ISSN: 1870-0578

Mexican Law Review

New Series

VOLUME XVII

Number 1

July - December 2024

UNIVERSIDAD NACIONAL
AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES
JURÍDICAS

Mexican Law Review

New Series

July - December 2024 Volume XVII, Number 1

Interior Design: Ricardo Hernández Montes de Oca

Instituto de Investigaciones Jurídicas

Mónica González Contró
Directora

Mauricio Padrón Innamorato
Secretario académico

Wendy Rocha Cacho
Jefa del Departamento de Publicaciones

Ricardo Hernández Montes de Oca
Coordinación de Revistas

Mexican Law Review, nueva serie, vol. XVII, núm. 1, julio-diciembre de 2024, es una publicación semestral editada por la Universidad Nacional Autónoma de México, Ciudad Universitaria, Coyoacán, 04510 Ciudad de México, a través del Instituto de Investigaciones Jurídicas, Circuito Maestro Mario de la Cueva s/n, Ciudad Universitaria, Coyoacán, 04510 Ciudad de México, teléfono 5622 7474, correo electrónico: mlr.iij@unam.mx. Editor responsable: John Mill Ackerman Rose. Certificado de Reserva de Derechos al Uso Exclusivo núm. 04-2010-102014301100-102. ISSN: 1870-0578.

Primera edición: 2 de julio de 2024

Hecho en México

Mexican Law Review se encuentra registrada en los siguientes índices y bases de datos: Sistema de clasificación de Revistas Mexicanas de Ciencia y Tecnología-Conacyt (competencia internacional); SCOPUS; Latindex; Clase; Periodica; Scielo (Scientific Electronic Library Online); Biblat (Indicadores Bibliométricos); Dialnet; Matriu d'Informació per a l'Avaluació de Revistes (MIAR).

Contents

Articles

Mexican Law Review, New Series, vol. XVII, num. 1, July - December 2024
ISSN (versión electrónica): 1870-0578

Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México

Notes

ARTICLES

The Mexican State's interpretation of indigenous self-determination in the age of democracy (1992-2022)

Bruno **Anaya Ortiz**[1]
https://orcid.org/0009-0006-8884-4647

Center for the Study of Law and Society

Email address: bruno.anaya@berkeley.edu

Received: September 6th, 2023
Accepted: February 1st, 2024

DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

Abstract: This article charts how Mexican authorities have interpreted and implemented indigenous peoples' constitutional right to self-determination since it was first adopted in a 1992 constitutional reform. "Self determination" can mean many things, and the constitution gives stakeholders ample discretion to define and negotiate the content of this right. Most state legislatures initially passed "indigenous culture laws" starting in the late 1990s. The state of Oaxaca also amended its electoral procedure code to allow municipalities with a majority of indigenous residents to elect the members of their local governments through community assemblies (instead of the "political party system"). In the last five years, courts have further expanded electoral protections for indigenous communities by mandating that federal and state electoral Institutes implement quotas reserved for indigenous candidates in legislative elections. The application of indigenous self-determination has thus gone from being handled by state legislatures to being the province of federal electoral courts. The prevailing interpretation of self-determination has shifted from self-determination as self-government to it being understood as special legislative representation.
Keywords: self-determination, indigenous, autonomy, interpretation, elections.

Resumen: Este artículo estudia cómo las autoridades mexicanas han interpretado e implementado el derecho constitucional de la libre determinación de pueblos indígenas desde su reconocimiento constitucional en 1992. "Libre determinación" puede significar muchas cosas, y la constitución otorga a las partes interesadas amplio poder de decisión para definir y negociar el contenido concreto de este derecho. Inicialmente, la mayoría de los congresos estatales adoptaron "leyes de cultura indígena" a

[1] His most recent project studies the imbrication of nationalistic discourses within and through modern Mexican Law.

partir de finales de los años 1990. El estado de Oaxaca también modificó su código de procedimiento electoral para permitir que los municipios con una mayoría de residentes indígenas elijan a sus gobiernos municipales a través de asambleas comunitarias (en lugar del "sistema de partidos políticos"). En los últimos cinco años, los tribunales han ampliado aún más las protecciones electorales para comunidades indígenas al instruir a institutos electorales federales y estatales la implementación de cuotas legislativas reservadas para candidatos indígenas. La aplicación de la autodeterminación indígena ha cambiado de ser competencia de las legislaturas estatales a ser materializada por los tribunales electorales federales. La interpretación preponderante de la libre determinación ha pasado de la autodeterminación como autogobierno a entenderla más recientemente como representación legislativa especial.
Palabras clave: libre determinación, indígena, autonomía, interpretación, electoral.

I. Introduction

This article offers an overview of the legislative and jurisprudential development of the indigenous self-determination in Mexican law. In 1990, Mexico ratified the International Labour Organization's (ILO) *Indigenous and Tribal Peoples Convention*, which took effect in 1992.[2] As a part of its commitments under the convention, Mexican Congress amended the Constitution to state that "The Mexican nation has a pluricultural composition sustained originally on its indigenous peoples."[3] In 2001, Mexico further modified the Constitution to recognize indigenous peoples and communities' right to "self-determination and autonomy."[4]

This study charts how the Mexican government has interpreted, codified, and applied indigenous self-determination laws. In other words, this article tracks the path that the right to indigenous self-determination has undergone

[2] International Labour Organization, Indigenous and Tribal Peoples Convention 169, June 27, 1989, 1650 U.N.T.S. 28383, available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169*

[3] Constitución Política de los Estados Unidos Mexicanos [CPEUM], Art. 4, Diario Oficial de la Federación [DOF] Feb. 5th, 1917, as amended 01-28-1992, (Mex.), available at: *https://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_122_28ene92_ima.pdf* [This portion of the constitution was later moved to Article 2.]

[4] *Id.* at Art. 2, Tit. A.

from an abstract constitutional guarantee to concrete legislative instruments, administrative policies, and judicial rulings.

"Self-determination" is a polysemic term. Its meaning was not totally defined when legislators first wrote it into the Constitution. The term "self-determination" first appeared in international law in the early twentieth century. Vladimir Lenin and Woodrow Wilson both used the term to mean something akin to sovereignty in the sense of colonial emancipation from foreign rule.[5] Over time, the term has taken on additional meanings in international law. Self-determination has been associated with democracy, cultural expression, freedom, and more.[6] When self-determination applies to domestic groups, it explicitly does not mean sovereignty and independence. However, it might mean administrative autonomy akin to that enjoyed by states or provinces under a federal system such as Mexico's or the US's. Because self-determination is a relatively flexible and open-ended term, Mexican authorities have had significant discretion to translate this constitutional principle to laws and policies.

Mexican government agencies have implemented indigenous self-determination through several legal instruments. First, most state legislatures have approved "indigenous culture" laws. Secondly, electoral authorities have recently implemented legislative quotas for members of indigenous communities. A handful of laws have also established "indigenous tribunals" meant to allow members of indigenous communities to act as judges in conflicts arising in their communities.

Indigenous culture laws guarantee indigenous communities the right to practice their culture, preserve their language, exercise their religion, and freely associate. State legislatures adopted these laws in the late 1990s and through the 2000s. The first such instruments go back to 1998.[7] Indigenous culture laws "grant" to indigenous peoples rights that the federal Constitution guarantees to all citizens.[8] That is, all citizens have a right to practice culture, exercise their

---

[5] Vladimir Lenin, The Right of Nations to Self-Determination: Selected Writings (2004); Joseph Massad, *Against Self-Determination*, 9 *Humanity Int. J. Hum. Rights. Dev. 161* (2018), available at: https://muse.jhu.edu/article/703633 (last visited Jan 18, 2023).

[6] Adom Getachew, Worldmaking after Empire: The Rise and Fall of Self-Determination (2019); Jörg Fisch & Anita Mage, The Right of Self-Determination of Peoples: The Domestication of an Illusion (2015).

[7] Ley de Derechos de los Pueblos y Comunidades Indígenas y Afromexicano del Estado de Oaxaca [Law for the Rights of Indigenous and Afro-Descendent Peoples and Communities of the State of Oaxaca], as amended, Periódico Oficial de Oaxaca, July 19 1998, (Mex.), available at: *https://www.congresooaxaca.gob.mx/docs65.congresooaxaca.gob.mx/legislacion_estatal/Ley_de_Derechos_de_los_Pueblos_y_Comunidades_Indigenas_y_Afromexicano_del_Estado_de_Oaxaca_(Dto_ref_778_aprob_LXV_Legis_18_ene_2023_PO_4_2a_secc_28_ene_2023).pdf*; Ley de Derechos, Cultura y Organización Indígena del Estado de Quintana Roo, [Law of the Rights, Culture and Indigenous organization of the State of Quintana Roo], as amended, Periódico Oficial Quintana Roo, July 29 1998, (Mex.), available at: *http://documentos.congresoqroo.gob.mx/leyes/L76-XVI-20220824-L16202208242 46-ley-derechos.pdf*.

[8] Constitución Política de los Estados Unidos Mexicanos [CPEUM], Art. 6, Diario Oficial de la Federación [DOF] Feb. 5th, 1917 (Mex.), *available at: https://www.diputados.gob.mx/*

religion, and associate freely. Indigenous culture laws therefore do not substantively expand indigenous peoples' rights. They also do not create institutional mechanisms for indigenous peoples to exercise the rights these laws enunciate. Nevertheless, they are on the books in 27 out of 32 Mexican states. It seems that states adopted indigenous culture laws in the 2000s to perfunctorily fulfill the federal Constitution's provision stating that "[t]he recognition of indigenous peoples and communities shall take place in states' constitutions and laws."[9]

More recently, courts have directed electoral institutes to adopt legislative quotas for members of indigenous communities. These policies first originated in the state of Oaxaca. Starting in 1995, Oaxaca's congress progressively modified its Electoral Procedure Code to enable indigenous communities to autonomously elect their local governments. The more recent expansion of indigenous legislative quotas across the country has, however, been propelled mainly by court rulings rather than legislative acts. Over the last decade, indigenous communities have brought a series of suits to the federal electoral courts seeking the expansion of the rights associated with self-determination. Electoral courts have largely sided with the communities, resulting in the adoption of these so-called "affirmative action" policies.

In sum, there have been two themes in Mexico's interpretation of indigenous self-determination: (1) the prominence of culture, and (2) the association of self-determination with electoral processes. Courts systematically justify their rulings in the language of "cultural plurality." They couch electoral affirmative action policies as a way to protect indigenous communities' cultures and "worldviews."

These interpretative choices are neither obvious nor necessary. Authorities could have interpreted the newly created legal category of "indigenous peoples and communities" in racial or linguistic terms rather than as a question of subjective consciousness, culture, or worldviews. Indigenous self-determination could also have been developed in a different area of law, rather than electoral law. Indigenous self-determination could have been taken up in administrative, tax, or criminal subject matters, for example. Nonetheless, for the time being indigenous self-determination remains circumscribed to electoral law and procedure.

I draw three conclusions from this survey of Mexican law's codification of indigenous self-determination. First, despite the language of autonomy and legal pluralism that often accompanies court rulings and administrative decrees, the new legal framework has mostly affected the Mexican state's positive law. Currently, the majority of the laws and policies associated with indigenous self-determination have been directed at ensuring that federal and state legislative bodies have at least some indigenous legislators. Laudable as these policies may be, they are more about ensuring a *diverse* composition of government (spe-

LeyesBiblio/pdf/CPEUM.pdf.

[9] *Id.* at Art. 2, Par. 4.

cifically Congress) than about securing the legal infrastructure for indigenous self-government. There are some exceptions (notably Oaxaca's autonomous indigenous local governments and a few concrete cases in Michoacán, Guerrero, and Hidalgo).[10] Still, most national policies related to indigenous self-determination do not quite attain the creation of independent, autonomous jurisdictions that "decide their own forms of internal coexistence and social, economic, political and cultural organization," as the Constitution sets forth.[11]

Mexican courts and legislators have silently moved from interpreting "self-determination" as *autonomy* to rendering it as diverse legislative *representation*. While autonomy (as self-government) and representation may *sometimes* go hand in hand, this connection is only contingent.

The clearest connection of autonomy and representation may be seen in the institution of the Senate, where the (partially) self-governing states each send three senators as representatives.[12] In this case, senators are representatives of the states and thereby an expression of their membership in the federation as independent political entities. Nevertheless, legislators elected under indigenous quota rules must only fulfil the requirement of being indigenous without necessarily having been independently elected by their community. In fact, indigenous legislators are chosen from the election at large, with all persons — indigenous or not— voting in the elections of which they are candidates. For example, some electoral rules require that all parties nominate indigenous candidates in certain electoral districts. This guarantees that the winning candidate is indigenous. While these electoral districts are all majority indigenous, they are not exclusively so, and many different ethnicities and communities often reside therein. This means that while the candidate will indeed be indigenous, they will formally be a representative of their district, not any given indigenous community.

As the second half of this article will show, electoral quotas are less about autonomy than the representation of the "cultural plurality of Mexican society," as a decree from the National Electoral Institute recently put it.[13]

---

[10] See: Janine M. Otálora Malassis, Casos Relevantes de La Defensoría Pública Electoral Para Pueblos y Comunidades Indígenas 53-68 (2020).

[11] *Id.* at Art. 2, Frac. A, Inc. I.

[12] The Mexican Senate is composed of three senators from each state as well as 32 senators elected through proportional representation. This means that in practice a given state could have more than three senators. Still, it is true that each state will be represented by at least three senators.

[13] Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A DIPUTACIONES POR AMBOS PRINCIPIOS QUE PRESENTEN LOS PARTIDOS POLÍTICOS NACIONALES Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL INSTITUTO, PARA EL PROCESO ELECTORAL FEDERAL 2020-2021, [Agreement of the General Council of the National Electoral Institute through which the council approves the criteria for the nomination before the councils of this institute of candidatures for federal deputies

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

II. State Legislation Codifying Indigenous Self-Determination

At the state level, three main legal instruments regulate indigenous rights. States have enacted (1) "indigenous culture" laws, (2) "indigenous justice" laws, or (3) indigenous quotas in their electoral procedure codes. Modifications to electoral codes are of two kinds. Some recently modified codes outline procedures for designating one reserved indigenous spot in the municipal council. Others set out ways for indigenous groups to elect all members of their local governments through community assemblies (rather than ordinary urns and ballots). Before 2018, Oaxaca was the only state to have any such modified electoral procedures.

The table in the Appendix shows the laws each state enacted by April 2021, when I concluded the legislative review for this article. As this is a rapidly changing field, state legislatures may have made modifications since. Three of Mexico's thirty-two states have enacted no legislation regulating indigenous rights. Sixteen states plus Mexico City have enacted "indigenous culture" laws but have not modified the electoral code and have passed no bill regulating "indigenous justice." Seven states have passed both "indigenous culture" bills and modified the electoral code to enable some form of indigenous representation. Two states have "indigenous justice" and "indigenous culture" laws but no modifications to the electoral code. One state has only an "indigenous justice" act. Only the state of Oaxaca has enacted all three forms of legislation. Among the nine states that have modified their electoral codes to enable some form of indigenous representation, six use a quota system to reserve a spot on the municipal council to a member of an indigenous community.[14] Political parties nominate the reserved indigenous representative on the municipal council. Only three states' electoral codes spell out mechanisms to perform elections outside the political party system.

The laws in each of these classes significantly resemble one another. All "indigenous culture" and "indigenous justice" laws have remarkably similar language to the point of being nearly identical in substance content and form. The exception is Mexico City, whose recently passed indigenous culture law has a markedly different paradigm from all other states. It broadens the notion of "indigenous community" to include "barrios" (neighborhoods).[15] Mexico

---

THROUGH BOTH PRINCIPLES PRESENTED BY NATIONAL POLITICAL PARTIES AND THEIR COALITIONS, FOR THE 2020-2021 FEDERAL ELECTIONS], INE/CG572/2020, 76., (Mex.), available at: *https://repositoriodocumental.ine.mx/xmlui/bitstream/handle/123456789/115204/CGex202011-18-ap-7.pdf*.

[14] The entity governing over a municipality is called *ayuntamiento*. It is composed of six or more *regidores*, a *síndico/a* and one *municipal president*. I shall render *ayuntamiento* as municipal council. Cf. Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Article 115, Diario Oficial de la Federación [D.O.], February 5th 1917 (Mex).

[15] LEY DE DERECHOS DE LOS PUEBLOS Y BARRIOS ORIGINARIOS Y COMUNIDADES INDÍGENAS RESIDENTES EN LA CIUDAD DE MÉXICO, [LAW OF RIGHTS OF INDIGENOUS PEOPLES AND BARRIOS AND INDIGENOUS COMMUNITIES RESIDING IN MEXICO CITY], GACETA OFICIAL DE LA CIUDAD DE MÉXI-

City's law also walks away from even the nominal pretense of "autonomy." It grants certain rights to the class of persons it designates as "indigenous." Still, it doesn't seem to be setting forth institutional systems for indigenous communities to exercise self-government. Among the "indigenous justice" laws, the exception is Zacatecas. Its "Community Justice" law is almost identical to other "indigenous justice" laws. However, Zacatecas's law does not once specify *indigenous* communities and makes the institution of "community judges" for low-stakes disputes available to the entire population.[16] Barring these two exceptions and setting aside electoral codes, the remaining sixteen "indigenous culture" laws and all four "indigenous justice" laws are sufficiently similar to discuss each as a single *type*.[17]

III. Indigenous Culture Laws

States' "indigenous culture" laws make broad declarations about indigenous "self-determination" but limit the legally sanctioned scope of what that "self-determination" entails to the point of making it trivial. They enunciate a series of cultural rights as if they were concessions to indigenous communities but direct no authorities or private actors in such a way as to make these broadly available.

"Indigenous culture" laws have language to the effect that the state "recognizes" indigenous peoples' autonomy and self-determination. They also explicitly state that indigenous autonomy must not infringe on existing legislation. For example, Tlaxcala's law guarantees indigenous peoples':

> The autonomy and self-determination to establish forms of internal government, the development of their culture and social norms, *all in a framework that respects the federal and state constitutions, as well as all laws that may emanate from them*.[18]

---

co, December 20 2019, (Mex), available at: *https://data.consejeria.cdmx.gob.mx/images/leyes/leyes/LEY_DERECHOS_DE_PUEBLOS_Y_BARRIOS_ORIGINARIOS_Y_COMUNIDADES_INDIGENAS_RESIDENTES_EN_LA_CDMX_2.4.pdf*.

[16] Ley de Justicia Comunitaria del Estado de Zacatecas, [Zacatecas Indigenous Community Justice Law], as amended, Periódico Oficial del Gobierno del Estado de Zacatecas, July 10 2002, (Mex), available at: *https://www.congresozac.gob.mx/64/ley&cual=70&tipo=pdf*.

[17] A 2018 report from the Chamber of Deputies (lower house of Congress) offers a succinct overview of indigenous Culture laws. It is now a little outdated for several states, and blends together indigenous culture and indigenous justice laws, but it is a helpful first approximation. See Claudia Gamboa Montejano & Sandra Valdés Robledo, Los Usos Y Costumbres De Pueblos Indigenas Derecho Comparado A Nivel Estatal (2018).

[18] Ley de Protección, Fomento y Desarrollo a la Cultura Indígena Para el Estado de Tlaxcala, [Law for the Protection, Fostering and Development of Indigenous Culture in the State of Tlaxcala], as amended, Art. 8 frac VI, Periódico Oficial de Tlaxcala, April 7 2006, (Mex), available at: *https://sfp.tlaxcala.gob.mx/pdf/normateca/ley%20de%20proteccion%20fo-*

Indigenous communities are "autonomous" but must respect all existing legislation. However, current legislation distributes most powers associated with public government to state and federal courts, municipalities, the state executive power, the state legislature, police forces, etc. The only way an indigenous community could legally "establish forms of internal self-government" would be if some law vested certain legal powers in it. Indigenous communities across Mexico have long exercised a degree of *de facto* autonomy in administrating their local affairs. One could think that the constitutional "recognition" of indigenous autonomy might involve some form of legal ratification of this *de facto* power. Despite their nominal recognition, indigenous culture laws do not give indigenous local governments the power that comes with being a state-sanctioned authority.

"Indigenous Culture" laws also "confer" upon indigenous peoples several rights already available to the population as a whole. For instance, Nayarit's law states: "indigenous peoples and communities may constitute associations for the legal purposes that they deem convenient."[19] This is written as if it was a right specific to indigenous peoples, but it is not. The federal Constitution guarantees a right of free association to all persons.[20] The Civil Code outlines procedures for any persons to establish nonprofit associations.[21] Federal mercantile and agrarian laws also set forth procedures for the creation of business and agrarian corporations. Indigenous peoples may constitute legal associations through these and other channels, like any persons. Nevertheless, there is no dedicated mechanism for indigenous communities to establish legal associations *as indigenous communities* in Nayarit or any other state. The declaration that indigenous peoples have the right to establish legal associations is thus either superfluous (if it means that they may establish legal persons through ordinary channels) or hollow (if it was meant to authorize a new dedicated form of indigenous collective legal personhood).

Indigenous Culture laws emphasize indigenous peoples' right to exercise their culture and language. However, it is unclear that these statements alone have a practical application, given that everyone has those rights. For instance, Chihuahua's law writes that "within the framework of their autonomy," indigenous communities have the right to "develop, preserve, use and enrich their

---

mento%20y%20desarrollo%20a%20la%20cultura%20indigena%20para%20el%20estado%20de%20tlaxcala.pdf.

[19] Ley de Derechos y Cultura Indígena del Estado de Nayarit, [Nayarit Indigenous Culture and Rights Law], as amended, Art. 19, Periódico Oficial Nayarit, December 18 2004, (Mex), available at: *https://congresonayarit.gob.mx/wp-content/uploads/QUE_HACEMOS/LEGISLACION_ESTATAL/leyes/derechos_y_cultura_indigena_del_estado_de_nayarit_ley_de.pdf.*

[20] Constitución Política de los Estados Unidos Mexicanos [CPEUM], as amended, Article 9, Diario Oficial de la Federación [DOF], February 5th 1917, (Mex).

[21] Código Civil Para el Estado de Nayarit [Nayarit Civil Code], as amended, Arts. 2041 - 2108, Periódico Oficial Nayarit, August 22 1981, (Mex), available at: *https://www.nayarit.gob.mx/transparenciafiscal/marcoregulatorio/ordenamientos/código%20civil%20para%20el%20estado%20de%20nayarit.htm.*

language, ritual systems, and in general, their tangible and intangible cultural legacy."[22] Once again, it is unclear that this declaration alone has any legal effects, given that all citizens, indigenous or not, already have a right to freely exercise their language and culture.

IV. Indigenous Justice

The National Penal Procedure Code as well as legislation in four states —Michoacán, Quintana Roo, San Luis Potosí, and Yucatán— set out mechanisms for indigenous communities to act as judges in their internal conflicts. The state-level laws create "indigenous community judges." The Penal Procedure Code outlines cases in which the District Attorney may withhold the exercise of its jurisdiction in favor of indigenous justice.

Indigenous justice is a promising project, but it remains somewhat limited. Indigenous judges have jurisdiction only when both parties opt into it. It is the state judiciary that appoints and removes indigenous judges.[23] Moreover, most serious crimes and larger civil suits are explicitly excluded from indigenous tribunals' jurisdiction. Therefore, indigenous justice works more like a pre-judicial alternative dispute resolution mechanism than as compulsory state tribunals.

As to criminal jurisdiction, Mexico's 2014 National Penal Procedure Code sanctions indigenous tribunals but also determines their limits. Article 420 provides for indigenous communities to bypass ordinary criminal courts in certain circumstances.[24] When a crime affects the rights of an indigenous community or one of its members and the perpetrator is a member of that same community, the community may elect to address the crime according to its own norms. If the District Attorney has already filed criminal charges, any member of the community may file a motion requesting that the District Attorney "extinguish criminal action." However, both the victim and the accused must "accept the way in which the community proposes to resolve the conflict." Essentially, if both the victim of the crime and the accused agree on an extrajudicial resolution to the conflict, a judge can instruct the District Attorney to dismiss charges. The Penal Procedure code excludes all "serious" crimes from indigenous justice. While the Penal Procedure Code does not state it explicitly, it is usually

---

[22] Ley de Derechos de los Pueblos Indígenas del Estado de Chihuahua [Law of the Rights of Indigenous Peoples of the State of Chihuahua], as amended, Art. 9, Periódico Oficial de Chihuahua, June 29 2013, (Mex), available at: *https://www.congresochihuahua2.gob.mx/biblioteca/leyes/archivosLeyes/1003.pdf*.

[23] Ley de Justicia Indígena del Estado de Quintana Roo [Quintana Roo Indigenous Justice Law], as amended, Periódico Oficial Quintana Roo, December 31 2012, (Mex), available at: *http://documentos.congresoqroo.gob.mx/leyes/L1320121231234.pdf.*

[24] Código Nacional de Procedimientos Penales [CNPP] [National Criminal Procedure Code], as amended, Art. 420, Diario Oficial de la Federación [DOF], March 5 2014, (Mex), available at: *https://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP.pdf.*

Mexican Law Review, New Series, vol. XVII, num. 1, July - December 2024, pp. 3-38
ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

understood that "serious" crimes are those that call for obligatory pre-trial detention and that were committed using violence. These crimes include homicide, rape, kidnapping, human trafficking, corruption, house theft, all crimes committed using a guns or explosives, and many more.

The Penal Procedure Code's indigenous justice provisions resemble sections on alternative dispute resolution mechanisms. Articles 186 through 190 of the code stipulate the procedure for a "reparation agreement." When the victim of a crime and the person accused of committing it reach a reparation agreement, they can file a motion for the District Attorney to dismiss charges. As with indigenous justice, only nonserious crimes are eligible for this form of resolution, and both parties must voluntarily opt into it.

In addition to the National Penal Procedure Code, four states have laws regulating "indigenous tribunals." All four are very similar, but Quintana Roo's law is the most expansive. I shall take Quintana Roo as the exemplary case.

Quintana Roo's indigenous justice law stipulates the jurisdiction of indigenous tribunals. It echoes the National Penal Procedure Code in stipulating three different times that the parties to a procedure must voluntarily opt into it.[25] In criminal cases, indigenous judges may not impose prison sentences of any duration as penalties, and the maximum fine they may impose is roughly 150 US dollars.[26] They have criminal jurisdiction only for theft, stealing up to two cattle heads, fraud, breach of trust, and (somewhat arbitrarily) crimes associated with beekeeping.[27] Quintana Roo's law also states that "crimes that the law qualifies as severe are expressly excluded from the competence of indigenous judges."[28] At all times, the state supreme court retains the right to take over jurisdiction of the case if it deems it "socially important." For civil suits, indigenous judges can offer themselves as arbiters, but they cannot force the parties to accept arbitration.

V. Modifications to Oaxaca's Electoral Procedure Law

Through a series of reforms going back to 1995, the state of Oaxaca instituted policies allowing indigenous communities to elect local governments through procedures the communities themselves determine. In this respect, Oaxaca is the exception among states. As of 2018, 417 out of Oaxaca's 570 total municipalities elect their mayors and municipal assemblies through modified electoral

[25] Ley de Justicia Indígena del Estado de Quintana Roo [Quintana Roo Indigenous Justice Law], as amended, Arts. 4, 11, 13, Periódico Oficial Quintana Roo, December 31 2012, (Mex).

[26] *Id.* at Art. 21.

[27] *Id.* at Art. 17.

[28] *Id.*

procedures determined by the communities.[29] Oaxacan law outlaws national political parties from participating in indigenous local elections, meaning that these policies presume a strict separation of indigenous local politics and national politics.

Oaxacan electoral law recognizes two electoral "regimes" in municipal elections, the "party system" and the "indigenous normative system." Municipalities' residents may change their electoral regime from the "party system" to the "indigenous normative system" through a community assembly in which two-thirds of the eligible residents vote in favor of the change.[30] Residents then submit records of the general assembly to the State Electoral Institute. In turn, the Electoral Institute holds a vote in the municipality, which again must be ratified by two-thirds of the residents.[31] If the electoral Institute's result confirms the original petition, it approves the change and issues a decree delegating the powers to host and organize elections to the community assembly.[32]

Once a municipality has switched to the indigenous normative system, its community assembly (or several of them) becomes the authority competent to organize the elections. Community assemblies have the discretion to determine the exact procedures to elect the municipal president and municipal council members [*regidores*].[33] Community assemblies can also determine the elected officers' term length and impose eligibility requirements above and beyond those set forth by the federal and local constitutions.[34] Basic eligibility requirements for office are the same across all municipalities (indigenous or not), as are the powers associated with them.[35]

Throughout the process, the State Electoral Institute retains several rights. The Electoral Institute must receive a written report of the "community statutes" or a "report of the institutions, norms, practices, and procedures of their

---

[29] Instituto Estatal Electoral y de Participación Ciudadana de Oaxaca [IEEPCO], ACUERDO POR EL QUE SE APRUEBA EL CATÁLOGO DE MUNICIPIOS SUJETOS AL RÉGIMEN DE SISTEMAS NORMATIVOS INDÍGENAS DEL ESTADO DE OAXACA Y SE ORDENA EL REGISTRO Y PUBLICACIÓN DE LOS DICTÁMENES POR LOS QUE IDENTIFICAN LOS MÉTODOS DE ELECCIÓN DE SUS AUTORIDADES MUNICIPALES [Agreement through which the catalogue of municipalities subject to the indigenous normative system regime of the State of Oaxaca is approved and the registration and publication of the expert opinions identifying the election methods for their municipal authorities is proclaimed], IEEPCO-CG-SNI-33/2018, (2019), (Mex), available at: *https://www.ieepco.org.mx/archivos/acuerdos/2018/IEEPCOCGSNI332018.pdf*.

[30] Ley de Instituciones y Procedimientos Electorales del Estado de Oaxaca [Law for Electoral Procedures and Institutions of the State of Oaxaca], as amended, Art. 274, Frac. II, Periódico Oficial de Oaxaca, June 3 2017, (Mex), available at: *https://www.ieepco.org.mx/archivos/documentos/2020/MarcoJuridico/LIPEEO.pdf.*

[31] *Id.* at Art. 275, Frac. IV.

[32] *Id.* at Art. 275, Frac. V.

[33] *Id.* at Art. 278, Frac. II.

[34] *Id.* at Art. 278, Fracs. I & IV.

[35] *Id.* at Art. 277.

indigenous normative systems."[36] The Electoral Institute ultimately certifies the election and can step in as arbitrator in case of disputes.[37]

The so-called "community assembly" is a central Institution in Oaxaca's codification of indigenous autonomy. Community general assemblies have at least one origin in agrarian law. Throughout the twentieth century, the Mexican state undertook a land distribution program for rural communities, including many indigenous communities. Distributed lands are known as *ejidos* and are owned collectively by the community. These lands have been used both for agricultural exploitation and urban development, with a large majority of indigenous towns located on *ejido* lands. Over the twentieth century, the federal government adopted several different agrarian laws and codes, which outlined in increasingly more specific terms the internal governance of ejido communities. As the agrarian law stipulates, "The ejido's supreme organ is the assembly, in which all ejido members participate."[38] A general assembly must approve most important acts in an ejido. Over time, ejido assemblies took on more *de facto* attributes than those initially vested in them by agrarian law. Community assemblies became an institutional vehicle through which most issues relevant to the community were discussed and adjudicated regardless of whether they were related to agrarian matters.[39]

In recognition of the community assembly's broad role, Oaxaca's Constitution and several laws, including the Electoral Procedure Law, recognize the community assembly as the primary indigenous authority.[40] Electoral Courts have ratified Oaxaca's recognition, issuing a jurisprudential precedent stating that "general community assemblies express the majority will" of indigenous communities.[41] However, despite all the talk of "legal pluralism," one of the community assembly's origins goes back to positive state agrarian law. Indeed, the fact that community assemblies are sufficiently generalized that Oaxacan law can take them as the indigenous authority *par excellence* across all 417 in-

---

[36] *Id.* at Art. 278, Frac. I.

[37] *Id.* at Arts. 282 & 284.

[38] Ley Agraria [LAG] [Agrarian Law], as amended, Art. 22, Diario Oficial de la Federación [DOF], February 26 1992, (Mex), available at: *https://www.diputados.gob.mx/LeyesBiblio/pdf/LAgra.pdf*.

[39] Araceli Burguete Cal y Mayor, *Municipalización del gobierno indígena e indianización del Gobierno Municipal en América Latina*, 6 *Rev. Pueblos Front. Digit. 38* (2011), available at: *http://www.scielo.org.mx/scielo.php?script=sci_abstract&pid=S1870-41152011000100038&lng=es&nrm=iso&tlng=es* (last visited Jan 17, 2022).

[40] Constitución Política del Estado Libre y Soberano de Oaxaca [Oaxaca Const.], as amended, Art. 22, Periódico Oficial de Oaxaca, April 4 1922, (Mex), available at: *https://www.oaxaca.gob.mx/cocitei/wp-content/uploads/sites/48/2019/07/CONSTITUCION-POLITICA-DEL-ESTADO-LIBRE-Y-SOBERANO-DE-OAXACA.pdf.*

[41] COMUNIDADES INDÍGENAS. INTEGRACIÓN DE LA ASAMBLEA GENERAL COMUNITARIA (LEGISLACIÓN DE OAXACA), Pleno de la Sala Superior del Tribunal Electoral [SUP-TEPJF] [Electoral Tribunal], Gaceta de Jurisprudencia y Tesis en materia electoral, Tribunal Electoral del Poder Judicial de la Federación, Año 4, Número 9, 2011, Tesis XL/2011, páginas 51 y 52, (Mex).

digenous municipalities is a product of the state's twentieth-century agrarian policies.

Nevertheless, Oaxacan legislators intended elections held under indigenous normative systems to be a vehicle for communities to exercise direct control over local government independently from national politics. This intended independence is apparent in Oaxaca's prohibition of political parties, political organizations, civil associations, or external agents from participating in indigenous municipal elections.[42] This prohibition is unique to Oaxaca and reflects the original commitment to a much more robust notion of "autonomy and self-determination" than the one that would eventually be generalized at the national level. Oaxacan legislators appear to have regarded indigenous communities as relatively independent political societies whose internal politics and governance ought to be distinct from the back and forth of national politics. The prohibition of all "external agents" from participating or "meddling" in indigenous elections is comparable to similar provisions prohibiting "foreign agents" from participating in national electoral processes. Consider, for example, all the discussion surrounding the possibility of "Russian interference" in the 2016 US election. Mexico's "Law of Political Parties" similarly prohibits candidates and parties from any form of economic aid from foreign agents.[43]

When Mexico's federal electoral courts expanded provisions that were vaguely inspired by Oaxaca's model to the national level in 2017, the courts moved from autonomy *stricto sensu* to *representation*. Because of some intricacies of the Mexican legislative election system, it was practically impossible *not* to use political parties in the institution of indigenous legislative quotas. When federal electoral courts mandated the implementation of indigenous affirmative action policies, they also abandoned Oaxacan law's strict differentiation between indigenous and non-indigenous electoral processes (tellingly named the "political party system").

In the last four years, a handful of other states have modified their electoral procedure laws to adopt policies similar to Oaxaca's. These changes were promoted by indigenous communities who filed strategic lawsuits in federal courts. Often ruling in favor of the communities, courts ordered state congresses to modify their electoral codes. In its resolution to a case brought by a representative of Guerrero's indigenous communities, for instance, the Superior Chamber of the Electoral Tribunal instructed Guerrero State's Congress to

> Harmonize its local Constitution and internal legislation with the [federal] Constitution and international treaties on indigenous rights, as regards

[42] Ley de Instituciones y Procedimientos Electorales del Estado de Oaxaca [Law for Electoral Procedures and Institutions of the State of Oaxaca], as amended, Art. 281, Num. 1, Frac. II, Periódico Oficial de Oaxaca, June 3 2017, (Mex).

[43] Ley General de Partidos Políticos [Law of Political Parties], as amended, Art 25 section i), Diario Oficial de la Federación [DOF], May 23 2014, available at: *https://www.diputados.gob.mx/LeyesBiblio/pdf/LGPP.pdf*.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

guaranteeing their access in equal conditions to popular election offices in the state, being required to implement affirmative actions in their favor, which actions must contribute to the materialization of indigenous persons' effective participation in elected offices.[44]

The Guerrero State Congress complied with the court order by modifying its electoral code in 2018. The modified provisions of the Electoral code essentially mimicked those initially contained in Oaxaca's statutes, making Guerrero one of three states to allow indigenous municipalities to autonomously elect their local government. Guerrero also wrote into law some provisions for "indigenous quotas" in municipal councils. These provisions emulated affirmative action policies previously undertaken by federal and state electoral institutes in compliance with court mandates. I will discuss these sorts of court-mandated affirmative action policies below.

Through most of the late 1990s and 2000s, Oaxaca was unique in legislating indigenous elections. Guerrero and Hidalgo have since adopted similar policies following court mandates.

VI. Court-Mandated Legislative Quotas in Favor of indigenous Communities

In the last decade, especially in the last five years, electoral authorities have been relatively proactive in adopting pro-indigenous policies. Most notably, Mexico's National Electoral Institute (the federal agency responsible for organizing elections) has adopted a policy requiring political parties to nominate a minimum number of indigenous candidates for legislative elections. State electoral institutes have adopted similar policies.

This section traces some of the most significant recent developments in so-called "indigenous affirmative action" policies. I will focus mainly on developments at the federal level because tracing the intricate back-and-forth between electoral institutes' administrative decrees and courts rulings on those decrees in all 32 states would be more cumbersome than informative. Nevertheless, electoral courts in several states have implemented similar policies, as exemplified by the Guerrero ruling cited above. I will, however, discuss one case arising at the local level that is widely regarded as the watershed moment in indigenous electoral jurisprudence.

Oaxaca's early experience with modified electoral procedures stands in the background as the first government entity to have coupled the right of

[44] Hipólito Arriaga Pote v. Tribunal Electoral Del Estado de Guerrero, Sala Regional Ciudad de México–Tribunal Electoral [SCM TEPJF] [Mexico City Regional Chamber, Electoral Tribunal], SCM-JDC-402/2018, p. 52, (Mex), available at: *https://www.te.gob.mx/salasreg/ejecutoria/sentencias/df/SCM-JDC-0402-2018.pdf*.

self-determination and electoral law. As noted in the introduction, there is no necessary connection between an abstract right of self-determination and electoral law. Indeed, countries like the US, which recognize indigenous peoples as partially "sovereign" nations, have not associated indigenous sovereignty with electoral law and practice. Oaxaca's rather creative application of self-determination to electoral procedures served as the precedent that made it natural for federal electoral to later adopt pro-indigenous policies. By the time in the early 2010s that federal electoral courts began presiding over lawsuits seeking to expand indigenous rights other states, the courts had been resolving Oaxacan indigenous electoral disputes for over a decade.

A 2011 constitutional reform changed how Mexican courts adjudicate human rights cases.[45] Throughout most of the twentieth century, judicial review powers were minimal. *Stare decisis* did not generally hold. Judicial rulings benefited only the party who brought the suit. A series of reforms since the 1990s had slowly set up mechanisms to establish binding judicial precedents in some circumstances. The rules for when precedents are binding are complex. In electoral matters, there usually have to be three consecutive rulings in the same sense before a precedent is considered binding. Moreover, judicial precedents are usually only obligatory for courts, not other government agencies.

Furthermore, before 2011, it was unclear whether the Federal Electoral Tribunal, the court of last resort in electoral subject matters, could adjudicate violations of constitutional human rights. This uncertainty led to a 2008 case before the Inter-American Court of Human Rights, in which the Mexican State was found guilty of not having appropriate mechanisms for citizens to allege violations of constitutional rights in electoral affairs. [46] This violated the right to a fair trial under article 8 of the Inter-American Convention of Human Rights. Following that ruling, electoral courts adopted a new trial in which citizens could allege human rights violations. Additionally, the 2011 constitutional reform settled this ambiguity by stipulating that "all authorities, in their areas of competence, are obligated to promote, respect, protect and guarantee Human Rights."[47] It gave the Electoral Tribunal unambiguous jurisdiction over alleged violations of constitutionally protected human rights.

---

[45] Constitución Política de los Estados Unidos Mexicanos [CPEUM], as amended August 14 2001, Article 1, Diario Oficial de la Federación [DOF], February 5th 1917 (Mex).

[46] See: Mónica Rodriguez, *Castañeda Gutman v. Mexico*, 36 *Loy LA Int'l Comp Rev*, 1949.

[47] Constitución Política de los Estados Unidos Mexicanos [CPEUM], as amended August 14 2001, Article 1, Diario Oficial de la Federación [DOF], February 5th 1917 (Mex).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

VII. Indigenous Elections in States Whose Laws do not Foresee the Mechanism: SUP-JDC-9167/2011

In 2011, a Purépecha Community from Cherán (Michoacán State) successfully sued the state electoral institute, demanding that it implement alternative electoral mechanisms similar to those of Oaxaca. The Cherán community petitioned the Electoral Institute to adopt such policies, which the Institute denied, arguing that it had no legal basis to do so since Michoacán's electoral procedure law contained no provision to that effect. The community appealed the Institute's decision before the Federal Electoral Tribunal, arguing that their Constitutional right of self-determination guaranteed them the possibility of electing their own authorities, like communities in Oaxaca. On the second appeal, the Superior Chamber of the Federal Electoral Tribunal relied heavily on the new human rights constitutional provisions to side with the Cherán community, arguing that Michoacán Congress's "legislative omission" could not trump the community's constitutional human right to self-determination.

Even though the court did not employ the language of distribution of powers, it is useful to understand the Cherán decision in terms of a struggle between different authorities' powers. As other scholars have argued, one of indigenous communities' greatest fights in the era of self-determination has been for the recognition and strengthening of a "fourth order of government."[48] Since its 1917 inception, the Federal Constitution sets out "three orders of government," the federal, state, and municipal. The Mexican Constitution's articles 115-122 outline a distribution of powers between the federal government, the sovereign states, and the autonomous municipalities. According to these provisions, local government is the provenance of municipalities. Rural and indigenous communities have long exercised *de facto* forms of sub-municipal local government within their communities.[49] Many conflicts that ultimately make their way to the federal courts involve tensions between indigenous communities and their municipal seats, which non-indigenous persons often control. Because outside of Oaxaca (and sometimes even within Oaxaca) municipalities include both non-indigenous settlements and (usually smaller) indigenous towns, many of indigenous communities' struggles have in practice consisted in seeking a transfer of municipalities' powers directly to the communities. For instance, in one ultimately unsuccessful bid, Michoacán communities petitioned the state congress to modify the state's territorial distribution to create more municipalities so that the municipal territory would coincide with each indigenous community in the state.[50]

---

[48] Orlando Aragón Andrade, *La Emergencia Del Cuarto Nivel de Gobierno y La Lucha Por El Autogobierno Indígena En Michoacán, México*, 94 *Cah. Am. Lat. 57* (2020).

[49] Helga Baitenmann, Matters of Justice: Pueblos, the Judiciary, and Agrarian Reform in Revolutionary Mexico (2020).

[50] Aragón Andrade, *supra* note 45 at 63; María del Carmen Ventura Patiño, Volver a La Comunidad: Derechos Indígenas y Procesos Autonómicos En Michoacán (2010).

In short, 2011 Cherán lawsuit was a bid for the community to exercise more direct control over its municipality. A series of more recent cases, also before the Electoral Tribunal, have gone further, with another Michoacán community seeking to control a portion of the municipal budget.[51] That community won its suit, but implementation has been slow and imperfect, partly because in adjudicating a dispute over local government, the Electoral Tribunal was quite transparently overstepping its jurisdiction, which is limited to electoral disputes. Determining the allocation of a municipal budget would, in principle, be the competence of the "autonomous" municipalities' governing bodies. Any disputes surrounding this allocation would be under the jurisdiction of administrative tribunals.[52]

Since the Cherán decision, other communities have filed similar suits. By and large, electoral courts have sided with communities, directing electoral institutes to set up alternative electoral mechanisms for indigenous peoples through administrative fiat even when extant electoral law does not mandate it.

VIII. Mexico City Constituent Assembly: SUP-RAP-71/2016

In 2017, Mexico City adopted a new constitution. The new constitution was drafted and eventually approved by a Constituent Assembly composed of 100 legislative representatives. 60 representatives were elected through proportional voting. The other 40 representatives were appointed by the two chambers of Congress, the President of the Republic, and the Mayor of the Federal District (since renamed Mexico City). The National Electoral Institute (INE) organized the election of the 60 elected representatives through a series of administrative decrees published in 2016.[53] Forty-two separate lawsuits filed by political

---

[51] Janine M. Otálora Malassis, Casos Relevantes de La Defensoría Pública Electoral Para Pueblos y Comunidades Indígenas 53-68 (2020).

[52] *Id.*

[53] Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL, POR EL QUE SE EMITE CONVOCATORIA PARA LA ELECCIÓN DE SESENTA DIPUTADOS, PARA INTEGRAR LA ASAMBLEA CONSTITUYENTE DE LA CIUDAD DE MÉXICO, [Agreement of the General Council of the National Electoral Institute, which issues a call for the election of sixty deputies to integrate the constituent assembly of Mexico City], INE/CG52/2016, 52, (Mex), available at: *https://portalanterior.ine.mx/archivos3/portal/historico/contenido/Estados/rsc/docs/CGext20160204_ac_P1.pdf;* ; Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBA EL PLAN Y CALENDARIO INTEGRAL DEL PROCESO ELECTORAL RELATIVO A LA ELECCIÓN DE SESENTA DIPUTADOS POR EL PRINCIPIO DE REPRESENTACIÓN PROPORCIONAL PARA INTEGRAR LA ASAMBLEA CONSTITUYENTE DE LA CIUDAD DE MÉXICO, SE DETERMINAN ACCIONES CONDUCENTES PARA ATENDERLOS, Y SE EMITEN LOS LINEAMIENTOS CORRESPONDIENTES, [Agreement of the General Council of the National Electoral Institute approving the comprehensive plan of the elections relating to the election of sixty deputies by the principle of proportional

parties, private companies, nonprofit associations, and private individuals challenged INE's decrees.

In a single ruling addressing ten of the 42 challenges to INE's original proposal for the election, the Federal Electoral Tribunal ordered INE to implement a series of affirmative action policies to ensure that "the youth" and indigenous communities would be represented in Mexico City's Constituent Assembly. Moreover, INE had originally implemented a series of gender parity quotas to ensure that a roughly equal number of men and women would be elected as representatives to the Constituent Assembly.

Elections for Mexico City's Constituent Assembly were carried out through proportional representation. Under proportional representation, political parties submit an ordered list of candidates as nominees. The electorate votes for a political party, not individual candidates. Once the results of the election are in, parties are awarded a number of legislative seats proportional to the percentage of votes they received in the election. These seats are occupied by the first candidates in each party's ordered list. For example, suppose there are 50 legislative seats up for grabs, and only three political parties A, B and C. Party A earns 20% of the vote. Party B gets 70%. And party C gets 10%. Each party then gets a proportional number of seats. Party A gets 10 seats; B gets 35; and C gets 5. These seats are then assigned to the first candidates in each party's ordered list. The first 10, 35 and 5 individuals in each party's list become representatives.

INE's affirmative action policies in favor of indigenous communities and the youth were formally identical. They obligated political parties to nominate at least one indigenous person and one person between the ages of 21 and 29 as candidates for the Constituent Assembly. Moreover, the youth and indigenous candidates had to be among the first ten nominees of each party.

In its argument for indigenous legislative quotas, the Electoral Tribunal went on a lengthy excursus justifying why it tied indigenous representation to political

---

representation to make up the Constituent Assembly of Mexico City, affirmative action policies to define them], INE/CG53/2016 (Mex), available at: *https://repositoriodocumental.ine.mx/xmlui/handle/123456789/87500*; Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBA Y ORDENA LA PUBLICACIÓN DEL CATÁLOGO DE EMISORAS PARA EL PROCESO ELECTORAL PARA LA ELECCIÓN DE SESENTA DIPUTADOS CONSTITUYENTES QUE INTEGRARÁN LA ASAMBLEA CONSTITUYENTE DE LA CIUDAD DE MÉXICO; SE APRUEBA UN CRITERIO GENERAL PARA LA DISTRIBUCIÓN DEL TIEMPO EN RADIO Y TELEVISIÓN QUE SE DESTINARÁ A LOS PARTIDOS POLÍTICOS Y AUTORIDADES ELECTORALES DURANTE EL PROCESO ELECTORAL, ASÍ COMO PARA LA ENTREGA Y RECEPCIÓN DE MATERIALES Y ÓRDENES DE TRANSMISIÓN; Y SE MODIFICAN LOS ACUERDOS INE/JGE160/2015 E INE/ACRT/51/2015 PARA EFECTO DE APROBAR LAS PAUTAS CORRESPONDIENTES, [Agreement of the General Council of the National Electoral Institute to approve and order the publication of the catalog of stations for the election of sixty constituent deputies that will make up the Constituent Assembly of Mexico City], INE/CG54/2016, (Mex), available at: *https://portalanterior.ine.mx/archivos3/portal/historico/contenido/Estados/rsc/docs/CGext20160204_Ac_P3.pdf.*

parties. Legislative quotas depend on political parties since the political parties, not the indigenous communities, nominate the candidates. INE's indigenous quota policies establish an *obligation for political parties* to nominate a certain number of indigenous candidates. These policies do not establish a *right for any given indigenous community* to be represented. Political parties are free to choose who they nominate as an indigenous candidate as long as they satisfy the electoral authorities that the person has ties to *some* indigenous community.

Nevertheless, the court likely had Oaxaca's prohibition of political parties participating in indigenous elections in mind when it devoted eight pages to justifying its choice of tying indigenous quotas to political parties, even though it did not explicitly mention it.[54]

The court argued that forcing political parties to nominate indigenous candidates was the only practical way of ensuring indigenous candidates would actually be elected, given the existing avenues for legislative representation. As the court noted, the only available alternative would be to institute indigenous candidates through non-party candidatures. Before 2012, all legislative and executive candidatures in Mexico had to be nominated by a political party (excepting Oaxacan indigenous municipal elections). But in 2012, Congress modified the law to enable so-called "independent candidatures." However, critics have argued that the party-controlled Congress wrote the rules for independent candidates to make it difficult for anyone to register as an independent candidate. Notably, a person seeking to register him or herself as an independent candidate must first gather the signatures of 1% of registered voters. As the court wrote, "fulfilling such a requirement would be a very difficult burden for indigenous persons."[55] The experience of the last ten years has shown that it is an extremely difficult requirement for just about anyone, let alone for communities that have historically experienced economic and social marginalization. Even if a person successfully gains registration as an independent candidate, winning the election is an uphill battle, as independent candidates do not have access to the same publicly-funded campaign budgets as political parties. In short, the court argued that given the existing strictures of electoral procedures, the only plausible way to ensure the election of indigenous candidates was to obligate political parties to nominate them.

In its support of indigenous legislative quotas, the Electoral Tribunal used logic similar to that used in the Cherán case, filling in for what it considered the INE's "omission." Summarizing one of the original complaints, the court noted the INE "General Council's omission to adopt special measures to guarantee material equality and ensure the rights of indigenous persons, peoples,

---

[54] Radiodifusoras Capital S.A. y Otros v. Consejo General Del Instituto Nacional Electoral, Sala Superior–Tribunal Electoral [SUP TEPJF] [Mexico City Regional Chamber, Electoral Tribunal], SUP-RAP-71/2016, pp. 245-252, (Mex), available at*: https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-RAP-00071-2016*.

