrea, *La regulación jurídica de los partidos políticos en México durante la primera mitad del siglo XX: de la Ley Madero al voto femenino*, in Partidos y sistemas de partidos: experiencias comparadas 179-198 (Francisco Paoli & Gonzalo Ferrera ed., UNAM, 2016).

[4] *See* Lorenzo Córdova, *Hacia una ley de partidos políticos. Ejes temáticos para su discusión*, in ¿Hacia una ley de partidos políticos? Experiencias latinoamericanas y prospectiva para México 133-156 (Raúl Ávila et al., ed., UNAM, 2012); Rosa Mirón, *La regulación partidista en México. Pertinencia, propósitos y contenidos mínimos para una ley de partidos*, 3 Revista Mexicana de Derecho Electoral 399-429 (2013).

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ing: 1) 1946: increased requirements to obtain legal recognition as political party; 2) 1977: constitutionalization of political parties and flexibilization of the requirements to obtain legal recognition; 3) 1996: radical increase in the public funding for political parties; 4) 2007: legislative incorporation of the intra-partisan judicialization, 5) 2014: homologation of the regulation in the federal and state levels, and 6) most recent reform proposal: reduction of state funding for political parties. These reforms are analyzed based on the political context in which they took place aimed at identifying the reasons that explain them.

II. 1946: Consolidating the Hegemonic Party System through the Legal Exclusion of Unwanted Political Parties

The legal regulation of political parties in Mexico started with the 1911 electoral law, approved during Francisco I. Madero's presidency. Madero led in 1910 an armed movement that toppled the authoritarian government of Porfirio Díaz (1876-1880 and 1884-1911), and once in office he tried to establish the foundations of an authentic democratic regime, which implied creating a party system. This law has only basic rules regarding the topic. The Chapter VIII (On Political Parties) had only one article, in which it is established that, to be legally admitted as political party, an organization must have at least 100 members, a political and governmental program, and must have edited at least 16 issues of a propagandistic newspaper before participating in the electoral process.

Since Madero's insurrection, every political actor observed the requirement of being elected to exercise public office. They understood the legitimizing power of the elections.[5] In fact, however, the electoral processes had a secondary roll. The power was in hands of strongmen, whose authority was not based primarily on winning elections, but on military success (caudillos) or on the distribution of goods and favors to his supporters along with the threat or actual use of violence against his opponents (caciques).[6] They, scattered throughout the national territory, founded parties to get in public offices fulfilling formalities.[7] During the revolutionary period it was possible to find hundreds or maybe thousands of national, regional or municipal political parties. Most of them were a personalistic vehicle built to participate in a certain election, and they commonly disappeared when the election was over or depending on the luck of its sponsor.[8]

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[5] Álvaro Arreola, Legislación electoral y partidos políticos en la república mexicana, 1927-1945, 59 (INEH, TEPJF & UNAM, 2015).

[6] Joy Langston, Democratization and authoritarian party survival. Mexico's PRI 56 (Oxford University Press, 2017).

[7] Pablo González Casanova, La democracia en México 46-48 (Ediciones Era, 1976).

[8] José Woldenberg, *Estado y partidos: una periodización*, 55 (2) Revista Mexicana de Sociología 85 (1993).

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At the national level, Álvaro Obregón could centralize the power in his hands. He was at the top of the pyramid of local and regional strongmen. He was elected president in 1920, and in 1924, due to the Constitutional prohibition of reelection, Plutarco E. Calles (his unconditional interior minister) replaced him. Then, in 1928 Obregón tried to occupy the presidency for a second period (the Constitution had been amended allowing *a nonconsecutive reelection* and extending the presidential period from 4 to 6 years). In the presidential election he won 100 per cent of votes; but he was assassinated before assuming the power.

In this context, Calles worked to avoid the breaking of the consensus which had been achieved around the assassinated caudillo. The aim was to keep the stability and to avoid a civil war. Calles proposed the melting of all political forces of the country in a single political organization. He proposed the creation of the National Revolutionary Party (Partido Nacional Revolucionario, or PNR).

Officially, the PNR was born on March 4, 1929, as a "Confederation of caciques". Although not all the relevant local groups in the country took part in its foundation, the party continued seeking the incorporation of new organizations, dividing them, and using also coercive tactics. Few months after the foundation of the party, it was stated that 1800 regional parties shaped it, and the remaining forces lacked an important national organization.[9]

Once the PNR was created, the process of centralizing political power began, being this party a key element to the institutionalization of the Mexican authoritarian regime. Thanks to the official party, the conflicts for power inside the revolutionary elite would be resolved by means of negotiations, without the need to use violence. The PNR began as a simple confederation of the most important political groups in the country, yet it became a bureaucratic structure highly disciplined which, in symbiosis with the government apparatus, enabled the revolutionary elite to maintain control of the political power.

In 1938 the PNR changed its name to Party of the Mexican Revolution (Partido de la Revolución Mexicana, or PRM). Thereby, it stopped being a *confederation of caciques* to become a mass party based on 4 sectors: labor, peasant, popular and army (the latter was suppressed in 1940).[10] The next organizational transformation of the party took place in 1946, when the PRM became Party of the Institutional Revolution (Partido Revolucionario Institucional, or PRI). This change implied the consolidation of the party. The centralization of the decision making was strengthened, bureaucracy became

[9] Luis Javier Garrido, El partido de la revolución institucionalizada (medio siglo de poder político en México). La formación del nuevo estado en México (1928-1945) 108 (Siglo XXI, 1982).

[10] Miguel González Compeán & Leonardo Lomelí, El partido de la revolución. institución y conflicto (1928-1999) 178 (FCE, 2000).

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a central characteristic, and the prominence of the president of the republic *vis a vis* the party became routinary.[11]

The creation of the official party (the party of the revolution, PNR-PRM-PRI) changed radically the Mexican party system, from an atomized one to another in which a single party controlled by itself the power of the state. There were opposition political parties, but they obtained just a marginal representation in every election. Considering the undemocratic character of the regimen, it was a hegemonic party system.

Once in place, the most important challenge to the survival of the hegemonic party did not come from marginal opposition groups, but from inside the party itself, from a possible division of the governing elite.[12]

The cases of Juan A. Almazán, who left the official party and created the Revolutionary Party of National Unification (Partido Revolucionario de Unificación Nacional, or PRUN) to run against the official candidate for the presidency of the republic in 1940, Ezequiel Padilla, who followed that same example with the Mexican Democratic Party (Partido Demócrata Mexicano, or PDM), in 1946, and Miguel H. Guzmán, who did the same in 1952 with the Federation of Mexican People's Parties (Federación de Partidos del Pueblo de México, or FPPM),[13] support this statement.

The first of those ruptures (Almazan's split) encouraged the regime's leaders to find ways to close the "exit option" where ambitious presidential contenders within the official party left it if they did not get the nomination, creating threats for the survival of the regime.[14]

To address this problem the party changed the electoral law. The objective was to control the electoral arena, banning the participation of threatening contenders. On January 7, 1946, the Federal Electoral Law was published, which gave the monopoly of the representation to political parties. Article 60 of this law established that "only political parties can nominate candidates". By doing so, the official party would not have to deal with independent opposition candidates. Additionally, it was established that to be legally recognized as political party an organization had to have at least 30,000 members, with two-thirds of states having at least 1000 members (article 24). In this way, the requirements to form a political party were increased (the minimal number of members went from 100, in the last legislation, to 30,000). Finally, the legal recognition of parties was left in hands of the Federal Electoral Commission, dependent of the Secretary of the Interior.

The new regulation on political parties helped the PRI to stay in power by creating many obstacles for other political groups to be officially recognized

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[11] Francisco Reveles, Partido revolucionario institucional: crisis y refundación 21 (UNAM & Gernica, 2003).

[12] Langston, *supra* note 6, at 38.

[13] Rosa María Mirón Lince, El PRI y la transición política en México, 100-108 (UNAM & Gernika, 2011).

[14] Langston, *supra* note 6, at 39.

