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ESTUDIES

PRESENTATION

Presentation

PhD. Evelyn Beatriz Farfán Mata[1]

This is a new issue of Revista Derecho, an academic space for the dissemination of thoughts of scholars from the School of Law and Social Sciences and those of the professionals from Political Science with current issues contributing to the scientific debate in the national legal field.

Revista Derecho of the School of Law and Social Sciences, in line with its mission as an institution of higher education training professionals with great critical and proactive skills to consolidate the constitutional state, peace and democracy in the Salvadoran society and to contribute to the solution of the problems and the scientific development of El Salvador, is presenting here four academic articles and a legal study about national legal issues.

The first section contains the following articles: "Historical approach to the constitutional regulation of political rights and its evolution in political participation in El Salvador" by William Ernesto Santamaría Alvarenga; "The plural municipal councils in El Salvador, a democratic debt or an obstacle to governance?" by Odaly Lissette Sánchez Arias; "The influence of the decisions of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights in the criminal law of States parties" by Jaime Edwin Martínez

1 Director of the School of Legal Sciences of the Faculty of Jurisprudence and Social Sciences from the University of El Salvador, Period 2011-2015. Professor of the School of Law and Social Sciences since 1997 to date. Lawyer and notary of the Republic. Degree in Legal Sciences from the University of El Salvador, 1993-1999. Master's Degree in Public and Private Pluralism Law from the Autonomous University of Barcelona, 2002-2004. PhD in Law from the Autonomous University of Barcelona, 2002-2006.

Ventura; "Innovations in Competence on the Civil and Commercial Procedure Code" by José Reinerio Carranza; and finally a legal study is presented: "A brief reference to the Principialist Conception of Law and the Life Cycle of Obligations: Initial Notes of Prescription and Expiry in Family Matters" by Cristian Eduardo Palacios Martínez.

In the first article, Santamaría Alvarenga provides a historical, legal and political analysis of the evolution of political rights in the Constitutions that have governed El Salvador, beginning with an outline about the per-independence period to the current situation of political rights and the challenges of the Salvadoran State to establish the legal and factual conditions that will enable all citizens to freely exercise their right to vote and their political rights in general.

In this first article the author emphasizes the normative evolution of the term "citizen", moving from census-based system of voting to universal suffrage, likewise the constant changes that the regulation of the way of electing the President of the Republic has undergone is put forward, its requirements and inabilities, as well as the main socio-political events that unleashed the phenomenon of the diversity of Constitutions that have governed in El Salvador. It ends up with an analysis of the citizen sectors who without legal obstacle are limited in the exercise of active voting like the Salvadoran people living abroad, the agents of the National Civil Police and the students of the National Academy of Public Security, and the impact on political participation, the electoral system and therefore on the Salvadoran political system.

Meanwhile, Odaly Lissette Sánchez Arias considers a historical approach to the emergence of the city councils, a comparative analysis of some countries that have incorporated the figure of the plural municipal councils and with some experiences gained on their operation. Moreover Sánchez Arias refers to the incorporation of this figure in the Salvadoran legislation and the

possible challenges in their implementation, based on the fact that although its regulation dates to 2013, their implementation is projected until the municipal elections of 2015.

In this article the author puts forwards the possible scenarios that could be presented in the implementation of the plural municipal councils in El Salvador; on the one hand, they could constitute a democratic advance as they lead to a greater representation and pluralistic political participation within local government, fitting into the first panorama proposed by the title of "The Plural Municipal Councils" which is a democratic debt fulfilled to Salvadoran society.

On the other hand, regarding the implications for governance, the author brings forward two contrasting scenarios. Firstly, the implementation of The Plural Municipal Councils could create an obstacle if the lack of maturity of the representatives of the political parties takes precedence over the particular interests before the general welfare of the community. This could adopt attitudes of unjustified opposition to local projects and lead to delays in taking decisions that will harm local development. Secondly, the multiparty composition of local governments could lead to an advance in democratic governance starting with the possibility of a greater citizen participation and understanding, and an honest debate among political forces; these possibilities would benefit the country's vision agreements with long term projects for a wider transparency based on effective accountability under an internal control scheme.

The third article presents the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights influence on the decisions concerning the criminal law of the States parties. The author develops his analysis based on the fact that in the period from 1995 to December 2012 the State of El Salvador recognized the contentious jurisdiction of the Inter-American Court of Human Rights which have had four convictions, two concerning the forced disappearances of boys and girls during the armed conflict, one known as the Case of the Serrano Cruz Sisters vs. El Salvador and the other known

as the Case Contreras and Others vs. El Salvador. A third sentence known as Caso García Prieto and Others vs. El Salvador was due to events in the post war period. It included a summary execution and violation of the right to the fair trial, to the judicial protection and to the personal integrity. The fourth one and final sentence on October 25th 2012 was due to the successive massacres committed by an elite army squad between December 11th and 13th 1981, in several locations in the northern Department of Morazán. This crime is known as Massacres of El Mozote and Surrounding Places vs. El Salvador. In this last sentence, the author clarifies that the case was not analyzed because it is the most recent one and its enforcement has not yet reached its conclusions.

Martínez Ventura, who has some experience in the area, develops an analysis regarding the first three condemnatory resolutions against the Salvadoran State by the Inter-American Court of Human Rights. In order to measure the internal level of domestic compliance, this study focused on a perspective of the influence of the resolutions of the Inter- American Court of Human Rights on the criminal and criminal procedural law of El Salvador. So far, however, the operative part orders El Salvador to continue and resume the corresponding criminal proceedings and to overcome the limitations and obstacles of fact and law that prevent the investigation so that they may be carried out effectively by El Salvador.

In the fourth article called "Innovations in Competence on the Civil and Commercial Procedure Code" the author illustrates a reference to the historical evolution of the forms of peaceful resolution of conflicts between members of society. He subsequently develops the competence at the theoretical level to separate it from the jurisdiction and to deepen into the criteria of competence regulated by the Civil and Commercial Procedure Code.

Carranza develops the competences attributed to the plenary of the Supreme Court of Justice , to the Civil Chamber, to the Second Instance Chambers, to the Trial Courts, to the Minor Offenses Trial Courts and finally

to the Magistrates' Courts. Then, the author develops a detailed analysis of the criteria of competence in relation to the territory, the functionality, the degree, the subject and the amount set up in the Civil and Commercial Procedural Code.

In order to provide an integral perspective of the topic, the author develops the unavailability of the competence, the conversion and creation of the civil and commercial courts, jurisdiction in the enforcement or the recognition process of foreign judgments and judicial decisions, the competence in enforcement, to end up with other jurisdictional cases such as preliminary inquiries, proof assurance, advance of evidence and precautionary measures, concluding with final reflections.

In the section on legal Studies, the work of Cristian Eduardo Palacios Martínez is presented; it is called: "A brief reference to the Principialist Conception of Law and the Life Cycle of Obligations: Initial Notes of Prescription and Expiry in Family Matters". This document brings up an excellent contribution as a study text for those who intend to start their studies in the legal sciences, since it introduces the reader in the study of issues of great importance such as law and obligations, issues addressed from the perspective of various classical and current authors, which allow the reader to have a general but very complete overview of the various developed issues.

ACADEMIC ARTICLES

Historical Approach to the Constitutional Regulation of Political Rights and its Evolution in the Political Participation in El Salvador

Lic. William Ernesto Santamaría Alvarenga

Aproximación Histórica a la Regulación Constitucional de los Derechos Políticos y su Evolución en la Participación Política en El Salvador

Lic. William Ernesto Santamaría Alvarenga

Resumen

El presente artículo presenta brevemente el proceso histórico, jurídico y político que se ha producido en el Estado salvadoreño con respecto a los requisitos y circunstancias que han motivado en las Constituciones de la República la exigibilidad de determinadas condiciones a fin de establecer si un habitante ostenta la calidad de ciudadano, y si, por tanto, está habilitado por el Sistema Jurídico para ejercer los Derechos Políticos, siendo el más representativo de ellos el derecho al sufragio activo, aunque paulatinamente se extiende al sufragio pasivo. Se analizan las modificaciones progresistas que el constituyente plasmó en la Carta Magna, de tal manera que es posible apreciar los diversos pasos que van desde el reconocimiento del voto censitario, acorde a las legislaciones europeas decimonónicas que habían cambiado su forma de gobierno de Monarquía Absoluta a Repúblicas, hasta las últimas reformas, decretadas por la Asamblea Legislativa, e interpretaciones, por parte de la Sala de lo Constitucional de la Corte Suprema de Justicia, que permitieron incluir en el ámbito de participación política para elegir Presidente y Vicepresidente de la República a los ciudadanos salvadoreños que residen en el exterior, así como la aprobación de reformas transitorias al Código Electoral que permitieron votar en las recién pasadas elecciones a los agentes de la Policía Nacional Civil y estudiantes de la Academia Nacional de Seguridad Pública, los cuales históricamente estuvieron imposibilitados para votar en toda elección. Es por tanto, la síntesis de un proceso de mayor inclusión en el Sistema Electoral salvadoreño.

PALABRAS CLAVE: CIUDADANÍA – DERECHOS POLÍTICOS – DEMOCRACIA REPRESENTATIVA – ELECCIONES – SISTEMA CONSTITUCIONAL – SISTEMA ELECTORAL – SUFRAGIO ACTIVO – SUFRAGIO PASIVO.

Historical Approach to the Constitutional Regulation of Political Rights and its Evolution in the Political Participation in El Salvador

Lic. William Ernesto Santamaría Alvarenga

Abstract

This article presents the historical briefly, legal and political process that has occurred in the Salvadoran State regarding the requirements and circumstances that motivated the Constitutions of the Republic enforceability of certain conditions in order to establish whether a resident holds the condition of citizen, and if, therefore, is enabled by the Legal System to exert Political Rights, specially the most representative one: right to active suffrage, but it gradually extends to passive suffrage. Progressive changes that the constituent embodied in the Magna Carta, so that we can appreciate several steps ranging from the recognition of census vote, according to the nineteenth-century European legislation which had changed its form of government from Absolute Monarchy to Republics, until the latest reforms enacted by the Legislature Assembly, and interpretations by the Constitutional Chamber of the Supreme Court of Justice, which allowed the inclusion of the scope of political participation for choosing President and Vice President of the Salvadoran citizens living abroad, as well as approval of transitional Electoral Code reforms that allowed to vote in the recent elections to the agents of the National Civil Police and students of the National Academy of Public Safety, which historically were unable to vote in every election. It is therefore the synthesis of a process of greater inclusion in the Salvadoran Electoral System.

KEYWORDS: CITIZENSHIP – POLITICAL RIGHTS – REPRESENTATIVE DEMOCRACY – ELECTIONS – CONSTITUTIONAL SYSTEM – ELECTORAL SYSTEM – ACTIVE SUFFRAGE – PASSIVE SUFFRAGE.

Historical Approach to the Constitutional Regulation of Political Rights and its Evolution in the Political Participation in El Salvador

Lic. William Ernesto Santamaría Alvarenga[1]

"For this city is not ruled by one man, but is free. The people rule in succession year by year, allowing no preference to wealth, but the poor man shares equally with the rich." [TN 1]
(Euripides, The Suppliants. 4th century B.C.)

Introduction

The purpose of this article is to present, in memory of PhD José Rodolfo Castro Orellana's[2] and in tribute to the thirty-first anniversary of the Constitution of the Republic of El Salvador, a study of the historical, legal and political development of the several amendments that the Constitutions of El Salvador have shown with regard to the regulation of political rights, in order to demonstrate the gradual process of inclusion of social sectors in the terms

Translation note:
1 This quote was taken from The Internet Classics Archive |The Suppliants by Euripides * Translated by E. P. Coleridge |Retrieved from http://classics.mit.edu/Euripides/suppliants.html (Athens).

1 Lawyer of the Republic with a degree in Political Sciences of the School of Law and Social Sciences from the University of El Salvador, graduated from the first Higher Diploma in Electoral -Law and Salvadoran Political System by the University of El Salvador in agreement with the Supreme Electoral Tribunal. He is also a former professor's assistant at the Department of Political and Social Sciences, School of Law and Social Sciences, University of El Salvador, in the course Introduction to Political Science and State Theory.

2 PhD. José Rodolfo Castro Orellana (August 1, 1944 – March 25, 2014) was a lawyer, sociologist, political scientist and professor at the School of Law and Social Sciences from the University of El Salvador in the courses Introduction to Political Science and State Theory of which he was coordinator until 2013. He has an extensive knowledge of methodology in social research, legal sociology and study of law. He was also a methodological advisor for thesis defense and an author of various research papers in the area of political science and history of El Salvador.

"citizen"[3] and "electorate". In addition, this article features the most recent interpretations of the Constitutions that include the Salvadoran people who lived abroad and the potential participation of the agents of National Civil Police and the students of the National Public Security Academy in the exercise of suffrage and its impact on political participation, the electoral system and therefore on the Salvadoran political system.

It would seem that analyzing the importance of the Constitution as a fundamental normative body and a supreme legal and political order of the current States is an exhausted subject since one thing is obvious to the community at large: the existence of fundamental rights and their priority recognition in the Constitution of the Republic. Although it should be noted that it was not always in that way especially with regard to political rights. These are initially reflected in the requirements for a person to have the status of being a citizen as the ability to vote. This recognition of the fundamental rights, including suffrage, has been produced in the Western world and particularly in El Salvador as a long process not without political and social conflicts, which have currently led to constitutional regulations much more related to the insertion of sectors that were previously excluded from the possibility of influencing a political impact on the affairs of the State either in a total or partial way. The conflict, armed or not, for the inclusion of fundamental rights and especially the political rights and their evolution, is a historical phenomenon that is not different to our national reality, and we need to identify the ways these rights have been regulated by the most important political, legal, and social instrument in the last few centuries: the National Constitutions of El Salvador.

3 "Based on logic it should be also *Polites* instead of *citizen*, because it is not exactly the same for the Greeks as it is for us. *Polites*, in fact, is the one who participates in the affairs of the polis and of the courts and people's assemblies. It identifies with the "political man", that is the one who permanently retains the responsibilities of the government. Consequently it expresses much more than what the simple word *"citizen"* means for us. ARISTOTELES. *Politeia (La Política).* Prologue, direct version of the Greek original and notes by Manuel Briceño Jáuregui S. J. Preliminary study and introductions by Ignacio Restrepo Abondano: Publications of the Institute Caro and Cuervo, nº 84. Bogotá, Colombia. 1989. p. 44

I. The nineteenth-century constitutionalism

1.1 The rise of nineteenth-century constitutionalism

Modern states arise on the basis of ensuring their stability through absolute monarchies[4] where the monarch was the only one to rule the state, create and enforce laws, and judge according to their own judgment. It is until the 18th-century, according to Duverger,[5] that two kinds of documents appear in the United States of America and the revolutionary France that reflected the basic principles of a Democratic State: the declarations of rights (the declaration of independence of the United States and the declaration of the rights of man and of the citizen in France) and the constitutions themselves. The former specified the natural rights of man which the State must respect, the latter regulated the organization of public authorities and the fundamental structure of the State. Over time, both kinds of documents would merge resulting approximately in the constitutions as they are known today.

In Europe, the French Revolution, despite its criticism and disagreements, was the event that made possible the origin of the constitutional states. These states had the purpose of delimiting the political power that the monarchs had held during the Middle Ages and early modern times through

4 "The absolute State, theorized by Hobbes and Bodino, rested on the omnipotence of the royal sovereign without relevant juridical restraints, since the limitations of divine and natural right and even of the fundamental laws of the kingdom were symbolic." SOLANO RAMIREZ, M. A. *"State and Constitution"*: Publications Section of the Supreme Court of Justice. First Edition. San Salvador, El Salvador.1998. p. 35.

5 DUVERGER, M. *"Political Institutions and Constitutional Law"*: Ariel Editorial. Sixth Edition. España 1980. p. 28.

their democrat governments[6] based on the right of universal suffrage as opposed to their divine right to govern.

In spite of the conflicts originated from the defense of the ruling rights of monarchs, the Catholic Church and the broad conservative sectors caused the process of replacing the absolutist monarchy model by the democratic model to be limited in the beginning. When this demarcation was extended from France to the rest of Europe, it was reflected in the institutionalization of the division of powers and the guarantee of subjective public rights, especially freedom (expression, assembly, association, etc.) and equality (before the law and no hereditary duties or privileges were recognized); these rights enshrined in the constitutions were intended to be guaranteed to the inhabitants of the new rules of law, in which power is concentrated in legislation, especially in written form, and not in the arbitrary and sole will of the monarchs.

1.2 The fall of the Spanish *ancien regime* and the Constitution of Cadiz

In the early years of the 19th century, the Kingdom of Spain was convulsed by the so-called crisis of the *ancien regime*; such term was adopted for the first time in literature by Alexis de Tocqueville.[7] This ancient regime was identified primarily by the absolutist monarchy system that reigned throughout Europe and which was progressively replaced by a liberal model in the style of the French Republic. After 1789, the monarchical and aristocratic system

6 Democracy has two different moments and visions, the ancient one and the modern one. Descriptively the ancients exercised it as a direct democracy, while the modern ones exercised it as a representative democracy, that is to say that for the ancients democracy had symbols such as the square, the assembly: "The power of *Demos*", While for the modern, democracy has elections as its symbols, the very exercise of the vote: "The power of the representatives of the *Demos*" BOBBIO, N. *"Teoría General de la Política"*: Editorial Trotta. First Edition in Spanish, translated by Antonio del Cabo y Gerardo Pisarello. España. 2003, p. 402 y 403.

7 TOCQUEVILLE, A. *The old regime and the revolution:* Economic Culture Fund. Third Edition. México 2006.

appeared old, outdated and precarious, so according to Duverger,[8] during the following fifty years in Europe a relentless fight between the old monarchical or aristocratic regime and the new democratic regime was developed.

In Spain this process of replacement to the *new regime* was immersed in various internal and external conflicts that triggered the popular uprising called *the Aranjuez mutiny* in March, 1808. This was caused by the pressure from the noble class because of the dissatisfaction of the French Army occupation in charge of the Emperor Napoleon Bonaparte on the Spanish land due to the Treaty of Fontainebleau.[9] The Popular pressure reached such a point that King Charles IV decided to abdicate in favor of his son, King Ferdinand VII, whose reign lasted only from March to May of the same year, given the influence and power of Emperor Bonaparte. On May 5th 1808 Ferdinand VII, in Bayonne France, abdicated his rights, and a month later the Emperor appointed his elder brother, Joseph Napoleon I[10] King of Spain. The new Monarch, once in power in Spain, promulgated on July 7th 1808 the Bayonne Statute, which was intended to be a constitution for Spain, but given the fact that it was granted by a foreign state and without popular will, it was not considered a constitution but an extension of the power of the Emperor Napoleon in the Kingdom of Spain.

These events led to an independence struggle on the part of Fernando VII, and in the middle of this war, the constituent assembly known as the Courts of Cadiz (Andalucia) emerges in Spain in 1810 in order to govern Spain in the

8 DUVERGER, M. *Political Institutions and Constitutional Law:* Ariel Editorial. Sixth Edition. España 1980. p. 49.

9 Through the Treaty of Fontainebleau of 1807, Spain and France made an alliance to invade Portugal which had allied itself with England, the main enemy of Emperor Napoleon Bonaparte. However, the French army took several localities not provided for in the Treaty as it passed through Spain, disturbing the noble class by triggering the Aranjuez mutiny demanding the abdication of King Charles IV and the resignation of Spain's Prime Minister Manuel Godoy. QUEIPO DE LLANO, J. M. Historia del levantamiento, guerra y revolución de España: Tomo Imprenta de Casimir. París, Francia.1838.

10 According to Javier Peñalosa, at this time the French general Leopoldo Hugo travelled to Spain and moved with his wife and children, among them the future writer Victor Hugo. In Madrid he would live and study until the French defeat in Spain became evident, then he returned to France with economic problems. HUGO, V. *The Miserables:* Porrúa Editorial. Preliminary note of Javier Peñalosa. México, 2011.

absence of the legitimate King since they did not recognize the authority of Joseph Napoleon I.

Therefore, after long debates about the best form of government, on March 19th 1812 the "Constitution of Cadiz" was promulgated, in which it was proclaimed that power is exercised by the nation represented in the courts. [11]This is considered the First Constitution of Spain whose validity also applied for the American continent territories under the Spanish rule, among them, the Intendancy of San Salvador.

However, in 1813 Ferdinand VII triumphed over the French army and returned to the throne of Spain. Contrary to what the Liberals expected of him, on May 4th, 1814 he repealed the Constitution of Cadiz to return to absolutism, persecuting the Liberals and suspending all constitutional rights, including citizenship and its rights.[12] This caused political instability that was ensued for years, until 1820, when the Spanish general and liberal politician Rafael de Riego addressed his army in order to express that they all were living under an arbitrary and absolute power, and that since King Ferdinand VII returned to the throne, not only had he repealed the 1812 Constitution but he also had violated the rights of the nation, provoking an anti-absolutist uprising. On March 8th , King Ferdinand was sworn into the Constitution of 1812, and two days later, this manifesto was published with the king's phrase: *"Let us march frankly, and I the first, by the constitutional path"*. Thus the so-called Liberal or Constitutional Triennium began, in which the Constitution of Cadiz started its second period of validity as a constitutional monarchy.[13]

11 Art. 3 of the Constitution of Cadiz: "Sovereignty resides essentially in the Nation, and therefore the right to establish its fundamental laws belongs to the latter exclusively."

12 Art. 23. "Only Spanish citizens may get municipal jobs, and choose for them in the cases specified by law."

13 However, the Constitution of Cadiz lost validity once more on October 1st 1823 when Fernando VII again repealed it in favor of absolutism during the "ominous decade" in which the monarchic absolutism resurfaced, until the civil war over hereditary disputes following the death of Ferdinand VII. These events did not affect Central America because independence had taken place.

With the second validity of the Constitution of Cadiz, in terms of the Salvadoran jurist and researcher PhD Napoleón Rodríguez Ruíz, Sr.,[14] the political propaganda for independence was allowed to spread legally thanks to the freedom of the press granted by the body of law. Hence two pro-independence newspapers appeared in Guatemala: *"El Editor Constitucional"*, on July 24th 1820, led by PhD Pedro Molina, with a radical current and "*El Amigo de la Patria"* headed by José Cecilio del Valle, with a more moderate ideological tendency.[15] These texts helped spread the ideas of independence throughout the Central American region.

The Constitution of Cadiz governed Central America until its detachment from the Spanish crown. This took place in El Salvador on September 15th 1821[16] and after a series of conflicts with Emperor Iturbide in Mexico,[17] the nascent Central American Federation was annexed with its own Constitution in 1824. This new constitution reflected not only the declaration of "freedom and independence of Spain and Mexico and of any other power or foreign government" (Art. 1 Constitution of 1824), but it also reflected liberal principles along with individual rights and the legal values based on human

14 RODRÍGUEZ RUÍZ, N. *History of Salvadoran legal institutions:* Publications section of the Supreme Court of Justice. San Salvador, El Salvador, 2006. p. 123.

15 Those who supported Pedro Molina called the followers of Cecilio Del Valle "Los Bacos" in reference to them being drunk, while the supporters of Del Valle called those who followed Molina "Los Cacos" in reference to them being thieves. These groups are considered the seeds of the first factions in Central America, from which the first political parties will gradually emerge. RODRÍGUEZ RUÍZ, N., *op. cit.* p. 123.

16 For a further study of political events in El Salvador between 1821 and 1822, Cfr. article CASTRO, J. R. *"Notes about actors, ideas and ideologies in the struggles for emancipation of El Salvador"* which is published in seven editions of the journal *Revista Ciencia Política* from the School of Law and Social Sciences of the University of El Salvador in its digital format. June 2010. Año 2. No. 3 a December 2012, year 4 No. 14 en http://www.jurisprudencia.ues.edu.sv/publicaciones.html revised on October 16th 2013.

17 On October 1st 1822 the Mexican emperor Iturbide ordered his army to attack on the province of San Salvador if it did not immediately join Mexico, on the basis of an entire submission to the Imperial Government, and without any conditions that could contradict it. (…) On February 9th 1823 the army of Iturbide entered the city of San Salvador, and on February 10th the El Salvador province was declared annexed to the Mexican Empire, but nine days later Iturbide abdicated the Imperial crown of Mexico, so the empire crumbled, and El Salvador and the rest of the invaded countries regained their freedom and independence. MONTERREY, F. *History of El Salvador. Chronological entries. 1810-1842:* Tome I. University Editorial. San Salvador, El Salvador. 1997. p. 95,104.

freedom, which would end in the year 1841 when El Salvador declared itself a unitary, independent and sovereign State, proclaiming its own Constitution of the Republic. Starting from this Constitution, a study of political rights would begin, not without first specifying some aspects that the Constitution of Cadiz imbued with the constitutionalism of the nascent Salvadoran State.

II. The Constitutions in El Salvador

As noted above, a few years before its independence, El Salvador had experienced a constitutional legal influence coming from Spain. This influence was due to the conflict with the fall and the rise of the absolutist State and the second stage of validity of the Constitution of Cadiz with its principles of constitutional monarchy. Therefore, it is not surprising that the constitutions of El Salvador declared principles inspired both from Spain, especially the relationship with Catholicism, but mostly from the revolutionary and bonapartist France. Thus in 1841 it was decided to form a republican, democratic and unitarian State which was completely separated from the Central American Federation, a process that had begun in 1838.

Regarding to the recognition of political rights, according to Avendaño Rojas,[18] during the two periods of validity of the Constitution of Cadiz, indirect elections were introduced. In America these were exercised in the election of town councils in 1812. Elections were also held to renew the representatives of the courts, of the city council and of the provinces in 1813 and 1820, which were held by electors from the parish, party and province.

Political rights were granted to certain citizens with certain requirements: Spanish people or their children born or living in the Spanish empire; naturalized foreigners or those who had lived for ten years in a village and the castes which served or distinguished themselves by their talents as

18 AVENDAÑO ROJAS, X *Elections, citizenship and political representation in the Kingdom of Guatemala. 1810-1821.*: bulletin AFEHC N° 12, published on september 2005, page 5, available in: http://afehc-historia-centroamericana.org/index.php?action=fi_aff&id=364 consulted on October 19th 2013.

long as they were legitimate children and married to "a free-born (ingenui) woman".[19] In addition, to be a citizen, they had to have a recognized job or lifestyle, no debts to the Treasury or pending trials or be a domestic servant.[20] The limitations on political rights, especially the right to be nominally "citizen" of a moral character, have been reproduced in the constitutions of El Salvador, with liberal nuances in each new constitution.

2.1 The 1841 Constitution

In article 2, it was proclaimed that El Salvador will be formed under a republican, popular and representative government which would be also exercised by three different powers: the legislative, executive and judicial power.

Article 5 stated those who should be considered citizens and what the requirements will be:

> *"All Salvadorans* ***over the age of 21*** *who are* ***parents****, or heads of household, or those who know how to read and write or those who have* ***the property designated by the law are citizens****"*[21]

In addition, article 8 set out the grounds for suspension and for loss of the citizenship:

> *"Citizens' rights are suspended by criminal proceedings in which a reasoned order of imprisonment has been issued for an offence which, according to the law, is worth a penalty more than correction; by being a legally declared* ***fraudulent debtor*** *or* ***debtor to public revenues*** *and judicially required to pay; by a* ***conduct notoriously flawed*** *or an* ***undignified occupation*** *legally qualified; by* ***madness,***

19 VARGAS VALENCIA, A. *The Institutions of Justinian in New Spain:* Institute of Philological Research, in *Notebooks of the Institute of Philological Research.* Number 25. National Autonomous University of México. México. 2011. p. 21 *"In Roman law an ingenui is a free-born person"* retrieved from http://132.248.101.214/chiifl9/lib/tpl/arctic/images/InstJustiniano.pdf on October 19th 2013.

20 The content of these requirements and limitations are among articles 18 to 26 of the Constitution of Cadiz.

21 The bold in this research, particularly in the text of the normative dispositions, are supplemented by the researcher.

insanity or mental illness *and by* ***being a domestic servant*** *close of the person. Those who admit employment or accept pensions, flagships, hereditary or personal titles from another nation without a license from the General Assembly shall lose their status of citizen; also those* ***sentenced for crimes*** *that are worth a penalty more than correction, until they rehabilitate."*

A series of requirements that limited the possibility of being a Salvadoran citizen by various criteria may be observed in article 5. In addition to the requirements of age and mental capacity, it is highlighted the requirement to own a property with extensions determined by law. This leads to considering article 11 of the same body of law that determines the requirements for a citizen to be part of the legislative power as a member of the Chamber of representatives. [22]These requirements included "to own a property of at least five hundred pesos", and to be a senator the property had to be "a real estate of not less than four thousand pesos, located anywhere in the Salvadoran territory". In the same way, to be President of the Republic, the presidential candidate had "to own a real estate not less than eight thousand pesos, located in any of the departments of El Salvador".

In addition, there were some limitations derived from social status, like being a parent or being financially responsible for the needs of a dwelling as well as knowing how to read and write; the latter is an element that widely limited the number of people able to adapt in the term "citizen".[23]

22 The legislative power of the Republic of El Salvador as a unitary State was formed by a two-chamber system composed of members of the representatives of Chamber and Senators. This configuration was established in the 1841 Constitution (art. 13) and remained for 45 years until the 1886 Constitution (art. 54). Since then the Legislative Assembly has been configured with the one-chamber system composed of parliament representatives, a system that remains the same until today.

23 "It is estimated that for 1841 80% of the Salvadoran population was illiterate." In this context the importance of the foundation of the University of El Salvador on February 16, 1841 was justified. PICARDO JOAO, O. *Historia y Reforma de la Educación Superior en El Salvador:* Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura, y Ministerio de Educación de la República de El Salvador. p. 28 retrieved from htt://wwwisis.ufg.edu.sv/wwwisis/documentos/M0/M000394.pdf on October 23rd 2013.

2.2 The 1864 Constitution

Article 7 established the requirements for citizenship in this historical period of El Salvador: the minimum age for citizenship remained at 21 years. Those who sought to be a Salvadoran citizen had to show a good behavior but also they had to demonstrate some of the following qualities or conditions: to be a parent or a head of household, to be able to read and write or to have a property designated by law.

There was an exception to age on the basis of educational level or family status, in this context citizens were also those over the age of eighteen who obtained a literary degree or got married.

Articles 10 and 11 determined the grounds for suspension or for loss of the citizens' rights. In general they remained with the same grounds as those related to the 1841 Constitution, except that a ground for suspension was removed, the fact of *being a domestic servant close to the person.* This formally opened up the possibility of access to political rights for those in that capacity.

Aside from the above, the eligibility for membership in State bodies was dependent to the possession of property of various dimensions by type of public official.[24] Thus, the census suffrage[25] still manifested itself both in the requirements to be citizens and in the requirements to be elected governor.

24 Candidates for President and Vice President were required to own property with a value of eight thousand pesos (Art. 15); for senator, a property of at least four thousand pesos (Art. 16); for parliamentary a property with a value of not less than five hundred pesos was required (Art. 17); to be a judge of the Supreme Court of Justice, it was demanded a capital of a thousand pesos in real estate (Art.19) and for government ministers it was necessary to own property with a value of at least two thousand pesos (Art. 20)

25 *"The censitarian suffrage was the first and most widespread form of restricted suffrage; it is the restriction of suffrage by conditions of fortune"*. Among the forms of census suffrage is that of possessing property, that is to say that *"only people who own land shall be eligible to vote..."* The census vote was justified on the basis that only people who had economic fortunes were truly linked to the nation, an argument supported by the 18th century and early 19th century bona fide bourgeoisie. DUVERGER, M. *Instituciones Políticas y Derecho Constitucional. Op. cit.* p. 95.

2.3 The 1871 and 1872 Constitutions

In April 1871 the Guatemalan military man and politician General Santiago González Portillo overthrew President Francisco Dueñas with a coup d'état, and assumed the provisional presidency of El Salvador.[26] The first actions of this provisional government tended to proclaim freedom of expression and press. On May 13th González Portillo called for elections of representatives to the Constituent Assembly. As a result, on October 17th, the fourth Constitution of the Republic of El Salvador was issued (taking into account the one from 1824).

This constitutional rule prohibited the consecutive re-election of the president (during the government of Dueñas, the Constitution of 1864 was amended to allow for re-election up to two consecutive times[27]) and it also stated that the current president would last in office for a two-year period. In addition, religious tolerance, independence of powers and indirect election were established. Finally, in order to legitimize the power, it was proclaimed that those who were not born in El Salvador and had lived for several years could be elected presidents. From this Constitution began progressively the liberal period that would reach its peak in the 1886 Constitution.[28] However the 1872 Constitution increased to four years the period of time that the President would remain in office, thus extending Gonzalez's "provisional" government to 1876.[29]

The regulations concerning citizens are set up in the Constitutions of 1871 and 1872 in articles 8 through 11, and since they are verbatim identical, they are presented in a single set.

26 MONTERREY, F. History of El Salvador. Chronological Anotations. 1843- 1871 Tomo II: University Editorial. San Salvador, El Salvador. 1997 p. 360-364.

27 MONTERREY, F. *Op. cit.* p. 351.

28 *Ibid.* p. 364.

29 *"All officials of the highest powers, whether elected by the people or by the Legislative Body, who began to exercise their functions in the current year, in accordance with the Political Code of October 16th 1871,* ***shall continue to operate until the end of the period allocated to them respectively in this Constitution."*** (Transitional Additional Article to the 1872 Constitution)

Article 8 determined the conditions for being a citizen: to be over twenty-one years old, to have a good behavior and also to have at least one of the following conditions: to be a parent or head of household, to know how to read and write or to have an independent lifestyle.

It is important to note that this constitution abolished the requirement to own a property in real estate in order to be a citizen, which set a standard for the elimination of the census vote. It was also abolished the exception of age for those who already had a literary degree at the age of eighteen years as well as the mandatory marriage requirement listed in the 1864 Constitution.

Similarly, Articles 10 and 11 determined the grounds for suspension and loss of citizens' rights, which were the same in both constitutions, except that the 1871 Constitution included selling the vote in the popular elections as grounds for loss of citizenship.

These constitutions were the intermediate point in the process of breaking with the conservative system widely linked to the power of the Catholic Church that had prevailed in the Salvadoran State. For example, in the assigned sections to elections in the 1871 Constitution, as well as in the 1841 and 1864 Constitution, the term "souls" was referred to the number of people in a "perimeter, district or canton", whereas in the 1872 Constitution the term "inhabitants" was used. In addition the prohibition of any clergyman to hold elected office was reinforced.

Finally, the 1872 Constitution contained two other changes: the first and most relevant one refers to the recognition of the inalienable nature of the right to vote (Art. 49); the second one was related to the administrative division of the State, which was previously divided into "perimeters" and thereafter into "departments", a division which nowadays remains.

2.4 The 1880 Constitution

At the end of Santiago González's presidential term and in the knowledge that he himself had promoted the 1872 Constitution which prevented his re-election, Gonzalez proposed Andrés del Valle as his official candidate, who under the influence of the Gonzalez regime was elected to office and began his government on February 1st 1876. However, this influence produced popular rejection, since Santiago González continued in government after he was appointed Vice-president of the Republic and General in Chief of the Armed Forces,[30] a charge that according to the Constitution belonged to the President (Art. 89). A few days later, Andrés del Valle faced a bloody revolutionary movement on the part of the Guatemalan government that ended in his resignation from the presidency on May 1st 1876. Rafael Zaldívar[31] was elected provisional president for the period from May 1st 1876 to February 1st 1880. At the end of his term as Interim President, Zaldívar promulgated the 1880 Constitution in order to remain in the power, which stated in article 131: ***"As a one-time only exception, the National Constituent Assembly shall directly elect and appoint the President of the Republic*** *for the first constitutional term, the judges of the Supreme Court of Justice and the three appointees referred to in the seventh section of article 69."*

The constitutional requirements in article 7 of this body of law, regarding to those of the 1872 Constitution, contained some updates, such as the inclusion of those who were twenty-one years old enlisted in the militias or in the Salvadoran army. Individuals who were eighteen years old could be citizens if they had "some literary degree" and those under twenty-one years old if they were married.

30 CARDENAL, R. *The ecclesiastical power in El Salvador. 1871-1931.* Second Edition: Direction of Publications and Printed Salvadoran History Library. San Salvador, El Salvador. 2001, p. 135- 138.

31 This election was not of a popular character; moreover, it was the result of a pact of coffee landowners, which was called by Andrés Valle as part of the agreement with Guatemala made up of around 200 Salvadoran among them, including incipient coffee growers, landowners, merchants, politicians, military and jurists *vid.* CARDENAL, R. *"The Power…" Op. cit.* p. 137.

The 1871 and 1872 Constitutions annulled the inclusion of people over the age of eighteen who had no literary degree but were married.

In the 1880 Constitution the inalienable nature of suffrage was reinforced and the mandatory nature was established (Art. 45). The term of office of the President of the Republic was four years, and the president could not be re-elected immediately until at least one presidential term had elapsed (Art. 78).

2.5 The Constitution of 1883

The 1880 Constitution had begun the process of the secularization of the State, in which the Catholic religion was always recognized as "the one professed by Salvadorans" with the protection of the State. However the profession of faith of other religions was fully guaranteed with the only aim of maintaining public order. In this constitution the establishment of conventual congregations or any other religious institutions were also prohibited (Art.40). In addition religious ministers were not allowed to hold elected office (Art. 50). Another liberal tendency that was gaining momentum at the moment was the "coffee state", which was producing large profits for the businessmen, so that between 1881 and 1882, *ejidos*[32] and communal lands[33] were exploited in order to be used for coffee growing. In 1880 the Salvadoran State acquired more strength and stability.

32 **Dictionary of the Spanish Language.** 22nd Edition. ***Ejido.*** (From lat. **exītus,* from *exĭtus,* output). *A common field of a village, adjacent to the village and which has not been worked and where cattle is usually gathered. Established eras. Cfr.* OLMEDO LOPE, H. J. "Breves Consideraciones al régimen de titulación de inmuebles en la legislación salvadoreña" Tesis doctoral: Universidad de El Salvador. Facultad de Jurisprudencia y Ciencias Sociales. San Salvador, El Salvador. 1969. p. 3 *"The word Ejido began to be used for the lands found at the exit of places or towns. However this word was later applied to the lands that the municipalities had in use and enjoyment first by concession of the Spanish Crown and after independence by concession of the state."*

33 **Communal Lands:** "The communities were extensions of lands managed by corporations that had legal registrable personality. The lands of the community were possessed in individuation." *(8) The communal lands were those that belonged to the communications of indigenous and ladinos which were managed by corporations that enjoyed legal personality being owned by the indigenous and ladinos in Proin division.* They disappeared with the community extinction law in 1881. OLMEDO LOPE, H. J. "Brief Considerations…" *Op. cit.* p. 3.

The State apparatus began to have a more effective presence in the national territory, especially in the western region, which was the most economically developed region with the growing and export of coffee. For the first time in several years the national territory was able to get rid of the wars with other countries; in addition the president managed to stay longer in his position, such as the term of Rafael Zaldivar in office, who managed to stay nine consecutive years until 1885.[34]

This situation of stability and interest in continuing in office caused Zaldívar to convene another Constituent Assembly on October 18th 1883. This new Constituent Assembly approved on December 4th a new constitution which was ratified by Zaldívar two days later. This Constitution abolished the prohibition on the re-election of the President of the Republic (Art. 77), calling for elections on December 23rd, with the same provisions of the 1873 electoral law, and Zaldivar was re-elected for the period 1884-1888.[35] However, he resigned as president on May 14th 1885.[36]

Articles 43 to 46 determined the rights of the citizen as well as the grounds for suspension and loss of citizenship, these did not vary at all within their essence compared to those set forth in 1872.