[55] *Id.* at 247.

and communities."[56] Just as the court in 2011 stepped-in to supplement Michoacán's "legislative omission," here it stepped in to fill the INE's administrative omission. But the court did more than simply declare the omission unconstitutional. The court instructed the INE to adopt very specific policies, namely electoral quotas. Even though some of the court's decisions are a welcome expansion of indigenous rights, it is worth noting that this expansion has occurred through not just "court-made law" but also "court-made administrative decisions."

Using identical arguments supporting youth quotas and indigenous quotas, the Electoral Tribunal evinced a specific understanding of democracy as involving more than just majority rule. The court ruling stated:

> The objective, therefore, is to include all representative groups in a foundational deliberative moment, especially the persons who have not only been excluded from the ordinary process of politics, but, above all, the people who have suffered a historical situation of vulnerability, which will enrich the Political Constitution of Mexico City. The more effective the participation, the more legitimacy the constitutive process will have.[57]

The Electoral Tribunal argued that Mexico City's Constituent Assembly needed to be "representative" of all groups because this was a "foundational moment" in the city, which was becoming an "autonomous federal entity" for the first time. As I shall show below, the Electoral Tribunal and INE later expanded these legislative quotas to ordinary federal elections as well, indicating that its view of representation expanded beyond constituent assemblies.

Most crucially, the court has slowly *moved away* from indigenous autonomy *stricto sensu* (i.e. as involving self-government) and opted instead to render it as special *representation* for indigenous communities. Per the court's argumentation, the emphasis is on having an adequately diverse legislative body. In this precedent-setting decision, indigenous self-government is simply not a theme. While there is a manifest concern with ensuring that the legislative body "reflects" the ethnic diversity of the population, there is relatively little discussion of the mechanisms or intricacies of representation. Indigenous representatives remain nominees of their parties, who formally represent the population as a whole. They are indigenous representatives in that they fulfill the individual requirement of being indigenous. They are not, however, formally agents of any given indigenous collective.

Indigenous quotas are thus closer to diversity, equity and inclusion policies than to self-government institutions. This is no coincidence. Electoral authorities had been generally successful in implementing gender parity principles in congress and other government bodies by the time they implemented indige-

[56] *Id.* at 221.

[57] *Id.* at 237.

nous quotas. Thanks to these policies, Mexico's congress is currently 50% male and 50% female. Indigenous quota policies were explicitly modeled after gender parity rules, and almost certainly after US affirmative action policies, as evident by the choice to name them "affirmative actions". Nevertheless, diversity, affirmative action, and gender parity policies historically have had no connection with self-determination or self-government. We don't think of female legislators as representatives of a female political entity in the way that we think of senators from a given state as representatives of that state. Female legislators are representatives of their entire state or district who happen to be female.

The unique circumstances through which Mexican indigenous quotas first came to exist thus set forth a slow but unmistakable shift of emphasis in the interpretation of the indigenous peoples' right to self-determination. While in Oaxaca's original marriage of electoral law and local government there was a clear view towards allowing indigenous groups, some amount of self-government, federal electoral authorities' affirmative action policies shifted towards ensuring diversity in *national* political bodies.

IX. Indigenous Quotas in 2018 and 2021 Federal Legislative Elections: SUP-RAP-726/2017 and SUP/RAP/121/2021

In 2017, Mexico's National Electoral Institute further adopted a policy that required political parties to register indigenous candidates in at least 12 of the 28 "indigenous electoral districts" for the 2018 first pass the post federal legislative elections.[58] The INE had previously defined "indigenous electoral districts" as those with at least 40% indigenous language speakers, per the national census bureau. While the INE had already experimented with indigenous electoral quotas when it organized Mexico City's constituent assembly in 2017, this was the first time a federal election would employ indigenous legislative quotas.

After a series of lawsuits challenging INE's original decree, the Electoral Tribunal partly modified the indigenous quota system.[59] The Electoral Tribunal

[58] Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE INDICAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A LOS DISTINTOS CARGOS DE ELECCIÓN POPULAR QUE PRESENTEN LOS PARTIDOS POLÍTICOS Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL INSTITUTO, PARA EL PROCESO ELECTORAL FEDERAL 2017-2018, [Agreement of the General Council of the National Electoral Institute through which the Council approves the criteria for the nomination of popular election candidates presented by national political parties and their coalitions, for the 2017-2018 federal elections], INE/CG508/2017, 508, (Mex), available at: *https://igualdad.ine.mx/wp-content/uploads/2018/09/Acuerdo-INE-CG508-2017.pdf*.

[59] Partido Verde Ecologista de México y Otros v. Consejo General Del Instituto Nacional Electoral, Sala Superior–Tribunal Electoral [SUP TEPJF] [Mexico City Regional Chamber, Electoral Tribunal], SUP-RAP-726/2017, (Mex), available at: *https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-RAP-726-2017*.

increased the number of electoral districts in which parties had to nominate indigenous candidates from 12 to 13. It also modified the definition of an indigenous electoral district to those with at least 60% indigenous language speakers. The Electoral Tribunal's aim with this ruling was to guarantee that indigenous candidates would actually be elected. Under the original INE policy, political parties could choose in which of the 28 indigenous electoral districts they would nominate indigenous candidates. Political parties could nominate indigenous candidates in districts where they expected to lose. The party that expected to win a district could nominate a non-indigenous candidate so that no indigenous candidates (or very few of them) would be elected. Under the Electoral Tribunal's modified formula, all political parties would have to propose indigenous candidates in the same 13 districts, guaranteeing that indigenous representatives would occupy at least 13 legislative seats.

After the relative success of indigenous quotas in the 2018 election, INE and the Electoral Tribunal broadened this form of affirmative action for the 2021 midterm election. This time they increased the number of reserved legislative seats, requiring parties to register indigenous candidates in both first pass the post and proportional representation nominations. Mexico's federal Chamber of Deputies (the lower house of Congress) comprises 500 deputies. Three hundred are elected through first pass the post based on their electoral districts, and 200 are elected through the principle of proportional representation, as outlined above. For the 2021 election, INE increased the number of districts in which political parties would have to nominate indigenous candidates from 13 to 21. Furthermore, INE required political parties to nominate at least 9 indigenous candidates in their party list for proportional representation elections. The 2021 election therefore combined the innovations of the Mexico City Constituent assembly (in which INE imposed quotas on proportional representation candidates) and the 2018 federal election (in which INE only required indigenous candidates for first pass the post representation).

The ultimate policy was only settled after a lawsuit-mediated intervention by the Electoral Tribunal. INE originally published a decree requiring that political parties nominate indigenous candidates in at least 21 of the 28 "indigenous electoral districts" identified based on data from the Mexican Census Bureau (INEGI).[60] On appeal, the Electoral Tribunal directed INE to specify in *which*

[60] Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A DIPUTACIONES POR AMBOS PRINCIPIOS QUE PRESENTEN LOS PARTIDOS POLÍTICOS NACIONALES Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL INSTITUTO, PARA EL PROCESO ELECTORAL FEDERAL 2020-2021, [Agreement of the General Council of the National Electoral Institute though the council approves the criteria for the nomination before the councils of this institute of candidatures for federal deputies through both principles presented by national political parties and their coalitions, for the 2020-2021 federal elections], INE/CG572/2020, (Mex), available at: *https://repositoriodocumental.ine.mx/xmlui/bitstream/handle/123456789/115204/CGex202011-18-ap-7.pdf*.

out of the 28 indigenous electoral districts political parties were required to nominate indigenous representatives. The Electoral Tribunal cited its own 2017 precedent and the concern that absent this measure, it would be possible to have indigenous candidates but few or none of them winning the election. The INE complied with the electoral Tribunal, issuing a new decree.[61]

It is worth emphasizing how much INE expanded indigenous quotas from 2018 to 2021. It increased the number of first pass the post indigenous candidates from 13 to 21 and forced parties to include indigenous candidates in the coveted first spots on the proportional representation lists. Especially for large political parties, persons in the first spots of the proportional representation candidates are almost guaranteed to win the election. The three largest political parties have usually won between 20% and 35% of the vote in legislative elections. Each can expect to win at least 40 of the 200 proportional representation seats. For these larger parties, persons included in the first ten spots of the proportional representation list are all but guaranteed to be elected federal deputies. From its outset, the 2021 indigenous electoral quota policy was conceived not just to have indigenous candidates but to ensure that there would be indigenous deputies in Congress.

X. Conclusion

This article has surveyed two main classes of state policies giving practical application to the Mexican Constitution's right of indigenous self-determination: indigenous culture laws and legislative quotas. The two are related. Although indigenous Culture laws have essentially been surpassed by the much more substantive modifications in electoral law and procedures, courts' justifications for their rulings continue to deploy a particular idea of indigeneity as deeply tied

[61] Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE EN ACATAMIENTO A LA SENTENCIA DICTADA POR LA SALA SUPERIOR DEL TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN EN EL EXPEDIENTE SUP-RAP-121/2020 Y ACUMULADOS, SE MODIFICAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A DIPUTACIONES POR AMBOS PRINCIPIOS QUE PRESENTEN LOS PARTIDOS POLÍTICOS NACIONALES Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL INSTITUTO, PARA EL PROCESO ELECTORAL FEDERAL 2020-2021, APROBADOS MEDIANTE ACUERDO INE/CG572/2020, [Agreement of the General Council of the National Electoral Institute whereby, in compliance with the ruling handed down by the Superior Chamber of the Electoral Tribunal of the Federal Judiciary in file sup-rap-121/2020 and accumulated, the applicable criteria for the registration of candidacies for deputies by both principles presented by the national political parties and, where appropriate, the coalitions before the councils of the institute, for the federal electoral process 2020-2021, approved by agreement ine/cg572/2020], INE/CG18/2021, 18, (Mex), available at: *https://repositoriodocumental.ine.mx/xmlui/bitstream/handle/123456789/116389/CGex202101-15-ap-12.pdf*.

to "culture." Authorities render "culture" in slightly different senses throughout their different instruments, but it remains the common thread.

In the most recent policies mandating that political parties nominate indigenous candidates for legislative elections, authorities reveal a particular view of the nation and the cultures that make it up. State agencies such as the National Electoral Institute construe Mexican society as composed of several different cultures. They accordingly seek to implement policies that ensure that legislatures reflect or resemble that cultural plurality. For instance, in the decree mandating indigenous quotas for the 2021 election, INE's General Council wrote that its affirmative action policies: "seek to revert the political underrepresentation of indigenous persons in the composition of the Chamber of Deputies as a constitutional organ that reflects the pluricultural composition of Mexican society."[62] In this rendering, there is a single national society composed of multiple cultures to which different *individuals* belong. Unlike the language used in earlier instruments such as Oaxaca's electoral procedure law, the various indigenous culture laws, or the Constitution itself, this decree speaks of indigenous *persons*, not *peoples and communities*. From this perspective, whose political ideal is accomplishing substantive and diverse *representation*, Mexican authorities fulfill their constitutional obligation to recognize indigenous self-determination by ensuring that the Chamber of Deputies is some type of a *reflection* of the nation's cultural diversity.

INE's notion of culture and plurality also has a unique form. The category of "indigenous cultures" is a pan-ethnic state category that itself incorporates an enormous diversity of groups. According to the National Institute for Indigenous Languages, 68 different languages belonging to 11 different language families are spoken in Mexico.[63] If one takes into account local variations, there are significantly more.[64] Indigenous scholars have argued that many people use the category of "indigenous" when interacting with the state but that indigenous persons and communities understand themselves in terms of their own identity in much more specific terms, as Q'anjob'al, Rarámuri, Rixhquei, etc. As linguist Yásnaya Aguilar Gil writes in a semi-autobiographical publication,

> For me, the world was divided into two, and it was all very clear: if you do not speak *Ayuujk*, you could only be *akäts* (non-Mije); whether you were Japanese, Swiss, Tarahumara, Guaraní, or Zapotec, I could only name you thus: *akäts*. It is no coincidence that the majority of indigenous languages do not have a word for *indigenous*.[65]

---

[62] Instituto Nacional Electoral [INE], INE/CG572/2020, at 76., (Mex).

[63] Instituto Nacional de Lenguas Indígenas, Catálogo de Las Lenguas Indígenas Nacionales: Variantes Lingüísticas de México Con Sus Autodenominaciones y Referencias Geoestadísticas, (2008).

[64] Yásnaya Elena Aguilar Gil & Ana Aguilar-Guevara, Aa: Manifiestos Sobre La Diversidad Lingüística (Primera edición, 2020).

[65] *Id.* at 39.

Here as elsewhere, Aguilar Gil argues that, strictly speaking, "indigenous" is not a category of self-understanding. Rather, it is a state category that amalgamates an enormous diversity of cultures, experiences, languages, and perspectives. For her, "indigenous" is not a cultural category in the sense that a single, cohesive indigenous culture does not exist. At most "indigenous" is a political category that can serve to mobilize a diversity of actors in a structurally similar situation of oppression.[66] But up to now, Mexican electoral authorities appear satisfied with this inevitably abstract sense of "culture" as the unit upon which to base plural representation.

Perhaps ironically, Mexican courts have issued criteria stating that indigenous identity is a subjective matter that cannot simply be reduced to objective criteria like language, education, race, etc. Courts have ruled that indigenous status is first and foremost a matter of "self-identification," which may sometimes be verified by certifying a person's "community bonds."

The notion of culture implicit in Oaxaca's electoral statutes is slightly different. Oaxaca's electoral laws treat indigenous communities as political collectivities that act through assemblies. Moreover, because Oaxacan law tries to separate local indigenous processes from national society and politics, it implies that "cultures" are like distinct *societies* or *nations*. Scholars and commentators (including the Electoral Tribunal) have sometimes described Oaxaca as the site of "legal pluralism."[67] On their view, different "cultures" autonomously create different legal orders that reflect their varying worldviews. This rendering of "culture" echoes modern ideas surrounding the nation-state, in which the *nation* appears as a culturally cohesive unit that gives unique form to the sovereign state. The diversity of national laws in the international theater would correspond to the diversity of national cultures. In the same way, different indigenous *peoples* in Oaxaca autonomously determine their own laws and local government policies.

It is not a coincidence that Mexican electoral courts used the term "affirmative actions" to describe their special legislative quotas. They were explicitly emulating the US's (now essentially defunct) policy of adopting special policies to guarantee African Americans and other minority groups equal access to opportunities in education and other spheres of life. The model of culture implied

---

66 This situation resembles US ethnoracial categories like "Hispanic" and "Asian." Most first-generation immigrants are surprised to discover that in the US, they become "Asians" and "Hispanics," categories that are so broad that they hardly refer to a single common culture or "ethnicity." At home, they might have understood themselves in terms of their national cultures as Cuban, Japanese, Chinese, Guatemalan, etc.

67 SISTEMA JURÍDICO MEXICANO. SE INTEGRA POR EL DERECHO INDÍGENA Y EL DERECHO FORMALMENTE LEGISLADO, Pleno de la Sala Superior del Tribunal Electoral [SUP-TEPJF] [Electoral Tribunal], Gaceta de Jurisprudencia y Tesis en materia electoral, Tribunal Electoral del Poder Judicial de la Federación, Año 9, Número 18, 2016, Tesis LII/2016, páginas 134 y 135, (Mex).

by Mexican electoral courts' quota system shares some formal characteristics with the US notion of race.

In contrast, Oaxaca's model of autonomous indigenous municipalities shares some formal characteristics with the US's relationship with indigenous nations, which enjoy a different status from other "minorities." US indigenous nations have powers similar to those of states, even though they exist in a situation of de facto subordination.[68]

These models are both mediated through the idea of culture. These two uses of "culture" are not mutually exclusive or necessarily contradictory. For instance, in Oaxaca, members of an indigenous community may simultaneously participate in their municipality's relatively autonomous political life and be eligible to run for national office as an indigenous representative. However, the various readings of culture favor different classes of policies, with the subjective-individual sense leaning more towards *representation* and the collective-political sense leaning more towards autonomy as self-government.

XI. Appendix: Overview of State-level secondary legislation on indigenous Rights

Federal Entity	"Indigenous Culture" Act?	Explicit mechanisms in Electoral code/ law?	If electoral code yes; municipal, regidor/a, or both	"Indigenous justice" act?
Aguascalientes	*Ley de Justicia Indígena del Estado de Aguascalientes (2015)* [69]	No		No
Baja California	*Ley de Derechos y Cultura Indígena del Estado de Baja California (2007)*	No		No
Baja California Sur	No	No		No
Campeche	*Ley de Derechos, Cultura y Organización de los Pueblos y Comunidades Indígenas del Estado de Campeche (2019)*	No		No

[68] Matthew L. M. Fletcher, Principles of Federal Indian Law (2017).

[69] The name would suggest that this is an "indigenous justice" act like those of Michoacán, Quintana Roo, San Luis Potosí and Yucatán. However, its content is that of an indigenous culture act. Aguascalientes is also unique in the fact that it essentially does not have any indigenous population, and yet it does have an indigenous Culture law.

Chiapas	*Ley de Derechos y Cultura Indígenas del Estado de Chiapas (1999)*	No		No
Chihuahua	*Ley de Derechos de los Pueblos Indígenas del Estado de Chihuahua (2013)*	No		No
Ciudad de México	*Ley de Derechos de Pueblos y Barrios Originarios y Comunidades Indígenas Residentes en la Ciudad de México (2019)*	No		No
Coahuila de Zaragoza	No	Yes	Regidor/a[70]	No
Colima	*Ley sobre los Derechos de los Pueblos y Comunidades Indígenas del Estado de Colima (2014)*	No		No
Durango	*Ley General de los Pueblos y Comunidades Indígenas del Estado de Durango (2007)*	No		No
Guanajuato	*Ley para la Protección de los Pueblos y Comunidades Indígenas en el Estado de Guanajuato (2011)*	Yes	Regidor/a[71]	No
Guerrero	*Ley de Reconocimiento, Derechos y Cultura de los Pueblos y Comunidades Indígenas del Estado de Guerrero (2011)*	Yes	Both[72]	No
Hidalgo	*Ley de Derechos y Cultura Indígena para el Estado de Hidalgo (2010)*	Yes	Both[73]	No

[70] Código Electoral Para el Estado de Coahuila de Zaragoza [Coahuila Electoral Code], as amended, Arts. 17 bis-17 quater, Periódico Oficial de Coahuila, August 1st 2016, (Mex), available at: *https://www.congresocoahuila.gob.mx/transparencia/03/Leyes_Coahuila/coa163.pdf*

[71] Ley de Instituciones y Procedimientos Electorales Para el Estado de Guanajuato [Guanajuato Electoral Institutions and Procedure Law], as amended, Art. 184 Bis., Periódico Oficial del Estado de Guanajuato, June 27 2014, (Mex), available at: *https://igualdadydemocracia.ieeg.mx/wp-content/uploads/2020/08/LIPEEG.pdf*

[72] Ley de Instituciones y Procedimientos Electorales del Estado de Guerrero [Guerrero State Electoral Institutions and Procedure Law], as amended, Arts. 13 bis, 272 bis and 455-468, Periódico Oficial del Estado de Guerrero, June 20 2014, (Mex), available at: *https://congresogro.gob.mx/legislacion/ordinarias/ARCHI/ley-de-instituciones-y-procedimientos-electorales-del-estado-de-guerrero-483-2023-06-28.pdf*

[73] Código Electoral del Estado de Hidalgo [Hidalgo Electoral Code], as amended, Arts. 295 a-295 z., Periódico Oficial del Estado de Hidalgo, December 22 2014, (Mex), available at: *http://www.congreso-hidalgo.gob.mx/biblioteca_legislativa/leyes_cintillo/Codigo%20Electoral%20del%20Estado%20de%20Hidalgo.pdf*

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

Jalisco	*Ley sobre los Derechos y el Desarrollo de los Pueblos y las Comunidades Indígenas del Estado de Jalisco (2007)*	Yes	Regidor/a[74]	No
México	*Ley de Derechos y Cultura Indígena del Estado de México (2002)*	No		No
Michoacán de Ocampo	No	No		*Ley de Justicia Comunal del Estado de Michoacán de Ocampo (2007)*
Morelos	*Ley de Fomento y Desarrollo de los Derechos y Cultura de las Comunidades y Pueblos Indígenas del Estado de Morelos (2012)*	No		No
Nayarit	*Ley de Derechos y Cultura Indígena del Estado de Nayarit (2004)*	No		No
Nuevo León	*Ley de los Derechos de las Personas Indígenas y Afromexicanas en el Estado de Nuevo León (2012)*	No		No
Oaxaca	*Ley de Derechos de los Pueblos y Comunidades Indígenas del Estado de Oaxaca (1998)*	Yes	Municipal[75]	No
Puebla	*Ley de Derechos, Cultura y Desarrollo de los Pueblos y Comunidades Indígenas del Estado de Puebla (2011)*	No		No
Querétaro	*Ley de Derechos y Cultura de los Pueblos y Comunidades Indígenas del Estado de Querétaro (2020)*	Yes	Regidor/a[76]	No

[74] Código Electoral del Estado de Jalisco [Jalisco State Electoral Code], as amended, Art. 24 Frac 3, Periódico Oficial del Estado de Jalisco, August 6 2008, (Mex), available at: *https://transparencia.info.jalisco.gob.mx/sites/default/files/Código%20Electoral%20y%20de%20Participación%20Ciudadana%20del%20Estado%20de%20Jalisco_0.pdf*

[75] Ley de Instituciones y Procedimientos Electorales del Estado de Oaxaca [Oaxaca Electoral Institutions and Procedures Code], as amended, Arts. 273-276, Periódico Oficial de Oaxaca, June 3 2017, (Mex).

[76] Ley Electoral del Estado de Querétaro [Querétaro Electoral Law], as amended, Arts. 162, 168 B, and 172, Periódico Oficial del Estado de Querétaro, May 22 2020, (Mex), available at: *http://legislaturaqueretaro.gob.mx/app/uploads/2016/01/LEY057_59_18.pdf*

Quintana Roo	*Ley de Derechos, Cultura y Organización Indígena del Estado de Quintana Roo (1998)*	No		*Ley de Justicia Indígena del Estado de Quintana Roo (2012)*
San Luis Potosí	*Ley Reglamentaria del Artículo 9º de la Constitución Política del Estado, sobre los Derechos y la Cultura Indígenas (2003)*	Yes	Regidor/a[77]	*Ley de Justicia Indígena y Comunitaria para el Estado de San Luis Potosí (2014)*
Sinaloa	*Ley de los Derechos de los Pueblos y Comunidades Indígenas para el Estado de Sinaloa (2018)*	No		No
Sonora	*Ley de Derechos de los Pueblos y Comunidades Indígenas de Sonora (2010)*	Yes	Regidor/a[78]	No
Tabasco	*Ley de Derechos y Cultura Indígena del Estado de Tabasco (2019)*	No		No
Tamaulipas	No	No		No
Tlaxcala	*Ley de Protección, Fomento y Desarrollo a la Cultura Indígena para el Estado de Tlaxcala (2006)*	No		No
Veracruz de Ignacio de la Llave	*Ley de Derechos y Culturas Indígenas para el Estado de Veracruz de Ignacio de la Llave (2010)*	No		No

[77] Ley Electoral del Estado de San Luis Potosí [San Luis Potosí Electoral Law], as amended, Art. *297, Periódico Oficial de San Luis Potosí, June 30 2014, (Mex), available at: http://www.ceepacslp.org.mx/ceepac/uploads2/files/Ley_Electoral_del_Estado_28_Sept_2022_1_compressed.pdf*

[78] Ley de Instituciones y Procedimientos Electorales para el Estado de Sonora [Sonora State Electoral Procedures and Institutions Law], as amended, Arts. 172-173, Boletín Oficial del Estado de Sonora, June 30 2014, (Mex), available at*: https://www.ieesonora.org.mx/documentos/legislacion/estatales/lipees.pdf*

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

Yucatán	*Ley para la Protección de los Derechos de la Comunidad Maya del Estado de Yucatán (2011)*	No		*Ley del Sistema de Justicia Maya del Estado de Yucatán (2014)*
Zacatecas	No	No		*Ley de Justicia Comunitaria del Estado de Zacatecas (2002)*

XII. References

Adom Getachew, Worldmaking after Empire: The Rise and Fall of Self-Determination (2019).

Araceli Burguete Cal y Mayor, *Municipalización del gobierno indígena e indianización del Gobierno Municipal en América Latina*, 6 *Rev. Pueblos Front. Digit. 38* (2011), available at: *http://www.scielo.org.mx/scielo.php?script=sci_abstract&pid=S1870-41152011000100038&lng=es&nrm=iso&tlng=es* (last visited Jan 17, 2022).

Claudia Gamboa Montejano & Sandra Valdés Robledo, Los Usos Y Costumbres De Pueblos Indigenas Derecho Comparado A Nivel Estatal (2018).

Código Civil Para el Estado de Nayarit [Nayarit Civil Code], as amended, Arts. 2041 - 2108, Periódico Oficial Nayarit, August 22 1981, (Mex), available at: *https://www.nayarit.gob.mx/transparenciafiscal/marcoregulatorio/ordenamientos/código%20civil%20para%20el%20estado%20de%20nayarit.htm*

Código Electoral del Estado de Hidalgo [Hidalgo Electoral Code], as amended, Arts. 295 a-295 z., Periódico Oficial del Estado de Hidalgo, December 22 2014, (Mex), available at: *http://www.congreso-hidalgo.gob.mx/biblioteca_legislativa/leyes_cintillo/Codigo%20Electoral%20del%20Estado%20de%20Hidalgo.pdf*

Código Electoral del Estado de Jalisco [Jalisco State Electoral Code], as amended, Art. 24 Frac 3, Periódico Oficial del Estado de Jalisco, August 6 2008, (Mex), available at: *https://transparencia.info.jalisco.gob.mx/sites/default/files/Código%20Electoral%20y%20de%20Participación%20Ciudadana%20del%20Estado%20de%20Jalisco_0.pdf*

Código Electoral Para el Estado de Coahuila de Zaragoza [Coahuila Electoral Code], as amended, Arts. 17 bis-17 quater, Periódico Oficial

de Coahuila, August 1st 2016, (Mex), available at: *https://www.congresocoahuila.gob.mx/transparencia/03/Leyes_Coahuila/coa163.pdf*

Código Nacional de Procedimientos Penales [CNPP] [National Criminal Procedure Code], as amended, Art. 420, Diario Oficial de la Federación [DOF], March 5 2014, (Mex), available at: *https://www.diputados.gob.mx/LeyesBiblio/pdf/CNPP.pdf*

COMUNIDADES INDÍGENAS. INTEGRACIÓN DE LA ASAMBLEA GENERAL COMUNITARIA (LEGISLACIÓN DE OAXACA), Pleno de la Sala Superior del Tribunal Electoral [SUP-TEPJF] [Electoral Tribunal], Gaceta de Jurisprudencia y Tesis en materia electoral, Tribunal Electoral del Poder Judicial de la Federación, Año 4, Número 9, 2011, Tesis XL/2011, páginas 51 y 52, (Mex).

Constitución Política del Estado Libre y Soberano de Oaxaca [Oaxaca Const.], as amended, Art. 22, Periódico Oficial de Oaxaca, April 4 1922, (Mex), available at: *https://www.oaxaca.gob.mx/cocitei/wp-content/uploads/sites/48/2019/07/CONSTITUCION-POLITICA-DEL-ESTADO-LIBRE-Y-SOBERANO-DE-OAXACA.pdf*

Constitución Política de los Estados Unidos Mexicanos [CPEUM], Diario Oficial de la Federación [DOF] Feb. 5th, 1917 (Mex.), available at: *https://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_122_28ene92_ima.pdf*

Helga Baitenmann, Matters of Justice: Pueblos, the Judiciary, and Agrarian Reform in Revolutionary Mexico (2020).

Hipólito Arriaga Pote v. Tribunal Electoral Del Estado de Guerrero, Sala Regional Ciudad de México–Tribunal Electoral [SCM TEPJF] [Mexico City Regional Chamber, Electoral Tribunal], SCM-JDC-402/2018, p. 52, (Mex), available at: *https://www.te.gob.mx/salasreg/ejecutoria/sentencias/df/SCM-JDC-0402-2018.pdf*

Instituto Estatal Electoral y de Participación Ciudadana de Oaxaca [IEEPCO], ACUERDO POR EL QUE SE APRUEBA EL CATÁLOGO DE MUNICIPIOS SUJETOS AL RÉGIMEN DE SISTEMAS NORMATIVOS INDÍGENAS DEL ESTADO DE OAXACA Y SE ORDENA EL REGISTRO Y PUBLICACIÓN DE LOS DICTÁMENES POR LOS QUE IDENTIFICAN LOS MÉTODOS DE ELECCIÓN DE SUS AUTORIDADES MUNICIPALES [Agreement through which the catalogue of municipalities subject to the indigenous normative system regime of the State of Oaxaca is approved and the registration and publication of the expert opinions identifying the election methods for their municipal authorities is proclaimed], IEEPCO-CG-SNI-33/2018, (2019), (Mex), available at: *https://www.ieepco.org.mx/archivos/acuerdos/2018/IEEPCOCGSNI332018.pdf*

Instituto Nacional de Lenguas Indígenas, Catálogo de Las Lenguas Indígenas Nacionales: Variantes Lingüísticas de México Con Sus Autodenominaciones y Referencias Geoestadísticas, (2008).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE EN ACATAMIENTO A LA SENTENCIA DICTADA POR LA SALA SUPERIOR DEL TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN EN EL EXPEDIENTE SUP-RAP-121/2020 Y ACUMULADOS, SE MODIFICAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A DIPUTACIONES POR AMBOS PRINCIPIOS QUE PRESENTEN LOS PARTIDOS POLÍTICOS NACIONALES Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL INSTITUTO, PARA EL PROCESO ELECTORAL FEDERAL 2020-2021, APROBADOS MEDIANTE ACUERDO INE/CG572/2020, [Agreement of the General Council of the National Electoral Institute whereby, in compliance with the ruling handed down by the Superior Chamber of the Electoral Tribunal of the Federal Judiciary in file sup-rap-121/2020 and accumulated, the applicable criteria for the registration of candidacies for deputies by both principles presented by the national political parties and, where appropriate, the coalitions before the councils of the institute, for the federal electoral process 2020-2021, approved by agreement ine/cg572/2020], INE/CG18/2021, 18, (Mex), available at: *https://repositoriodocumental.ine.mx/xmlui/bitstream/handle/123456789/116389/CGex202101-15-ap-12.pdf*

Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBA EL PLAN Y CALENDARIO INTEGRAL DEL PROCESO ELECTORAL RELATIVO A LA ELECCIÓN DE SESENTA DIPUTADOS POR EL PRINCIPIO DE REPRESENTACIÓN PROPORCIONAL PARA INTEGRAR LA ASAMBLEA CONSTITUYENTE DE LA CIUDAD DE MÉXICO, SE DETERMINAN ACCIONES CONDUCENTES PARA ATENDERLOS, Y SE EMITEN LOS LINEAMIENTOS CORRESPONDIENTES, [Agreement of the General Council of the National Electoral Institute approving the comprehensive plan of the elections relating to the election of sixty deputies by the principle of proportional representation to make up the Constituent Assembly of Mexico City, affirmative action policies to define them], INE/CG53/2016 (Mex), available at: *https://repositoriodocumental.ine.mx/xmlui/handle/123456789/87500*

Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A DIPUTACIONES POR AMBOS PRINCIPIOS QUE PRESENTEN LOS PARTIDOS POLÍTICOS NACIONALES Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL INSTITUTO, PARA EL PROCESO ELECTORAL

FEDERAL 2020-2021, [Agreement of the General Council of the National Electoral Institute through which the council approves the criteria for the nomination before the councils of this institute of candidatures for federal deputies through both principles presented by national political parties and their coalitions, for the 2020-2021 federal elections], INE/CG572/2020, (Mex.), available at: *https://repositoriodocumental.ine.mx/xmlui/bitstream/handle/123456789/115204/CGex202011-18-ap-7.pdf*

Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE APRUEBA Y ORDENA LA PUBLICACIÓN DEL CATÁLOGO DE EMISORAS PARA EL PROCESO ELECTORAL PARA LA ELECCIÓN DE SESENTA DIPUTADOS CONSTITUYENTES QUE INTEGRARÁN LA ASAMBLEA CONSTITUYENTE DE LA CIUDAD DE MÉXICO; SE APRUEBA UN CRITERIO GENERAL PARA LA DISTRIBUCIÓN DEL TIEMPO EN RADIO Y TELEVISIÓN QUE SE DESTINARÁ A LOS PARTIDOS POLÍTICOS Y AUTORIDADES ELECTORALES DURANTE EL PROCESO ELECTORAL, ASÍ COMO PARA LA ENTREGA Y RECEPCIÓN DE MATERIALES Y ÓRDENES DE TRANSMISIÓN; Y SE MODIFICAN LOS ACUERDOS INE/JGE160/2015 E INE/ACRT/51/2015 PARA EFECTO DE APROBAR LAS PAUTAS CORRESPONDIENTES, [Agreement of the General Council of the National Electoral Institute to approve and order the publication of the catalog of stations for the election of sixty constituent deputies that will make up the Constituent Assembly of Mexico City], INE/CG54/2016, (Mex), available at: *https://portalanterior.ine.mx/archivos3/portal/historico/contenido/Estados/rsc/docs/CGext20160204_Ac_P3.pdf*

Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL, POR EL QUE SE EMITE CONVOCATORIA PARA LA ELECCIÓN DE SESENTA DIPUTADOS, PARA INTEGRAR LA ASAMBLEA CONSTITUYENTE DE LA CIUDAD DE MÉXICO, [Agreement of the General Council of the National Electoral Institute, which issues a call for the election of sixty deputies to integrate the constituent assembly of Mexico City], INE/CG52/2016, 52, (Mex), available at: *https://portalanterior.ine.mx/archivos3/portal/historico/contenido/Estados/rsc/docs/CGext20160204_ac_P1.pdf*

Instituto Nacional Electoral [INE], ACUERDO DEL CONSEJO GENERAL DEL INSTITUTO NACIONAL ELECTORAL POR EL QUE SE INDICAN LOS CRITERIOS APLICABLES PARA EL REGISTRO DE CANDIDATURAS A LOS DISTINTOS CARGOS DE ELECCIÓN POPULAR QUE PRESENTEN LOS PARTIDOS POLÍTICOS Y, EN SU CASO, LAS COALICIONES ANTE LOS CONSEJOS DEL

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19159

INSTITUTO, PARA EL PROCESO ELECTORAL FEDERAL 2017-2018, [Agreement of the General Council of the National Electoral Institute through which the Council approves the criteria for the nomination of popular election candidates presented by national political parties and their coalitions, for the 2017-2018 federal elections], INE/CG508/2017, 508, (Mex), available at: *https://igualdad.ine.mx/wp-content/uploads/2018/09/Acuerdo-INE-CG508-2017.pdf*

Instituto Nacional Electoral [INE], INE/CG572/2020, at 76., (Mex).

International Labour Organization, Indigenous and Tribal Peoples Convention 169, June 27, 1989, 1650 U.N.T.S. 28383, available at: *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169*

Janine M. Otálora Malassis, Casos Relevantes de La Defensoría Pública Electoral Para Pueblos y Comunidades Indígenas 53-68 (2020).

Jörg Fisch & Anita Mage, The Right of Self-Determination of Peoples: The Domestication of an Illusion (2015).

Joseph Massad, *Against Self-Determination*, 9 *Humanity Int. J. Hum. Rights. Dev. 161* (2018), available at: https://muse.jhu.edu/article/703633 (last visited Jan 18, 2023).

Ley Agraria [LAG] [Agrarian Law], as amended, Art. 22, Diario Oficial de la Federación [DOF], February 26 1992, (Mex), available at: *https://www.diputados.gob.mx/LeyesBiblio/pdf/LAgra.pdf*

Ley Electoral del Estado de Querétaro [Querétaro Electoral Law], as amended, Arts. 162, 168 B, and 172, Periódico Oficial del Estado de Querétaro, May 22 2020, (Mex), available at: *http://legislaturaqueretaro.gob.mx/app/uploads/2016/01/LEY057_59_18.pdf*

Ley Electoral del Estado de San Luis Potosí [San Luis Potosí Electoral Law], as amended, Art. 297, Periódico Oficial de San Luis Potosí, June 30 2014, (Mex), available at: *http://www.ceepacslp.org.mx/ceepac/uploads2/files/Ley_Electoral_del_Estado_28_Sept_2022_1_compressed.pdf*

Ley de Derechos, Cultura y Organización Indígena del Estado de Quintana Roo, [Law of the Rights, Culture and Indigenous organization of the State of Quintana Roo], as amended, Periódico Oficial Quintana Roo, July 29 1998, (Mex.), available at: *http://documentos.congresoqroo.gob.mx/leyes/L76-XVI-20220824-L1620220824246-ley-derechos.pdf*

Ley de Derechos de los Pueblos Indígenas del Estado de Chihuahua [Law of the Rights of Indigenous Peoples of the State of Chihuahua], as amended, Art. 9, Periódico Oficial de Chihuahua, June 29 2013, (Mex), available at: *https://www.congresochihuahua2.gob.mx/biblioteca/leyes/archivosLeyes/1003.pdf*

Ley de Derechos de los Pueblos y Barrios Originarios y Comunidades Indígenas Residentes en la Ciudad de México, [Law of Rights of Indigenous Peoples and Barrios and Indigenous Communities Residing in Mexico City], Gaceta Oficial de la Ciudad de México, December 20

2019, (Mex), available at: *https://data.consejeria.cdmx.gob.mx/images/leyes/leyes/LEY_DERECHOS_DE_PUEBLOS_Y_BARRIOS_ORIGINARIOS_Y_COMUNIDADES_INDIGENAS_RESIDENTES_EN_LA_CDMX_2.4.pdf*

Ley de Derechos de los Pueblos y Comunidades Indígenas y Afromexicano del Estado de Oaxaca [Law for the Rights of Indigenous and Afro-Descendent Peoples and Communities of the State of Oaxaca], as amended, Periódico Oficial de Oaxaca, July 19 1998, (Mex.), available at: *https://www.congresooaxaca.gob.mx/docs65.congresooaxaca.gob.mx/legislacion_estatal/Ley_de_Derechos_de_los_Pueblos_y_Comunidades_Indigenas_y_Afromexicano_del_Estado_de_Oaxaca_(Dto_ref_778_aprob_LXV_Legis_18_ene_2023_PO_4_2a_secc_28_ene_2023).pdf*

Ley de Derechos y Cultura Indígena del Estado de Nayarit, [Nayarit Indigenous Culture and Rights Law], as amended, Art. 19, Periódico Oficial Nayarit, December 18 2004, (Mex), available at: *https://congresonayarit.gob.mx/wp-content/uploads/QUE_HACEMOS/LEGISLACION_ESTATAL/leyes/derechos_y_cultura_indigena_del_estado_de_nayarit_ley_de.pdf*

Ley de Instituciones y Procedimientos Electorales Para el Estado de Guanajuato [Guanajuato Electoral Institutions and Procedure Law], as amended, Art. 184 Bis., Periódico Oficial del Estado de Guanajuato, June 27 2014, (Mex), available at: *https://igualdadydemocracia.ieeg.mx/wp-content/uploads/2020/08/LIPEEG.pdf*

Ley de Instituciones y Procedimientos Electorales del Estado de Guerrero [Guerrero State Electoral Institutions and Procedure Law], as amended, Arts. 13 bis, 272 bis and 455-468, Periódico Oficial del Estado de Guerrero, June 20 2014, (Mex), available at: *https://congresogro.gob.mx/legislacion/ordinarias/ARCHI/ley-de-instituciones-y-procedimientos-electorales-del-estado-de-guerrero-483-2023-06-28.pdf*

Ley de Instituciones y Procedimientos Electorales del Estado de Oaxaca [Law for Electoral Procedures and Institutions of the State of Oaxaca], as amended, Periódico Oficial de Oaxaca, June 3 2017, (Mex), available at: *https://www.ieepco.org.mx/archivos/documentos/2020/MarcoJuridico/LIPEEO.pdf*

Ley de Instituciones y Procedimientos Electorales para el Estado de Sonora [Sonora State Electoral Procedures and Institutions Law], as amended, Arts. 172-173, Boletín Oficial del Estado de Sonora, June 30 2014, (Mex), available at: *https://www.ieesonora.org.mx/documentos/legislacion/estatales/lipees.pdf*

Ley de Justicia Comunitaria del Estado de Zacatecas, [Zacatecas Indigenous Community Justice Law], as amended, Periódico Oficial del Gobierno del Estado de Zacatecas, July 10 2002, (Mex), available at: *https://www.congresozac.gob.mx/64/ley&cual=70&tipo=pdf*

Ley de Justicia Indígena del Estado de Quintana Roo [Quintana Roo Indigenous Justice Law], as amended, Periódico Oficial Quintana Roo,

December 31 2012, (Mex), available at: *http://documentos.congresoqroo.gob.mx/leyes/L1320121231234.pdf*

Ley de Protección, Fomento y Desarrollo a la Cultura Indígena Para el Estado de Tlaxcala, [Law for the Protection, Fostering and Development of Indigenous Culture in the State of Tlaxcala], as amended, Art. 8 frac VI, Periódico Oficial de Tlaxcala, April 7 2006, (Mex), available at: *https://sfp.tlaxcala.gob.mx/pdf/normateca/ley%20de%20proteccion%20fomento%20y%20desarrollo%20a%20la%20cultura%20indigena%20para%20el%20estado%20de%20tlaxcala.pdf*

Ley General de Partidos Políticos [Law of Political Parties], as amended, Art 25 section i), Diario Oficial de la Federación [DOF], May 23 2014, available at: *https://www.diputados.gob.mx/LeyesBiblio/pdf/LGPP.pdf*

María del Carmen Ventura Patiño, Volver a La Comunidad: Derechos Indígenas y Procesos Autonómicos En Michoacán (2010).

Matthew L. M. Fletcher, Principles of Federal Indian Law (2017).

Mónica Rodriguez, *Castañeda Gutman v. Mexico*, 36 *Loy LA Int'l Comp Rev*, 1949.

Orlando Aragón Andrade, *La Emergencia Del Cuarto Nivel de Gobierno y La Lucha Por El Autogobierno Indígena En Michoacán, México*, 94 *Cah. Am. Lat. 57* (2020).

Partido Verde Ecologista de México y Otros v. Consejo General Del Instituto Nacional Electoral, Sala Superior–Tribunal Electoral [SUP TEPJF] [Mexico City Regional Chamber, Electoral Tribunal], SUP-RAP-726/2017, (Mex), available at: *https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-RAP-726-2017*

Radiodifusoras Capital S.A. y Otros v. Consejo General Del Instituto Nacional Electoral, Sala Superior–Tribunal Electoral [SUP TEPJF] [Mexico City Regional Chamber, Electoral Tribunal], SUP-RAP-71/2016, pp. 245-252, (Mex), available at*: https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-RAP-00071-2016*

SISTEMA JURÍDICO MEXICANO. SE INTEGRA POR EL DERECHO INDÍGENA Y EL DERECHO FORMALMENTE LEGISLADO, Pleno de la Sala Superior del Tribunal Electoral [SUP-TEPJF] [Electoral Tribunal], Gaceta de Jurisprudencia y Tesis en materia electoral, Tribunal Electoral del Poder Judicial de la Federación, Año 9, Número 18, 2016, Tesis LII/2016, páginas 134 y 135, (Mex).

Vladimir Lenin, The Right of Nations to Self-Determination: Selected Writings (2004).

Yásnaya Elena Aguilar Gil & Ana Aguilar-Guevara, AA: Manifiestos Sobre La Diversidad Lingüística (Primera edición, 2020).

Towards an evidence-based pretrial risk assessment in Mexican juvenile offenders: A systematic review of relevant instruments using COSMIN guidelines

Nadja **Monroy Vite**
https://orcid.org/0000-0002-0675-3965

Universidad Nacional Autónoma de México. México
Email address: nadfisc@gmail.com

Ana **Fresán Orellana**
https://orcid.org/0000-0001-9160-6988

Instituto Nacional de Psiquiatría Ramón de la Fuente Muñiz. México
Email address: a_fresan@yahoo.com.mx

Carmen Patricia **López Olvera**
https://orcid.org/0000-0001-5005-8145

Universidad Nacional Autónoma de México. México
Email address: patlopezolvera@unam.mx

J. Nicolás Ivan **Martínez López**
https://orcid.org/0000-0002-0506-4076

Instituto Nacional de Psiquiatría Ramón de la Fuente Muñiz. México
Email address: saludmentalforense@gmail.com

Received: June 21st, 2023
Accepted: March 12th, 2024

DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Abstract: The Mexican Comprehensive Criminal Justice System for Adolescents (Sistema Integral de Justicia Penal para Adolescentes) is in urgent need of validated tools to help diminish the likelihood of pretrial failure, (that is, when juveniles interfere in one way or another with the course of the criminal process before the trial stage). To this end, this article aims to evaluate the measurement properties of relevant instruments to guide and support pretrial risk assessment in Mexican juvenile offenders. Firstly, a systematic review was conducted in PubMed, metasearch

engines (DGB-UNAM and Google Scholar), and databases using the COnsensus-based Standards for the selection of health Measurement Instruments (COSMIN) guidelines. As it was found that no validated pretrial risks assessment instruments had been published earlier in Mexico, we present a proposal based on a preliminary selection of five instruments suitable for pretrial risks assessment taking both analysis and theory into account. Since this is the first systematic review in the field, results provide evidence for developing pretrial risk tools to aid decision-making in the juvenile offenders sector in Mexico.
Keywords: pretrial risk, risk assessment, juvenile justice, systematic review, COSMIN

Resumen: El Sistema Integral de Justicia Penal para Adolescentes de México requiere urgentemente contar con instrumentos validados para ayudar a reducir la probabilidad de presentar una conducta procesal indebida, es decir, cuando los adolescentes interfieren de una u otra forma en el curso del proceso penal antes del juicio. Para ello, este artículo tiene el objetivo de evaluar las propiedades de medición de instrumentos relevantes que orienten y sustenten la evaluación de riesgos procesales de adolescentes mexicanos en contacto con el Sistema de Justicia Penal. En primer lugar, se realizó una revisión sistemática en PubMed, metabuscadores (DGB-UNAM y Google Scholar) y registros, utilizando la guía de los Estándares basados en el COnsenso para la selección de Instrumentos de Medición en Salud (COSMIN). Como se encontró que no habían sido publicados instrumentos de evaluación de riesgos validados en México, presentamos una propuesta basada en una selección preliminar de cinco instrumentos adecuados para evaluar riesgos procesales tomando en cuenta el análisis y la teoría. Como esta es la primera revisión sistemática en la materia, los resultados proveen de evidencia para desarrollar herramientas que coadyuven a la toma de decisiones en el sector de adolescentes en contacto con el Sistema de Justicia Penal de México.
Palabras clave: riesgo procesal, evaluación de riesgo, justicia juvenil, revisión sistemática, COSMIN.

I. Introduction

A systematic review of instruments aims to identify gaps in knowledge and assist in selecting the most suitable tool to measure the variable in question regarding a specific population.[1] In this case, we focus on tools for pretrial risk assessment in Mexican juveniles. A review can also provide information about measurement properties, defined as an aspect of the quality of an instrument,

[1] Cecilia A.C. Prinsen et al., *COSMIN guideline for systematic reviews of patient-reported outcome measures*, 27 Qual. Life Res. *1147, 1148* (2018).

which in turn can be divided into three main domains, 1) validity, 2) reliability and 3) responsiveness. These properties are explained below.

Validity reflects the degree to which a tool measures the variable intended to measure, for instance, if it is adequately based on a general review (*face validity*), expert opinion (*content validity*), statistical confirmation of the underlying theoretical elements that compose the variable (structural validity), consistency with empirical evidence (*hypotheses testing*), adaptation of the original version of the tool in a different population (*cross-cultural validity*) and comparison with an instrument considered as a "gold standard" (*criterion validity*). *Reliability* indicates if the measurement is free of error, i.e., that changes in the score reflect changes in the variable under different conditions, for example, the degree of interrelatedness among different items (*internal consistency*) or consistency through repeated applications (*test-retest*). Last, *responsiveness* refers the ability to detect changes in the variable over time such as a change in the score of the tool[2]. Each of these properties requires a particular type of study to assess them and this review describes the methodology used to analyze the studies of selected instruments for pretrial risk assessment.

II. Precautionary Measures and Pretrial Risks

In the 1960s, Pretrial Justice Services (PJS) were implemented in the United States of America (USA).[3] Nowadays, they operate in different countries like Canada, the United Kingdom, Australia, Chile, and Mexico to create quality information for evaluating and supervising the conditions imposed by the Court.[4] These conditions, called precautionary measures, look to guarantee the effectiveness of the criminal procedure and reduce the likelihood of pretrial failure.[5]

The Inter-American Commission on Human Rights[6] defines pretrial failure as 1) failure to appear (or FTA) in court or flight and 2) hampering the criminal investigation. However, admission of pretrial misconduct varies across countries and jurisdictions. For instance, in North America, this failure is characterized by failure to appear and/or the commission of another public offense before

[2] COSMIN, *COSMIN Taxonomy of Measurement Properties* (last visited March 13, 2024), https://www.cosmin.nl/tools/cosmin-taxonomy-measurement-properties/

[3] Pretrial Justice Institute, Pretrial Services Program Implementation: A Starter Kit 3 (2010).

[4] Ana Aguilar & Javier Carrasco, Servicios Previos al Juicio Manual de Implementación 25 (Instituto de Justicia Procesal Penal, AC 2d ed. 2013) (2011). *Also* The Justice Studies Center of the Americas, Manual de Servicios de Antelación al Juicio Mecanismos para Racionalizar el Uso de las Medidas Cautelares en Materia Penal 17 (2011).

[5] Aguilar & Carrasco *supra* note 4 at 15. *Also* Rene Octavio Cardona, *Medidas cautelares: Sus conceptos finalidades características reglas y principios para su imposición,* 27 Revista IFDP. *7, 82* (2019).

[6] The Inter-American Commission on Human Rights, Report on the Use of pretrial Detention in the Americas 8 (2013).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

the end of the trial, a situation which is also known as public safety.[7] In Latin America, pretrial failure consists of failure to appear; acting against personal integrity or putting the life of a victim, offended party, witnesses or the community at risk; and/or interfering with the criminal investigation by altering or falsifying evidence, intimidating witnesses and threating or hampering the work of the actors involved.[8]

According to theoreticians[9] and international Juvenile Justice standards,[10] precautionary measures must comply with the principles of *minimum intervention* while promoting non-custodial measures, *rationality* according to the impact caused by behavior, *suitability* to a given objective, and *necessity* based on a selection of the measures that are the least restrictive of rights. Therefore, preventive detention must be used as a last resort, for the shortest possible time and when there is a need for caution due to pretrial risk. To this end, there is a diverse catalog of non-custodial measures, which include periodic appearances in court, prohibition from leaving a specific territory, and banning contact with certain persons.[11]

Pretrial Risk Assessment

In 1993, the *Juvenile Detention Alternatives Initiative* (JDAI) was created with the primary objectives to encourage non-custodial measures, avoid overcrowding facilities, improve conditions in detention facilities, and deter pretrial failure.[12] To achieve this, one fundamental strategy is the implementation of evidence-based pretrial risk assessment instruments (RAI) that assist judicial decision-making regarding the best precautionary measures,[13] while ensuring that personal characteristics of the accused and prior criminal charges do not bias decisions.[14] This could be one reason why violence RAI are not suitable to assess pretrial

---

[7] Sarah L. Desmarais, & Evan M. Lowder, Pretrial Risk Assessment Tools: A Primer for Judges Prosecutors and Defense Attorneys 3 (2019). *Also* David Steinhart, Juvenile detention risk assessment: A practice guide to juvenile detention reform 10 (2006).