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as political parties (and thus to participate in elections). In practice, only opposition groups which did not represented a threat to the PRI's hegemony obtained legal status as political parties. Thereby, the electoral law of 1946 was a tool to avoid splits within the PRI's structure. It created negative incentives for members willing to leave the party, in view of the fact that if they were to do it, they would lose their chances to run for public offices.[15]

III. 1977: The Opening of the System. The Incorporation of Extralegal Political Parties

The official party was one of the two main pieces of the authoritarian political system in Mexico —which lasted until 2000—. The other one was a presidency of the republic with exceptional faculties. Both elements were intrinsically related, and its strength depended on each other.[16]

The presidency had an outstanding prominence not only because of its constitutional faculties, but also because of its informal, or meta-constitutional, ones.[17] Among its constitutional faculties it should be mentioned its position as chief executive, with legislative faculties —such as law initiative and veto power over the laws approved by the Congress—, and faculties regarding the budget and economy of the country. One of its meta-constitutional prerogatives was its leadership in the PRI, by which the president was the real chief of the official party that ruled the public offices at national, state, and municipal level, a faculty which gave him a wide control over the decision making at all levels and powers of the state.

The executive power manipulated the access to public office at convenience. As mentioned, the Secretary of the Interior, through the Federal Electoral Commission (Comisión Federal Electoral, or CFE), granted legal recognition as political party (needed to postulate candidates for public offices) only to political organizations without real chances of defeating the PRI. Additionally, the CFE was in charge of organizing ballots and counting votes, having thus the chance of committing fraud, if it was imperative.

With these rules, the official party was able to consolidate its hegemony. Its unity and discipline, as it was argued, was based on the same rules. Leaving the party to challenge it in the ballots box stopped being a possibility. Moreover, the banning of the reelection, established to all public offices in 1933, created one more incentive to stay with the party and remain loyal. The ambitious militants, defeated in the selection of candidates, would have the op-

[15] Other informal practices to block internal splits include the restriction of possible party presidential successors to PRI politicians serving in the president's cabinet, the prohibition for cabinet members to openly admit their presidential aspirations, and the "dedazo" (finger tapping) or the right of the president to choose his own successor, Langston, *supra* note 6, at 40.

[16] Daniel Cosío Villegas, El sistema político mexicano (Joaquín Mortiz, 1975).

[17] Jorge Carpizo, El presidencialismo mexicano (Siglo XXI, 2010).

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portunity again to get in public office (every three and six years) and those members occupying public offices had to show loyalty, because otherwise they would not be considered to represent the party again.

Threats to PRI's hegemony were no tolerated. However, the interest in keeping elections working prevented the system from getting completely shut down. Three political parties took part in every electoral process since the 1950s: the National Action Party (Partido Acción Nacional, or PAN), the Popular Socialist Party (Partido popular Socialista, or PPS), and the Authentic Party of the Mexican Revolution (Partido Auténtico de la Revolución Mexicana, or PARM). The PAN was a weak party, and, in any case, it was possible to commit electoral fraud to ensure its defeat. The remaining parties worked as PRI's allies: since 1958 both PPS and PARM advocated PRI's candidate for the presidency.[18]

The official party used its sectors (labor, peasant, and popular) to be in touch with the people, but the relationship was hierarchical and authoritarian. There were no means of transmitting demands to the government —which grew fast in a modernizing society—, and every attempt to develop an independent organization or protest was repressed based on the 145 and 145 bis articles of the Penal Code, which typify the "social dissolution crime".[19] Civil rights, thus, were seriously limited.

In this context, the elections did not fulfill the function of channeling the citizen's preferences regarding who should rule and what kind of policies should be made.[20] As a consequence, the dissatisfaction with the regime rose.

In the 1950s labor, peasant, professional, academic and student protests took place, but they were repressed, and its leaders jailed.[21] The abuse of power reached an intolerable level even to the legal opposition parties. After the 1958 election, the PAN complained about an alleged electoral fraud, removed its representative in the CFE, and asked its elected deputies not to attend the Congress.[22]

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[18] Octavio Rodríguez Araujo, *Partido Popular Socialista*, in La Reforma Política y los Partidos en México 146-149 (Octavio Rodríguez Araujo ed., 1987). Alfonso Guillén Vicente, *Partido Auténtico de la Revolución Mexicana*, in La Reforma Política y los Partidos en México 156-160 (Octavio Rodríguez Araujo ed., 1987).

[19] The social dissolution crime was created during the Second World War based on the idea that it would be useful to fight against the Nazis. In the context of Cold War, it was used against the opposition accused of being communist preparing subversions. The punishment was 12 years in jail, which added to other crimes could keep dissidents jailed for life, Pablo González Casanova, El estado y los partidos políticos en México 128 (ERA, 1988).

[20] Margarita Favela, *Sistema político y protesta social: del autoritarismo a la pluralidad*, in Los Grandes Problemas de México vi. Movimientos Sociales 107-108 (Ilán Bizberg, Ilán & Francisco Zapata ed., COLMEX, 2010).

[21] Martha Singer, *Partido dominante y domesticación de la oposición, 1951-1963*, in El Siglo del Sufragio. De la no Reelección a la Alternancia 161-162 (Luis Medina ed., FCE, 2010).

[22] Soledad Loaeza, El partido acción nacional: la larga marcha, 1939-1994. oposición leal y partido de protesta 267-268 (FCE, 1999).

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To prevent the conflict from climbing, the government combined repression with concessions. On July 22, 1963, the Constitution was amended establishing that those political parties who obtained at least the 2.5 per cent of national voting would receive five seats in the chamber of deputies, plus one seat more for each extra 0.5 per cent of the votes, up to 10 per cent. Additionally, on December 28, 1963, the electoral law was amended granting tax exemption to political parties. Finally, it was established that those elected deputies who do not attend the Congress would lose their political rights for six years, suffering the political parties they belong to the temporal or definitive suspension of its registration.

According to Molinar[23] this reform followed a "carrots and sticks strategy". The regime offered benefits to political parties willing to play inside the institutional limits (carrots), while punished those unwilling to cooperate (sticks). This strategy was successful in the short time. Legal political parties obtained more seats in the lower chamber, leaving (temporarily) anti-system tactics and joining the legislative work.

However, the stability was ephemeral. The system was still closed and unwilling to incorporate social groups that did not fit its corporative arrangement or the controlled opposition. Considering itself to still being underrepresented, the PAN returned to usual anti-system tactics. At the end of the 1960s and in the 1970s the system went into crisis. The subversive opposition grew and so did the repression.

The clash was especially acute in the 1968 and 1971 slaughters and in the fight between guerrilla groups and paramilitary organizations (dirty war). More benefits for the institutional opposition were established, but they were unsuccessful in view of the fact that the main problem was not faced: the most belligerent opposition did not have an institutional way of participation.

Finally, the democratic facade went down in 1976. Due to an internal conflict, the PAN did not participate in the presidential election of that year,[24] and the PRI's candidate (José López Portillo) was the only option for voters. So, with protesting movements all around the country, there was not a single opposition party running against the PRI.

As a reaction, the government opened the party system. On December 6, 1977, a Constitutional amendment declared the political parties *public interest entities*, which means that, without being state institutions, they fulfill important functions for the society —such as making access to the political power possible for all citizens—, which justify state protection. A new electoral law (Federal Law of Political Organizations and Electoral Processes, or Ley Federal de Organizaciones Políticas y Procesos Electorales, LFOPPE) was published (December 27, 1977), which established a new way to obtain legal recognition as political party and thus to participate in elections: the *conditioned recognition.*

[23] Juan Molinar Horcasitas, El tiempo de la legitimidad: elecciones, autoritarismo y democracia en México 65 (Cal y Arena, 1991).

[24] *See* Loaeza, *supra* note 22, at 308-313.

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With this instrument, it was not mandatory to fulfill all the requirements to form a political party (to participate in elections). If a political organization willing to postulate candidates for public offices demonstrated that it represents "an opinion group who expresses a political ideology present in the nation", and that it had undertaken permanent political activities during four years before requesting the admission, or just one if it had been working as National Political Organization, it would be able to postulate candidates. The new legislation also established more rights for political parties, as having permanent access to radio and television, and having an office to organize public meetings —in the center of the uninominal electoral districts—. Finally, on September 27, 1978, an Amnesty Law was published which benefited all the political opponents arrested for the security forces.