The Zaldívar government ended by resigning in 1885 due to a popular uprising led by Francisco Menéndez, in which several social sectors participated. Zaldívar's social and economic policy turned against him because opponents thought that Zaldívar only benefited a sector of people of trust or clique. The emerging landowner class was directly involved for the first time in the political and military opposition of a ruler who they felt was acting outside their interests.

34 **AA.VV.** History of El Salvador, Tomo II. Ministry of Education. San Salvador, El Salvador. 1994, pp. 22-23.

35 Legislative Power, order of January 28, 1884 published in Official Gazzete , Tome 16 Number 25, of January 29, 1884.

36 *Vid.* VIDAL, M. *Notions of Central American history.* Department Editorial, Ministry of Culture. Fifth Edition. San Salvador, El Salvador. 1957. pp. 304-307.

According to the opinion of Salvadoran historians, "*The opponents considered that Zaldívar had not complied with the fundamental precepts of liberalism, especially those related to the rights of citizens, such as freedom of expression, representative democracy, and equality of citizens before the law*."[37] The leader of the opposition, Francisco Menéndez, called a constituent assembly when he arrived at the head of the government. The 1885 draft constitution was rejected by Menéndez claiming that it gave very little power to the President of the Republic. For example, the presidential term was reduced to three years (Art. 80), the appointment of ministers without Salvadoran nationality was not allowed and the right to insurrection of the people was implemented for the first time if the people observed that the rulers disregarded fundamental laws (Art. 36). Confronted by the refusal of the government to amend the draft Constitution, Menéndez dissolved the congress, he declared himself dictator and the Constitution remained unsigned. Subsequently, he convened a new Assembly Constituent, which was installed on June 21st 1886.

2.6 The 1886 Constitution

Most of the differences between the 1885 and 1886 constitutions tended to maintain the powers of the executive branch such as that of 1883. The changes in the citizens' section varied in the sense that the age of majority was set at eighteen years of age, including those who were married or with an academic degree even if they were under that age. (Art. 51) In addition, the grounds for the loss of their exercise were extended by including those who sell votes in elections, those who act to promote presidential re-election and those officials who restrict the freedom to vote (Art. 53 ordinals 5th, 6th and 7th).

Lastly, the bicameral system of the legislative branch was amended and the unicameral system was instituted with a certain number of representatives (art. 54), and its powers and duties were extended with respect to the 1883

37 **AA.VV.** History of El Salvador, Tome II, *op. cit.,* p. 31.

constitution (Art. 68). The conditions related to the exercising of elections remained similar to the last Constitution in force. In addition, the right of the people to insurrection was maintained, but it was limited to separating the rulers from their posts by maintaining the legal order without any modification.

The 1886 Constitution is called "liberal" because of the recognition of the principles and rights inherent in this ideological tradition. This has been the Constitution whose period of validity lasted the longest; on its basis the coffee-growing state was consolidated as well as the elite class, and their estrangement from the social sectors such as farmers, day laborers and workers in general. The progressive emergence of sectors publicly revealed against the *status quo* was reinforced, in an era without truly free, secret and egalitarian elections.

2.7 The 1939 Constitution

As a historical and political framework, it is necessary to remember the rise to power of General Maximiliano Hernández Martínez through a coup d'état in 1931 against Arturo Araujo, the latter being probably the first president freely elected by the citizenry since 1841. Popular struggles due to inequality among social classes, especially among peasants, labor unions and indigenous sectors, the economic crisis that affected coffee prices since 1929 and the electoral fraud in the municipal and legislative elections of early January 1932;[38] produced the peasant uprising and the massacre in the western sector of the country by Martinez in order to dominate the popular masses. As a result of this, there were various massive mobilizations by both national and foreign people, which made it difficult to control those who were Salvadorans and those who were not. Thus the Residence Card Law was issued for the first time, to issue a document

38 At that time the votes of various polling stations were annulled, especially in the western part of the country, because it was there that the peasant and indigenous movement was stronger, together with the Salvadoran Communist Party, that during the government of Araujo obtained the legal status that allowed him to participate directly in those elections. *Vid.* ANDERSON, T. *El Salvador 1932.* Publications and Printing Department: Third edition. San Salvador, El Salvador. 2001.

that included a series of data on each person over eighteen years of age[39], and which presentation was obligatory in order to be able, among other things, to exercise the right to vote. (Art. 8 of the Residence Card Act).

Various authors[40] had determined in their Salvadoran historical studies that for the municipal and legislative elections of 1932, it was still allowed to register independent candidacies, due to the lack of political parties as they are recognized nowadays.[41] Quotas of political power were allocated to candidates who won the elections because of their popularity and government capacity; this was the so-called "caudillismo", in other words there were mayors who carried out handcrafted work but who were elected because they were considered leaders in their respective communities, far removed from the central government in San Salvador.

Since then, the registration of "independent" candidates for municipal and legislative elections has been prohibited. In addition the administrative and

39 For Rafael Guidos Véjar, the idea of creating such a document was to control the population, granting the document to those without "communist" traits or backgrounds, a group that became the enemy of the government from that moment. *Vid.* GUIDOS VÉJAR. R. *The rise of militarism in El Salvador:* UCA editors. Third edition. El Salvador, 1986. p. 16. It should be noted that this document was also the precursor to the Identity Card, which in turn was the antecedent of the current Identity Card (Documento Único de Identidad). This is one of the functions of these three documents has been the holder's capacity to vote. *Vid.* National Registry of Natural Persons. Work memory 2011. El Salvador, 2012. p. 15.

40 *Vid.* ANDERSON, T. El Salvador 1932. *Op. cit.* HERNÁNDEZ TURCIOS, Héctor Antonio. Political party regime 1930 1975. Doctoral Thesis: University of El Salvador. San Salvador, El Salvador. 1977. HÁNDAL, Shafik. Theory of the revolutionary situation. Editions: Schafik Hándal Institute. First Edition. San Salvador, El Salvador. 2012. DALTON, R., El Salvador, monograph: UCA editors. Third Edition. San Salvador, El Salvador. 1993.

41 "This is how we can define our political initiation as the stage in which the political caudillismo develops. In this stage a man by his military or economic power, whichever, would at will seize power or force the obedient to appoint him president. In addition, if this man got bored with power, he would bring to power whomever he would put someone chosen randomly to replace the former in this one which was equally random. (...) At the end of the century (…) the caudillo parties, a new political stage, emerged although carrying the same previous tendencies, changed the modalities of organization and struggle. They formed political parties around a man, so the man and the party were the same thing, and if there was a mass of people around them, the party, mass of people and man was the same. However the interesting thing was that this unity was of such fragility. If an election was lost, passed or removed the man-candidate, the party and the mass of people would disappear. The whole organization, the caudillo party remained until 1960 or 1961." HERNÁNDEZ TURCIOS, Régimen de partidos políticos…*Op. cit.* p. 28.

economic autonomy of the municipalities had been severely restricted[42]. That same year, the Residence Card Law was enacted. The most essential purpose of this document was the requirement to be presented by citizens in order to vote. This document is the first precedent of the current Identity Card known as Documento Único de Identidad.

The best-known incident regarding the political rights of citizens was the Prudencia Ayala case in 1930. She showed up to the municipal government of San Salvador to register herself as citizen and later to run for the presidential elections. The motion was rejected on the ground that the Constitution of that time did not provide the right to vote for women.[43]

Prudencia Ayala appealed to the Supreme Court of Justice, which declared itself incompetent to hear the case because the Constitution did not consider such petitions to be within its jurisdiction because they were political rights and not civil rights.[44] The actions of Prudencia Ayala alarmed the Salvadoran political sectors, especially because at that time it was a tense electoral period and also the political sympathies from women were not clear;[45] in addition women's suffrage was also being recognized in several Nations.[46]

42 In fact, Martinez's strategy in the elections of 1932 was to open the candidacies to any sector that wanted to participate in the elections. This was done because at that time, the elections were not secret, since the citizen had to register on specific lists stating his or her electoral preference. So during the massacre, the government used these lists to locate the pro-Salvadoran Communist Party people. HERNÁNDEZ TURCIOS, Héctor Antonio. Political party regime. p. 33-34.

43 Albeit there was no article in the 1886 Constitution limited the right to vote and stand for election for women, during all constitutions validity it was never considered any real section to include women in civil or political rights. This was a general fact at the international level, in addition to the existence of laws that placed women legally below men, as specific articles of the Civil Code (133 and 134) now repealed.

44 Art. 37 of the 1886 Constitution: *"Everyone has the right to request and obtain the protection of the Supreme Court of Justice or Second Instance Chamber, if any authority or individual restricts* ***personal freedom or the exercise of any of the other individual rights*** *guaranteed by this Constitution. A special law shall regulate the manner in which this right is implemented."*

45 The number of women over eighteen years old in 1930 was 85,107. This number is higher than that register of men which was 80,994. Data taken from the Population Census of El Salvador 1930. Virtual Library in Population. Central American Population Center. http://ccp.ucr.ac.cr/bvp/censos/El_Salvador/1930/ consulted on November 11th, 2013.

46 For the American continent cases *vid.* IRAHETA, C. "First deputies in the Legislative Assembly in El Salvador". **AA.VV.** *History of women. Women of history in El Salvador.* Secretary of Culture

This recognition was used as an advantage by Martinez to seek popular support and continue in the executive branch, so Martinez included two special articles regarding to women's suffrage in the 1939 Constitution:

"Art. 21. -The right to vote for women shall be regulated by the Electoral Law."

"Art. 144. -The right to choose in an election is inalienable, and its exercise is obligatory, except for women which is voluntary."

The 1939 Election Regulations Law established the following requirements for a woman to become a citizen: to have the Residence Card, to prove that she was married and over twenty-five years old, and if unmarried she must be over thirty years old. In addition, regardless of marital status, she was required to have completed at least primary school. But if the woman had any professional title, she could be included by proving that she had reached the age of majority.[47]

Furthermore, the 1939 Constitution was the first in El Salvador that not only determined who were considered citizens, but also presented a list of the rights and duties of those of such quality (Art. 20). The rights were the exercise of suffrage and to qualify in a public office, whereas the duties were to serve the nation, respect the authorities and contribute to public expenditure in a proportionate and equitable manner.

However the previous recognition of the political rights of men in general and women in particular was only a kind of concession to the real reason for the repeal of the 1886 Constitution: The re-election of Hernández Martínez[48] as President of the Republic using the same "legal" method that

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of the Presidency. Parliamentary Group of Women, Legislative Assembly of El Salvador: National Direction of Research in Culture and Art. First Edition. San Salvador, El Salvador. 2013. p. 151 y ss. To the rest of the World cases *vid.* URIARTE E, Introduction to Political Science. Editorial Tecnos. Madrid, España. 2012 p. 117 y ss.

47 Article 4 of the Regulatory Law of elections. Decree constituent N° 31 of january 31, 1939, published in the Official Gazzete number 44 tome 126, of february 24, 1939.

48 Prior to the 1935 elections, Hernandez Martinez resigned and placed in office his first appointee, Andrés Ignacio Menéndez, six months before the elections. During that time he was minister of war, navy and aviation, so he was able to register as a sole candidate (pro patria) and extended his mandate from 1935 to 1939. This was not a secret, to the point that

Zaldívar had used, thus, the third paragraph of Art. 91 the executive branch determined: ***"Exceptionally,*** *and due to the national interests demands, the citizen who would exercise the Presidency of the Republic since March 1st of this year to January 1, 1945, according to this Constitution shall be elected by the deputies to the National Constituent Assembly,* ***the incapacities referred to in article 94 would not applied as a one-time exception*** *(prohibition of consecutive re-election)."* So he continued in his position for the third term from 1939 to 1945, since it even expanded the term of office to six-year. (Art. 92)

2.8 The 1945 Constitution

By 1941 a Pan-American alliance had been formed in favor of democracies in the struggle against the Hitler and Mussolini's regimes. This alliance issued openly an anti-dictatorial propaganda. The most effective of these organizations was the Salvadoran Democratic Action (ADS, in Spanish) which by 1943 had to operate underground due to its active campaign against the Hernández Martínez's re-election.[49] In 1944, Martínez again faced the problem of perpetuating himself in the presidential office in a legal form. Once more, he called a Constituent Assembly.

On February 24th, 1944, this assembly made a series of reforms to the 1939 Constitution.[50] In order to preserve Hernández Martínez's dictatorial regime, the most relevant one was the reform to Art. 91 which determined:

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the editorial of the Official Gazette expressed on the day of the "presidential handover": *"The Salvadorans already know the reasons why General Hernandez Martinez had to request permission before the honorable Congress: He's going to be in charge of the election work that his friends have been organizing for him..."* Official Gazette N° 187, Volume N° 117 on August 29th 1934.

49 **AA.VV.** History of El Salvador, Tome II. *Op. cit.* p. 142.

50 It should be noted that article 18 of the Constitution was also amended by ratifying the right to vote of women who meet the requirements of the Secondary Law.

In five days the National Constituent Assembly elected, "unanimously" and in the name of the "Salvadoran People," Maximiliano Hernández Martínez as President of the Republic, until December 31st 1949.[51]

The incidents undermined the will to continue under the dictatorship. On April 2nd, 1944, civil and military groups started a riot provoking more repressive measures from the Executive Body, but without success. Additionally, the international pressure increased, especially from the United States, which after the end of the Second World War was again paying attention to Latin America. So the ministers were resigning their posts progressively and the measure that generated the most pressure was the strike on May 3th known as "the Strike of the Fallen Arms". Everyone refused to return to work until the shootings were stopped and a way out of the crisis was found with the resignation of the president, which occurred on May 8th, not before appointing General Andrés Ignacio Menéndez as his successor in the presidency.[52]

On October 21st, 1944, a military council requested the resignation of General Menéndez and in his replacement the Legislative Assembly appointed Colonel Osmín Aguirre y Salinas.[53]

At the beginning of his term of office, Aguirre y Salinas announced that he would comply with the constitutional precept of freedom of suffrage. Presidential elections were held in January, 1945. At that time, the freedom of the press had been restricted and the main opposition parties had either abandoned the electoral option or had fled the country as a result of persecution by the

51 Constituent Decree N° 12 of February 29th, 1944, published in Official Gazette N° 50, Volume N° 136, February 29, 1944.

52 D. L. N° 34 and 35 of May 10th, 1944 published in Official Gazette N° 103 Volume 136 of May 10th, 1944.

53 Miguel Tomás Molina was legally allowed to be the provisional President of the Republic. However the military junta demanded the Legislative Assembly to meet early in the morning of the same day and modify the order of the succession to designate Colonel Osmín Aguirre y Salinas. The resignation of General Menéndez and the appointment of Osmín Aguirre y Salinas as the first designate of the Presidency and then as the President of the Republic can be retrieved in the Legislative Decrees Numbers 109, 110 and 111 of October 21st 1944. These events were published in El Diario Oficial Número 234 Tomo N° 137 del 21 de octubre de 1944.

Government. So the only candidate, General Salvador Castaneda Castro, was elected president, taking office on March 1st, 1945.

Among the unpopular measures of Castaneda Castro, one of the most notorious ones was the declaration of validity of the 1886 Constitution, throughout a series of reforms. The discontent of the Salvadoran people stemmed from the fact that this Constitution was no longer considered capable of leading to the modernization of the State because it was obsolete. Among the reforms carried out was section "P". This section determined that the electoral law in force thereafter would be the 1886 law, except that it should be especially reformed to regulate the right of women to vote[54] and to repeal the 1939 Constitution as well as its 1944 reforms. Thus on December 28th 1945 the Constituent Assembly decreed that the Constitution was the same one of 1886 with the modifications given in November.

The weakness of Castaneda's government came to a head with the problem of succession. Presidential elections were to be held in March 1949. Castaneda Castro was convinced of the need to promote a new constitutional reform that would allow him to be re-elected.

With that purpose, on December 13th 1948 the Legislative Assembly decreed an "urgent" call for elections to the Constituent Assembly within a week.[55] Castaneda Castro had been re-elected president for a term of six years before the decree established for the new validity of the 1886 Constitution which set up that the deadline of the presidency was four years. The Constituent Assembly justified that it was necessary for Castaneda Castro to remain in office until 1951 on the grounds that it was necessary to clarify the text of the 1886 Constitution. At the news of the imminent prolongation of the President's power, the next day Castaneda Castro was deposed by the "Military Youth Movement". This was composed of three soldiers and two civilians. Further

54 Constituent Decree N° 251 of November 29th 1945, published in Official Gazette N° 262, number 139 on November 30th 1945.

55 Legislative Decree N° 253 of December 13th 1945, published in Official Gazette N° 273 Volume N° 145 on 13 December 1948.

ahead this movement was known as the Revolutionary Governing Council. This Council took the power on a provisional basis *"to ensure respect for democratic principles including the freedom of suffrage"*.[56]

2.9 The 1950 Constitution

Since such milestone, a process of legal and institutional reform had begun. This process resulted in the creation of a commission for the drafting of electoral laws and for the enactment of a new Constitution in particular.

Elections were held in March, 1950. Colonel Óscar Osorio won as member of the Revolutionary Governing Council (CGR, in Spanish). The Constitution entered into force on September 14th, 1950.

The Constitution in general represented the basis for the modification and creation of various institutions that, at least formally, guaranteed the social rights of Salvadoran people and promoted the industrialization of the State.

Regarding to citizenship, it is important to note that art. 22 determined that all Salvadorans over eighteen years old were considered citizens without distinction of gender. Thus, for the first time, the full equality of political rights for men and women was established.[57]

However it was not the only relevant modification regarding political rights, since art. 23 established as citizens' rights *"to associate in order to form political parties"* with the exception of ministers of any religious denomination who were not eligible for elected office (art. 24). The characteristics of the vote were recognized as *"direct, egalitarian and secret"* (Art. 28). At that time it was prohibited to hold simultaneous elections: parliamentary representatives and the President of the Republic (Art.31).

56 Decree N° 1 of Revolutionary Government Council, december 16 of 1948, published in Official Gazette N° 276 tome N° 145, december 16 of 1948.

57 However four women were elected as deputies until the legislative period of 1956. For further information *Vid.* CAÑAS DINARTE, C.; CORTEZ, V. S. *"History of the Legislative Organ of the Republic of El Salvador 1824-2006" Op. cit.* p. 67 – 68.

One of the most relevant novelties was the creation of the Central Council of Elections (arts. 33 and 34) as a permanent body for the control of electoral processes and events. Prior to that date, these bodies were of a transitional nature which operated only during the period of elections.

The term of the President's of the Republic office was set for six years (art. 62) but it was regulated that whoever exercised *"in any capacity"* the Presidency could not be President, Vice President or Nominee of the Presidency during the following term of office of the President. Formally, this limitation guaranteed the non-reelection of the President, an action that was recurring in previous administrations. Regarding the growing importance of political parties, the Constitution also recognized their right to be monitored in the electoral process (art. 33).

2.10 The 1962 Constitution

The political event that caused the 1962 Constitution was the coup d'état against Colonel José María Lemus, led by professionals and military forces on October 26th 1960. From this coup d'état, a Civic - Military Council took over the power of the Republic.

This Council repealed the state of siege and amendment as well as the abuses of public power by the previous government, being overthrown later and replaced by a Military Civic Directory on January 25th 1961. This convened the Constituent Assembly on January 3rd 1961 and repealed the 1950 Constitution, being replaced by the new Constitution which entered into force on January 25th 1962.[58]

The truth is that this Constitution was very similar to that of 1950, with only a few changes regarding the Executive Power, in which it appeared: the change of the presidential term to five years (Art. 63), the beginning and end of each presidential term for July 1st instead of December 14th (Art.63) and finally

58 Published in the Official Gazette on 8 January 1962.

the ban on vice-presidents and presidential nominees from being President of the Republic in the following was amended. So the drafting limited the re-election only to whoever was holding the office of President.

With regard to the political rights of the citizens' and the functions of political parties or the Central Electoral Council, there were no changes with respect to the 1950 Constitution, although with respect to the latter there were amendments to the Electoral Law, all for the purpose of preserving the political power of this historic period.

III. The 1983 Constitution

3.1 Original text of the Constitution

Some of the events that led to the coup d'état on October 15th 1979 against General Carlos Humberto Romero were the political and legal distrust of public institutions during the 60s and 70s, economic and social inequality and the frustration caused by the inability of citizens to make a political impact on decision-making through truly free and fair elections. After that, the first Revolutionary Government Council was established.

This one resigned in the early 80s and the second Revolutionary Government Council was formed. The latter called for elections to the Constituent Assembly due to the economic, social and political circumstances that El Salvador was facing. On December 18th 1981, the Transitional Electoral Law was decreed, which would be the electoral law governing the 1982 elections. When the Constituent Assembly was elected and installed, it decreed the Constitution on December 16th 1983 whose validity began on December 20th of that same year.

Regarding the rights of the citizen was very similar to the one contained in the Constitution of 1950 and 1962 as expressed in the single report[59] of the

59 *Vid.* Single report of the commission to study the draft constitution of 1883.

original text. However a characteristic of the vote was added and recognized for the first time, therefore: "the vote was free" (Art. 78) since the previous constitutions determined that the vote was direct, egalitarian and secret.

As an importat novelty in electoral concerns, it must be highlighted the introduction of the "second round system" in the presidential elections, for when none of the candidates obtains the minimum number of votes required. It should be noted that before this system, when this happened, the Legislative Assembly decided who would be the president of the Republic. Additionally, through these dispositions, the system of proportional representation in the Legislative Assembly was elevated to Constitutional status; this system was already legally effective since the reform of the Electoral Law in 1963.[60] Besides, the function of electoral registry now delegated to the Central Council of Elections was elevated to constitutional status as well. Finally, in reference to the Organic part, the term "Power" was replaced by that of "Body" to designate the legislative, executive and judicial branches.

Nevertheless, other articles were drafted in order to govern the country during the armed conflict, which at that time was already in full development. The clearest example is found in article 85, which excluded any organization from the possibility of exercising power within the Government, except for political parties.[61]

60 Legislative Decree N° 365 of August 14th 1963, published in the Official N° 154, Volume N° 200 of August 21st 1963. Before this new reform, in El Salvador the majority system operated for the formation of the Legislative Assembly, in other words, the political party that got the greatest number of votes obtained the real power in the Legislative Body.

61 According to the judgment of unconstitutionality 61-2009 regarding to the term *"Government"* the constituent body must be understood as referring to "Executive Body", that is to say that no one can become President or Vice-President of the Republic if he is not registered in a political party, this intention of the constituent body, according to the judgment, was verified in at least two ways: 1) In the text of the Constitution, the membership of a political party is included in the requirements for being a president (Art.151). However this requirement was not requested for being a member of the Legislative Assembly (Art. 126), magistrates of the Supreme Court of Justice (Art. 176) or Member of the Municipal Council (Art. 202, paragraph 2°)2) The single report of the commission about the study of the constitution draft developed on the chapter concerning Art. 85 the following: *"for the defense of the democratic system and* ***in accordance with national realities,*** *the Commission includes an additional concept of limitation: Political parties are limited to a representative democratic pluralism expression,* ***so that other kinds of institutions with different purposes*** *are not allowed to claim popular representation and participation*

3.2 Constitutional reforms within the framework of the Peace Accords

Following the events of November, 1989, the negotiation process for the definitive cessation of the armed conflict began, and this process culminated on January 16th, 1992, with the signing of the Peace Accords. The negotiation process and the agreements that were emerging at each stage are beyond the aim of this research, so we will briefly review those that exclusively have direct application in the context of our concerning subject.[62]

First, the Supreme Electoral Tribunal is created to replace the Central Electoral Council. The Supreme Electoral Tribunal has more powers than the previous collegiate body, such as ensuring that the exercise of suffrage is free, and monitor the non-violation of alternation in the presidency of the Republic, powers previously vested in the Armed Forces. Although it is not a constitutional reform, the FMLN was allowed to register as a political party, which allowed broad sectors of society a party option that represented their interests and that had not previously been guaranteed by the Salvadoran State.

Lastly, it is necessary to highlight the promulgation of the Electoral Code containing the reforms and new powers with regard to the Supreme Electoral Tribunal. Furthermore, the limitations imposed on the armed forces and transferred to institutions such as the Supreme Electoral Tribunal, the Supreme Court of Justice and the Office of the Procurator for the Defense of Human Rights helped to stabilize several of the tensions that gave rise to the armed conflict. The articles concerning political rights were not amended,

in the government." The bold and underlined passages are set up by the researcher to emphasize the situation of the armed conflict that existed in El Salvador at the time of the drafting of the Current Constitution, in which these provisions were placed to *"delegitimize"* any change in public power that would arise from the forces of the *"insurgents"* according to the judgment.

62 For more information check: MARTINEZ URIBE, A. Twenty years after the Peace Accords. An analysis about the fundamental reform: the armed institution. Collection of Studies CENICSH. First Edition. San Salvador, El Salvador. 2012. GUIDOS VÉJAR, R. *The Peace Agreements ¿Refoundation of the Republic?* in **AA.VV.** El Salvador: *Minimal History 1811- 2011.Secretary of Culture of the Presidency.* San Salvador, El Salvador, 2011. p. 97; Agreements of El Salvador. On the way to Peace. Published by Public Information Departament of United Nations. San Salvador, El Salvador. 1993.

except for the parts that replaced "Central Council of Elections" with "Supreme Electoral Tribunal"; although the modification of some articles from other sections helped political rights to be exercised in a more plural form with progressive democratizing nuances.

3.3 The Salvadorans Political Rights' in the 21st Century

Since the Peace Accords, ten electoral events have been held in El Salvador, five to elect President and Vice-Presidents and five to elect members of the Legislative Assembly, the Central American Parliament and Municipal Councils. In two of these elections (1994 and 2009), all the officials were elected because of the arithmetic calculation of the election periods, five years for President and Vice-President and three years for members of the Legislative Assembly and Municipal Councils.

However, the Electoral Code has undergone a series of reforms since its promulgation in 1993, which even exceeded the number of reforms made to any other body of legislation in force in El Salvador. Several of these reforms were made to maintain political parties that did not reach the minimum number of votes required to continue functioning in that capacity.

Starting on 2010, and after a judicial-political conflict between the Legistative Assembly and the Constitutional Court within the Supreme Court of Justice, a series of electoral reforms begun based on the citizen's bigger influence within the political decision-making by the exercise of suffrage; standing out among them:

Non-partisan candidacies: following the judgment of unconstitutionality 61-2009, the Constitution of the Republic was interpreted to mean that for elections of member of the Legislative Assembly, it is possible to register as candidates' citizens who are not affiliated to a political party.

Preferential vote: in the elections for deputies, the citizens could mark their preference over one or more of the members of the list of candidates proposed by the same political party; it was possible to change the order of the list and depending on the number of votes cast by a candidate, the candidate could occupy the top of the list, being able to get a seat in the Legislative Assembly constituency even if his name was the last on the list and vice versa.

Plural Municipal Councils: These basically were a proportional representation in the Municipal Councils, so that there was representation of all the parties that competed in the election, which in theory, generated greater representation of citizens who voted for a party that was not elected.

Residential Vote: the citizens could vote in the voting center geographically closest to their place of residence. This is the result of a process that began in 2006 and was implemented at the national level for the 2014 presidential elections.

The vote from abroad: for the first time, the right to vote has been recognized for Salvadorans who, without having renounced their nationality, reside in another State through the postal vote, which was implemented in the 2014 presidential elections. Such reform has been the subject of legal, political and sociological studies,[63] reaching the conclusion that the constitutions in El Salvador had never defined the exercise of the right to vote of Salvadorans residing abroad. In addition, the Constitution has regulated in other articles the obligation of the State to guarantee the exercise of this fundamental right.[64]

In May 2014, the Constitutional Chamber admitted a unconstitutional complaint against an article of the Electoral Code (195) and two of the Police

63 **INTERINSTITUTIONAL COMMISSION FOR THE IMPLEMENTATION OF THE VOTE FROM ABROAD.** Technical feasibility study for the implementation of voting from abroad by Salvadorans residing abroad for the presidential elections. 2014. San Salvador, El Salvador. 2012.

64 **SOCIAL INITIATIVE FOR DEMOCRACY (ISD).** Baseline of the Salvadoran electoral system. San Salvador El Salvador, november, 2011. pp. 48 - 51

Career Law (86 and 87). These articles infringed the right to vote of officers of the National Civil Police and students of the National Public Security Academy, since there was no permanent regulation on how these citizens could vote while performing their duties of security of the polling centers[65] in places other than those determined by the electoral roll.

If a judgment declaring unconstitutionality were passed, this case would be the most recent case about empowerment of Salvadoran citizens' political rights.

These and other reforms have been manifested through various legislative bodies, such as the promulgation of the new Electoral Code in August 2013, the provisions for the nomination of non-partisan candidates in legislative elections, the Special Law for the Exercise of Foreign Vote in Presidential Elections and the Law on Political Parties.

65 In the presidential elections of February and March 2014, National Civil Police officers and students of the National Public Security Academy were able to cast their ballots with the authorization of a transitional decree.

Conclusions

The historical, legal, constitutional and political research about the rights of citizens in El Salvador has the following conclusions:

a) *The concept of citizenship is key in republican States. In addition, it is also one of the hallmarks of monarchist states, since at least in theory, it is through the acquisition of this status that a person can exercise part of their sovereign power. This status allows not only to decide the rulers of the state through the electoral process, but also to actively participate in politics with the possibility of being a candidate for elected office and may also form or register political parties.*

b) *From 1824 to the present, the acquisition of the status of citizen and the rights given in the thirteen constitutions enforced in El Salvador, has been subject to limitations in the economic, academic and labor area, age, gender, family status and residence in the territory. These limitations have gradually disappeared. This has made less rigorous the legislation in the requirements, and it has been reinforced by the recognition of other fundamental rights for the democratization of the State, such as equality, freedom of expression, the right of assembly, association, insurrection in specific cases, and the right to form political parties with ideological plurality. Therefore the rights and guarantees of a modern Constitutional State based on the rule of law has been strengthened.*

c) *To acquire the rights of the citizen has been the result of various struggles throughout Salvadoran history. The well-known limitations for citizenship were the legal, religious, academic, gender equality and the impossibility of applying for elected office for electoral fraud. When these limitations have been declared, by antithesis as well, the movements and initiatives that have influenced the demand of these rights have been manifested by becoming the factual framework of constitutional and legal reform.*

d) *The relationship between political rights and the electoral system is notorious, since according to Salvadoran political history, it is the electoral system in force that guarantees the full material exercise of the rights of the citizen or contributes to violating them. This is the reason why it is important to implement a greater research and academic reflection both historical and current of our system, process and Electoral Law to contribute, from the Legal Sciences, the strengthening of the democratization processes of the Salvadoran State.*

THE PLURAL MUNICIPAL COUNCILS IN EL SALVADOR

A Democratic Debt or an Obstacle to Governance?

Licda. Odaly Lissette Sánchez Arias

Los Concejos Municipales Plurales ¿Deuda Democrática u Obstáculo a la Gobernabilidad?
Licda. Odaly Lissette Sánchez Arias

Resumen
El artículo presenta un panorama de la conformación de los Concejos Municipales en El Salvador, los que constituyen los gobiernos locales y tienen la oportunidad de conocer de manera inmediata sus necesidades. En El Salvador, a partir de 2015, el mecanismo de elección de los Concejos Municipales será puesto a prueba al pasar de una conformación monopartidaria a una integración plural, es decir con la representación proporcional de los partidos que compitieron por la alcaldía. Sin embargo, a nivel político, la introducción de esta reforma abre el espacio para plantearse algunos posibles escenarios; por una parte, puede en efecto propiciar una mayor participación ciudadana a través de la representación de los partidos políticos en contienda, pero a su vez, podría acarrear mayores problemas en cuanto a la gobernabilidad, pues resulta más difícil tomar decisiones entre más intereses se encuentren representados. Esta disyuntiva sin embargo, no justifica el hecho de no haber implementado los Concejos Municipales Plurales con anterioridad, pues en toda la región latinoamericana se han registrado experiencias locales bajo este formato, pero en El Salvador, lo que una medida como ésta significa es que, los partidos políticos deberán comenzar a trabajar más bajo la figura de consensos y menos bajo la figura de oposición así como a tomar decisiones en base a intereses colectivos generales y menos intereses particulares. Ello se traducirá en un mayor fortalecimiento del sistema democrático salvadoreño y un manejo más transparente y eficiente del poder público.

PALABRAS CLAVE: CONCEJO MUNICIPAL – DEMOCRACIA REPRESENTATIVA – GOBERNABILIDAD – MUNICIPALISMO – PARTICIPACIÓN CIUDADANA – PLURALISMO POLÍTICO – REPRESENTACIÓN PROPORCIONAL – SISTEMA ELECTORAL – TRANSPARENCIA.

The Plural Municipal Councils in El Salvador, A Democratic Debt or an Obstacle to Governance?
Licda. Odaly Lissette Sánchez Arias

Abstract
The article presents an overview of the formation of the Municipal Councils in El Salvador, which are local governments and have the opportunity to meet their needs immediately. In El Salvador, from 2015, the election mechanism of the Municipal Councils will be tested when moving from one political system forming to plural integration, which is the proportional representation of parties competing for city hall. However, at the political level, the introduction of this reform opens the space for considering some possible scenarios; on the one hand, it may indeed promote greater citizen participation through the representation of political parties in contention, but in turn, it could lead to major problems in terms of governance, since it could be more difficult to make decisions when more political interests are at stake. However, this dilemma does not justify the failure of Plural Municipal Councils implemented before, considering that many countries in the Latin American region have experimented with these mechanisms. For El Salvador, Plural Municipal Councils may imply that political parties need to start working through consensus, rather than oposition; and they may want to consider colective interest, rather than particular motivations. This will lead to a further strengthening of the Salvadoran democratic system and a transparent and efficient management of public power.

KEYWORDS: MUNICIPAL COUNCIL – REPRESENTATIVE DEMOCRACY – GOVERNANCE – MUNICIPALISM – CITIZEN PARTICIPATION – POLITICAL PLURALISM – PROPORTIONAL REPRESENTATION – ELECTORAL SYSTEM – TRANSPARENCY.

The Plural Municipal Councils in El Salvador
A Democratic Debt or an Obstacle to Governance?

Licda. Odaly Lissette Sánchez Arias[1]

"Pluralism is the basis on which democracy is built and means recognition of the other, it is the ability to accept diversities and discrepancies as a condition for the existence of a free society".[2]

Introduction

The figure of the plural municipal councils in the national legal system emerged in March 2013 after the 1992 reform of the Electoral Code. It was added to the new Electoral Code of July 2013. This figure was expected to be incorporated in the elections of mayors and municipal councils in 2015. In the academic sphere, different scenarios were proposed on the effectiveness of its implementation, from possible conflicts of governance to transparency and participation in the management of municipal affairs. From this political-electoral juncture, this article aims to presents a historical approach to the emergence of municipal councils, an analysis of the countries that apply municipal councils in their regulations, the incorporation of these regulations in the Salvadoran legislation and the possible challenges in its implementation.

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2 PhD. Raúl Alfonsín is a lawyer and politician. He was the President of the Argentine Republic from 1983 to 1989.

The doctrine presents municipal governments[3] as the result of representative democracy,[4] since through suffrage, the population seeks to choose the people with the greatest suitability for the achievement of their social interests. The composition of the Municipal Councils regains importance by ensuring harmonious and peaceful coexistence for each of the inhabitants of the municipality.

According to Reynoso Soto, it must be understood that *"The municipality is composed of a population sharing cultural and historical identities, settled in a given territory that is administered by authorities constituted in a Municipality elected by universal and direct suffrage or by the modalities determined by law, for their progress and development. Its legal personality is manifested in its political, administrative, financial and regulatory capacity"*.[5]

The municipal governments in reality establish a better approach to the population that they administrate, unlike the central government, which cannot opt for a closer proximity due to factors of distance and feasibility.

The population of the municipality is composed of sectors with opposing interests, some of them, may not be the majority and therefore they remain without representation in municipal decisions. In this sense, the composition of municipal councils with multi-party participation is reflected as an option for the effective representation of the population general interests in a municipality.

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3 In El Salvador, the Municipal Code in the article 2 section 1 points out: *"The Municipality constitutes the primary Administrative Political Unit within the State organization. It was established in a given territory which is its own, organized under a legal system that guarantees popular participation in the formation and management of local society with autonomy to give itself its own government. This government is an instrumental part of the Municipality which is responsible for the direction and management of the local common good, in coordination with national policies and actions aimed at the general common good by enjoying sufficient power, authority and autonomy to fulfill those functions"*.

4 *"Therefore representativeness entails that the interests of the representative are perfectly suited to those of its representatives, where the former exercise the power granted in accordance with the interests of the latter". Cfr*. National Foundation for Development (FUNDE), *"Plural Municipal Councils and Democratic Governance for El Salvador: A Proposal for Electoral Reform"*, San Salvador, 2009, p. 17.

5 REYNOSO SOTO, R. M. *"Basic Manual for Municipal Administration"*, Fourth Edition, Toluca, México, october 2003: Institute of Public Administration of the State of México, A.C, p. 2.

"A system is characterized as democratic if the people who participate in the exercise of power is the most accurate reflection possible of the people as such".[6] Based on this Presno Linera's thought, the essence of a democratic system lies in the capacity of people influencing in the transcendental decisions of the management of public power.

In El Salvador the initiatives for effective representation within municipal councils were presented with proposals from professional and political sectors seeking to reform the Salvadoran Electoral Code.[7] This was due to the fact that its consideration did not agree with the pluralistic political system established by the Salvadorian Constitution in Article 85.

On the basis of these proposals, various political circumstances held back for years the attempt to achieve proportional representation in the formation of the municipal councils because of the fear of losing total power over the administration of the municipality affairs. At that time, El Salvador faced the Central American region as the only country that did not allow the representation of the entire population of a municipality in the integration of municipal councils.

This situation was affecting the consolidation of representative democracy at the local level. It was not until 2013 that a legislative decree was approved, allowing a reform to the 1992 Electoral Code, which promoted its incorporation in the new code opening the way to the formation of the plural municipal councils.

6 PRESNO LINERA, M. Á., *"The Right to Vote"*, Tecnos Editorial, 2003, Madrid, España, p. 62.

7 *Cfr.* Social Initiative for Democracy, *Proposal on Plural Municipal Councils,* disponible en: http://isd.org.sv/wp/wpcontent/uploads/2012/11/Presentaci%C3%B3n-depropuesta-sobre-Concejos-Municipales-Plurales.pdf, consulted on July 31st 2014.

I. Historical analysis

During the colonial period, the Spanish city halls and the Indian cabildos[TN 1] had their own powers over the central power of the Spanish monarchy representatives (captain general and intendants).

These local authorities constituted the immediate antecedent of the current municipalities.[8]

With independence, city halls were considered as the direct expression of popular opinion. In 1822, before the proposal to annex the Central American territories to the Mexican empire, the city halls were consulted to decide on this initiative. This indicated the relevance that was assigned to them as a direct and close citizens' representation.[9]

In the first years of independence, the city halls were renamed municipalities. At the time of the Liberal Reform (1870-1890), the municipally autonomy was limited in favor of a centralist scheme that remained during the historical period of the Coffee Republic (1890-1931) as well as during the governments of military authoritarianism (1931-1979). During this time, the municipality was considered as an appendix to the central government and even the position of local commanders, representatives of the military authority in the remote areas of the country were strengthened. The electoral legislation envisaged that the members of the municipal council (mayor, trustee and

Translator Note

TN 1 Cabildo: a municipal council, or a town hall, in Latin America - Collins English Dictionary. Retrieved from: https://www.collinsdictionary.com/dictionary/english/cabildo

8 *"In Ibero-America the municipal dimension acquired even more importance due to the absence of representative organs from the kingdoms during the whole colonial era. In addition, the cabildo was an institution of local autonomy for both white or creole society (the Spanish cabildos) and indigenous society (the indigenous cabildos). Indeed, the historiography of the last twenty years has amply demonstrated how this institution of European origin was managed by the indigenous people to redefine their identity in the wake of the conquest"*, MORELLI, F., "Origins and values of Ibero-American municipalism": *Araucaria Magazine*, year 9, number 18, Sevilla, second semester of 2007, p. 3.