[8] Aguilar & Carrasco, *supra* note 4 at 17, 54-5. *Also* The Justice Studies Center of the Americas, *supra* note 4 at 24.

[9] Cardona, *supra* note 5 at 103-05.

[10] Committee on the Rights of the Child, General Comment No 24 (2019) on Children's rights in juvenile justice, ¶ 85, 87, U.N. Doc. CRC/C/GC/24 (Sept. 18, 2019). *Also* G.A. Res. 44/25, ¶ 40 U.N. Doc. A/RES/44/25 (Nov. 20, 1989). *Also* G.A. Res. 45/113, ¶ 17,18 U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

[11] The Inter-American Commission on Human Rights, Juvenile Justice and Human Rights in the Americas 271, 272 (2011).

[12] Steinhart, *supra* note 7 at 5.

[13] Sarah L. Desmarais, & Evan M. Lowder, *supra* note 7. *Also* The Justice Studies Center of the Americas, *supra* note 4 at 42. *Also* Steinhart, *supra* note 7 at 8-9.

[14] Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [L.N.S.I.J.P.A.] [Law of the Comprehensive Criminal Justice System for Adolescents], as amended, Diario Oficial de la Federación [D.O.F.], December 20, 2022. Articles 27, 37.

failure in juvenile offenders because risk factors like criminal sentences, personality traits, substance use and friends with antisocial behaviors are mainly applicable for predicting violent recidivism,[15] while pretrial risks focus on information relevant to procedural purposes as a means to lower the probability of pretrial failure while the ruling is being determined. Even though both take into account general principles of risk assessment (e.g., the intensity of intervention should be proportional to the level of risk obtained through evidence-based factors), violence and pretrial failure are different behaviors that require a distinctively different approach.

Guidelines establish that pretrial RAI should take a risk-protective approach through an evaluation of individual, contextual and situational factors based on empirical and normative criteria.[16] Some minimum areas to be assessed[17] include community ties, delinquent behavior, and collateral factors (Table 1). This information is then verified through interviews (face-to-face or by telephone) with informants such as family, teachers, or friends. Domiciliary visits, a review of legal files, and other types of documentation may also be considered.[18] Once the information is verified, a risk assessment is made by calculating an overall and behavior-specific risk score that guides the release or detain decision.[19]

[15] Deborah Koetzle et al., Guía Práctica de Evaluaciones de Riesgos y Necesidades para Jóvenes en América Latina y el Caribe 6, 7, 9-10, 14-7 (2021), https://www.air.org/sites/default/files/2021-10/Guia%20practica%20de%20evaluaciones%20de%20RNA%20para%20jovenes.pdf *Also* Sarah L. Desmarais & Samantha A. Zottola, *Violence risk assessment: Current status and contemporary issues*, 3 Marq. L. Rev. *793, 795, 798* (2020).

[16] Sarah L. Desmarais, & Evan M. Lowder, *supra* note 5 at 4. *Also* Charles Summers & Tim Willis, Pretrial Risk Assessment Research Summary 4-5 (2010). *Also* Marie VanNostrand & Gena Keebler, Pretrial Risk Assessment in the Federal Court For the purpose of Expanding the Use of Alternatives to Detention 44 (2009).

[17] Aguilar & Carrasco, *supra* note 4 at 54-5, 69. *Also* The Justice Studies Center of the Americas, *supra* note 4 at 33-5, 44. *Also* Steinhart, *supra* note 7 at 30-40.

[18] Aguilar & Carrasco, *supra* note 4 at 73, 75. *Also* The Justice Studies Center of the Americas, *supra* note 4 at 37-41.

[19] Aguilar & Carrasco, *supra* note 4 at 76. *Also* Steinhart, *supra* note 7 at 5, 9.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Table 1. Required minimum sections in juvenile pretrial risk assessment instruments

Section	Content
Community Ties	Residential stability, cohabitants, economic dependents, employment stability, education, family and peer relationships, facilities to leave the country or remain hidden, and social context
Delinquent Behavior	Current offense, legal status, prior and pending cases or petitions, infractions, behavior in detention, severity of the foreseen sanction, weapon involvement, aggression against victim or witnesses, prior pretrial misconduct, and violations of prior judicial conditions
Collateral Factors	Aggravated or mitigated risk score in previous areas, including the age at intake, family environment safety and stability, escape or runaway history, school performance and attendance, first offense, degree of involvement in the offense, mental health condition, etc., not to be considered if not supported by the information system

Note. These elements are merely enunciative, but not limited to other areas of evaluation. Developed by the author based on the guidelines established by Pretrial Justice Services.[20]

In the USA, the Pretrial Justice Institute (PJI) and the National Association of Pretrial Service Agencies (NAPSA) created guidelines and standards for pretrial release and diversion.[21] Pioneer states like California, Florida, New Mexico, and Virginia have implemented and validated detention RAI for juvenile offenders. To date, more than 15 US states have implemented them.[22]

In Latin America, some efforts have been made since the implementation of the Accusatory Criminal Justice System. Mexico[23] and Chile[24] have developed pretrial justice service implementation manuals, comprising a comprehensive model of evaluation and supervision with pretrial risk assessment standards. In Mexico, pretrial justice services are commonly called Unidades de Medidas Cautelares (UMECAs).[25] The UMECA of the State of Morelos in Mexico was one of the first to implement RAI,[26] but its measurement properties are unknown, much less its impact on pretrial release and detention rates[27] even

[20] Aguilar & Carrasco, *supra* note 17. *Also* The Justice Studies Center of the Americas, *supra* note 17. *Also* Steinhart, *supra* note 17.

[21] Pretrial Justice Institute, *supra* note 3 at 1, 22, 25-8. *Also* The Justice Studies Center of the Americas, *supra* note 4 at 18.

[22] Steinhart, *supra* note 7 at 8,19.

[23] Aguilar & Carrasco, *supra* note 4 at 11-3.

[24] The Justice Studies Center of the Americas, *supra* note 4 at 6-7.

[25] Aguilar & Carrasco, *supra* note 4 at 16.

[26] *Id.* at 23, 140

[27] Steinhart, *supra* note 7 at 17.

though it is used for determining the rationality and suitability of precautionary measures.[28]

When designing a new tool, it is recommendable to examine the instruments of different pretrial justice services in order to identify common variables, especially those that have been effective and validated in the referral population.[29] This underlines the urgency of conducting pretrial risk assessments based on validated tools with adequate measurement properties which simultaneously meet theoretical and normative risk assessment criteria, especially for juveniles in conflict with the law, a person between 12 and 17 years of age accused of criminal behavior.[30]

Hence, a standardized procedure is needed to select the most suitable instruments to assess pretrial risks along the lines of the protocol developed by the COnsensus-based Standards for the selection of health Measurement INstruments (COSMIN) initiative, which seeks to reinforce a selection of outcome measurement instruments in clinical and research fields.[31]

This study aims to assess and summarize the quality of measurement properties of pretrial risk assessment instruments for Mexican juveniles in the Comprehensive Criminal Justice System for Adolescents (Sistema Integral de Justicia Penal para Adolescentes or SIJPA), through a systematic review using the COSMIN methodology.

III. Methods

This systematic review follows COSMIN guidelines for searching and evaluating measurement properties:[32]

1. Search Strategy

A literature review was performed in 1) the PubMed database 2) metasearch engines;[33] the UNAM General Office for Libraries and Digital Information

[28] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], as amended, Diario Oficial de la Federación [D.O.F.], April 25, 2023. Art. 156.

[29] Aguilar & Carrasco, *supra* note 4 at 107. *Also* Steinhart, *supra* note 7 at 14-5.

[30] Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [L.N.S.I.J.P.A.] [Law of the Comprehensive Criminal Justice System for Adolescents], as amended, Diario Oficial de la Federación [D.O.F.], December 20, 2022. Art.1.

[31] Prinsen et al., *supra* note 1 at 1150-54.

[32] Caroline B. Terwee et al., *COSMIN methodology for evaluating the content validity of patient-reported outcome measures: A Delphi study*, 27 Qual. Life Res. *1159, 1162-67* (2018). *Also* Lidwine B. Mokkink, H. C. W. de Vet et al., *COSMIN risk of bias checklist for systematic reviews of patient-reported outcome measures*, 27 Qual. Life Res. *1171, 1173-77* (2018). *Also* Lidwine. B. Mokkink, M. Boers et al., *COSMIN Risk of Bias tool to assess the quality of studies on reliability or measurement error of outcome measurement instruments: A Delphi study*, 20 BMC Med. Res. Methodol. *1, 6-10* (2021).

[33] These include various sources, from online repositories, universities, professional societies

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Services (DGB-UNAM, in Spanish) and Google Scholar, and 3) libraries found on pretrial organization websites; Criminal Procedure Justice Institute (IJPP, in Spanish), Juvenile Justice Advocates International (JJAI) and Institute for Legal Research (IIJ, in Spanish).

The Peer Review of Electronic Search Strategies (PRESS) 2015 Checklist[34] and the search strategy of the COSMIN with a sensitive filter for studies on measurement properties[35] were taken into account for a more precise search (Table 2). Previously specified criteria were considered for potential article selection (Table 3). Language or time restrictions (from its inception to June 15, 2022) were not placed in order to make the search as extensive as possible.

Table 2. Search strategy used per database

Database	Search terms
PubMed	(pretrial OR detention OR probation) AND ("Risk Assessment"[Mesh] NOT "violence risk")† AND ("Adolescent"[Mesh] OR juvenile OR youth) AND measurement properties filter‡
DGB-UNAM§	(pretrial OR detention assessment OR detention risk OR public safety risk OR failure to appear OR FTA OR flight risk) AND (adolescent* OR juvenile OR youth) AND (validation OR psychometr* OR clinimetr* OR development)
Google Scholar	("pretrial risk" OR "pretrial failure" OR "public safety risk" OR "failure to appear") AND (adolescent* OR juvenile OR youth) AND (Mexico OR Latino) AND ("validation study" OR psychometr*)
Institute for Legal Research (IIJ)	"adolescente" AND "cautelar"
Other websites ¶	No search terms were used. A manual review of their resources was conducted.

† Some violence risk instruments assess general recidivism which include violating probation or parole conditions[36] that could be compatible with pretrial risk assessment. If this were the case, the search terms would include them in the results.

and databases such as PsyArticles, PsycINFO, Criminal Justice Database, SAGE, ScienceDirect, Scopus, Web of Science and Wiley Online Library. *See* UNAM, *Recursos electrónicos,* Dirección General de Bibliotecas y Servicios Digitales de Información (Feb. 26, 2024), https://www.bidi.unam.mx/index.php/colecciones-digitales/bases-de-datos/ver-todos-los-recursos

[34] Jessie McGowan et al., *PRESS peer review of electronic search strategies: 2015 guideline statement,* 75 J. Clin. Epidemiol. *40, 41-4* (2016).

[35] Caroline B. Terwee et al., *Development of a methodological PubMed search filter for finding studies on measurement properties of measurement instruments,* 18 Qual. Life Res. *1115, 1121-23* (2009).

[36] Desmarais & Zottola, *supra* note 15 at 797.

‡Filter developed by Terwee et al.[37] to find studies on measurement properties
§ Filtered by type of resources: academic publications, electronic resources, and reports
¶ Includes Criminal Procedure Justice Institute[38] and Juvenile Justice Advocates International[39]

Table 3. Inclusion and exclusion criteria for selection of studies

Criteria	Description
Inclusion	• Mexican or Latino from 12 to 17 years old † • Detained population or on probation • Development or validation study • Pretrial or detention risk assessment instrument
Exclusion	• General or clinical population • Other types of study, including studies in which pretrial or detention risk assessment instruments used to validate another instrument • Violence or recidivism risk assessment instrument

† For development studies of instruments not originally written in Spanish, other population groups were used for reasons of inclusion.

An additional strategy was proposed in the event that no pretrial RAI were found. Since it is an acceptable practice to consider instruments developed with similar population characteristics and theoretical models,[40] an open database from the Mexican Government was consulted[41] to search for instruments from National Surveys with juveniles assessing the recommended risk assessment variables (Table 1).

In this regard, an advanced search was used in the *Gobierno* section with the terms "encuesta nacional," "Adolescentes," and "Mujeres" as filters. The selection of surveys was made based on titles, objectives, and conceptual design. Potential resources for information on pretrial risk assessment underwent a general review of the questionnaire contents for face validity.

Once a potential instrument was identified, another search was performed using the search terms listed in Table 4 to find measurement property studies including Mexican or Latino juveniles. The selection of articles was made based on the title and the abstract. All articles were reviewed independently by two reviewers. The article was included for analysis if at least one reviewer

37 Terwee, *supra* note 35.

38 Instituto de Justicia Procesal Penal, *Biblioteca (Acervo)*, https://www.ijpp.mx/media/biblioteca/ (last visited June 21, 2023).

39 Juvenile Justice Advocates, *Library*, https://www.jjadvocates.org/library/ (last visited June 21, 2023).

40 Aguilar & Carrasco, *supra* note 29. *Also* Steinhart, *supra* note 29.

41 Mexican Government, *Búsqueda de trámites información y participación ciudadana*, https://www.gob.mx/busqueda?utf8=✓ (last visited March 13, 2022).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

considered it relevant. References were also checked for potentially relevant studies.[42]

Table 4. Search strategy used for development or validation studies

Database	Search terms
PubMed †	"Measurement instrument"‡ AND ("Adolescent"[Mesh] OR juvenile OR youth) AND measurement properties filter§
DGB-UNAM¶	"Measurement instrument"‡ AND (adolescent* OR juvenile OR youth) AND (validation OR psychometr* OR clinimetr* OR development)
Google Scholar	English: "Measurement instrument" AND adolescent* AND (validac* OR psicometr*) Spanish #: "Measurement instrument" AND adolescent* AND (validac* OR psicometr*)

Note. Searches were conducted separately for Spanish and English sources.
† A validation study filter was applied, except for the *Parent-Child Conflict Tactics Scale*.
‡ Replaced by each instrument name (Spanish and English) or abbreviations, if applicable, as text words. Some alternatives were used specifically for each language. In *English*, the terms Social Insecurity Perception Scale, "risk perception scale" OR "social insecurity perception scale" were used. For *Spanish*, the terms Social Insecurity Perception Scale, "escala percepcion inseguridad social" OR "escala inseguridad percibida" were used, and APQ "parentalidad alabama" OR "practicas parentales alabama" OR "estilos parentalidad alabama" were also used. The preposition "*de*" in an instrument's name in Spanish was not included as search term, except in the case of Google Scholar.
§ Filter developed by Terwee et al. [43] to find studies on measurement properties
¶ Filtered by type of resources: academic publications and thesis
# For the *Alabama Parenting Questionnaire*, instrument names ("parentalidad alabama" and "practicas parentales alabama") were used in separate searches.

2. Evaluation of Measurement Properties

According to COSMIN methodology, the assessment was performed in three stages.[44] Two reviewers conducted analyses independently and an additional reviewer resolved any discrepancies.

[42] Prinsen et al., *supra* note 31.
[43] Terwee et al., *supra* note 35.
[44] Prinsen et al., *supra* note 31.

A. Evaluation of development and content validity[45]

Consideration was given to general design characteristics, such as theoretical framework, population characteristics, sample size, methodology relevancy, and statistical analyses for concept elicitation, identification of items, and pilot testing. Content validity includes the evaluation of relevance, comprehensiveness, and comprehensibility. The criteria of each study were scored on a four-point scale ranging from *inadequate* (I) to *very good* (V) using the COSMIN Risk of Bias Checklist[46] to assess the methodological quality of studies and determine whether the results are reliable from a total score based on its lowest rating.

In this section, the design criteria[47] for a study performed in a sample representing the target population and qualitative methodology for concept elicitation was modified according to the literature[48] that considered the examination of instruments with compatible theoretical models a suitable methodology.

B. Evaluation of other measurement properties[49]

The methodological quality of construct validity, criterion validity, reliability, and responsiveness were examined by sample size, method and statistical analysis suitability, and description of bias. Similarly, a four-point scale rating (*Inadequate* to *Very good*) was used for each set of criteria and the lowest rating was reported as the total score. In addition, values were compared against criteria for *good measurement properties*[50] to determine if the measurement property was *sufficient* (+), *insufficient* (-) or *indeterminate* (?).[51]

---

[45] Terwee et al., *supra* note 32.

[46] Mokkink, de Vet et al., *supra* note 32. *Also* Mokkink, Boers et al., *supra* note 32.

[47] "5.-Was the PROM development study performed on a sample representing the target population for which the PROM was developed?" The Not Applicable (NA) rating was added: *Study was not performed in a sample representing the target population* and the Inadequate rating was eliminated.

"6.- Was an appropriate qualitative data collection method used to identify relevant items for a new PROM? Rating changed to Very Good: *Widely recognized or well justified qualitative [or quantitative] method used, suitable for the construct and study population*, Adequate: *Assumable that the qualitative [or quantitative] method was appropriate and suitable for the construct and study population, but not clearly described,* and Doubtful: *[Unjustified] method(s) or doubtful whether the method was suitable for the construct and study population*.

[48] Aguilar & Carrasco, *supra* note 29. *Also* Steinhart, *supra* note 29.

[49] Mokkink, de Vet et al., *supra* note 32. *Also* Mokkink, Boers et al., *supra* note 32.

[50] Cecilia A.C. Prinsen et al., *How to select outcome measurement instruments for outcomes included in a "Core Outcome Set"–A practical guideline*, 17 Trials. *1, 7-8* (2016). *Also see* Prinsen, et al., *supra* note 31 at 1152.

[51] The rating criteria for structural validity were modified. An additional criterion for sufficient Exploratory Factor Analyses (EFA) was added based on Prinsen et al., *supra* note 49: *First factor accounts for at least 20% of the variability AND ratio of the variance explained by the first to the second factor greater than 4 OR Bi-factor model: Standardized loadings on a common factor >0.30 AND correlation between individual scores under a bi-factor and unidimensional model >0.90*

C. Evaluation of quality of evidence[52]

If more than one study assessing a measurement property was found, results would be qualitatively summarized per instrument and compared against the criteria for *good measurement properties* to determine whether the measurement property is *sufficient* (+), *insufficient* (-), *inconsistent* (±) or *indeterminate* (?). For development and content validity, ten criteria for good content validity were graded based on studies and the reviewer's rating.[53] Next, an overall rating per criteria was assigned, prioritizing the study results to reduce subjective judgment. Lastly, the quality of evidence was rated using the Grading of Recommendations Assessment, Development and Evaluation (GRADE) approach, starting from *high quality* and progressively downgraded for risk of bias, inconsistency, imprecision, and indirectness, depending on whether it was *serious, very serious* or *extremely serious.*

IV. Results

1. Search Results

The results of the first research strategy were 1) PubMed: 34 articles, 2) DGB-UNAM: 66 articles, and 3) Google Scholar: 149 articles. No instruments were found specifically for Mexican or Latino populations. No publications were found on Criminal Procedure Justice (28 reports), Juvenile Justice Advocates International (18 reports) and Institute for Legal Research (6 articles, 2 reports) websites either. Consequently, the second strategy was employed.

From the findings of the second strategy (Figure 1, Search 1), one survey was selected since it was the only report with previous validation: Mexico National Survey of Drug Use Among Students (ENCODE, in Spanish).[54] Surveys with juvenile offenders[55] were excluded due to the lack of information on the scale design or validation in the methodology report. According to variables in pretrial RAI, five scales were selected: 1) the *Peer Scale* (Escala de Grupo de Amigos),[56] 2) the *Social Insecurity Perception Scale* (Escala de Percepción de Inse-

---

[52] Prinsen et al., *supra* note 31.

[53] Terwee et al., *supra* note 32.

[54] National Institute of Psychiatry et al., Encuesta Nacional de Consumo de Drogas en Estudiantes (ENCODE) (July 12, 2014), https://www.gob.mx/salud%7Cconadic/documentos/encuesta-nacional-de-consumo-de-drogas-en-estudiantes-2014-encode

[55] Elena Azaola, Diagnóstico de las y los Adolescentes que Cometen Delitos Graves en México 18-19 (2015). https://www.casede.org/BibliotecaCasede/Diagnostico_adolescentes.pdf *Also* National Institute of Statistics and Geography, Encuesta Nacional de Adolescentes en el Sistema de Justicia Penal (ENASJUP) (2017). https://www.inegi.org.mx/programas/enasjup/2017/

[56] Nancy Gigliola Amador & Maya Iselda Cavero, El Consumo de Cocaína en los Adolescentes y su Relación con el Ambiente Familiar el Grupo de Pares y la Autoestima (2004)

guridad Social),[57] 3) the *Alabama Parenting Questionnaire* (APQ),[58] 4) the *Family Environment Scale* (FES) (Escala de Ambiente Familiar),[59] and 5) the *Parent-Child Conflict Tactics Scale* (CTSPC) (Escala de Tácticas de Conflicto Padre- Hijo).[60]

These studies yielded 1195 results (Figure 1, Search 2) although the *Peer Scale* was removed since no relevant studies were found therein. After a full-text screening, two additional scales were included: *Family Environment Scale for Adolescents* (Escala de Ambiente Familiar para Adolescentes or EAFA)[61] and *FES–Short Form* (Escala de Ambiente Familiar–Versión abreviada).[62]

The main characteristics of the instruments are described in Table 5. All include self-report tools which mostly assess different aspects of the parent-child relationship, especially from the child's point of view, using a 4-point ordinal scale or predefined frequency categories. The *Social Insecurity Perception Scale* assesses the social environment.

Of these studies, 71% (n=5) were carried out with Mexicans. US studies (29%, n=2) consist of development studies. 86% (n=6) used a cross-sectional design with probabilistic sampling (57%, n= 4). The study design corresponds to secondary analyses of the surveys with general (29%, n=2) and student population (57%, n=4) ranging from 6 to 23 years of age. 43% (n=3) rely on informant reports provided by primary caregivers. Key characteristics of studies are displayed in Table 6.

(B.A. thesis, National Autonomous University of Mexico) (TESIUNAM) at 51.

[57] Jorge Ameth Villatoro Velázquez et al., *Percepción inseguridad social y su relación con el uso de drogas*, 14 Rev. Mex. Psicol. *105, 107-10* (1997).

[58] Karen K. Shelton et al., *Assessment of parenting practices in families of elementary school-age children*, 25 J. Clin. Child Psychol. *317, 318-24* (1996).

[59] Jorge Ameth Villatoro Velázquez et al., *La relación padres-hijos-una escala para evaluar el ambiente familiar de los adolescentes*, 20 Salud Mental. *21, 23-6* (1997).

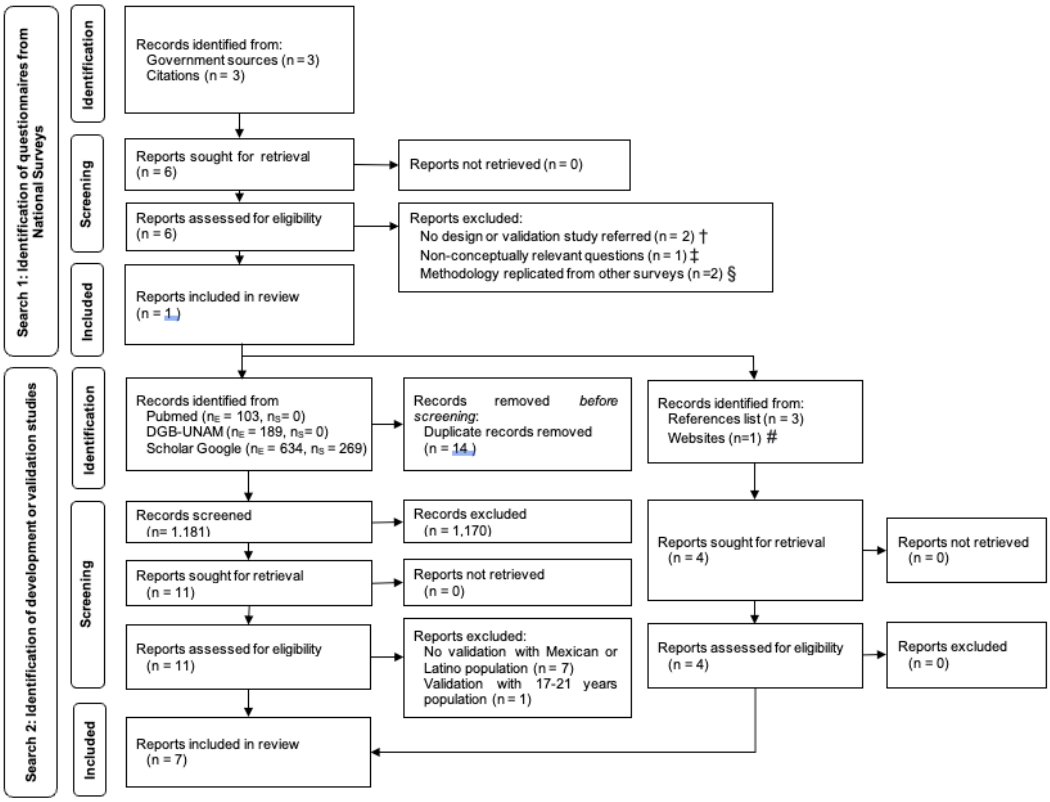
[60] Murray A. Straus et al., *Identification of Child Maltreatment With the Parent-Child Conflict Tactics Scales: Development and Psychometric Data for a National Sample of American Parents*, 22 Child Abuse Negl. *249, 253-59* (1998).

[61] Claudia Teresita Ruiz-Cárdenas et al., *Validez de constructo de escala ambiente familiar para adolescentes*, 20 VERTIENTES. *35, 37-40* (2017).

[62] Nieves Quiroz del Valle et al., *La familia y el maltrato como factor de riesgo de conducta antisocial*, 30 Salud Mental. *47, 50* (2007).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Figure 1. Flow diagram of the two-step search strategy according to PRISMA[63]



† Includes Special report, Adolescents: Vulnerability and Violence[64] and the National Survey on Adolescents in the Criminal Justice System[65]

‡ Includes the National Survey on the Dynamics of Household Relationships[66]

§ Includes the National Survey of Drugs, Alcohol and Tobacco Consumption 2016-2017[67] and the Diagnosis of adolescents who commit serious crimes in Mexico[68]

¶ Results with search terms in English are noted as *nE.* and those with search terms in Spanish are noted as *nS*

Refers to Data Analysis and Survey Unit of National Institute of Psychiatry records[69]

---

63 Matthew J. Page et al., *The PRISMA 2020 statement: an updated guideline for reporting systematic reviews*, 10 Syst. Rev. *1, 2-6* (2021).

64 National Human Rights Commission, Informe Especial Adolescentes: Vulnerabilidad y Violencia (2017). https://informe.cndh.org.mx/uploads/menu/30101/Informe_adolescentes.pdf

65 National Institute of Statistics and Geography, *supra* note 55.

66 National Institute of Statistics and Geography, Encuesta Nacional sobre la Dinámica de las Relaciones en los Hogares (ENDIREH) (2016). https://www.inegi.org.mx/programas/endireh/2016/

67 National Institute of Psychiatry et al., Encuesta Nacional de Consumo de Drogas, Alcohol y Tabaco 2016-2017 (ENCODAT 2016-2017) (Nov. 28, 2017). https://www.gob.mx/salud%7Cconadic/acciones-y-programas/encuesta-nacional-de-consumo-de-drogas-alcohol-y-tabaco-encodat-2016-2017-136758

68 Azaola, *supra* note 55.

69 Unidad de Encuestas y Análisis de Datos, *Introducción*, http://www.uade.inpsiquiatria.edu.mx (last visited June 21, 2023).

Table 5. Characteristics of the outcome measurement instruments included in the searches

Instrument	Author(s) (year of publication)	Construct	Mode of administration†	Number of scales (number of total items); Range of score	(Sub)scale(s) (number of items)	Response options	Language
Alabama Parenting Questionnaire (APQ)	Frick (1991)	Parenting practices related to externalizing behaviors in children	Self-report and Interview (Child and Parent)	5 (42); 42-168	Involvement (10), positive parenting (6), poor monitoring/supervision (10), inconsistent discipline (6), corporal punishment (3), and other discipline practices (7)	4-point frequency scale (1-4: never, sometimes, often, and always)	English. *Transl.* Spanish
Family Environment Scale	Villatoro et al. (1997)	Family environment: communication, support and cohesion	Self-report	6 (42); 42-168	Hostility and rejection (11), parent communication (9), child communication (9), parent support (7), daily child support (6), and significative child support (6)	4-point frequency scale (1-4: hardly ever, sometimes, frequently, very frequently)	Spanish
Family Environment Scale – Short Form	Quiroz et al. (2007)	Family environment: communication, support, and cohesion	Self-report	5 (18); 18-72	Hostility and rejection (NR), parent communication (NR), child communication (NR), parent support (NR), and daily child support (NR)	4-point ordinal scale (1-4: hardly ever, sometimes, frequently, very frequently)	Spanish

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Family Environment Scale for Adolescents (EAFA)	Ruiz-Cárdenas et al. (2017)	Family environment: perception of family relationships regarding discipline, communication, problem solving, and affection	Self-report	5 (25); 25-100	Parent conflict (6), lack of family communication (5), lack of family habits and rules (6), hostility (5), and family acceptance (3)	4-point frequency scale (1-4: hardly ever, sometimes, frequently, almost always)	Spanish
Parent-Child Conflict Tactics Scale (CTSPC)	Straus et al. (1995)	Psychological and physical maltreatment, neglect, and nonviolent modes of discipline	Self-report and Interview (Child and Parent)	3 (22); 0-22+, depends on response category *Suppl.*=3(13)	Nonviolent discipline (4), psychological aggression (5), and physical assault: corporal punishment (5), physical maltreatment (4), severe physical maltreatment (4) *Suppl.* Weekly discipline (4), neglect (5), sexual maltreatment (4)	Overall 7 frequency categories: this has never happened, not in the past year, but it happened before, more than 20 times, 11-20 times, 6-10 times, 3-5 times, twice and once in the past year	English. *Transl.* Spanish
Social Insecurity Perception Scale	Villatoro et al. (1997)	Social risk: perception of neighborhood safety and danger	Self-report	3 (15); 15-60	Distant risk (9), social safety (3), and personal risk (3)	4-point ordinal scale (1-4: completely agree, agree, disagree, completely disagree)	Spanish

Note. Instruments are displayed in alphabetical order. *Transl.*= Translation, *Suppl.*= Supplemental, and NR= Not reported.
† If administration is collected directly from the user, it is self-reported, but if a professional is required to interpret or complete the assessment, the information is obtained through an interview.

Table 6. Characteristics of development and validation studies found over the course of the research

Instrument	Author(s) (year) [Reference]	Purpose of study	Study design (Sampling)	Study population		City (Country)
				N (% Male)	Age Mean ± SD, Range years	
Alabama Parenting Questionnaire (APQ)	Shelton et al. (1996)	To compare the assessment of parenting practices across informants and methods using several indices of reliability and validity.	Longitudinal (Non-probabilistic)	*N*=160 children and their caregivers, n=124 (M=81%) clinic-referred, n=36 (M=73%) volunteer	Clinic= 8.7 ± 2.0, 6-13 years Volunteer= 9.1 ± 2.4, 6-13 years	Alabama (USA)
Alabama Parenting Questionnaire (APQ)	Robert (2009)	To examine parenting practices in Mexico and assess the usefulness of the APQ with Mexican caregivers.	Cross-sectional (Probabilistic)	*N*=829 female primary caregivers (mothers: n=829, grandmothers: n=24, missing: n=9) and their children (n=862, M=48%)	Caregivers= 37.8 ± 7.35, 19-79 years Children= 11.7 ± 0.64, 10-15 years	Nuevo Leon (Mexico)
Family Environment Scale	Villatoro et al. (1997)	To present the validity and reliability of a scale aimed to evaluate the adolescent's perception of their family environment.	Cross-sectional (Probabilistic)	*N*=793 students (M=46.8%)	15.3 ± NR, 11-22 years	Mexico City (Mexico)

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Family Environment Scale – Short Form	Quiroz et al. (2007)	To determine the relationship between past experiences of mistreatment or inadequate familiar environment and the presence of antisocial behavior in adolescents.	Cross-sectional (Probabilistic)	N=3,603 students (M=NR)	7th to 12th grade	Mexico City (Mexico)
Family Environment Scale for Adolescents (EAFA)	Ruiz-Cárdenas et al. (2017)	To obtain the construct validity of the Family Environment Scale for Adolescents.	Cross-sectional (Non-Probabilistic)	N=391 students (M=48.8%)	14 ± 0.56, 14-16 years	Mexico City (Mexico)
Parent-Child Conflict Tactics Scale(CTSPC)	Straus et al. (1998)	To create a parent-to-child version of the Conflict Tactics Scale.	Cross-sectional (Probabilistic)	N= 1,000 parents (M=51%) and their children (n=1,000)	Parents= 36.8 ± NR Children= 8.4 ± NR, <18 years	(USA)
Social Insecurity Perception Scale	Villatoro et al. (1997)	To obtain validity and reliability of a measure of social insecurity and its relation to drug abuse in Mexican adolescents.	Cross-sectional (Non-probabilistic)	N= 795 students (M=46.8%)	15.3 ± NR, 11-23 years	Mexico City (Mexico)

Note: Instruments are displayed in alphabetical order. N = total sample size, n= subgroups, μ = mean, SD = standard deviation, M = male, NR= not reported and USA= United States of America.

2. Measurement Properties of the Instruments Selected

A. Evaluation of Development

Most of the scales (n=4) described a clear construct with a defined conceptual framework and context of use, especially with evaluation and epidemiological research applications. The scales are grounded on developmental theories of disruptive and antisocial behavior,[70] and sociological theories.[71] To note, the *APQ* does not provide a clear construct definition, while the *Social Insecurity Perception Scale* and the *FES* only include a general description of population with non-detailed or unspecified characteristics (e.g., *parent*, *child, adolescent)*. These criteria give a rating of *insufficient*.

In terms of concept elicitation, all reported using methodology based on a literature review and previous versions of instruments but did not give detailed information on the methodology and subsequent analyses. Therefore, a *doubtful* rating was assigned in such cases. The *EAFA* and the *FES–Short Form* consider factorial analysis for identifying relevant items. Quiroz et al.[72] state that the *FES–Short Form* is the result of subsequent analysis of the *FES*, possibly a factor analysis, but no additional information is provided. Lastly, only the *APQ* and the CTSPC conducted a pilot study with an adequate sample size (n≥7) of parents for improved clarity, but the particulars of the procedure are not presented.

In summary, the content validity rating was *insufficient* for the *FES*, the *EAFA,* and the *Social Insecurity Perception Scale* due to *inconsistent* relevance and unassessed comprehensiveness and comprehensibility. As stated above, general design characteristics are not specified and no justification for either the selected response category or the recall period is provided. Similarly, the *APQ* relevance was *insufficient* while comprehensibility was *sufficient*. The CTSPC relevance was *sufficient*, but comprehensibility could not be rated as the only available validation was found in the English version. Comprehensiveness was unassessed on any scale. A detailed evaluation for content validity is described in Table 7.

[70] This includes scales of Shelton et al., *supra* note 58, Villatoro et al., *supra* note 59, and Quiroz et al., *supra* note 62.

[71] This includes scales of Villatoro et al., *supra* note 57 and Straus et al., *supra* note 60.

[72] Quiroz et al., *supra* note 62.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Table 7. Content validity rating of potential instruments for pretrial risk assessment

	Instrument or Acronym	Alabama Parenting Questionnaire			Family Environment Scale		Family Environment Scale for Adolescents		Parent-Child Conflict Tactics Scale – Parent Form		Social Insecurity Perception	
	Type of Study	DS (Shelton et al., 1996)	CV (Robert, 2009)	Authors	DS (Villatoro et al., 1997)	Authors	DS (Ruiz-Cárdenas et al., 2017)	Authors	DS (Straus et al., 1998)	Authors	DS (Villatoro et al., 1997)	Authors
	Criteria											
					Relevance ‡							
1	Are the items included relevant to the construct of interest?	-	-	+†	+	+†	+	+†	+	+†	+	+†
2	Are the items included relevant to the target population of interest?	-	-	+†	-	+†	+	+†	+	+†	-	+†
3	Are the items included relevant for the context of use of interest?	+	-	+†	-	+†	+	+†	+	+†	-	+†
4	Are the response options appropriate?	+	-	+	-	+	-	+	+	-	-	+
5	Is the recall period appropriate?	?	-	?	?	?	?	?	-	+	?	?
	Rating	±	-	+	±	+	±	+	+	+	±	+
	Overall Rating[c]				±		±		+		±	

						Comprehensiveness ‡						
6	Are all key concepts included?	-	-	+	-	+	-	+	-	+	-	+
	Rating	-	-	+	-	+	-	+	-	+	-	+
	Overall Rating[c]		-		-		-		-		-	
						Comprehensibility ‡						
7	Does the population of interest understand the instructions as intended?	?	?	NA	-	NA	-	NA	?	NA	-	NA
8	Does the population of interest understand the items and response options as intended?	?	?	NA	-	NA	-	NA	?	NA	-	NA
9	Are the items appropriately worded?	NA	NA	+	NA	+	NA	+	NA	?	NA	+
10	Do the response options match the question?	NA	NA	+	NA	+	NA	+	NA	?	NA	+
	Rating	?	?	+	-	+	-	+	?	?	-	+
	Overall Rating §		+		-		-		-		-	
	Content Validity Rating §		±		-		-		±		-	

Note. Instruments are displayed in alphabetical order. The rating was determined using COSMIN criteria for good content validity.[73] The abbreviations used are DS: Development study and CV: Content validity study.

† Rating assigned by authors, taking into account construct, population, and context of use for pretrial risk assessment

‡ The rating system is +: Sufficient, -: Insufficient, ±: Inconsistent, ?: Indeterminate, and NA: Not applicable.

§ The rating system is +: Sufficient, -: Insufficient, and ±: Inconsistent.

[73] Terwee et al. *supra* note 32.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

B. Evaluation of Validity

This domain includes *content* (n=1), *construct* (n=6) and *criterion validity* (n=1). *Content validity* was assessed from the comprehensibility of the items by an adequate sample size of mothers and children,[74] but the quality was *doubtful* due to the poor description of the procedure. For the *Social Insecurity Perception Scale*, a dissertation[75] described a comprehensibility assessment for a 9-item scale, but the procedure was not clearly described. This particular paper was not included as it was not a study on measurement properties.

Regarding *construct validity*, 1) Cross-cultural validity was not reported, not even for the Spanish versions of the *APQ* and the CTSPC. Robert[76] reported back-translation and pilot test for relevance and clarity issues of the *APQ–Parent Form*, but cultural equivalence was not examined. Its factorial structure was compared with the English version[77] and, as a result, differences were found when sorting the corresponding items in each factor. A previous study[78] stated that the *APQ* validity and reliability were suitable, and some items of the CTSPC were adapted from the Spanish version,[79] but the methodology and results are not described. Good internal consistency is only reported for the CTSPC in a study with Mexican juveniles.[80] No justification is reported for an item reduction in Spanish versions: *APQ*-33 items,[81] *APQ*-18 items,[82] CTSPC-51 items[83] and CTSPC -61 items.[84]

2) Structural validity (n=4) was examined through exploratory (n=2) and confirmatory (n=2) factor analyses with a sufficient sample size, except for the *EAFA* which obtained an *insufficient* rating. The *APQ85* conducted confirmatory factor analyses, which reported theoretical inconsistency between parental

---

74 Christina Jane Robert, Parenting practices and child behavior in Mexico: A validation study of the Alabama parenting questionnaire (April 2009) (Ph.D. dissertation, University of Minnesota) at 44-5. https://conservancy.umn.edu/bitstream/handle/11299/51024/1/Robert_umn_0130E_10269.pdf

75 Francisco Lorenzo Juárez, Influencias Psicosociales sobre la Conducta Antisocial en Estudiantes de Nivel Medio Superior del DF y EDOMEX (2009) (Ph.D. dissertation, National Autonomous University of Mexico) (TESIUNAM) at 76, 78, 83.

76 Robert, *supra* note 74.

77 Shelton et al., *supra* note 58.

78 Jorge Ameth Villatoro Velázquez et al., ¿Cómo Educamos a Nuestro/as Hijos? Encuesta Maltrato Infantil y Factores Asociados 2006 44 (2006). http://cedoc.inmujeres.gob.mx/documentos_download/100769.pdf

79 Miguel Ángel Caballero et al., *Violencia familiar en adolescentes y su relación con el intento de suicidio y sintomatología depresiva*, 18 Psiquiatría, *131, 133* (2002).

80 *Id.*

81 Villatoro et al., *supra* note 78.

82 National Institute of Psychiatry et al., *supra* note 54.

83 Villatoro et al., *supra* note 78.

84 National Institute of Psychiatry et al., *supra* note 54.

85 Robert, *supra* note 74 at 71-5.

involvement, positive parenting, and poor monitoring/supervision factors. A confirmatory analysis was conducted for the *FES* to solve conceptual inconsistencies of the parent communication factor, validating a two-factor model and adding a new factor on *significant child support*.[86] For the *Social Insecurity Perception Scale*, a *doubtful* rating was assigned because of sampling bias; most participants were classified at a moderate risk level. For the other scales, indetermination was attributed to unspecified fit indices.

3) Hypotheses-testing was assessed through the direct association between negative parenting (*APQ* and *FES – Short Form*) with the *Child Behavior Checklist* (CBCL)[87] and the *Antisocial Behavior Scale*,[88] and criminogenic settings (*Social Insecurity Perception Scale)* with the *High School Drug Use Questionnaire*.[89] Besides, discrimination between groups were evaluated by gender and antisocial behavior (*FES – Short Form)*, as were disruptive behavior diagnoses (*APQ*). Most of the results support the author's hypotheses, but some (n=2) were *indeterminate* due to vague interpretation. Therefore, problematic scales due to inconsistency were positive parenting (*APQ*), parent and daily child support (*FES – Short Form*), and social safety (*Social Insecurity Perception Scale*). Indicators of *doubtful* quality were related to the inclusion of scales with *inadequate* internal consistency ($\alpha<.70$), undescribed fit indices for regression models, unequal group sizes, and unspecified description of subgroups. *Inadequate* quality was due to a lack of description of the measurement properties of the comparator. Finally, *criterion validity* was only reported for the *FES*. As a result of the analysis, a short form was obtained with suitable correlation values for original subscales.[90]

C. Evaluation of Reliability

This domain comprises internal consistency (n=6) and test-retest reliability (n=1). Most of the scales (n=4) had a good methodological quality, so a *doubtful* rating relates to the sampling bias described earlier. An *indeterminate* rating is attributed to a prior determination of structural validity. According to Cronbach's alpha values, *inadequate* scales are positive parenting ($\alpha=.545$), poor monitoring/supervision ($\alpha=.623$), inconsistent discipline ($\alpha=.557$) and corporal punishment ($\alpha=.408$) (*APQ*), similar to the English version.[91] Also, social safety ($\alpha=.688$) and personal risk ($\alpha=.613$) (*Social Insecurity Perception Scale*), as well as the *FES*–daily child support ($\alpha=.680$), the *EAFA*–hostility ($\alpha=.681$) and the

---

[86] Villatoro et al., *supra* note 59 at 24.

[87] Thomas M. Achenbach, Manual for the Child Behavior Checklist / 4-18 and 1991 profile (1991).

[88] Francisco Juárez et al., *Antisocial behavior: Its relation to selected sociodemographic variables and alcohol and drug use among Mexican students*, 7 Subst. Use Misuse, *1437, 1439-40* (1998).

[89] María Elena Medina-Mora et al., *Validity and reliability of a high school drug use questionnaire among Mexican students*, 33 Bull Narc, *67, 68-75* (1981).

[90] Quiroz et al., *supra* note 62.

[91] Shelton et al., *supra* note 58.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

CTSPC–neglect (α=.220). Test-retest reliability was only reported for the *APQ* using a wide range time interval across interviews ("at least three days apart in a two-to-four-week period"*)* which also implies a possible training bias due to repeated administration over a short-time period. In this case, it was assigned a *doubtful* quality and as it was estimated with coefficient alpha, the rating was *indeterminate*.

3. Quality of Evidence of the Instruments

All development studies obtained *very low* quality scores attributable to a *very serious* risk of bias because it only takes into account one poor quality study and no content validity study. The quality for the CTSPC also decreased due to *serious* inconsistency and *serious* indirectness in the results as it includes a different population and administration format. As to the *APQ*, although it considers a *doubtful* content validity study for the parent form, it also included a different population, making the results largely *inconsistent*. In the validation studies, *low* quality (n=8) is related to *very serious* indirectness and a *very serious* risk of bias for it due to inclusion of a *doubtful* study; and *very low* quality (n=3) is explained by *very serious* indirectness and a *very serious* to *extremely serious* risk of bias in examining *doubtful* and *inadequate* studies. Table 8 describes the quality of evidence per measurement property.

Table 8. Methodological quality and measurement properties of potential instruments for pretrial risk assessment

Instrument or Acronym [Reference]	Instrument Development	Content Validity	Structural Validity	Internal Consistency	Test-retest reliability	Criterion Validity	Hypotheses Testing
Alabama Parenting Questionnaire (APQ)† (Shelton et al., 1996)	Design-MQ: I Pilot-MQ: D Total: I Q: Very Low	NR	NR	MQ: V R: - Q: High	MQ: D R: ? Q: Low	NR	*Discriminative* (DBD) MQ: D R: + Q: Low
Alabama Parenting Questionnaire (APQ) – Parent Form (Robert, 2009)	NA	MQ: D Q: Very Low	MQ: V R: ? Q: Low	MQ: V R: - Q: Low	NR	NR	*Convergent* (CBCL) MQ: D R: + Q: Very Low
Family Environment Scale (Villatoro et al., 1997)	Design-MQ: I Pilot-MQ: I Total: I Q: Very Low	NR	MQ: V R: + Q: High	MQ: V R: - Q: High	NR	NR	NR
Family Environment Scale – Short Form (Quiroz et al., 2007)	NR	NR	NR	NR	NR	MQ: V R: + Q: High	*Convergent* (AB Scale) MQ: D R: ? *Discriminative* (Gender and AB) MQ: D R: + Q: Low

Mexican Law Review, New Series, vol. XVII, num. 1, July - December 2024, pp. 39-72
ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

Family Environment Scale for Adolescents (EAFA) (Ruiz-Cárdenas et al., 2017)	Design-MQ: D Pilot-MQ: I Total: I Q: Very Low	NR	MQ: I R: - Q: Very Low	MQ: V R: - Q: High	NR	NR	NR
Parent-Child Conflict Tactics Scale (CTSPC) – Parent Form (Straus et al., 1998)	Design-MQ: D Pilot-MQ: D Total: D Q: Very Low	NR	NR	MQ: V R: ? Q: Low	NR	NR	NR
Social Insecurity Perception Scale (Villatoro et al., 1997)	Design-MQ: I Pilot-MQ: I Total: I Q: Very Low	NR	MQ: D R: ? Q: Low	MQ: D R: - Q: Low	NR	NR	*Convergent* (HSDUQ) MQ: I R: ? Q: Very Low

Note. Instruments are displayed in alphabetical order. Methodological quality (MQ) was determined using COSMIN Risk of Bias checklist,[92] while property measures rating (R) was based on criteria for good measurement properties.[93] The abbreviations used are V: Very good, A: Adequate, D: Doubtful, I: Inadequate, +: Sufficient, -: Insufficient, ?: Indeterminate, NR: Not reported, Q: Quality of evidence, DBD: Disruptive behavior diagnosis, CBCL: Child Behavior Checklist, AB: Antisocial Behavior, HSDUQ: High School Drug Use Questionnaire.
† Only the *child report* subscale was considered for measurement properties evaluation.

92 Mokkink, de Vet et al., *supra* note 32. *Also* Mokkink, Boers et al., *supra* note 32.

93 Prinsen, et al., *supra* note 50.

V. Discussion

The main objective of this review was the evaluation of the measurement properties of relevant pretrial RAI for Mexican juvenile offenders. Nevertheless, no development or validation studies were found. This is probably because of the lack of publication practices within the Criminal Justice System. Although some tools have been designed (e.g., UMECA of the State of Morelos), there is no available data, thus making it difficult to examine them.

Nonetheless, there is an enormous number of outcome measurement instruments which can be adapted to forensic settings. For instance, scales designed for epidemiological studies, like those included in the review, are compatible with community ties and family collateral factors in pretrial RAI.[94] These scales are appropriate for the Juvenile Justice System because of their criminological and sociological framework of antisocial behavior, a comprehensive construct that encompasses substance use and criminal behavior.[95]

An unexpected finding was discovered in development studies. Most included an ambiguous description of the design, while others had none. The *EAFA* and the CTSPC were the only ones that clearly established the main characteristics and only the latter specified response options and a recall period. A pilot test for a developed outcome measurement instrument is not a frequent procedure and if conducted, it generally only gauges comprehensibility. Regarding content validity, one of the most important measurement properties,[96] was only reported for the *APQ*. According to Prinsen,[97] [98] instruments with poor content validity should not be selected, but when a *very low*-quality level estimation is not reliable, other properties like internal consistency must be examined. This last property obtained the highest methodological and quality level of evidence, which means it is one of the most reliable estimations, followed by structural and criterion validity.

From validation, the *FES* obtained the highest quality. Meanwhile, more measurement properties were examined in the *APQ* and the *Social Insecurity Perception Scale*, but these had *low*-quality levels reflecting substantial differences from a true estimation. The *APQ* was the only one with two studies published. No validation studies were found for the CTSPC.

After the analyses with COSMIN, the selection of instruments for forensic application should be determined by the level of evidence, highlighting the sci-

---

94 Aguilar & Carrasco, *supra* note 17. *Also* The Justice Studies Center of the Americas, *supra* note 17. *Also* Steinhart, *supra* note 17.

95 Alan E. Kazdin & Gualberto Buela-Casal, Conducta Antisocial. Evaluación Tratamiento y Prevención en la Infancia y Adolescencia 19-20 (1998). *Also* Rolf Loeber & Karen B. Schmaling, *Empirical evidence for overt and covert patterns of antisocial conduct problems: A metaanalysis*, 13 J. Abnorm. Child. Psychol. *337, 346-48* (1985).

96 Prinsen et al., *supra* note 50 at 5-6.

97 *Id. Also* Prinsen et al., *supra* note 31 at 1151.