The legal regulation of political parties, which emerged from the 1977 reform, changed the institutional logic established since 1946. The previous legislation had the objective of excluding the opposition, but the new one had the objective of including it. Besides, the new prerogatives to political parties represented another incentive aimed at stimulating the canalization of discontent by means of institutional opposition through political parties and electoral participation.

In 1963 the era of legally protected political parties began, but it was not until 1977 when protection became part of a comprehensive policy whose objective was to incorporate dissident groups into the institutional system. Even so, this did not imply the transformation of the regime into a fully democratic one. Dissidents acquired important rights, but the electoral processes continued to be inequitable and electoral fraud was still a resource in the hands of the PRI. Once again, the law on political parties was modified to favor the official party. The 1977 reform had the objective of opening up the political system while the PRI still controlled the access to power. The idea was to liberalize, not to democratize the regime. The authoritarian controls were loosened, and the opposition was incorporated, but just enough to defuse the crisis, thus maintaining the democratic facade.

IV. 1996: Assuring Survival. Drastic Increase of Public Funding for Political Parties

The 1977 political reform achieved its purpose, and the opposition began to use the institutional means to express their dissatisfaction with the status quo. In the 1979 elections three new opposition political parties participated: the Mexican Communist Party (Partido Comunista Mexicano, or PCM), the Worker's Socialist Party (Partido Socialista de los Trabajadores, or PST), and the Mexican Democratic Party (Partido Demócrata Mexicano, or PDM), and others joined the political arena in the next years, yet not all of them kept legal recognition.

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In the 1980s the engine of the political change was the economy. In reaction to the hard economic crisis of the beginning of this decade, the government implemented an orthodox stabilization plan. Minimal wage was limited, state spending was frozen, and the consumption subsides were reduced.[25] These actions generated a widespread social discontent.

Dissatisfied business groups blamed the authoritarian regime for the economic crisis and decided to participate in politics against the official party. The PAN was the ideal participation channel because of the ideological convergence on topics like the defense of private property or freedom in education.[26] The new PAN members brought money and organizational infrastructure to the party. Thanks to them, the PAN increased its competitiveness —especially in the northern part of the country— and started to win elections.

On the other hand, due to the economic crisis, the PRI had to face not only a growing and aggressive opposition, but also internal conflicts. The exclusion of the traditional politicians in favor of experts in economy (technocrats) resulted in the emergence of an internal faction: the Democratic Current (Corriente Democrática, or CD). This group was formed by "prominent individuals marginalized by the technocracy", whose purpose was to push to democratize the presidential candidate selection method for the 1988 election and to change the economic policy of the government.[27]

The demands of the CD were ignored and as a consequence this group left the official party and postulated its leader, Cuauhtémoc Cárdenas, as presidential candidate for the 1988 election. The CD sponsored the creation of the National Democratic Front (Frente Democrático Nacional, or FDN) where converged the independent left (Partido Mexicano Socialista, or Mexican Socialist Party, PMS), the satelital left (PPS, PARM and the Cardenist Front of National Reconstruction Party, Frente Cardenista de Reconstrucción Nacional, or PFCRN), and the extraparliamentary left (organizations such as the National Civil Revolutionary Association, Asociación Cívica Nacional Revolucionaria, or ACNR).[28]

Thus, in the 1988 presidential election the PRI candidate, Carlos Salinas de Gortari, faced two strong adversaries: Manuel Clouthier, postulated by the oldest opposition party (PAN), and Cuauhtémoc Cárdenas, postulated by the new political force (FDN).

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[25] María Lorena Cook, Kevin Middlebrook & Juan Molinar, *Las dimensiones políticas del ajuste estructural: actores, tiempos y coaliciones,* in Las Dimensiones Políticas de la Reestructuración Económica 56 (María Lorena Cook et al., ed., Cal y Arena, 1996).

[26] Soledad Loaeza, El llamado a las urnas 261 (Cal y Arena, 1989).

[27] Mirón, *supra* note 13, at 192 y 193.

[28] Víctor Hugo Martínez González, Fisiones y fusiones, divorcios y reconciliaciones: la dirigencia del partido de la revolución democrática (PRD), 1989-2004 49 (Plaza y Valdés, 2005).

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On July 6, the day of the electoral journey, the conflict was unavoidable when the computer system "went down" and the official results gave the victory to the PRI candidate, with 50.74 per cent of the votes, against 31.06 per cent of the FDN candidate and 16.81 per cent of the PAN candidate.[29] According to Magaloni "there is no doubt that the PRI committed fraud", however, "it is impossible to know if the PRI would have actually lost the presidency had there been no electoral fraud".[30] The opposition parties rejected the results, but the PAN and the FDN followed distinct paths and their protests had no consequences in the official results.

After the election, Cárdenas took advantage of the FDN structure and sponsored the creation of the Party of the Democratic Revolution (Partido de la Revolución Democrática, or PRD). Officially it was born on May 26, 1989, and inside it converged many (but not all) of the political groups that supported the FDN candidacy in the 1988 presidential election.[31]

During Salinas' presidency (1988-1994) the opposition still demanding free and fair elections and, in response, more electoral reforms were approved. Among other aspects, in 1989-1990 the Federal Electoral Tribunal (Tribunal Federal Electoral, or TRIFE) was created as an autonomous jurisdictional electoral body, and the Federal Electoral Institute (Instituto Federal Electoral, or IFE) was born as an autonomous administrative electoral body, which replaced the governmental CFE in the function of organizing the electoral processes.

In 1993 a meeting took place between a group of prominent entrepreneurs and the president of the republic, where they agreed to donate 750 million dollars to the PRI.[32] This revelation unleashed a political scandal, which led to establish limits on private donations, limits on campaign expenditure and the mandate for political parties to present annual expense reports.

Additionally, the electoral crimes were added to the penal code, and in 1994 the Specialized Prosecutor's Office of Electoral Crimes (Fiscalia Especializada para la Atención de Delitos Electorales, or FEPADE) was established. These reforms improved the fairness of the electoral processes.

In the 1994 presidential election the three main contenders were: Ernesto Zedillo (PRI), Diego Fernandez de Cevallos (PAN), and Cuauhtémoc Cárdenas (PRD). The winner was Zedillo, who reached 50.18 per cent of the valid voting while Fernandez de Cevallos reached 26.69 per cent, and Cárdenas 17.06 per cent. The high electoral participation (77.2 per cent of the electorate) and the positive evaluation that the national and international observers

[29] Molinar, *supra* note 23, at 219.

[30] Beatriz Magaloni, Voting for autocracy. Hegemonic party survival and its demise in Mexico 239 (Cambridge University Press, 2008).

[31] Martínez, *supra* note 28, at 61.

[32] María Casar & Luis Ugalde, Dinero bajo la mesa. Financiamiento y gasto ilegal de las campañas políticas en México 31 (Grijalbo-MCCI, 2018).

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gave to the election legitimated the results. However, the spending was excessively unequal, which was noted by Zedillo, who said that "the election was legal but also unbalanced". The PRI spent 71.4 per cent, the PAN, 17.8 per cent, and the PRD, 6.05 per cent of all the resources used by the parties in the presidential election. And in the case of the Congressional elections the disparity was even more dramatic. The PRI spent 77.25 per cent of all the resources used in the campaign for deputies, and 81.24 per cent in the campaign for senators. In this context, the PRI elite sponsored an electoral reform whose central issue regarding political parties was the public funding for these organizations.[33]

In 1996, after a series of debates, seminars and workshops which gathered the PRI, the opposition parties (PAN, PRD and PT) and experts from civil society, the constitutional amendment was unanimously approved.[34] Article 41 established that the public funding for political parties must prevail over the private funds and that its distribution must be equitable, specifying that 30 per cent must be delivered on exactly equal terms and 70 per cent according to the electoral strength of each party.

However, the consensus was broken at the moment of deciding the total amount of public funding for political parties. The opposition wanted a moderate rise, while the PRI demanded a significant one. In the end the PRI imposed its majority[35] and the public funding increased in 476 per cent compared to the original proposal,[36] which implied a rising equivalent to five times the amount that the parties reported having spent in 1994.[37]

The exponential growth of the public money delivered to political parties was normatively justified on the idea that: 1) it would make transparent the resources used by the political parties; 2) it would balance the competition among parties, and 3) it would prevent political parties from becoming hostages of big economic groups or criminal organizations.[38] However, following Brinegar et al.,[39] the underlying aim of the PRI was to ensure its own survival.

