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THE MIGRATION OF MEXICAN LEGAL SCHOLARS: CAUSES AND PERSPECTIVES FOR THE FUTURE

Gerardo Centeno García*

Abstract: *This article aims at describing the status of migration of Mexican legal scholars around the world. It defines who a legal researcher is, who performs and gets paid for this activity in Mexico and explains why the most common teaching method in law classrooms (magister dixit), alongside other factors like centralization, drastically hinders the production of original legal knowledge in Mexican law schools. The article presents data obtained through a survey presented to National Council for Science and Technology (CONACyT) scholarship recipients who studied abroad between 2012 and 2020. With said information, the author asserts that Mexico City students monopolized the scholarships to study abroad during the period in question. Moreover, evidence points out that most students awarded a scholarship came from socioeconomically privileged backgrounds, even though their schools did not produce original legal research. The article concludes with the assessment that the legal education system, the lack of academic professional opportunities and poor wages offered by the academia leave Mexican graduate law students with no other alternative than to join the private sector or effectively remain in the country where they decide to study.*

Keywords: *Migration, Mexican legal scholars, Legal research, Legal education, CONACyT.*

Resumen: *Este artículo tiene como objetivo definir el estado de la migración de los juristas mexicanos en todo el mundo. Define quién es un investigador jurídico, quién desarrolla y cobra por esta actividad en el país y explica por qué el método de instrucción más común en las aulas de derecho (el magister dixit), junto con otros factores como la centralización, dificulta drásticamente la producción de conocimiento jurídico original en escuelas de derecho fuera de la Ciudad de México. El artículo presenta los datos obtenidos a través de una encuesta enviada a los beneficiarios de una beca del Consejo Nacional de Ciencia y Tecnología (CONACyT) para estudiar en el extranjero entre los años 2012 y*

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2020. Con dicha información, el autor afirma que los estudiantes de la Ciudad de México acapararon las becas para estudiar en el extranjero durante el período seleccionado. Además, la evidencia señala que la mayoría de los estudiantes que recibieron una beca provienen de un entorno socioeconómico privilegiado, a pesar de que sus escuelas no son productoras de investigación legal original. El artículo concluye con la valoración de que el sistema de educación jurídica, la falta de oportunidades académicas profesionales y los bajos salarios que ofrece la academia, dejan a los estudiantes de posgrados en Derecho mexicanos sin más alternativa que incorporarse al sector privado o permanecer efectivamente en el país en el que decidieron estudiar.

Palabras clave: *Migración, Juristas mexicanos, Investigación jurídica, Educación jurídica, CONACyT.*

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I. Introduction

Legal science is spurned (along with other social sciences) as a resolver of "the great problems of the State".[1] Around the world, scientific research receives little public financing. On average, governments spent 2.3%[2] of their gross domestic product on research and development in 2017. The lack of financial support to legal researchers often means that they must secure two jobs to cover their basic needs and, hopefully, obtain the capital needed to fund their research. The impact of not being able to do full-time research poses the risk of lowering the quality of their work or abandoning the project altogether. Moreover, low national employment rates lead graduates to seek work in activities that are not related to their degree which, according to Becerra Ramirez, can be considered a type of "brain drain".[3]

This article is an effort to determine the causes and consequences of legal scholars' migration to foreign higher education institutions (hereafter, HEIs). Note that this text solely is focused on people who work and are dedicated to the academic legal research industry, excluding lawyers who migrated to engage in litigation or similar activities (although acknowledging it throughout the text). This article argues that the latter group has benefited from the goal *to generate of high-level human capital*, making them eligible to receive a National Council for Science and Technology (CONACyT) scholarship to study abroad, even without an academic profile.

Until the first quarter of 2020, CONACyT had 62 active scholarships for Mexican law graduate students (henceforth, MLGS) in foreign HEIs.[4] *The term MLGS encompasses both LL.M. (Master of Laws) and doctoral students (Ph.D.,*

[1] Dr. Becerra Ramirez has compiled various facts and opinions on why the Mexican National Researchers System (SNI) is dominated by "hard-science" researchers. The flaws in the system come from its very conception as it was an idea proposed by natural scientists, which leads to disparities in the productivity assessment for social sciences. Moreover, the lack of communication between the two scientific branches causes, according to researcher Fatima Fernandez, a lack of cooperation between them. *See* Manuel Becerra Ramírez, Posgrado e Investigación Jurídica 108, 130 (*Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México* [IIJ-UNAM], 2010).

[2] UNESCO Institute for Statistics, *Research and Development expenditure (% of GDP)*, World Bank, (May 20, 2019), *http://api.worldbank.org/v2/es/indicator/GB.XPD.RSDV.GD.ZS?downloadformat=xml*.

[3] Becerra Ramírez, supra note 2, at 57.

[4] National Council for Science and Technology (CONACyT), *Becas al Extranjero de Enero a Marzo 2020*, CONACyT, (Apr. 29, 2020), *https://www.conacyt.gob.mx/images/conacyt/becas/padron_de_beneficiarios/2020/Becas_al_Extranjero_de_enero_a_marzo_2020.xlsx*.

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S.J.D, and so forth) for the purposes of this text. Between 2012 and the first quarter of 2020, 632 MLGS have obtained CONACyT resources to study abroad.[5]

II. Who is a Legal Researcher?

For purposes of this study, a legal researcher is a person holding a position with assigned financial resources to conduct academic legal research. In Mexico, there are two main ways to receive payment for this purpose: through the National System of Researchers (SNI) and through bonuses awarded by the HEI employing them. As we will see below, legal research is not a common requirement for legal professors in the country.

Not all Mexican legal researchers are registered in the SNI. This limitation on including only SNI-registered legal researchers is made for methodological practicality since there is a registry of beneficiaries with data that assists to their quantification and identification of researchers, contrary to the case of unregistered researchers who work in other diverse areas, such as private companies. This aspect requires further research, but does not impact the intent of this article.

The purpose of the SNI is to promote and strengthen, by means of periodic evaluation, the quality of the scientific research produced in the country or by Mexican researchers living abroad.[6] Anyone registered in the SNI receives economic stimuli according to their assigned level.[7] To register, a researcher must meet the following requirements:

— Have a doctoral degree;
— Produce scientific and technological knowledge; and
— Participate as a member of the scientific community, for the three years prior to the date of the request.[8]

The committee assesses candidates under a specific criterion, which includes scholars' leadership, participation in academic activities, human resources training, thesis direction, dissemination of knowledge, and teaching, among others.[9]

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[5] *Id.*

[6] Reglamento del Sistema Nacional de Investigadores [RSNI] (Regulations of the National System of Researchers), as amended, *Diario Oficial de la Federación* [D.O.F.], April 20, 2021. § Article 3.

[7] CONACyT, *Sistema Nacional de Investigadores,* CONACyT, (Jun. 20, 2019), *https://www.conacyt.gob.mx/index.php/el-conacyt/sistema-nacional-de-investigadores*.

[8] CONACyT, *Sistema Nacional de Investigadores. Convocatoria 2020 para Ingreso o Permanencia en el Sistema Nacional de Investigadores (SNI),* CONACyT, (Feb. 14, 2020), *https://bit.ly/31Nsox5*.

[9] CONACyT, *Criterios Específicos de Evaluación, Área V: Ciencias Sociales,* CONACyT, (May 29, 2021), *https://conacyt.mx/wp-content/uploads/sni/marco_legal/criterios_especificos_area_V.pdf*.

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Despite the presence of the SNI and other financial stimuli programs to incentivize new generations of researchers (legal researchers in this case), the Mexican legal education system is not particularly keen to develop such professionals. Moreover, even if there are individuals who succeed at getting hired to do research, the system does not provide an appropriate environment for them to remain in this line of work. This context is the main reason the CONACyT financial stimuli (scholarships, SNI, etc.) fail to foster scientific research in law.

To prove this, let us make a succinct analysis of the Mexican legal education system:

III. The Mexican Legal Education System

Mexican legal education offers the following degrees: undergraduate, specialization, master's degree, and doctoral degree.

1. *Licenciatura en Derecho: Bachelor of Laws*

In this section, the author will describe the undergraduate law degree in Mexico: the *Licenciatura en Derecho* (hereinafter, LED). According to Lopez Hurtado's research, the most important characteristics of the principal program in this legal education system are:

> 1. [U]nlike in the U.S., [the LED is] an undergraduate degree earned after graduation from high school.
> 2. [Between 2006 and 2007] there were 930 institutions offering the legal bachelor's … *fewer than 20[%] of them were involved in research or other scholarly activities*.
> 3. In most institutions, the curriculum is rigid.
> 4. More than 90[%] of the law professors combine teaching with professional practice; *most law degree programs do not have full-time faculty*.
> 5. The cost to open and run a law degree program is low. All that is required … is a few poorly paid lecturers, one classroom for each level of students, and a library with the books recommended for each course.[10]

Both public and private HEIs offer LED programs. However, the number of institutions varies tremendously from one sector to the other. In its 2019 Annual Report, the Center for the Study of Teaching and Learning Law (CEEAD) reported that 91% of Mexican law schools were private HEIs.[11] However,

[10] Luis Fernando Perez Hurtado, *Content, Structure, and Growth of Mexican Legal Education*, 59 Jour. of Leg. Edu. 567, 569 (2010).

[11] Center for the Studies on Law Teaching and Learning [CEEAD], *Annual Report 2019 Transforming legal education in Mexico,* CEEAD, (Jun. 21, 2019), *http://www.ceead.org.mx/assets/annual_report_2019-web.pdf.*

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these schools hold 33.24% of total national enrollment in undergraduate degrees, and 38.04% at the graduate level.[12] This means that, although larger in numbers, private HEIs usually have fewer students. According to Perez Hurtado, for private law schools to obtain the certifications necessary to operate: "…[R]ecognition or incorporation can be granted by a) the federal government by presidential decree; b) the federal government through the Ministry of Education; and c) state governments through their respective ministries of education, but only for institutions and programs within that state".[13]

Incorporation is granted by public HEIs, decentralized entities created by the federal government or by states (the latter admit private institutions and academic programs within that state).[14]

All institutions are free to set the content of their law program curriculum and what the student must do to obtain a license to practice, which is valid in all Mexican states, and not restricted to requirements set by a local bar association or the judicial branch of government as in the United States.[15] Moreover, law schools are allowed to offer several "options for degree conferral". *A priori,* thesis writing was the only way to obtain a law diploma. However, in recent years, the following alternatives have been added:

> The "automatic degree conferral" or "option zero" includes the sole requirement that students must pass all courses and complete pro-bono work … [and] the standardized general exam to graduate … The third option for degree conferral is "professional experience", which means the law graduate has worked at least five years in a law-related job.[16]

The thesis option has been quantitatively squashed. To give an example, of the 29,335 students who graduated in 2019 from all the fields of study offered at the National Autonomous University of Mexico (UNAM), 76% (23,843) obtained their degree through options other than the traditional thesis or thesis and professional exam.[17] According to the TESIUNAM platform, 369 theses registered at the School of Law between 2019 and 2020.[18] No other law school in Mexico has this data available to the public.

Therefore, the LED program can be described as a massively extended cheap-to-install basic law degree with a tendency to create lawyers to meet

[12] National Association of Universities and Institutions of Higher Education, *Anuarios Estadísticos de Educación Superior*, ANUIES, (last visited Jun. 21, 2019), *http://www.anuies.mx/informacion-y-servicios/informacion-estadistica-de-educacion-superior/anuario-estadistico-de-educacion-superior*.

[13] PÉREZ HURTADO, supra note 11, at 572-4.

[14] *Id.*

[15] *Id.,* at 575-6.

[16] *Id.,* at 577.

[17] Statistics National Autonomous University of Mexico [UNAM], *La UNAM en números*, UNAM, (Apr. 17, 2019), *http://www.estadistica.unam.mx/numeralia/*.

[18] UNAM, *TESIUNAM*, UNAM, (Apr. 17, 2019), *https://bit.ly/3cADzvg*.

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the corporate need for a legal workforce, with a fixed curriculum, taught by part-time teachers, with little to no interest in producing research.

Until 2003, the *Licenciatura en Derecho*[19] *was the higher education program with the highest enrollment in Mexico*. Perez Hurtado points out that HEIs have rapidly increased their capacity to offer this degree. In the 1997-1998 school year, 364 schools offered a law program. By the 2006-2007 school year, that number grew to 930.[20] Carbonell points out that out of 2,602 universities in Mexico,[21] 1,608 offers an LED, which means there is one law school per every 69,861 inhabitants.[22] The most recent CEEAD report states that there are 2,332 law schools with authorized LEDs.[23]

This vast expansion resulted from the efforts to extend the availability of education in Mexico and, more specifically, the low cost involved in opening and operating a law program in the country, as Perez Hurtado explains.[24]

2. *Graduate Level*

Both Becerra Ramirez[25] and Perez Hurtado[26] maintain that there is a marked tendency for LED students to enroll in graduate programs immediately after obtaining an undergraduate law degree. Their main motives are further specialization, filling educational gaps in the LED, unemployment, curriculum building; and embarking on a career as a legal researcher.[27]

The Mexican Master's degree has two lines: the professionalizing stream and research-intensive. Becerra Ramirez points out that the first one teaches students to find knowledge by themselves; rather than providing all of it through instruction, hence, preparing them for legal research (it is not, however, mandatory to generate new legal knowledge). This could lead them to find tools to go on to doctoral studies. In the second line, students must seek and create knowledge by themselves, which places them on the doctoral studies track. The author agrees with Becerra Ramirez's assertion that the main issue surrounding master's degree studies in Mexico is the structuralizing efforts done by HEIs.

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[19] Luis Fernando Pérez Hurtado, La futura generación de abogados mexicanos. Estudio de las escuelas y los estudiantes de derecho en México 25 (IIJ-UNAM ed., 2016).

[20] *Id.,* at 1.

[21] Cultural Information System, *Universidades por Estado,* Ministry of Culture (Jun. 27, 2019), *https://sic.cultura.gob.mx/lista.php?table=universidad&disciplina=&estado_id=*.

[22] Miguel Carbonell, *Informe: Instituciones que imparten la carrera de Derecho en la República Mexicana,* Miguel Carbonell (Jun. 27, 2019) *http://www.miguelcarbonell.com/docencia/Informe_Instituciones_que_imparten_la_carrera_de_Derecho_en_la_Republica_Mexicana.shtml*.

[23] CEEAD, supra note 12, at 8.

[24] Pérez Hurtado, supra note 20, at 26, 87.

[25] Becerra Ramírez, supra note 2, at 45.

[26] Pérez Hurtado, supra note 20, at 183-8.

[27] Becerra Ramírez, supra note 2, at 45-6.

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The selection of students precludes the academic background of those who seek this degree which has students taking courses for approximately two years in a school setting without fostering researching efforts, but many curriculums for this degree seem like just a continuation of the LED studies.[28]

The highest degree conferred by Mexican Law schools is the *Doctorado en Derecho* (Doctor of Legal Science). Becerra Ramirez argues that the Mexican doctoral degree should be both research-intensive (as it is its nature) and specialized. He argues that this scenario is possible under the idea that specialization programs are used to disseminate and systematize existing knowledge, rather than formulate new ideas. However, he deems it important for universities to define the profiles of their programs.[29]

Becerra Ramirez mentions a "demographic surplus of doctors", which takes from Marcos Kaplan's *"lumpenintelectual"* concept.[30] He argues that the idea (promoted by the government) of national development based on the existing number of doctorate graduates is a fallacy because of the lack of job opportunities for these graduates. On the contrary, that public policy produces a brain drain since doctoral students are compelled to emigrate abroad or stay in their hosting countries or perform other jobs.[31]

3. *Part-time Programs*

Another setting detrimental to Mexican legal graduate education is the part-time program. Mexican law graduate programs started in 1949 with the publication of the Statute of the Doctorate in Law at the UNAM.[32] Throughout its history, the initiative lacked the financial and human capital to satisfy the program's demand.[33] As a result, UNAM chose to set up weekend graduate classes, considering the professional lives of its applicants while translating into strenuous workdays for teachers, anti-pedagogical classes, and students with limited time to study.

These types of programs do not have a specialized research focus which, along with the eagerness of law schools outside of Mexico City to imitate UNAM graduate programs,[34] meant that subsequent attempts to set up graduate course platforms around Mexico were sterile in terms of legal research.

[28] *Id.,* at 51-65.

[29] *Id.,* at 31.

[30] "The category of intellectual lumpen or professional lumpen arises and grows, made up of those who are given the illusion - above all, and little or nothing in reality - of a training and an academic-professional career. Massification, pauperization, intellectual and professional lumpenization, acquire a political dimension, such as criticism or rejection of the prevailing socio-economic-political model". *See*, *Id.,* at 56-7.

[31] *Id.*

[32] *Id.*, at 17.

[33] *Id.*, at 21.

[34] *Id.*, 21-2.

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Nicholson and Trumbull presented data indicating that part-time evening schools faltered in terms of producing legal research. Trumbull's experiment states that, particularly, students enrolled in these programs lack the time to conduct independent research,[35] placing them in a disadvantage against their full-time counterparts.

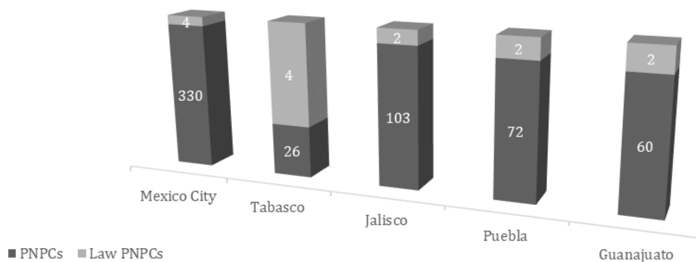
The creation of full-time programs in the country would lead to more legal research, at least at the graduate level.

4. *The PNPC and Legal Researchers per State/University*

There is a policy to establish more full-time graduate programs. The mission of the National Quality Graduate Program (PNPC) is to promote continuous improvement, to ensure the quality of the national postgraduate degree, to increase the country's scientific capacities, and to incorporate knowledge as a resource for Mexico's development.[36] Within PNPC's categories, we find School Programs, subdivided into a) Research-Oriented Graduate Programs and b) Professional Graduate Programs.[37]

The PNCP assigns scholarships for full-time students taking academic programs registered within it.[38] However, not many programs are registered in the PNPC. The first subcategory has 25 PNPC approved legal research programs in Mexico. As the focus of this article is on Mexican legal researchers, this subcategory draws the author's full attention. The five states with the most programs are:

Graph 1[39]



[35] Michael P. Cox, *Part-Time Legal Education: The Kelson Report and More,* 27 Jour. of Leg. Edu. 473, 481-82 (1976).

[36] CONACyT, *Programa Nacional de Posgrados de Calidad*, CONACyT, (Apr. 11, 2020), *http://www.conacyt.gob.mx/index.php/becas-y-posgrados/programa-nacional-de-posgrados-de-calidad*.

[37] CONACyT, *Posgrados Escolarizados,* CONACyT, (Mar. 28, 2020), *http://svrtmp.main.conacyt.mx/ConsultasPNPC/escolarizados.php*.

[38] CONACyT, supra note 37.

[39] CONACyT, *Padrón del Programa Nacional de Posgrados de Calidad 2019*, CONACyT, (Mar. 28, 2020), *http://svrtmp.main.conacyt.mx/ConsultasPNPC/datos_abiertos/Padron%202019.csv*.

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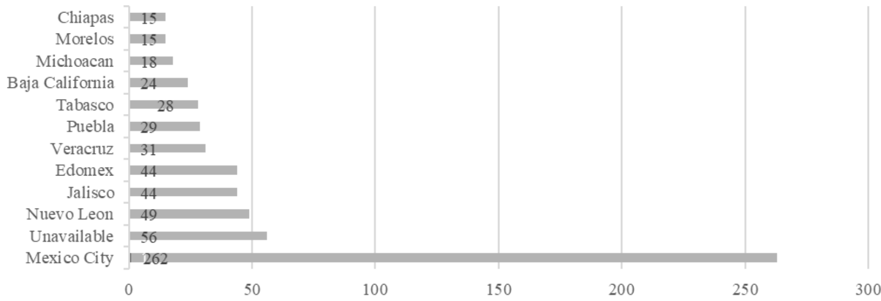
In total, there are 774 legal researchers registered in the SNI,[40] distributed across the country as follows:

GRAPH 2[41]



If we consider the history of the Mexican law graduate level, we can see that UNAM had the advantage of having an Institute for Legal Research (hereafter, IIJ-UNAM) since 1940, which allowed the institution to generate the scientific knowledge long before most universities in Latin America.[42]

Only 25 of 1,528 postgraduate programs with PNPC accreditation are law programs.[43] As Godinez Lopez points out, only 6.2% of the PNPC programs in Mexico belong to private HEIs.[44] As we know, 1984 saw the creation of the SNI. According to the 1985 IIJ-UNAM activity report, the Institute had 47 legal researchers among its ranks, with 34 academic technicians.[45] The graph 3 illustrates the distribution of the SNI by institutional affiliation.

UNAM has an advantage of 95 legal researchers registered in the SNI over its closest competitor (UANL). Through the data compiled in the graphs, legal researchers, according to the variables presented, are mainly centralized in one region and in one institution: The Mexico City Metropolitan Area and in UNAM.

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[40] National Researchers System [SNI], *Padrón de beneficiarios,* SNI, (Feb. 9, 2022), *https://conacyt.mx/wp-content/uploads/sni/Padron_de_Beneficiarios_2021.xlsx*.

[41] The list of the excluded states are: Queretaro, Sinaloa, Tamaulipas (14), Aguascalientes, Tlaxcala (12), Chihuahua, Durango, Guanajuato (11), Coahuila de Zaragoza (10), San Luis Potosí, Yucatán (9), Nayarit (8) Colima (6), Guerrero (5), Campeche, Oaxaca (3), Quintana Roo (2), Baja California Sur, Sonora, Zacatecas and Foreign Country (1). *See Id.*

[42] IIJ-UNAM, *Misión y Objetivos*, IIJ-UNAM, (Aug. 27, 2016), *https://www.juridicas.unam.mx/acerca-de/mision-y-objetivos*.

[43] CONACyT, supra note 40.

[44] Ana Cecilia Godínez López, *"Abrir una universidad es tan fácil como abrir una tortillería": la participación de las instituciones de educación superior particulares en la matrícula de posgrado en México*, 14 POLI. DE EDU. SUP.1, 12 (2017).

[45] IIJ-UNAM, supra note 43.

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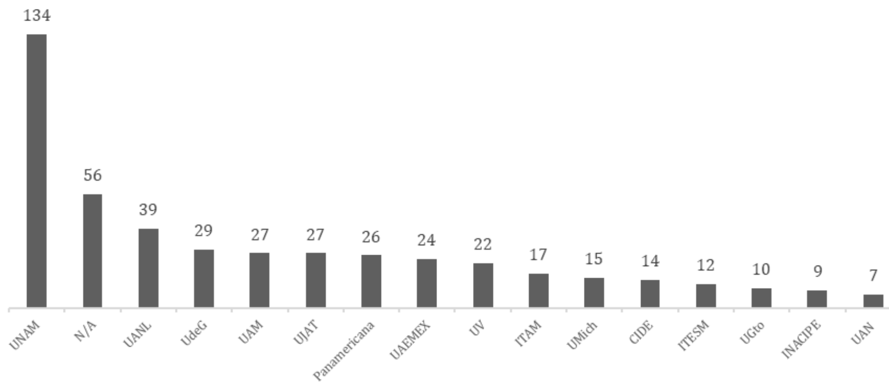
Graph 3[46]



Under the circumstances, legal research oriented graduate PNPC programs (albeit their names) have insignificant impact on the number of researchers. However, this seems not to be the case at UNAM. IIJ-UNAM is (practically) the sole source of legal information with its (up to 2020) 13 law journals, over 5,380 law books produced,[47] 13 law collections,[48] and 39,060 law articles,[49] among other non-written media. From the research conducted by the writer, there are no other legal research institutions that promote this type of legal content, regardless of the presence of law journals.

There is a lack of interest in heightening legal education in Mexican law schools, since success in the legal industry does not rely on the quality of the legal scholars' work, but on their capacity to weave personal social networks that translate into favors and patronage. Becerra Ramirez points out that this situation holds a kinship with the Soviet Union's concept of "*zbiasi*", a system in which obtaining boons through legal and social channels was the rule.[50] How does this impact Mexican legal research?

IV. Mexican Legal Research

According to Lopez Ayllon, Mexican legal research has not been able to provide legal solutions to the changes the country faces.[51] Perez Cazares adds

[46] *Id.*

[47] IIJ-UNAM, *Libros (Biblioteca Jurídica Virtual),* IIJ-UNAM, (May 25, 2020), *http://ru.juridicas.unam.mx/xmlui/handle/123456789/8972*.

[48] IIJ-UNAM, *Colecciones y Series,* IIJ-UNAM, (May 25, 2020), *http://ru.juridicas.unam.mx/xmlui/handle/123456789/41050*.

[49] IIJ-UNAM, *Listar por título,* IIJ-UNAM, (May 25, 2020), *http://ru.juridicas.unam.mx/xmlui/browse?type=title*.

[50] Becerra Ramírez, supra note 2, at 8-9.

[51] Sergio López Ayllón, *Perspectivas de la investigación jurídica en México*, Crónica, (last visited May 27, 2019), *http://www.cronica.com.mx/notas/2015/913831.html*.

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that Mexican legal researchers focus, primarily, on dogmatic and non-transcendent research, circumscribed only to commentary on law and doctrine.[52] He attributes this shortcoming to mediocre legal pedagogy and the lack of professors with a background in legal research, an educational system designed to make obedient students, and the abuse of rote learning.[53]

Many authors have listed deficient teaching as the main problem surrounding legal research in Mexico. Sanchez Vazquez states that the current teaching method is *magister dixit,* a medieval method in which the only person with knowledge inside a classroom is the professor, while the students are passive recipients of said wisdom.[54] Mexican legal education is "authoritarian, informative, monologue, immutable, passive, receptive, rote, descriptive, tame, and uncritical".[55] This restrictive doctrine does not encourage students to do research, nor does it require the professor to produce it. This puts Mexican legal education in a state of under-theorization.[56]

Various authors have blamed the *magister dixit* method for hindering the production of new legal researchers and for being an antiquated teaching method. Camilloni advocates for legal education that fosters students' creativity by means of newly generated content added to objects of knowledge for classes, departments and research and teaching institutes.[57] Moreover, as Elgueta and Palma point out, the *magister dixit* method has been scrutinized since the 1950s, with much criticism aimed at the passivity it imposes on law students.[58] This teaching methodology is widely condemned, and it might have the greatest impact upon the production of original legal research.

1. *Volume of Legal Research Produced in Mexico*

According to SCImago, Mexico produced 117 law-related papers in 2018,[59] representing 5.22% of the 2,238 social sciences articles published in

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52 Martin Eduardo Pérez Cazares, *Problemas de la investigación jurídica y su enseñanza en nivel de posgrado en México*, 12 Rev. sobre Enseña. del Der. 253, at 255 (2014).

53 *Id.,* at 256-63, 266-74.

54 Rafael Sánchez Vázquez, *Reflexiones en torno a la docencia e investigación jurídica en México,* 64 Rev. de la Fac. de Der. de Mex. 657, 661 (2014).

55 Rafael Sánchez Vázquez, *Algunas reflexiones sobre la docencia e investigación jurídica en México*, 5 Prospe. Juri. 67, 75.

56 Pérez Hurtado, supra note 11, at 581.

57 Alicia Camilloni, *La enseñanza del derecho orientada al desarrollo de la creatividad,* 6, (1) Rev. Ped. Univ. Y Didac. del Der. 5, at 19 (2019).

58 María Francisca Elgueta Rosas, Eric Eduardo Palma González, *Una propuesta de clasificación de la clase magistral impartida en la Facultad de Derecho*, 41(3) Rev. Chil. Derecho 907, at 912-3 (2014).

59 SCImago, *Mexico - Social Sciences*, SCImago, (Apr. 27, 2020), *https://www.scimagojr.com/countrysearch.php?country=mx&area=3300*.

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the country that year.[60] Scopus shows that production in 2015-2017 was 321 articles, published in five journals owned by one sole publisher: UNAM.[61] Journal Citation Reports has only one Mexican law journal registered in its database[62] as is the case in W&L's index.[63] Unsurprisingly, UNAM has both journals. In comparison, Canada (a country with only 21 law schools, meaning that there is a law school per 1,673,891 inhabitants)[64] has 60 journals registered in the W&L's index[65] and, according to SCImago, produced 1,046 law papers in 2019.[66]

According to Sanchez Trujillo, there are around 2,000 law journals in Mexico.[67] However, of the 216 scientific journals arbitrated by CONACyT, only nine are law journals.[68] Sanchez Trujillo points out that the researchers interested in writing and peer-reviewing tasks are scarce,[69] a situation that might be due to the type of legal education in Mexico, which does not produce researchers but legal technicians.

Overall, Mexico's production of legal research reveals the poor quality and passive setting of its legal education system. Aside from UNAM and few other exceptions, practically all the other law schools are the passive recipients of the transmission of the knowledge produced by IIJ-UNAM.

V. Is Legal Research Remunerated in Mexico?

Another contributing factor for Mexican legal scholars to migrate abroad is how unlikely it is for them to attain a livable salary once inserted in the

[60] SCImago, *Mexico - All subject areas,* SCImago, (Apr. 27, 2020), *https://www.scimagojr.com/countrysearch.php?country=mx*.

[61] Scopus, *Sources (2020)*, Elsevier, (Apr. 27, 2020), *https://www.scopus.com/sources.uri*.

[62] This is the *Boletín Mexicano de Derecho Comparado. See* JCR, *Journals and Conferences*, Publons, (Apr. 28, 2020), *https://publons.com/journal/?esi=12&publisher=981*.

[63] In this case, *Mexican Law Review* is the only one registered. See, Washington & Lee Law School, *W&L Law Journal Rankings,* Washington & Lee Law School, (Apr. 28, 2020), *https://managementtools4.wlu.edu/LawJournals/*.

[64] PowerScore. *Canadian Law Schools Guide*, PowerScore Publishing, (Apr. 27, 2020), *https://s3.amazonaws.com/powerscorepdfs/lawschool/guides/Canadian%20Law%20Schools%20Guide.pdf*.

[65] *Id.*

[66] SCImago, *Canada - Social Sciences,* SCImago, (Apr. 27, 2020), *https://www.scimagojr.com/countrysearch.php?country=CA&area=3300*.

[67] María Guadalupe Sánchez Trujillo, *De la generación del conocimiento jurídico a los canales para su difusión. Revista Jurídica In Jure Anáhuac Mayab,* in María Dolores Almazán Ramos, David Anuar González Vázquez, Comunidad Académicas y Políticas Editoriales, 176 (*Universidad Autónoma de Yucatán* ed., 2016).

[68] National Consortium of Scientific and Technological Information Resources [CONRICyT], *Revistas Arbitradas del CONACYT*, CONRICyT, (Mar. 26, 2020), *https://www.conricyt.mx/files/Listado_revistas_2018.xlsx*.

[69] Sánchez Trujillo, supra note 68, at 179-80.

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system. As stated previously, legal research can be paid in the form of wages and incentives awarded by HEIs (both public and private) and/or through resources awarded by the SNI. The first surpasses the second, as resources provided by HEIs are the main source of income paying for legal research in the country, especially since most professors employed by a given university are not members of the SNI. For example, in 2021, only 54 out of 1,388 professors employed by UNAM were SNI researchers.[70] IIJ-UNAM's personnel and Law School salaries[71] greatly surpass SNI resources as the main funding source of legal research in the country.

1. *Salaries*

Mexican public schools are usually ranked to receive research stimuli. Although the ranks are mostly similar throughout the country, they may vary from one institution to another. Here are the monthly salaries offered by five public HEIs to their highest-ranked professors:

Institution	*Salary*
UADY	28,411.20 MXN[72]
USon	29,365.55 MXN[73]
UNAM	31,704.48 MXN[74]
UANL	33,019.39 MXN[75]
UAN	17,466.09 MXN[76]

[70] UNAM, *4to informe de actividades. Dr. Raul Contreras Bustamante*, Faculty of Law, (Feb. 2, 2022), *https://www.derecho.unam.mx/informes/cuartoinforme/Informe_Extenso.pdf*, at 15.

[71] UNAM, *Remuneración Bruta y Neta*, Portal de Transparencia Universitaria, *http://www.transparencia.unam.mx/obligaciones/consulta/remuneracion-personal/202*.

[72] Autonomous University of Yucatán [UADY], *Tabulador de Sueldos Mensual Personal Académico*, UADY, (Jan. 1, 2015), *http://www.transparencia.uady.mx/a9/Documents/financiera/tabuladores/2015/TabuladordeSueldosMensualPersonalAcademico2015.pdf*.

[73] Sonora University [USon], *Personal Academico*, USon, (Jan. 1, 2015), *http://www.transparencia.uson.mx/archivos/TABACAD.pdf*.

[74] UNAM, *Tabulador del Personal Académico. 1 Febrero de 2020,* UNAM, (Feb. 1, 2020), *https://www.plataformatransparencia.unam.mx/archivos/repositorio/SADM/2020/tabuladorfeb2020/tabacad-feb2020.pdf*.

[75] Autonomous University of Nuevo Leon [UANL], *Tabulador Mensual por Puesto y Salario Bruto del Personal Académico (Antes de deducciones) Vigente Durante el Ejercicio 2019 (Año cero)*, UANL, (Jan. 1, 2019), *http://www.transparencia.uanl.mx/secciones/RH/archivos/Tabulador_2019.pdf*.

[76] Autonomous University of Nayarit [UAN], *Tabulador Salarial del Personal Docente Año 2016*, UAN, (May. 31, 2016), *http://www.uan.edu.mx/d/a/sfa/drh/transparencia/tabuladorDocente.pdf*.

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The National Council for the Evaluation of Social Development Policy (CONEVAL) has established that any person with a salary under $11,290.80 MXN[77] per month is living below poverty level. None of the higher-ranked professors employed by the five chosen institutions belong to the poverty levels set by CONEVAL.

The reality is very different for the lower ranks, who must gamble with their economic security while hanging on in the lower ranks, which will, undoubtedly, require them to take on a second job. Last reliable data on salaries reported by professors on the private sector is dated from 2009, showing that the wages ranged between $13,325.00 MXN- $27,764.00 MXN, on average.[78]

Not all the law school professors receive the salaries detailed in the table above. Most of the professors working in private HEIs receive an hourly wage.[79] Although the information on wages of private universities' professors is unavailable, in the case of public universities, that information is public. These are the salaries of professors hired under this type of contract:

Institution	*Minimum Hourly Wage*	*Maximum Hourly Wage*
UADY[80]	$74.83 MXN	$98.49 MXN
UNAM[81]	$400.24 MXN	$455.04 MXN
UANL[82]	$330.21 MXN	$376.52 MXN
UAN[83]	$265.79 MXN	$270.93 MXN
USon[84]	$371.56 MXN	$1,114.68 MXN

This is a peek at what being a part-time professor in Mexico is like. However, this researcher found that 86.7% of the academics working at those

77 CONEVAL, *Ingreso, Pobreza y Salario Mínimo*, CONEVAL, (Jun. 1, 2017), available at: *https://www.coneval.org.mx/SalaPrensa/Documents/INGRESO-POBREZA-SALARIOS.pdf*.

78 Alma Maldonado Maldonado, *Salarios de académicos de instituciones de educación superior en México comparado con treinta países,* Consejo Mexicano de Investigación Educativa, (Nov. 11, 2011), *http://www.comie.org.mx/congreso/memoriaelectronica/v11/docs/area_16/2395.pdf*.

79 Adrián de Garay, *La participación de los académicos de las universidades privadas en el Sistema Nacional de Investigadores del Conacyt,* Monitor Económico, (Jan. 25, 2012), *https://issuu.com/uiemmonitoreconomico/docs/25_enero_2012__a_*. Abril Acosta Ochoa, *Experiencias laborales y expectativas de futuro de profesores por hora en universidades mexicanas*, Red Mexicana de Investigadores en Estudios Organizacionales, (Aug. 28, 2017), *https://www.researchgate.net/publication/326532838_Experiencias_laborales_y_expectativas_de_futuro_de_profesores*.

80 UADY, supra note 73, at 1.

81 UNAM, supra note 75, at 5.

82 UANL, supra note 76, at 1.

83 UAN, supra note 77, at 1.

84 USon, supra note 74, at 1.

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institutions were doing so under hourly wages. The panorama is not much better in public HEIs since 60.24% of the professors were employed under the same circumstances.[85]

The differences between the wages offered by private and public HEIs do not vary much, although the labour conditions of private law schools are worse than public ones. In private schools, most law professors receive their wages under a concept known as *"honorarios"*, which is the remuneration received by a professional who practices their profession independently, with no labour relationship and as a service provider.[86] Under this labor scheme, law professors in private HEIs do not get social security or other employment benefits. Meanwhile, most teachers at public universities receive all the social security benefits established by Mexican labour law.[87]

91% of law schools in Mexico are private and cater to all types of budgets (elite, middle class, and working-class sectors).[88] Acosta Silva argues that the sector constantly produces newer but unprepared private HEIs that imitate large elite private universities.[89] These institutions prioritize labour market insertion; research also seems to be oriented towards that goal.[90] Herrera Guzman points out that research is not a priority for recently created private HEIs due to the lack of resources, which are mostly directed at covering wages and current expenditures.[91]

2. *Tuition Fees: Their Importance for Salaries*

Raising tuition fees is a common proposal to alleviate financial problems in public HEIs. However, this might not be a possibility due to the economic reality of many Mexican citizens.

Tamanaha argues that US law teachers are among the best paid around the world. Between 1998 and 2009, they have seen their wages increase by 45%, with senior professors at top schools receiving better salaries than federal district judges. According to Society of American Law Teachers data, the average median salary of a full-time professor in 2008-9 was $147,000 USD a year. These sums are primarily attained through hefty tuition fees,

[85] *Id,* at 2.

[86] IIJ-UNAM, Diccionario jurídico mexicano, t. IV, E-H, 343 (Editorial Porrúa, 1985).

[87] Acosta Ochoa, supra note 81, at 27-8.

[88] Adrián Acosta Silva, *Del separatismo al mercado: evolución y perspectivas de la educación superior privada en México*, in Alonso Lujambio, Rodolfo Tuiran, La educación pública: patrimonio social de México, 166-7, 174 (Fondo de Cultura Económica ed., 2011).

[89] *Id.,* at 178.

[90] Martha Armida Fabela Cárdenas & Alfonso Hernán García Treviño, *Gestión de la calidad educativa en educación superior del sector privado*, 6 Revis Inter. de Investi. en Edu. 65, 81 (2014).

[91] Beatriz Herrera Guzmán, *Estructura financiera de las universidades privadas en Zacatecas, México.* ¿Educación de calidad? 13 Prax. Sociol. 241, 248 (2013).

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leading to debts that students will never repay without an average salary of $85,000 USD.[92]

The Mexican government largely subsidizes tuition fees, a policy that has helped Mexican college students repay their debt in under six years.[93] As we can see in the UNAM's 2019-20 budget, the Mexican government provided a subsidy covering 88.61% of the budget, whereas tuition represents a mere 0.07%.[94] The system has its shortcomings, but it has undoubtedly increased the expansion of public education throughout Mexican territory. However, it does affect professors' wages.

Whereas US law schools try to offer the best salaries to their teaching staff to keep the best roster possible away from competing law faculties and firms,[95] Mexican law schools have cut this competition by setting up an internal labour market, ruled by the present academic body and their labour unions. This means that Mexican law professors are in a conundrum in terms of obtaining better salaries. On one hand, law schools are blocked from increasing their tuition fees because it would directly affect expanding higher education in the country, thus limiting access to law schools to impoverished sectors of the population. The shape of the internal labour market in the Mexican academic industry represents an obstacle for lower ranked educators to climb to higher levels, as they would be even more hindered by the usual corruption in evaluations and the politicization of the committees in charge.[96] New recruits would face meager wages for most of their academic careers, without access to financial mobility due to the monopolization of higher ranks.[97]

3. *Which Setting Offers the Best Platform for Legal Research?*

Public universities employ the most SNI researchers, reaffirming that private universities do not focus on producing scientific research. 477 of the 774 SNI-registered law researchers are currently working in a public HEI, whereas 134

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[92] Brian Z. Tamanaha, Failing Law Schools 48-49, 109-12 (University of Chicago Press ed., 2012).

[93] Fernando Barceina Paredes & José Luis Raymond Bara ¿Es rentable para el sector público subsidiar la educación en México?, 62 Inves. Eco. 141, 141-158 (2003).

[94] UNAM's Budget 2020 establishes that the total revenue attained by the university ascends to $46.629 billion MXN. The Mexican government's subsidies sum up to $41.317 billion MXN (88.61%), and the income coming from tuition fees is $34.045 million MXN (0.07%). See, UNAM, *SECADMIVA,* UNAM, (Feb. 12, 2020), *https://presupuesto.unam.mx/secadmiva/presupuesto/pres2020.php*.

[95] Tamanaha, supra note 94, at 47-8.

[96] Eduardo Ibarra Colado, *La "nueva universidad" en México: transformaciones recientes y perspectivas*, 7 Rev. Mex. de Inves. Edu. 75, 91 (2012).

[97] Maricela Zúñiga Rodríguez, Coralia Juana Pérez Maya et al., *Hacer ciencia y producir de conocimiento: impacto en las universidades y en los profesores investigadores,* 77 Eikasia. Rev. de Fil. 45, 51 (2017).

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of them belong to the private sector.[98] Due to their private nature, it is hard to distinguish how these institutions conduct and finance scientific studies.

Private HEIs do not have legal or public policy constraints preventing them from raising their tuition fees, which might explain why Maldonado-Maldonado arrives at the conclusion that these HEIs paid more on average.[99] But, as seen, 86.7% of the academics working in private HEIs were employed by hour whereas 60.24% were under the same setting in public HEIs.[100]

Therefore, we have that, although both scenarios are grim, public HEIs do present a more financially stable platform for legal research due to the existence of government subsidies for academic staff carrying out scientific research, albeit the processing and the amount of said resources are not the most advantageous.[101]

VI. SNI

Legal academics can apply for registration in the SNI program that gives financial resources to scholars producing research. However, only 774 legal researchers in the country receive said stimulus. There are four SNI levels, each of which is assigned a specific amount. The financial stipends are shown in Units of Measurement and Update (UMAs) as follows:

- Candidate: Three times the monthly UMA value[102] ($2,925.09*3 = $8,775.27 MXN).
- Level I: Six times the monthly UMA value ($17,550.54 MXN).
- Level II: Eight times the monthly UMA value ($23,400.72 MXN).
- Level III and Emeritus: Fourteen times the monthly UMA value ($40,951.26 MXN).
- One-third of the stimulus for candidate level is assigned to researchers outside Mexico City ($2,925.09 MXN).[103]

As per the last SNI report, there were 227 legal researchers at candidate level, 399 at Level 1, 88 at Level 2, and 60 at Level 3.[104] These amounts are

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[98] The rest are settled in the Government (106) and 57 of them do not have an institution assigned. See SNI, supra note 41.