98 Prinsen et al., *supra* note 50 at 6.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

entific evidence obtained from expert-consensus-standardized methodology as established by the Daubert Standard.[99] This implies selecting the *FES* among parent-child relationship scales, as well as the CTSPC and the *Social Insecurity Perception Scale*, for evaluating a different domain of family environment and community settings. However, it could be worthwhile to select subscales with *adequate* methodological quality and *sufficient* measurement properties that are also supported by evidence of predictors of pretrial misconduct or antisocial behavior. For instance, some studies have reported that positive parenting practices[100] like involvement and supervision, mainly through adolescent disclosure,[101] are significant predictors. Therefore, the authors encourage adapting involvement from the *APQ*, lack of family communication from the *EAFA* and parent support and child communication from the shorter form of *FES*. As to the others, the CTSPC in its entirety and distant and personal risk from the *Social Insecurity Perception Scale* are recommended to provide information about safety in the family environment and additional characteristics of the neighborhood. In any case, it is necessary to revise the items, response scales, and recall period to ensure relevance, comprehensiveness, and comprehensibility, mainly because the transcultural adaptation of the Spanish versions of the *APQ* and the CTSPC is unknown.

These subscales could improve the evaluation of contextual factors with the lowest number of items possible since pretrial RAI should be brief to be used as a screening device and easier to fill out,[102] while also adhering to the law.[103] In the Mexican Comprehensive Criminal Justice System for Adolescents, information about collateral factors, like mitigating factors, must be considered a benefit[104] to ensure that judicial decisions comply with the principles of pre-

---

[99] Conocimientos Científicos Características Que Deben Tener Para Que Puedan Ser Tomados En Cuenta Por El Juzgador Al Momento de Emitir Su Fallo, Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXV, March 2007, Tesis CLXXXVII/2006, page 258 (Mex.).

[100] Olalla Cutrín, José Antonio Gómez-Fraguela et al., *Effects of parenting practices through deviant peer on nonviolent and violent antisocial behaviours in middle-and late-adolescence*, 9 Eur. J. Psychol. Appl. Leg. Context. *75, 77-9* (2017). *Also* Olalla Cutrín, Lorena Maneiro et al., *Longitudinal effects of parenting mediated by deviant peers on nonviolent and violent antisocial behaviours and substance use in adolescence*, 11 Eur. J. Psychol. Appl. Leg. Context. *23, 26-9* (2019). *Also* Dongdong Li et al., *Risk and Protective Factors for Probation Success Among Youth Offenders in Singapore*, 17 Youth Violence Juv. Justice. *194, 201-204* (2019).

[101] Cutrín, Maneiro et al., *supra* note 100.

[102] Steinhart, *supra* note 7 at 29.

[103] Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [L.N.S.I.J.P.A.] [Law of the Comprehensive Criminal Justice System for Adolescents], as amended, Diario Oficial de la Federación [D.O.F.], December 20, 2022. Title II Medidas Cautelares.

[104] Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [L.N.S.I.J.P.A.] [Law of the Comprehensive Criminal Justice System for Adolescents], as amended, Diario Oficial de la Federación [D.O.F.], December 20, 2022. Arts. 12, 27

cautionary measures[105] and protect the best interests of the child throughout the criminal process. This is why mental health status cannot be considered an aggravating factor, but an opportunity to detect mental health needs from a public health perspective.[106]

Studies with juvenile offenders[107] report mental health problems such as disorders due to substance use and disruptive behavior which may increase as the criminal case progresses; it is more likely that this will meet the criteria in the latter stages than at the onset.[108] This highlights the relevance of the Juvenile Justice System's prompt detection of needs to guarantee the protection of the right to enjoy the highest attainable standard of health.[109] [110] In the end, the point of pretrial risk assessment is to balance individual rights with the need for caution, and to accomplish this, validated tools are essential.

In the future, it will be fundamental to consider some challenges in their implementation so as to enhance the effectiveness of these instruments. First, before testing, justice system operators could be invited to take part in the development process to record suggestions and obtain their approval.[111] This would improve instrument feasibility and promote a multidisciplinary approach. Second, for validation purposes, the sample must represent the referral population by having similar characteristics (e.g., sex, age, scholarity, etc.), with different charge types and risk levels.[112] If statistical analysis is adjusted to these conditions and results are monitored, they could diminish potential bias in judicial decisions when establishing conditions and detention lengths. Last, it may be appropriate to implement structured guidelines for judicial operators regarding scope and limitations in practice, so as to standardize judicial discretion when possible and increase awareness of possible biased outcomes as a result of discretion.[113] To sum up, pretrial risk assessment could be a double-edged sword

---

[105] Committee on the Rights of the Child, General Comment No 24 (2019) on Children's rights in juvenile justice, ¶ 85, 87, U.N. Doc. CRC/C/GC/24 (Sept. 18, 2019). *Also* G.A. Res. 44/25, § 40 U.N. Doc. A/RES/44/25 (Nov. 20, 1989). *Also* G.A. Res. 45/113, ¶ 17,18 U.N. Doc. A/RES/45/113 (Dec. 14, 1990).

[106] Nora D. Volkow et al., *Drug use disorders: Impact of a public health rather than a criminal justice approach*, 16 World Psychiatry, *213, 213-214* (2017).

[107] Rohan Borschmann et al., *The health of adolescents in detention: A global scoping review*, 5 The Lancet Public Health. *e114, e116-20* (2020). *Also* Manfred Nowak, The United Nations Global Study on Children Deprived of Liberty 130-136 (United Nations) (2019).

[108] Gail A. Wasserman et al., *Psychiatric disorder comorbidity and suicidal behavior in juvenile justice youth*, 37 IACFP., *1361, 1365-1368* (2010).

[109] Committee on the Rights of the Child, General Comment No 24 (2019) on Children's rights in juvenile justice, ¶ 82, U.N. Doc. CRC/C/GC/24 (Sept. 18, 2019).

[110] G.A. Res. 44/25, § 24 U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

[111] García & Carrasco, *supra* note 2 at 109. *Also* Steinhart, *supra* note 7 at 50.

[112] Jennifer E. Copp & William M. Casey, *Pretrial risk assessment instruments in practice: The role of judicial discretion in pretrial reform*, 21 Criminol. Public Policy. 329, 342-344 (2022). *Also* Sarah L. Desmarais et al., *The empirical case for pretrial risk assessment instruments*, 6 Crim. justice behav. 807, 808-809, 811 (2022).

[113] Copp & Casey, *supra* note 112 at 348, 349.

if not supported by data and reliable methodology, but especially if it does not adhere to decision-making guidelines.[114]

As to the limitations of this study, despite following a well-established protocol, search results were restricted because of database scope and publishing practices about measurement properties. First, the instruments assessed were selected from national surveys, so it is possible that several instruments with a smaller sample size were excluded. Second, the selection of studies was initially made based on the title and the abstract, but it was found that it is common practice to report a development and validation study without it being clearly stated in these sections. Authors recommend searching by domains (e.g., attachment, delinquency behavior) or particular variables to broaden the scope of results for Mexican and Latino populations. This strategy should include a manual search in government databases and institutional repositories that are not included in this review.

VI. Conclusions

This is the first systematic review conducted to identify pretrial RAI for Mexican juvenile offenders, using well-documented criteria like COSMIN. However, no pretrial RAI were found. Authors proposed five self-report instruments that were selected from surveys for evaluating parenting practices and social context. No validated tools were found for delinquent behavior and most variables of community ties, such as residential, employment and school stability. Last, because of the quality level of evidence, the selection of subscales was simply laying the groundwork. More research is needed on the validity and reliability of instruments in order to reach a more solid conclusion.

This review highlights the urgent need for the Mexican Comprehensive Criminal Justice System for Adolescents to use proven and reliable tools that have an impact on detention decisions without infringing on legal principles. Future research should be directed at developing and validating pretrial evidence-based tools with a risk-need approach to encourage the implementation of precautionary measures suited to the Mexican context, the best interests of the child, and legal standards.

VII. Conflict of Interest Statement

The Authors declare that there is no conflict of interest.

[114] Evan M. Lowder et al., *Effects of pretrial risk assessments on release decisions and misconduct outcomes relative to practice as usual*, 73 J. Crim. Justice. 1, 8-10 (2021).

VIII. Acknowledgements

The authors are grateful to the National Council for Humanities, Sciences and Technologies (Conahcyt), for providing a scholarship to the first author (CVU: 920535), a doctoral student from the master's degree and Ph.D. Degree in Medical, Dental and Health Sciences Program of the National Autonomous University of Mexico.

IX. References

Alan E. Kazdin & Gualberto Buela-Casal, Conducta Antisocial. Evaluación Tratamiento y Prevención en la Infancia y Adolescencia 19-20 (1998).

Ana Aguilar & Javier Carrasco, Servicios Previos al Juicio Manual de Implementación 25 (Instituto de Justicia Procesal Penal, AC 2d ed. 2013) (2011).

Caroline B. Terwee et al., *COSMIN methodology for evaluating the content validity of patient-reported outcome measures: A Delphi study*, 27 Qual. Life Res. *1159, 1162-67* (2018).

Caroline B. Terwee et al., *Development of a methodological PubMed search filter for finding studies on measurement properties of measurement instruments,* 18 Qual. Life Res. *1115, 1121-23* (2009).

Cecilia A.C. Prinsen et al., *COSMIN guideline for systematic reviews of patient-reported outcome measures*, 27 Qual. Life Res. *1147, 1148* (2018).

Cecilia A.C. Prinsen et al., *How to select outcome measurement instruments for outcomes included in a "Core Outcome Set"–A practical guideline*, 17 Trials. *1, 7-8* (2016).

Charles Summers & Tim Willis, Pretrial Risk Assessment Research Summary 4-5 (2010).

Christina Jane Robert, Parenting practices and child behavior in Mexico: A validation study of the Alabama parenting questionnaire (April 2009) (Ph.D. dissertation, University of Minnesota) at 44-5. https://conservancy.umn.edu/bitstream/handle/11299/51024/1/Robert_umn_0130E_10269.pdf

Claudia Teresita Ruiz-Cárdenas et al., *Validez de constructo de escala ambiente familiar para adolescentes*, 20 VERTIENTES. *35, 37-40* (2017).

Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], as amended, Diario Oficial de la Federación [D.O.F.], April 25, 2023.

Conocimientos Científicos Características Que Deben Tener Para Que Puedan Ser Tomados En Cuenta Por El Juzgador Al Momento de Emitir Su Fallo, Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXV, March 2007, Tesis CLXXXVII/2006, page 258 (Mex.).

COSMIN, *COSMIN Taxonomy of Measurement Properties* (last visited March 13, 2024), https://www.cosmin.nl/tools/cosmin-taxonomy-measurement-properties/

David Steinhart, Juvenile detention risk assessment: A practice guide to juvenile detention reform 10 (2006).

Deborah Koetzle et al., Guía Práctica de Evaluaciones de Riesgos y Necesidades para Jóvenes en América Latina y el Caribe 6, 7, 9-10, 14-7 (2021). https://www.air.org/sites/default/files/2021-10/Guia%20practica%20de%20evaluaciones%20de%20RNA%20para%20jovenes.pdf

Dongdong Li et al., *Risk and Protective Factors for Probation Success Among Youth Offenders in Singapore*, 17 Youth Violence Juv. Justice. *194, 201-204* (2019).

Elena Azaola, Diagnóstico de las y los Adolescentes que Cometen Delitos Graves en México 18-19 (2015). https://www.casede.org/BibliotecaCasede/Diagnostico_adolescentes.pdf

Evan M. Lowder et al., *Effects of pretrial risk assessments on release decisions and misconduct outcomes relative to practice as usual*, 73 J. Crim. Justice. 1, 8-10 (2021).

Francisco Juárez et al., *Antisocial behavior: Its relation to selected sociodemographic variables and alcohol and drug use among Mexican students*, 7 Subst. Use Misuse, *1437, 1439-40* (1998).

Francisco Lorenzo Juárez, Influencias Psicosociales sobre la Conducta Antisocial en Estudiantes de Nivel Medio Superior del DF y EDOMEX (2009) (Ph.D. dissertation, National Autonomous University of Mexico) (TESIUNAM) at 76, 78, 83.

Gail A. Wasserman et al., *Psychiatric disorder comorbidity and suicidal behavior in juvenile justice youth*, 37 IACFP., *1361, 1365-1368* (2010).

Instituto de Justicia Procesal Penal, *Biblioteca (Acervo)*, https://www.ijpp.mx/media/biblioteca/ (last visited June 21, 2023).

Jennifer E. Copp & William M. Casey, *Pretrial risk assessment instruments in practice: The role of judicial discretion in pretrial reform*, 21 Criminol. Public Policy. 329, 342-344 (2022).

Jessie McGowan et al., *PRESS peer review of electronic search strategies: 2015 guideline statement,* 75 J. Clin. Epidemiol. *40, 41-4* (2016).

Jorge Ameth Villatoro Velázquez et al., ¿Cómo Educamos a Nuestro/as Hijos? Encuesta Maltrato Infantil y Factores Asociados 2006 44 (2006). http://cedoc.inmujeres.gob.mx/documentos_download/100769.pdf

Jorge Ameth Villatoro Velázquez et al., *La relación padres-hijos-una escala para evaluar el ambiente familiar de los adolescentes*, 20 Salud Mental. *21, 23-6* (1997).

Jorge Ameth Villatoro Velázquez et al., *Percepción inseguridad social y su relación con el uso de drogas,* 14 Rev. Mex. Psicol. *105, 107-10* (1997).

Juvenile Justice Advocates, *Library,* https://www.jjadvocates.org/library/ (last visited June 21, 2023).

Karen K. Shelton et al., *Assessment of parenting practices in families of elementary school-age children*, 25 J. Clin. Child Psychol. *317, 318-24* (1996).

Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [L.N.S.I.J.P.A.] [Law of the Comprehensive Criminal Justice System for Adolescents], as amended, Diario Oficial de la Federación [D.O.F.], December 20, 2022.

Lidwine B. Mokkink, H. C. W. de Vet et al., *COSMIN risk of bias checklist for systematic reviews of patient-reported outcome measures*, 27 Qual. Life Res. *1171, 1173-77* (2018).

Lidwine. B. Mokkink, M. Boers et al., *COSMIN Risk of Bias tool to assess the quality of studies on reliability or measurement error of outcome measurement instruments: A Delphi study*, 20 BMC Med. Res. Methodol. *1, 6-10* (2021).

Manfred Nowak, The United Nations Global Study on Children Deprived of Liberty 130-136 (United Nations) (2019).

María Elena Medina-Mora et al., *Validity and reliability of a high school drug use questionnaire among Mexican students*, 33 Bull Narc, *67, 68-75* (1981).

Marie VanNostrand & Gena Keebler, Pretrial Risk Assessment in the Federal Court For the purpose of Expanding the Use of Alternatives to Detention 44 (2009).

Matthew J. Page et al., *The PRISMA 2020 statement: an updated guideline for reporting systematic reviews*, 10 Syst. Rev. *1, 2-6* (2021).

Mexican Government, *Búsqueda de trámites información y participación ciudadana*, https://www.gob.mx/busqueda?utf8= (last visited March 13, 2022).

Miguel Ángel Caballero et al., *Violencia familiar en adolescentes y su relación con el intento de suicidio y sintomatología depresiva*, 18 Psiquiatría, *131, 133* (2002).

Murray A. Straus et al., *Identification of Child Maltreatment With the Parent-Child Conflict Tactics Scales: Development and Psychometric Data for a National Sample of American Parents*, 22 Child Abuse Negl. *249, 253-59* (1998).

Nancy Gigliola Amador & Maya Iselda Cavero, El Consumo de Cocaína en los Adolescentes y su Relación con el Ambiente Familiar el Grupo de Pares y la Autoestima (2004) (B.A. thesis, National Autonomous University of Mexico) (TESIUNAM) at 51.

National Human Rights Commission, Informe Especial Adolescentes: Vulnerabilidad y Violencia (2017). https://informe.cndh.org.mx/uploads/menu/30101/Informe_adolescentes.pdf

National Institute of Statistics and Geography, Encuesta Nacional sobre la Dinámica de las Relaciones en los Hogares (ENDIREH) (2016). https://www.inegi.org.mx/programas/endireh/2016/

National Institute of Psychiatry et al., Encuesta Nacional de Consumo de Drogas, Alcohol y Tabaco 2016-2017 (ENCODAT 2016-2017) (Nov. 28, 2017). https://www.gob.mx/salud%7Cconadic/acciones-y-programas/encuesta-nacional-de-consumo-de-drogas-alcohol-y-tabaco-encodat-2016-2017-136758

National Institute of Psychiatry et al., Encuesta Nacional de Consumo de Drogas en Estudiantes (ENCODE) (Ju-

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19199

ly 12, 2014). https://www.gob.mx/salud%7Cconadic/documentos/encuesta-nacional-de-consumo-de-drogas-en-estudiantes-2014-encode

National Institute of Statistics and Geography, Encuesta Nacional de Adolescentes en el Sistema de Justicia Penal (ENASJUP) (2017). https://www.inegi.org.mx/programas/enasjup/2017/

Nieves Quiroz del Valle et al., *La familia y el maltrato como factor de riesgo de conducta antisocial*, 30 Salud Mental. *47, 50* (2007).

Nora D. Volkow et al., *Drug use disorders: Impact of a public health rather than a criminal justice approach*, 16 World Psychiatry, *213, 213-214* (2017).

Olalla Cutrín, José Antonio Gómez-Fraguela et al., *Effects of parenting practices through deviant peer on nonviolent and violent antisocial behaviours in middle-and late-adolescence,* 9 Eur. J. Psychol. Appl. Leg. Context. *75, 77-9* (2017).

Olalla Cutrín, Lorena Maneiro et al., *Longitudinal effects of parenting mediated by deviant peers on nonviolent and violent antisocial behaviours and substance use in adolescence*, 11 Eur. J. Psychol. Appl. Leg. Context. *23, 26-9* (2019).

Pretrial Justice Institute, Pretrial Services Program Implementation: A Starter Kit 3 (2010).

Rene Octavio Cardona, *Medidas cautelares: Sus conceptos finalidades características reglas y principios para su imposición,* 27 Revista IFDP. *7, 82* (2019).

Rohan Borschmann et al., *The health of adolescents in detention: A global scoping review,* 5 The Lancet Public Health. *e114, e116-20* (2020).

Rolf Loeber & Karen B. Schmaling, *Empirical evidence for overt and covert patterns of antisocial conduct problems: A metaanalysis*, 13 J. Abnorm. Child. Psychol. *337, 346-48* (1985).

Sarah L. Desmarais et al., *The empirical case for pretrial risk assessment instruments*, 6 Crim. justice behav. 807, 808-809, 811 (2022).

Sarah L. Desmarais, & Evan M. Lowder, Pretrial Risk Assessment Tools: A Primer for Judges Prosecutors and Defense Attorneys 3 (2019).

Sarah L. Desmarais & Samantha A. Zottola, *Violence risk assessment: Current status and contemporary issues,* 3 Marq. L. Rev. *793, 795, 798* (2020).

The Justice Studies Center of the Americas, Manual de Servicios de Antelación al Juicio Mecanismos para Racionalizar el Uso de las Medidas Cautelares en Materia Penal 17 (2011).

The Inter-American Commission on Human Rights, Juvenile Justice and Human Rights in the Americas 271, 272 (2011).

The Inter-American Commission on Human Rights, Report on the Use of pretrial Detention in the Americas 8 (2013).

Thomas M. Achenbach, Manual for the Child Behavior Checklist / 4-18 and 1991 profile (1991).

UNAM, *Recursos electrónicos,* Dirección General de bibliotecas y Servicios Digitales de Información (Feb. 26, 2024), https://www.bidi.unam.mx/index.php/colecciones-digitales/bases-de-datos/ver-todos-los-recursos

Unidad de Encuestas y Análisis de Datos, *Introducción,* http://www.uade.inp-siquiatria.edu.mx (last visited June 21, 2023).

Effective law enforcement and human security in Mexico

Felipe Carlos **Betancourt Higareda**
https://orcid.org/0000-0001-9908-9305
Universidad Autónoma del Estado de México. México
Email address: fcbetancourth@uaemex.mx

Jorge **Olvera García**
https://orcid.org/0000-0002-2607-8987
Universidad Autónoma del Estado de México. México
Email address: jolverag@uaemex.mx

Hiram Raúl **Piña Libien**
https://orcid.org/0000-0002-5745-6880
Universidad Autónoma del Estado de México. México
Email address: hrpl@uaemex.mx

Alejandra **Flores Martínez**
https://orcid.org/0000-0002-2121-9445
Universidad Autónoma del Estado de México. México
Email address: afloresm@uaemex.mx

Received: February 16th, 2024
Accepted: March 12th, 2024

DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

Abstract: Mexico is experiencing a level of violence and crime that threatens human rights and prevents the attainment of human security and human development. Effective law enforcement should not only be approached as a worthy ideal, or something only desirable or convenient, but as a human right, since it is focused on achieving the greatest protection of the most fundamental rights of the people: life, freedom, integrity, property, among others. This article develops this argument by examining legal doctrines on the subject and proposes the centrality of effective law enforcement to strengthen not only the rule of law, but individual security as well as other types of security. It thus highlights the importance of a better state handling of law enforcement in order to achieve peace, order, and prosperity in Mexico. Finally, this article also provides a description of the various means of challenge and appeal which are available in Mexico by which the human right to effective law enforcement may be obtained in order to achieve a minimum threshold of public security that could effectively guarantee human security and freedom.

Keywords: Mexico, effective law enforcement, human security, human rights, rule of law.

Resumen: México experimenta un contexto de crimen y violencia despiadada que amenaza seriamente la exigibilidad de los derechos humanos, así como la consecución de su seguridad y desarrollo humanos. En este sentido, la aplicación eficiente del Derecho en materia de seguridad pública no debería ser considerado solamente un ideal digno, o algo solamente deseable o conveniente para este país, sino más bien como un derecho humano básico, ya que se enfoca en la mayor y mejor protección de los bienes jurídicos más fundamentales de todas las personas: vida, libertad, integridad, propiedad, entre otros. El presente artículo desarrolla este argumento detalladamente y, a través de una reflexión teórica y doctrinal en la materia, promueve la centralidad de la aplicación efectiva del Derecho en materia de seguridad pública para fortalecer no solamente el Estado de Derecho, sino especialmente la seguridad humana, sus subtipos y demás tipos de seguridad para el Estado Constitucional Mexicano. Por último, el presente artículo proporciona una descripción de los diferentes medios de impugnación, válidos en México, a través de los cuales el derecho humano a una aplicación efectiva del Derecho en materia de seguridad pública puede ser exigido, con el objetivo de garantizar un umbral de seguridad humana y de libertad en este país.
Palabras clave: México, seguridad pública eficiente, seguridad humana, derechos humanos, Estado de derecho.

I. Introduction

Humanitarian crises in Mexico have been triggered by the inability of the state to uphold the rule of law. Indeed, the most serious human rights abuses in this country derive from a widespread culture of impunity. Nevertheless, there has been little reflection in Mexico about the importance of effective law enforcement in advancing not only the rule of law but in guaranteeing human security in general.

Many scholars have focused on the importance of law enforcement agencies respecting the rights of suspected criminals,[1] yet very few have reflected on the

[1] For example, just to name a few of these scholars, Gustavo Flores-Macías and Jessica Zarkin, *The Consequences of Militarized Policing for Human Rights: Evidence from Mexico,* 57(3), *Comp. Pol. St. 387, 418* (2024); Juan Masullo & Davide Morisi, *The Human Costs of the War on Drugs. Attitudes*

link between an effective law enforcement system and the attainment of human security in Mexico.[2] The present article is intended to fill this gap in the academic scholarship and argues that effective law enforcement should not only be regarded as a human right, but also one of highest priorities necessary to ensure a minimum threshold of security. Effective law enforcement should contribute to improving the level of human security in Mexico in addition to respecting the human rights of persons suspected and convicted of criminal activity. For this reason, effective law enforcement also constitutes a key factor in improving the rule of law in this country.

Besides, in terms of the conceptual relationship between law enforcement and human security, it has been argued[3] that the ultimate purpose of law enforcement should be to preserve those social conditions which allow all human rights to be properly respected, protected, defended, promoted, and exercised. Preventive, investigative and prosecutorial agencies are of critical importance in modern societies, since their failures could have a negative impact not only on their specific law enforcement tasks, but also on the level of human security. These agencies are key to the advancement of political stability in any country, which is why it is important to promote their effectiveness. By improving their performance, these agencies strengthen the most foundational pillar of any democratic and free society: a solid rule of law.

Unfortunately, law enforcement agencies in Mexico have actually become part of the human rights problem,[4] and the militarization of law enforcement tasks has exacerbated this type of abuse. Some of the main deficiencies of municipal, state, and federal preventive and prosecutorial agencies in Mexico which inhibit effective enforcement of the law are: a) fragmentation, b) inadequate training, c) lack of career development, d) lack of transparency and accountability, and, e) an authoritarian design model.[5] Additionally, there is

Towards Militarization of Security in Mexico, 0(0), *Comp. Pol. St. 1, 34* (2023); Pierre Gaussens and Carolina Jasso González, *Militarization of Public Security and Violation of Human Rights in Mexico (2000-2020),* 15, *The A. Of H. R. J. 26, 50* (2020).

[2] Among these scholars we found Martin Flegl and Eva Selene Hernández Gress, *A two – stage Data Envelopment Analysis model for investigating the efficiency of the public security in Mexico,* 6 *Dec. A. Jo. 100, 181* (2023), who have highlighted the need for quality empirical research to design suitable strategies to improve the effectiveness of preventive and investigative agencies in overcoming the increasingly violent episodes in Mexico.

[3] For more on this purpose of law enforcement, see, for example, Pera, *Dominic*, Drug Violence and Public (In)Security: Mexico's Federal Police and Human Rights Abuse 5 (Sept. 17, 2015) (unpublished undergraduate dissertation, University of San Diego).

[4] For a more comprehensive treatment of this human rights problem, see, for example, Guillermo Zepeda Lecuona, *Criminal Investigation and the Subversion of the Principles of the Justice System in Mexico,* in Reforming the Administration of Justice in Mexico 133,152 (Wayne A. Cornelius & David A. Shirk eds., 2007).

[5] For more on these deficiencies, see, for example, enrique thoth verdeja márquez, la solución a la impunidad e inseguridad pública en méxico 32 (ACASEPP, 2015). In fact, in addressing these deficiencies this author proposes the following actions to improve the performance of preventive and prosecutorial agencies in Mexico: a) To implement a police development sys-

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

confusion in Mexico regarding the formal scope of responsibility of the various law enforcement agencies since Mexico's "national security agenda has blended with its public security goals",[6] causing uncertainty regarding which responsibilities the different agencies are to fulfill in their struggle against organized crime.

The lack of checks and balances, control mechanisms, and proper accountability within the law enforcement system in Mexico has also contributed significantly to human rights violations in the country. Furthermore, "Mexico's police institutions and model are the root causes of violence, corruption and insecurity",[7] which means that the authoritarian culture of this country frequently induces law enforcement agencies to operate arbitrarily and perform deficiently. For this reason, Mexico needs better democratic checks over these agencies and more community participation demanding greater responsiveness, transparency and accountability so that their legal goods are more effectively protected.[8]

In this regard, Nicoline Ambe[9] highlights the importance of the strength of the rule of law in effectively advancing human rights. She also acknowledges that the independence of the judiciary constitutes an essential condition for solidifying the rule of law since it prevents any other branch of government from enforcing the law arbitrarily. Unfortunately, both preventive and prosecutorial agencies in Mexico frequently perpetrate some of the most serious human rights abuses against both ordinary people as well as suspected criminals, mainly due to their cooptation by, and submission to, local political bosses who control them to further their own political agendas or to conceal their own collusion with organized crime.[10]

What clearly explains the exponential rise in the levels of violence and human rights abuses in Mexico are the ruthless clashes that regularly take place between rival criminal organizations, as well as those which occur between

---

tem based on procedures of career development, professionalization, certification and of disciplinary regime, b) To ensure the job stability and security of policemen, c) to employ proper admission, permanence and promotion profiles, based on the hierarchy and function of personnel, c) to implement promotion systems of policemen based on their performance, professionalization and dignification, to encourage their career development and their social recognition.

6 6 Dominic Pera, *supra* note 3, p. 15; for more insight on this issue, see also Sigrid Artz, *The Militarization of the Procuraduría General de La República: Risks for Mexican Democracy*, in Reforming the Administration of Justice in Mexico 153,174 (University of Notre Dame Press, 2007).

7 Dominic Pera, *supra* note 3, p. 18.

8 For more on the link between democratic governance, the rule of law and the public security crisis in Mexico, see, for example, David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, III(2) *Mex. L. Rev. 191, 198* (2011).

9 Nicoline Ambe, *A Legal Analysis of the Domestic Enforceability of International Human Rights Law. The Rule of Law Imperative*, 47 *UNBJL, 110, 111* (1998).

10 For an in depth analysis of the current reality, see, for example, John Bailey, *Crimen e Impunidad. Las trampas de la seguridad en México* 30 (Penguin House Mondadori, 2014). Professor Bailey, for example, even claims that weak 'formal' institutions in Mexico have been overridden by strong 'informal' institutions (or practices), such as clientelism, which have seriously undermined the rule of law and civic culture in this country.

these organizations and the state's various security agencies. These encounters often have the appearance of actual warfare since these agencies, and the Mexican army itself, have been encouraged to destroy these criminal organizations at all costs.[11] Despite the constitutional amendments initiated by President Felipe Calderón and approved by the Mexican Congress during his *sexenio* (2006-2012), which were designed to provide increased resources and improve the performance of the preventive and prosecutorial agencies, as well as the judiciary and penitentiary authorities in combatting organized crime, human rights abuses have sharply increased. In fact, Mexican civil society has experienced an increasing level of ruthlessness from criminal organizations. This makes effective law enforcement more necessary than ever to guarantee a minimum threshold of human security in Mexico.[12]

Today, effective law enforcement is a critical prerequisite for the proper defense and protection of fundamental rights in Mexico. This is especially true because of the humanitarian crises resulting from the ruthless violence of organized crime in different regions of the country. Thus, law enforcement agencies must be a key focal point of any comprehensive institutional framework intended to defend and protect human rights.[13]

However, even the most effective law enforcement system can succumb to arbitrariness if Mexican authorities do not use the state apparatus properly and consistently to enforce the law and instead use it to advance their own interests. The law enforcement system in Mexico should demonstrate the active involve-

---

[11] For a more comprehensive perspective on the reality in Mexico, see, for example, Felbab-Brown, Vanda, Mexico's Out of Control Criminal Market 1-29 (2019) (unpublished manuscript, on file with the Foreign policy at Brookings working paper). Professor Felbab-Brown, for example, claims that 'over the past two decades, criminal violence in Mexico has become highly intense, diversified, and popularized, while the deterrence capacity of Mexican law enforcement remains critically low. The outcome is an ever more complex, multipolar, and out of control criminal market that generates deleterious effects on Mexican society and makes it highly challenging for the Mexican state to respond effectively' (p. 2).

[12] Some interesting proposals regarding the reform of law enforcement in Mexico, come, for example, from David A. Shirk, *Future Directions for Police and Public Security in Mexico*, in *Police and Public Security in Mexico* 225,257 (Robert A. Donnelly & David A. Shirk eds., 2009). On the other hand, Professor Shirk, affirms that 'Mexico's public security agencies are ill-equipped, police lack professional training and preparation, their mandates are incongruent with the challenges they face, and there are inadequate mechanisms to ensure effective public oversight of police conduct. These institutional weaknesses in the public security apparatus suggest that Mexicans are not inherently lawless -at least no more so than people in the United States or elsewhere. Rather, in the absence of effective law enforcement, criminal impunity reigns.' (p. 28).

[13] See, for example, Laura Isela Díaz Bernal, et. al., *La capacitación como medida de prevención de violaciones a derechos humanos por los elementos de seguridad pública en el Estado de México*, 12 *Dignitas, 81, 130* (2018). These authors highlight the importance of permanent training of police officers in human rights in the performance of their duties so that they may be able to develop their abilities to such a degree that they effectively protect Mexican society from abuse by public security authorities as well as non-state actors.

ment of inclusive political institutions, or even consensus democracy,[14] since this type of law enforcement presupposes effective accountability and control mechanisms. This accountability is especially important regarding the authorities in charge of the national system of public security in order to ensure that they execute their responsibilities lawfully and with the goal of strengthening the rule of law.

Effective law enforcement requires the ongoing training of police officers. This has, unfortunately, been largely disrupted, and even corrupted, by a deep clientelist culture that has neutralized its potential positive effects.[15] This has occurred primarily due to powerful political bosses (or *caciques*) having coopted the preventive and prosecutorial agencies at the local, state, and even national level. As a result, impunity has increased astronomically and has become the most serious challenge to effectively advancing human security in Mexico.[16] Through appropriate sanctions, Mexican authorities should ordinarily be able to guarantee the respect for human rights which are fundamental for protecting human dignity.

The endemic impunity in this country has been generated primarily by the shortcomings of preventive and prosecutorial agencies in performing their public responsibilities. Since the amendment to the Mexican Constitution in 2011 regarding the presumption of innocence, prosecutorial agencies cannot request the imprisonment of suspected criminals until they have been proven guilty and been sentenced. Despite representing some progress with the respect to human rights, the 2011 amendment has, nevertheless, been particularly challenging for Mexico, since law enforcement agencies do not currently possess sufficient human, technological, logistical, and budgetary resources, nor the trained personnel, necessary to successfully investigate every crime. Often, their personnel have not been sufficiently trained in the prosecution of crime and the formal processes designed to achieve this goal have become extremely slow to be implemented.[17]

---

[14] For more on what an inclusive political institution entails, see DARON ACEMOGLU & JAMES A. ROBINSON, *Why Nations Fail?* (Crown Publishers ed., 2013).

[15] For a thoroughly treatment of how this clientelist culture has worked in Mexico, see, for example, JOHN BAILEY, *supra*, note 10, p. 38. Professor Bailey, for example, claims that the efforts in Mexico to prioritize citizen security above political parties' own agendas have historically failed.

[16] See *Id.* at p. 35. In fact, according to Professor John Bailey, Mexico has been hijacked by a security trap through which crime, violence, corruption, and impunity constantly reinforce each other and override any attempt to construct ethical democratic governance in this country.

[17] This type of situation is of particular concern in Mexico according to Buscaglia, *Edgardo* & Jan Van Dijk, Controlling Organized Crime and Corruption in The Public Sector 12 (2005) (unpublished manuscript, on file with eScholarhip.org, University of California at Berkeley); procedural complexity in criminal prosecutions and trials has worked as a barrier to fair access to court services, and to justice in general, in countries like Mexico.

II. The Dignity and the Personality of the Individual as Foundations for the Recognition of Human Rights in Mexico

Why should human rights be universally respected? It has frequently been argued that the main reason justifying this universal respect relies on the inherent *dignity* of the human being, on his or her dignity as a *person*, endowed, either potentially or in fact, with reason and free will, who, by his mere existence possesses a transcendental purpose.[18] It has also been claimed that all people, no matter their accidental circumstances, share only *one* nature and the *same* dignity as their fellows, thus, in principle, each is entitled to this right as a result of this shared nature: that each individual shall be secure in the enjoyment of their freedom and happiness.[19]

The positive concession of legal recognition to every individual constituted a crucial step toward the official recognition of individual human rights since such recognition can only occur once every individual is recognized as a person under the law.[20] Consequently, formal legal recognition is granted to every person, whether their capacity to exercise their rights may be *potential* (as in the case of children) or *actual* (as in the case of mature people). Therefore, through the legal recognition of each individual the law concedes every human being certain fundamental rights, but also subjects him or her to basic duties, so that through these rights and duties each may determine his or her own destiny.

Legal recognition demands each person take full responsibility for her or his actions and constitutes the basic premise for attributing legal consequences for one's acts, in terms of rewards or sanctions. Thus people are officially acknowledged as their own masters, as "someone" rather than "something"; who are able to decide by themselves their own fate, thus distinguishing them from other entities that have recently been granted certain rights, but who are not masters over themselves (such as animals, the earth, the environment, etc.). This official acknowledgement of the individual person as his own master entitles him to the

---

[18] For more on the dignity of the human being and the formal recognition of human rights, see, for example, Jürgen Habermas, *The concept of human dignity and the realistic utopia of human rights*, 55(64) *Diánoa, 3, 25* (2010). It is possible to claim that by possessing reason and free will the individual person becomes not only a rational being but an owner or his own actions, which distinguishes him from other living beings, even from those with larger brains, such as dolphins or whales, which have not displayed the same rational intelligence and free will as human beings have.

[19] For a more profound philosophical reflection on the purpose of the human being, see, for example, Aristotle, The Nichomachean Ethics, (Oxford University Press, 1980). Based on this classic philosopher, age, sex, ethnic origin, religion, nationality, skin color, culture, etc., constitute accidental circumstances of the human person, which do not override his substance, or purpose, of his life.

[20] For a more profound reflection on legal personality and its impact on the formal recognition of human rights, see, for example, Luis Castillo-Córdova, *La Persona Jurídica como Titular de Derechos Fundamentales*. 167 *Actualidad Jurídica 125,134* (2007). This author even claims that 'to the extent that only the human person can be subject of law, we speak of legal personality'.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

enjoyment of civil liberties and political rights, without which he could not be authentically free within the political community.

Consequently, effective law enforcement should be regarded as a fundamental right in Mexico since it is only by this means that preventive and prosecutorial agencies can competently protect these basic legal rights. Hence, a more effective law enforcement system would contribute to the enhancement of freedom in this country, and through this, Mexicans could productively pursue the democratic governance of their country. Social, economic, and cultural rights, such as the right to education, dignified housing, access to health care, meaningful work, social security, adequate food, etc., are also important since they allow people to more effectively pursue their own personal and communal happiness.[21]

III. The Constitutional State and Fundamental Rights in Mexico

The Mexican constitutional state recognizes certain fundamental rights as legitimate limitations on the exercise of political power. In principle, this recognition aims to prevent the arbitrary exercise of power by executive, legislative and judicial authorities so that these fundamental rights, as well as other civil liberties and political rights, may be effectively protected from autocratic governance.[22] Within the Mexican constitutional state, political power has been formally limited through basic principles, namely, the principles of constitutionality and of legality of authorities' acts.[23] The exercise of this power is also subject to the fundamental duties of transparency and accountability.

In our case study, Mexico, there are additional constitutional principles that authorities must follow which are designed to protect, defend, and promote hu-

---

[21] For a thorough study on the impact of social, economic, and cultural rights on the welfare of a political community, see, for example, Heartley Dean, Social Rights and Human Welfare 3-4 (Routledge, 2015). For example, this author argues that the term social rights may be used in a normative sense to refer more generally to societal objectives and the levels of social protection that ought to be mutually guaranteed within all human societies (p. 3).

[22] See, for example, Ignacio Burgoa, Las Garantías Individuales 162-187 (Porrúa, 1994). Professor Burgoa used the term "individual guarantees" rather than "fundamental rights" when referring to these limitations, and explains that these "guarantees" mean the "different types of securities and protections in favor of the governed within a constitutional state, that is, within a structured and organized political entity in which government decisions are subjected to pre established rules based on the constitutional order" (p. 162). He subsequently argues that these constitutional guarantees "are equivalent to the legally positive consecration of human rights since they are invested of obligatoriness and imperativeness so that they shall be respected by state authorities" (p. 187).

[23] For a more comprehensive explanation of these principles, see, for example, Ignacio Burgoa, El Juicio de Amparo 149-158 (Porrúa, 1994). Professor Burgoa explained, for example, the scope of both principles when they are combined, by arguing that the "amparo writ" not only protects the Mexican constitutional order, but it also extends its protection to secondary laws that are in accordance with this order.

man rights such as the *pro persona* principle and the principles of progressivity, universality, inalienability, interdependence, and indivisibility of these rights.[24] Another central characteristic of the Mexican constitutional state is the formal system of checks and balances incorporated into its presidential system of government, which is designed to ensure should not only good governance with respect to public policies and laws, but also to support the protection and defense of fundamental rights.[25] The formal goal of these checks and balances is to avoid the emergence of a tyrannical regime, that is, to impede the subjection of the entire Mexican political system to the arbitrary will of one individual or single branch of government.[26] Only when all fundamental rights are effectively protected in Mexico will civil liberties and political rights be exercised to their fullest extent throughout this country and human dignity be fully respected.[27]

IV. Good Governance and Human Security in Mexico

As stated above, the protection of basic social, economic, health and cultural conditions necessary for living with dignity have become indispensable to guarantee human security within a constitutional state. This implies that a minimum threshold of human security must be guaranteed in order to encourage human development. Only through effective democratic governance it is possible to achieve these basic conditions, since, in principle, this form of governance im-

---

[24] For an in-depth reflection on these principles, see, for example, Hugo S. Ramírez García, *La Constitucionalización de la Persona: Un Marco de la Relación entre el estado de Derecho y los Derechos Humanos,* 47 *Cuestiones Constitucionales, 370, 387* (2022).

[25] For a panoramic analysis of the relevance of these checks and balances in guaranteeing the respect, protection, and defense of human rights in Mexico, see, for example, Jorge Carpizo, *México: Poder Ejecutivo y Derechos Humanos, 1975-2005*, 126 *Boletín Mexicano de Derecho Comparado. 1237, 1279* (2009). For example, to provide an "updated" account of the system of checks and balances within the Mexican presidential system of government, Professor Carpizo explains that many of the factors that had supported an autocratic regime in Mexico had disappeared or weakened by 2009. He also highlights the importance of the CNDH (the Mexican Human Rights Commission) in this system so that federal authorities can be better controlled and held accountable for human rights violations.

[26] For more on the relevance of suitable checks and balances to consolidate democracy in Mexico, see, for example, Laura Valencia Escamilla, *Equilibrio de Poderes, Cooperación y la Conformación de Gobiernos de Coalición en México*, 6(11) *Rev. Leg. de Est, Sociales y de Opinión Pública, 7* (2013). Although Professor Valencia Escamilla also highlights that divided governments in Mexico, in which the executive and the legislative powers are in the hands of different political parties, lack a formal system of cooperation. Furthermore, she asserts that cooperation between political parties or coalitions of parties in Mexico does not take place because of programmatic coincidence, but on account of mutual conditions for electoral profit.

[27] For more on the relationship between fundamental rights and human dignity, see, for example, Francisco Javier Ansuátegui Roig, *Derechos Fundamentales y Dignidad Humana*, 10 *El Tiempo de los Derechos. 3, 17* (2011). In reflecting on human dignity, Professor Ansuátegui asserts, for example, that 'human dignity is the basic axiological reference of the system of rights that people are entitled to'.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

plies deliberation and the implementation of sensible public policies that will effectively protect, defend, and promote all human rights.[28]

In other words, good governance implies coherent steps are taken to ensure a minimum threshold of human security within the constitutional state. Although this intrinsic purpose of good governance has not been seriously disputed in legal scholarship, the appropriate means of achieving this threshold have been controversial in other social disciplines. For example, political science scholars have argued that enhancing certain specific aspects of democracy (such as public debate, political participation, transparency, accountability, responsiveness, rule of law, elections, etc.) would improve the ability of lawmakers and ordinary citizens to think about, discuss, and implement sensible policies that might improve the welfare, human security and human development of the people within the state.[29]

In fact, the scholarly debate on human security has also been linked with the scholarly debate on human development.[30] Historically, it is possible to distinguish two broad routes that countries around the world have followed to promote human welfare (and human development). The first, led by the US and the West, is a free market economic system, mixed with some measure of social subsidiarity and social solidarity (or a welfare state). The second, currently led by China, North Korea and other countries, is the pursuit of a centralized economic system inspired by Marxist materialist thinking.[31]

---

[28] For the relevant evaluative criteria necessary to determine these policies, see for example, Amitav Acharya, et al., Human security: From Concept to Practice 1-3 (World Scientific, 2011). These authors have proposed the HSIA (Human Security Impact Assessment) which they consider to be of a much broader scope than the EIA (Environmental Impact Assessment) since the HSIA includes in its measurement long-term political and social factors that could affect the achievement of human security in the respective constitutional state.

[29] For more on the effect of the quality of democracy on political decision-making processes within the constitutional state, see, for example, Larry Diamond & Leonardo Morlino, *The Quality of Democracy. An Overview,* 15(4) *Journal of Democracy, 20-31387* (2004). In this regard, Professors Diamond and Morlino argue, for example, that a quality democracy 'will provide a context in which the whole citizenry can judge the government's performance through mechanisms such as elections, while governmental institutions and officials hold one another legally and constitutionally accountable as well (procedural quality)' (p. 22).

[30] See, for example, Alkire, Sabina, A Conceptual Framework for Human Security 1-52 (2003) (working paper, on file with the Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford). Professor Alkire argues that human security and human development are both people centered, multisectoral and multidimensional: 'Human development provides the 'broad picture' long-term objective of human fulfilment within any society, whether it is rich or whether it is poor; whether composed of refugees or artisans or farmers. This broad objective is shared by human security although the human security approach pursues a narrower agenda.' (p. 36). Furthermore, she asserts that 'human security includes a strictly delimited subset of human development concerns (...), but it excludes much of human development as lying outside of its own mandate.' (p.36).

[31] To obtain a more profound knowledge of the implications of both routes for the human development of multiple countries across the world see, for example, Acemoglu & Robinson, *supra* note 14, pp. 91-120.

Democratic governance implies that various controls function efficiently in the course of executive, legislative and judicial decision-making processes,[32] for example: a) top-down accountability (through periodical elections), b) checks and balances (effective horizontal accountability), c) data access and transparency, d) the rule of law, e) equality and freedom, f) political participation, g) the public sphere (public debate and access to news media), etc. The goal of these controls is that laws, public policies, and judicial determinations be thoughtfully reached from an inclusive perspective, that is, a perspective based on what is beneficial for the entire community, which is the only one that can successfully advance human security and human development.

In this way, the different dimensions of a democratic regime should work effectively within the Mexican state so that legislative, executive and judicial authorities, and the society at large, may more easily achieve consensus or majority decisions (or majority opinions, as the case may be) regarding those laws, rulings and public policies that could effectively improve, not only human development, but also the various subdimensions of human security (e.g., food security, economic security, health security, environmental security, personal security, community security, and political security), as well as other pertinent types of security (e.g., citizen security, social security, public security, interior security, national security, international security, etc.). The proper functioning of the checks and balances within the Mexican presidential system of government ensure that the executive, legislative, and judicial powers do not disregard human rights, human security and human development in their public policies, laws and rulings. Consequently, the appropriate structural functioning of its democratic regime should become the starting point for advancing human security, human development and the respect for human rights within the Mexican constitutional state since a superior deliberative democracy could improve the quality of public policies aimed at enhancing the respect for fundamental rights as well as the effectiveness of the state apparatus, protect people from any type of threat to their existence or bodily integrity, and in foster their potential as rational beings.[33]

---

[32] See, for example, Diamond & Morlino, *supra* note 29, pp. 22-26. In this research paper, Professors Diamond and Morlino propose eight dimensions to measure the quality of any democratic regime: 'a) freedom, b) rule of law, c) vertical accountability, d) responsiveness, e) equality, f) participation, g) competition and h) horizontal accountability.' On the other hand, they also explain that 'at a minimum democracy requires: 1) universal, adult suffrage, 2) recurring free, competitive and fair elections; 3) more than one serious party; and 4) alternatives sources of information.'

[33] For more on the relevance of deliberative democracy on the quality of political decision-making within the constitutional state, see, for example, Nabaz Abdullan & Mohd Rahman, *The Use of Deliberative Democracy for Public Policy Making Process*, 5(3), *Pub. Pol. and Admn. Res. 221, 231* (2015). Professors Abdullan and Rahman argue, for example, that public deliberation is the result of a quality democracy, that it legitimizes government decisions and maximizes the outcomes of public policies, and that there are several advantages of deliberative practices in public policy

Deficient democratic governance can become the most serious obstacle to safeguarding human rights in Mexico, including the human rights of access to justice and of due process of law, since without checks and balances, even the Mexican judicial power could easily manipulate its ruling in a way that avoids accountability for its decisions. To improve human security and human development in Mexico it is necessary to promote an extended civic culture that effectively protects, defends and respects human rights in everyday life, without the need for legal disputes. In other words, an extended civic culture would contribute to the enjoyment of human rights in ordinary life.[34] Furthermore, democratic governance also implies the pursuit of policies that can effectively promote the enjoyment of human rights in everyday life, especially through the standard decisions of administrative authorities. Good governance depends on expanding opportunities for citizen participation in executive, legislative and even judicial spheres (e.g., grand juries) so that the resulting laws or policies may be better oriented to the effective accomplishment of both human security and human development within the constitutional state.[35] Coherent policies that improve access to justice and guarantee due process of law will improve not only the rule of law but will increase the level of human security as well, since these fundamental rights have become essential to effectively defend, protect and advance all human rights, which are especially important in the context of the humanitarian crises that have resulted from the ruthlessness of organized crime.[36]

---

making processes, among them, a reason-based discussion, a focused decision, and the facilitation of agreement on disputed preferences.

[34] For more on the importance of achieving a culture of respect for human rights to enhance human security within the constitutional state see, for example, Lloyd Axworthy, *Human Security and Global Governance: Putting People First*, 7(1) *Glob. Gov. 19, 23* (2001). Professor Axworthy, explains, for example, that there is growing academic recognition that the protection of the people should be the principal concern of the security of any state, even above the protection of its national sovereignty. Even more, he affirms that 'human security today puts people first and recognizes that their safety is integral to the promotion and maintenance of international peace and security.'

[35] For more insight into the relationship between democratic governance and human rights, see, for example, Francisco Sagasti, *A human rights approach to democratic governance and development*, in Realizing the right to development. Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development 126,128 (United Nations ed., 2013). Professor Sagasti explains that different values of democratic governance, such as 'participation, dialogue, consensus, transparency, accountability and the rule of law make the state more representative and capable of responding adequately to the concerns of its citizens.' (p.126).

[36] For more on the importance of the due process clause for defending and protecting human rights, see, for example, Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses.* 52 *U. Cin. L. Rev. 3,* (1983). Professor Christenson, in discussing a precedent in the United States related to the exercise of the human right of due process to impede an arbitrary detention, stated that 'due process is an evolutionary concept that takes into account accepted notions of fairness.' Furthermore, he argues that 'a fundamental human right to be free from arbitrary detention exists'. As we can see, the due process clause constitutes an effective instrument to defend the people from abuses of power, thereby improving human security in any constitutional state.

V. Effective Law Enforcement and Human Security in Mexico

For these reasons, competent and effective law enforcement in Mexico should be recognized as a fundamental right, not only to successfully defend and protect the human rights of suspected, indicted, convicted and sentenced criminals, but also the victims of crimes and ordinary people, since this kind of law enforcement has become indispensable to prevent the disruption, disorder and even destruction of entire communities, especially that caused by non-state actors. Thus, effective and competent law enforcement constitutes a crucial means to advance human security within a constitutional state. There is a mutually dependent relationship between a functional law enforcement system and the level of human security in Mexico. Individuals cannot be protected, and human rights can hardly be enjoyed, unless the state apparatus implements preventive mechanisms that protect them from crime, investigative and prosecutorial strategies that discourage crime, judicial procedures that can efficiently resolve legal disputes, and penal systems designed to not only punish but to repair any damage.