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[33] Ricardo Becerra et al., La mecánica del cambio político en México 371-373 (Cal y Arena, 2005).

[34] Jacqueline Peschard, *De la conducción gubernamental al control parlamentario: 30 años de reformas electorales*, in Los Grandes Problemas de México XIV. Instituciones y Procesos Políticos 382-385 (Soledad Loaeza and Jean Francois Prud'homme, ed., COLMEX, 2010).

[35] In the LVI legislature (1994-1997) the PRI had 301 deputies, the PAN 119, the PRD 70, and the Worker's Party (Partido del Trabajo, or PT) 10. Francisco José de Andrea, Breve historia del congreso en México: siglo XX 99-100 (UNAM, 2012).

[36] John Ackerman, Órganos autónomos y democracia. El caso de México 85 (Siglo XXI, 2007).

[37] Brinegar et al., *supra* note 1, at 81.

[38] José Woldenberg, Historia mínima de la transición a la democracia en México 115 (COLMEX, 2012).

[39] Brinegar et al., *supra* note 1.

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By the 1990s it was clear that the voting trend was unfavorable to the PRI —in every presidential election since 1958 (except for the 1976 election) it lost some percentage of voting—,[40] and the electoral reforms passed after the controversial 1988 election eliminated the electoral fraud. Thus, the PRI could not take the electoral victory for granted anymore. In this context, the official party saw a trustworthy income in the public funding to survive even in case of losing the resources from controlling the federal government. Thereby, having enough deputies to reform the electoral law by itself, the PRI decided to increase drastically the amount of public funding for political parties (against the desires of the opposition) to assure its own survival. In fact, as Langstone claims,[41] public funding constituted a key element to understand the PRI survival after 2000 (when it lost the federal government).

V. 2007: Regulating State Intervention in Political Parties' Internal Affairs

Since the 1980s, the competitiveness of the electoral processes escalated considerably, and the PRI begun to lose important public posts. In 1997 for the first time in its history this party lost the majority in the chamber of deputies, and in 2000 the presidency of the Republic.

In this context, the opposition parties' candidacies for public offices became very valuable. Winning elections was a real option for opposition political parties and the cost of the campaign would be covered in an important percentage by the state (because of the 1996 reform on public funding for political parties). Consequently, the conflicts within the parties rose. The struggle for the candidacies not always ended smoothly, and on occasion the losers claimed that the leadership-imposed winners, violating the rules of the party and their partisan-political rights. However, until 2003 they had no option but to accept the defeat or to leave the party, in view of the lack of an independent state body in charge of resolving internal disputes and protecting the rights of the party members against the violations committed by the intra-partisan authorities. In 2003 this situation changed as a result of a judicial sentence.

In 1996 the TRIFE (electoral court) became Electoral Tribunal of the Federal Judicial Power (Tribunal Electoral del Poder Judicial de la Federación, or TEPJF) and it was put in charge of defending the citizens' political-electoral rights. The instrument created for this purpose was the Trial for the Protection of the Political-Electoral Rights of the Citizens (Juicio para la Protección de los Derechos Político-Electorales de los Ciudadanos, or JDC),

[40] Octavio Rodríguez Araujo & Carlos Sirvent, Instituciones Electorales y Partidos Políticos en México 217-221 (Jorale, 2005); Molinar, *supra* note 23, at 219.

[41] Langston, *supra* note 6.

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which is something similar to an *habeas corpus*, but specifically to guard political rights.

However, in spite of being an instrument created to protect political rights, originally the JDC was not appropriate to resolve intra-partisan disputes. Thereby, when members of different political parties asked for the electoral court's protection against alleged violations of their rights committed by the authorities of the parties they belong to, the appropriateness of the application was always denied. In 1997 the electoral court claimed that neither in the Constitution nor in the law was there the possibility, explicit or implicit, of judicially checking the decisions made by the internal authorities of the political parties since the JDC is only appropriate against decisions made by state electoral authorities. Yet, members of different parties kept demanding the protection of their rights by the Electoral Court, thus encouraging a subsequent change in the judicial interpretation.[42]

In 2003 the TEPJF decided the appropriateness of the JDC to resolve intra-partisan disputes, claiming that the Constitution establishes in article 99 that it must resolve the disputes over alleged violations of the citizens' political rights, without establishing its inappropriateness in the case of violations committed by political parties. Therefore, the TEPJF changed the interpretation of the constitution and since 2003 this authority resolves the conflicts within the political parties as final court. Some years later, this judicial decision was incorporated in the law. The 2007 political reform harmonized the Constitution with this electoral jurisprudence. The reform established the competence of the TEPJF to resolve the intra-partisan conflicts, but at the same time it added two conditions. Since 2007 Article 41 of the Constitution dictates that the electoral authorities 1) *could intervene only in the internal affairs of the political parties according to what the Constitution and the law established*. Additionally, article 99 of the Constitution indicates since the same year that 2) the Electoral Tribunal *could intervene only when the complainant has exhausted the intra-party bodies of conflict resolution*.

According to González and Báez, the purpose of the constitutional reform was to limit as much as possible the intervention of the electoral court in the internal affairs of the political parties, since the legislators consider it an extreme judicialization that damages the Mexican democracy.[43] However, the conditions created do not avoid the effective intervention of the TEPJF in the internal life of the political parties. In 2008, article 46 of the electoral law (Código Federal de Instituciones y Procedimientos Electorales, or COFIPE) established that the "internal affairs of the political parties encompass the actions and procedures related to their organization and working" and in general the "decisions made by its leading bodies and

[42] *See* Manuel González Oropeza & Carlos Báez Silva, La intervención de los órganos electorales del estado en la vida interna de los partidos políticos (IIJ, 2010).

[43] *Id.*, at 2, 3.

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by the internal organizations that group its members". Therefore, practically every intra-partisan process could be judicially contested. On the other hand, the obligation to exhaust the intra-party bodies of conflict resolution does not imply avoiding the intervention of the electoral Tribunal, since it is still the maximum authority. Additionally, the TEPJF created the *per saltum* criterion, which allows a citizen to request its direct intervention when there is a risk that exhausting other authorities could leave the contested decision irreparable.[44]

In summary, the 2003 judicial decision of the electoral Tribunal changed to the full extent the logic of the intra-partisan processes in Mexico. The prohibition of the state intervention in the internal life of the political parties was abandoned in favor of new rules that, aiming to protect the political rights of the citizens affiliated to them, allow the state intervention (through the judicial electoral branch) in its internal affairs. And, finally, the 2007 political reform harmonized the law with what already occurred by a judicial decision.

VI. 2014: Centralizing the Rules

The last legal reform concerning political parties was approved in 2014, as part of a wider electoral reform whose objective was to centralize in the federal electoral authorities many functions regarding the organization of the local electoral processes. According to its sponsors, centralizing the organization would result in fairer electoral processes.

The state electoral processes were relegated for a long time. During the transition to democracy what mattered was what happened in the federal level. However, once accomplished the organization of reasonable free and fair electoral processes in this level, what happened in the states became more relevant.

In Mexico since 1946 the federal elections (for the Presidency of the Republic and both chambers of the Congress) are organized and qualified by federal bodies, while state elections (for governorships, state Congresses and municipalities) by local ones. Due to the principle of states sovereignty, the reforms that in the federal level created trustworthy electoral institutions (administrative and judicial bodies in charge of the elections) were not followed with the same rigorousness in the local level. As a result, the freedom and fairness of the elections in the states were not an undoubted reality.

Since 2007, the political parties of the opposition claimed that most of the governors controlled the decisions made by their local Congresses and, indirectly, the decisions made by the local electoral institutes, thus damaging

[44] Carlos Báez & David Cienfuegos, *El per saltum en el derecho procesal electoral federal*, 42 (126) Bol. Mex. de Der. Comp. 126 (2009).

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the reliability of the electoral processes. To address this problem, legislators from different political parties proposed centralizing in the federation the organization of the local elections through a new electoral institute (National Electoral Institute), which would substitute the Federal Electoral Institute (Instituto Federal Electoral, or IFE) and the 32 local electoral institutes (Flores and Faustino 2014, 141-143).