[99] MALDONADO MALDONADO, supra note 79, at 5-6.

[100] *Id*, at 2.

[101] Alejandro Mungaray, Marco Tulio Ocegueda et al., *La calidad de las universidades públicas estatales de México, después de 13 años de subsidios extraordinarios*, 177 REV. DE LA EDU. SUP. 67, 89 (2016).

[102] National Institute of Statistic and Geography. UMA, INEGI, *https://www.inegi.org.mx/temas/uma/*.

[103] SNI, supra note 41. RSNI, article 46, 59.

[104] SNI, supra note 41.

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not part of the wages or salaries these researchers perceive at their educational institutions.

Are these stipends enough for a legal researcher in Mexico? It would depend on the researcher's main salary. Salaries vary according to the nature of the HEI (whether private or public) and the location of the law school.

1. *The SNI and Wage De-Homologation*

Although wage de-homologation has worked in terms of strengthening academic bodies in public HEIs and linked participants to other research platforms like the SNI,[105] its goal is not to provide researchers with decent wages or to increase the number of institutions where they might work. In 2011, the Comprehensive Institutional Strengthening Program (PIFI) was born with the objective to improve and strengthen the quality of educational programs.[106] Resources are awarded through a competitive process, with academic bodies (or individuals) delivering academic products (not always related to research) in hopes of securing funding. In essence, the PIFI intended to de-homologate wages with, alas, the same effects. The fact is that this policy has resulted in a myriad of complaints from the scientific sector: clientelism,[107] lack of professionalization,[108] insolvency and bureaucratic protectionism (which puts students and researchers at the bottom of CONACyT budgetary priorities),[109] among others.

There are voices asking for the elimination of the SNI, making its resources available through a full salary.[110] Granados argues that the SNI is nothing

[105] Mungaray, Ocegueda *et al.,* supra note 103, at 89.

[106] Cesar Alfonso Velázquez Guadarrama, *Programa Integral de Fortalecimiento Institucional S235 Evaluación en Materia de Diseño 2011*, Ministry of Public Education, (Jun. 7, 2012), *http://www.sep.gob.mx/work/models/sep1/Resource/2821/2/images/informe_final_s235.pdf*.

[107] Fátima Fernández Christlieb, *Luces y sombras del SNI*, Nexos, (Jul. 1, 2009), *https://www.nexos.com.mx/?p=13200*.

[108] "Some data show the challenges faced by the professionalization of the national academic staff: regarding the type of contract, only 23.8% are full-time professors, less than 2% work half or three-quarters of the time and 75% work part-time; 45% have been employed less than 4 years registered for retirement (in private HEIs it reaches 61%), and only 11.8% have a doctorate. The professionalization of part-time teachers is an unavoidable challenge since just over 50% of the courses in educational programs are taught by them". *See* Jaime Valls Esponda, *La docencia como profesión*, El Universal, (May 9, 2017), *https://www.eluniversal.com.mx/entrada-de-opinion/articulo/jaime-valls-esponda/nacion/2017/05/9/la-docencia-como-profesion*.

[109] Marco Ornelas, *Desaparecer al Conacyt*, El Presente del Pasado, (May 21, 2018), *https://elpresentedelpasado.com/2018/05/21/desaparecer-el-conacyt/*.

[110] Héctor Vera, *SNI, privilegios y generosidad*, El Presente del Pasado, (Jun. 1, 2020), *https://elpresentedelpasado.com/2020/06/01/sni-privilegios-y-generosidad/*.

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more than a productivity stratagem that prevents researchers from attaining decent salaries.[111]

If legal research continues to be perceived as an extra feature of Mexican legal education financially rewarded through highly productivity but insufficient stimuli, Mexican law professors will not feel compelled to generate original research. The author of this piece subscribes to Vera's opinion: "Every teacher (including subject teachers) should receive a salary that adequately covers their needs, and that does not happen today. None should have their income conditional on evaluations".[112]

Moreover, law professor candidate research portfolios should be a standard hiring requirement/consideration in all processes; excluding, of course, practicum teachers, as their profiles are not predominantly centered on research. If it were so, there would be no need for a SNI since legal research would be an integral part of the profession. Therefore, salaries should be increased to reflect the hypothetical disappearance of the SNI. However, as Vera himself admits, the Ministry of Finance and Public Credit would not allow it.[113] Advocacy and the formation of organic academic and research faculty is needed, but the *magister dixit* methodology makes it improbable that the number of research-interested law professionals will increase to a volume large enough to make this a reality.

VII. Centralization

UNAM is the preferred university for students interested in conducting scientific research.[114] As seen in SNI numbers, public financed legal research is (practically) centralized in IIJ-UNAM. The overwhelming number of SNI researchers at IIJ-UNAM is explained because it is a research body solely dedicated to producing original legal research. Moreover, the UNAM School of Law has started the Project to Promote the Entry of more academics into the National System of Researchers (SNI), to raise its quality of education.[115] This situation only exists in UNAM and a handful of other institutions (i.e., CIDE, UANL).

Despite the poor wages offered in the country, legal researchers see IIJ-UNAM as one of the few possible employers in Mexico to conduct academic

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[111] Luis Fernando Granados, *Acabemos con el SNI,* El Presente del Pasado, (Jun. 21, 2020), *https://elpresentedelpasado.com/2020/06/22/acabemos-con-el-sni/*.

[112] Vera, supra note 113.

[113] *Id*.

[114] Tonatiuh Anzures Escandon, *Opening Pathways, Building Bridges: skilled migration and the case of Mexican scientists and engineers in the UK,* (Jun. 8, 2020), at 5 *https://discovery.ucl.ac.uk/id/eprint/10044826/1/2018.%20T.%20ANZURES.%20Opening%20Pathways%2C%20Building%20Bridges.pdf*.

[115] UNAM, supra note 71, at 14.

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legal research. This institution has 1,388 law professors[116] (134 in the SNI) supported by 544 support staff members facilitating the creation of academic clusters, research groups, law journals, etc.[117] These crucial factors are what foster the "monopoly" of legal research within IIJ-UNAM halls.

Sanchez Trujillo purports the idea that there are around 2,000 law journals in Mexico.[118] However, the absence of peer-reviewers and writers reported by Sanchez Trujillo makes it clear that Mexican legal research is but a shell without substance in most institutions. This is one of the negative consequences of the rigid curriculum of most LEDs in the country. Students are taught with outdated methods and theories, nor do they question the information provided by their instructors, which provides the latter with no incentive to update their materials. The lack of demand for new knowledge makes legal research an extra feature of legal education rather than its catalyst. To change this situation, the law curriculum should be revisited and discussed among law professors nationwide.

UNAM itself recognized this situation back in 1983, in one of their Annual Evaluations of the Work at IIJ-UNAM, reporting that the work they did at provincial universities only consisted of teaching since "they do not have, except one, an institute, division or department of legal research".[119] In 2002, Sanchez Vazquez complained that the situation for law schools outside Mexico City are very different from that of UNAM:

> [There is a] lack of documentary and *human infrastructure*. In other words, it has been very difficult for postgraduate courses in the [states] to have worthwhile libraries and newspaper archives … in virtue of this, if we compare these collections with those of the Institute of Legal Research library at the UNAM, they do not exceed 8%.[120]

Universities outside Mexico City have no interest in having their academic staff become doctoral scholars. The "research professor" concept is recent in Mexico, and time and resources are needed to put together and support a research body to conduct research.[121]

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[116] UNAM, supra note 71, at 15.

[117] UNAM, supra note 72.

[118] Sánchez Trujillo, supra note 68, at 182.

[119] Legal Research Institute of the National Autonomous University of Mexico, *Evaluación de las labores del Instituto de Investigaciones Jurídicas durante 1983,* National Autonomous University of Mexico, (Feb. 15, 1984), *https://archivos.juridicas.unam.mx/www/site/acerca-de/pdfsplantrabajo/jorgecarpi/Informe1983.pdf*.

[120] Rafael Sánchez Vázquez, *Algunas consideraciones sobre la docencia e investigación jurídica en México*, in Salvador Valencia Carmona, Educación, ciencia y cultura 305 (IIJ-UNAM ed., 2002).

[121] María del Socorro Hernández Manzano & Roberto Giacoman Gidi, *Investigación jurídica y desarrollo de competencias: la experiencia de la Universidad Iberoamericana Torreón,* CEEAD 69 (Apr. 28, 2016), *https://congreso.ceead.org.mx/pdf/Memorias_CC2016.pdf*.

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Establishing research institutes is costly. The IIJ-UNAM total budget for 2019-2020 was $306,082,256.00 MXN, with 72% of these resources allocated to salaries, benefits, and incentives.[122] In comparison, the UADY's School of Law had a total budget of $37,854,000.00 MXN.[123] Financially, law schools, aside from UNAM's, would view the creation of a legal research institute as a luxury.

1. *CONACyT Policies*

Centralization is not unbeknownst to the Mexican government, as it has previously tried to foster the reintegration of graduate students with degrees from foreign institutions by offering scholarships or cancelling student debt if they migrated to other cities in the country. The idea was to distribute resources in a way that would promote equity and decentralization by means of the compensatory allocation of available resources to regions outside Mexico City.[124] However, there are no records on the efficiency of this policy.[125] Alongside the decentralization policy, CONACyT has a repatriation policy and a professorship program.

The repatriation policy aims at incorporating researchers with research experience both abroad and within the country.[126] CONACyT will provide the beneficiary with a monthly stipend of $30,000 MXN for the next 12 months and a one-time payment of $36,000 MXN for relocation. Researchers who are heads of households will receive an additional monthly bonus of $3,000 MXN for 12 consecutive months.[127] Since its creation in 1991 and until 2015, the repatriation policy has brought back 3,062 researchers.[128]

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[122] IIJ-UNAM. *Discurso del director. 2019-2020,* UNAM, (Aug. 1, 2019), at 7, *https://www.juridicas.unam.mx/informe-2019-2020/discurso-director#descargar-discurso*.

[123] UADY's General Coordination of Financial Development, *Egresos por Dependencia y Objeto del Gasto Subsidio Público*, UADY, (Jan. 29, 2020), *https://www.cgdf.uady.mx/download.php?file=aHR0cDovL3RyYW5zcGFyZW5jaWEudWFkeS5teC9jZ2RmL1ByZXN1cEZpbmFuLzIwMjIvRWdyZXNvcG9yRGVwZW5kZW5jaWF5T2JqZXRvZGVsR2FzdG9TdWJzaWRpb1B1YmxpY28ueGxzeA==*.

[124] Francisco Marmolejo, *Redes, movilidad académica y fuga de cerebros en América del Norte: el caso de los académicos mexicanos*, in Sylvie Didou Aupetit, Etienne Gerard, Fuga de cerebros, movilidad académica y redes científicas 110,143 (*Centro de Investigación y de Estudios Avanzados del Instituto Politécnico Naciona*l ed., 2009).

[125] *Id.,* at 50-1.

[126] CONACyT, *Repatriaciones y Retenciones,* CONACyT, (Sep. 30, 2021), *https://conacyt.mx/becas_posgrados/repatriaciones-y-retenciones/*.

[127] CONACyT, *Apoyos para la Incorporación de Investigadores Vinculada a la Consolidación Institucional de Grupos de Investigación y/o Fortalecimiento del Posgrado Nacional. Convocatoria 2019 (1),* CONACyT, (Aug. 28, 2019), *https://www.conacyt.gob.mx/index.php/el-conacyt/convocatorias-y-resultados-conacyt/convocatoria-de-apoyos-complementarios-grupos-de-investigacion/conv-rp-rt-19/18982-conv-rr-19-1/file*.

[128] Alma Paola Trejo Peña, *La cooperación académica en educación superior entre México y España*

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In the 2000s, public investment in the program dropped due to a lack of interest in repatriating Mexicans who studied and were working abroad, which led to a steady decrease in repatriations. Izquierdo argues that one of the main issues raised about this policy at the time was the lack of full-time jobs for the repatriated people.[129] In general, the rate in the 1990s was about 40 returnees for every 100 doctoral students studying abroad with CONACYT scholarships, but by 2016 the rate had decreased to only 1 returnee per 100 PhD students abroad.[130]

Moreover, as García Pascacio, *et al.* pointed out, the lack of research groups prevents proper repatriations.[131] The presence of the *magister dixit* method and the lack of the legal research centers circumscribe successful repatriations to a handful of institutions (namely, the IIJ-UNAM and the UANL legal research center). Therefore, and due to the inability (nay, disinterest) of the private HEIs, which have the most law schools registered in Mexico, the possibilities of attaining a job as a legal scholar in Mexico are very reduced.

The CONACyT professorships program originated with the 2013-2018 National Development Plan, as part of the national "Mexico with Quality Education" goal. It aims at making scientific, technological and innovation development the pillars for economic progress and social sustainability in the country and generating an important number of highly qualified human capital by incorporating researchers into the knowledge market and thus reaching levels of global competitiveness and productivity. Currently, 1,076 researchers carry out 664 research, innovation, and technological development projects in 132 institutions in all the states in the country. In 2014, CONACyT awarded a monthly wage of $30,676.05 MXN to those benefitting from this program.[132]

Neither the repatriations[133] *nor the professorships programs*[134] *have registered legal scholars or projects*. The decentralization of legal research will take more than just resources to become a reality.

1977-2017. Una política migratoria y contexto de acogida diferenciado, 28 Edu. Pol. Anal. Arch. 1, 5 (2020).

[129] Isabel Izquierdo, *Las científicas y los científicos extranjeros que llegaron a México a través del subprograma de* cátedras *patrimoniales del CONACyT*, 39 Rev. de la Edu. Sup. 61, 72 (2010).

[130] Luis Enrique García Pascacio & Jorge Ariel Ramírez Pérez et al., *La política y las condiciones de repatriación de investigadores en México (1991-2017),* 42 Perf. Edu. 135, 142 (2020).

[131] *Id.,* at 150.

[132] CONACyT, *Cátedras Conacyt,* CONACyT, (Aug. 29, 2020), *https://www.conacyt.gob.mx/index.php/el-conacyt/desarrollo-cientifico/catedrasconacyt*.

[133] CONACyT, *Convocatorias para la Consolidación Institucional: Repatriaciones y Retenciones. Padrón de Beneficiarios,* CONACyT, (Sep. 30, 2021), *https://conacyt.mx/convocatorias/convocatorias-para-la-consolidacion-institucional-repatriaciones-y-retenciones/*.

[134] CONACyT, *Convocatorias Cátedras Conacyt para Jóvenes Investigadores,* CONACyT, (Aug. 28, 2020), *https://www.conacyt.gob.mx/index.php/el-conacyt/convocatorias-y-resultados-conacyt/convocatoria-catedras*.

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VIII. Are Mexican Legal Scholars Migrating?

Who falls under the category of migrant legal scholar? Anzures Escandon uses the term "brain" to refer "to those individuals who hold at least a BSc degree obtained in Mexico".[135] I will use the same definition, but changing the BSc degree for the "Bachelor of Laws" degree.

One of the most common ways MLGS study abroad is through scholarships offered by CONACyT. Anzures Escandon argues that the scholarships foster "a model of mobility biased to the U.S., in view of the lack of job opportunities or the low wages offered to graduates".[136] Garcia Pascacio argues that these scholarships are "an invitation to migrate".[137]

No research has been done on how many law students have left Mexico to pursue postgraduate studies in law at foreign universities. The author decided to use the CONACyT Registry of Scholarship Recipients (RSR), a registry with the names, destinations, and scholarships granted to Mexican students pursuing graduate studies, in order to obtain the corresponding figures.[138]

1. *CONACyT Scholarships to Study Abroad*

Anzures Escandon argues:

> The [CONACyT] scholarship programme is the most important asset for talent formation/forming/developing talent in Mexico. [Its] priority was to increase the number of teachers and researchers in Mexican higher education institutions, as well as to support the creation of research centers across the country.[139]

After consulting RSR data on scholarships awarded between 2012 and the first quarter of 2020 and filtering out other fields of knowledge, 632 law students received CONACyT resources to study abroad. The RST includes information on students' names, duration of the scholarship, levels of studies, hosting institutions, hosting countries, programs, areas of knowledge, and amounts paid to the institutions.

Aside from CONACyT scholarships, MGLS can receive other scholarships like the Chevening while others even resort to bank loans to finance their studies. However, since banks are private companies, data on specific MGLS who applied for loans were unavailable for this research.

135 Anzures Escandon, supra note 117, at 51.

136 *Id.,* at 30, 3.

137 García Pascacio, supra note 133, at 143.

138 CONACyT, supra note 5.

139 Anzures Escandón, supra note 117, at 130-2.

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2. *Survey: Using the RSR and Contacting Students*

MLGS were located through LinkedIn, along with information on which university they obtained their bachelors' degrees and their current jobs. Those who responded were asked the following questions:

— *Question 1*: Could you describe your experience as a law student in Mexico, and the differences you find between the foreign graduate program you took and the LED?
— *Question 2*: Do you aspire (or did you aspire) to stay in the country where you are pursuing (or pursued) studies to obtain a job as a legal researcher (whether for a university, NGO, government, etc.)?
— *Question 3*: If so, did you encounter any kind of obstacle when making the same attempt to find a job in Mexico?

From the original 632 student sample, 106 could not be contacted by any means possible. Moreover, there was no reliable information in terms of employment or *alma maters*. Therefore, the sample was reduced to 526 as per the criteria described in this paragraph. They were contacted via LinkedIn or email, with 54 people responding to the survey questions.

3. *Demographics*

A. *Gender and Alma Mater*

In terms of gender, the MLGS sample consisted of 327 males and 307 females. Among those who were legal researchers, 43 were women and 28 were men. As we will see later, researchers (regardless of gender) are a very small minority. Which Mexican HEI sends the most MLGS to foreign HEIs?

Of the 10 universities mentioned in the graph, seven are private HEIs. Five of these institutions (Ibero, ITAM, ITESM,[140] ELD, Panamericana)[141] are regarded the most exclusive institutions in the entire country. The numbers shown on Graph 4 are comparable to the ones purported by Arceo Gomez *et al.*[142]

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[140] Yazmin Cuevas Cajiga, *La institución superior privada en México. Representaciones sociales de estudiantes: privilegio y prestigio*, 16 Revista Iberoamericana de Educación Superior, at 49 (2015).

[141] Former Mexican presidents Felipe Calderon and Enrique Peña Nieto obtained their undergraduate degrees from these last two universities, respectively. *See* Lorenzo Meyer, *Las universidades de los políticos*, El Siglo de Torreón, (Aug. 29, 2020), *https://www.elsiglodetorreon.com.mx/noticia/692275.las-universidades-de-los-politicos.html*.

[142] From 2013-2016, 76% of the applications for postgraduate scholarships to study abroad were sent by only 20 institutions, and of these, half are private. Eva O. Arceo Gómez et al., *Desigualdades en el sistema de becas para posgrado en el extranjero en México,* 24 Rev. Mex. de Inves. Edu. 69, 69 (2019).

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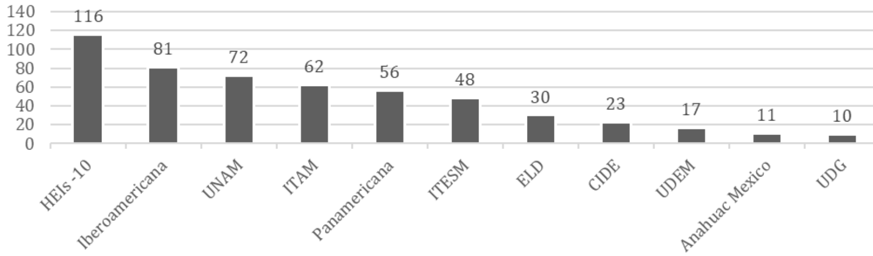
GRAPH 4[143]



The students enrolled in these HEIs generally come from wealthy backgrounds, meaning that those resources are often awarded to people who might not need them in the first place. It is impossible to assess the socioeconomic background of MLGS in the sample, but we can infer that the prevalence of private HEIs in the number of MLGS in the sample is due to the credit-like nature of CONACyT scholarships for studying abroad, which means that students must repay the amount.[144]

Class privilege[145] might play an interesting role in the awarding of CONACyT scholarships, which contradicts several CONACyT announcements requiring the validation of applicants' socioeconomic situation condition when reviewing eligibility for financing.[146] This context is important since, as Anzures Escandon points out: "Privileged immigrants (skilled individuals among them) are more likely to enjoy the benefits of these contemporary migration dynamics than their unskilled, generally poorer counterparts".[147]

In most scholarships announced for 2020, CONACyT excluded legal studies from its priority areas[148] established by CONACyT and a secondary sponsor. This is one of the main reasons why MLGS with active CONACyT scholarships in 2019 were outnumbered by other disciplines that CONACyT did

[143] CONACyT, supra note 5. All the graphs in this chapter were obtained from the same source.

[144] Anzures Escandon, supra note 117, at 130-2.

[145] "[P]rivilege is defined as a special right, benefit, or advantage given to a person, not from work or merit, but by reason of race, social position, religion, or gender ... Over time, the individual's insulated worldview is assumed by the individual to be normative, universal, and ubiquitous, and those not subscribing to the privilege person's worldview are considered deviant". *See* William Ming Liu, Theodore Pickett Jr. et al., *White Middle-Class Privilege: Social Class Bias and Implications for Training and Practice*, 35 JOUR. OF MULTIDIS. COUNSE. AND DEV. 194,195-6 (2011).

[146] *Reglas de Operación del Programa de Becas de Posgrado y apoyos a la calidad*, § 1.3.3.2. Criterios de Selección; *Reglamento de Becas del Programa de Fomento, Formación y Consolidación de Capital Humano de Alto Nivel*, § Art. 10.

[147] ANZURES ESCANDÓN, supra note 117, at 66.

[148] CONACyT, *El Conacyt lanza convocatorias para becas de posgrado en el extranjero 2020*, CONACyT, (Feb. 22, 2020), *https://www.conacyt.gob.mx/index.php/comunicados/1243-com-140-2020*.

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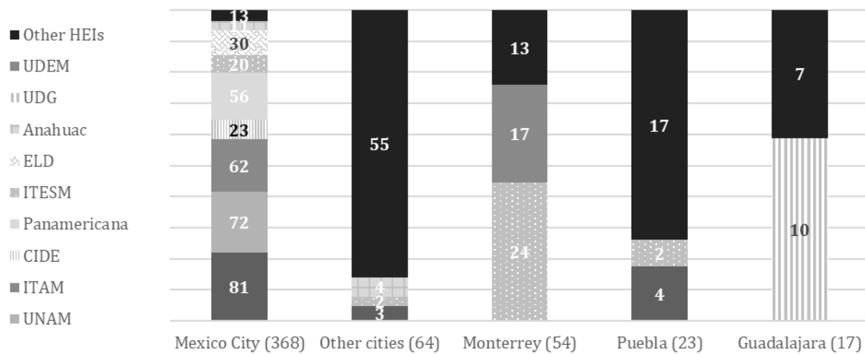
consider a priority.[149] Granting scholarships to students from privileged socio-economic backgrounds is not inappropriate, but attention should be brought to the fact that most of the limited opportunities to study law abroad are given to these students.

B. *Cities*

"Patterns of migration are usually interregional, intra-state or rural-urban before they become international".[150] This is known as "internal brain drain".

GRAPH 5



From the cases we reached out to, 368 MLGS obtained their undergraduate law degree from a university in Mexico City, revealing the very remote possibility for students from HEIs outside Mexico City, Monterrey, Puebla, and Guadalajara[151] to obtain a CONACyT scholarship to study abroad, with only 64 cases seen in this graph.

The above cited Arceo Gomez et al. states that:

> Our analysis shows high degrees of concentration in the distribution of educational quality at the highest level in the country, both geographically and institutionally. Mexico City and the northeast of the country represent 60% of the total applications in 2013-2016 … As for the [South], only 144 of the 2,507 higher education institutions registered with the ANUIES sent at least one scholarship application to [CONACyT] during the period in question.[152]

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[149] In the 2019 RSR, 119 MLGS were registered. Other fields had larger numbers: physics and mathematics (445), medicine and health sciences (516), biology and chemistry (508), and engineering (1307).

[150] ARCEO GÓMEZ, supra note 146, at 124.

[151] Mexico City, Puebla, Monterrey, and Guadalajara. *See* Anzures Escandon, supra note 117, at 125.

[152] ARCEO GÓMEZ, supra note 146, at 95.

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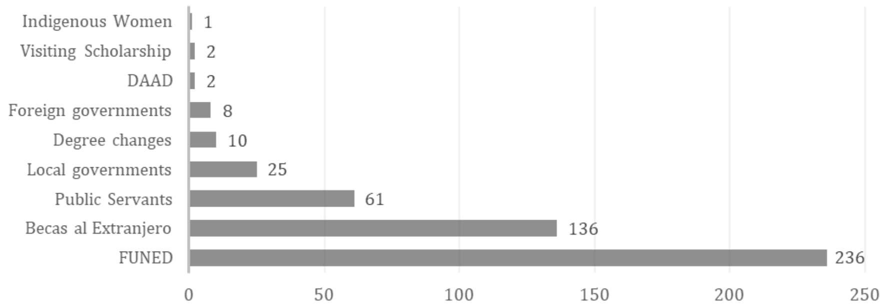
C. *Scholarships Used*

As the information on the scholarships granted between 2013 and 2018 is incomplete, this MLGS sample consists of the 482 were registered on the CONACyT webpage. The following graph shows the scholarships used by MLGS:

GRAPH 6



As seen, FUNED (a non-governmental organization) represents almost half (236 of the available 482) of the scholarships sample. This financial support consists of monthly financial support for paying tuition up to an annual amount of $76,800.00 MXN. FUNED assists students with a $15,000.00 USD loan.[153]

This scholarship establishes several selection criteria. The one that most stands out is an assessment of the applicants' socio-economic situation.[154] The graph of the *alma maters* of MLGS revealed that most of them obtained an undergraduate degree from exclusive private schools. A desired socio-economic background for applicants is not established in the rules or in calls, making this requirement inconsequential. Its purpose might be attributed to the fact that the support is basically a loan, which would explain why students with greater purchasing power have greater access to aid.

Consequently, 160 of FUNED recipients come from private HEIs (120 from Mexico City). FUNED itself stated that private HEI recipients (from all fields) represented 80% of the cases in its 2019 report.[155] Moreover, there

[153] CONACyT, *Becas Conacyt-FUNED 2019 Primer Periodo*, CONACyT, (Sep. 9, 2019), *https://www.conacyt.gob.mx/index.php/el-conacyt/convocatorias-y-resultados-conacyt/convocatorias-becas-al-extranjero/convocatorias-becas-al-extranjero-1/convocatorias-cerradas-becas-al-extranjero/conv-cerr-be-19/18916-convt-funed-1er-19/file*.

[154] *Id.*

[155] Mexican Foundation for Education, Technology and Science, *FUNED Informe 2019*, FUNED, (Sep. 11, 2019), *https://funedmx.org/wp-content/uploads/2020/01/INFORME-FUNED-2019-comprimido.pdf*.

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are four dominant institutions: Ibero (36), Panamericana (32), ITAM (30), and ELD (13). From public HEIs (46), we have that UNAM (21) and CIDE (11) have 69.56% of the beneficiaries. 30 awardees did not have information regarding their *alma mater*.

In second place, we have the "Becas al Extranjero" scholarship. The call for this scholarship states that "priority shall be given to doctoral studies and programs related to the areas established by the Special Program for Science, Technology, and Innovation (PECITI)".[156] Legal studies are not included. However, "applicants whose study program is not contemplated in [these] areas may apply".[157] This clause has an actual impact on the type of applicants pursuing this financial ais since 73 of the 137 recipients were doctoral students. In terms of geographical distribution, "Becas al Extranjero" scholarship recipients are well-spread across the country. In our sample, 10 states were present: Mexico City (20), Nuevo Leon (3), Jalisco (3), Sonora (2), Puebla, Michoacan, Guanajuato, Tamaulipas, Baja California, and the State of Mexico. UNAM had 10 beneficiaries of this scholarship.

Overall, scholarships are as centralized as the production and legal research platforms. Arceo Gomez *et al.,* believe the main reason for this situation is because scholarships are mostly promoted in a handful of universities, founding that 10 private HEIs have higher "application per student" rates than those in the rest of the country. Moreover, as these researchers state, the patterns of segregating universities in the applications will not change if the quality of basic and upper secondary education is not improved. Even then, these inequalities should not be exacerbated in access to scholarships to study abroad.[158]

D. *Doctoral Students*

The *"Becas al Extranjero"* gives preference to doctoral students. Since these programs are, by nature, research-oriented, they are the perfect way to identify potential legal researchers. Out of 570 MLGS CONACyT scholarship recipients, 104 were doctoral students. To prove that these students are likelier to obtain legal research positions, it is necessary to look into MLGS' current occupations.

[156] The fields covered by the PECITI are biotechnology, medicine, energy, environment, industrial manufacturing technologies, materials, nanotechnology, information and telecommunications technologies, and applied mathematics and modeling. CONACyT, *Becas CONACyT al Extranjero 2014 Convocatoria CONACyT para la Formación de Recursos Humanos de Alto Nivel en Programas de Posgrado de Calidad en el Extranjero,* CONACyT, (Jul. 18, 2017), *https://www.conacyt.gob.mx/index.php/el-conacyt/convocatorias-y-resultados-conacyt/convocatorias-becas-al-extranjero/convocatorias-becas-al-extranjero-1/convocatorias-cerradas-becas-al-extranjero/convocatorias-becas-al-extranjero-2014/3618-convocatoria-becas-conacyt-al-extranjero-2014/file*.

[157] *Id.*

[158] Arceo Gómez, supra note 146, at 86.

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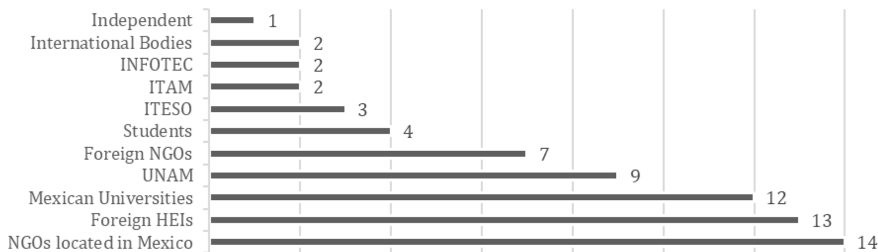
E. *Employment*

In this section, we list MLGS' current occupations. However, 119 of them did not have any work-related information on their LinkedIn profiles or any public information on that point.

GRAPH 7

This graph shows that between 2012 and 2020 CONACyT scholarships helped produce 69 legal researchers. Although (both national and international) academia employs most of them, non-governmental organizations have played a key role in providing 21 jobs for such professionals. Four cases of people who are currently studying abroad but answered that talks were already underway to fill the ranks of a Mexican university as a legal researcher were included in this tally. Doctoral students were keener to get legal research positions than were other students. From the sample, 42 doctoral students are now currently employed as legal researchers, compared to 27 masters' degree students. If we classify MLGS by their degrees, 40% of the doctoral students landed a legal research job, while only 5.80% of master's students did. The following graph shows places employing legal researchers:

GRAPH 8



From the data we can see that 47 individuals are working in Mexico as legal researchers, only 8.93% of all MLGS who received a CONACyT scholarship to study abroad. The remaining 22 are part of the "brain drain".

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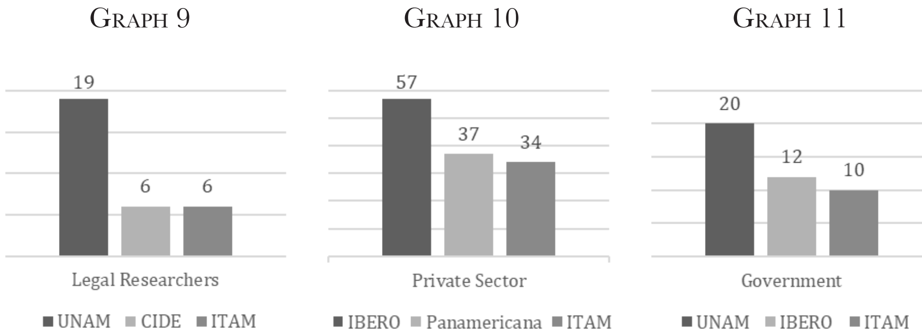
As for undergraduate degrees, the Mexican universities that have produced the most legal researchers between 2012-2020 and a comparison between universities with lawyers working in other sectors are shown in the following graphs:

Graph 9 | Graph 10 | Graph 11



With these graphs, we can see which universities are more likely to send MLGS for private-professional reasons or for academic purposes.

F. *Survey*

Question 1:

This is *Minera*'s answer to Question 1:

> In academic terms, when I started my activities at the University of Alicante, I honestly realized that I was at a real disadvantage… there were great differences between my academic skills and those of other students… Furthermore, I was very used to a teaching/learning process where the student has little autonomy; that is, the professor tells you what to do. Meanwhile, the program I was taking gave me little along those line since student[s] were the ones who had to organize [their] time, look for [their] material, flesh out a project and deliver substantial progress.

As we can see, the *magister dixit* method had a negative impact on *Minera's* academic development. She was a doctoral student who, as she points out, did not have coursework as part of the program.

Capirotada faced a similar situation while studying at McGill University:

> …It was difficult since my education in law in Mexico [in the 1990s] was through the transmission teaching-learning process. In other words, professors only transmitted their knowledge and mainly evaluated by means of exams. However, the McGill University system was one of problematization, and therefore I had days to acquire the skills I had not acquired in years in the [LED].

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Which are these differences? MLGS point out that the programs they attended focussed on legal theory side, instead of solely focusing on the practice. In *Cuachala*'s experience:

> My graduate degree was in legal theory. So, comparing it to a bachelor's degree is a bit difficult. It centered on Anglo-Saxon legal theories (Dworkin, Shapiro, etc.) and some continental European ones (Luhmann). In general, its approach was more discussion and case resolution, although perhaps the comparison between a national degree and a postgraduate degree abroad is not the same.

Graduate law programs in Mexico do follow a *magister dixit* setting like the one in the LED.[159] On the other hand, foreign law graduate programs display flexibility in terms of how students gain and produce knowledge. Students are generally proactive, or at least programs do not see passivity as something desirable, unlike Mexican ones.[160]

One exceptional case was reported by some CIDE students. *Huarache* tells us her story while studying there:

> At CIDE, I had courses that are quite scarce in other law schools: Introduction to economics, political science, legal analysis, legislative drafting. Most of these courses were part of the common core. In other words, I studied with guys from the Bachelor of Economics, Political Science, etc. The Legal Methodology course was our 'filter' since the CIDE aims at preparing researchers.

Moreover, *Huarache* had the opportunity to work as a Research Assistant, a rare figure in the Mexican legal education system. Another aspect we can extract from this testimony is CIDE's multidisciplinary coursework.

Another interesting aspect shared by some MLGS is the desire to acquire knowledge on certain topics that are not available in Mexico. *Camote*'s experience shows that:

> To give some background, I studied a master's in International Tax Law [adv. Program] at the International Tax Center of the University of Leiden, in the Netherlands… [T]he teaching resources at the University of Leiden are superior to those in Mexican universities. The scope and level of my master's degree are not available in any educational institution in Mexico.

Camote is a tax lawyer, with 19 peers among MLGS registered in the RSR. None of these 20 MLGS were working in academia.

Another aspect pointed out by interviewees was the language barrier. In the traditional format, the language barrier might be an obstacle to conduct research. *Cabrito* tell his experience: "As for the writing style, I am sure you

159 Becerra Ramírez, supra note 2, at 21-2.
160 Sánchez Vázquez, supra note 55, at 661.

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understand me. In the anglophone world, you have to get to the point at the beginning of the article instead of giving too much context before coming to the results".

English was the dominant language of MLGS' studies. Studying law abroad is a matter of class privilege in many cases, exacerbated by the prevalence of English language classes in private education (a feature that was, until recently, almost exclusive to these institutions).[161] Moreover, CONACyT only has scholarship agreements with universities in two Spanish-speaking countries (Spain and Costa Rica).[162] *Tejate* has an interesting anecdote to this regard:

> My scholarship application process was long and winding. I decided to study at [postgraduate institution] since it has interesting and fitting coursework form my research on Indigenous rights. However, when I started my paperwork to obtain funding, certain people from [public research institution] approached me and insisted that I study in Costa Rica, since the [postgraduate institution] did not have a scholarship agreement with CONACyT. After months of insisting and after paying tuition fees for the first year of my program, they granted me the scholarship. The institution reimbursed me for the money I had paid. However, I do not think this is proper by any means. I have talked with several other [MLGS] here in Spain, and none of them have mentioned a situation like mine. Moreover, to make matters even worse, they were not asked to comply with certain requirements made by [research public institution].

None of the other MLGS interviewed had a story like *Tejate*'s.

In sum, MLGS seemed to agree that their graduate programs were far superior to their LEDs. The *magister dixit* setting prevented them to be prepared for a maieutic structure. To take the classes properly, MLGS must study and read in advance. To do so, the professor must have a syllabus to guide students and establish the basic requirements to pass the course. However, this tool is quite rare in LEDs in Mexico and demands further research.

Question 2:

30 of MLGS (the majority) in the sample said that they were not aiming (or aimed) at staying in the host countries. The remaining 24 did indicate a desire to remain in their host countries or were already settled there. However, their reasons were varied. Starting with those who aspired to remain abroad,

[161] Luz Elena Narváez Hernández, *Bilingüismo en México,* Red Latinoamericana de Cooperación Universitaria, (Jun. 6, 2016), *https://www.rlcu.org.ar/recursos/A_0000117_004_Bilinguismo_en_Mexico.pdf*.

[162] CONACyT, *Convenios de Colaboración para Becas al Extranjero,* CONACyT, (Mar. 1, 2020), *https://conacyt.mx/wp-content/uploads/convocatorias/becas_extranjero/documentos/2021/Convenios_de_Colaboracion_marzo_2021.pdf*.

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Calavera, a student who managed to obtain a job as a legal researcher during her doctoral studies, told us her story:

> An important point I think should be mentioned is that the money I received to study abroad with a family (husband and son) was very limited. That forced me to look for a job to survive and finish my studies. As a result, by having to work I had to reduce the time dedicated to studying, which lengthened the duration of the studies themselves. For many people I know, this increases the risk of dropping out. I was fortunate to have my family's support, both financially and emotionally … I believe that a more realistic financial aid and one more in tune with the real conditions and needs of students during their studies would help the completion rates of programs initiated and would facilitate their return to Mexico after completing these programs.

However, not all MLGS might have *Calavera's* same luck. Among those who expressed their intention to stay, the main reason for returning home was the financial burden of remaining in their host country.

Certain MLGS who gave a negative response to the *second question* acknowledge that they were dumbfounded by the competition in their host countries. *Discada* tells us about her experience in Washington, D. C.:

> After finishing my studies at American University, I was contemplating several possibilities to remain in Washington. However, my Fulbright Scholarship agreement (one of my three scholarships) had a clause that ordered me to go back to Mexico and stay there for at least 24 months. I talked to the Fulbright team and they told me that there were ways for me to stay in the US. However, they did warn me that it would entail a great sacrifice and, moreover, the type of temporary jobs available to me at the time would not allow me to have a credit history, among other basic concepts in American life. Furthermore, while I was there, my professors at the American University suggested that my area of knowledge (Environmental Law) was not in high demand. These, among other situations, convinced me to go back to Mexico, against my initial desires.

Only 4 MLGS currently studying aid to be in talks with Mexican institutions to join their ranks as soon as they finish their studies abroad. *Mole Poblano* had his *alma mater* offer him a contract to teach there even before he had gone:

> When I got the news that I had been accepted into the University of Edinburgh, I called my university to tell them. I was already teaching there when this happened. Surprisingly, they assured me that I would have a job on my return to Puebla. My supervisor at the University of Edinburgh did offer me to stay there and do a post-doc, but I was under contract with UDLAP and I wanted to retribute the confidence they had in me.

Some interviewees could have stayed at their host institutions. *Pambazo* is considering staying as a clinical law professor. However, his true desire is to

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return to Mexico and teach law there. In a phone call, he shared that: "For personal reasons, my wife and I would like to go back to Mexico once we finish our studies here at Cornell. I was considering to seek employment outside Mexico City since [the Bank of Mexico] would cancel my loans if I do so".

Pambazo showed concern regarding law professors' wages, which shows that waiving MLGS' loans is not attractive enough.

However, not all MLGS had *Mole Poblano*'s luck. *Esquite* did her doctoral studies in Australia. She was on a university's payroll for 18 years, but quit after the institution denied her an academic position:

> At first, I had no incentive to stay as I had a permanent position at [institution], but by the end of my studies, I was warned that there would be no growth in [institution]. So, I tried to look for a job as a full-time professor or tutor since I had already given some classes and tutorials. However, I was not successful. The subjects that could be taught at the time were generally given by nationals since the legal system is completely different. Upon returning, the [institution] itself denied me academic spaces, so two years after returning to the country, I submitted my resignation after working for them for 18 years.

Practically all the interviewees showed concern about the low wages offered by law schools in Mexico. MLGS currently studying did acknowledge that situation as the main issue that would persuade them to try to stay in their host country. *Calavera* was the only person among the 54 MLGS participating in this survey who mentioned "safety" as a reason to remain in the host country.

Question 3:

MLGS with more "traditional" careers in the legal industry (i.e., attorneys, corporate lawyers) had a higher rate of success than those who actively sought opportunities in the academic field. 27 out of the 50 MLGS in the sample were doing activities unrelated to academia. Most mentioned that their degree helped obtain a job. *Sopa de Lima* tells us that:

> I tried to stay in England or in Europe, specifically in a UN agency. I also went to a job fair at my university and, talking to some legal firms, they told me that I had to start from scratch as an intern or trainee and that the subject of the work visa could be a deal-breaker. Most recommended that I register with their subsidiaries in Mexico or Latin America. In Mexico, it was easier. I arrived and with my credentials, I was offered a position as an advisor in a government agency, as well as in a law firm.

There were a couple of cases in which studying abroad helped MLGS interested in academia get a job. *Guacamaya* has something to share in that regard:

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> In my case, my desire to return to Mexico upon completing my studies and joining an educational institution was always clear. Although I really enjoyed my stay in [host country], I needed to give back a little of what had been given to me. Fortunately, my studies opened many doors and when I returned to Mexico, I had already won a competition for a position at a university.

Minera did not have the same luck:

> Coming back to Mexico, it was extremely difficult to find a position as a researcher (it was even more difficult to find a position as a practicing lawyer). In some job interviews I felt that studying abroad was more an obstacle than an advantage because you do not generally even get an interview if you do not know someone who knows someone who can convince the decision-makers to give you a chance …I first tried to get hired with the CONACyT repatriation program, but none of the universities I visited was willing to commit with this program. UNAM was not an exception as they were not interested in the CONACyT repatriation program. They found the topic I suggested interesting and told me they thought my CV was extraordinarily strong, but they asked me to go through a postdoc application process.