9 BONILLA, A., "Independence and Republic" en AA.VV., *Minimal history of El Salvador 1811-2011:* Secretariat of Culture of the Presidency of the Republic, p. 27-28.

aldermen) should belong to the list proposed by the political party with the highest number of votes excluding all other political options. This allowed the full control of the municipalities by the official political parties.[10]

Articles 202 to 206 of the 1983 Constitution established the foundations for a genuine democratic and autonomous municipal system, which materialized in the 1986 Municipal Code. Despite the innovations introduced by the Municipal Code, the monopolization of the council by the political party with the highest number of votes remained, by ignoring the figure of the plural councils. The 1992 Peace Agreements did not provide for municipal reforms.

In 1994 the first presidential elections were held after the signing of the Peace Accords. There was a second round between the candidates Dr. Armando Calderón Sol from the Alianza Republicana Nacionalista (ARENA) [TN 2] and Dr. Rubén Zamora Rivas of a coalition of left-wing parties led by the Frente Farabundo Martí para la Liberación Nacional, FMLN[TN 3]. In the context of this electoral process, the opposing forces negotiated a political reform agenda which included several elements that had been overlooked in the Peace Accords. The goal of introducing the figure of municipal councils in a plural composition was established in this agenda. These were demanded by the civil society organizations as a necessary mechanism of democratization. But the aforementioned political agreement did not become a reality, then passing the proposals to the Legislative Assembly.

Translator Note

TN 2 The Nationalist Republican Alliance is the right-wing political party of El Salvador.

TN 3 The Farabundo Martí National Liberation Front is the left-wing political party of El Salvador.

10 *Cfr.* MORALES EHRLICH, A. et al., *Notes on Political History of El Salvador*, First Edition: Central American Institute for Political Studies, Guatemala City, 2001, p. 16-38.

At the end of 2007, the Comision Nacional para el Desarrollo Local, CONADEL[TN 4] and the Red de Cooperantes para el Desarrollo Local[TN 5,] RECODEL, together with the Fundacion Nacional para el Desarrollo[TN 6], FUNDE, the Agencia Española de Cooperación Internacional[TN 7], AECID and the United States Agency for International Development (USAID) took seriously the analysis of electoral reforms that would facilitate the formation of multi-party councils.

In 2008, there was a new political agreement that sought to materialize the plural municipal councils in the electoral process of March 2009 but in the same way this agreement was frustrated by the interests of political actors. In August, 2009, the Iniciativa Social para la Democracia[TN 8], ISD promoted a law to introduce the plural composition of municipal councils.

Upon the prolonged default of the Legislative Assembly to make the plural composition of the municipal councils a reality, the director of the Iniciativa Social para la Democracia, Ramón Villalta, lodged an action of unconstitutionality on December 12th, 2011 against the one-party formation of the councils. This was on the basis of Articles 3 (principle of equality), 78 (egalitarian nature of the vote) and 85 (principle of political pluralism) of the Constitution. This action was supported by the civil organizations integrated into the management group by plural municipal councils, among which the Fundación Nacional para el Desarrollo, FUNDE stood out.

Translator Note

TN 4 National Commission for Local Development

TN 5 Network for Local Development Aid Workers

TN 6 National Foundation for Development

TN 7 Spanish Agency for International Cooperation

TN 8 Social Initiative for Democracy

Thereafter, the Legislative Assembly was requested by the Constitutional Chamber of the Supreme Court of Justice due to the admission of a lawsuit of unconstitutionality of Article 264 of the Electoral Code for whose the deadline for deciding on the legality of that article was February 28th, 2013. In this context of judicial questioning of legislative inactivity, a final agreement was reached between the legislative fractions within the Electoral and Constitutional Reform Commission. This provided the approval of the 1992 reforms to the Electoral Code on March 7th, 2013 which allowed the composition of the plural municipal councils by fulfilling the plaintiffs'claim in the unconstitutionality process followed before the Constitutional Chamber. In July of that same year, a new Electoral Code was approved by Legislative Decree No. 413. This incorporated in its Article 219 the formation of the Municipal Council in a plural manner.

All this took place within the framework of an initiative presented by the FMLN Parliamentary Group in addition to the political lobbying carried out by the civil society organizations, which were grouped together in the aforementioned management group. These efforts were aimed at achieving the legal changes needed to implement the plural municipal councils in the country. After a long discussion within the Electoral and Constitutional Reform Commission, an agreement was reached in January, 2013 between the legislative fractions to implement the plural municipal councils. The prompt adoption of the judgment was impeded by the decision of the ARENA party to submit this proposal to the consultation of its mayors. However on March 7th, 2013,[11] after new negotiations, the Legislative Assembly approved the legal reforms necessary to end the one-party composition of the municipal councils, and it was reaffirmed in July of the same year in the new Electoral Code.

11 See the following journalistic notes that expose the discussion process for the implementation of the plural composition of the Municipal Councils: "Contra Punto" Digital Newspaper, http://www.contrapunto.com.sv/politica/concejos-plurales-19-anos-para-materializarse, Co Latino Newspaper, http://www.diariocolatino.com/es/20120606/nacionales/104224/FMLN-presiona-por-Concejos-Plurales.htm, http://www.diariocolatino.com/es/20120324/nacionales/101755/Organizaciones-piden-aprobaci%C3%B3n-de-Concejos-Municipales-Plurales-en-actuallegislatura.htm, Active Transparency, http://www.transparenciaactiva.gob.sv/apruebanconcejos-plurales/

II. Comparative law

The presentation of a further overview of the implementation of the plural municipal councils allows to observe the degree of progress of the reform implemented in the country, showing objective data of the form of regulation in the legislation of other countries. Below are the data on the application of this figure in electoral laws that form a more complete vision of the feasibility of the plural formation in the municipal councils.

Regarding the Latin American Constitutions, Nohlen in his Treaty of Comparative Electoral Law[12] establishes that in almost all constitutions a section referring to the electoral system can be found. He gives as examples countries such as Mexico (Articles 52-54) and Panama (Article 14), in which the electoral system is described in a complete and detailed manner in the Constitution. He also reiterates that in all other countries there is an electoral law containing important additional.

This additional or decisive regulations, such as Costa Rica, El Salvador and Honduras, in which the electoral system is determined exclusively by an electoral law. This situation is not common because it is difficult to find the principle of representation embodied in constitutions.

In the same vein, there are other countries such as Paraguay, whose Constitution (Article 118) establishes the "system of proportional representation". In Peru the 1993 Constitution establishes the principle that proportional representation must be used in all multi-personal elections (Article 187). In Bolivia (Art. 60), Brazil (Art. 56), Ecuador (Art. 99), Nicaragua (Art. 132), Uruguay (Art. 88), Venezuela (Arts. 63 and 186) in their corresponding constitutions express this proportional representation as a principle or a decision-making formula. The majority representation is named as an electoral system only in the constitutions of two countries (Haiti, Art. 89s. and Argentina, Art. 45); however in Argentina

12 NOHLEN, D. *et al, Treaty of Comparative Electoral Law of Latin America,* Culture Fund Economical 2011, p. 296.

it is elected according to proportional representation.

The table below contains the regulation of the electoral system of some countries concerning the formation of municipal councils, which shows the application of the principle of proportional representation in that election.

Table N° 1. Comparative Law: Electoral laws that regulate the principle of proportional representation in municipal councils.

COUNTRY	LAW	ARTICLE
Honduras	Electoral Law and Political Organizations[13]	Article 3 Election system: In accordance with the provisions of this law, the election system may be: 1. By a simple majority; or 2. By proportional representation by electoral, national, departmental and municipal quotient and remainder.Article 195 Members of municipal corporations: For the declaration of election of members of municipal corporations the following shall be done: 3. In order to obtain the municipal electoral quotient, the total number of valid votes cast in the municipality shall be divided by the total number of members of the municipal council to be elected, excluding the vice-mayor; 4. The elected mayor and vice-mayor shall be those citizens who appear on the list of candidates of a political party, alliance or independent candidacy, who have obtained the majority of votes, subtracting from the total number of votes in favor of this list, the equivalent of a municipal electoral quotient; and, 5. A citizen who appears on the list with the highest number of votes, after having subtracted the municipal electoral quotient, with which the mayor and vice-mayor were declared elected, shall be declared elected first councilor. In the same way it will be done successively until completing the number of councilors corresponding to the municipality. 6. If the distribution referred to in the previous paragraph of this article does not complete the total number of councilors to be elected for each municipality, the candidate for councilor shall be declared elected from the list of the political party, alliance or independent candidacy that has reached the greatest municipal electoral remainder; and so forth, in the descending order of remainders, until completing the number of councilors to be elected.

13 For more information, see the Law here http://pdba.georgetown.edu/Electoral/Honduras/Leyes/LeyeElectoral.pdf

COUNTRY	LAW	ARTICLE
Nicaragua	Electoral Law[14]	Article 157. "The election of the councilors provided in the preceding article shall be carried out by the municipal district using the proportional representation system by the electoral quotient and with the same methodology of a greater average that is used for the election of the departmental or regional members".
Panamá	Electoral Law	Article 330. "In the case of two or more councilors' election, the rules of article 326 shall be applied with consideration in the case of the lists of independent candidates". Article 326. "In the case of electoral circuits that elect two or more legislative members, the Electoral Circuit Counting Boards shall proclaim the candidates elected in accordance with the following rules: 1. The total number of valid votes cast by all electors shall be divided by the number of citizens to be elected. The result of this division shall be called the electoral quotient. 2. The total number of ballots obtained by each list of candidates shall be divided by the electoral quotient and the result of this operation shall be the number of candidates to be elected by the party which launched the list in question. 3. If the number of citizens to be elected remains to be filled, one shall be awarded to each of the remaining lists which have obtained a number of ballots not less than half of the electoral quotient in the order in which those lists obtained the ballots. The parties that have obtained the electoral quotient shall not be entitled to the medium quotient. 4. If there are still vacancies to be filled, they shall be awarded to the most voted candidates, once the quotient and half quotient have been applied"...
Venezuela	Organic Law of Electoral Processes[15]	Article 8. "For the election of the members of the National Assembly, those of the State legislative councils, those of the municipal councils, and those of popular election collegiate bodies, a parallel electoral system shall be applied with a personalization in the suffrage for the nominal positions and of proportional representation for the positions on the list. In no case shall the nominal election affect the proportional election by list".

14 For more information, see the Law here http://pdba.georgetown.edu/Parties/Nica/Leyes/LeyElectoral.pdf

15 For more information, see the Law here

By observing the laws on electoral systems, El Salvador was facing a delay in its representative democracy, since it did not allow for genuine participation[16] by the population in municipal affairs. This limited the suffrage to a single option for local government administration. This situation is different even in countries like Cuba that do not allow the diversity of political parties, but whose municipal councils, however, are regulated by the direct representation of social organizations in the municipal assemblies of people's power, which guarantees the existence of plural criteria in it.

In the countries in Table N°1, the formation of municipal councils is established in a plural way, respecting the representative democracy by giving value to each of the votes of the population that make up the municipality. In the light of the international experience, which reflects an advance in terms of plural representation in the municipal administration, in El Salvador, is the formation of plural municipal councils a debt to democracy or an obstacle to governance?

Undoubtedly, the reform of Articles 220 and 264 of the 1992 Electoral Code and their incorporation into the 2013 Electoral Code is an inescapable step for the democratic breakthrough of the country in terms of municipal governments. It has been evident that the basic rule for the formation of the municipal councils was the majority system.

http://www.cne.gov.ve/web/normativa_electoral/ley_organica_procesos_electorales/indice.php

16 *"The participation of the citizen in the municipality is a kind of political participation related to the conduct of the local political society and consists of taking an active part in the corresponding governmental decisions". Cfr.* HERNÁNDEZ, A. M., *Municipal Law: general part,* Institute of Legal Research of the National Autonomous University of Mexico, 2003, p. 381 y ss.

III. Plural municipal councils, a new Salvadoran reality

The representation procedures in the election of municipal officials are a democratic mechanism[17] that gives full legitimacy to this role and through which the popular will is reflected. Through them, these officials acquire the commitment to administer the municipal government. *"The clearest explanation of political participation in the democratic municipality consists of the elective character of the communal authorities"*.[18]

Within societies, a multiplicity of developing problems requires solutions. Against this background, democracy proposes a mechanism to the research for common good by consolidating the agreement of the population on the people who will make the transcendental decisions for social harmony. It is on the basis of that consensus that decision-making in municipal affairs is not carried out directly by the community, but by the people elected by citizens, who have the obligation to look after their interests.[19]

The democratic exercise within the plural municipal councils arises from understanding that, through the diversity of political components in the administration of the municipal government, a greater legitimacy of the agreements and decisions reached will be allowed, in addition to attaching importance to the opinion of a minority that feels represented, as expressed

17 *"In accordance with a "minimum definition" of democracy as a form of government, characterized by Norberto Bobbio, democracy refers to a set of fundamental rules which establishes who is authorized to make decisions, under what procedures and under what conditions. According to this, a form of government will be considered democratic only if it is complied with 3 conditions: the individuals involved in the decision-making processes are the majority of the adult population; the decision-making procedure is governed by the principle of majority; and a set of basic freedoms are guaranteed (opinion, information, association, assembly, etc.). With these the involved individuals are allowed to present and/or choose the undefined political options without any pressure on them from the coercion mechanisms"*. CAMOU, A., in "Governance and Democracy", in *Notebooks for the Disclosure of Democratic Culture*, number 4, Federal Electoral Institute, available in: http://www.ife.org.mx/documentos/DECEYEC/gobernabilidad_y_democracia.htm#presenta

18 HERNÁNDEZ, A. M., *op. cit.*, p. 388.

19 See: Constitutional Chamber of the Supreme Court of Justice, *Judgment of unconstitutionality*, reference: 61-2009. Recital III. 3. A: *"The right to vote rests on three elements: the principle of popular sovereignty; democracy as a form of government; and the political representation. This right is affirmed because the popular election of the rulers serves both to allow the people to participate in the government and for the rulers to exercise the quality of representatives of the same"*.

by the Constitutional Chamber: *"Popular sovereignty implies the management of public affairs affecting the generality, and to that extent, has an interest in it. For this reason, the fate of society must be decided by all the members, each citizen having a vote with the same value. In other words: (i) the general decisions affecting the collective fate must be made by the people; (ii) all public office holders must be elected by the people or derived from elected office; and (iii) decisions are made by the majority, taking into account their interests, but with respect for minorities".*[20]

In the specific case of El Salvador, on March 22nd, 2013, Legislative Decree 326[21] established that, on the basis of Article 85 of the Constitution, which reflected the pluralistic nature of the political system,[22] it opens the door for the formation of the plural municipal councils, allowing the participation of political forces with a greater support from the population was presented, that is, the political forces with a significant degree of votes obtained in the municipal election.

The main incentives for the adoption of this reform are to promote the inclusion of minorities,[23] accountability and transparency of the exercise of municipal power.

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20 Constitutional Chamber of the Supreme Court of Justice, *Judgment of unconstitutionality,* reference: 61-2009. Recital III.1

21 Legislative Decree N° 366, published in the Official Gazette, volume 398, number 57 of 22 March 2013.

22 *"The principle of pluralism enshrined in article 85 section 2 has two basic dimensions: The ideological pluralism, which, as opposed to totalitarianism or integralism, implies promoting the expression and dissemination of a diversity of opinions, beliefs or conceptions of the world, from the conviction that no individual or social sector is the repository of the truth. The truth can only be achieved through discussion and encounter between different positions; or, in the words of the Single Report of the Committee for the Study of the Draft Constitution, 'the temporal and spatial coexistence of multiple ideologies within a regime of freedom'. The political pluralism, which -in contrast to statism- implies the recognition and protection of the multiplicity of social groups and institutions formed naturally and spontaneously between the individual and the State -the so-called intermediary institutions-. These institutions are generally organized for the defense of group or sectoral interests and to promote certain ideologies. Although they are not part of the governmental structure, they influence the formulation of political decisions". Vid.* Judgment of 20-VII-99, Inc. 5-99, Recital IX. 1.

23 *"A man gathers in society, not for the attainment of the good of one to the exclusion of others constituents but for the good of each and every member, in that sense a general community good. The common good is the purpose that focuses the life of the political community, encourages the activity of its government and provides meaning to the law as an instrument of power action and political order".* DROMI, J. R., *Municipal Autonomy,* La Plata: Argentine Notarial University, 1982, p. 111.

On the basis of this progress, the pluralist political system is accompanied by the principle of representative democracy as opposed to the system of municipal elections used before Decree 326 and the adoption of the new Electoral Code, through which the city halls were granted by a majority system. In this way, the mayor was elected, as well as the administrator and the entire municipal council, by being members of the same political party or coalition. This form of election was based on a complete exclusion of the rest of the political forces without allowing a channel to get back on track the interests represented by them.

Within this framework, Articles 220 and 264 of the 1992 Electoral Code, which allow for the pluralistic composition of municipal councils, are amended, taking into account the support reflected in votes by the inhabitants of the municipality for their formation. The achievement of this reform of the Electoral Code presented a lack of will on the part of political actors to consolidate this democratic advance because throughout the political discussions for its approval there was opposition and extensions. These oppositions and extensions were due to the interest of the exclusive management of the mayors; but despite the obstacles, political consensus was achieved that finally allowed the reform.

Political parties also reacted in different ways to this electoral reform. The political party Gran Alianza por la Unidad Nacional (GANA) showed a negative stance, since they were thought to impede the stable management of the municipal governments, and that a power struggle would be unleashed leading to the regression in the municipalities. In their turn, the political party Alianza Republicana Nacionalista (ARENA), after giving initial support to the favorable opinion, changed their position and asked for the withdrawal of the opinion of the legislative plenary, becoming an obstacle to the approval of the same one under the justification that they needed more time to explain to their mayors the new functioning of the plural Councils.[24]

24 *Cfr.* Semanario Voces *"Assembly delays approval of plural councils"*, new published in january 25, 2013, available http://voces.org.sv/2013/01/25/asamblea-legislativa-retrasala-aprobacion-de-consejos-plurales/

Finally, the political party Frente Farabundo Martí para la Liberación Nacional (FMLN), as the driving force behind the reform since their first formulations, maintained its support for it, ensuring that the corresponding opinion were not shelved but returned to the legislative plenary. After the criticism made by civil society organizations, the ARENA party had to express its support for this project again. Finally, with 73 votes, the Legislative Decree 326 containing a reform to the 1992 Electoral Code[25] was approved on March 25th 2013. From that date it was incorporated into the Electoral Code in July of that same year; this showed a step towards transparency and the proper management of public funds.

The social and political actors have agreed to positively assess the incorporation of pluralism within the municipal councils and it is considered as further progress in the democratization process in the country. It is noteworthy that a consensus of the political forces were achieved, as well as the approval of civil society organizations on the scope of this reform. However one of the criticisms made from the academy notes the delay in adopting this measure despite the fact that it has been under discussion since 1994, making El Salvador the only Latin American country with councils composed of a single political party.

This unequal condition prior to the reform of Articles 220 and 264 of the Electoral Code was the lack of respect for the pluralistic character of the political system. This situation occurred in the national elections of members to the Legislative Assembly, prevailing the principle of representative democracy. On the contrary, for elections at the local level, that is, in the municipalities there was no level of access to effective representation of the interests of the general population.

25 See the text of the reform allowing the composition of plural municipal councils: D.L. N° 326, published in the Official Gazette., volume 398, number 57 of March 22nd 2013.

This lack of homogeneity in the electoral system[26] affected democracy at the municipal level, since only one political party was left to conduct municipal affairs and the latter often won with less than fifty per cent of the vote, which meant that a minority decided affecting governance and democracy within the municipality.

IV. Challenges in the Implementation of Plural Municipal Councils

Regarding the implications on governance[27] and democracy, from the academic point of view, the possibility is left open to a first scenario characterized by the understanding and honest debating among political forces. This would promote the achievement of the country-vision agreements and the implementation of long-term projects, which would lead to democratic consolidation. Among the expected advances in governance is transparency in the administration of the municipal government and citizen participation established with the multi-party composition of the municipal council that is the highest authority of the municipality, a better management of resources and effective accountability under an internal control scheme allowing an effective debate on the appropriateness of the decisions made.

The other potential scenario when integrating the Plural Municipal Councils is the possible repetition of the confrontation between the different

26 *The purpose of the electoral system is to ensure that the votes reflect the authentic, free and spontaneous expression of the citizens. The votes are also an accurate and timely reflection of the will of the elector expressed at the polls by direct vote. Its basic functions are the planning, organization and execution of electoral, the referendum processes or other popular consultations, the maintenance and care of a single register of people's identification and the registration of acts modifying civil status. Cfr."* NOHLEN, D. *et al., op. cit.*, p. 295.

27 *"In other words, it is not a state or government that allows itself to govern a society, nor is a society itself governable or ungovernable; rather, it is the complex relationship between the two terms allowing to talk about the conditions of governance. The issue is not only of theoretical importance but also of practical relevance: the responsibility to maintain adequate conditions of governance is not a question that lays unilaterally on the government or on society. In this way, government and opposition, citizen parties and organizations must jointly commit themselves to maintaining an acceptable level of governance". Cfr.* CAMOU, A., *op. cit.*

political forces at the local level. This situation may generate problems for governance and delays in decision-making process which are for the welfare of the community, due to the pursuit of partisan interests over the general interest.

In order to achieve the first scenario, it is necessary to sacrifice particular interests on the part of the political forces of the country becoming aware that they must agree on decisions that are transcendental for society. Based on this reality, municipalities must learn to overcome party differences in order to prioritize the well-being of the population, while guaranteeing accountability to their governed, which in this case is more effective because of the proximity between the municipal leaders and the population.[28]

In addition to the amendments to the Electoral Code, the approval of the Law on Access to Public Information is also part of the need to show the population a degree of transparency in the decision-making of public entities as well as the criteria that guided public officials to decide what the best option was. With this, a system of social comptroller is created that monitors and regulates the actions of the government granting a greater legitimacy and trust to the public administration.

As part of the implementation of the plural municipal councils, the Legislative Assembly approved a new Decree number 737, which contains another set of reforms to the Electoral Code, such as the incorporation in the election of Members of the Central American Parliament on the same rules for the election of Members to the Legislative Assembly (Article 156). Article 165 has been amended establishing the creation of a list of the party or coalition in order of precedence of their candidates for municipal council in the event that they do not obtain a simple majority and that in this list the candidate for

28 *"Municipal democracy "fulfills, for its supporters says Fernando Albi, three fundamental missions: it brings the population closer to local problems, constitutes a school of civility and citizenship and means a brake on the excessive concentration of power in the central bodies power". There is faith in local democracy but that does not mean that it is taken for granted that every municipality is democratic, just as not every state is democratic. It is desirable to have democracy in the government since this constitutes "the only moral climate in which man can realize the sacred right to be man". Cfr.* HERNÁNDEZ, A. M., *op. cit.*, p. 422.

mayor and municipal administrator may be included. Article 219 literals g and h and the final paragraph were amended as well; they determine that in the event of a tie between the parties, a decision shall be taken by lottery. In the constitution of the municipal council, it creates a prohibition that excludes the participation of blood relatives, and the allocation of councilors in ascending order according to the number of valid votes.[29]

This set of reforms in the electoral system shows signs of innovation, as well as a greater political representation and participation. With the first formation of plural councils scheduled for March 1st, 2015, the decrease in secret and authoritarian practices that impede transparency in decision-making processes at the municipal level is promoted, favoring a more effective public comptroller.

Conclusions

1. *The consolidation of the democratic system in El Salvador lies in the search for a real representation of the people in the significant decisions and the transparent and efficient management of public power.*
2. *The municipal council is the entity in charge of the public administration of the municipality, showing itself closer to the needs of the population. In this sense, the representation of all sectors in this entity allows the discussion and problem-solving process affecting the community.*
3. *The reforms approved in March 2013 to Articles 220 and 264 of the 1992 Electoral Code made way for ruling to the pluralistic representation in the municipal councils. The new Electoral Code of July 2013 incorporated the mechanism for the election of a proportional municipal council to the votes obtained in the election (Art. 219).*
4. *In 2014, the Legislative Assembly issued a new Decree (N° 737) establishing the order of precedence of the candidates to the municipal council, the incorporation of the*

29 Legislative Decree 737: Reforms to the Electoral Code relating to Plural Municipal Councils, approval of ballots and registration of deputies to the Central American Parliament.

candidate for mayor and an exclusion referred to kinship. This Decree sought the effective implementation of the plural municipal councils for the municipal elections of 2015.

5. *El Salvador was the only country in the Central American region that did not allow proportional representation of the voting population, establishing a mayor and municipal council by the majority system, reflected in the administration of the mayor's office by a single political party. However, before 2013, many attempts were made to approve the plural municipal councils in order to create a real representation in the administration of municipalities. Within the legislative debate political negotiations emerged as well as the pressure from civil society organizations and even a process of unconstitutionality by the one-party formation of the municipal councils.*
6. *The formation of the plural municipal councils remained as a debt to the Salvadoran democracy, since before that, the municipal representation of the majority of the population was avoided. This reform of the municipal election system constituted a democratic advance that would help to measure the level of political maturity of the political parties in terms of work in favor of the population.*
7. *Regarding governance, it is expected that with this reform, there will be a greater transparency in the administration of the Municipal Government, as well as a greater citizen participation. With the multi-party composition of the municipal council is intended to have a better management of resources and effective accountability under an internal control scheme allowing broadening the debate in the decision-making process.*
8. *Finally, with the plural municipal councils, one of the biggest challenges for governability is to get over the particular interests generated between the different political parties, thus avoiding delays in the decision making that would be for the wellbeing of the community, and focusing on the transparent and efficient management of the municipal administration.*

The Influence of the Decisions made by the Inter–American Court of Human Rights and the Inter-American Commission on Human Rights in the Criminal Law of the States Parties

Lic. Jaime Edwin Martínez Ventura

Influencia de las Decisiones de la Corte IDH y de La Comisión Interamericana de Derechos Humanos en el Derecho Penal de los Estados

Lic. Jaime Edwin Martínez Ventura

Resumen

El Salvador es uno de los pocos países de Iberoamérica que proclama, explícitamente en su Constitución, la existencia y validez de un ordenamiento jurídico internacional con jerarquía normativa supra legal. Desde 1978 es parte de la Convención Americana de Derechos Humanos (CADH) y en 1995 reconoció la competencia contenciosa de la Corte Interamericana de Derechos Humanos (Corte IDH). Sin embargo, las tres primeras de cuatro sentencias condenatorias – existentes hasta diciembre de 2012 – de dicha Corte contra este país, no han sido cumplidas en lo que atañe a la parte dispositiva que ordena continuar o reiniciar los procesos penales respectivos y superar las limitaciones u obstáculos de hecho y de derecho que impidan el cumplimiento de las investigaciones de manera efectiva. Este estudio trata acerca de ese y otros fenómenos, en tanto presenta un panorama de la influencia de las resoluciones de la Corte IDH en el derecho penal y procesal penal de El Salvador, y se analiza si las decisiones de dichos órganos son cumplidas en el ámbito interno y en qué medida lo son. Se divide en seis partes en las que se desarrollan, entre otros temas, los aspectos más relevantes de la incorporación del derecho internacional, especialmente de la CADH, en el ámbito interno, entre ellos el reconocimiento y la jerarquía de los tratados internacionales en el ordenamiento jurídico salvadoreño; la aplicación directa de la CADH y el reconocimiento en el derecho interno de la obligatoriedad estatal de cumplir con las decisiones de la Comisión Interamericana de Derechos Humanos (CIDH).

PALABRAS CLAVE: CORTE INTERAMERICANA DE DERECHOS HUMANOS – COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS – JURISPRUDENCIA – EL SALVADOR – CUMPLIMIENTO DE SENTENCIAS CONDENATORIAS.

The Influence of the Decisions made by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights in the Criminal Law of the States Parties

Lic. Jaime Edwin Martínez Ventura

Abstract

El Salvador is one of the few countries in Latin America proclaiming explicitly in its Constitution, the existence and validity of an international legal system with supra legal hierarchy. Since 1978, it is part of the American Convention on Human Rights (ACHR) and in 1995, it recognized the litigious competence of the Inter-American Court of Human Rights (IACHR). However, three of the first four condemnatory sentences - existing until December 2012 - of this Court against this country, have not been fulfilled regarded as the dispositive part in continuing ordering or restart the respective criminal proceedings and exceed the limitations or obstacles of fact and law that prevent the compliance investigations effectively. This study is about these and other phenomena, while presenting an overview of the influence of the resolutions of the Inter-American Court (IAC) in criminal law and criminal procedure of El Salvador, and analyzing whether the decisions of these bodies are fulfilled in the internal field and in what extent they are. It is divided into six parts that are developed, among other topics, the most relevant aspects of the incorporation of international law, especially of the ACHR, domestically, including recognition and hierarchy of international treaties in the Salvadoran legal system; direct application of the ACHR and recognition in the domestic law of the state obligation to comply with the decisions of the Inter-American Commission on Human Rights (IACHR).

KEYWORDS: INTER-AMERICAN COURT OF HUMAN RIGHTS – INTER-AMERICAN COMMISSION OF HUMAN RIGHTS – JURISPRUDENCE – EL SALVADOR – COMPLIANCEOF CONDEMNATORY SENTENCES.

The Influence of the Decisions made by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights in the Criminal Law of the States Parties

Report of El Salvador[1]

Lic. Jaime Edwin Martínez Ventura[2]

Introduction

In this article, an overview is presented of the influence of the resolutions of the Inter – American Court of Human Rights, to be named also as The IACHR or The Court, and The Inter – American Commission on Human Rights, to be named also as IACHR or the commission, in the criminal law and criminal procedure of El Salvador, with the objective of exposing if the decisions of those bodies are fulfilled internationally and to what extent they are.

Decisions in this work are understood exclusively by three types of acts: first, the disposed by the court in the operative part of the judgments as a

1 Article published originally in Kai Ambos, Ezequiel Malarino and Christian Steiner (editors): *Inter – American System of Protection of Human Rights and The International Criminal Law – Volume III,* Bogota: Konrad Adenauer Stiftung, Georg – August – Universitat – Gottinger, 2013, p. 253 to 276. For publication this number of the magazine Right, has been adapted in aspects of shape.

2 Member of The Latin American group of studies about International Criminal Law, sponsored by the Program State of Rights for Latin American, of the Konrad Adenauer Foundation of Germany; under the academic leadership of the professors Kai Ambos and Ezequiel Malarino. Member of the Observatory of Organized Crime in Latin America and from the group of Studies on Regional Security in Central America, sponsored by the Regional Security Program of Fundación Friedrich Ebert from Germany. Former Director of Centro de Estudios Penales, (by its Spanish acronym CEPES), from La Fundación de Estudios para la Aplicación del Derecho (by its Spanish acronym FESPAD). Former Director of the de la Unidad de Justicia Juvenil de la Corte Suprema de Justicia of El Salvador. General Director of the National Academy of Public Security of El Salvador, from June 2009 to date.

remedy in contentious cases; second, what is suggested by The Court (IACHR) in an advisory opinion; three, what is recommended by The Commission at the end of a report according to articles 50 and 51 of the American Convention on Human Rights, ACHR.

The report is divided into six parts. First, the most relevant aspects of the incorporation of international law, especially the ACHR is developed internally, including the recognition and hierarchy of international treaties in the Salvadoran legal system; the direct application of the American Convention, and the recognition in the internal law of the state obligation to comply with the decisions of the IACHR and the Inter – American Court on Human Rights.

In the second part, the main focus of this study, the effects of the decisions of the Inter-American bodies on the criminal, and criminal procedure are treated, dividing such decisions for expository purposes, in decisions of the Inter-American Court in judgments of contentious cases, advisory opinions, and recommendations of the IACHR, each in three areas: in the legislation, in specific court cases and other types of effects in criminal matters and criminal procedure.

The third part answers the question whether there are legal mechanisms in El Salvador to implement the decisions of the Inter-American Court of Human Rights; the fourth part refers to the legal criteria or national jurisprudence used in relation to the compliance with the decisions of the Inter-American bodies in criminal and non-criminal cases; the fifth part explains whether there are legal or constitutional legal obstacles that oppose the compliance with the decisions of the Inter-American bodies; and, finally, in part six some conclusions are exposed.

I. Incorporation of International Law, in particular, The American Convention on Human Rights (ACHR) in the internal area

1.1. Incorporation of Internal Law in general

El Salvador, together with Argentina, Costa Rica, Honduras, Paraguay, Peru and Venezuela, are part of the exceptionality of Ibero-American countries that have constitutional legal provisions or domestic legal provisions that recognize an international or supranational legal order.

Regarding the hierarchy of treaties within the Salvadoran legal system, they have a supralegal value as a constitutional provision, still being under the Constitution of the Republic though; this is what Article 144 of the Carta Magna provides by pre-writing that international treaties celebrated by El Salvador with other States or with international organizations constitute laws of The Republic upon entering into effectiveness, with a higher value than the ordinary laws, which cannot modify or repeal what was agreed in a current treaty for El Salvador, so if in certain circumstances the treaty and the law enter into conflict, the treaty will prevail.[3]

However, according to the constitutional text, the provisions of a treaty may not be over the Constitution of the Republic, since international treaties or conventions have a higher value than common laws, but the first ones are not incorporated into the Constitutional text, they are not part of the so-called constitutionality block and, consequently, if at a certain moment it

3 The Constitutional provision says: *"Art. 144.- The international treaties agreed by El Salvador with other states or international organisms, constitute laws of the Republic once they enter into effect, in conformity with the dispositions of the same treaty and this Constitution.*
The law shall not modify or repeal that agreed in a treaty in effect for El Salvador. In case of conflict between the treaty and the law, the treaty shall prevail".

is determined that a conventional provision is contrary to the Constitution, it cannot prevail over the Constitution of the Republic.[4]

Regarding the competent authority and the procedure to be followed for the signing and ratification of international treaties, article 168, ordinal 4, of the Salvadoran Constitution, establishes the attribution of the President of the Republic, to conclude international treaties and conventions, submit them to the ratification of the Legislative Assembly, and to monitor its fulfillment, attribution that according to the Internal Regulation of the Executive Branch, the President exercises through the Ministry of Foreign Relations.[5]

At the same time, the Art. 131, Ordinal 7th of the Constitution, prescribes that it is the attribution of the Legislative Assembly to ratify such treaties.[6]

4 At least this is the official position that the Salvadoran State has sustained and has continuously maintained in coherence with the declaration expressed in the instrument of ratification of the American Convention, deposited in the Secretaria General (General Secretariat) of the OAS (known in English as Organization of American States).

5 This regulation states:
"Art. 32 - It concerns to the Ministry of Foreign affairs (known in Spanish as Ministerio de Relaciones Exteriores):
2 - Manage, negotiate, sign, and denounce treaties, conventions, and international agreements by hearing the opinion of the interested Secretary when necessary;"

6 The ratification of treaties, as a general rule, requires the vote of a simple majority of elected deputies. There are two exceptions in which the vote of a qualified majority of two types is demanded: two-thirds of the votes of the elected deputies, in the treaties relating to the extradition (Art. 28, subsection 3 constitutional); and the vote of at least three-quaters of the elected deputies, in cases related to the national territory and the limits of the Republic, as provided in Article 147 of the Constitution.
Regards to reservations or constitutional prohibitions relating to certain matters or objects of conventions or treaties, Article 145 prescribes that treaties that restrict or affect in any way the constitutional provisions cannot be ratified, unless the ratification is made with the corresponding reservations. The dispositions of the treaty on which the reservations are made are not the law of the Republic.
Likewise, Article 146 of the Constitution prohibits the conclusion or ratification of treaties or the granting of concessions in which the form of government is altered in any way, or the integration of the territory, the sovereignty and independence of the Republic, or the rights and fundamental guarantees of the human person. This prohibition includes international treaties or contracts with governments or national or international companies in which the Salvadoran State is subject to the jurisdiction of a court of a foreign state, which, according to the same constitutional text, it does not prevent that in both the treaties and the contracts, the Salvadoran State in case of controversy, submit the decision to an arbitration or an international tribunal.

1.2 Incorporation of the American Convention of Human Rights (ACHR)

El Salvador ratified the American Convention about Human Rights, through Legislative Decree Number 5, dated June 15, 1978, published in the Official Gazette Number 113, June 19, 1978. The instruments of ratification were received by the General Secretary of the OAS (known in English as the Organization of American States) on June 23rd, 1978, with a reservation regarding the recognition of the contentious jurisdiction of the Inter-American Court, and a declaration.[7]

1.3 Direct Application of the ACHR

Article 144 of the Constitution of the Republic establishes that the international treaties celebrated by El Salvador with the other States or with international organisms, are laws of the Republic since they enter into force. In other words, they become part of the domestic legal system and therefore must be complied with and applied directly by the courts and competent authorities or may even be invoked by natural or legal persons in specific situations and cases in which they have an interest, particularly when it comes to rules of public policy that do not need to be developed in secondary laws because they deal with matters of political content or fundamental relations of the States.[8] In

7 This reservation and this declaration says:
"The present Convention is ratified, its provisions being interpreted to mean that the Inter-American Court of Human Rights shall have jurisdiction to hear any case that can be submitted to it, either by the Inter-American Commission on Human Rights or by any State Party, provided that the State of El Salvador, as a party to the case, recognizes or has recognized such jurisdiction, by any of the means and under the arrangements indicated in the Convention. The American Convention on Human Rights, known as the "Pact of San José, Costa Rica", signed at San José, Costa Rica, on November 22, 1969, composed of a preamble and eighty-two articles, approved by the Executive Branch in the Field of Foreign Affairs by Agreement 405, dated June 14 of the current year, is hereby ratified, with the reservation that such ratification is understood without prejudice to those provisions of the Convention that might conflict with express precepts of the Political Constitution of the Republic".

8 Nevertheless, many treaties, due to the object or matter they regulate, require for their effective application the issuance of internal legislation, as is the case of international conventions on environmental matters, against drug trafficking, organized crime, and others. Regarding *vid.* Salvadoran Foundation for Economic and Social Development. Department of legal studies. *Ratification and observation of international treaties.* Legal Studies Bulletin number 79, July 2007,

consequence, the American Convention about Human Rights could and must be applied directly by the courts, public authorities and other competent officials.

In practice, the direct application of the ACHR by the superior courts of El Salvador, understood as such the Constitutional Chamber, Administrative Litigation Chamber, Criminal Chamber of the Supreme Court of Justice, and the second instance criminal chambers, is very recent. For this study and according to the information available, the first applications are from 2002,[9] while the validity of this convention is from June 23, 1978. In other words, they had to spend more than twenty years for the main courts of this country decided to use directly the provisions of the ACHR for the basis of their judgments and resolutions.