After debating different bills, the reform aimed at centralizing the local electoral processes was passed in 2014. Two new laws emerged, both General, which means that they have jurisdiction in federal and local levels. The General Law of Electoral Institutions and Procedures (Ley General de Instituciones y Procedimientos Electorales, or LGIPE) and the General Law of Political Parties (Ley General de Partidos Políticos, or LGPP). With the LGIPE, the National Electoral Institute (Instituto Nacional Electoral, or INE) was created, which is in charge of appointing the members of the direction bodies of the local electoral institutes. Thus, the local electoral bodies were not eliminated, but its integration is now a responsibility of the INE and is no longer a prerogative of the local legislature. On the other hand, the LGPP concentrated all matters concerning political parties –with the exception of access to mass media, which remains in the LGIPE–, and homogenized the federal and local rules in the following aspects: 1) requirements to form new political parties and to keep legal recognition, 2) public funding, 3) auditing, 4) access to mass media, and 5) gender quote (parity).[45]

In sum, in 2014 as part of a reform whose objective was to limit the local autonomy concerning the organization of electoral processes, the legislation on political parties was centralized. With the new general laws (LGIPE and LGPP) the states lost autonomy to dictate their own rules on political parties, and the new national electoral authority (INE) acquired the responsibility of enforcing the legislation in both federal and state levels.

[45] 1) The creation of a new political party requires a number of members representing at least 0.26 per cent of the electoral registration at the national level (for national political parties) or at the state level (for local political parties). To keep their legal recognition political parties, need to obtain at least 3 per cent of the national votes (for national political parties) or state votes (for local political parties). 2) The amount of public funding for political parties is calculated based on the number of citizens listed in the electoral register multiplied by 65 per cent of the minimum wage (since 2016 the "Measurement and Updating Unit" replaced the minimal wage). 30 per cent of the resulting amount is delivered in equal terms and 70 per cent based on the votes each party gets, in national and state elections. 3) The INE is in charge of overseeing the incomes and expenditures reported by the political parties, but it can delegate this function to the local electoral institutes in the case of resources reported at the state level. 4) the political parties receive official time from the state on radio and TV. The distribution of the time is based on the following: 30 per cent in equal terms and 70 per cent according to the electoral strength of each party. 5) Political parties have to postulate equal number of candidates of each gender for the federal and local legislatures.

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VII. Most Recent Reform Proposal: Reducing Public Funding for Political Parties

Since the 1996 reform on public funding for political parties, in Mexico these organizations receive one of the most generous amounts of state financing in the world. As a result, the political parties in this country have been able to build huge bureaucratic structures and they also have been able to genuinely compete for political power. Partly because of this, Mexico has a competitive and, consequently, a democratic party system.

However, at the same time political parties have been one of the most discredited institutions. The 2017 latino-barometer report revealed that only 9 per cent of Mexicans trust political parties, which represented the lowest support reported by this organization since 1995. In the latest report (2018), trust in political parties increased to 11 per cent, but it is still lower than the average in Latin America, which is 13 per cent.[46]

Dissatisfaction with the political parties has encouraged the demand to reduce or even to eliminate the public financing they receive. In this regard, the proposal came from the civil society. In May 2012 more than 350 representatives of civil society organizations gathered in the "First Citizen Summit" and agreed to present a common agenda of reforms to the parties which ran in the elections of that year. The proposals included the reduction of public funds for political parties.[47]

When the electoral process finished, the proposal was resumed in the "Pact for Mexico", an agenda of reforms signed on December 2, 2012, by the main political parties (PRI, PAN and PRD). However, the approved reform went in the opposite direction. In 2014 the formula to calculate the total amount of public funding for political parties in the states was homologated with the one used in the federal level. As a result, the total amount increased, since most of the states used (until 2014) a formula that granted a smaller quantity of resources.[48]

Yet, the idea of reducing public funding for political parties has not been discarded. On September 7 and 19, 2017, two earthquakes severely damaged a number of Mexican states.[49] These natural disasters took place when

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[46] *See https://www.latinobarometro.org/lat.jsp* (last visited October 25, 2020).

[47] Maite Azuela, Primera cumbre ciudadana para construir un México pacífico y justo: una historia que debe contarse (UNAM, 2013).

[48] César Astudillo, *Con la cuchara grande*, 256 Voz y Voto (2014); Casar & Ugalde, *supra* note 32, at 46.

[49] The first earthquake was especially serious in the states of Chiapas and Oaxaca, and the second one in the states of Morelos, Puebla, Guerrero, Tlaxcala, Veracruz, Estado de México, and Mexico City. Together they were responsible for 464 dead victims and infrastructure loss for 48 000 million pesos (around 2 400 million dollars). *Recuento de los daños 7S y 19S: a un mes de la tragedia*, 17 Notas Estratégicas, Instituto Belisario Domínguez, Senado de la República (2017).

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the 2018 electoral process begun, in which more than 3400 public offices at the federal and local level would be elected, including the presidency of the republic and the federal Congress. Confronting the emergency, thousands of people took to the streets attempting to rescue the victims from the debris, and to donate, gather and deliver provisions to people in need. The rise of popular participation also had political consequences.

After the first earthquake (September, 7), it was proposed that the public funds that the political parties would receive in 2018 be used to help the victims and to rebuild the damaged infrastructure. The political parties altogether would receive 6 782 million pesos (including 79 million to independent candidates).[50] The proposal, which circulated in the first place in the social media, began asking to use 20 per cent of the public funds for political parties. The first reaction of some members of the political parties was against the proposal, claiming that using the public funds to a purpose not established in the law is illegal. However, after the proposal became a demand widely supported by the public,[51] the political parties adopted the idea, even proposing the total elimination of public funds for them.[52]

Many legislative proposals aimed at reducing public funding for political parties have been presented in congress (21 just from September 2018 to December 2019). However, there are significant disagreements among them regarding the formula and method of resource allocation,[53] and therefore it has not been possible to pass any bill.

The initiative presented by the Committee on Constitutional Issues in December 2019 was rejected by the plenary of the chamber of deputies.[54] However, different political parties have presented in both chambers of the federal congress new bills aimed at reducing public funding for political par-

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50 Around 339.1 million dollars (including around 3.95 million dollars to independent candidates. *See*, *https://www.ine.mx/actores-politicos/partidos-politicos-nacionales/financiamiento-publico/* (last visited October 25, 2020).

51 The site www.change.org declared that the proposal to use the public funds for political parties to the emergency reached the "highest traffic peak in the history of this platform". *Partidos sin dinero: la petición más fuerte en Change.org*, Milenio, September 22, 2017, available at: *https://www.milenio.com/estilo/partidos-dinero-peticion-fuerte-change-org*_(last visited October 25, 2020).

52 Jesusa Cervantes, *El PRI propone eliminar financiamiento público a partidos y a legisladores plurinominales*, Proceso, September 25, 2017, available at: *https://www.proceso.com.mx/504872/pri-propone-eliminar-financiamiento-publico-a-partidos-a-legisladores-plurinominales* (last visited October 25, 2020).

53 Patiño et al., *El financiamiento público de los partidos políticos desde una perspectiva de derechos humanos*, 5 Cuaderno de Investigación, Instituto Belisario Domínguez, Senado de la República, (2020) at 36-44.

54 *Rechazan propuesta de reducir a la mitad el financiamiento a partidos políticos*, Cámara de diputados, December 12, 2019, available at: *http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Agencia-de-Noticias/2019/Diciembre/12/3902-Rechazan-propuesta-para-reducir-a-la-mitad-el-financiamiento-a-partidos-politicos* (last visited October 25, 2020).

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ties.[55] Therefore, although this proposal to reduce public funding for political parties has not achieved the necessary consensus to be approved, it is still supported by some political parties, and for that reason it may be successfully passed in the future.

VIII. Conclusion

In this article I conducted an analysis of the main reforms in the history of the legal regulation of political parties in Mexico.