The appropriate functioning of these five subdimensions (prevention, investigation, prosecution, judgment, and correction of criminal offenders) that encompass effective law enforcement is indispensable for guaranteeing the proper respect, protection, defense and promotion of all human rights in Mexico. As previously stated, this applies not only to those suspected, indicted, convicted and sentenced criminals, but to ordinary citizens and victims of crime who are regularly exposed to serious mental and physical harm, especially by non-state actors. Of course, protection of the human rights of people facing criminal investigation and prosecution is indispensable for achieving a fair criminal justice system, as Professor Ferrajoli would remind us.[37] Nevertheless, it is equally important that the Mexican state develop the capability of enforcing the law in a manner that also discourages any future criminal or unlawful behavior.

In other words, the robustness of law enforcement is critical for the overall strength of the rule of law in Mexico, and a solid rule of law is an essential precondition for peace, order, prosperity, and democracy, as well as human security and human development in this country. This is the reason why policies focused on improving the effectiveness of law enforcement are crucial in Mexico, since they could have a positive impact on the overall development, stability and internal security of this constitutional state.[38] Nevertheless, though crucial, effec-

[37] See, for example, Luigi Ferrajoli et al., Derechos y garantías. La ley del más débil (Trotta, 1999).

[38] See, for example Tadkbakhsh, Shahrbanou, Human Security: Concepts and Implications 5 (Sept. 2005) (unpublished manuscript, on file with Les Etudes du CERI, No. 117-118). To highlight the significance of effective law enforcement in achieving stability, national security, and human security within a constitutional state, Professor Tadkbakhsh affirms that 'the guarantee of national security no longer lay in military power, but in favorable social, political and economic conditions, the promotion of human development, and the protection of human rights.' (p. 5).

tive law enforcement should be regarded as only one of several critical factors that could improve the state of human rights in Mexico. Other factors include the design of appropriate policies that guarantee social, economic, and cultural development, or as previously explained, more and better checks and balances within the Mexican presidential system of government to guarantee the proper level of accountability, transparency, and responsiveness of its authorities.

Without effective law enforcement, it is difficult to advance the rule of law and human security in this country. Therefore, one of the highest priorities of the Mexican government should be to improve systems for the prevention, investigation and prosecution of crimes, as well as the judicial and correctional systems, in such a way that all these dimensions of law enforcement might contribute to guaranteeing the appropriate protection of human rights. There is a growing academic debate focused on whether or not social, economic, and cultural rights should also be considered fundamental rights which could be guaranteed through redistributive policies.[39] Nevertheless, few scholars have openly argued in favor of a fundamental right to effective law enforcement, which should be regarded as more important in this country given the present context of humanitarian crisis (triggered by the ruthlessness of non-state actors), and since human security is a prerequisite to the enjoyment of any other rights.[40] In other words, before considering the expansion of human rights we should be more concerned about guaranteeing the most fundamental right of human security and ensuring a genuine rule of law.

From a sociological perspective, there is an ongoing tension within individuals between the quest for the common good and the pursuit of self-interest. If the pursuit of self-interest prevails, to the detriment of respecting the rights of others, then oppressive or extractive practices tend to expand which affect the overall peace, stability, order, and prosperity of the community, and thus, the level of human security and of human development. As a result, the first sensible policy needed to achieve effective law enforcement should be to establish a new program of civic education, from elementary school onward, which would foster civic virtue and make people more aware of the importance of behaving responsibly in society so that peace, stability, order, and prosperity may more easily be achieved. Indeed, if civic virtue is appropriately fostered throughout

---

[39] See, for example, Heartley Dean, *supra*, note 21; or Malcolm Langford, *The justiciability of social rights: From practice to theory,* in Social rights jurisprudence: emerging trends in international and comparative law, vol. 3, 4, (Cambridge, 2008). For example, Professor Langford asserts that 'it is arguable that one debate has been resolved, namely whether economic, social and cultural rights can be denied the status of human rights on the basis that they are not judicially enforceable – there is now too much evidence to the contrary.' (p. 4). And that this kind of evidence provides 'some answer to the critique that adjudicatory bodies lack the democratic legitimacy and institutional capacity to enforce such rights.' (p. 4).

[40] In support of this argument, see, for example, Article 2 of the *Ley General del Sistema Nacional de Seguridad Pública,* which explicitly states that the goal of public security in Mexico is to safeguard the integrity and the (fundamental) rights of people, as well as to preserve the freedoms and the public peace and order in the country.

Mexican society, a democratic form of government would not only be more feasible, but it would also demand more effective law enforcement. In fact, the expansion of civic virtue should aid Mexico considerably in overcoming its extreme social and economic inequalities since this could effectively restrain the exercise of oppressive political and economic practices which are usually the driving force behind these extreme inequalities and which are also reflected in higher public debt, lack of accountability, and political corruption.[41]

The weakness of the rule of law, which derives from the lack of civic virtue in society, has become convenient to the Mexican 'establishment' since corrupted politicians can get away with their attacks on preventive and prosecutorial agencies, and other autonomous constitutional bodies, which are then even less capable of effectively sanctioning unlawful or criminal behavior. Not surprisingly, the weakness of the rule of law is more common in autocratic regimes and in those countries that are experiencing processes of autocratization (which could be the case in Mexico), in which preventive and prosecutorial agencies, as well as independent auditing and review mechanisms, are deliberately kept weak or even deliberately conjoined with public corruption or organized crime.[42] Therefore, one of the most significant policies that Mexico could enact to improve the rule of law and its transition to democracy should be to increase the degree of citizen responsibility towards the community. This kind of civic culture should foster not only an environment in which human rights are properly respected, protected, defended, and promoted, but an environment in which basic responsibilities towards individuals and the community at large may be fulfilled.

To improve human security and even human development in Mexico, it is crucial that people not only protect, defend and promote their fundamental rights, but that they fulfill their responsibilities towards their fellow citizens and the community at large. In fact, according to Beccaria, one of the main reasons for the imposition of legal sanctions and penalties is to awaken awareness in people regarding how their unlawful behavior can negatively impact the overall happiness of the community at large.[43] Consequently, law enforcement will be

---

[41] For more on the importance of civic virtue in improving the general welfare of any country, see, for example, William A. Galston, *Civil Society, Civic Virtue, and Liberal Democracy*, 75(2) *Chi.-Kent L. Rev. 603, 612* (2000). In this article Professor Galston argues, for example, that there is scientific evidence that 'stable intact families are the single best anti-poverty program,' that 'voluntary associations can serve as sites of resistance against tyranny and oppression', and that these associations 'can foster the virtues that modern democratic societies need and can nourish the habits of civic engagement'.

[42] In support of this argument see, for example, Buscaglia & Van Dijk, *supra* note 17, p. 2. In this article, these scholars test and prove the 'links between the growth of organized crime and that of corruption in the public sector in a large number of countries.' And they found that 'the two types of complex crime reinforce each other.'

[43] See, for example, Bernard E. Harcourt, *Beccaria's On Crimes and Punishments: A Mirror on the History of the Foundations of Modern Criminal Law*, in Foundational Texts In Modern Criminal Law 39,59 (MARKUS DUBBER, ED., 2014). In this article, Professor Harcourt explains

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

more effective when there is a widespread culture of social responsibility, solidarity, and subsidiarity which bolsters inclusive economic practices, as well as democratic values, within the system of government, such as transparency, accountability, and responsiveness to the legitimate requests of citizens.

On the other hand, if by the rule of law we also mean the rule of justice, then one could argue that there is no true rule of law (or true rule of justice) if people, apart from claiming their fundamental rights, are not willing to fulfil their basic duties toward other individuals or the community at large. Indeed, if we stop to reflect carefully, the enjoyment of human rights depends on the fulfilment of basic responsibilities in society, which means that each person has the fundamental right that every other member of society fulfill his or her basic obligations with regard to him or her. Otherwise it would not be possible to speak about a true rule of law (or true rule of justice) since this always implies an equilibrium between the enjoyment of rights and the fulfilment of duties.

Therefore, if individuals are focused merely on demanding the respect, protection, defense, and promotion of their own rights, but neglect the fulfillment of their basic duty of respecting the fundamental rights of other people, then the rule of law becomes increasingly weak. Instead, the law of the stronger shall become more decisive in social relationships, where the stronger is that group of people who are able to more forcefully demand the protection of their own rights, even if it would diminish the fundamental rights of others. The fulfillment of duties demands personal sacrifice, to provide others what they are entitled to, and even demands the practice of cardinal virtues, such as temperance and fortitude. Examples include the duty of working well and responsibly, or not overexploiting subordinates, etc. This is the reason why strengthening the rule of law in Mexico means to encourage the practice of not only civic virtues, but also moral virtues.[44] If moral virtues, but especially cardinal virtues (justice, prudence, fortitude, and temperance), are not sufficiently encouraged through its educative system, Mexico will become more likely to experience a rise in crime as well as violations of human rights.

Requiring the fulfilment of basic duties towards the entire political community also means advancing the rights of the Mexican state with respect to each of its citizens. Only if the rights of the entire political community are protected from arbitrary harm by individuals will human rights also be efficiently protected since the principal function of a constitutional state is to protect the welfare

---

that, according to Beccaria, "'the metric of just punishments and of just laws —the metric of justice— is precisely the greater good of the individuals, or, as Beccaria writes in his very introduction, 'whether or not (the laws) conduce to the greatest happiness shared among the greater number'" (p.45).

[44] See, for example, Aristotle, *supra* note 19. In this book, this classic philosopher highlights the significance of moral virtues, not only for the individual, but for the entire political community, since they lead to collective happiness. On the other hand, happiness depends on behaving 'rationally', that is, according to practical 'right' reason, which constitutes the basis for the practice of moral virtues.

of its citizens. This statement can be better explained in this way: if an organization (in this case the Mexican state) is overburdened by requests by individual citizens who do not themselves contribute to the overall appropriate functioning of the organization, this organization will stop working effectively, to the detriment of its individual members.[45] This means that Mexicans should be concerned about making their entire society work fairly, so that their own human rights may be adequately protected. If the Mexican state is incapable of fostering a culture of social responsibility, solidarity, and subsidiarity, and ineffective in protecting fundamental rights through appropriate penalties and sanctions, by allowing crimes to go unpunished, for example, then human rights violations will tend to grow significantly and human security will tend to diminish proportionately in this country.

VI. Democratic Governance and The Human Right to Effective Law Enforcement in Mexico

Institutional schemes that provide for power sharing among different political actors and the equitable distribution and decentralization of political power should enhance democratic governance and possibly even generate a consensus democracy in Mexico.[46] This kind of institutional design should also nurture better public deliberation regarding human rights policies since they would be inspired more by a perspective focused on the common good rather than the self-centered agenda espoused by political parties.[47] Democratic deliberation

[45] This figure of speech is based on Hebert Spencer's theory of structural functionalism. Helpful literature on structural functionalism include the following: Jonathan H. Turner, *Hebert Spencer,* The Blackwell Companion to Major Classical Social Theorists 69-92 (George Ritzer ed., 2003); or Rober George Perrin, Herbert Spencer's Functionalism (April, 1974) (unpublished DPhil dissertation, The University of British Columbia).

[46] For more on what consensus democracy is, see, for example, Arendt Lijphart, *Consensus and Consensus Democracy: Cultural, Structural, Functional, and Rational Choice Explanations,* 21(2) *Scand. Pol. Stud. 99, 108* (1998). Professor Lijphart explains in this article that a 'consensus democracy can be seen as an institutional arrangement that is able to produce as much consensus as possible in countries, such as ethnically and religiously divided societies, where a spontaneous consensus is in short supply' (p.100), and that in those societies where consensus democracy has become a reality, the derived 'power-sharing systems that were set up all followed the same general pattern: an inclusive government consisting of representatives of all the important rival groups; as much autonomy for these groups as possible; proportionality in representation and appointments, an a formal and informal minority veto power with regard to the most vital and fundamental matters' (p.101).

[47] To better understand the relationship between institutional design and the quality of deliberative democracy, see, for example, Jane Mansbridge, et. al. *A systemic approach to deliberative democracy*, in Deliberative systems: Deliberative democracy at the large scale 1,26 (Jane Mansbridge and John Parkinson eds., 2012). In terms of the impact of institutional design on the development of effective deliberative systems, Professor Mansbridge argues that 'a highly functional deliberative system will be redundant or potentially redundant in interaction so that when one part fails to play an important role another can fill in or evolve over time to fill in. Such a

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

should enhance the capabilities of the Mexican state in enacting policies that could make law enforcement more competent and effective. This statement means that the more citizen participation there is in the consideration of policies related to the improvement of law enforcement, the better the quality of these policies will be, especially if the participation is informed, respectful, deliberative, and aimed at achieving the common good.[48]

Enhanced accountability, transparency, and responsiveness of the Mexican system of government would also meaningfully contribute to law enforcement effectiveness against crime, especially organized crime. Furthermore, these democratic values should bolster the common good orientation of preventive and prosecutorial agencies. In addition, improved democratic controls over these agencies should discourage their extractive tendencies. Moreover, greater social accountability of law enforcement agencies should bolster their responsiveness to the demands of civil society. The current lack of accountability of these agencies mainly benefits those with more political influence and makes effective law enforcement and human security goals more difficult to achieve. Consequently, a more accountable, transparent, responsive, more democratically oriented law enforcement system in Mexico is essential to effectively defend, protect, and promote the fundamental rights of ordinary people, victims of crimes, and even suspected criminals, and will improve everyone's security.[49]

Constitutional rules that guarantee more fair competition in business activities should effectively discourage public and private oligopolies that might disrupt the free and fair market system in Mexico which is essential for supporting a democratic regime, rule of law, human security, and human development.[50] The growth of the informal economy in Mexico has led to the emergence of 'caciques' (political bosses) who have a decisive influence on the economic expectations of many street vendors and who are able to control, or even manipu-

---

system will include checks and balances of various forms so that excesses in one part are checked by the activation of other parts of the system.' (p. 5).

[48] See, for example, *Id.* at p. 2. In fact, in acknowledging that more civic participation can improve deliberative systems within democratic regimes, Professor Mansbridge argues that 'most democracies are complex entities in which a wide variety of institutions, associations, and sites of contestation accomplish political work —including informal networks, the media, organized advocacy groups, schools, foundations, private and non-profit institutions, legislatures, executive agencies, and the courts. We thus advocate what may be called a systemic approach to deliberative democracy.'

[49] On the positive impact of a democratically oriented law enforcement system for the improvement of human security in Mexico, see, for example, Edgardo Buscaglia, Vacíos de Poder en México 25-38 (Random House Mondadori, 2013). On the other hand, Professor Buscaglia also explains that 'when states are weak, transnational and regional criminal organizations compete wildly, with violence, to fill in state voids, eating complete fragments of the country land and of the institutional scaffolding, to consolidate afterwards their illegal markets with much graver crimes, for example, human trafficking, abduction, or human organ trafficking' p. 26.

[50] For more on the relationship between a free and fair market system, the consolidation of a democratic regime, and the growth of human security, see, for example, Acemoglu & Robinson, *supra*, note 12, pp. 21–62.

late, them more effectively, especially in electoral terms, all of which seriously undermines the human security of these vendors.[51] Effective law enforcement should also include a more fair application of the law in the economic realm where the values of impartiality and equality should also be emphasized. Consequently, one of the main instruments necessary to revitalize a prosperous free enterprise system in Mexico, as well as the effective transition to democracy, is strengthening law enforcement in the economic arena, both regulatory and criminal. If law enforcement remains weak in Mexico, the system of benefits will persist and be increasingly based on political influence or membership in the current political class. A solid law enforcement system should undermine the structure of prerogatives that this 'establishment' imposes on Mexican society.[52]

VII. The Justiciability in Mexico of the Human Right to Effective Law Enforcement

It is important to recall that access to justice and due process of law should be deemed essential for the effective enjoyment of any human right in Mexico. Indeed, these rights should enable Mexican people to defend all their other rights, as well as the lawfulness of their actions or decisions, by being provided the realistic opportunity to present their evidence and arguments before a tribunal established for this purpose.[53] Access to justice implies that judges resolve legal controversies through a legitimate system of due process, that is, by hearing the question in controversy and objectively analyzing the evidence and legal defenses so that they may be able to apply the appropriate legal rules that

[51] For more on these social phenomena, see, for example, John Bailey *supra*, note 10, p. 68. Professor Bailey explains, for example, that informal activities in Mexico generate corrupt interchanges whenever they involve government regulators and that policemen and other regulatory agents negotiate bribes to permit, or even protect and foster, illegal and informal activities. These policemen and agents subsequently compensate their respective bosses.

[52] For more on this relationship between the weakness of the rule of law and a system of exemptions in Mexico, see, for example, Edgardo Buscaglia, *supra*, note 46, pp. 28-29. Professor Buscaglia also explains that improved *judicial, asset, corruption, and social* controls could reinforce the law enforcement system in Mexico since they are indispensable to combat both public corruption and organized crime, which, unfortunately, have captured state institutions and have thwarted social trust and social capital in this country.

[53] See, for example, Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in Access to Justice as Human Right 1,26 (Franceso Francioni ed., 2007). Professor Francioni asserts in this chapter, for example, that the 'respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies' and that the human right of access to justice should be understood as the right to have a case 'heard and adjudicated in accordance with substantive standards of fairness and justice'.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

address the various rights and duties which will lead to a fair resolution of the legal dispute.[54]

Due process of law means the procedure is impartial, that any judge will follow the law and arrive at an unbiased ruling, in conformity with positive law, to effectively resolve the legal dispute. Enforcement of this right also suggests that no administrative authority can arbitrarily deprive someone of his or her lawful rights. In this way, rights must be withheld, and duties may be imposed, only after an unprejudiced process is followed that demonstrates that this course of action is the appropriate result and reflects impartiality and fairness in social relationships. Due process in trials mainly consists in giving parties an equal opportunity to present evidence and arguments which demonstrate their entitlement to specific rights.

Both access to justice and due process of law have been regarded in Mexico as appropriate constitutional limitations on the potential abuse of political power and as crucial parts of the system of checks and balances in the Mexican presidential system of government that is designed to guarantee the enforcement of fundamental rights.[55] In this way, the degree of efficacy in the enforcement of these specific rights is a reliable indicator of the overall enjoyment of human rights in this country. There are various legal processes through which people can demand the enforcement of their human rights in Mexico.

Indeed, the Mexican Constitution, and the international human rights laws sanctioned by the Mexican Senate and President, have enabled a diversity of means to challenge the denial of, or enforce entitlement to, fundamental rights in this country. These include the writ of amparo, the constitutional controversy, the unconstitutionality action, the diffuse control of constitutionality, and

---

[54] See, for example, E. Thomas Sullivan & Toni. M. Massaro, The Arc of Due Process in American Constitutional Law 11 (Oxford University Press, 2007). In the context of American History, Professors Sullivan and Massaro explain, for example, that the due process clauses 'functioned as an expression of the rule of law principle as protection of citizens against arbitrary treatment by the judiciary and other government officials. At first blush, due process expressly connected the concepts of rule of law with a provision of proper procedures providing for limitations of government search and seizure, protections for criminal defendants, basic notice and hearing opportunities, and a host of other procedural protections for unfair application of the law or deprivation of life, liberty or property without a firm base in existing law.'

[55] For more on the importance of these rights to the protection of other human rights, see, for example, Alfredo Islas Colín & Alejandra Díaz Alvarado, *El derecho al acceso a la justicia en el sistema interamericano de protección de derechos humanos*, (7)14 *Prospectiva Jurídica 47, 60* (2016). Professors Islas and Díaz define due process of law as that constitutional guarantee that ensures the right of self-defense in a legal proceeding that must be resolved with a grounded, fair, and reasonable ruling. On the other hand, citing Pablo Elías González Monguí, La policía judicial en el sistema penal acusatorio 43-53 (Ediciones Doctrina y Ley LTDA, 2007), they also explain that different constitutional guarantees are implicit in the due process of law, for example, the independence, the impartiality, and the immediacy of the judge, the principle of publicity, the rights of victims of crime, and the orality of legal proceedings, etc.

the diffuse control of conventionality, among others.[56] Nevertheless, additional means of challenge have been designed and implemented at the state level which are complimentary to these national methods and the appeals available under the Interamerican Commission of Human Rights.

In this way, Mexicans have recourse to various judicial mechanisms through which they can demand the protection of their human rights.[57] Furthermore, many Mexican states continue to implement new, refined appeals processes designed to protect and defend fundamental rights, but the scope of their application is more limited than those at the national level.[58] Despite their limited scope, these state level appeals play an important role in the enforcement of fundamental rights in Mexico and have prevented the arbitrariness of legislative, judicial, and even administrative rulings which could have compromised the exercise of fundamental rights in their respective states.

There are also supplementary constitutional appeals, quasi-judicial in nature, both at the national and state level of government in Mexico. These have also been successfully used in the defense, protection and promotion of human rights in this country. These include the human rights recommendations issued by autonomous constitutional bodies. These recommendations are usually released only after careful investigation of the facts in dispute when serious human rights violations have been discovered to have been perpetrated by administrative authorities of different levels of government in this country.[59]

The controls of constitutionality and of conventionality (of the Interamerican Convention of Human Rights) have become special means of challenge that have meaningfully assisted in the enforcement of human rights in Mexico

---

[56] For more on these existing means of challenge and appeals valid in Mexico, see for example, Osvaldo Villegas Cornejo, *Mecanismos de Control Jurisdiccionales y No Jurisdiccionales Para la Defensa de Derechos Constitucionales*, 13 *Ex Legibus, 247, 258* (2020).

[57] An exhaustive treatment of these state level means of challenge can be found in Manuel González Oropeza & Eduardo Ferrer Mac-Gregor, La justicia constitucional En Las Entidades Federativas (Porrúa, 2006).

[58] Since these appeals rely on state constitutions and not the national constitution; see, for example, César I. Astudillo Reyes, *La Justicia Constitucional Local en México. Presupuestos, Sistemas y Problemas*, 115 *Bol. Mex. De Der. Comp. 9, 56* (2006). Nonetheless, Professor Astudillo asserts that it is possible that we are witnessing an acceleration of state level appeals and that the system of constitutional justice at the state level in Mexico may soon become a reality in every region of the Mexican Republic (pp. 12-13).

[59] For more on the nature of these supplementary constitutional appeals, see, for example, Raymundo Espinoza Hernández, *Las Recomendaciones de la CNDH. El Control del Poder y la Protección de los Derechos Humanos*, 93 *Alegatos 350, 351* (2016). Professor Espinoza explains, for example, that, technically speaking, these recommendations form part of the instruments of defense of the Mexican Constitution, and can also be considered as non-jurisdictional means of protection of human rights, as well as mechanisms for the protection of the Mexican Constitution regarding human rights, as well as mechanisms for the control of political power focused on protecting human rights; and finally, according to Professor Espinoza, they can be regarded as means of constitutional control of an administrative nature, since they oversee decisions of administrative authorities.

since they uphold the *pro persona* principle, as well as the constitutional principles of progressivity, universality, inalienability, interdependence and indivisibility of these rights, which together guarantee greater respect, protection, defense, and promotion of fundamental rights in legal disputes.[60]

In addition, the Interamerican Court of Human Rights (ICHR) has published jurisprudencial criteria that guarantee greater defense, protection, respect, and promotion of human rights in every legal dispute and which all judges, tribunals, and justices in Mexico must take into consideration before drafting their final rulings.[61] All these means of challenge, appeals, principles, and jurisprudencial criteria could also be employed to require the appropriate functioning of law enforcement agencies in the prosecution of ordinary crime, as well as organized crime, and to demand their satisfactory performance, accountability, transparency, and responsiveness so that peace, public order, and human security may more easily be achieved in this country.

Some final rulings resulting from a writ of *amparo* have become precedent and have assisted in clarifying of the responsibilities of Mexican preventive and prosecutorial agencies regarding the protection of human rights in the battle against crime and have also refined the scope of constitutional appeals and conventional means of challenge in the promotion of these rights.[62] Jurisprudencial criteria used by the Interamerican Court of Human Rights (ICHR), which is valid in Mexico, have suggested formal limits on law enforcement agencies in their struggle against crime so that their actions and decisions fully respect, pro-

[60] For more on these diffuse controls, see, for example, Eduardo Ferrer-MacGregor, *Interpretación Conforme y el Control Difuso de Convencionalidad. El Nuevo Paradigma Para el Juez Mexicano*, 9(2) *Est. Const. 531, 622* (2011). In this research article, Professor Ferrer-MacGregor, for example, explains the principle of 'interpretation according to' (*interpretación conforme*) regarding human rights in Mexico, as well as the *pro persona* principle as an interpretative guideline of human rights in this country. In this way, Professor Ferrer-MacGregor asserts that every legal rule related to human rights in Mexico must be interpreted 'according to' the human rights established in the Mexican Constitution and in the international treaties approved by this country, and that the *pro persona* principle implies that no legal rule can be interpreted to exclude those rights and guarantees that are inherent to the human person.

[61] For more on the relevance of this jurisprudence for the protection of human rights in Mexico, see, for example, Luis Fernando Angulo Jacobo, *El Control Difuso de la Convencionalidad en México*, 1 *Rev. del Inst. de la Jud. Fed. 73, 85* (2013). This scholar argues, for example, that 'through considering the possibility that all judges carry out the control of conventionality, the Mexican state demonstrates, at first sight, its intention of fulfilling the protection of human rights contained in international treaties' (p. 83).

[62] For example, the following precedent GARANTIAS INDIVIDUALES. CONCEPTO DE VIOLACION GRAVE DE ELLAS PARA LOS EFECTOS DEL SEGUNDO PARRAFO DEL ARTICULO 97 CONSTITUCIONAL, Pleno de la Suprema Corte de Justicia (S.C.J.N.) (Supreme Court) Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo III, Junio de 1996, Tesis LXXXVI/1996, Página 460 (Méx.). This is a very relevant precedent in this subject matter, since it states that there are serious violations of human rights whenever there is insufficient legal, or political, or social, or material security as consequence of the negligence or omission of authorities to guarantee peaceful interactions within society, or if these authorities have neglected the due respect of human rights.

tect and defend the human rights of not only suspected criminals, but the rights of innocent people as well.[63] Despite these precedents and jurisprudential criteria, the following question is still relevant in Mexico: Is it possible to require, through some constitutional appeal or conventional means of challenge, preventive and prosecutorial agencies to enforce the rule of law and defend the human rights of innocent people against the disastrous effects of organized crime?

Based on one precedent established by the Mexican Supreme Court of Justice[64] which asserts that social, economic and cultural rights can be enforced through the writ of amparo, it is possible to answer this question, since this precedent helps us to argue that it is more reasonable that the lack of effective and competent law enforcement in criminal cases should be legally challenged through this type of constitutional appeal since its focus is protecting essential legal goods which can only be safeguarded through a proactive provision of the state: an effective law enforcement system. However, the writ of amparo should not be the only constitutional appeal available in Mexico to require the effective protection of fundamental rights from the ruthlessness of organized crime. Due to the critical levels of public insecurity, other appeals could serve this purpose as well, such as complaints before national and state human rights constitutional bodies, or official pronouncements from ordinary judges as part of their exercise of the controls of constitutionality and of conventionality in ordinary legal disputes.

Therefore, as a critical right necessary for protecting the life and the integrity of the individual, effective and competent law enforcement in criminal cases should be recognized as a human right enforceable through ordinary, constitutional and conventional appeals and other means of challenge. Additionally, the principles of progressivity, universality, interdependence, and indivisibility of human rights recognized in the Mexican Constitution, as well as the *pro persona* principle, also legitimize judicial enforcement of the human right to effective law enforcement by means of the diffuse controls of constitutionality

---

[63] For more on these criteria, see, for example, Javier Sepúlveda Amed, *Los límites de la violencia y el uso legítimo de la fuerza en la jurisprudencia interamericana*, in CRITERIOS Y JURISPRUDENCIA INTERAMERICANA DE DERECHOS HUMANOS: INFLUENCIA Y REPERCUSIÓN EN LA JUSTICIA PENAL 195,204 (Sergio García Ramírez, et. al. eds., 2014). Professor Sepúlveda, for example, cites extracts of final rulings of different controversies solved by the Interamerican Court of Human Rights (ICHR), such as the '*Caso Zambrano Velez y otros vs. Ecuador*' or the '*Caso Montero Aranguren y otros vs. Venezuela'*, which have established criteria for the fair use of institutional violence against crime. For example, in the 'Caso Zambrano Velez y otros vs. Ecuador' the ICHR established that the use by any state of institutional violence must be limited by principles of proportionality, necessity and humanity, and in the 'Caso Montero Aranguren y otros vs. Venezuela' the ICHR has established that the exceptional use of lethal force and weapons must be constructed by the law, interpreted restrictively so as to be minimized in every circumstance, and be of absolute necessity to face successfully the threat that the state may intend to repel.

[64] DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES. SON JUSTICIABLES ANTE LOS TRIBUNALES, A TRAVÉS DEL JUICIO DE AMPARO, Tribunales Colegiados de Circuito, Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo III, Agosto de 2014, Tesis Aislada (V Región) 5o.19 K (10a.), página 1731 (Méx.).

and conventionality, since these judicial resources are aimed at extending the scope of protection of fundamental rights within ordinary legal disputes. The explicit acknowledgment of an enforceable right through constitutional and conventional appeals and means of challenge should be approached as a natural consequence of the validity of these constitutional principles, which, taken together, compel the Mexican state to guarantee the greatest respect, defense, protection, and promotion of human rights within its territory, even if this specific human right entails the legitimate use of force against criminals. Finally, effective law enforcement should also be deemed a critical human right necessary to advance peace, order, freedom, prosperity and human development in Mexico. Indeed, it is for the greatest benefit of all people living in Mexico that this human right become enforceable through judicial appeals and means of challenge since its justiciability shall effectively pressure the Mexican state to deal with the calamities produced by organized crime against the people in Mexico.

VIII. Relevant Policies for Improving Law Enforcement in Mexico

Perhaps the most positive public policy in the long term to enhance the rule of law in Mexico would be a comprehensive state approach to law enforcement, which should effectively avoid partisan use of preventive, investigative and prosecutorial agencies and should successfully foster accountability to the Mexican state and society as a whole, and not just a partisan majority in the Mexican Congress.[65] The mandate of state preventive police forces in Mexico should be institutionally based, not person based.[66] This kind of mandate reinforces a state vision of public security tasks and may improve transparency, responsiveness, and accountability of these enforcement agencies.

Additionally, more citizen participation within organizations of civil society that oversee preventive and prosecutorial agencies should also reinforce this state approach to law enforcement, which, in turn, should improve accountabil-

[65] For more on the origin of this state approach to law enforcement, see, for example, Josiah Flynt, *Police Methods in London,* 176(556) *The N. Am. Rev. 436, 449* (1903). Professor Flynt explains that this approach started in Great Britain in 1829 with Sir Robert Peel who 'succeeded in getting through Parliament a bill by which the different parish and ward police forces were organized into one force' and 'the commissioner of the new force was selected and appointed by the Imperial Government, as is the case today'. He subsequently affirms that 'politics is not allowed to play any part in the management and direction of the organization' and that 'the most striking difference between London Police and police forces in the United States, as regards management, is that the former is an Imperial force'.

[66] See, for example, Enrique Thoth Verdeja Márquez, *supra* note 7, p. 94. According to this author, this new approach to the single mandate of preventive police forces shall improve the coordination between municipal, state, and federal agencies, encourage a single operative system, as well as efficient methods of assessment and supervision of results. It should also discourage institutional dispersion and reinforce institutional solidity and responsibility in public security tasks.

ity, responsiveness and transparency. This new state approach to law enforcement would also encourage more deliberation regarding policies that effectively reduce the attractiveness of crime by substantially increasing the costs of breaking the law, and, at the same time, expanding the incentives to comply with it.[67] Since the cooptation of preventive and prosecutorial agencies by executive incumbents, which hinders their independence, autonomy, accountability and transparency, constitutes the most serious challenge to implement this comprehensive state approach to law enforcement in Mexico,[68] it is crucial that before implementing policies based on 'rational choice theory' or on 'opportunity theories' to deter crime, this country first transform its authoritarian approach to law enforcement so that public security tasks may effectively be directed toward strengthening the rule of law.

In other words, a more democratically controlled law enforcement system, achieved by encouraging more citizen participation in the accountability and transparency of both preventive and prosecutorial agencies, would improve the protection of fundamental rights and legal goods of ordinary people from both ordinary crime and organized crime. In the end, this kind of transformation of the law enforcement system should also improve citizen security in this country and support its overall transition to democracy. Once the authoritarian approach to law enforcement in Mexico is transformed into one which is more responsive, transparent, and accountable to society, public policies designed to deter crime and improve law and order based on 'opportunity theories' and 'rational choice theory' would also become more beneficial to this country.

---

[67] For more on the timeliness of these policies to improve law enforcement in Mexico, please see, for example, Markus Felson & Clarke Ronald V, *La ocasión hace al ladrón. Teoría práctica para la prevención del delito*, in Serie Claves del Gobierno Local 6 193,234 (Fundación Democracia y Gobierno Local ed., 2008). Professors Felson and Ronald argue, for example, that opportunity is a 'root cause' of crime and explain in their paper ten principles to reduce crime: 1. Opportunities play a role in causing all crime; 2. Crime opportunities are highly specific; 3. Crime opportunities are concentrated in time and space; 4. Crime opportunities depend on everyday movements of activity; 5. One crime produces opportunities for another; 6. Some products offer more tempting crime opportunities; 7. Social and technological changes produce new crime opportunities; 8. Crime can be prevented through reducing opportunities; 9. Reducing opportunities does not usually displace crime; 10. Focused opportunity reduction can produce wider declines in crime.

[68] For more on this type of challenge, see, for example, Edgardo Buscaglia, *supra* note 49, pp. 63-69. Professor Buscaglia affirms, for example, that the appointment, permanence, and dismissal of prosecutors depend on the political ups and downs of the relative state government and that they are subject to the approval of the respective Governor. On the other hand, he also argues that the absence of effective control mechanisms over prosecutorial agencies has created a vacuum of state power in Mexico that have led to abuse by these agencies. To impede the arbitrariness of their behavior, he proposes strengthening the legal and technical controls and supervision of the resolutions of these agencies.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

IX. Autonomous Constitutional Bodies and Effective Law Enforcement in Mexico

Another proposal to improve law enforcement in Mexico would be the creation of autonomous constitutional bodies that oversee the performance of preventive, investigative, and prosecutorial agencies in their public security tasks. These new entities (whether national, state, or municipal) could be modeled after already existing autonomous constitutional bodies that exist at the national level in Mexico such as the *Instituto Nacional Electoral* (INE) (Electoral National Institute), and which could function as supervisory boards that encourage more efficient citizen control over law enforcement agencies. One positive effect of these already existing autonomous constitutional bodies, such as the INAI (*Instituto Nacional de Accesso a la Información Pública*), the COFECE (*Comisión Federal de Competencia Económica*), the CNDH (*Comisión Nacional de Derechos Humanos*), or the Banxico (*Banco de Mexico*), has been helping the growth of consensus democracy in Mexico by more fairly distributing the system of checks and balances between the different governmental powers of the Mexican state so that its public administration is more effectively oriented toward the enhancement of the rule of law within the Mexican constitutional state.[69]

Nevertheless, and especially in recent times, these kinds of bodies in Mexico have become vulnerable to the colonization of party or group interests and politics which have compromised their independence, impartiality, objectivity, and legality, and thus, their accountability and transparency as well, which has a negative effect on their ability to work as part of the checks and balances of the Mexican system of government.[70] The solution to this colonization should not be to eliminate these kinds of organizations, but to improve their institutional design so that their independence, impartiality, state and citizen-driven perspective, may be effectively protected from any party or group interest.[71]For this reason, law enforcement agencies, the judiciary, and penal institutions, all

[69] For a deeper analysis of these bodies, please see, for example, José Fabián Ruiz, *Los órganos constitucionales autónomos en México: una visión integradora*, 37 *Cuest. Const. 96, 98* (2017). Professor Ruiz argues, for example, that these kinds of bodies bolster the non-partisanship, de corporatization, and democratization of public entities, that they have constituted the best way to supervise, make transparent and democratize relevant faculties of the constitutional state; and that they better guarantee impartiality and technical honesty in the supervision of different government tasks.

[70] During the *sexenio* of 2018 – 2024 the performance of many constitutional autonomous bodies at the national level, such as the *CNDH,* the *INAI,* the *INE,* the *Bank of Mexico,* the *COFECE*, etc., have been accused of working in the interests of the ruling elite rather than in the interest of the nation, precisely because their impartiality, independence, objectivity, accountability and transparency have been compromised by party and group interests.

[71] The best way to achieve this is through preserving consensus decision-making (a qualified majority of the Mexican Congress) regarding the institutional design of these kinds of bodies, so that it becomes very difficult for a single party or coalition of parties to override the principles that guarantee their impartial functioning.

require competent oversight through independent and autonomous bodies that could effectively discourage their 'capture' by political bosses.[72]

These autonomous constitutional bodies (or supervisory agencies) should have their councilors selected and removed through a qualified majority (66%) of the relevant legislative body, whether it be the Mexican Congress or a state congress, following rigorous criteria, so that they may not be easily subjected to the extortion or manipulation of a single party or a coalition of parties.[73] These bodies should also be accountable to the respective pertinent legislature and be subject to the same rules of inspection, administration, criminal responsibility and formal checks and balances of the Mexican presidential system of government.[74] These autonomous bodies should also be modeled after the Mexican Federal Judiciary Council, which is the constitutional office authorized to oversee the appointment of judges, supervise their performance, and manage their professional careers; likewise, these bodies should supervise the appointment and performance of police officers and the careers of all members of preventive and prosecutorial agencies.[75] Other formal responsibilities that these bodies (or supervisory entities) could exercise are the following:

a) To propose the budget of law enforcement agencies based on an informed and accurate analysis of their needs.
b) To monitor through reliable indicators the overall performance of these agencies.

---

[72] Nonetheless, this kind of oversight has been proposed for some time for law enforcement agencies in Mexico, see, for example, Hiram Escudero Álvarez, *Los órganos constitucionales autónomos y la seguridad pública*, in Los desafíos de la seguridad pública en México 53,54 (2002). Based on Luigi Ferrajoli, Professor Escudero Álvarez, for example, has already proposed special autonomous constitutional bodies so that the rights of accused persons may be shielded from arbitrariness resulting from a lack of autonomy, independence, impartiality and objectivity of experts and public defenders, since these professionals could also compromise the fundamental rights of the accused.

[73] Consequently, these proposed bodies should also be like the INAI and the Mexican states' bodies in charge of guaranteeing transparency and access to public information, since they enjoy technical and administrative autonomy, legal personality, and are specialized, independent, and collegiate, are formed by an odd number of councilors, and possess the faculty of deciding their own budget as well as their internal organization (Art. 37. *Ley General de Transparencia y Acceso a la Información Pública*).

[74] Therefore, their political, administrative, and criminal responsibilities should also be broadly regulated by Title IV of the Mexican Constitution (CPEUM) (Arts. 108-114), just as other public servants, whether federal, state, or municipal, are subjected to these constitutional rules. For example, their administrative responsibility should also derive from the actions or omissions that could impact the legality, honorability, loyalty, and efficiency of their work; or they should have internal controlling boards that efficiently inquire into actions and omissions that constitute administrative faults.

[75] Just as the Mexican federal and state judiciary councils oversee the administration, surveillance, discipline, and careers of judges (see Article 73 of *Ley Orgánica del Poder Judicial de la Federación*), these new constitutional bodies should survey and oversee the administration, discipline and careers of municipal, state, and federal preventive and prosecutorial personnel.

c) To carry out constant supervisory audits over these agencies so that they may be effectively compelled to perform their duties accordingly.[76]

X. Institutional Reform and Effective Law Enforcement in Mexico

The National Council of Public Safety in Mexico already exists, created under the *Ley General del Sistema Nacional de Seguridad Pública*[77] (Act of the National System of Public Safety), but this council is not an independent, autonomous, and specialized constitutional body that could enhance the necessary checks and balances related to the Mexican law enforcement system, nor does it provide for the transparency and accountability of preventive and prosecutorial agencies. Nonetheless, this Act does represent a crucial step forward in the design of new, autonomous, constitutional bodies that could reinforce a state approach to public security in Mexico.[78] The existing National Council of Public Safety is composed of three main commissions: a) data, b) certification and accreditation, and, c) crime prevention and citizen participation.[79] All of these commissions could be handed over to our proposed supervisory body at the national level, retaining many of their original responsibilities, but with more influence, independence, and autonomy from those authorities they oversee.

The problem with the present National Council of Public Safety is that its institutional design can easily lead to conflicts of interest since its members can act as accusers, judges, and defendants at the same time. A new National Council of Public Safety, as an autonomous constitutional body, should resemble the INE, which possesses a General Council that makes decisions collectively.[80] This new constitutional body, at the national level of government, should also

[76] Furthermore, these new constitutional bodies, at the federal, state, and municipal level of government, should also imitate the Mexican Federal Judiciary Council (see Article 86 of *Ley Orgánica del Poder Judicial de la Federación* to have a panoramic view of its scope), and have the ability to issue internal regulations related to the management, career and disciplinary regime of preventive and prosecutorial agencies; to make decisions about the appointment, confirmation, removal, bar or reinstatement of police officials; the power to suspend policemen involved in the commission of felonies, based on the reports of investigative agencies; the ability to process administrative complaints; the ability to appoint the heads of their auxiliary bodies and addressing their resignations, license, removals, and suspension, among others that could be adapted from the official capacities that the Mexican federal and state judiciary councils possess regarding judges.

[77] See Article 12 of this Act. This Council is composed of the Mexican President, the Secretary of the Interior, the Secretary of National Defense, the Secretary of the Navy, the Secretary of Public Safety, the Attorney General, the State Governors, the Head of Government of Mexico City, and the Executive Secretary of the National System of Public Safety.

[78] For example, most of the capacities established in Article 7 of this Act could be assumed by this new autonomous constitutional organism, although some other capacities should continue being carried out by the different law enforcement agencies of Mexico.

[79] See Articles 17, 19 – 22. *Ley General del Sistema Nacional de Seguridad Pública.*

[80] See Art. 41. *Constitución Política de los Estados Unidos Mexicanos. Apartado A.*

resemble the Mexican Commission of Human Rights (*CNDH*), which possesses a consultative council, a general secretary, and several appointed positions / appointed officials / visiting officials.[81] Thus, the consultative council of this proposed supervisory body should be comprised of honorable and knowledgeable citizens that are able to efficiently review the work of its General Council to guarantee its impartiality and independence.

The visiting officials of this new Council of Public Safety should assess the work of law enforcement agencies using specific standards relating to performance, behavior, loyalty, and discipline. The visits of these officials should keep preventive and prosecutorial agencies focused on fulfilling their responsibilities and duties and prevent other government institutions, especially municipal, state, and federal executives, from interfering in law enforcement tasks and from compromising the independence, autonomy, impartiality, objectivity, and professionalism of these agencies. These officials should also aid this new autonomous body in preparing reports to be submitted to the Mexican Congress so that it can monitor the state of law enforcement at the national level, state, or in a municipal levels when necessary.[82]

These reports should also assess the level of training and the qualification of police officers, their career development, the level of coordination among law enforcement agencies, and the degree of social participation in law enforcement tasks. To improve the performance of the public security apparatus, both ordinary citizens and police officers should be able to present complaints against law enforcement authorities for failing to carry out their duties appropriately. There should also be coordination between this new constitutional body at the national level and the Mexican Commission on Human Rights, as well as with other autonomous bodies, such as the INAI, the Federal Judiciary Council, or the INE, so that they can support each other in the fulfilment of their corresponding responsibilities and thus foster the rule of law in their respective areas.

For example, if a citizen submits a complaint before the CNDH due to misconduct by law enforcement authorities, the CNDH should notify this new National Council of Public Safety about the complaint so that both organizations can support each other in resolving it based on their respective areas of responsibility. To this end, this new constitutional body should require the authorities accused of misconduct to produce a thorough report regarding the subject of the complaint so that they are aware of the reasons and motivations behind the challenged actions or omissions. This procedure should strengthen the degree of responsiveness, accountability, and transparency of law enforcement agencies to the Mexican state and society.

---

[81] See Art. 5. *Ley de la Comisión Nacional de Derechos Humanos.*

[82] Each state and municipality should have its own council of public safety (or new constitutional autonomous body), similar to the National Council of Public Safety, to monitor the state of law enforcement in its own territory or municipality and submit their reports to the corresponding state legislature or municipal council.

However, these new constitutional bodies, at the national, state and even municipal level, should also, whenever possible, use alternative means to resolve conflicts, such as mediation and arbitration, to encourage solidarity, subsidiarity, and a culture of peace within law enforcement agencies, as well as between citizens and the authorities. Just as the Federal Judiciary Council does,[83] these proposed bodies should have their own unit of administrative responsibilities to try all those preventive and prosecutorial personnel that may be accused of administrative misconduct. These new bodies should also monitor the functioning of the crime prevention systems, the training of police officers, the independence and autonomy of preventive and prosecutorial agencies from executive power, as well as their accountability.

These new autonomous bodies should themselves be subject to accountability as well and be obliged to periodically send reports to the legislature which would reinforce their independence and autonomy with regard to the executive power.

Mexico needs a constitutional amendment that effectively requires states' law enforcement agencies to become more engaged with and supportive of the federal government's fight against organized crime.[84] The concentration in the Mexican General Attorney (FGR) of the responsibilities involving combating organized crime has, paradoxically, increased its vulnerability to organized crime. It has also encouraged the penetration of organized crime into the states' preventive and prosecutorial agencies as well as they attempt to interfere with the Mexican General Attorney's investigations into these criminal organizations.[85]

A democratically oriented law enforcement system in Mexico, through the creation of these new autonomous constitutional bodies could become the most effective driver for improving the rule of law, human security, and human development in this country. These bodies should also encourage situational crime

---

[83] See Arts. 99-100. *Ley Orgánica del Poder Judicial de la Federación.*

[84] For a thorough assessment of the situation of law enforcement at the state level in Mexico, see, for example, Edgardo Buscaglia, *supra* note 49. pp. 63-69. Professor Buscaglia explains, for example, that at the state level in Mexico criminal investigations are not led by prosecutorial agencies themselves, since they usually operate in favor of the corresponding executive power. This way of operating invites serious violations of due process of law. To avoid these kinds of violations, Professor Buscaglia affirms that Mexico needs, especially at the state level of government, hard control mechanisms over law enforcement agencies and the judiciary, so that they may support high-quality prosecutions in order to obtain well-grounded and fair sentences against criminal suspects.

[85] See Article 73, XXI, b. *Constitución Política de los Estados Unidos Mexicanos.* See also John Bailey, *supra* note 10, pp. 181-182. Professor Bailey, for example, acknowledges that criminal organizations focus their corruptive and threatening activities on preventive and prosecutorial agencies at all levels of government, and that some municipal and state policemen have become spies, defenders and even direct members of these organizations. He also asserts that sometimes rival criminal organizations make use of different police departments, or even different high ranking officials within the same department, and that prosecutorial agencies and the administrative personnel of courts have become the most vulnerable to infiltration by organized crime.

prevention, since based on rational choice and opportunity theories, human behavior is driven by a rational assessment of costs and benefits, which means that if the price of carrying out a crime surpasses its potential rewards, criminals will ordinarily refrain from engaging in it.[86] These new bodies should design and implement new policies that reduce the attractiveness of crime by increasing its costs so that potential criminals would perceive such conduct as risky, less profitable, and less excusable to a legal tribunal. For example, if the number of policemen in any municipality or state of Mexico were increased, were better equipped and trained, had more and better surveillance vehicles, weaponry, cameras, salaries, and systems of accountability, etc., the commission of crimes would be effectively discouraged in such places.

These new bodies should discourage those factors that increase the rewards and reduce the cost of committing crime at the local level in Mexico, such as: a) easy escape, b) time needed to commit the crime, c) possibility of not being identified, and, d) the possibility of not being arrested.[87] However, enhanced technology, infrastructure, organization, and logistics of preventive police forces, would substantially increase these 'costs' and sharply reduce the 'benefits' of committing crime. Indeed, the improvement of situational crime prevention, by providing effective incentives to comply with the law, and by increasing the personal efforts and negative consequences for breaking the law, should be greatly encouraged by these new constitutional bodies in Mexico.[88]

These constitutional bodies should also manage the distribution of resources, technology, and qualified personnel within preventive agencies. Additionally, to improve the investigation of crimes, it is also vital that these autonomous bodies promote larger budgets, more resources, more qualified personnel, better facilities and logistics, and upgraded technology for prosecutorial agencies.

These new constitutional bodies should first improve on some of the internal aspects of preventive, investigative and prosecutorial agencies to achieve a more effective law enforcement system in Mexico, for example:

a) A system of career development to upgrade the performance, professionalization, and dignity of police officers.

---

[86] For more insight on the relevance of situational crime prevention for improving the rule of law in Mexico, see, for example, Felson & Clarke, op. cit., *supra* note 67, pp. 193-234.

[87] See Enrique Thoth Verdeja Márquez, *supra* note 5, p. 29.

[88] For more on the specific situational crime prevention policies that these constitutional bodies could promote, see, for example, Graem Newman, et al., Rational Choice and Situational Crime Prevention: Theoretical Foundations *4-5* (Ashgate 1997). In the introduction to this book, for example, Professor Graem Newman explains that the theory of situational crime prevention possesses an interactionist view of causation, which means that 'the cause of a particular behavior is tied closely to the immediacy of the situation or, to put it yet another way, the situation is seen as the primary or foreground agent in crime causation'. In this way, 'situational crime prevention is about intervening in proximal crime situations to inhibit the operation of a crime event, generating causal mechanisms which will counter the criminogenesis of the situation.'

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

b) Better salaries, training, and equipment officers.
c) Better coordination between federal, state, and local agencies.
d) The development of reliable indicators that accurately measure the efficiency of their respective funding levels.
e) The creation of standardized systems of operation.
f) Better distribution of their overall budget.[89]

In the case of the judiciary, it is essential to encourage increased independence, autonomy, and competence through permanent training, and to supply it with a larger budget, better facilities, and more qualified personnel. These goals could also be encouraged by the *Consejo de la Judicatura Federal* (Federal Judiciary Council) and pursued before the Mexican Congress and the Federal Executive Power.

Lastly, regarding the penitentiary system, it is imperative that these new constitutional bodies encourage the improvement of penal facilities, the increase of its budget to make prisons places that demonstrate respect for the human rights of convicted and sentenced criminals, more efficient training of its personnel regarding human rights, enhancement of its current logistics and surveillance technology to avoid riots or disturbances within penal institutions, so that this system may be able to foster the successful reintegration of convicted and sentenced criminals into society.[90] Combining all of the foregoing policies should contribute to improving law enforcement in Mexico. However, unless the authoritarian practices within the law enforcement system are transformed, these policies will not be able to improve the rule of law or human security, nor will they be able to defend the rights of those accused of committing crime or the innocent victims of organized crime.

XI. Conclusions

An effective law enforcement system should be regarded as a basic human right in Mexico. Such a system is not only necessary to overcome the humanitarian crises resulting from the ruthlessness and violence of non-state actors, but also to increase the level of human security and human development in this country.