Her testimony reminds us of the "*zbiasi*" setting described by Becerra Ramirez: the larger the network, the bigger the net worth. Moreover, we can see again that the CONACyT public policy is flawed when dealing with MLGS trying to return to the country. As seen in discussing this policy, there were no law projects or academics registered in either CONACyT repatriations or professorships.[163]

In most CONACyT scholarship calls, we read that the funds are directed not only to researchers, but also to "high-level human resources". Neither Science and Technology Law nor the Regulations for the Promotion, Training and Consolidation of High-Level Human Capital Program Scholarships define what this concept means, so it is open to interpretation. 27 interviewed MLGS found employment in jobs unrelated to academia, so it is accurate to say that they are what CONACyT calls "high-level human resources". *Camote* pointed out that the knowledge that he acquired was not available in any Mexican Law school, which led him to study abroad. Therefore, the author asks why the government (through CONACyT and other academic instances) does not foster Mexican law schools (and universities in general) to start producing their own knowledge instead of paying millions of pesos in tuition to educate its citizens in foreign HEIs. Given the risks of the current policy (such as brain drain), this stance unsustainable and unproductive as regards the country's goals in science.

As the reader might recall, *Esquite* quit her academic job due to its lack of academic opportunities and platforms. The environment she describes does

[163] CONACyT, supra note 129.

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not seem ideal and would probably scare other MLGS from seeking employment there. However, other law schools might not offer the platform needed to conduct legal research among other shortcomings (i.e., very low wages). This situation is a conundrum rising from a lack, again, of legal research institutes like IIJ-UNAM. Is staying in a foreign law school the answer? *Pozole*'s experience might tell us otherwise:

> It was not clear to me if I wanted to stay or not. But what I did want was to research Mexican and Latin American law, making it more logical to return to Mexico. Having an [LED] and not a [JD] or an [LL.B.] was an obstacle to teaching basic classes like Case Law in Sydney. The New South Wales State Bar asked for students with a barrister's profile. So, the obstacle was rather the opposite and I wanted to go back.

Working in a different jurisdiction will always be the greatest disadvantage MLGS face while competing in a foreign legal academic setting.

In sum, MLGS seemed to have different experiences depending on their goals. Private sector and government lawyers benefited from attaining a postgraduate degree. However, those in pursuit of academic jobs have had several obstacles in their way.

Therefore, we can see that the Mexican legal education system is not designed to produce legal researchers, which is unacceptable for a country with problems of corruption,[164] the Rule of Law,[165] and a judicial system in dire need of reform.[166] Despite this, the numerous means of financial support available/granted by CONACyT to Area V (Social Sciences) represents the biggest pool of SNI recipients in the system (774 out of 5,973).[167]

As the survey suggests, most recipients of these scholarships have ended up joining the ranks of the private sector. The relevance of using CONACyT scholarships to study abroad to train high-quality human resources goes beyond the intention of these lines and should be reserved for later studies. Nonetheless, the results of this survey are no more than an indication that scholarships (at least in legal sciences and law) do not end up in the hands of those who aspire to do legal research of any kind.

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[164] In 2019, Mexico ranked 130th of 198 countries assessed in Transparency International's Corruption Perceptions Index. See, Transparency International, *Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL (Jan. 23, 2020) *https://www.transparency.org/en/cpi/2019*.

[165] Mexico ranked 104th of 128 in the World Justice Project Rule of Law Index 2020. See World Justice Project, *Rule of Law Index 2020,* WORLD JUSTICE PROJECT (Mar. 11, 2020) *https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf*.

[166] *Id.*

[167] Area V: Social Sciences has 5,937 SNI researchers. The other areas are Area I: Physics-Mathematics and Earth Sciences (5,154), Area II: Biology and Chemistry (5,295), Area III: Medicine and Health Sciences (3,933), Area IV: Humanities and Behavioural Sciences (5,045), Area VI: Biotechnology and Agricultural Sciences (4,853), and Area VII: Engineering (4,962). See SNI, supra note 41.

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IX. Mexico City or Bust: Conclusions

Studying abroad is a privilege. This pattern is present in the MLGS sample shown herein. Following Aupetit's arguments, we can affirm that the types of migration occurring among MLGS are for personal reasons and short-term stays. Only one person stressed "safety" concerns.[168] In this sense, the answer to the question "is there migration of Mexican legal scholars?" is yes, but they are not the only ones.

As Anzures points out, the brain drain in Mexico refers, in most cases, to the professional elites of the middle classes.[169] Moreover, students from only four cities (dominated by Mexico City) are those with a chance of studying in foreign HEIs. Additionally, the greatest advantage that Mexico City has in terms of researchers registered in the SNI (mostly arising from the presence of IIJ-UNAM) underscores the idea that it is the only place where legal scholars can get a job. The multidisciplinary setting of CIDE coursework (as mentioned by *Huarache*) may be encouraging, but it is not a deciding factor to produce more legal researchers. However, with CIDE in Mexico City, we could say that law students there have a *socio-spatial privilege* (a concept used in ableism studies),[170] expressed in their evident greater access to financial resources to support their studies abroad (regarding CONACyT scholarships) and, above all, a variety of education systems other than the *magister dixit* method, thus effectively centralizing legal research in Mexico City, as well as the opportunity to study abroad. Class privilege comes into play while assigning the symbolic amount of CONACyT scholarships granted to other cities.

There is no demand for legal researchers due to teaching settings adopted in most Mexican Law faculties: the *magister dixit* method. In this situation, the production of new legal knowledge is considered an extra, and not the main catalyzer of the country's law schools. Therefore, there is no need for legal research institutes, and hence, legal researchers.

The survey showed that MLGS in the sample were predominantly private-sector lawyers, working as litigants or corporate advisors. Considering Sanchez Vazquez's assertion, the low volume of legal researchers is caused by a disinterest in legal research more than the centralization of legal knowledge, *per se.* Moreover, individuals who finance their studies with loan-type scholarships (like FUNED) might expose themselves to poorly paid jobs in academia during the early stages of their careers. Eventually, these scholars might have to turn

[168] *Personal reasons*: Migrations linked mainly to mixed marriages with intergenerational trajectories of migration, as well as family cultural traditions. *Expulsions*: Fear for personal safety. *Short-term stays*: Composed of people who originally left for a short period (schooling processes, temporarily occupied positions) and did not return due to job offerings. *See* Gerard Aupetit, supra note 127, at 50, 110.

[169] Anzures Escandon, supra note 117, at 121.

[170] Mark Anthony Castrodale, *Mobilizing Dis/Ability Research: A Critical Discussion of Qualitative Go-Along Interviews in Practice,* 24 Qualitative Inquiry 1, 8-9.

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to the private sector to do activities unrelated to research in order to repay their debts. Even worse, they could end up in the ranks of unemployment.

The sample taken from the RSR shows that CONACyT scholarships to study abroad are not an effective policy to produce legal researchers. Moreover, the financial stimuli disbursed through SNI and other CONACyT policies do not contribute to that goal either. The current policy regarding CONACyT training of high-level human resources is nothing more than a migratory exacerbation of the *magister dixit* method. The idea behind this is to send law students to the best schools around the globe and have them educated in foreign jurisdictions of applicable law, instead of generating it through national research frameworks. While it is beneficial to have lawyers trained in international law in a globalized society, national and local levels might not benefit as much from this area of expertise. The repatriation of these professionals has only one possible destiny: Mexico City. Other cities lack the necessary institutions that produce specialized legal knowledge, being these official (like ministries and judicial)[171] or academic entities. The absence of legal knowledge production in these locations restrains lawyers to a very limited number of legal issues.

The author proposes this list of actions that could cultivate new generations of legal researchers in Mexico and aid the existing ones:

1. Give workshops and courses directed at existing law professors, teaching them about other teaching methods other than the *magister dixit* one.
2. Homologate SNI Candidate stimuli to those at Level I.
3. Standardize hiring processes to include research portfolios as a requirement/consideration to employ a law professor (at least in public HEIs).
4. If point 3 is implemented, research stimuli should be added to the law professors' main salary. This could trigger the debate to *effectively cancel the SNI*.
5. Channel MLGS with intentions of joining academia towards platforms where they can conduct research until research professor positions become available. Law schools could advocate for spaces reserved for legal researchers on platforms like CONACyT professorships.

These changes, although available to all MLGS and law professors in the country, should be directed to be applied in HEIs outside Mexico City. Law schools outside the capital city and the three other student cities (Guadalajara, Monterrey and Puebla) have given up on the production of legal knowledge and, even further, opinion to a limited number of legal research centers.

[171] To give an example, the Federal Tribunal of Administrative Justice has specialized chambers dedicated to deciding on environmental, intellectual property and international trade controversies, all of which are seated in Mexico City. See Federal Tribunal of Administrative Justice, *Localización de las Salas*, FEDERAL TRIBUNAL OF ADMINISTRATIVE JUSTICE (Oct. 13, 2019) *https://www.tfja.gob.mx/tribunal/metropolitana_esp_exterior/*.

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Legal research outside these cities, with a few exceptions (Tabasco, for example, has the largest number of legal researchers and PNPC programs in all southeastern Mexico), seems to be a pretty effort that embellishes a lawyer's curriculum vitae. Just looking at Mexico City, legal research sets a line of defense against dubious legislation that tarnishes the Rule of Law to favor certain interests.

One of the MLGS interviewed for this article shared that: "Legal researchers and the institutions where they worked are an excellent technical counterweight to any legal controversy that may arise from Mexico's legislative bodies".

That is the importance of legal researchers and that is why the brain drain in the legal sphere must be addressed soon. Migration should be a personal decision, not a professional shot in the dark.

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CONSTITUTIONAL AND INTERNATIONAL APPROACHES ON THE USE OF POLICE FORCE IN MEXICO AND THE UNITED STATES

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Abstract: *In order to accomplish the aim of this article, we discuss law enforcement in Mexico and the United States from three angles. The international principles approach on the issue, constitutional lines, and several cases from their corresponding Supreme Courts, as well as the existing framework and mechanisms of police procedures for institutional accountability. In the first section, we assume that international standards have a weak influence in shaping domestic approaches to law enforcement. In the second section, we describe how, through case law, constitutional principles expand or restrain police abuse. While in the third one, we deal with internal or external processes and mechanisms of accountability for the police. The analysis of these three aspects is not purely normative, it addresses background elements on how police abuse is defined, instigated, or tolerated, both by institutional and even "legal" practices.*

Keywords: *Law enforcement in United States and Mexico, human rights, constitutional approaches, qualified immunity, police abuse.*

Resumen: *Para los efectos de este artículo, elegimos analizar las fuerzas policiales en Estados Unidos y México desde tres aristas. Una aproximación desde los principios internacionales sobre el tema, límites constitucionales y jurisprudencia selecta de sus correspondientes Cortes Supremas, así como el marco y los mecanismos existentes de procedimientos policiales para una rendición de cuentas institucional. En el primer apartado, intentaremos corroborar si las normas internacionales influyen en la configuración de sus enfoques nacionales de las fuerzas policiales. En el segundo apartado, estudiaremos los principios consti-*

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tucionales y jurisprudencia pertinente sobre fuerzas policiales y abuso policial. Mientras que, en el tercero, estudiamos los procesos y mecanismos internos o externos de rendición de cuentas de la policía. El análisis de estos tres aspectos no es puramente normativo, sino que muestra elementos de fondo sobre cómo se define, instiga o tolera el abuso policial, tanto por prácticas institucionales como incluso "legales".

Palabras clave: *Fuerzas policiales en Estados Unidos y México, derechos humanos, enfoques constitucionales, inmunidad calificada, abuso policiaco*.

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I. Introduction

Nowadays, States around the world should be much more obliged to conceive their police models in accordance to human rights, especially when people around the world are losing faith in those who are supposed to "serve and protect" our communities. The death of (unarmed) George Floyd under po-

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lice custody in the state of Minnesota caused global outrage, resulting in massive protests and riots in several cities, clearly evidencing an already divided and angry society in the United States.[1] Worst of all, police brutality in that country appears to be the norm and not only a sporadic or exceptional unfortunate event. Similarly, in Mexico, there is evidence of lethality from police officers within the context of the narco-war and even against unarmed civilians under police custody or engaged in social protests. Within both police models of law enforcement, it seems highly difficult to adjust human rights standards to police models because there might not be a strong will to do so. Nevertheless, at least there are those who advocate a police system in which human rights are not something rhetorical or even marginal, but rather the backbone of proper police function.[2]

However, we must consider that since memorial times, the ruler and the ruled settled constitutional rationales on the exercise of power to protect individuals from harm, pain, theft, deprivation of liberty; but above all, the most precious value for human beings, life. These rights outline the main values in modern constitutional democracies, whereas arbitrariness is a factual situation provoked by autocrats who disregard modern values on the rule of law.[3]

Recent studies on the rule of law, terrorism and state of emergency, have focused on constitutional implications on the use of force for human rights,[4] exceptional legislation, military actions, and counterterrorism measures, which create tension on both the rule of law and human rights at national and international levels.[5] The war against terrorism has particularly intensified discussions on how police scrutiny has increased towards individuals,[6] and how national responses have facilitated the introduction of intrusive leg-

[1] House Committee on the Judiciary, H.R. 7120, (2020).

[2] Sara Pastor Alonso, *Los derechos humanos en la función policial: Recetas para mejorar la formación y la rendición de cuentas en las fuerzas policiales*, 6 Rights International Spain 3-29, 26 (2016).

[3] Bingham captured the existing principles of the rule of law: the prohibition of torture, fair trial, and other legal and moral foundations, which are part of the customary law of the nations. Tom Bingham, The Rule of Law 66, 90, 110 (Penguin Books, 2010).

[4] Genevieve Lennon, Colin King & Carole McCartney (eds.), Counter-terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker (Hart Publishing, Bloomsbury 2018); Alan Greene, Permanent State of exception and the Rule of Law. Constitutions in an Age of Crisis (Hart Publishing, Bloomsbury, 2018); Morton Stephen, States of Emergency. Colonialism, Literature and Law 11 (Liverpool University Press, 2013).

[5] Federico Fabbrini & Vicki Jackson (eds.), Constitutionalism Across Borders in the Struggle Against Terrorism (Edward Elgar Publishing Ltd., 2016).

[6] For example, the Patriot Act I and II in the United States, expanded the capacity of the Government to investigate and use personal data of its own citizens. This sacrifice of liberties has been criticized by David Cole & James Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (The News Press 3rd ed., 2006); Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 European Journal of International Law, 4, 613-635, (2005).

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islation, as well as public policies without administrative, political controls, nor human rights-based approaches.

The outrage unchained by law enforcement's lethal use of force can be perceived in several "democratic" countries in the American continent. From Bolivia, passing through Chile, Mexico, and the United States,[7] police and even armed forces have carried on massive detentions and extrajudicial executions.

The central purpose of this article is to identify normative and factual limitations of law enforcement in the United States and Mexico. To achieve this aim, we will refer to the main features of the legal and jurisprudential framework of human rights in both countries, in order to unveil how the lack of accountability on the use of force in law enforcement could very well be tackled. Our hypothesis points out to the deep and historic problems related to police brutality —in the United States—, and the political use of police officers in Mexico. Two factors converge in both countries, overall: a lack of application of human rights law within the context of the use of force, and a lack of accountability both in the administrative and criminal law fields. The issue is far more complex than a simple question of *cops vs thieves* or *shooters vs looters.* It requires analytic approaches, international attention, and concerns on the way we see our democracies beyond the electoral dimensions.

This article is organized in three parts. In the first one, we set the scene for international guidelines as well as the treaties on law enforcement, emphasizing the importance of recognizing the use of force under a strict application of legality, prevention, proportionality, and absolute necessity. In the second and third parts, we will highlight the existing issues in Mexico and the United States, and some constitutional guidelines provided by their corresponding Supreme Courts when matters related to law enforcement knock at their doors. To provide an accurate framework of current approaches on Mexico and the U.S., we will refer to contextual information on law enforcement, critical problems, and particularities from each country, which involve even political opportunism within an atmosphere of misconceptions on human rights, as well as a lack of internal and external accountability for violations committed by law enforcement agencies.

II. The International Principles on Law Enforcement

1. *Basic Principles on Law Enforcement*

Under constitutional and international law, we are entitled to human rights and fundamental freedoms which include the right to life and to our security and wellbeing, as well as to be free from torture and other cruel, inhuman,

[7] Inter-American Human Rights Commission, Annual Report (2019).

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or degrading treatment or punishment. Mandatorily, these rights and freedoms require implementation in domestic legislations. Therefore, for States to guarantee respect and protection towards human rights, they need to "set up adequate rules and procedures governing whether, when, and in what manner the State is entitled to use force for law enforcement purposes".[8] And although many democratic countries have accepted and ratified a growing set of international human rights standards in relation to police work, unfortunately such acceptances and ratifications do not in themselves guarantee compliance with their content. To do so, it would be necessary to put in place specific and planned measures, ensuring that police activity is carried out respecting and promoting such international standards.

As Casey-Maslen & Conolly accurately explained, the overarching framework for the international law of law enforcement[9] has developed from international human rights law, although "much of the detail of that body of law, at least insofar as it regulates police use of force, is found in a combination of customary rules and two general principles of law: necessity and proportionality".[10] The above-mentioned authors have defined these principles as follows: "Any force used must be only the minimum necessary in the circumstances (principle of necessity)". Furthermore, "the force used must be proportionate to the threat (principle of proportionality)".[11] Thus, law enforcement personnel are required to abide by these principles, as failure to do so "will usually mean that the victim's human rights have been violated by the state".[12] In recent times a third general principle of law enforcement has emerged: the principle of precaution, requiring "that states ensure that law enforcement operations are planned and conducted to minimize the risk of injury".[13]

However, many of the rules on law enforcement were first established by means of two soft law instruments;[14] the 1979 Code of Conduct for Law Enforcement Officials[15] and the 1990 Basic Principles on the Use of Force and

[8] United Nations Office on Drugs and Crime (UNODC), Resource Book on the Use of Force and Firearms in Law Enforcement 6 (Criminal Justice Handbook Series, 2018).

[9] Stuart Casey-Maslen & Sean Conolly, Police Use of Force Under International Law 79 (Cambridge University Press, 2017); Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, 6 Academy in-Brief 3-40, 5 (2016); Stuart Casey-Maslen, Weapons under International Human Rights Law (Cambridge University Press, 2014).

[10] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 79.

[11] *Id.*, at 82.

[12] *Id.,* Additionally, in Douet v. France, a case related to the use of force during the arrest of Mr. Gilbert Douet by French gendarmes, the Strasbourg Court found a violation on the right to freedom from inhuman treatment; because France failed to prove that the force used by the officers had been both necessary and proportionate. Case (Douet v. France), European Court of Human of Human Rights, paras. 38-39, (2013).

[13] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 79.

[14] *Id.*, at 79-80.

[15] Code of Conduct for Law Enforcement Officials (1979).

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Firearms by Law Enforcement Officials.[16] Therefore, when it comes to international law ruling the use of force in law enforcement, we are compelled to address these two documents developed by the United Nations Crime Congress; an event that takes place every five years and gathers specialists to work on the agenda and standards of the UN on crime prevention and criminal justice.[17]

Regarding the 1979 Code of Conduct, it is relevant to highlight both articles 2 and 5 of the stated instrument. Article 2 *ad litteram* reads that: "[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons". While Article 5 refers to the international crime of torture, establishing that:

> …[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Another relevant article arising from the 1979 Code of Conduct is article 3, as it relates to the use of force by law enforcement officials, who "may use force only when strictly necessary and to the extent required for the performance of their duty". Subsequently, the 1990 Basic Principles deeply elaborated on the norms regarding the use of force,[18] primarily in the General provisions section of the document. In other words, "the Basic Principles set out the core parameters to determine the lawfulness of use of force by law enforcement personnel and establish standards for accountability and review".[19]

Although the rules of these two instruments have not been part of an international treaty, "many of the key norms they espouse are widely regarded today as constituting more generally binding international law."[20] Additionally, both the European Court of Human Rights and the Inter-American Court of Human Rights have considered "the 1990 Basic Principles as authoritative statements of international rules governing use of force in law enforcement".[21] It is also important to consider that the Code of Conduct

[16] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

[17] Casey-Maslen (2016), *supra* note 9, at 5, footnote 4.

[18] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 80.

[19] United Nations Office on Drugs and Crime, *supra* note 8, at 7.

[20] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 80; Casey-Maslen (2016), *supra* note 9, at 5.

[21] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 80; Casey-Maslen (2016), *supra* note 9, at 5-6. *See also,* European Court of Human Rights, Benzer v. Turkey (2014). para.

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and the Basic Principles apply to the acts of every organ of the state, when employing use of force in law enforcement operations, exercised by civil or military authorities (uniformed or not). In the words of Casey-Maslen & Conolly, these "rules govern not only the police but also any other law enforcement agency, state security force, paramilitary force (such as *gendarmerie*), or the military, whenever it is engaged in acts of law enforcement".[22]

The specific rights that will be analyzed in the next section require particular attention from law enforcement officials while performing their duties. "The meaning and scope of these rights, as well as how they shall be protected, should be well understood"[23] by law enforcement personnel. We are referring to the right to life; the right to freedom from torture and other forms of ill-treatment; the right to liberty and security of person; the right to a fair trial; the rights to freedom of peaceful assembly, association, and freedom of expression; and the right to an effective remedy.

2. *Human Rights within the Context of Law Enforcement*

Beginning with the fundamental right to life, it is accurately said that without life, the other rights would have no meaning or logic for existence. Therefore, the use of force combined with weapons and firearms could infringe on this right.[24] The right to life is enshrined in article 3 of the Universal Declaration of Human Rights (UDHR) and in article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), establishing that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".[25]

Nonetheless, the last sentence of the prior paragraph implies that the right under analysis "is not absolute, as indeed some deprivation of life may be non-arbitrary",[26] e.g., when in lawful circumstances in which a law enforcement official is forced to use his firearm to stop an armed suspect threatening innocent civilians. However, "even potentially violent suspects should be arrested, not killed, whenever it is reasonably possible to do so".[27] Nevertheless, these "exceptional measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. In international law, the right to life includes protection against arbi-

90; Inter-American Court of Human Rights, Cruz Sánchez and others v. Peru, para. 264 (2015).

[22] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 81.

[23] United Nations Office on Drugs and Crime, *supra* note 8, at 11.

[24] *Id.*

[25] Article 6(1) of the *International Covenant on Civil and Political Rights (ICCPR)*. Additionally, the *American Convention on Human Rights (ACHR)*, where the right to life is found in article 4(1).

[26] United Nations Office on Drugs and Crime, *supra* note 8, at 11.

[27] Casey-Maslen & Sean Conolly (2017), *supra* note 9, at 86.

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trary deprivation of life by State security forces".[28] Its status under customary international law is absolute and non-repealable. It must also be always respected; no exceptional circumstance, such as state or threat of war, internal political instability, or public emergency, may be invoked to justify an arbitrary deprivation of the right to life.[29]

Additionally, the right to life is incorporated in the 1990 Basic Principles, where the instrument states that: "law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person". Furthermore, Principle 9 asserts that the use of lethal force "may only be made when strictly unavoidable in order to protect life". Consequently, use of force resulting "in the death of a subject could … depending on the circumstances, amount to a gross human rights violation".[30]

The right to freedom from torture and any other forms of cruel, inhuman, or degrading treatment is also an absolute right,[31] and as such may not be restricted under any circumstances, either by way of limitations or derogations.[32] Article 2(3) of the Convention Against Torture (CAT) clearly states that: "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture".[33] Therefore, law enforcement agents should always refrain from such acts, and the State must: "…keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture".[34]

The purpose for this absolute prohibition as reasoned by the Human Rights Committee "is to protect both the inherent dignity of the human person and his or her physical and mental integrity".[35] Moreover, every State

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[28] United Nations Office on Drugs and Crime, *supra* note 8, at 11; UN Human Rights Committee (1982).

[29] United Nations Office on Drugs and Crime, *supra* note 8, at 11; the *International Covenant on Civil and Political Rights (ICCPR)* article 4(2) and the *Convention Against Torture (CAT)* article 2(2).

[30] United Nations Office on Drugs and Crime, *supra* note 8, at 11.

[31] The prohibition of torture is binding on all States, as it is widely accepted as forming part of customary international law. *Id.*, 12. *See also*, International Court of Justice, Belgium v. Senegal, para. 99 (2012).

[32] United Nations Office on Drugs and Crime, *supra* note 8, at 11. Additionally, this right is established in the *UDHR*, article 5; the *International Covenant on Civil and Political Rights (ICCPR)* article 7; the Convention Against Torture (CAT) article 2; the *European Convention on Human Rights (ECHR)* article 3; the *American Convention on Human Rights (ACHR)* article 5(2); and on article 5 of *the African Charter on Human and Peoples' Rights*.

[33] Article 2(3) of the Convention Against Torture (CAT); United Nations Office on Drugs and Crime, *supra* note 8, at 11.

[34] Article 11 of the Convention Against Torture (CAT); United Nations Office on Drugs and Crime, *supra* note 8, at 11.

[35] *Id.*, at 12; UN Human Rights Committee, para. 2 (1992).

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must take whatever measure possible to protect those under its jurisdiction from either torture or ill-treatment, "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity".[36] States must also inform their populations, though especially law enforcement personnel, about the prohibition of torture and ill-treatment on a regular basis.[37]

Furthermore, depending on the circumstances, the use of force and firearms in law enforcement activities could amount to torture or other forms of ill-treatment. On that note, article 1(1) of the CAT explains that torture or other forms of ill-treatment do "not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".[38] While in contrast, use of force resulting in severe pain and suffering that, under certain circumstances would be considered unjustified, disproportionate, or excessive, could very well amount to a form of ill-treatment.[39] Consequently, the use of force by enforcement officials, both when the subject is under their control (arrest, detention) and in cases of incident control (during riot control) may amount to torture (if the use of force is unlawful and falls under the definition of torture) or cruel, inhuman, and degrading treatment (if the lawful use of force is excessive, disproportionate and unjustifiable).[40]

Another significant human right is the right to liberty and security of person. On the one hand, we have liberty of "freedom from confinement of the body (not general freedom of action)", while on the other, "security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity".[41] Pursuing this line of thought, the Human Rights Committee has expressed that, "the right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained",[42] entailing "an obligation to prevent and redress unjustifiable use of force in law enforcement".[43]

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[36] United Nations Office on Drugs and Crime, *supra* note 8, at 12.

[37] *Id.*; article 10 of the *Convention Against Torture* (*CAT*); UN Human Rights Committee, para. 10 (1992).

[38] Article 1(1) of *the Convention Against Torture* (*CAT*); United Nations Office on Drugs and Crime, *supra* note 8, at 12.

[39] *Id. See also*, Reports of the Committee Against Torture (1997) (1999) (2001). On case law regarding "unjustified" and "excessive" use of force by police officers during apprehension, arrest, or detention of a suspect from the European Court of Human rights, *see* Manfred Nowak, *What Practices Constitute Torture? U.S. and UN Standards*, 28 Human Rights Quarterly 4, 809-841 (2006).

[40] United Nations Office on Drugs and Crime, *supra* note 8, at 12. *See also*, Office of the United Nations High Commissioner for Human Rights, Chapter 5 (2017).

[41] United Nations Office on Drugs and Crime, *supra* note 8, at 12.; UN Human Rights Committee, para. 3 (2014).

[42] *Id.,* para. 9.

[43] United Nations Office on Drugs and Crime, *supra* note 8, at 12. *See also*, UN Human Rights Committee, para. 9 (2014).

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Article 9(1) of the ICCPR enshrines the right to liberty and security of person[44] as follows: "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

Additionally, "this right is to be read in conjunction with article 7 (prohibition of torture and other forms of ill-treatment) and article 10(1)"[45] of the above-mentioned instrument, establishing that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[46] Hence, the right to liberty and security of person gains relevance when it comes to law enforcement activities. "[A]s force may be applied (and misused) in arrest and detention operations and may as such lead to a violation of this right when the use of force was unlawful, excessive or disproportionate".[47]

Another highly important right is the right to a fair trial. This right is established in article 14(1) of the ICCPR and encompasses the principle of equality before the law by stating in its first sentence that, "[a]ll persons shall be equal before the courts and tribunals".[48] The mentioned article also includes "the principle of presumption of innocence and the right of everyone to a fair hearing before a competent, independent and impartial tribunal established by law, in determination of a criminal charge".[49] Although States are entitled to derogate this right "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", such derogation should be made "to the extent strictly required by the exigencies of the situation",[50] and "must not endanger the fundamental principles of fair trial".[51]

A significant question to keep in mind when analyzing the right to a fair trial is that an inappropriate use of force by law enforcement officers could violate due process. For instance, any statement in a criminal proceeding "obtained as a result of a violation of the prohibition of torture or other forms

[44] A very complete study regarding this right under international law can be found in Alice Edwards, Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants 17-28, (UNHCR-Legal and Protection Policy Research Series, Division of International Protection, 2011).

[45] United Nations Office on Drugs and Crime, *supra* note 8, at 12.

[46] Article 10(1) of the *International Covenant on Civil and Political Rights (ICCPR)*; United Nations Office on Drugs and Crime, *supra* note 8, at 12.

[47] *Id.*, at 13.

[48] Article 14(1) of the *International Covenant on Civil and Political Rights (ICCPR)*; United Nations Office on Drugs and Crime, *supra* note 8, at 13.

[49] *Id.*

[50] Article 4(1) of the *International Covenant on Civil and Political Rights (ICCPR)*.

[51] United Nations Office on Drugs and Crime, *supra* note 8, at 13.

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of ill-treatment (e.g. confessions as a consequence of torture) may render the whole trial automatically unfair".[52]

The rights to freedom of peaceful assembly, association and freedom of expression could be affected by law enforcement. As stated by Casey-Maslen, "[t]he rights to freedom of peaceful assembly and association are integral to a democracy and are therefore repressed harshly in autocratic regimes. As a rule of thumb, it can be said that the freer a regime, the more civic space it offers".[53] However, they are not absolute and could be limited under certain circumstances by the State, as long as these limitations are "in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others".[54] Under similar circumstances may the right to freedom of expression be restricted, as established in article 19(3) of the ICCPR.

Furthermore, as law enforcement officials are often called upon to facilitate assemblies and protests, it is crucial for them to fully understand the rights explored in the previous paragraph, particularly the very specific conditions under which they can be restricted.[55] An assessment of the appropriateness of using force in such contexts should be advisable to instruct law enforcement personnel "to facilitate assemblies in accordance with human rights law",[56] incorporating training in "«soft skills» such as effective communication, negotiation, and mediation, allowing law enforcement officials to avoid escalation of violence and minimize conflict".[57]

Another important point within the context of law enforcement is the right to an effective remedy, which can be found in article 2(3) of the ICCPR, declaring that each State party accepts "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".[58] Moreover, the same article urges States to ensure this right through their corresponding legal systems and develop the possibilities of a judicial remedy. It also requires States to guarantee that their competent authorities enforce such remedies when these are granted.[59]

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[52] *Id. See also* article 15 of the Convention Against Torture (CAT*)*.

[53] Casey-Maslen (2016), *supra* note 9, at 16.

[54] Article 21 of the *International Covenant on Civil and Political Rights (ICCPR);* United Nations Office on Drugs and Crime, *supra* note 8, at 13. Regarding restrictions on the right to freedom of association, *see* article 22(2) of the *International Covenant on Civil and Political Rights (ICCPR)*.

[55] United Nations Office on Drugs and Crime, *supra* note 8, at 13-14.

[56] Casey-Maslen (2016), *supra* note 9, at 17.

[57] *Id*. *See also* the UN Joint Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, para. 42 (2016).

[58] Article 2(3) of the *International Covenant on Civil and Political Rights (ICCPR)*.

[59] *Id.*

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Undoubtedly, the use of force by law enforcement is an issue full of controversy around the world. Nevertheless, it surely exacerbates when it is focused on a country with increasing levels of forced disappearances and extra judicial executions such as Mexico, and the widespread and deeply ingrained corruption of its policing agencies.[60]

3. *Inter-American Jurisprudence on the Use of Force*

From 2000 to 2020 at the Inter-American level, we can find several cases in which the IACtHR has been pointing out parameters and limits on the use of force in different contexts: political riots, extrajudicial executions, police brutality, immigration and so on. The first one was *Caso del Caracazo v. Venezuela* (2002), in which the Court condemned Venezuela for the extrajudicial executions of 44 individuals and for the lack of compliance with suspension of human rights in terms of Article 27 ACHR.[61]

Afterwards, in *Montero Aranguren v. Venezuela* (2006) the IACtHR established four principles: the prohibitions of firearms and lethal force against civilians to protect the right to life; the maximum limitation and (exceptional) use of force with adequate training and accountability rules as a matter of positive obligation.[62] *Zambrano Vélez v. Ecuador* (2007) incorporated other principles: proper planning and implementation of operatives on the use of force, adequate control of legitimacy and accountability.[63] However, Nadege Dorzema was the case in which the Court set out a complete framework on the use of force in three stages: in the first one, as a duty to protect, States must consider the principles of legality and exceptionality. In the critical moment of the use of force (second stage), authorities must consider specific actions under the proportionality principle. In the consequent stage, States must carry on the due diligence principle respecting the right to life, personal integrity, and the humanity principle.[64]

On the one hand, several facts of the abovementioned cases share common factors: despite accurate national legislation forbidding the use of force, political authorities, police bodies and military forces simply ignored

[60] For example, Carlos Silva Forné, *Uso excesivo de la fuerza policial en CDMX,* 37 Estudios Sociológicos 109, 165-193 (2019); María José Bernal Ballesteros, *La función policial desde la perspectiva de los derechos humanos y la ética pública*, 13 Revista del Instituto de Ciencias Jurídicas de Puebla-IUS 44, 251-275 (2019).

[61] Caso del Caracazo, Inter-Am. Ct.H.R., (ser. C) No. 58 at 1 (c) (d), 42, 43. (Nov. 11, 1999).

[62] Montero Aranguren & Others (Retén de Catia), 2006 Inter-Am. Ct.H.R., (ser. C) No. 150, at 68-79 (Jul. 5, 2006).

[63] Zambrano Vélez & Others, 2007 Inter-Am. Ct.H.R., (ser. C) No. 166, at 83-88 (Jul. 4, 2007).

[64] Nadege Dorzema & Others, 2012 Inter-Am. Ct.H.R., (ser. C) No. 251, at 79-98 (Oct. 24, 2012).

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such legislation and applied the political doctrine of "internal enemies" and "national security". On the other hand, the Inter-American Court followed its legal reasoning according to the Principles on the Use of Force and Firearms by Law Enforcement Officials, as well as its previous doctrine on the matter.

Recent judgments show increasing trends of gross human rights violations. For instance, in Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia) *v. Colombia* (2014), the Court left aside the possibility of punishing an excessive use of force employed by the armed forces during an operative to recover Colombia's Palace of Justice (disproportionate measures and lack of planning on the use of force, which left at least 95 dead people, and many others were subjected to forced disappearance).[65] This case is useful to understand the judicial limitations to provide an appropriate solution to situations of extreme violence perpetrated by both: State and civilian armed groups.

One case that emphasized the Inter-American doctrine on the use of force is *Cruz Sánchez y otros v. Perú.* Again, the IACtHR remastered the principles of legality, absolute necessity and proportionality, while now adding the principles of international humanitarian law: the IACtHR interpreted those victims of the case had the right to be treated humanely in all circumstances, without any adverse distinction, according to the rules of Article 3 of the four Geneva Conventions. However, the Court highlighted that those criminal prosecutions on individuals are a matter of States internal procedures.[66]

The Inter-American Court of Human Rights has been defining accurate conditions on the use of force and general obligations within three aspects: an accurate regulation of law enforcement, setting guidelines on training of police bodies based on human rights approaches and development of mechanisms of accountability.[67]

Specifically, the Inter-American Court of Human Rights has judged Mexico's lack of police control[68] in the case of *Women victims of sexual torture in Atenco.* In the specific guidelines on the use of force, the IACtHR remarked the core principles when carrying on an operative:

— Legality: the use of force *must* be aimed at achieving a legitimate objective, and there must be a regulatory framework that contemplates how to act in said situation.

[65] Rodríguez Vera & Others, 2014 Inter-Am. Ct.H.R., (ser. C) No. 287, at 93-106 (Nov. 14, 2014).

[66] Cruz Sánchez & Others, Inter-Am. Ct.H.R., (ser. C) No. 292, at 276-280 (Apr. 17, 2015).

[67] *Mujeres Víctimas de Tortura Sexual en Atenco v México*, 2018, Inter-Am. Ct.H.R., (ser. C) No. 371, at 161 (Nov. 28, 2020).

[68] However, Mexico has been condemned for using military forces against civilians and in the context of the narco-war, causing forced disappearances, rape of indigenous women and torture. *See* for instance Alvarado Espinoza *et al*. v. México (2018); Rosendo Cantú v. México (2010).

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- Absolute necessity: the use of force must be limited to the non-existence or unavailability of other means to protect the life and integrity of the person or situation that it seeks to protect, in accordance with the circumstances of the case.
- Proportionality: the means and method used must be in accordance with the resistance offered and the existing danger. Thus, the agents must apply a criterion of differentiated and progressive use of force, determining the degree of cooperation, resistance or aggression on the part of the subject to whom it is intended to intervene and with it, employ tactics of negotiation, control or use of force, as appropriate.[69]

The Inter-American Court ordered Mexico to investigate the levels of responsibility of superior hierarchies, in order to find out with accuracy, the origin of the orders given to exercise an excessive use of force in Atenco. However, the case of *Women victims of sexual torture in Atenco* shows the importance of an administrative and legal recognition of the police "chain of command," to unveil the level of criminal and political responsibility of those who ordered the police operative against civilians, in the context of a social protest.

Overall, the Inter-American parameters on the use of force are the most advanced at a jurisprudential and normative level. There are two reasons of such accomplishment: the first one is the systematic and multilevel interpretation of the ACHR and International law, while the second is the increasing recognition of the IACtHR's legitimacy judging the abuse of political orders in a context of weak national judiciaries and authoritarianism in our recent Latin American history.

III. Law Enforcement and Police Abuse. The Case of Mexico

1. *Critical Human Rights Violations by Police Forces in Mexico*

Law enforcement in Mexico is an old and controversial issue. The lack of legal rationales, accountability, and political control over police forces, both within national and local levels, can be tracked since the eighties in Mexico City, where a police boss carried on politically motivated prosecutions against the opposition, while controlling gangs, local mafia bosses and the whole prison system.[70] During the nineties, police regulations and legislation were enacted to set accurate rules on federal and local competences. Nevertheless, police corruption worsened in the context of the war against cartels, which began in a previous stage in 2001, and had a second wave after 2006.

69 *Mujeres Víctimas de Tortura Sexual en Atenco*, *supra* note 67, at 162.

70 José González González, Lo negro del Negro Durazo (Editorial Posada, 1983).

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As an infamous example of continuous arbitrary behavior from police officers, in June 2020 the cases of Giovanni (a man) and Alexander (a teenager) emerged: they were both shot-dead by police officers in different municipalities for not wearing masks in the context of Covid-19. The cases sparked protests and illegal detentions while exhibiting that, despite accurate constitutional guidelines, in the field/praxis nothing has changed in terms of law enforcement. Paradoxically, regarding budgetary concerns on security, between 2005-2018, under both opacity and lack of accountability, the executive branch increased funds in every single year, although criminal activities continued to rise.[71]

2. *Legal Changes and Factors Undermining Professional Capacities of Police Officers in Mexico*

From 2000 to 2008, there were important constitutional changes concerning police principles, legislation, and institutional reforms, which tried to create a new federal police force without clear purposes or professional capacity. These changes in Article 123 (B, XII) of the Mexican Constitution (MC), from June 18, 2008, deprived police officers of due process of law, while focusing only in the advantages of institutions deciding who would continue in the police forces, and who would be fired under discretional circumstances.

The outcome was twofold: firstly, it promoted unequal treatment for all members of police corporations working at any level of the government (federal, local, and municipal), with no right to labor stability nor social security, in addition to a lack of fair rules to continue working in the police body. Secondly, police officers were intimidated, pushed away and gradually adopted by cartels to work along with them in corruption contexts.[72] The overall outcome was that the ousted police officers were now an integral element of the highest levels of violence, while actively participating in drug cartel activities.

From a legal-human rights perspective, Mexico has been dealing with the *Narco* war in terms of a humanitarian tragedy, unleashed by the government of Felipe Calderón.[73] According to Rodiles, "the war metaphor is used to activate

[71] Fernando Gaona Montiel & Guillermo Martínez Atilano, *Presupuesto público, violencia y gestión en México, 2000-2012,* 72 Revista de Ciencias Sociales y Humanidades 33, 89-108 (2012). Regarding the opacity of Peña Nieto's security budget, *see* Tania Montalvo, *Gobierno de Peña gasta 20 veces más en seguridad y además oculta en qué invierte los recursos*, Animal Político (May. 8, 2017), *https://www.animalpolitico.com/2017/05/seguridad-partida-dinero-opacidad/*.

[72] Miquel Ruíz Torres & Elena Azaola Garrido, *Cuadrar el delito. Corrupción institucional y participación de policías en el secuestro en México*, 22 Perfiles Latinoamericanos 91-112 (2014).

[73] Alejandro Rodiles, *Law and Violence in the Global South: The Legal Framing of Mexico's "NARCO WAR"*, 23 Journal of Conflict & Security Law 271 (2018). This study points out the problem of labelling the "narco war" as an internal armed conflict, subject to scrutiny under International Human Rights Law.

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the idea that a situation of exception is taking place which justifies the recourse to exceptional measures against the enemy to be defeated rather than the criminal offenders to be prosecuted".[74] Hence, since 2006 Mexico has been involved in arbitrary detentions, extrajudicial executions, excessive use of force, public security problems and gross human rights violations.[75] After 16 years of police abuse and critical problems linked to forced disappearances and extrajudicial executions, a comprehensive framework separating different issues of a true state of emergency, internal threat or public order is needed more than ever.[76]

In its concluding observations from 2019, the UN Human Rights Committee was concerned "about reports of widespread use of torture, ill-treatment and excessive use of force by the police, armed forces and other public officials, particularly during arrests and the initial period of detentions".[77] To make matters worse, from 2006 to 2020 Mexican police forces have been signaled as perpetrators of gross human rights crimes.[78] At the same time, police perception among society is negative,[79] a situation that could influx the levels of impunity.

Some of the most well-known cases are linked to social protests, while others are an outcome of law enforcement in the context of the narco-war.[80] An infamous case that presented unusual levels of degrading treatment within an environment of social protest was the sexual torture of women in Atenco in 2006. There are thousands of local and federal police officers carried out massive detentions and sexually tortured eleven women who were also prosecuted within a context of false evidence and due process violations.