Even though the application of the American Convention in criminal matters and criminal procedure by the Salvadoran courts is still pending, there are a significant number of judgments and resolutions in which this convention has been applied concerning various criminal and criminal procedural matters and institutions.[10] By way of example, the following five are cited:

1. *Right of the accused to be informed of the reasons for his arrest (Constitutional Chamber / Habeas Corpus / Final Judgments, 53-2010 dated 10/06/2010)*[11]
2. *Right of the defendant to have a defense counsel of his / her choice (Criminal Chamber / Final Judgments, 165 - CAS-2009 dated 11/07/2011; Criminal Chamber's Judgment Ref. 474 -CAS- 2006, of the 10: 20 hours on the day 5/29/2008;*

San Salvador, p. 5.

9 It is not ruled out that these higher courts or criminal courts have directly applied this Convention before 2002, but due to the lack of availability of jurisprudential records ordered in those previous years, this was not the objective of study in this report.

10 This direct application can be consulted by the Supreme Court of Justice of El Salvador. Judicial Documentation Center. Jurisprudence. Jurisprudential Lines. http://www.jurisprudencia.gob.sv/visor2012/lineas.aspx. As part of the investigation carried out for this report, more than 30 sentences were detected and analyzed in which direct application of the ACHR was made about 17 criminal or criminal procedural subjects or institutions, in final judgments of the Constitutional Chamber, Administrative Chamber and Criminal Chamber, of the Supreme Court of Justice, and the criminal courts of the second instance.

11 The sentence substantially says: The right mentioned is also reflected in the American Convention on Human Rights, specifically in article 7 number 4: *"Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him…"*

Criminal Chamber's Judgment Ref. 70-CAS-2008, at 9:31 hours on the day 6/4/2008; Criminal Chamber's Judgment, Ref. 437 -CAS-2004 of the 10 hours on the day 8/8/2007; Judgment of the Criminal Chamber, Ref. 239-CAS-2004 at 9:30 hours on the day 02/15/2005);[12]

3. *Principle of legality and non-retroactivity of the criminal law (Final Judgment of the Criminal Chamber, Ref. 193-M-2001 of 9:10 of 14/3/2003, and final judgment of the Criminal Chamber, Ref. 206- C-2001 at 9:10 of date 5/06/2004);*[13]
4. *Due application of the principle Ne Bis In Idem (Criminal Chamber / Definitive Sentences, 235-CAS-2007, dated 04/21/2010; Definitive Sentences, 283-CAS-2005, dated September 27, 2010; sentences of the Criminal Chamber, Ref. 599-CAS-2006, of the 11:25 hours of the date 9/04/2009; sentences of the Criminal Chamber Ref. 63-CAS-2006 of 10 hours of the day 7/23/2008; Judgment of the Criminal Chamber Ref. 4-CAS-2005 of the 11:30 hours of the date 11/30/2005; Sentences of the Criminal Chamber Ref. 298-CAS-2005 of 10:34 am of the 12/9/2005; Chamber of the Third Section of the Center, San Vicente, Ref. 65-03 / 03 of 11:50 hours of the date 5/27/2004);*[14]

12 In pertinent terms, these sentences coincidentally express: "In addition to the above, the American Convention on Human Rights -Art. 8.2 Lit.d) - and the International Covenant of Civil and Political Rights -Art. 14.3 Lit. d), recognize the right of the accused to be represented in the process by an advocate "of his choice", where it is clear that It refers to a fundamental right, and therefore its exercise is inherent in the inviolability of the defense in the procedure."

13 The judgments in the pertinent and in a similar way express: *"Likewise, the American Convention on Human Rights (Pact of San Jose, OAS, 1969), ratified with interpretation by El Salvador through the Legislative Decree number five on June Fifteen one thousand nine hundred and seventy-eight, published in the Official Gazette number one hundred and thirteen, volume two hundred fifty-nine, on June nineteen of the same year, it's recognized in its art. 9 Principle of Legality and Retroactivity: "No one can be convicted for actions or omissions that at the time of committing would not be criminal according to the applicable decree and cannot be imposed more seriously than the application at the time of the commission of the crime. "With posterity to the commission of the crime the law has the imposition of a greater penalty, the offender will benefit from it."*

14 The judgments in the pertinent and in a similar way express: *"In view of the allegation made by the appellant, it must be noted that Article 11 of the Constitution contains a series of guarantees and principles that must be complied with in an obvious manner, to procure and preserve a fair trial, in this way, which among these, the procedural legality, which means that the judge will imperatively comply with the structural and functional organization during the entire process, to avoid the manipulation of your organization determined before.*
It is also represented as a procedural guarantee, the one that prohibits double judging or what in doctrine is called non-bis in idem, which is also recognized by international regulations, for example, Art. 14.7 of the International Covenant on Civil and Political Rights, and Art. 8.4 of the American Convention on Human Rights (...)"

5. *Principle of exceptionality of the preventive detention (Sentence of the Chamber of the 2nd section of the West, Sonsonate, at 9:02 hours of the day 2/7/2007, Sentence of the Chamber of the 3rd Western Section, Ahuachapán, Ref. 84/06 of 16:00 hours of the day 08/14/2006; Sentence of the Chamber of the 3rd Section of the West, Ahuachapán, Ref. 05/06 at 16:00 hours of the day 1/12/2006; Sentence of the Chamber of the 3rd Western Section, Ahuachapán, Ref.76/06 of the 9:58 hours of the day 07/19/2006; Sentence of the Chamber third Section West, Ahuachapán, Ref. 131/06 of 16:00 hours of day 11/17/2006, Chamber of the 3rd Western Section, Ahuachapán of 16:00 of the day 01/25/2005; the 2nd Section of the West, Sonsonate, Ref. 60-2004 of the 14:15 hours of the day 15/12/2004, Chamber of the 3rd Western Section, Ahuachapán, at 14:00 hours of the day 12/12/2003 ; Chamber of the 3rd Western Section, Ahuachapán at 9:30 hours of the day 04/29/2003; Sentence of 11:30 on 02/21/2002, Chamber of the 2nd Western Section, Sonsonate).*[15]

1.4 Recognition in the domestic law of the State obligation to comply with the decisions of the Inter-American Court of Human Rights (IACHR) and the Inter-American Commission on Human Rights (IACHR)

El Salvador does not have any legal instrument in it recognizes the obligation to comply with the recommendations of the Inter-American Commission on Human Rights, although when it comes to precautionary measures ordered by the organism mentioned before, as a general rule it has complied with them, as will be seen below.

15 The judgments cited, in pertinent and coincidentally, say: *"It is appropriate to note that it is the exclusive right of judges to assess in each specific case and according to the particular circumstances thereof, the application of the" principle of the exceptionality of provisional detention "that enshrine Articles 9.3 of the International Covenant on Civil and Political Rights and 7.5 of the American Convention on Human Rights, saying that the preventive detention of persons to be tried should not be the general rule and that the freedom to the defendants may be subject to guarantees that ensure their presence at the trial or at any other time of the proceedings."*

Instead, it juridically acknowledges the contentious competency of the Inter- American Court of Human Rights through Legislative Decree No. 319 dated March 30, 1995. This decree was published in the Official Gazette No. 82. Volume 327 of May 5th, 1995. The date on which the recognition of competency became effective was June 6th, 1995, the date on which the correspondent instrument was presented before the General Secretary of the OAS, with a consistent reserve about the acceptance of competency as being only for the foregoing juridical acts or juridical acts which have principles of execution previous to the date in which the instrument of recognition was handed to the OAS and making a reservation of the right of ceasing the competency at any moment that is considered convenient".[16]

II. Effects of the decisions of the Inter-American organization in criminal matters and criminal procedure

2.1 Decisions made by the Inter-American Court of Human Rights in sentences about repairs

Up to this date, El Salvador has been condemned by the Inter- American Court of Human Rights in two cases related to forced disappearances of children during the armed conflict, like in the case of the sisters Serrano Cruz v. El Salvador.

16 The declaration of competence states:
"I. The Government of El Salvador recognizes as mandatory under the law and without a special convention, the competence of the Inter-American Court of Human Rights, following the provisions of Article 62 of the American Convention on Human Rights or" Covenant of San José.
II. The Government of El Salvador, when recognizing such competence, leaves a record that its acceptance is made for an indefinite period, under the condition of reciprocity and with the reservation that the cases in which is recognized the jurisdiction, which includes only and exclusively facts or legal acts or subsequent facts or legal acts whose principle of execution is subsequent to the date of deposit of this Declaration of Acceptance, reserving the right to stop the competence at the time it deems appropriate
III. The Government of El Salvador, recognizes such competence of the Court, in the measure that this recognition is compatible with the dispositions of the Constitution of the Republic of El Salvador."

Serrano Cruz v. El Salvador[17] and the Case of Contreras *et al.* El Salvador.[18] A third case of events that occurred in the post-war, related to summary execution and violation of the rights to judicial guarantees, judicial protection, and personal integrity is the Case of Contreras *et al*.[19] On December 10th, 2012, the fourth conviction against El Salvador, dated on October 25th of that year, was publicly announced for the successive massacres committed by an elite battalion of the army, for the period from December 11 to 13 1981, in diverse places of the north of the Department of Morazán, known as Case of the Massacres of El Mozote and nearby places v. El Salvador. However, as it is the most recent of these sentences, whose compliance has not yet reached its terms, it will not be analyzed in this paper.

2.1.1 Effects on legislation

In the judgment of the Case of the Serrano Cruz Sisters, the IACHR, in terms of effects on the legislation, in paragraph 6, orders: *"6. The State must (...) eliminate all obstacles and mechanisms of fact and right that prevent compliance with these obligations in the present case,[20] so that it uses all the measures available to it, either through the criminal process or through the adoption of other suitable measures (...) in the terms of the paragraphs 166 to 182 of the present Judgment".*

Therefore, this point must be interpreted in coherence with what is indicated in paragraphs 166 to 182 of the judgment that are pertinent, taking into account that these paragraphs are part of the first measure of reparation dictated by the court, consisting of the *Obligation to investigate the facts denounced, identify and punish those responsible and conduct a serious search of the victims.* Regarding

17 *Vid.* Inter - American Court on Human Rights. Case of Serrano - Cruz sisters vs. El Salvador Sentence of March 1st 2005. http://www.corteidh.or.cr/casos.cfm

18 *Vid.* Inter - American Court on Human Rights. Contreras Case and others vs. El Salvador. Sentence of August 31st, 2011 (Merits, Repairs and Costs). http://www.corteidh.or.cr/casos.cfm

19 *Vid.* Inter - American Court on Human Rights. García Prieto Case and others vs. El Salvador. Sentence of November 20th, 2007 (Preliminary Exceptions, Funds, Repairs and Costs). http://www.corteidh.or.cr/casos.cfm

20 It refers to the first duty imposed by this judgment, such as effectively investigating the facts reported in that case, within a reasonable period of time.

effects in the legislation, the relevant paragraphs are:

> *"172. The Court observes that the State must ensure that the domestic proceedings to investigate what happened to Ernestina and Erlinda and, if appropriate, punish those responsible, has the desired effect. The State must abstain from using figures such as amnesty and prescription or the establishment of measures designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction.*[21] *This Court repeats that in relation to compliance with the obligation to investigate and punish: […] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible as they are intended to prevent the investigation, and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution, and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.*[22]
>
> *180 (...) the Court considers it fair and just to order El Salvador, in compliance with its obligation to investigate the reported facts, to identify and punish those responsible and to conduct a genuine search for the victims,* ***to eliminate all the obstacles and mechanisms de facto and de jure that hinder compliance with these obligations, in this case,***[23] *using all possible means, either through the criminal proceedings or by the adoption of other suitable measures."*[24] [25]

21 *Cfr. Case of the Gómez Paquiyauri Brothers supra* note 3, para. 148; *Case 19 Merchants, supra* note 15, para. 175; and *Case Maritza Urrutia, supra* note 19, para. 126.

22 *Cfr. Case of Carpio Nicolle and others, supra* note 3, para. 130; *Case of the Gómez Paquiyauri Brothers, supra* note 10, para. 233; and *Case 19 Merchants, supra* note 15, para. 262.

23 The startled in bold is supplied by the author.

24 *Cfr. Case of Carpio Nicolle and others, supra* note 3, para. 134; and *Case of Myrna Mack Chang, supra* note 8, para. 77.

25 Inter - American Court on Human Rights. Case of Serrano - Cruz sisters v. El Salvador, cit.

This provision of the Inter-American Court has not yet been complied with, although it is not due to the Attorney General of the Republic arguing that there are legal obstacles such as the Law of Amnesty,[26] the statute of limitations and other criminal, and criminal procedural institutions that prevent it. According to the resolution of supervision of compliance with the judgment of the Inter-American Court, of February 3th, 2010, the State acknowledged that there is no substantial progress in the investigation, although the Prosecutor's Office, in compliance with a requirement of the Court of First Instance of Chalatenango , requested to the President of the Republic twice, the nomination of the officers who participated in a military operation during which the disappearance of the Serrano Cruz sisters was perpetrated. In July 17th, 2009, the President ordered the Minister of Defense to deliver such information, but it has not yet been provided.[27]

Because of the lack of progress in the investigation, the Court has decided to keep open the procedure of supervision of the compliance with the pending points to be obeyed, among them " To investigate effectively the facts denounced in the present case, identify and sanction the responsibles, and make a search of the victims, remove all obstacles and mechanisms of fact and law that prevent compliance with those obligations", and resolved: "To request to the State to present to the Inter-American Court of Human Rights, no later than June 30th, 2010, a report that contains all the measures to comply with the reparations ordered by this Court and that is pending of compliance".[28]

Other measures ordered by the Inter - American Court of Human Rights in this case, that could have an impact on the Criminal Legislation, is that the Salvadoran State has to classify as appropriate the crime of forced disappearance of persons and must ratify the Inter-American Convention

26 General Amnesty Law for the Consolidation of Peace. Legislative Decree 486, of 03-20-93; published in Diario Oficial No. 56, Volume 318, of 03-22-93.

27 *Cfr.* Court Resolution of the Inter-American Court of Human Rights of February 3, 2010. Case of the Serrano Cruz Sisters v. El Salvador. Monitoring Compliance with the Judgment. Paragraph 12. http://www.corteidh.or.cr/ Cases.cfm

28 *Ibidem*, Declarative point 2 and operative paragraph 2.

on Forced Disappearance of People since when the facts under investigation occurred, this figure was not classified as a crime in the respective criminal law. As of 1999, the aforementioned offense was incorporated into the Salvadoran Penal Code, but the Court observed that the classification is not consistent with international standards regarding the description of the elements of the criminal nature and the penalty corresponding to the severity of the crime.[29]

To date, the Salvadoran State has not carried out any reform or adaptation of the criminal type of forced disappearance of persons as a result of the judgment in this case, nor has it ratified the American Convention on Forced Disappearance of Persons.[30] Therefore, it has not complied with this operative part of the sentence of the Serrano sisters' case. In the judgment of the Contreras case, operative paragraph 10, the court ordered: *"10. The State must adopt the pertinent and appropriate measures for justice operators, as well as Salvadoran society, public, technical and systematized access to the archives containing useful and relevant information for the investigation into cases followed by violations on human*

29 *Cfr.* Inter-American Court of Human Rights. Case of the Serrano Cruz Sisters v. El Salvador, mentioned in Paragraph 174. The Criminal Code of El Salvador, in force since 1999 and also in force at the date of the decision of the Inter-American Court (March 1, 2005), defines three criminal types of forced disappearance of persons. The basic type is called **"Forced Disappearance of Persons"** (Art. 364), according to which *"The public official or employee, agent of authority or public authority, who legally or illegally detains a person and does not give reasons about his whereabouts, shall be sanctioned with imprisonment of four to eight years and absolute disqualification of the respective position or employment for the same term"; the offense of* ***"Forced Disappearance committed by Individuals" (Art. 365),*** *which reads: "He who will perform the conduct described in the previous article, having received orders or instructions from an official or public employee, agent of authority or public authority, shall be sanctioned with imprisonment of three to six years and fine of one hundred eighty to two hundred days fine";* and the criminal type called **"Disappearance of guilty persons" (Art. 366),** which states: *"He who by fault allows another to commit the crime of forced disappearance of persons, shall be punished with a penalty of two to four years in prison, fine from one hundred to one hundred eighty days fine. If it is an official or public employee, agent of authority or public authority, it will also be imposed, disqualification for the exercise of the respective position or job for the same term."* Unfortunately, the IACHR does not precisely state why those typical descriptions do not conform to international standards. It only states that (SIC) *"that said classification did not conform to international standards on forced disappearance of persons, as regards the description of the elements of the criminal type and the penalty corresponding to the seriousness of the crime. The Court considers that it would be convenient for El Salvador to properly classify said crime and adopt the necessary measures to ratify the Inter-American Convention on Forced Disappearance of Persons."*

30 *Cfr.* Organization of American States, OAS. Inter-American Convention on Forced Disappearance of Person. Status of Signatures and Ratifications. http://www.oas.org/juridico/spanish / firmas / a-60.html, accessed 09-15-12

rights during the armed conflict, in accordance with the provisions of paragraph 212 of this Judgment."

El Salvador issued on December 2nd, 2010, the Law on Access to Public Information,[31] (LAIP, for its Spanish acronym), which has been in force since May 2011; such as indicated in the judgment of this case.[32] However, the approval and promulgation of the mentioned law does not derive directly from compliance with this sentence. In addition, paragraph 212 included in the measures of reparation ordered by the Inter-American Court, this court refers to the fact that it has observed as one of the limitations to advance research, the lack of access to the information contained in files related to operational counterinsurgency, as well as people, units and military who participated in the operations in which the victims disappeared of the present case, including their hierarchies, functions, and responsibilities. In consequence, the LAIP coming into effect is not considered complete in the disposition of the Court.

However, it should be noted that the sentence of the Case of Contreras *et al.* v. El Salvador, it is only from August 31th, 2011, it can be considered that the State is still within the reasonable period that the Court ordered to comply with this operative paragraph. In addition, it must be considered that in this case, the Salvadoran State before the sentence recognized its international responsibility for the forced disappearance, the violation of the rights to judicial protection and other rights, so the Court dismissed the controversy regarding the violation of such human rights[33] and in this way, El Salvador demonstrated,

31 Legislative Decree 534, published in the Official Gazette 70, Volume 391, of 04-08-11.

32 *Cfr.* Inter-American Court of Human Rights. Case of Contreras *et al.* v. El Salvador... *"(…) 111. The State reported about the entry into force on April 8, 2011 of the Law on Access to Public Information that "will allow an internal mechanism of access to related information to government activities allegedly linked to the disappearance of children during the internal armed conflict", and which also provides "the creation of Units for Access to Public Information", as well as "the creation of an Institute for Access to Public Information", with legal personality and own patrimony, which will be in charge for ensuring the application of the law. Likewise, it informed that this law contemplates "a control mechanism in the absence of a response to a request of information".*

33 *Cfr.* Inter-American Court of Human Rights. Case Contreras and others. vs. El Salvador. paragraphs 17 to 28.

in an unprecedented way, that it has the will to fulfill with the sentence of the regional court.

In the final judgment of the Case of García Prieto *et al.*, the Court on the operative point 5, provides that the State *"must conclude the pending investigations regarding the killing of Ramón Mauricio García Prieto and the threats and harassment, within a reasonable period of time, in the terms of paragraphs 192 to 197 of this Judgment"*. Paragraph 196 of this judgment orders: *"It corresponds to the States issue the rules and adjust the necessary practices to comply with the provisions of the decisions of the Inter-American Court if they do not have these dispositions"*.[34]

This operative paragraph has not been complied by the Salvadoran State, as established by the resolution of compliance monitoring of the judgment of the Inter-American Court, dated August 27th, 2010.[35]

2.1.2 Effects on Specific Judicial Cases

In the case of the Serrano Cruz sisters, the Inter - American Court on Human Rights, regarding the effects on judicial cases, in item 6, orders: *"6. The State shall, within a reasonable time, carry out an effective investigation into the reported facts in this case, identify and punish those responsible and conduct a genuine search for the victims (...) in the terms of paragraphs 166 to 182 of this Judgment"*.[36]

34 *Cfr.* Inter-American Court of Human Rights. Case of García Prieto *et al.* v. El Salvador, cit.

35 *Cfr.* Order of the Inter-American Court of Human Rights. August 27, 2010. Case García Prieto and others. vs. El Salvador. Monitoring Compliance of the Judgment. This resolution provides the procedure for monitoring compliance with two points pending compliance will be kept open: a) conclude pending investigations regarding to the killing of Ramón Mauricio García Prieto and the threats and harassment suffered by Mr. José Mauricio García Prieto Hirlemann and Mrs. Gloria Giralt de García Prieto; and, b) provide for free the medical, psychiatric or psychological assistance required by the Mr. José Mauricio García Prieto Hirlemann and Mrs. Gloria Giralt de García Prieto.

36 This operative paragraph, therefore, must be interpreted under the provisions by the Court in the paragraphs between 166 and 182 of this judgment, which, as already explained, are part of the reparation measures issued by the Court.
In this case, such paragraphs are:
"175. In light of the foregoing considerations, the Court considers that El Salvador must effectively investigate the facts reported in this case, in order to determine the whereabouts of Ernestina and Erlinda, what happened to them, and in their case, identify, judge and punish all material and intellectual authors of the violations committed to their detriment, for criminal purposes and any others that may result from the investigation of acts (...) "

This resolving point of the Inter-American Court of Human Rights has not been fulfilled, but not necessarily because the Fiscalia General de la República argues the existence of legal obstacles such as the Law of General Amnesty for Peace Consolidation, prescription, and other criminal and criminal procedural institutions that prevent it.[37] According to the resolution monitoring compliance with the Sentence of the Inter-American Court, of February 3, 2010, the State recognized that there is no substantial progress in the investigation.

However, in the resolution mentioned before, it is clarified that the Prosecutor's Office, in compliance with a requirement of the Court of First Instance of Chalatenango, requested the President of the Republic on two occasions the payroll of the officers who participated in a military operation during which the disappearance of the Serrano Cruz sisters was perpetrated. On July 17, 2009, the President ordered the Minister of Defense to deliver such information, but this has not been provided yet.[38]

In the Contreras case, in operative point number 2, The Court ordered: *"2. Within a reasonable time, the State must continue effectively and with the greatest diligence open investigations, as well as open those that are necessary in order to identify, judge and, where appropriate, punish all those responsible for the forced disappearances of Gregoria Hermina Contreras, Serapio Cristian Contreras, Julia Ines Contreras, Ana Julia Mejia Ramirez, Carmelina Mejia Ramirez y José Rubén Rivera Rivera, as well as*

"176. Likewise, is required that in the investigation of the facts, the State does not repeat the actions and omissions indicated in the considerations of the Court regarding the violation of Articles 8.1 and 25 of the Convention (supra para. 52 to 107). It is necessary to take into account the particularities of the facts denounced and the situation of armed conflict in which El Salvador was at the time the events allegedly occurred (...)

37 If the Attorney General's Office does not allege the existence of legal obstacles that prevent it carry out the investigations ordered in the judgments of the Inter-American Court, probably because the main impediment to investigate is the lack of political will to do so; it is also possible that neither the Attorney General's Office, nor the National Civil Police, have developed sufficient scientific research capacities in crimes as complex as those who were subject to the judgments of the inter-American court and, consequently, we are also facing a problem of institutional fragility and administrative weakness.

38 *Cfr.* Administrative Order of the Inter-American Court of Human Rights of February 3, 2010. Case of the Serrano Cruz sisters v. El Salvador. Monitoring Compliance with the Judgment. Paragraph 12. http://www.corteidh.or.cr/ Cases.cfm

other related wrongful acts, in accordance with the provisions of paragraphs 183,185 and 187 to 188 of this Judgment".[39]

As in the case of the Serrano Cruz Sisters, this operative part must be interpreted coherently by the Court in the paragraphs mentioned that are part of the repairs ordered by the Court.[40]

The Salvadoran State has not yet completed the investigation ordered by the Inter-American Court in this case, but it should be taken into account that the judgment was issued on August 31st, 2011, so the State is still within the reasonable period that the Court ordered for compliance.[41]

In the final judgment of the García Prieto case, operative paragraph 5, the Court ordered: "*5. The State must conclude the pending investigations regarding the Homicide of Ramón Mauricio García Prieto and threats and harassment, in a reasonable period, in the terms of paragraphs 192 to 197 of this Judgment*".[42]

39 *Cfr.* Inter-American Court of Human Rights. Case of Contreras *et al.* v. El Salvador, cit.

40 Paragraph 185 is clear in saying that the investigation of the facts should be conducted by the State "*removing all the obstacles de facto y de jure that maintain impunity in this case. In particular, the State must:*
a) take into account the systematic pattern of forced disappearances of children in the context of the Salvadoran armed conflict (…)
b) identify and individualize all material and intellectual authors of disappearances forced victims (...)
c) ensure that the competent authorities carry out the corresponding investigations ex officio, and for that purpose have at their access and use all logistic and scientific resources need for the investigations (…)
d) because they are serious human rights violations, and in consideration of the nature continued or permanent forced disappearance whose effects do not cease until establish the fate or whereabouts of the victims and their identity is determined (supra para.83 and 92), the State must refrain from resorting to figures such as amnesty for the benefit of authors, as well as any other similar provision, the prescription, non-retroactivity of the criminal law, ne bis in idem or any similar exemption from liability, or excuse from this obligation, and
e) ensure that investigations into the facts constituting forced disappearances of the present case remain, at all times, under the jurisdiction's knowledge ordinary.

41 Likewise, in this case, it has to be considered that, before the sentence, the Salvadoran State recognized his responsibility for the forced disappearance, the rights violation of judicial protection, among others; the Court consequently terminated the dispute regarding the violation of such rights and in this way El Salvador demonstrated its will complying with the sentence of the regional court.

42 *Cfr.* Inter-American Court of Human Rights. Case of García Prieto *et al.* v. El Salvador. Judgment of November 20th, 2007 (Preliminary Objections, Merits, Reparations and Coasts). The most relevant of paragraphs 192 to 197, which are part of the measures of reparation ordered by the Court, as regards the judicial effects derived from the sentence, are:
"193. (…) The State failed to comply with the duty of collaborating with the judicial authorities

This provision has not been complied with by the Salvadoran State, as established by the resolution of supervision of compliance with the sentence of the Inter-American Court, dated August 27th, 2010.[43]

2.1.3 Other effects in criminal or criminal proceedings

Case of the Serrano Cruz Sisters:

a) *The functioning of a national commission to search for young individuals who disappeared as children during the armed conflict and the involvement of civil society;*

b) *Creation of a search website;*

c) *Creation of a genetic information system, in accordance with paragraphs 183 to 193 of this Judgment.*[44]

The National Commission for the Search of Missing Children during the Internal Armed Conflict was created in April, 2010.[45] The Inter - American Court, in its resolution of monitoring compliance with the judgment of 02-3-10, was arranged to maintain the supervision of compliance with that measure at that

in the investigation related to the judicial inspection of the "entry and exit" books of the personnel of the Batallon San Benito of the National Police (supra para. 116). Because of that, The State must complete this investigation.
194 In addition to the above, two investigations are still open, one regarding the Homicide of Ramón Mauricio García Prieto and another regarding threats and harassment suffered by Mr. José Mauricio García Prieto Hirlemann and Mrs. Gloria Giralt de García Prieto (supra para. 94, 116, 137, 157). These investigations should continue as soon as possible, in accordance with internal law.
195 In compliance with the obligation to investigate, the State must use all means available to expedite the investigation and the respective procedures, and in this way avoid the repetition of facts like those in the present case."

43 *Cfr.* Order of the Inter-American Court of Human Rights. August 27, 2010. Case of García Prieto and others. vs. El Salvador. Monitoring Compliance with the Judgment. This resolution provides that it will keep open the procedure for monitoring compliance with two pending points to be fulfilled, among them the one of *"concluding the pending investigations regarding the killing of Ramón Mauricio García Prieto and the threats and harassment suffered by Mr. José Mauricio García Prieto Hirlemann and Mrs. Gloria Giralt de García Prieto. "*

44 *Cfr.* Inter-American Court of Human Rights. Case of the Serrano Cruz Sisters. vs. El Salvador, cit.

45 Executive Decree No. 5, dated 04-9-10, published in the Diario Oficial No. 75, dated 05-26-09. This commission was created to replace the *"Inter-institutional Commission for the Search of Children and Missing Girls as a result of the Armed Conflict in El Salvador"*, created on October 5, 2004, by Executive Decree No. 45, which did not meet the requirements demanded by the claimants, by the IACHR and by the Inter-American Court.

time, the State informed that there was a preliminary draft law presented in the Legislative Assembly to create a such commission, but it had not been approved by the Legislative Branch. In view of this, the Executive Branch, through an executive decree, had decided to create a National Search Commission, that meets the standards established by the Court in its Judgment.[46]

Currently, it can be considered that the State has complied with the creation and operation of this National Search Commission, to such an extent that the Constitutional Chamber of the Supreme Court of Justice, in a sentence of Habeas Corpus in favor of another person who was a victim of disappearance forced as a child during the internal armed conflict, prove her existence and compliance communicate said sentence for effective compliance of its functions, concerning the applicable regulations.[47]

Regarding the creation of a search website and a system of genetic information measures has not yet been complied by the State to the satisfaction of the Inter-American Court, and because of that, this regional court decided to maintain supervision of compliance in the resolution of February 3rd, 2010.[48]

Case of Contreras *et al.*:

a) *Articulate coordination mechanisms between the different bodies and state institutions with research capacities, as well as follow-up of the causes that are processed by the acts of forced disappearance of children during the armed conflict, for which it must organize and keep updated a database on the subject, in order to achieve the most consistent and effective research;*

46 *Cfr.* Resolution of the Inter-American Court of Human Rights of February 3, 2010. Case of the Serrano Cruz Sisters vs. El Salvador. Monitoring judgment compliance.

47 *Cfr.* Supreme Court of Justice of El Salvador. Constitutional Division. Sentence of Habeas Corpus 199-2007, dated 12-01-10. http://www.jurisprudencia.gob.sv/VisorMLX/Documento/, consulted on 09-15-12

48 *Cfr.* Resolution of the Inter-American Court of Human Rights of February 3, 2010. Case of the Serrano Cruz Sisters vs. El Salvador. Monitoring judgment compliance.

b) Develop action protocols in the field under an interdisciplinary approach andtrain officials involved in the investigation of serious violations to human rights, to these officials make use of the legal, technical and scientific available element.

c) Promote relevant international cooperation actions with other States, to facilitate the collection and exchange of information, as well as other legal actions requirements, and

d) Ensure that the various organs of the justice system involved in the case have the human, economic, logistic, scientific, or any other human resource necessary to perform their tasks adequately, independently, and impartially and take the necessary measures to ensure that judicial officials, prosecutors, investigators, and other justice operators have an adequate security system and protection, taking into account the circumstances of the cases under his charge and the place where they are working, that allows them to perform their duties with due diligence, as well as the protection of witnesses, victims, and family."

All these provisions ordered by the Court in the Case of Contreras *et al.* have not been fulfilled. However, the above considerations must be taken into account regarding that this is an even recent sentence, from August 31st, 2011.

2.2 Advisory opinions of the Inter-American Court of Human Rights

There are no advisory opinions from the Inter-American Court that have been promoted and accepted as binding by the State of El Salvador.

2.3 Recommendations of the Inter-American Commission on Human Rights

2.3.1 Effects under the Legislation

There are no recommendations from the Inter-American Commission on Human Rights, derived from a specific report about El Salvador that has been complied with by that State and has directly caused effects in its legal system.

2.3.2 Effects under specific judicial cases

Between 1996 and 2009, the Inter-American Commission on Human Rights, IACHR, ordered precautionary measures to guarantee the life, and the physical integrity of several people in six cases.[49] In all or most of these cases, the government of El Salvador complied with the granting of the preventive measures ordered, including police protection by agents of the Protection Division to Important Personalities or Victims and Witnesses of Policia Nacional Civil, the only police force in this country.

2.3.3 Other Effects

There are no recommendations from the Inter-American Court of Rights Humans have caused other effects in criminal or procedural matters in institutions or the legal system of El Salvador.

49 People who have been favored with precautionary measures consisting of protection of their lives and physical integrity, ordered by the IACHR, by year and according to the name of the cases are: 1996, Adrián Esquino Lisco case, in favor of Mr. Adrián Esquino Lisco; 1997, Ramón García Prieto case, measures in favor of Mauricio García Prieto Hirlemann, Gloria Giralt de García Prieto and Carmen de García Prieto; 2001, Ramón García Prieto case, measures in favor of Mauricio García Prieto Hirlemann, Gloria Giralt de García Prieto, Benjamín Cuéllar, Pedro Cruz and David Morales; 2006, Damián Miguel Pedro Taylor Colosal case, measures in favor of him; Case of Adrián Meléndez Quijano and others, measures in favor of Adrián Meléndez Quijano and family and Eurípides Meléndez Quijano and family; 2009, Héctor Antonio García Berríos case and others, measures in favor of Héctor Antonio García Berríos, Alirio Napoleón Hernández Leiva, Miguel Ángel Rivera Moreno, members of the Asociación Amigos de San Isidro (ASIC by its Spanish initials); Alexander Beltrán Castillo, Ludwin Iraheta, and Vladimir Abarca, members of Radio Comunitaria Victoria; and the priest Luis Alberto Quintanilla.

III. Legal mechanisms, especially mechanisms to review last judicial sentences in authority of *res judicata*, to make effective the decisions of the Inter-American Court in the internal field

There are no such mechanisms in the legal system of El Salvador. The only thing that exists is a draft bill for the Compliance with the Judgments of the Inter-American Court of Human Rights, prepared by one of the advisers of the legislative section of the party Frente Farabundo Martí para la Liberación Nacional.

IV. Legal criteria or national jurisprudence used in relation to the compliance with the decisions of Inter-American organs in criminal and not criminal cases

There are no legal criteria or national jurisprudence related to comply with sentences, resolutions, recommendations, or other type of decisions of the organs of the Inter-American system for the protection of human rights in criminal and non-criminal cases.

V. Constitutional legal or legal obstacles that are opposed to compliance with the decisions of Inter-American organs

For a part of the Salvadoran legal community, there are legal obstacles such as the Law of General Amnesty for Peace Consolidation, prescription, non-retroactivity of criminal law, *res judicata*, *ne bis in idem*, and other similar

exemptions from responsibility;[50] for another part of such community, such obstacles do not exist or should not exist, as the Court establishes in its judgments against El Salvador.

Conclusions

El Salvador is one of the few Iberoamerican countries that recognizes explicitly in its Constitution, the existence and validity of an international legal order with supra legal hierarchy of norms.

The Salvadoran constitutional text, however, states that the provisions of the treaties cannot be under the Constitution of the Republic, since when they are subscribed and ratified do not become part of the Constitution, therefore, if it is determined that a treaty or one of its provisions contradicts the Constitution, it cannot prevail over the Magna Carta.

With that declaration and a reservation regarding the contentious competence of the Inter-American Court, El Salvador deposited the instrument of ratification of the American Convention at the General Secretariat of OAS on June 23rd, 1978, and a similar demonstration was also made when it recognized the contentious competence of the Inter-American Court of Human Rights, occasion in which it also expressed the reserve of recognizing such competence solely and exclusively for acts or subsequent legal acts whose execution principles are after June 6th, 1995.

The direct application of provisions of the American Convention by the tribunals of the Republic of El Salvador is a relatively recent fact; the first cases was registered as of the year 2002 in some of the Second Instance Chamber of Criminal Matters. Before that year, the great majority of superior courts, understanding of such three chambers of the Supreme Justice: Constitutional,

50 That opinion of a part of the Salvadoran legal community is in the abstract because until that date there is not a single concrete case in which it has been argued that an investigation Court ordered by the Inter-American Court is inadmissible for violating the principle of ne bis in idem.

Administrative Litigation, and Criminal, as well as to the second instance chamber of criminal matters, ignored, in their judgments, the provisions of the ACHR. It is likely that the courts or tribunals of first instance have been taken ahead of the direct application of this Convention, but this issue escaped within the scope of this study.

Regarding compliance with the judgments of the Inter-American Court of Human Rights issued against El Salvador and that have had an effect on the legal system, in specific judicial cases or other effects in a criminal matter and criminal procedure, to date there are only three contentious cases that have concluded with sentences against this country.

A common feature in these three judgments, as the main resolution point that is also part of the reparation measures, is the Inter-American Court of Human Rights' ruling ordering the Salvadoran State to continue or restart the respective criminal proceedings, as they also share the nearly absolute impunity for the serious human rights violations reported. For this purpose, the regional tribunal instructs the State to take the necessary measures to overcome factual and legal limitations or obstacles that hinder the effective conduct of the investigations, including the adaptation of its domestic criminal legislation.

Unfortunately, the three cases also share the common feature of the Salvadoran State's failure to comply, to this date, with both resolution points that are interconnected. That is, conducting effective judicial investigations, for which, if necessary, it must remove internal legal obstacles. In none of the three cases have substantial advances been made in the investigations that fall under the responsibility of the Fiscalía General de la República in the administrative proceedings. Therefore, up to this moment, none of the three judgments has had any impact in the judicial sphere, let alone in the applicable criminal and procedural legislation.

Regarding other types of effects on the criminal and criminal procedure, derived from compliance with the sentences, the only thing that stands out is the creation and operation by executive decree of the National Search Commission

of Disappeared Girls and Boys during the Internal Armed Conflict from April, 2010, replacing a previous commission created in 2004, but it did not comply with the standards required by the Inter-American Court.

Also, the creation on May 5th, 2010, through Executive Decree No. 57, of the "National Commission for Reparation to Victims of Violations of Human Rights, occurred in the Context of Internal Armed Conflict", in order to propose to the President of the Republic, through a duly substantiated report, the establishment of a presidential reparation program for victims of serious human rights violations, in which re-found young people will be included, although this is not a measure ordered by the Inter-American Court.

Regarding advisory opinions of the Court, El Salvador has not promoted or recognized as mandatory any opinion of this regional court, therefore there are no legal, judicial, or legal effects of another type in the criminal and criminal procedure derived from the advisory competence of the Inter-American Court.

Regarding the recommendations or measures ordered by the Inter-American Commission on Human Rights, El Salvador in several cases has given the due to compliance with the ordered precautionary measures, among them the protection measures in charge of Policia Nacional Civil, through the Division of Proteccion de Personalidades Importantes (in its Spanish acronym PPI), and the Division of Victims and Witnesses Protection. Beyond these types of measures, decisions or measures of the IACHR have had no effect on the legal system or other type of effects in the institutions of the criminal system and criminal procedure.

In El Salvador, there are no legal mechanisms, especially for review past judicial sentences in the authority of *res judicata* to make compliance with judgments or other binding decisions of the Inter-American Court.

There are also no legal or national jurisprudence criteria used in relation to compliance with the decisions of the Inter-American organs in criminal and non-criminal cases.

Regarding legal or legal-constitutional obstacles contrary to compliance with the decisions of the Inter-American organs, a part of the Salvadoran legal community considers that there are legal obstacles such as the Law of General Amnesty for Peace Consolidation (named in Spanish as Ley de Amnistia General para la Consolidación de la Paz), prescription, non-retroactivity of criminal law, *res judicata, ne bis in idem* and other similar exemptions from responsibility; for another part of such community, such obstacles do not exist or should not exist, such as the Inter-American Court establishes in its judgments against El Salvador.