[89] See Enrique Thoth Verdeja Márquez, *supra* note 5, pp. 37, 42, 90-94; see also Arturo Alvarado Mendoza & Sergio Padilla Oñate, *Organización policial y debilidad institucional: balance de las capacidades de las policías estatales,* 90(42) *Izt. Rev. C. Soc. Hum. 11, 47 (*2021). In this article, Professors Alvarado Mendoza & Padilla Oñate call attention to the need to fortify the institutional capacity of law enforcement agencies to improve their performance against crime, especially organized crime, and they define this capacity as the ability of authorities to frame public policies, execute them with sufficient budgets and operate them efficiently.

[90] For more on the specific policies that should improve the human security of prisoners in Mexico, see, for example, Baruch Alejandro Castro Bernal, *La Reinserción Social a la Luz de los Derechos Humanos* (Sept. 27, 2023) (unpublished Ph.D. dissertation, Universidad Autónoma del Estado de México).

Furthermore, it should be considered one of the most fundamental rights by the Mexican state since it implies an institutional design that effectively guarantees all other human rights. It would make no sense for the Mexican state to formally acknowledge human rights if it remains institutionally incapable of guaranteeing their actual fulfillment.

Indeed, the extent of impunity in Mexico exacerbates security problems since fundamental rights are constantly violated by non-state actors and authorities alike without any effective deterrent or incentive to prevent such violations. Consequently, effective law enforcement should be advanced as a fundamental right in Mexico to guarantee the protection of the individual in all circumstances, whether in daily life or official proceedings, such as trials, administrative procedures, or exercising a petition right. To this end, specific reforms to the law enforcement system of Mexico have been proposed in the present article, reforms that could guarantee a public security system that genuinely protects and defends all human rights and thus improves the level of security in this country.

These proposals are based on a state approach to public security which could be the best strategy to overcome the clientelist and authoritarian tradition in law enforcement that has weakened the rule of law and has encouraged impunity and ongoing violations of human rights in Mexico. This enhanced state approach to public security could also prompt a transition to democracy in Mexico and increase the level of economic, social, political, and human development since it should encourage the rule of law (or the rule of justice) in all of these areas. Perhaps the most important contribution of this article was to identify the fact that an effective law enforcement system is fundamental for the protection of individuals against threats to themselves and their rights. A better system for protecting fundamental rights, through effective and competent law enforcement, can guarantee a minimum threshold of human security that may enable people in Mexico to more confidently pursue their own economic, social, political, environmental, cultural, and human development. Competent and effective law enforcement is also extremely important to improve all other aspects of security in this country, whether of individuals or of the Mexican constitutional state itself, since they also depend on a strong foundation of the rule of law.

XII. References.

Alfredo Islas Colín & Alejandra Díaz Alvarado, *El derecho al acceso a la justicia en el sistema interamericano de protección de derechos humanos*, (7)14 *Prospectiva Jurídica 47, 60* (2016).

Alkire, Sabina, A Conceptual Framework for Human Security 1-52 (2003) (working paper, on file with the Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford).

Amitav Acharya, et al., Human security: From Concept to Practice 1-3 (World Scientific, 2011).

Arendt Lijphart, *Consensus and Consensus Democracy: Cultural, Structural, Functional, and Rational Choice Explanations,* 21(2) *Scand. Pol. Stud. 99, 108* (1998).

Aristotle, The Nichomachean Ethics, (Oxford University Press, 1980).

Arturo Alvarado Mendoza & Sergio Padilla Oñate, *Organización policial y debilidad institucional: balance de las capacidades de las policías estatales,* 90(42) *Izt. Rev. C. Soc. Hum. 11, 47 (*2021).

Baruch Alejandro Castro Bernal, *La Reinserción Social a la Luz de los Derechos Humanos* (Sept. 27, 2023) (unpublished Ph.D. dissertation, Universidad Autónoma del Estado de México).

Bernard E. Harcourt, *Beccaria's On Crimes and Punishments: A Mirror on the History of the Foundations of Modern Criminal Law*, in Foundational Texts In Modern Criminal Law 39,59 (MARKUS DUBBER, ED., 2014).

Buscaglia, *Edgardo* & Jan Van Dijk, Controlling Organized Crime and Corruption in The Public Sector 12 (2005) (unpublished manuscript, on file with eScholarhip.org, University of California at Berkeley)

César I. Astudillo Reyes, *La Justicia Constitucional Local en México. Presupuestos, Sistemas y Problemas*, 115 *Bol. Mex. De Der. Comp. 9, 56* (2006).

Daron Acemoglu & James A. Robinson, *Why Nations Fail?* (Crown Publishers ed., 2013).

David A. Shirk, *Criminal Justice Reform in Mexico: An Overview,* III (2) *Mex. L. Rev. 191, 198* (2011).

David A. Shirk, *Future Directions for Police and Public Security in Mexico*, in *Police and Public Security in Mexico* 225,257 *(*Robert A. Donnelly & David A. Shirk eds., 2009).

DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES. SON JUSTICIABLES ANTE LOS TRIBUNALES, A TRAVÉS DEL JUICIO DE AMPARO, Tribunales Colegiados de Circuito, Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo III, Agosto de 2014, Tesis Aislada (V Región) 5o.19 K (10a.), página 1731 (Méx.).

Edgardo Buscaglia, Vacíos de Poder en México 25-38 (Random House Mondadori, 2013).

Eduardo Ferrer-MacGregor, *Interpretación Conforme y el Control Difuso de Convencionalidad. El Nuevo Paradigma Para el Juez Mexicano*, 9(2) *Est. Const. 531, 622* (2011).

Enrique Thoth Verdeja Márquez, La Solución A La Impunidad E Inseguridad Pública En México 32 (ACASEPP, 2015).

E. Thomas Sullivan & Toni. M. Massaro, The Arc of Due Process in American Constitutional Law 11 (Oxford University Press, 2007).

Felbab-Brown, Vanda, Mexico's Out of Control Criminal Market 1-29 (2019) (unpublished manuscript, on file with the Foreign policy at Brookings working paper).

Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in Access to Justice as Human Right 1,26 (Franceso Francioni ed., 2007).

Francisco Javier Ansuátegui Roig, *Derechos Fundamentales y Dignidad Humana*, 10 *El Tiempo de los Derechos. 3, 17* (2011).

Francisco Sagasti, *A human rights approach to democratic governance and development*, in Realizing the right to development. Essays in commemoration of 25 years of the United Nations Declaration on the Right to Development 126,128 (United Nations ed., 2013).

GARANTIAS INDIVIDUALES. CONCEPTO DE VIOLACION GRAVE DE ELLAS PARA LOS EFECTOS DEL SEGUNDO PARRAFO DEL ARTICULO 97 CONSTITUCIONAL, Pleno de la Suprema Corte de Justicia (S.C.J.N.) (Supreme Court) Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo III, Junio de 1996, Tesis LXXXVI/1996, Página 460 (Méx.).

Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 *U. Cin. L. Rev. 3,* (1983).

Graem Newman, et al., Rational Choice and Situational Crime Prevention: Theoretical Foundations *4-5* (Ashgate 1997).

Guillermo Zepeda Lecuona, *Criminal Investigation and the Subversion of the Principles of the Justice System in Mexico,* in Reforming the Administration of Justice in Mexico 133,152 (Wayne A. Cornelius & David A. Shirk eds., 2007).

Gustavo Flores-Macías and Jessica Zarkin, *The Consequences of Militarized Policing for Human Rights: Evidence from Mexico,* 57(3), *Comp. Pol. St. 387, 418* (2024).

Heartley Dean, Social Rights and Human Welfare 3-4 (Routledge, 2015).

Hiram Escudero Álvarez, *Los órganos constitucionales autónomos y la seguridad pública*, in Los desafíos de la seguridad pública en México 53,54 (2002).

Hugo S. Ramírez García, *La Constitucionalización de la Persona: Un Marco de la Relación entre el estado de Derecho y los Derechos Humanos,* 47 *Cuestiones Constitucionales, 370, 387* (2022).

Ignacio Burgoa, El Juicio de Amparo 149-158 (Porrúa, 1994).

Ignacio Burgoa, Las Garantías Individuales 162-187 (Porrúa, 1994).

Jane Mansbridge, et. al. *A systemic approach to deliberative democracy*, in Deliberative systems: Deliberative democracy at the large scale 1,26 (Jane Mansbridge and John Parkinson eds., 2012).

Javier Sepúlveda Amed, *Los límites de la violencia y el uso legítimo de la fuerza en la jurisprudencia interamericana*, in Criterios y jurisprudencia interamericana de derechos humanos: influencia y repercusión en la justicia penal 195,204 (Sergio García Ramírez, et. al. eds., 2014).

John Bailey, *Crimen e Impunidad. Las trampas de la seguridad en México* 30 (Penguin House Mondadori, 2014).

Jonathan H. Turner, *Hebert Spencer,* The Blackwell Companion to Major Classical Social Theorists 69-92 (George Ritzer ed., 2003).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

José Fabián Ruiz, *Los órganos constitucionales autónomos en México: una visión integradora*, 37 *Cuest. Const. 96, 98* (2017).
Josiah Flynt, *Police Methods in London,* 176(556) *The N. Am. Rev. 436, 449* (1903).
Jorge Carpizo, *México: Poder Ejecutivo y Derechos Humanos, 1975-2005*, 126 *Boletín Mexicano de Derecho Comparado. 1237, 1279* (2009).
Juan Masullo & Davide Morisi, *The Human Costs of the War on Drugs. Attitudes Towards Militarization of Security in Mexico,* 0(0), *Comp. Pol. St. 1, 34* (2023).
Jürgen Habermas, *The concept of human dignity and the realistic utopia of human rights*, 55(64) *Diánoa, 3, 25* (2010).
Laura Isela Díaz Bernal, et. al., *La capacitación como medida de prevención de violaciones a derechos humanos por los elementos de seguridad pública en el Estado de México*, 12 *Dignitas, 81, 130* (2018).
Laura Valencia Escamilla, *Equilibrio de Poderes, Cooperación y la Conformación de Gobiernos de Coalición en México*, 6(11) *Rev. Leg. de Est, Sociales y de Opinión Pública, 7* (2013).
Larry Diamond & Leonardo Morlino, *The Quality of Democracy. An Overview,* 15(4) *Journal of Democracy, 20-31387* (2004).
Lloyd Axworthy, *Human Security and Global Governance: Putting People First*, 7(1) *Glob. Gov. 19, 23* (2001).
Luigi Ferrajoli et al., Derechos y garantías. La ley del más débil (Trotta, 1999).
Luis Castillo-Córdova, *La Persona Jurídica como Titular de Derechos Fundamentales*, 167 *Actualidad Jurídica 125,134* (2007).
Luis Fernando Angulo Jacobo, *El Control Difuso de la Convencionalidad en México*, 1 *Rev. del Inst. de la Jud. Fed. 73, 85* (2013).
Malcolm Langford, *The justiciability of social rights: From practice to theory,* in Social rights jurisprudence: emerging trends in international and comparative law, vol. 3, 4, (Cambridge, 2008).
Manuel González Oropeza & Eduardo Ferrer Mac-Gregor, La justicia constitucional En Las Entidades Federativas (Porrúa, 2006).
Martin Flegl and Eva Selene Hernández Gress, *A two – stage Data Envelopment Analysis model for investigating the efficiency of the public security in Mexico,* 6 *Dec. A. Jo. 100, 181* (2023).
Markus Felson & Clarke Ronald V, *La ocasión hace al ladrón. Teoría práctica para la prevención del delito*, in Serie Claves del Gobierno Local 6 193,234 (Fundación Democracia y Gobierno Local ed., 2008).
Nabaz Abdullan & Mohd Rahman, *The Use of Deliberative Democracy for Public Policy Making Process*, 5(3), *Pub. Pol. and Admn. Res. 221, 231* (2015).
Nicoline Ambe, *A Legal Analysis of the Domestic Enforceability of International Human Rights Law. The Rule of Law Imperative,* 47 *UNBJL, 110,111* (1998).
Osvaldo Villegas Cornejo, *Mecanismos de Control Jurisdiccionales y No Jurisdiccionales Para la Defensa de Derechos Constitucionales*, 13 *Ex Legibus, 247, 258* (2020).
Pablo Elías González Monguí, La policía judicial en el sistema penal acusatorio 43-53 (Ediciones Doctrina y Ley LTDA, 2007)

Pera, *Dominic*, Drug Violence and Public (In)Security: Mexico's Federal Police and Human Rights Abuse 5 (Sept. 17, 2015) (unpublished undergraduate dissertation, University of San Diego).

Pierre Gaussens and Carolina Jasso González, *Militarization of Public Security and Violation of Human Rights in Mexico (2000-2020),* 15 *The A. Of H. R. J. 26, 50* (2020).

Raymundo Espinoza Hernández, *Las Recomendaciones de la CNDH. El Control del Poder y la Protección de los Derechos Humanos*, 93 *Alegatos 350, 351* (2016).

Rober George Perrin, Herbert Spencer's Functionalism (April, 1974) (unpublished DPhil dissertation, The University of British Columbia).

Sigrid Artz, *The Militarization of the Procuraduría General de La República: Risks for Mexican Democracy*, in Reforming the Administration of Justice in Mexico 153,174 (University of Notre Dame Press, 2007).

Tadkbakhsh, Shahrbanou, Human Security: Concepts and Implications 5 (Sept. 2005) (unpublished manuscript, on file with Les Etudes du CERI, No. 117-118).

William A. Galston, *Civil Society, Civic Virtue, and Liberal Democracy*, 75(2) *Chi.-Kent L. Rev. 603, 612* (2000).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19188

The influence of feminist mobilization on legal consciousness and the practices of femicide prosecutors in Mexico at the subnational level

María de Lourdes **Velasco Domínguez**
https://orcid.org/0000-0002-2301-4136

Universidad Nacional Autónoma de México. México
Email address: lourdes.velasco@crim.unam.mx

Received: October 14th, 2022
Accepted: March 12th, 2024

DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

Abstract: Over the last two decades, some feminist organizations in Mexico have applied principles of transnational women's rights through the use of concepts such as femicide (*feminicidio*) and also promoted both the pretrial preventive detention for these crimes, and the implementation of "gender-based violence alerts" by the Mexican federal government. The article aims to understand how these federal policies have influenced the legal consciousness and practices of prosecutors in the state of Nuevo León, Mexico, from 2009 to 2021. I argue that feminist discourses have been inspired by federal-level policies based on penal populism and, although they have encouraged prosecutors to defend the rights of femicide victims, they have also promoted violations of defendants' and victims' rights. A qualitative methodology based on documental analysis and interviews with prosecutors, defense attorneys, and human rights defenders has been applied. The article compares narratives and practices of femicide prosecutors during two historical periods and claims that feminist discourses have helped to raise consciousness of women's rights for prosecutors but have also helped to justify some probable violations of human rights.
Keywords: feminism, femicide, public prosecutorial offices, legal consciousness, pretrial detention.

Resumen: Durante las primeras dos décadas de este siglo, algunas organizaciones feministas en México han traducido los derechos de las mujeres reconocidos internacionalmente en conceptos como "feminicidio" y han promovido la prisión preventiva oficiosa para estos probables delitos, así como que el gobierno federal declare Alertas de Violencia de Género. Al respecto, el artículo tiene el objetivo de comprender el impacto de estas políticas federales en la conciencia legal y las prácticas de fiscales en la entidad federativa de Nuevo León, México, de 2009 a 2021. Se argumenta que los

discursos feministas han estado ligados a políticas federales basadas en el populismo penal y han incentivado que los fiscales defiendan los derechos de las víctimas de feminicidio, pero al mismo tiempo han promovido algunas violaciones de derechos de las personas imputadas y víctimas. Se emplea una metodología cualitativa basada en análisis documental y entrevistas a profundidad dirigidas a fiscales, abogadas/os defensores y personas defensoras de derechos humanos. El artículo compara las narrativas y las prácticas de fiscales especializados en feminicidios durante dos periodos y argumenta que los discursos feministas han permitido el avance de la conciencia sobre los derechos de las mujeres entre las y los fiscales, pero al mismo tiempo han ayudado a justificar algunas probables violaciones de derechos humanos.
Palabras clave: feminismo, feminicidio, procuración de justicia, conciencia legal, prisión preventiva oficiosa.

I. Introduction

Over the last two decades, a sector of Mexican feminism has applied the principles of transnational women's rights to the national context through the conceptualization of femicide (feminicidio) and femicidal violence (violencia feminicida),[1] the promotion of pretrial detention for defendants accused of femicide[2] and attempted femicide, and a federal measure to control subnational politics called "alerts for gender-based violence against women" (alertas de violencia de género contra las mujeres). These feminist discourses and demands have encouraged new policies with regard to how to prosecute violence against women at the national and local level in Mexico. However, it is unknown how these feminist discourses and their institutional effects have influenced the ideas and practices of local prosecutors who investigate and prosecute femicidal violence.

This article seeks to fill this hole by answering the following question: How have the narratives and policies promoted by a sector of Mexican feminism influenced the legal consciousness and performance of prosecutors who investigate violence against women in local contexts? Previous works about consciousness of rights can be classified into three groups: the first one embraces a vertical perspective of rights consciousness.[3] It assumes that spreading discours-

[1] Marcela Lagarde, *Claves feministas en torno al feminicidio. Construcción teórica, política y jurídica*, in Feminicidio en América Latina (Rosa L. Fregoso coord., 2011).

[2] Cámara de Diputados, *Mesa de Trabajo "Feminicidio y Prisión Preventiva Oficiosa"*, YouTube Cámara de Diputados (Jan. 19, 2019), https://www.youtube.com/watch?v=01PZGM3b_Pw.

[3] David M. Engel, *Vertical and Horizontal Perspectives on Rights Consciousness*, 19 Indiana J. Glob. Leg. Stud. 423–455 (2012).

es on transnational human rights raises rights consciousness at the grassroots. A second approach considers that formal rights are just one type of discourse that competes with others[4] for the power to lead the meanings and practices of grassroots. The third perspective argues that when human rights discourses are linked to punitive strategies, the human rights of defendants and victims could be violated.[5]

In the framework of these research concerns, I argue that feminist discourses on femicidal violence have an ambiguity because they advocate women's human rights but, at the same time, they sustain a dichotomous and essentialist gender perspective that encourages disrespect to human rights. These discourses have promoted new prosecutorial policies and a paradigmatic change in the legal consciousness of prosecutors. On the one hand, prosecutors have developed awareness about violence against women, and they have tried to protect women's lives and dignity. On the other hand, they maintain a perspective of the female plaintiff as passive victims who should be protected by the State, even if that transgresses the victims' desires. Meanwhile defendants are represented as potential women killers who should be controlled regardless of their rights.

To test this argument, a qualitative methodology based on the analysis of social discourses is applied. The units of study are not individuals but rather regularities and distance between different discourses.[6] This analysis aims to distinguish how gender, human rights, and justice representations of feminist discourses and "tough on crime" discourses are adopted, questioned, and translated by prosecutors who were interviewed. The Mexican state of Nuevo León from 2009 to 2021 was selected as a case study.

The article is organized into five sections. The first one presents a discussion regarding different theories about legal and rights consciousness, and argues that advocating for human rights can have as an unintended consequence several human rights violations. Then some considerations about the applied qualitative methodology are included. The period from 2009 to 2015 is analyzed, when penal populism and federal tough-on-crime discourses helped to shape prosecutors' narratives and practices. The next section examines the national and local feminist discourses and their impact on the consciousness and practices of prosecutors from 2016 to 2021. The final section provides the main findings of this research and suggests some topics for future research.

---

[4] *Id.*

[5] Lucía Núñez, El género en la ley penal: crítica feminista de la ilusión punitiva (2018); Lucía Núñez, *El giro punitivo, neoliberalismo, feminismos y violencia de género*, Política y Cult. 55–81. (2019); Tamar Pitch, *Feminismo punitivo*, *in* Los feminismos en la encrucijada del punitivismo (Deborah Daich & Cecilia Varela eds., 2020); Thiago Rodrigues & Erika Rodríguez-Pinzón, *«Mano dura» and Democracy in Latin America: Public Security, Violence and Rule of Law*, 84 Am. Lat. Hoy 89–113 (2020).

[6] Cristina Herrera, Invisible al ojo clínico: violencia de pareja y políticas de salud en México (2009).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

II. Legal Consciousness, Practices and Human Rights Studies

Legal consciousness refers to

> the ways in which people experience, understand, and act in relation to law. Legal consciousness researchers study not just cognition but also behavior, the ideologies and the practices of people who are involved with situations in which law could play a role. They explore the absence as much as the presence of law in people's understanding of the social world and their place in it.[7]

According to Chua & Engel, the definitions of legal consciousness can be organized in a continuum that goes from a conception of this as an autonomous and independent phenomenon, to an approach of consciousness as a social and relational phenomenon where individuals do not matter.[8] This debate about the nature of consciousness recreates the social theory discussion on how the nature of social phenomenon is defined by individual agency or by social structure. In this regard, I subscribe to the social constructivism of Herrera and Amuchástegui which advocates the study of consciousness through social discourses. In this framework the individual consciousness is shaped by a polyphony of discourses in society that compete for the power to define and rule social life.[9] From this perspective, the study units are social discourses, the distance between them and their "ideology dimension,"[10] which means the social conditions that produced them.

Social discourses are knowledge mechanisms because they are built with a specific perspective of social reality. They are also power mechanisms that intend to control people's behavior. The ability of social discourses to produce gender representations and gendered practices is of particular importance in this study. In that sense, discourses are also gender technologies[11] that create representations about sexual differences between bodies and the places where they circulate, i.e. gender narratives aiming to prescribe the meaning of being a man or a woman and how each one should be treated.

The studies about the influence of human rights discourses on legal consciousness of grassroots have been classified in two types according to Engel: first, there is a vertical approach to rights consciousness that assumes a normative perspective in favor of human rights and holds "the inevitability of a

---

[7] Lynette J. Chua & David M. Engel, *Legal Consciousness*, *in* Routledge Handbook of Law and Society 187, 187 (Mariana Valverde et al. eds., 2021).

[8] *Id.* at 190.

[9] Ana Amuchástegui, Virginidad e iniciación sexual en México. Experiencias y significados (2000).

[10] Herrera, *supra*, at 19.

[11] Teresa de Lauretis, *Technologies of Gender*, *in* Technologies of Gender. Essays on Theory, Film and Fiction 1 (1989).

growth in rights consciousness."[12] Merry's research on raising awareness of women's rights at the grassroots can be considered part of this group.

A second group of investigations, based on Law and Society studies, holds "that legal rights are very often either unfamiliar to or deliberately rejected by their intended beneficiaries; that other value systems or normative arrangements tend to be prized more highly than the law; that potential claimants often view the pursuit of legal rights and remedies as destructive of important relationships."[13] According to this perspective, human rights are only one kind of discourse that disputes with others the capacity to influence the consciousness and performance at the grassroots.

Engel´s classification can be complemented with a third kind of study which criticizes the dichotomy between human rights and antidemocratic discourses. Some human rights discourses hold representations of identities and practices as opposed to human dignity. Additionally, discourses that link the defense of human rights with the application of the criminal justice system can bring about the violation of human rights from other social sectors as an undesired consequence.[14]

Taking into account the previous studies, I argue that feminist discourses about femicidal violence in Mexico at the federal level during the 21st century set an ambiguous defense of women's human rights. They are based on a dichotomous gender perspective which represents women as victims and demands the criminal justice system to protect them. These discourses have been linked to penal populism discourses, a fact that has promoted legal amendments and public policies that have encouraged a paradigmatic change in the legal consciousness of local prosecutors. The prosecutors raise awareness on the importance of making visible the violence committed against women and respecting their rights. Nevertheless, not only do the prosecutors reproduce dichotomous notions of gender that impose limits on the autonomy of female victims, but they also maintain a behavior that disrespects the defendants' human rights.

III. Methodological Considerations

The Mexican state of Nuevo León from 2009 to 2021 was selected as a case study because it is one of the states with the highest rates of judicialization of homicide and femicide in Mexico.[15] Furthermore, its contemporary history allows us to study the influence of feminist mobilization and punitive populism

[12] Engel, *supra*, at 442.

[13] *Id.* at 449.

[14] Núñez, *supra*; Pitch, *supra*; Rodrigues and Rodríguez-Pinzón, *supra*.

[15] María de Lourdes Velasco, Judicialización estratégica de homicidios y feminicidios en México (2023).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

discourses in the criminal justice system and its agents. From 2009 to 2011, Nuevo León experienced an unprecedented rise in homicidal violence, which has been associated with drug cartels' disputes to control trafficking routes to the United States. This violence has also been related to the "iron-fisted" security policies, including the militarization of the state during Rodrigo Medina's government (from 2009 to 2015).

In 2016, the local feminist mobilization urged the federal government to issue a gender-based violence alert for five municipalities in the state. That same year, femicide was included as an autonomous crime in the local penal code. In 2018 the local prosecutorial office was constituted as an autonomous institution and the prosecutorial office specialized in femicide and felonies against women was created. These historical facts are key to understand the process of shaping the legal consciousness of prosecutors in the state.

This work does not study legal consciousness of specific individuals. Instead, it studies regularities and differences in the discourses and practices of prosecutors. The objective is to find prevalent social discourses, such as feminist discourses, penal populism ideas or arguments in favor of human rights, and the kind of practices related to these. The research is based on a qualitative methodology that aims to analyze the conditions of production of the social discourses and practices that shape the consciousness of prosecutors. Moreover, the work examines gender representation and the performance of prosecutors. The techniques used for data collection were interviews with key actors and document analysis.

The key actors interviewed were five leaders of non-governmental organizations, two public defense attorneys, two private defense attorneys, two prosecutors from the attorney's office specialized in femicides and felonies against women, two prosecutors belonging to the attorney's office specialized in homicides, and a control judge. The document analysis involved the study of three types of documents: 1) reports from civil organizations; 2) statistical reports from Mexico´s Instituto Nacional de Estadística y Geografía (INEGI); 3) governmental documents such as human rights recommendations and governmental policies and programs (these documents allow us to recognize quantitative and qualitative patterns in the femicide prosecutor's practices), and 4) governmental documents regarding violence against women and femicide violence, which show different types of discourses that influence prosecutor's behavior. The analysis of these interviews and documents has allowed us to identify several types of prevalent discourses: punitive feminist discourses,[16] punitive

[16] Pitch, *supra*.

populism discourses or "iron-fisted" measures,[17] and discourses on criminal guarantee.[18]

IV. Penal Populism Discourses

Drug banning policies along with the fight against drug trafficking and terrorism policies promoted by the United States[19] are the framework that influenced penal populism discourses in the Mexican federal government. These discourses have helped to develop security policies in Nuevo León and to shape legal consciousness and performance of prosecutors. Iron-fisted discourses have been characterized by shaping "the image of organized crime as a danger that is rising, omnipresent and out of control in consequence, the unique option to successfully tackle it is a repressive policy."[20] Media coverage of atrocities perpetrated by alleged dangerous criminals generates fear and terror at the grassroots. It justifies popular support for the use of armed forces in public security and the strengthening of punitive measures to tackle crime without confronting the structural causes of crime.

In 2008, a set of federal security measures criticized for giving rise to a *de facto* state of exception included: 1) pretrial detention (arraigo) for organized crime, 2) mandatory preventive detention (*oficiosa* preventive prison) for homicide and femicide, 3) fewer requirements to execute mandatory preventive arrest in the new accusatory criminal system than in the former inquisitive-mixed system,[21] 4) Informal mechanisms to preserve the leadership of the executive branch over autonomous attorney's offices in subnational level,[22] and 5) predominance of efficiency over due process in procedural policies.[23]

From 2009 to 2015, prosecutors in charge of homicides developed discourses and practices related to punitive populism. They carried out systematic and generalized violations of the rights of the defendants and worked without a gender perspective. In the period from 2016 to 2021, the national and local discourses of punitive feminism promoted the criminalization of violence against

---

[17] Máximo Sozzo, *Inequality, welfare and punishment. Comparative notes between the Global North and South*, 19 Eur. J. Criminol. 368 (2022); Brenda Focás & Amparo Marroquin-Parducci, *Presentación. Revisitando la agenda de la seguridad en América Latina*, 31 Rev. CS 13 (2020).

[18] Luigi Ferrajoli, Garantismo Penal (2006).

[19] Fernando Escalante, El crimen como realidad y representación. Contribución para una historia del presente (2012).

[20] Marco Estrada, *Fernando Escalante Gonzalbo, El crimen como realidad y representación*, XXXI Estud. Sociológicos, El Col. México 204 (2013).

[21] Centro Prodh, *Perpetuar el fallido modelo de seguridad: La Ley de Seguridad Interior y el legado de una década de políticas de seguridad en México contrarias a los derechos humanos*, (2017).

[22] Velasco, *supra* note 15.

[23] Máximo Langer & David Slansky, *Epilogue: Prosecutors and Democracy – Themes and Counterthemes*, *en* Prosecutors and Democracy a cross-national study 300–339 (Máximo Langer & David Slansky eds., 2017).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

women. However, at the same time, they encouraged new punitive discourses and practices that affected the rights both of the defendants and the victims.

V. First Period: De Facto State of Exception

From 2009 to 2015, Nuevo León's Public Attorney's Office worked with the inquisitorial-mixed system dependent on the executive branch lead by Rodrigo Medina. The government promoted punitive populism discourses and efficiency to bring to trial violent murderers in order to appease popular demands of security. This policy entails systematic and massive violations of the rights of the defendants.[24] That period was also characterized by the absence of gender perspective in the handling of female murders, and the lack of punishment of violence against women, thus encouraging murders against women.

The prosecutors perceived homicide violence as the result of a war hard to control, which justified the cooperation of armed forces and the implementation of punitive measures. A prosecutor interviewed expressed that: "The time was very difficult. We experienced a war among cartels disputing territorial control over the state. It was too ugly, critical [...]. We made a huge effort, with a lot of communication and support from the Army Secretary. The Navy Secretary strongly helped to contain the violence in the state" (4th prosecutor interviewed, 2021).

During this period the participation of armed forces in public prosecution in Nuevo León[25] included arresting individuals who allegedly committed flagrant homicides, or arresting individuals with a judicial order, and, as one prosecutor said: "When we arrived at a crime scene we were frequently accompanied by soldiers. Investigations and arrests of high-status criminals were always made with the collaboration of militaries" (4th prosecutor interviewed, 2021).

Not only did prosecutors justify the cooperation of the armed forces, but also they recognized that in homicide investigations: "The most important tool was pretrial detention of individuals (arraigo), and during that time we used to end the case investigation. Moreover, forced confession (*confesión forzada*) prevailed in investigations. Almost all defendants gave their testimony accepting their participation in crimes" (4th prosecutor interviewed, 2021).

Even though pretrial detention was used exclusively for defendants accused of organized crime, according to the Federal Constitution in that period, the Superior Court of Justice in Nuevo León informed that 558 pretrial detention orders for intentional homicide were accepted between 2011 and 2014. In addi-

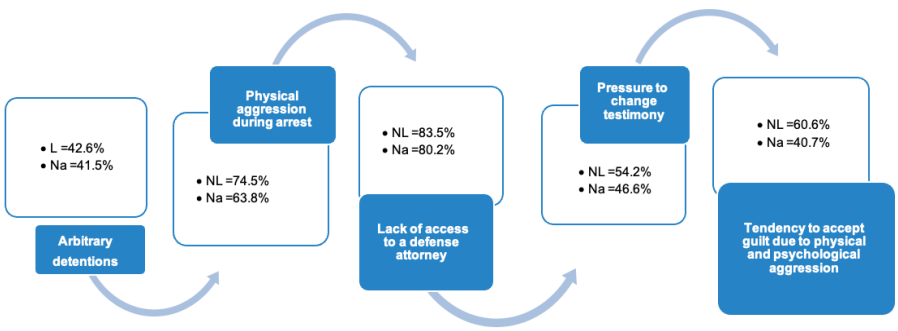
[24] Velasco, *supra* note 15.

[25] Carlos Treviño & Jesus Adalid, *Militarización en Nuevo León*, (2017).

tion, the detention time exceeded the 60 days maximum period, reaching 1280 days in 39 cases.[26]

According to the National Survey of Detained Population (ENPOL, INEGI, 2016), the incidence of due process violations committed by prosecutors in Nuevo León was higher than the national average. The main violations of the rights of the defendants were: 1) arbitrary detentions; 2) physical aggression during arrest; 3) lack of access to a defense attorney; 4) pressure to change testimony, 5) tendency to accept guilt due to physical and psychological aggression suffered (See Diagram 1).

Diagram 1. Percentage of inmates who declared some violation of rights during arrest and detention at Public Prosecutorial Offices in Nuevo León (NL) and National (Na) average



Source: Information obtained from the ENPOL (INEGI, 2016).

In 2013 femicide was included in Nuevo León's Penal Code. Nevertheless, according to the Public Human Rights Office in the state, prosecutors applied neither gender perspective nor femicide charges in their investigations of violent murders against women during this period. A human rights recommendation established that:

> Measures implemented by the District Attorney's Office in the state, through prosecutors, have not tended to completely guarantee respect to human rights and gender perspective in the attention of facts where women have been victims of murders in Nuevo León and, consequently, impunity and vulnerability of victims and their families have been promoted.[27]

[26] Observatorio Ciudadano del Sistema de Justicia, *Observatorio Ciudadano del Sistema de Justicia: arraigo, medidas cautelares y ejecución penal. El uso del arraigo a nivel federal, en el estado de Nuevo León y el Distrito Federal: Análisis de constitucionalidad, legislación y práctica*, (2015).

[27] Comisión Estatal de Derechos Humanos de Nuevo León, *Recomendación 18-2018*, 9 (2018).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

Domestic violence was another felony in which prosecutors neither applied gender perspective nor assessed femicide risks to prevent murders against women. In this respect, the Public Human Rights Office addressed some recommendations to the local District Attorney's Office because it did not give adequate attention to intimate partner violence and, as a result, in some cases the violence turned into femicides.[28]

To sum up, from 2009 to 2016, punitive discourses expressed by prosecutors justified efficiency in bringing to trial homicides and the risks of violations of the rights of defendants. After femicide was included in the local Penal Code in 2013, neither this normative nor gender perspective were applied. Additionally, omissions in addressing extreme violence against women prevented prosecutors from fulfilling their obligation to prevent femicidal violence.

VI. Feminist Discourses on Femicide Violence

During the first decade of the 21st century, a feminist movement sector in México contributed to transform transnational discourses on women's rights into federal legal amendments. The feminist sector has advocated for increased punitive measures in order to guarantee the right of women to a life free from violence, so it can be conceptualized as punitive feminism.[29]The concepts of femicide and femicidal violence emerged from the application of transnational women's rights discourses to the Mexican context of the 21st century. This context was characterized by an increase of violent murders of women in the border town of Juárez and other cities. The feminist anthropologist and federal congresswoman Marcela Lagarde adopted the notion of "femicide" addressed by Diana Russell in the United States and proposed the concept of femicide to refer to violent murders of women due to a continued violation of women's rights, which constitute a crime of State:

> Femicide occurs because authorities are careless, neglectful, colluded with aggressors. In consequence, they execute institutional violence against women when they obstruct women's access to justice and contribute to impunity. Femicide implies a partial break on the rule of law and the State incompetence to guarantee women's lives, respect their rights, enforce the law, prosecute, and achieve a fair trial and prevent and eradicate the violence that causes femicides. Femicide is a crime of State (Lagarde, 2011, p. 38).

According to Núñez (2009), the incorporation of the crime of femicide into the federal Penal Code arose from feminist demands. However, there are three main problems in that: the State's responsibility upon systematic impunity over

[28] Comisión Estatal de Derechos Humanos de Nuevo León (CEDHNL), *Recomendación 05-2019*, 7 (2019).

[29] Pitch, *supra*, at 10.

violence against women was reduced to punishing public officials that obstruct access to justice in specific cases. Gendered reasons were limited to specific behaviors without a sociological or anthropological analysis of what a femicide entails, and the main responsibility for these crimes was attributed to deviant individuals instead of to institutional and social structures that encouraged their behavior.[30] In summary, the criminalization of femicide and violence against women "universalizes the problem but privatizes its causes" (Pitch, 2003, p. 138).

Another federal punitive measure promoted by feminist organizations such as the National Observatory of Femicide (Observatorio Nacional del Feminicidio) and Pro Persona Justice (Justicia Pro Persona) was the use of pretrial preventive detention for femicide through an amendment to article 19 of the federal Constitution.[31] Some attorneys have claimed that this measure violates the principle of presumption of innocence and puts the rights of the defendants at risk.[32] In 2012, the civil organization *Artemisas por la Equidad A.C.* (Artemisias for equity), with the collaboration of other organizations, asked the federal government to declare a gender-based violence alert in Nuevo León. This policy is a mechanism of accountability through which the federal government and civil society monitor and encourage local governments to prevent, punish and eradicate femicidal violence.[33] After four years of litigation before courts advocating for this request, in November 2016, the federal secretary of government issued the declaration of gender-based violence alert for five of Nuevo León municipalities: Monterrey, Juárez, Cadereyta, Apodaca and Guadalupe.

Half of all the measures established by the Declaration are related to justice, although their objective is to: "prevent, give attention, punish and eradicate violence against women." [34] The measures aim to achieve an efficient prosecution of crimes and victims' access to justice by means of an increased budget for specialized prosecution offices, training for prosecutors, technical resources for investigation, promotion of supervision and punishment of public officials, and improved attention to victims. Briefly, Nuevo León Declaration focuses on increasing the resources and capabilities of specialized prosecution offices. To sum up, feminist punitive discourses in Mexico contributed to bringing transnational discourses on women's rights to the national context through the concepts of femicide and femicidal violence. They have also promoted the criminalization of violence against women, pretrial preventive detention for

---

30 Núñez, *supra* note 5 at 209.

31 Diario Oficial de la Federación, *DECRETO por el que se declara reformado el Artículo 19 de la Constitución Política de los Estados Unidos Mexicanos, en materia de prisión preventiva oficiosa*, (2019); Cámara de Diputados, *supra*.

32 Miguel Carbonell, *Presentación. La teoría garantista de Luigi Ferrajoli*, *in* Garantismo penal 3–9 (2006); Centro Prodh, *supra* note 21.

33 Cámara de diputados del H. Congreso de la Unión, *Ley general de acceso de las mujeres a una vida libres de violencia*, Diario Oficial de la Federación (DOF) (2007).

34 *Id.* at 1.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

femicide, the efficient prosecution of these crimes, and an alert on gender-based violence against women.

VII. Second period: Women's Rights as Justification to Strengthen Penal Measures

Since 2016 a set of institutional changes in Nuevo León's Prosecution Offices promoted a transformation in the discourses and practices of prosecutors who investigate violent murders of women. That same year the Declaration of Gender Violence Alert allowed feminist organizations to implement justice measures in Prosecution Offices. The prosecution office specialized in violence against women was created. However, violent murders of women continued to be investigated by homicide departments. The classification of femicide in Nuevo León was homologated with the Federal Penal Code. In 2018, the District Attorney's Office was established as an autonomous institution, and in 2021 the District Attorney's Office for femicide and crimes against women was created. These political changes had a relevant influence on the discourses and practices of Nuevo León's prosecutors.

1. Denormalization of Violence against Women

The institutional changes advocated by feminist discourses produced a paradigmatic change on legal consciousness and practices of prosecutors. Firstly, they promoted the denormalization of violence against women and the evaluation of the risk of femicidal violence in order to prevent this crime. But at the same time, feminist organizations spread an essentialist and dichotomous conception of gender which has justified violent institutional practices against victims and defendants.

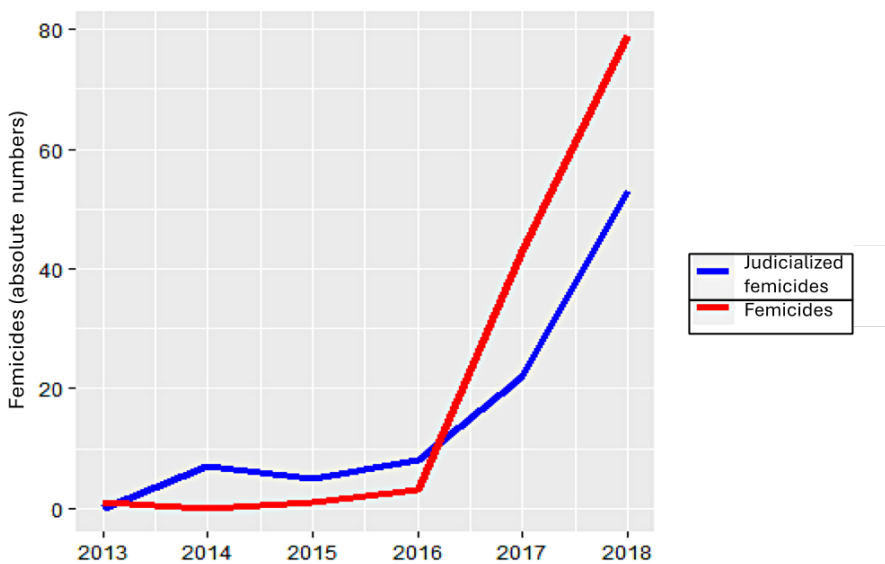
The training received by prosecutors aims at enabling them to apply gender perspective, international standards, and court precedents concerning violence against women, encouraging them to recognize the need to avoid assumptions that blame or attack women who have suffered violence. In this respect, a prosecutor stated: "Juárez is a municipality where organized crime has been present, then we used to think that a murdered woman 'was part of a criminal organization'." In the sexual crime department it was often heard: "She was likely a sex worker." So we must avoid these ideas, we should neither make immediate suppositions nor judge straight away" (Interviewed F1, 2021).

Prosecutors said that gender perspective avoids victims' feeling of "being ignored, judged, rejected, [because] all of these produce a feeling of impunity" (Interviewed F1, 2021). Therefore, gender perspective encouraged the participation of victims in the penal process and the implementation of a penal process. In summary, from the perspective of prosecutors, not only does the gender

perspective allows them to give a dignified treatment to victims, but it also contributes to solve cases efficiently (Interviewed F1, F2, F3, 2021).

In this context, prosecutors increased the registration and investigation of violent murders of women as femicides. In addition, prosecutors raised the classification of violent facts denounced by women to attempted femicides. In 2016, only five of these crimes (femicide and attempted femicide) were registered; in 2017, there were 40, and in 2018, 78. At the same time, the judicialization of both of them grew considerably: in 2016 only nine cases were prosecuted, in 2017 there were 21 and in 2018 there were 52 cases.[35]

Graph 1. Femicides and attempted femicides registered by the Public Prosecutor Offices and prosecuted cases in Nuevo León from 2013 to 2018



Source: Own elaboration with data from the 2014 to 2019 State Prosecution and Justice Censuses, from INEGI.

Briefly, institutional changes promoted by punitive feminists at the national and local levels have caused a paradigmatic shift in the legal consciousness and practices of Nuevo León prosecutors. This change includes the application of gender perspective in the investigations of all violent murders of women as femicides. However, these improvements have several limitations.

[35] INEGI, *Censo nacional de Procuración de justicia estatal*, Instituto Nacional de Estadística y Geografía (2021), https://www.inegi.org.mx/programas/cnpje/2021/; INEGI, *Censo Nacional de Impartición de Justicia Estatal*, Instituto Nacional de Estadística y Geografía (2021), https://www.inegi.org.mx/programas/cnije/2021/.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

2. The Violence of Dichotomous Gender Representation

Feminist punitive discourses have fostered the recognition and respect of women's rights in the criminal justice system. Nevertheless, they entail the embracing of an essentialist and dichotomous gender conception by criminal law and prosecutors. On the one hand, the prosecutors´ gender perspective identifies women who report violence as passive victims who must be protected by public institutions, although this protection was opposite to women desires. On the other hand, men accused of violence against women are represented as active aggressors and potential murderers who must be controlled with punitive measures, without their rights being a priority.

In this logic, prosecutors have tried actively to prevent women from abandoning the criminal process, and they have pressured them to change their testimonies and exacerbate the accounts of the violence they have suffered. The strategies applied by prosecutors to prevent women from abandoning the criminal process are: 1) ordering police to search women and bring them to the District Attorney's office, and 2) asking civil organizations "to empower" women with legal and psychological advice. In this regard, a prosecutor said:

> Currently, we were given automobiles to bring back victims who are unable to come. When we have a case in which the victim does not want to press charges, we ask authorities and "violet doors" (which are the legal and psychological consultancy service of the civil organization "Pacific Alternatives") to empower women. We have a shelter for female victims of violence. We have improved our service little by little (Prosecutor interviewed F1, 2021).

Prosecutors tend to classify domestic violence reports as attempted femicides, although they do not have enough evidence. The prosecutors promoted attempted femicide classification in order to execute pretrial preventive detention. This measure would prevent a defendant from perpetrating a femicide and a prosecutor from being responsible for the crime. With the justification of protecting women's lives, prosecutors have promoted the criminal process against the will of the victims, something that has had serious consequences for defendants.

A public defense attorney said that a woman victim of domestic violence asked him for his support after she testified that her husband had tried to kill her because the police told her to testify in that way. However, when her husband was arrested for attempted femicide, the woman tried to argue that her husband never tried to kill her. According to the defense attorney, prosecutors told women that if they did not exacerbate their testimony on their partner´s violence, they would be punished. At an initial hearing, a prosecutor argued that the victim had not been able to attend. Nevertheless, he had not asked her to be present for fear that she would change her testimony. The defense attor-

ney said that the classification of domestic violence as attempted femicide is a behavioral pattern of the prosecutor that violates the rights of the defendant.

Prosecutors have recognized that the attribution of attempted femicide in some cases is based on a subjective assessment of the risk, which is biased by the risk of the prosecutors himself receiving a penalty. In this regard, a prosecutor stated that: "my boss keeps a strict eye on me and other prosecutors and he has told us: 'Whatever happens to a victim whose case you handle is going to be your responsibility'" (Prosecutor interviewed F2, 2021). Through the attempted femicide classification, prosecutors have tried firstly to avoid being punished, and secondly, to protect the rights of victims. A prosecutor expressed that:

> [Surveillance] forced us to make decisions like this classification [attempted femicide]. My boss watches over me and measures me. If a victim suffers more violence, it will be my responsibility. We propose the attempted femicide classification to a judge and if the victim is killed, it will be the judge's responsibility. We measure the femicide risk, but I think it should not be very subjective, because it is defined by our ideas, by our more direct contact with victims than the judges´. Judges see cases as a formal judicial matter, while the attorney general, who watches over us personally, has all the control. Therefore, I will not allow a watched case to progress into a femicide. In this process, some objectivity is lost (Prosecutor interviewed F2, 2021).

Defense attorneys and feminist organizations have different perceptions about these measures. On the one hand, defense attorneys consider that these accusations have grave consequences for defendants. A person accused of general femicide cannot request a conditional suspension of the criminal process, whereas this measure is allowed for domestic violence. Femicide implies pretrial preventive detention and can bring a sentence of 30 years, while domestic violence does not admit pretrial detention and the conviction is around three years (Defense attorney interviewed 1, 2021). On the other hand, local feminist organizations have considered prosecution for attempted femicide an important achievement. A feminist leader said: "The prosecution office specialized on femicide is doing a good job because it is bringing to trial cases classified as attempted femicide that were previously classified as injuries or some other crime" (NGO leader interviewed, 2021).

Regarding pretrial preventive detention, some experts have stated that the requirements that a prosecutor must present to impose this measure on a defendant are fewer in the accusatory criminal system than in the mixed inquisitorial system. [36] A private defense attorney expressed: "The new criminal system is less respectful of the rights of the defendant than the previous system in relation to crimes in which pretrial preventive detention is permitted" (Defense attorney interviewed 1, 2021).

[36] Centro Prodh, *supra* note 21 at 178.

In this respect, a prosecutor considered that when he asks for pretrial detention for femicide defendants, he submits enough evidence about the defendant's responsibility. However, he said that this measure should be more respectful of rights: "It would be good not to allow pretrial preventive detention for homicides [and femicide]. Instead, judges should analyze the necessity of caution based on parameters to determine when pretrial detention should be applied in specific cases" (Prosecutor interviewed F4, 2021).

In short, femicide and attempted femicide criminalization has implied the implementation of policies and practices that could violate defendants' rights, such as: pretrial preventive detention, promoting attempted femicide as classification instead of domestic violence, changes in the woman's testimony, and disrespect for women's desires regarding their criminal process. This prosecutors' performance has occurred in a context marked by complaints from feminist organizations, mass media, and political actors about the efficiency of femicide prosecution. Consequently, the prosecution of femicidal violence in Nuevo León seeks efficiency, but it could disrespect the rights of victims and defendants. However, it has been justified because it protects women's rights.

VIII. Conclusion

The article aimed to ask how have the discourses and policies promoted by a sector of Mexican feminism have influenced the legal consciousness and performance of prosecutors who investigate violence against women in local contexts. In order to answer this question, I analyzed the impact of punitive feminist discourses and the "iron-fist" policies on discourses and practices of prosecutors in charge of investigating and prosecuting femicidal violence in the state of Nuevo León, México, from 2009 to 2021.

This work argued that feminist punitive discourses are ambiguous because they seek to guarantee and protect women's rights, but also to strengthen the State's punitive power and embrace a dichotomous gender perspective that disrespects human rights. This ambiguity has carried over into the federal and local procedural regulations and policies. Consequently, prosecutors play the role of mediators between demands for efficiency and protection of women's rights that have been developed by feminist groups, mass media and political discourses, on one side, and daily cases of femicidal violence, on the other.

Since 2016, prosecutors have tried to avoid normalized violence and discrimination against women, to protect the dignity of women and to prevent femicidal violence. However, prosecutors have maintained some punitive practices that perpetuate the violence against human rights perpetrated by prosecutors before 2016. These practices are linked to a dichotomous and essentialist gender perspective.

The representation and practices of prosecutors since 2016 have certain trends. First, prosecutors consider women who report violence as passive vic-

tims who need to be protected by the State. Therefore, they change women's testimony of violence to sustain that those women suffer attempted femicide while transgressing the women's wishes regarding the criminal process. Second, the pretrial detention (arraigo) in the first period was substituted by pretrial preventive detention (prisión preventiva oficiosa) in the second. The last measure was promoted against femicide defendants by feminist organizations at the national level, but this disrespects the presumption of innocence and other defendants' rights. Third, prosecutors classify facts that could be considered domestic violence as attempted femicide, arguing that they want to prevent a femicide and overall to evade any responsibility for this crime. Nevertheless, this measure puts at risk the accused's rights and access to justice.

Future research could explore new topics regarding the prosecution of gender violence, such as: the effects of prosecutorial behavior on lives of women who suffer violence, women's expectations about criminal justice, and their own ideals of justice, prosecutors' and victims' representations of gender, race, age and social class, and their effects on the criminal process and on human rights. It is also very important to compare feminist punitive discourses and other feminist positions related to gender-based violence linked to other types of social inequalities, and to analyze their alternative perspectives of justice, their repertories of action and their impact on women's lives.

IX. References

Ana Amuchástegui, Virginidad e iniciación sexual en México. Experiencias y significados (2000).