In 2017, the case of *Women Victims of Sexual Torture in Atenco v. Mexico* reached the Inter-American Court. In late 2018, the judgment established that Mexican authorities violated the right to personal integrity on a gender basis. On the one hand, the operative carried out by local and federal police agencies (which was even broadcasted in real time by the media) showed a coordinated

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[74] *Id.*, at 274.

[75] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in Follow-up to his Mission to Mexico (2016).

[76] Before the war against narcos, scholars had warned on the lack of accurate definitions and potential abuse of power. *See* for instance Hector Fix-Zamudio, *Los Estados de excepción y la defensa de la Constitución*, 37 Bol. Mex. de Der. Comp. 111, 817-819 (2004).

[77] UNHRC, Concluding Observations on the Sixth Periodic Report of Mexico, para. 30 (2019).

[78] Different perspectives on the matter can be found in laura Atuesta & Alejandro Madrazo Lajous, Las violencias. En busca de la política pública detrás de la guerra contra las drogas (CIDE, 2018).

[79] Aurea Grijalva Eternod & Esther Fernández Molina, *Efectos de la corrupción y la desconfianza en la policía sobre el miedo al delito. Un estudio exploratorio en México*, 62 Revista Mexicana de Ciencias Políticas y Sociales 231, 167-198 (2017).

[80] David Pion-Berlin, *Military Use in Public Security Operations: Is it Ever Advisable?* 13 Revista IUS 13-28 (2019).

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attack on the population of San Salvador Atenco between May 3 and 5 2006; there were massive detentions, inhuman treatment, illegal trespass of properties by police and generalized violence against men and women, who were also illegally prosecuted afterwards. On the other hand, *Atenco* revealed the federal government's intentions to suppress political protest and incarcerate leaders from San Salvador Atenco for not selling their land to build an airport.[81] The most concerning issue was the perpetration of sexual torture as a method of social control and punishment inflicted against several women by police officers.[82] The most important question and lesson for Mexico as a member State of the ACHR is to identify and prosecute the "chain of command" unveiling who, how and under which circumstances the orders were given to all police bodies to carry on with the operative in that context.

Overall, during the period of 2006-2018, the Mexican panorama of "police performance" had been dominated by abuse and extrajudicial executions in the context of the narco war. If we look around emblematic non-judicial complaints at the CNDH[83] and local human rights commissions, most of the individual and collective complaints refer to police brutality and illegal law enforcement at the states and municipal level.[84]

We can find cases showing high levels of disproportionality on the use of lethal force by law enforcement, such as the Massacre of Tanhuato (2015), which reported at least 22 extrajudicial executions.[85] In its final report on the case, the CNDH found that police officers violated the principles of legality, necessity, proportionality and breached the right to personal integrity and the right to life.[86] Apart from the external outcome concealing the participation of police officers, another key problem unchained by extrajudicial executions is the lack of due process of law, in addition to reducing to zero any possibility of creating effective measures against cartels, because they are seen as enemies of the State, rather than ordinary criminals to be prosecuted within the rule of law.

Criminalizing social protest is a second type of police abuse. Emblematic cases demonstrate the lack of constitutional means-objectives, the non-articulated operatives, and the political reasons behind the police abuse in Mexico. The most well-known case is the forced disappearance of 43 students in Iguala Guerrero (Ayotzinapa), in September 2014, which was carried out by local police officers with the participation of the federal police, and under the sight of military forces, but without a chain of command.[87] In 2018, a landmark

[81] *Mujeres Víctimas de Tortura Sexual en Atenco*, *supra* note 67, paras. 56-65 (2018).

[82] *Id.*, para. 222.

[83] Comisión Nacional de Derechos Humanos (CNDH).

[84] Human Rights Watch (2019); Silva Forné, *supra* note 60, at 165-193.

[85] Comisión Nacional de Derechos Humanos (2018).

[86] *Id.*, paras. 508-509.

[87] Inter-American Commission on Human Rights, Informe Final, Mecanismo Especial de Seguimiento al asunto Ayotzinapa, paras. 118-180 (2018).

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amparo judgment was issued by a federal court showing the arbitrary detentions, forced disappearances, lack of preventive detention control, illegal procedures on evidence gathering,[88] as well as an institutionalized practice of torture, which police officers conducted to build the "legal truth", instead of a real investigation with all hypotheses, data, considerations, and with next of kin victim participation.[89]

Currently, *Ayotzinapa* is in progress with a Truth Commission ("*Comisión de la verdad para el caso Iguala*") working along with the judiciary to investigate the whereabouts of the 43 students and discover both the material and the intellectual perpetrators.[90] Lethal use of force by police against social protests provokes extrajudicial executions on a regular basis.

In June 2016, four communities in Oaxaca were attacked by "unknown members" of the police. Members of the communities suffered violations on their personal integrity (women, children and elderly people). The CNDH's concluding observations on the issue pinpointed failures and lack of methods to control the protest before, during and after the operation. Firstly, events in Nochixtlan and other three communities showed that the federal and local government hid the type of police officers-corporations involved in the event.[91] Secondly, police officers coming from multilevel bodies participated using violent means (tear gas, rubber bullets, guns, and short rifles) as primarily tactic-objective[92] to undermine a social protest avoiding dialogue and negotiation techniques.[93]

Between 2006 and 2018, and at municipal levels from 2018 to date, we can find patterns of police abuse and lack of control when armed officers confront people and suspected criminals, revealing several issues:

i) When exercising lethal force, police bodies do not distinguish between preventive interventions in contexts of social protest and effective threats, which could lead to abuses in the use of such force.

ii) It is a commonplace that law enforcement encounters against drug cartels lead to extrajudicial executions, manipulation of facts/evidence, and excessive use of force, with negative consequences for due process and an effective prosecution of possible offenders.[94]

[88] Existing literature coincides on this topic: *the criminal process was built on a series of shady and artificially articulated facts*. Ruiz Torres *et al*., *supra* note 72, at 103.

[89] Primer Tribunal Colegiado Auxiliar de Tamaulipas, paras 359, 548-550, 1091-1094, 1113-1115 (2017).

[90] Under the principles of immediate, effective, impartial, and independent investigations, and with the participation of the National Human Rights Commission. *Id*., paras. 1034, 1126, 1127, 1128.

[91] Comisión Nacional de Derechos Humanos, paras. 500-505 (2017).

[92] *Id*., paras. 507, 516.

[93] *Id*., para. 512.

[94] Comisión Nacional de Derechos Humanos, paras. 601-610 (2018).

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iii) Mexican law enforcement agencies do not follow constitutional or international guidelines on proportionality, legality, professionalism, objectivity, efficiency, and honesty, at any stage of police intervention.

iv) There are inexistent accountability measures to supervise or punish police abuse individually, and there are no political or administrative responsibilities towards the "chain of command", allowing police officers to act above the constitutional mandate.

v) There are no external watchdogs providing feedback of improvements in the police development, both at local and federal levels. At a very practical level, these problems could be solved if the municipal, local and federal governments create a complete new structure and institutional capacities based on the four dimensions pointed out by Llanos Reynoso et al.: the operative-organizational dimension; the human factors that include better strategies of recruitment, salaries and improvement of physical and intellectual skills; the technological dimension, which provides relevant information to prevent-control crime; and the ethical values of the police, which could improve the way they see themselves before society and *vice versa.*[95] At the normative level, there is no national or local implementation of international or Inter-American parameters on the use of force by police. Such mistake provokes a non-uniformed national approach and divergence among all agencies and administrative rules for police bodies. Recent literature highlights that Mexican security agencies require legal and formal levels of coordination beyond personal leadership.[96]

Unfortunately, the debate on the ways in which local and federal police agencies must be reformed in the current Mexican scenario of police brutality is and has been overlooked. One essential consideration is that police officers are first responders in any event of violence, social protest, or emergency situations, and that the role of law enforcement cannot be —by definition— to prosecute criminals while avoiding constitutional and international law. But the institutional convenience, at least from 2006 to 2018, was to justify detentions and diminish criminal organizations, even if it meant avoiding due process of law.

3. *Constitutional Approaches in Mexico: The Role of the Supreme Court*

Between 2011 and 2015, there were isolated pronunciations in the Mexican Supreme Court of Justice (SCJN) on the principles of law enforcement,

[95] Luis Felipe Llanos Reynoso et al., *La eficacia de la policía en México: un enfoque cualitativo*, 13 Polis 107-138 (2017).

[96] Gerardo Rodríguez Sánchez Lara, Seguridad Nacional en México y sus Problemas Estructurales, Colectivo de Análisis de la Seguridad con Democracia 147-150 (Editorial UDLAP, 2017).

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according to international law (absolute necessity, legality, proportionality, and the exceptional use of lethal force).[97] None of these judgments had general effects on the legal and institutional framework of the multilevel police bodies across the nation. However, from 2016 to date, the SCJN made various judgments on the use of force, national security, prevention of crimes, and intervention of armed forces in security activities, as well as local police departments against drug cartels.

An important decision was made in 2016 in which the SCJN declared void several articles allowing the use of force as "first option", and a provision that might determine a discretionary use of force due to potential cruel and unusual punishment. Nevertheless, despite the levels of discretionary considerations on such concepts, the SCJN recognized a certain provision on "disabling weapons", and the use of force on public gatherings to re-establish public order.[98] In late 2018, the SCJN declared the participation of armed forces in public security tasks null and void, as it was envisaged in "Ley de Seguridad Interior", enacted by former president Peña Nieto.[99]

Regarding the administrative regime of the Mexican police members of security bodies, when a case reaches the SCJN, they usually ratify restrictions on police officers' rights, imposed based on different regimes of labour rights, derived from Article 123 (B, XVIII) of the Mexican Constitution.[100] These restrictions do not contribute to the professionalization of police bodies and the recognition of their individual dignity. In fact, such conditions demonstrate discrimination compared to other public servants. On the contrary, restrictions contribute to an atmosphere of stigmatization and overwhelming levels of corruption from police corporations, both at federal and local levels.

As noted in this part, so far, the SCJN has only addressed peripheral aspects on security issues and law enforcement, but it is far from analyzing profound police problems on corruption and abuse within the context of social protests and the limits on the use of force against drug cartels. Additionally, the judicial approach taken by the SCJN in 2009 on the case of *Women victims of sexual torture in Atenco* was an example of how the SCJN settled constitutional restrictions to investigate gross human rights violations, allowing discretionary levels on the use of force.[101] To date, despite the accurate guidelines of the IACtHR, not one police officer has been convicted for sexual torture;

[97] Mexican Supreme Court of Justice, 52 (2011).

[98] Mexican Supreme Court of Justice, Acción de Inconstitucionalidad 25/2016.

[99] Mexican Supreme Court of Justice, Acción de Inconstitucionalidad 6/2018.

[100] Mexican Supreme Court of Justice, 1277 (2019).

[101] On the importance of gross human rights violations and the levels of responsibilities left aside by the SCJN in the *Atenco* case, *see*, Alberto Suárez Ávila, *La investigación de las violaciones graves a los derechos humanos en México, antes y después de la reforma constitucional de 2011*, in Historia y Constitución, Tomo I: Homenaje a José Luis Soberanes Fernández 463-491 (Miguel Carbonell & Oscar Cruz Barney eds., UNAM-IIJ, 2015).

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local authorities from the State of Mexico have been blocking the federal investigation,[102] and there is no significant progress in the case.

From 2018 to 2021, the judiciary overall, and the SCJN face several issues related to public security, human rights, torture and forced disappearances that create a wide range of tasks.[103] Currently, there are four constitutional proceedings challenging the "Ley de la Guardia Nacional" issued by president López Obrador in May 2019. The national ombudsperson and other political actors challenged the so-called militarization of the civil body "Guardia Nacional" and the participation of armed forces into ordinary security tasks. Several emerging arguments against the law come from the lack of consideration of the SCJN precedents and the lack of (constitutional) legitimacy of the executive power to legislate in security matters. Hence, the SCJN must solve the set of "acciones de inconstitucionalidad" 62/ 2019, 63/2019 and amparos against the law. Meanwhile, the rates of violence are high: 21.1 millions of victims in 2020, prevalence of crimes in metropolitan zones, perception of insecurity;[104] assassination of journalists, and disputing grounds to armed cartel organizations in Michoacán and other regions of the country.

In June 2021, the First Chamber of the SCJN settled an important precedent that could be a turning point to improve collaboration among the police, attorneys and the judiciary to reduce the high levels of forced disappearances, due to Mexico's acceptance of the International Convention for the Protection of All Persons from Enforced Disappearance. The Chamber established that all urgent actions ordered by the UN Committee on Enforced Disappearances are legally binding for Mexican authorities and the consequent judicial supervision to ensure an urgent, coordinated, objective and impartial investigation.[105]

Throughout 2021, the balance of security in Mexico had remained the same as in previous years. One visible problem is the lack of accurate information and coordination from the three existing levels of government: federal, states and municipalities. Centro Pro, an organization dedicated to protecting human rights in Mexico, stressed some urgent actions that must be carried out by actors involved in security matters in all levels: judicial review on security laws, account of information —and external watchdog— on the use of force, request

[102] *See,* Centro de Derechos Humanos Miguel Agustín pro Juárez, *Mujeres del caso Atenco presentan amparo contra fiscalía de EdoMex por obstaculizar investigación penal*, Centro Prodh, (Sep.13, 2020), *https://centroprodh.org.mx/2020/09/13/mujeres-del-caso-atenco-presentan-amparo-contra-fiscalia-de-edomex-por-obstaculizar-investigacion-penal/*.

[103] Javier Jankelevich, *Poder judicial y desaparición de personas en México*, in Desde y Frente al Estado; Pensar, Atender y Resistir la Desaparición de Personas en México 129-230 (Javier Jankelevich coord., Centro de Estudios Constitucionales, Suprema Corte de Justicia de la Nación, 2017).

[104] Encuesta Nacional de Victimización y Percepción sobre Seguridad Pública (ENVIPE), 2021.

[105] Amparo en revisión 1077/2019, First Chamber of the SCJN, June 16, 2021.

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for a civil commander for the "Guardia Nacional", while incorporating civil personnel in medium and low levels of command, and participation of the Office of the UN High Commissioner for Human Rights in monitoring the use of force.[106] All the points stressed by Centro Pro are timely and essential to reorganize the use of force in Mexico. However, we have to consider the deep roots of the historical lack of accountability in police bodies and the use of force.

The most notorious example of deep levels of police corruption from high public agencies in Mexico emerged when former public security secretary Genaro García Luna (the highest rank for a member of former president Calderon's government, just below him), was accused of receiving bribes from the Sinaloa Cartel, and is now facing prosecution in the U.S. on the basis of "International Cocaine Distribution Conspiracy" and "Conspiracy to Distribute and Possess with Intent to Distribute Cocaine".[107] Garcia Luna's case represents the worst case of corruption within the Mexican police and top security agencies, while also unveiling the high levels of corruption in the forefront of police chain of command.

A summary of the current problems of police abuse in Mexico necessarily pinpoints two considerations: the first one is the lack of structural and legislative proposals aimed at avoiding corruption, while generating compliance of constitutional principles envisaged in Article 21 of the Mexican constitution, required by local and municipal police bodies. At the same time, the second one represents the lack of attention from the federal Congress on the issue, which causes a non-integrated approach on police bodies from federal entities and municipalities. In this regard, it is urgent to review each constitutional obligation to provide security within the territory.

IV. Controversial Issues on Law Enforcement in the United States

1. *The U.S. Original sin on Law Enforcement: Police Brutality through Racial Profiling*

Trust between law enforcement agencies and the people they vow to serve and protect is more than essential in any democratic system. However, a country

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[106] *See* Centro de Derechos Humanos Miguel Agustín Pro Juárez, *Presentamos informe sobre la Guardia Nacional y los riesgos de perpetuar la militarización*, Centro Prodh, (July 1, 2021), *https://centroprodh.org.mx/2021/07/01/presentamos-informe-sobre-la-guardia-nacional-y-los-riesgos-de-perpetuar-la-militarizacion/*.

[107] United States District Court Eastern District of New York, United States v. Genaro Garcia Luna (2019). To date (February 2022), at least four front men of the Mexican top security agencies in the Calderon era are being prosecuted for torture and drug trafficking at the U.S. and México: Luis Cárdenas Palomino, Facundo Rosas, Ivan Reyes Arzate and Porfirio Javier Sánchez Mendoza.

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such as the United States is far from exempt when it comes to highly controversial issues within its police forces, and these problems —brutality, racial discrimination, corruption and opacity— which are considered endemic to policing in the U.S., have persisted for more than 50 years.[108] As established by Sekhon, "[t]his has occurred notwithstanding the advent of modern constitutional criminal procedure and countless judicial opinions applying it to the police".[109] Not to mention the international legal framework on law enforcement developed from international human rights law —addressed in part one of this investigation—, which is apparently often taken for granted by police forces throughout the world. And although the history of policing in the United States since the 1830's[110] has been plagued by controversies and shameful events,[111] the situation for law-and-order agencies has continued to decay to levels where they now encounter serious criticism and profound scrutiny from the population. In sum, the American police forces are facing a crisis of legitimacy.[112]

To better understand the issue of race related police brutality in the U.S.,[113] it is necessary to undertake a historical analysis of law enforcement since the very origins of the nation in the 1700s, in the times of the thirteen colonies. Furthermore, there is an interesting but highly revealing fact which differentiates what originated American policing in the Northern *vis-à-vis* the Southern states in those colonies,[114] an evident racial bias perpetuating throughout time, until our very present days.[115] I am referring to the infamous "Slave Patrol", the first of which was created in the Carolina colonies

[108] Nirej Sekhon, *Police and the Limit of Law*, 119 Colum. L. Rev. 1711 (2019).

[109] *Id.*

[110] The idea of a centralized municipal police department in the United States emerged in the 1830's. "By the 1880's all major U.S. cities had municipal police forces in place". Gary Potter, The History of Policing in the United States 2 (Eastern Kentucky University, 2013). *See also*, Sidney Harring, Policing a Class Society: The Experience of American Cities, 1865-1915 (Haymarket Books, 2d. ed., 2017).

[111] A brief but comprehensive work on the historical evolution of the police in the U.S. can be found in Potter, *supra* note 110, 2-15. A much more documented investigation on this matter is found in Carol Archbold, Policing: A Text/Reader (Sage Publications, 2012).

[112] "No Justice, no peace. No racist Police!", was the chant echoed during weeks by thousands of protesters across U.S. streets, making one thing very clear: "The American police face a crisis of legitimacy". Amanda Taub, *Police the Public, or Protect It? For a U.S. in Crisis, Hard Lessons from Other Countries*, The New York Times, (June 11, 2020), *https://www.nytimes.com/2020/06/11/world/police-brutality-protests.html*.

[113] An interesting article on this issue can be found in Devin Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?* 51 Harv. C.R.-C.L. L. Rev. 159-187 (2016).

[114] According to Walker: "*[d]iscussions of American police history should generally distinguish be tween the southeastern states and the rest of the country*". Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 The University of Chicago Legal Forum 15, 624 (2016).

[115] David Harris, *Racial Profiling: Past, Present, and Future?* 34 Criminal Justice 11 (2020).

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in 1704.[116] This demonstrates "that the police have traditionally served the will of the dominant white majority".[117] As expressed by Harris, "[h]istorically, racial targeting by police did not start in the late twentieth century. It has constituted a fact of life for African Americans as long as there have been organized police forces in the United States —indeed, even before that, with the slave patrols of the American Antebellum South—".[118] These patrols had "three primary functions: (1) to chase down, apprehend and return to their owners runaway slaves; (2) to provide a form of organized terror to deter slave revolts, and (3) to maintain a form of discipline for slave-workers who were subject to summary justice, outside the law, if they violated any plantation rules".[119] By the end of the Civil War (1865), these "vigilante-style organizations" evolved into modern Southern police departments, especially targeting freed slaves and "enforcing «Jim Crow» segregation laws,[120] designed to deny freed slaves equal rights and access to the political system".[121]

Meanwhile, in the Northern states, the first police forces were being created. The city of Boston was the first one in 1838, then came New York City in 1845, and Chicago in 1851, to name a few. By the 1880s all major U.S. cities had their own agencies.[122] These modern police forces emerged as a response to "disorder", and not necessarily to fight crime.[123] Among the main characteristics shared by them was that "they were notoriously corrupt and flagrantly brutal".[124] According to Walker, "[p]hysical brutality was routine and unpunished. (Shootings by police officers were uncommon, for the simple reason that handguns did not become common until the twentieth century)".[125] Furthermore, the agencies "were dominated by local politics with no commitment to public service or to the rule of law".[126] In a nut-

[116] Potter, *supra* note 110, at 3; Philip Reichel, *The Misplaced Emphasis on Urbanization in Police Development*, 3 Polic. Soc. 1-12 (1992).

[117] Walker, *supra* note 114, at 624.

[118] Harris, *supra* note 115, at 11.

[119] Potter, *supra* note 110, at 3.

[120] Regarding the controversial "Jim Crow laws", which separated Black people from association and contact with White people in the U.S., we have the work of Catherine Lewis & Richard Lewis, Jim Crow America: A Documentary History (University of Arkansas Press, 2009); David Martin, *The Birth of Jim Crow in Alabama, 1865-1896*, 13 National Black Law Journal 184-197 (1993); Richard Wormser, The rise and fall of Jim Crow (St. Martin's Press, 2003).

[121] Potter, *supra* note 110, at 3.

[122] *Id.*, at 2. *See also*, Harring, *supra* note 110.

[123] Potter, *supra* note 110, at 3.

[124] *Id.*, at 5.

[125] Walker, *supra* note 114, at 626.

[126] *Id.*, at 624. In this corrupt environment, Potter describes how the police forces protected politicians, as well as their gambling, prostitution and drug distribution endeavors. Potter, *supra* note 110, at 5-10.

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shell, the problems that today still exist in controlling police use of force while equally protecting all people and groups, have been well established since the nineteenth century.[127]

Until 1931, by means of the Wickersham Commission report, the U.S. had its first systematic investigation of abusive police tactics, also known as *Lawlessness in Law Enforcement.*[128] While in 1935, the ongoing discrimination from police forces against African Americans became more visible, after the publication of *Mayor LaGuardia's Commission on the Harlem Riot,* which occurred that same year.[129] During the next twenty years, many efforts for a needed professionalization of the police forces were made. This movement would bring deep reforms within the police in assimilating military models of organization and discipline.[130] Some desired goals were to eliminate political influence from policing, to appoint highly qualified individuals as police chiefs, introduce principles of modern management into police departments and develop specialized units to address specific crime problems.[131] The publication of O.W. Wilson's book titled Police Administration in 1950, served as a benchmark for this movement.[132] However, this professionalization lacked attention to the conduct of police officers on the streets, such as "the use of all forms of force; the conduct of searches, seizures and interrogations; and systemic racism in all police activities".[133] This tendency in law enforcement agencies carried on for at least two more decades,[134] and became highly problematic when in the 60s it collided with massive social and political changes.

The Civil Rights movement and the many riots throughout the U.S., highlighted the frustration of African Americans suffering from systemic discrimination, as well as an elusive dream for racial equality. As described by Walker, this historic movement challenged these aspects of police actions:

> …fatal shootings of citizens, particularly African Americans; the use of excessive physical force; racially discriminatory stop-and-arrest practices; aggressive crime fighting strategies and tactics that alienated African American communities; inadequate procedures for handling citizen complaints against police officers; and race discrimination in police employment practices.[135]

[127] WALKER, *supra* note 114, at 626.

[128] *Id.*, at 626-627. *See also*, NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931).

[129] WALKER, *supra* note 114, at 627.

[130] *Id.*, at 628-631; POTTER, *supra* note 110, at 11.

[131] WALKER, *supra* note 114, at 628-629.

[132] *Id.*, at 629; POTTER, *supra* note 110, at 11.

[133] WALKER, *supra* note 114, at 629.

[134] The Fourth Edition of Wilson's book, *Police Administration* published in 1977, was still missing those relevant topics. *Id.*, at 629-630.

[135] WALKER, *supra* note 114, at 632.

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Ultimately, police suppression of the Civil Rights movement "often by brute force did irreparable damage to American policing",[136] a damage that continues until this day. As a response to the continuous civil unrest and violence the U.S. was experiencing, in July 1967 president Lyndon Johnson announced the creation of the National Advisory Commission on Civil Disorders, also known as The Kerner Commission.[137] Nevertheless, the Commission's report emphasized on serious problems from black communities, such as segregated education, extreme poverty, and structural racism from the white society, as well as ways to potentially solve these issues, the report was finally rejected from Johnson's political agenda, due to —among other issues—, the costly Vietnam War.[138]

2. *The U.S. Supreme Court and the Creation of Qualified Immunity*

Since those days of protests during the sixties and so far, the U.S. judiciary has continued supporting an excessive use of force by law officers. In this section, we will identify the background of qualified immunity and the legal shield granted to the police by the judicial system. Even though the analysis of these cases will not be exhaustive in this research, I must highlight the U.S. Supreme Court (SCOTUS) decisions in *Mapp v. Ohio*[139] (violation of the 4th amendment; unreasonable searches and seizures from the government) and *Miranda v. Arizona*[140] (violation of the 5th Amendment; which confers several rights applicable to either criminal or civil legal proceedings), as they brought the most significant reforms of the 60s imposing constitutional limits on the police. The cases affected "traditional police crime-fighting tactics of searches and seizures and interrogations".[141] Additionally, *Mapp* and *Miranda* forced law enforcement agencies to create internal policies governing critical police actions, such as the use of deadly force and the use of non-lethal force, among others.[142] However, the Supreme Court's decisions also sparked the creation of police unions.[143]

During the subsequent two decades, strong efforts towards improving the police image in the American society were made. At the beginning of the

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136 Potter, *supra* note 110, at 13.

137 Report of the National Advisory Commission on Civil Disorders (1968); Walker, *supra* note 114, at 632.

138 In his research, Clayton described several factors considered by President Johnson which finally rejected the Report's recommendations. Dewey Clayton, *Two Nations: Black and White, Separate and Unequal*, 1 Nat. Rev. of Black Politics 51-52 (2020).

139 Mapp v. Ohio, 367 U.S. 643 (1961).

140 Miranda v. Arizona, 384 U.S. 436 (1966).

141 Walker, *supra* note 114, at 641.

142 *Id.*, at 642.

143 *Id.*, at 644.

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80s, the concepts of community policing and problem-oriented policing emerged.[144] The aim of these approaches was to gain confidence between the police forces and the communities across the nation.[145] It also contributed to advances on police policymaking, citizen oversights: auditors, monitors and inspectors general,[146] as well as community police commissions to supervise the work and effectiveness of the police, while developing law enforcement policies.[147]

The 80s would also bring two landmark decisions from the SCOTUS regarding the use of force by law enforcement officers; both of the victims were Black Americans; *Tennessee v. Garner*,[148] where lethal use of force went under scrutiny, and *Graham v. Connor*,[149] where excessive use of force came into play. These cases have generated many high-profile acquittals, particularly the *Graham* precedent.[150] In the *Garner* decision, the Court argued that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable".[151]

Nevertheless, it also held that under the Fourth Amendment, a police agent could resort to deadly force against an unarmed fleeing felon, when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others".[152] According to Greene, this reasoning forms "the backbone [of] modern jurisprudence commonly implicated in police shootings".[153] In the *Graham* case, the Court established the "objective reasonableness standard" of police conduct, which

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144 *Id.*, at 644-645.

145 Potter, *supra* note 110, at 14.

146 Walker, *supra* note 114, at 644-650.

147 *Id.*, at 652-659.

148 Tennessee v. Garner, 471 U.S. 1 (1985). The case arises from the fatal shooting by police officers in accordance with Tennessee law of an unarmed young Black male (home burglary suspect), who was attempting to escape while climbing a fence. *Id.*, at 3-4; Corinthia Carter, *Police Brutality, the Law and Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 C. U. N. Y. L. Rev. 534 and footnote 89 (2017).

149 Graham v. Connor, 490 U.S. 386 (1989). Originated by the arrest of a black man for suspicion of theft, although the ordeal ended up as a huge misunderstanding by the arresting officers, the victim suffered a broken foot and several other injuries. He then sued under §1983 for excessive use of force during the (unjustified) stop. *Id.*, at 388-390; Caroline Reinwald, *A One Two Punch: How Qualified Immunity's Double Dose of Reasonableness Dooms Excessive Force Claims in the Fourth Circuit*, 98 N. C. L. Rev. 669 (2020).

150 In the words of Martin and Kposowa, *Graham v. Connor* had a large impact on the allowance and justification of police abuse. Martin & Kposowa, *Race and Consequences: An examination of Police Abuse in America,* 15 Journal of Social Sciences 2 (2019).

151 Tennessee v. Garner, 471 U.S. 1, 11 (1985). *See also*, Linda Greene, *Before and After Michael Brown-Toward an End to Structural and Actual Violence*, 49 Washington University Journal of Law and Policy 37 (2015).

152 Tennessee v. Garner, 471 U.S. 1, 3 (1985); Greene, *supra* note 151, at 37.

153 *Id.*

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determines "whether [an] officer's actions are «objectively reasonable» considering facts and circumstances confronting them, without regard to their underlying intent or motivation".[154] The *Graham* judgement practically "prohibits any second-guessing of the officer's decision to use deadly force: no hindsight is permitted, and wide latitude is granted to the officer's account of the situation, even if scientific evidence proves it to be mistaken".[155] Although *Graham* set the standard for analyzing excessive force claims,[156] ironically the decision "itself provides limited guidance to law enforcement agencies regarding what constitutes excessive force".[157]

However, throughout these years cases of excessive use of force by police against the black population have kept emerging. In March 1991, the world witnessed the cruel (videotaped) beating of an unarmed Rodney King by four L.A.P.D. officers. A year later, the officers were tried on charges of police brutality; however, surprisingly enough neither of them was found guilty.[158] Within hours of the acquittals, the bloody L.A. riots and protests erupted.[159] Another case worth mentioning, which occurred in Ferguson, Missouri during the Obama administration, was the fatal shooting of unarmed eighteen-year-old Michael Brown by a white police officer in August 2014. This case also brought massive protests, riots, media attention and academic input,[160] in addition to the Final Report of the President's Task Force on 21st Century Policing, a year later.[161] The task force was charged "with identifying best practices and offering recommendations on how policing practices can promote effective crime reduction while building public trust".[162] Now the challenge has become to successfully apply the task force recommendations by means of the Implementation Guide[163] in the more

[154] Graham v. Connor, 490 U.S. 386, 397 (1989); Carter, *supra* note 148, at 529.

[155] Chase Madar, *Why it's Impossible to Indict a Cop: It's Not Just Ferguson-Here's How the System Protects Police,* The Nation, (Nov. 25, 2014), *https://www.thenation.com/article/archive/why-its-impossible-indict-cop/*; Carter, *supra* note 148, at 535.

[156] Reinwald, *supra* note 149, at 669.

[157] Joanna Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1820 (2018).

[158] Abraham Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 Harv. Blackletter Jour. 67 (1993).

[159] Cassandra Chaney & Ray Robertson, *Racism and Police Brutality in America*, 17, J. Afr. Am. Stud. 484 (2013).

[160] Greene, *supra* note 151, at 3-4. In addition to Jebadiha Potterf & Jason Pohl, *A Black Teen, a White Cop, and a City in Turmoil: Analyzing Newspaper Reports on Ferguson, Missouri and the Death of Michael Brown,* 34 J. Contemp. Crim. Justice (2018); Michael Oshiro & Pamela Valera, *Framing Physicality and Public Safety: A Study of Michael Brown and Darren Wilson,* 20 *Equality, Crime and Health Among African American Males*, Research in Race and Ethnic Relations 207-228 (2018).

[161] Final Report of the President's Task Force on 21st Century Policing (2015).

[162] *Id.*, at 1.

[163] President's Task Force on 21st Century Policing Implementation Guide (2015).

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than 18,000 law enforcement departments throughout the nation. The Trump administration never showed interest in advancing the program.[164] What will Biden do on this matter? Only time will tell.

Nevertheless, in our present times police brutality against minorities in the U.S. is far from being a solved issue.[165] Ever since the above-mentioned Rodney King brutal beating at the beginning of the nineties, the increase in technology and media coverage have given rise to many more videos as undeniable evidence of police brutality and excessive use of force.[166] One of the latest incidents, the case of George Floyd, has brought strong condemnation and rejection not only within the U.S., but also across the world. While being filmed by bystanders, a white police officer from Minneapolis had Floyd handcuffed and faced down in the street with his knee on Floyd's neck for almost nine minutes. Floyd repeatedly begged for his life with the words: "I can't breathe!" until he became motionless; he had been killed while in police custody.[167] Since his death, there have been many mass protests and violent riots both all over the U.S. and abroad. Floyd's last words have become a slogan for the Black Lives Matter (BLM) movement,[168] and resonated in every corner of the planet. A few weeks after Floyd's death, in another videotaped incident, Rayshard Brooks was shot and killed in Atlanta, Georgia, by a police officer. In June 2021, Derek

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[164] Stephen Menendian, Richard Rothstein & Nirali Beri, *The Road Not Taken: Housing and Criminal Justice 50 Years After the Kerner Commission Report*, Othering and Belonging Institute 17 (2020).

[165] We have evidence arising from the vast academic articles and books recently published on the matter: Hasan Arslan, *The Impact of Police Shootings in the United States on Police Community Relations*, in Policing and Minority Communities 105-124 (James Albrecht, Garth den Heyer & Perry Stanislas eds., 2019); Jennifer Cobbina, Hands Up, Don't Shoot!: why the protests in Ferguson and Baltimore matter, and how they changed america 288 (NYU Press, 2019); Corey Miles, *How a Democracy Killed Tamir Rice: White Racial Frame, Racial Ideology, and Racial Structural Ignorance in the United States,* in Gender Sexuality and Race in the Digital Age 99-111 (Nicole Farris, D'Lane Compton & Andrea Herrera eds., 2020); Amanda Graham et al., *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 Victims and Offenders 5, 549-573 (2020); Matthew Platt, *Hoodies on the Floor: Exploring Black Members' Legislative Response to Police Brutality*, I National Rev. of Black Politics 69-79 (2020); Hannah McManus et al., *Will Black Lives Matter to the Police? African Americans' Concerns About Trump's Presidency*, in Crime and justice in the Trump era 1040-1062 (Francis Cullen & Amanda Graham eds., 2019).

[166] As described for example in Martin & Kposowa, *supra* note 150, at 1-9.

[167] Ironically, after Floyd's death (25th of May 2020), three other (past) cries of "I can't breathe!" recordings of black men who died shortly after having interactions with police have surfaced: Eric Garner (died in 2014), Javier Ambler (died in 2019), and Manuel Ellis (died in March 2020). Jason Hanna, *3 Recordings. Three Cries of "I Can't Breathe". 3 Black Men Dead After Interactions with Police*, CNN, (June 10, 2020), *https://edition.cnn.com/2020/06/10/us/cant-breathe-deaths-javier-ambler-george-floyd-manuel-ellis/index.html*.

[168] Regarding the Black Lives Matter movement (BLM), see for example, Carter, *supra* note 148, at 523, 525, 541, 546, 550.

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Chauvin was found guilty of Floyd's murder and sentenced to 22 and half years in prison.

3. *Police Officers' Accountability and Qualified Immunity in U.S. Courts*

When it comes to police brutality, why is it so difficult to prosecute law enforcement officers in U.S. Courts? The answer to this dilemma can be found in the Supreme Court's controversial development of the "qualified immunity" doctrine, "as part of its interpretation of the Civil Rights Act of 1871".[169] As expressed by Novak, "Qualified immunity is a judicially created legal doctrine that shields government officials performing discretionary duties from civil liability in cases involving the deprivation of statutory or constitutional rights".[170] Supporters of qualified immunity have considered that "it plays an important role in affording police officers some level of deference when making split-second decisions about whether to, for example, use force to subdue a fleeing or resisting suspect".[171] At the same time, critics have considered the doctrine's doubtful origins,[172] in addition to giving "too much deference to the police", jeopardizing accountability while eroding criminal suspects' constitutional rights.[173]

In pragmatic terms, qualified immunity has been employed as an "unwritten defense"[174] to civil rights lawsuits brought against state and local police officers under the statute 42 U.S.C. § 1983. The Statute known as "Section 1983" "was first enacted during Reconstruction as a section of the 1871 Ku Klux [Klan] Act, part of a suite of «Enforcement Acts» designed to help combat lawlessness and civil rights violations in the southern states".[175] The statute "provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of statute, ordinance, regulation, custom, or usage, of any State or Territory".[176] When it comes to police officer's conduct, "Section 1983 provides a legal remedy for individuals claiming that their constitutional rights, such as the right to be free from

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[169] Whitney Novak, *Policing the Police: Qualified Immunity and Considerations for Congress,* Congressional Research Service 1 (2020). See also, the Civil Rights Act of 1871, also known as "The Ku Klux Klan Act."

[170] Novak, *supra* note 169, at 1.

[171] *Id*. *See also*, Baxter v. Bracey *et al*., 590 U.S. 23-26 (2019).

[172] William Baude, *Is Qualified Immunity Unlawful?* 106 Calif. L. Rev. 55 (2018).

[173] Novak, *supra* note 169, at 1.

[174] Baude, *supra* note 172, at 45, 50, 66, 77.

[175] *Id*., at 49.

[176] Novak, *supra* note 169, at 2; Baude, *supra* note 172, at 49. *See also* the Statute 42 U.S.C. § 1983.

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excessive force under the Fourth Amendment, were violated by state or local police".[177]

However, qualified immunity as counterweight to "Section 1983", was first decided by the SCOTUS in the case *Pierson v. Ray* in 1967.[178] The Court described it "as grounded in common law defenses of good faith and probable cause that were available for state-law false arrest and imprisonment claims"[179] to police officers. Even so, there are scholars who have shown that history does not support the Court's claim of its common-law foundations.[180] Nonetheless, in the case *Harlow v. Fitzgerald* of 1982, the Court established the "modern qualified immunity test", granting it "to those government officials whose conduct «does not violate clearly established statutory or constitutional rights of which a reasonable person would have known»".[181] In other words, this standard shields law enforcement from constitutional violations, unless they infringe "clearly established law".[182]

After the *Harlow* decision, the SCOTUS has been "refining and expanding" the doctrine's reach,[183] so it has become more and more difficult for plaintiffs to show a violation of "clearly established law" by government officials. In a recent study of eighteen qualified immunity cases that the Court heard from 2000 to 2016 —many of which involved police use of excessive force in violation of the Fourth Amendment—, in 16 of them the Court granted qualified immunity, stating that "they did not act in violation of clearly established law".[184] Now, what constitutes clearly established law? The SCOTUS has stated that, "it depends substantially upon the level of generality at which the relevant «legal rule» is to be identified".[185] In a very recent case, the Court held that "the clearly established right must be defined with specificity … That is particularly important in excessive force cases".[186] This means that, "even minor differences between the case at hand and the case in which the relevant legal right claimed to be violated was first estab-

[177] Novak, *supra* note 169, at 2. *See also,* Graham v. Connor, 490 U.S. 386 (1989).

[178] Pierson v. Ray, 386 U.S. 547 (1967).

[179] "The Court in *Pierson* appeared to focus on common-law defenses available in Mississippi at the time the case was filed". Schwartz, *supra* note 157, at 1801.

[180] *Id*; Baude, *supra* note 172, at 55; Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 Minnesota Law Rev. Headnotes, 78 (2016); James Pfander, Constitutional Torts and the War on Terror 16-17 (Oxford University Press, 2017); David Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 University of Colorado Law Review 14-21 (1972).

[181] Novak, *supra* note 169, at 3; Baude, *supra* note 172, at 53.

[182] *Id.*, at 45-46, 53. More on this matter can be found in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[183] Novak, *supra* note 169, at 3. *See also* Kinports, *supra* note 180, at 62-78.

[184] Novak, *supra* note 169, at 3; Kinports, *supra* note 180, at 63 and footnote 6.

[185] Anderson v. Creighton *et al.*, 483 U.S. 635, 639 (1987); Novak, *supra* note 169, at 3.

[186] City of Escondido v. Emmons, No. 16-55771 (2019).

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lished, can immunize the defendant police officer".[187] The Court's reasoning has scholars considering that, it "severely restrict[s] the ability of individuals to recover for constitutional violations that they suffer at the hands of law enforcement",[188] jeopardizing the purpose of Section 1983.[189]

Even some Justices have raised concerns about the damage the doctrine is causing to the Constitution.[190] In the recent case *Ziglar v. Abbasi*, Justice Thomas criticized the historic background from where supposedly qualified immunity arises, "and for being defined by «precisely the sort of freewheeling policy choice[s]' that we have previously disclaimed the power to make»".[191] Adding that, "[i]n an appropriate case we should reconsider our qualified immunity jurisprudence".[192] While in dissenting opinions "[i]n 2015 [*Mullenix v. Luna*], and again in 2018 [*Kisela v. Hughes*], Justice Sotomayor expressed concern that the Court's qualified immunity decisions contribute to a culture of police violence".[193] In her words, "[b]y sanctioning a «shoot first, think later» approach to policing, the Court renders the protection of the Fourth Amendment hollow".[194] Sotomayor's reasoning may be supported by a recently developed study, which reveals that appellate courts —especially in excessive force cases— have been increasingly granting qualified immunity to law officers.[195] For example, from 2005 to 2007, "44 percent of courts favored police in excessive force cases. That number jumped to 57 percent … from 2017 to 2019".[196]

After Floyd's tragic death, the debate overqualified immunity has intensified.[197] There is already a discussion on which branch of government is

[187] Novak, *supra* note 169, at 3.

[188] Stephen Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences,* 113 Michigan Law Review 1245 (2015).

[189] Novak, *supra* note 169, at 3.

[190] The Supreme Court's decision in *Mullenix v. Luna*, "provoked Justice Sotomayor's expression of concern about the damage qualified immunity does to the Constitution". Schwartz, *supra* note 157, at 1816.

[191] *See*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017).

[192] *Id.*, at 1872; Schwartz, *supra* note 157, at 1798.

[193] *Id.*, at 1799; Novak, *supra* note 169, at 4. In Mullenix, Sotomayor reasoned that, "the majority ignored the longstanding and well-settled Fourth Amendment rule that there must be a governmental interest not just in seizing a suspect, but in the level of force used to effectuate that seizure". Supreme Court of the United States, *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305 (2015) (Sotomayor, J., dissenting). *See also*, Kisela v. Hughes, 584 U.S. 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting, joined by Ruth Bader Ginsburg).

[194] Mullenix v. Luna, 577 U.S. 7, 136 S. Ct. 305 (2015) (Sotomayor, J., dissenting).

[195] Andrew Chung et al., *For Cops who Kill, Special Supreme Court Protection*, Reuters Investigates, (May 8, 2020); Novak, *supra* note 169, at 4.

[196] *Id.*

[197] *See* for example, Michael Dorf, "Would Eliminating Qualified Immunity Substantially Deter Police Misconduct?," Verdict-Justia, June 10, 2020.