I argue that: 1) In 1946 the requirements to form new political parties were drastically increased with the purpose of avoiding the electoral participation of political groups that were a threat to the hegemony of the PRI. 2) In 1977 the rules for the legal recognition of political parties were loosened in order to incorporate the extralegal opposition in the institutional system. 3) In 1996 the public funding for political parties was drastically increased with the objective of protecting the PRI in the case of losing the government and becoming an opposition political party. 4) In 2007 the judicialization of the intra-partisan processes were regulated aiming to harmonize the constitution with the electoral court's jurisprudence and to establish procedures and conditions. 5) In 2014, as part of a wider reform whose intention was to centralize many aspects of the electoral processes, the rules on political parties at federal and local levels were homologized. This reform ruled out the different logics (federal and locals) in order to have only one logic in aspects like the recognition of new political parties, public funding or gender quota. 6) Finally, the most recet reform proposal centers on the reduction of public funding for political parties. The discredit of these organizations and the exorbitant state financing they receive sustain this idea.

Changes regarding the legislation on political parties are, therefore, closely related to changes in the political system. The first three reforms correspond to the era of a hegemonic party system: the 1946 reform was approved in

[55] *See Morena presenta nueva iniciativa para reducir el financiamiento de partidos,* Cámara de diputados, April 14, 2020, available at: *http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Agencia-de-Noticias/2020/Abril/14/4845-Morena-presenta-nueva-iniciativa-para-reducir-el-financiamiento-de-partidos#:~:text=%E2%80%9CMorena%20plantea%20reducir%20el%20monto,pesos%20en%202017%E2%80%9D%2C%20se%C3%B1al%C3%B3* (last visited October 25, 2020); *Presenta Fernández Balboa iniciativa para reducir financiamiento a partidos políticos*, Cámara de senadores, February 09, 2021, available at: *http://comunicacion.senado.gob.mx/index.php/informacion/boletines/50215-presenta-fernandez-balboa-iniciativa-para-reducir-financiamiento-a-partidos-politicos.html* (last visited March 20, 2021); *Iniciativa con proyecto de decreto por el que se reforma la base II del artículo 41 de la Constitución Política de los Estados Unidos Mexicanos, en materia de reducción gradual del financiamiento público de los partidos políticos y un equilibrio más equitativo en su distribución, a cargo de la senadora Claudia Ruiz Massieu Salinas, del grupo parlamentario del PRI,* available at: *https://infosen.senado.gob.mx/sgsp/gaceta/64/3/2020-12-03-1/assets/documentos/Inic_PRI_Sen_Massieu_art_41_CPEUM.pdf* (last visited March 20, 2021).

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its beginning; the 1977 reform was passed during its liberalization; and the 1996 reform was approved in its decay. On the other hand, the next reforms correspond to an era where the political plurality is mirrored in the legislative changes. The 2007 reform originated from a judicial decision; the 2014 reform was triggered by opposition political parties; and the last initiative emerged first from the civil society.

Explaining the origin of the reforms constitutes an important step towards understanding the institutional framework of political parties. However, there are important topics which remain neglected. Future research should aim at revealing not only the reasons that explain the approval of the reforms, but also their consequences. In addition, it is necessary to conduct research about the working of the regulation of political parties at the subnational level. Mexico is a federal country and the partisan dynamic in the state level could vary substantially. Finally, it would be worth doing comparative research at regional or global levels, since it would reveal the generalities and particularities of the Mexican case.

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RONALD DWORKIN'S LEGAL NON-POSITIVISM: MAIN CHARACTERISTICS AND ITS CONFRONTATION WITH LEGAL POSITIVISM OF THE TWENTIETH CENTURY (H.L.A. HART)

Gabriela G. Valles Santillán*

Abstract: *This note is based on the legal non-positivist model of Ronald Dworkin, developed in important works*[1] *such as Taking rights seriously, Law's Empire, and Freedom's Law —the moral reading of the American Constitution—. Furthermore, the consultation of the work of this jurist is taken into account, because in it a theory of justice is developed —Justice for Hedgehogs—.*[2] *This note is complemented with the reference of other authors to confront this model with the legal positivism view of the Twentieth Century, in particular with the positivist legal model of H.L.A. Hart. The main purpose is to show extracts that are considered significant to the theoretical principialist Dworkinian model of law, in order to understand and distinguish this cognitive-moral non-positivist type of model. Therefore, an emphasis on fundamental rights and the exposure of the premise regarding the only correct solution, or the only answer to legal controversies submitted to the analysis of the judges in difficult cases —the so-called hard cases— is taken into account.*

Keywords: *Law, fundamental rights, hard cases, legal non-positivism, moral.*

Resumen: *Esta nota se basa en el modelo no iuspositivista de Ronald Dworkin, desarrollado por este jurista en importantes obras como lo es Taking rights seriously, Law's Empire y Freedom's Law —la lectura moral de la Constitución Americana—. Además, se suma la consulta de la obra en la cual dicho jurista aborda una teoría de la justicia —Justice for Hedgehogs—, así como la referencia a algunos otros autores que complementan el estudio corres-*

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[1] Ronald Dworkin, Taking Rights Seriously (1977) [hereinafter TRS]; Ronald Dworkin, Law's empire (1986) [Hereinafter Le]; Ronald Dworkin, Freedom's law. the moral reading of the american constitution (1996) [hereinafter fl].

[2] Ronald Dworkin, Justicia para erizos (1st ed. in Spanish language, 2014).

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pondiente, con el fin de confrontar este modelo con el iuspositivismo del siglo XX, en particular con el modelo iuspositivista de H.L.A. Hart. El objetivo principal es mostrar extractos que se consideran significativos del modelo teórico principialista Dworkiniano, con el fin de comprender y distinguir este modelo cognitivo-moral no iuspositivista, con énfasis en los derechos fundamentales y la exposición de la premisa de la única solución correcta o única respuesta a controversias jurídicas sometidas al análisis de los jueces en casos difíciles —los llamados hard cases—.

Palabras clave: *Casos difíciles, Derecho, derechos fundamentales, moral, no iuspositivismo.*

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I. Dworkin's Legal Model

It is important that the construction of Ronald Dworkin's model is based on a critique of a liberal theory of law that consists of two parts: the first concerning what the law is, and the second concerning what the law should be.[3]

This liberal theory of law has its origins, in turn, from Jeremy Bentham's utilitarian argument that gives a guideline to the consequentialist ethical position,[4] through which the greatest benefit is sought for the majority or for the greatest number of individuals, in such a way that the consequences of human acts matter and are taken into account for the sake of always producing that benefit in general terms. While in that liberal and utilitarian theory of law it is understood that the purpose of legal institutions is to serve at all times the general welfare —that is, the welfare of the majority—, the *Dworkin-*

[3] Ronald Dworkin, *in* TRS *supra* note 1.

[4] *See* Aída Rivera Sotelo, *El Utilitarismo de Jeremy Bentham ¿Fundamento de la Teoría de Leon Walras?*, 30 (55) Cuadernos de Economía 55-76 (2011), available at: *https://perma.cc/9VT3-QVN3*.

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ian theoretical model is built on the idea of individual human rights, and by virtue of that, the purpose of legal institutions is to seek, to the greatest extent possible, the welfare of individuals.

Dworkin's model not only differs from the liberal theory of law that starts from Bentham's utilitarian premise, but also differs from the theoretical legal positivist model —also of a liberal nature—, even in the soft Twentieth Century version that derives from H.L.A. Hart's thesis. Furthermore, Dworkin is emphatic in pointing out a series of criticisms, especially regarding the open texture that Hart maintains in legal norms when they are vague and imprecise, giving judges free discretion in their application to specific cases. In fact, it is worth mentioning that the nature of the Benthamite theory resides precisely in Hart´s legal positivist version.

II. Dworkin's Critique of Hart's Positivist Legal Model

Ronald Dworkin refers to a general theory of law not only with a conceptual approach, but also with a normative approach.[5] The *Dworkinian* model constitutes the presentation of a very particular perspective of law —the American law—, which is supported by political philosophy and morality.

The conceptual approach of the *Dworkinian* model deals, to a great extent, with criticizing the *Hartian* theoretical foundation which reduces the right to a system of rules, ignoring the importance of principles as sources of law.[6] The latter, despite the fact that Dworkin himself argues that Hart's theory uses a non-limitative connotation of the concept of rule.[7]

On the other hand, the normative approach of the *Dworkinian* model contains, in turn, three important theoretical aspects: legislation, adjudication —better known as jurisdiction—, and compliance.