Competitive Innovations in the Civil and Commercial Procedural Code

Lic. José Reinerio Carranza

Innovaciones en la Competencia en el Código Procesal Civil y Mercantil
Lic. José Reinerio Carranza

Resumen
En este artículo se presenta un panorama de las innovaciones experimentadas en lo relativo a la competencia de los tribunales en materia civil y mercantil, a partir de la vigencia en el Código Procesal Civil y Mercantil en 2010, caracterizado por la introducción del proceso por audiencias en sustitución del modelo basado en la escrituralidad, lo que ha implicando un reto de adaptación, tanto por parte de las instancias del Estado encargadas de su aplicación, así como para la comunidad jurídica del país. Para la mejor comprensión de estas innovaciones, además de la regulación normativa, se incluyen datos históricos sobre la evolución de la competencia, así como la jurisprudencia y reflexiones doctrinarias que coadyuvan a la definición de la institución procesal de la competencia y a su diferenciación de otros conceptos jurídicos, así como a la determinación de los diversos criterios de competencia de acuerdo a una visión moderna. De igual manera se hace una referencia sucinta a una serie de casos especiales como la competencia para conocer de las medidas cautelares, diligencias preliminares y ejecución de la sentencia, resaltando las modificaciones introducidas por el CPCM, así también se hace mención de los Decretos Legislativos que han establecido nuevos tribunales y reestructurado otros que ya existían, todo ello con el objeto de facilitar la aplicación de dicha normativa procesal.

PALABRAS CLAVE: COMPETENCIA – DERECHO PROCESAL – CÓDIGO PROCESAL CIVIL Y MERCANTIL – JURISPRUDENCIA – JURISDICCIÓN – EJECUCIÓN FORZOSA – PRUEVA – MEDIDAS CAUTELARES.

Competitive Innovations in the Civil and Commercial Procedural Code
Lic. José Reinerio Carranza

Abstract
This article presents an overview of the innovations tested regarding as to the jurisdiction of courts in civil and commercial matters, from the current Civil and Commercial Code in 2010, characterized by the introduction of the hearings process is presented in replacement model-based writing, which has implying an adaptive challenge, both by state bodies responsible for its implementation, as well as for the legal community in the country. For a better understanding of these innovations, in addition, the normative regulation, including historical data on the evolution of competence, and the case law and doctrinal reflections that contribute to the definition of the procedural institution of competence and its differentiation from other legal concepts included as well as the determination of several criteria of competence according to a modern vision. Similarly, a brief reference to several special cases like the jurisdiction of the precautionary measures, preliminary proceedings, and execution of the judgment is made, highlighting the changes introduced by the CPCM, and also made mention of the Legislative Decrees have established new courts and restructured others already exist, all to facilitate the implementation of the procedural rules.

KEYWORDS: COMPETITION – PROCEDURAL LAW – CIVIL AND COMMERCIAL CODE – CASE LAW – JURISDICTION – FORCED EXECUTION – EVIDENCE – PRECAUTIONARY MEASURES.

Competitive Innovations in the Civil and Commercial Procedural Code

Lic. José Reinerio Carranza[1]

Introduction

The Salvadoran State is organized to achieve justice, legal certainty, and the common good. For the fulfillment of these purposes, it develops different functions, among them the function stands out in court carried out by the Judicial Branch and manifested in jurisdictional acts. This function consists of the authority that the State has to provide a response to the legal conflict that exists between individuals or between them and the State itself.

The Salvadoran legal system recognizes the principles of separation of powers and distribution of competences among the fundamental branches of Government. As a derivation of this principle, the fundamental norm has exclusively attributed to the Judiciary Branch to judge and execute what is judged, being strictly prohibited any interference of the other state bodies in the exercise of this function.[2]

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The author thanks the collaboration of Licda. Odaly Lissette Sánchez and Mr. Wilfredo Antonio Jovel, Assistants of the Research Unit of the Faculty of Jurisprudence and Social Sciences of the University of El Salvador.

2 *"The exclusivity of the Jurisdictional Body to judge and enforce the court, contemplated in the art.*

The jurisdictional process is the instrument used by the State to resolve conflicts and satisfy the claims of individuals, giving compliance through the specific procedural regulation to its constitutional function of administering justice. It should be emphasized that only through a process carried out with strict respect for the parameters provided in the Constitution can a person be deprived of the rights established in their favor by the legal system.[3]

To materialize the jurisdictional function in the civil and commercial justice system, procedural rules are established in the positive legal framework. Articles 26 to 41 of the Civil and Commercial Procedural Code (in Spanish, CPCM) regulate jurisdiction and competence, which is also governed by the provisions of the Judicial Organic Law and its Complementary Decrees, as well as Legislative Decree number 372, through which courts are created or converted, with the responsibility to judge and execute judgments in civil and commercial matters according to legally determined competence.

As a result of the aforementioned, the importance of studying competence within the framework of procedural legislation lies in the fact that this institution enables the resolution of conflicts in human life within society through the jurisdictional function of the State. It achieves this by specifically assigning a predetermined sphere of action to the courts of the Republic, which, in turn, contributes to the unrestricted respect for legal certainty. This allows every citizen to know where to turn in case their rights enshrined in the legal system are violated.

The topic becomes particularly relevant for legal professionals and law students, given the significant innovations introduced by the Civil and Commercial Procedural Code of 2010, which bring about a new distribution of

172 inc. 1 ° Cn., Excludes or prevents the possibility of usurpation of judicial powers by part of the Executive Branch and the Legislative period 2014-2019. Constitutional Chamber of the Supreme Court of Justice, final judgment of the unconstitutionality process with ref. 16-98, San Salvador, December 1, 1998, Recital III.3.D.

3 Constitutional Chamber of the Supreme Court of Justice. Judgment of the amparo process with reference number 718-2006. San Salvador, October 16, 2008, Considering resolution III.

competence. These changes pose a challenge for the state bodies responsible for its application, as well as for the legal community of the country, which needs to adapt to the new process.

I. Historical Evolution

The peaceful resolution of conflicts between members of society to achieve social peace is one of the central objectives sought by the legal system. In the course of history, evolution oriented to overcome the primitive tendency of human beings to solve their disputes through the use of force.[4] It is within the framework of this process that goes arising from the jurisdictional process in which the judge is responsible *"to whom it concerns as a connatural function the one to solve the conflicts, to give a normclear, precise and concrete that governs in the future and as res judicata the situations conflicts that arise and are debated in the process"*.[5] Currently, it is recognized that the judge must be independent, impartial, and with predetermined competence under the law, but it must be specified that these guarantees have been developing in the historical future.

As a remote antecedent, it should be mentioned that in ancient societies, in the judgment of controversies was exerted by the monarch or by his closest advisors, although progressively there was a functional specialization emerging in the figure of the judge. So, the ancient Egyptian civilization records the existence and operability of procedural rules in which competence was assigned in the task of imparting justice,[6] given that matters civilians corresponded to local courts that were called sepat. In addition, there was a higher court in the city of Memphis that had jurisdiction to know in appeal of all the cases sentenced

4 *Cfr.* QUINTERO, B. and PRIETO, E, *General Theory of Procedural Law,* Ed. Temis, fourth edition, 2008, p. 10.

5 *Ibidem,* p. 16

6 It is mentioned that ancient civilizations are as a historical precedent, though it is worthy mentioned that the characteristics of the judiciary were missing in these first manifestations of the judiciary. Independence and impartiality are inherent in the jurisdictional function in its modern conception.

in such courts.[7] This allows us to affirm that from the dawn of civilization, the need to not concentrate the function of imparting justice on a single judge was recognized as well as means of contesting judicial decisions were provided.

Beyond the Egyptian precedent, it was in the State Cities of Greece Antigua where a distribution of jurisdiction between various courts was regulated, thus *"in the city of Athens, in the democratic period, the majority of cases civil and criminal were the competence of the popular courts (Heliae), only the more serious crimes were submitted to the Areopagus Council"*.[8]

The modern process, applied in countries that belong to the legal system of continental or Romanist law, has its origins in the legislation and forensic practice of Ancient Rome, complemented by the contribution of Germanic peoples along with medieval canon law.

As Véscovi indicates, in Ancient Rome, there were three moments key in the development of Procedural Law: *"The system known as legal actions corresponds to the monarchy. At that time the judicial function was exercised by the king. At the time of the Roman Republic, the power to administer justice went to the Consuls. In 387 BC, when the commoners reached that dignity, the patricians, to reserve the power to administer justice, entrusted itto a new magistrate named Pretor"*.[9]

The ancient Roman process included two parts to the magistrate by rights (*in jure*) and then to the judge (known in Latin *as iudex*)[10] (in judgement or known in latin as *in iudicium*), which was designated by the litigants or, failing that, by the magistrate.

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7 *Cfr.* ALONSO ROYANO, F., Law in Pharaonic Egypt, in *Space, time and form.Journal of the Faculty of Geography and History,* National University of Distance Education, Series II, Ancient History, number 11, Madrid, 1998, p. 36-38.

8 AA VV., Millennium Thematic Encyclopedia, Volume V, Ed. Cultural Recreational, Bogotá, 2001, p.1260

9 VÉSCOVI, Enrique, *General Theory of the Process,* Editorial Temis, second edition, Bogotá, 1999, p. 22.

10 Sometimes this Latin word has been translated by the Castilian words "judge" or "arbitrator", see. VÉSCOVI, E., *op. cit.,* p. 22

To take an action, *"the plaintiff fulfilled a series of legal formalities in the presence of witnesses. The process was predominantly oral. After fulfilling the previous legal formalities designated judge (iudex) and the magistrate determined loudly the controversial points"*.[11]

After the indicated procedural acts, the trial instruction continued by the judge (*iudex*), the authority to whom the witnesses repeated the words pronounced by the magistrate; then the tests were produced, and according to them, the judge (*iudex*) dictated the sentence.

In the Republican period of Rome, it was observed the emergence of a new criteria of competence as a result of the presence of foreigners in Rome, special judges were named pilgrim pastors, who corresponded to solve the disputes involving Roman citizens with foreigners from Rome.

At this stage of Roman law, thanks to the aforementioned pretors (roman magistrate) it was created the procedure form that was effective in the second period. This new procedure consisted of the magistrate, after hearing the parties in dispute, delivering to the plaintiff a written instruction called "formula" which began with the designation of the judge and included the exposition of the facts, the summary of the plaintiff's claims, and the judge's authority to condemn or absolve, and the authority to adjudicate the ownership of the disputed thing.

The form system had a short duration as it was replaced by the extraordinary procedure imposed by Emperor Diocletian. In this procedure, *"the magistrate directly knew the controversy (litigation)."* In this period, the territorial criterion of competence was applied, attributing the prosecution of civil and criminal cases of their respective province, to the local representatives of the imperial power (vicars and prefects),[12] *"there was also a functional criterion of competence, since the appeal to the emperor was foreseen"*.[13]

11 *Ibidem,* p. 23.

12 Regarding the criteria of competence in the Roman process, *vid.* ADINOLFI, G., "Extremisms on the subject of "accusatio" and " inquisitio "in the Roman criminal process", in *Revista de Estudios Histórico-Jurídicos,* number XXXI, Valparaíso, Chile, 2009, p. 37-60.

13 VÉSCOVI, Enrique, p. 25, *op. cit.*

With the invasions of the Germanic peoples (5th century after Christ), they left several important procedural institutions that have had application in subsequent procedural systems. Among the Germanic peoples, the faculty to administer justice resided in the population as a whole. The judgments solved according to the traditions preserved by the elders as they had no written laws. There was no separation between civil and criminal proceedings since the same body (popular assembly) was competent to hear both issues. This assembly had the power to settle rather than solve.[14]

In the European countries in the years after Christianization, during the government of Emperor Constantine, it was recognized as the right of the parties to voluntarily submit to the authority of the bishops to solve conflicts in civil matters, which allowed the church to exercise true supremacy in the temporal sphere. The ecclesiastical courts initially applied the stages of the Roman procedure with some new forms and institutions. The bishops had territorial competence within the scope of their diocese.

Over time, ecclesiastical courts of lesser competent hierarchy emerged in the circumscription established by the respective bishop. In this period, competence criteria were constructed, *"Canon Law established, based on the reforms of Pope Gregory VII, the possibility of appealing episcopal sentences to the Pope as the highest ecclesiastical authority"*.[15]

In the medieval period, the glossators elaborated a mixed Roman-canonical procedure also called common. Véscovi points out that the last procedure was introduced *"the German institutions as the division of the process into two parts, the solemnity of the litigation response. The fundamental principles of the evidence and the sentence, all were of Roman origin. Under the influence of canon law*

14 *Vid.* ROJAS DONAT, L., "El sistema probatorio medieval de los germanos", in *Revista de Estudios Histórico-Jurídicos,* number XXXIV, Valparaíso, Chile, 2012, p. 483.

15 Regarding on the incidence of canon law in procedural norms, *vid.* GARCÍA Y GARCÍA, A., "La compilación de Huesca de 1247 y el Derecho canónico medieval," in *Glossae. Revista de historia del derecho europeo*, Instituto de Derecho Común Europeo, Universidad de Murcia, Murcia, 1996.

that the process was written and entirely directed by the officials the secret procedure, with an evidence system measured".[16]

The procedural innovations introduced by the influence of Canon Law were known in Spain and progressively incorporated into various legislative bodies, including the *"Compilación de Huesca" (1247), the "Siete Partidas" of Alfonso X the Wise (1265), the "Ordenamiento de Alcalá" (1348), and the "Ordenamiento Real" of 1485, the latter approved by the initiative of the Catholic Monarchs".*[17]

The Spanish procedural institutions influenced by the canonical Roman tradition passed to the American countries during the prolonged colonial period.[18] After independence, the Spanish influence remained remarkably as in the Salvadoran case in, which the Code of Civil Procedures of 1882, was inspired by the Spanish Civil Procedure Law of that time.

The Code of 1882 remained in force for more than a century, underpinning a scriptural procedural model, which since the last decades of the twentieth century showed signs of exhaustion and excessive delays of trials, beginning a public discussion on the desirability of adopting the procedural model by audiences, which had already been received in various Iberoamerican countries. It was as a result of the verification of the structural problems of the previous procedural legislation that promulgated the Civil and Commercial Procedural Code, whose validity was established on July 1st, 2010, which clearly opted for a procedural model by audiences with an important component of orality.

16 VESCOVI, E., *op. cit.* , p. 27 - 28

17 GARCIA Y GARCIA, A., *op. cit.* , p. 29.

18 In the Hispanic colonies of America, it was applied preferentially the norms contained in the Collection of Indian Laws in 1542 and other legal bodies of special character, which made up the so-called Indian Right, and in a supplementary manner the rules of the Right of Crown of Castile. In this regard *vid.* RODRÍGUEZ RUIZ, N., *History of Salvadoran legal institutions,* first edition, Editorial Universitaria, 1959.

II. Concepts and foundations of the Competence

2.1 Doctrinal

The jurisdictional function is the attribution and duty of the State to solve the different conflicts that arise from the interrelation of society, that is, between its population and even with the same State, in order to protect the legal order established and enhance respect for the fundamental rights of people. To fulfill this function, it has been established the Judicial Branch, composed of a set of courts characterized by independence, impartiality, and regulatory predetermination.[19]

Given that the conflicts in society are numerous and are produced by different motivations, it arises the need for the effective application of the jurisdictional function and the material impossibility that a single judge can comply with all the processes that are promoted. For this reason, the jurisdiction is assigned to several judges, determining for each of them, their specific competence.

Indeed, jurisdiction is the faculty to administer justice that is granted to judges and it is essential to regulate its exercise. In order to reasonably distribute and delimit the scope of action of each court, the legal system provides the establishment of competence criteria. It is in consideration of the interrelationship between the concepts of jurisdiction and competence that Devis

19 The right to trial by a court predetermined by law is one of the inherent requirements of due process and is widely recognized in Comparative Law. Regarding this right, the Peruvian Constitutional Court establishes: *"[T] he jurisdiction and the jurisdiction of the judge must be predetermined by law, so the allocation of judicial competence must necessarily have been established prior to the start of the process, guaranteeing that no one can be judged by an ex post facto judge or by an ad hoc judge."* Constitutional Court of the Republic of Peru, Final judgment of habeas corpus, January 9, 2009, Exp. Number 03790-2008-PHC. On the other hand, the trial by a predetermined court has been considered as one of the judicial guarantees derived from art. 8 of the American Convention on Human Rights in multiple judgments of the Inter-American Court of Human Rights such as those issued in the *Caballero Delgado vs. Colombia* (January 29, 1997) and *Cesti Hurtado vs. Peru* (September 29, 1999).

Echandía establishes: *"The competence is therefore the power that each judge or magistrate of a jurisdictional branch has to exercise jurisdiction in certain matters, and within a certain territory. That is why we can consider competence from a double aspect: the objective, as the set of issues or causes in which, according to the law, the judge exercises jurisdiction; and the subjective, as the power conferred on each judge to exercise jurisdiction within the limits to which it is attributed. Although these limits have different importance, they are always about the distribution of jurisdiction among the judges of the same jurisdictional branch"*.[20]

As Mario Oderigo observes, the legal regulation of competence transcends a mere arithmetic distribution of the total number of cases among the various courts, but requires the organization of judicial work according to objective and reasonable criteria. So, in the words of the aforementioned author: *"The laws have not made a simple numerical distribution, but a qualified distribution: they have made a qualified division of labor among the judges according to certain circumstances, which allow a reasonable classification of the issues, forming with them, different categories and attributed the knowledge of each of those categories to each of the judges or groups of judges. It is not that they have divided the jurisdictional function, but that they have indicated the limits within each of the judges can exercise it; they have determined the sphere of action of each judge, their competence"*.[21]

That is why not all judges know indistinctly about the legal conflicts that are presented to them, this will depend on the competence granted to know certain causes, in short, competence is the extent to which jurisdiction can be applied between the various authorities. Following the previous conception outlined, Véscovi defines competence as *"the portion or part of the jurisdiction of the various jurisdictional bodies and, at the same time, their ability to judge certain matters. It also has a negative aspect, designated with the name*

20 ECHANDIA, H. D., *Teoría General del proceso,* Third edition, Editorial Universidad, Ciudad de Buenos Aires. p. 142.

21 ODERIGO, M. A., *Lecciones de Derecho Procesal,* Parte General, Volume I, Ediciones De palma, Buenos aires, 1973. p. 243.

of incompetence, which means the impossibility of judging certain matters by the lack of such aptitude, since the function has been attributed to other organs of the jurisdiction".[22]

Essential differences between jurisdiction and competence

Of importance for the understanding of competence, is its distinction with the jurisdiction, for this reason, the opinion of the Chilean jurist Casarino Viterbo has been revisited, who summarizes the distinction between both concepts:

"a) Jurisdiction is the power that the courts have to administer justice; On the other hand, competence is the power that each court has to know regarding its businesses;

b) Jurisdiction is a generic concept: hence, it is essential for every court to have jurisdiction; on the other hand, competence is a specific concept, inherent to its own nature, and that is why a court may not have jurisdiction to know about a certain matter and therefore it does not cease to be such;

c) Jurisdiction is the whole; on the other hand, the competence is the part, and for that reason, it can also be defined by saying that it is the amount, degree, or measure of the jurisdiction that corresponds to each court, and

d) The jurisdiction indicates the sphere of action of the Judiciary against other powers of the State; on the other hand, the competence indicates the sphere of action of various courts between them".[23]

2.2 Legal

As it has been previously developed, competence implies the determination of precise limits to the sphere of action in which each judge may exercise the jurisdictional power that has been attributed to him, which contributes to the good internal order of the judiciary and allows him to attend matters adequately that are submitted to his knowledge.

22 VÉSCOVI, E., *op. cit.*, p. 133.

23 CASARINO VITERBO, M., *Manual de Derecho Procesal. Derecho Procesal Civil.* Volume I, Editorial Jurídica de Chile, Valparaíso, 2011, p. 127.

The 2010 CPCM does not present a legal definition of competence. However if it does carry out a detailed regulation of the courts' competence since it is recognized the relevance of this institution to ensure the proper order of judicial work as well as effective protection to the rights of each person who goes to the Jurisdictional Body.

Commenting on the foundation of the legal institution of competence in the CPCM, Cisco Channels states: *"For the best performance in the exercise of the jurisdictional function, it arises to judicial legal life the institution of judicial competence, understanding as such, the faculty attributed to each court or tribunal to judge and execute what is judged, meeting a clearly defined, which distribute such powers, seeking an order in the exercise of the jurisdictional function"*.[24]

To show an overview of competence regulation in the CPCM and thus integrate theoretical knowledge with the normative reality of the Salvadoran legal system, the following summary table is presented:

TRIBUNAL	COMPETENCE	ARTICLE CPCM
Supreme Court of Justice in plenary	1st From the abstentions and objections in accordance with the provisions of this code; 2nd From the cassation when the Civil Chamber has met on appeal, excluding the magistrates that make up that room; 3rd From competence of conflicts; and 4th From the other matters determined by law.	Art. 27
Supreme Court of Justice	1st Exequatur processes; 2nd Resource of cassation; 3rd Resource of appeal when the second instance chambers have met in the first instance; 4th Of the revision of firm sentences; and 5th Of the other matters determined by law.	Art. 28
Second Instance Chambers	1st Resource of appeal; 2nd Of claims against the state; and 3rd Of the other matters determined by law.	Art. 29

24 AA. VV., *Código Procesal Civil y Mercantil Comentado,* Consejo Nacional de la Judicatura, San Salvador, 2011, p. 40.

TRIBUNAL	COMPETENCE	ARTICLE CPCM
First Instance Court	1st of the common process; 2nd Of the special processes regulated in this code, notwithstanding what is established for the monitoring process; 3rd Forced execution, in accordance with the provisions of this code; 4th Of the other matters determined by the laws of the Republic. Likewise, the court of first instance of the abbreviated processes and of the audits that arise in those districts where there is no lower court of first instance.	Art. 30
Courts of First Instance for Small Claims	1st of the abbreviated process; 2nd of the monitoring processes; 3rd Forced execution, in accordance with the provisions of this code; 4th Of the executive processes whose amount does not exceed twenty-five thousand colones or its equivalent in dollars of the United States of America; and 5th Of the rest determined by the laws.	Art. 31

2.3 Jurisprudence

One of the essential components of due process is the existence of a court predetermined by the legal system to know and solve disputes raised by people in the conservation and defense of their rights.

Regarding the link between due process and competence, the Third Civil Chamber of the First Section of the Central District, on October 18th, 2012, expressed in its ruling 193-DQCM-12: *"The Due Process or Constitutionally Configured Process includes, among others, the existence of a competent tribunal, as it appears in various international treaties recognized by El Salvador, in relation to Arts. 172 to 190 of the Constitution, since it is recognized that in a Rule of Law, the administration of efficient and effective Justice, through a competent tribunal, (Guarantee of Competence), independent and impartial, constitutes a special basic judicial guarantee of the legality that the State must ensure ... Among us, the Organic*

Judicial Law contains the organizational distribution of the Judicial Branch, to which constitutionally the jurisdictional powers of judging and enforcing the judged are attributed, in the matters that in it is pointed out, although, really, as a whole, the law is intended to distribute the jurisdiction based not only on the subject (RATIONE MATERIAE), but also by degree, territory and functionality. Arts. 131 Ordinal 31, 172, and 184 Constitution".[25]

III. Competence criteria

The delimitation of competence criteria is originated as a product of the material reality in which the jurisdiction must be exercised, in which the justice applicator must know of a high number of causes as well as the territorial demarcation in which he exercises his function. As Hugo Alsina states: "*The existence of a single judge exercising the full jurisdiction in a territory, to which all individuals and matters would be subject without distinction of classes or issues, can be conceived. However, in practice, this is not always possible because if the territory is vast, the judge could not, without detriment to their functions, move from one place to another to administer justice, nor would it be reasonable for a person to be obliged to cover long distances to appear before the judge merely because a lawsuit has been filed against them, which they may be acquitted of. On the other hand, even if the territory were small, the density of the population and the multitude of disputes could seriously disrupt the judge's function due to the impossibility of examining and resolving them with due attention. Therefore, it is necessary to devise a means that facilitates the judge's task, and that means is the regulation of competence".*[26]

25 Third Civil Chamber of the First Section of the Center. Order in the incident of appeal of the definitive order pronounced by the Fifth Judge of Civil and Commercial Law. Consignment Payments. San Salvador, October 18th, 2012, Ref. 193-DQCM-12

26 ALSINA, H., *Tratado Teórico Práctico de Derecho Procesal Civil y Comercial,* Volume II, second edition, EDIAR Editores, Buenos Aires, 1957, p. 508.

3.1 Territorial

This criterion is framed within the geographical limit where the court will exercise its jurisdiction since it is necessary to establish a specific range of action for the judge, and security for the population that will agree to settle their conflicts.

Devis Echandía describes the scope of the criterion of jurisdiction based on the territory: *"It relates to the territorial jurisdiction within which the judge can exercise their authority. In principle, various cases of the same nature can be heard by all judges of the same class and category throughout the country. To distribute cases, the location of the parties' domicile is taken into account, especially that of the defendant. In the absence of a domicile, it may consider their residence (Personal Jurisdiction) or the place of fulfillment of the contractual obligation (Conventional Jurisdiction), the location of the subject matter of the case, or the place where the act that generates criminal or tort liability occurred. It can also be based on the location of the business administration (General or Special Territorial Jurisdiction)".*[27]

The Supreme Court of Justice, in the conflict of jurisdiction, raised between the Civil Court of Santa Tecla and the Fourth Civil and Commercial Court of San Salvador, dated October 6th, 2011,[28] states: *"There are rules on territorial jurisdiction that use different elements to determine which court has the authority to hear a specific conflict... For a better understanding of territorial criteria regarding jurisdiction that covers most scenarios and determines the competent court, the CPCM (Code of Civil and Mercantile Procedure) separates them into two groups: general territorial criteria and special territorial criteria. Arts. 33, 34, 35 and 36 CPCM. In the present case, it concerns the application of the criteria about competence in the general cases of territoriality that are identified as follows: a) domicile of the defendant, which includes a determined address and the indeterminate when he has no domicile or*

27 ECHANDIA, H. D., *Compendio de Derecho Procesal*, Volume I, six edition, Editorial ABC, Bogotá, 1978, p. 115.

28 Supreme Court of Justice. Resolution of the conflict of negative competence between the Civil Judge of Santa Tecla and the Fourth Civil and Commercial Judge of San Salvador. October 6, 2011. Ref. 123-D-2011.

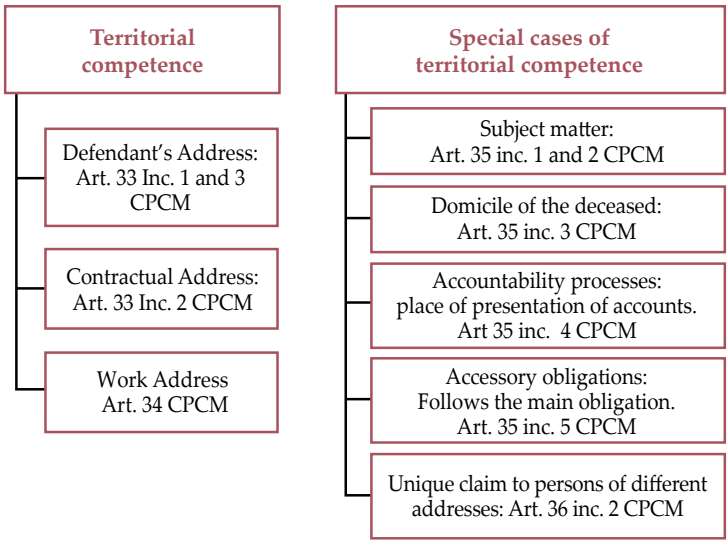
residence in the country; b) contractual domicile, will be the one in which the parties have submitted in advance by reliable instruments in which there is mutual agreement between the parties; c) Labor domicile, where the defendant carries out the work activities, and d) Place where the legal situation or regulation referred to in the process was born or should take effect".

In the conflict of jurisdiction between the Civil Judge of Zacatecoluca and the Civil Judge of Soyapango,[29] the Supreme Court of Justice establishes: *"As a basis, what is established in Art. 33 CPCM, which establishes the criteria on competence about competence in reason of the territory, and in its first paragraph states the domicile of the defendant, which includes a fixed address, and the indeterminate when he has no domicile or residence in the country. Based on this premise, the Judge is called to evaluate two aspects: 1. The contribution that the plaintiff makes from the place where it knows that the domicile of the defendant is established; under the assumption that it is he who knows the facts that motivate his action Art.7 CPCM, and also based on the principle established in Art.13 of the same legal body, which concerns exclusively the parties at the time of providing their allegations; and 2. To be known the fact of the domicile disclosed by the plaintiff, the Judge will carry out the assessment judgment to establish its competence, following what the substantive Law understands as the domicile of a person. In that line of thought, concerning what is stipulated in Article 57 of the Civil Code, domicile is comprised of two elements, namely, residence and the intention to remain in the same place. Among them, the intention to remain predominates".*

The lack of territorial competence, as established by the Civil and Commercial Procedural Code gives way to the suspension of the procedure; however, the court, at the request of the party, can perform acts aimed to guarantee the effects of the lawsuit.

To understand the legal regulation of the application of the territorial criterion on competence, it is exemplified in the following table:

29 Supreme Court of Justice. Resolution of the Conflict of Negative Competence induced between the Civil Judge of Zacatecoluca, Departamento de La Paz and the Civil Judge of Soyapango. San Salvador, 30 de julio de 2012. Ref. 128-D-2012.



Criteria for territorial jurisdiction and special cases in the Civil and Commercial Procedural Code.

3.2 Funcional

The functional criterion must be understood as the attribution that the law establishes for each of the jurisdictional bodies to know in different instances of the same process, establishing specific functions for each court. In the words of the Colombian proceduralist Devis Echandía: *"It is derived from the special kind of functions that the judge performs in a process; according to the instance or the appeal and review, and their knowledge is distributed among several judges of different categories"*.[30]

Ramos Méndez clarifies regarding this criterion: *"Functional competence results from the administrative organization of justice. By a necessary principle of coordination, the various courts are established, which must intervene in the same process throughout their various phases. The various degrees or instances of the same matter are distributed among the courts"*.[31]

30 ECHANDIA, H. D., *Compendio de Derecho Procesal,* Volume I, Six Edition, Editorial A B C, Bogotá, 1978, p. 115.

31 RAMOS MÉNDEZ, F., *Derecho Procesal Civil,* Editorial Bosch, Barcelona, 1980, p. 161.

Professor Ortells Ramos clarifies the relationship of this criterion with others such as territorial: *"The attribution of objective and territorial competence has implicit the functional competence: of knowing the first instance of the process, but there are activities in a process that the law attributes to other bodies. To make such an attribution, the law uses the existing relationship between the courts in the judicial organization"*.[32]

The specific regulation of this criterion is found in Article 38 CPCM, in relation to the provisions of the Arts. 27 to 32 CPCM.

3.2.1 Grade

As part of the functional criterion, which concerns the attribution of jurisdiction to Courts in the first and second instances, as well as the knowledge of appeal in the cases that are required, the procedural order has provided a special regulation for the processes in which the State intervenes as a defendant.

Thus, in the words of Oscar Canales Cisco, the new Code of Civil and Commercial Procedure *"reaffirms the privilege granted by the Code of Civil Procedures in favor of the State of El Salvador, as long as that it possesses the quality of a defendant in all kind of processes and in any matter and amount."*[33] Such regulation is based on the consideration of the State, as a representative of public interests, therefore special rules are laid down concerning the court competent to recognize in each of the instances.

Under this criterion, proceedings against the State, regardless of the amount, regardless of the amount shall be at first place to the Second Instance Chambers with territorial jurisdiction in the Capital of the Republic, as provided in CPCM by Art. 29, 2nd ordinal in relation to Art. 39; for such cases, the appeal will be heard by the Civil Chamber of the Supreme Court of Justice, Art. 28 3rd ordinal; the Supreme Court of Justice in Plenary Session will hear the appeal

32 ORTELLS RAMOS, M., and others, *Derecho Procesal Civil,* fifth edition, Editorial Aranzandi, Valencia España, 2004, p. 226.

33 *Cfr.* CANALES CISCO, Oscar, en AA. VV., *Código Procesal Civil y Mercantil Comentado, op. cit.*, p. 45.

in cassation, excluding the Judges of the Civil Chamber, in accordance CPCM with the provisions of Art. 27 2nd ordinal.

Based on article 39, paragraph 2 of the CPCM, municipalities, the Instituto Salvadoreño del Seguro Social, as well as decentralized entities of the State are excluded from this special rule, which may be sued according to the common functional criterion. The aforementioned privilege does not apply either when it is the State who sues a single individual, since in such case the lawsuit will be filed according to the common rules of competence.

3.3 Materia

The diversity of situations that may be subject to judicial protection is attributed to the knowledge of a court through the criterion of competence based on the matter, which takes as its basis the nature of the conflict that is submitted to the knowledge of the judicial body, it means , the legal relationship from which the litigation arises and the characteristics of the matter in dispute.[34]

As Véscovi says, this is a variable criterion, which is oriented to organize the courts according to the specialization of the judges and magistrates regarding the nature of the process. This criterion, in some positive legal systems such as the Uruguayan one, has led to semantic confusion with jurisdiction, however, in most positive systems the two concepts are clearly differentiated.[35]

In the 20th century, specialized labor and family courts emerged. The modern trend towards specialization in the administration of justice has been maintained with the establishment of new courts dedicated to matters such as childhood and adolescence, agrarian and environmental, among others.

Modernly, the doctrine tends to consider that competence by reason of the matter is part of what is called objective competence, as they attend circumstances not related to the parties, but to the nature and object of the

34 ROMERO SEGUEL, A., *Curso de Derecho Procesal Civil,* Volume II, Editorial Jurídica de Chile, third edition, Valparaíso, 2009, p. 51

35 VÉSCOVI, E., *op. cit*., p. 135

claim, and regarding the competence by matter, it is attended *"to the content of the legal relationship"*[36] that originates the conflict between the parties.

3.4 Amount

The amount as a factor of determination of absolute competence consists in estimation of the amount of money or economic value claimed in a given matter. In civil and commercial matters, the amount is determined by the value of the disputed *res judicata*.[37]

As the doctrine points out, this is a highly casuistic criterion, and the amounts established to distinguish the different disputes are expressly determined by the legal precepts.[38] The value of the litigation determines not only the competence of the knowledgeable Court, but also the procedure to be followed, since multiple cases are subject to special processes such as the abbreviated for its low value. The most generalized criterion is the one to attribute matters of lower economic value to judges of a lower ranking on the hierarchical scale. It has been excluded from this criterion the causes in which the contentious object has undetermined value and those that refer to very personal rights.

In modern doctrine, the quantity criterion is located as part of the objective competence since it attends to a circumstance of the procedural object, such as the economic value of the *res judicata*. However, the prominent prosecutor Francesco Carnelutti held an opposite opinion and rejected that the amount is part of the objective competence classifying it as a kind of functional competence.[39]

In the Civil and Commercial Procedural Code of 2010, an innovative aspect worth highlighting regarding the criterion of amount is that the legislator

36 *Cfr*. CANALES CISCO, Oscar, en AA. VV., *Código Procesal Civil y Mercantil Comentado, op. cit.,* p. 43.

37 ROMERO SEGUEL, A., *op. cit.,* p. 55.

38 RAMOS MÉNDEZ, F., *Derecho Procesal Civil,* Editorial Bosch, Barcelona, 1980, p. 154.

39 *Cfr.* QUINTERO, B. y PRIETO, E., *op. cit.,* p. 274.

updated the fixed amounts to the present reality of Salvadoran society for determining competence by amount. For example , the CPCM provides for the expedited process to hear claims whose amount does not exceed twenty-five thousand colones or its equivalent in dollars. The Courts of First Instance for Small Claims are competent to hear this type of process (art. 31 concerning to art. 241 CPCM). This in contrast to the previous Civil Procedures Code that established very small amounts that were completely inapplicable in the Salvadoran reality of the last decades.[40]

As a second innovative aspect of the 2010 Code, the legislator has taken the precaution of considering the constant transformation of economic affairs, and that is why in Art. 700 CPCM has been planned to periodically update the sums set within the amount criterion, which will prevent monetary inflation from depriving the legal regulation of this criterion of meaning.

IV. Unavailability of Competence

The legal regulation of competence is based on reasons of public order, so it cannot be delegated by the holder of the authority to which it is attributed,[41] as was allowed in Roman times. Hence, it has to be exercised exclusively by the court previously established in the law.[42] The delegation's ban does not oppose the institution of the procedural commission since, as Véscovi observes, *"it is admitted that courts, for reasons of judicial assistance, commit others to carry out some of the procedural actors that cannot carry out for themselves. For example, everything that must be done outside the jurisdiction of each court can be committed to the respective location"*.[43]

40 *Cfr.* Arts. 502 y 503 del Código de Procedimientos Civiles de 1882.

41 "Through the appointment of rigor the State legitimizes the judges for the exercise of jurisdiction with competence in a certain court, which will be exercised in accordance with the rules that define the exercise of the function. Neither jurisdiction nor competence may be delegated by those who are invested with such attributes. " FALCÓN, E., Derecho Procesal Civil, Comercial, Concursal Laboral y Administrativo, Tomo I, Rubinzal Culzoni Editores, Santa Fe, 2003, p. 103.

42 *Cfr.* QUINTERO, B. y PRIETO, E, *op. cit.*, p. 292-293

43 VÉSCOVI, E., *op. cit.*, p. 145.

As Santiago Garderes affirms: *"Historically, it is recognized that the norms that deal with the distribution of the competence criteria are unavailable. The refusal to alter the competence rules has a solid foundation based on the principle of legality in Art. 3 CPCM, consisting of the impossibility of the procedural subjects to alter the processing of the process before a competent Judge and under the provisions of the CPCM. This rule regarding the unavailability accepted in repeated pronouncements by ordinary national jurisprudence was taken up by the new procedural law in art. 26 CPCM., In the same, expressly recognizes that competence in general is unavailable, except competence due to territory"*.[44]

The exception to the general rule of non-transferability of competence is provided in Article 26 of the CPCM, where it is allowed only in the case of jurisdiction based on territory. Regarding this exception, the jurisprudence of the Supreme Court of Justice in the conflict of competence with reference 128-D-2012 establishes: *"The availability of territorial jurisdiction is the prerogative of the defendant, who shall be responsible to controvert such situation and denounce the lack thereof in accordance with Art. 42 Inc. 1 CPCM.- Having announced the plaintiff the defendant's domicile, it has met one of the requirements for the admission of the demand, developed in Art. 276 ord. 3rd CPCM; which determines -in principle and as a general rule- the jurisdiction, as has been sustained on many occasions by this Court (eg, judgments 34-D-11 and 70-D-2011); since the consignment of the address contributes to determining the passive element of the claim; In addition, the manifestation of the domicile of the defendant constitutes a matter of fact and not of law, for which reason it corresponds to the plaintiff to declare it, and the judge should not inquisitively try to determine it by other means, but must respect the principle of good faith, according to what the actor has stated"*.[45]

44 AA. VV., Código Procesal Civil y Mercantil Comentado, *op. cit.*, p. 29.

45 Supreme Court of Justice, July thirty, two thousand and twelve. Conflict of negative jurisdiction between the Civil Judge of Zacatecoluca, department of La Paz and the Civil Judge of Soyapango. Ref. 128-D-2012.

V. Creation and conversion of the Civil and Commercial Courts

Within the Salvadoran legal community the renewal of procedural regulations in civil and commercial matters was eagerly awaited, since serious problems were evident in the application of the Code of Civil Procedures of 1882, especially referring to excessive judicial default as well as lack of speed in the processing of processes in which scripturality prevailed. Against this background, the country's legal community hoped that the new procedural legislation would respond to the challenges posed by the current development of Salvadoran society since the previous regulation responded to the reality of the 19th century; Thus, after having developed the constitutionally established stages for the law formation process and having passed a *vacatio legis* for more than one year, the Civil and Commercial Procedural Code entered into force on July 1st, 2010.