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more suitable to reform the failed doctrine.[198] Since qualified immunity is judicially created, the SCOTUS is entitled to assume the task of revising it, as it has done in the past, although creating more confusion and problems.[199] However, even after the current social unrest of the nation spawned by a systematic police abuse of citizens, the Court has recently declined to weigh in on the doctrine shielding law enforcement.[200]

So, everything now points to the U.S. Congress to provide for a damages remedy[201] for the many victims of police abuse of power. Considering that, "qualified immunity is a product of statutory interpretation, Congress has wide authority to amend, expand or even abolish the doctrine".[202] The "Ending Qualified Immunity Act" or H.R. 7085, introduced by Congressman Justin Amash, is a proposed legislation aimed for that objective, and could potentially amend "Section 1983 by abolishing both the «good faith defense» and the defense that the law was not clearly established at the time of the alleged misconduct".[203] Following this crescendo trend, the "Justice in Policing Act of 2020", has emerged as a promising proposal destined "to cases brought against local law enforcement and state correctional officers".[204] Both of these efforts could potentially eliminate the judicially created qualified immunity defense in Section 1983 litigation.[205] As possible alternatives to "scale back qualified immunity to limited circumstances", Novak has proposed the following examples: Congress could limit the reach of the doctrine to certain government actors, excluding law enforcement agencies, or limit the application of the doctrine to Fourth Amendment excessive use of force claims, or it could "abrogate recent Supreme Court jurisprudence requiring specificity for a finding of «clearly established law». Or Congress could explore eliminating other doctrines that might be viewed as insufficiently policing law enforcement misconduct".[206]

In sum, the qualified immunity doctrine invented by the SCOTUS has two effects in terms of constitutional rights: Firstly, it has created a non-existent right in the U.S. Constitution, instead of promoting an accurate legislation

[198] *See* for example, Scott Michelman, *The Branch Best Qualified to Abolish Immunity,* 93 Notre Dame Law Review 1999-2020 (2018); Novak, *supra* note 169, at 4.

[199] Michelman, *supra* note 198, at 2000.

[200] Jamie Ehrlich, Ariane de Vogue & Devan Cole, *Supreme Court Declines to Weigh In on Legal Doctrine that Shields Law Enforcement*, CNN (June 15, 2020), *https://edition.cnn.com/2020/06/15/politics/supreme-court-qualified-immunity/index.html*.

[201] Michelman, *supra* note 198, at 2001.

[202] Novak, *supra* note 169, at 4; Michelman, *supra* note 198, at 2001.

[203] Novak, *supra* note 169, at 4; House Committee on the Judiciary, H.R. 7085, (2020).

[204] Novak, *supra* note 169, at 4; House Committee on the Judiciary, H.R. 7120, (2020).

[205] Novak, *supra* note 169, at 4.

[206] "Such as the 1978 Supreme Court decision in Monell v. Department of Social Services, which significantly limits municipalities' liability for police misconduct". *Id.*, at 4-5; Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978).

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to regulate the use of force, according to international standards. Secondly, it has created a "disturbing trend regarding the use of this Court's resources",[207] apart from making it very complicated for victims of excessive use of force by law enforcement officers, to obtain the much-desired justice and reparation in U.S. courts. However, in a recent move towards the right direction, Governor Polis of the state of Colorado, has signed into law a broad Police Accountability Bill, ending —among other issues— qualified immunity defense for law enforcement agents in that state.[208] Let's just hope this represents a genuine turn of the tide for the rest of the states in that nation.

4. *Concerns of the Inter-American Commission towards U.S. Policy*

United States signed but did not ratify the Inter-American Convention on Human Rights; hence, it is not part of the compulsory jurisdiction of the Inter-American Court. However, the Inter-American Commission on Human Rights can monitor human rights situations in the U.S. directly. Under this mandate, a report from 2018 unveiled concerns on excessive use of force, discrimination and killings perpetrated by the police against African Americans.[209] The three key issues detected by the IACHR are racial profiling, excessive use of force, and (qualified) immunity, generating impunity for police officers, in addition to the use of military techniques and weapons in police departments.[210] Current use of lethal force as first response, even in the context of social protests, reveals a wide state of affairs that breach international guidelines on the use of force in the U.S., with no possibilities for a remedy under its domestic framework.[211] Concluding observations of the IACHR highlight —as a matter of urgency— the need to make a reform in domestic law, as well as to review local protocols on the use of force; this includes the prohibition of racial profiling and the implementation of international standards on the use of force, the adoption of measures to reverse militarization, and provide remedies on accountability and due diligence.[212]

Essentially, the Inter-American findings on historic racial discrimination do not differ from the internal pictures of police abuse in the U.S. Hopefully,

[207] Kisela v. Hughes, 584 U.S. 138 S. Ct. 1148 (2018), Sotomayor, J., dissenting. Justice Sotomayor, with whom Justice Ginsburg joins, 14.

[208] Li Cohen, *Colorado Passes Sweeping Police Reform Bill*, CBS News, (June 19, 2020), *https://www.cbsnews.com/news/colorado-passes-sweeping-police-reform-bill/*.

[209] The report also reveals a wide range of segregation, poverty, lack of political participation, inequality on access to justice and other socio-legal problems faced by African Americans. Inter-American Commission on Human Rights (African Americans), paras. 45-50 (2018).

[210] *Id.*, paras. 69, 88, 105.

[211] *Id.*, paras. 213, 239.

[212] *Id.*, paras. 308-318.

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the House of Representatives takes into consideration the largely identified problems of policing practice and accountability. Street demonstrations by the American public calling for reforms must show the democratic spirit of all branches of government involved in the issue.

V. Conclusions

Despite the importance of the police in providing security, contributing to the rule of law, combating crime and strengthen confidence within communities, Mexico's police bodies and their institutional framework need to be studied thoroughly, while acknowledging the level of participation of each branch of the government. In the United States, despite the extensive scholar inputs on police brutality, qualified immunity for police officers, unreasonable searches and seizures from the government, as well as racial profiling concerns, problems on police performance remain very much the same.

Notwithstanding the wide range of specific guidelines explaining principles of legality, prevention, proportionality and absolute necessity, neither Mexico nor the United States has implemented international principles in a level playing field, aimed at reforming police institutions and preventing abuse, while creating accountability mechanisms that allow the public to be an active participant of these reforms.

In Mexico, constitutional guidelines on police principles have no influx in police bodies and their chain of command. The solution must be triggered by a national dialogue to propose legislative and administrative work at the federal, local, and municipal levels, accompanied by professionals on police sustainability, legal, social and scholars from the humanities. Every Mexican political branch has a constitutional duty and is aware of the situation, but a thorough police reform demands political and dialogical participation within federal, local, and municipal governments. The great opportunity for the federal government, which might translate in concrete steps to emancipate a police reform aimed at building a peaceful society.

In the United States, the main concerns I am obliged to highlight when dealing with law enforcement are corruption, brutality, and lack of accountability. Nevertheless, an aggravating factor eroding the police system, while shaking the very foundations of American democracy is the historically ingrained racial discrimination within its forces, emerging as one of the main reasons why police agencies are currently facing a severe legitimacy crisis. To make matters worse, the "qualified immunity" doctrine created by the SCOTUS has denied access to justice in police brutality cases against racial minorities, weakening both the constitutional promise of equal protection under law and the principles of international human rights law. Ultimately, only the American people will force the government to change, just as only the American people will continue to demand equality for all.

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In this globalized world, we do not need an aggressive and fearsome police force. What we really need is better trained and much more humane law enforcement bodies, professional and capable of meeting the already complicated challenges that democratic societies are facing. From our perception, there is a gap between the approaches on state of exception/emergency and lack of accountability for the executive branch at national levels, in terms of a constitutional and democratic exercise of power. Police abuses might have different origins and backgrounds, but the outcome is the same: deprivation of life and subsequent loss of public trust in the exercise of power, resulting in outrage while igniting both political tension and riots.

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THE REFORMS TO THE JUDICIAL POWER OF THE FEDERATION OF MARCH 2021: AN APPROACH TO ITS STRUCTURAL PERSPECTIVE AND FUNDAMENTAL CHALLENGES

Eduardo Pérez Alonso*

Abstract: *The reform of March 2021 has generated a lot of tension in the journalistic area and seems to herald a lot of reflections in the academic field of law. However, to date, a good part of the discussions have focused on descriptively replicating its content, as well as on the short-term consequences. So, it is considered essential to move towards a discussion that inserts other variables that allow the fabric to become denser, in order to walk towards a much more comprehensive solution. This analysis puts into debate two of the articulating axes of the reform: the system of precedents, and the fight against corruption, placing special emphasis on some gaps, but, above all, pointing out its inability to solve problems of a structural nature. This insolvency results from a lack of reflection on the socio-historical fabric that, under the present reading, will lead to its results being modest, inoperative and/or even causing the intensification of the problems it intends to solve.*

Keywords: *Judicial reform, precedent system, anti-corruption, meritocracy, discourse analysis.*

Resumen: *La reforma de marzo de 2021 ha generado mucha tensión en el terreno periodístico y parece anunciar una gran cantidad de reflexiones en el campo académico del derecho. Sin embargo, hasta la fecha buena parte de las discusiones se han centrado en replicar de manera descriptiva su contenido, así como en las consecuencias en el corto plazo. Se considera indispensable avanzar hacia una discusión que inserte otras variables que permitan volver el tejido más denso y caminar hacia una solución mucho más integral. Este análisis pone a debate dos de los ejes articulares de la mencionada reforma: el*

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sistema de precedentes y el combate a la corrupción, colocando especial énfasis en algunos vacíos, pero, ante todo, señalando su incapacidad para solucionar problemas de naturaleza estructural. Esta insolvencia resulta de una falta de reflexión sobre el tejido socio histórico que bajo la presente lectura llevará a que sus resultados sean modestos, inoperantes o incluso provoquen el recrudecimiento de las problemáticas que pretende resolver.

Palabras clave: *Reforma judicial, sistema de precedentes, anticorrupción, meritocracia, análisis de discurso.*

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I. Introduction

Since the end of the last century, a good part of the countries in Latin America have been immersed in historical processes tending to modify the way in which power had been exercised. Mexico has not been the exception since, in recent decades, the country has fought for its democratization. In this context, judicial reform and the rule of law are considered essential elements to consolidate political democratization. However, being the recent reform of March 2021[1] one of its most significant corollaries, it is really a medium-term process that must be interpreted as part of a set of transformations of the judicial justice system that could have its clearest antecedents in the late 80s.

In 1987, a constitutional reform was carried out that conferred greater powers both to the Supreme Court of Justice, to the Federal Judicial Power, while incorporating in the Constitution guarantees and minimum guidelines for the Judicial Powers of the federative entities. Despite this, the most relevant aspect of this reform is that the Judicial Power of the Federation was granted a higher amount of financial resources, which, although at first, they certainly seemed to be more the product of a presidential decision than a judicial policy, they strengthened and stimulated changes within it, linked to its integrity and independence.[2]

[1] Ley Orgánica del Poder Judicial [L.O.P.J.], Organic Law of Judicial Power of the Federation, as amended, *Diario Oficial de la Federación* [D.O.F], 7 de junio de 2021 (Mex.).

[2] Héctor Fix Fierro, El Poder del Poder Judicial y la Modernización Jurídica en el México Contemporáneo 137 (Instituto de Investigaciones Jurídicas, 2020).

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Later, another important reform was carried out within the structure of the Judicial Power of the Federation, which was the result of processes related to the administration of justice, the collapse of public finances in 1982, the neoliberal shift it had caused, as well as the frequent scandals that occurred during the previous decade that had resulted in the deterioration of the public image of the Judiciary. Thus, during December 1994, a series of modifications of 27 articles of the Constitution took place with the aim to strengthen the Supreme Court of Justice of the Nation by establishing powers that configured it as a constitutional court. These changes were a milestone in the structure of the Judiciary, and in its functions in terms of constitutional control and judicial guarantees.

In 1999, another reform was carried out that reversed some important aspects of the one implemented in 1994, submitting the Federal Judiciary Council to the control of the Court itself. This way it recovered part of the authority and influence within the Judicial Power of the Federation that it had lost at the hands of the Council. At the end of the same year, at its initiative, a commission was established made up of federal judges, lawyers and academics who took on the task of preparing a project for a new Amparo Law. The commission worked hard for a year, analyzing, and systematizing several hundred proposals. The project carried out by the commission was presented and discussed in a national legal congress at the end of 2000 and, after a review by the same ministers, it was sent to the corresponding instances.

The aforementioned project included important technical innovations, but the most significant aspect is that it was proposed to give greater force to the resolutions of the Judiciary through the general declaration of unconstitutionality, and the so-called declaration of consistent interpretation. Unfortunately, although a good part of the reflections favored these changes, the members of the other two powers did not speak out for their adoption until 2003. Around 2000, the president of the Supreme Court declared his open opposition to the budget restrictions to which the Power was bound, which led to a very notable increase during that year because it occurred at times of budget.

On March 11, the first year of its publication in the Official Gazette of the Federation, the last constitutional reform in judicial matters —which has been identified as a reform with and for the Judiciary— was completed. It is an event that could achieve a historical status since it addresses a series of transformations that are articulated through five federal ordinances related to the adequacy of judicial processes, the labor regime of public servants, the federal public defender, as well as the issuance of two new laws: one regarding the organization of the Judicial Power of the Federation and another one related to the judicial career.

In very general terms, it could be stated that the reform is shaped through the modification of the judicial reorganization in order to strengthen the role of constitutional court of the Supreme Court of Justice of the Nation (SCJN),

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and to promote the judicial and public defender career. With respect to the first axis, the reform provided a wide margin of discretion to the Plenary of the SCJN so that, through general agreements, it established the matters that will be known to it and those that must be referred to the Regional Plenary Sessions and to the Collegiate Circuit Courts, in order to resolve only those matters of true constitutional control and not of mere legality. Likewise, it has been determined that the direct amparo trial proceedings against judgments that resolve on the constitutionality of general norms establish the direct interpretation of a precept of the Constitution or fail to decide on such matters when they have been raised, provided that they are of exceptional interest in constitutional or human rights matters. Hence, the previous condition is invalidated, consisting of the fact that a criterion of importance and transcendence was imperative. It also states that, against the order that rejects a review resource for not complying with such requirements, no means of challenge will proceed, thus eliminating the claim resource that was previously in order. Additionally, the Council of the Judiciary was empowered to concentrate on one or more jurisdictional bodies so that they deal with matters that constitute serious violations of human rights. This will be carried out considering the social interest and public order, constituting an exception to the rules of turn and competition.

The Unitary Circuit Courts will be replaced by Collegiate Courts of Appeal, which will retain their constitutional powers. But, also, within the circuits that the general agreements determine, their composition will be established by three magistrates to strengthen the deliberative process. Similarly, in order to expand the scope of jurisdiction by territory, the Circuit Plenaries, which represented the Courts of a particular federal entity, will be replaced to create Regional Plenaries, which will exercise jurisdiction over the circuits that the agreements define, with the aim to solve the contradictions of criteria that are generated by different circuits, so that only one persists in the respective region.

The reform is articulated under the premise that the Supreme Court will also hear constitutional controversies on the constitutionality of general norms, acts or omissions that arise among federal autonomous constitutional bodies, and between one of these and the Executive Branch of the Union or Congress of the Union. The foregoing occurs as long as the controversies deal with general provisions of the federal entities, of the Municipalities or of the territorial demarcations of Mexico City contested by the federative entities, or in the cases referred to in subsections c), h), k) and l) of article 105, section I, of the Federal Constitution, which were declared invalid by the resolution of the Supreme Court of Justice of the Nation. Said resolution will have general effects once it has been approved by a majority of at least eight votes. It is important to mention that in this type of controversies only violations of the Constitution can be asserted, as well as the human rights recognized in the international treaties in which the Mexican State is a party.

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The backbone of the reform is the idea of strengthening the Supreme Court as a constitutional court. Consequently, the jurisprudence system was transformed into one based on precedents, very similar to the scheme used in other constitutional courts, as in the United States. According to this new model, the sentences issued by the Plenary of the SCJN by a majority of eight votes will be directly binding for the rest of the jurisdictional authorities (federal and local), and for the Chambers, by a majority of four votes, without the need to reiterate criteria.

On the other hand, with the aim to improve and promote the judicial and public defense career, it was established that the Council of the Judiciary will have a Federal Judicial Training School that must implement training and updating processes for the judicial and administrative personnel of the Judiciary and its auxiliary bodies. This school must also hold competitive examinations to access the different categories of the judicial career in order to ensure promotions based on meritocracy and equal conditions for all people, while at the same time train public defenders, through the Federal Institute of Public Defense. Similarly, the reform established that the entry, training, and permanence of *magistradas*, *magistrados*, *juezas*, *jueces*, *secretarias* and *secretarios*, as well as other personnel of the judicial career of the Courts and Courts, will be subject to the regulation established in the applicable provisions. Except for this condition, only the SCJN. will directly appoint and remove its officials and employees. Also, against the designations of *magistradas, magistrados, juezas, jueces*, *secretarias* and *secretarios*, there will not be any resource, but the results of the competitive examinations may be challenged before the Plenary of the Council.

Nevertheless, in a very general way, a description of the nature of the 2021 reform was made, which, as can be seen, is a complex change that will simply an enormous effort from this Power to restructure itself, as it intends to establish itself as a more efficient, close, and professional institution. However, like any reform that pretends to be a hurricane, as the mentioned case of March 2021, it has its strengths, but also its weaknesses, and its nature is such, that it is very possible that its ability to transform reality will be called into question since, as the trajectories of the previously implemented reforms have shown, the one that is the subject of this reflection faces many problems *per se*. It is necessary to start from the assumption that frequently the premises that articulate the changes are not the product of maturation processes, nor are they supported by solid evidence. This analysis aims to address some of the most problematic areas of the reform itself: the system of precedents and the fight against corruption, in order to evaluate the way in which the reform can impact the functioning of the Judiciary as a core part of the Mexican State. It is about the axes, as we already mentioned, that articulate the entire reform and from there derives the concern around them, while in a more conscientious analysis the reform does not seem to resist the socio-historical inertia in which a sentence has been passed, and the judiciary power has structurally functioned.

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II. The Precedent System

Through General Agreement Number 1/2021, the beginning of the 11th period of the Judicial Weekly of the Federation was mandated, and its bases were established, with which the plenary session of the Supreme Court of Justice of the Nation launched the system of precedents provided for in the 12th paragraph of article 94 of the Political Constitution of the United Mexican States.[3] This agreement began the 11th season of the Judicial Weekly of the Federation (which began on May 1, 2021). Thus, from this agreement it was established that the reasons that justify the decisions contained in the sentences issued by the Plenary of the SCJN with a majority of eight votes, and by the Chambers, with a majority of four votes, will be mandatory for all jurisdictional authorities of the Federation and of the states. That does not mean the thesis system will disappear. However, obviously, it will be necessary to modify its format so that it is consistent with the new model of precedents.

Of course, it is a necessary process, which is part of larger-scale modifications in the world or more specifically in Latin America, since one of the most significant problems in Mexico is the low level of predictability in sentences, which is related to an acute lack of legal certainty. To reduce the risk that the courts arrive at alternative solutions in similar cases, the regulation of judicial precedent is presented as one of the possible solutions. If that fails, it is very useful to respond to massive conflicts, which occur in large amounts and with analogous characteristics, as could be the case of the Mexican reality.

However, it must be noted that it is not really a completely new phenomenon, since a diachronic review of the praxis reflected in the rulings, in the Mexican case, is enough to show that almost the center of judicial argumentation has always been moved towards the consideration of previous decisions, so that these have rarely been limited to the pure exegesis of legislative texts. In this sense, the precedents have really constituted a material with which the Mexican judicial system has always operated, with a view to make the "decision" to appear not to be of a personal nature, but to give it a much more objective nuance. However, the nature of the precedent must be understood more carefully, since the reform seems to have skipped the theoretical and methodological discussions around it, assuming or superficially addressing the complex doctrinal, jurisprudential, and normative scenarios referred to it.

Apparently, the reform will establish the precedent as a principle of the judicial body to follow and continue its own determinations of law previ-

[3] Acuerdo General Número 1/2021, del 8 de abril de 2021, del Pleno de la Suprema Corte de Justicia de la Nación, por el que se determina el inicio de la Undécima Época del *Semanario Judicial de la Federación*, y se establecen sus bases [General Agreement Number 1/2021, of April 8, 2021, of the Plenary Session of the Supreme Court of Justice of the Nation, which determines the start of the Eleventh Period of the Judicial Weekly of the Federation, and establishes its bases], *Diario Oficial de la Federación* [D.O.F], 15 de abril de 2021 (Mex.).

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ously adopted, provided that the same topics are analyzed in the cases. In this context, the issues decided by the Supreme Court will have a binding effect on courts or tribunals of other ranks. In other words, under this new scheme, those precedents adopted by a qualified majority in the Plenary or Chambers of the Supreme Court will be binding and will tend to provide greater legal certainty to each of the parties subject to a constitutional conflict. There will be no radical changes on what to expect in the resolutions by district courts and collegiate circuit courts, since those that come to dictate must adhere to consistency within the constitutional doctrine in attention to vertical obligation.[4] Under this dynamic, the Supreme Court in its capacity as Constitutional Court will act as final authority and as the original body (not exclusive) to define the object, scope, and purpose of the constitutional and conventional provisions in a concentrated control, and, therefore mandatory for the rest of the legal operators in the Mexican State.

In this way, the constitutional doctrine in charge of the Supreme Court will move away from the system of reiteration of thesis, configuring a discernment that seems qualitative in principle, but that is apparently ruled by a quantitative scheme. That is, whenever (necessary condition) the reasons adopted by the Plenary or the Chambers result in a qualified vote (eight or four, respectively), the determination will be considered a binding precedent to integrate the constitutional doctrine in the Eleventh Period. It was also specified in articles 222 and 223 of the reform of the Amparo Law that, since such a quantitative requirement was not met in the arguments analyzed by the ministers, then it can be considered that it is not a mandatory criterion for the rest of the legal operators of the Mexican State. This notion is reinforced by the content of the second article of the General Agreement 1/2021 of April 8, 2021, of the Plenary of the Supreme Court.

It should be noted that the March reform does not mention what will happen in regard to the thesis system included since the 10th Period, while, in the case of the reiteration system, there is no modification for the collegiate circuit courts, as stated in article 107 of the federal Constitution. The mandatory nature of prior determinations is still not entirely clear. However, it is inferred that, if such determinations comply with the qualitative and quantitative constitutional standard, they could be considered as precedents by the Chambers or the Plenary, maintaining continuity and dialogue intergenerational with previous decisions.

As can be seen, the reform places the Supreme Court as the authority constitutionally in charge of laying the first stone in this new system, which also implies the development of the considerations of the initial or original case. That is to say, the reform aspires to configure the structure that allows establishing the system of precedents in Mexico, and its defenders act as if

[4] This vertical obligation derives from the systematic interpretation between articles 94, first and twelfth paragraphs; 105, section II, last paragraph; 106, and 107, section II, second paragraph, and section IX, of the Federal Constitution.

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the problems that this implies were settled so that there are enough criteria to establish what is going to be considered as a precedent, from a theoretical but also a practical point of view. It suffices then to google the system of precedents and find some 14 million sites that deal with the subject, from those of a mere diffusion, journalistic nature to documents with scientific rigor.

The discussion around the possibilities of a tool for the application of justice should not be a sufficient cause to deny its possibilities as an invaluable resource to settle the problems that the current model has meant. The premise that this system has been operational and efficient in other realities, such as the United States, is a compelling reason to bet on this reform. Likewise, thought should be given to the fact that, as such, the precedent is not an element foreign to Mexican justice, since, really, the way in which jurisprudence was constituted in the country had in great part the heritage of Common Law, as was already mentioned.[5]

Under these two premises, the implementation of the system of precedents should herald its success. On one hand, it has shown its effectiveness in other judicial systems (in one as complex as the United States), but also on the other hand, the fact that, in the strict sense, its operation seems not to be absent from the historical reality of Mexico. Nevertheless, the reform has denied the presence of a sociohistorical process behind the articulation of the previous system that has implied a more plural trajectory on the process, which suggests that the current reform can cause a greater concentration of power in the dome of Power, Judicial, which is extremely dangerous, in terms of political power, but also administrative efficiency. The other great element that articulated the reform, the fight against corruption, looms with a problem of this same nature, which would imply the systematic failure of the entire reform. In this sense and due to the overlapping way in which one and the other axis are found, it is difficult to understand the problem because the elements touch constantly. However, this text will try to dissect the problem somewhat.

The system of reiteration of criteria dates to the 17th century, so its disappearance implies an important break insofar as it dislocates a historical way in which justice has been administered. Therefore, its constitution should have involved and must continue to involve a deep analysis in terms of scientific

[5] Thus, through the so-called "theses" a legal criterion, used for the most important cases, which originally were centered in the Supreme Court of Justice and the collegiate circuit courts, has been built. Being one of the most notorious characteristics the obligatory nature of the jurisprudence resolved in the amparo processes, where the product was consolidated with a minimum vote of eight judges to see if it would be adopted by the Plenary of the Supreme Court, and of four judges, if the rooms were involved. It was also added that an uninterrupted ratification of five consecutive sentences in the same sense was necessary, after which its imperative character arose, and it could be contradicted or modified. The jurisprudence that did not meet the conditions described was granted the category of "thesis" when it did not reach the formality of five consecutive sentences, and "thesis of jurisprudence" that was mandatory.

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rigor. Then, following this historical trajectory, the first tangible problem refers to the very incapacity that the Supreme Court has shown throughout its diachronic evolution. In this sense, the SCJN, has shown little ability to establish stable and consistent axes in matters of jurisprudence, which is essential for the constitution of the system of precedents. If we look at the time from the beginning of the Tenth Period of the Judicial Weekly of the Federation until March 2021, we find that 678 had already been issued. During the previous periods the same trend is noticeable: 1604 theses in the 6th Period (1957-1968), 1959 in the 7th Period (1969-1988), 751 in the 8th Epoch (1988-1995), and 3356 during the 9th Period (1995-2011). As for the results of the National Census of Federal Justice Administration (2021), they show that, of the 7270 revenue matters, only 5033 were resolved, which means that 31% of the total revenue matters were not addressed.[6]

Taking a general look at the justice administration censuses from 2011 to the one carried out at the end of 2020, we can observe the enormous number of issues that reach the plenary session of the Supreme Court, and the way in which it has responded to them. This challenge shows of course a notable inefficiency in its response. However, this did not seem to be a denied phenomenon, on the contrary, the reform itself emerges as a palliative response to this notable insufficiency. What does need to be discussed is that the complexity of the issues that have reached the Plenary has not changed, and in this sense, 2021 could become an example of the inertia that engages in the construction of sentences. So, there is a risk that the problem that should be solved, namely the lack of legal certainty, not only does not disappear or is mitigated, but also worsens, since, as has been observed historically, the Supreme Court of Justice has had serious difficulties in defining guidelines, while the system of precedents established from the reform determines that the sentences that are issued annually by the SCJN, as long as they have a majority of eight votes in plenary session and four in chambers, will become the binding criterion and part of the jurisprudential heritage, from which the sentencing guidelines must be formed.

These axes closely follow the model proposed by Ronald Dworkin and his category of "integrity as law", which in very general terms is based on the consideration of integrity as a political virtue on the same level as justice, equity, and due process. For this theoretician, the foregoing is justified by the fact that it is this virtue that allows us to conceive our political community as

[6] Instituto Nacional de Geografía, Estadística e Informática, Censo Nacional de Impartición de Justicia Federal 2017 (2017); Instituto Nacional de Geografía, Estadística e Informática, Censo Nacional de Impartición de Justicia Federal 2018 (2018); Instituto Nacional de Geografía, Estadística e Informática, Censo Nacional de Impartición de Justicia Federal 2019 (2019); Instituto Nacional de Geografía, Estadística e Informática, Censo Nacional de Impartición de Justicia Federal 2020 (2021); Instituto Nacional de Geografía, Estadística e Informática, Censo Nacional de Impartición de Justicia Federal 2021 (2021).

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an association of principles. In this sense, the law is articulated around the judicial principle of integrity, according to which judges who resolve difficult cases try to find the best constructive integration of the political structure and legal doctrine of their community, in some coherent set of principles regarding the rights and duties of people in that community. This conception presupposes the existence of a correct and true answer in difficult cases, which judges must seek, even though its truth cannot be demonstrated, and it always constitutes a controversial issue.[7]

Note that Dworkin's proposal has been subject to punctual criticism, some sufficiently argued, others not so much, precisely around his principle of the correct answer, and his strong air of defense of Natural Law. Thus, it has been pointed out that this theorist seems to limit himself to proclaiming some higher moral values that must be respected and carried out in the Law, without exhaustively explaining why we must respect and carry them out. Although it is true, one of the main Dworkins' contributions refers, accurately, to incorporating the social framework within the reflections around the administration of justice and putting on the table the dangers of fragmentation and the complexity of the legal experience. However, the foregoing is not enough to save the fact that his proposal seems to be that of a supporter of Natural Law, and that the superiority of certain values may be debatable.

Thus, thinking in theoretical terms of statements of this magnitude, even though they invite a somewhat more complex reflection on the administration of justice, does not necessarily mean that their usefulness has been sufficiently argued, especially in a country where syncretism has it sounded more like a state imposition on other cultural expressions other than the hegemonic one and where, historically, there have been movements of vindication around community rights, as is the case in Mexico. And this social plurality, which sometimes generates a spectacular level of work for the Judiciary, seems to want to be disappeared and in this sense, as mentioned before, there is a double risk that the system of precedents causes more dispersion and with-it legal uncertainty, or that the need to unify criteria generates, rather, the denial of the particularities that each case entails and with it each resolution. There is then a talk of a double risk, both equally tangible, which concerns evidently epistemological problems, but also of a political nature, which cannot be separated.

The premise of the superiority of Common Law has already been expressed before, often related to its effectiveness, and this in turn with the superiority of the justice systems and therefore with national superiority. Remember here the Theory of Legal Origins, according to which (colonial) inheritance in matters of law would play a fundamental role in national eco-

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[7] Ronald Dworkin, El imperio de la justicia: de la teoría general del derecho, de las decisiones e interpretaciones de los jueces y de la integridad política y legal como clave de la teoría y práctica 168 (Gedisa, 1986).

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nomic growth. This theory was developed by four economists (Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Yishny[8]) who concluded that States belonging to the Common Law legal culture grant the highest degree of protection, source of an efficient financial market and synonymous with economic growth. In the 2000s, the theory was extended to other legal fields and focused on demonstrating more generally the general efficiency of the common law model. In such a way that, even later, this theory strongly influenced the highly commented Doing Business reports of the World Bank, whose eminently political objective is the establishment of a legal framework favorable to the expectations of the private sector. In 2008, the original authors —except for R. Vishny— met again, not to carry out a new empirical study, but to draw up an inventory of the Theory of Legal Origins. The article marked a true turning point, since from here the Theory of Legal Origins is now distinguished by its comprehensive, almost total character. More than an influence on the protection of investors, the legal origins of a state condition the style of social control of economic life.[9]

Legal Origins Theory took on a whole new dimension with the publication of the World Bank's Doing Business reports. Since, prior to this, it had been confined to the center of academic research, where innovation and originality are in principle in the spotlight, the reflection then moved to the field of practice to put results in motion, direct and concrete. The Doing Business[10] reports advocated a clear reduction in regulation. However, it turns out that the countries that regulate the most are, on the one hand, low-income countries and, on the other, countries belonging to the civil legal culture, so that the reports asserted that legal origin was one of the important variables to explain the different levels of regulatory intervention. The World Bank advocated the path of system convergence based on the principle that 'one size fits all'. This expression, explicitly repeated in the 2004 report, considers that a model that works successfully in one State can be implemented, with the same success, in any other.[11]

This serves, not to affirm that the Theory of Legal Origins is behind the proposal of Arturo Saldivar, but rather to understand that there always exists, as it happens in any trial, that the proposals, however objective they may seem, are loaded with ideology, which in turn has a strong sediment of our

[8] Rafael La Porta et al., *Law and Finance,* 6 Journal of Political Economy 1113-1155 (2008).

[9] Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 (2) Journal of Economic Literature 285-332 (2008).

[10] These different reports were prepared by the Private Sector Development section of the International Finance Corporation (I.F.C.). I.F.C. It is one of five institutions that make up the World Bank Group, each of which is legally and financially independent.

[11] World Bank & International Finance Corporation, Doing Business in 2004: Understanding Regulation 86 (2004).

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social place. For this reason, the sciences have a political character from the beginning, whether we discuss Economics, Physics or Law, if only through the postulates, most of the time implicit, at the origin of a demonstration, that is something that Thomas Kuhn[12] or Michel Foucault[13] themselves established. In this sense, what, if last year's reform must be carried out, is to build in a world in which globalization reigns centered on the United States, and the temptation to consider that the world's dominant power necessarily holds the best of legal systems. In other words, the reform emerges in a world where cultural imperialism is a tangible reality, and more so in a country like Mexico where geopolitical closeness is often chilling, so that the American Way of Life has been the linchpin of the social practices, which also includes the generation of law.

Then it is necessary to evaluate that, although the Theory of Legal Origins does not seem to resist a more rigorous analysis in scientific terms, it is built as part of an imaginary that is vital at the time of the administration of justice. Equally important is the strong presence of the World Bank in the implementation of public policies in developing countries, as is the case of Mexico, which have tended to try to guarantee interests in favor of capital. Of course, these statements are just guidelines that need to be investigated in a more conscientious way to explain how the reform came about, but above all to understand its scope and its enormous limitations because then it would happen that there is a presumption that the system of precedents will generate positive results under the premises that there is a single correct answer that can help us solve the atavistic problems that the Judicial Power drags, which is strongly subordinated by models that do not correspond to the reality of Mexican society.

The speech of Arturo Zaldívar, architect of the reform, does not illustrate and explains little what was the reason for carrying out the changes that were made, rather it is plagued by triumphalism, profoundly, questionable only a year after having occurred the first steps to implement them.[14] This lack of clarity in explaining what led to the integration of jurisprudence from a system of reiteration of criteria to one based on precedents, can be explained by the very way in which the reform was accepted. The exchange of arguments for the debate was left out of the sessions of the commissions and plenary sessions in both chambers, where the reform was supposed to be "discussed" from the beginning. Thus, beyond the rhetoric of some speakers, the sessions did not leave room for a reply or for a thorough revision of the text. This does not mean that there have not been some legislators who expressed their con-

[12] Thomas Kuhn, La estructura de las revoluciones científicas (Fondo de Cultura Económica, 1971).

[13] Michel Foucault, La arqueología del saber (Siglo XXI ediciones, 1970).

[14] Arturo Zaldívar, Minister President of the S.C.J.N, *Words by Minister Arturo Zaldívar, on his Third Annual Report on the Work of the Judicial Power of the Federation* (Dec. 15, 2021).

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cerns or proposed alternatives, but they did not find an echo in the Plenary so that the majority voted against any possibility of discussing the reservations, both in the Senate last 27 November and in the Chamber of Deputies on December 9, both during 2020.

The fact that the reform was not analyzed and subjected to adequate scrutiny was so evident that the special rapporteur of the United Nations Organization, Diego García-Sayán, sent an urgent communication to the Mexican Government on November 30, in which he recommended "guarantee the maximum dissemination and official debate with civil society, including the organizations of magistrates and judges, on the meaning of a judicial reform" and "adapt the legislation in accordance with the international principles and guarantees in matters of judicial independence", since it considered that "even when [the reform initiatives] partially strengthen the administration of justice, they present potential inconsistencies regarding international standards on judicial independence".[15]

The silence of the Mexican State, including the Judiciary itself, in the face of this call is worrying, even after a year, more so because a few days after (December 8, 2020) the reform opinion sent by the Senate by part of the United Commissions of Justice and Constitutional Points of the Chamber of Deputies, was approved in less than an hour and with speeches of a maximum of three minutes, without real debate. This gave a glimpse of what finally happened later in the Plenary, where the majority supported the reform without further reflection and without discussing the reservations that were presented, even when some of its members said that it could be perfected. The hasty way in which this process was developed leaves much to speculation, in a country terribly exhausted by the alliances under the table of political power, it would be necessary to think then about how it is that a reform that intends to deal with corruption, was covered by a veil of suspicion even at the international level, without mentioning here, the controversial thirteenth transitory article that extends the presidency of Minister Arturo Zaldívar as head of the Supreme Court of Justice (S.C.J.N.) from 4 to 6 years, as well as the mandate of the advisors of the Council of the Federal Judiciary (C.J.F.).

However, although alarming, the transitory problem can hardly serve as a symptomatology to exhibit the way in which Mexican politics is dynamic, helping to diagnose in the short term the delegitimization that overshadows the reform and Zaldívar's own career. It is thought then that the reflection around the anti-corruption axis, which is another of the strong arms of the reform, must advance beyond the transitory itself and the political agreements that, obviously, had to exist so that the reform could see the light.

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[15] Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, Mandato del Relator Especial sobre la independencia de los magistrados y abogados (2020).

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III. The Fight Against Corruption

The changes that articulate what has been called the anti-corruption axis of the reform, were structured from the transformation to article 97 second paragraph, and 99 last paragraphs from which it is established that the entry, training and permanence of the holders of the jurisdictional bodies and other personnel in the Judicial Power of the Federation will be subject to the regulation established in the applicable provisions. To promote gender parity, the Reform modified various constitutional articles (articles 97 first and second paragraph, and a hundred paragraphs tenth and eleventh) to build an inclusive language, namely, to appoint through concepts such as judges and magistrates, as well as judges and magistrates.

On the other hand, to combat nepotism and arbitrariness, article 97 in the 4th paragraph was modified, so that in the Circuit Courts and in the District Courts the appointment and removal of officials is carried out in accordance with what have the applicable provisions at the time. Only the Supreme Court of Justice of the Nation may freely appoint and remove its officers and employees. Likewise, the 11th paragraph of article 100 was changed, so from this, it was established that, against the appointment of judges and magistrates, no appeal will proceed. Only the results of competitive examinations may be challenged before the plenary session of the Federal Judiciary Council. The 7th paragraph of the same article was also reformed so that the Institute of the Federal Judiciary was transformed into the Federal School of Judicial Training, which will oversee implementing the processes of formation, training and updating of the jurisdictional and administrative personnel of the Power. Judiciary of the Federation and its auxiliary bodies, as well as to carry out competitive examinations to access the different categories of the judicial career.

As can be seen, from the outset, these are tools that seek to share corruption, but none of them concern a reform of a structural nature, and when they are seen, one cannot avoid thinking of the Federal Public Administration Career Professional Service Law, which since 2006 has not been efficient in bringing down nepotism and corruption. But in addition and with a direct relationship, to the previous reform, that is, the one of 1994, which included the judicial career as one of its key pieces, did not mean a significant change in the process of selection and promotion of federal judges despite that trust was placed in the merit or capacities of the individuals to guarantee the adequate qualification of the persons who were to assume the jurisdictional function, as was expressed in the explanatory memorandum. However, Julio Ríos Figueroa, in his popular report *El déficit meritogrático. Nepotismo y redes familiares en el Poder Judicial de la Federación*,[16] managed to document exhaustively

[16] Julio Ríos Figueroa, El déficit meritocrático. Nepotismo y redes familiares en el Poder Judicial de la Federación (2018).

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that almost 25 years after this reform, although there is progress, there is also a meritocratic deficit in the Judicial Power of the Federation. The report identified that the deficit is the product of the limitations of the institutional architecture and administrative organization of the Judiciary as well as nepotism and the family networks that inhabit it, and that both factors feed off each other.

The changes in 2021 are intended to overcome the problems of the operation of the previous changes, which is obviously positive, however, think of a specific case: the modifications made to article 97 of the Constitution now propose to unlink the appointment and removal of personnel from the courts and courts of the decision of judges and magistrates. However, the wording is opaque insofar as it does not clarify that entry and promotion in all judicial career positions will be carried out through competitive examinations. That omission does not seem like an oversight; there's a reason the reformation didn't plan it that way. In the initiative of the Judicial Career Law, proposed in the same package of initiatives of this reform, it is established that the rule to access judicial career positions will be the winner in an opposition contest. Anyhow, exceptions are foreseen for certain positions, which are freely appointed: the project secretaries of courts and tribunals and, in general, the jurisdictional officials of the Supreme Court of Justice of the Nation and the Electoral Tribunal of the Judicial Power of the Federation.

The foregoing is extremely paradoxical, since Zaldívar's own speech recognizes that competitive examinations are the best antidote against practices of nepotism and cronyism, as derived from this, there is no explanation for this inequity and the judicial career is applied to some yes and not to others, giving the impression that those who are subject to the reform are the lowest echelons and not the top echelons of power, as occurs with the register of family relationships, a mechanism proposed in the Judicial Career Law, but it is not applicable to officials of the Supreme Court or the Electoral Tribunal. Similarly, the reform did not consider the possibility that the Office of the Comptroller of the Judicial Power of the Federation could play an essential role in terms of deconcentrating power and modifying the appointment process of the heads of the offices of the Comptroller, so that they no longer depend on the president of the Council, the Supreme Court or the Electoral Tribunal, as it happens today.

Another problem that could lie ahead is also a consequence of the reform to article 100 where the Federal Judiciary Council is empowered to concentrate on one or more jurisdictional bodies so that they hear matters related to events that constitute serious violations of human rights, which will constitute an exception to the rules of turn and jurisdiction that is decided only after the presentation of the issues, is a jurisdiction that expressly contravenes international treaties binding on Mexico. On the other hand, the criteria established to carry out the concentration are ambiguous and will not allow verifying that it is not an arbitrary decision, how much and more so that the request for

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concentration does not go through the request of a party or consultation of the complainants, as if provided for in the Amparo Law. It is assumed that the great objective of the reform is to consolidate the role of the Supreme Court of Justice as a constitutional court, this argument has already been mentioned before, however what we have just pointed out contradicts this objective when it is easy to realize that, derived from the objective anti-corruption, the Supreme Court seems to consolidate several administrative functions that it did not have before the reform.

Before advancing on this, it is necessary to differentiate from where it is possible to review this anti-corruption axis that constitutes the reform. A good part of the reflections expressed so far have exerted pressure on the very nature of the discourse that structures the changes, or more specifically, on whether it is feasible that these modifications can overcome the absences and errors recognized by the 1994 operation, certainly extremely important elements, as we have tried to illustrate so far.[17] But together with the proposals made, an attempt is made to build a fabric that allows us to understand the reform in a more complex dimension, pointing out its failures, but also how problematic its success also means. The foregoing refers to a phenomenon of a structural nature, concerning the endemic administrative corruption and the viability of meritocracy as the best way to abate nepotism.