The theoretical aspect of adjudication itself is a theory of controversy, which establishes standards that judges should use when deciding difficult cases.

As Dworkin points out, in order to understand his model, it is important to specify some key elements that the legal positivist theory has, in order to confront it with the *Dworkinian* legal theory. For instance, it is important to mention that Hart brought to the contemporary stage of law —in the Twentieth Century—, a more detailed and complex theory. That is, in contrast, to other paleo-positivist previous authors such as John Austin, who conceived law as a system of rules to which he attributed the character of simple commands to be obeyed by their addressees, in a context of supra-subordination

[5] Dworkin, in TRS *supra* note 1, at vii-viii.

[6] *See* Marisa Iglesias, *La teoría del derecho de Ronald Dworkin*, Academia.Edu (2006), available at: *https://perma.cc/5EW7-9GK2*.

[7] Dworkin, *The Model of Rules II*, in TRS, *supra* note 1, at 58-59.

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and the imposition of legal sanctions in the event of failure to comply with those commands.[8]

Similarly, Dworkin points out that Hart managed to model a more elaborate conception of law, in which it is possible to distinguish —within a system of rules— between primary and secondary norms.[9]

Likewise, Hart emphasized that compliance with primary legal norms —which are those that establish rights and obligations— is enforceable by virtue of the fact that their addressees have accepted them as standards governing their conduct, and not simply because they are commands that must be obeyed, derived from the relationship of supra-subordination and consequent sanction, as expressed by Austin.[10]

Given that Hart is part of the theoretical current legal positivist of the Twentieth Century, Dworkin stresses that it is possible to notice in the *Hartian* model the importance given to the fact of verifying that the legal norms are such because they were issued in accordance with the corresponding legal procedure —established in the secondary legal norms—. Based on this conceptual premise, the famous *rule of recognition* derives and consists in the theory exposed by Hart.

Another point that Dworkin considers noteworthy in Hart's work, is that Hart made it clear that in the legal system it is possible for legal norms to become vague and imprecise, and therefore, judges —in their capacity as legal operators— interpret them according to what Hart called an *open texture* —as a property of legal norms— deciding with discretion the specific cases submitted to their jurisdiction.[11]

On this point, Dworkin makes a particular criticism, because his analysis on the topic of the discretion of judges makes his theoretical model clearly distinguishable from the Hartian positivist perspective. The latter by proposing a special argumentative construct that limits such discretion in the framework of a legal system not only composed by rules, but also of principles of justification, therefore Dworkin manages to emerge as an alternative reference of great importance in the Anglo-Saxon legal context, while providing significant contributions to contemporary constitutionalism in general.

On the other hand, Dworkin is clear when referring that the discretionality in the field of legal positivism is broad-spectrum or practically unlimited in the exercise that judges make of law, as the ultimate applicators of it[12] —although legal positivists like Hart insist that the discretional power of judges is limited in all cases—.

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8 Dworkin, in TRS, *supra* note 1.

9 *Id.*

10 H.L.A. Hart, El concepto del derecho (translation by Genaro, Carrió,1961).

11 *Id.*, at 158-159; *see id.* H.L.A. Hart, Post scríptum al concepto de derecho (preliminary study, translation to Spanish language, notes and bibliography by Rolando Tamayo y Salmorán, 2000), available at: *https://perma.cc/L3X7-NSCL*.

12 Dworkin, in TRS, *supra* note 1.

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In fact, in view of this criticism of the legal positivist method on the issue of discretion, derived from the open texture of legal norms, Hart made some considerations by way of a *post scriptum* in the following terms: [13] although Dworkin rejects the position consisting that legal norms —in part indeterminate or incomplete— can be filled in gaps with judges exercising limited creative judicial discretion,[14] however, there will be issues where existing law cannot provide any correct solution, therefore, to resolve cases like these the judge has to exercise his creative legal power, also the judge does not have to do so arbitrarily: that is, he must always have some general reason to justify his resolution.

Another interesting point that emerges from the *Dworkinian* theoretical model, is that it also rejects the *Hartian* legal positivist thesis consisting of the following: that in every legal system there is a rule of recognition that makes it possible to identify which norms are legally valid —the formal validity that is the object of the analysis in the classical legal positivist model—; this, once it is verified, through a test or *pedigree*, whether or not such norms have been issued by the organ legally competent to carry out such issuance, added to the social acceptance that is assumed about such norms in terms of considering them standards that regulate the conduct of the individuals to whom they are addressed.

The rejection of the rule of recognition described by Hart in the aforementioned terms occurs in the sense that Dworkin considers that such a rule does not apply to a conceptual and normative theoretical model,[15] such as the one Dworkin proposes, that is, a model that contemplates not only rules but also principles. Accordingly, such a rule of recognition is not applicable as a test or pedigree for identifying which principles can be validly considered part of the law, therefore, as legal standards for resolving specific cases.

The *Dworkinian* model opts for an identification test that is much more complex than the recognition rule set forth by Hart, since it contemplates a verification technique that includes a moral reading of the supreme order, to which it is added an analysis of both precedents and legal provisions that cite or exemplify principles involved in the disputes, as well as the study of documents that support legislative debates that mention them.[16]

In Dworkin's work, dedicated to the moral reading of the American Constitution, this philosopher states that his purpose is to highlight the importance of the Constitution with a sense of political morality, while most contemporary constitutions recognize individual rights, contained in abstract clauses that invoke moral principles that appeal to justice and are interpretable.[17]

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[13] Hart, Post scríptum al concepto de derecho, *supra* note 11, at 55-56.

[14] In Hart's point of view, Dworkin argues that what is incomplete is not the Law, but the positivist view of it. *See id*.

[15] Dworkin, *supra* note 7, at 59.

[16] Dworkin, *The Model of Rules I*, *in* TRS, *supra* note 1, at 40-45.

[17] Dworkin, *Introduction: The Moral Reading and The Majoritarian Premise*, in FL, *supra* note 1, at 2.

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III. The *Dworkinian* Model: The Distinction between Principles and Rules

Dworkin is noted for his adherence to the distinction between principles and rules, at least in a general sense.[18] For this jurist, principles are moral standards —of political morality— that are implicit in the legal system, that is, both in the Constitution and laws, as well as in precedents.[19] They govern the actions of judges in the substantiation and resolution of specific cases.

Based on the above, the principles differ substantially from the rules, in that the latter definitely apply, or do not apply to particular disputes. The rules have a subsumption methodology, that is, a logical operation from species to genus, and this is determined by the factual assumptions in each specific case, which means that the legal consequences of their application are directly and immediately applicable.

According to Dworkin, the principles do not operate in this way when taken into consideration to settle a dispute, since this logical operation of the subsumption is not applicable to them, and because they do not establish fixed or constant legal consequences which derive automatically according to conditions and assumptions of specific facts.

While the rules provide for legal hypotheses and may also establish an express list of exceptions to them, the principles are not capable of listing exceptions to hypotheses, but rather of attributing to them a dimension of weight or importance in each specific case, a property that the rules do not have.

IV. *Judge Hercules* and the Solution of Difficult Cases —*Hard Cases*—

For didactic purposes, Dworkin develops, in the part of his theoretical model dedicated to difficult cases, a fictional character he refers to as *Judge Hercules*: a judge in an American jurisdiction endowed with superhuman skills, great knowledge, patience, and insight to perform his functions; this, on the understanding that such a judge knows and recognizes the law corresponding to his jurisdiction, as well as the duty that judges have in the American context to follow the criteria contained in the previous rulings that they have issued, or to follow the criteria adopted by the higher courts and applied to specific disputes submitted for their substantiation and resolution.[20]

That *Judge Hercules*, in the North American common law structure, bases his decisions on an argumentative construct based on the Constitution, laws

[18] Dworkin, *supra* note 16, at 23.

[19] Brian Bix, Jurisprudence. Theory and Context 91 (2012).

[20] Dworkin, *Hard Cases*, *in* TRS, *supra* note 1, at 105-106.

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and judicial precedents, so that, based on a scheme of abstract justifying principles, he provides a construct with coherent legal reasoning that allows him to resolve the controversies that are presented to him for solution.