The 2010 Code came to structurally transform the entire processing system, establishing greater speed, concentration and procedural economy, turning the previous Code of Civil Procedures extremely rigorous and formalistic. These changes constitute a modernization and progress for the Salvadoran order.

As part of the implementation of the 2010 Code, the creation of new courts were necessary, along with the conversion of existing ones, to ensure the correct application of the new Code. Given the above conditions, the Legislative Decree number 372 was established, dated May 27th, 2010, which creates civil and commercial Courts in the most populated cities of the country, and at the same time is responsible for the conversion of those already established in the municipalities of smaller population, so that they assume the causes initiated from the entry into force of the new procedural legislation.

Documents emanating from abroad

Judicial decisions issued abroad, as acts of the sovereignty of another State, to enjoy the same effectiveness as the resolutions issued by the national courts need the recognition of the Salvadoran state authority.

Exequatur, also called *auto de pariatis,* is the process of recognizing foreign judgments and judicial decisions prior their execution, provided that it meets the requirements established by the Salvadoran legal system.

Exequatur may also be given under an international instrument, in compliance with the requirements outlined in that instrument. Article 28 numeral 1 of the Civil Procedure Code attributes exclusively to the Civil Chamber, the knowledge of *exequatur* processes.

In the Fifth Book of the CPCM, within the legal regulation of Forced Execution in Articles 555 to 558 it is deduced that the foreign judicial resolutions that end a process, if they are recognized in El Salvador, they are also enforcement titles (Art. 555).

When there is no international treaty applicable to the recognition of a foreign title in El Salvador, it may be produced if at least it meets the requirements determined by art. 556 CPCM:

1st. *That the sentence with the authority of res judicata in the State where it was pronounced comes from a competent court according to Salvadoran norms of international jurisdiction.*

2nd. *That the defendant, against whom the execution is intended to be carried out, would have been legally summoned, even if it had been declared rebel, provided that the possibility of exercising its defense had been guaranteed and that the resolution had been legally notified.*

3rd. *The sentence meets the necessary requirements to be considered as such in the place where it was issued, as well as the authenticity conditions required by national law.*

4th. *That the sentence does not affect the constitutional principles or public order of Salvadoran law, and the fulfillment of the obligation it contains must be lawful in El Salvador.*

5th. *There is no ongoing process in El Salvador, nor a final and conclusive sentence issued by a Salvadoran court that has res judicata effect.*

The jurisdiction for the recognition of judgments, judicial decisions and arbitration awards from abroad corresponds to the Civil Chamber of the Supreme Court of Justice. This is a reform that brought Art. 557 in harmony with Art. 28 of the Code of Civil and Commercial Procedure since, at the time, this code came into force, the cited Article 557 conferred jurisdiction on the Supreme Court of Justice, as it happened in the previous Code of Civil Procedures.

The acknowledgment must be requested by the party that is interested in and of the request, a hearing must be given to the opposing party, placing it before the Court so that it can make allegations about the concurrence of the legally established requirements.

When no allegations have been formulated, or evidence has not been practiced, the Civil Chamber shall issue a judgment recognizing the foreign resolution and granting it full effect, or denying such recognition within ten days.

It will be allowed to present evidence, in which case an evidentiary period will be opened. If useful and pertinent evidence has been proposed, its practice will be ordered in a hearing, which must be carry out within a period not exceeding twenty days, and after being concluded it, the sentence will be issued. There is no appeal against the judgments of the Civil Chamber that resolve the *exequatur* process.

VII. Forced execution

The judicial authority must be exercised not only to judge and issue a ruling but also to bring about the effective enforcement of that mandate, for which the figure of execution is necessary. Execution is a way to enforce what is established in a judgment and prevent the judge's activity from being limited to mere rulings that do not materialize.

All of this is aimed at achieving effective judicial protection, as it is the duty of the State to ensure the secure fulfillment of the rights that citizens seek to have protected, recognized, and enforced. We should not only limit ourselves

to accessing justice but also strive for its ultimate realization, considering that the Constitution of the Republic implicitly includes in Article 2 the State's obligation to ensure effective judicial protection.

"The executive activity is presented as a necessary continuation of the process in order to comply in all its aspects with the judicial sentence, especially in front of a rebellious conduct of the convicted person. Execution is based here on the existence of a jurisdictional title: the judgment or any other jurisdictional resolution.

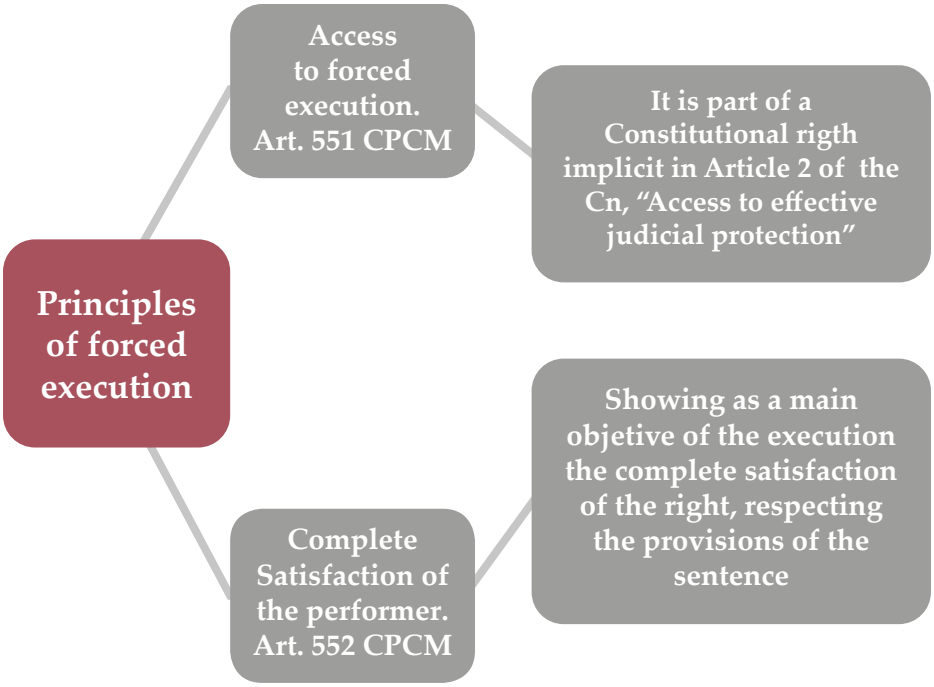
The existence of this phase of the procedural activity is essentially subordinated to the need for effective legal protection. It matters little to obtain a favorable judicial decision or to possess any other executive title if one cannot achieve effective realization of these titles or obtain the benefit that they protect. While it is true that the legal system relies on the process, this requirement is fully fulfilled in its significance during the process of execution. Without execution, the law becomes something that vanishes in ethereal declarations or more or less fortunate formulations. At this level, the law would fail to fulfill the purpose that justifies its own existence".[46]

The execution of the sentence is only carried out in convicting sentences, since in merely declaratory and constitutive sentences, they do not need the execution stage, since it is in charge of exercising effective compliance with that issued by the court and in declaratory and constitutive sentences, the same sentence makes them effective.

"In the civil process, when a judgment has passed in the authority of res judicata, the coercive profile of the State begins to appear in its monopolistic use of force, since if the debtor does not comply with the obligation declared in the sentence, the creditor can initiate the forced execution of his credit. This new stage, which starts from the acquisition of firmness by the judicial ruling, is of execution, because it tends to enforce-execute-the provisions of the sentence, it is procedural because it consists of a series of procedural acts, some investigative, others directly enforceable, ordered for this purpose, and it is forced, because the use of coercion predominates

46 RAMOS MENDEZ, F., *Derecho Procesal Civil,* Editorial Bosch, Barcelona, 1980. p. 951.

over the assets and, sometimes, also over the person of the debtor, whose will will be dispensed with".[47]



Articles 554 and 555 of the CPCM give rise to Forced Execution, dividing the types of titles into National and Foreign, with the exception of Article 457 which specifies the executive process. It is therefore appropriate to differentiate between the executive process and forced execution. The former is a special process carried out to comply with a title that entails execution, whereas forced execution is a process by which a judgment is made effective in application of the principle of effective judicial protection, which obliges the State to judge and enforce what has been judged.

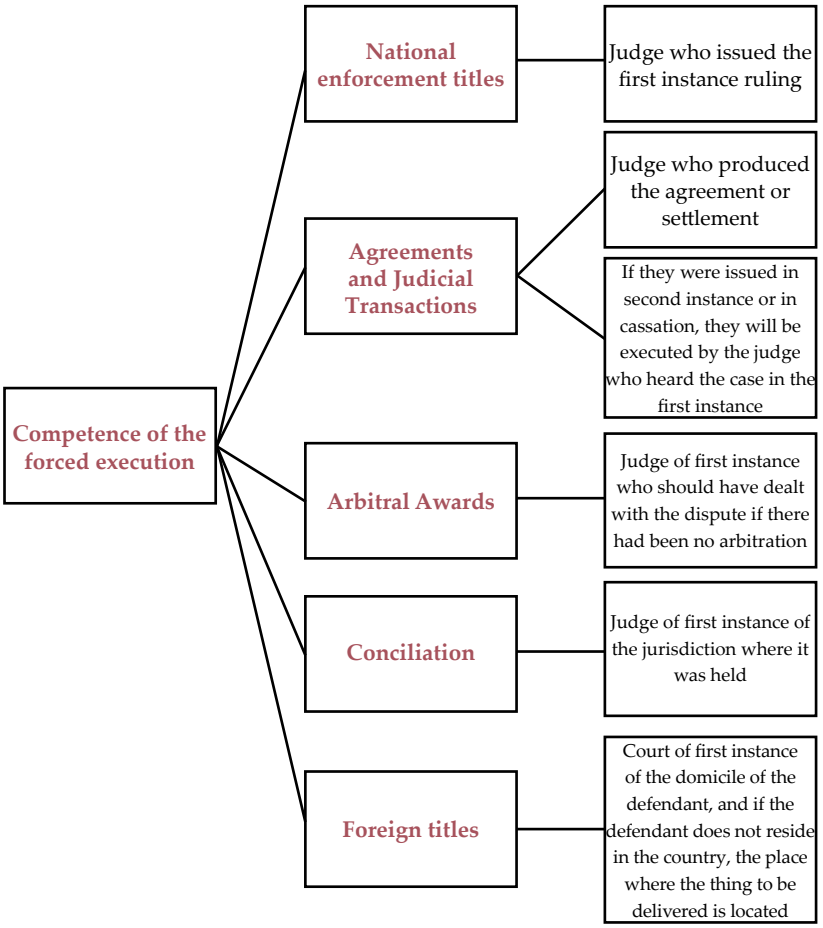
47 ARAZI, R., *Derecho Procesal civil y comercial, parte general y especial*, second edition, editorial Astrea, Buenos Aires, 1995. p. 600

As explained above, it must be a sentence of conviction, since it is not necessary to enforce a declaratory or constitutive process; it must be a judgment that has passed with the authority of *res judicata*. For this case, the CPCM exposes three scenarios in articles 229, 230, and 231, which are as follows: when the appeals filed have been resolved and no other appeals are available in the case; when the parties expressly consent to it; and when the deadline for filing an appeal has passed without filing the corresponding appeal. These scenarios serve as impediments for another process involving the same parties and the same claim.

One of the main innovations is the *"Provisional execution of judgements on appealed"* provided in Article 592 CPCM; this mechanism operates at the request of a party and is brought before the judge who had decided in the first instance:

As a general rule, there is no need for the presentation of a surety, except when the judge decides otherwise, taking into account the economic capacity of the applicant. If the judgment is reversed, the applicant is liable for damages to the respondent, and the judge will take the necessary actions to reverse the executed actions, either by returning the money or the property. If it is not possible to return the property, it will be replaced with its equivalent in money.

Regarding the competence of forced execution, it is found regulated from Articles 561, 254 and 562 CPCM.



VIII. Other cases of competence regulation

8.1 Preliminary Proceedings

To enter the study regarding who is responsible for knowing about preliminary proceedings, the following shows what is understood by our Civil and Commercial Procedural Code by "preliminary proceedings":

According to Valentín Cortés and Víctor Catena, the preliminary proceedings are *"actions that are postulated by the judicial bodies and are intended to obtain information about circumstances related to the personality of the future defendant or other extremes that whoever intends to file a lawsuit needs to know for initiation successfully from a civil process, as well as obtaining documents or objects that are necessary to enter in such process"*.[48]

At the same time, we find a definition that helps us to clarify the term in the CPCM, that states: *"Proceedings constitute a true autonomous process and subsist independently, they can never be considered as accessory procedures to a main process, it means, as an incidental question. All the inquiries to complete the information for the preparation of the claim, the availability of the evidentiary means and the litigation object must be within the reach of the parties, before the initiation of the process, otherwise the claim will be rejected"*.[49]

We must bear in mind that when speaking of preliminary proceedings we are not leading to the end of precautionary measures, since as it has been expressed in the previous definitions, they refer to the search for the effective presentation of a claim, seeking to prepare all the information and documents necessary to help the future plaintiff to successfully file his claim, as expressed in Article 255 of the CPCM, the proceedings preliminary purposes are to *"prepare the process"*, and if these measures are not used within a month they lose their effectiveness.

48 CORTÉS DOMÍNGUEZ, V. y CATENA MORENO, V. *"Derecho Procesal Civil, Parte General"*, third edition, Editorial Tirant lo Blanch, Valencia, 2008, p. 118.

49 Código Procesal Civil y Mercantil Comentado, *op. cit.*, p. 251

On the other hand, when talking about jurisdiction for the knowledge of preliminary proceedings, we find in article 257 of the CPCM that these should be handled by the court of the domicile of the person who must testify, exhibit, or intervene in the proceedings, and if this information cannot be found by the applicant subsidiarily, the court where the future lawsuit is to be filed shall be competent.

The CPCM in the same article 257 expresses two specific assumptions for the application of the subsidiary criterion[50] of competence (the court where the future claim will be processed will have competence):

Art. 256 Ord. 2nd CPCM: *"The integration of legal representation of minors, incapacitated individuals, and minor children who litigate against their parents shall be provided by the Fiscalía General de la República or through the means established by law".* Art. 256 Ord. 6th CPCM: *"The judicial determination of the group of affected individuals in processes for the defense of collective interests of consumers and users. In such cases, the court may request the adoption of appropriate measures to ascertain the members of the group, according to the circumstances of the case and based on the information provided by the petitioner, including requiring the defendant to collaborate in such determination"*.

8.2 Evidence assurance

The assurance of the evidence consists of the request that is made before the court to achieve the effective protection of a test that will be poured into the judgment. It can be requested either before filing the lawsuit or in the course of the process, the ultimate goal is to ensure that the evidence can be shown through the trial without any alteration.

50 Regarding the Preliminary Proceedings, a point of relevance for the application of the subsidiary criterion of jurisdiction, it is found that the Commented Civil and Commercial Procedural Code, *op. cit*., p. 252 states: *"Under the same idea, regarding the special and subsidiary criteria, it should be noted that it will not only take place when the required domicile is unknown, but also in cases where the territorial criterion cannot be used as a reference to establish the competence according to the general rules, as is the case of the lawsuits filed against the State of El Salvador; in this, there is no doubt that art. 257 subsection 1st tacitly refers us to what is regulated by art. 39 CPCM ".*

"Unlike preliminary proceedings, precautionary and evidence preservation measures aim to advance or guarantee, even before the start of the procedure, the gathering of evidence related to the merits of the case that may be at risk of not being able to be obtained if subject to regular temporal provisions... The evidence preservation measures seek to ensure that, during the ordinary procedural phase, it makes sense to propose and it is possible to conduct relevant and useful evidence".[51]

Regarding the competence of the assurance of the evidence, article 323 of the CPCM is clear when explaining two assumptions:

- *If the assurance of the evidence is requested when the process is in progress, the competent judge to know about it will be the judge who is hearing the case (the court that is solving the dispute).*
- *If the assurance of the evidence is requested before the filing of the claim, the knowledge of this is the competence of the court that must know the main process.*

8.3 Advance Evidence

The advance of evidence is a mechanism provided by the legal system in the interest of justice and truth, which consists of a request made by one of the parties before or during the pre-trial phase, aiming to produce a specific means of evidence and document such production so that it can be evaluated at the appropriate procedural moment.

The justification for authorizing the advance of evidence lies in the existence of a certain risk that it may not be able to be submitted to the process due to some subsequent circumstance. As Montero Aroca states, the anticipation of evidence *"consists of the practice of any means of evidence prior to the trial, in fear that its own source will be lost, making its contribution to the process impossible. It is not about securing the source, but about practicing the medium".*[52]

51 CLEMENTE CASAS, I. "Diligencias preliminares y medidas de anticipación y aseguramiento de prueba", in *"Revista Actualidad Jurídica"*, number 12, Madrid, 2005. p. 93. Available in: http://www.uria.com/documentos/publicaciones/1477/documento/foro7.pdf

52 Cited by REYES HURTADO, M., *Tutela jurisdiccional diferenciada,* Palestra Editores, Lima, 2006, p. 443.

Based on the art. 328 CPCM, the competence to know about the request of the advance of evidence corresponds:

- *The judge who is already handling the ongoing process but has not yet entered the evidentiary phase.*
- *The judge who would be competent to handle the process according to the general rules if the request is made prior to the lawsuit.*

8.4 Precautionary Measures

As Santiago Garderes observes: *"the process is usually conceived as a slow and sometimes ineffective instrument"*. This same author indicates that *"even the most agile procedural structures will have to take a time that, considering the circumstances of the case, may be excessive, putting at risk the effectiveness of the judicial protection"*.[53] For his part, Kielmanovich affirms that *"it has been noted since ancient times that the natural, and we would even say inevitable, slowness of judicial procedures may entail a certain risk that the composition of the conflict will be late"*.[54]

Given the reality of procedural delays, various solutions have been proposed, such as the implementation of abbreviated processes to address the claims that present special urgency, although this does not eliminate the minimum structure of any process related to respect for the principles of bilaterality and contradiction, from there that it does not eliminate the risk of dissatisfaction with the rights that require judicial protection. Therefore, the legal order has provided for the institution of precautionary measures as a mechanism to safeguard the effectiveness of the process, despite the aforementioned delay.

Gascón Inchausti delimits this procedural institution, stating: *"These are provisional arrangements, agreed by the Judge, through which is provided what*

53 GARDERES, S., en AA. VV., *Código Procesal Civil y Mercantil Comentado, op. cit.*, p. 461.

54 KIELMANOVICH, J., *Medidas cautelares,* Rubinzal Culzoni Editores, Buenos Aires, 2000, p. 14.

is necessary to ensure, during the pendency of the main proceedings, that it will be possible to carry out what was decided in the sentence, when it arrives and assuming that it is a judgment by default of the actor's requests".[55]

The doctrine recognizes a set of fundamental principles that inform the procedural institution of precautionary measures, which lists the universality of application, proportionality, defense and contradiction, speed, responsibility, consistency, and the principle of operation. Within these principles should be highlighted the universality of application, which refers to the possibility of requesting precautionary measures in all processes regardless of their specific matter, as well as their origin in any procedural stage, being appropriate even prior to the start of the process when the risk of ineffectiveness is justified due to the delay in processing it.[56]

On the other hand, the proceduralists highlight two distinctive characters of the precautionary measures: instrumentality and provisionality. Regarding the first of these characters, it is stated that *"precautionary measures are instrumental, as they lack an end in themselves, and are functionally subordinate and ordered to a main process on which they depend, to ensure compliance with the aim of ensuring the enforcement of the judgment to be rendered in that main process"*;[57] while the provisionality refers to the precautionary measures *"must subsist until the final judgment becomes firm or enforceable"*.[58]

The adoption of precautionary measures requires the intervention of the body vested with the jurisdictional function, since they affect the assets of the defendant before the existence of an enforcement order; for this reason, it becomes necessary the special motivation of the judicial resolution in which such measures are imposed, which must be based on compliance with the two basic

55 GASCÓN INCHAUSTI, F., *La adopción de las medidas cautelares con carácter previo a la demanda,* Cedecs Editorial, 1998, p. 19.

56 *Cfr.* GARDERES, S. *et. al., op. cit.*, p. 463-468.

57 KIELMANOVICH, J., *op. cit.,* p. 42.

58 KIELMANOVICH, J., *op. cit.*, p. 42.

assumptions traditionally called: *fumus boni iuris* and *periculum in mora.* The first of them consists of the reasonable appearance that the applicant is entitled to what he asks for in the proceedings on the merits, while the second budget refers to the danger related to the effect of the passage of time that leads to damaging or rendering ineffective the final resolution of the process.[59]

As indicated above, one of the principles that informs the procedural institution of precautionary measures is the universality of application, which implies that precautionary measures can be adopted before and during the processing of the process, a principle regulated in our civil and commercial process through Article 434 CPCM.

Starting from the universality of application, it should be indicated that the competence to impose precautionary measures includes both assumptions, as it is regulated in Article 449 CPCM: *"It will be competent for the adoption of precautionary measures, the judge who must know, in the instance or resource, about the procedure in which they are to be agreed "*. From the aforementioned provision it is inferred that regardless of the procedural moment in which they are requested, it will correspond to the same court that is in charge of the process, or the one that should know when the lawsuit has not yet been filed, being applicable the criteria of competence already addressed, such as the territory and the subject.

On the other hand, Article 449 CPCM, in its second subparagraph, also foresee two special cases of competence. The first concerns the fixation of precautionary measures in matters of internal arbitration, establishing that *"The jurisdiction shall belong to the first-instance judge of the place where the arbitral decision must be executed or where the measures must take effect";* the second refers to jurisdictional or arbitration processes developed abroad, for which the same regulation is established, except for the specific provisions of the international treaties ratified by the country.

59 *Cfr.* GASCÓN INCHAUSTI, F., *op. cit.,* p. 22-23.

IX. Final reflection

The Civil and Commercial Procedural Code in force since July 1st, 2010, has generated a profound transformation in the functioning of justice in the field of Private Law, introducing a process for hearings that came to replace the previous procedural regulation of a planned scriptural nature in the Code of Civil Procedures that had more than a century of validity.

This change in the civil and commercial processes that include the principle of orality aims to streamline a system stagnant in formalities that saturated the system and prevented prompt and accomplished justice. It is undeniable that it shows challenges for legal professionals, but that it represents an advance to the process.

The procedural norm of 2010, in addition to establishing hearings in the procedural process, contains significant changes in the adoption of new classifications of processes; the provision of the appeal for review of final judgments; the specific regulation of special processes such as payment orders and possession; as well as a reformulation of the norms and principles of Evidentiary Law.

Within the aforementioned set of innovative aspects, the CPCM profoundly modifies the normative regulation of competence, a legal institution that delimits spheres of action that corresponds to the various courts between them.

In the CPCM, the legislator has systematically provided for the regulation of the areas of competence of the Supreme Court of Justice, the Second Instance Chambers, First Instance Courts, and Peace Courts, all with the purpose of facilitating access to the administration of justice for individuals who seek the intervention of the jurisdictional bodies to resolve their disputes.

ESTUDIES

Brief reference to the Principialist Conception of law and the life cycle of obligations

Prescription and expiration in family matters

Part I

Lic. Cristian Eduardo Palacios Martínez

Breve referencia a la Concepción Principialista del Derecho y al ciclo vital de las obligaciones. Prescripción y Caducidad en Materia de Familia
Parte I
Lic. Cristian Eduardo Palacios Martínez

Resumen
El Derecho es un organismo vivo, está en constante cambio, sujeto a colisiones entre sus componentes y transitando progresivamente en el tiempo. Sin duda alguna que la idea de Derecho invoca la idea de obligación, pues hablar de Derecho es hablar de la necesidad de ejercer o no una actividad, bajo la advertencia de sufrir la imposición y el cumplimiento de una sanción. El Derecho es un mundo obligacional, y una obligación es la fuerza que mantiene unidas a las instituciones jurídicas, adecuando la interacción entre ellas y posibilitando que el orden jurídico no se altere. Ahora bien, las obligaciones tienen su propia naturaleza y explicación, la forma de cómo se originan, expresan, desarrollan y extinguen; es decir, tienen su propio ciclo vital. Asimismo, el Derecho es un sistema de principios dotados de justicia, según lo predica la Concepción Principialista del Derecho. En esta concepción no se interpreta a los principios como partículas absolutas y sobrepuestas al todo, sino como compuestos inteligibles y entrelazados que responden a una forma coherente y estable de la labor jurídica, como parte del quehacer de la sociedad. La Concepción Principialista del Derecho permite entonces descubrir que la eficaz aplicación de un sistema normativo no depende de la codificación cerrada y extensiva del mismo, sino de la adecuada interpretación de los principios que guían su composición y estructura. Sin duda alguna que en esta concepción los principios tienen no solo un valor supletorio del Derecho, sino también un valor fundamentador e interpretativo del mismo.

PALABRAS CLAVE: CADUCIDAD – CONCEPCIÓN PRINCIPIALISTA DEL DERECHO – DERECHO DE FAMILIA – OBLIGACIONES JURÍDICAS – PRESCRIPCIÓN – PRINCIPIOS JURÍDICOS.

Brief reference to the Principialist Conception of law and the life cycle of obligations. Prescription and expiration in family matters
Part I
Lic. Cristian Eduardo Palacios Martínez

Abstract
The law is an alive organism in constant change, subject to collisions between components and progressively traveling in time. Without a doubt, the concept of Law invokes the idea of obligation, as talking about Law is talking about the necessity of carrying out or not carrying out an activity, under the warning of facing imposition and the fulfillment of a sanction. The law is an obligational world and an obligation is a force that holds together the legal institutions, adapting the interaction between them and enabling the legal system to be not altered. However, the obligations have their nature and explanation, the way how they originate, express, develop and extinguish; meaning, it has their own life cycle. Also, the law is a system equipped with principles of justice, according to the Principal´s Conception preached by the law. It does not interpret in this conception of the principles as absolute and overlaid particles at all, but as intelligible and intertwined compounds that respond to the way stable and consistent with legal work, as part of the task of the society. The principalist conception of law allows the discovery the effective implementation of a regulatory system does not depend on the closed and extensive encoding of the same, but the proper interpretation of the principles that guide their composition and structure. Without a doubt, the principles have not only a substitute value of law in this conception, but also a foundational and interpretive value the same.

KEYWORDS: EXPIRY – PRINCIPIALIST CONCEPTION OF LAW – FAMILY LAW – LEGAL OBLIGATIONS – PRESCRIPTION – LEGAL PRINCIPLES.

Brief reference to the Principialist Conception of law and the life cycle of obligations
Prescription and expiry in family matters
Part I

Lic. Cristian Eduardo Palacios Martínez[1]

…incredible things are happening in the world (…)
Right there across the river there are all kinds of magical instruments
while we keep on living like donkeys…[2]

Introduction

The article describes some considerations on the prescription and expiry in family matters in the Salvadoran legal system that arise within forensic practice and certainly within the study of the theoretical currents about the doctrinaire acquis of Law scientists in which it is sustained and explained.

This study aims to make available to the public administration, the actors of the judicial system, and, of course, all those interested in Family Law, a theoretical approach to one of its appendices, which reflects the legal effects of time in the consolidation of legal relationships. This area we are referring to is that of family-related obligations.

For the systematization and exposition of information, this work has been divided into three parts, the first part is related to the exposition of the theoretical bases of the principialist conception of law and the life cycle of

1 Bachelor in Legal Sciences, graduated from the School of Jurisprudence and Social Sciences of the University of El Salvador, and Court assistant of the Second Family Court (Judge 2), of the Municipality of San Salvador, Department of San Salvador, El Salvador.

2 By José Arcadio Buendía in GARCIA MARQUEZ, Gabriel, *One Hundred Years of Solitude,* Bruguera, Barcelona, 1985, p. 13.

obligations. The second part shall be about the development of the prescription, and the third part about the exposition of the academic issues that correspond to the expiry and the contrast of both legal institutions. The two parts that complete the content of this work will be made available to the reader in the following publications of this journal.

This article aims to expand the field of Family Law in our legal culture and enrich a fertile area of study, such as the Law of Family Obligations. Undoubtedly, the theoretical enrichment does not begin with the presentation of the ideas contained in this article but with the criticism and improvement that can be made of them.

I. Study approach

In general terms, this study approach allows the reader to know what the interpreter's perception of the legal situation they are investigating (objective, subjective, current, positive, public, private, social law, for example), to facilitate the understanding of an investigation. Likewise, according to the research approach, the theoretical perspective used to discover, interpret and expose the data obtained in the research is established. These theoretical perspectives are the theoretical orientation of the natural law, legal positivism, legal realism as forms of legal reductionism, legal trialism, and argumentative theories. And with that, define the type of legal research: Legal-dogmatic formalist or legal-historical sociological.

There are different approaches as interpreters exist. Some have been classified on account of their more general characteristics with their own traits which go from traditional conceptions to more modern orientations, and based on precise methods (analytical, synthetic, deductive, inductive, analogical-comparative, systematic, historical, dialectical, intuitive) and with particular research techniques (surveys, interviews, case studies, comparative tables, among others).

The approach used in the research that gave rise to the present article was eminently regulatory with certain axiological[3] and factual characters which do not fit precisely with the legal reductionisms. Nevertheless, the core of the research was eminently legal-dogmatic formalist, reducing itself to analyze, synthesize, deduce, induce and compare the meaning of the norm, and to contrast its content with the values and principles that justify it.

Therefore, in the elaboration of this work the deductive method has been used, which starts from the most abstract (values and principles) and takes shape through the factual assumptions (casuistry). Thus, the link that joins the origin or source (law) with the destination (casuistry) is built, and the end or result is foreseen (Jurisprudence).

II. Previous notion

Similar to the phenomena of the physical world which occur within a larger order, that is, within a solar system which belongs to a galaxy, and this to the universe; legal institutions belong to a legal order, which is part of something greater, that is, a legal system,[4] which settles down in a social conglomerate, precisely, within society. Within that system orbit all legal institutions, including sources of law, around and in favor of people. In an ethical-abstract world, like

3 Every regulation of human action implies a choice of values; therefore, the normative is intimately linked to axiology, that is, to the world of values. *Vid.* MARTINEZ MARULANDA, Diego, *Ground for an introduction to law,* Erinia Collection, University of Antioquia, Medellín, 2007, p. 41. It has been said that values are basic and primary, norms are derived and secondary.) It is even said that the rules are instrumental for the realization of some values. *Vid. VON WRIGHT, Georg Henrik, An Essay in Deontic Logic and the General Theory of Action,* translated by Ernesto Garzón Valdés, Collection: Cuadernos, Cuaderno 33, Philosophical Research Institute, Mexico City, 1976, p. 12. The Law involves axiological aspects with different denominations National Autonomous University of Mexico, by the authors, as follows: moral correctness or claim to correctness, as a non-positivist concept of Law (Robert Alexy) or objective morality (Moreso). *Vid.* FERRAJOLI, Luigi, *"Constitucionalismo principialista y constitucionalismo garantista",* Digital Edition, in **AA.VV**., Doxa (periodicals): Notebooks of Philosophy of Law, electronic magazine, number 34, 2011, Virtual Library Miguel de Cervantes, p. 29. Also available in http://bib.cervantesvirtual.com/FichaObra.html?Ref=053980) [Accessed May 14, 2014].

4 The idea of a *legal system* in this article is broader than that of a legal order. Therefore, the concept of a legal system does not correspond exactly with the idea of *constitutionalism,* which itself involves the idea of a normative system.

the phenomena of the physical world, legal institutions have raison d'être; they live interacting in an order that, to a greater or lesser extent, is harmonious and intelligible, thereby expressing their own cosmos. This is a structural vision of law,[5] with which the idea of is not exhausted either.

Law is inserted in a *social galaxy*. Law is an *obligatory world,* and in the way of conceiving it in this article, an obligation is a force that holds *legal atoms* together, that is legal institutions,[6] adapting the interaction between them[7] and enabling the legal order not to be altered. Legal obligations enable and strengthen the continuity of legal relations, and from this perspective, they allow the progressive continuity of law and, in turn, the balance of human relations. Obligations have their own nature and explanation, the way how they are constituted, expressed, developed, and extinguished. Obligations have their own *legal cosmology.*

Despite the similarities that are noticed when making an analogy between the physical world and the legal world, the laws that govern each of them are completely different. In the first, they are firm and unalterable, whereas in the second, they are totally opposite. In the physical world, for example, the forces that maintain the existence of things are not established by the human

5 From a realistic or sociological approach, the Law is not simply language and normativity, but also, human behavior, and in particular, judicial behavior. Likewise, the Law is argument, a technique for solving practical problems. As an argument, Law is an instrument that humanizes principles and values. It is the field of factual conjectures and legal refutations. *Vid.* ATIENZA, Manuel, " Law as argumentation" in AA.VV. Legal argument, Electronic Magazine Isegoria, number 21, 1999, p. 37-38. Available in http://isegoria.revistas.csic.es/index.php/isegoria/issue/view/4. [Accessed May 15, 2014].

6 These can be understood as living elements of Law, as elemental entities that form the most logical and stable structure of the legal system, gaining vitality because they constitute true requirements and thus deserve a more or less detailed normative regulation. They can also serve as the backbone of the legal order. For example, the ideas of person, state, property, tenancy, prescription, expiration, public order, life, and legal security are all legal institutions because the legal system is based on them. For this reason, they are often subject to specific regulations within legal frameworks. Additionally, Law relies on these institutions to update and legitimize itself, sometimes even without prior codification.

7 The configuration that the legal norm makes of basic social facts, always taking into account values and possibilities, is what is called legal institutions. These institutions are proposed to the subjects of Law, who participate with them through *legal relations. Vid.* MORAN MARTIN, Remedios, *Materials for a law history course,* National University of Distance Education, Madrid, 2010, p. 65.

being. On the other hand, in the legal world, the forces (obligations) that carry out the legal order are established by humans. However, these latter are not based on individual will but on *values* that embody the generally accepted will of a human group in a specific period.

Even under the light of reason, that reveals the similarities between the physical world and the legal world, the laws that govern them cannot be explained in the same way, but they require different methods and techniques that fit with the objects of study that one world or the other presents. Understanding this is essential for the *legal cosmology* that seeks to explain the origin, evolution, expression, structure, and purpose of Law, and of course, to explain the *life cycle of obligations*[8] and the incidents that manifest within it. Indeed, we must understand that the legal obligation is affected by prescription and expiration,[9] but in an incidental way, because these institutions may or may not manifest themselves in the forces that give stability to the legal order.

However, the physical world and legal world do not obey the same laws, this is not an obstacle indicating that the laws of both are revealed to the human being and it is he who discovers, interprets, understands, and explains them. At the end, at a later stage of knowledge, human beings can predict the phenomena that will happen in both. Of course, in whole or in part the human being is revealed by the curiosity that characterizes human thinking, affected by the germ of the continuity of knowledge.

Before understanding the effects of time on the consolidation of legal relations, through the institutions of prescription and expiration, it is necessary to know more closely what the forces that maintain the order established in the legal world are, the links seeking stability and security for such a changing

8 The idea of the *life cycle of obligations* has been taken from JULIAN, Emil Jalil, "The normative system of the General Theory of Obligations in the projected Civil Code", in AA.VV., *Derecho Privado. Reforma del Código Civil. Obligaciones y Responsabilidad,* Directors Gustavo Caramelo and Sebastián Picasso,Ministry of Justice and Human Rights of the Nation Editorial, Buenos Aires, Year I, Number 3, December 2012, p.4.

9 Expiration - extra procedural -, as will be explained below, indirectly affects rights. Therefore, if the obligations are the correlative of the rights, the expiration indirectly affects the obligations as well.

and complex world. In fact, it is essential to know the *life cycle of legal obligations* based on their constitution or birth, development or life, and extinction or death thereof.

III. Law

Law is a living organism, just like the planet; it is constantly changing, subject to collisions between its components and progressively passing through time. Law is the *Dasein of the ought-to-be.*. The law reproduces itself does not require closed and finished concepts that declare it. It is enough to interpret human thinking. The law is reproduced and renewed every day in the courts and tribunals, in public administration institutions, and even in the simplest human relations. Hence for *Legal Realism,*[10] law is created and reproduced with forensic practice.

The legal world, like the physical world, is not created or destroyed but transformed. Consequently, the new elements of it are only *discovered.* The law, when applied, is revealed as something new and finished, although it is constantly changing, subject to social laws, interest shocks and value weighing. Therefore, the law, in the conception that has been described following the stimulus that the facts produce, only discovers itself. Then, the error of law is not in the law itself, but in the thought of whoever discovers, interprets and exposes it.

Now, in this article, we will focus our interest on the pragmatic idea of law, that is, we will start from the notion of law as a bond, necessity, burden, commitment, or more precisely, as an *obligation.* The very essence of law is "being an obligation." (*Dasein of the legal ought-to-be*[11]).

10 It is a distinctive note of *American Legal or Behavioral Realism,* the judicial creation of Law. *Vid.* MORALES, José Humberto, *Notes on Philosophy of Law*, University Editorial, University of El Salvador, San Salvador, 2011, p.78.

11 The Law is there; it has its own existence. It has a time and a place where it manifests. It is not in consciousness, it is an external entity that naturally overcomes human behavior, since it has enough real force to bend it.

3.1. Law as an obligation

The legal conception of human relations is adorned with the element of obligation, the helmet of afflictive necessity. The idea of law invokes the idea of obligation. Speaking of law means speaking of the necessity to perform or refrain from an activity, under the *warning* of suffering the imposition and fulfillment of a positive or negative sanction.

Law is the prelude to a series of warnings, positive or negative, for its recipients. At the same time, it is the concretization of these warnings. For this reason, law is the source and the means that are discharged in an end, being this end the human being, to whom it is revealed and to whom the law is allowed to be the way it is known. However, this way of discharging is not as simple as described but rather it is due to the internal and logical mechanics of social organization more or less complex.

Law as it is known today is an imposition which commands, permits or prohibits. It is a source of commands and rules, and the means by which those commands and rules are channeled and fulfilled. In order for the law to be discharged, observed or updated in the legal subjects, it is required that they accept it as legitimate or valid. The process of acceptance of the law is silent, because the legal subjects from their birth or constitution are incorporated into a pre-established order. Although they recognize the law under the condition of their own personal, patrimonial and legal security, a real and express will does not intervene, but rather, a presumption[12] of acceptance. In addition the legal subjects, as recipients of the norms, sacrifice a portion of their state of freedom and, in return, they become conditionally free.

12 Therefore, it is not surprising that in the rationalist creation of the Constitutional State of Law, it is presumed that all norms are constitutional, and therefore mandatory, and that to establish otherwise, they must be declared as unconstitutional by the competent authority and under the legally established means.

3.2. Enforceability of law

That Law is obligatory means that it becomes coercible. *Coercibility* is the inherent characteristic of Law that enhances the effectiveness of its *legal propositions.*

Coercibility is the characteristic of law, precisely of legal norms,[13] that enables them to be enforced by their recipients through the afflictive, threatening, or restrictive intervention of a third party, particularly, the State. Coercibility accomplishes and materializes the hetero-composition of human conflicts. In private justice and self-composition,[14] there is no coercibility, notwithstanding the coercive support provided by the State in this latter form of conflict resolution.

The law is coercible because it is naturally infringed. It legitimizes and validates its existence in its own disobedience. For this reason, it requires being coercible to overcome what law itself has foreseen. Laws exist because social evolution has demanded them to exist because if life in society were interest free, laws would not be necessary. In other words, the coercibility of law is based on the fact that it will naturally be infringed or disobeyed.

Even when discussing the legal nature of international law norms due to their apparent lack of enforceability, their legal nature will not be diminished because the law itself obtains the coercible nature of the general principles of law (prevailing values of the time), precisely of the idea of justice.[15] The law

13 It has been well said that *enforceability* is a characteristic of the legal norm, together with rationality, generality, imperative nature, statehood, formal unity, unilateralism, permanence and propositional character.