Brenda Focás & Amparo Marroquin-Parducci, *Presentación. Revisitando la agenda de la seguridad en América Latina*, 31 Rev. CS 13 (2020).

Cámara de diputados del H. Congreso de la Unión, *Ley general de acceso de las mujeres a una vida libres de violencia*, Diario Oficial de la Federación (DOF) (2007).

Cámara de Diputados, Mesa de Trabajo "Feminicidio y Prisión Preventiva Oficiosa," YOUTUBE CÁMARA DE DIPUTADOS (Jan. 19, 2019), https://www.youtube.com/watch?v=01PZGM3b_Pw.

Carlos Treviño & Jesus Adalid, *Militarización en Nuevo León*, (2017).

Centro Prodh, *Perpetuar el fallido modelo de seguridad: La Ley de Seguridad Interior y el legado de una década de políticas de seguridad en México contrarias a los derechos humanos*, (2017).

Comisión Estatal de Derechos Humanos de Nuevo León (CEDHNL), *Recomendación 05-2019*, 7 (2019).

Comisión Estatal de Derechos Humanos de Nuevo León, *Recomendación 18-2018*, 9 (2018).

Cristina Herrera, Invisible al ojo clínico: violencia de pareja y políticas de salud en México (2009).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19187

David M. Engel, Vertical and Horizontal Perspectives on Rights Consciousness, 19 INDIANA J. GLOB. LEG. STUD. 423–455 (2012).

Diario Oficial de la Federación, *DECRETO por el que se declara reformado el Artículo 19 de la Constitución Política de los Estados Unidos Mexicanos, en materia de prisión preventiva oficiosa*, (2019).

Fernando Escalante, El crimen como realidad y representación. Contribución para una historia del presente (2012).

INEGI, *Censo Nacional de Impartición de Justicia Estatal*, Instituto Nacional de Estadística y Geografía (2021), https://www.inegi.org.mx/programas/cnije/2021/.

INEGI, *Censo nacional de Procuración de justicia estatal*, Instituto Nacional de Estadística y Geografía (2021), https://www.inegi.org.mx/programas/cnpje/2021/

Lucía Núñez, El género en la ley penal: crítica feminista de la ilusión punitiva (2018).

Lucía Núñez, *El giro punitivo, neoliberalismo, feminismos y violencia de género*, Política y Cult. 55–81. (2019).

Luigi Ferrajoli, Garantismo Penal (2006).

Lynette J. Chua & David M. Engel, *Legal Consciousness*, *in* Routledge Handbook of Law and Society 187, 187 (Mariana Valverde et al. eds., 2021).

Marcela Lagarde, Claves feministas en torno al feminicidio. Construcción teórica, política y jurídica, in FEMINICIDIO EN AMÉRICA LATINA (Rosa L. Fregoso coord., 2011).

Marco Estrada, *Fernando Escalante Gonzalbo, El crimen como realidad y representación*, XXXI Estud. Sociológicos, El Col. México 204 (2013).

María de Lourdes Velasco, Judicialización estratégica de homicidios y feminicidios en México (2023).

Máximo Langer & David Slansky, *Epilogue: Prosecutors and Democracy – Themes and Counterthemes*, *en* Prosecutors and Democracy a cross-national study 300–339 (Máximo Langer & David Slansky eds., 2017).

Máximo Sozzo, *Inequality, welfare and punishment. Comparative notes between the Global North and South*, 19 Eur. J. Criminol. 368 (2022).

Miguel Carbonell, *Presentación. La teoría garantista de Luigi Ferrajoli*, *in* Garantismo penal 3–9 (2006).

Observatorio Ciudadano del Sistema de Justicia, *Observatorio Ciudadano del Sistema de Justicia: arraigo, medidas cautelares y ejecución penal. El uso del arraigo a nivel federal, en el estado de Nuevo León y el Distrito Federal: Análisis de constitucionalidad, legislación y práctica*, (2015).

Tamar Pitch, *Feminismo punitivo*, *in* Los feminismos en la encrucijada del punitivismo (Deborah Daich & Cecilia Varela eds., 2020).

Teresa de Lauretis, *Technologies of Gender*, *in* Technologies of Gender. Essays on Theory, Film and Fiction 1 (1989).

Thiago Rodrigues & Erika Rodríguez-Pinzón, *«Mano dura» and Democracy in Latin America: Public Security, Violence and Rule of Law*, 84 Am. Lat. Hoy 89-113 (2020).

A review of the legal tax framework for digital platforms in Mexico

Juan Emmanuel **Delva Benavides**
https://orcid.org/0000-0002-2859-378X

Universidad de Guadalajara. México
Email address: emmanueldelva@cucea.udg.mx

Jorge Antonio **Leos Navarro**
https://orcid.org/0009-0000-1444-5455

Universidad de Guadalajara. México
Email address: a.leos@cucea.udg.mx

Guillermo **Martínez Cons**
https://orcid.org/0000-0002-8574-5583

Universidad de Guadalajara. México
Email address: guillermo.martinez@cucea.udg.mx

Received: February 22nd, 2024
Accepted: April 25th, 2024

DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

Abstract: In recent years, Mexico has made significant advances in its legislation related to digital platforms, especially regarding their tax obligations. In this regard, this text seeks to delve into the Mexican tax system in order to understand its direct relationship with e-commerce, as it not only currently represents 5% of GDP but also experienced an almost doubling in just one year. It will explore how various laws regulate the actions of different digital platforms and how they seek to prevent international companies from making profits without paying taxes. Specifically, the 2021 tax reform and its relationship, application, and implications with digital platforms will be analyzed in detail. The analysis is based on the premise that said reform is a success of the Legislative Power. However, the need to adapt laws as Mexican society continues to adopt technology and carry out transactions in the digital market is also discussed.

Keywords: digital platforms, tax reform, legal framework in Mexico, Income Tax Law, electronic commerce.

Resumen: En los últimos años, México ha avanzado significativamente en su legislación relacionada con las plataformas digitales, especialmente en lo que se refiere a sus obligaciones fiscales. En este sentido, este texto busca adentrarse en el sistema fiscal mexicano para entender su relación directa con el comercio electrónico, ya que este no solo representa actualmente el 5% del PIB, sino que además experimentó una casi duplicación en tan solo un año. Se explorará cómo diversas leyes regulan las acciones de las diferentes plataformas digitales y cómo buscan evitar que empresas internacionales obtengan ganancias sin pagar impuestos. En concreto, se analizará en detalle la reforma fiscal de 2021 y su relación, aplicación e implicaciones con las plataformas digitales. El análisis parte de la premisa de que dicha reforma es un acierto del Poder Legislativo. Sin embargo, también se discute la necesidad de adecuar las leyes conforme la sociedad mexicana continúa adoptando la tecnología y realizando transacciones en el mercado digital.
Palabras clave: plataformas digitales, reforma fiscal, marco legal en México, Ley del Impuesto Sobre la Renta, comercio electrónico.

I. Introduction

The arrival of the Internet brought about significant changes, first in the entertainment, news, advertising, and retail industries. In these industries, the initial significant digital players stemmed from traditional business models, initially adapting them to better serve end-users (both within and outside organizations) and to a broader interconnection through the Internet.[1] In recent years, the rise of digital platforms has revolutionized how we conduct commercial transactions, access services, and consume information. Mexico has not been immune to this transformation, and as a result, it has had to adapt its tax legal framework to address the challenges posed by the Digital Economy (DE).

As indicated in the Tax Challenges Arising from Digitalisation–Interim Report 2018, while globalization has allowed companies to locate various parts of their production process in different countries and, at the same time, access a greater number of customers worldwide, this trend has intensified with digitization. A broader commercial reach of companies as a result of digitization has occurred regardless of the location of users and/or customers of companies or the headquarters of companies, and even the distance between them.[2]

In this context, digital platforms play a fundamental role in the country's economic activity. They facilitate not only commercial transactions but also entertainment services, communication, and a variety of activities that have re-

[1] OECD, Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report (2015).

[2] OECD, *Tax Challenges Arising from Digitalisation–Interim Report 2018: Inclusive Framework on BEPS* (2018).

defined our way of interacting and doing business. However, this exponential growth has also posed challenges regarding regulation and taxation. However, due to the intangible nature of the presence of these companies in many territories, this organizational model of digital companies hinders the possibilities of control by tax authorities over the activities they carry out.[3]

Mexican tax authorities and legislators have been attentive to the impact of these platforms on the tax system. The goal is to ensure fair and equitable participation in tax collection. The tax legal framework has become a central topic of debate, seeking to find a balance between fostering innovation and ensuring that digital platforms contribute appropriately to the country's development.[4]

In today's society, people seek ways to streamline daily life, optimize time, and accomplish tasks more efficiently. Therefore, the use of technology is constant in our environment, and all the innovations it brings have been driven and utilized for everyday use. Thanks to this, e-commerce has become one of the most important commercial models and has been adopted by companies.

In Mexico, there are some rules and institutions focused on the development of e-commerce and its safe implementation. For example, in Article 24 the Federal Law on the Protections of the Consumer defines the Federal Consumer Attorney's Office (PROFECO) as the institution responsible for taking the necessary measures to promote and protect consumer rights, as well as to ensure fairness and legal security between suppliers and consumers.[5] Since 2004, PROFECO has been running a program called "Monitoring of virtual stores." This program aims to ensure that Mexican e-commerce sites have the necessary standards and elements to protect transactions between parties.[6]

With change, optimization, adaptation, and inevitable globalization, digital platforms emerge to deliver goods and services internationally. These digital platforms are defined as Internet forums that serve for interaction and digital commerce. Their characteristics include diversity and dynamism, inclusion of search engines, comparison and review, portals, and commercial markets, among others.[7]

The use of such digital media requires the introduction of regulatory mechanisms regarding new business models. On one hand, entrepreneurs receive an alternative way to develop their business and make themselves known in a broader market segment, while on the other hand, taxation applicable to the

---

[3] Ester Quintas Gutiérrez, *La imposición directa ante la economía digital*, 24 *Cuadernos de Formación 122* (2019).

[4] J. C. Rodríguez Domínguez, *Plataformas Digitales y su Regulación Fiscal a Partir del 2020*, Pérez Góngora y Asociados, May 21, 2021.

[5] Ley Federal de Protección al Consumidor (DOF, 1992)

[6] Profeco, https://www.profeco.gob.mx/tiendasvirtuales/index.html (last visited Feb. 25, 2022).

[7] Federal Ministry for Economic Affairs and Energy, White Paper Digital Platforms: Digital regulatory policy for growth, innovation, competition and participation 21-23 (Spree Druck Berlin GmbH, 2017).

country where income is received and the tax appreciation of the company in question are involved.

The Fiscal Reform of 2020 in Mexico introduced mechanisms to mainly tax individuals who offer products or services through Internet Digital Platforms (IDP). However, the platforms themselves are not subject to these taxes. The discussion about "digital taxes" arose due to large-scale tax evasion attributed to big digital corporations like Google, Amazon, Uber, and Mercado Libre. This regime, contained in the VAT Law, establishes tax obligations for individuals and legal entities that sell goods or provide services through digital platforms to residents in Mexico, regardless of whether the provider is located within national territory or abroad.

From a tax perspective in Mexico, a new tax regime called Digital Platforms is included in the Official Gazette of the Federation, where the Income Tax Law and the Value Added Tax Law were reformed.[8] Similarly, the Income Law of the Ministry of Finance and Public Credit proposes that, in the provision of services or sale of goods through the Internet via technological platforms, tax withholding be applied, which will be the responsibility of the service provider.

The intended purpose of this change is to focus on non-resident companies in Mexico operating nationwide in order to collect revenues, withhold, and pay taxes on them. However, some companies that provide services such as Netflix, Uber, Mercado Libre, and Amazon, to name a few, adhere to tax payment by residency and do not have to pay for services in other countries as they normally do in Mexico.

The physical absence of a non-resident company in Mexico is a tax collection issue because there is no permanent establishment at the business location, and taxes on agreed services can only be levied in the country of origin. Profits received from consumers are withdrawn from the country's territory. Support measures for business growth, such as a website, a social network, a platform, or a digital application, present a challenge in applying the corresponding values to transfer prices.

Given the steps taken by tax authorities to collect taxes digitally, small businesses and state-owned enterprises bear a higher tax burden than international companies that pay taxes in their country of origin, with tax reduction and income shifting from the services they provide. All of this leads to a lack of fair competition and to unfair treatment of the parties. We hypothesize that the implementation of a specific tax legal framework for digital platforms in Mexico will contribute to increase tax collection and equity in tax burden, while fostering sustainable growth of the digital economy.

Our thesis is that the tax legal framework applicable to digital platforms in Mexico should be comprehensive, considering both individuals offering goods or services through these platforms and the platforms themselves. This will al-

[8] Gaceta Oficial de la Federación (Cámara de Diputados del H. Congreso de la Unión, 2019).

low addressing tax evasion and ensuring a fair contribution to the tax system, without hindering innovation and technological development.

The digital economy is evolving faster than countries can modify legislation to establish any particular tax; however, guidelines set for digital platforms are becoming effective in different parts of the world.[9] It is true that the involvement of technological platforms in business generates a wide range of legal relationships and models of economic interaction.

II. Digital Platforms

The digital transformation of the economy and production processes necessitates rethinking and adjusting the parameters of tax justice that have shaped international tax standards during the 20th century. These standards have allowed for significant social, economic, and technological advancements worldwide.

The ease with which users of platforms can exchange goods and services on the internet, allowing individuals to enter the job market, has made these platforms a highly popular resource. Nevertheless, their emergence and development have not been without controversy, as they have faced numerous challenges and disputes affecting pre-established interests.[10]

According to Urquizu Cavallé, the sharing economy can be defined as "the business model that uses information technologies through digital platforms to obtain income based on the shared use of goods, services, and/or knowledge." According to the author, the sharing economy implies a "new business modality that is constituted on the basis of an economic activity that originates, facilitates, and/or promotes the shared use of goods and/or services, obtaining income subject to taxation."[11]

In this regard, the tax field is not immune to the impact of new technologies such as Big Data, Artificial Intelligence, robotics, or new business models based on online content generation. These developments present a series of challenges to tax systems while also opening up new opportunities for improving tax compliance and combating fraud and tax evasion. The primary objective should be to ensure that new technologies do not impede the comprehensive

[9] Eduardo Antonio Paredes Paredes & Aracelly Esther Paguay Ledesma, La determinación tributaria a los servicios digitales de entretenimiento que prestan las empresas multinacionales 22 (Ambato, 2019).

[10] Laura Mercedes Velázquez Arroyo et al., Cuadernillo de análisis sobre: Modelo de intermediación de servicios de movilidad y reparto por internet. Nota de análisis en materia fiscal, laboral y derecho privado, (Instituto de Investigaciones Jurídicas, 2024).

[11] Ángel Urquizu Cavallé, *El modelo de negocios basado en compartir y/o servicios: marcos jurídicos y tributación (1)*, 10 *Revista quincena fiscal 1* (2019).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

application of the constitutional principles governing the tax system and to guarantee fair taxation that supports public expenditure.[12]

The agreements reached at the international level, known as Pillar I and Pillar II, promise a hopeful future thanks to the significant political consensus achieved internationally. However, they are not without problems and technical barriers in their final approval process and practical implementation.[13] In the context of the digital transformation of the economy, Pillars I and II represent two fundamental areas for establishing a solid framework that promotes sustainable development and resilience in the digital era. These pillars, established by the Organization for Economic Cooperation and Development (OECD), provide a comprehensive approach to addressing the challenges and opportunities presented by the digital economy.[14]

It is worth referring to these pillars due to their importance to the topic at hand. Pillar I focuses on creating a favorable business and innovation environment for the flourishing of the digital economy. This entails:

- Promoting competition and market openness: Removing unjustified barriers to entry and competition in the digital market, fostering the participation of various actors and encouraging innovation.
- Facilitating access to capital and financing: Providing businesses, especially small and medium-sized enterprises (SMEs), with adequate and affordable financing to drive the development of their digital businesses.
- Developing digital skills and talent: Investing in education and training in digital skills to prepare the workforce for the challenges and opportunities of the digital economy.
- Encouraging research and development: Supporting research and development in emerging digital technologies, such as artificial intelligence, blockchain, and cloud computing, to drive innovation and economic growth.

For its part, Pillar II focuses on addressing the fiscal challenges presented by the digital economy, ensuring that multinational companies pay a fair share of their taxes wherever they operate. This includes:

- Establishing a global minimum tax rate: Implementing a global minimum tax rate to prevent tax evasion and ensure that multinational companies pay taxes fairly in all countries.

---

[12] Saturnina Moreno González, *La digitalización de la sociedad y el impacto sobre los sistemas tributarios*, in Nuevas tecnologías disruptivas y tributación (Thomson Reuters, 2021).

[13] Alfredo García Prats, *Tributación internacional de la economía digital: el mundo post-BEPS*, in Transformación digital y justicia tributaria (Tirant lo Blanch, 2022).

[14] OECD, https://www.oecd.org/tax/la-ocde-presenta-las-normas-modelo-del-segundo-pilar-para-facilitar-la-aplicacion-interna-del-impuesto-minimo-global-del-15-por-ciento.htm (last visited Feb. 25, 2024).

- Addressing Base Erosion and Profit Shifting (BEPS): Implementing measures to prevent multinational companies from shifting their profits to countries with more lenient tax regimes, thereby reducing tax revenue in countries where they generate value.[15]
- Improving tax transparency: Promoting tax transparency by requiring multinational companies to disclose information about their activities and tax payments in different countries.

As observed, digital platforms not only provide a means to buy and sell goods or services but also facilitate interactions and transactions between users, encouraging the delivery of creative content through advertising, search, social networks, applications, communications, and payment methods.[16]

It should be noted, as Eva Escribano points out:

> The concept of a permanent establishment (hereinafter PE). The PE appears, in one form or another, in double taxation treaties, and sets the threshold at which the source state can tax the business profits obtained by non-resident companies. Such taxation could occur as long as these companies have a permanent establishment in their territory to which profits can be attributed.[17]

The author highlights, and this is very relevant for our study, that:

> A quick look at the various PE clauses in the three most influential treaty models allows us to conclude that, in essence, all of them require some degree of physical presence in the source state's territory, to a greater or lesser extent. For example, the so-called 'general clause' establishes that a company will have a PE in a territory if it maintains a fixed place of business there through which it carries out all or part of its activity (Article 5.1), unless such activity can be classified as preparatory or auxiliary (Article 5.4). This can include headquarters, branches, offices, factories, or workshops (Article 5.2). On the other hand, the so-called 'construction site PE' (Article 5.3) determines that a PE will arise for the non-resident whenever it carries out a construction or installation project in the corresponding territory, provided its duration exceeds a certain time threshold. Then there is the 'agency PE' (Article 5.5), according to which a company will have a PE in a

[15] Comisión Europea, Propuesta de Directiva del Consejo por la que se modifica la Directiva (UE) 2016/1164 en lo que respecta al pilar I de las normas BEPS (Comisión Europea, 2021).

[16] Paula Castaños Castro & José Antonio Castillo Parrilla, El Mercado Digital en la Unión Europea (Reus, 2019).

[17] Eva Escribano, *La tributación de los beneficios de las empresas digitales: soluciones desde la (re) interpretación del concepto de establecimiento permanente y desde su enmienda. Un análisis comparado vis à vis de las propuestas de la OCDE y la comisión europea,* 170 *crónica tributaria 7 (*2019).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

> territory if a person acting on its behalf habitually concludes contracts on its behalf (Article 5.5). Lastly, there is the 'service PE,' characteristic of the United Nations model (Article 5.3.b), which will arise when the company provides services in the source state through internal or external employees, as long as the activity continues for a minimum period .[18]

As we can see, it is evident that all the definitions of the concept of Permanent Establishment in the three models share the characteristic of requiring some degree of physical presence in the source state's territory. From the general clause and the construction site PE (e.g., the location of the office, branch, or site in the source state) to the agency PE or service PE (where the persons representing the PE must carry out their activity physically in that state).

Escribano puts emphasis on a concept that is pertinent to our topic: purely digital companies, also known as digital native companies or pure digital companies, are those that operate exclusively in the online environment. Unlike traditional companies that have a physical presence, these companies do not have physical stores, offices, or tangible assets.

In this context and in line with what was previously mentioned, Patricia Font points out that:

> The globalization process has led companies, in their pursuit of greater fiscal optimization, to engage in abusive practices that result in the shifting of profits. This is undoubtedly facilitated by the rise of the digital economy, which promotes business models that do not require a physical presence in the territory where the income is generated, thus aiding in the relocation of profits. In this context, the concept of a permanent establishment becomes particularly relevant as a point of connection that allows for the taxation of generated income, and which has been reviewed by the OECD under the BEPS Plan.[19]

Their business model is based on the use of the internet and digital technologies to carry out all their activities, from the production and distribution of goods or services to customer service and marketing. Among their characteristics, we find the following:

Online sales channel: Their primary sales channel is the internet, whether through their own website, e-commerce platforms, or social networks.[20]

---

[18] *Idem*.

[19] Patricia Font Gorgorió, *La redefinición del establecimiento permanente en el marco de la economía digital el establecimiento permanente virtua*, 182 *Revista Española de Derecho Financiero 115* (2019).

[20] OECD, Empresas nativas digitales: un nuevo paradigma para la economía del siglo XXI, (2020).

Robust digital presence: They have a strong presence on the internet, with an optimized website, active social media profiles, and effective digital marketing strategies.[21]

Scalable business model: "Their business model is highly scalable, allowing them to reach a global audience with relatively low investment." [22] Thus, digital platforms within the scope of this tax regime have the following obligations:

- Register in the Federal Taxpayer Registry (RFC): Digital platforms must obtain an RFC and comply with general tax obligations, such as submitting informational returns and paying taxes.
- Certify their tax residency: Foreign digital platforms must certify their tax residency to the Mexican authorities.
- Appoint a legal representative in Mexico: Foreign digital platforms must appoint a legal representative in Mexico to act on their behalf before the tax authorities.
- Withhold VAT and ISR: Digital platforms must withhold VAT and ISR on payments made to suppliers residing in Mexico.
- Submit informational returns: Digital platforms must submit monthly and annual informational returns containing information on operations carried out with residents in Mexico.

However, it is important to highlight what Marcel Olbert and Christoph Spengel state:

> In the rise of the digital economy, it has been asserted that data holds a value similar to that of valuable natural resources like oil. However, this analogy is flawed. Data only increases in value when it is linked to a specific problem domain and solves issues for customers and companies. In other words, data needs to be transformed by companies aiming at value creation, and this fact should be considered when thinking about corporate income tax and data. Clearly, data (in its raw form) is not comparable to oil.[23]

The aforementioned authors state that data mining refers to the techniques, methods, and algorithms for analyzing large amounts of data with the ultimate goal of transforming it into knowledge. In the context of business model analysis, data mining can be considered as the part of a business model that creates

---

[21] Foro Económico Mundial, Las empresas nativas digitales están cambiando el mundo (2021). https://www.weforum.org/agenda/2023/01/davos-emerging-technology-ai/

[22] Endeavor México, ¿Qué son las empresas puramente digitales y por qué son importantes? (2022). https://es.linkedin.com/pulse/empez%C3%B3-una-nueva-era-para-pymes-y-mipymes-bienvenidos-blaise-iknme

[23] Marcel Olbert and Christoph Spengel, *Taxation in the Digital Economy–Recent Policy Developments and the Question of Value Creation,* 3 *International tax studies 18* (2019).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

value from data.[24]Given the above, we can argue that digital platforms and their innovations have led to the creation of different types of markets and activities through platforms, such as accommodation services, restaurants, transportation service offers, and other options that can be contracted digitally. As we will see in the following cases:

The public transportation service concessionaire, in accordance with state transportation authorities' regulations, agrees on fares and considers the number of bases assigned based on the demand of the geographical area, the number of taxis, commercial areas, etc. Under this assumption, the State is obligated to monitor and control the services provided, leaving the responsibility to the service provider to obtain the permit from the governmental authority, which subjects it to a special legal regime for operation and compliance with its obligations.

In the 2020 fiscal reform package, a rate was applied for the provision of passenger land transport services and the delivery of goods according to their monthly income. With the modifications made to the 2021 fiscal reform package, a comparative table is included to detail the changes made.

Monthly Income Amount	Year 2020 Withholding Rate	Year 2021 Retention rate
Up to $5 500	2%	4%
Up to $15 000	3%	
Up to $21 000	4%	
More than $21 000	8%	

Source: Own elaboration based on quantitative information published by the Ministry of Finance and Public Credit (SHCP).

On the other hand, it is noted that in the lodging services, it has become common for individuals or families to search through their digital media the various options offered by a company. These searches have the greatest impact on traditional hotels. Tax authorities have taken the stance of applying the treatment of business activity to lodging services through digital platforms, considering as improper tax practice cases where a different tax treatment is applied.

Similarly to transportation, accommodation also introduces changes in the package of tax reforms for 2021, a comparative table is attached to see the changes made.

[24] *Idem.*

Monthly Income Amount	Year 2020 Withholding Rate	Year 2021 Retention rate
Up to $5 000.00	2%	4%
Up to $15 000.00	3%	
Up to $35 000.00	5%	
More than $35 000.00	10%	

Source: Own elaboration based on quantitative information published by the Ministry of Finance and Public Credit (SHCP)

According to the National Association of Hotel Chains, these changes foster fair and healthy competition in the tourism market, as their contribution to the gross domestic product represents 8.7% of the total.[25]Additionally, streaming services are available, providing access to play audio or video files from websites or mobile applications. In Mexico, the user base has grown by 66% between 2019 and 2020, from nine million to fifteen million registered users.[26]

Due to the ease, speed, and accessibility of content provided by streaming services, users have determined their preferences regarding the use of such platforms. Seven out of ten Mexicans use a streaming platform daily, and 65% of television consumption time is spent streaming; 84% would choose a platform if they had to select only one type of transmission.[27]

As Santos Flores warns, the digitization of the economy and the emergence of new business models leveraging Information and Communication Technologies (ICT) pose significant challenges for Financial and Tax Law. The use of blockchain technology by tax administrations, the tax regime for technological platforms and software applications, the application of Artificial Intelligence (AI) and Big Data in tax management, the taxation of digital services, and the tax treatment of cryptocurrencies and financial technologies such as crowdfunding, are challenges that both academic studies and authorities must consider as imperative agenda items.[28]

[25] The Competitive Intelligence Unit https://www.theciu.com/publicaciones-2/2021/5/5/contribucin-fiscal-de-la-oferta-de-alojamiento-de-corto-plazo-acp-en-mxico (last visited: March 3rd, 2022).

[26] Carla Martínez, *Ademas de Netflix, ¿por qué otros como Spotify subirán de precio?,* El Universal, May 7, 2020.

[27] Magnite Team, *CTV in LATAM: Widespread CTV Adoption and High Ad Receptivity Shows Opportunities for Marketer,* Magnite, April 21, 2021.

[28] Israel Santos Flores, Fiscalidad y Economía Digitalizada 45 (Thomson Reuters, 2023).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

III. Overview of the legal tax framework of Digital Platforms in Mexico

As Wolfgang Schön argues, tax law -like any other area of law- is intended to express long-term value judgments and political agreements, which have been transformed into legislative language. These norms exhibit a general character and can be applied to new facts regardless of changes in the real world, whether they are changes in technology or changes in the way business is conducted. Old concepts of Roman law on warranties for defective goods can be invoked, whether they are sold in a rural market or over the Internet. Legal regimes -unlike consumer software- do not inherently require periodic updates as technology and business progress. Instead, a specific political argument is needed to modify the law, including tax law.[29]

The digitization of the economy in Mexico has progressed by leaps and bounds in recent years, driven by the increasing penetration of the Internet, the adoption of mobile technologies, and the proliferation of digital platforms. This process has brought with it a series of benefits, such as increased productivity, the creation of new jobs, and improved access to goods and services. However, it has also presented new challenges, both for businesses and for the government, hence the need for tax reform.

Wolfgang[30] asserts that arguments in favor of international tax reform in light of the digitization of the economy, which can be found in the current debate, show a vast variety. But they all start from two assumptions:

- The digitization of the economy makes it easier to offer goods and services to customers worldwide without establishing a "physical" permanent establishment or a branch in the market jurisdiction.
- The business models behind the success of companies in digitized markets are based on intangible assets (patents, algorithms, among others) and economies of scale (in particular).

It is essential to understand that the digitization of the economy is an irreversible process that presents both opportunities and challenges for Mexico. Addressing legislative challenges effectively will be crucial to maximizing the benefits of the digital economy and ensuring that all Mexicans can participate in it. We will now examine the legal framework in our country.

[29] Wolfgang Schön, *Ten questions about why and how to tax the digitalized economy,* BULLETIN FOR INTERNATIONAL TAXATION (2018).

[30] *Idem.*

1. Value Added Tax Law

The value added tax is a tax levied on the consumption of goods and the use of services indirectly,[31] aiming to tax the consumption of taxpayers based on production costs and income obtained, which are then passed on to final consumers through sales. The Value Added Tax Law includes in Chapter III Bis the foundation for the provision of digital services by non-residents without establishment in Mexico, its general provisions, and digital services of intermediation between third parties.

Value added tax for taxpayers resident in the national territory or non-residents without establishment in Mexico will be imposed on the sale of goods, provision of digital services of intermediation between third parties, temporary use or enjoyment of goods, among others.

Regarding the value added tax, digital platforms that provide services or sell goods in Mexico are required to apply and charge VAT to their end users. This includes, for example, the sale of applications, subscriptions to streaming services, online advertising, and other digital services. Additionally, foreign digital platforms that do not have an establishment in Mexico but provide services to Mexican residents are required to register with the SAT (Tax Administration Service) and comply with their tax obligations in the country.

Their withholding rate corresponds to 50% of the Value Added Tax charged. When a natural person does not provide their Federal Taxpayer Registry to the digital platform, the withholding will be 100%.

The offsetting of value added tax may be made subject to the requirements established by law, namely, the transmission and direct and separate identification of the service provider and its beneficiary. If services are provided together with other digital services not covered in Article 18B, the tax will be calculated at the 16% rate stated on the tax receipt indicating the breakdown of these services. If the previous classification is not made, the remuneration is equal to 70% of the service value. Article 18-L allows a taxpayer who has earned up to $300 000 Mexican pesos in the immediate preceding fiscal year for intermediation activities to definitively withhold the tax,[32] provided they do not receive income from other sources except for those coming from salaries or interests. This option requires registration in the Federal Taxpayer Registry before the Tax Administration Service, retention document retention and payment information from those who made the retention, issuance of the Digital Tax Invoice through the Internet to the purchasers of goods or services, and submission of the notice to opt for that option before the Tax Administration Service.

---

[31] QuickBooks https://quickbooks.intuit.com/mx/recursos/controla-tu-negocio/que-es-el-impuesto-digital-2021/ (last visited: March 8, 2022).

[32] Cámara de Diputados del Congreso de la Unión, Value Added Tax Law (Diario Oficial de la Federación, 1978).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

One of the most contentious aspects of the Value Added Tax Law is that it temporarily blocks access to digital services from foreign providers who do not meet their financial obligations. The blockage is carried out by public network operators in Mexico, with cases where some failures to meet obligations such as registration in the Federal Taxpayer Registry, appointment of a legal representative, provision of a national address for notification purposes, as well as failure to process the Advanced Electronic Signature, among others, are presented.

2. Income Tax Law

Income tax is a direct application tax that taxes the income of an individual, legal entity, or another legal entity, and the calculation is based on a variable percentage associated with these. Its object is the income received by individuals in cash, in kind, or on credit. In the case of legal entities, it concerns income derived from commercial, industrial, agricultural, or fishing activities.[33]

Article 31, Section IV of the Political Constitution of the United Mexican States, establishes that Mexicans are obliged by law to contribute to public expenditure in a proportional and equitable manner.[34] Regarding income tax, digital platforms are subject to the same tax obligations as any other company or individual earning income in Mexico. This includes the obligation to file periodic tax returns, calculate and withhold the corresponding tax on income obtained through the platform, as well as to maintain accounting records and documentation supporting their operations.

The Income Tax Law, in Section III, addresses the income base for the sale of goods or the provision of services through the Internet via technological platforms, software applications, and similar means. In accordance with Article 113-A of the Income Tax Law, taxpayers belonging to the regime of individuals conducting business activities are subject to taxation, which specifies that the economic activity included in this case is the sale of goods through the Internet or digital platforms, software applications, among others, that provide intermediary services, such as suppliers and buyers of goods.[35]

Their tax base corresponds to the total amount of income actually received through technological platforms, software applications, and similar means. The tax will be paid through withholding by Mexican or foreign legal entities, as well as foreign legal entities providing the digital service. The withholding varies depending on the service or activity performed, with 2.1% for transportation and delivery services, 1% for the sale of goods and provision of services, and 4% for lodging services. If a portion of the consideration is received directly from users

[33] Dolores Beatriz Chapoy Bonifaz & Gerardo Valdivia Gil, Introducción al Derecho Mexicano. Derecho Fiscal (Instituto de Investigaciones Jurídicas, 1981).

[34] Cámara de Diputados del Congreso de la Unión, Constitución Política de los Estados Unidos Mexicanos (Gaceta Oficial de la Federación, 2024).

[35] Cámara de Diputados del Congreso de la Unión, Ley de Impuesto sobre la Renta (Gaceta Oficial de la Federación, 2013).

and the income does not exceed $300 000 Mexican pesos annually, taxpayers may opt to make the tax payment definitively.

The penalty that a taxpayer may incur for failing to withhold and remit the tax is similar to that of VAT; specifically it will be applied within three consecutive months for foreign legal entities without a permanent establishment in the country, as well as for foreign legal entities referred to in Article 113-A of this Law. The temporary blockage of access to the digital service and its unblocking will be carried out in the same manner as explained in the Value Added Tax Law.

3. Federal Fiscal Code

The Federal Fiscal Code is the regulation that defines basic tax concepts, and establishes procedures for the collection of revenue, methods for implementing tax decisions, and other aspects.[36] Its interests are usually concentrated in the tax field and in practice it is of subsidiary application. It is a summary of various fiscal aspects, aimed at determining contributions and obligations in relation to the payment of federal taxes.

The requirement of a fiscal voucher in Article 29 of this Law establishes that:

> When issuing digital tax vouchers via the Internet, the federal taxpayer registry of both parties and the tax regime under which they pay, folio number and digital seal of the Tax Administration Service, place and date of issue, amount, unit of measure, and description of the service must be displayed. If any of the aforementioned requirements are not met, or if the information provided differs from that established by tax regulations, such information cannot be tax-deducted or credited.[37]

Notifications corresponding to administrative acts are made through the tax mailbox, in person, or by certified mail. In cases where the taxpayer cannot be located at the address indicated in their Federal Taxpayer Registry, ignores their address, or opposes the notification process; the notification must be made by publication. When the person has died and the representative of the estate is unknown, it will be through edicts.

The fine established in Article 18-H QUÁTER of the Value Added Tax Law corresponds to the amount of $500 000 to $1 000 000 Mexican pesos and its penalty will be applied to concessionaires of a public telecommunications network in Mexico who do not comply with the order to block access to the

[36] SoyConta https://www.soyconta.com/introduccion-al-estudio-del-codigo-fiscal-de-la-federacion/ (last visited: November 15, 2021).

[37] Cámara de Diputados del Congreso de la Unión, Código Fiscal Federal (Gaceta Oficial de la Federación, 2013).

provider's digital service. Similarly, the fine will be incurred when the unblocking is not carried out within the established period in said Law.

4. Fiscal Miscellaneous Resolution

The Fiscal Miscellaneous Resolution is an annual document published in the Official Gazette of the Federation. Its objective is to encompass and facilitate the understanding imparted by tax authorities through their rules regarding taxes, products, benefits, improvement contributions, and federal rights. It is considered a guide to all aspects of tax law in a single document.

The tax reform of 2020 added a chapter on income generated through digital services for both Income Tax and Value Added Tax. In doing so, they have taken the lead in regulating e-commerce and how companies provide services with more specific operational control and greater oversight over digital platforms. Title 12 covers the provision of digital services and is divided into three chapters considering foreign residents, digital intermediary services, and individuals selling goods, providing services, or offering lodging through platforms.[38]

5. Federal Consumer Protection Law

On December 22, 1975, the first Federal Consumer Protection Law was published in the Federal Bulletin, from which the National Consumer Institute and the Federal Consumer Attorney's Office were born. Its creation is very important since Mexico was the first Latin American country to have this type of consumer protection agencies.[39] It has undergone various reforms, and the regulations have strengthened consumer protection mechanisms, one of which occurred when the Law was modified in 2000 to add Chapter VIII Bis.

Chapter VIII Bis of this Law refers to the rights of consumers in transactions carried out through the use of electronic, optical, or any other technology. Its provisions apply to the relationships between suppliers and consumers regarding their transactions.

Transactions must comply with a series of requirements such as protecting and keeping confidential the information supplied by the consumer, the provider must hand out contact information or a means for future claims or clarifications, avoiding deceptive commercial practices regarding their products, disclosing all information regarding terms and conditions, and ensuring that their published information is clear and sufficient about the services offered.[40]

---

[38] Secretaría de Hacienda y Crédito Público, Resolución Miscelánea Fiscal para 2021 (Gaceta Oficial de la Federación, 2021).

[39] Jorge Witker, Derecho de la Competencia Económica en México (Universidad Nacional Autónoma de México, 2003).

[40] Cámara de Diputados del Congreso de la Unión, Ley Federal de Protección al Consumidor (Gaceta Oficial de la Federación, 1992).

When a violation of the Federal Consumer Protection Law is committed, the Federal Consumer Attorney's Office initiates administrative proceedings against companies that have harmed consumers. An example was the application of Airbnb, which had a service conflict. In the advertisement, the provider indicates that it offers quality accommodation and booking services but does not take responsibility for their use. The responsibility lies with the hosts, and the application disclaims any action or mishap that may occur.

6. National Commission for the Protection and Defense of Financial Services Users

It is a decentralized public institution aimed at supporting and defending the rights and interests of individuals or users associated with financial products or services offered by Mexican financial institutions. Its purpose is to increase the legal certainty of the transactions carried out and of the relationships established. Another task is to act as an intermediary to achieve consensus between users and financial institutions.

The National Commission for the Protection and Defense of Financial Services Users has taken two actions to strengthen the relationship between Financial Technology Institutions and their users. Preventive measures aim to promote transparency regarding the level of publicly available information and financial education. Corrective actions focus on resolving disputes. Likewise, this institution created the Fintech User Platform with the purpose of providing support to the user and offering them adequate attention.

Due to the peculiarities of the institutions, markets, and products related to the National Commission for the Protection and Defense of Financial Services Users, all support, advice, and complaints are made through digital means. To file a complaint, the user must complete a form, which must be signed and attached in PDF format on this institution's website. This includes, among other things, the arbitration process between the parties in dispute, issuing statements and recommendations to federal authorities and financial institutions.

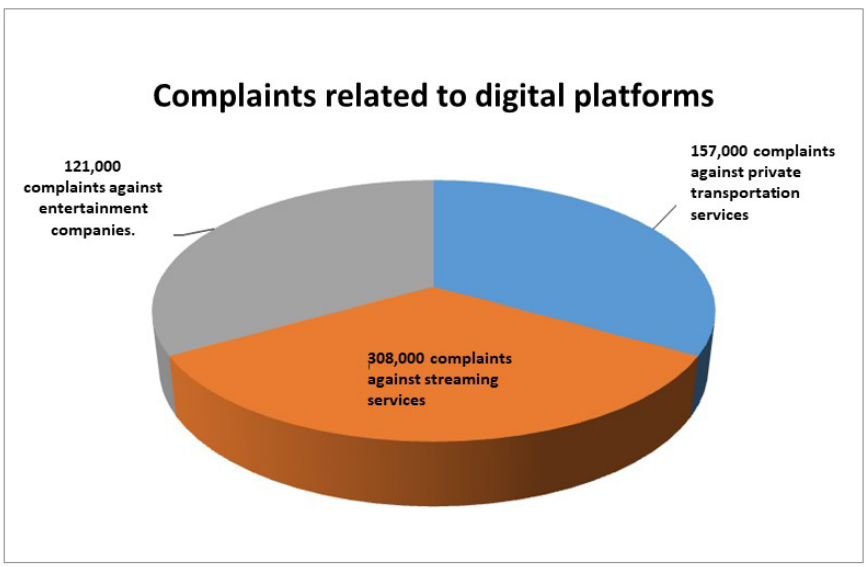
In the first quarter of 2018, 1.7 million possible fraud complaints were registered, of which 59% came from e-commerce.[41] Regarding digital platforms, a total of 308 000 complaints were filed for streaming services, 157 000 for private transportation services, and 121 000 for entertainment companies.[42]

[41] CONDUSEF https://www.condusef.gob.mx/?p=contenido&idc=387&idcat=1 (last visited: January 4, 2022).

[42] Internet Association MX, *Study on E-commerce in Mexico 2019*, Digital Statistics, 2019.

Graph 1. Source: Own elaboration based on the report published on the CONDUSEF platform, 2018

Graph 2. Source: Own elaboration based on the report published on the CONDUSEF platform, 2018



7. Code of Ethics on E-commerce

The Code of Ethics on E-commerce is a set of minimum standards to improve commercial practices globally. Compliance with the code is mandatory, and its effects apply to the provider. When a consumer is affected by an activity or movement, the platform will be responsible for the services provided and will be subject to what is stipulated in its terms and conditions. To be available to consumers through a digital platform, they must have the identification and contact information of the provider, information on purchases and returns, delivery methods, among others. The terms and conditions should reference general conditions, the validity period of bargains and promotions, and payment or delivery restrictions.

Within the code of ethics, it is established that digital advertising must be truthful, clear, and related to the products or services offered on its platform, in addition to respecting the guidelines established in the Federal Consumer Protection Law. Such advertising must mention the identity of the advertiser, their contact information, and the possibility to opt out of receiving direct commercial advertising.[43]

Likewise, the provider must have an accessible and legible privacy statement that clearly indicates all information related to the protection of personal data. The Code will comply with the provisions of Article 16 of the Political Constitution of the United Mexican States, which recognizes the right of any person to the protection of their personal data, access, rectification, and cancellation thereof.In cases where there are conflicts with consumers, providers must have their own mechanisms to resolve disputes through alternative means and reach quick agreements through mediation, conciliation, and arbitration. Additionally, they must be guided by the Mexican Standard for E-commerce NMX-COE-001-SCFI-2018, which establishes a series of guidelines for best practices, aimed at protecting consumers and ensuring competition among companies.[44]Similarly, the Federal Consumer Protection Agency conducts quarterly monitoring of adhering providers, with the purpose of reviewing their compliance. The list is published in the Registry of Responsible Providers in E-commerce.

8. Commercial Code

The basic principles of electronic commerce were originally established in the Model Law on Electronic Commerce, which has been adopted by various countries in their legislation. The law aims to enable and facilitate electronic

[43] DOF https://www.dof.gob.mx/nota_detalle.php?codigo=5612351&fecha=26/02/2021#gsc.tab=0 (last visited: January 2023).

[44] ECIJA https://ecija.com/sala-de-prensa/mexico-profeco-emite-codigo-de-etica-para-e-commerce/ (last visited: February 4, 2022).

commerce by providing lawmakers with a set of regulations focused on eliminating legal obstacles.[45]

In Mexico, the Commercial Code is presented in accordance with its interpretation and application related to the principles of technological neutrality, autonomy of the will, international compatibility, and functional equivalence with documented information.

In the second title of the second book of the Commercial Code, the legal provisions for electronic commerce are specified. Of the 11 chapters of the previous title, attention is focused on the first chapters that correspond to data messages and signatures.

The content of an intact data message will be considered as such when it has remained complete and unaltered, regardless of any changes the medium containing it may have undergone. Its place of dispatch shall be where the sender has its establishment and the place of receipt is where the recipient has its own.

When there exists a signature in connection with a data message, the electronic signature is deemed satisfied when the Law requires the existence of the agreement. The electronic signature shall be considered advanced when the context in which it is used corresponds to the signatory or when any alteration of the signature made after the moment of its signing can be detected. The signatory shall comply with obligations related to the use of their electronic signature, act diligently, avoid unauthorized use of the signature, and be liable for obligations arising from the unauthorized use of their signature. Likewise, they shall be responsible for the legal consequences arising from failure to fulfill their obligations.[46]

9. Law to Regulate Financial Technology Institutions

The Fintech Law regulates Financial Technology Institutions with the aim of increasing the legal certainty of financial services through digital platforms. The Official Gazette of the Federation promulgated the law on March 9, 2018, and the bodies responsible for approving, regulating, and supervising activities related to these platforms are the Ministry of Finance and Public Credit, the Bank of Mexico, and the National Banking and Securities Commission. Article 2 of the law establishes that its provisions focus on promoting competition, protecting consumers, safeguarding financial stability, and preventing illegal transactions.[47] It also describes the operations of Financial Technology Institutions and banks using virtual assets and the legal framework for exchanging infor-

[45] United Nations Commission on International Trade Law, Model Law on Electronic Commerce (United Nations, 2021).

[46] Cámara de Diputados del Congreso de la Unión, Código Comercial (Diario Oficial de la Federación, 1989).

[47] Cámara de Diputados del Honorable Congreso de la Unión, Ley para regular las instituciones de tecnología financiera (Diario Oficial de la Federación, 2021).

mation with financial institutions and third parties.[48] With the information obtained, providers are given the profile of each client and the method that best suits what they are looking for in order to promote the digital economy and increase financial literacy in society.

With the aim of further improving Mexico's financial technology, authorities have proposed the implementation of this law consisting of general rules. These rules are clear and must be adjusted as this type of tool grows. Organizations need to have a broad view of regulatory, legal, and tax issues that strengthen their strategic corporate governance plans.

The regulations are based on electronic payment platforms and crowdfunding. Financial Technology Institutions that are not associated with either of the two concepts mentioned above are called novel models or Sandboxes. They aim to provide financial services using innovative technological tools or means other than those established in the market. Their approval is temporary and granted by financial authorities.

10. Federal Law for the Prevention and Identification of Operations with Illicit Proceeds

The purpose for which it was created is to monitor cash flow to maintain a healthier and more transparent economy so that illegally sourced resources are not included in the formal economy.[49] The law establishes that its object is to protect the financial system and the national economy by establishing measures and procedures to prevent and detect acts or operations involving illicit resources. With respect to electronic platforms, the management of virtual assets is considered one of the vulnerable activities provided for by this regulation. The reason for this is the transfer of virtual assets that are not recognized by the Bank of Mexico for operations related to the purchase or sale of products.

This measure helps identify their use on a platform that enables cryptocurrency as a payment option and prevents the origin of such assets from being illicit. It must safeguard, protect, store, and prevent the destruction or concealment of information and documentation that supports the vulnerable activity, as well as its identification to users or customers.

If the amount of the purchase or sale transaction is greater than or equal to the equivalent of 645 Units of Measure and Update, notice must be provided to the authorities. If the amount is less than the amount required by law, the platform is not obliged to provide it. All information and documents must be kept in electronic or physical form for five years from the date of dispatch or operation.[50]

---

[48] OECD, Digital Platforms and Competition in Mexico OECD (2018).

[49] Jorge García Villalobos, *Obligaciones LFPIORPI*, Deloitte, 2016.

[50] Cámara de Diputados del Honorable Congreso de la Unión, Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita (Diario

11. Financial Information Standards

Financial information standards are mandatory standards that must be followed by those responsible for financial information within the organization or independently. It is a harmonization of local standards used in various sectors of the Mexican economy and complies with the guidelines of the International Financial Reporting Standards issued by the International Accounting Standards Board.[51]

NIF C-22 was approved for publication by the Mexican Council of Financial Information Standards in November 2019 and came into effect on January 1, 2021. The objective of this standard is to establish valuation, presentation, and disclosure standards focused on cryptocurrencies. The standard defines it as a unique digital asset that can only be sent electronically and used as a means of payment or exchange. Its structure is based on encrypted codes for security reasons and to prevent corruption.

Cryptocurrencies are a type of digital currency that is independent of a central bank, government, or central institution for its issuance and control. They are used as electronic payment methods, among many other functions, and can only operate within a legal framework if the virtual asset is authorized by the Bank of Mexico.The currency emerged as a way to carry out operations or transactions electronically without the need for an intermediary, making the operation more efficient, fast, and anonymous. The Bank of Mexico associates them with volatility and warns that risks may arise due to the underlying complexity.

Its valuation is based on NIF B-17 where fair value is determined, as it is an asset intended for exchange or sale. In order to be reflected in a financial position statement, it must be considered as a short-term item for the purpose of being available assets to be used as a means of payment. In Mexico, digital platforms do not consider cryptocurrency as a method of payment as they are not authorized by financial institutions to handle their balances. Meanwhile, financial authorities have pointed out that financial institutions that carry out or provide transactions with virtual assets without permission violate the rules and are subject to corresponding sanctions.[52]

Oficial de la Federación, 2012).

[51] Mexican Council for Research and Development of Financial Information Standards https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrencies (last visited: February 25, 2022).

[52] Gobierno de México https://www.gob.mx/cnbv/articulos/banco-de-mexico-shcp-y-cnbv-advierten-sobre-riesgos-de-utilizar-activos-virtuales-275831?idiom=es (last visited: January 29, 2022).

12. Federal Labor Law

In recent years, the number of users and platforms offering services through digital means has increased significantly. The increase has gone from 142 platforms in 2010 to over 777 in 2020.[53] One of the main problems resulting from this trend is labor regulation, the lack of social security, and other benefits for workers. Moreover, workers often engage in activities on digital platforms to supplement their income from other jobs and prefer to do so from home. Thus, 32% declare that platform work is their main source of income, 36% work 7 days a week, 43% work at night, and 68% work in the afternoon.[54]

The main reasons people choose to work on online platforms are the opportunity to earn additional income, hobbies, or the need to work from home. Additionally, according to the International Labour Organization, digital platforms provide two types of employment relationships: those who work for the platform and those who operate through the platform or on their own account.

The operating hours of these platforms are typically long and in high demand from users. Compared to other services, transportation providers work an average of 65 hours per week compared to 59 hours for food delivery. Chapter VI of the Federal Labor Law deals with the work of self-employed transporters and emphasizes that wages are fixed per day, trip, ticket, or kilometers traveled, and include a fixed amount or bonus on earnings.[55] The determination for calculating rest days, vacations, and severance will be as provided in Article 89. In the case of service providers working through digital platforms, their work activities will correspond to the number of workdays, and benefits will not be granted to their employees due to the absence of an employment contract.

In the case of homeworking, Article 316 of the Federal Labor Code prohibits the use of the term intermediary, and when an employer offers to provide homework, they must register with the Homework Registry of Employers, which clearly specifies details of the employer and worker, establishment, salary, date, and place of payment. They will enjoy mandatory vacations, holidays, and other benefits granted. For employees working through the platform, the benefit of this approach is flexibility in terms of events and hiring. When it is not considered subordination to the service provided, the existence of an employment relationship is discredited. It is a provision of services and follows new technologies that create new types of work.[56]

To recognize the rights of all those who request and possess work, in 2020, it was proposed before the Senate to add a chapter to the Federal Labor Law regarding the issue of digital platforms. The addition intends to grant basic pro-

---

[53] International Labour Organization https://www.ilo.org/global/about-the-ilo/lang--en/index.htm (last visited: 4 January, 2023).