According to Dworkin, *Judge Hercules*' argumentative legal construct does not originate from his own personal convictions[21] —for this would imply giving a guideline to a scheme similar to that of the discretionality of the judges exposed by positivists like Hart—. On the contrary, although it is undeniable that the decisions of *Judge Hercules* reflect his own intellectual, philosophical, and moral convictions, such convictions do not have an independent force in the argumentative construct, but rather derive from the legal structures that constitute the objective Law applicable to each particular case —and which *Judge Hercules*, based on his arguments, takes care to justify—, taking as a first structural reference the constitutional clauses that recognize and protect individual rights.

The legal structures that make up objective Law implicitly contain the moral traditions of the community —political morality— which, although they may present some inconsistencies in the timeline, from that implicit morality *Judge Hercules* uses his own judgment to determine what rights and obligations the parties have in the dispute, and once this trial has been carried out, based on the much–discussed argumentative construct, there is no more substance left to be subjected to the scrutiny of either *Judge Hercules*' own convictions, much less to the scrutiny of other subjects, even if they constitute a democratic majority.[22] Moreover, the latter means that the *Dworkinian* model suggests the possibility that, when it comes to the protection of individual human rights, the judge may decide in a manner contrary to the majority premise, that is, the majority in terms of merely formal or representative democracy —*the majoritarian premise*—.[23]

V. The Connection between Law and Political Morality

It is equally relevant to bring up what Dworkin expounds in his theory of justice, in terms of understanding the relationship between law, ethics and morality, and more specifically, the indissoluble connection between law and political morality.[24]

This is based on the fact that, in principle, Dworkin distinguishes between ethics and morality, in the sense that while ethics makes proposals about what it is to live well, morality is related to the way in which one treats others.[25]

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21 *Id.*, at 106-30.

22 *Id.*, at 125.

23 Dworkin, *supra* note 17, at 15-19.

24 Dworkin, *supra* note 2.

25 *Id.*, at 43.

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Then, Dworkin argues that morality has a tree structure, *i.e.*, branched out.[26] In this branch, which corresponds to more general personal morality, we find political morality, and above the latter is law as a product made by human beings. All these branches, in turn, emerge from a main branch corresponding to a general theory about what it is to live well, that is, from ethics itself.

It is also important to understand that while from an initial orthodox perspective it is possible to conclude that, at least conceptually speaking, law and morality are not the same thing, the truth is that there is a clear connection between these two, because when a community decides which legal norms to create, morality must guide and limit it.[27]

The morality that guides and limits human beings constituted in advanced societies to create their legal and political regime is precisely political morality, which, when applying the law to concrete cases translates into justifying principles that are implicit in the legal structure's judges use in their practice, giving rise to a legal-argumentative construct that is as coherent as possible —*the adjudicative principle of integrity*—.[28]

The ideal or adjudicative principle of integrity directly instructs adjudicators to identify the rights and obligations of parties to legal disputes, expressing a coherent conception that evokes principles such as justice, equity, and due process, while providing the best constructive interpretation in the legal practice of a specific community.[29]

Thus, the *Dworkinian* theoretical model points out that there is often only one correct answer in complex controversies of law and political morality.

The only correct answer or solution is the one that emerges from the argumentative construct that has been referred to so much in this work, that is, the interpretative construct of a judge in the style of *Judge Hercules*.

VI. Dworkin and his Position on Fundamental Rights

We now turn to some of Dworkin's most significant considerations, in terms of fundamental rights. It is again important to note that the positions of this jurist are developed theoretically within the framework of the American legal system.

In Dworkin's work, there is an essay entitled *Taking rights seriously*,[30] which, along with twelve other essays, makes up the compilation of the same name.

In this work, Dworkin proposed to explore the implications of the thesis where individuals have in their favor a series of rights with moral content

[26] *Id.*, at 20.

[27] *Id.*, at 486.

[28] Bix, *supra* note 19, at 93-95.

[29] Dworkin, in LE, *supra* note 1, at 225.

[30] Dworkin, *Taking Rights Seriously*, in TRS, *supra* note 1, at 184-205.

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against the State, which are fundamental and are positivized in the Constitution. This set of rights includes the rights of individuals to protection by the State, as well as personal rights of freedom, which impose on the State the obligation not to interfere in that sphere of personal freedom.

The implications referred by Dworkin, have to do precisely with the obligation of the State to take seriously fundamental rights, as they represent constitutional rights with moral content before the public power.

Now, to take these rights seriously means to give this predicate a strong connotation or sense —in the strong sense—.[31] This, in turn, gives rise to the consideration that if a person´s fundamental right is undermined through the application of a legal norm or provision, that person has the right to disobey that norm or provision, insofar as it arbitrarily violates his sphere of fundamental rights. This is the meaning or strong connotation that Dworkin wants to convey by expressing its position of taking rights seriously.

Thus, the thesis that Dworkin defends, breaks with the traditional legal positivist scheme which establishes that the objective right must be fulfilled and obeyed in all cases. At the same time, the criticism of the non-positivist *Dworkinian* thesis is directed at the fact that validating such a position would imply diminishing the certainty of the law, since its coercive and obligatory character is weakened.

In this vein, it should also be noted that Dworkin recognizes that fundamental rights are not absolute, and that there are exceptional cases in which they can be restricted by state authority. In this regard, he suggests that when there is a need to restrict these rights, the justification that the State is obliged to provide must go beyond simply alluding to the objective of satisfying the general interest or utility.

Dworkin points to two exceptional cases in which fundamental rights can be justifiably restricted:[32]

— First, when there is a dispute between fundamental rights in the strictly personal or individual field —competing rights—, in such a way that the legal operator has to weigh up and solve the dispute by prioritizing the fundamental rights of one of the parties in conflict.
— And second, there is the exceptional case of the restriction of fundamental rights due to the prevention of a catastrophe, war or an emerging situation of great magnitude involving an imminent danger to society —in fact, assimilating this argument with respect to the Mexican legal system, this is the case of the express restriction contained in Article 29 of the Mexican Constitution, which was clarified by the constitutional reform on human rights of June 10, 2011—.

[31] *Id.,* at 190.

[32] *Id.,* at 193-195.

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Another key point to highlight in Dworkin, as far as fundamental rights are concerned, is that deciding in favor of them can mean going against the majoritarian premise, which, moreover converges, *e.g.*, with the non-positivist European position of Robert Alexy.[33]

In that tessitura, anyone who professes to take rights seriously is because he considers the following:

> He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant […] Supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and that holds that such treatment is profoundly unjust.
>
> The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves…[34]

This can be summarized as follows: taking fundamental rights seriously means considering, first of all, the vague but powerful idea of the dignity of the person. And second, taking care of political equality understood as the right of the weakest to have the State care for them with the same intensity as it cares for the strongest in a society.

VII. Conclusion

Although Dworkin's model is developed specifically around the American legal tradition, the truth is that it complements and adds to the transcendence of the current neo-constitutionalist ideology, theory, and methodology, which is characterized above all by the contributions of neo-legal naturalists, principialist and non-positivist constitutionalists, and even neo-legal positivists or alternative legal positivists.

All of these propose a fresh and new perspective of law and its operation in the resolution of disputes or specific cases.

As could be seen from the research work presented, Dworkin's position focuses on highlighting the importance of individuals as integral parts of democratic societies organized legally and politically in such a way that the struggle for the general interest does not unjustifiably undermine the fundamental rights of individuals.

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[33] *See*, *e.g.*, Robert Alexy, *Los Principales Elementos de mi Filosofía del Derecho*, 32 Doxa, Cuadernos de Filosofía del Derecho 67-84 (2009), available at: *https://doxa.ua.es/article/view/2009-n32-los-principales-elementos-de-mi-filosofia-del-derecho [https://perma.cc/Q6T6-4JHM.*

[34] Dworkin, *supra* note 30, at 198-199.

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Likewise, the *Dworkinian* model emphasizes the important work that judges do in resolving specific difficult cases emphasizing, of course, that this work must be done in accordance with an optimal argumentative construct, in which the discretion of judges, although impossible to suppress in its entirety, is constrained to a coherent expression that evokes justifying principles implicit in constitutional and legal structures, such as justice, equity and due process. All the above implies taking rights seriously.

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