14 It can be defined as that peaceful and direct form of dispute resolution that consists in the reciprocal or unilateral subordination of the interest of each party or one of the parties to the dispute, to that of the other in dispute. *Vid.* ALDEA MOSCOSO, Rodolfo Alejandro, Legal Editorial of Chile, Santiago de Chile, 1989, p. 86. *Of self-composition. A contribution to the study of the solution of legal conflicts.*

15 The study of the sources of law can be adopted from a legal-positive perspective or from a philosophical and legal perspective. *Vid.* GARCIA CUADRADO, Antonio M., The constitutional order. A historical and formal approach of the theory of the Constitution and the sources of Law, Editorial Club Universitario, Alicante, 2002, p. 196.

serves an ultimate goal: Justice[16] in the person. This purpose determines what behavior must be observed. Something is required because it is considered or should be considered as necessary to achieve justice. If the obligation does not serve that end, it is naturally illegitimate and therefore should be disobeyed.

Law as a historical product is an expression of a certain history, that is, of the prevailing values of the era that is lived. The forms or ways of the law to assert itself will precisely vary according to the organization of societies in the course of time.[17] Therefore, the international law, that has been said to be more a Law of moral content[18] than legal content, has its own self-executing way according to its historical evolution to the present day. It would not be strange if in the future really pressing means will be recognized to force states to fulfill their obligations. Furthermore, the discussion of the legal content of international law has to do with the absence of a world state,[19] but this is no reason to denature it as a moral right.

3.3. General principles of law (Principialist Conception)

That the law is an obligation does not merely rely on its words being printed on paper, or that it has been positivized, although the latter is an apparent and necessary closing clause of law. *The principalist conception of law* makes it possible to discover that the effective application of a normative system does not depend on its closed and extensive codification. The application of

16 Hence the concept of what is called Dikelogia which is the science of justice. *Vid*. ALDEA MOSCOSO, Rodolfo Alejandro, *De la autocomposición…*, *op. cit*., p. 86.

17 It is not surprising that at present people who sell products by electronic means ("virtual people") are supposed to pay taxes just like natural persons. They are demands requested by society according to its historical evolution.

18 This distinctive note is important because it has been considered that the law is coercible and moral is not. *Vid.* OLASO, Luis María, *Introduction to Law Course. Philosophical Introduction to the Study of Law,* Tomo I, 3rd edition, Andres Bello Catholic University, Caracas, 1998, p. 120.

19 *Vid*. ATIENZA RODRIGUEZ, Manuel, *Three Lessons in Theory of Law,* Universitary Club Editorial, Alicante, España, 2000, p. 34.

this system depends on the proper interpretation of the threads (principles) that guide its composition and legal structure. In the p*rincipialist conception of law*, principles not only have a supplementary value to the law but also a foundational and informative or interpretative value of it.[20]

The general principles of law do not come from legal norms, they are not a product of them, but quite the opposite; even though some legislations have recognized the general principles of law in their normative texts as sources of the law.[21] That is to say, contemporaneously, from a rationalist vision, the "principialist codification" takes place, and this phenomenon is not foreign to our legal-political culture, nor to our legislative technique.[22] That is to say that *protectionist constitutionalism* considers that ethical-political principles are old expressions of natural law that they have been positivized, converted into binding legal principles for all holders of normative functions.[23]

From a *philosophical-legal* conception, the core of the law is in the force of the innate principles of the law itself and not in the positivization of legal norms. These innate principles are the threads that discover the existence of a supreme normative order to the written one, the one that goes ahead of the normative texts. This normative order counts on the existence of norms so that the legal subjects get to know them. It is appropriate to state that the legislator is mechanical and limited, and consequently, at times unconscious and insensitive. On the other hand, the principles of law are flexible and full of content, available

20 *Vid.* JORDANO BAREA, Juan B., "The primary source of Law (Gloss to an old dispute between Castro and D'Ors)", in AA.VV., *Book tribute to Professor Manuel Albaladejo García,* coordinators J.M. González Porras and F.R. Méndez González, Volume I, National College of Property and Mercantile Registrars of Spain, Editum, University of Murcia, España, 2004, p. 2,548.

21 This happens with Spanish legislation which in Article 1 of the Civil Code has established that the sources of the Spanish legal system are law, custom and general principles of Law. (The new edition of the Royal Decree of Spain of July 24th 1889)

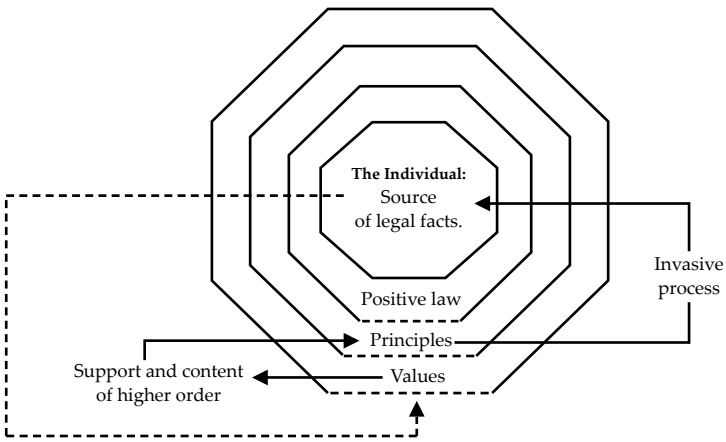
22 The Code of Civil and Commercial Procedure (2010) is the clearest example of this phenomenon in El Salvador whose general content recognizes some of the principles of Procedural Law which are, in turn, part of the wide range of principles of law.

23 *Vid.* FERRAJOLI, Luigi, *"Constitucionalism…", op. cit.,* p. 27. It is about the *neo-constitutionalism, principialist constitutionalism or ius-constitutionalism,* which the aforementioned author nominates.

to all those responsible, not just to a few legislators, who based on the idea of popular representation, decide that it will be (positive) law for this historical era.

In the *principialist conception of law*, principles are not interpreted as absolute and superimposed on the whole particles, but as intelligible and intertwined compounds that respond to a coherent and stable form of legal work as part of the society's activity. Indeed, *the law is a system of principles endowed with justice* that does not respond to particular interests, but to values of a human conglomerate. Once this information has been cleared up, it is concluded that the principles do not apply absolutely, if so, the principles the law would be emptied, and this law would lose its content and every idea of legal certainty. Furthermore, any idea of Constitutional, Social, or Environmental State of Law would be unknown. This is the raison d'être of the principle of legality by investment (Art. 8 CN) as a closing clause of the positive law, but not as a closing clause of the law itself.

The general principles of law have the particularity of being invasive because, despite being above the legislative text and seemingly "in an abstract sphere," they infiltrate the legal sphere, reaching the point of being the foundation of jurisprudence. In other words, they descend perpendicularly from the abstract to the concrete based on prevailing values.



The previous figure shows that when a fact breaks the law (positive law), either by *anomie or antinomy,* for example, the membrane that divides the law into the principles is broken in the same way, and therefore, this membrane invades the facts based on the prevailing values[24] which arise from the same people. Even though they are not considered as individuals, as the people that break the law, but as a whole of society.

Truly, it is a kind of *legal apeiron,* as everything returns to its origins and renews itself infinitely. The law is renewed, and at the same time, it is discovered by its recipients.

Then, the law is not only positive law, although this is the one that is most easily revealed to its recipients. The support of the Law as it is known is the principles of the law, and consequently, the pillars of the legal world are in a higher order. This support is revealed to the legal subjects in a renewed manner in each historical period with greater or lesser degree of stability as required by the interests that society intends to protect.

IV. Obligations

4.1. Importance of the general theory of obligations

The different areas of legal reality are referred to as *legal platforms.*[25] These legal platforms are built, intertwined and transformed from obligations. No *legal proposition* is effective in reality if it is not based on a *legal warning,* that is, a *legal consequence.* The recipients of the norms obey them with the understanding that their non-compliance entails the realization of what is

24 These values will vary according to the culture of the group. For example, when doing a study of the sources of Islamic Law, in the countries that practice this religion, it is noticed that the Islamic Religion was before the State. Unlike Christianity, that the State came first and this later legitimizes the Christian Religion. *Vid.* LOSANO, Mario, "The sources of Islamic Law", in **AA.VV.,** *Current perspectives of the sources of Law,* Coordinators María del Carmen Barranco Avilés, Óscar Celador Angón y Félix Vacas Fernández, Dykinson, Madrid, 2011, pp. 155-157.

25 A *legal platform* is any economic, social, cultural, political field, whose structure is shaped and governed by legal norms.

warned by those same norms. Even in the Rousseauian conception, which offers a conjecture on the cause of life in society under the rule of authority, the idea of a social contract implies the warning of constraining the "contracting parties" under the mechanisms stipulated for their fulfillment.

It is human behavior, its resistance and fallibility, that justifies the need for obligations. Obligations support the possibility of the execution of the uncertainty. Therefore, knowing the forces that join the pieces of the whole and allow legal platforms to function in the best possible way is as important as knowing the whole. The unit is not explained until each of its components is divided. It is understood that from the social, economic, political and cultural point of view, in a multiform and dynamic society such as today, the law of obligations and the general theory that explains those obligations acquire a relevant importance because through obligations the vast majority of legal relationships are developed. Through these legal relationships each individual develops in the life of their community.[26]

There is no doubt about the prominence of the general theory of obligations for legal sciences because when speaking about them in a generic sense, sub-species are presented according to the nature of the legal platforms on which they operate. Thus, the general theory of obligations has an approach to civil and commercial obligations, which regulate legal transactions between private or public individuals, whether for profit or not. At the same time, this theory approximates the obligations that regulate the interests of fully consolidated social groups at a given time and place such as the obligations of employers and workers, suppliers and consumers, among others; and of course, it approximates those of family order which this article is about.

26 In DIAZ PAIRO, A., *General theory of obligations,* Vol. I, 2nd edition, Havana, 1945, p.1, cited by ACEDO PENCO, Ángel, *General theory of obligations,* Dykinson, Madrid, 2010, p. 19.

4.2. Concept of Obligation

To avoid engaging in wearisome distinctions, despite their differences,[27] the concepts of obligation and duty are considered equivalent. The concept of obligation, regardless of the cause, denotes the need to comply with a particular activity or to stop doing one in particular, in order to seek, prevent, or concretize a warning, which translates into approving or acquiring a benefit or avoiding a reproach.

However, the concept described above is too generic, since it is applicable to any kind of obligation, which is why it is not possible to distinguish the dividing line between legal obligations and those that are not; In that sense, it will be defined what is a legal obligation, but not before indicating what are the kinds of obligations and standards.

4.3. Quadruple root of the origin of obligations

Obligations are bounded to normative statements which imply a regulation of human activity.[28] Therefore, obligations are formal derivations of the content of the standard. Meanwhile, the standard has been defined as a rule of behavior. This way, traditionally, four kinds of standards have been classified, namely moral, religious, social and legal. In turn, obligations include four kinds too moral, religious, social (social uses) and legal. This is the *quadruple root* of the origin of obligations or of ought to be.

27 It has been considered that duty indicates something more compelling for the conscience; on the other hand, the obligation indicates something more absolute for practice. *Vid.* BARCIA, Roque, *Castilian Synonyms,* University of Rosario, Classics of Knowledge Collection, Bogotá, 2010, p.105. Thus, it has been said that the obligation is imposed by law whereas duty comes from conscience. The moral and religious man has duties, and the associated man has obligations. Nevertheless, the terms duty and obligation are legally equivalent because they have no substantial divergences. Therefore, the position of those who prefer to use the terms legal duty and legal obligation seems more reasonable (H. Kelsen, H. Nawiasky, H. Hart ...). *Vid.* MONTORO BALLESTEROS, Alberto, The legal duty, Notebooks of Fundamental Theory of Law, number 14, University of Murcia, 1993, p. 9.)

28 *Vid.* MARTINEZ MARULANDA, Diego, *Fundament*…, *op. cit.,* p. 41.)

The *quadruple root* of the origin of obligations or *the ought-to-be* finds its foundation and expression, as indicated in the moral, religious, social, and legal norms[29] which must be differentiated in order to estimate the legal nature a the conduct, and its possible legal sanction.

This article is specifically about legal norms, usually characterized by being *external, bilateral, heteronomous and enforceable*.[30]

At the same time, doctrines accept a trend of reformulation, considering that a rule is legal not because it is necessarily external, bilateral, heteronomous, and enforceable, but because it belongs to a legal system that is so. For example, the standard that establishes the age of majority in different countries is not an enforceable rule, while it is not intended to regulate human behavior through the use of force. However, this provision can be considered a legal rule because it belongs to a system of rules called the legal system,[31] which is enforceable. Thus, it is correct that the legal nature of a rule, and consequently the link that it produces for its recipients - legal obligation -, is appreciated not depending on the rule in isolation, but as belonging to the whole, that is, to the legal system that it integrates. This vision is compatible with the principialist conception of law, and also, more complete, because it does not exclude the legality of the norms based on the individual operability of each one of these norms, but quite the opposite.

29 For the study of the different characters of religious, moral, social (social uses) and legal norms. See HOFFMAN ELIZALDE, Roberto, *Introduction to the study of law,* 2nd edition, Iberoamerican University, México D.F., 1998, pp. 15-26.

30 *Vid.* MARTINEZ MARULANDA, Diego, *Fundament…, op. cit.,* pp. 50-54. Even the norm - legal - has been defined as a model of human behavior, external, bilateral, imperative and enforceable that regulates the actions of men in order to establish a fair and organized order of human coexistence. *Vid.* PACHECO, Máximo, *Introduction to the study of law,* Santiago, Editorial Jurídica de Chile, 1976, p. 50, cited by SOTO GAMBOA, María de los Ángeles, *Basic notions of Law,* 2nd edition, State Distance University Editorial, San José, Costa Rica, 2005, p. 17.

31 It has been debated whether the norms of international law are a type of sui-generis rule, because it involves a system of rules whose structure does not fit completely with the legal norms. However, such an approach does not take place when one thinks more of the coherence and content of the standard in relation to the system of norms it integrates than of the coherence and content of the standard seen in isolation. Thus, it will be sufficient for the regulatory system to contain enforceable rules for that system to be considered legal. *Vid.* MARTINEZ MARULANDA, Diego, *Fundamento…, op. cit.,* pp. 54-56.

It is important to highlight what has been mentioned because of its high academic value, to the extent that some branches of knowledge such as the philosophy of law have been concerned with differentiating legal obligations from those that are not. Moreover, as legal obligations have not always existed but have rather emerged, and modified with the organization of societies in the course of history. Similarly, they have served to project the future of human relations, according to the worldview of the one who interprets reality. Thus, in the marxist view, legal obligations would tend to disappear along with the law and the State since they would lose their foundation by the coexistence of people in the community.

Indeed, it is useful to understand the subjection of human beings to higher authorities, such as the fact that religious norms precede legal norms. In this regard, *legal anthropology*[32] shows us that in primitive society, every norm of conduct is presented in the form of customary practice, and thus, custom transitions from something that has been and is, to something that "ought-to-be".[33] Precisely, the obligatory nature of an activity arises from its repetitiveness and convenience until the community accepts that this activity must be regarded as a duty. It is clear, then, that a behavior is binding, or in other words, obligatory, based on its necessity, which means that through its repetitiveness and approval, it is endowed with stability, permanence, and continuity within the social group. But even so, that conduct does not obtain legal character merely through generic acceptance. It becomes legally binding only when the community recognizes a higher objective order and achieves compliance with a conduct through means that are consensually established by the community itself. From now on, we will refer to legal obligations when speaking about obligations in general.

32 *Vid.*KROTZ, Esteban, *Legal Anthropology: Sociocultural Perspectives in the Study of Law,* Anthropology Collection Authors, Topics and Texts, Edition of ESTEBAN KROTZ, Editorial Anthropos, Autonomous Metropolitan University, Iztapalapa, 2002.

33 *Vid.* HOFFMAN ELIZALDE, Roberto, *Introduction…, op. cit.*, pp. 15-16.

4.4. Etymology and definition of legal obligation

It has been accepted by doctrine that the term obligation, during the gestation of Roman Law derives from the ancient verb *obligare,* which comes from the expressions *ob* (around) and *ligare* (to bind), something like "to bind around". Later, the noun *obligatio*, would mean "binding or restraint", both physical and moral.[34]

Defining the different legal concepts academically is as delicate and challenging as defining what law is, because the evolution of society is progressive and hasty, and consequently, the evolution of law is similarly so, leaving a restricted margin of stability for the interpreters of legal reality. And the fact is, if legal concepts are not fully developed, their definitions are not either. However, for didactic purposes, it is necessary to resort to definitions.

First and foremost, we must consider that a legal obligation goes beyond expressing the necessity of fulfilling a particular activity or refraining from doing one, in order to pursue or prevent the realization of a warning, which results in approval or the acquisition of a benefit, or in the way of avoiding a reproach. The legal obligation has a special component which is due to the adjective that accompanies it.

The notion of obligation is what Justinian's works gave when they said: *"Juris vinculum quo necessitae adstrigimur alicuius solvendae rei secundum nostrae civitatis iura"*. It is a legal bond whereby a person, known as the debtor, is obligated to another person, known as the creditor, to give, do, or refrain from doing something.[35] However, it has been erroneously argued that an obligation consists of giving, doing, or refraining from something, as this description refers to the immediate content of the obligation, which is the performance. For this reason, it has been said that an obligation is a legal relationship (obligatory legal relationship), whereby a person, called the debtor, has the legal duty to

34 *Vid.* ACEDO PENCO, Ángel, *Theory…, op. cit.,* p. 20.

35 *Vid.* ROCHA ALVIRA, Antonio, *Lessons on Civil Law. Obligations of Antonio Rocha Alvira. Reviewed, updated and completed by Betty Mercedes Martínez Cárdenas,* Colección "Living Memory" Collection, Jurisprudence Faculty, University of Rosario, Bogotá, 2009, p. 17.

perform an obligation in favor of another person, called the creditor, who has the power to demand it.[36]

Without prejudice to the previous theoretical contributions, and in order to approximate the definition of legal obligation, it can simply be indicated that this *is a necessary requirementto fulfill in order to obtain an approval or to avoid a legally established reproach.* The elements of this statement are presented below:

a) Necessary requirement to obey (factual or legal assumption)

The necessary requirement to obey is the description that the legal order makes of the conduct that enables the shaping of the *legal warning*. It is what has been called the *factual assumption* of the legal norm. The use of the expression *necessary requirement to obey seems appropriate*, because legal norms, in principle, can be permissive (such as those that establish powers), descriptive (such as those that delimit concepts), and imperative (such as those that impose obligations or prohibitions). The necessary requirement to obey is imperative.

The requirement then falls on the "must" and "must not," which are deontic or normative operators, along with the "can," which correspond to the notions of obligation, prohibition, and permission, respectively.[37] Thus, the factual assumptions of the norms that impose obligations, before they are simply stated, they are, in particular, requirements to obtain or avoid what is expected.

b) Obtaining an approval or avoiding a reproach (Legal warning)

The approval or the reproach is the prize for the accomplishment or the nonperformance of the necessary requirement to obey. In this article, the use of the concept of legal warning is preferable over that of legal

36 *Vid.* LOPEZ DIAZ, Elvira, *Initiation to Law,* Delta publications, Madrid, 2006, p. 168. Any legal bond by virtue of which a person must perform a service in favour of another person is called an obligation. *Vid.* CAMACHO CUBIDES, Jorge, *Obligaciones,* 5th edition completed and updated with the collaboration of Juanita Cubides Delgado, Professors Collection, Pontifical Javeriana University, Bogotá, 2005, p. 33.

37 *Vid.* VON WRIGTH, Georg Henrik, *Un ensayo de lógica deóntica y la teoría general de la acción,* Translated by Ernesto Garzón Valdés, 2nd edition in Spanish, notebook 33, Philosophical Research Institute, National Autonomous University of México, México D.F., 1998, p. 9.

consequence, because in the way the information is presented, the idea of warning corresponds more closely to that of approval and reproach.

Despite how debatable this may be, in the mandatory order, although it is true that formally a legal consequence is a subsequent legal fact as a result of a previous legal fact; structurally, it is not possible to evidence a real consequence (in the sense of alteration), but rather, the concretization of a warning that the recipient of the norm should know. From an eminently normative dimension, a legal proposition is a deontic statement that allows, obliges or prohibits; and this legal proposition is the deposit of warnings, of course, of legal content. A legal proposition does not alter an established order, does not imply new results, nor brings effects that change the legal system, but it is limited to recognizing what has previously been established, that is, to consummate a pre-established warning. The factual assumptions do not surprise the legal system in which they manifest themselves because somehow they will always receive a legal qualification.

Furthermore, the *actual result* should not be confused with the legal consequence since in the configuration of the factual assumption (necessary requirement to obey) the *actual result* may not take place, while the legal consequence may happen. For example, the legal consequence of a punishable act is the punishability of the perpetrator, and not the actual execution of the sentence as long as the mandate "is valid",[38] which would be the actual result sought by the norm for the commission of the punishable act.

Notwithstanding the above, the ideas of factual assumption and legal consequence are generally accepted fundamental legal concepts which this article is not intended to refute, but quite the contrary. Finally, it should be noted that the factual assumption belongs to the state of being, whereas the legal consequence belongs to the state of ought to be. Harmonizing these two states is the job of law operators.

38 The legal consequences are produced *in concreto*, that is to say, it acquires validity because it has been coordinated *in abstracto* by the legal proposition. *Vid.* LARENZ, Karl, *Methodology of the Science of Law,* Ariel Editors, Barcelona, 1966, p. 166.

c) Legally established (recognized superior order)

Throughout time, human beings have recognized higher orders, among them, a divine order, a moral order, a social order and finally, a legal order. The latter is the result of social organization through norms that ensure a peaceful intersubjective coexistence. These norms are enforceable by the means established by that order. What is legally required are legal warnings, of course, provided that the necessary requirement to obey has been carried out. Thus, in order to *obtain an approval or to avoid a reproach*, the approval or reproach must exist (be established) in the legal order, as well as the means to demand it. That is, what is legal is what is required by a prior agreement between humans.

However, regardless of the foundation of the legal order, which is essentially validated and legitimized in positive law or natural law,[39]it will always be a superior order to which human behavior is subordinated. In both foundations, there is recognition of a higher authority to whom the realization of legal warnings can be demanded and whose ultimate goal is justice.[40] Legal warnings must be previously established by the legal order, because ultimately it is the validity of the principle of legality, as a closing clause of the legal order and as a guarantee of legal certainty. This is without prejudice to the renewal of the law, as stated in principle.

Only obligations of a legal nature, regardless of their origin, involve the coercive power of the State, in order to confirm the precise content of such obligations and, above all, to avoid leaving without compensation or indemnification for the damage caused to persons or property as a result of non-compliance.[41] The guarantor of the legal obligations is the State, which must create the necessary mechanisms to bring them to compliance, whether

39 The legal order becomes, for the positive law, the set of positive legal norms; and for the natural law, the set of innate norms to the human beings that regulate their own actions in society, without the need to be rationally set by the human beings.

40 Justice has been considered to be a distinctive note of the legal order, which separates it from the order of current morality and social conventions. *Vid.* LARENZ, Karl, *Methodology…*, *op. cit.*, p. 159.

41 *Vid.* ACEDO PENCO, Ángel, *Teoría…*, *op. cit.*, pp. 19-20.

or not that State is obliged to do so. Legal obligations give stability to human relations, avoiding a clash of cultures and conceptions of life.

4.5. Concept of Law of Obligations

The *Law of Obligations* is the specialized branch of legal sciences that studies legal obligations, taking into account their life cycle, structure, systematization and expression in legal reality. The law of obligations is a foundation for the other legal sciences because it provides a general theory about its object of study, and it is applicable to the different areas of law.[42] Then the practical importance of this branch of knowledge as an instructive discipline must be known by all legal operators.

Likewise, in a clear and simple way, it has been indicated that the Law of Obligations is the part of the Civil Law that deals with the relations of obligation.[43] It should be understood that a *relationship of obligation* is the communion between subjects of law that has been born linked to one of the sources of the obligations and that imposes the need to comply or refrain from performing conduct.

4.6. Classification of obligations

Legal categories can be classified according to the preference of whoever does it. On this occasion, it has been considered appropriate to take a foreign classification of obligations,[44] but appropriate for the purposes of this article, to

42 The law of obligations has been considered to be of a patrimonial nature, which is not debatable, provided that the patrimonial is not assimilated to the pecuniary because there are obligations such as those of family laws, that do not have an economic component, but that belong to a personal or extra-patrimonial order such as the duties of marriage, for example.

43 *Cfr*. LACRUZ BERDEJO, José Luis, SANCHO REBULLIDA, Francisco de Asís, DELGADO ECHEVERRIA, Jesús and Francisco RIVERO FERNANDEZ, *Elements of Civil Law II, Law of obligations,* First Vol., 2nd edition, Bosch Editorial, Barcelona, 1985, p. 15, cited by ACEDO PENCO, Ángel, *Theory…*, *op. cit.*, p. 20.)

44 This classification corresponds to JULIAN, Emil Jalil. See in this regard "*The system...*", *op. cit.*, pp. 3 - 32.

which the relevant contributions have been made. According to the CC, legal obligations can be classified as follows:

Depending on the object

By the nature of the service (Art. 1309 CC)

Obligations to give

To give money

To do

Not to do

By the nature of the link

Alternative obligations (Art. 1370 CC)

Optional obligations (Art. 1376 CC)

By the possibility of splitting the service

Divisible obligation (Art. 1395 CC)

Indivisible obligation (Art. 1395 CC)

By the relevance of the service

Main obligation (Arts. 1343, 1406, 1536, 209 CC, among others)

Accessory obligation (Arts. 2086, 2094 and 225 CC)

Depending on the individual

Single-person

Multi-personal

By the responsibility in the payment

Joint obligations (Art. 1382 subparagraph 1 CC)

Obligations of solidarity or *in solidum* (Art. 1382 subparagraph 2 CC)

Depending on its enforceability

By the possibility of being prosecuted in court

Civil obligations (Art. 1341 subparagraph 2 CC)

Purely natural obligations (Art. 1341 subparagraph 3 CC)

By the possibility of demanding its immediate compliance

Pure and simple obligation (Arts. 2090 CC)

Conditional obligation (Art. 1344-1369 and 2090 CC).

V. The life cycle of obligations

The law is reproduced and its appendices do the same. The accessory follows the fate of the principal. Obligations follow the fate of the law. The law is updated second by second, and its cells fall and renew themselves. Therefore, when their appendices die, it does not mean that the law also does so, but that as in biotic beings, their cells (obligations and rights) change so that others take their place more vigorously.

The law has its own system with which it circulates legal traffic, it reflects a systolic pressure with rights and a diastolic pressure with obligations. The rights are exercised and the obligations required, this is the heart rate with which the law expresses its vitality. Therefore, just as the biotic beings of nature have their existential origin that constitutes the beginning of their biological cycle, and an end that is consistent with natural death, obligations in general hold the same fate.[45] It is between these two moments that *the life cycle of obligations* is concretized. The vitality of obligations will then be examined.

5.1. The mandatory birth

In the material world, nothing arises from nothing, and in the legal world, no obligation arises from nothing. The creation of a legal obligation is subject to prior recognition by the legal order. For an obligation to exist and be legitimate, a title is required that describes its existence and through which it is legitimized. That title tells us what the *cause of the obligation* is, or if preferred, the *efficient cause that gives rise to it.*

5.1.1. Characteristics and elements of the obligation

The characteristic features of an obligation, in general, are relativity (they are required from specific individuals), the existence of a *legal bond* (legal relationship),

45 *Vid.* JULIAN, Emil Jalil, "*The System…*", *op. cit.*, p. 4.

temporality (they have a limited duration in time), and patrimoniality (the credit and debt are integrated into the assets of the creditor and debtor, respectively).[46] The obligation has an active aspect called credit, and a passive aspect called debit.[47] Legal obligations must be objective, rational, and necessary.

The essential elements of the obligation are those components that must inevitably be present in the obligatory bond at the time of its formation.[48] The obligation has a logical structure, it operates under necessary connections, it has a subjective element (assets and liability), objective (benefit), legal (link or power relationship) and causal (reason for the legal relationship).

As for the causal element, it must be clear that it is not about the cause of the content of the obligation (the benefit), but about the cause of the obligation. The cause of the content of the obligation differs in its meaning from what we are now explaining; for example, it has been considered that in bilateral contracts, the object of one party's obligation is the cause of the other party's obligation. Therefore, we are not referring to the cause of the content of the obligation, but to the cause of the obligation itself. That is, we are not referring to the cause in the sense of "why," but "by virtue of what".

Thus, it is questioned where the maintenance obligation comes from, and not why the father has an obligation to assist his children with food. For the first case, the answer may be that the obligation comes from the law or the sentence, and in the second case, from the filial connection that the father has with the child and that is proven by the child's birth certificate.

5.1.2. The efficient cause of the obligation: mediate or immediate cause

In obedience to the principle of legality, there is no legal obligation without a cause, that is, a cause that makes it derive from some suitable fact to

46 *Vid.* ACEDO PENCO, Ángel, *Theory…*, *op. cit.,* pp. 23-24.

47 *Vid. U. BARBERO, Omar, Introduction to Private Law,* Juris, Rosario, 2004, p. 191.

48 *Ibidem,* p. 191.

produce it, as established by the legal system. Article 8 CN, which recognizes the so-called *principle of legality by investment*,[49] ignores the obligations born outside the law. The legal obligation will always have a cause, and to know what this cause is, a title is needed to reveal it. The cause is expressed by the title.

The cause of the obligation can be mediate or immediate. *The mediate cause* of the obligation is the law, that is, the legal norm. The *immediate cause* is a source of the obligations, such as a contract, a quasi-contract, a crime, a quasi-delict, a misdemeanor, an unjust enrichment, an abuse of the right,[50] among others. The legal obligation will always have its origin in the legal norms or in the sources of the obligations that these norms establish. Outside these, the obligation loses its legal character and becomes a moral, religious or public use obligation. The cause of the obligation is always the legal norm because it is the one that establishes the sources of the obligations; in fact, article 1308 CC indicates thatlaw itself is one of the causes of the obligation.

The classification between mediate and immediate cause of the obligation is for academic purposes of systematization and exposure of the information that is presented herein. However, the difference between the mediate and immediate cause of the obligation has practical effects because when the fact with legal incidence either does not fit or does not match the legal hypothesis or factual scenario, the legal consequence cannot be coordinated or

49 But this rule (closing clause of the positive law), in order to be formally valid and coherent in a system of norms, requires another rule that enables what is not prohibited or prohibits what is indefinitely allowed. This is because the system of norms has as a last support or filter the content of the general principles of law. From a positive dimension, it is not entirely true that the facts are always manifested within a full and coherent legal system, but rather, this is a presumption. Therefore, it is not strange that acts such as the change of sex of persons due to transsexualism and intersexualism, despite not being expressly prohibited, are also not considered to be expressly allowed or enabled. Instead, to resolve this type of case the jurisprudence resorts to general principles of law and other sources of law, such as international jurisprudence and doctrine, for example. However, what is provided in Article 8 CN is that, one cannot reproach for something not forbidden that was done, nor can one reward or acknowledge what is not allowed. This is the basis of criminal law, which does not prosecute a conduct that is not criminalized by the law.

50 Concerning an unjust enrichment and an abuse of law: *vid*. BONNECASE, Julien, *Elements of Civil Law,* Volume II, Volume XIV, translated by José M. Cajica Jr., Editorial José M. Cajica R., Puebla, Mexico, 1945, pp. 307-334.

configured. Therefore, the legal system must resort to *legal instances of assistance* or help. Indeed, when the obligation arises from a source other than the law, the first recourse is to the same law (legal norm); and when the obligation arises directly from the law, the legal sources are consulted, including the general principles of law. There is, therefore, a principialist assistance for obligations, which in turn becomes a cause of legal obligations.

5.1.3. Principialist cause of the legal obligation

The principialist cause of obligations is the genesis of the forces of the legal world. This cause prevails in the legal world to a centripetal force that can be described as follows: *Values / principles as sources of law / law / legal obligation.* It is as if in the physical world the causes of the forces that govern and explain it will be sought as if it were a question of knowing the origin of the world. Similarly, from this conception, the remains of a *legal Big Bang* are sought, not limited only to codified norms, but also looking into the antecedents of the forces that give effectiveness to human relations within the legal world, that is, into the most remote antecedents of obligations.

It was previously indicated that the cause of the obligation is the law or legal norm, which has been called the *mediate cause of the obligation*, but such statement does not reveal or *discover* anything new. However, what is historically disputable and still debatable today is that the law is not the origin of obligations in the first place, but that the true germ of obligation is found in the sources of law, particularly in the general principles of law. These principles translate (make comprehensible) the messages of the prevailing values of the historical era to the recipients of the objective order in which those principles exist. Hence, it is the general principles of law that *not only reveal, but also cause* the origin of legal obligations. The legislative activity itself is steeped in values.

It should not be forgotten that the general principles of law do not aim to empty the law; on the contrary, to prevent them from overflowing or

saturating the legal framework, they have established their own restraint or counterbalance through principles that support the realm of the positive. This is quite rightly so, because there are values that are a reinforcement of the same codified order, for example, that of legal certainty, which is forcefully expressed through the principle of legality in its different dimensions. It would not be logical for the application of general principles of law to render ineffective that which they themselves are based on. Therefore, it is insisted that the general principles are applied in a supplementary or auxiliary way to the positive law. This is the double function with which they operate, in principle, (1) as the founders of the legal order, and then, (2) in aid of the application of the law.

5.1.4. Principialism and sources of Law

The sources of obligations should not be confused with the sources of law. The sources of law have been conceptualized in various ways and have been named as sources of knowledge, creative forces, creative authorities, grounds of validity, and forms of manifestation of norms,[51] among others. However, without aiming to present a definitive concept and in accordance with the legal approach used in the elaboration of this article, we can say *that the sources of law are the ways in which law reveals or manifests itself.* As law, as explained, is only *discovered*, the sources of law are the means through which it *reveals* itself to its recipients.

In the sources of law, specifically in the values, lies the core of the legal world, or if preferred, they are the pillars or foundations on which it stands. It is vitally important to know the sources of law in order to understand the nature of human relations, and to differentiate those that have legal content from those that do not.

51 LEGAZ y LACAMBRA, *Philosophy of Law,* 5th edition, Bosch, Barcelona, 1979, p. 509 cited by AGUILÓ REGLA, Josep, *General theory of the sources of Law (and the legal order),* Ariel, Barcelona, 2000, p. 22

The sources of law have traditionally been treated by civilists, however, nowadays it must first be considered as a fundamental issue of public law,[52] and certainly of social law, which requires a general theory to discover and explain it.

The sources of law include (1) values,[53] and within these, legal values, (2) the general principles of the Law, and more precisely, the special principles of the different areas of law, (3) the jurisprudence or *juris prudence,* (4) customs, (5) the law, (6) legal acts and, of course, (7) the scientific doctrine. In regardless the sources mentioned above, it should be borne in mind that, among all the sources of law "discovered", the values occupy the first place in the *scale of legal abstraction*. These values are the founders of the legal order, and from these values, the legal assets protectable by the historical society that recognizes them and the facts legally reproachable are detached.

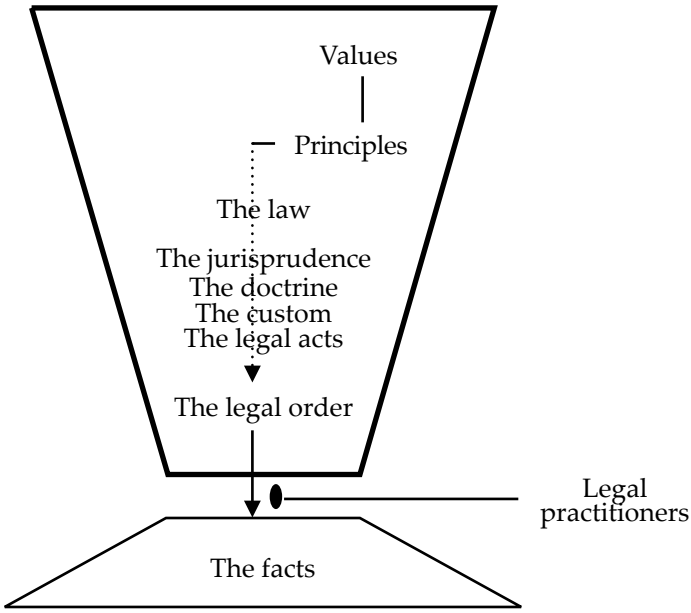
However, because of the high level of abstraction values require a link with human reality, and *those links are the general principles of law.* Thus the jurisprudence, the law, and even the legal acts, on the scale of abstraction are slightly below the values. For this reason, they are imbued with the essence, to a greater or lesser extent, of the same values,[54] and, of course, the specific cases they regulate are as well.

52 *Vid.* GARCIA CUADRADO, Antonio M., *El ordenamiento…, op. cit.*, p. 195.

53 The Law appears, hides and reincarnates in the values. This is the legal existentialism, the Dasein of the ought to be.

54 The norm is made up of social values that the community has decided to protect and regulate, regardless how they are presented. *Vid.* SOTO GAMBOA, María de los Ángeles, *Notions…, op. cit.,* p. 17.

The following "inverted" trapeze may indicate the ideas above.



It can be seen that it is preferable to use a trapeze rather than an inverted pyramid because the law is an infinite system which renews itself constantly and progressively without finding an ending point.

5.1.5. The legal norm

As explained in this article, there are two orders of realities: a physical order, with unalterable norms that are always inexorably fulfilled (laws of nature), and an ethical order, in which the norms can be broken, as they refer to the behavior of man, and he is free to comply or break the rules. The ethical order is therefore governed by a set of norms, among which can be classified, according to their nature and purpose, into moral, religious, legal norms and social uses.[55]

55 *Vid.* GARCIA CUADRADO, Antonio M., *The ordering…*, *op. cit.*, p. 196.

Legal norms are those rules that regulate free human behaviors that may be judicially enforceable.[56] Therefore, as indicated above, among the aspects that differentiate legal norms from those that are not, there is the possibility of resorting to the jurisdictional bodies to demand compliance, that is, their enforceability.

It should not be forgotten that the concept of norm invokes a broader idea than that of formal-law, because the formal-law, like custom and jurisprudential decisions, is a manifestation of the legal norm.[57] The legal norm in the law-formal dimension finds its offspring in the principle of legality. This principle substantiates the closure of a legal system by means of codified norms. The rationalists, precisely the positivists, considered it necessary to indicate through written precepts which human behaviors were juridical and, by exclusion, which were not, without prejudice to a post-legal evaluation. Indeed, the principle of legality, based on the value of legal certainty, seeks to provide legal stability; however, the law is not exhausted by what is positive, but it is a closing key for the most repetitive and legally relevant behaviors.

5.1.6. Principles and legal norms

Legal norms are a reflection of values and principles; they are values embodied in the material reality of a society. Unlike the principles, as previously stated, values are too abstract, they require a link with reality, and that link, that guide to the human world, are the general principles of the law. These principles are the ones that establish (translate) which norms must exist, which must be repealed and which must be understood to exist, even without their prior codification, that is, surpassing the same legislative activity, that is, overwhelming the principle of legality in a rational way. Therefore, it has been said that the principles fulfill a *founding or revealing* function of the Law.

56 *Ibidem,* p. 196.

57 *Vid.* SOTO GAMBOA, María de los Ángeles, *Notions…, op. cit.*, p. 17.