Despite the efforts made in terms of democratic change and administrative reforms, aimed directly and indirectly at regulating the abuse of power and making government work more efficient, corruption continues to be one of the main problems in the country. The question that arises then is whether concentrating power in a group of "notables" may be enough to somewhat intimidate the problem of corruption within the Judiciary. Can the constitution of a school educate, and train judicial functions generate a change in terms of a phenomenon of an endemic nature? Of course, the strategy that supports the reform is highly questionable and, on the contrary, as multiple analysts have pointed out from different angles, it rather announces the recrudescence of nepotism and corruption, or else, be the seed of new forms of these. Giving ethics classes to officials or potential officials is insufficient to attack a social and historical problem that has been one of the main obstacles for the Mexican State.

The problem grows when we observe that in the spirit of the reform is the premise of meritocracy as a way out of nepotism, the redistribution of power and with it the resources, pretending through it to meet the demands of justice around the social order. In our country, it is necessary to analyze a little more the nature of the phenomenon, it serves for now to resort to the analyses that have already questioned the assumption that meritocracy is the way out to build a fairer society. Michael Sandel summed it up very well when he pointed

[17] José Antonio Caballero Juárez, La reforma judicial de 2021. ¿Hacia dónde va la justicia? (UNAM, 2021).

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out that the root problem of meritocracy is that opportunities are not really the same for everyone.[18] Note therefore, first, that a judicial career based on the idea of meritocracy would have to start, absurdly, from a Mexico with "equal opportunities". Let's take a very specific case, who will be able to enter the Federal School of Judicial Training? The truth is that a young person with one or two parents in the Judiciary can receive certain privileges, and this does not refer to an inheritance with large properties but to educational and cultural advantages to be admitted to them. Some of you will say that if it is so, this is fair, however, it is not the case or rather it should not be the case because, as we will see later, this brings with it serious problems of access to justice and the promotion of social inequality.

A second problem that is observed concerns what is going to be considered as merit or, more specifically, what knowledge or what experience must be had to access to be part of the Judiciary, that is, what is valuable or vital to be part of federal judges? The answer seems simple, but it really is not, it is a problem again of an epistemological nature but also an ethical one, around which action, executed with skill and effort, and generating socially relevant consequences, is "meritful" in relation to the imparting of Justice. Let's take a case, an aspiring Circuit Court magistrate, with a Doctorate level and who has an impeccable track record within the Judiciary, but who has divorced and married a 20-year-old girl. The answer then no longer seems so simple in the heat of criticism from the contemporary feminist movement.

What happens is that really, the idea of meritocracy is related to a notion of justice that is eminently contingent. To ask ourselves if we "should" appoint this aspiring Circuit Court magistrate is to ask ourselves precisely about what we consider valuable or meritorious —income, wealth, duties and rights, powers and opportunities, positions and honors not only within the Judiciary itself but at a social level—. The answer about a judicial career based on merit seems to be the beginning of fairer ways to place the fit in these positions of the dispensing of justice, but doing so implies asking we about justice itself: who deserves what, and for what reasons. In English, "merit" and giving someone what they "deserve" do not really have many differences. However, the terms are not the same. The point in question is that merit is only one among many ways of deciding who deserves what, and the question of how convenient and how fair it is as a principle to make it an access route to occupy a place from where the justice at the national level is far from settled.

Another problem is constituted by the fact that the meritocratic system has generated scenarios, as shown by the implementation of the 1994 reform, where those who have access to positions within the Judiciary get all the privileges. This had already been pointed out by Eduardo Engel and Patricio Navia when they affirmed that within meritocracy, the court first seems to be

18 Michael Sandel, La tiranía del mérito. ¿Qué ha sido del bien común? 125-126 (Debate, 2020).

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leveled at the beginning of the game, and the "best" wins and takes the prizes. As Ríos Figueroa concludes in his report on meritocracy in the Judiciary: leveling the field was not enough, and it seems that it will not continue to be enough when the size of the field and the rules of the game are determined by a group of actors who will later be part of the party. In other words, the allocation mechanisms that are built to elect the officials of the Judiciary certainly affect the degree of fairness at the end of the game, as evidenced by the privileges that the Court itself granted itself in the recent reform. This analogy is crude because it ignores the dynamics of power, or more specifically, the circular nature of the game, in which it is the "notable", that is, the winners who define the rules of the next game or, as Engel and Navia, "it's not that the field is uneven, it's that the game is fixed".

A fourth problematic axis for the reform is articulated under the fact that a Judicial Power organized around the idea of meritocracy runs the risk of eroding the democratic bases of coexistence. Democracy is, in its simplest definition, the organization of collective decisions around the principle of equality among all participants. It is, applied to the national organization, the government of the people, and both the talented and the most disadvantaged, the strong and the weak, the fit and the inept participate in it. So then, a strong democracy cannot be, by definition, only a "government of the best". The elites that govern and administer justice have convinced the citizenry that in a democracy, the law and the institutions rule, not the people. And if the institutions rule, then those who dispense justice are a technocratic elite that, as in any self-respecting modern bureaucracy, is structured around the NOTION OF MERIT.

IV. CONCLUSIONS

Analysis is needed in academics, social and political terms around the reform, and these must be articulated more in the medium and long term because it is in them that it is possible to reflect on its structural nature, being in this place where change does not resist an analysis, and it is possible to question its historical viability. Nor is it a question of rejecting it completely, quite the contrary, it is considered that there is an invaluable reflection on the fact that: the way in which the Judiciary has administered justice and has been organized until now, cannot constitute a fairer society, in this sense, awareness of a problem of this nature is an invaluable step for transformation.

However, awareness does not mean that a good diagnosis has been made, and this is the problem that runs through all this change. It seems that there is a denial or marginalization of phenomena of a structural nature such as, as already pointed out: corruption, the problem of objectivity and dispersion in the generation of law, as well as the way in which social organization has generated inequality. A misdiagnosis implies the administration of the wrong

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medication or only to alleviate the symptoms when the root problem has not been resolved, then the patient will continue to be ill. Of course, it is an extremely crude reference, but it serves as a metaphor to show that what has been located up to this point is a lack of analysis around the socio-cultural processes that constitute the Mexican reality, and not only the Judiciary. But note that this does not discourage the fact that this is worrying, since it would be expected that, in the place from which justice radiates, there would be no nepotism, inequality or power games. To think this would be to fall into the traps into which the Zaldívar reform has fallen, to believe that the Judiciary can abstract itself from the social reality in which it was created and in which it must deliver justice.

The reform intends that the problems that cross the entire Mexican society stop there before entering the Judiciary or that when they enter; it is capable of reversing or intimidating them. It is a tough task, undoubtedly, that sounds almost unattainable for a mere change in the written discourse, which in this sense would have to be supported by a strong social mobilization for it to find legitimacy. The foregoing is complicated to happen because Mexican society has a view on the Judiciary, as an axis absent from the constitution of the State, but also and even more importantly as a group with too many privileges.

Again, the last thing mentioned is not an exclusive representation for this Power, however, once again the symbolic load that is constituted by "this should not happen here" plays brutally against it, and therefore also calls into question the operation of the power. Reform. This means accepting that the Judiciary itself requires legitimacy to continue operating, the reform itself is presented as an attempt to regain confidence in the administration of justice in Mexico. However, in addition to the problems of a more general nature that have been pointed out here, the messianic attitude with which Arturo Zaldívar has addressed the citizens cannot be marginalized and which was fueled by the famous transitory, as well as by the headline of the Executive Branch. Of course, this resonates and has consequences for the legitimacy of the legislative change, even though the process seems like an issue that has already happened in media terms, but we are not talking about the immediacy but about the readings that will be taken again in the long time on the process, invoking the delegitimization of its main architect. It is not a short-term issue, but something that will accompany the reform throughout its life history since, in discourse analysis, it is always a necessary process to see the margins or the processes that seem to be outside the content and, in this process, Zaldívar is core.

The reform has several absences and this point more towards maintaining or in some other cases, much more worrying, strengthening atavistic ways of administering justice, of negotiating power and resources within the Judiciary, than the look that can have on her is deeply overwhelmed with suspicion. Of course, the scope will end up being much more modest than what has been raised at first, that seems normal in the process of applying any law,

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that is, the reform will not be able to end corruption, nor nepotism, neither with meritocracy, nor with the processes of appropriation of theses. However, it is thought that the results will be even more limited because the construction of the diagnosis was not exhaustive enough and did not attract a more multidisciplinary analysis of the existing problems. They would mean having thought, to mention an example, in other ways about the system of precedents, the limitations that it may have in a society as complex as Mexico's, and the very way in which law is taught in Mexico. In a few words, the reform seems to be out of the debates and contemporary realities both in the country and in global dynamics, as well as a complete denial of the historical processes that have dragged the administration of justice in Mexico, so that it has the face that have. Here only possible lines of reflection have been opened that intend to put on the table some of the problems that are observed around the reform of March 2021, which have not been intended to be exhaustive, quite the contrary, under the principle that it does more discussion is needed, it is necessary to obtain more complex tools at a methodological and theoretical level to face the dynamics of a change that transforms not only the Judiciary but, in principle, many dynamics of social organization in the country.

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CARLOS S. NINO AND HOW TO CONSTRUCT OUR CONSTITUTIONS: REVISITING A METHODOLOGICAL CHALLENGE OF NEW ORIGINALISM

Luciano D. LAISE*

ABSTRACT: *New Originalism stresses the original public meaning, not the semantic intentions of the framers. This requires a reformulation of the two main activities of every constitutional practice. First, interpretation implies discovering the original public meaning, i.e., what the ordinary users of language intended to mean through constitutional provisions. Second, constitutional construction is a subsequent stage of interpretation, as it involves giving effect or implementing those provisions, mainly if they are vague or ambiguous. In this article, I contribute to that ongoing debate by resorting to one of the most well-known law philosophers from Latin America: Carlos S: Nino. I shall claim that his scholarship may pose an actual and significant contribution to one of the toughest challenges of New Originalism: how to construct our constitutions. Although I will not label Nino as an originalist, he elaborates three requirements that could be very useful for constructing constitutional provisions: (i) to secure democratic processes; (ii) to respect individual rights, and (iii) the preservation of continuous legal practice.*

KEYWORDS: *American constitutionalism, Carlos S. Nino, constitutional interpretation, Latin America constitutionalism.*

RESUMEN: *El nuevo originalísimo pone el acento en el significado público original, no en las intenciones semánticas de los constituyentes. Esto implica una reformulación de dos de las principales actividades que conlleva toda práctica constitucional. En primer lugar, la interpretación supone el descubrimiento del significado público original; esto es, lo que la generalidad de usuarios del lenguaje designaba mediante una disposición constitucional. En segundo término, la construcción constitucional es una etapa posterior a la interpretación, la cual implica hacer efectivas o implementar tales disposiciones jurídicas, particularmente si estas resultan ambiguas o vagas. En este artículo contribuiré a esta*

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discusión mediante los aportes de uno de los filósofos del derecho más reconocidos de América Latina: Carlos S. Nino. Sostendré que su trabajo académico podría implicar una colaboración significativa a uno de los retos más duros del Nuevo Originalísimo: cómo construir nuestras constituciones. Si bien no caracterizaré a Nino como un originalista, este autor propone tres requisitos que podrían ser útiles para construir disposiciones constitucionales: (i) asegurar el procedimiento democrático; (i) respetar los derechos individuales; (iii) preservar una práctica jurídica de tipo intergeneracional.

Palabras clave: *constitucionalismo estadounidense, Carlos S. Nino, interpretación constitucional, constitucionalismo iberoamericano.*

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I. Introduction: Complementing how to Construct the Original Public Meaning with a Non-Originalist Contribution

New Originalism stresses original public meaning, not subjective intentions of the framers. That poses a reformulation of the very concept of constitutional interpretation.[1] According to that theoretical framework, interpretation is discovering the original meaning of a particular clause; that is, what the ordinary users of language intended to mean through a particular constitutional provision.[2] A constitutional construction is a subsequent stage of interpretation and involves giving effect or implementing those provisions.[3] Although that former step requires some methodological specifications, the current trends on

[1] Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola Law Rev. 611–654 (1999).

[2] Randy E. Barnett, *Interpretation and Construction*, 34 Harv. J. Law Public Policy 65–72 (2011).

[3] *Id.,* at 67.

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originalism do not often tackle them. To put it differently, the how-to problem when constructing our constitutions is one of the toughest challenges for the New Originalism.[4]

In this article, I contribute to that ongoing debate by resorting to one of the best well-known legal philosophers from Latin America: Carlos S. Nino. I claim that his scholarly work can pose an actual and significant contribution to a pressing challenge of new originalism: how should we construct our constitutions? Nino's theoretical contributions to that topic are an original and creative blend of Anglo-Saxon analytical philosophy and Habermas' discursive theory.[5] That blend represents one of the most interesting attempts to connect the continental and the analytical tradition within the Latin American practical philosophy. Thus, Nino's scholarship could work as a bridge between an American discussion on constitutional adjudication and the Latin-American legal tradition, especially for legal systems that had incorporated a judicial review following most of the main features of American constitutionalism like Argentina, for instance.

Although I do not label Nino as an originalist, nor do I aim at contrasting his overall work with the New Originalism, I will claim that he proposes three requirements for constitutional adjudication that could be very useful for constructing constitutional provisions: (a) to secure democratic processes; (b) respect for individual rights, and (c) the preservation of continuous legal practice.

To unfold my claim: (i) I will briefly describe Nino's theory on constitutional adjudication. (ii) Then, I will offer some criticisms to Nino's approach to originalism, as the former is not necessarily committed to a deference to subjective intentions of the framers. Indeed, Nino could not possibly anticipate the emergence and significance of new originalism. (iii) However, Nino's work on legal adjudication might enhance the constitutional construction as elaborated by the Original Public Meaning Originalism movement. Although I do not intend to associate Nino with any originalism, I aim at complementing the way to construct our constitutions —according to new originalism—, with Nino's theoretical contributions.

II. Nino's Case for Constitutional Adjudication: Methodological Steps

Constitutional adjudication is part of the two-stage argumentative structure that explains how the constitution is an enduring social practice. Nino rejects that constitutional text entails a practical difference when interpreting

[4] John Danaher, *The Normativity of Linguistic Originalism: A Speech Act Analysis*, 34 Law Philos. an Int. J. Jurisprud. Leg. Philos. 397-431 (2015).

[5] *See*, for instance, Carlos Santiago Nino, *Constructivismo epistemológico: entre Rawls y Habermas*, 5 Doxa. Cuad. Filos. del Derecho 87-105 (1988).

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the constitution, as he asserts that not only the constitutional text constrains our practical-legal reasoning. In fact, the conventional nature of the constitution is what mainly constrains our reasoning.[6] But what did Nino mean by that? The enduring social practice called "constitution" is a convention in a highly technical and philosophical sense. Conventions are instruments to solve coordination problems; that is, intersubjective situations in which agents' intentions might be frustrated.

Besides, the constitution is a convention from the internal point of view of justificatory reasoning. In fact, "decisions of political agents are not isolated individual actions, but that their efficacy derives from a system of intertwined actions, attitudes and expectations".[7] Indeed, when a judge delivers her judgment, she contributes to a social practice that is constantly dynamic and operative. Judges work as a link within the network of conducts and attitudes comprising those legal practices considered as a whole.[8]

Thus, Nino compared a constitution with building a cathedral. Both necessitate a commitment across several generations to conclude the masterpiece. The architect who designed a cathedral knew he would never see it concluded. Once the architect passed away, the community usually preferred to end that building —if necessary, fleshing out some details—, instead of restarting all over again. Something quite alike happens with a constitution. The framers expected their constitutional project to be completed by the following generations. Each generation may fine-tune details to adapt constitutional provisions to the needs of every particular time.[9] We hardly ever consider restarting from zero unless our constitutional order is falling to pieces.

But which features of that convention referred to as "constitution" may solve coordination problems? One of the main factors for achieving that goal is that we generally follow the constitutional text. However, that would be merely accidental or contingent. For example, UK constitutionalism has been applying basic rights without resorting to a Bill of Rights incorporated in a formal constitution.[10] In any case, Nino maintains that a fact is insufficient for providing "reasons for action". In contrast, what we need is a constitutional practice that produces effective decisions delivered by Congress or judges, and mostly, ordinary citizens. This practice is the most relevant feature, as social expectations lie on two grounds: (i) the general belief that most people

[6] Carlos Santiago Nino, The Constitution of Deliberative Democracy 25 (2007).

[7] *Id.,* at 218.

[8] *Id.,* at 218.

[9] Carlos Santiago Nino, La Constitución como Convención, 6 Rev. del Cent. Estud. Const. 189–217 (1990).

[10] This issue became far more complex since the UK passed the Human Rights Act in 1998, and then adopted the European Convention of Human Rights. For a survey on this topic, see Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 Int. J. Const. Law 86–11 (2011).

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will act in a certain way, and (ii) our consecutive willingness to keep on doing that if others keep on behaving that same way.

Nino holds that the conventional process entails a sequence of linguistic acts, texts and, lastly, practices. The normative propositions function as the link of that sequence. The very starting point is a linguistic prescriptive act uttered to work as an exclusive reason for action. That prescription comes from a particular political body or fulfills a procedure for decision-making.[11] Nino acknowledges that we might achieve the former through the oral form. Even though it is not conceptually necessary, prescriptive acts usually adopt a written form, since they are intended to endure over time, and they try to avoid misunderstandings.[12]

After the prescriptive linguistic act is informed in an oral or written form, if successful, then regular or frequent behaviours emerge, which result in constitutional practices or conventions.[13] However, those "regular behaviours" are not fixed once and for all. Nino claims that there is a wide range of possibilities to contend with new or alternative solutions. Those changes partially fit in the previous constitutional solutions, but they may also introduce new elements. The constitutional practice sometimes applies those changes in a disruptive manner, and sometimes this is done in a subtle and almost imperceptible way.

In Nino's theoretical framework, the methodological topics on how to apply constitutional provisions are only an instance of the former conventional process. Indeed, he does offer a quite precise "to-do list" when applying provisions to specific cases. That is quite remarkable, as most theoretical elaborations on constitutional adjudication do not offer such methodological guidelines.

The first step is (i) *defining significant legal material*. Nino holds that this stage is evaluative, since it aims at providing legitimacy to constitutional decisions. Then, for example, we may need to resort to some principles which may ground legitimacy for treating some legal material as authoritative. Thus, it would be possible to try some substantive solutions lying on its moral plausibility. And those solutions can be recognized by following the legal practice through some institutional acts or decisions.[14]

A second step is (ii) the *discovery of relevant legal material.* This step relies on the previous one and does not require evaluative activities but rather empirical inquiries. Indeed, once we accept some evaluative principles for selecting relevant legal materials, then we are up to discover those. That might entail a difficult pursuit and, sometimes, a simple inquiry. Every practitioner knows

[11] Carlos Santiago Nino, Fundamentos de derecho constitucional: análisis filosóficos, jurídicos y politológicos de la práctica constitucional 78 (1992).

[12] *Id.,* at 79.

[13] *Id.,* at 79.

[14] *Id.,* at 81.

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that sometimes she may have a hard time collecting some judicial decision or administrative order.[15]

A third step is (iii) *to attribute a sense to those relevant materials*. Applying a legal provision to an actual case must deal with many facts —*e. g.*, legal texts, speech acts—, that are not sufficient to justify an action or practical decision. Thus, we need to move from those raw facts to normative propositions. Therefore, we require more than normative principles to legitimate that operation. We must attribute meaning to those acts. But how shall we perform that activity? According to Nino, we have two possibilities.

(a) *Subjective criterion*: in this case, we are to consider which intentions of speech acts are relevant to the law of the case. Those speech acts could be performed by a precise author of a specific legal provision or refer to a broader speech community through customary practices of a specialized group. Then, we have a second possibility: (b) *objective criterion.* In this case, we shall examine the ordinary and everyday use of language. Nino holds that the meaning of expressions does not depend on the fit in their semantic intentions. To put it differently, according to the objective criterion, common use of language might overlap with —but it is not necessarily tailored to— the speaker's semantic intention.[16]

Nino claimed that some of the most pressing debates on constitutional adjudication, such as originalism vs. living constitution, are merely a dispute on selecting one of those criteria.[17] However, that statement is, at least, outdated. As we shall examine in further sections of this article, originalism thrived, and then it became not just a central theory on constitutional adjudication but a family of theories.[18]Unfortunately, Nino died (1993) before the boost of sophisticated theoretical discussions within originalist tradition (since 1999, approximately).

Although some originalist theories match a subjective criterion —original intent originalism—, the dominant starting point of originalist adjudication in America is beyond mere semantic intentions.[19] The prevailing originalist theory has shifted from original intent to original public meaning, which en-

[15] *Id.,* at 82.

[16] *Id.,* at 82.

[17] *Id.,* at 83.

[18] Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in The Challenge of Originalism: Theories of Constitutional Interpretation 12–41 (Bradley Wayne Huscroft, Grant; Miller ed., 2011), at 15.

[19] *Id.* at 12. Barnett, *supra* note 3, at 613. Defenders of living constitutionalism and originalism assume originalism as the dominant theory of constitutional interpretation in the United States of America. Lawrence B. Solum, *We Are All Now Originalist*, in Constitutional Originalism: A Debate 1–77 (2011). For a critical review about current trends on originalism, see James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 Tex. Law Rev. 1785–1813 (2013). For a monographic study regarding the current trends on originalism, see Luciano D. Laise, *El poder de los conceptos: convenciones semánticas y objetividad referencial en la interpretación constitucional originalista* (2017).

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tails an objective criterion. In that case, the meaning of constitutional provisions refers to what a speech community fixes as the semantic content of a particular norm.

A fourth step is (iv) *discovery of the sense of relevant materials.* That is another mainly empirical step. Once we decide to interpret a legal provision through a subjective or objective criterion, we have a further methodological challenge: to discover the content of that objective or subjective criterion. Indeed, how should we proceed when identifying the original intent of the framers? How should we recognize the current or original public meaning of a particular constitutional provision? Nino acknowledges that those questions are not straightforward. Many constitutional theories of constitutional interpretation do not elaborate a precise set of instructions or guidelines.[20] Consequently, most constitutional theories have left behind the *how-to-do* questions.

Nino noticed that the how-to-do question is not an empirical task. There are, of course, some empirical challenges, especially when dealing with enduring constitutional provisions. Thus, we may become aware of the difficulties of tracing historical records. For example, it is not trouble-free to know what the Argentine amendment (1994) intended to mean by some of its most relevant provisions. More specifically, that amendment introduced Section 75.22 of the Argentine Constitution. According to that provision, some international treaties of human rights —*e.g.* The American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Convention on the Rights of the Child, among others— have constitutional hierarchy "in the full force of their provisions".[21] But what the framers did intend to mean by that? How shall we discover the meaning of "in the full force of their provisions?".

One of the framers of that amendment, Rodolfo Barra, stated that "in the full force of their provisions" referred to the conditions assumed by Argentina when it ratified international treaties on human rights.[22] That would have included reservations and interpretative statements made by Argentina when it adopted those international treaties. But what if the Inter-American Court of Human Rights does not pay attention to those reservations? Is Argentina entitled to disobey Inter-American rulings that ignore those reservations and interpretive statements? Would Argentina be responsible for violating a human right if it disobeys that sort of rulings?

Those questions cannot be answered only through empirical inquiries. Those issues pose many empirical challenges intertwined with evaluative cri-

[20] Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 Am. J. Jurisprud. 255–298 (2002).

[21] The translation of the Argentine Constitution was extracted from the official site of the National Ministry of Justice and Human Rights: *http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf.*

[22] Rodolfo Carlos Barra, *Convención Nacional Constituyente*. 34a. Reunión – 3a. Sesión Ordinaria (Continuación) (Senado de la Nación, 1994).

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teria. To revisit my previous example: how to define the precise extent of the semantic intentions of the Argentine framers? Should we examine only what they intended to mean? Should we infer and then instantiate the purpose of those semantic intentions? As Nino did without putting in Dworkin's words, how should we determine the level of abstraction of those semantic intentions?[23] That involves discovering those intentions through empirical activities, but also performing robust evaluations of the law. As Finnis[24] suggested: legal descriptions are necessarily compromised with a normative point of view.[25]

The fifth step involves *logical implications of those relevant materials discovered in the previous stage*. This logical operation necessitates adequate rules for inferences —*i. e*., *modus ponens* and *modus tollens*—. Nino does not explicitly elaborate on those rules. So, what do they mean? In a few words, *modus ponens* is one of the primary sorts of legal reasoning. It means that if the rule conditions are satisfied, the rule-conclusion follows from the rule and the concrete description of the facts. Lawyers usually hold that the facts of a case are to be subsumed under a rule, which is why many describe it as the "subsumption model".[26]

Modus tollens, or better*: modus tollendo tollens,* applies to reasoning on conditional utterances. But, in this case, when you deny (*tollendo*) the consequence, you would necessarily deny the antecedent's conditional. For example, "Premise 1: if X is drafting her doctoral dissertation, then X is a graduate student". "Premise 2: X is not a graduate student". Conclusion: "Then, X is not drafting her doctoral dissertation".[27]

Nino maintains that such logical implications are sometimes so deeply rooted in our practical reasoning, that we are often unaware of that.[28] Nevertheless, whether we are aware of that or not, we always perform legal reasonings that lie on logical rules. In contrast, we often realize that as soon as we face some of the most challenging logical problems on legal interpretation, such as legal gaps, contradictions, and redundancies.

The sixth step is *overcoming those semantic indeterminacies.* Nino holds that it is impossible to overcome semantic or syntactic indeterminacies without compromising some evaluative point of view.[29] Moreover, avoiding evaluative

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[23] Ronald Dworkin, *The Forum of Principle*, 56 New York Univ. Law Rev. 469–518 (1981).

[24] John Finnis and Tony Honoré were Nino's doctoral supervisors at Oxford University. Santiago Legarre, *John Finnis, el profesor*, 3 Rev. Jurídica Digit. UANDES 164–175 (2019). Roberto Gargarella, *Cuatro temas y cuatro continuaciones posibles para la teoría penal de Carlos Nino*, 6 Quaestio Iuris 98–118 (2013).

[25] John Finnis, Natural Law and Natural Rights 16 (2nd ed. 2011).

[26] Jaap Hage, Studies in Legal Logic 88 (2005). Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 Ratio Juris 433–449 (2003), *https://doi.org/10.1046/j.0952-1917.2003.00244.x*.

[27] Hage, *supra* note 26, at 88.

[28] Nino, *supra* note 12, at 83.

[29] *Id.* at 84.

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principles is a futile effort. According to Nino, it is out of the question to solve a legal gap or contradiction without those evaluative principles. In other words, it is not just desirable but a conceptual necessity to resort to evaluative principles whenever we are surmounting legal indeterminacies, gaps, contradictions, or redundancies.[30]

Finally, the last stage entails subsuming the particular and actual case under a legal provision. This step is the complete synthesis of all previous stages. The most pressing challenge is to identify if the case has any relevant feature for the particular legal system in which that provision is to be applied. For instance, some authors hold that the right to life may permit abortions after rape in Argentina since Article 4.1 of the American Convention on Human Rights only protects that right "in general, from the moment of conception".[31] Other jurists reject that claim as the Argentine legal system made an explicit reservation when ratifying the Convention on the Rights of the Child.[32] That reservation states that *every* child is a human being from conception.

Hence, following that former reasoning, the current Argentine legal system should not allow abortion because every unborn child is entitled to a right to life, regardless of how she was conceived, whether by an act of rape or a consented decision.[33] According to Nino's framework, the Argentine discussion on the right of abortion after rape is a dispute on whether the lack of consent of women is or not a relevant feature for that legal system. However, that feature might be extremely relevant in other legal systems.

III. Originalism Revisited: Objective Criterion does not Necessarily Involve an Evolving Interpretation

The theory of constitutional adjudication has evolved since Nino passed away (1993). Nowadays, originalism explicitly and systemically has become a "family of theories" and not only a theory regarding authority, regulations, and intelligibility of original intentions.[34] But what Nino was unable to suggest was the possibility of a kind of originalism that referred not to subjective in-

[30] In a similar regard, *see* Luigi Lombardi Vallauri, Corso di filosofia del diritto (1981).

[31] María Angélica Morán Faúndes & José Manuel Peñas Defago, *La vida como política: la iglesia católica y las concepciones científicas y legales contrarias a la legalización del aborto*, in La reproducción en cuestión: investigaciones y argumentos jurídicos sobre aborto 53–66 (Agustina Bergallo, Paola; Ramón Michel ed., 2018).

[32] Carlos I. Massini Correas, *Los Derechos Humanos y la Constitución Argentina reformada. Consideraciones en ocasión de un aniversario*, 58 Pers. Derecho 71–103 (2008).

[33] Manuel García-Mansilla, *Las arbitrariedades del caso "F., A.L." omisiones, debilidades y (ho)(e)rrores del "Roe v. Wade" argentino*, XXXIX An. Acad. Nac. Ciencias Morales y Política 347-385. (2013).

[34] Solum, *supra* note 19, at 12.

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tentions but to what we currently name as "original public meaning".[35] And what do I mean by "original public meaning?" For Barnett, Solum, Whittington and Scalia, the meaning of constitutional texts refers to the public meaning of those provisions when adopted. We may recap the former in the following question: what did "X" mean —"X" = a particular constitutional provision— for the speech community that adopted a specific provision? Most originalist authors describe that community as including drafters or framers and a broader community of speakers.

To put an example, Barnett resorts to magazines, newspapers, judicial decisions, debates within ratifying state conventions, journal articles, the federalist papers, and any historical record that could be useful to discover what "commerce" meant for the community that adopted the clause commerce in the US Constitution.[36] As Scalia claimed in *Heller* (2008) —probably the finest judicial example of originalism in American constitutional history—: "In interpreting this text, we are guided by the principle that «[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning»."[37]

Thus, once originalism has left behind —at least for its central tenets— the focus on original intentions, we need to reframe the concept of originalist interpretation. There is no longer a conceptual equivalence between originalism and the subjective criterion when attributing a sense to relevant legal materials, as once Nino maintained. Subjective criterion does not necessarily refer to past practices, and objective criterion does not exhaust our current practices. Indeed, there is a possible blend of past and objective criteria. We could summarize that blend in two central claims of the current originalism: 1) *fixation thesis*: the idea that the semantic meaning of a constitutional text is fixed at the moment of its enactment; 2) *contribution thesis:* the claim that the original meaning of the constitution should make a substantial contribution to the content of constitutional doctrine.[38]

To sum up, Nino's theory of constitutional interpretation turned out to be outdated for describing recent trends of originalism. However, another central claim of new originalism that Nino's work could illuminate is the distinction between interpretation and construction. More specifically, I suggest that Nino's theoretical framework offers a significant contribution to how to construct our constitution. The following section unfolds this claim.

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[35] Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2nd Edition ed. 2014); Solum, *supra* note 20; Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original intent and Judicial Review (1999). Antonin Scalia, *Originalism: The Lesser Evil*, 57 Univ. Cincinnati Law Rev. 849–865 (1989).

[36] Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 Univ. Chicago Law Rev. 101–147 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. Law Rev. 847–900 (2002).

[37] 54 U.S. 570 (2008).

[38] Solum, *supra* note 19, at 33-35.

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IV. Interpretation vs. Construction Distinction Revisited: Nino's Contributions to how to Construct our Constitutions

As I mentioned before, new originalism stresses the interpretation and construction distinction. Barnett, Solum and Whittington describe constitutional practices as a process with two moments or stages: interpretation and construction.[39] This distinction is only conceptual as both activities are necessarily bound and intertwined in the practice of constitutional law.[40] The distinction aims at enlightening *how to* adjudicate constitutional cases through originalism. As Solum asserted, "without the interpretation construction distinction, our thinking about the law will necessarily be confused".[41]

Interpretation is an empirical activity that aims at discovering the original public meaning of constitutional provisions. Thus, interpretation is nothing more than an activity for illuminating the content of a "matter of fact".[42] Or, to put it differently, interpretation is an empirical activity that entails discovering a fact: knowing what a particular community attributes as the semantic content of a constitutional provision.

Construction is the second moment of constitutional practice. It is an activity that gives effects to texts, either translating the linguistic meaning into legal doctrine or applying or implementing the text.[43] A constitutional construction is an overall normative task. Indeed, constructing a constitutional provision entails a previous interpretation, and, after that, we resort to some normative assumptions to implement that interpreted semantic content.[44] There are many ongoing discussions, within originalism, on how to construct constitutional provisions. Even though there is a quite unanimous consent on interpreting, there is a persistent debate on constructing the constitution, probably, because construction lies on normative and evaluative considerations on what the constitution should be.[45] Or, in other words, construction is "thickly normative".

But how Nino's work could make a significant contribution to those discussions on how to construct a constitution? I hold that his conception of consti-

[39] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95–118 (2010). Barnett, *supra* note 4, at 65 and ss. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham Law Rev. 375–409 (2013). Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 Cornell Law Rev. 1465–1488 (2019). Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 Ariz. Law Rev. 903–946 (2017).

[40] Whittington, *supra* note 34, at 5. Solum, *supra* note 37, at 116.

[41] Solum, *supra* note 37, at 116.

[42] Randy E. Barnett, *The Gravitational Force of the New Originalism*, 82 Fordham Law Rev. 411–432 (2013), at 415.

[43] Solum, *supra* note 37, at 103.

[44] Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame Law Rev. 479–520 (2013).

[45] Solum, *supra* note 37, at 104.

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tutional adjudication as an activity that intertwines empirical and normative/evaluative considerations would be productive to construct our constitution.[46] Although Nino could not engage in current debates on originalism, we may enhance constitutional construction with his constitutional theory. Nino's most remarkable theoretical efforts on this topic consists of a balanced conception of those two elements: empirical and normative activities when interpreting a legal provision.

Nino was quite clear in separating two activities: on the one hand, empirical activities regarding discovering the sense of a constitutional provision and, on the other one, normative considerations about whether we should apply or not that legal provision. However, Nino's normative approach becomes more interesting for constitutional construction. We could resort to his work for holding this claim: to implement or give effect constitutional provisions needs harmonizing democratic process, respect for individual rights, and preservation of continuous legal practice.[47]

Let's explain that by applying Nino's theoretical framework to an actual case. The Argentine constitutional text did not include the supremacy of judicial review, just like the American Constitution. The US Constitution —Article III— reads: "The judicial Power of the United States shall be vested in one Supreme Court, and in such Courts as Congress may from time to time ordain and establish".

And Section 108 of Argentina's Constitution asserts: "The Judicial Power of the Nation shall be vested in a Supreme Court and such lower courts as Congress may constitute in the territory of the Nation".

Barnett holds that the judicial review derives from interpreting *strictu sensu* the Article III, and indeed, the very institution of the judicial power entailed the power to nullify unconstitutional legislation.[48] However, the supremacy of judicial review is a constitutional construction. That supremacy could serve as a paradigmatic example of how to construct a constitutional provision because that doctrine intends to give effect to the judicial review, but not by any means. According to Nino, we should instantiate the supremacy of the judicial review through (i) a democratic process, (ii) respect for individual rights and the (iii) preservation of continuous legal practice.

(i) Although the judicial or constitutional review is one of the most persistent theoretical debates on constitutional theory, the supremacy of judicial review can respect democratic processes. In general, judicial review —but mainly

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[46] BARNETT acknowledges that interpretation and construction distinction was first elaborated by contract law. BARNETT, *supra* note 4, at 67. SOLUM, *supra* note 46. Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEORG. J. LAW PUBLIC POLICY 13–48 (2020).

[47] Carlos Santiago Nino, *A Philosophical Reconstruction of Judicial Review*, 14 CARDOZO LAW REV. 799–846 (1993).

[48] Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUPREME COURT ECON. REV. 115–138 (2004).

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when exercised by the Argentine Supreme Court of Justice— is conceived as an inescapable, necessary, and extreme remedy for securing constitutional supremacy. We should not apply that for an ordinary controversy on whether a legal provision is the best instantiation of a particular constitutional norm.[49] Thus, to judge a legal or administrative norm as unconstitutional should be a last resort to secure constitutional supremacy. To put it differently, it must be downright or indispensable to withdraw some lower law as unconstitutional.

(ii) Does judicial supremacy respect individual rights? Yes. That is one of its primary purposes. Judicial supremacy entails judicial review as a formidable instrument for securing individual rights. Argentinean case law has introduced that doctrine to secure a consistent separation of powers in one of the first judgments delivered by Argentina's Supreme Court of Justice.[50] Nevertheless, the first time Argentina's Supreme Court of Justice declared a federal act as unconstitutional it aimed at entrenching the right to property from arbitrary use of public power —"Municipalidad de la Capital c/Elortondo" (1888)—. In that judgment, an expropriation was declared unconstitutional. Specifically, the Court protected the right of property because a part of expropriated assets was not directed to a specific public utility, as Section 17 of Argentina's Constitution prescribes.[51]

(iii) And what about the preservation of a continuous legal practice? Here we shall recall the cathedral's analogy. Consolidating a constitutional practice does not require to start all over again, but to continue an incomplete and imperfect human creation, just like concluding a cathedral involves a challenging effort across several generations.[52] Nino's contributions suggest that constitutional changes through constitutional constructions should not be disruptive or revolutionary. To sum up, Nino seems to be quite Burkean in this specific issue.

Thus, if the constitution would require some adjustments, those should be progressive, and they should preserve, as best possible, our persistent legal tradition. Even though judicial decisions seem to be disruptive in some particular circumstances, we should not try to hinder our legal tradition. That looks quite similar to Dworkin's "chain novel", as Nino explicitly acknowledges.[53] Collective and significant efforts across several generations —to consolidate a constitutional system or build a cathedral— are usually achieved by these kinds of means.

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[49] C. S. J. N. (Argentina). "Joaquín M. Cullen, por el Gobierno Provisorio de Santa Fé c/ Doctor Baldomero Llerena s/ inconstitucionalidad de la ley nacional de intervención en la Provincia de Santa Fé y nulidad", *Fallos* 53:420 (1893).

[50] C. S. J. N. (Argentina). "Ramón Ríos, Francisco Gómez y Saturnino Ríos, por salteamiento, robo y homicidio perpetrados a bordo del pailebot nacional "Unión" en el río Paraná", *Fallos* 1:32 (1863).

[51] C. S. J. N. (Argentina), "Municipalidad de la Capital c/ Isabel A. Elortondo s/ Expropiación; por inconstitucionalidad de la ley de 31 de octubre de 1884", *Fallos:* 33:162 (1888).

[52] Nino, *supra* note 13.

[53] *Id.* at 67.

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However, Nino stresses the possibility that we might realize that our community does not want to continue with a previous project. And what shall we do in that case? Nino holds that sometimes we can adjust our original master plan. But what if those adjustments entail a significantly different style? Sometimes those changes are only possible by several substantive modifications to the master plan, and sometimes we may need to reformulate the whole plan. In both cases, the architect must always be aware of the need for a new design. Conversely, he must acknowledge if amendments could introduce the necessary changes to the original master plan or design.

For example, many discussions on constitutional theory regarding constitutional review of constitutional amendments are instantiations of the following problem: what shall we do to preserve a constant constitutional practice? How to acknowledge if we are before a constitutional amendment that we undertook by the procedures established in the constitution? Or what should we do if we were before a whole new constitution, but formally elaborated as a "constitutional amendment?" Colombian Constitutional Court has several judgments on this topic.[54]

I do not intend to deliver a final answer to those issues, but Nino's theory might illuminate that kind of debate. Thus, I shall offer some tentative answers to the former topic to clarify my claim: we should interpret those three requirements as balanced or harmonized as possible. For instance, the constitutional review of constitutional amendments must preserve constitutional practice and the democratic process from head to toe; that is, we shall respect the formal democratic procedures and secure the outcome of those procedures. At the same time, we shall protect individual rights, specifically, the right to participate in a constitutional assembly to discuss our polities' most relevant issues. Briefly, a particular solution for a constitutional review of constitutional amendments would have to reply or tackle the former questions.

V. Conclusions: Three Requirements for Constructing our Constitutions

Nino's contribution to constitutional adjudication theory intends to balance the concept of constitutionalism and democracy. That might shed some light on the new originalism debate. His scholarship is not relevant or significant for constitutional interpretation, but it is for constitutional construction. Indeed, Nino may illuminate how to implement or give effect to interpretive practices. More specifically, Nino poses three requirements that could enhance how we construct our constitutions: (i) to secure democratic processes,

[54] Santiago García-Jaramillo & Francisco Gnecco-Estrada, *La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislativo*, 133 Vniversitas 59–103 (2016).

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(ii) to guarantee respect for individual rights, and (iii) to preserve a continuous legal practice.

Nevertheless, the most relevant suggestion on Nino's work is to highlight the central significance of harmonizing those three requirements. None is the most important of all. They are all equally relevant for securing the constitutional order. For instance, democracy necessitates entrenching individual rights in a context where we preserve a continuous legal practice. And changes must not undermine that ongoing practice. To guarantee a constitutional practice should entrench the constitution's persistence, and, by that means, we shall set some limits to the exercise of public power.

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THE EMOTIONAL INTELLIGENCE OF JUDGES AS A FUNDAMENTAL COMPONENT FOR THE ADMINISTRATION OF JUSTICE

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Danitza MORALES GÓMEZ**
Araceli RODRÍGUEZ SARO VARGAS***

ABSTRACT: *Emotional intelligence is vital for the proper development of the personality. In the case of judges, the behavior and process of the administration of justice are fundamental to the rule of law. However, little attention has been paid to the issue of the emotional conditions of judges, which directly or indirectly affect individuals and court administrative personnel. Several health institutions have demonstrated the connection between people's mental and physical health, which not only implies the absence of disease, but also a healthy and suitable lifestyle to perform their work properly. In this specific case, this article aims to show how judges´ good or bad emotional health can affect the decisions made in their courts and the importance of their effects on the people who need to abide by such rulings. It is imperative to continue requesting that the judicial authorities have the necessary resources to ensure they can do their work properly and the judgments issued are not hampered by health factors. Finally, it should be mentioned that this article also analyzes judges' behavior and thus raises awareness about the effects of mental and physical health, as it has an impact on the jurisdictional processes to which judges are party.*

KEYWORDS: *Judge, emotional intelligence, justice, mental health.*

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Resumen: *La inteligencia emocional es vital para el desarrollo adecuado de la personalidad. En el caso de los jueces, la conducta y la administración de justicia es fundamental para el estado de derecho. Sin embargo, se le ha prestado poca atención a la condición emocional del juez, que directa o indirectamente afecta a individuos así como a la administración de la corte. Diversas instituciones de salud han demostrado el estrecho vínculo que existe entre la salud mental y física de las personas que no solo implica el carecer de enfermedades si no el llevar un estilo de vida saludable y adecuado para la correcta ejecución de sus labores, en este caso específico se pretende exponer el como una buena o mala salud emocional de un juez puede repercutir en las decisiones que se llevan a cabo en su corte y la importancia que tienen estos efectos en las personas que acatan sus dictámenes. Es fundamental el continuar solicitando que autoridades judiciales cuenten con los requerimientos necesarios que aseguren el correcto desempeño de su trabajo y que las resoluciones que se lleven a cabo no se vean obstruidas por factores de salud. Por último hay que mencionar que este artículo también tiene como fin analizar el comportamiento de las personas juzgadoras y así concientizar respecto de los efectos de la salud mental y física, pues impacta en los procesos jurisdiccionales de los que son parte los jueces.*

Palabras clave: *Juez, inteligencia emocional, justicia, salud mental.*

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I. Introduction

Protecting rights implies believing in people because the ones monitoring compliance are not institutions or legal systems,[1] but people specialized in delivering justice in their respective spheres (federal, state, or municipal).