[54] *Idem*.

[55] Cámara de Diputados del Honorable Congreso de la Unión, Ley Federal del Trabajo (Diario Oficial de la Federación, 2024).

[56] INEGI https://www.inegi.org.mx/ (last visited: January 9, 2024).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

tections contemplated in the Law to workers who have a link or provide services within the platforms. This initiative has been referred to the Joint Committees on Labor and Social Welfare and Second Legislative Studies. In 2021, the issue was resumed with an emphasis on workers enjoying the rights mentioned in Article 123, Section A of the Political Constitution of the United Mexican States. Furthermore, tips are recognized as additional income to workers' salaries , and they will be delivered in a manner and time frame specified by the digital platform. Workers can also organize unions to better protect their labor rights and can enter into collective agreements with digital platforms.[57]

We believe it is necessary to reform the tax legal framework for digital platforms in Mexico with the aim of:

• Expanding the tax base: Including all digital platforms conducting economic activities in Mexico, regardless of their place of residence.

• Establishing fairer tax rates: Applying tax rates that reflect the actual value of transactions made on digital platforms.

• Strengthening tax collection: Implementing more efficient mechanisms for collecting VAT and ISR from digital platforms.

• Combating tax evasion: Implementing measures to prevent digital platforms from evading their tax obligations.

IV. Conclusions

The tax framework for digital platforms in Mexico has evolved significantly in recent years, aiming to adapt to changes in the digital landscape and ensure fairness and efficiency in the tax system. However, there is still work to be done to address emerging challenges and promote a fair and equitable tax environment for all businesses. Through collaboration and dialogue among different stakeholders, we can move towards a more efficient tax system suitable for the 21st-century digital economy. Current regulations aim to tackle tax evasion and ensure that digital platforms contribute appropriately to the tax system. It is important to continue monitoring developments in this area to adapt to technological changes and evolving fiscal needs.

In developing the principles of the Model Rules, the Organization for Economic Cooperation and Development (OECD) emphasized that businesses should report the income they generate through digital platforms. The digital age is constantly evolving, and every business must adapt to societal changes, so the concept of taxing digital services is an alternative to fee-based services. Therefore, it is important to raise the issue of tax withholding and who will pay the mentioned tax.

[57] INTERACSO https://interacso.com/blog/2021/07/14/la-economia-de-las-plataformas-un-nuevo-modelo-economico/ (last visited: March 1, 2024).

In Mexico, certain measures of the Organization for Economic Cooperation and Development have been adopted, and withholdings have been implemented in the Value Added Tax and Income Tax to tax the income of each operation. This business model has the potential to increase GDP and provide financial services to developing countries. In the case of Mexico, the participation of e-commerce in GDP increased from 3%[58] to 5%,[59] and its significance lies in the fact that the digital economy represents almost 20% of global GDP. As a result, digital platforms have revolutionized the economy and brought significant improvements to society.

At the national level, given that Mexico has many different laws still being developed to support a growing relationship from digital platforms, it is important to begin standardizing regulations to clarify the fiscal and legal procedures involved in having a digital platform. Therefore, when traditional and digital transactions are equitable, there will be healthy competition, and tax authorities will be able to add or establish chapters to applicable regulations clarifying and specifying how each scenario will be regulated.

On the other hand, a global, transparent, and fair tax model must be agreed upon to prevent specific laws of each country from distorting or requiring double or even triple payment of the same instrument, which can lead to certain global platforms deciding not to have a presence in some given regions. The biggest challenge is to protect users: these new taxes should not affect prices or create entry barriers that hinder the use of digital platforms. While progress has been made in Mexico with the auditing and handling of digitally conducted operations, technological platforms are a recent business model and will take time to adapt for better use with tax authorities.

Some legislative challenges of the digitalization of the Mexican economy revolve around issues such as:

- Lack of an adequate legal framework: Current legislation is not always up to date with the rapid changes in the digital economy, which can create legal uncertainty for businesses.
- Protection of personal data: The growing collection and use of personal data pose challenges in terms of privacy and security.
- Unfair competition: Digital platforms may have an unfair competitive advantage over traditional businesses, affecting market competition.
- Digital inclusion: Not all Mexicans have access to the Internet or the digital skills necessary to participate in the digital economy.

[58] INEGI https://www.inegi.org.mx/ (last visited: January 9, 2024).

[59] INTERACSO https://interacso.com/blog/2021/07/14/la-economia-de-las-plataformas-un-nuevo-modelo-economico/ (last visited: March 1, 2024).

V. Proposals

To address the challenges of digitization in Mexico's economy from a legislative perspective, the following proposals are presented:

- Develop a comprehensive law for the digital economy: This law should establish general principles to regulate the digital economy, including aspects such as competition, protection of personal data, cybersecurity, and the accountability of digital platforms.
- Update existing legislation: It is crucial to update current laws, such as the Federal Telecommunications and Broadcasting Law and the Federal Law on the Protection of Personal Data Held by Private Parties, to adapt them to the realities of the digital economy.
- Implement mechanisms for agile regulation: Mechanisms should be established to enable the government to regulate the digital economy quickly and efficiently, adapting to constant technological advancements.
- Implementation of a global income tax: This levy would target the profits of multinational companies worldwide, regardless of where they are generated. This aims to prevent companies from resorting to tax havens to evade their tax obligations.
- Adoption of a digital services tax: This tax would apply to sales of digital services, such as online advertising, streaming platforms, and mobile applications. Its goal is to ensure that digital companies contribute equitably to the tax system, even if they do not have a physical presence in Mexico.
- Strengthening of tax administration: It is essential for the Mexican government to invest in modernizing its tax administration systems to effectively identify and tax economic activities in the digital sphere. This involves improving the auditing capacity of the Tax Administration Service (SAT) and adopting technology to detect tax fraud.
- Increase international cooperation: Mexico should collaborate with other countries in developing international tax regulations for the digital economy. This would help prevent tax evasion and ensure that digital companies fulfill their tax obligations in all countries where they operate.
- Exploration of taxes on digital property: The possibility of taxing digital property, including cryptocurrencies, non-fungible tokens (NFTs), and other digital assets, could be studied. However, it is important to evaluate the challenges and opportunities this entails before implementing such a measure.

VI. References

Alfredo García Prats, *Tributación internacional de la economía digital: el mundo post-BEPS*, in Transformación digital y justicia tributaria (Tirant lo Blanch, 2022).

Ángel Urquizu Cavallé, *El modelo de negocios basado en compartir y/o servicios: marcos jurídicos y tributación (1)*, 10 *Revista quincena fiscal 1* (2019).
Cámara de Diputados del Congreso de la Unión, Código Comercial (Diario Oficial de la Federación, 1989).
Cámara de Diputados del Congreso de la Unión, Código Fiscal Federal (Gaceta Oficial de la Federación, 2013).
Cámara de Diputados del Congreso de la Unión, Constitución Política de los Estados Unidos Mexicanos, (Gaceta Oficial de la Federación, 2024).
Cámara de Diputados del Congreso de la Unión, Ley Federal de Protección al Consumidor (Gaceta Oficial de la Federación, 1992).
Cámara de Diputados del Congreso de la Unión, Ley de Impuesto sobre la Renta (Gaceta Oficial de la Federación, 2013).
Cámara de Diputados del Congreso de la Unión, Value Added Tax Law (Diario Oficial de la Federación, 1978).
Cámara de Diputados del Honorable Congreso de la Unión, Ley Federal del Trabajo (Diario Oficial de la Federación, 2024).
Cámara de Diputados del Honorable Congreso de la Unión, Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita (Diario Oficial de la Federación, 2012).
Cámara de Diputados del Honorable Congreso de la Unión, Ley para regular las instituciones de tecnología financiera (Diario Oficial de la Federación, 2021).
Carla Martínez, *Ademas de Netflix, ¿por qué otros como Spotify subirán de precio?,* El Universal, May 7, 2020.
Comisión Europea, Propuesta de Directiva del Consejo por la que se modifica la Directiva (UE) 2016/1164 en lo que respecta al pilar I de las normas BEPS (Comisión Europea, 2021).
CONDUSEF https://www.condusef.gob.mx/?p=contenido&idc=387&idcat=1 (last visited: January 4, 2022).
DOF https://www.dof.gob.mx/nota_detalle.php?codigo=5612351&fecha=26/02/2021#gsc.tab=0 (last visited: January 2023).
Dolores Beatriz Chapoy Bonifaz & Gerardo Valdivia Gil, Introducción al Derecho Mexicano. Derecho Fiscal (Instituto de Investigaciones Jurídicas, 1981).
ECIJA https://ecija.com/sala-de-prensa/mexico-profeco-emite-codigo-de-etica-para-e-commerce/ (last visited: February 4, 2022).
Endeavor México, ¿Qué son las empresas puramente digitales y por qué son importantes? (2022). https://es.linkedin.com/pulse/empez%C3%B3-una-nueva-era-para-pymes-y-mipymes-bienvenidos-blaise-iknme
Ester Quintas Gutiérrez, *La imposición directa ante la economía digital*, 24 *Cuadernos de Formación 122* (2019).
Eva Escribano, *La tributación de los beneficios de las empresas digitales: soluciones desde la (re) interpretación del concepto de establecimiento permanente y desde su enmienda. Un*

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

análisis comparado vis à vis de las propuestas de la OCDE y la comisión europea, 170 *crónica tributaria 7 (*2019).

Federal Ministry for Economic Affairs and Energy, White Paper Digital Platforms: Digital regulatory policy for growth, innovation, competition and participation 21-23 (Spree Druck Berlin GmbH, 2017).

Foro Económico Mundial, Las empresas nativas digitales están cambiando el mundo (2021). https://www.weforum.org/agenda/2023/01/davos-emerging-technology-ai/

Gaceta Oficial de la Federación (Cámara de Diputados del H. Congreso de la Unión, 2019).

Gobierno de México https://www.gob.mx/cnbv/articulos/banco-de-mexico-shcp-y-cnbv-advierten-sobre-riesgos-de-utilizar-activos-virtuales-275831?idiom=es (last visited: January 29, 2022).

INEGI https://www.inegi.org.mx/ (last visited: January 9, 2024).

INTERACSO https://interacso.com/blog/2021/07/14/la-economia-de-las-plataformas-un-nuevo-modelo-economico/ (last visited: March 1, 2024).

Internet Association MX, *Study on E-commerce in Mexico 2019*, Digital Statistics, 2019).

International Labour Organization https://www.ilo.org/global/about-the-ilo/lang--en/index.htm (last visited: 4 January, 2023).

Israel Santos Flores, Fiscalidad y Economía Digitalizada 45 (Thomson Reuters, 2023).

J. C. Rodríguez Domínguez, *Plataformas Digitales y su Regulación Fiscal a Partir del 2020*, Pérez Góngora y Asociados, May 21, 2021.

Jorge García Villalobos, *Obligaciones LFPIORPI*, Deloitte, 2016).

Jorge Witker, Derecho de la Competencia Económica en México (Universidad Nacional Autónoma de México, 2003).

Laura Mercedes Velázquez Arroyo et al., Cuadernillo de análisis sobre: Modelo de intermediación de servicios de movilidad y reparto por internet. Nota de análisis en materia fiscal, laboral y derecho privado, (Instituto de Investigaciones Jurídicas, 2024).

Magnite Team, *CTV in LATAM: Widespread CTV Adoption and High Ad Receptivity Shows Opportunities for Marketer,* Magnite, April 21, 2021.

Marcel Olbert and Christoph Spengel, *Taxation in the Digital Economy–Recent Policy Developments and the Question of Value Creation,* 3 *International tax studies 18* (2019).

Mexican Council for Research and Development of Financial Information Standards https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrencies (last visited: February 25, 2022).

OECD, Addressing the Tax Challenges of the Digital Economy. Action 1: 2015 Final Report (2015).

OECD, Digital Platforms and Competition in Mexico OECD (2018).

OECD, Empresas nativas digitales: un nuevo paradigma para la economía del siglo XXI (2020).

OECD, https://www.oecd.org/tax/la-ocde-presenta-las-normas-modelo-del-segundo-pilar-para-facilitar-la-aplicacion-interna-del-impuesto-minimo-global-del-15-por-ciento.htm (last visited Feb. 25, 2024).

OECD, *Tax Challenges Arising from Digitalisation–Interim Report 2018: Inclusive Framework on BEPS* (2018).

Patricia Font Gorgorió, *La redefinición del establecimiento permanente en el marco de la economía digital el establecimiento permanente virtua*, 182 *Revista Española de Derecho Financiero 115* (2019).

Paula Castaños Castro & José Antonio Castillo Parrilla, El Mercado Digital en la Unión Europea (Reus, 2019).

Profeco, https://www.profeco.gob.mx/tiendasvirtuales/index.html (last visited Feb. 25, 2022).

Saturnina Moreno González, *La digitalización de la sociedad y el impacto sobre los sistemas tributarios*, in Nuevas tecnologías disruptivas y tributación (Thomson Reuters, 2021).

QuickBooks https://quickbooks.intuit.com/mx/recursos/controla-tu-negocio/que-es-el-impuesto-digital-2021/ (last visited: March 8, 2022).

Secretaria de Hacienda y Crédito Público, Resolución Miscelánea Fiscal para 2021 (Gaceta Oficial de la Federación, 2021).

SoyConta https://www.soyconta.com/introduccion-al-estudio-del-codigo-fiscal-de-la-federacion/ (last visited: November 15, 2021).

The Competitive Intelligence Unit https://www.theciu.com/publicaciones-2/2021/5/5/contribucin-fiscal-de-la-oferta-de-alojamiento-de-corto-plazo-acp-en-mxico (last visited: March 3rd, 2022).

United Nations Commission on International Trade Law, Model Law on Electronic Commerce (United Nations, 2021).

Wolfgang Schön, *Ten questions about why and how to tax the digitalized economy,* Bulletin for international taxation (2018).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19228

NOTE

The characteristics of Russian and Mexican environmental taxation systems

Irina **Matvienko**
https://orcid.org/0000-0002-9324-0681
Ural Branch of the Russian Academy of Sciences
Email address: iim1978@rambler.ru

Vladimir **Myakshin**
https://orcid.org/0000-0002-3989-7367
Ural Branch of the Russian Academy of Sciences
Northern (Arctic) Federal University named after M.V. Lomonosov
Email address: mcshin@yandex.ru

Received: March 8th, 2024
Accepted: April 2nd, 2024

DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19185

Abstract: This note examines Russia's current environmental taxation system by comparing it to that of Mexico. In recent years, the process of 'greening' Russia's taxation system has made good progress but it still has a long way to go before it achieves the level of developed countries, the latter operating a whole set of dedicated taxes designed to stimulate sustainable economic growth and generate wealth with zero environmental impact. Russia's efforts towards a modernized environmental taxation have unfolded by optimizing the existing taxes, fees and non-tax payments, establishing the pollution quotas, and regulating greenhouse gas emissions. In this study, we explore the feasibility of applying Mexican environmental taxation practices in Russia.
Keywords: environmental taxation, green tax, green economy, Mexico, Russia.

Resumen: Esta nota de investigación examina el sistema fiscal medioambiental ruso y lo compara con el de México. En los últimos años, el proceso de "ecologización" del sistema tributario ruso ha avanzado a buen ritmo, aunque aún le queda un largo camino por recorrer antes de alcanzar el nivel de los países desarrollados. Estos últimos cuentan con todo un conjunto de impuestos específicos diseñados para estimular el crecimiento económico sostenible y generar riqueza con un impacto medioambiental nulo. Los esfuerzos de Rusia hacia una fiscalidad medioambiental modernizada se han desarrollado optimizando los impuestos, tasas y pagos no fiscales existentes, estableciendo las cuotas de contaminación y regulando las emisiones de

gases de efecto invernadero. En este estudio, exploramos la viabilidad de aplicar las prácticas mexicanas de fiscalidad medioambiental en Rusia.
Palabras clave: fiscalidad medioambiental, impuesto ecológico, economía verde, México, Rusia.

In present-day society, the economic methods and models that facilitate the transition to a green economy —and seen as capable of accelerating economic growth and creating wealth without damaging the environment— are gradually coming into focus. Since the 2000s, the trend in many European countries regarding what can lead to better environmental safety and compliance has leaned towards stepping away from administrative coercion towards market-based instruments, such as taxes. The need to introduce environmental taxation was first acknowledged in 1973 in the First Environmental Action Programme of the European Community (Programme 1 spanned from 1973-1976).[1] In 2011, environment-related taxes were recognized in the Organization for Economic Cooperation and Development Guide for Policy Makers, as a key means for reducing environmental damage while minimizing harm to economic growth.[2]

Many green economists view specific environmental taxes[3] as an inevitable necessity, especially given their power to stimulate/encourage innovation. After all, with more appropriate technologies in place, societies can expect more cost-effective environmental decision-making. Provided that the State knows how to apply eco-taxation appropriately, it will be possible "[...] to succeed in attaining the tasks of sustainable economic development [...]".[4] In practice, environmental taxes offer governments ease of administration while being transparent to businesses and society at large. Furthermore, they offer a good source of revenues to budgets at all levels, allowing governments to redistribute/reallocate funds among national programs or socio-economic projects.[5] At the same time, it should be borne in mind that any new environmental tax is never a welcome measure, for it "... bears the threat of social strain ...".[6] As seen from the above,

---

[1] EU Environment Policy, http://www.library.fa.ru/exhib.asp?id=315 (last visited Jan. 15, 2024).

[2] Organization for Economic Co-operation and Development, Environmental Taxation. A Guide for Policy Makers (2011), available at: https://www.oecd.org/env/tools-evaluation/48164926.pdf

[3] V.V. Gromov, *Ėkologicheskie Nalogi: Klassicheskoe I Sovremennoe Ponimanie Sushhnosti* [*Environmental taxes: classical and modern understanding of the essence*], Ėkonomika, Statistika i Informatika. Vestnik Uchebno-Metodicheskogo Obedineniia, Apr. 2014, at 41, 44 (Russ.).

[4] E.S. Vylkova, A.L. Tarasevich, *Ėkologicheskoe Nalogooblozhenie kak Instrument Ustoĭchivoĭ Nalogovoĭ Politiki* [*Environmental Taxation as a Tool for Sustainable Tax Policy*], Izvestiia Sankt-Peterburgskogo gosudarstvennogo ėkonomicheskogo universiteta, Jan. 2020, at 31, 39 (Russ.).

[5] M.A. Nazarov, Orlova D.R. *Ėkologicheskoe Nalogooblozhenie: Rossijskiĭ i Zarubezhnyj Opyt* [*Foreign Experience of Environmental Taxation on the Path to a "Green" Economy*], Vestnik Rossijskogo ėkonomicheskogo universiteta im. G. V. Plehanova, Jun. 2012, at 41, 47 (Russ.).

[6] R. Vecseli, M. Begak, *Ėkologicheskoe Nalogooblozhenie: Koncepciia Dlia Rossii* [*Environmental Taxation: a Concept for Russia*], Nalogovaia politika i praktika, Dec. 2011, at 40, 43 (Russ.).

societies are paying more and more attention to environmental taxation, with "...green taxation being part of green economy mechanisms...".[7]

In today's world, human-caused environmental changes seem to be accepted as unavoidable to some degree. While taking care to minimize pollution levels, humanity cannot but accept the damage in order to continue to supply the vital goods and services. In this context, green taxation is exactly the tool needed for achieving a counterbalance by leveraging economic relations and environmental impacts. This idea was officially voiced and advocated by William Nordhaus, the recipient of the 2018 Nobel Prize in Economic Science "for integrating climate change into long-term macroeconomic analysis".[8] To this end, it should be added that, for green taxation to produce the desired effect, there should be a balance of interests between the State, communities and businesses.

One of the most productive mechanisms to put green economy into action, as proposed by many Western experts and researchers, is through carbon emission regulation. In general, greenhouse gas management is a regulatory process based on tax or quota schemes/systems. The recent trend in many European countries has moved towards introducing a national carbon tax. While modern societies use carbon tax to achieve environmentally friendly living conditions, also enabled through innovation-driven solutions and technologies, it should be borne in mind that carbon tax may not always be beneficial. The positive effects of carbon management include reduced pollution levels, jobs, and national producers with a higher competitive edge. But in the least environmentally friendly countries, any carbon policy is rather a disadvantage. Carbon tax thus represents a prime example of the leverages for driving the green economy; the expediency and necessity of carbon tax has been a major point of discussion in many countries including the Russian Federation (RF).

In the RF, whose stance on green taxation seems to be at variance with global practices, there is an urgent need to reform the tax system to promote environmental objectives. Admittedly, the process of 'greening' Russia's taxation system is lagging behind that of developed countries. According to M.A. Nazarov & D.R. Orlova, "... Russia is yet to establish its environmental taxation system —an important tool in promoting a nation's environmental policy ...".[9] One can fully agree with this assertion since Russia's tax system does not provide for any dedicated eco-taxes. Nor is there any detailed rationale for their application/implementation, although there are some fees and levies stipulated

---

[7] M.A. Egorova, *Osnovnye Napravleniia Pravovogo Regulirovaniia «Zelenogo» Nalogooblozheniia Dlia Celej Predprinimatel'skoĭ Deiatel'nosti: Opyt Zarubezhnyh Stran* [*Main Directions of Legal Regulation of "Green" Taxation for Business Purposes: Experience of Foreign Countries*], Aktual'nye problemy rossijskogo prava, Jul. 2022, at 71, 79 (Russ.).

[8] *Nobelevskaia Premiia po Ėkonomike 2018 Goda* [*Nobel Prize in Economics 2018*], http://www.library.fa.ru/exhib.asp?id=315 (last visited Dec. 28, 2023).

[9] M.A. Nazarov, Orlova D.R. *Ėkologicheskoe Nalogooblozhenie: Rossijskij i Zarubezhnyj Opyt* [*Environmental Taxation: Russian and Foreign Experience*], Ėkonomika i upravlenie: nauchno-prakticheskij zhurnal, Mar. 2020, at 111, 116 (Russ.).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19185

in the Tax Code of the Russian Federation (RF Tax Code), as well as non-tax payments to be paid for any environmental damage caused and can therefore be defined as elements/components, or varieties, of environmental taxes. So, what exactly are the taxes, fees and non-tax payments levied by Russia's current environmental tax system? Before going into that, however, it must be noted that there is no legally established concept of environmental tax in Russian legislation, leaving a gap in the use of terminology.[10]

The fees and taxes that can be roughly classified as dedicated environmental taxes are established in the RF Tax Code[11] and constitute the payment payable by businesses and individuals for the environmental damage caused, to some extent as a compensation. These include: 1) mineral replacement tax, 2) tax on excess hydrocarbon profit, 3) water tax, 4) land use tax, 5) transportation tax, and 6) fees for using wildlife and aquatic biological resources. Three of the above taxes —water tax, mineral replacement tax, and tax on excess hydrocarbon profit—are viewed as likely to unbalance the environmental situation due to the scarcity of water and mineral resources. As prescribed by the Fiscal Code of the Russian Federation (RF FC), 100% of the revenues collected from the taxes on water and excess/surplus hydrocarbon profits go to the federal Russian Federation budget, and those from the mineral replacement tax (depending on the type of mineral produced/extracted) go to the federal budget and those of the Russian regions.[12]

Land use and transportation are known as sources of environmental damage, contributing to air pollution and surface soil degradation. Designed to compensate for this damage, the land and the transportation taxes, however, classify as non-earmarked taxes and go to budgets at the lower levels (100% of land tax revenues go to local (municipal) budgets and 100% of transport tax revenues go to regional budgets).The fees levied on the use of wildlife and aquatic biological resources can compensate for the damage caused as a result of hunting and fishing but only partially. These taxes are not earmarked and, as stated in the RF FC, are sent to the federal budget and the budgets of Russian regions.

It should be noted that the revenues from these taxes and fees are primarily for replenishing RF budgets/coffers, which are used to cover State spending commitments on an aggregate basis as provided for in Articles 84-86 of the RF FC since, pursuant to Article 35, budget expenditures cannot be linked to specific budget revenues. Every year a portion of these revenues is spent to fund environmental protection measures, because, by virtue of Articles 21, 84-86 of the RF FC, the "environmental protection" expenditure item is included

---

[10] Ju.N. Solnyshkova, *Razvitie Ėkologicheskogo Nalogooblozheniia v Rossijskoĭ Federacii* [*Development of Environmental Taxation in the Russian Federation*], Vestnik Saratovskogo gosudarstvennogo social'no-ėkonomicheskogo universiteta, Feb. 2017, at 87, 89 (Russ.).

[11] Nalogovyĭ Kodeks Rossiĭskoĭ Federatsii [NK RF] [Tax Code] art. 3340 (Russ.).

[12] Biudzhetnyĭ Kodeks Rossiĭskoĭ Federatsii [BK RF] [Budget Code] art. 3823 (Russ.).

at every level of budget spending in the RF budgetary system, encompassing "...environmental monitoring; waste collection and disposal and wastewater treatment; the protection of flora, fauna and habitats; applied environmental research; miscellaneous environmental issues...".[13] In summary, RF fiscal legislation does provide for using aggregate revenues for environmental protection expenditures, but the amount of funding available in the budgets at all levels does not appear to be enough to fund the transition to a green economy.

The non-tax payments that can be classified as comprising the current Russian environmental taxation include:

1) Environmental handling fee. An environmental handling fee is paid by goods importers and manufacturers for the disposal of products at the end of their useful life. One hundred percent of the environmental handling fee goes to the RF federal budget and must be spent, as stated in Article 24.5 of the Federal Law "Concerning Production and Consumption Waste",[14] in strict compliance with the RF FC. First enshrined in the Russian legislation on January 1, 2022, these revenues aimed at, *inter alia*, waste disposal following the procedure established in environmental standards. On January 1, 2024, the procedure for paying this fee was drastically reformed to improve the manufacturer accountability mechanisms, as well as to establish new rules for calculating the fee to be paid and the reporting procedure.

2) Vehicle recycling fee. A vehicle recycling fee was imposed for "... protecting human health and the environment from harmful effects of vehicle operation ...".[15] Article 24.1 of the Federal Law "Concerning Production and Consumption Waste" defines this fee as payable by manufacturers or buyers per every vehicle produced or imported into the Russian Federation in order to cover the cost of ensuring the environmentally safe disposal of vehicles in accordance with the corresponding standards. The vehicle recycling fee is an earmarked, one-time payment, and 100% of its revenues go to the RF federal budget.

3) Environmental impact fee. Negative environmental impact fee is levied in accordance with Article 16 of the Federal Law "Concerning Environmental Protection" on "... the emission of pollutants into atmospheric air by stationary sources; discharges of pollutants into water bodies; and the storage and disposal of production and consumption waste ...".[16] According to the RF FC, 60% of the revenues from the negative environmental impact fees are sent to

---

[13] Biudzhetnyĭ Kodeks Rossiĭskoĭ Federatsii [BK RF] [Budget Code] art. 3823 (Russ.).

[14] Federal'nyĭ Zakon RF ob Othodah Proizvodstva i Potrebleniia [Federal Law of the Russian Federation on Production and Consumption Waste], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 26, Item 3009.

[15] *Id.*

[16] Federal'nyĭ Zakon RF ob Ohrane Okruzhajushhej Sredy [Federal Law of the Russian Federation on Environmental Protection], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 2, Item 133.

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19185

local (municipality-level) budgets and 40% to regional budgets. Since January 1, 2022, the negative environmental impact fee enjoys the status of an earmarked contribution and is solely used for the purposes specified in Article 16.6 of the Federal Law "Concerning Environmental Protection." Previously, regional and municipal authorities had the authority to establish the size of environmental protection expenditures at their own discretion. As of January 1, 2024, the fee rate was indexed, while air pollution fines became stricter as part of the efforts to boost nature protection and cultivate a sustainable future for all (businesses, communities, governments).

In 2018, attempts were made to replace the negative environmental impact fee with a unique/special Ecotax and to add a new section, "Ecotax", to the RF Tax Code to that effect (Initiative dd. August 13, 2018, Project ID: 02/04/08-18/00083016).[17] The Ecotax was to be introduced on January 1, 2020, but had to be shelved due to inconsistencies and flaws in the draft bill. One of the main reasons the government sought to reclassify the negative environmental impact fee as a tax was to increase tax administration efficiency. In such a case, Ecotax revenues would be controlled by the Federal Tax Service —which has access to all the details of a businesses' core and non-core activities— and not by the Federal Oversight Service of Natural Resource Management (RosPrirodnadzor). Furthermore, Ecotax evasion would not only be subject to administrative sanctions, they would also be criminally prosecuted, thus bringing additional revenue to the budget and coming down hard on business. If implemented, the Ecotax would make it more difficult for businesses to declare and pay the fees/charges/rates since the procedure would require data reconciliation with the RosPrirodnadzor. Furthermore, the initiative did not include any assurance/guarantee to civil society that the Ecotax would actually allocate more funding for environmental protection measures that it did the negative environmental impact fee.

Another initiative (dated October 2, 2018, Project ID: 02/04/10-18/00084496)[18] proposed that the vehicle recycling fee be placed under the jurisdiction of the RF Tax Code by adding a section on "Vehicle Recycling Fee". This move was originally contemplated in "The 2020 Principal Guidelines for Fiscal and Customs Tariffs Policy and 2021-2022 Planning Period," a document designed to optimize existing non-tax payments of quasi-tax nature. It

---

[17] *O Vnesenii Izmenenič v Chasti Pervuiu i Vtoruiu Nalogovogo Kodeksa RF. Proekt Federal'nogo Zakona ot 13.08.2018 g* [*On Amendments to Parts One and Two of the Tax Code of the Russian Federation. Draft Federal Law Dated August 13, 2018*], https://minfin.gov.ru/ru/document/npa_proĭects/?id_4=3230-o_vnesenii_izmenenii_chasti_pervuyu_i_vtoruyu_nalogovogo_kodeksa_rossiiskoi_federatsii (last visited Dec. 27, 2023).

[18] *O Vnesenii Izmenenij v Chasti Pervuju i Vtoruju Nalogovogo Kodeksa RF. Proekt Federal'nogo Zakona ot 02.10.2018 g* [*On Amendments to Parts One and Two of the Tax Code of the Russian Federation. Draft Federal Law Dated October 2, 2018*], https://minfin.gov.ru/ru/document/npa_proĭects/?id_4=4317-o_vnesenii_izmenenii_v_nalogovyi_kodeks_rossiiskoi_federatsii_i_nekotorye_zakonodatelnye_akty_rossiiskoi_federatsii (last visited Dec. 28, 2023).

stressed that "... the intention of transferring the Vehicle Recycling Fee, currently classified as a non-tax payment, to the jurisdiction of the Tax Code has been dictated by the need for more stable rules for calculations and payment, as well as an attempt to give businesses further guarantees against possible changes in the makeup of the said payment ...".[19] Economically, including the vehicle recycling fee in the RF TC can benefit the State by generating extra funds exempt from legal liability (tax and criminal prosecution), while businesses, if found in breach of fiscal regulations, would face extra outlays or face difficulties claiming the amounts paid for vehicle disposal since the very mechanism of such disposal is yet to be determined. The procedure for the recycling fee refund is still too centralized, with 100% of its revenues going into the federal budget.

The next step was the adoption of a federal bill proposing a Climate Experiment, in the summer of 2019 with a timeline spanning from January 1, 2020 to December 31, 2026, envisioning the introduction of a cap and trade scheme in 12 urban areas and districts in Russia.[20] Twenty-nine more cities in 16 regions joined in the fall of 2023. The Climate Experiment seeks to increase the quality of life and environmental safety in major population centers, thus promoting the basic principles of a green economy.

In the fall of 2021, the Russian government approved the Low-Greenhouse Gas Emission Economy Strategy 2050,[21] which provides, among other things, for amendments to be carried out on the current tax policy and to promote green financing. At the same time in 2021, the World Bank released its Russia Economic Report, which recommended that the Russian Federation follow Europe's plan to establish a carbon tax in 2023 as a measure for a faster and more effective transition to a green economy. However, in the spring of 2022, after Western countries imposed sanctions on Russia in response to its special operation in Ukraine, the implementation of the said strategy was suspended, as was the issue of following the West's proposed carbon tax. Even then, on March 6,

---

19 *Osnovnye Napravleniia Bjudzhetnoĭ, Nalogovoĭ i Tamozhenno-Tarifnoĭ Politiki na 2020 God i na Planovyĭ Period 2021 i 2022 Godov* [*Main Directions of Budget, Tax And Customs Tariff Policies for 2020 and for the Planning Period Of 2021 and 2022*], http://www.consultant.ru/document/cons_doc_LAW_334706/d9771877fceb7291429718520be673066c38e351/ (last visited Dec. 15, 2023).

20 Federal'nyĭ Zakon RF o Provedenii Èksperimenta po Kvotirovaniju Vybrosov Zagriaznia-jushhih Veshhestv i Vnesenii Izmenenij v Otdel'nye Zakonodatel'nye Akty RF v Chasti Snizhenia Zagriazneniia Atmosfernogo Vozduha [Federal Law of the Russian Federation on Conducting an Experiment on Quotas for Emissions of Pollutants and Introducing Amendments to Certain Legislative Acts of the Russian Federation in Terms of Reducing Air Pollution], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2019, No. 30, Item 4096.

21 Rasporiazhenie Pravitel'stva RF ot 29 Oktiabria 2021 g. ob Utverzhdenii Strategii Social'no-Ekonomicheskogo Razvitiia Rossii s Nizkim Urovnem Vybrosov Parnikovyh Gazov do 2050 Goda № 3052-r. [Resolution Of The Government Of The Russian Federation Of October 29, 2021 On The Approval Of The Strategy For The Socio-Economic Development Of Russia With Low Greenhouse Gas Emissions Until 2050 № 3052-r], https://docs.cntd.ru/document/726639341 (last visited Dec. 20, 2023).

2022, an official resolution[22] was issued instructing a number of the Russian regions (with the Sakhalin Region as a pilot area) to conduct the Climate Experiment for capping greenhouse gas emissions. This experiment involves GHG inventory, emission and sequestration quotas, as well as mandatory carbon reporting, followed by the adoption of one more resolution,[23] in the summer of 2022, that establishes a charge for exceeding the greenhouse gas emissions quota as part of the Climate Experiment in the Sakhalin Region.

The Climate (*de facto* ecological) Experiment began on September 1, 2022, and is scheduled to end on December 31, 2028. Work is in process in the Sakhalin Region to introduce known carbon management practices and develop new ones. Among its many goals, the experiment aims to find a balance between sources and drops in emissions no later than December 31, 2025. In the fall of 2023, it was officially announced that on ending the experiment in Sakhalin, carbon regulation practices would be implemented in other Russian regions.

As mentioned earlier, the current greenhouse gas regulation system uses carbon tax or quota setting mechanisms. In the RF, GHG emission quotas have been legally established in Article 8 of the Federal Law "Concerning the Experiment to Limit Greenhouse Gas Emissions in Certain Regions of the Russian Federation",[24] and there is a charge for exceeding GHG emission quotas, as established in a separate RF Government Regulation.[25] Just like carbon tax, this one serves as a mean to urge businesses to reduce their levels of pollution and should be seen as the Russian version of the Western carbon tax —a kind of an alternative of quasi-tax for regulating emissions within a green economy framework. For now, there is no clear vision of what path the green tax process will

[22] Federal'nyĭ Zakon RF o Provedenii Ėksperimenta po Ogranicheniju Vybrosov Parnikovyh Gazov v Otdel'nyh Sub"ektah RF [Federal Law of the Russian Federation on Conducting an Experiment to Limit Greenhouse Gas Emissions in Certain Constituent Entities of the Russian Federation], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 10, Item 1391.

[23] Postanovlenie Pravitel'stva RF ot 18 Avgusta 2022 G. № 1441 o Stavke Platy Za Prevyshenie Kvoty Vybrosov Parnikovyh Gazov v Ramkah Provedeniia Ėksperimenta po Ogranicheniju Vybrosov Parnikovyh Gazov na Territorii Sahalinskoĭ Oblasti [Regulations of the Government of the Russian Federation of August 18, 2022 No. 1441 on the Rate of Payment for Exceeding the Quota of Greenhouse Gas Emissions as Part of an Experiment to Limit Greenhouse Gas Emissions in the Sakhalin Region], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 34, Item 5990.

[24] Federal'nyĭeZakon RF o Provedenii Ėksperimenta po Ogranicheniju Vybrosov Parnikovyh Gazov v Otdel'nyh Sub"ektah RF [Federal Law of the Russian Federation on Conducting an Experiment to Limit Greenhouse Gas Emissions in Certain Constituent Entities of the Russian Federation], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 10, Item 1391.

[25] Postanovlenie Pravitel'stva RF ot 18 Avgusta 2022 G. № 1441 o Stavke Platy Za Prevyshenie Kvoty Vybrosov Parnikovyh Gazov v Ramkah Provedeniia Ėksperimenta po Ogranicheniju Vybrosov Parnikovyh Gazov na Territorii Sahalinskoĭ Oblasti [Regulations of the Government of the Russian Federation of August 18, 2022 No. 1441 on the Rate of Payment for Exceeding the Quota of Greenhouse Gas Emissions as Part of an Experiment to Limit Greenhouse Gas Emissions in the Sakhalin Region], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 34, Item 5990.

take in Russia to come close to global standards, but there has certainly been some progress made towards green taxation in Russia. Despite external pressure and sanctions, the Russian Federation continues to move towards green economy standards, aiming to achieve sustainable economic growth and generate wealth with zero environmental impact.

For the time being, Russia's environmental taxation system operates by means of a set of fees and non-tax payments, and not a by dedicated eco-tax scheme. These fees have been established in the RF Tax Code as non-earmarked for environmental services and are levied for the purpose of replenishing the RF budgets while all current non-tax payments are classified as earmarked and intended to compensate the environmental damage caused. By introducing an alternative to carbon tax, i.e. the charge for exceeding the greenhouse gas emissions quota, Russia has taken another step towards environmental taxation. Further progress in this area should rely on reforming all existing payments and use of eco-taxes as an instrument to transition toward a national economy functioning within an environmental framework.

In the future, it seems expedient to move away from the non-earmarked taxation —which has in recent years been the case in Russia— to allotting all environmental tax revenues to environmental services. It may also be expedient to revive the Federal Environment Facility, which existed in the RF between 1991 and 2001, as well as to re-establish territorial environment facilities for funding local projects and a more effective handling of local environmental issues. Lastly, it seems advisable to channel revenues from some existing taxes (e.g. mineral replacement tax, water tax, transportation tax or land tax) to these federal and local environment facilities so that once they are in place, they can be directed solely to environmental issues.

On the upside, Russia's recent efforts towards green taxation have resulted in having the Environmental Handling Fee and Vehicle Recycling Fee re-classified as from January 1, 2022, into earmarked tax revenues. Another important outcome is Russia's legal establishment, at least on an experimental basis in 2022, of its greenhouse gas emission regulation system, following the 2019 experimental introduction of pollutant emission quotas. The legal frameworks for Russia's environmental taxation have undergone changes and should soon receive important updates expected as to their beneficial effect on the environment.

The process towards a more efficient legal framework for environmental taxation should be continued. Payers of environmental taxes and related non-tax fees should be given ample encouragement to fulfill their obligation to pay on time and in full —even more so when there is positive ecological evidence of the revenues being spent for environmental purposes. Introducing environmentally related taxes has been a significant development and can play an important part in Russia's tax reform.[26]

[26] L.S. Samodelko, M.V. Karp, *Znachenie i Principy Ėkologicheskogo Nalogooblozheniia* [*The Meaning and Principles of Environmental Taxation*], Vestnik universiteta, Nov. 2020, at 141, 147 (Russ.).

Mexico's environmental taxation system also has its advantages. In Mexico, tax issues are regulated not only by federal laws, but also by state and municipal authorities. Federal laws generally take precedence over state and municipal laws with the exception of federal carbon taxes to be paid by producers and importers of fuels. Mexico's environmental payments are predominantly regulated by states and municipalities and include: 1) transportation tax, 2) environmental sanitation tax, and 3) carbon (emission) tax.

Mexico levies an annual transportation tax on vehicles and motorcycles. Subject to their home registration, owners pay according to the term, procedure and amount payable to by each state independently. The tax itself may have different names —vehicle ownership tax, vehicle operation tax, or state license plate tax, etc.— but it is still essentially a transportation tax. For example, residents of the states of Chihuahua, Sonora and Baja California Sur are exempt from transportation tax, while those in Tabasco only pay it for vehicles and motorcycles that exceed the established threshold. In Sinaloa and Quintana Roo, vehicle owners may apply for subsidies funded by their state government.

Another element of Mexico's environmental taxation system is the environmental sanitation tax. Levied on tourists arriving in Mexico, its revenues are directed at supporting the country's tourist industry, beaches and related facilities. The right to introduce and regulate the amount of environmental sanitation taxes lies under the jurisdiction of the municipalities. This tax is levied, for example, in the municipalities of Tulum, Benito Juárez, Puerto Morelos, and Solidaridad. Latin America, and Mexico in particular, are working towards achieving their carbon agendas. Hence, carbon markets are shifting from voluntary to mandatory as Latin America introduces mechanisms like carbon tax and emissions trading systems (ETS), which have either been established or are due to appear in Latin America's four largest economies —Brazil, Mexico, Colombia, and Chile.

Mexico is the only country in Latin America with a well-established ETS. Piloted in 2020, the Mexican ETS covers direct carbon emissions from stationary sources in the energy and manufacturing sectors and entered its operational phase in 2023. The government is introducing carbon pricing, and a federal carbon tax introduced in 2014 began to be levied on fuel producers and importers. In fact, this carbon tax sets payment rates for carbon emissions in addition to those attributed to natural gas. Moreover, local carbon schemes (projects) are covered by individual Mexican states. For example, there are carbon emissions regulation systems in the states of Zacatecas (since 2017), Baja California (since 2020), and Tamaulipas (since 2021), among others.

Thus, even though the Mexican environmental taxation system can be described as less diverse than that of Russia, it offers a good example of an environmental tax system that has been in place since 2014. Meanwhile the Russian environmental taxation system currently operates under a set of taxes, fees and non-tax payments, none of which are *per se* a dedicated environmental protection directly. A feasibility analysis of Mexico's environmental taxation

mechanisms like carbon tax and emissions trading systems (ETS) has also been undertaken for their use in Russia.

Summing up, there is an urgent need in Russia to promote environmental taxation in a way that allows balancing the interests of all stakeholders (government, communities, businesses). In modern conditions of socio-economic development, the priority in balancing the economic interests of businesses, social agendas and institutional reforms should be given to environmental concerns. The environmental policy should be comprehensive and provide for institutions, legislative frameworks and measures ensuring that growth-oriented businesses and the private sector operate in way that is environmentally sustainable. The primary purpose of green taxation lies in fostering innovation aligned with green economy standards and not in reflecting the State's intent to apply punitive measures on businesses with limited capacity for greening by prosecuting them either administratively or criminally. As a result of green taxation there has been a noticeable change in the emissions of Russia's largest oil and gas producers —Rosneft, LUKOIL, Gazprom Neft, NOVATEK, Surgutneftegaz, Tatneft, to name a few. At this stage, Russia's system of environmental taxation should aim at a complete overhaul of its environmental economy. The nation's efforts to prevent and reduce environmental damage would be much more effective by implementing environmentally conscious taxation. After all, the economy and human health depend directly on the conditions of the environment.

References

Biudzhetnyĭ Kodeks Rossiĭskoĭ Federatsii [BK RF] [Budget Code] art. 3823 (Russ.).

E.S. Vylkova, A.L. Tarasevich, *Ėkologicheskoe Nalogooblozhenie kak Instrument Ustoĭchivoĭ Nalogovoĭ Politiki* [*Environmental Taxation as a Tool for Sustainable Tax Policy*], Izvestiia Sankt-Peterburgskogo gosudarstvennogo ėkonomicheskogo universiteta, Jan. 2020, at 31, 39 (Russ.).

EU Environment Policy, http://www.library.fa.ru/exhib.asp?id=315 (last visited Ian. 15, 2024).

Federal'nyĭ Zakon RF ob Ohrane Okruzhajushhej Sredy [Federal Law of the Russian Federation on Environmental Protection], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 2, Item 133.

Federal'nyĭ Zakon RF ob Othodah Proizvodstva i Potrebleniia [Federal Law of the Russian Federation on Production and Consumption Waste], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 26, Item 3009.

Federal'nyĭ Zakon RF o Provedenii Ėksperimenta po Kvotirovaniju Vybrosov Zagriazniajushhih Veshhestv i Vnesenii Izmenenij v Otdel'nye Zakonodatel'nye Akty RF v Chasti Snizheniia Zagriazneniia Atmosfernogo

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19185

Vozduha [Federal Law of the Russian Federation on Conducting an Experiment on Quotas for Emissions of Pollutants and Introducing Amendments to Certain Legislative Acts of the Russian Federation in Terms of Reducing Air Pollution], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2019, No. 30, Item 4096.

Federal'nyĭ Zakon RF o Provedenii Ėksperimenta po Ogranicheniju Vybrosov Parnikovyh Gazov v Otdel'nyh Sub"ektah RF [Federal Law of the Russian Federation on Conducting an Experiment to Limit Greenhouse Gas Emissions in Certain Constituent Entities of the Russian Federation], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 10, Item 1391.

Ju.N. Solnyshkova, *Razvitie Ėkologicheskogo Nalogooblozheniia v Rossijskoĭ Federacii* [*Development of Environmental Taxation in the Russian Federation*], Vestnik Saratovskogo gosudarstvennogo social'no-ėkonomicheskogo universiteta, Feb. 2017, at 87, 89 (Russ.).

L.S. Samodelko, M.V. Karp, *Znachenie i Principy Ėkologicheskogo Nalogooblozheniia* [*The Meaning and Principles of Environmental Taxation*], Vestnik universiteta, Nov. 2020, at 141, 147 (Russ.).

M.A. Egorova, *Osnovnye Napravleniia Pravovogo Regulirovaniia «Zelenogo» Nalogooblozheniia Dlia Celej Predprinimatel'skoĭ Deiatel'nosti: Opyt Zarubezhnyh Stran* [*Main Directions of Legal Regulation of "Green" Taxation for Business Purposes: Experience of Foreign Countries*], Aktual'nye problemy rossijskogo prava, Jul. 2022, at 71, 79 (Russ.).

M.A. Nazarov, Orlova D.R. *Ėkologicheskoe Nalogooblozhenie: Rossijskiĭ i Zarubezhnyj Opyt* [*Foreign Experience of Environmental Taxation on the Path to a "Green" Economy*], Vestnik Rossijskogo ėkonomicheskogo universiteta im. G. V. Plehanova, Jun. 2012, at 41, 47 (Russ.).

M.A. Nazarov, Orlova D.R. *Ėkologicheskoe Nalogooblozhenie: Rossijskij i Zarubezhnyj Opyt* [*Environmental Taxation: Russian and Foreign Experience*], Ėkonomika i upravlenie: nauchno-prakticheskij zhurnal, Mar. 2020, at 111, 116 (Russ.).

Nalogovyĭ Kodeks Rossiĭskoĭ Federatsii [NK RF] [Tax Code] art. 3340 (Russ.).

Nobelevskaia Premiia po Ėkonomike 2018 Goda [*Nobel Prize in Economics 2018*], http://www.library.fa.ru/exhib.asp?id=315 (last visited Dec. 28, 2023).

Organization for Economic Co-operation and Development, Environmental Taxation. A Guide for Policy Makers (2011), available at: https://www.oecd.org/env/tools-evaluation/48164926.pdf

Osnovnye Napravleniia Bjudzhetnoĭ, Nalogovoĭ i Tamozhenno-Tarifnoĭ Politiki na 2020 God i na Planovyĭ Period 2021 i 2022 Godov [*Main Directions of Budget, Tax And Customs Tariff Policies for 2020 and for the Planning Period Of 2021 and 2022*], http://www.consultant.ru/document/cons_doc_LAW_334706/d9771877fceb7291429718520be673066c38e351/ (last visited Dec. 15, 2023).

O Vnesenii Izmenenĭ v Chasti Pervuiu i Vtoruiu Nalogovogo Kodeksa RF. Proekt Federal'nogo Zakona ot 13.08.2018 g [*On Amendments to Parts One and Two of the Tax Code of the Russian Federation. Draft Federal Law Dated August 13, 2018*], https://min-

fin.gov.ru/ru/document/npa_proĭects/?id_4=3230-o_vnesenii_izmenenii_chasti_pervuyu_i_vtoruyu_nalogovogo_kodeksa_rossiiskoi_federatsii (last visited Dec. 27, 2023).

O Vnesenii Izmenenij v Chasti Pervuju i Vtoruju Nalogovogo Kodeksa RF. Proekt Federal'nogo Zakona ot 02.10.2018 g [*On Amendments to Parts One and Two of the Tax Code of the Russian Federation. Draft Federal Law Dated October 2, 2018*], https://minfin.gov.ru/ru/document/npa_proĭects/?id_4=4317-o_vnesenii_izmenenii_v_nalogovyi_kodeks_rossiiskoi_federatsii_i_nekotorye_zakonodatelnye_akty_rossiiskoi_federatsii (last visited Dec. 28, 2023).

Postanovlenie Pravitel'stva RF ot 18 Avgusta 2022 G. № 1441 o Stavke Platy Za Prevyshenie Kvoty Vybrosov Parnikovyh Gazov v Ramkah Provedeniia Ėksperimenta po Ogranicheniju Vybrosov Parnikovyh Gazov na Territorii Sahalinskoĭ Oblasti [Regulations of the Government of the Russian Federation of August 18, 2022 No. 1441 on the Rate of Payment for Exceeding the Quota of Greenhouse Gas Emissions as Part of an Experiment to Limit Greenhouse Gas Emissions in the Sakhalin Region], Sobranie Zakonodatel'stva Rossiĭskoĭ Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2022, No. 34, Item 5990.

Rasporiazhenie Pravitel'stva RF ot 29 Oktiabria 2021 g. ob Utverzhdenii Strategii Social'no-Ėkonomicheskogo Razvitiia Rossii s Nizkim Urovnem Vybrosov Parnikovyh Gazov do 2050 Goda № 3052-r. [Resolution Of The Government Of The Russian Federation Of October 29, 2021 On The Approval Of The Strategy For The Socio-Economic Development Of Russia With Low Greenhouse Gas Emissions Until 2050 № 3052-r], https://docs.cntd.ru/document/726639341 (last visited Dec. 20, 2023).

R. Vecseli, M. Begak, *Ėkologicheskoe Nalogooblozhenie: Koncepciia Dlia Rossii* [*Environmental Taxation: a Concept for Russia*], Nalogovaia politika i praktika, Dec. 2011, at 40, 43 (Russ.).

V.V. Gromov, *Ėkologicheskie Nalogi: Klassicheskoe I Sovremennoe Ponimanie Sushhnosti* [*Environmental taxes: classical and modern understanding of the essence*], Ėkonomika, Statistika i Informatika. Vestnik Uchebno-Metodicheskogo Obedineniia, Apr. 2014, at 41, 44 (Russ.).

ISSN (versión electrónica): 1870-0578
DOI: https://doi.org/10.22201/iij.24485306e.2024.1.19185