Furthermore, principles serve an *auxiliary function* in the application of law, which involves the odd aspect that, in addition to their *foundational function,* they also serve a suspensive function of law. This may seem particular because, without eliminating the rule of conduct they underpin, they only suspend it in a particular case. The complete suppression of a norm or rule of conduct must be carried out in compliance with the principle of legality, that is, under the *principialist order,* through legislative or jurisprudential activity, the latter being reserved for the Courts that issue judgments with *erga omnes* effects and binding on lower courts. Therefore, the general principles of Law, while revealing Law in the abstract, also reveal how it should be manifested in the concrete, regardless of whether this means the need to temporarily suspend the efficacy of a rule of conduct in a specific case.

The legal norms, and consequently, the legal obligations, have a *principialist cause*. This is reasonably correct; that's why it is not surprising that legal norms may be disregarded, even by courts, in favor of general principles of law, and of course, in the face of specific principles of different branches of law. It is entirely reasonable that a legal proposition loses its validity in a specific case when it collides with a principle of law. Therefore, a principle of law has enough strength to override the effectiveness of a legal norm in a particular case.

Illustrative Casuistry

An example is presented below in which a codified norm loses its force against the principles of the Law. For this purpose, the vote of the substitute magistrate that resolves the discord in the procedure of loss of parental neglect due to abandonment without justified cause, classified under reference 129-13-SA-F2, of the Family Chamber of the Western Section, known on appeal, will be cited and commented on. The recitals of the said vote are the following:

Article 206 of the Family Code stipulates that: Parental authority is the set of faculties and duties which are granted and imposed by the law on the father and mother over their children who are minors or declared incapable, so that they are to be protected, educated, attended and prepared for life, and they are represented by their parents. Their assets are also to be managed by their parents.

It is understood that, parental authority involves a host of faculties-duties, a series of reciprocal relationships between parents and children. The duties of the parents become faculties for the children, and what is expressed as faculties for the father becomes a duty for the child, and more especially, in front of the other parent who must respect those prerogatives, and even demand them when they are not fulfilled. From this perspective, it should be understood that the exercise of parental authority is not always observable, nor is it always fulfilled, either due to intentional and attributable acts by one or both parents, or due to acts not attributable to them, for some justifiable reason.

In the first case, when the parents consciously and intentionally fail to comply with their parent-child duties, the law provides, for the causes determined in article 240 CF, the loss of parental authority, as a legal sanction of a family nature, which results in the elements of parental authority (1) Personal care, (2) Legal representation and (3) Administration of assets of the son or daughter, not being exercised by the parent who has been sanctioned with loss of parental authority. In the second case, when configuring the assumption of fact that concretizes the legal consequence (legal warning), it cannot be attributed to the father or mother who is intended to be sanctioned with the loss of parental authority due to circumstances beyond his or her control which mitigate or exclude their responsibility. In the first case, however, when the cause of loss of parental authority has been proven, and that therefore, the precept established in Article 240 subsection 1 CF must be obeyed which states:

*The father, mother or both will lose parental authority over **all** their children, for any of the following causes:*

1ª) When they corrupt any of them or promote or facilitate their corruption;

2ª) When they abandon any of them without a justified cause;

3ª) When they incur in any of the conducts indicated in article 164; and

4ª) When they are convicted as perpetrators or accomplices of any intentional crime committed against any of their children.

*The legal proposition clearly states that the father, mother or both will lose parental authority over **all their children (...).** In this regard, it cannot be denied that it has been a practice of the Salvadoran judicial activity to interpret the legal norm textually (historical-exegetical interpretation) leaving aside any interpretation in accordance with the Constitution, the coherent system of the legal system and with a human rights approach under a principialist conception of law.*

Therefore, under a literal interpretation, it is easily noticeable that, regardless of the number of children sired by the parent sanctioned with the loss of parental authority, the effects of the sentence of loss of parental authority extend to all of them. In other words, it is a sentence with pluripersonal effects, regardless of whether they are guaranteed a prior hearing in which all the children are heard.

Consequently, regardless of whether they are traditional siblings (when they come from the same parents), or half siblings (when they come from the same ancestry in the first degree, differing in the other parent), the effects of the sentence are extended to these siblings.

According to a Human Rights approach and an interpretation in line with the Constitution, in those processes where the cause of loss of parental authority reaches a gravity that requires the child to be removed from the parental relationship, due to its imminent preventive protection, to safeguard certain legal goods or fundamental rights, the sentence should indeed have pluripersonal effects. Such a sentence must be extended to all the children of the parent sanctioned with loss of parental authority, given the claim of loss of parental authority is based on the

fourth ground of Article 240 CF. Otherwise, the effects of the sentence should only reach the children for whom the corresponding process has been promoted, and those who have participated in the process; on the contrary, the child's right to express an opinion would be violated. In addition, the right of defense of the defendant and the children who did not participate in the process would be affected, because those effects affect fundamental rights concerning people with whom they maintain family relationships, whether they are effective or not. In that regard, when the loss of parental authority is promoted by abandonment without just cause, it would not be fair if the effects of the sentence extend to all the children of the parent who incurred a sanction because of the assumption of article 240 causal 2 CF; otherwise, the sentence would be excessive for reaching the interests of the children who did not participate in the corresponding process.

It is then noted that the interpretation made in the related judicial ruling obeys a *principialist conception of law,* because the judge is not limited to being the mouth of the law, but refers to exploring and understanding the genesis of law, to explain it and apply it. The judge, in the commented vote, valued the defendant's right to defense and hearing, his right to a fair trial or prior trial. The judge also valued the right of the child to be heard and to have effective filial relationships to unity, integration, and family solidarity, and of course, their best interests, under equity and justice. This set of values and principles subtracted (*suspended*) the vigor of the norm codified in the specific case, which established that the sentence of loss of parental authority should be extended to all the children of the sanctioned parent. Then, it can be strongly said that the principles may overthrow (*suspend*) the legal norm *in concreto* cases. Hence the judge must apply the legal norm (Art. 86 subsection 3, 172 and 235 CN), but in coherence to a logical and fair law system, not a mechanical and irrational law.

So far, this article has referred to the cause of the obligation, but it remains to refer to the title that expresses that cause.

5.1.7. The title expressing the cause of the obligation

The title does not refer directly to the cause of the obligation, but to the instrument that proves its existence and the way in which it was generated. The title of the mediate cause is the legal text, the legal norm itself; the title of the immediate cause is the instrumentalized fact or legal act that generates *the necessary requirement to obey to obtain approval or to avoid a legally established reproach.* The mediate cause has a title *in general*, while the immediate cause, a title *in particular*. In that order of ideas, the sentence is the title that expresses the cause of the crime, for example, homicide, theft, kidnapping, which generated the criminal responsibility borne by the perpetrator. The contract or written agreement is the title of the contract of sale, exchange, and of course, of other conventions that generate obligations, such as the divorce agreement, of maintenance, of marriage contracts, and even the marriage itself, for example.

Thus, the obligation of the father to provide maintenance for the child has its source in the law, particularly in articles 33 CN and 247 and 248 CF. However, when the father is forced to provide maintenance for the child, through a maintenance agreement signed before the Attorney General of the Republic (art. 263 CF) or by means of an enforceable sentence in maintenance or divorce proceedings (arts. 247 and 111 subparagraph 1 CF), the law is still the *mediate cause* of the obligation, in this type of cases, the title that expresses the immediate cause of the obligation is the agreement or the respective sentence though. Then, it is no longer a generic source, as though the law, but a particular title is present, and therefore, it has the same effects. The same applies to the obligations of visiting arrangements, personal care and those derived from the marriage union (the title of these obligations is the instrument in which the marriage act was formalized).

However, there are enforceable obligations that only become for a particular title, that is, through an *immediate cause,* such as the obligation of the guardian to take care of the ward and to administer their goods, except for the

obligation of the relatives who are called to exercise the legitimate guardianship of the ward (Art. 291 CF), in respect to the principle of *family solidarity;* but in any case, the corresponding sentence is required to require the relatives to fulfill their obligations as guardians. Therefore, it is this point that should not be lost sight of, because the fulfillment of non-enforceable generic obligations cannot be claimed, that is, obligations arising from a previous judicial declaration, such as the obligations derived from the judicial declaration of non-marital union or those that arise as a result of the divorce decree, such as the payment of compensatory pension, for example.

The title has practical effects. While the positive-current norm (title of the mediate cause) imposes on the parents the obligation of providing nourishment, this obligation is generic, since there is no time limit to establish its expiration and, consequently, to execute its collection. On the other hand, the sentence (title of the immediate cause) imposes payment dates and the amount of maintenance to be paid, allowing for the calculation of a specific amount and a collection period. Therefore, on one hand, it enables the execution of the title through the collection action in favor of the child, and on the other hand, the prescription action in favor of the maintainer, which are the issues worth to be pointed out in this article.

It is debated though whether the title of the obligation is autonomous to the motivating underlying relationship as in commercial matters concerning securities. For example, ccan a child support judgment be executed when the paternity or maternity of the maintainer has been challenged concerning the recipient of support? Or can a divorce judgment - considering that it was issued on the basis that the defendant was of unknown whereabouts - be enforced regarding the payment of spousal support when the marriage for which it was imposed has been declared null? In the first question, it has been considered that a sentence is an act of authority that must be obeyed for legal certainty. Therefore, although it is true that such an obligation had no foundation from

the moment the filial bond was challenged. It is true that such a judgment produces effects as long as they do not cease through legal mechanisms.[58] In family matters it has been estimated that despite being personal relationships, the title is autonomous to the motivating underlying relationship, since it is valid as long as the contrary is not declared consequently producing full effects.

5.2. The Obligatory Life

After exposing the origin of a legal obligation, it should be noted that after its birth, it will go through a regular process that will end or be renewed with the fulfillment of the legal obligation depending on whether the obligation is periodic or not. The obligation has its own life, and thus, it will undergo a legal development, going through a series of stages according to its nature, as determined by the law, and above all, the will of its holder. However, like any process that can be diverted from its normal course, the legal obligation may follow an irregular process which will cause it to be extinguished in a way that was not originally foreseen.

The birth of an obligation is subject to conditions, under penalty of being discarded by the legal order under a kind of *natural selection* because the obligations that contravene the legal order are unknown under the established mechanisms as is the case with acts that generate obligations that are null and void. So the birth of an obligation is not as simple as one might think, but quite the opposite, and it is of the utmost importance because it marks the life expectancy that the obligation will have. The life of an obligation can be charged with as many events as the owner of the obligation allows.

58 It is difficult to resolve such a situation because the process of cessation of maintenance obligations does not foresee this ground (Art. 270 CF) and, due to the *principle of objective challenge*, the appeal for review of sentences is not simply configured, although it should be appropriate. On the other hand, because of justice, the illegitimate obligation should be disobeyed, and if the obligor is sentenced for such behavior, he should be assisted by the corresponding constitutional remedy.

During its life, the obligation can undergo changes in its structure or elements (subject, object, legal link, and cause), and at the same time it may face situations typical of the mandatory life such as partial payment, default, and legal interest. However, these situations are not essential or typical to their life course because they are contingent or incidental circumstances. For example, regarding the change in the obligation structure, it may mutate into a natural obligation (the legal bond loses force); it may be subrogated, legally or conventionally (the subjective element changes), and it may even be suspended (by fortuitous event or force majeure), among other aspects, regardless the death or extinction of the obligation for an effective compliance.

Regarding the contingent circumstances with which the obligation can be accompanied, we can mention that the obligation can be secured through real or personal guarantees, or in turn, be assisted by penalty clauses, earnest money, or the payment of conventional interests. We are truly talking about a form of obligational reproduction because the cause of the guarantee is found in the main obligation for which it is constituted, meaning that the accessory obligation derives from the main one. Let us refer to some aspects of the obligational life that are of interest to be explained in this article.

5.2.1. Natural, moral or conscientious obligation

Concerning the relations between the members of a society in which someone provides another with an advantage or satisfies a need or a benefit, only some of these, legal obligations come to be directly supported by the legal-political organization of the society. This organization confers full efficacy and validity to the legitimate action of the subject, putting its power at the service of the creditor[59] in order to obtain the satisfaction of their interests.[60] It must

59 Little use has been made of the term *creditor* as it is a concept of Private Law, far from Family Law, although in reality the creditor is both in Public Law and in Social Law, despite the fact that the basis of credit is totally different.

60 *Vid.* MEDINA PABON, Juan Enrique, *Civil Law: Approach to Law. Rights of Persons.* 2nd edition, Jurisprudence Lessons Collection, University of Rosario Editorial, Colombia, 2010, p. 333.

be remembered, then, that legal obligations, according to their possibility of being prosecuted in court, are classified into civil and merely natural or simply natural obligations.

Pursuant to article 1341 CC, *the obligations are civil or merely natural. Civil obligations are those which give the right to demand compliance. Natural obligations are those which do not confer the right to demand compliance, but once obeyed, authorize to retain what has been given or paid by reason of such obligations.*

In principle, all obligations are presumed to be civil, except those not established by the law. The civil obligation allows its execution in case of its eventual breach, and it must be demanded before the public authority. This public authority is to be under the obligation to activate the legal mechanisms to comply with it or to compensate for its breach. On the other hand, obligations that are merely natural or simply natural, although they can be demanded in court through the right of access to justice and petition, the law does not authorize the assistance of the State in favor of the petitioner; that is, the State must not activate its apparatus to achieve compliance with the disobeyed obligation or to compensate for its breach. In this case, the action would be illegal and the resolution would be challenged. Therefore, a natural obligation does not enable any action to demand compliance, that is, it does not entail execution. In effect, the compliance of a natural obligation depends on the will of the debtor, but once fulfilled by the latter, the return cannot be demanded (to repeat is the technical word) and the creditor is entitled to retain the satisfied interest.[61] Hence, they are called natural, moral[62] or conscientious obligations because their fulfillment is at the discretion of the debtor or obligor.[63]

61 *Ibidem,* p. 333.

62 Natural obligations come to be an intermediate type between moral duty and legal obligation. *Ibidem,* p.334.

63 The obligation may have a moral or conscientious nature, the main effect of which lies in the fact that what has been handed over in compliance of the said duty is unrepeatable. *Vid.* JULIAN, Emil Jalil, "*El sistema…*", *op. cit.*, p. 7.

The natural obligations that Salvadoran legislation recognizes, according to article 1341 CC, are the following.

1º. *Those contracted by people who, having sufficient judgment and discernment, are, however, unable to bind themselves according to the law such as unauthorized adult minors;*

2º. *The civil obligations extinguished by the prescription;*

3º. *Those that come from acts that lack the solemnities required by the law so that they produce civil effects such as paying a legacy imposed by a will that has not been duly granted;*

4º. *Those that have not been recognized in court for the lack of evidence.*

The list included in the above-mentioned article is appraised, limited or closed. The natural obligations are so by (1) innate causes to its birth or by (2) supervening causes. Thus the natural obligations related in the 1st and 3rd ordinals of article 1341 CC, are for innate causes to them, because they were born with a vice that did not allow them to be constituted according to the established legal order. It is as if there is a kind of *natural selection in the legal world* that discards those imperfect legal creations. On the other hand, the natural obligations mentioned in 2nd and 4th ordinals were born perfectly, but in their legal development, in their obligatory life, they were affected by a vice that removed their vigor to be prosecuted in court. This is why they have been called *aborted obligations,* because being civils, they lost the possibility of being claimed in court, mutating into natural obligations.

Natural obligations, compared to civil ones, have their distinctive notes:

a. *They do not enable legal action: The main characteristic of natural obligations is that they do not enable legal action against the debtor, neither to claim compliance with the obligation, nor to demand compensation for its breach. Based on the right of access to justice, of petition and response, the creditor has the right to formulate the petition to the jurisdictional entity, but the latter must not accede to it without the rejection of the attempted action extinguishing it, based on the natural obligation, as stated in article 1342 CC.*

b. *They admit guarantee: Although the force of the legal bond has been unknown to the State, the law allows natural obligations to be secured by real or personal guarantees, provided that the one who constitutes the surety is, at the time of establishing it, aware of the circumstances that turn the obligation that ensures into a natural obligation, as provided in article 1343 CC. The law respects the autonomy of the will of individuals and allows their relationships to be based on the fluidity of the legal traffic. However, it is debated whether the legal action can be tried against the guarantor, the pledge or mortgage debtor, of a natural obligation, who were constituted as such having knowledge that they were assuring a natural obligation. At first, it is considered that it is not, because the accessory obligations follow the fate of the principal one, and because the third party should not answer for what the principal debtor was not obliged to do. At another time it is considered to be so, because the law enables it, based on the consent of the guarantor, that is, that its own will overcomes the natural obligation, otherwise it would not make sense to ensure compliance with an obligation that they do not recognize. In other words, the guarantor, the pledge or mortgage debtor, recognize the civil vigor of an obligation that is natural. This thesis seems correct, on the basis that the natural debtor also consents to it for subrogation purposes. Indeed, the guarantee of natural obligations is validated based on the consent of the guarantor and the debtor.*

c. *They allow retaining what was paid when the payment was done voluntarily: A second essential characteristic of natural obligations is that what is paid for them cannot be repeated. The natural debtor cannot claim the payment of what is not due, when he has already made the payment voluntarily. The natural creditor has the right to keep in its assets and dispose of what has been paid as a natural obligation, including with the support of the public authority. As it is understood, the execution of the natural obligations is validated based on the consent of the debt holder.*

d. *Indirectly operates as an exception (It is a procedural consequence): Procedurally, natural obligations indirectly dismiss the claim brought against the debtor because if the facts are proven that turn a civil obligation into a natural obligation, the claim based on them must be rejected, notwithstanding the debtor's*

acknowledgment. Obligations become natural due to the cause that gives them such a status, without the need for a prior judicial declaration to consider them as such. Therefore, in the same proceeding in which the claim for payment is litigated, the reason for the civil obligation becoming a natural one can be proven. In other words, the fact that an obligation becomes natural is the effect, and the exception is the cause that produces that effect. For example, the exception is prescription, and the effect of proving this exception is that it results in a natural obligation, which dismisses, therefore, the claim.

The judge will be obliged to recognize the existence of a natural obligation ex officio when the cause for it does not prevent it. However, the causes that give rise to natural obligations, which are relevant in this article, must be alleged at the request of a party. Thus, the third cause stated in Article 1341 of the Civil Code must be alleged and proven by the debtor, preventing the judge from recognizing it ex officio. The same applies to the first cause mentioned in the same article. Both causes refer to prescription and relative nullity, respectively, which are applicable at the request of a party. On the contrary, the second cause of the same article operates differently because the lack of formalities is a cause of absolute nullity, which, according to Articles 1552 and 1553 of the Civil Code, the judge must declare ex officio.

5.2.2. The contractual sanction or guarantee: The penalty clause

The contract is one of the sources of the obligations. The contract is an agreement between subjects of law by means of which the fulfillment of unilateral or reciprocal obligations between them is imposed. In contracts, the autonomy of the will of individuals prevails, provided they do not contravene the established legal order. Therefore, the limits of the obligations acquired by the contracting parties are as flexible as their will, provided that such flexibility does not exceed the legal framework on which it is agreed.

Based on the flexibility above, it is debated whether individuals, considering that in their private relations the autonomy of the will prevails, can stipulate sanctions among themselves for the breach of the acquired obligations. In this regard, a sector of the Doctrine argued that it is not possible for individuals to agree on sanctions among themselves, but only to mechanisms to guarantee the assets committed in their contractual relationships.[64] Another side of the Doctrine considers that, in the case of private relationships, they can agree on sanctions, as long as the law does not prohibit such a situation, because the sanctioning activity that is characteristic of the public authority, is by omission guaranteed in favor of individuals. However, in the positive order and for legal certainty, for a conduct to be supported by the public authority, a norm is required so it enables this conduct (articles 86 subsection 3 and 235 CN). The absence of a norm that prohibits conduct is not enough for such conduct to be endorsed by a public authority (article 8 CN). Therefore, in principle, it is not admissible for individuals to agree to the imposition of sanctions among themselves.

On this point, it has been discussed whether it is possible for a civil law institution, such as the penalty clause, to be incorporated into institutions proper to family law. This means that legal figures born under the philosophy of protecting and compensating a credit right (in which the particular interest prevails, for profit or not) take place in legal relationships of social interest and be far from seeking to obtain a lucrative interest. Since they seek to guarantee the continuity of the family group and the integral and progressive (bio-psycho-social) development of its members.

Therefore, a brief comment will be made on what the *penalty clause* is in contractual relationships, in order to assess its legality when included in instruments (immediate cause of the obligation) that establish the payment of alimony, special alimentary quota, or compensatory pension.

64 It is even prohibited in some legislations, as it happens in the Belgian Code. Behind this reality seems to lie the idea that it is inappropriate for individuals to agree to a fine or sanction other than pure compensation for damages. *Vid.* DIAZ ALABART, Silvia, *The penal clause,* Reus Editorial, Madrid, 2011, p. 40.

Generalities: Concept, classes and legal nature

According to Art. 1406 CC, *the penalty clause is that in which a person, in order to ensure compliance with an obligation is subject to a penalty consisting of giving or doing something in case of not executing the main obligation or in case of delaying its execution.*

The object of the penalty clause is the payment of a sum of money, or any other benefit in kind that may be the object of a legal obligation, either for the benefit of the creditor or a third party[65] as agreed by the contracting parties.

The Civil Code of El Salvador recognizes the existence of two types of penalty clauses: (1) compensatory and (2) moratory, depending on whether they are applied for the non-performance of the obligation or for the delay in its fulfillment. Therefore, these penalty clauses serve both a repressive and preventive purpose. In reality, apart from their approval, they have a preventive and repressive or punitive function, but not a guaranteeing one, as will be explained later. When there is non-compliance or delay in fulfilling the obligation, the legal warning takes place. This means that the possibility of demanding the second obligation is activated, which is not intended to directly satisfy the main obligation but rather to repress and compensate for the non-compliance or delay.

The penalty clause is of a contractual origin; therefore, it is governed by those rules. The penalty clause is an accessory element of contracts, and it may or may not be present in them. For this reason, the penalty clause must be expressly agreed upon. This clause is always accessory; it follows the fate of the main obligation. For one sector of the Doctrine, its legal nature is that of a *surety* and not a guarantee[66] as it is a *duplicate obligation* on the part of the debtor, who has no greater possibility of ensuring the satisfaction of the creditor than

65 The penalty clause is intended to benefit the creditor, although it may be in favor of a third party. See more characteristics in ibid., pp. 40-41.

66 It has been indicated that between surety and guarantee there is a gender to species relationship.

the one with the main obligation.[67] Another part of the Doctrine considers the penalty clause as a *guarantee* in itself because it constrains the debtor, under the threat of patrimonial content charges to fulfill the acquired obligation. However, the penalty clause is similar in nature to the *personal recognizance* (which is not strictly a guarantee) because the same obligor cannot also be guaranteed, taking into account that they are, as a general rule, the sole owners of an estate.

A different situation arises when a penalty clause is imposed on a third party, a new patrimony comes into play, and therefore, a true guarantee is established. It differs from a surety, as the party obligated to pay the penalty (fulfill the penalty clause) does not assume the entire obligation of the debtor, but only the obligation to pay the stipulated penalty, whether for non-compliance (compensatory) or for delay (moratory). The penalty clause in charge of a third party is configured as a guarantee of a personal nature as opposed to the *down payment,* typified as a real guarantee.[68] In any case, it is not a guarantee of the entire debt, unless the penalty clause covers the full amount of the debt.

Doctrinally there is much to comment on, but it is not the object of the present work, since it is not intended to exhaust the subject, but to illustrate the necessary points to be treated in this article. What it does need to be considered is whether the penalty clause, which operates on credit relationships, is compatible or not with family assistance relationships, taking into account the differences between these two relationships.

67 *Vid. Ibidem,* p. 59.

68 MELICH-ORSINI, José, *General contract theory,* 4th edition, Academy of Political and Social Sciences, Caracas 1997, p. 561 to 585 cited by MORALES HERNANDEZ, Alfredo, *Garantías mercantiles,* Editorial Texto C.A., Andrés Bello Catholic University, Caracas, 2007, p. 74.

Credit relationships	Family Assistance Relationships
They operate outside the relationship	They seek family unity and stability of the social group
The purpose is of a patrimonial nature	Its purpose is the continuity of the family group (extra-patrimonial)
The objective is particular	The objective is family-collective
There is a selfish protection of assets	There is solidarity protection for the family group
The legislator does not intervene actively	The legislator intervenes actively
They enable criminal sanctions	They enable criminal sanctions

There is no normative provision establishing the *penalty clause* is an institution reserved for civil or commercial contracts. However, based on the family legal order, in principle, it does not seem acceptable to seek a lucrative activity against the debtor, by the holder of the credit right. For example, it would seem debatable the imposition of a penalty clause on the father who fails to comply with his periodic maintenance obligations, or in the payment of special alimony, even though that these are situations that are not far from reality. Thus, in a divorce agreement, the applicants established, together with the payment of the maintenance fee and the annual update basis of the same (article 108 clause 2 CF), that the obligor had to pay ten percent of the child support for not making the corresponding payment on the agreed date, plus the corresponding maintenance fee. Such a moratorium sanction had been inserted in the form of a penalty clause. However, this clause was not approved in the Divorce proceedings by mutual consent, as it was considered excessive at the expense of the provider. In addition, that clause had no correspondence with the purpose permeating the principles of Family Law.

The same happens with the *legal interests* claimed for the non-payment of the maintenance fee, which would not proceed because they do not obey the purpose of family assistance that the maintenance is intended to provide. Notwithstanding the above, it cannot be denied that the admission of this type

of stipulation in agreements that have family obligations is not prohibited; However, based on the nature of credit relationships and family assistance, the penalty clause would be admissible in those obligations that are predominantly credit-based, such as the settlement of marital property or the payment of compensatory alimony, and not in family assistance relationships, such as child support and special alimony payments. Otherwise, the purpose of family assistance relationships would be distorted, and their *mercantilism* would be given. It should not be forgotten that legal obligations must be rational, objective and necessary; and that they are a function of historical values and, specifically, of the principles reproduced in a human conglomerate. These principles, regarding family assistance, are not coordinated with the idea of credit with which the penalty clause is impregnated.

5.3. Compulsory decease

Nature can grant long periods of time, but not indefinite time. The legal world operates under the same logic, hence the foundation of prescription and expiry, as it will be seen later. It has been said that the Law as a living organism changes its cells, changes its elements and is updated in time, and people *discover* it, as its progressive changes are revealed. From this perspective, the legal obligation is born with the fate or fortune of death. The obligation is extinguished as part of a whole that lives on even after it.

Nothing is eternal in the physical world, everything is constantly changing and subject to an end. In the same way, in the legal world, legal institutions suffer alterations, and above all, they are extinguished, either by the intervention of the subjects of law (legal acts) or by the action of natural phenomena (legal facts). This is the effect of the passing of time. This fate follows the legal obligation that since its birth has been condemned to death. However, the death of an obligation is more precise than its birth because, regarding its birth, the law is very broad, pointing out various ways of how an obligation can

be conceived. The death of obligations is not the same because the law has been more rigorous, carefully indicating the ways in which they are extinguished.

Ways to extinguish obligations

The Salvadoran Civil Code regulates the extinction of the obligations in Title XIV of Book IV, specifically in article 1438.

The existence of the obligation must be recorded from its birth to its death. This follows *the principle of the instrumentality of the act*. The death of the obligation will be determined by the reason and conditions of its death, that is, by the mode of extinguishing the obligation that operated on it. The modes of extinguishing obligations are the facts or acts to which the law attributes the value of ceasing the effects of the obligation.[69] It is said that an obligation has been extinguished when, by virtue of a specific action, it has been definitively canceled.[70]

Obligations can be extinguished in whole or in part. They are completely extinguished when the object of the obligation was fully satisfied, disqualifying the creditors to demand the collection of what was owed to them. They are partially extinguished when the creditors were partially satisfied with respect to the credit in their favor, the collection action of the remainder or residual owed being safe.

Obligations can be extinguished directly or indirectly.[71] In the first case, the obligation is flatly satisfied or canceled. In the second case, the obligation disappears due to the expiration of the force of the instrument (title) that gives life to the obligation, as when the contract is declared void. In this case, the obligation is not understood to be satisfied, either real or fictitious. The forms of direct extinction are payment, the novation-delegation, debt remission, compensation, confusion, and prescription.

69 *Vid.* RAMOS PAZOS, Rene, *Of the obligations*, Legal Manuals Collection, Editorial Jurídica de Chile, Santiago de Chile, 1999, p. 319.

70 *Vid.* ESPINOSA, José María y Enrique GOMEZ, *Lessons of Roman Law*, coordinators Lucia Bernard and Gabriel Buigues, European Higher Education Area, Universitat of Valencia, 2011, p. 146.

71 *Vid.* BONNECASE, Julien, *Elements…, op. cit.*, p. 451.

Without wishing to explain each of the ways of extinguishing the obligations recognized in article 1438 CC, a brief reference will be made to some of them in order to make some considerations about family obligations.

5.3.1. Rescission

Rescission or mutual agreement is the act by which the contracting parties, by mutual agreement, decide to consider the stipulated obligation as fulfilled. Rescission can be seen as the contractual agreement by which the generated obligation is rendered void, as it is considered to have been satisfied, even if it has not been actually executed.

Subparagraph 1 of article 1438 CC, provides that:

All obligations can be extinguished by a convention in which the interested parties, being able to freely dispose of their own, agree to consider said obligation fulfilled.

The legal proposal quoted is the legal basis of the mutual agreement. In this proposal there is the germ of the idea that *the contracts as they are made are undone.* This is correct because the facts are done; instead, the Law is updated and discovered. The autonomy of the will, just as it disposes to create, it disposes to rescind what is created. TRescission operates under a legal fiction, as it deems something fulfilled even when it was not actually complied with. Rescission is, in itself, a way of *self-composing* future disputes and, indeed, it is a form of private justice.[72]

Only what is one's own, that to which one is the holder or author, can be disposed of, not that which becomes imposed. Therefore, we must state that, particularly in Family Law, there are obligations imposed by the law that have the characteristic of being non-disposable by individuals. As a result, they cannot be terminated by mutual agreement. Thus, rights that do not fall within the realm of autonomy of the will are exempt from the free will of legal subjects;

72 "Private" because the defendants at their own request agree to resolve a situation that could later become the subject of prosecution.

they are non-disposable rights and obligations. Therefore, rescission does not apply to them. Obligations are inherently non-disposable, but in family matters, they are even non-disposable by the holders of the claims.

This is important because there are obligations that arise not from the autonomy of the will, but from the will of the constituent, from a second constituent power, and in many occasions, from mandates of public authority. From this perspective, no individual will exceed the sovereign will of the law (Art. 1 CC), leaving without effect by mutual agreement the duties that it institutes. For example, the duty to provide food, imposed by maintenance agreement or by final judgment, cannot be annulled by mutual agreement between the maintenance provider and the child, but it requires the authorization of the State. For this reason, in order to modify or rescind the sentence issued in a maintenance trial, it is necessary to conduct the sentence modification process (Art. 83 LPRFM) or cessation of maintenance obligations (Art. 270 CF).

5.3.2. The payment

The solution or effective payment is the normal form of extinction of the obligations by compliance with them. Hence, Title XIV of the Civil Code is called "On the ways to extinguish the obligations and *first of all the solution or effective payment.*" The Romans called this form of fulfillment "solutio",[73] thence the origin of its name. Payment entails the release of the debtor from the obligatory bond, extinguishing their responsibility and that of their guarantors, if any.

The payment is the satisfaction of any kind of benefit, not just the delivery of money, as it is commonly understood. Therefore, both shall pay the person who delivers a thing and the one who performs or abstains from a fact.[74] It has therefore been simply and clearly stated that the payment, in the technical sense of the term, is the compliance of the benefit, subject of obligation.[75] Paying

73 *Vid.* ESPINOSA, José María y Enrique GOMEZ, *Lessons…, op. cit.,* pp. 146-147.)

74 *Vid.* U. BARBERO, Omar, *Introduction…, op. cit.,* p. 247.

75 To the respect in *BONNECASE, Julien, Elements…, op. cit.,* p. 452.

is paying exactly what is owed. The payment corresponds to a need, generally of patrimonial content, and this need is satisfied by the purpose of the payment.

Discussing the importance of this legal figure is essential for family law because it is one of the ways to extinguish obligations more frequently in family relationships. In forensic practice, especially in the compliance of maintenance obligations, the phenomenon of payment in kind arises, even though the title of the obligation imposes payment in money by the maintenance provider. This leads to a situation where, during the liquidation phase of the forced execution procedure (Art. 170 LPRFM) or in the proceedings for adjusting modalities (Art. 175 LPRFM), there is a debate about whether in-kind payment can be deducted from the amount owed by the debtor, especially when the obligation's title specifies payment in a particular item, typically money. In this regard, the Courts rightfully do not allow it because the title expressing the cause of the obligation describes how the obligation was created and, consequently, how it must be fulfilled in its legal development (indicating the place, manner, time, among other aspects, of how the payment will be made).

Notwithstanding the above, it has been argued that the only way to introduce in-kind payment in the liquidation is if the beneficiary or their legal representative agree to it. This is when the "dación en pago" (payment in kind) comes into play. However, this is applicable only to enforceable obligations, that is, those for which the deadline for compliance has passed without the obligor having fulfilled them. It does not apply to obligations that are yet to be fulfilled because, as previously indicated, the title (of the non-disposable rights-obligations) cannot be modified by the autonomy of the will. This is so because the legislator is significantly protectionist in matters of childhood and adolescence.

Another aspect to be considered is that the payment can be made, independently of the debtor, by all interested persons, such as co-debtors and guarantors, and also by any other person (article 1443 CC), unless the obligation has been generated in consideration of the quality of the obligor. Therefore, it is

worth indicating that "payment", like any legal act, expresses an *intention* and a *fact,* the intention reflects, or presumes the positive disposition of the debtor to comply with the obligation; and the fact is the materialization of the intention that causes the satisfaction of the creditor. However, the purpose permeating the principles of family law goes beyond causing material satisfaction to the creditor, because family unity and continuity require the satisfaction of non-patrimonial interests, which are only satisfied for the purpose of complying with the obligation (a feeling of family assistance). For this reason, obligations are being perfected exclusively by certain subjects, without the obligation arising in consideration of subjects' quality; and although the obligation is fulfilled by a third party, it does not completely release the debtor from his responsibility. A series of cases can be mentioned in which the obligated party seeks to shield themselves by claiming that a third party made the payment on behalf of the creditor and in the absence of the obligated party, but this does not absolve the latter from their affective responsibilit (spirit), such as when the food payment is carried out by the paternal grandparents, the father wanting to justify his actions in such a situation. This type of case occurs with some frequency in the trials of loss of parental authority due to abandonment without just cause, when the father alleges, in defense of the plaintiff's claim that his child has never been abandoned because his father or mother (grandparents) has covered the needs of his child (grandchild).

5.3.3. The compensation and the confusion

Another way to extinguish obligations is *compensation*. This compensation takes place when two persons, in their own right, meet the quality of creditor and debtor reciprocally, whatever the causes of one or the other debt.[76] Therefore, being one of the other debtors, the two debts, up to the amount of the lesser, are extinguished with a force of payment, leaving the remainder of the larger debt outstanding in favor of the credit holder of the

76 *Vid.* JULIAN, Emil Jalil, "*The System…*, *op. cit.,* p. 10.

same. The compensation may result from the law itself which supposes the existence of two debts from different origins in which the creditor of one is the debtor of the other, and vice versa. These debts must be enforceable, liquid, homogeneous, fungible and *available*.[77]

The compensation can be opposed as an *exception* in court, as a way to cancel, totally or partially, the debt that is claimed provided that the object of the obligation allows it. It is on this opposition that the unavailable nature of family rights and obligations must be reconsidered on the grounds that invaluable obligations cannot be compensated because their equivalence would not be estimated. This is the reason why the obligations that admit compensation must be enforceable, liquid, homogeneous, fungible, and of course, available.

However, there are situations that the law takes as equivalent, without being in the presence of compensation, such as when a spouse does not work but takes care of the children, such activity is considered a contribution equivalent to the economic proportion with which another spouse contributes to the family expenses (Art. 37 CF). Likewise, for compensation to take place, it must be made only by the credit holders. For example, the mother (ex-spouse) cannot offset the credit produced by the non-payment of maintenance in favor of the child with the debit of compensatory pension that she has to pay in favor of the father (ex-spouse), because the holders of the right to maintenance (child) and compensatory pension (ex-spouse), are different people.

Finally, it will be indicated that the legal obligation is extinguished by the *confusion* which takes place when the qualities of the creditor and debtor are brought together in the same person and the same patrimony, leaving the obligation extinguished totally or partially in proportion to the part of the debt in which the confusion occurs.[78] The confusion is a legal fact that extinguishes the obligation which is settled by meeting the same person as the creditor and debtor.

77 *Vid.* BARBERO, Omar, *Introduction…*, *op. cit.*, pp. 256-257.

78 *Vid.* JULIAN, Emil Jalil, "*The System…*, *op. cit.*, p. 10.

This is because no one can owe something to themselves, or more precisely, the same patrimony cannot be committed to itself because it would be a contradiction.

The confusion can be operated by succession to a universal level (inheritance), or to a singular level, generally due to death. In the first case, because the creditor is the heir of the debtor, or because the debtor will inherit the creditor or, because upon the death of the creditor and the debtor, a third party receives the inheritance from both of them. In any case, if the inheritance is accepted with the inventory benefit, the confusion does not operate because the estates preserve their individuality.[79] A very practical case occurs when the father owes alimony to his child, and upon the father's death, the child accepts his father's inheritance. As a result of this, the credit and debt regarding the owed alimony become confused in the child, regarding the owed alimony.

Conclusion

A brief reference has been made to the principialist conception of Law and the life cycle of obligations in order to establish a doctrinal position in this regard. In conclusion, the following principles can be stated:

Law is not only positive law. Law is the axio-normative order that governs human behavior. Therefore, law is a set of principles endowed with justice, which translate the prevailing values of a specific time and community to legal subjects. That is why written law is interpreted according to the principialist order.

79 *Vid.* BARBERO, Omar, *Introducción…*, *op. cit.*, pp. 257-258. A similar situation occurs with the Individual Company of Limited Responsibility (EIRL) in commercial matters (Articles 600 and following CCOM.). It can be seen about the EIRL in DÍAZ MARTÍNEZ, Rutílio Antonio, "Individual Company of Limited Responsibility and Unipersonal Society" en **AA.VV.,** *Legal Window,* N°. 6, Año III, Vol. 2, Julio-Diciembre, 2005, Consejo Nacional de la Judicatura, San Salvador, El Salvador, pp. 113-127.

The general principles of Law are the guides that interconnect the ethical-ideal order with the real order. These principles seek to adapt the world of ought to be to the world of being. The principles of Law are the understandable language of values that justify the repetitiveness of behavior in a historically established society.

The principles of law fulfill a creative function and a suspensive function. The creative function is referred to the foundation of legal norms (justifying the laws) and to the foundation of legal solutions (judicial decisions). With the suspensive function, the principles of law have sufficient force to render the legal norm ineffective (*suspend)* in *specific* cases when the norm is not coordinated with the general sense of the principialist order.

In the principialist conception of Law, the principle of legal security is the support of positive Law which requires that the principles of Law be applied in a subsidiary, supplementary or alternative way to the legal norm (formal law); otherwise, by arbitrary and excessive application of them, the law would be emptied. Consequently, compliance with legal obligations is verified under the requirements of the general principles of Law which indicate that a legal obligation is legitimate as long as it is coordinated with the current value system.

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