It is therefore important to focus on legal operators because it is not only necessary to have statutory laws aligned with reality to achieve optimal justice within a system. Bodies and/or institutions are also needed to manage and

[1] Luigi Ferrajoli, Democracia y Garantismo 87 (Trotta 2008).

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implement it. It is also necessary for those in charge of monitoring and administering justice are fit for such a responsibility.

It is therefore worth asking whether those serving as judges are well-suited for the role, i.e., whether in addition to having the legal knowledge, they are also in good (physical and mental) health because this last factor could be considered necessary to fit the profile required for this role since health also extends to psychological and emotional aspects. Having a positive attitude towards life, engaging in healthy personal relationships, limiting stressful situations and being optimistic are habits that cannot be absent from judicial operators because in some way they will have an impact on their work in the judiciary.[2]

This article is composed of nine sections. The first, second and third discuss the concept of good physical and mental health. The fourth, fifth and sixth deal with the ideal profile of judges and its context in Mexican domestic law, the importance of their training and the requirements to become a judge as stipulated in the Mexican legal framework, The seventh underlines the importance of emotional intelligence in judges, so they can optimally perform their judicial function. The eighth section lists the statements issued by the Council of the Federal Judiciary addressing complaints of misconduct of federal judges. The ninth section contains criticisms and proposals aimed at questioning, among other things, whether the requirements established by law, as well as those set forth in various Agreements of the Plenary of the Council of the Federal Judiciary, should add provisions requiring judges to have a healthy emotional intelligence, as this is an essential element for the performance of this role.

The objective of this research article is to highlight whether emotional intelligence in legal operators is a fundamental component of justice as several jurisprudential and legal texts have stressed the importance and implementation of human rights in regulatory frameworks as well as in the institutions in charge of their oversight. However, in our opinion, it seems that in order to succeed in this, it is necessary to focus on those in charge of administering justice because it is not enough for such person to have legal knowledge, but to also be physically, psychologically and emotionally stable and in full health, since these aspects will be reflected in the work of the internal administration of the count in charge, as well as its judgements.[3]

II. The Concept of Good Health

To be in "good health" does not only mean to be free from disease, but also to enjoy physical, mental and social well-being. In this regard, the opening of

[2] Annamaria Di Fabbio, Emotional Intelligence 67 (Intech 2012).

[3] Michael Walzer, Las esferas de la justicia 313 (FCE 2004).

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the World Health Organization (WHO) Constitution[4] states that "the States Parties to this Constitution, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples" which, among others, include health, defined as: "…a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".[5] In 1992, "to live harmoniously in a changing total environment" was added to this description.

In this sense, good health could be described as the condition in which both the body and the mind are working properly.[6] The main causes of poor health are diseases, a poor diet, injury, mental stress, lack of hygiene, and an unhealthy lifestyle, among others.

Although advances in medical research have led to a wide range of treatments available today to stave off, control and prevent diseases, we play a crucial role in taking care of our own health. Medical professionals all agree that good health starts with good eating habits and therefore, prevention and education are essential because if we fail to give sufficient importance to good (physical and mental) health, it can lead to the progressive decline, which can lead to long-term health problems.

When it began (1947), the World Federation for Mental Health (WFMH) defined mental health as "the state that enables the best physical, intellectual and emotional development of each individual, insofar as it is compatible with the development of other individuals". Mental health is just as important as physical health, so it should not be neglected. This type of health ensures mental and emotional fitness; that is, the ability to adapt to change, cope with crises, establish meaningful relationships with other members of the community and find meaning in life, given that it is linked to reasoning, emotions and behavior when facing different situations in everyday life.

In its Summary Report on Promoting Mental Health: Concepts, Emerging Evidence, Practice, the World Health Organization established:[7]

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[4] The Constitution was adopted by the International Health Conference in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. Wld Hlth Org.*, 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on February 3rd, 1977; January 20th, 1984; July 11th, 1994, and September 15th, 2005 respectively and are incorporated in this text.

[5] World Health Organization, *Constitution*, WHO, (2006), *available at https://www.who.int/governance/eb/who_constitution_sp.pdf?ua=1*.

[6] Daniel Goleman, Emotional Intelligence Chapter 11 (Bloomsbury, 2014).

[7] *Summary Report on Promoting Mental Health: Concepts, Emerging Evidence, Practice, of the World*

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> Sustained socioeconomic determinants are a known risk to the mental health of individuals and communities. The clearest evidence is associated with indicators of poverty, including low levels of education. Poor mental health is also associated with rapid social change, stressful work conditions, gender discrimination, social isolation, unhealthy lifestyle, the threat of violence and poor physical health and human rights violations. There are also specific personality and psychological factors that make a person more prone to mental disorders. Finally, mental illness also has biological causes influenced by, for example, genetic factors or biochemical brain imbalances.

Based on the above, it follows that mental health, like mental problems, can be determined by personal, social, and environmental factors, which can be grouped into three domains: a. how the person feels about themselves; b. how they feel about others; and how they respond to the challenges of life.

But how does one diagnose mental health? In order to make a more accurate diagnosis, it is advisable to first check for complications related to physical conditions that could cause pain or discomfort. Subsequently, any potential\ physical ailment should be backed up with other laboratory tests, such as, thyroid function tests, alcohol and/or drug screening. Once the physical results have been verified, a psychological evaluation should be performed by a mental health specialist who can correlate physical discomfort with thoughts, feelings, and behavior patterns. The more information obtained, the more likely it will be to identify the possible mental disorder and suggest the treatment to be followed.

The typical symptoms of each mental illness are detailed in the "Diagnostic and Statistical Manual of Mental Disorders" (DSM-5) published by the American Psychiatric Association,[8] which is used by mental health professionals to diagnose mental disorders.

The DSM-5 is divided into three sections. Section I is entitled "DSM-5 Basics", which establishes guidelines for the clinical and forensic use of the manual. Section II on "Diagnostic criteria and codes" contains the diagnostic criteria and codes for the different disorders while Section III on "Emerging measures and models" indicates dimensional measures for assessing symptoms, criteria on the cultural formulation of disorders and an alternative model for conceptualizing personality disorders, as well as a description of the clinical conditions currently under study.

The main types of mental illness covered in the manual are:[9] a. Neurodevelopmental disorders. b. Schizophrenia spectrum and other psychotic disorders.

Health Organization, WHO, (2004), *available at https://www.who.int/mental_health/evidence/promocion_de_la_salud_mental.pdf*.

[8] María del Carmen Lara Muñoz, *Diagnóstico de los trastornos mentales: el DSM-5,* in SALUD MENTAL Y MEDICINA PSICOLÓGICA (Juan Ramón de la Fuente y Gerhard Heinze eds., 2014).

[9] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) (2014).

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c. Bipolar and related disorders. d. Depressive disorders. e. Anxiety disorders. f. Obsessive-compulsive and related disorders. g. Trauma-and stress-related disorders. h. Dissociative disorders. i. Somatic symptom and related disorders. j. Feeding and eating disorders. k. Elimination disorders. l. Sleep-wake disorders. m. Sexual dysfunctions. n. Gender dysphoria. o. Disruptive, impulse-control, and conduct disorders. p. Substance-related and addictive disorders. q. Neurocognitive disorders. r. Personality disorders. s. Paraphilic disorders. And t. Other mental disorders.

However, as far as treatment is concerned, it depends on the type of mental illness diagnosed, as well as the severity and what is most effective in each case. In these cases, treatments are usually combined; that is, clinical therapy is combined with medication, as well as suggestions for some kind of activity (sport, art, and so on), which is what works best. It should be noted that each case is unique and special; therefore, it is not possible to generalize any type of treatment. What should be done is to propose an individualized approach to improvement based on each person's condition to ensure that all psychiatric, medical and social needs are addressed appropriately.[10] Medication will depend on each individual situation and how the body responds to it.

When psychotherapy is suggested as part of the treatment for a mental illness, it is to establish a conversation therapy between the specialist and the patient about the condition, which helps to understand the disease, the moods, feelings, thoughts, and behaviors. This understanding and knowledge gives the patient the ability to acquire skills to cope with situations and control stress. The length of the treatment depends on the damage sustained; in some cases it may be short, medium or long term.

It is also important to wonder whether a person with a mental illness could infect their environment, i.e., whether a mental illness has the same effect as a physical illness, like the flu that can be transmitted to the people around them. We would venture to answer in the affirmative, since the person who has lived with a mentally ill person may begin to feel similar emotions, albeit differently. In other words, "Emotional contagion is feeling or expressing an emotion similar that of the people around you because their feelings tell you to believe that you should have those same emotional reactions. We see how others respond, and emotional contagion is an extreme form of that...", according to the text published in the journal Memory & Cognition.[11]

It should be noted that not all mental illnesses are contagious, as in the case of someone suffering from schizophrenia, anxiety or some addiction, but they could trigger a bad mood or generate a state of permanent stress, thereby causing a different type of mental illness to the person living with someone who is toxic and has not been treated.

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[10] Daniel Goleman, Working with emotional intelligence chap. 3 (Bantam books 1998).

[11] Jessecae K. Marsh & Lindzi L. Shanks, *Thinking you can catch mental illness: How beliefs about membership attainment and category structure influence interactions with mental health category members*, 42 Memory & Cognition 1011, 1025 (2014).

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III. The Ideal Profile for a Judge

Every society needs the presence of a hero or Supreme Being to deliver it from barbarism and lead it along the path of civilization. Thus, in any historical era, there is a need for someone outstanding entrusted with the task of judging, i.e., of striking a balance in each concrete case to restore universal harmony.[12]

Therefore, striking the proper balance is a difficult task because justice is the middle ground between committing an injustice and/or suffering from one.

The judicial officer is romanticized as a great man of law, emanating the image of holding on to the tablets of the Constitution or its Codes and conveying the idea of social order as a reflection of a just government.[13]

According to Manuel Atienza a good judge is defined as one who "...not only complies with codes of conduct but has professionally developed certain character traits that are judicial".[14]

The Code of Ethics of the Federal Judiciary provides that "if the Constitution lays out the guiding principles of the judicial career with genuine moral content, such principles should also be regarded as guiding principles for the ethical behavior of judges and, consequently, as general guidelines for drafting a Code of Ethics to govern the conduct of public servants in the judiciary".[15]

It is also worth mentioning a part of the preamble to the Code of Ethics of the Federal Judiciary, which gives a brief explanation of justice as stated in the Federal Constitution of 1824:

> …there is no freedom without justice, and the basis of justice can be no other than the balance between the rights of others and our own… in the hope of … to ensuring equality before the law, freedom without disorder, peace without oppression, justice without rigor, clemency without weakness; to mark the limits of the supreme authorities of the nation, to arrange them in such a way that their combination always produces good and makes evil impossible; to restore the legislative process, protecting it from all rashness and waywardness… to assure to the Judicial Power such independence that it never arouse concern for innocence nor offer guarantees to crime..." and with the awareness that "... the very conduct we observe greatly compromises our national honor. If we

[12] Salvador Cárdenas Gutiérrez, El juez y su imagen pública. Una historia de la judicatura mexicana 129 (Suprema Corte de Justicia de la Nación, 2006).

[13] David Held, Models of democracy 27, 44, 48, 78, 92, 116, 152, 173, 201, 215, 253, 282, 308 (Stanford University Press, 2006).

[14] Manuel Atienza, Reflexiones sobre ética judicial 18 (Suprema Corte de Justicia de la Nación 2008).

[15] Guillermo Ortiz Mayagoitia, *Palabras del ministro Guillermo I. Ortiz Mayagoitia en la Presentación del Código de Ética del Poder Judicial de la Federación*, in Comentarios a la Reforma Constitucional en Materia Penal 18 (Suprema Corte de Justicia de la Nación 2005).

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> deviate from the constitutional path; if we do not hold maintaining order and scrupulously observing the laws included in the new Code as the most sacred of our duties; if we do not act together to save this repository and shield it from the attacks of the wicked; Mexicans, we will henceforth be miserable, without ever having been happy.

The purpose of this statement is to instruct the judges that the application and legal interpretation of the sources of law in force should be carried out pursuant to the guiding principles of legal ethics, to ensure respect at all times for the fundamental right of persons (individuals and legal entities) provided for in Article 17 of the Constitution on the access to and administration of accessible, prompt, complete, impartial and predictable justice.

On this, legal scholar Jesús Ángel Arroyo Moreno said:

> For justice to be truly impartial and independent, the judge must act out of conviction and love his work. He must also have the courage to defend his convictions, without fear of repercussions, but also without being pigeonholed in misguided criteria. It is the judge's personal readiness to do justice, to give to each his due, that guarantees good and reasonable justice. Without it, everything is futile because justice depends on judges.[16]

Hence, to speak of an "ideal judge" entails being virtuous, committed to legal ethics and the proper administration of justice. Therefore, their performance and actions are decisive factors in the daily life of society because their clear, impartial and coherent rulings have an immediate impact on public trust.[17]

In this regard, Judge Julio César Vázquez-Mellado García pointed out that "the judge does not seek a conceptual truth when issuing rulings, but an eminently practical truth that resolves a dispute".[18]

The author also indicated that to achieve a profile of excellence in judges, it is essential to have them participate in refresher and training activities offered by the Judicial Academy or other academic institution with the following main training attributes: 1. Sound legal training; 2. Ability to interpret, rationalize and argue their decisions from a judicial standpoint; 3. Ability to identify the underlying social conflicts in the issues; 4. Administrative skills for the proper management of the material and human resources assigned to them; 5. Trained in values enabling them to perform their work independently and autonomously; and 6. Knowledge of the so-

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[16] Jesús Ángel Arroyo Moreno, *El juez*, Jurídica, Anuario del Departamento de Derecho de la Universidad Iberoamericana 81 (1993).

[17] John Agresto, *The Supreme Court and Constitutional democracy* 53, 54 (Cornell University Press, USA 1984).

[18] Julio César Vázquez-Mellado García, *El perfil del juez,* in Cuadernos de trabajo 2 (Instituto de la Judicatura Federal, 2014).

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cial, cultural and economic conditions of the country and where they perform their duties.[19]

Piero Calamandrei pointed out that in idealizing judges

> …so high is the mission of judges in our estimation and so necessary is our trust in them, that human weaknesses that go unnoticed or are forgiven in any other type of public official, seem inconceivable in a magistrate… Judges are like people who belong to a religious order. Each of them has to be an example of virtue if they do not want their believers to lose faith.[20]

Another important point is that judges must bear in mind the consequences of their actions and the duties of their role, given that a judge's highest ambition is to be the best possible judge; that is, the one best suited for the judicial career. However, when such a public servant does not act in accordance with the guiding principles of their position, accountability is the feature that is associated with the premise of judicial independence, since independence and accountability are mutually inherent concepts to prevent such independence from being transformed into arbitrariness in the exercise of public authority.

IV. The Importance of Judges' Emotional Intelligence

A person is considered to be in good health when three areas are covered: physical health, emotional balance and psychological stability, aspects that are interrelated within the concept of comprehensive well-being.

To achieve this well-being, lifestyle habits must be forged; that is, to strive to adopt and consistently follow routines that bring -preferably long-term-health benefits. Furthermore, no habit works by itself, but one contributes to another and enhances others. For example, a healthy diet can enhance an exercise routine, which in turn contributes to improve one's mood, i.e., reducing feelings that are related to stress, depression, anxiety or others.

In short, health and well-being can result in a drastic improvement in the overall quality of life by enabling a person's body to function properly and thus be able to perform the different activities that are part of their daily routine. Health is a phenomenon that is achieved through countless actions and can be preserved for a long time or, alternatively, lost for a variety of reasons.[21]

But why is health important for judges and how can "good level of health" be reached and maintained?

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[19] *Id.*

[20] Piero Calamandrei, Elogio de los jueces escrito por abogados 261-262 (Jurídicas Europa América 1989).

[21] Ran Hirschl, Towards Juristocracy 221 (Harvard University Press 2007).

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First, it should be noted that a healthy lifestyle has several benefits, among which include ridding the body of pain and discomfort (bad eating habits, colitis, migraines, etc.), as well as various forms of mental disorders (stress, insomnia, depression, etc.). In addition, when in "good health", people are able to optimize their capacity, thus enabling them to do a good job that will situate them as valuable members of their organization and, consequently, of society itself.

If stability in emotional intelligence is applied to the work of judges, will not only allow them to act congruently with their high moral standards, but also to have a clear, objective and solid mindset because there will be times during their career when decisions will require both legal knowledge and the counsel of their own conscience, which means putting in practice the values inherent to make effective the intrinsic values of their own work and in the law, without forgetting that their work is a determining factor for the daily life of society.

On this, José Ramón Narváez Hernández explained that

> …the sense of justice is that call from each person's conscience, which helps to distinguish what is just from what is unjust. It is also called by other names, such as clamor for justice or social demand for justice… Common sense is possessed by only a few; it is associated with sound judgment, good sense, discernment, and the ability to propose solutions to improve oneself and/or society.[22]

In this way, the sense of justice and common sense seek to humanize justice, i.e., to make it less technical and formalist. A good level of emotional intelligence will have an impact on judicial work, particularly in two aspects:

a. Internal administration of the jurisdictional body since it implies expertise in aspects of life related to family, work, workplace interactions and society, among others. On this point, it is necessary for judges to display maturity, tolerance, respect and empathy toward the different situations they may encounter in their administration. They are also responsible for their area to be effective, capable, competent and creative when dealing with their environment and influencing it to maximize the skills of each member as a key element for a smooth workflow, while removing those who show complete ineptitude in the judiciary. Judges should even be a source of inspiration for others who aspire to be judges and embrace their way of working.

   But if the judge is not mentally stable, the results could be devastating. The working environment would reflect stress, insecurity, indifference, incomprehension and perhaps a lack of respect. Unease at the workplace, not a heavy workload, would be an important obstacle to work effectively, efficiently and with quality. This situation would not only be perceived

[22] Amalia Amaya et al., Emociones y Virtudes en la Argumentación Jurídica 70 (Tirant lo Blanch, 2017).

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in the office, but it has a "domino effect". In other words, good behaviors, like empathy, tolerance, responsibility, respect, optimism, and solidarity, or bad behaviors related to mental disorders, stress, intolerance and a lack of respect, among others, can manifest themselves outside the workplace and affect the people close to that worker, leading to a better or worse society, depending on the case.

b. Administration of justice (rulings). If judges have good levels of emotional intelligence, justice will be better served. This is because the person will not experience any frustration that prevents them from objectively, professionally and impartially studying and analyzing the cases entrusted to them. Similarly, they will be able to put into practice the ethical principles of justice and will have the ability to enhance their skills to do an excellent job given that they will not only apply the law, but their decision will not be out of touch with the social reality, rendering judges empathetic and not merely legal technicians. Their commitment will have a significant impact and will be a key element for harmony and balance within the community.

V. Judges in the Context of Mexican Domestic Law and its Virtues

With the 2011 amendment to the Mexican Constitution, International Human Rights Law provisions were incorporated into the country's legal system, as well as the use of interpretative principles, in order to achieve greater and better protection of human rights, which should obviously be reflected in the work of judges and in the drafting of their judgements.

The constitutional reform has had an impact on judges' actions and on their final decisions.[23] To ensure the administration of justice in accordance with the challenges of legal paradigms, it is clear that judges must not only interpret the legal provision, but also be fully involved with the prevailing social context, be assisted by other branches (besides being a criterion, law is a multidisciplinary science) and be in good health.

Regarding this last point, a systematic analysis of Article 4 of the Political Constitution of the United Mexican States/Mexican Constitution, Article 12, paragraphs 1 and 2, of the International Covenant on Economic, Social and Cultural Rights, as well as Articles 2; 23; 24, Section I; 27, Sections III, IV, VIII and X; 28, 29, 32 and 33 of the General Health Law shows that the Mexican State is obliged to establish conditions that ensure medical assistance and services to all people in the event of illness. Furthermore, it is stipulated that adequate protection of the right to health consists of providing of comprehensive services, which includes the provision of adequate and full treatment, including,

[23] Isabel Trujillo, Imparcialidad 30, 69 (UNAM 2007).

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if necessary, the supply of basic medicines. Hence, the protection of the right to health includes both physical and mental health.[24]

In this regard, in Court Opinion 8/2019 (10a.) the First Chamber of the Mexican Supreme Court of Justice established that the protection of the right to health should be one of the State's main objectives because it is a fundamental right. It should therefore be considered essential for legal operators, i.e., to ensure their general well-being, as this will impact their physical and psychological integrity, as well as their performance and quality work in the judiciary.

Moreover, a systematic interpretation of Articles 17; 94, eighth paragraph; 99, penultimate paragraph; 100, seventh paragraph; 101 and 128, all of which are in the Political Constitution of the United Mexican States,[25] provides the main guiding principles for judicial work: efficiency, probity, good repute, competence (professional ability), independence,[26] impartiality,[27] objectivity,[28] professionalism,[29] excellence,[30] loyalty, legality and transparency.

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[24] José Roberto Dromi, El Poder Judicial 55-60 (UNSTA 1982).

[25] Derecho a la Protección de la Salud. Dimensiones Individual y Social, Tesis de Jurisprudencia, Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, febrero 2019, Tesis P. 1a./J. 8/2019, p.486 (Méx.):

Right to Health Protection. Individual and Social Dimensions. Health protection is an objective the State can legitimately pursue, since it is a fundamental right recognized in Article 4 of the Constitution, which expressly states that every person has the right to health protection. In this regard, we must not lose sight of the fact that this right has an individual or personal dimension, as well as a public or social one. In terms of the protection of the health of individuals, the right to health translates into achieving a certain general well-being composed of the person's physical, mental, emotional and social health, from which stems from another fundamental right, the right to physical and psychological integrity. It is, therefore, clear that the State has a constitutional interest in providing individuals with an adequate level of health and well-being. On the other hand, the social or public dimension of the right to health consists of the State's duty to address the health problems affecting society in general, as well as to establish the necessary mechanisms for all persons to have access to health services. This includes the obligation to take the necessary steps to achieve this end, such as developing public policies, monitoring the quality of health services, and identifying the main problems affecting the public health of the social conglomerate, among others.

[26] Judicial independence is a judge's ability not to be manipulated to obtain political benefits. Judges must decide without yielding to pressures or insinuations of any kind, being guided solely by their free judgment, adhering to the law.

[27] Impartiality is defined as a judge's attitude against influences unrelated to the law, coming from the parties in the processes under their authority.

[28] Objectivity is the judge's capacity to act in accordance with the criteria dictated by the law, regardless of the judge's inclinations or dislikes. It consists of the judge putting all subjective considerations aside; it is the absence of prejudice, which is necessary to attain the level of trust courts must inspire in citizens in a democratic society.

[29] Professionalism is the willingness to perform judicial duties responsibly and seriously, with the appropriate skills and dedication.

[30] According to the Code of Ethics of the Federal Judiciary, excellence should emerge as the ideal profile of a good judge. It is defined as a judge's daily efforts to perfect the following

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Additionally, having worked in the Federal judiciary, we would add other virtues that we personally consider essential for legal operators, so they can take on the challenges of their role, such as: empathy, humility, tolerance, common sense and commitment to their job.[31] Judges should not only be interpreters of the principles and values contained in legal systems (the Constitution, international treaties, laws, regulations or other legal systems), but also carry out the onerous task of administering justice; that is to say, to give to each person their due when discussing human rights, aware that these are people who seek to be recognized in terms of their freedoms, but also to be heard, understood and comforted.

VI. Requirements to be a Federal Judge [Magistrado] in Mexico

Article 110 of the Organic Law of the Federal Judiciary sets out the categories pertaining to a Judicial Career.[32] It is therefore important to cite the requirements to become a judge (judge or *magistrado*) based on these provisions:

> Article 106. In order to be appointed a circuit judge, it is necessary to be a Mexican national by birth, not to hold another nationality and to be in full enjoyment and exercise of their civil and political rights, to be over thirty-five years of age, to have a good moral standing, not to have been convicted of a felony with a prison sentence of more than one year, to have a legally issued law degree and to have practiced professionally for at least five years, in addition to the requirements contained in this law regarding the judicial career. Circuit judges shall serve for six years in the performance of their duties, at the end of which, if ratified, they may only be removed from their posts for the reasons specified in this law or by forced retirement upon reaching the age of seventy-five.
>
> Article 107. A circuit court clerk must have at least three years of professional experience and meet the other requirements to be a judge, except for the

judicial virtues: humanism, justice, caution, responsibility, integrity, patriotism, social commitment, loyalty, order, respect, decorum, diligence, perseverance, humility, simplicity, sobriety, and honesty.

[31] This sense entails combining the external senses (sight, touch, taste, smell, and hearing) with the internal senses (memory, imagination, intuition).

[32] The progression in the Mexican judiciary is as follows: i. *Magistrados de circuito*; ii. *Juez de distrito*; iii. *Secretario General de Acuerdos de la Suprema Corte de Justicia o de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación*; iv. *Subsecretario General de Acuerdos de la Suprema Corte de Justicia o de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación*; v. *Secretario de Estudio y Cuenta de Ministro o Secretarios de Estudio y Cuenta e Instructores de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación*; vi. *Secretario de Acuerdos de Sala;* vii. *Subsecretario de Acuerdos de Sala*; viii. *Secretario de Tribunal de Circuito o Secretario de Estudio y Cuenta de las Salas Regionales del Tribunal Electoral del Poder Judicial de la Federación*; viii Bis. *Asistente de Constancias y Registro de Tribunal de Alzada*; ix. *Secretario de Juzgado de Distrito*; ix Bis. *Asistente de Constancias y Registro de Juez de control o juez de enjuiciamiento*; and x. *Actuario del Poder Judicial de la Federación*.

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> minimum age. Court clerks must be Mexican citizens, in full exercise of their rights, with a legally issued law degree, have a good moral standing and not to have been convicted of a felony with a prison sentence of more than one year. Circuit court clerks shall be appointed in accordance with the provisions applicable to judicial careers.
>
> Article 108. To be appointed district judge, it is necessary to be a Mexican national by birth, not to hold another nationality, to be in full exercise of their rights, to be over 30 years of age, to have a legally issued law degree, to have practiced professionally for at least five years, to have a good moral standing, and not to have been convicted of a felony with a prison sentence of more than one year. District judges shall serve for a period of six years, at the end of which, if ratified or appointed as circuit judges, they may only be removed from their posts for the reasons specified in this law or by forced retirement upon reaching seventy-five years of age.
>
> Article 109. Court clerks must have at least three years of professional experience and meet the same requirements to be a judge, except for the minimum age. Court clerks must be Mexican citizens, in full exercise of their rights, with a legally issued law degree, have a good moral standing and not to have been convicted of a felony with a prison sentence of more than one year. Court clerks of the district courts shall be appointed in accordance with the provisions applicable to judicial careers.

In addition to the above, the interested parties must meet other requirements set for each call for District Judge and/or Circuit Judge appointments, including: use and management of information and communication technology tools to process trials and all their online instances, submitting a list of documents such as: birth certificate, Sole Population Registration Code, diploma and professional license, voting identification card or passport, curriculum vitae drawn up under oath, academic transcripts, proof of five years of work experience, information on any pre-existing condition, a list of family members by affinity and consanguinity who work at the Federal Judiciary.

The list of successful applicants is published and three stages must then be passed. The first step is to answer a questionnaire on technical legal knowledge. Once this phase has been passed with a minimum score of 8.5 (out of 10), the applicant goes on to the second stage, which consists of a drafting a proposed judgment on a case study. If successful, the next step is stage three, which consists of an oral examination on a legal topic listed in the published agenda.[33]

Four sections are required to draw up a judgment: a. preamble (identification information, i.e., file number, name of the plaintiff and/or appellant, name of the judge, name of the clerk, place and date); b. statement of facts (general background information on the main events of the case); c. recitals (information on the analysis: competence, temporality, grievances/concepts of violation and study of the merits of the case, i.e., decision); and, d. operative paragraphs (the meaning of the decision).

[33] *See*, Javier Saldaña Serrano, Virtudes del juzgador 48-51 (SCJN, 2007).

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Therefore, the ability to prepare clear, simple, congruent, comprehensive judgments that are easy for society to understand is also required, as these documents are public and must be transparent. It would be of no practical use if judges' decisions were only understood by people with legal knowledge. Thus, one of the new challenges faced by those who dispense justice is to be able to make anyone understand what is written in their judgements. Hence, the legal language used calls for a special skill to know how to express and convey the idea.[34]

In a virtual chat on the Challenges of Justice in Mexico held on August 18, 2020, Chief Justice Arturo Zaldívar of the Supreme Court of Justice and of the Council of the Federal Judiciary spoke about the set of intersecting issues in the administration of justice, noting that:

> In practice, federal justice is the final court for disputes and is often the last hope for people to obtain justice. The reform we propose will make federal justice accessible to all, will raise the quality of the judgments, through better training of judges and strengthening the judicial career, and will allow constitutional and human rights legal principles to better permeate the work of all legal operators.[35]

It follows from the above that emphasis has yet to be placed on judges' emotional intelligence as a key component of justice, as will be explained below. Misconduct of federal judicial officials is to be reported to the Council of the Federal Judiciary, the body responsible for preserving and strengthening the autonomy, independence and impartiality of the federal courts and the administrative areas under their jurisdiction, as well as for issuing and implementing regulations, guidelines, directives and policies in the areas of administration, oversight, discipline and judicial careers.

However, this body only hears of the misconduct of members of the Federal Judiciary through a written complaint filed by an employee of the judicial body or by a party involved in the dispute over the jurisdiction of the legal operator in question. Based on the results of this article, it is evident that this is insufficient because at no time during the performance of the public servant's duties is it considered whether they are healthy enough to continue with their work. Unfortunately, such issues are only investigated when a complaint has been made against a public servant, and only if it is well justified does it result in the imposition of an administrative sanction.

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[34] Carlo Guarnieri & Patrizia Pederzoli, Los jueces y la política 16 (Taurus, 1999).

[35] *Palabras del Ministro Presidente Arturo Zaldívar en el primer encuentro nacional digital "Desafíos de la Justicia Mexicana"*, Suprema Corte de Justicia de la Nacional (2022), *available at https://www.scjn.gob.mx/sites/default/files/discurso_ministro/documento/202008/PALABRAS%20DEL%20MINISTRO%20PRESIDENTE%20ARTURO%20ZALDÍVAR%20EN%20EL%20PRIMER%20ENCUENTRO%20NACIONAL%20DIGITAL%20DESAFÍOS%20DE%20LA%20JUSTICIA%20MEXICANA_.pdf.*

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It seems to us that this "apparent solution" of imposing an administrative sanction on public servants who have committed wrongdoing is insufficient. If the Council of the Federal Judiciary is responsible for monitoring, it would seem that more disciplinary actions could be taken and more training could be given to legal operators throughout their judicial career, as follows:

a. To verify whether those who given the opportunity to serve in a judicial or administrative position have stable mental health, as this would prevent corruption, sexual harassment, and harassment at work, among others. The type of personality would reflect the quality of the work and it would also question how the person would handle situations of power and stress, as well as how that could have an impact on judicial duties.
b. Once the person is actively involved in judicial work, it seems that the only thing that matters in terms of health is the physical aspect. However, it is not enough to address this factor because health is not only made up of physical ailments, but also by mental ones (emotional and psychological). In other words, actions that also have an impact on taking care of emotional intelligence should also be implemented, such as, building habits to organize work, to avoid stress, to eat a balanced diet and do exercise; to know how to manage feelings (sadness, anxiety, anger, etc.).
c. Even when it is necessary to comply with a certain number of cases, emphasis should be placed on the quality of the work. "Not having a backlog" is not enough because the legal operator must also make the effort, analyze and study each case, thus reflecting their professional commitment by reaching the best possible decision. It is therefore recommended that medical check-ups should include not only physical examinations, but also an additional psychological examination. We should not lose sight of the fact that judicial operators are foremost people, and they are not exempt from experiencing any situation that could lead to depression, alcoholism, insomnia, anxiety or stress. Perhaps achieving optimal health may not only mean medicine for physical discomfort, but also additional treatment to heal mind and feelings.[36]

Accordingly, if those who aspire to serve in the judiciary and of those who seek to ratify their position had their emotional intelligence were protected in terms of emotional intelligence, it would create a culture of greater interest in well-being thus produce a more aware and stable society, thereby ensuring a better justice system. Regarding the considerations in the statements referred to in the preceding section, the various sanctions against judges and

[36] Daniel Herrendorf, El Poder de los Jueces 97-109 (Abeledo-Perrot, 1994).

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other public servants who committed "misconduct", i.e., actions related to sexual and labor harassment, lack of professionalism, leaking and selling confidential information, possible violations like bribery, improper use of information, influence peddling and concealment, as well as notorious ineptitude and carelessness in performing the functions or duties to be performed in a judicial career are noteworthy.[37]

However, such behaviors were not evaluated or considered before granting and/or ratifying public service positions, and that has to do with personality traits as well as personal life histories. It seems to us that it is not enough to meet the requirements laid down in Council of the Federal Judiciary regulations and agreements, like having studies attesting to legal knowledge and work experience, and passing the corresponding examinations for the position, for it would be worthwhile to take the emotional intelligence of such persons into consideration and to determine whether there is any behavior or disorder that would interfere with the ideal vision and determination for the administration of justice.

1. Assuming that the applicant has excellent knowledge of the law and perhaps of other social or scientific fields, in addition to having the experience for the position, if their training took place in an environment of family violence or their personality traits, those would be circumstances which could significantly affect objectivity, impartiality and professionalism when deciding on any issue related to said situation because their life history may be reflected in the case before them and they are called upon have to rule on it. Or when a judge who is not a parent has to settle a family dispute where children are involved, it would be difficult for the judge to empathize with the family's situation because experience does not only mean having the latest training in the legal field and many years of service in the judiciary, but also being involved with real and social aspects like family living and being the cause of it because in this way there will be and they will be able to identify the bonds between dependents and the many circumstances they must face without losing objectivity, conveying such awareness of the circumstances to the parties and reaching the best decision to resolve the conflict.[38]

VII. Criticism and Conclusion

The art of judging goes beyond shaping judges who only resolve a certain number of cases every week, every month, every year. If so, it would simply be a matter of equipping a presence with artificial intelligence along with that integrates a database with all the legal systems that exist in a certain place and time, and just update them with any modifications so that the law could be applied according to each specific case.

[37] TEPJF, El Sistema Mexicano de Justicia Electoral (2003).

[38] Larry Yackle, Regulatory Rights 80 (The University of Chicago Press, 2007).

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But is that what makes justice be more effective? I would venture to say no, what humans want when the balance in the realm of their rights is upset and go to some judicial authority searching for justice, is for a person endowed with legal knowledge and virtues to restore balance by issuing a decision with both a human touch and legal excellence. Moreover, people want the entire community to be able to understand that decision because it was drafted in plain language and is in line with the social context.

Being a judge is actually a huge challenge because their work represents plays a fundamental role in conscientiously protecting human rights; that is, seriously taking care of them, trying to understand the full context. To do so, it is not enough to simply interpret the legal provision, but one needs to be fully immersed in the current social reality, to draw on other scientific and social fields and, above all, for judges to be foremost someone who should never lose their humane sensibility.

Health and well-being are basic elements for human beings and society as a whole to fully reach their professional development and harmony. Therefore, it would be prudent to take these aspects into consideration not only for judges, but also for litigants, teachers, other public servants and, taking a broad approach, not to confine it to the field of law, but spread it to all professions.

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TRANSFORMATIVE CONSTITUTIONALISM OR FEMINIST CONSTITUTIONALISM? ADVANTAGES OF A TRANSFORMATIVE CONSTITUTIONAL ADJUDICATION

Julio César Muñoz Mendiola*

Abstract: *Transformative constitutionalism is a current of legal thought based on the belief that constitutional judges can play a key role in promoting social change and expanding constitutional rights. Another current, feminist constitutionalism, seeks to remedy deficiencies resulting from the failure of the law and constitutions to sufficiently protect the rights of women. These two constitutionalist currents could be regarded as constituting an unnecessary conceptual separation, since they share a fundamental convergence in their view of the important role constitutional judges can play in the advancement of women's rights. This note argues that the underlying principles of the various currents of constitutionalism rest on the same legal foundation, that is, a legal system comprised of a constitution with normative force and an institutionalized system of constitutional justice. As a result, the practice of transformative constitutional adjudication is a more realistic and constructive means by which to foster transformative social change than either of the aforementioned constitutionalisms since it does not require the institutionalization of a specific constitutional framework. All that is required is the transformative conviction of the constitutional judges themselves. This note is organized in the following way: first, I analyze the concept of constitutionalism in general; second, I explain transformative constitutionalism; third, I describe feminist constitutionalism; fourth, I propose the concept of transformative constitutional adjudication that combines principles from both of the previously reviewed constitutionalisms; fifth, I examine eight specific cases from various countries where transformative constitutional adjudication was employed in the resolution of the constitutional issue raised.*

Keywords: *Constitutionalism, transformative constitutionalism, feminist constitutionalism, transformative constitutional adjudication, constitutional judges.*

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Resumen: *La corriente del constitucionalismo transformador se basa en conseguir cambios sustanciales en la realidad social a través de los derechos y del papel de los jueces constitucionales. Al mismo tiempo, existe una corriente constitucionalista feminista que lucha por una reivindicación de los derechos de las mujeres desde la Ley y la Constitución, lo que podría ser, primero, una separación conceptual innecesaria y, segundo, una convergencia fundamental a través del papel de los jueces constitucionales para la reivindicación de los derechos de las mujeres. Esta nota sostiene, como tesis central, que las corrientes del constitucionalismo tienen la misma base jurídica representada en una Constitución con fuerza normativa y la justicia constitucional, por lo que es más realista y valioso referirse a lo que llamo una adjudicación constitucional transformadora, ya que no se necesita un marco constitucional específico, sino sólo la convicción transformadora de los jueces constitucionales. Así: primero, analizo el constitucionalismo y su significado como fenómeno; segundo, explico el constitucionalismo transformador; tercero, describo el constitucionalismo feminista; cuarto, propongo el concepto de adjudicación constitucional transformadora que conjuntaría ambos postulados de los constitucionalismos revisados; quinto, examino algunos casos en la práctica constitucional en los que se demuestra la adjudicación constitucional transformadora.*

Palabras clave: *Constitucionalismo, constitucionalismo transformador, constitucionalismo feminista, adjudicación constitucional transformadora, jueces constitucionales.*

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I. Introduction

Contemporary constitutionalism is a theoretical, ideological, and methodological doctrine which can be characterized as a currently existing phenomenon despite a lack of uniformity among its various currents.[1] Transformative consti-

[1] We can identify the principle currents of constitutionalism as: *principialista* (*focused on rights*), *garantista*, *popular,* and *dialógico*. *See* Luis Prieto Sanchís, *El constitucionalismo de los derechos*, 71

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tutionalism (hereafter, "TC") and feminist constitutionalism ("FC") envision reformulating legal propositions in such a way that the constitution, constitutional rights, and constitutional judges ("CJs") can become the instruments through which social transformation and the advancement of women's rights can be achieved. Although these two perspectives present an apparent conceptual separation,[2] they converge when the focus is limited to viewing the constitution, rights, and CJs as the specific instruments for advancing their goals. This leads to two key questions: Is a specific constitutional institutional design necessary to promote the advancement of women's rights? And can the role of CJs be transformative of women's reality, even when the juridical system itself cannot be characterized as TC or FC?

Several issues should be addressed before developing answers to these questions. First, when we say that a specific institutional design is not necessary, for example, a feminist design, it should be emphasized that there is a substantial difference between what is necessary and what is desirable. This note will not address the desirability of a feminist institutional constitutional design with a strong gender perspective. Rather, I aim to demonstrate that even with an unreliable or unstable institutional design, CJs still retain the ability to harmonize the demands of the constitution and the promotion of women's rights. Second, my goal here is not to compare the merits and shortcomings of TC and FC, but to outline the principal objectives of each viewpoint and identify the convergences between the two. Finally, it is essential to note that the concept of transformative constitutional adjudication ("TCA") proposed here will be developed as both a descriptive and a normative proposition, that is, it will describe existing constitutional judicial practice as well as offer a new judicial perspective that can be incorporated into this practice.

Thus, the objectives and methodology of this note will be: 1) to provide a general analysis of constitutionalism as a phenomenon, highlighting its theory, ideology, and method; 2) to identify several of the premises of TC, with the aim of highlighting the role that CJs play in bringing about change at a societal level; 3) to point out some of the main arguments of FC to highlight its ideological purpose; 4) to describe how constitutional adjudication is an area of convergence between TC and FC, and to propose the concept of TCA; 5) to show, through a compilation of constitutional rulings

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Revista Española de Derecho Constitucional 47-72 (2004); Lugi Ferrajoli, *Constitucionalismo principialista y constitucionalismo garantista*, 34 Revista Doxa 15-53 (2011); Roberto Niembro, *Una mirada al constitucionalismo popular*, 38 Revista Isonomía 191-224 (2013); Roberto Gargarella, *El nuevo constitucionalismo dialógico frente al sistema de los frenos y contrapesos*, 14 Revista Argentina de Teoría Jurídica 1-3 (2013).

[2] I refer to an "apparent conceptual separation" because although different constitutionalisms favor different approaches to constitutional institutional design, they all have the following convergences: 1) in their conceptual connections: constitution, rights, democracy, constitutional review; 2) in recognizing the dual dimension of the constitutional state; 3) in the objection or defense at constitutional review; and 4) in requiring a solid legal basis for the legal system generated by a constitution.

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from legal systems that do not have a feminist institutional design, that TCA has considerable relevance for the advancement of women rights, which will reinforce the hypothesis of this text, namely, that the transformative and feminist conviction of CJs can significantly facilitate the advancement of women's rights.

II. Constitutionalism

The term constitutionalism refers to a complex set of historical, political and constitutional phenomena that, for many authors, began with the Magna Carta of June 15, 1215, in England.[3] It represents the origin of the contemporary constitutions, the idea of limiting or controlling public power, and the recognition of various individuals' rights. From the beginning, constitutionalism has represented a normative proposition about how the constitutional text, democracy, rights, and justice should function in modern society.[4] We could refer to foundational constitutionalism as the conception and practice of public power restrained to guarantee certain specified spheres of freedom.[5] This conception was reflected in the liberal ideals of the late eighteenth century and functioned as an instrument of legitimization in the legal-political discourse of that time.[6]

The concept of constitutionalism functions both as a theory relating to the constitutionalization of legal systems, as well as an analytical point of departure for evaluating a constitution as a normative and axiological model.[7] Therefore, constitutionalism can also be understood as an ideology founded on a distrust of political power in general, as well as a distrust of the way democracy itself might function in practice.[8] Finally, constitutionalism can be regarded as a methodology which allows constitutional principles and fundamental rights to act as a bridge between law and morality.[9]

Thus, constitutionalism is a phenomenon comprised of all the aforementioned characteristics, as well as the constitutionalization of the law itself through formal written constitutions which consist of a host of specifically enumerated rights and set boundaries for legislation, jurisprudence, the

[3] Martín Carlos de Cabo, Pensamiento crítico, constitucionalismo crítico 57 (Trotta, 2014).

[4] Peter Häberle, *El constitucionalismo como proyecto científico*, 29 Revista de Derecho Constitucional Europeo 105 (2018).

[5] Luigi Ferrajoli, *supra* note 1, at 17.

[6] Maurizio Fioravanti, Constitucionalismo. Experiencias históricas y tendencias actuales 17-ff. (Trotta, 2009).

[7] Paolo Comanducci, *Formas de (neo)constitucionalismo: un análisis metateórico*, 16 Revista Isonomía 97-99 (2002).

[8] *Ibid*., at 100.

[9] *Ibid*., at 101.

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action of political actors, and social relations.[10] In other words, the theory, ideology, and methodology of constitutionalism manifest themselves in institutional and social reality. Here, constitutionalism shares the evolution of the different models of the rule of law.[11] As well as the idea of a juridical-political project (*the liberal model*), and nowadays of a constitutional project for a political community (*a constitutional democracy*). Therefore, all constitutionalist currents pursue specific aims and objectives and offer their own methodology for the analysis and evaluation of new proposals to determine the degree to which they might advance or frustrate those aims and objectives. Among these currents are TC and FC.

III. Constitutionalism with a Transforming Conviction

TC considers that the objective of a constitution is not only to control power and preserve fundamental rights,[12] but to link the constitutional text with social progress.[13] In other words, it is a constitutionalism that favors social transformation to make manifest the basic pillars of the social state.[14] Given this premise, the constitution, rights, and the role of CJs are of central importance since TC is based on a model of strong constitutional justice as opposed

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[10] Manuel Atienza, Curso de argumentación jurídica 29 (4th ed., Trotta, 2016).

[11] I refer to three stages of the rule of law: 1) the liberal stage, which is based on elective representation, the rights of citizens, and the separation of powers, which together could be summarized as mechanisms for the protection against the arbitrariness of public administration through the law; 2) the constitutional stage, where a large number of human rights were included within states (individual, political, and social rights), as well as the inclusion of a system of constitutional justice for the protection of these rights; and 3) the contemporary stage, which involves a complex synthesis between the central elements of the liberal state, the social state, and constitutional democracy, *see* Gustavo Zagrebelsky, El derecho dúctil. Ley, derechos, justicia 23 (9th ed., Trotta, 2009); Robert Alexy, *La institucionalización de los derechos humanos en el Estado constitucional democrático*, 8 Derechos y Libertades 21-ff. (2000); José Ramón Cossío, *Constitucionalismo y multiculturalismo*, 12 Revista Isonomía 84 (2000).

[12] Although the concept of, and trend towards, transformative constitutionalism was developed in Colombian constitutionalism after the promulgation of the Constitution of 1991, the contributions of South African constitutionalism has also been significant. In both cases, judicial practice has developed new theoretical approaches for transformative constitutionalism. On the reception and evolution of transformative constitutionalism in South Africa, *see* Theunis, Roux, *Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?*, 2 Stell LR 258-ff. (2009); Cass Sunstain, *Social and economic rights? Lessons from South Africa*, 11 Constitutional Forum 123-125 (2000).

[13] Mauricio García Villegas, *Constitucionalismo aspiracional*, 29 Revista Araucaria, 79 (2013).

[14] Jorge Roa Roa, *El rol del juez constitucional en el constitucionalismo transformador latinoamericano,* in MPIL Research Paper Series. Max Planck Institute 3 (Bogdandy, A. & Peters, A. eds., 2020).

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to a weak one.[15] Hence, even judicial activism finds strong institutional support in TC due to its role in establishing new rights.[16] However, this activist role of the CJs is not regarded as a monopolization of the fundamental collective decision-making function. On the contrary, TC envisions CJs using their position to encourage action by other governmental powers to ensure the constitutional text has an impact on social reality.[17] Such a role is particularly important in a society where there is a high degree of inertia in the legislative and executive branches.[18]

Thus, the role of CJs can be perceived in either of two ways: it can be perceived as overly intrusive regarding the other branches of power, or it can be viewed as complementary to democratic values. TC sees that role as complementary to democratic values because rulings by CJs can only transform society if the transformation is supported by the society itself.[19] In this sense, the view of democracy adopted by TC is a constitutional democracy where all of the various state powers must coordinate together to realize a constitutional project. This is an important issue considering the difficulty generally associated with advancing social rights since any transformative ruling, without the support and participation of the other state powers, would likely result in becoming nothing more than an unenforceable declaration.

The notion of fundamental rights is central to TC, particularly those rights with a social dimension. Since the protection of these rights by CJs in societies with a welfare state that is still in the process of construction, or where structural inequalities exist, it contributes to a consolidation of the levels already achieved on these societies.[20] South African TC can be

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[15] A system having strong constitutional justice, that is, where the constitutional court has the last word, does not mean that transformative constitutionalism is in conflict with other political or social institutions, rather, one of its objectives is to strengthen such institutions. *See* David Landau, *A Dynamic Theory of Judicial Role*, 55 Boston College Law Review 1535-ff. (2014). Likewise, some positions arising in popular and dialogical constitutionalism refer to a weak form of constitutional justice and suggest that institutional dialogue offers the best way for social rights to be realized. *See* Mark Tushenet, Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law 228-ff. (Princeton University Press, 2008).

[16] However, judicial activism is difficult to define since it is a phenomenon that moves between arbitrariness and judicial discretion without a clear demarcation; thus, a rethinking of judicial activism would have to be considered. *See* Julio Muñoz Mendiola, *Un replanteamiento al significado del activismo judicial*, 34 Universitas. Revista de Filosofía, Derecho y Política de la UC3M 75-96 (2021).

[17] Rosalind Dixon & Roux Theunis, *Making Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa*, 64 UNSW Law Research Paper 1-ff. (2018).

[18] Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited*, 5 Int. J. Const. Law 403-ff. (2007).

[19] Armin Von Bogdandy, *Ius constitutionale commune en América Latina: una mirada al constitucionalismo transformador*, 34 Revista del Estado 23 (2015).

[20] Jorge Roa Roa, *supra* note 14, at 10.

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differentiated from Latin American TC since the latter contains a complex convergence in two areas: first, between human rights, democracy, and the rule of law, and second, between the constitutional courts and the regional courts charged with protecting human rights.[21] However, there is no doubt that the tenets of TC presuppose that CJs have a transformative and openly activist conviction.

IV. Constitutionalism with a Feminist Ideology

In order to analyze FC, it is necessary to first consider several features of feminism in general. First, it is characterized by *polyconceptualization*[22] in the sense that distinctions are frequently made between different feminisms.[23] Second, there is a theoretical duality contained in feminism, for example, it can be regarded as a theory of equality, or as a theory about the objectivity of the law.[24] Lastly, feminism also has a dual practical aspect in that it has a constitutional character generally focused on the individual rights of women in a given society,[25] but also has a universal character in the sense that the international community has begun to take its demands into consideration, as well as the fact that it has become a consolidated global social movement.[26] However, due to the complexity of feminism, the analysis here will be limited to its legal and constitutional dimensions.

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[21] In the Latin American region, transformative constitutionalism is also called *ius constitutionale commune*, *see* Armin Von Bogdandy, *supra* note 19, at 16-ff.

[22] Owen Fiss, ¿Qué es el feminismo?, 14 Revista Doxa 321 (1993).

[23] Distinctions such as *radical feminists*, *cultural feminists*, *liberal feminists,* and *socialist feminists* which should be analyzed and evaluated from an ontological perspective. *See* Gemma Nicolas Lazo, *Feminismos, concepto sexo-género y derecho*, in Análisis feminista del Derecho. Teorías, igualdad, interculturalidad y violencia de género 15-28 (Sánchez Urrutia, Ana & Pumar Beltrán, Núria, coords., 2013).

[24] *Ibid*.

[25] James Tully, Strange multiplicity. Constitutionalism in age of diversity (Cambridge University Press, 1995).

[26] For example, Article 1 of the Universal Declaration of Human Rights of 1948 contains an expansive mandate for equality which has expressed itself in various ways within the UN, such as *The Spotlight Initiative*, which is a campaign between the European Union and the UN aimed at eliminating all forms of violence against women and girls; and, the *Women, Girls and Adolescents in Latin America and the Caribbean program*, which is a project of the Inter-American Commission of Human Rights. These are available respectively at: *https://www.un.org/es/spotlight-initiative/* and *https://cidhoea.wixsite.com/mujeres*. On the analysis and perspectives of feminism as a social movement, *see* Grace Prada Ortiz, *El feminismo, un movimiento social alternativo*, 19 Repertorio Americano 36-ff. (2005); Marta Fuentes, *Feminismo y movimientos populares de mujeres en América Latina*, 118 Revista Nueva Sociedad 55-ff. (1992); Giovanna Mérola, *Feminismo: un movimiento social*, 78 Revista Nueva Sociedad 112-ff. (1985).

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One starting point is in the field of critical legal studies, where the contingency of law is criticized because it lacks objectivity in its goals.[27] Thus, feminism would try to use the law to reverse: 1) the differences between women and men;[28] 2) the ethic of justice that fails to recognize inequalities between women and men;[29] and 3) the domination and exploitation of women by men.[30] In the constitutional sphere, the feminist perspective recognizes that the constitutional paradigm is based on a principle of equality,[31] but objects to the fact that historically it has primarily benefitted men,[32] effectively excluding women from the founding covenant of contemporary constitutional states.[33] From that perspective, therefore, the constitutional state and constitutionalism have demonstrated they are not a sufficiently effective tool in the struggle to reverse the structural inequalities faced by women, that is, to improve democracy.[34] In this sense, FC adopts the demand for equality originating in the liberal thought of the late eighteenth century, as well as from feminist theory, with the aim of [re]conceptualizing equality as the central axis of the constitutional state.[35]

FC is a legal current that has developed out of several theoretical bases.[36] These bases are founded not only in a legal-institutional vision, but

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27 Critical legal studies are a field of study focused on an alternative use of the law which would promote the rights of excluded social groups, such as people of color, women and workers. *See* Matthew Kramer, Critical legal theory and the challenge of feminism, 265-ff. (Rowman & Littlefield, 1995).

28 Deborah Tannen, You just don't understand: women and men in conversation 87-ff. (William Morrow, 1990).

29 *See* Carol Gilligan, In a difference voice (Harvard University Press, 2003).

30 *See* Catharine Mackinnon, Feminism unmodified (Harvard University, 1987).

31 The post-war period saw advances in the equality between women and men, but these advances were incomplete since they were limited to extending to women the rights already enjoyed by men. In addition, women's rights continued to be affected by gender roles in the family and in the private sphere. *See* Ruth Rubio-Marín, *The (dis) establishmente of gender: care and gender roles in the family as constitutional matter*, 4 International Journal of Constitutional Law 787-818 (2015).

32 Some of the most radical feminist currents regard society as being comprised almost exclusively of constructs of male domination over women, which makes the problem of addressing inequality almost impossible to resolve. For these currents, see Ignacio Álvarez Rodríguez, *El movimiento feminista y la Constitución como norma*, 281 Revista de la Facultad de Derecho de México 84 (2021).

33 Nilda Garay Montañez, *Constitucionalismo feminista: evolución de los derechos fundamentales en el constitucionalismo oficial*, in Igualdad y democracia: el género como categoría de análisis jurídico. Estudios homenaje a la profesora Julia Sevilla Merino 270 (Corts Valencianes 2014).

34 *Ibid*.

35 *Ibid*., at 270-271.

36 Someone could argue, by contrast, that a feminist legal theory is not necessary since an equality legal theory would be sufficient. Fiss, Owen, *supra* note 22, at 335.

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also in a philosophical-political one.[37] For example, critical legal studies scholarship includes the notion that it is desirable that the law be used as a tool to advance women's equality, that is, an instrumental use of the law.[38] This is because FC reveals the dysfunction of the liberal model: it was not only biased in the creation of the legal system and its laws, but was also founded on the complete exclusion of women from participation in many areas.[39]

Thus, FC would seek to embed feminist principles and issues into the institutional design of a constitutional system, giving it a strong gender perspective.[40] An important point to note is that some of the most radical currents of feminism sometimes overlook the fact that the constitution represents a common project to support diverse and often conflicting ideologies.[41] With that in mind, a fundamental objective of FC would be the reformulation of constitutions within legal systems, which implies at least three possibilities: 1) feminist constituent processes will include women as constituent legislators, and feminist rights, principles, and values will be incorporated into the text of new constitutions;[42] 2) constitutional reforms will be carried out with true feminist participation, especially when constitutional norms relating to issues affecting the rights of women are being debated and established;[43] 3) constitutional adjudication will include interpreting and applying the consti-

[37] *See* MALENA COSTA, FEMINISMOS JURÍDICOS (Ediciones Didot, 2016); Jenny Chapman, *La perspectiva feminista*, in TEORÍA Y MÉTODOS DE LA CIENCIA POLÍTICA, (Marsh, David & Stoker, Gerry, eds., 1995).

[38] OWEN FISS, *supra* note 22, at 339-ff.

[39] Ana Marrades Puig, *Los derechos políticos de las mujeres: evolución y retos pendientes*, 36 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIOL, 196-ff (2001).

[40] Baines, Beverley *et al.*, *Introduction: The Idea and Practice of Feminist Constitutionalism*, in FEMINIST CONSTITUTIONALISM. GLOBAL PERSPECTIVES 1-ff. (Baines, Beverley *et al.,* eds., 2012).

[41] ÁLVAREZ RODRÍGUEZ, *supra* note 32, at 85. In fact, feminism can serve as an ideological instrument at the service of populism. This would represent a reduction in the value of individual autonomy since the credibility of their rationally plausible and fully debatable claims depends on a separation between populism and feminism. *See* Alfonso García Figueroa, *¿Unidas podemos?* La deriva populista del feminismo, in ESTUDIOS SOBRE MUJERES Y FEMINISMO. ASPECTOS JURÍDICOS, POLÍTICOS, FILOSÓFICOS E HISTÓRICOS 119-ff. (Escribano Gámir, María, coord., 2021).

[42] The recent Constituent Convention in Chile represents the first time in world history in which a constituent process will be entirely made up of men and women on an equal basis.

[43] It could be objected that a constitution should enshrine generic constitutional concepts (equality, freedom, justice), and not particular viewpoints about those concepts (christian, marxist, or feminist), because if feminism were to become the religion of the state as a result of constitutional reform, then the constitution will have lost its neutrality (ideological, political, or religious) and the society would be moving in a regressive direction. Itziar Gómez, *¿Qué es eso de reformar la Constitución con perspectiva de género? Mitos caídos y mitos emergentes a partir el libro "Una Constituyente feminista"*, 16 EUNOMÍA. REVISTA EN CULTURA DE LA LEGALIDAD 312-329 (2019).

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tution from a feminist perspective, for example, interpreting constitutional objectives and goals in a manner which advances women's rights and strives to achieve an equality that is actually reflected in the social reality.[44] These three possibilities are not mutually exclusive, but rather represent a possible integration of the theoretical and practical aspects of FC. However, of the three, constitutional adjudication offers the most immediate, realistic, and concrete option for achieving the objectives of FC.

V. Constitutional Adjudication with a Transformative Conviction

Before proposing the concept of TCA, it is necessary to point out two areas of convergence between TC and FC. First, there is a convergence in their vision of the Constitution, and the Fundamental Rights it establishes as an instrument of social change, not merely as a legal or political discourse. Second, there is a convergence in their reactionary character for achieving a realization of a constitutional state. These two convergences between TC and FC would be based on a specific institutional design; however, both constitutionalisms would find it difficult to their institutional designs work in the social reality. This is where TCA would be important to achieve the goals of TC and FC, since TCA only needs an institutional design that contemplates a constitutional justice system (*a constitution with normative force and a strong model of constitutional justice*).[45]

At this point, TCA would be a viable and realistic option to make possible women's rights, even in precarious contexts (*legals, politicals, and socials*).[46] This would situate the TCA with a means-goals structure,[47] but also with a

[44] Regarding adjudication of the Constitution, if a woman can apply the law with the same capabilities as a man, why could a man not do the same as a woman regarding issues relating to justice? Alfonso García Figueroa, *Feminismo de Estado: Fundamentalmente religioso y religiosamente fundamentalista,* 17 Eunomía. Revista en Cultura de la Legalidad 358-376 (2019).

[45] A model of strong constitutional review is where CJs have the authority to review, modify or invalidate laws for being contrary to the constitution. Even intermediate models between weak and strong forms are included. An example of this is the Canadian Supreme Court. That Court can review and invalidate laws for being contrary to its bill of rights, however, Canadian legislation also contains a "notwithstanding clause" which gives representative assemblies the power to leave a ruling of the Canadian Court without any effect. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 The Yale Law Journal 1353-1359 (2006).

[46] The tenets of both TC and FC acknowledge these precarious contexts since both constitutionalism's face adverse conditions that inhibit progress toward their aims and objectives. For example, FC aims to abolish the patriarchal structure of the legal system.

[47] From my perspective, all public power and its exercise presents this means-ends structure, that is, a thesis of the instrumentality of public power which establishes that this power represents a means that is oriented to the achievement of specific constitutional aims and objectives that impact social reality.

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pluralist character since the constitutional text is a framework that contains all the projects and principles of a pluralistic society,[48] therefore, TCA will have a plurality of goals to be achieved. Here is where a feminist institutional design would not be essential since the goal of TCA would be change the legal, political, institutional, and social structures designed under a patriarchal or unequal logic for women.[49]

The concept of TCA that I propose is based on three pillars: 1) the foundational nature of constitutional adjudication in constitutionalism;[50] 2) the historical-pragmatic role of CJs as a brake on public and political power; and 3) a kind of "cosmopolitan constitutionalism".[51] CJs adhering to these pillars in the context of expanding rights and freedoms, would be playing an openly activist role, but a role that was, nevertheless, an institutional one. From a political perspective, such behavior could invite criticism by other governmental powers for what could be perceived as overreach for CJs.[52]

Of course, the transforming conviction of the CJs needs other elements, for example, in Latin America there are several factors that helping to this conviction, such as: 1) the inclusion of human rights in the region through the constitutional blocks; 2) the regional jurisdiction for the protection

[48] Jaime Cárdenas Gracia, Del Estado absoluto al Estado neoliberal 106 (UNAM-IIJ, 2017).

[49] It is not my intention to trivialize the tenets or objectives of feminist constitutionalism. I am not saying that constitutional interpretation and application are sufficient, rather, that such a proposition represents a practical and nondiscursive perspective. I would only emphasize that constitutional adjudication is a powerful tool for promoting change, and although it is not a unique solution, it can help to bring about change in different dimensions of the state, that is, in its legal, political, and social spheres.

[50] Diego Valadés, *La garantía política como principio constitucional*, 132 Boletín Mexicano de Derecho Comparado 1265-1267 (2011).

[51] Cosmopolitan constitutionalism is based on the fact that although a uniform constitutional state does not exist since constitutions have different meanings in different legal systems, they still have practical convergences in the area of constitutional justice that stand out. Gustavo Zagrebelsky, *Jueces constitucionales*, 117 Boletín Mexicano de Derecho Comparado 1136 (2006).

[52] An example of this was the so-called *Warren Court* in the United States which played a valuable role in the expansion of individual rights and liberties of great importance for American society. The activism it displayed, however, resulted in a certain level of societal ambivalence toward the Court, since although its conduct was institutional, some believed the Court was improperly intruding into the political sphere. However, the fact that significant rights were obtained during that time through constitutional adjudication cannot be denied. *See* Justin Driver, *The Constitutional Conservatism of the Warren Court*, 5 California Law Review 1101-ff. (2012); Robert McCloskey, *Reflections on the Warren Court*, 7 Virginia Law Review 1229-ff. (1965). In its paradigmatic case, *Brown v. Board of Education (1954)*, the Court used constitutional adjudication to begin to reverse the long-standing inequality and deeply embedded discrimination that had been effectively institutionalized in that North American society. This case can be consulted at: *https://supreme.justia.com/cases/federal/us/347/483/#tab-opinion-1940808.*

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of these rights;[53] and 3) the so-called *conventional control* made by national courts.[54] These exogenous factors have allowed CJs to use their interpretative and adjudicative powers to become agents of change. This does not mean that their convictions are always desirable or correct from the point of view of those who prefer that CJs have a feminist conviction, as is proposed in the thesis of this note. However, I am not interested here in making a historical defense of constitutional adjudication, I merely want to point out that by means of these adjudications, it is possible for CJs to achieve structural changes,[55] and, that this possibility does not necessarily depend on a legal system having a constitutional framework designed in conformance with the principles of FC.

Hence, TCA, as presented, provides an alternative method for reversing specific manifestations of structural inequality.[56] From its institutional position within the legal system it can also provide a louder voice to demands for social change. TCA is further supported by the recognition that CJs contribute to social transformation through their interpretation of the constitutional text due to their awareness of the effects of their decisions, particularly when they are designed to remedy structural problems.[57] In this context, constitutional adjudication with a feminist ideology would be a significant tool for furthering social change through constitutional interpretation. Compared to the other branches of government, CJs are uniquely positioned to promote constitutional goals that impact society,[58] especial-

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[53] Armin Von Bogdandi & René Urueña, *Comunidad de práctica en DDHH y constitucionalismo transformador en américa latina,* special issue ANUARIO DE DERECHOS HUMANOS 15-34 (2020). Here, it is appropriate to clarify that if we are considering the transforming conviction of CJs at a global level, we must consider the fact that in countries such as South Africa or India there are no mechanisms such as *conventional control* created by the Inter-American Court of Human Rights, which highlights the importance of conviction on the part of their CJs to transform their social reality.

[54] Heideer Miranda Bonilla, *El control de convencionalidad como instrumento de diálogo jurisprudencial en América Latina*, 12 REVISTA JURÍDICA IUS 1-ff (2015).

[55] We should take into account the variables that could have an impact on this hypothesis, for example, achieving change by way of constitutional adjudication also requires strategic litigation, as well as the involvement and collaboration of other public entities, including the government in power. As a result, a ruling by a CJ is more than a procedural act that puts an end to a legal conflict, it is a decision with political transcendence. RAÚL BOCANEGRA SIERRA, EL VALOR DE LAS SENTENCIAS DEL TRIBUNAL CONSTITUCIONAL 19 (Instituto de Estudios de Administración Local, 1982).

[56] JESÚS DE LA TORRE RANGEL, EL DERECHO COMO ARMA DE LIBERACIÓN EN AMÉRICA LATINA, SOCIOLOGÍA Y USO ALTERNATIVO DEL DERECHO 124 (CEDH-UASL-CEJS, 2006).

[57] In this regard, CJs would be empowered as the highest interpreter and defender of constitutional rights, defining how authorities should act with a view toward concretizing these rights and solving identified social problems. Nestor Osuna, *Las sentencias estructurales*, in JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES Nº 5. LA PROTECCIÓN DE LOS DERECHOS SOCIALES. LAS SENTENCIAS ESTRUCTURALES 89-125 (Bazán, Víctor, ed., 2015).

[58] ROSALIND DIXON, & ROUX THEUNIS, *supra* note 17, at 1-ff.

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ly when the legislative and executive branches are paralyzed by inertia.[59] Thus, TCA represents a realistic vision for social transformation in contexts where institutional, political, and social conditions reveal an unequal protection of women's rights.

VI. Some Examples of Transformative Constitutional Adjudication

In this section, I will provide some examples of how TCA was able to advance women's rights, even in adverse contexts. The aim here is not a quantitative analysis, but rather a qualitative analysis, highlighting the transformative role played by CJs in the area of women's rights. My objective is to clarify how TCA has been employed in judicial practice. The principal point here is that neither a specifically transformative nor feminist institutional design is necessary, since in the legal systems where TCA has been employed, CJs were operating within a typical institutional framework based on a constitution with normative force and characterized by strong constitutional review. This reinforces the hypothesis that TCA is realistic, valuable, and viable, and can contribute to the advancement of women's rights even in adverse contexts.

The following information shows eight cases in which the adjudication by CJs was transformative and promoted women's rights. Nevertheless, there will also be cases in which the adjudication represented a setback for women's rights. The analysis provides the facts of each case, the decision, the constitutional framework of the relevant legal system, and reviews the resulting repercussions on women's rights.

Ruling:	*Facts/decision about case:*
Supreme Court of United States United States v. Virginia, 1996 (EE UU)[60]	The Virginia Military Institute, which provides university-level academic and military training to its students, denied admission to a female applicant because of the Institute's tradition and rules which reserved admission exclusively to men. The applicant filed a discrimination claim, and The District Court ruled in favor of Institute since it was not possible to force the Institute to admit women. The Fourth Circuit reversed and ordered to State of Virginia to implement a parallel program for women (*Virginia Women's Institute for Leadership)*. Later, The Court of Appeals acknowledged that both Institutes have substantively comparable benefits to his students. How ever, this decision was vulnerable to challenge since it merely constituted a new form of the previously rejected doctrine of "separate but equal". The case would reach the Supreme Court which held the discrimination violated the Fourteenth Amendment's Equal Protection Clause

[59] Rosalind Dixon, *supra* note 18.

[60] This case can be consulted at: *https://supreme.justia.com/cases/federal/us/518/515/case.pdf*.

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which prohibits discrimination based on gender.[61] Thus, the Institute was required to provide training in the same form and conditions for women as it did for men.

Constitutional framework:

The U.S. Constitution is very general in its content and reduced in its articles (*7 articles & 27 amendments)*, and it is not a text that is continuously reformed, its adaptation has been by The Supreme Court.[62] Therefore, the institutional design of the Constitution is not feminist, altought, the Fourteenth Amendment has a generic equality clause which has helped to Court rules gender cases.

Repercussions:

In this case, the constitutional adjudication was transformative and resulted in advancing women's rights. The Court's decision established the precedent that any law attempting to deny women equal rights, freedoms, or opportunities due to her gender would be deemed unconstitutional. This occurred despite not having a FC institutional design.

Ruling:

Constitutional Court of Chile Rol 740/2007 (Chile)[63]

Facts/decision about case:

A group of deputies challenged a regulatory decree that legalized the use of emergency hormonal contraception (*the pill and IUDs*) claiming it would violate the Constitution, specifically, the right to life protected in Article 19.1. The Court found the decree violated the constitutional protection of the unborn child, whose life begins at conception, since the contraception would be abortive. The Court based its decision on the constitutional personhood of the human embryo since Chilean constitutional doctrine has affirmed that constitutional protection of the person begins at the moment of conception. Thus, because the exact effects of emergency hormonal contraception cannot be conclusively established, there exists a reasonable doubt as to its abortive nature. Therefore, the unborn child should be protected. In other words, the *pro persona* principle requires the interpretation that most protects the person, and as a result, the life of the unborn child should be defended.

Constitutional framework:

The current Chilean Constitution is the product of a dictatorship, therefore, it does not have a FC institutional design; however, Article

[61] The U.S. Supreme Court relied on *Mississippi University for Woman v. Hogan (1982)*, which held that a statute prohibiting a man from entering an all-women's nursing school was unconstitutional, and *J.E.B. v. Alabama ex rel. T.B. (1994)*, which held that peremptory challenges of jurors based solely on their gender to be unconstitutional. These cases can be consulted at: *https://supreme.justia.com/cases/federal/us/511/127/#tab-opinion-1959474 https://supreme.justia.com/cases/federal/us/458/718/#tab-opinion-1954696*.

[62] Perhaps in the Ninth Amendment is an obligation of CJs to adapt the constitutional text to the social reality, at least with regard to rights and liberties, the Amendment establishes *that the enumeration of certain rights in the Constitution cannot be understood as a denial or disregard of others that the people retain*.

[63] This case can be consulted at: *https://www.tribunalconstitucional.cl/expediente*.

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	19.5 prescribes equality between women and men before the law and in the exercise of fundamental rights.[64] *Repercussions:* The constitutional adjudication was to the detriment of women and represented a setback in their sexual and reproductive rights. It also had the effect of promoting inertia on the part of public authorities. It would be ten years before the Court would rule again on the rights of women in Rol 3729-17,[65] a case which recognized the fundamental rights of women and would be a step toward free abortion for Chilean women.
Ruling: *Constitutional Court of Spain* STC 12/2008 (Spain)[66]	*Facts/decision about case:* A group of deputies challenged an organic law that established gender parity in the nomination of candidates of parties, federations, coalitions of parties, and electoral groupings. The Court decided the law was constitutional since the aim of the legislation was to overcome a social reality characterized by the lower presence of women in public life. Therefore, under the substantive mandate of material equality of Article 9.2 of the Constitution, the Court required political parties to have a balanced composition of women and men.[67] *Constitutional framework:* The Spanish constitutional framework does not present an institutional design of FC, nor does it contain norms that explicitly guarantee women's rights. However, some norms could be considered neutral, such as Articles 14, 23.2, 35.1, and 9.2, the last being the one the Court relied on to resolve this dispute via its mandate of material equality. *Repercussions:* In this case, the constitutional adjudication was both transformative and collaborative with respect to the legislature, guaranteeing women's rights by the use of gender quotas which remedied the structural inequality faced by Spanish women in the political sphere.
Ruling: *Mexican Supreme Court* Amparo en revisión 1340/2015 (Mexico)[68]	*Facts/decision about case:* A woman challenged the constitutionality of a civil law provision that regulated presumptions concerning the determination of compen satory pensions upon the termination of a marriage. She claimed it failed to take gender perspectives into account and perpetuated stereotypes.

[64] Perhaps by the time this note is publised, the new Chilean constitution will have already been promulgated; here I am referring to the constitutional text precedent to this new text.

[65] This case can be consulted at: *https://www.tribunalconstitucional.cl/expediente.*

[66] This case can be consulted at: *http://hj.tribunalconstitucional.es/*es-*ES/Resolucion/Show/6244*.

[67] The only dissenter in this case argued against gender quotas claiming they violated the guarantees of ideological freedom and self-organization of political parties under Articles 6 & 22 of the Constitution. The dissent also emphasized the freedom of creation and exercise of political parties, as well as the absence of any constitutional obligation regarding quotas in other European countries such as France, Germany, Italy, Belgium, and Portugal. As a result, the dissent argued quotas should not be imposed on political parties by the legislature.

[68] This case can be consulted at: *https://www.scjn.gob.mx/sites/default/files/igualdad/sentencias/documento/2016-12/2%20CIVIL%20A*R*%201340-2015%2012AMIJ.pdf.*

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The rule did not specifically differentiate between men and women concerning the granting of a pension, but it indirectly excluded the possibility that the woman might be unable to work or develop professionally because she had been dedicated primarily to the care of her home and her children. The Court decided the law was unconstitutional since it disregarded the structural inequality between men and women in professional development. The Court also determined that the division of labor constituted a real, objective, and legitimate cause of need for the woman who had devoted herself primarily to the home, and that this need should be alleviated to the extent possible by the one who had benefited over the years, which in this case was the man.

Constitutional framework:

The Mexican constitutional framework does not represent an institutional design of FC, but it does have more explicit protections for women. This is because, in addition to Article 4 of the Constitution establishing equality between men and women, there are also conventions that specifically protect the rights of women, such as CEDAW which is domestic law through the block of constitutional regularity that operates in the Mexican legal system.

Repercussions:

In this case, the constitutional adjudication was transformative for the rights of women since the decision authorized a new rule regarding the awarding of compensatory pensions to women from men. Therefore, family judges are required to not only apply gender perspectives to concrete cases involving structural inequality, but also to make use of the concept of intersectionality.[69]

Ruling:

Indian Supreme Court Shayara Bano *et al.* v. Union of India *et al.*, 2016 (India)[70]

Facts/decision about case:

An Indian woman claimed that her right to equality before the law was violated by the religious practices of triple talaq, polygamy, and nikah halala because they discriminated against women.[71] The Supreme Court decided that the practice of *triple talaq* was unconstitutional as it violated Articles 14 and 13.1 of the Constitution because it represented an inequality between men and women, as well as discrimination based on gender. Furthermore, the law that permitted this practice, *sharia of 1937*, which predated the effective date of the current Constitution, was, by way of Article 13.1, subject to conformity with the fundamental rights enshrined in the constitutional text.

69 That is, taking into account that discrimination against women based on sex and gender is indivisibly linked to other factors that affect them as well, such as race, ethnic origin, religion or beliefs, health, status, age, and sexual orientation, among others.

70 This case can be consulted at: *https://main.sci.gov.in/supremecourt/2016/6716/6716_2016_Judgement_22-Aug-2017.pdf*.

71 Talaq is a religious practice in Islam that allows a man to divorce his wife without any legal or religious consequences by merely uttering the phrase “I divorce” (“Talaq”) three times. This practice is unusual since it is a custom with deep cultural and social roots but is not contemplated in the holy book of Islam, the Koran.

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Constitutional framework:

The Indian constitutional framework is peculiar, as it is immersed in both a Western and a conservative context at the same time. Therefore, it does not have a FC institutional design, nor does it have norms that guarantee a gender perspective or address feminist demands.

Repercussions:

In this case, the constitutional adjudication was more than transformative for the rights of women, as the prevailing context in India is overtly patriarchal. The decision of the Court succeeded in banning the *triple talaq* at the national level.[72]

Ruling:

Federal Supreme Court of Brazil Habeas Corpus 124.306, 2016 (Brazil)[73]

Facts/decision about case:

The Supreme Court heard a habeas corpus petition filed by several people against the Public Prosecutor of Rio de Janeiro who had prosecuted patients, nurses, and doctors for having worked in a clinic that allegedly performed clandestine abortions. Although the actual constitutional dispute was about the imposition of preventive detention on the defendants, one of the dissenting opinions questioned the legitimacy of the underlying measure itself considering abortion was being determined to be constitutional during the first 12 weeks of pregnancy. The Court held that although the fetus did enjoy constitutional protection, this protection was gradual and increased along with fetal development. In contrast, the limitations on women's fundamental rights (i.e., personal autonomy, physical and psychological health, sexual and reproductive rights, and the violation of gender equality) were excessive and unwarranted.[74]

Constitutional framework:

The Brazilian constitutional framework does not present an institutional design of FC as such. However, Articles 3 and 5 of the Constitution recognize both the equality of men and women, as well as other gender-based rights. These legal protections are similar to human rights treaties the Brazilian state has signed as well, such as CEDAW.

Repercussions:

In this case, the constitutional adjudication was partially transformative regarding the rights of women, but only in the sense that the dissenting vote introduced the issue of decriminalization of abortion into the public debate, a debate in which experts, academics, as well as national and international institutions, would participate.

[72] Almost immediately following this ruling, the Government of India introduced a bill criminalizing this practice. However, the Indian Parliament would not approve such criminalization until 2019.

[73] This case can be consulted at: *https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12580345*.

[74] The dissenting opinion, by contrast, focused on the direct impact of intersectional discrimination on women's human dignity, which represented an argument with a very clear gender perspective.

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Ruling: *Constitutional Court of Colombia* T 398/2019 (Colombia)[75]	*Facts/decision about case:* The Constitutional Court dealt with a case involving the menstrual health of a homeless woman living on the street. The Court's ruling established that the State must provide at least a minimal level of hygiene and health services to this woman, as well as all women living in similar circumstances. The Court recognized a fundamental right to menstrual health services for this particular homeless woman, which thereby obligated various state entities to try to resolve a structural problem that affected many other homeless women.[76] *Constitutional framework:* The Colombian constitutional framework does not have an institutional design of FC. However, Articles 13, 42, and 43 of the Constitution recognize equality between women and men in different areas, such as marital relations. In addition, the Colombian state has signed various treaties that protect the rights of women, and which have direct application in its legal system such as CEDAW. *Repercussions:* In this case, the constitutional adjudication was transformative and structurally reinforced the rights of women. The Court's ruling sought to reverse a problem faced by all homeless women. It is worth noting that a right to menstrual health services is a right exclusively for women.
Ruling: *Polish Constitutional Court* K1/2020 (Poland)[77]	*Facts/decision about case:* The Constitutional Tribunal examined the constitutionality of a controversial law on family planning and the conditions that permit the termination of a pregnancy. The Court examined whether Article 4 of the law, which enumerated certain conditions for allowing the termination of a pregnancy, had a basis in the Polish Constitution. The Court ruled that it did not have a basis in the Constitution. This ruling can be understood as limiting both the free development of the personality and the sexual rights of women, since it prohibits abortion even in cases where the life or health of the woman is in danger. The central argument of the decision was that the inherent human dignity of the fetus attaches to it from the moment of conception. *Constitutional framework:* The Polish constitutional framework does not have an institutional design of FC, although it should be noted that Articles 33.1 and 33.2

[75] This case can be consulted at: *https://www.corteconstitucional.gov.co/relatoria/2019/T-398-19.htm*.

[76] Some of the actions indicated by the Court's ruling were: 1) investment in social spending to attend to homeless women who do not have access to adequate menstrual hygiene services; 2) legislative modifications and implementation of public policies in the short and long term; 3) analysis by the secretariats charged with this social problem to identify and keep track of women in this situation; and 4) implementation of a contingency plan which extended the right to menstrual health services in other parts of the country.

[77] This case can be consulted at: *https://trybunal.gov.pl/en/hearings/judgments/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy*.

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of the constitution establish equality between women and men in the marital, public, political, labor, social, economic, and educational dimensions.

Repercussions:

In this case, the constitutional adjudication was detrimental to the sexual and reproductive rights of women since the Court's decision has conclusively settled the abortion issue.

The following points can be inferred from the cases analyzed in the model: 1) the different legal systems of the analyzed cases did not present an institutional design of FC, nor a large number of constitutional norms with a gender perspective; 2) most of the constitutions in the systems that were analyzed contain a generic equality clause that expressly emphasizes equality between men and women; 3) the appearance of TCA as a method to resolve a claim for women's rights was contingent, but, of the eight cases reviewed, six complied with TCA; and 4) the constant that determines whether TCA will result in a favorable outcome for women's rights is the conviction of the CJs to carry it out, or as the case maybe, not to do so.[78]

VII. Conclusion: The Importance of Constitutional Judges with a Transformative Vocation

Constitutionalism is a phenomenon that can incorporate varying ideologies, such as TC and FC. However, its foundation is built on a normative constitution, strong constitutional review, and a leading role for CJs. Through their

[78] The rulings analyzed here highlight the fact that, in most of the cases, the CJs held a strong conviction regarding the importance of women's rights. Although there is no guarantee that a constitutional ruling will change the social reality women face, these rulings often have an effect that radiates beyond the litigants themselves. Several examples of this are: 1) The case of United States v. Virginia (1996) established a precedent for the analysis of laws that differentiate between people on the basis of gender, or that discriminate against women, including such areas as wage discrimination, which was employed later in the case of Ledbetter v. Goodyear (2006); 2) In the case STC 12/2008, the Spanish Constitutional Court declared Organic Law 3/2007 constitutional, and the effectiveness of this law in strengthening women's rights can be seen in various areas, such as labor, where women have achieved managerial positions and the wage gap has narrowed; 3) In the case AR 1340/2015 the Supreme Court of Justice of the Nation introduced the concept of intersectional discrimination as a category of analysis which allowed for a more comprehensive analysis and facilitated identification of other types of discrimination that affect women; 4) In the case of Shayara Bano v. Union of India (2016), the Supreme Court of India declared the practice of triple talaq unconstitutional which not only prompted reform at the national level regarding this practice, but also marked a change of jurisprudential direction in the recognition of women's rights in India.

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adjudications, CJs can generate changes that impact society, not only at the legal level but also at a structural level, in the following ways: 1) pursuing an activist role within institutional margins for the achievement of constitutional aims and objectives; 2) searching for opportunities for collaboration with other public powers since constitutional adjudication is not sufficient by itself to achieve concrete constitutional objectives; 3) taking into consideration the instrumentality of public power in their decisions, since all public powers are obliged to fulfill constitutional aims and objectives,[79] and CJs play a fundamental role in initiating and orchestrating that collaboration.[80] All of the above may be considered controversial insofar as a constitutional decision imposes a mandatory institutional dialogue between the various institutions of state power. However, from the perspective of this note, this collaborative exercise must be understood as a functional, institutional form of dialogue that is necessary in order to make new rights a concrete reality in the social dimension.[81]

This note did not propose that an institutional design of TC or FC would not be desirable. However, as the analysis in Section VI reveals, these types of institutional designs did not exist in the various legal systems under examination. Given that reality, CJs with a transformative vocation could make a significant impact by linking the law to a vision of a more equitable social order.[82] Examples of this would include reversing the structural inequalities faced by women and working to eliminate gender partiality in the law. CJs can operate as an engine of change by using TCA to promote projects or movements such as feminism, since they are the guarantors of the social pluralism reflected in the constitution. Thus, TCA is a means to achieve constitutional objectives that have an impact on society, and for purposes of this note, that includes the objectives of gender equality and protecting the rights of women.

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[79] For example, the aim of CJs, when they engage in the act of interpretation, is to fulfill the purpose for which a constitution was created. See Aharon Barak, Un juez reflexiona sobre su labor. El papel de un tribunal constitucional en una democracia 58-ff. (SCJN, 2008).

[80] Regarding the collaboration of constitutional judges with other public authorities, this collaboration is extraordinary in constitutional practice since a ruling obligates these authorities for the realization of actions to make possible social rights, but the collaboration of these authorities will depend on an institutional dialogue that will be supported by a goal of the constitutional State. Furthermore, we must take into account that the factual possibilities of CJs to guarantee social rights will have a profound link between the enforceability of this rights and public spending. See Holmes, Stephen y Sunstein, Cass R., El costo de los derechos. Por qué la libertad depende de los impuestos, 53-59 (Siglo Veintiuno, 2011).

[81] *See* Julio César Muñoz Mendiola, *Un replanteamiento a la forma de entender la legitimidad democrática del juez constitucional a través del ejercicio del poder público a su cargo*, 19 Revista Precedente 100-ff. (2021).

[82] Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 Osgoode Hall Law Journal 522 (1990).

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Due to the short length of this note, it was not possible to explore other lines of research regarding TCA, for example, the analysis of TCA by each CJs into a constitutional court since their *transformative feminist* vocation could also make a big difference.[83]

[83] For example, the conservative US Supreme Court Justice, Sandra Day O'Connor, who was appointed by President Ronald Reagan, was personally opposed to abortion. However, despite her personal beliefs she was a key player in preventing the U.S. Supreme Court from overturning the important precedent of Roe v. Wade (1973), which represented a triumph for feminist demands and the reproductive rights of American women. This case can be consulted at: *https://supreme.justia.com/cases/federal/us/410/113/*.

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